No. 99273-8

THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeal Division II No. 53248-4-II

CHRISTOPHER W. SARTIN and ROSE M. RYKER,
Individually and as a marital community,
Petitioners,

v.

THE ESTATE OF ALONZO MCPIKE; PIERCE COUNTY PUBLIC TRANSPORTATION BENEFIT AREA CORPORATION, a/k/a PIERCE TRANSIT, MULTICARE HEALTH SYSTEM, a Washington corporation d/b/a TACOMA GENERAL HOSPITAL; MULTICARE OCCUPATIONAL MEDICINE; and RICHARD GILBERT, M.D., individually.

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS AND INTRODUCTION

Respondents, the Estate of Alonzo McPike and Pierce County Public Transportation Benefit Area Corporation ("Pierce Transit") ask this Court to deny Petitioners Christopher Sartin and Rose Ryker's Petition for Review. Alonzo McPike held a Washington state commercial driver's license ("CDL"), and a medical certificate issued by a federally-authorized medical examiner, qualifying him to serve as a Pierce Transit bus driver. The medical examiner, along with all of Mr. McPike's treating doctors, unanimously testified that he was medically qualified to hold an intrastate commercial driver's license and operate a public bus.

Petitioners asked the trial court to impose on Pierce Transit and Mr. McPike a duty to second guess these doctors and foresee, contrary to the conclusions of his treating medical professionals, that Mr. McPike would suffer a sudden incapacitation while driving. The trial court, finding no evidence that either Mr. McPike or Pierce Transit had any basis on which to anticipate Mr. McPike's sudden incapacitation, granted Pierce Transit and Mr. McPike's motion for summary judgment. The Court of Appeals affirmed. *See* 475 P.3d 522 (Wn. App. 2020).

Discretionary review is not warranted here. The appellate court rooted its decision in the record and applied long-settled Washington law. Because the decisions below conform to Washington case law on the sudden

incapacitation doctrine, and because the decisions below do not implicate substantial public interests, the McPike Estate and Pierce Transit respectfully request that the Court deny review.

II. ISSUE PRESENTED

"A driver who becomes suddenly stricken by an unforeseen loss of consciousness, and is unable to control the vehicle, is not chargeable with negligence." *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 466, 398 P.2d 14 (1965), *amended sub nom. Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 401 P.2d 350 (1965). Should this Court deny Petitioners' Petition for Review where the Court of Appeals, applying *Kaiser*, found no evidence in the record refuting the conclusion that Mr. McPike's sudden loss of consciousness was not foreseeable?

III. STATEMENT OF THE CASE

Alonzo McPike served as a Pierce Transit bus operator for nearly two decades. CP 74 (Curry Decl. ¶ 7). On May 26, 2015, as his bus approached the intersection at East 28th Street, Mr. McPike suddenly slumped over in his seat. CP 88 (Alexander Decl. ¶ 4). "It was very sudden; one moment the bus driver was operating the bus, and the next second, the driver was slumped over." *Id.*; *see also* CP 94 (Gu Decl. ¶¶ 3, 5). While Mr. McPike was unconscious, unresponsive to passenger exclamations, and unable to operate the vehicle, the bus continued moving forward and rear-

ended a pickup truck stopped at a red light. CP 42–65 (Tacoma Police Dep't. Traffic Collision Report). The pickup truck—occupied by driver Colleen Robinson and front-seat passenger Petitioner Christopher Sartin—then struck a 1999 Toyota Sienna minivan. *Id.*

Paramedics found Mr. McPike unconscious in the driver's seat of the bus, and determined that his heart had stopped. CP 121–22 (Dr. Thompson Decl. ¶ 5). Although they restored cardiac rhythm before transporting him to Tacoma General Hospital, Mr. McPike never regained consciousness. *Id.* Mr. McPike died approximately one month later. *Id.*

Subsequent medical review confirmed that Mr. McPike suffered a sudden cardiac arrest prior to losing control of the bus. *Id.* ¶¶ 5–8. A sudden cardiac arrest occurs when the electrical system to the heart malfunctions and suddenly becomes very irregular. *Id.* ¶ 7. Cardiac arrest symptoms are often immediate and drastic. *Id.*; CP 1047–48 (Fletcher Dep. at 51:24–52:3).

A. Regulatory Background

Washington's Uniform Commercial Driver's License Act ("UCDLA"), RCW 46.25 *et seq.*, controls the issuance of CDLs in this state. The Washington Department of Licensing ("DOL"), in turn, promulgates all rules necessary to implementation of the UCDLA. RCW 46.25.050; 46.25.140. RCW 46.25.055 (2003) provides: "A person may not drive a commercial motor vehicle unless he or she is physically qualified to do so

and . . . has on his or her person the original, or a photographic copy, of a medical examiner's certificate that he or she is physically qualified to drive a commercial motor vehicle."[1]

Although the stated purpose of the UCDLA is to implement the federal Commercial Motor Vehicle Safety Act of 1986, the UCDLA imposes different requirements for intrastate drivers, such as Mr. McPike, in comparison to interstate drivers. The UCDLA allows drivers to obtain waivers for conditions that would be disqualifying under the federal system.

> A person who is not physically qualified to drive a commercial motor vehicle under section 391.41 of the Federal Motor Carrier Safety Regulations (49 C.F.R. 391.41), and who is otherwise qualified to drive a motor vehicle in the state of Washington, may apply to the department of licensing for an intrastate waiver. Upon receipt of the application for an intrastate waiver, the department shall review and evaluate the driver's physical qualifications to operate a motor vehicle in the state of Washington, and shall issue an intrastate waiver if the applicant meets all applicable licensing requirements.

WAC 308-100-100. WAC 308-100-100 authorizes medical examiners and DOL to assess and approve the medical fitness of intrastate drivers. This authority is not constrained by Federal Motor Carrier Safety Administration ("FMCSA") regulations.

The UCDLA limits duties owed by employers, including Pierce

[1] The omitted language relates to 49 C.F.R. § 391.67, which is an exemption for "farm vehicles" not applicable here.

Transit,[2] to (1) collecting new-driver applicants' job histories per RCW 46.25.030(3); and (2) refraining from knowingly allowing, permitting, or authorizing a driver to drive a commercial motor vehicle during any period in which the driver's CDL has been suspended, revoked, cancelled, or in which the driver is known to have more than one CDL per RCW 46.25.040. The UCDLA does not require an employer to verify or monitor a driver's physical qualifications. *See* RCW 46.25.040.

Notably, FMCSA regulations do not apply to the intrastate operation of a commercial motor vehicle. *See* 49 C.F.R. § 390.3T ("The rules in this subchapter are applicable to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce."); *see also* 49 C.F.R. § 390.5T (defining "interstate" and "intrastate" commerce and other terms, such as "employee," "employer," and "commercial motor vehicle" in the context of interstate commerce).

49 C.F.R. § 383.71(b) requires CDL applicants to certify whether they expect to operate interstate, in which case Part 391 (physical qualifications) applies, or whether they expect to operate solely intrastate, in which case the driver is "subject to State driver qualification requirements." Here, it is undisputed that Mr. McPike operated Pierce

[2] The UCDLA defines "employer" as "any person, including the United States, a state, or a political subdivision of a state, who owns or leases a commercial motor vehicle, or assigns a person to drive a commercial motor vehicle." RCW 46.25.010(11).

Transit buses exclusively within the state of Washington and within the definition of "intrastate."[3]

To renew his CDL for purposes of his employment with Pierce Transit, Mr. McPike not only had to pass a CDL Fitness Determination examination, he had to obtain an intrastate medical waiver because he had insulin-dependent diabetes. CP 131 (Dr. Wang Decl. ¶¶ 3–6); CP 134 (January 23, 2015 Intrastate Medical Waiver Application); *Sartin*, 475 P.3d at 525. Dr. Richard Gilbert, a federally-certified CDL medical examiner, examined Mr. McPike on January 30, 2015, and certified his fitness to operate commercial vehicles with an intrastate waiver for one year. CP 105–08 (Dr. Gilbert Decl. ¶¶ 2–11); CP 115–17 (CDL Fitness Determination Medical Examination Report); CP 119 (Intrastate Medical Waiver).

B. Procedural Background

The trial court denied Pierce Transit's first summary judgment motion, presumably based on questions of fact suggested by Petitioners' experts' declarations. CP 972-73 (Order); CP 1330-31 (Oral Argument Transcript). On November 30, 2018, after deposing Petitioners' experts,

[3] Even where commercial motor vehicles are operated interstate, the FMCSA regulations do not regulate local-government employers. 49 C.F.R. § 390.3T(f)(2) ("Unless otherwise specifically provided, the rules in this subchapter do not apply to . . . [t]ransportation performed by. . . a State, or any political subdivision of a State . . . ."); *see also* 49 C.F.R. § 390.5T (defining "employer" to expressly exclude any State or political subdivision of a State). Pierce Transit is a "Public Transportation Benefit Area," defined as "a municipal corporation of the state of Washington" and created pursuant to RCW 36.57A. RCW 36.57A.010(7).

Pierce Transit renewed its motion for summary judgment based, in large part, on Petitioners' medical expert Dr. David Fletcher's deposition testimony. Dr Fletcher admitted, *inter alia*, that:

- he could point to no evidence to show that either Pierce Transit or Mr. McPike had notice, after the issuance of Mr. McPike's medical certificate in 2015, that Mr. McPike was not fit to drive, CP 1056–70 (Fletcher Dep. at 122:9–123:3, 136:11–18, 137:1–14, 140:8–22, 143:24–144:21);

- he could not opine, on a more probable than not basis, that any additional medical evaluations would have revealed coronary artery disease, CP 1047–49 (Fletcher Dep. at 51:24–52:3, 52:24–53:5); and

- he could not opine, on a more probable than not basis, that further evaluations would reveal a disqualifying condition, CP 1062 (Fletcher Dep. at 132:5–12).

CP 1009–24 (Renewed MSJ). The trial court granted the second summary judgment motion and Petitioners appealed.

> The appellate court affirmed the trial court's order, holding that:
>
> (1) as matter of law, it was not reasonably foreseeable to McPike that he would lose consciousness even though he had several preexisting health problems; [and] (2) there is no genuine issue of fact regarding Pierce Transit's independent liability for failure to monitor McPike's medical conditions because there is no evidence that fit for duty examinations would have disqualified McPike from driving a bus . . .

Sartin, 475 P.3d at 524.

IV. ARGUMENT

A Petition for Review will only be accepted by this Court if the Court of Appeals' decision conflicts with a decision of this Court or a published decision of the Court of Appeals; if the case involves a significant constitutional question; or if the case presents an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Petitioners fail to satisfy any of these standards. Instead, Petitioners merely restate the arguments presented to the courts below; improperly asking this court to sit as a court of error.[4] Petitioners' arguments do not support or justify review by this Court.

A. Rules 13.4(b)(1) and (2) Do Not Support Review.

"Only two published Washington cases have addressed a sudden loss of consciousness of a driver." *Sartin*, 475 P.3d at 528. Both prior cases addressed foreseeability in relation to the at-issue loss of consciousness. *Id.* at 530. Where, as here, the Court of Appeals reviewed, relied upon, and applied both cases, *see id.* at 528-30, Petitioners cannot justify review under Rule 13.4(b)(1) or (2).

[4] *See Colella v. King Cty.*, 72 Wn.2d 386, 388, 433 P.2d 154 (1967) ("'In determining,' 'in finding,' and 'in awarding' fall far short of meeting the requirements of Rules on Appeal 42(g)(1)(iii) and 43, RCW vol. O, by which a finding of the trial court may be questioned on appeal. The phrases are only invitations to us to read the record and second-guess the trial court. This we cannot do." (citing *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959)).

1. Washington's Sudden Incapacitation Doctrine

This Court first applied the sudden incapacitation doctrine in *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 398 P.2d 14 (1965). In *Kaiser*, a Suburban Transportation System bus struck a telephone pole after its driver lost consciousness. *Id.* at 462. The driver's loss of consciousness was "attributed to the side effects of a drug (pyribenzamine) which had been prescribed by his doctor for the treatment of a nasal condition." *Id.* at 462-63. The bus driver claimed that the doctor did not warn him of any possible side effects. *Id.* at 463. A few miles before the accident, the bus driver felt "groggy and drowsy," he then "blacked out or went to sleep shortly before his bus left the road." *Id.*

The injured plaintiff sued the transit agency and its driver, and, in the alternative, the doctor and his employer. *Id.* The trial court dismissed the claims against the doctor and his employer and directed a verdict against the driver and his employer. *Id.* The plaintiff, driver, and transit agency all appealed. *Id.*

This Court began its analysis with the medical provider's duties, holding that, irrespective of the driver's potential negligence, "the doctor would nevertheless be liable if the jury finds the harm resulting to the plaintiff was in the general field of danger, which should reasonably have been foreseen by the doctor when he administered the drug." *Id.* at 465.

Turning to the standard applicable to the bus driver's conduct, this Court held that "[a] driver who becomes suddenly stricken by an unforeseen *loss of consciousness*, and is unable to control the vehicle, is not chargeable with negligence." *Id.* at 466 (emphasis added). This Court further held that "[k]nowledge and conscious appreciation of the significance of facts constituting *premonitory warning of sleep or incapacity to the driver* is essential to sustain the bus driver's liability." *Id.* at 468 (emphasis added).

Unlike the "general field of danger" analysis applicable to claims against the doctor, claims against drivers, including common carrier drivers, are subject to proof of notice or warning that a loss of consciousness or incapacity would occur.

The second case addressing Washington's sudden incapacitation doctrine is *Presleigh v. Lewis*, 13 Wn. App. 212, 534 P.2d 606 (1975). In *Presleigh*, a physician gave the defendant an anti-nauseant injection treatment for the flu. *Id.* at 212. Unlike the facts of *Kaiser*, the defendant driver admitted that the physician warned him the shot could affect his driving. The doctor told him:

> I don't want you to drive downtown or out on the freeway or someplace where you are going to be in traffic because this shot could have a tendency to make you drowsy, some people it does, some people it doesn't . . . .

Id. at 213.

The defendant blacked out driving home from the doctor's office and crashed into the plaintiff's home. *Id.* at 212. In reviewing whether the trial court properly granted judgment n.o.v., the appellate court held that the defendant breached the duty to drive in a reasonable manner

> when he undertook to drive his automobile *knowing his ability to drive in a reasonable manner might be affected*. The fact that he did not know the precise way in which his driving might be affected and he did not in fact become drowsy before he blacked out or went to sleep does not relieve him from a breach of this duty. Thus, defendant was negligent as a matter of law for driving *after he was warned that his driving could be affected by the injection* and must be held liable for the damages resulting therefrom.

Id. at 214-15 (emphasis added) (citing *Kaiser*, 65 Wn.2d at 461).

2. The Restatement Conforms to Washington Law.

In addition to reviewing the details of *Kaiser* and *Presleigh*, *see Sartin*, 475 P.3d 529-30, the court below reviewed the Restatement (Third) of Torts: Liability for Phys. & Emot. Harm § 11(b) (Am. Law Inst. 2010) ("Restatement"), *id.* Echoing this Court's analysis in *Kaiser*, the Restatement provides: "[t]he conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor." Restatement § 11(b).

Far from being a departure from Washington law, as Petitioners argue, the Restatement simply articulates the "impressively unanimous"

acceptance of the rule that "a party does not bear liability if the party's substandard behavior is due to an unforeseeable seizure or loss of consciousness." Restatement § 11 cmt. d. In fact, the Restatement relies upon *Kaiser* as support for its formation.[5]

The court below recognized that the Restatement suggested factors to consider when deciding whether an incapacitation was reasonably foreseeable, including: (1) "the number and frequency of episodes of incapacitation in the past"; (2) "the circumstances of those episodes, insofar as those circumstances bear on the likelihood of a reoccurrence"; (3) "the extent to which medical treatment the actor is receiving can be expected to control the underlying medical problem"; and (4) "whatever advice the actor's physician has provided." *Sartin*, 475 P.3d at 528. These factors are

[5] *See id.* (citing *Kaiser v. Suburban Transp. Sys.*, 398 P.2d 14 (Wash. 1965) among other cases including: *Walker v. Cardwell*, 348 So.2d 1049 (Ala. 1977); *Goodrich v. Blair*, 646 P.2d 890 (Ariz. Ct. App. 1982); *Lutzkovitz v. Murray*, 339 A.2d 64 (Del. 1975); *Watts v. Smith*, 226 A.2d 160 (D.C. 1967); *Burns v. Grezeka*, 508 N.E.2d 449 (Ill. App. Ct. 1987); *Holcomb v. Miller*, 269 N.E.2d 885 (Ind. Ct. App. 1971); *Freese v. Lemmon*, 267 N.W.2d 680 (Iowa 1978); *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. Ct. App. 1988); *Brannon v. Shelter Mut. Ins. Co.*, 507 So.2d 194 (La. 1987); *Moore v. Presnell*, 379 A.2d 1246 (Md. Ct. Spec. App. 1977); *Murphy v. Paxton*, 186 So.2d 244 (Miss. 1966); *Storjohn v. Fay*, 519 N.W.2d 521 (Neb. 1994); *Word v. Jones*, 516 S.E.2d 144 (N.C. 1999); *Jenkins v. Morgan*, 566 N.E.2d 1244 (Ohio Ct. App. 1988); *Parker v. Washington*, 421 P.2d 861 (Okla. 1966); *van der Hout v. Johnson*, 446 P.2d 99 (Or. 1968); *Howle v. PYA/Monarch, Inc.*, 344 S.E.2d 157 (S.C. Ct. App. 1986); *McCall v. Wilder*, 913 S.W.2d 150 (Tenn. 1995); *Witt v. Merricks*, 168 S.E.2d 517 (Va. 1969); Restatement Second, Torts § 283C, Comment c); *see also* Timothy E. Travers, *Liability for automobile accident allegedly caused by driver's blackout, sudden unconsciousness, or the like*, 93 A.L.R.3d 326 ("cases decided under negligence theories have uniformly held that a sudden loss of consciousness while driving is a complete defense to an action based on negligence or gross negligence, if such loss of consciousness was not foreseeable") (listing cases from 38 states).

consistent with the analyses in *Kaiser* and *Presleigh*, including determining whether a defendant was warned by a physician.

3. Petitioners' Argument Conflicts with Washington law.

On appeal and in their petition, Petitioners argued that the inquiry for this case should be whether it was foreseeable that Mr. McPike's driving would be affected "in some way" by his health conditions. Pet. at 9; *Sartin*, 475 P.3d at 530. "However, Sartin's claim is inconsistent with well-settled law regarding sudden loss of consciousness. Both *Kaiser* and the Restatement are clear that there is no negligence unless the loss of consciousness is foreseeable to the defendant." *Sartin*, 475 P.3d at 530 (citing *Kaiser*, 65 Wn.2d at 466; Restatement § 11(b)).

The appellate court addressed Petitioners' request to substitute the logic of *Lee v. Willis Enterprises, Inc.*, 194 Wn. App. 394, 402, 377 P.3d 244 (2016)—which did not involve an incapacitated motor vehicle driver—for *Kaiser*. In rejecting Petitioners' argument, the court reasoned that:

> *Lee* addresses foreseeability in the context of the scope of a legal duty – whether it was foreseeable that the defendant's careless behavior while working around high voltage equipment could cause some injury. 194 Wash. App. at 401-03, 377 P.3d 244. Conversely, this case involves the foreseeability of a very specific event – McPike's loss of consciousness.

Id.

The Court of Appeals' reasoning aligns with *Kaiser* which recognized the specific foreseeability analysis applicable to a case involving an incapacitated driver. This Court held that the doctor would be liable if the accident was within the "general field of danger" of his conduct, *but* the driver was only liable if he had "conscious appreciation of the significance of facts constituting *premonitory warning of sleep or incapacity* . . . ." *Kaiser*, 65 Wn.2d at 468 (emphasis added). Petitioners' general field of danger analysis, as applied to Pierce Transit and Mr. McPike, conflicts with *Kaiser* and, if adopted, would eviscerate Washington's sudden incapacitation doctrine.[6]

4. The Decisions Below Conform to *Kaiser* and *Presleigh*.

As required by *Kaiser* and *Presleigh*, the appellate court reviewed whether Mr. McPike had notice that he could suffer a sudden incapacitation. *Sartin*, 475 P.3d at 529-31. Contrary to Petitioners' brief, the appellate court did not become "laser focused," Pet. at 10, on whether Mr. McPike had

[6] Under Petitioner's view, having any health conditions that increase one's risk of developing coronary artery disease, which, in turn, could put one at risk of a sudden cardiac event, would put a person in the "general zone of danger" of a sudden incapacitation event. Combined with Petitioners' expert's admission that "20 percent of the time the first manifestation of coronary artery disease is sudden death," CP 1047–48 (Fletcher Dep. at 51:19–52:3), it is unclear whether *any* driver, lay or professional, should be on the road. The duty Petitioners seek to impose is so potentially broad as to leave drivers and public transit agencies with no standards by which to judge their decisions to get behind the wheel of a motor vehicle.

coronary artery disease ("CAD"). Rather, the court reviewed the undisputed evidence in the record relating to foreseeability, including:

- Petitioners' expert's admissions that "no medical provider advised McPike that he was not fit to drive a bus," *Sartin*, 475 P.3d at 531;
- Petitioners' expert's admissions that "no medical provider told McPike that he could not drive because of his high blood pressure, diabetes, or sleep apnea, or because of his irregular heartbeat," *id.*;
- "none of [Mr. McPike's] doctors believed it was unsafe for him to drive a bus," *id.*; and
- Mr. McPike "qualified for a CDL medical certificate less than four months before the accident," *id.* 529.

On these undisputed facts, the Court of Appeals affirmed the trial court's finding that Mr. McPike's sudden loss of consciousness was not foreseeable as a matter of law. *Id.* at 531.

Notably, even if the appellate court had focused on whether Mr. McPike had CAD, that would only be because Petitioners' own expert opined that Mr. McPike's alleged CAD was the cause of his incapacitation. *Id.* at 533 ("[Dr. Fletcher] testified that he was certain that McPike had significant coronary artery disease that caused the arrhythmia that resulted in his cardiac arrest."); CP 1047–48 (Fletcher Dep. at 51:19–52:3).

This Court repeatedly holds that "[a] party cannot properly seek review of an alleged error which the party invited." *Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) (citing *Rao v. Auburn Gen. Hosp.*, 19 Wn. App. 124, 573 P.2d 834 (1978)). If review of

the question regarding whether Mr. McPike had CAD was an error, it was at Petitioners' invitation.

5. Petitioners' complaint regarding the legal conclusions flowing from this record does not justify review.

Petitioners' myriad assertions regarding the implications of evidence in the record do not place the Court of Appeals' decision in conflict with Washington law. For example, Petitioners reiterate their unsupported assertion that Mr. McPike misrepresented his health history to his medical providers. Pet. at 15. Yet, the Court of Appeals addressed this issue in its decision, finding it immaterial to foreseeability:

> Sartin suggests in an argument subheading that McPike withheld his dangerous medical history from his medical providers and Pierce Transit. He also claims that McPike made misrepresentations to his medical providers to get re-certified. Dr. Fletcher made the same allegation. However, Sartin provides no argument regarding this allegation. Specifically, he does not explain why withholding medical information would affect the foreseeability of McPike's loss of consciousness.

Sartin, 475 P.3d at 531 n.1.

Petitioners also generally assert that, despite the undisputed fact that his medical providers never warned him he was unsafe to drive,[7] Mr. McPike, nonetheless, "should have known" he was not fit to drive, Pet. at 15-16. Petitioners base this argument on Mr. McPike's allegedly

[7] CP 1056–70 (Fletcher Dep. at 122:9–123:3, 136:11–18, 137:1–14, 140:8–22, 143:24–144:21).

"disqualifying" blood pressure readings. *See id.*[8] Notably, Petitioners cannot (and do not) point to a specific, disqualifying blood pressure reading because no such reading is present in this record. Mr. McPike's blood pressure readings, relative to the federal regulatory standard, were all qualifying as demonstrated in this chart:[9]

Not Hypertensive within 49 C.F.R. pt. 391	**Stage 1 Hypertension <u>140-159</u> 90-99** **Qualified: One Year**	**Stage 2 Hypertension: <u>160-179</u> 100-109** **Qualified: Three Months**	**Stage 3 Hypertension: <u>180+</u> 110** **Disqualified**
Nov. 28, 2014: 134/70 CP at 114	Nov. 7, 2014: 150/72 CP at 1102	Jan. 30, 2015: 162/64 CP at 1629	
Dec. 16, 2014: 138/68 CP at 114	Dec. 18, 2014: 146/78 CP at 1624		
Jan. 14, 2015: 132/70 CP at 114	Jan. 29, 2015: 148/75 CP at 1626		
	March 3, 2015: 140/78 CP at 533		

[8] Petitioners argue that a "November 7, 2020 [sic] letter from Dr. Harmon warned Mr. McPike that his blood pressure was too high to continue driving when it registered 150/72." Pet. at 15. However, Dr. Harmon's November 7, 2014 letter actually said that Mr. McPike's blood pressure was too high "for a one year qualification." CP 1105. Dr. Harmon also stated that Mr. McPike was "cleared to operate a commercial vehicle. He is issued a 90 day card while he has a sleep evaluation and bp control." CP 1104.

[9] 49 C.F.R. Pt. 391, App. A(II)(F)(3) articulates the standard for stage 1; 49 C.F.R. Pt. 391, App. A(II)(F)(4) for stage 2; and 49 C.F.R. Pt. 391, App. A(II)(F)(5) for stage 3.

Petitioners also argue that Pierce Transit failed to adequately investigate Mr. McPike's medical fitness. Pet. at 17.[10] But, "Sartin did not present any evidence that but for Pierce Transit's failure to monitor McPike's medical condition, the accident would not have occurred." *Sartin*, 475 P.3d at 532. Dr. Fletcher, Petitioners' expert, admitted that he could only speculate that: an additional evaluation was warranted, an evaluation would have revealed CAD, or, if an issue was found, it would have been disqualifying. *See id.*; CP 1062 (Fletcher Dep. at 132:5–12).

Petitioners' non-medical expert Lew Grill's opinions do not change the decision below. Dr. Fletcher admitted that one would have to speculate that any of the additional evaluations Mr. Grill believes should have occurred would have provided notice that Mr. McPike was not fit to drive. *Sartin*, 475 P.3d at 532; CP 1062 (Fletcher Dep. at 132:5–12). Thus, even with the addition of Mr. Grill's opinions, Petitioners cannot show that "but for Pierce Transit's failure to monitor McPike's medical condition, the accident would not have occurred." *Sartin*, 475 P.3d at 532.

[10] The statute Petitioners cite merely states that a carrier shall not permit a driver to operate a vehicle "*while* the driver's ability or alertness is so impaired . . . ." Pet. at 17 (citing 49 C.F.R. § 392.3) (emphasis added). Although Respondents disagree that they are subject to this statute, *see supra* § III.A., it is important to note that the statute does not require Pierce Transit to be the decision-maker on *whether* the driver is impaired. Nor do Petitioners mention *how* non-medical professionals should make that determination. *See generally*, Pet. The cited statute does not prohibit a transit agency from relying on the expertise of medical professionals for those decisions.

B. Rule 13.4(b)(4) Does Not Support Review.[11]

This is only the third time a Washington court has addressed the sudden incapacitation doctrine in a published opinion. And, in two of those three instances, Washington courts addressed the doctrine in the context of a public transit operator. Petitioners' argument that the current state of the law poses an urgent danger to the public is belied by the infrequency with which Washington courts are called upon to apply *Kaiser*.

Petitioners' are asking this Court to consider overturning *Kaiser* and instead rule that any time a person is hurt in a motor vehicle accident, someone must be adjudged liable and must pay damages. This is not the law in the state of Washington. As such, Pierce Transit and the McPike Estate respectfully request that this Court deny Petitioners' request for review.

V. CONCLUSION

As *Kaiser* and *Presleigh* demonstrate, reviewing foreseeability in terms of whether a driver's *sudden incapacitation* was foreseeable does not foreclose a plaintiff's ability to recover. The courts below both applied the rule that a defendant may be liable if there is proof of a warning by a doctor prior to the sudden incapacitation. Here, the record is devoid of any such warning—in fact, all of the medical evidence revealed the opposite. All of

[11] No party has identified any constitutional implications arising from this case. RAP 13.4(b)(3).

Mr. McPike's medical providers endorsed his fitness to operate a Pierce Transit bus. To impose liability in such a situation "would be to punish one who is not culpable . . . and to punish where there is no culpability would be the most reprehensible tyranny." *Kaiser*, 65 Wn.2d at 466–67 (citations omitted).

Review is not justified under any Rule 13.4(b) basis. Pierce Transit and the Estate of Alonzo McPike respectfully request that this Court deny the Petition.

RESPECTFULLY SUBMITTED this December 31, 2020.

STOKES LAWRENCE, P.S.

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Dated this 31st day of December 2020, at Seattle, Washington.

/s/Linda McIntosh Wheeler
Practice Assistant

STOKES LAWRENCE, P.S.

December 31, 2020 - 12:18 PM

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