IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

HENRY MICHAEL FUHRER, Plaintiff, vs. AVIS BUDGET GROUP, INC., AVIS BUDGET CAR RENTAL, LLC, PV HOLDING CORP, AB CAR RENTAL SERVICES, INC, and TADASHI DAVID EMORI, Defendants.	Case No. 19CV38807 **Defendants' Third Motion for Summary Judgment** *Oral Argument Requested*

Estimated Time for Oral Argument: 30 minutes

Court Reporting Services Requested: Yes

Motion

Defendants Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, AB Car Rental Services, Inc. (collectively, the Avis defendants) move for summary judgment on plaintiff's the Third Claim for Relief in the Second Amended Complaint for violation of ORS 654.305, also known as the Employer Liability Law (ELL).

As explained below, plaintiff's ELL claim fails for two reasons:

A. The ELL protects persons engaged in particularly hazardous work. It does not apply to work involving everyday tasks or ordinary risks and dangers. Plaintiff was injured while riding as a passenger in a vehicle, an everyday task that is not inherently dangerous and does not involve an uncommon degree of risk.

B. ORS 654.305 applies only to work of the kind that is described in ORS 654.310. Plaintiff's work is not *of that kind*. More specifically, plaintiff's work is not akin to "the

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construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance."

Undisputed Facts

The facts material to this motion are simple, short, and undisputed.

Plaintiff was injured in an auto accident while he was working as a driver for one of the Avis defendants, a job that involved shuttling Avis rental cars from one location to another and riding as a passenger in an Avis shuttle van. Declaration of Julie Smith in Support of Defendant's Third MSJ (Smith Declaration), Ex. 1 (Second Amended Complaint, ¶ 7, 31, 32), and Ex. 2 at 6-7 (plaintiff's deposition).

At the time of the accident, plaintiff was seated in the back seat of a shuttle van that was being driven by his co-worker, Emori, who was attempting to make a left-hand turn onto N. Columbia Boulevard in Portland, when the shuttle van was struck by a speeding car. Smith Declaration, Ex. 1 at ¶¶ 17-20 and Ex. 2 at 8-11.

Argument

In his Third Claim for Relief, plaintiff asserts that the four Avis entities named in this suit violated the ELL, specifically ORS 654.305. As explained below, because the ELL applies only to persons involved in certain types of hazardous work, the ELL does not apply here.

A. The ELL was enacted in 1910 to protect persons engaged in certain categories of hazardous work and remains substantively the same today

The ELL was enacted in 1910 by a vote of the people through the ballot measure process. *Yeatts Whitman v. Polygon Nw. Co.*, 360 Or 170, 191 (2016). The purpose of the ballot measure, as described in the Official Voters' Pamphlet, was to protect "persons engaged in hazardous employments" by imposing higher standards of care on their employers. *Id.* As originally enacted, the language now appearing in ORS 654.305 and ORS 654.310 appeared together in section 1 of the measure, comprised of single, lengthy sentence. *Groves v. Max J. Kuney Co.*,

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303 Or 468, 472 and n 2 (1987). "In 1953, at the time Oregon's compiled laws were revised, the revisers split section 1 * * * into two parts." *Groves v. Max J. Kuney Co.*, 303 Or 468, 474 (1987). The first part of the paragraph became ORS 654.310 and the second part, commonly known as the "and generally" clause, became ORS 654.305. *Id.*

ORS 654.310 (the first part) now provides:

> "All owners, contractors, subcontractors, or persons whatsoever, engaged in the **construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance**, shall see that all places of employment are in compliance with every applicable order, decision, direction, standard, rule or regulation made or prescribed by the Department of Consumer and Business Services pursuant to ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780."

(Emphasis added.)

And ORS 654.305 (the second part) now provides:

> "Generally, all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any **work involving a risk or danger to the employees or the public** shall use every device, care and precaution that is practicable to use for the protection and safety of life and limb, **limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device**, and without regard to the additional cost of suitable material or safety appliance and devices."

(Emphasis added.)

The Supreme Court concluded in *Groves*, 303 Or at 474 that the legislature did not intend to change the meaning of the ELL when it split the section into two parts. In *Yeatts*, 360 Or 191 n 6, the court also observed that "the current text has not changed substantively from the original. *See* Or. Laws 1911, ch. 3, § 1."[1]

[1] Copies of the operative and original text are attached as Exhibit 3 to the Smith Declaration.

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B. Plaintiff was not injured while performing hazardous work

"In the broadest sense, every injury involves a risk or danger. Otherwise the injury would not have occurred." *Ferretti v. S. Pac. Co.*, 154 Or 97, 103 (1936). To give meaning to the stated purpose of the ELL, then, the Oregon Supreme court has concluded that the ELL applies only when the work is "inherently dangerous," *Snyder v. Prairie Logging Co.*, 207 Or 572, 577 (1956), to an "enhanced degree," *Short v. Federated Livestock Corp.*, 235 Or 81, 86 (1963), and in a way that is "uncommon." *Barker v. Portland Traction Co.*, 180 Or 586, 604 (1946). "Duties and employments attended only with *ordinary* risks and dangers are unaffected by the act." *Barker*, 180 Or at 609 (emphasis added).

The inquiry into whether a plaintiff's work involves inherent, enhanced, and uncommon risks or dangers (as opposed to ordinary ones) focuses on "the nature and character of the work actually being performed at the time and place the injuries were received and, in particular, the nature of the duties of the injured employe[e] in connection therewith." *McLean v. Golden Gate Hop Ranch of Oregon, Inc.*, 195 Or 26, 34 (1952).

Whether work involves an ordinary or extraordinary risk or danger is typically a question for the jury to decide, especially in cases in which the plaintiff is actively engaged in physically demanding work or is working in a particularly dangerous location at the time of the injury. In *Kruse v. Coos Head Timber Co.*, 248 Or 294, 304 (1967), for example, the court allowed the jury to decide whether work "was so inherently dangerous or presented dangers so uncommon that the employment would be classed as work involving 'risk or danger'" when the plaintiff was hit by a falling timber while trying to remove lime rock from the base of a tower. *See also Hamilton v. Redeman*, 163 Or 324, 341 (1939) (same; digging with a pick in a gravel pit); *Parks v. Edward Hines Lumber Co.*, 231 Or 334, 337 (1962) (same; steadying a steel beam while it was being moved with a "lift truck"); *Snyder*, 207 Or at 577 (same; observing that, while scaling logs is not hazardous "in and of itself," the fact that the work was done adjacent to tree-felling operations made the "risk or danger" issue a question of fact for the jury).

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Even so, trial courts do have an important "gate-keeping" role to play in ELL cases. In a variety of contexts, Oregon courts have ruled as a matter of law that certain categories of work do not involve the type of "risk or danger" the ELL protects. Just last year, for example, Federal District Court Judge Simon held in *Kemper v. MWH Constructors, Inc*, 3:21-CV-145-SI, 2021 WL 1914212, at *3 (D Or May 12, 2021), that a plaintiff's ELL claim failed as a matter of law because "[w]orking around trip hazards is not so uncommon that the employment should be classified as work involving risk or danger" under the ELL. *See also Short*, 235 Or at 87–88 (same; feeding pigs did not involve risk or danger under the ELL); *McLean*, 195 Or at 34 (same; "ordinary farming" did not involve risk or danger under the ELL); *Barker*, 180 Or at 604 (same; walking on snow and ice did not involve risk or danger under the ELL because it is an ordinary activity); *Cox v. Graebel/ Oregon Movers, Inc.*, No. 03:11–cv–97–HZ, 2012 WL 33084 (D Or Jan 4, 2012) (Hernandez, J.) (same; inspecting a stack of doors for imperfections was not work involving the type of risk or danger the ELL protects against); *Travis v. Knappenberger*, 204 FRD 652, 655 (D Or 2001) (Redden, J.) (same; legal assistant's work involved "everyday risks"); *Sisco v. DPR*, Multnomah County Circuit Court Case No. 18CV57520, (Bottomly, J.) (same; granting summary judgment motion arguing that work involving walking over snow and ice does not fall under the ELL); *Anderson v. DPR* et.al., Multnomah County Circuit Court Case No. 18CV06752 (Hodson, J.) (same; granting Rule 21 motion arguing that walking over wet floor is not an inherently risky or dangerous task under the ELL); *Murray v. Ward-Henshaw Construction, Inc.*, Multnomah County Circuit Court Case No. 18CV32214 (Rees, J.) (same; granting summary judgment motion arguing that ELL did not apply to work involving walking in icy conditions).[2]

This is one of those cases in which the court should rule as a matter of law that plaintiff's work did not involve the type of "risk or danger" the ELL protects. It is undisputed that plaintiff

[2] Copies of the trial court opinions and orders cited in this motion are attached as Exhibits 4 and 5 to the Smith Declaration.

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was working at the time of the accident and that his work entailed riding as a passenger in a vehicle, as he is being transported from one location to another. Riding as a passenger in a vehicle involves ordinary, everyday dangers and risks, not extraordinary ones. As in *Kemper*, *Cox*, *Travis*, *Short*, *McLean*, *Barker*, *Sisco*, and *Anderson*, the activity in which plaintiff was engaged at the time he was injured involves risks too ordinary to be protected by the ELL.

Indeed, at least one Oregon judge has so concluded in circumstances very similar to this case. In *Helland v. Hoffman Const. Co. of Oregon*, No. 3:11–CV–01157–HU, 2013 WL 5937001 (D Or Nov 3, 2013), Federal District Court Judge Hernandez held that the ELL did not apply to a steamfitter who was injured on his way to a construction site when he slipped and fell while boarding a shuttle bus. The court concluded that "there [wa]s no genuine issue of fact as to whether * * * work as a steamfitter was rendered inherently dangerous by [the contractor]'s use of an old school bus to transport workers to the construction site." *Id.* at *6. This court should follow Judge Hernandez's decision and hold that plaintiff's ELL claims against the Avis defendants fail because riding as a passenger in a vehicle is not extraordinarily dangerous as a matter of law.

C. Plaintiff was not performing hazardous work of the kind described in ORS 654.310

In any event, the text of the ELL contains a second limitation on its scope – it limits the reach of ORS 654.310 to hazardous work of the type described in ORS 654.310.

When analyzing the scope of a statutory scheme, Oregon courts use two interpretive rules that are relevant here. "*Ejusdem generis* is an interpretive rule requiring a nonspecific or general phrase that appears at the end of a list of items in a statute * * * to be read as referring only to other items of the same kind as the items in the list." *Gordon v. Rosenblum*, 361 Or 352, 364, (2017) (ellipses in original; internal quotation marks omitted). "And the maxim *noscitur a sociis* reminds us that the meaning of words in a statute may be clarified or confirmed by reference to other words in the same sentence or provision." *Id.* at 365 (internal quotation marks omitted).

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Consistent with these interpretive rules, the Oregon Supreme Court has concluded that a plaintiff can sue under ORS 654.305 – the second part of the ELL, also known as the "and generally" clause – only if the plaintiff was involved in work of the same general kind as the work described in ORS 654.310 – the first part of the ELL.[3] *See Ferretti v. S. Pac. Co.*, 154 Or 97, 104 (1936) ("if reliance is had on the 'and generally' clause [of ORS 654.305], the case must be one of the general kind mentioned specifically in the preceding parts of the act"); *Freeman v. Wentworth & Irwin*, 139 Or 1, 14 (1932) ("The only employments protected by [the "and generally"] clause are those which are of the general kind mentioned specifically in preceding parts of the act").

ORS 654.310 (quoted in full above) applies to work involving "construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance." Riding as a passenger in a vehicle is not like any of these things. Because riding as a passenger in a vehicle is fundamentally unlike the categories of work enumerated in ORS 654.310, the ELL (including ORS 654.305) does not apply here.

[3] As explained above, the language that now appears in ORS 654.310 originally preceded the language that appears in ORS 654.305.

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Conclusion

The court should enter summary judgment in the Avis defendants' favor on the ELL claims against them.

DATED: February 4, 2022

s/ Julie A. Smith

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Of Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing **Defendants' Third Motion for Summary Judgment** on the date indicated below by:

☐ mail with postage prepaid, deposited in the US mail at Portland, Oregon,

☐ electronic filing notification (if applicable, ORCP 9 H and UTCR 21.100),

☒ hand delivery,

☒ courtesy copy also sent by email

☐ overnight delivery,

☐ email (party has consented to service by e-mail, ORCP 9 C(3)),

☐ facsimile transmission (with confirmation attached, ORCP 9 C(2)).

I further certify that the copy was delivered as indicated above and addressed to the attorneys listed below:

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