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, AVIS RENT A CAR SYSTEM, LLC, CONTINENTAL CASUALTY COMPANY, GASPAR DAVID MATEO, GASPAR DAVID PABLO, and TADASHI DAVID EMORI, Defendants.	Case No. 19CV38807 **DEFENDANTS AVIS BUDGET GROUP, INC., AVIS BUDGET CAR RENTAL, LLC, PV HOLDING CORP, AB CAR RENTAL SERVICES, INC., AVIS RENT A CAR SYSTEM, LLC, AND TADASHI DAVID EMORI'S MOTION FOR SUMMARY JUDGMENT** ORAL ARGUMENT REQUESTED Court Reporting Services Requested (45 Minutes Estimated)

MOTION

Pursuant to ORCP 47, defendants Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, Avis Rent A Car System, LLC, AB Car Rental Services, Inc. (collectively, the "Avis Defendants"), and Tadashi David Emori ("Emori") hereby move for summary judgment on plaintiff Henry Michael Fuhrer's third and fifth claims for relief. This Motion is supported by declarations of Iain Armstrong, Suzanne Panicoe, and Michael Pratt, including the exhibits referenced therein, as filed contemporaneously herewith.

CASE BACKGROUND

A. The Automobile Accident

On September 12, 2017, Plaintiff was a passenger in a shuttle van driven by his then co-worker, Emori, when the van was struck by a car driven by defendant Gaspar David Mateo ("Mateo") near the intersection of N. Columbia Boulevard and N. City Dump Road in

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

Portland. Just prior to the collision, Emori was attempting to turn left onto N. Columbia Boulevard when the collision occurred with Mateo, who was traveling west bound on N. Columbia Boulevard at the time.

Following the accident, police officers arrested Mateo for his role in the accident and charged him with assault and reckless driving.[1] A collision reconstructionist and investigator with the Portland Police Bureau calculated that Mateo was traveling at approximately 67 miles per hour (the posted speed limit was 40 miles per hour) when his vehicle started skidding just before the impact with the shuttle van.[2] The police told Emori that he was not responsible for the accident and did not issue him any citations or charge him with any crimes.[3]

B. Plaintiff's Complaint

Plaintiff alleges two claims for relief against the Avis Defendants and Emori in his Complaint. First, Plaintiff asserts a claim for negligence/vicarious liability against Emori and his employer (i.e. the third claim for relief).[4] This claim contends that Emori acted negligently and caused the accident, and that Emori's alleged negligence is imputed to his employer, who is vicariously liable.[5]

Second, Plaintiff brings a claim under ORS 654.305 of Oregon's Employer Liability Law against the Avis Defendants (i.e. the fifth claim for relief). Specifically, Plaintiff alleges that these defendants acted negligently and in violation of ORS 654.305 by (1) failing to research the safest route for regular vehicle transport; (2) failing to adequately train shuttle drivers to use the safest route; and (3) failing to specifically plan the safest route for returning

---

[1] Armstrong Declaration, Exhibit F, Police report (DEF PROD 0151).

[2] *Id*. at Police Report (DEF PROD 0168).

[3] *Id*. at Exhibit C, 87:24-25; 88:1-9.

[4] Plaintiff's First Amended Complaint asserts this claim against defendants Emori and PV Holding Corp. *See* Complaint, page 5, lines 11-12. But the Complaint also alleges that defendant AB Car Rental Services, Inc. was Emori's employer. *Id*. at p. 2, ¶5. This appears to be a typo in Plaintiff's pleading. Otherwise, as the record will show below, there is no issue of fact that AB was Emori's sole employer at all material times.

[5] *Id*. at p. 5, ¶¶27-29.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

shuttle drivers from the train lot to the car lot.[6] Moreover, Plaintiff contends in this claim that the Avis Defendants "were engaged in a common enterprise" and "actually controlled the work or instrumentality that caused harm to plaintiff – namely the route taken by their employee shuttle driver."[7]

C. Emori, Plaintiff, and the Avis Defendants' Relations (or lack thereof) to AB's Shuttle Van Operations

First, Emori was the "lead" shuttle van driver at the time of the accident for AB Car Rental Services, Inc. ("AB").[8] As a lead driver, Emori was responsible for directing a group of drivers, including Plaintiff, on what vehicles are to be taken to different facilities, as well as picking up other drivers from one location and transporting them to another.[9]

Second, Plaintiff was a driver for AB whose duties consisted of moving cars from Avis' storage lot in Portland out to the various rental agency offices in the metropolitan area.[10] Plaintiff did not operate any of AB's shuttle vans.[11]

Third, defendant AB was both Plaintiff and Emori's employer at the time of the accident.[12] AB was also the sole entity of the Avis Defendants to execute Avis' shuttle van operations in its Portland office.[13] Aside from AB, none of the other Avis Defendants directed shuttle van drivers on how to operate their shuttle vans, nor did they supervise or ensure that AB's shuttle drivers drove in compliance with applicable driving laws.[14] Further, none of the

---

[6] First Amended Complaint, p. 7, ¶41.

[7] *Id*. at p. 7, ¶¶39-40.

[8] Armstrong Declaration, Exhibit C, 12:10-12.

[9] *Id*. at 11:17-22.

[10] *Id*. at Exhibit D, 21:4-10; Exhibit E (DEF PROD 1382-1385).

[11] *Id*. at Exhibit D, 21:11-13.

[12] First Amended Complaint, p. 3, ¶12; Armstrong Declaration, Exhibit C, 16:22-25; 17:1-2.

[13] Pratt Declaration, ¶10.

[14] *Id*. at ¶ 5.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

Avis Defendants trained or directed AB's shuttle van drivers on safe driving practices or the specific routes AB's drivers would take when performing their job duties.[15] Should one of its shuttle vans require maintenance or repair work, AB alone determines whether such work is necessary and how it will be handled.[16] Further, none of the other Avis Defendants performed or oversaw any of the maintenance or repair work on AB's shuttle vans.[17]

Fourth, defendant Avis Budget Car Rental, LLC employee, Michael Pratt, served as Plaintiff and Emori's supervisor at the time of the accident.[18] However, Pratt was not involved with the "step-by-step process" in how AB's employees drive and ride in shuttle vans.[19] Rather, AB's shuttle drivers follow maps and GPS to determine the routes to use when accomplishing job tasks.[20] Further, Avis Budget Car Rental, LLC does not train AB's drivers on how to drive shuttle vans; rather, shuttle drivers just need to have a valid driver's license and pass a driver record check to be able to operate them.[21]

Lastly, defendants Avis Budget Group, Inc., Avis Rent A Car System, LLC, and PV Holding Corp were not involved whatsoever with fleet operations in Portland, including AB's shuttle van operations, at the time of the accident.[22]

D. The Avis Defendants' Workers' Compensation Policy and Plaintiff's Workers' Compensation Claim

Each of the Avis Defendants is a named insured under a workers' compensation policy underwritten by CNA with a policy period of July 1, 2017 to July 1, 2018 (the "Policy").[23]

---

[15] Pratt Declaration, ¶¶ 4-7.

[16] *Id*. at ¶ 9.

[17] *Id*.

[18] Armstrong Declaration, Exhibit D, 21:21-22; Exhibit C, 63:18-20.

[19] *Id*. at Exhibit A, 42:15-17.

[20] Pratt Declaration, ¶ 7.

[21] Armstrong Declaration, Exhibit A, 2-11.

[22] Pratt Declaration, ¶ 10.

[23] Panicoe Declaration, ¶¶ 4-6; Exhibit A.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

Indeed, Plaintiff asserted a claim under the Policy for injuries and treatment he allegedly incurred due to the accident and received benefits under the Policy.[24]

POINTS AND AUTHORITIES

A. Summary Judgment Standard

A court will grant a motion for summary judgment "if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law."[25]

No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.[26]

The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial.[27]

B. Workers' Compensation's "Exclusive Remedy" Provision

Oregon's workers compensation laws provide the exclusive remedy for workers alleging claims against their employer for on-the-job injuries. The rules establishing the employer's exemption from liability under the exclusive remedy provision are contained in ORS 656.018(1)(a):

> The liability of every employer who satisfies the duty required by ORS 656.017 (1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except

---

[24] Panicoe Declaration, ¶ 7.

[25] ORCP 47C.

[26] *Id.*

[27] *Id.*

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

as specifically provided otherwise in this chapter.

This exemption from liability extends beyond the employer to also cover the employer's contracted agents, employees, partners, limited liability company members, general partners, limited liability partners, limited partners, officers, and directors of the employer.[28]

An employer qualifies for the exclusive remedy provision under ORS 656.018(1)(a) if it maintains assurance with the Director of the Department of Consumer and Business Services that subject workers of the employer will receive compensation for compensable injuries and that the employer is carrier insured.[29]

C. Employer Liability Law

ORS 654.305 of Oregon's Employer Liability Law (the "ELL"), mandates that

> "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."[30]

Liability under the ELL can only be imposed on an indirect employer who

> "(1) is engaged with the plaintiff's direct employer in a '*common enterprise*'; (2) *retains the right to control* the manner or method in which the risk-producing activity was performed; or (3) *actually controls* the manner or method in which the risk-producing activity is performed."[31]

These three criteria are assessed further below. However, before delving into whether the indirect employer meets any of these criteria, Oregon appellate courts make clear that

---

[28] ORS 656.018(3).

[29] ORS 656.017(1)(a).

[30] The Oregon Supreme Court has interpreted "work involving a risk or danger to . . . employees" under ORS 654.305 to include both the worker's discrete task and the circumstances under which the worker performs that task. *Woodbury*, 335 Ore. at 161.

[31] *Woodbury v. CH2M Hill, Inc.*, 335 Ore. 154, 160 (2003) (summarizing *Wilson v. P.G.E. Company*, 252 Ore. 385, 391-92 (1968)) (emphasis added).

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

identifying the "risk-producing activity" is a necessary first step.[32]

1. Identifying the "Risk-Producing Activity"

Identifying the relevant scope of work for purposes of the ELL requires an initial determination of whether the work involved a risk or danger to the employees or the public.[33] The Oregon Supreme Court has defined the relevant scope of the work involving risk or danger to include both the worker's discrete task and the circumstances under which the worker must perform that task.[34]

In *Sanford v. Hampton Res., Inc.*, the plaintiff sustained injuries when a piece of heavy equipment he was operating fell off a bridge on the defendant-indirect employer's land.[35] The indirect employer had also designed and built the bridge in question.[36] The *Sanford* court defined the risk-producing activity in that case as "driving heavy equipment to the logging site across the railcar bridge" and "not the bridge itself."[37]

In *Woodbury v. CH2M Hill, Inc.*, the defendant-contractor had instructed the plaintiff's direct employer-subcontractor to install a pipe as part of a construction project.[38] Much of the pipe was installed underground and several feet had to be installed over a sunken stairway and corridor that was approximately ten feet below ground level. The plaintiff's direct employer constructed a plywood platform to facilitate the installation of that section of pipe and, after

---

[32] *See Sanford v. Hampton Res., Inc.*, 298 Ore. App. 555, 572 (2019) ("Thus, we must initially identify the work involving risk or danger over which [the indirect employer] must have retained a right to control"); *see also Yeatts v. Polygon Northwest Co.*, 360 Ore. 170, 179 (2016) (defining, "[a]t the outset," the risk-producing activity before engaging in an analysis of each of "common enterprise," "actual control," and "retained right to control" criteria); *Cortez v. Nacco Material Handling Group, Inc.*, 356 Ore. 254, 272-273 (2014) (identifying the risk-producing activity before analyzing the indirect employer's liability under the "common enterprise" and "actual control" theories of liability).

[33] *Woodbury*, 335 Ore. at 161.

[34] *Id.*

[35] *Sanford*, 298 Ore. at 557.

[36] *Id.* at 569.

[37] *Id.* at 573.

[38] *Woodbury*, 335 Ore. at 161.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

the installation work was complete, the plaintiff began to dismantle the platform but lost his balance and fell onto the corridor below.[39] Under those circumstances, the Supreme Court explained that the "'work involving a risk or danger' included requiring plaintiff to work at height during the assembly, use, and disassembly of the platform."[40]

In *Yeatts v. Polygon Northwest Co.*, a general contractor subcontracted with the plaintiff's employer to perform framing work on a residential development.[41] The plaintiff's direct employer decided to use guardrails and constructed them as a fall protection system at the work site. While framing an exterior wall on the third floor of one of the residences, the plaintiff, who was kneeling down facing a guardrail, leaned against the guardrail in an attempt to push himself into a standing position.[42] The guardrail gave way and the plaintiff fell nearly 20 feet to a concrete surface below.[43] In that case, the Supreme Court determined that the risk-producing activity was correctly identified as "plaintiff's framing work at a dangerous height above a concrete surface."[44]

2. "Common Enterprise"

The "common enterprise" category applies in circumstances where employees of the defendant and employees of the plaintiff's direct employer have intermingled duties and responsibilities in performing the risk-creating activity or where equipment that the defendant controls is used in performing that activity.[45] The intermingling of duties and responsibilities "must consist of more than a common interest in the economic benefit from the enterprise" for liability to exist under the "common enterprise" doctrine.[46]

---

[39] *Woodbury*, 335 Ore. at 158.

[40] *Id*. at 162.

[41] *Yeatts*, 360 Ore. at 173.

[42] *Id*. at 177.

[43] *Id*.

[44] *Id*. at 179 (internal quotation marks omitted).

[45] *Id*. at 180.

[46] *Yeatts*, 360 Ore. at 180.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

A "common enterprise" exists if: (1) both the direct (plaintiff's employer) and the indirect (defendant) employer participate in a project of which the defendant employer's operations are an integral or component part; (2) the work must involve a risk or danger; (3) the plaintiff must be an "employee" of the defendant employer, and (4) the defendant must have charge of or responsibility for the activity or instrumentality that causes the plaintiff's injury.[47]

In *Yeatts*, the Supreme Court concluded that there was no common enterprise between the plaintiff's direct employer and the indirect employer. The *Yeatts* court based its holding on the fact that there was no evidence that the indirect employer's "employees or equipment were engaged or used in framing work on the project or in the design, assembly, or maintenance of the guardrail that failed."[48]

In *Sacher v. Bohemia, Inc.*, the Supreme Court ruled that a "common enterprise" did not exist between the direct and indirect employers.[49] The *Sacher* plaintiff was a direct employee of Cascade, a manufacturer of broom handles.[50] Cascade contracted with defendant-indirect employer Bohemia, a lumber producer, to install and operate a broom handle production line at one of Bohemia's mills.[51] The plaintiff was injured when he tried to remove a piece of wood that had lodged in the saw blades of Cascade's production line.[52] Bohemia's employees assisted in the operation by producing the scrap wood that Cascade used for making the broom handles, supplying the conveyors used to bring the waste wood the Cascade operation, forklifting completed bins of broom handles to the yard for loading, occasionally

---

[47] *Sacher v. Bohemia, Inc.*, 302 Ore. 477, 486-87 (1987). To satisfy the third factor, a plaintiff must be "1) an 'adopted' employee . . . ; 2) an 'intermingled employee' . . . ; or 3) an employee of an independent contractor hired by the defendant where the defendant retains or exercises a right to control the risk creating activity or instrumentality." *Id.* at 486.

[48] *Yeatts*, 260 Ore. at 182.

[49] *Sacher*, 302 Ore. at 487-488.

[50] *Id.* at 479.

[51] *Id.* at 480.

[52] *Id.* at 481.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

sharpening Cascade's saws, and having the contractual right to approve all hiring of employees to work in Cascade's broom handle operation.[53] However, despite those connections, the Supreme Court concluded that there was no evidence that Bohemia was engaged in a common enterprise with Cascade with respect to the broom handle production unit that caused plaintiff's injury.[54] The court held that there was no common enterprise because "[p]laintiff was not injured because of a failure on Bohemia's part to take proper precautions regarding its own equipment . . . or employees."[55]

3. "Retained Right to Control"

To establish a defendant's right to control the pertinent risk-producing activity, a plaintiff must "identify some source of legal authority for that perceived right."[56] That source may be statutory or contractual.[57]

In *Yeatts*, the Supreme Court concluded that the direct employer "retained the right to control" the risk producing activity based on certain provision in the underlying subcontract.[58] The subcontract between the general contractor-indirect employer and the framer contractor-direct employer provided that the framer would be "primarily responsible for safety measures for the framing work and required it to protect Polygon from liability for injuries that might befall the [subcontractor]'s employees doing that work."[59] However, the subcontract also specified that the direct employer "retained some right to control the framing work, including

---

[53] *Sacher*, 302 Ore. at 487.

[54] *Id*. at 487.

[55] *Id*. (footnote omitted).

[56] *Yeatts*, 360 Ore. at 184 (citing *Boothby v. D.R. Johnson Lumber Co.*, 341 Ore. 35, 41 (2006)).

[57] *See, e.g., Boothby*, 341 Ore. at 41 (basing defendant's right to control on "specific [contractual] provisions").

[58] *Yeatts*, 360 Ore. at 192.

[59] *Id*. at 184.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

related safety matters."[60] For example, the direct employer was required to comply with "any safety measures requested by [Polygon]," and Polygon's Accident Prevention Plan also required Polygon to inspect the construction site daily for safety hazards.[61] The Oregon Supreme Court held that

> "retention of the rights to require additional safety measures, and to inspect the work site in its entirety, particularly in the absence of a contractual provision that placed sole responsibility for safety measures on [the subcontractor], constituted sufficient evidence that Polygon retained the right [to] control . . . so as to preclude summary judgment."[62]

4. "Actual Control"

Liability under the actual control test is triggered only if the defendant actually controls the manner and method – that is, how – the plaintiff or the plaintiff's employer performs the risk-producing activity.[63]

In *Yeatts*, the court concluded that the indirect employer had not exercised "actual control" over the risk producing activity because (1) the underlying subcontract assigned to the direct employer the responsibility of assembling and maintain the fall protection system; (2) the direct employer's employees did in fact assemble and maintain the guardrail that failed; (3) the direct employer decided to use guardrails for fall protection; and (4) the indirect employer's superintendents did not actually physically inspect the guardrails to determine whether they were properly assembled and maintained.[64]

In *Woodbury*, the court held, in the context of a summary judgment ruling, that there

---

[60] *Yeatts*, 360 Ore. at 184.

[61] *Id*. at 185.

[62] *Id*. at 192.

[63] *See Wilson v. P.G.E. Company*, 252 Ore. 385, 398 (1968)) (concluding that defendant had not exercised actual control over work involving risk or danger because defendant's "only exercise of control was for the purpose of securing the ultimate result for which defendant had contracted," and there was "no evidence of an attempt by defendant to control the method and manner of the work").

[64] *Yeatts*, 360 Ore. at 183.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

was sufficient evidence to create a triable issue of fact as to whether the defendant was liable under the ELL because it actually controlled the manner or method in which the risk-producing activity was performed. The *Woodbury* court based its holding, in particular, on the fact that the direct and indirect employers "jointly decided to use a fixed wooden platform consisting of boards and plywood sheets."[65]

ARGUMENT ON SUMMARY JUDGMENT MOTION #1: PLAINTIFF'S THIRD CLAIM FOR RELIEF (NEGLIGENCE/VICARIOUS LIABILITY)

As a threshold matter, Plaintiff erroneously names defendant PV Holding in his Complaint as the direct employer to Emori who is vicariously liable for Emori's alleged negligence. There is no factual dispute that AB Car Rental Services, Inc., not PV Holding, is Emori's employer in this case. Accordingly, this motion operates on the assumption that Plaintiff's Complaint intended to name AB Car Rental Services, Inc. as the employer who is allegedly vicariously liable under Plaintiff's third claim for relief.

AB Car Rental Services, Inc. is immune from liability in this case under ORS 656.018(1)(a)'s exclusive remedy provision because AB is a carrier-insured employer and, therefore, a complying employer under ORS 656.01. AB extended workers' compensation coverage to employees such as Plaintiff and Plaintiff successfully filed for, and received, workers' compensation benefits in this case under AB's workers' compensation policy relating to the accident.

Tadashi Emori is also immune from liability under ORS 656.018(1)(a) and (3) because Mr. Emori and Plaintiff were both employed by AB at the time of the accident. There is no factual dispute that Mr. Emori was operating in his capacity as an employee for AB at the time of the accident.

---

[65] *Woodbury*, 335 Ore. at 162. The court also based its holding on the fact that the indirect employer's representative provided detailed on-site instructions as to how a pipeline should be constructed, as well as the representative addressing jointly with the direct employer what was required to facilitate work on the part of the pipeline that spanned the underground concrete corridor. *Id.* at 162-163.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

ARGUMENT ON SUMMARY JUDGMENT MOTION #2: PLAINTIFF'S FIFTH CLAIM FOR RELIEF (EMPLOYER LIABILITY LAW)

A. No Issue of Material Fact that Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, and Avis Rent A Car System, LLC were not Engaged in a "Common Enterprise" with AB Car Rental Services, Inc.

There is no issue of material fact that the Avis Defendants were not engaged in a "common enterprise" with Plaintiff's direct employer, AB Car Rental Services, Inc., with regard to the risk producing activity in this case – ***driving and riding in shuttle vans while engaged in work activities on public roads.***

1. Avis Budget Group, Inc., PV Holding Corp, and Avis Rent A Car System, LLC had Zero Involvement with the Risk-Producing Activity

Neither Avis Budget Group, Inc., PV Holding Corp, or Avis Rent A Car System, LLC were involved in training, supervising, controlling or directing AB's operations of driving and riding in shuttle vans. AB and its employees alone bore the duties and responsibilities of determining how and where to drive the shuttle vans. Emori was responsible for directing a group of drivers, including Plaintiff, on what vehicles to take on the date of the accident. Additionally, only AB's employees were present in the shuttle van at the time of the accident. At best, the only connection that Avis Budget Group, Inc., PV Holding Corp, and Avis Rent A Car System, LLC had with the risk-producing activity was a "common interest in the economic benefit from the enterprise." However, Oregon appellate courts have made clear that this common economic benefit is insufficient to establish common enterprise.

2. Avis Budget Car Rental, LLC and AB Car Rental's Duties were not Commingled as to the Risk-Producing Activity

Plaintiff will presumably point to Plaintiff's supervisor, Michael Pratt of Avis Budget Car Rental, LLC, and his assignment of work tasks to Plaintiff and Emori on the date of the accident as evidence that the LLC was engaged in a common enterprise with AB. However, Plaintiff does not allege in this lawsuit that his injuries arose because of the work Pratt assigned. Rather, Plaintiff alleges that his injuries arose from Mateo and Emori's negligent

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

driving, as well as the Avis Defendants' failures to plan the safest routes for AB to take and training AB's drivers on these routes. Factually, this case is most analogous to *Sacher*, where the court concluded that a common enterprise did not exist because the plaintiff's injuries did not occur as a result of the indirect employer's failure to take proper precautions regarding its equipment and employees, but rather the equipment that the direct employer alone operated. Like the direct employer in *Sacher*, AB alone was responsible for operating the equipment involved in the accident – i.e. the shuttle van. Similar to the indirect employer in *Sacher*, the LLC's duties of assigning work tasks to AB's drivers was not the cause of the accident, nor were those duties "intermingled" with AB's autonomous decisions as to how its workers drove and rode in shuttle vans while on the clock.

3. Avis Budget Group, Inc.'s "Code of Conduct" and Work Rules Do Not Create Factual Dispute as to Common Enterprise

It is also anticipated that Plaintiff will point to Avis Budget Group, Inc.'s "code of conduct" or work rules to create a factual issue as to whether the other Avis Defendants were engaged in a common enterprise with AB. However, those policies do not involve the "intermingling of duties and responsibilities" as to the protocol of how AB was to drive and ride in shuttle vans. These policies simply reiterate applicable driving laws by requiring AB's employees to follow "local safety rules and/or policies" and not "driving any Company vehicle in an unsafe, negligent, or reckless manner at any time."[66] There are no driving protocols in the Code of Conduct that are specific to shuttle vans, which are large passenger vehicles akin to a "bus."[67] Similarly, there is no directive in the Code of Conduct, for example, as to how many AB employees can ride in the shuttle van at any given time, nor are there any mandates that AB's shuttle drivers avoid freeways.

The policies referenced in the Code of Conduct and Work Rules prescribe general rules for the Avis Defendants' employees to follow but are not specific to the risk-producing

[66] Armstrong Declaration, Exhibit I, Code of Conduct (DEF PROD 1399-1400).

[67] *Id*. at Exhibit D, 111:7-8.

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

activity in this case.

B. No Issue of Material Fact that Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, and Avis Rent A Car System, LLC did not "Actually Control" the Risk-Producing Activity

Plaintiff and Mr. Emori each testified at their respective depositions that shuttle drivers themselves determined the safest route to take from the rail yard to the administrative building. As employees of AB Car Rental, Plaintiff and Mr. Emori both testified that they did not receive training on safe driving practices from either AB or any of the Avis Defendants. The Avis Defendants' individual roles within the larger Avis corporate structure also demonstrate that none of those entities were engaged in a common enterprise with Plaintiff's direct employer, AB Car Rental.

Unlike *Woodbury*, where the direct and indirect employers made joint decisions on whether to use a wood platform and how it would be used, AB's shuttle drivers' decisions associated with the risk producing activity – driving and riding in AB's shuttle vans on public roads while working – did not involve any input, oversight, or collaboration with any of the other Avis Defendants.

The mere fact that AB did not purchase or supply the shuttle van in question is also insufficient to create an issue of fact as to "actual control" because Plaintiff does not allege that the shuttle van itself was defective or the cause of the subject accident. Further, *Sanford* supports that the condition of the shuttle van does not define the risk-producing activity in this case. Similar to *Sanford* and the plaintiff's unsuccessful argument that the bridge itself was the risk-producing activity, the condition of the shuttle van itself is not a factor in determining the risk-producing activity in this case because the scope of the risk-producing activity instead focuses on the AB's drivers and riders conduct.

/// ///

/// ///

/// ///

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

C. Plaintiff does not Allege "Retained Right to Control" Theory of Liability Under the ELL Claim, but even if he did, Summary Judgment is Still Appropriate

Plaintiff's First Amended Complaint does not allege the "retained right to control" theory of liability under the ELL claim. Therefore, this issue is not part of the record before the court.

Even if Plaintiff were to amend his Complaint to incorporate such a theory, the record does not present an issue of material fact that neither Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, nor Avis Rent A Car System, LLC retained a right to control the risk-producing activity in this case. Unlike *Yeatts*, there are no contracts between these entities that reserve the right to control the risk producing activity in this case – that is, AB's employees driving and riding in shuttle vans while engaged in work activities on public roads. Likewise, there is no source of legal authority, whether statutory or otherwise, that gives Avis Budget Car Rental, LLC, Avis Budget Car Rental, LLC, PV Holding Corp, or Avis Rent A Car System, LLC the retained right to dictate the method and manner in which AB's employees drive and ride in shuttle vans on a public road while working.

CONCLUSION

First, summary judgment of Plaintiff's third claim for relief in favor of defendants AB Car Rental Services, Inc. and David Emori is warranted because Plaintiff's direct employer was AB, Mr. Emori was Plaintiff's co-worker at AB, and AB was a complying employer under ORS 656.017 and 656.018. Plaintiff submitted, and received, workers' compensation benefits under the Avis Defendants' policy in relation to the accident. As a result, Oregon's workers' compensation laws bar AB and Mr. Emori from liability in this case as a matter of law.

Second, summary judgment of Plaintiff's fifth claim for relief in favor of defendants Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, AB Car Rental Services, Inc. and Avis Rent A Car System, LLC is appropriate because (1) there is no issue of fact that Plaintiff's direct employer, AB, was not involved in a common enterprise with the

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801

other Avis Defendants as to the applicable risk-producing activity; (2) there is no issue of fact that the other Avis Defendants did not actually control the manner and method in which AB performed the risk-producing activity; and (3) there is no source of legal authority, contractual or statutory, that retains a right to Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, or Avis Rent A Car System LLC to control the risk-producing activity.

DATED this 9th day of July, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: *s/ Ben Veralrud*

Ben Veralrud, OSB #124860
Iain M. R. Armstrong, OSB #142734
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800
Fax: 971.712.2801
Ben.Veralrud@lewisbrisbois.com
Iain.Armstrong@lewisbrisbois.com
Of Attorneys for Defendants Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, AB Car Rental Services, Inc, Avis Rent A Car System, LLC and Tadashi David Emori

CERTIFICATE OF SERVICE

I certify that I served the foregoing **AVIS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** on the following attorneys by the method indicated below on the 9th day of July, 2021:

Attorneys for Plaintiff:	
Thomas Melville	_____ Via First Class Mail
Gresham Injury Law Center	_____ Via Federal Express
424 NE Kelly Ave.	_____ Via Hand-Delivery
Gresham, OR 97030	✓ Via E-Mail
Tom@greshaminjurylaw.com	
Attorneys for Continental Casualty Company:	
Heather Beasley	_____ Via First Class Mail
Davis Rothwell Earle & Xochihua	_____ Via Federal Express
200 SW Market St., Suite 1800	_____ Via Hand-Delivery
Portland, OR 97201	✓ Via E-Mail
HBEASLEY@davisrothwell.com	
Attorneys for Defendant Mateo:	
John R. Barhoum	_____ Via First Class Mail
Jeffrey W. Hansen	_____ Via Federal Express
Chock Barhoum LLP	_____ Via Hand-Delivery
121 SW Morrison, Suite 415	✓ Via E-Mail
Portland, OR 97204	
John.barhoum@chockbarhoum.com	
Jeff.hansen@chockbarhoum.com	
Attorneys for Defendant Pablo:	
Flavio A. Ortiz	_____ Via First Class Mail
Martin M. Rall	_____ Via Federal Express
9700 SW Capitol HWY, Ste. 120	_____ Via Hand-Delivery
Portland, OR 97217	✓ Via E-Mail
alex@rallortiz.com	
marty@rallortiz.com	

s/ Rebecca Ruston
Rebecca Ruston, Legal Secretary
rebecca.ruston@lewisbrisbois.com

Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
Telephone: 971.712.2800 • Fax 971.712.2801