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 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Oral Argument Requested

UTCR 5.050 INFORMATION

Time requested for argument:	30 minutes
Telephone attendance requested:	Yes
Counsel located more than 25 miles from the court:	No
Recording services requested:	Yes

MOTION

Plaintiff Henry Michael Fuhrer, by and through his attorneys, hereby moves the Court for an order granting partial summary judgment and dismissing Defendants Second, Third, and Fifth Affirmative Defenses as follows:

SECOND AFFIRMATIVE DEFENSE

(Comparative Fault)

In the event defendants are found at fault and liable for plaintiff's injuries, defendants are entitled to an allocation of fault against all parties responsible or

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potentially responsible for plaintiff's injuries under ORS 31.600, including, but not limited to, any parties previously named as defendants in this case who were voluntarily dismissed by plaintiff.

See Stokes Decl. in Supp. of Pl.'s Mot. for Partial Summ. J. ("Stokes Decl."), Ex. 1, Ans. & Affirmative Defs. to 2nd Am. Compl. ¶ 31.

Plaintiff requests that this Court rule as a matter of law that those defendants voluntarily dismissed from this case are not proper parties for a consideration of fault by the fact-finder, and that no allocation of fault can be made against non-settling dismissed parties. In Support of this motion, Plaintiff relies upon the court file in its entirety, the Declaration of Sean J. Stokes and its attached exhibits, and the points and authorities cited herein.

THIRD AFFIRMATIVE DEFENSE

(Exclusive Remedy – ORS 656.018)

Defendants Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp. and AB Car Rental Services, Inc. are immune from liability given that they were in compliance with the Workers' Compensation Law.

Id. at ¶ 32.

Plaintiff requests that this Court rule as a matter of law that Avis Budget Group, Inc., Avis Budget Car Rental, LLC, and PV Holding Corp. do not meet the statutory definition of "employer" under ORS 656.005(13)(a), and thus, cannot claim Worker's Compensation immunity in this matter. In support of this motion, Plaintiff relies upon the court file in its entirety, the Declaration of Sean J. Stokes and its attached exhibits, and the points and authorities cited herein.

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FIFTH AFFIRMATIVE DEFENSE

(Negligence of Fellow Servant)

> Defendants deny that Emori was negligent. However, to the extent Emori is found to be negligent, then defendants Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp., and AB Car Rental Services, Inc. are immune from liability under the Employer Liability Law given that plaintiff's injuries were caused by the negligence of a fellow servant.

Id. at ¶ 34.

Plaintiff requests that this Court rule as a matter of law that ORS 654.330 abolishes the fellow servant defense to Plaintiffs Employer Liability Law claims. In support of this motion, Plaintiff relies upon the court file in its entirety, the Declaration of Sean J. Stokes and its attached exhibits, and the points and authorities cited herein.

BACKGROUND

This case stems from injuries Mr. Fuhrer sustained in a catastrophic automobile crash that occurred on September 12, 2019. *See* Stokes Decl, Ex. 2, Emori Dep. 65:12-67:18. Mr. Fuhrer was a passenger in a Ford Transit van owned by PV Holding Corp. and operated by David Tadashi Emori. *See id.*, Ex. 3, Pratt Dep. at 27:21-28:6. Mr. Fuhrer was sitting behind the driver side seat of the van and took the brunt of the forces of the crash, thereby causing his life-threatening injuries. *Id*., Ex. 2, Emori Dep. 58:10-59:22, 60:7-9.

At the time of the subject collision, Plaintiff was working as a "shuttler" as part of a group tasked with moving cars held within the Avis portfolio from location to location. Defendant Emori was the "lead driver" of the group and was transporting the "shuttlers," including Plaintiff. *Id.* Ex. 3, Pratt Dep. at 21:22-22:15. Both Plaintiff and Emori were being paid for their work by AB Car Rental Services, Inc., an entity within the Avis Budget Group

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umbrella. *See* Stokes Decl., Ex. 4, Fuhrer payroll records, *see also* Ex. 5, Emori payroll records. Neither Plaintiff nor Emori were paid for their work by any of the other Avis Defendants.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is intended as a tool to make litigation more efficient by allowing the court to determine legal issues prior to the expense of a trial. *Garrison v. Cook*, 280 Or 205, 209-10, 570 P2d 646 (1977). Summary judgment is appropriate only if there are no genuine disputes of material fact. *Garrison v. NW Pac Bell*, 45 Or App 523, 533-34, 608 P2d 1206 (1980). For purposes of summary judgment, "[a] material fact is one that, under applicable law, might affect the outcome of a case." *Zygar v. Johnson*, 169 Or App 638, 646, 10 P3d 326 (2000). The question of a person's employment status is for the trier of fact, if the facts surrounding the arrangement between the parties are in dispute. When there is no dispute, and the parties merely disagree about the legal consequences of the agreed facts, the question is one for the court. *Blacknall v. Westwood Corp., Developers & Contractors*, 89 Or App 145, 147, 747 P2d 412, 414 (1987), *aff'd*, 307 Or 113, 764 P2d 544 (1988).

The conditions under which a court must grant a motion for summary judgment are delineated in ORCP 47 C. A party moving for summary judgment has the initial burden of showing that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. ORCP 47 C; *Thompson v. Estate of Pannell*, 176 Or App 90, 100, 29 P3d 1184, *rev denied*, 333 Or 655, 45 P3d 448 (2002). If the moving party meets this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the nonmoving party fails to do so, summary judgment must be entered against the nonmoving party. ORCP 47 D; *see also McKinley v. DMV*, 179 Or App 350, 357-58, 39 P3d 920 (2002).

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II. THE AVIS DEFENDANTS ARE NOT ENTITLED TO AN ALLOCATION OF FAULT BETWEEN THEMSELVES AND PREVIOUSLY DISMISSED PARTIES

Oregon's comparative negligence regime is found at ORS 31.600 *et seq*. Under those statutes, the factfinder is to compare the fault of the claimant with (a) any party against whom recovery is sought; (b) any third party defendant who is liable in tort to the claimant; and (c) any person with whom the claimant has settled. ORS 31.600(2). That list is exhaustive. No individuals, parties, or entities other than those outlined in ORS 31.600 (2) may be considered in the jury's allocation of fault. *Id.*, *see also* ORS 31.605, ORS 31.610(2).

Ignoring this clear directive, the Avis Defendants' Second Special Defense improperly adds "previously named defendants who were voluntarily dismissed by Plaintiff" to ORS 30.600(2). *See* Stokes Decl., Ex. 1, Ans. & Affirmative Defs. to 2nd Am. Compl. ¶ 31. Those prior parties in this case - Gaspar David Mateo and Gaspar David Pablo -- were voluntarily dismissed by notice of July 9, 2021, and judgment entered on October 4, 2021. Stokes Decl., Ex. 6, Notices of Dismissal; Stokes Decl., Ex. 7, Limited Judgment of Dismissal. It is of no matter that they were once parties to the action. Only those who are parties at the time or trial or settling parties qualify for allocation. *Mills v. Brown*, 303 Or 223, 226, 735 P.2d 603, 605-608 (1987); *see also* ORS 31.600(2). Since no settlement was entered into with Gaspar David Mateo or Gaspar David Pablo, and neither will be parties at the time of trial, there is no basis for the jury to allocate fault with the Defendants. Stokes *Decl.* at ¶ 12.

For that reason, Plaintiff requests that this Court enter Summary Judgment barring any allocation between the conduct of the Avis Defendants and any prior parties dismissed by Plaintiff.

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III. THE AVIS DEFENDANTS ARE NOT PLAINTIFF'S STATUTORY "EMPLOYERS" PURSUANT TO ORS 656.018, AND THEREFORE NOT ENTITLED TO IMMUNITY.

A. ORS 656.018 Immunity.

Under Oregon's Worker's Compensation scheme, immunity is conferred upon an employer who satisfies its duty to provide Worker's Compensation benefits to its workers. ORS 656.018. For purposes of immunity, "employer" is statutorily defined by a two part mandatory test. ORS 656.005(13)(a). An entity is an immune "employer" when it (1) pays or contracts to pay remuneration to a worker, **and** (2) secures the right to direct and control the services of that worker. ORS 656.005(13)(a)(emphasis added). Any defendant seeking immunity for its negligent actions must satisfy **both** elements of ORS 656.005(13)(a), or immunity is denied. "[T]he immunity conferred by ORS 656.018 is available only to one who fills the role of the plaintiff's employer.[1]" *Osborn v. Crane Equip. Mfg. Corp*., 135 Or App. 176, 179-80, 897 P2d 1192, 1194 (1995). Under Oregon's Worker's Compensation scheme, "employer" is statutorily defined as one that "contracts to pay a remuneration for **and** secures the right to direct and control the services of any person." ORS 656.005(13)(a) (emphasis added). Thus, the determination of whether a particular entity enjoys immunity turns on whether the entity both pays the worker and directs and controls the work at issue. *Martelli v. R.A. Chambers & Assocs*., 310 Or 529, 537, 800 P2d 766, 771 (1990). In short, if the entity does not do both (pay and control), then there is no immunity. *See Liberty v. Nw. Ins. Corp. v. Church*, 106 Or App 477, 808 P.2d 106 (1991).

> "[t]he **two elements necessary** to create an employment relationship for the purposes of worker's compensation are **a contract to pay remuneration for services and the right to direct and control the services of the worker**."

[1] ORS 656.018(3) extends immunity to individuals and entities not at issue here.

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Id. (emphasis added).

In *Liberty*, the Court of Appeals overturned a finding of the Worker's Compensation Board, which determined that a realty management company, rather than the property owner, was the "employer" of a Worker's Compensation claimant. *Id* at 481. Before the Board, the property owner had argued that the claimant himself believed he was an employee of the realty management company. *Id.* The Court of Appeals rejected this argument, and focused on the relevant inquiry: which entity **paid** the claimant, and which entity **controlled** the claimant:

> "The Board's findings support only the conclusion that claimant was employed by [owner], not [realty management company]. Although claimant may not have realized it, his written contract of employment was with [owner]. Although he may not have known it, **he was paid by** [owner], and [owner] **exercised its power to control his daily work activities through its agent**, [realty company]…The Board erred in holding that claimant was employed by [realty company]."

Id. (emphasis added).

B. The Related Entities Within The Avis Budget Group Do Not Enjoy Immunity Under ORS 656.018.

It is undisputed that the only entity that paid Plaintiff is AB Car Rental Services, Inc. *See* Stokes Decl., Ex. 4, Fuhrer payroll records; *see also id.*, Ex. 8, Ans. to RFAs. Thus, AB Car Rental Services, Inc. is the only entity that could possibly satisfy both **necessary elements** of the immunity test. Indeed, in their answers to Requests for Admission, Avis Budget Car Rental, LLC, PV Holding Corp., and Avis Rent a Car System LLC all **denied** that they contracted for Plaintiff's services in exchange for remuneration. *See id.*, Ex. 9, Ans. to RFA No. 13, at pp. 4, 10. Because the Avis Defendants do not satisfy the statutory test—by their own admission, they are not entitled to ORS 656.018 immunity.

For the purposes of ORS 656.018, each entity claiming immunity is treated as separate and distinct from others, and only those who satisfy the statutory definition of employer, or those

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who belong to the limited universe of entities outlined in ORS 656.018(3), are immune. "[T]he employment relationship exists for the purpose of immunity under ORS 656.018 **only** if there is an employment relationship between the plaintiff and the defendant as defined in the Workers' Compensation Law." *Osborn v. Crane Equip. Mfg. Corp.*, 135 Or App 176, 180, 897 P.2d 1192, 1194 (emphasis added). The Avis Defendants do not qualify for the extension of immunity found at ORS 656.018 (3). *See Nancy Doty, Inc. v. WildCat Haven, Inc.*, 297 Or App 95, 119, 439 P3d 1018, 1030, *rev den*, 365 Or 556, 451 P3d 1003 (2019) (describing "discrete group" to which ORS 656.018(3) extension applies and refusing to extend ORS 656.018 immunity to holding company solely because officer of holding company was immune).

Thus, it is of no consequence that the Avis Defendants arguably fall under the same group or corporate family, because they are not Plaintiff's statutory employer. The Court of Appeals addressed this very question in *Osborn* and reversed a trial court ruling that Niedermeyer-Martin Company ("NMC"), a closely related entity to Plaintiff's statutory employer, Pacific Wood Treating Corporation ("PWTC"), also enjoyed ORS 656.018 immunity. *Osborn*, 135 Or App at 179-80. That the two entities were so closely related that Plaintiff could have successfully pierced the corporate veil did not alter the analysis. *Id.* The only question was whether each entity met the definition of "employer" under our Worker's Compensation statutes.

> "[T]he immunity conferred by ORS 656.018 is available only to one who fills the role of the plaintiff's **employer**, by virtue of the direction and control of the worker's services. The record supports the trial court's determination that under that test, plaintiff was a subject worker of PWTC, not of NMC. Additionally, NMC does not fit within any of the other categories of persons entitled to immunity under ORS 656.018. **That is the extent of our inquiry. We reject the contention that NMC should be treated as claimant's employer for the purpose of immunity because of the nature of its relationship with PWTC.**"

Id. (emphasis added).

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Presumably, the Avis Budget Group chose its corporate structure for specific business purposes. The Avis Budget Group could have had all of its workers employer by one entity. Instead, the Avis Budget Group made the business decision to have workers work for various different corporations and paid by various different corporations. Whatever benefit was obtained from that choice is not relevant here. As recognized in *Osborn*, under the plain language of ORS 656.005(13)(a) and ORS 656.018, the Avis Defendants do not enjoy the immunity.

IV. THE FELLOW SERVANT DEFENSE IS NOT A VALID DEFENSE AGAINST PLAINTFF'S EMPLOYER LIABILITY LAW CLAIMS

The Employer Liability Law removes the fellow servant defense where the injury was caused or contributed to by the neglect of the person in control of the machinery in use **or** the work being conducted at the time of the injury. ORS 654.330 (emphasis added). In this case, Plaintiff's Employer Liability Law claims allege that Emori was negligent in operating the subject van. See Stokes Decl., Ex. *, 2nd Am. Compl.¶ 37 (a) – (e). In responding, the Avis Defendants deny that Emori was negligent, but admit in their Answer that Defendant Emori was the "lead driver," in charge of "operating the subject van", and that Plaintiff was merely a passenger at the time of the collision. See Stokes Decl. Ex. 1, Ans. & Affirmative Defs. to 2nd Am. Compl. ¶ ¶ 18, 25; *see also id.*., Ex. 3, Pratt Dep. at 21:22-22:15.

Considering these admissions, the case falls squarely under the purview of ORS 654.330 and its abolition of the fellow servant defense. It is undisputed that Emori was in control of the subject van and thus in charge of the subject work when the collision occurred and when the Plaintiff suffered injury. *Id.* Under those circumstances, the Employer Liability law expressly holds the fellow servant defense inapplicable. For those reasons, Plaintiff's Motion for Summary Judgment as to the Fifth Affirmative Defense should be granted.

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CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's motion for partial summary judgment, dismissing the Avis Defendants' Second, Third, and Fifth Affirmative Defenses.

DATED this 19th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the below date, I served a true and correct copy of the foregoing **Plaintiff's Motion for Partial Summary Judgment** on the following in the manner(s) described below:

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DATED this 19th day of November, 2021.

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