IN THE COURT OF SUPREME COURT OF THE STATE OF

OREGON

WESLEY JAMES GARRETT,	)
	) No. S062199
Plaintiff-Appellant,	)
	) 9th Circuit No. 1235310
v.	)
	) US District Court of
NEW HAMPSHIRE INSURANCE	) Oregon
COMPANY, a division of	) No. 3:11-CV-00788-HZ
CHARTIS, INC,	)
	)
Defendant-Respondent.	)

APPELLANT'S OPENING BRIEF

On Certified Questions from the Ninth Circuit Court of Appeals Accepted by the Oregon Supreme Court by Order dated May 29, 2014

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STATEMENT OF THE CASE

1. Nature of the Action

This is a coverage action to force an automobile insurer, Defendant New Hampshire Insurance Company, to cover personal injury damages arising from a single vehicle accident. Plaintiff Wesley Garrett was a passenger in a pickup truck, owned by the logging company for which he worked, and on the way to a logging site. The driver, who worked for the same company and who had permission to drive the company truck, tried to pass a bus going at least 60 mph on Highway 30 in December on the icy highway, lost control of the pickup and smashed the right side into trees, causing Wes extensive and serious personal injuries.[1] Garrett applied for and received workers' compensation benefits from his employer.

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[1] As alleged in paragraph 5 of Plaintiff's original Complaint: right 5th metatarsal fracture, right talar dome displacement, right distal tibia dislocation, right tibial plateau fracture, right anterior talofibular ligament disruption, right anterior/lateral leg compartment syndrome, right femur fracture, left hip dislocation, left acetabulum fracture, right acetabulum fracture, right inferior pubic hematoma, right sacroiliac joint diastasis, wing fracture, pelvic hematoma, right sacroiliac joint diastasis, left eyelid laceration, facial lacerations, right knee abrasion, fracture of the left sacroiliac joint, left sacroiliac instability, right ankle dislocation/fracture, disruption of lateral and medial ligaments of right ankle, right ankle instability and post traumatic stress disorder.

Plaintiff Garrett's third party lawsuit against the driver resulted in a $1,865,120.00 million personal injury judgment. The judgment included the following finding of fact [2]:

> 5. Defendant Baller's driving and actions were wilful and unprovoked aggression proximately leading to Wes Garrett's serious personal injuries.

This finding of fact tracks the language of ORS 656.018(3)(a), and establishes as fact that the claim and the judgment arose out of an exception to the workers' compensation bar; that one employee (Garrett) was able to sue another (Baller) for personal injuries.

New Hampshire issued a $1 million primary and a $5 million excess policy covering both the vehicle, and all permissive drivers. The driver of the pick up was a permissive driver; New Hampshire stipulated that the driver was a permissive user.

Garrett demanded that New Hampshire pay the judgment; New Hampshire refused to pay, relying solely upon one exclusion in the policy, the "Fellow Employee Exclusion"[3] Plaintiff Garrett then started an

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[2] Dkt #24-2, Vol II, ER 237.

[3] The language of the "Fellow Employee Exclusion" is:"Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

action to compel coverage in Oregon state courts pursuant to ORS 742.031[4].

2. Course of Proceedings in the District Court

New Hampshire removed this action to federal court, District of Oregon. On cross motions for summary judgment, District Court Judge Marcos Hernandez granted plaintiff's motion that the negligent driver was a "permissive user" and therefore an insured under defendant's policy, hence his claim was a covered claim, but Judge Hernandez also granted defendant's motion that coverage was precluded by the "Fellow Employee Exclusion"[5]. Plaintiff had argued that the exclusion, the "Fellow Employee Exclusion", violated Oregon's law regulating automobile insurance, the Financial Responsibility Law (FRL) and that the exclusion did not apply under the facts of the accident. The trial

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[4] If any person or legal representative of the person shall obtain final judgment against the insured because of any such injuries, an execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within 30 days after it is rendered, then such person or legal representatives of the person may proceed against the insurer to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto. ORS 742.031.

[5] "Both parties move for summary judgment. I grant defendant's motion. I grant plaintiff's motion on the issue of initial coverage; to the extent plaintiff's motion seeks summary judgment on the exclusion issue, I deny the motion." Dkt # 24-1,Vol I, ER 4.

court held that the exclusion did apply, and was valid under Oregon's FRL.

3. Course of Proceedings in the Ninth Circuit Court of Appeals

Garrett then appealed to the Ninth Circuit. After briefing and oral argument, the three judge panel issued a partial opinion, a copy of which is appended as Exhibit A for the court's convenience, and certified two questions to this court.

4. Nature of the Judgment

Plaintiff appeals from the final judgment entered by the District Court on March 27, 2012. Dkt # 24-1, Vol I, ER 1-2.

5. Appellate Jurisdiction and Timeliness of Appeal

The Notice of Appeal was filed April 20, 2012, within 30 days pursuant to Fed. R. App. P. 4(a)(1)(A). Dkt # 24-2, Vol II, ER 1.

6. Certified Questions

1. Do the exclusions of liabilities in ORS 742.454 apply to insurance policies issued to comply with the FRL when the insured under the policy is a permissive user?
2. If the answer to question one is "yes", is it permissible under ORS 742.454 for an insurer to exclude coverage for a permissive user pursuant to the fellow-employee exclusion?

7. Summary of Arguments

Certified Question #1: Answer: no. The exclusions of liabilities in ORS 742.454 do not apply to permissive users under a straight forward statutory analysis; the Court of Appeals adopted the same analysis in *Safeco Insurance Co v American Hardware Mutual Ins.,* 169 Or App 405, 9 P.3d 749 (2000). The Oregon legislature mandated that all auto insurance policies cover "permissive users", ORS 806.080(1)(b) and provided only one exception to such mandated coverage ORS 742.450; the one exception does not apply to this case. Since the more specific statute controls over the more general, any exclusions of liability in ORS 742.454 do not apply to insurance policies issued to comply with the FRL when the insured is a permissive user.

Certified Question #2: Answer: the question should be moot, but assuming arguendo that ORS 742.454 does apply to permissive users, ORS 742.454 does not authorize or allow auto insurance policies to exclude coverage through the "Fellow Employee Exclusion". ORS 742.454 permits that auto insurance policies need not insure ". . . any liability on account of bodily injury to . . . an employee of the insured while engaged in the employment, . . . of the insured." ORS 742.454 allows non-coverage for "an employee of the insured", not a "**fellow**

employee of the insured". By adding the extra word "fellow" before "employee", the exclusion goes beyond the explicit language of the statute and therefore must be stricken from the policy.

ORS 742.454 also allows non-coverage for "any liability under workers' compensation law". "Liability under workers' compensation law" is the obligation of an employer to pay the employee workers' compensation benefits. However, the "Fellow Employee Exclusion" excludes coverage for **tort** liability, **not workers' compensation** liability. A "fellow employee" has no liability under workers' compensation law; an employer does, but not a "fellow employee". Hence ORS 742.454 does not provide a statutory basis for the "Fellow Employee Exclusion" and must be stricken from the policy.

This court can also rule that the non-coverage provided in ORS 742.454 does not, as a matter of law, apply to the facts of the instant case.

8. Statement of Facts

Plaintiff accepts the statement of facts set forth in the Ninth Circuit Order Certifying a Determinative Question of Law to the Oregon Supreme Court, appended as Exhibit A, and adds the following facts:

Wes sued Baller in Columbia County Circuit Court, alleging the

usual negligence claims of failure to maintain control, and also alleging in paragraph 2 that:

> "Defendant Baller wilfully and without provocation drove with aggression on December 28, 2009, including while attempting to pass the bus, causing him to lose control of the vehicle and proximately causing the injuries to plaintiff."

The allegation is the language of ORS 656.018(3)(a); an employee is not prevented by the usual workers' compensation bar from suing a fellow employee when the injury is caused by wilful aggression without provocation

In the initial lawsuit, *Garrett v. Baller*, Columbia County Case No. # 11-2065[6], Defendant Baller was properly served under ORCP 7. New Hampshire was notified that the action was commenced, New Hampshire was notified that a default would be taken, New Hampshire was notified that a prima facie hearing would be held on damages, and New Hampshire was notified that a judgment would be issued [7]. New Hampshire chose not to defend or appear to contest any of the claims

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[6] Dkt # 24-2, Vol II, ER 236.

[7] Dkt # 24-2, Vol II, ER 235-236.

asserted in *Garrett v. Baller* [8] at any step of the proceedings.

After New Hampshire failed to defend Baller, a prima facie hearing was held before the Columbia County Circuit Court, Honorable Steven B. Reed. After hearing the testimony of Wes Garrett, Judge Reed entered the following finding of fact:

> 5. Defendant Baller's driving and actions were wilful and unprovoked aggression proximately leading to Wes Garrett's serious personal injuries.

After the prima facie hearing, which New Hampshire Insurance Co. chose not to attend, Judge Reed reduced the requested damages from $2,304,625.53 to $1,865,120.00. Dkt # 24-2, Vol II, ER 237, 240, 263. A judgment was then entered. Dkt # 24-2,Vol II, ER 262.

Wes then commenced this direct action against New Hampshire, under ORS 742.031 to collect the judgment. Dkt # 24-2, Vol II, ER 251-254.

Defendant New Hampshire stipulated that its two policies, a $1 million motor vehicle (Dkt # 24-2 Vol II, ER 123, 234 #4), and a $5 million umbrella (Dkt # 24-2, Vol II, ER 182, 234 #4), covered the permissive user, Baller for the December 28, 2009 accident which

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[8] Dkt # 24-2, Vol II, ER 235.

caused plaintiff Wes Garrett's significant bodily injuries. Dkt # 24-2, Vol II, ER 234.[9]. The trial court appropriately found that there was coverage under the New Hampshire policy[10]. The trial court erred, however, when it found that the "Fellow Employee Exclusion" was permissible under ORS 742.454, because:

"There is no dispute that plaintiff receives workers' compensation

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[9] As the trial court noted, the parties agreed that the issues regarding coverage for the primary and excess policies are the same. Dkt # 24-1, Vol I, ER 21.

Nor has defendant New Hampshire ever asserted that if plaintiff prevails, anything less than the full amount of the combined policies is available to cover the judgment. Dkt # 24-2, Vol II, ER 71-100. Cf *Collins v. Farmers Ins. Co. of Oregon*, 312 Or. 337, 822 P.2d 1146 (Or., 1991), and *Farmers Ins. Co. of Or. v. Mowry*, 350 Or. 686, 261 P.3d 1 (Or., 2011). New Hampshire did reserve the right to contest the reasonableness of the underlying judgment, if coverage was established as a matter of law.

[10] "In disputes involving insurance policies, the insured has the initial burden of establishing conditions of coverage, and the insurer has the burden of establishing that the policy excludes coverage. *Employers Ins. of Wausau v. Tektronix, Inc.*, 2011 Or. App. 485, 509, 156 P.3d105, 119 (2007). The parties have stipulated as follows: "Mr. Baller was a permissive driver on 12/28/2009 and is, therefore, an insured under the New Hampshire primary and excess policies and thus, is entitled to coverage for damages alleged by Mr. Garrett, subject to applicable exclusions to coverage found in the policies. Dkt # 24-2, Vol II, ER 234, #1. Given this, plaintiff meets his burden of establishing coverage. The question is whether there is an applicable exclusion." Dkt # 24-1, Vol I, ER 7.

benefits for his injuries. Thus, his injuries are a liability under workers' compensation laws and coverage for those injuries is exempt by virtue of ORS 742.454." Dkt # 24-1, Vol I, ER 23.

RESPONSE TO FIRST CERTIFIED QUESTION

The "need not insure" provisions of ORS 742.454 do not apply to coverage or exclusions for permissive drivers. Coverage of permissive drivers was specifically added by the legislature and it only allowed very limited, specific exclusions. The specific nature of the statutes for permissive users controls over the more general terms in ORS 742.454.

ARGUMENT

1. New Hampshire's Auto Policy language must comply with Oregon's FRL

All vehicles in Oregon are statutorily mandated to have liability insurance. ORS 806.010 et seq. (The "Financial Responsibility Law", or "FRL")[11]. Because auto insurance is statutorily mandated, all auto

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[11] ORS 806.060(2)(a) requires that all drivers obtain the "ability to respond in damages" by, among other things, purchasing a motor vehicle liability policy that provides "at least minimum limits necessary to pay amounts established under the payment schedule under ORS 806.070."

policies issued must comply with the FRL. ORS 742.450(3)[12]. If a policy does not cover what is required by the FRL, the coverage is inserted. ORS 742.038(1)[13] ; *Viking Insurance v Perotti*, 308 Or. 623, 784 P.2d 1081 (Or. 1989)(court inserted coverage for vehicle omitted in "named driver" policy); *Laird v. Allstate Ins. Co.*, 232 Or. App. 162, 221

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[12] ORS 742.450(3): "The agreement or indorsement required by subsection (2) of this section shall also state that the insurance provided is subject to all the provisions of the Oregon Vehicle Code relating to financial responsibility requirements as defined in ORS 801.280 (Financial responsibility requirements) or further responsibility filings as defined in ORS 801.290 (Future responsibility filings), as appropriate."

The principle that insurance policies must comply with statutory mandates is broader than just motor vehicle liability insurance. For example, an Oregon statute required liability insurance for pesticide applicators. ORS 634.116(5). The insurance policy was required to provide coverage mandated by statute, despite an exclusion in policy. *American States Ins. Co v. Super Spray Service, Inc*, 77 Or App 497, 713 P2d 682 (1986).

[13] ORS 742.038(1): "Validity and construction of noncomplying forms. (1) A policy in violation of the Insurance Code, but otherwise binding on the insurer, shall be held valid, but shall be constructed as provided on the Insurance Code.

An insurance policy issued to comply with statutorily mandated coverage covers the loss even if the policy provides otherwise. **The statute adds to the policy or displaces contrary provisions in the policy**. *Rhone v. Louis*, 282 Or 693 (1978).(City of Portland ordinance requiring coverage for drivers of rented vehicles overrode insurance contract language that coverage only for named rentee). *Rowley v Dairyland Ins. Co.*, 44 Or App 333, 605 P2d 1356 (1980)(FRL overrides and makes unenforceable any "non-cooperation" clauses in auto insurance policies).

P.3d 780 (Or. App., 2009) ("Under ORS 742.038, a policy that does not comply with the insurance code must be construed and applied in accordance with the code."). If a policy purports to exclude required coverage, unless the exclusion is expressly permitted by the FRL, the exclusion is stricken. ORS 742.038(2)[14] ; *State Farm v. Jones*, 306 Or. 415, 759 P.2d 271 (Or 1988)(family exclusion voided for permissive driver because exclusion violated FRL); *Mathews v. Federated Service Ins. Co.*, 122 Or.App. 124, 130-131, 857 P.2d 852 (1993)(Leased auto exclusion for permissive driver void as violating FRL); *Erickson v. Farmers Ins. Co. of Oregon*, 331 Or. 681, 21 P.3d 90 (Or., 2001) (UM exclusion voided because coverage mandated by FRL).

The coverage and exclusions under the FRL are different for "permissive users" versus "named insured's". *See analysis, infra.* The trial court erred when it enforced, rather than strike, New Hampshire's auto policy exclusion, the "Fellow Employee Exclusion", because the exclusion was not expressly permitted under Oregon's FRL for a

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[14] ORS 742.038(2): Any insurance policy issued and otherwise valid which contains any condition, omission or provision not in compliance with the Insurance Code, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy been in fully compliance with the Insurance Code."

permissive user.

2. FRL mandates coverage for "Permissive Users"

The FRL explicitly requires coverage for permissive users:

> ORS 806.080(1)(b) provides: "A motor vehicle liability insurance policy used to comply with financial responsibility requirements under ORS 806.060 must meet all of the following requirements:...
> (b) It must insure the named insured and all other persons insured under the terms of the policy against loss from the liabilities imposed by law for damages arising out of the ownership, operation, use of maintenance of those motor vehicles by persons insured under the policy. *The policy must include in its coverage all persons who, with the consent of the named insured, use the motor vehicles* insured under the policy, except for any person specifically excluded from coverage under ORS 742.450."
> (Emphasis added.)

The requirement to cover "permissive users" was specifically added by Oregon's legislature in 1991. Or. Laws 1991, ch. 768, section 8. See discussion, *Sheptow v. GEICO Gen. Ins. Co.*, 246 Or.App. 18, 23, 265 P.3d 4, 7 (Or. App., 2011)("Our decision in Mid–Century Ins. Co. is not controlling here, because it predated the amendment of ORS 806.080(1)(b) in 1991 that extended the provision of liability coverage to permissive users unless they are excluded under ORS 742.450."). Because this case involves the liability of a "permissive user", it is crucial to understand that only those statutory provisions in the FRL

regarding "permissive users" control.

3. Only Exclusions to Coverage for a Permissive user are ORS 742.450(6) or (7)

ORS 806.080(1)(b), supra, explicitly sets forth the **only** permissible exception to coverage for a permissive user is that under ORS 742.450. Accord, *Sheptow v Geico, supra.* The one and only permissible exception to coverage for a permissive user is when a driver is "excluded by name", as set forth in ORS 742.450, subsections (6) and (7).

> (6) a motor vehicle liability insurance policy issued for delivery in this state **may exclude by name** from coverage required by subsection (2)(a) of this section any person other than the named insured, for any of the reasons stated in subsection (7) of this section. When an insurer excludes a person as provided by this subsection, the insurer shall obtain a statement of indorsement, signed by each of the named insured's, that the policy will not provide any coverage required by subsection (2)(a) of this section when the motor vehicle is driven by any named excluded person.
> (7) A person may be excluded from coverage under a motor vehicle liability insurance policy as provided in subsection (6) of this section:
> (a) Because of the driving record of the person. The director of the Department of Consumer and Business Services by rule may establish restrictions on the use of the driving record in addition to other restrictions established by law.
> (b) because of any reason or set of criteria established by the director by rule.

(Emphasis added).

4. The Permissive User in this case, Baller, was not excluded by name as required by ORS 742.450(6)

New Hampshire never proved, nor could it, that the driver, Stanley Baller, against whom plaintiff obtained a judgment, was excluded by name in the policy issued to Warrenton Fiber, as required by the statute[15]. Dkt 24-2, Vol II, ER 114, p. 160. Baller was not so excluded, Baller had permission to drive the pick up involved in the wreck, Baller was therefore covered, and most importantly, no exclusion permissible under the FRL applied to him. Baller was not excluded from coverage by name under ORS 742.450 (6) or (7), and hence any exclusion in the policy, negating coverage for a permissive user, was void and unenforceable.

This is as far as the trial court needed to go, and it is as far as this court needs to go; this court should answer the Ninth Circuit's first certified question: "no". Although New Hampshire's policy includes

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[15] There is nothing in the record establishing that Baller was excluded by name. If he had been excluded by name, it would appear in the declarations of New Hampshire's Policy. Dkt # 24-2, Vol II, ER 113-129. A Review of the declarations reveals that Baller was not excluded by name under defendant New Hampshire's policy.

verbiage purporting to exclude "fellow employees", when liability is predicated upon a permissive user, as in this case, the "Fellow Employee Exclusion" is not specifically allowed by the FRL, and is therefore void. This court must hold that the "Fellow Employee Exclusion" does not apply to this case, defendant admits that Baller is covered under the policy, therefore this court must reverse the trial court and enter judgment that plaintiff is entitled to coverage under the New Hampshire auto policy.

5. Rules of Statutory Construction Support Previous Analysis

A basic tenant of Oregon statutory construction, articulated in *PGE v BOLI*, 317 Or. 606, 859 P.2d 1143 (Or., 1993), is that the court always looks to the statutory language first to interpret a statute, and only looks at any other analysis in the event that the language is not clear[16].

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[16] In interpreting a statute, the court's task is to discern the intent of the legislature. ORS 174.020; *State v. Person*, 316 Or. 585, 590, 853 P.2d 813 (1993); *Teeny v. Haertl Constructors, Inc.*, 314 Or. 688, 694, 842 P.2d 788 (1992). To do that, the court examines both the text and context of the statute. *State v. Person*, supra, 316 Or. at 590, 853 P.2d 813; *Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or. 495, 498, 852 P.2d 197 (1993). That is the first level of our analysis.

In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. *State v. Person*, supra, 316 Or. at 590, 853 P.2d

813; *State ex rel. Juv. Dept. v. Ashley,* 312 Or. [317 Or. 611] 169, 174, 818 P.2d 1270 (1991). In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning. See *State v. Langley*, 314 Or. 247, 256, 839 P.2d 692 (1992) (illustrating rule); *Perez v. State Farm Mutual Ins. Co.*, 289 Or. 295, 299, 613 P.2d 32 (1980) (same).

Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. *Southern Pacific Trans. Co. v. Dept. of Rev., supra*, 316 Or. at 498, 852 P.2d 197; *Sanders v. Oregon Pacific States Ins. Co.,* 314 Or. 521, 527, 840 P.2d 87 (1992). Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. Some of those rules are mandated by statute, including, for example, the principles that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all," ORS 174.010, and that "a particular intent shall control a general one that is inconsistent with it," ORS 174.020. Other such rules of construction are found in case law, including, for example, the rules that use of a term in one section and not in another section of the same statute indicates a purposeful omission, *Emerald PUD v. PP & L*, 302 Or. 256, 269, 729 P.2d 552 (1986), and that use of the same term throughout a statute indicates that the term has the same meaning throughout the statute, *Oregon Racing Com. v. Multnomah Kennel Club*, 242 Or. 572, 586, 411 P.2d 63 (1966).

If the legislature's intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary.

If, but only if, the intent of the legislature is not clear from the text

Plaintiff believes that the straightforward statutory analysis regarding permissive drivers is clear and that other provisions in the FRL, including ORS 742.454, do not apply. Defendant argues to the contrary; if defendant is correct, then there is a conflict in the FRL statutory scheme. To resolve the conflict, ORS 174.020 and ORS 174.030 provide guidance.

> When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent. ORS 174.020(2).

Plaintiff respectfully suggests that the provisions regarding the coverage and exclusions for permissive drivers are more specific, and adopted later, than the provisions of ORS 742.454, and therefore control.

> "Where a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to prevail." ORS 174.030.

Because " . . .the overriding purpose of the FRL to ensure that all motor vehicle accident victims are compensated for their injuries," *Safeco*

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and context inquiry, the court will then move to the second level, which is to consider legislative history to [317 Or. 612] inform the court's inquiry into legislative intent.

Insurance Co v American Hardware Mutual Ins., 169 Or App 405, 9 P.3d 749, 754 (2000), Plaintiff respectfully suggests that his interpretation favors a natural right, his right to obtain fair compensation for his injuries to person (and from automobile insurance)[17], while defendant's interpretation frustrates that natural right.

It is instructive that in *Safeco Insurance Co v American Hardware Mutual Ins.*, supra, Judge Edmonds, while rejecting a purported auto insurance exclusion for a permissive driver, followed the same statutory analysis as outlined above. First, he noted that ORS 742.450 set forth very limited exclusions permitted under the FRL. Then he noted that ORS 806.080(1)(b) requires coverage for all permissive users, except those specifically excluded under ORS 742.450. The language requiring that all permissive users be covered was specifically added by the legislature in 1991. *See footnote 8, id.* The defendant auto insurer American Hardware had argued that the statute allowed an exception to requiring coverage for permissive users when there was co-existing insurance. Judge Edmond's language rejecting that argument is highly instructive for this case:

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[17] Oregon Constitution, Article I, Section 10 (. . .and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

> "When ORS 806.080(2) is read in context with ORS 806.080(1) and ORS 742.450 (2)(a), (6) and (7), it is evident that the legislature knew how to write an exception to coverage into FRL when it wanted to achieve that purpose." Id at 754.

Judge Edmonds then concluded because the FRL required coverage for a permissive user, and the purported exclusion was not allowed by ORS 742.450, then the purported exclusion violated the FRL, was not permitted and coverage was mandated. American Hardware attempted to use FRL language exempting coverage from other sections of the FRL to apply to the specific situation involving a permissive driver, just as New Hampshire does in the current case. The Court of Appeals rejected the attempt, as should this court.

It follows in this case that legislature has not written the exception to coverage for permissive users that defendant New Hampshire relies upon, the "Fellow Employee Exclusion". Since the legislature has not done so, the "Fellow Employee Exclusion" is void; it cannot be enforced and must be stricken from the policy when, as here, the insured is a permissive user. The answer to the First Certified Question is "No".

RESPONSE TO SECOND CERTIFIED QUESTION

Assuming arguendo that ORS 742.454 allows exclusions from

coverage for permissive drivers, it is not statutory basis for the "Fellow Employee Exclusion", because the language of ORS 742.454 does not extend as far as New Hampshire needs to permit the "Fellow Employee Exclusion".

ARGUMENT

1. New Hampshire's "Fellow Employee Exclusion is not permissible because it goes beyond the language of ORS 742.454.

New Hampshire readily concedes that coverage exists for Wes Garrett's injuries and judgment, as Baller was a permissive driver. The ONLY basis to deny coverage is the "Fellow Employee Exclusion". It is instructive that The New Hampshire policy contained both an "employee exclusion" and a "fellow employee exclusion" (Dkt # 24-2, Vol II, ER 136). It is also instructive that defendant New Hampshire never asserted or argued that the "employee exclusion" applied; clearly, it did not, because Wes Garrett was not an employee of the permissive insured, Stanley Baller. Without the word "fellow", New Hampshire does not have an exclusion to block payment in this case.

So, assuming arguendo that ORS 742.454 does allow exclusions from coverage for a permissive driver, it is important to review the specific statutory language that Defendant argues supports the "Fellow

Employee Exclusion". One part of ORS 742.454 relied upon by defendant reads:

". . . an insurer need not insure. . . any liability on account of bodily injury to . . . an employee of the insured while engaged in the employment, . . . of the insured." New Hampshire would have a solid argument that it was entitled to exclude from coverage injuries to "an employee of the insured . . ." But New Hampshire's exclusion goes one step further, and excludes coverage for a "*fellow* employee of the insured". Before ORS 742.454 could provide a statutory basis for New Hampshire's claimed exclusion, this court would have to insert language into ORS 742.454 which does not exist; this court would have to insert the missing word "fellow" into the statute. Doing so, of course, is contrary to all strictures of statutory construction. ORS 174.010 ("not to insert what has been omitted, or to omit what has been inserted.") The answer to the Ninth Circuit's Second Certified Question is that ORS 742.454 does not allow the "Fellow Employee Exclusion", it must be stricken from the policy, and Wes Garrett is entitled to coverage.

Another part of ORS 742.454 relied upon by defendant states that an auto insurer "need not insure . . any liability under workers' compensation law". Throughout this case New Hampshire Insurance

Company has made confusing arguments, conflating the workers' compensation bar under ORS Chapter 656, with the "Fellow Employee Exclusion". Plaintiff readily concedes that in the vast majority of cases, one employee cannot sue another. But New Hampshire has never defended this coverage case based upon the workers' compensation bar for two reasons. First, the underlying action was predicated upon an exception to the workers' compensation bar, ORS 656.018(3). Second, it waived that defense when it failed to defend the driver, Stanley Baller, in the first lawsuit. So workers' compensation is not an issue in this case; the only issue is the contractual and statutory coverage required for auto insurance policies issued in Oregon.

Plaintiff's interpretation of the language "need not insure . . . any liability under workers' compensation law" means that the policy does not require payments of workers' compensation benefits, through the workers' compensation system. If Plaintiff's interpretation is correct, then the statute provides no basis allowing the "Fellow Employee Exclusion" under the FRL.

Defendant's interpretation of the above quoted part of the statute is not entirely clear, but previous briefing asserted that "Mr. Garrett's receipt of workers' compensation benefits establishes that his injuries

are a liability under workers' compensation laws and coverage for those injuries is exempt by virtue of ORS 742.454." This was also the conclusion of the trial court. So the interpretation is that if an injured person receives any workers' compensation benefits, it is permissible to exclude auto insurance coverage for injuries caused in a car wreck. That cannot be the correct interpretation, because there would be no reason to have the language allowing exclusion of " . . . any liability on account of bodily injury to . . . an employee of the insured while engaged in the employment, . . . of the insured." This interpretation makes the above quoted language of ORS 742.454 meaningless – it would be covered by the overarching "workers' compensation" provision. This interpretation violates Oregon's rules of statutory construction. ORS 141.010. (. . . where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.)

Another reason this cannot be the correct interpretation is that Oregon policy is that an injured worker can receive workers' compensation benefits AND pursue a claim against a responsible third party. If a third party causes a compensable injury, an injured worker may seek to recover damages from that third party. ORS 656.154; ORS 656.578. The injured worker's election to seek damages from a third

party does not affect the worker's right to receive workers' compensation benefits from the employer under the statutory scheme for compensable injuries. ORS 656.580. The injured worker then must repay the paying agency; the statute creates a workers' compensation lien on the third party case. ORS 656.593(1). Oregon policy, as expressed in this statutory scheme, promotes the right of an injured worker to do exactly what Plaintiff Wes Garrett seeks in this case; to receive workers' compensation benefits while pursuing a third party claim, and if successful, reimbursing the workers' compensation insurer from the proceeds.

According to Black's Law Dictionary, liability is defined as: "The state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility." ORS 742.454 permits insurers not to cover liabilities under, ie arise from, or occur because of, workers' compensation law. The liability in this case, and in every auto case, is not based upon workers' compensation law; the liability is based in tort law. Stanley Baller's reckless driving created the liability which the auto policy covers; Stanley Baller had no liability "under workers compensation law". ORS 742.454 does not provide a statutory basis for an auto insurance policy to exclude tort liability from coverage. But that

is exactly what New Hampshire's "Fellow Employee Exclusion" does; it limits and excludes liability under tort law. Because the liability in this case is tort liability, not workers' compensation, ORS 742.454 does not provide a statutory basis under the FRL for the "Fellow Employee Exclusion".

In previous briefing supporting regarding ORS 742.454, defendant New Hampshire also argued: "workers' compensation covers the liability not only of the employer, but the employee as well" and cited ORS 656.018(3), *Dehiya v Spencer*; 221 Or App 539, 191 P3d 730 (2008). This is incorrect; workers' compensation does not "cover the liability", it creates an *exemption* from liability. "The exemption from liability given an employer under this section is also extended to the . . .employees . . ." Id. What defendant is arguing, and what the trial court did, was to transmogrify the language "need not insure . . . any liability under workers' compensation law" into "need not insure . . . if there is an exemption under workers' compensation law". ORS 742.454 says what it says; it does not go as far as the trial court pushed it. Hence, ORS 742.454 does not provide a statutory basis permitting the "Fellow Employee Exclusion", and must be stricken.

As a matter of uncontested fact, the liability in this claim is based

upon very bad, reckless driving, it is not based in any part upon liability from workers' compensation. In fact, the underlying judgment is based upon an exception to workers' compensation non-liability; the underlying judgment excepts this case from any usual rules of the workers' compensation system. Because liability in this case is NOT "any liability under workers' compensation law", that phrase in ORS 742.454 cannot be a statutory basis for an otherwise impermissible "Fellow Employee Exclusion". The impermissible exclusion is stricken from the policy, and the judgment is covered.

CONCLUSION

This court should answer Certified Question #1: No, and rule that only limited exclusions from coverage for permissive drivers are allowed under Oregon's FRL, that the "Fellow Employee Exclusion" is not allowed, therefore it is stricken from the policy, and the damages of the underlying judgment are covered. Alternatively, if the court rules that ORS 742.454 does apply to permissive drivers, then it should answer Certified Question #2: No, and rule that ORS 742.454 does not provide a statutory basis for the "Fellow Employee Exemption", that the "Fellow Employee Exclusion" is not allowed, therefore it is stricken from the

policy, and the damages of the underlying judgment are covered.

Plaintiff is entitled to reasonable attorneys fees pursuant to ORS 742.061.

DATED: September 2, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENT

1. I certify that (1) opening brief complies with the word-count limitation in ORAP 5.05(2)(b)(ii) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 6,319 words.

2. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED: September 2, 2014.

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CERTIFICATE OF SERVICE

I certify that on September 2, 2014, I electronically filed the foregoing APPELLANT'S OPENING BRIEF with the Oregon Court of Appeals by using the Appellate e-File system.

I certify that on September 2, 2014, I served two (2) true and correct copies via first class mail & email on:

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