IN THE COURT OF SUPREME COURT OF THE STATE OF

OREGON

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

APPELLEE'S ANSWERING BRIEF

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

Attorney for Plaintiff-Appellant:
Stephen C. Hendricks
OSB No. 792653
schendricks@hendrickslaw firm.com
Hendricks Law Firm, P.C.
1425 SW 20th Ave., Ste. 201
Portland, OR 97201
Tel: (503) 241-5629
Fax: (503) 241-1633

Attorney for Defendant-Appellee:
Donald J. Verfurth,
OSB No. 066480
dverfurth@gordonrees.com
Gordon & Rees, LLP
701 5th Ave., Ste. 2100
Seattle, WA 98104
Tel: (206) 695-5100
Fax: (206) 689-2822

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STATEMENT OF THE CASE

1. Nature of the Action

New Hampshire Insurance Company ("New Hampshire") disagrees with Wesley Garrett's ("Mr. Garrett) statement of the case. New Hampshire disputes Mr. Garrett's contention that Stanley Christopher Baller, Jr ("Mr. Baller") "tried to pass a bus going at least 60 mph on High 30 in December on the icy highway". As set forth in footnote 7 herein, New Hampshire takes exception to the Ninth Circuit Court of Appeals' characterization of the speed of the vehicle. Furthermore, there is no record to support this contention. Rather, the record establishes that Mr. Baller was driving between 45 and 55 mph and that there was no ice on the pavement. Dkt.24-2, Page: 22 of 272. New Hampshire further takes exception to Mr. Garrett's reference to his original Complaint in footnote one as the Complaint itself is not part of the record before this Court. Mr. Garrett has never cited to paragraph 5 of this Complaint before. New Hampshire also submits that this section sets forth argument, which is impermissible under Oregon Rules of Appellate Procedure ("ORA") Rule 5.40(1).

This insurance coverage matter arises out of Mr. Garrett's claim under ORS 742.031 against New Hampshire for insurance coverage that is allegedly available to Mr. Baller as an insured under the New Hampshire policies. Mr.

Garrett attempts to find coverage for a default judgment taken against Mr. Baller in the amount of $1,865,120.00.

New Hampshire issued a primary automobile liability policy and an umbrella policy (collectively "policies") to Warrenton Fiber Company ("Warrenton"), a logging company that employed both Mr. Garrett and Mr. Baller at the time of the automobile accident. The policies contain an exclusion for bodily injury to any fellow employee [Mr. Garrett] of the insured [Mr. Baller] arising out of and in the course of the fellow employee's employment.

Mr. Garrett sustained injuries in the automobile accident while he was a passenger in a vehicle driven by Mr. Baller. As the Ninth Circuit Court of Appeals found prior to certifying two questions to this Court, at the time of the accident, Mr. Baller and Mr. Garrett were fellow employees as they both worked for Warrenton, and were riding in a vehicle provided by their employer for transportation to a logging site, *i.e.* the employer's conveyance. Mr. Garrett has been receiving workers' compensation benefits and has never disputed that he has received more than $25,000 to date.

Mr. Garrett filed a lawsuit against Mr. Baller on or about January 31, 2011, for the injuries from the accident. Dkt.23-2, Pages: 89-90 of 200. Mr. Baller did not appear in the lawsuit and a prima facie hearing was held to address only the damages. Dkt.17, Pages: 8, 9, and 22 of 28. A **default**

judgment in the amount of $1,865,120.00 was filed on April 24, 2011. Dkt.23-2, Pages: 89-90 of 200.

2. Course of Proceedings in the District Court

New Hampshire agrees with Mr. Garrett's recitation of factual statements under this section.

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

New Hampshire agrees with Mr. Garrett's recitation of the statements under this section, but also sets forth that the Ninth Circuit agreed with the District Court that the "fellow employee" exclusion applies in this case.

4. Nature of the Judgment

New Hampshire agrees with Mr. Garrett's recitation of the statements under this section.

5. Appellate Jurisdiction and Timeliness of Appeal

New Hampshire agrees with Mr. Garrett's recitation of the statements under this section.

6. Certified Questions

New Hampshire agrees with Mr. Garrett's recitation of the certified questions by the Ninth Circuit Court of Appeals under this section.

7. Summary of Arguments

Certified Question #1: **Do the exclusions of liabilities in ORS 742.454**

apply to insurance policies issued to comply with the Oregon Financial Responsibility Law ("FRL") when the insured under the policy is a permissive user?

Answer: **Yes. 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.**

ORS 742.450(6) and (7) are not the only exclusions applicable to permissive user insureds, contrary to Mr. Garrett's argument. In fact, these statutes are not exclusions at all. Rather, ORS 742.450(6) and (7) allow insurers to limit which permissive users qualify as permissive user insureds under the policy, *i.e.* "exclude by name from coverage...any person...for any of the reasons stated in subsection (7)".[1] ORS 742.450(6) and (7) do not address the circumstances under which the permissive user insureds are not entitled to

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[1] ORS 742.450(6) and (7) state, in part:

> (6) A motor vehicle liability insurance policy... may exclude by name from coverage required by subsection (2)(a) of this section any person..., for any of the reasons stated in subsection (7) of this section....
>
> (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...
> (b) Because of any reason or set of criteria established by the director by rule.

coverage based upon an exclusion. *See Safeco Ins. Co. v. American Hardware Mutual Ins. Co.*, 169 Or. App. 405, 9 P.3d 749 (2000) ("to the extent that the definition of "Who Is An Insured" operates to deny coverage to [the permissive user test driver]..., it is invalid".).

The plain language of ORS 742.454 does not contain any language that limits the application of the exclusions to only the named insureds.[2] Nothing in ORS 742.454 requires that the liability under workers compensation law be that of someone specific. ORS 742.454 specifies that **any** liability under any workers compensation law may be excluded from coverage.[3] Under ORS 174.010, the word "any" must be given effect.[4]

Certified Question #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 follow-employee exclusion?**

Answer: **Yes. It is permissible under ORS 742.454 for an insurer to exclude coverage for a permissive user pursuant to the "fellow employee" exclusion.**

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[2] ORS 174.010 states that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted..."

[3] ORS 742.454 states that an automobile liability insurance policy "need not insure any liability under any workers compensation law..."

[4] *See* footnote 2 above.

ORS 742.454 states, in part, that automobile liability insurance "need not insure any liability under any workers compensation law..." In Oregon, the exclusive remedy of workers' compensation is available to both the employer and the fellow employee under ORS 656.018(3).[5] Consequently, workers' compensation covers the liability not only of the employer, but that of the fellow employee as well. ORS 656.018(3); *Dehiya v. Spencer*, 221 Or. App. 539, 191 P.3d 730 (2008); *Shoemaker v. Johnson, et al.*, 241 Or. 511, 407 P.2d 257 (1965).

The purpose of the FRL is to ensure that injured persons have a course of compensation. *State Farm Ins. v. Farmers Ins. Exch.,* 238 Or. 285, 387 P.2d 825 (1964); *Davis v. Liberty Mut. Ins. Co.*, 19 F. Supp.2d 193 (D.C. Vt. 1998). The purpose of workers' compensation law is to provide fair, adequate and reasonable benefits to injured workers. ORS 656.012. The FRL permits an exception to coverage for liability under workers' compensation to prohibit double recovery by an employee injured in an automobile accident, who is already covered by workers' compensation. *Archer Daniels Midland Co. v. Burlington Ins. Co. Group, Inc.*, 2011 WL 1196894 (N.D. Il. 2011) (purpose of employer's liability exclusion is to prevent an employee covered by worker's compensation from double recovery); *Heiser v. Gibson,* 386 F. Supp. 901 (E.D.

[5] ORS 656.018(3) states that the "exemption from liability given an employer under this section is also extended to the...employees..."

La. 1974) (purpose of fellow employee exclusion is to preclude coverage where compensation is available to injured employee under workers' compensation).

Mr. Garrett claims that the "fellow employee" exclusion excludes coverage for tort liability, not workers' compensation liability. This is incorrect. Tort liability is the exact type of liability for which workers' compensation is the remedy for an injured employee. ORS 656.018(3); *Shoemaker, supra; Dehiya, supra* (plaintiff sued co-worker for negligence but lawsuit was dismissed as plaintiff's remedy was workers' compensation).

Because workers' compensation applies to both employer and fellow employee liability, the workers' compensation exclusion, the employer's liability exclusion, and the "fellow employee" exclusion all serve the same purpose of preventing double recovery by an injured employee, whose injuries arose out of and in the course of employment. ORS 742.454 permits an insurer to exclude coverage for a permissive user insured pursuant to the "fellow employee" exclusion. *State Farm Mutual Auto. Ins. Co. v. Dyer*, 19 F.3d 514 (10th Cir. 1994) ("fellow employee" exclusion did not violate the Wyoming Financial Responsibility Law, which is identical to the Oregon FRL).[6]

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[6] Mr. Garrett claims that ORS 742.454 "does not, as a matter of law, apply to the facts of the instant case." *See* p.6. However, this argument and position are unrelated to, and have nothing to do with, the certified legal questions.

8. Statement of Facts

New Hampshire accepts the statement of facts set forth in the Ninth Circuit Court Order Certifying a Determinative Question of Law to the Oregon Supreme Court, appended as Exhibit A to Mr. Garrett's Opening Brief.[7] New Hampshire also agrees with Mr. Garrett's recitation of facts under this section, except as follows:

New Hampshire takes exception to Mr. Garrett's references to any duty to defend on pages 7 and 8 of his Opening Brief as the duty to defend was never an issue in this case. Dkt.24-2, Pages: 261-4 of 272. Mr. Garrett has no standing to raise that issue as there was no assignment and Mr. Garrett does not stand in the shoes of Mr. Baller.

Mr. Garrett filed a lawsuit against Mr. Baller on or about January 31, 2011, for the injuries from the accident. Dkt.23-2, Pages: 89-90 of 200. Mr. Baller did not appear in the lawsuit and a prima facie hearing was held to address only the damages, not liability. Dkt.17, Pages: 8, 9, and 22 of 28. A **default judgment** in the amount of $1,865,120.00 was filed on April 24, 2011. Dkt.23-2, Pages: 89-90 of 200. The default judgment is on Mr. Garrett's counsel's stationery and the Judge wrote in the damages amounts, which indicates that the judgment was prepared and submitted by Mr. Garrett's

[7] However, New Hampshire takes exception to the Ninth Circuit Court of Appeals' reference to the speed of the vehicle. *See* page 1 herein.

attorney already with the language of willfully causing injury in it for the Judge's signature. Dkt.24-2, Pages: 239-42 of 272.

RESPONSE TO FIRST CERTIFIED QUESTION

The exclusions of liabilities in ORS 742.454, *i.e.* any liability under any workers' compensation law and employer's liability, apply to insurance policies issued to comply with the FRL even when the insured under the policy is a permissive user. ORS 742.450(6) and (7) do not set forth exclusions that are applicable to permissive user insureds. ORS 740.450(6) and (7) simply state that a permissive user can be excluded as an insured by name. ORS 742.450(6) and (7) have nothing to do with exclusions that apply to preclude coverage to a permissive user insured. The exclusions of liabilities in ORS 742.454 apply to both named insureds and permissive user insureds.

1. New Hampshire Policies Comply with the FRL as Mr. Baller Is a Permissive User Insured.

ORS 806.080(1)(b) requires that all automobile policies provide coverage to drivers of insured vehicles with the permission of the insured. New Hampshire policies complied with ORS 806.080(1)(b) as Mr. Baller is an insured under the New Hampshire Policy, as he was driving a company vehicle with the permission of Warrenton, the named insured. Dkt.23-2, Pages: 89-90 of 200.

2. ORS 742.450(6) and (7) Address Which Permissive Users Can Be Excluded as Insureds in Automobile Policies.

ORS 806.080(1)(b) states, in part, that the policy need not cover "any person specifically excluded from coverage under ORS 742.450." ORS 742.450(6) and (7), in turn, state that a person may be excluded from coverage by name based upon the driving record or any reason established by the director by rule.

Mr. Garrett erroneously claims that being identified by name is the only exclusion available to exclude coverage for permissive users. However, ORS 742.450(6) and (7) simply allow insurers to exclude certain permissive users as insureds under the policy, *i.e.* "exclude by name from coverage...any person...for any of the reasons stated in subsection (7)". These statutes simply stand for the proposition that a permissive user can be excluded **as an insured** by name. *See Safeco Ins. Co. v. American Hardware Mutual Ins. Co.*, 169 Or. App. 405, 9 P.3d 749 (2000). They do not specify the exclusion to coverage that might apply to the permissive user insureds.

In *Safeco*, Safeco appealed from a summary judgment ruling that a permissive user of an insured vehicle **was not "an insured"** under the American Hardware policy. *Id.* at 750 (emphasis added). The American Hardware policy stated that a group of individuals, *i.e.* test drivers with other insurance, did not qualify as insureds. *Id.* at 751-2. Safeco argued that the

American Hardware policy violated FRL's requirement to provide coverage to all permissive users of the insured vehicles. *Id.* at 755. The Court of Appeals agreed and held that, "to the extent that the definition of "Who Is An Insured" operates to deny coverage to [the test driver] in the minimum amount required by the FRL, it is invalid.[8] We conclude that the trial court erred when it ruled that [the test driver] **was not an insured**..." *Id.* (internal citations omitted; emphasis added).

The *Safeco* Court recognized that exclusions to coverage can exist for permissive user insureds. In fact, the *Safeco* Court noted in footnote 10, that "[o]n this record, no statutory exception to coverage is evident." In this case, a statutory exception to coverage does exist under ORS 742.454, which is referenced in footnote 9 by the *Safeco* Court. This reference to ORS 742.454 in a case involving permissive user insureds shows that the *Safeco* Court recognized exceptions to coverage under the FRL for permissive user insureds, including liability under workers' compensation in ORS 742.454.

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[8]Similarly, the "fellow employee" exclusion would only be invalid to the extent that the fellow employee exclusion operates to deny coverage to Mr. Baller in the minimum amount required by the FRL. However, Mr. Garrett has already received more than $25,000, which is the minimum required payment under ORS 806.070(2)(a), from workers' compensation. Because Mr. Garrett has already received the amount required under the FRL, the purpose and requirement of FRL have been met. *See State Farm Ins. v. Farmers Ins. Exch.*, 238 Or. 285, 387 P.2d 825 (1964); *Collins v. Farmers Ins. Co.,* 312 Or. 337, 882 P.2d 1146 (1991); *Farmers Ins. Co. v. Mowry*, 350 Or. 686, 261 P.3d 1 (2011).

The *Safeco* case supports New Hampshire's position that ORS 742.450(6) and (7) only address who is a permissive user insured under specific circumstances. These statutes do not address what exclusions to coverage there might be for permissive user insureds. Unlike the American Hardware policy in *Safeco*, which restricted a class of permissive users that qualified as permissive user insureds, the New Hampshire policies have no limitations on who qualifies as permissive user insureds.

Mr. Garrett also erroneously claims that coverage and exclusions under the FRL are different for permissive user insureds and named insureds, such as Warrenton. That is, Mr. Garrett argues that the exclusion for workers' compensation liability in ORS 742.454 does not apply to permissive user insureds. Mr. Garrett cites to various cases for his argument. As discussed below, however, the cases to which he cites do not stand for such proposition and are distinguishable.

In *State Farm Fire and Cas. Co. v. Jones*, 306 Or. 415, 759 P.2d 271, 274 (1988), the automobile policy excluded liability coverage for bodily injury to any insured. The insured argued that the exclusion violated FRL as it denied permissive user insureds the ability to respond in damages for liability, and this Court agreed. Nevertheless, this Court specifically noted that not all liabilities need to be insured, and that ORS 743.778 (currently ORS 742.454) allowed

insurers to exclude coverage for damage to property owned by, rented to, in charge of, or transported by the insured. This Court's statement that not all liabilities need to be insured, pursuant to ORS 742.454, when the Court was addressing a case involving a permissive user insured, supports New Hampshire's argument that ORS 742.454 exclusions apply to permissive user insureds.

In *Jones,* this Court noted that the conclusion in *Dowdy v. Allstate Ins. Co.*, 68 Or. App. 709, 685 P.2d 444 (1984), rested, in part, on "an interpretation of ORS 743.778...[current ORS 742.454], which purports to allow exclusion for certain types of liability." *Id.* at 274. These references to ORS 743.778 (currently ORS 742.454) in *Jones*, which involved a permissive user insured, establish that the exclusions in ORS 742.454 apply to permissive user insureds. Also, the *Jones* case is distinguishable as the "fellow employee" exclusion is valid under the FRL in this case through ORS 742.454, which is discussed below.

With respect to *Mathews v. Federated Service Ins. Co.*, 122 Or. App. 124, 857 P.3d 90 (1993), Mr. Garrett argues that the leased auto exclusion for permissive driver was voided as violating the FRL. This is incorrect. The Court of Appeals in *Mathews* was simply addressing whether granting of an automobile lease constituted "consent" within the meaning of ORS 806.080(1).

In other words, the leased auto exclusion limited the permissive users that could qualify as permissive user insureds:

> We hold that the granting of an automobile lease constitutes "consent" within the meaning of ORS 806.080(1). A "motor vehicle liability insurance policy used to comply with financial responsibility requirements under ORS 806.060" must therefore provide coverage when a covered vehicle is leased to another person. The "LEASED AUTO" exclusion in the insurance policy is invalid to the extent that it would deny coverage in the minimum amount required by the Financial Responsibility Law. [9]

Id. at 856.

As for *Erickson v. Farmers Ins. Co. of Oregon*, 331 Or. 681, 21 P.3d 90 (2001), it addresses UIM statutes and issues.[10] The *Erickson* case is neither informative nor relevant to the issues in this case.

3. ORS 742.454 Contains Exclusions Applicable to Permissive User Insureds.

ORS 742.454 specifies that **any** liability under **any** workers compensation law may be excluded from coverage, *i.e.* may exclude from coverage such liabilities for injuries to certain individuals. ORS 174.010 mandates that this Court "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit

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[9] *See* footnote 8 herein.

[10] For instance, this Court held that Exclusion 3d (no coverage if the injured person was occupying a vehicle you do not own which is insured for this coverage under another policy), which denied plaintiff coverage under her own policy, was unenforceable as it is "less favorable to an insured than ORS 842.504(9)(a) and (b) permit." *Id.* at 93.

what has been inserted". ORS 742.454 does not contain any language that limits or restricts the application of the exclusions to only the named insureds. Nothing in ORS 742.454 requires that the liability under workers compensation law be that of someone specific.

As will be discussed below, workers' compensation covers the liability of not only the employer, but that of the fellow employee as well. ORS 656.018(3); *Dehiya, supra*; *Shoemaker, supra*. Mr. Baller, as a fellow employee of Mr. Garrett, is entitled to the same exemption as Warrenton, the employer of Mr. Garrett. As the District Court noted, "[t]here is no dispute that [Mr. Garrett] receives workers' compensation benefits for his injuries. Thus, Mr. Garrett's injuries are a liability under workers' compensation law and coverage for those injuries is exempt by virtue of ORS 742.454." Dkt.23-2, Page 23 of 200. Because workers' compensation applies to both the employer and the fellow employee, "any liability under any workers compensation law" includes the liability of Mr. Baller, as Mr. Garrett's fellow employee.

Under Mr. Garrett's argument, there would be no way to exclude coverage for a permissive user insured in Oregon, which would be contrary to Oregon law.[11] Mr. Garrett's argument is irrational and unfair to named insureds in that coverage is excluded under certain circumstances for a named insured

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[11] *See Jones* at 273 ("Not all liabilities need be insured...".)

but not for a permissive user insured. This is particularly true in a situation in which the named insured and the permissive user insured are both entitled to the exclusive remedy of workers' compensation, as in this case.

4. Statutory Construction Rules Support New Hampshire's Argument.

Contrary to Mr. Garrett's argument, the statutory construction rules support New Hampshire's position that ORS 742.450(6) and (7) simply state that a permissive user can be excluded as an insured by name and that ORS 742.454 applies to the worker's compensation liability of both the employer and the fellow employee. Initially, the court must "always look to the statutory language first to interpret a statute". *PGE v. BOLI*, 317 Or. 606, 859 P.2d 1143 (1993). Statutory construction is nothing more than judicial process of discerning and declaring intent of legislature. *Fifth Ave. Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978); ORS 174.020. ORS 174.010 mandates that

> [i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

ORS 742.450(6) and (7) state, in part, as follows:

> (6) A motor vehicle liability insurance policy... 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...
>
> (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....
>
> (b) Because of any reason or set of criteria established by the director by rule.

Under ORS 174.010, this Court must "ascertain and declare what is, in terms or in substance," contained in ORS 742.450(6) and (7), and not "insert what has been omitted" or "omit what has been inserted". Therefore, this Court must conclude that ORS 742.450(6) and (7) permit insurers to exclude certain permissive users as insureds under the policy, *i.e.* "exclude by name from coverage...any person...for any of the reasons stated in subsection (7)".

ORS 742.454 states, in part, as follows:

> The motor vehicle liability insurance policy required by ... 806.080 (Insurance),...need not insure any liability under any workers compensation law...

This Court must not "insert what has been omitted", and ORS 742.454 does not contain any language that limits or restricts the application of the exclusion to only the named insureds. Nothing in ORS 742.454 requires that the liability under workers' compensation law be that of someone specific. This Court must also not "omit what has been inserted", and ORS 742.454 specifies that **any** liability under any workers' compensation law may be excluded from

coverage. Under ORS 656.018(3), Mr. Baller, as Mr. Garrett's fellow employee, is entitled to the same protection of the exclusive remedy of workers' compensation as Warrenton, Mr. Garrett's employer. Mr. Garrett has received workers' compensation for his injuries. Mr. Garrett's injuries are a liability under workers' compensation law and coverage for those injuries is exempt by virtue of ORS 742.454.

Mr. Garrett argues that there is a conflict in the FRL statutory scheme under New Hampshire's construction of ORS 742.450 and ORS 742.454.[12] This is incorrect. Under New Hampshire's construction, these statutes work together and both statutes are given effect.[13] ORS 742.450(6) and (7) address who qualifies as a permissive user insured, and ORS 742.454 identifies any workers' compensation liability as an acceptable exclusion for the insureds, be they named insureds or permissive user insureds. Under New Hampshire's construction, the statutes are harmonized and there is no conflict in the FRL statutory scheme.

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[12] This is the first time that Mr. Garrett argues that there is a conflict in New Hampshire's construction of ORS 742.450 and ORS 742.454, and that ORS 174.020 and ORS 174.030 provide guidance in resolving the conflict. New Hampshire submits that because Mr. Garrett is making certain arguments for the first time in this brief, New Hampshire is also entitled to make certain arguments for the first time in this brief.

[13] "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein,... **and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.**" ORS 174.010 (emphasis added).

The plain languages of ORS 742.450(6) and (7) and ORS 742.454 do not conflict, contrary to MR. Garrett's argument, such that this Court need resolve any conflict between these statutes. Consequently, Mr. Garrett's argument that only ORS 742.450(6) and (7) apply as these sections are more specific than ORS 742.454 and as these sections are adopted after ORS 742.454, fails.

Mr. Garrett further claims that because the "overriding purpose of the FRL [is] to ensure that all motor vehicle accident victims are compensated for their injuries," his interpretation favors a natural right and should prevail. However, this is not a situation where Mr. Garrett is without compensation for his injuries. Mr. Garrett has received fair compensation for his injuries through workers' compensation. Mr. Garrett has never disputed that he has received more than the FRL statutory minimum of $25,000.

Mr. Garrett argues that *Safeco*, *supra*, followed his statutory construction. This is incorrect. *Safeco* stands only for the proposition that a limitation on who qualifies as permissive user insureds, *i.e.* test drivers with other insurance, is impermissible under the FRL.[14]

Mr. Garrett's reference to "co-existing insurance" with respect to the *Safeco* case is inapplicable to this case to the extent that Mr. Garrett is suggesting that the FRL requirements cannot be met by other insurance such as

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[14] New Hampshire incorporates by reference the arguments and positions on pages 10-12 above, where New Hampshire discussed the *Safeco* case in detail.

workers' compensation. *Safeco* involved two automobile policies issued by Safeco and American Hardware, with American Hardware arguing that the FRL requirement was met by the Safeco policy under ORS 806.080(2).[15] This case is distinguishable as this case involves New Hampshire policies and workers' compensation benefits. This case does not involve co-existing automobile insurance policies.

Mr. Garrett also argues that the legislature has not written the "fellow employee" exclusion into ORS 742.454 for permissive users and as a result, the exclusion is void. New Hampshire disagrees. As will be discussed below, the "fellow employee" exclusion encompasses workers' compensation liability for an employee, as workers' compensation applies to both employer and fellow employee liability. ORS 656.018(3); *Dehiya, supra*; *Shoemaker, supra*. The "fellow employee" exclusion fits within the confines of "any liability under any workers' compensation law" exclusion permitted under ORS 742.454.

Under New Hampshire's construction, both FRL and workers' compensation statutes are given effect. New Hampshire's construction also gives effect to ORS 742.450(6) and (7) and ORS 742.454. Mr. Garrett's misinterpretation of ORS 742.450(6) and (7) and ORS 742.454 leads to the odd

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[15] "(2) The requirements for the insurance may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements."

result of a permissive user insured, who is a fellow employee of the plaintiff, having more coverage than the named insured, who is an employer, when the fellow employee and the employer both receive the benefit of the exclusive remedy of workers' compensation. The fact that ORS 742.454 permits an exclusion for any liability under any workers' compensation law, establishes that an insurance carrier need not insure such liability in an automobile policy under the exclusions for workers' compensation, employer's liability and "fellow employee". *See Dyer, supra.*

RESPONSE TO SECOND CERTIFIED QUESTION

It is permissible under ORS 742.454 for an insurer to exclude coverage for a permissive user pursuant to the "fellow employee" exclusion. Motor vehicle liability insurance required by ORS 806.080 "need not insure **any liability under any workers compensation law**..." ORS 742.454 (emphasis added). Workers' compensation law covers the liability of not only the employer, but that of the fellow employee as well. ORS 656.018(3); *Dehiya, supra; Shoemaker, supra.* "[A]ny liability under any workers compensation law" includes the liability of a fellow employee. Because Mr. Garrett's injuries and damages arose out of and in the course of his employment, he has been receiving workers' compensation benefits. Consequently, his injuries are a liability under workers' compensation laws and coverage for those injuries is

exempt by virtue of ORS 742.454. *Dyer, supra.*

1. The "Fellow Employee" Exclusion, Which Excludes Coverage for Workers' Compensation Liability, Is Permissible under ORS 742.454.

The FRL is based upon a policy of favoring the protection of innocent victims of vehicular accidents. *State Farm Fire and Cas. Co. v. Sevier*, 272 Or. 278, 537 P.2d 88 (1975); *Bailey v. Universal Underwriters Ins.*, 258 Or. 210, 474 P.2d 746 (1971). FRL requires that individuals, "be able to respond in damages, in amounts required under [ORS 806.070], for liability on account of accidents arising out of the ownership, operation, maintenance or use of motor vehicles." ORS 801.280; ORS 806.060. The purpose of FRL is to ensure that motor vehicle accident victims are compensated for injuries and that drivers can respond in damages for liability. *Jones* at 272. "Such laws, above all, seek to ensure that motor vehicle accident victims are compensated for injuries received." *Id.; State Farm Ins. v. Farmers Ins. Exch.*, 238 Or. 285, 387 P.2d 825, 393 P.2d 786 (1964). Certain liabilities, however, need not be insured, *i.e.* any liability under any workers' compensation law and any liability on account of bodily injury to an employee of the insured. ORS 742.454; *Jones* at 273.

Such exceptions are permitted to avoid double recovery by an injured employee, whose exclusive remedy is under workers' compensation or employer's liability insurance, for injuries that arose out of and in the course of

employment. ORS 656.018(1)(a); *Archer Daniels Midland Co., supra* (purpose of employer's liability exclusion is to prevent an employee who is covered by worker's compensation from double recovery); *Heiser, supra* (purpose of fellow employee exclusion is to preclude coverage where compensation is available to the injured employee under workers' compensation laws). Because workers' compensation covers the liability of a fellow employee, the "fellow employee" exclusion does not violate ORS 742.454.

In *State Farm Mutual Auto. Ins. Co. v. Dyer*, *supra*, the Tenth Circuit, ruling on the applicability of the "fellow employee" exclusion, found that it did not violate the Wyoming Financial Responsibility Law ("Wyoming FRL"), which is identical to the Oregon FRL. In *Dyer*, Dodgion was fatally injured when the pickup, in which he was a passenger and driven by Dyer, Dodgion's fellow employee, was in an accident. Dyer and Dodgion were both employed by Rock Springs Roofing Company, which was partially owned by Boyd, the owner of the pickup. The pickup was insured by State Farm. Both Dodgion and Dyer were acting in the scope of their employment at the time of the accident. *Id.* at 516. The Tenth Circuit held that under the plain language of the State Farm's "fellow employee" exclusion, there was no coverage for Dyer. *Id.* at 522. Likewise, in this case, the "fellow employee" exclusion falls within the bounds of ORS 742.454, as one of the liabilities that an insurer need not

insure.

The Tenth Circuit held in *Dyer*,

> [t]here is no imperative public policy need for automobile liability insurance where the injured party is covered by worker's compensation.... The Wyoming Supreme Court has pointed out that the "reason for the employee exclusionary clause was that the remedy for one employee injuring a fellow employee should be workmen's compensation."... *State Farm Mut. Auto. Ins. Co. v. Hollingsworth*, 668 F.Supp. 1476 (D.Wyo.1987) (the purpose of a fellow-employee exclusion is to protect an employer from having to pay for separate insurance in addition to workers' compensation). It is undisputed that workers compensation was available in this case, and was paid... As a result, there is no compelling public policy need for automobile liability insurance coverage in this case.

Id. at 524. *Also see Hancock v. Tri-State Ins. Co.*, 43 Ark. App. 47, 858 SW.2d 152 (1993) (exclusion for workers' compensation, employer's liability and "fellow employee", all of which relate to work-related injuries to employees, do not violate Arkansas law, public policy and workers' compensation law and are a recognition that work related injuries to employees should be compensated under workers' compensation laws).

The "fellow employee" exclusion is valid under ORS 742.454. Since an employee is entitled to the same benefit of the exclusive remedy of workers' compensation under ORS 656.018(3), an employee's liability for an injured fellow employee is workers' compensation liability, which can be excluded under ORS 742.454. Here, the Ninth Circuit has already found that Mr.

Garrett's injuries arose out of and in the course and scope of his employment.

Mr. Garrett erroneously contends that the "fellow employee" exclusion in the New Hampshire policies is impermissible because it "goes beyond the language of ORS 742.454." Mr. Garrett argues that before ORS 742.454 could provide a statutory basis for the "fellow employee" exclusion, this Court would have to insert the word "fellow" into ORS 742.454 and doing so would be contrary to ORS 174.010.[16] Mr. Garrett's argument is meritless as New Hampshire never made the argument that Mr. Baller's liability is employer's liability.

Mr. Garrett continues that workers' compensation is not an issue in this case because New Hampshire never defended the coverage case based on workers' compensation bar for two reasons.[17] Mr. Garrett argues, without citation to any authority, that New Hampshire waived the defense of workers' compensation bar because 1) it did not defend Mr. Baller, and 2) the underlying lawsuit was based on an exception to the exclusive remedy of workers'

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[16] This is the first time that Mr. Garrett makes this argument. New Hampshire submits that because Mr. Garrett makes arguments for the first time to this Court, New Hampshire is entitled to make arguments for the first time to this Court.

[17] This is the first time that Mr. Garrett makes this argument. New Hampshire incorporates footnote 16 herein.

compensation under ORS 656.018(3).[18] Mr. Garrett's arguments, both of which are unsupported by authority, are meritless.

First, the defense of Mr. Baller is not at issue in this case. Mr. Garrett did not receive an assignment to assert any claims related to the duty to defend. This lawsuit is based on ORS 742.031, which, in essence, is a garnishment action. Moreover, Mr. Garrett sets forth no evidence to establish any intentional relinquishment by New Hampshire. *Brown v. Portland School Dist. #1*, 291 Or. 77, 628 P.2d 1183 (1981).

Second, the underlying lawsuit involved a default judgment and was based on workers' compensation liability. Mr. Garrett specifically contended that the "**liability is based upon Baller's negligent driving**" and that "Baller **negligently** caused a single vehicle wreck". Dkt.9, Page: 12 of 35; Dkt.17, Page:19 of 28 (emphasis added). Liability based on negligence is the exact type of liability for which workers' compensation is the remedy for an injured worker. ORS 656.018(3); *Shoemaker, supra; Dehiya, supra* (co-worker sued for negligence but lawsuit dismissed as plaintiff's remedy was under workers' compensation).

Mr. Garrett argues that "workers' compensation is not an issue in this

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[18] This is the first time that Mr. Garrett makes these arguments. New Hampshire incorporates footnote 16 herein. New Hampshire will address below Mr. Garrett's argument related to ORS 656.018(3).

case; the only issue is the contractual and statutory coverage required for auto insurance policies issued in Oregon."[19] The contractual and statutory coverage required under the FRL is $25,000.[20] 806.070(2)(a). The statutory coverage requirement of $25,000 has already been met in this case. Mr. Garrett has never disputed that he has received more than $25,000 in workers' compensation benefits. The public policy concern of compensating injured persons, whose injuries arose out of and in the course and scope of employment, has been met through workers' compensation benefits.[21]

Mr. Garrett also incorrectly argues, without authority, that the language - "need not insure...any liability under workers' compensation law" - means that the policy does not have to pay workers' compensation benefits. This Court has held that workers' compensation and employer's liability exclusions aim to "exclude from liability insurance coverage all bodily injury claims of

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[19] This is the first time that Mr. Garrett makes these arguments. New Hampshire incorporates footnote 16 herein.

[20] As to the amounts and other coverage apart from that minimum, an insurer can restrict that additional coverage by exclusion. *Collins v. Farmers Ins. Co.*, 312 Or. 337, 882 P.2d 1146 (1991); *Farmers Ins. Co. v. Mowry*, 350 Or. 686, 261 P.3d 1 (2011).

[21] Mr. Garrett appears to be concerned that a permissive user insured, who is a fellow employee of the injured workers, is not provided coverage for liability, per the FRL. However, an injured employee, whose injuries arose out of and in the course of employment, is entitled to workers' compensation benefits. Moreover, a permissive user insured, who is a fellow employee of the injured employee, is entitled to protection of the exclusive remedy of workers' compensation. As a result, the permissive user insured's liability, if any, is covered by workers compensation.

employees that arise from their employment." *McLeod v. Tecorp International, Ltd.*, 318 Or. 208, 865 P.2d 1283 (1993).

Mr. Garrett argues that New Hampshire's argument and the District Court's conclusion (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 exempted by virtue of ORS 742.454) means that it is permissible to exclude coverage for injuries from an automobile accident if an injured worker receives workers' compensation benefits. That is exactly what ORS 742.454 permits. Mr. Garrett continues that such interpretation cannot be correct because that interpretation would render the employer's liability exclusion in ORS 742.454 meaningless, which, in turn, violates proper statutory construction under ORS 174.010.[22] Mr. Garrett is incorrect.

First, Mr. Garrett's argument that employer's liability exception in ORS 742.454 is superfluous, is meritless. In *McLeod, supra*, this Court noted that the aim of workers' compensation exclusion and the employer's liability exclusion is to exclude from liability coverage any claim of an employee for bodily injury if the claim arises out of the employee's employment. *Id.* at 1287. This Court continued that the purpose of an employer's liability exclusion is "to

[22] This is the first time that Mr. Garrett makes this argument. New Hampshire incorporates footnote 16 herein.

exclude from coverage bodily injury claims of employees that arise out of and in the course of their employment, but that are not workers' compensation claims...", *i.e.* employees who are not required to be covered by workers' compensation. *Id.* Contrary to Mr. Garrett's argument, ORS 742.454 has no inconsistent or superfluous provision.

Second, Mr. Garrett continues that his interpretation of New Hampshire's position (permissible to exclude coverage for injuries from an auto accident if an injured person receives workers' compensation benefits) is incorrect because an injured employee can receive workers' compensation benefits and pursue a claim against the tortfeasor at the same time.[23] New Hampshire disagrees. ORS 742.454 does not preclude an employee's action against the employer or another employee under ORS 656.156(2) and ORS 656.018(3), respectively, for intentional injury.

In the alternative, nothing in the FRL, including ORS 742.454, states that the exception for liability under workers' compensation law applies only if workers' compensation is the injured employee's exclusive remedy. ORS 742.454 contains no qualifier to "any liability under any workers' compensation law". To the contrary, ORS 742.454 states that "**any** liability under any workers' compensation law" can be excepted from coverage. *See* ORS

[23] This is the first time that Mr. Garrett makes this argument. New Hampshire incorporates footnote 16 herein.

174.010. Mr. Garrett attempts to change the focus from whether there is any liability under workers' compensation law to whether workers' compensation is his exclusive remedy. ORS 742.454 does not require that an injured employee's exclusive remedy be workers' compensation in order for the exclusion in ORS 742.454 to apply.

2. Mr. Baller's Liability Is Workers' Compensation Liability that can be Excluded under ORS 742.454.

In the section addressing the second certified question, Mr. Garrett argues that the liability in this case is not based on workers' compensation law but in tort law, and that Mr. Baller's liability is based on his allegedly reckless driving. Initially, New Hampshire does not believe this issue is before this Court. The Ninth Circuit Court of Appeals certified two legal questions. *See Western Helicopter Services, Inc. v. Rogerson Aircraft, et al*, 311 Or. 361, 811 P.2d 627 (1991). The second certified question is "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?"[24] The second certified legal question does not ask, or seek a determination as to, whether New Hampshire can exclude coverage for a permissive user insured under the "fellow employee" exclusion when the permissive user insured's liability is based on allegedly reckless driving. Mr. Garrett's argument does not

[24] As discussed above, the answer to the second certified legal question is "yes".

answer the second certified legal question. Nevertheless, to avoid any waiver issues related to this argument, New Hampshire responds as follows.

Mr. Garrett is incorrect that ORS 742.454 does not provide a statutory basis for an automobile policy to exclude tort liability from coverage. Mr. Garrett specifically contended that the "**liability is based upon Baller's negligent driving**" and that "Baller **negligently** caused a single vehicle wreck". Dkt.9, Page: 12 of 35; Dkt.17, Page:19 of 28 (emphasis added). Mr. Baller's liability is workers' compensation liability because tort liability, or liability based on negligence, is the exact type of liability for which workers' compensation is the exclusive remedy for an injured employee. *Shoemaker, supra; Dehiya, supra* (plaintiff sued co-worker for negligence but lawsuit was dismissed as plaintiff's remedy was under workers' compensation). The "fellow employee" exclusion precludes coverage to an employee's workers' compensation liability for a fellow employee's injury that arose out of and in the course and scope of employment. ORS 742.454 provides a statutory basis for the "fellow employee" exclusion.

Mr. Garrett continues that New Hampshire transmogrified the language "need not insure...any liability under workers' compensation law" into "need not insure...if there is an exemption under workers' compensation law". New Hampshire is not transmogrifying ORS 742.454. This Court has held that the

aim of workers' compensation exclusion is to exclude from liability insurance coverage all bodily injury claims of employees that arise from their employment. *McLeod, supra.* If an employee's claims arise out of employment, that employee's remedy is workers' compensation and the workers' compensation exclusion, which is permitted under ORS 742.454, applies to preclude coverage to that liability. Mr. Garrett's injuries are a liability under workers' compensation law and coverage for those injuries is exempt by virtue of ORS 742.454. Dkt.23-2, Page: 23 of 200.

Mr. Garrett continues that "[a]s a matter of uncontested fact", Mr. Baller's liability is based on Mr. Baller's allegedly reckless driving, that the underlying default judgment is based on an exception to workers' compensation, and that the underlying default judgment excepts this case from the usual rules of workers' compensation system. Not only is Mr. Garrett wrong in all respects, but the issues addressed in the remainder of the brief are not before this Court. New Hampshire maintains that Mr. Garrett's arguments related to the alleged liability of Mr. Baller should be disregarded by this Court as these arguments do not answer, or relate to, the second legal question certified by the Ninth Circuit Court of Appeals.

Mr. Baller did not appear in the underlying lawsuit. Dkt.23-2, Pages: 89-90 of 200. A default judgment was taken after a prima facie hearing, which, as

admitted by Mr. Garrett, was held to address only the damages. Dkt.17, Pages: 8, 9, and 22 of 28. The issue of whether Mr. Baller intentionally injured Mr. Garrett was never actually litigated in the underlying lawsuit because Mr. Baller did not appear in the lawsuit.

The finding of willful conduct is not binding on New Hampshire. One essential element for issue preclusion, or collateral estoppel, is that the issue was actually litigated. *Nelson v. Emerald People's Utility Dist.*, 318 Or. 99, 862 P.2d 1293 (1993). The party asserting issue preclusion has the burden to establish this element. *Id.*; *Barackman v. Anderson*, 214 Or. App. 660, 167 P.3d 994 (2007). This Court has held that:

> since collateral estoppel rests upon the principle that an issue was actually decided and was necessary to the judgment in the prior action, **the party asserting estoppel bears the responsibility of placing into evidence the prior judgment and sufficient portions of the record, including the pleadings, exhibits, and reporter's transcript of the testimony and proceedings, to enable the court to reach that conclusion with the requisite degree of certainty.**

State Farm v. Century Home, 275 Or. 97, 550 P.2d 1185 (1976) (emphasis added).

Mr. Garrett fails to carry his burden that the issue of whether Mr. Baller intentionally injured him was actually litigated. In support of his contention, Mr. Garrett simply refers to the default judgment against Mr. Baller. Dkt.17, Page: 8 of 28. Mr. Garrett did not submit any evidence or transcript of

testimony from the default proceeding "to enable the court to reach that conclusion with the requisite degree of certainty". *Id.* There is no evidence in this case that the issue of whether Mr. Baller intentionally injured Mr. Garrett was actually litigated. Because this issue was never actually litigated, it is not binding on New Hampshire. *State Farm Fire and Cas. Co. v. Reuter*, 299 Or. 155, ftnt. 10, 700 P.2d 236 (1985) (the issue must have been actually litigated for the result to be binding against the successor in interest).[25]

Furthermore, Mr. Garrett cannot carry his burden that Mr. Baller intentionally injured him. Oregon courts have consistently adhered to a strict construction of the statutory exception to the exclusive remedy of workers' compensation. *Bakker v. Baza'r, Inc.*, 275 Or. 245, 551 P.2d 1269 (1976).[26] Mr. Garrett has the burden to establish that he qualifies under the exception to the exclusive remedy of workers' compensation. *Duk Hwan Chung v. Fred Meyer, Inc.*, 276 Or. 809, 556 P.2d 683 (1976).[27]

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[25] It is well settled in federal courts that a default judgment does not warrant issue preclusion when a default is entered. *Charter Oak Fire Ins. Co., et al. v. Interstate Mechanical, Inc., et al.*, 2012 U.S. Dist. LEXIS 55556 (D. Or. 2012), *citing* Wright & Miller, 18A Fed. Prac. & Proc. §4442 (2d Ed., rev. 2011).

[26] The exception in *Bakker* was ORS 656.156(2) (deliberate injury by employer is exception to workers' compensation). Like the exception in ORS 656.156(2), the exception in ORS 656.018(3) would be strictly construed as they are both exceptions to the exclusivity of workers' compensation. *See Hanson v. Versarail Systems, Inc.*, 175 Or. App. 92, 28 P.3d 626 (2001).

[27] In *Chung,* the Oregon Supreme Court was discussing the burden of proof with respect to the exclusion in ORS 656.156(2). Nevertheless, under *Hanson,*

The Oregon Court of Appeals noted that ORS 656.156(2) and ORS 656.018(3) allow actions by an injured worker against an employer and a fellow employee, respectively, where the employer or fellow employee has intentionally injured the worker. *Hanson v. Versarail Syst., Inc.*, 175 Or. App. 92, 28 P.3d 626 (2001). The Court of Appeals noted that the two statutes serve a similar function of allowing an injured worker to bring an action against an employer and a fellow employee where the employer and the fellow employee intentionally injured the worker. The two exceptions have a similar purpose; the burden of proof should be the same.

Oregon courts have held that the narrow exception to the exclusive remedy of workers' compensation applies when a fellow employee's injury is deliberately and intentionally caused. *Virgil v. Walker*, 280 Or. 607, 572 P.2d 314 (1977) (the term "willful," as used in ORS 656.018(3), is defined as "deliberately and intentionally."); *Jenkins v. Carman Mfg. Co.*, 79 Or. 448, 155 P. 703 (1916); *Hanson, supra*; *Terris v. Stodd,* 126 Or. App. 666, 870 P.2d 835 (1995) (a person may seek damages for intentionally caused injuries under ORS 656.018(3), *i.e.* assault and battery).

In this case, Mr. Garrett has the burden to establish that Mr. Baller

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supra, the burden of proof for ORS 656.018(3) should be the same as that for ORS 656.156(2).

intentionally caused his injuries under ORS 656.018(3).[28] Mr. Baller testified that he did not intend to injure anybody, including Mr. Garrett, and that he did not deliberately injure Mr. Garrett. Dkt.33-2, Page: 4 of 5. The undisputed evidence is that Mr. Baller did not intentionally injure Mr. Garrett.

Mr. Garrett cannot carry his burden, or establish by any evidence, that Mr. Baller intentionally injured him, and the "finding" of willfulness is not binding on New Hampshire. Mr. Baller's liability is not an exception to the exclusive remedy of workers' compensation. Mr. Baller's liability is "any liability under any workers' compensation", under ORS 742.454. Because Mr. Baller's liability is workers' compensation liability, the "fellow employee" exclusion, which has already been held to be applicable by the District Court and the Ninth Circuit Court of Appeals, is valid under the FRL.

CONCLUSION

The answers to both certified questions are "yes". The exclusions of liabilities in ORS 742.454 apply to insurance policies issued to comply with the Oregon FRL when the insured under the policy is a permissive user. Moreover, it is permissible under ORS 742.454 for an insurer to exclude coverage for a permissive user pursuant to the "fellow employee" exclusion.

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[28] Any argument by Mr. Garrett that Mr. Baller acted willfully because Mr. Baller allegedly drove aggressively should not be considered by this Court. As discussed, the exception to the exclusive remedy of workers' compensation under ORS 656.018(3) requires intent to cause injury.

DATED: November 4, 2014.

Respectfully submitted,

GORDON & REES LLP

/s/ Donald J. Verfurth
Donald J. Verfurth, OSB No. 066480
Attorney for Defendant/Appellee,
New Hampshire Insurance Company

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENT

1. I certify that (1) answering 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 8,433 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: November 4, 2014.

Respectfully submitted,
GORDON & REES LLP

/s/ Donald J. Verfurth
Donald J. Verfurth, OSB No. 066480
Attorney for Defendant/Appellee,
New Hampshire Insurance Company

CERIFICATE OF SERVICE

I certify that on November 4, 2014, I electronically filed the foregoing APPELLEE'S ANSWERING BRIEF with the Oregon Supreme Court by using the Appellate e-File system.

I certify that on November 4, 2014, I served two (2) true and correct copies via first class mail and email on:

Attorney for Plaintiff-Appellant:
Stephen C. Hendricks
OSB No. 792653
schendricks@hendrickslawfirm.com
Hendricks Law Firm, P.C.
1425 SW 20th Ave., Suite 201
Portland, OR 97201
Telephone: (503) 241-5629
Facsimile: (503) 241-1633

DATED: November 4, 2014

GORDON & REES LLP

/s/ Donald J. Verfurth
Donald J. Verfurth, OSB No. 066480
Attorney for Defendant/Appellee,
New Hampshire Insurance Company