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 OPPOSITION TO DEFENDANTS' THIRD MOTION FOR SUMMARY JUDGMENT *Oral Argument Requested*

UTCR 5.050 INFORMATION

Time requested for argument:	90 Minutes
Telephone attendance requested:	Yes
Counsel located more than 25 miles from the court:	No
Recording services requested:	Yes

OPPOSITION TO DEFENDANTS' THIRD MOTION FOR SUMMARY JUDGMENT

Plaintiff Henry Michael Fuhrer responds in opposition to Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp., AB Car Rental Services, Inc., and Defendant Tadashi David Emori's ("Avis Defendants") Third Motion for Summary Judgment because employment involving the operation of motor vehicles involves a risk of danger to employees, a fact which is borne out by the sheer magnitude of motor vehicle related deaths in the

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employment context.[1] When, as here, those inherent risks are combined with the complete absence of any driver training, the involvement of a large multi-person van, and a known dangerous Avis location and intersection as the scene of the collision, it is for the jury to determine in this case whether the "operation of any machinery", namely the multi-purpose van, at the time of the collision included "any work involving risk or danger to the employees or the public" under the Employer Liability Law. ORS 654.305 and ORS 654.310.

FACTUAL BACKGROUND

Plaintiff Henry Michael Fuhrer suffered catastrophic injuries in a motor vehicle crash while conducting work for the Avis Defendants. Stokes Decl., Ex. 1, *Emori Dep.* 31:14-35:12. At the time of the collision, the vehicle in which he was riding was operated by Defendant David Tadashi Emori, who had been employed as a "lead driver" for the Avis Defendants. *Id.* Defendant Emori had no background in the operation of large, 12-person vehicles, such as the vehicle he was driving, nor had he received any training from the Avis Defendants. *Id.* 10:11-20:12; 24:19-22, 61:17-22.

The intersection where the collision occurred is a five lane commercial area known to the Avis Defendants to be particularly dangerous due to obstructed sight lines caused by a curve in the roadway, the known speed of traffic on the roadway, the type of vehicles, and the number of vehicular accidents which occur in that area. *Id.*, 42:9-12, 47:19-21; 50:11-51:8, 64:25-65:6, 79:8-11. The negligence of Defendant Emori was a cause of the collision when he pulled out at an unsafe time, and in an unsafe manner. *Id.*; 81:10-82:10; Ex. 2, *Fuhrer Dep*. 115:18-25, Ex. 3 *Stokes Aff*. But for Defendant Emori's negligence, the collision would not have occurred. *Id.*

[1] See Stokes Decl., Ex. 3, Stokes Aff., ¶ 3.

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ARGUMENT

I. LEGAL STANDARD

Motions for Summary Judgment may be granted only where, after considering the pleadings, depositions, affidavits, declarations, and admissions on file in the light most favorable to the adverse party, the Court finds that no objectively reasonable juror could return a verdict in favor of the adverse party. ORCP 47 C.

The Avis Defendants' Third Motion for Summary Judgment seeks a determination from the Court that no objectively reasonable juror could find that the activity Plaintiff and his coworkers were engaging at the time of the crash involved risk or danger under ORS 654.305. The question of whether the activity included "any work involving a risk or danger to the employees or the public" is ordinarily left to the jury. Summary Judgment is proper only in rare cases where reasonable minds cannot differ as to whether particular work involved risk or danger. *See Rowden v. Hogan Woods, LLC*, 306 Or App 658, 678, 476 P.3d 485, 497 (2020), *citing Snyder v. Prairie Logging Co., Inc.*, 207 Or 572, 577, 298 P.2d 180 (1956); *Richardson v. Harris*, 238 Or 474, 476–77, 395 P.2d 435, 436 (1964). Thus, if after considering the evidence in the light most favorable to Plaintiff, the Court finds that objectively reasonable minds can differ on whether any particular work or activity involves risk or danger, a jury question is created and summary judgment must be denied. *Id.*

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II. PLAINTIFF'S INJURY IS COVERED BY THE EMPLOYER LIABILITY LAW

A. Work involving the "operation of any machinery", such as the subject van, is an activity specifically included within the Employer Liability Law. There is no merit to the suggestion that Plaintiff's work was fundamentally unlike the categories of work enumerated in ORS 654.310.

The work of Plaintiff and his co-workers required the operation of motor vehicles, and specifically, operating and riding as passengers in multi-passenger vans with untrained drivers on dangerous roads. As Defendants apparently suggest in their motion, there is no exception in the statute that excludes subject van from "machinery" as set forth in ORS 654.310. Instead, ORS 654.310 very broadly and specifically includes occupations involving "the operation of any machinery." ORS 654.310.

The Employer Liability Law was adopted in 1910 as a means to impose higher standards of care than supplied by the common law on employers whose work involved risk or danger. *Groves v. Max J. Kuney Co.*, 303 Or 468, 472, 737 P.2d 1240, 1241 (1987). The *Groves* court, tasked with answering a question not pertinent to the instant action,[2] undertook to analyze the meaning of the Employer Liability Law. In doing so, it noted that the language now found at ORS 654.305 and ORS 654.310 was initially combined into one long passage, which specifically mentioned employments involving the operation of machinery. *Id.*, 303 Or 472 n 2. As the Avis Defendants point out, subsequent reorganization did not change the meaning and intent of the statute, which continues to cover those jobs which involve the use of machinery:

> 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

[2] *Groves* involved the question of whether an independent contractor is covered by ORS 654.310. *Id.* at 471.

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> 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.

ORS 654.310

Thus, "[t]he Employer's Liability Act is applicable to all "persons whatsoever, engaged in the operation of any machinery." *Grammer v. Wiggins-Meyer S.S. Co.*, 126 Or 694, 701, 270 P. 759, 761 (1928). Contrivances much less "machine-like" than the 12 passenger van at issue in this case have qualified. *Id.* at 695 (cargo hook is "machinery"); *Malloy v. Marshall-Wells Hardware Co.*, 90 Or 303, 313, 173 P. 267, 270, *on reh'g*, 90 Or 303, 175 P. 659 (1918) (block and tackle pulley system is "machinery"); *see also Jodoin v. Luckenbach S.S. Co.*, 125 Or 634, 635-641, 268 P. 51, 52-54 (1928)(collision between four wheel truck and motor tractor operated by defendant employee); *Bartley v. Doherty*, 225 Or 15, 22–24, 357 P.2d 521, 523–24 (1960)(operation of farming tractor). Indeed, application of the act to incidents involving the use of a motor vehicle is so clear that the parties so stipulated in *Manasco v. Barclay*, 189 Or 109, 110–12, 218 P.2d 469, 469–70 (1950), which involved injury stemming from a single vehicle accident occurring during the operation of a log truck.

Additionally, many courts have held that the original language of the Employer Liability Law meant to indicate that those specifically enumerated employments, including those involving machinery, were inherently dangerous as a matter of law. *See Grammer v. Wiggins-Meyer S.S. Co., supra*, 126 Or 701, *citing Malloy v. Marshall-Wells Hardware Co.*, 90 Or 303, 314, 173 P. 267, 270, *on reh'g*, 90 Or 303, 175 P. 659 (1918)([i]n short, the Employers' Liability Act is applicable to all "persons whatsoever, engaged **in the operation of any machinery**) (emphasis added); *Williams v. Clemen's Forest Prod.*, 188 Or 572, 594, 216 P.2d 241, 249–50 (1950) (portions of O.C.L.A. § 102-1601 [now ORS 654.310], which precede the 'and

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generally' clause [now ORS 654.310, referring to machinery], amount to a legislative determination that certain kinds of activity do involve risk or danger as a matter of law).

In fact, many of the cases cited by the Avis Defendants reflect this principle. For example, in *Short v. Federated Livestock Corp*., 235 Or 81, 86–88, 383 P.2d 1016, 1019–20 (1963), the Court emphasized, in finding that feeding hogs, without more, was not inherently dangerous, in part because ***it did not involve the dangers presented by machinery***. *Id.*

> This court has determined in several cases the application of the Employers' Liability Law to farming operations in which a farm employee sustained injury. In the cases in which liability was recognized, the employee was **using power driven machinery**…

Id. at 87. (emphasis added). The same can be said for *McLean v. Golden Gate Hop Ranch of Or.*, 195 Or 26, 32–35, 244 P.2d 611, 614–15 (1952). There, the Court noted "it is obvious that the duties of plaintiff's employment did not bring her within the scope of any of the occupations covered by the **specific requirements contained in the first part of the Act**. Her work was in no way connected with… **machinery**." *Id.* at 32-35 (emphasis added). The *McLean* Court left no room for interpretation had it been presented with the facts of the instant case. "If the duties of her employment had required her to work **with, in, or about the power-driven machinery** used in the picking operations, **no question could arise** as to the applicability of the act." *Id.* (emphasis added). *See also Cox v. Graebel/Oregon Movers, Inc.*, No. 03:11-CV-87-HZ, 2012 WL 33084, at *4–5 (D. Or. Jan. 4, 2012), *citing Union Oil Co. v. Hunt*, 111 F.2d 269, 274–275 (9th Cir.1940):

> Oregon's Employer Liability Act applies only to employments involving a risk or danger, and which are inherently dangerous, whether due to or caused by **machinery or otherwise, and comprehends hazardous occupations in general, specifically enumerated or otherwise**.

Id. (emphasis added).

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By its plain terms, ORS 654.310 protects all employments engaged in the operation of any machinery. Plaintiff's employment required that he operated vehicles, and his injury stemmed from the operation of a vehicle. There is no question that Plaintiff's employment is one contemplated by ORS 654.310. Defendant's argument to the contrary is without support or merit.

B. Even if Plaintiff's work were not specifically enumerated in ORS 654.310, which it is, Plaintiff's work at the time of the collision qualifies as "work involving risk of danger as set forth in ORS 654.305 -- the "and generally" clause.

In assessing whether particular work can be considered to be inherently dangerous under the "and generally clause" of Employer Liability Law, one must not simply consider the specific task at issue. That is exactly what the Avis Defendants ask this Court to do in asserting that the scope of Plaintiff's work was "riding as a passenger in a vehicle." *See* Defendants Motion at 1, 6. The suggested scope fails to account for any of the risk factors involved at the time of the collision, running afoul of *Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 160–62, 61 P.3d 918, 921–22 (2003), which provides the current state of law regarding the definition of "any work involving risk of danger" as used in ORS 654.305. Deploying the statutory interpretation method set forth in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P.2d 1143 (1993), the *Woodbury* court determined that for purposes of ORS 654.305, risk of danger refers to conditions of the work that create the possibility that a worker will suffer harm. *Id.* at 161. With that definition in mind, the court determined that failing to account for the conditions of the work that created the risk of injury, there—work that was being conducted at a dangerous height over a concrete surface—was error. *Id.* at 161-162. This expanded analysis of the risk-producing activity has been consistently affirmed. *See Moe v. Eugene Zurbrugg Const. Co.,* 202 Or App 577, 585, 123 P.3d 338, 343 (2005); *Spain v. Jones*, 257 Or App 777, 793, P.3d 257, 266 (2013);

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Yeatts v. Polygon Nw. Co., 268 Or App 256, 263–65, 341 P.3d 864, 870–71 (2014), *aff'd in part, rev'd in part sub nom. Yeatts Whitman v. Polygon Nw. Co.*, 360 Or 170, 379 P.3d 445 (2016).

As noted above, to define the work as "riding as a passenger in a vehicle,"" would be to commit the same error denounced in *Woodbury* – failing to account for the particularly dangerous conditions that existed at the time of the injury. Such a narrow view harkens back to the outdated and limited view of the Employer Liability Law exemplified in *McLean*, which has been specifically rejected by reviewing courts. *See Quirk v. Skanska USA Bldg., Inc.*, No. 3:16-CV-0352-AC, 2018 WL 2437537, at *7–9 (D. Or. May 30, 2018) (*Mclean* reflects an older, more limited concept of ELL liability, common in other cases of the era [1950s]).

In this case, the relevant risks arise from the location of the collision, an area known by the Avis Defendants to be uncommonly dangerous due to the obscured view of traffic, the curve in the roadway, and the speed of vehicles that typically travel along the commercial roadway. Stokes Decl., Ex. 1, *Emori Dep.*, 42:9-12, 50:11-51:8, 64:25-65:6, 79:8-11. The maneuver involved pulling the van from a commercial railyard onto Columbia Blvd., a five lane roadway where vehicles are known to be speeding, further increasing the risk of harm. *Id.*, 34:25-35:25, 47:15-21, 61:25-62:11. Making matters worse, the operator of the vehicle, Defendant Emori, had no training in driving the large, 12 person van. *Id.* 24:19-22, 61:17-22. He negligently pulled the van into traffic at an angle in the path of the Mateo vehicle seconds before impact. *Id.* 47:15-21, Ex. 2, *Fuhrer Dep*. 115:18-25, Ex. 3 *Stokes Aff*. When Emori noticed the Mateo vehicle, pulled out into the path of the oncoming vehicle and turned the van further toward its path, increasing the risk of collision. *Id*., Ex. 1, *Emori Dep.*, 81:10-82:10. Emori's negligence in pulling the van into traffic was a cause of the collision. *Id.* Ex. 3, *Stokes Aff*.

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Applying *Woodbury* requires an analysis of the specific conditions that made work dangerous at the time of Plaintiff's injury. Viewed in that lens, it is clear that a reasonable juror could find that the work Plaintiff was engaged during the time of the collision involved risk or danger as contemplated by ORS 654.305.

C. Authorities relied upon by the Avis Defendants fail to show they are entitled to a ruling that Plaintiff's work is not protected by the Employer Liability Law.

The Avis Defendants recognize that the question of whether work can be characterized as involving risk or danger under the "and generally clause" is ordinarily a jury question. *See* Defendants Motion at 4. In a failed attempt to show that this is one of those rare matters where judicial determination of the nature of the work is appropriate, the Avis Defendants cite to a string of cases, none of which involve the use of machinery, and all of which are otherwise factually distinguishable.

Most involve slip and fall incidents which occurred in circumstances that posed no inherent risk of danger. For example, *Kemper v. MWH Constructors, Inc*, No. 3:21-CV-145-SI, 2021 WL 1914212, at *2–3 (D. Or. May 12, 2021) involved a plaintiff injured when he tripped on a pipe that was in a visible location free from clutter. The Court found that working around trip hazards, without more, did not represent an occupation involving risk or danger. *Id.* It noted, however, that other conditions surrounding trip hazards could qualify, for example, working in conditions which impact visibility and sure-footedness. *Id., citing Anderson v. Intel Corp.*, No. 3:20-CV-02138-AC, 2021 WL 1401492, at *4–5 (D. Or. Apr. 14, 2021). Similarly, in *Barker v. Portland Traction Co.*, 180 Or 586, 602–11, 173 P.2d 288, 294–98 (1946), plaintiff was injured where he slipped and fell while removing snow in the course of his employment as a street car operator. Plaintiff argued that because his other job duties – operating a streetcar—were

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hazardous, the act applied. *Id.* at 604. The Court rejected that contention and focused on the task occurring at the time of injury and held that merely removing snow is not covered by the Act. *Id.* at 610. *See also Helland v. Hoffman Const. Co. of Oregon*,[3] No. 3:11-CV-01157-HU, 2013 WL 5937001, at *3–6 (D. Or. Nov. 3, 2013) (plaintiff steamfitter injured traversing uneven stairs while boarding school bus used to shuttle workers).

The Avis Defendants also cite to state court rulings involving slip and/or trip and fall injuries. See Smith Decl., Ex. 4 and Ex. 5, attaching Complaints and Orders in the following cases: *Murray v. Ward-Henshaw Construction, Inc*., Multnomah County Circuit Court Case No. 18CV32214 (granting summary judgment in case involving fall on ice); *Anderson v. DPR et.al.*, Multnomah County Circuit Court Case No. 1 8CV06752 (granting ORCP 21 motion in slip and fall case, allowing plaintiff to replead at a later date); *Sisco v. DPR*, Multnomah County Circuit Court Case No. 18CV57520 (granting summary judgment in slip and fall case). Obviously, cases disposed of pursuant ORCP 21 offer little instruction here. Further, no written opinions are attached from any of cases involving summary judgment rulings, so little can be gleaned from their existence. If any legal principle can be discerned from the vast majority of the cases cited by the Avis Defendants, it is that this risk of tripping, without more, does not bring a case under the purview of the Employer Liability Law. That general theme does not help the Avis Defendants here.

In the case at bar, Court should not only consider, as Defendants suggest, that Plaintiff was "riding as a passenger in a vehicle," but also that the area in which Plaintiff was riding

[3] Though the injury in *Helland* occurred on a shuttle bus- the parallels to the instant matter end there. It is entirely unclear how a worker injured while ascending stairs onto a bus can be fairly said to have been injured in "circumstances very similar to this case." *See* Defendants Motion at 6.

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involved unique dangers such as a line of sight obstruction caused by the curve of the roadway and the known speed of vehicles which travel in this commercial area. The presence of those dangers, combined with the fact that Plaintiff's employment required the use of machinery, renders it clear that this matter falls under the purview of the Employer Liability Law. At the very least, a genuine issue of material fact exists, and the Avis Defendants' Motion for Summary Judgment must be denied.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Third Motion for Summary Judgment in its entirety.

DATED this 28th day of February, 2022.

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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 OPPOSITION TO DEFENDANTS' THIRD MOTION FOR SUMMARY JUDGMENT** on the following in the manner(s) described below:

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DATED this 28th day of February, 2022.

D'AMORE LAW GROUP, P.C.

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