the top of the load. Defendant offers evidence in reply that the language on the posting came from TP Trucking upon defendant's inquiry on the use of plastic. The court notes that, at the bottom of the document is handwritten "TP Trucking." (Pl. Ex. 14; Niedermeyer Decl. Ex. 2.) It is unclear from the summary judgment record who made the initial decision to plastic wrap loads. Plaintiffs point to evidence supporting a finding that defendant Timber Products made the decision to change from using plastic bags, which did not require truckers to get on top of the load, to using 100-foot rolls of plastic, which requires truckers to get on top of the load, because defendants product was being damaged; also, rolls of plastic are less expensive. Timber Product's safety director testified in this regard:

> Q Were you familiar with the plastic – is bags the right word?
> A Sure.
> Q The plastic bags, if I'm understanding correctly, is the unit of wood is put inside the plastic and each unit is self-contained in plastic.
> A Yes.
> . . . .
> Q And using that method the forklift driver would load the plastic on the truck and then the truck driver would simply throw over the straps to tarp it and never have to get on top, is that correct?
> A I don't know that they never had to get on top but they wouldn't have to get on top to put plastic on, true.
> . . . .
> Q What was the reason, if you know, from going to the individually wrapped plastic units or wrapping the whole load?
> A The unit bags were damaging our product. It was causing the unit in the wood to sweat and the moisture would come out on and be trapped in those bags. So from what I understand one of the owners decided that we would go to the plastic rolls as opposed to the bags.
> Q Was the plastic roll less expensive in terms of the product itself, the amount you paid for the plastic?
> Q I've heard that it is. In our investigation, I heard that it was less expensive but it didn't seem to matter. We'd considered going back to them.
> Q After Mr. Clare fell you considered going back to them?
> A Sure.

Q As part of your overall safety improvement?
A You bet.
Q Did you make a decision one way or the other?
A Well, one of the managers decided that it wasn't worth the chance of damaging our product again. We had, from what I understand . . . ,we had a claim, an expensive claim where the customer – the wood was moldy from the moisture that been [sic] built up inside so they didn't want to go that route again.

(Hill Dep. at 26-28.)

Plaintiffs also rely on after injury reports issued before any remedial changes were made to show control by defendant. Defendant moves to strike these exhibits and certain other exhibits, including any related briefing, as evidence of inadmissible subsequent remedial measures.[5] Federal Rules of Evidence 407 provides:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence
> - culpable conduct
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

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[5] Plaintiffs acknowledge their exhibits 29 and 30 are evidence of subsequent remedial measures which would normally be inadmissible under Rule 407, but argues these exhibits are admissible to show control. (Pl. Resp. At 17 & n.11.) He refers to his exhibits 23, 24, 25, and 31 in support of his contention defendant had retained or actual control over the loading and plastic wrapping. Defendant moves to strike plaintiffs' exhibits 23, 24, 25, 26, 27, 29, 30, and 31.

To the extent the exhibits referenced in defendant's motion to strike are evidence of subsequent remedial measures and, without deciding whether any of these exhibits implicate Rule 407, the court will consider only references to "we" or "our" in plaintiffs' exhibits 23 through 25 and 31 to show control by defendant over the plastic wrapping of loads. The remainder of defendant's motion to strike plaintiffs' evidence is moot for purposes of summary judgment. The exhibits which are the subject of defendant's motion to strike, if offered at trial, may or may not be admissible in their entirety or in part.

Construing the evidence in favor of plaintiff, as it must, the Court finds there is sufficient evidence in the record which raises genuine issues of material fact as to whether defendant Timber Products retained control or exercised actual control over the manner or method of plastic wrapping loads of lumber to subject defendant to ELL liability. Defendant's motion on this ground is denied.

Defendant's motion one for summary judgment on plaintiff James Clare's ELL claim is denied.

Defendant's Motion Two: Common-Law Negligence Claim

To establish a claim for negligence under Oregon law, a plaintiff must prove a duty of due care owed by the defendant, a breach of that duty, causation, and damages. Hilt v. Bernstein, 75 Or. App. 502, 510 (1985) (citing Brennen v. City of Eugene, 285 Or. 401 (1979)). If a plaintiff invokes a special status, relationship, or standard of conduct, then that relationship may create, define, or limit the defendant's duty to the plaintiff. Or. Steel Mills, Inc. v. Coopers &

Lybrand, LLP, 336 Or. 329, 340-41 (2004) (citing Fazzolari *ex rel.* Fazzolari v. Portland Sch. Dist. No. 1J, 303 Or. 1, 17 (1987)).

Defendant argues plaintiff James Clare's negligence claim fails because plaintiff was as an independent contractor and defendant did not have a right to control and did not exercise control over the way in which plaintiff applied plastic tarping to his cargo. Defendant relies on the same arguments made in support of its motion as to plaintiff's ELL claim.

As found above, questions of fact exist as to whether defendant retained control or exercised actual control over the manner or method of plastic wrapping of loads and, therefore, defendant's motion two for summary judgment on plaintiff's negligence claim is denied.

Defendant's Motion Three: Claim for Loss of Consortium

"[A] claim for loss of consortium is based on injuries peculiar to a plaintiff that were the consequence of tortious injury suffered by the plaintiff's spouse." Shoemaker v. Mgmt. Recruiters Int'l, Inc., 125 Or. App. 568, 572 (1993). A loss of consortium claim is considered to be a derivative claim and dependent upon resolution of the spouse's claims. Knepper v. Brown, 213 Or. App. 598, 609 (2007), aff'd, 345 Or. 320 (2008). Because the court has found genuine issues of material fact exist as to plaintiff James Clare's claims for violation of the ELL and for negligence, plaintiff Kathy Clare's claim for loss of consortium will proceed to trial. Defendant's motion three for summary judgment on plaintiff Kathy Clare's loss of consortium is denied.

Alternatively, defendant moves for partial summary judgment contending that loss of earnings are not proper damages in plaintiff Kathy Clare's loss of consortium claim. It is unclear

to the Court from a review of plaintiffs' second amended complaint and the briefing on this issue whether or not plaintiff Kathy Clare is seeking lost earnings independent from those sought by plaintiff James Clare. Plaintiff Kathy Clare's claim will go forward to trial and the issue can be revisited at that time. Defendant's motion three for summary judgment on this ground is denied.

II. PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Plaintiffs move to amend the claims of ELL liability and negligence. Leave to amend should be "freely give[n]" "when justice so requires." Fed. R. Civ. P. 15(a)(2); Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999). The court considers four factors in determining whether to allow an amendment: "(1) bad faith on the part of the plaintiffs; (2) undue delay; (3) prejudice to the opposing party; and (4) futility of the proposed amendment." Lockheed Martin, 194 F.3d at 986. Plaintiffs conceded at oral argument that defendant would be prejudiced if leave were granted as to the new specification of negligence that defendant provided plaintiffs with a short roll of plastic. Plaintiffs' motion to amend in this regard is denied. Plaintiffs' motion to amend is otherwise granted.

ORDER

Based in the foregoing, plaintiffs' motion to supplement response (#41) to defendant's motion for summary judgment is denied; plaintiffs' motion to strike evidence included in their response is denied; defendant's motion to strike evidence included in its reply brief is granted in part as stated herein and the remainder of the motion is moot for purposes of summary judgment; defendant's motions for summary judgment (#22) are denied; and plaintiffs' motion for leave to file third amended complaint (#39) is granted in part and denied in part as stated herein.

DATED this 23 day of February 2012.

MARK D. CLARKE
United States Magistrate Judge