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No. 53248-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

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

BRIEF OF APPELLANT

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I. INTRODUCTION

This case seeks redress for the grievous injuries that Christopher Sartin suffered on May 26, 2015, when his pickup truck was rear-ended by an out-of-control Pierce Transit bus driven by Alonzo McPike. For the protection of members of the public, like Mr. Sartin, commercial drivers, their DOT medical examiners, and their employers are held to rigorous standards to ensure the driver is physically and mentally fit to operate the commercial vehicle. Bus driver Alonzo McPike, Pierce Transit, and medical examiner Richard Gilbert, MD neglected their responsibilities to the public and, as a result of their neglect, Mr. Sartin was seriously injured.

This collision occurred because Mr. McPike operated (and was allowed to operate by his employer, Pierce Transit, and medical examiner, Dr. Gilbert) a commercial vehicle despite his, his superiors', and his medical examiner's actual and imputed knowledge of multiple medical conditions that put him at high risk of a sudden loss of consciousness. As of the date of the collision, Mr. McPike's known and high-risk medical conditions included high blood pressure, insulin-dependent diabetes with poor blood sugar control, obstructive sleep apnea, irregular heart rhythm, obesity, and PTSD.

Records in Pierce Transit's human resources and workers compensation files, which were available to them through medical records requests and requests for Commercial Driver's License (CDL) examinations, disclosed Mr. McPike's high risk medical conditions and a history of his incapacitation associated with those medical conditions. Similarly, Dr. Gilbert had actual or imputed knowledge that Mr. McPike had medical examination findings and a medical history that made him too ill to safely operate a commercial vehicle. Nonetheless, Mr. McPike, Pierce Transit, and Dr. Gilbert ignored the multiple warning signs, gambled by placing Mr. McPike behind the wheel, and on May 26, 2015, Mr. Sartin (and others) paid the price.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred in granting Defendants Estate of Alonzo McPike and Pierce Transit's Renewed Motion for Summary Judgment on January 4, 2019. CP at 1292.
- B. The trial court erred in granting Defendants Multicare Health System and Richard Gilbert, M.D.'s Motion for Summary Judgment on March 1, 2019. CP at 1837.
- C. The trial court erred when it struck Dr. Fletcher's expert witness declaration from Plaintiff's Opposition to Defendants Multicare and Dr. Gilbert's Motion for Summary Judgment. CP at 1837.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Do material questions of fact exist as to whether it was foreseeable to Alonzo McPike and/or Pierce Transit that Mr. McPike could suffer a sudden medical event while operating the transit bus such that summary judgment in favor of Pierce Transit and the Estate of McPike was improper? YES.
- B. Do material questions of fact exist as to whether it was foreseeable to Richard Gilbert, MD that Alonzo McPike could suffer a sudden medical event while operating the Pierce Transit bus such that summary judgment in favor of Dr. Gilbert and Multicare was improper? YES.

IV. STATEMENT OF THE CASE

Regulatory Background

Pierce Transit bus drivers must hold a CDL. CP at 18. In order to obtain a CDL, drivers must undergo periodic physical examinations that are heavily regulated. Under the regulations, certification examinations are not valid unless the medical examiner is listed on the National Registry of Certified Medical Examiners. 49 CFR 391.43(a). To join the registry, the licensed physician must pass a course. CP 1570-71.

The minimum physical qualifications that must be evaluated by the examiner are delineated in 49 CFR 391.41. This includes evaluations of

the extremities, the cardiovascular system, respiratory function, vision, hearing, and mental health, as well as screenings for hypertension, diabetes, arthritis, cardiovascular disease and other diseases, epilepsy, and drug and alcohol abuse. 49 CFR 391.41 and Appendix to Part 391 - Medical Advisory Criteria. The examiner has the authority to grant or deny medical certification and may not set the expiration date for longer than 24 months. 49 CFR 391.45(b). *See also* CP at 1708-10. The examiner can also make a card extension contingent upon passing additional medical testing. CP at 1708-10.

Dr. Gilbert is a certified Department of Transportation (DOT) and Federal Motor Carrier Safety Administration (FMCSA) medical examiner, and therefore, Dr. Gilbert is required by regulation to "be knowledgeable of the specific physical and mental demands associated with operating a commercial motor vehicle," of the medical advisory criteria prepared by the FMCSA, and be proficient in the "medical protocols necessary to adequately perform the medical examination." 49 CFR 391.43(c).

Factual Background

On May 26, 2015, Alonzo McPike reported to Pierce Transit headquarters at 4:04 a.m. to begin his shift as a public bus driver. CP at 74, 81. Approximately a half-hour later, Mr. McPike began his shift operating a Pierce Transit bus on Route 41 between the 72nd Street Transit

Center and the 10th and Commerce Zone E. CP at 74. Approximately four hours into his shift, Mr. McPike was driving his route on Portland Avenue East in Tacoma when passengers noticed him slumped in the driver's seat, held in by only his seatbelt. CP at 43, 98. Mr. McPike's bus careened ahead and rear-ended a pickup truck that was stopped at a red light, causing a chain of collisions involving *five vehicles*. CP at 42-65. Mr. Sartin was a passenger in the pickup truck that the bus struck first and that was pushed by the bus into another vehicle. *Id.*

Emergency responders found Mr. McPike unconscious in his bus and determined that his heart had stopped. CP at 121. Although paramedics were able to restore Mr. McPike's heartbeat, Mr. McPike never regained consciousness and died five weeks later. CP at 121-22. Mr. McPike's cause of death was listed on the death certificate as anoxic brain injury, cardiac arrest, diabetes and hypertension, and obesity, with untreated obstructive sleep apnea as a contributing factor. CP at 388.

There are varying accounts from bus passengers as to Mr. McPike's behavior prior to the collision. *See* CP at 90-99. While some passengers reported seeing nothing unusual about Mr. McPike or the operation of the bus until Mr. McPike slumped over, others noticed that Mr. McPike was

acting out of character, missing scheduled stops, and driving abnormally in the minutes before the collision.¹ CP at 380-84.

Although Pierce Transit has video cameras placed in its busses, and the footage is available for preservation for 30 days, Pierce Transit *did not preserve the video* for the full four-hours of bus operation prior to the collision; instead, it preserved only eight-minutes of video, from 8:32 a.m. through 8:40 a.m., for the day of the collision. CP at 390-396. Indeed, despite the severity of the collision, Pierce Transit preserved *less than two-minutes of footage* preceding the accident. *Id.*

At the time of the accident, Mr. McPike had been a Pierce Transit bus driver for 18-years. CP at 74. Pursuant to the terms of his employment, Mr. McPike held a CDL issued by the Washington State Department of Licensing. CP at 75. In order to qualify for a CDL license in Washington, Mr. McPike was required to undergo testing that required him to demonstrate a basic working knowledge of the medical conditions that can disqualify a driver from operating a commercial motor vehicle. CP at 351-54. He had also received specific instructions from his medical

¹ Passenger Pamela Corba boarded the bus and noted that she recognized Mr. McPike and was surprised that he was stone faced and did not acknowledge her when she boarded. CP at 381. Ms. Corba noticed that Mr. McPike missed a number of stops on the route, even though there were people waiting at the stop. *Id.* Ms. Corba also observed the bus lacked the acceleration necessary to climb an incline on Portland Avenue, causing the bus to nearly come to a stop. *Id.* Ms. Corba later overheard some passengers near the front of the bus comment that the bus was traveling very fast. *Id.* Passenger Robert Bennett also noticed that Mr. McPike failed to stop at several stops despite passengers yelling at Mr. McPike that he had missed their stop. CP at 383-84.

providers that his medical conditions placed him at risk for developing a serious cardiac condition. *Id.* By regulation, Mr. McPike was also required to undergo periodic physical examinations to ensure that he was physically fit to drive a commercial vehicle. CP at 105-08. In addition to hypertension, Mr. McPike had a host of other medical problems that should have been of concern to him and his medical examiners. CP at 19, 211. Mr. McPike had a history of hyperlipidemia, diabetes, obstructive sleep apnea, erectile dysfunction, cardiac arrhythmia, frequent alcohol use, involuntary muscle twitching, post-traumatic stress disorder, daytime fatigue, and morbid obesity. CP at 343-47. Throughout 2014, Mr. McPike's diabetes caused him to miss eight days of work, and his doctors noted six episodes of non-compliance with physician recommendations for controlling his diabetes. CP at 237-43. Mr. McPike also reported experiencing daytime fatigue on several occasions in the year preceding the accident, including two occasions in March 2015. CP at 353.

From 1998 to 2015, Mr. McPike's medical records indicate 17-separate instances in which Mr. McPike's medical providers indicated episodes of cardiac arrhythmia. CP at 343. Beginning June 10, 2010, Mr. McPike provided FMLA certifications from Dr. Mark F. Brooks, Mr. McPike's personal doctor, that placed Pierce Transit on notice that diabetes will cause incapacity that is not predictable and that Mr. McPike's

comorbid conditions may cause periodic flare-ups that are unpredictable, but may cause him to miss work approximately two times per year. CP at 190-246. Similar certifications were provided to Pierce Transit on August 1, 2011, and again on March 19, 2014. CP at 214-17, 240-43.

Mr. McPike concealed his significant medical, psychological, and substance abuse history from his employer and his CDL medical providers, thwarting their ability to accurately address his fitness to operate a commercial vehicle. CP at 349-51, 1214-15, 1239-40. Indeed, he obtained his CDL repeatedly under misleading circumstances, then chose to operate the passenger bus, despite his significant medical and psychological history and his declining health. CP at 341-59, 360-76.

Mr. McPike's supervisor at Pierce Transit, Marvin Gilliam, testified that if Mr. McPike had disclosed the sleep apnea, hypertension, irregular heart rhythm, and obesity, he would have approached Human Resources about requiring an extra fit for duty examination. CP at 333-34. Additionally, if known, Mr. McPike's history of substance abuse would have triggered an evaluation by a substance abuse professional. CP at 1234-40. This would have included information from the employment file that he had been previously terminated for cannabis use and never got tested again. CP at 1241-44.

Notwithstanding Mr. McPike's numerous omissions, prior to the collision, Pierce Transit still had Department of Licensing, Workers Compensation, FMLA Certifications, Absence Reports, and other records that placed it on notice that Mr. McPike had multiple serious medical conditions. *Infra*. Most prominently, Pierce Transit's own records contained the following red flags:

1. The July 13, 2007 Medical Examiner's certificate contains a list of nine medications that Mr. McPike was taking. The form also includes detailed educational material with definitions of disqualifying medical conditions. 49 CFR 391.41. CP at 183.
2. On August 15, 2007, Pierce Transit itself terminated Mr. McPike for a positive drug test (Cannabis). CP at 187-88.
3. On February 26, 2009, Mr. McPike underwent a recertification exam by Pierce Transit under a second chance program and admitted to alcohol use. CP at 190-95.
4. After presenting FMLA certifications from Dr. Brooks from 1999 through 2007 that certified his diabetes was not expected to cause absences from work, Dr. Brooks changed the certification on June 10, 2010, to note the diabetes will cause incapacity that is 'not predictable.' CP at 198. He further reported Mr. McPike's "co-morbid conditions" may cause periodic flare-ups that are

unpredictable but may cause him to miss work approximately two times per year. *Id.*

5. Dr. Brooks completed a nearly identical certification on August 1, 2011. CP at 214-17.
6. In January 2012, Mr. McPike missed four-days of work due to diabetes. CP at 219.
7. On March 6, 2012, Mr. McPike was in a work-related collision resulting in neck and back injuries and a diagnosis of acute PTSD. CP at 221-22. The injuries caused disability, prevented him from working, and required psychiatric treatment. CP at 224-33.
8. On January 21, 2013, Mr. McPike completed an Intrastate Medical Waiver application in which he identified his disqualifying medical condition as a “well controlled diabetic.” CP at 235. The application is signed by Dr. Brooks, however, it is incomplete because Dr. Brooks did not check the appropriate box to indicate whether the medical condition is likely to interfere with Mr. McPike’s ability to safely operate a motor vehicle. *Id.*
9. Mr. McPike missed 14-days of work in January 2014 due to diabetes complications. CP at 237-38.
10. On March 19, 2014, Dr. Brooks certified that Mr. McPike’s diabetes would now cause incapacitation for unpredictable periods

of time. CP at 242. Dr. Brooks increased Mr. McPike's treatment frequency to four-times per year and noted that flare-ups from the condition would incapacitate Mr. McPike from operating a commercial vehicle approximately twice per year. CP at 242.

11. Mr. McPike also reported additional absences due to out-of-control diabetes on March 26, 2014; March 27, 2014; August 29, 2014; and August 30, 2014. CP at 245-46.

12. Mr. McPike's Medical Waiver cards indicated his diabetes was not likely to interfere with his ability to operate a commercial vehicle, but those indications are in conflict with the FMLA applications submitted by Dr. Brooks on Mr. McPike's behalf. CP at 248-51.

In addition to a review of its own records, if Pierce Transit had requested the medical examination records publicly available through the Department of Licensing, it would have identified the following red flags regarding Mr. McPike's fitness to operate a bus:

1. A 2002 arrest for DUI. CP at 269-70.
2. A February 14, 2011, Medical Examination Report that details Mr. McPike's health history including diabetes, frequent alcohol use, and narcotic use. CP at 272-74. The report also noted that Mr. McPike measured 6 feet tall and 270 pounds. *Id.*

3. A November 7, 2011, Medical Examination Report that noted a history of high blood pressure, diabetes, chronic low back pain, regular/frequent alcohol use, obesity, suspicion of sleep apnea, and a blood pressure finding of 150/72. CP at 277-79.
4. A January 30, 2015, Medical Examination Report that detailed the preceding five years of Mr. McPike's health history including, high blood pressure, diabetes, sleep disorders, and sleep apnea, and identifies the medical providers who had previously treated Mr. McPike for diabetes and high blood pressure. CP at 279-83. This report also recorded Mr. McPike's blood pressure as 162/64, his height as 6 feet, and his weight as 296 pounds. *Id.* The physical examination portion of the report noted abnormalities in Mr. McPike's general appearance, *heart*, and neurological examination. *Id.* The examiner's comments include, "overweight, irregular rhythm, probably PAC's." *Id.*

Despite the severity of Mr. McPike's medical condition, Pierce Transit ignored these multiple red flags and failed to use the authorizations, already signed by Mr. McPike, to release the information it had in its workers compensation files to conduct *any investigation* into Mr. McPike's fitness to operate one of its buses. CP 290. Further, if it had wanted to conduct any additional scrutiny of Mr. McPike's fitness to

drive, it also could have simply requested Mr. McPike sign a medical release. CP at 293.

In ignoring the perilous state of its driver's health, Pierce Transit ran afoul of its policies. *Infra*. Indeed, its Operational Manual boasted expectations that its Operators would receive the "best training possible" and identified driving safety as an "essential responsibility of the job." CP at 301. During orientation, new drivers are told that "health and wellness is something that they need to be cognizant of." CP at 297. But there was no other culture within the corporation to encourage operator health and wellness. CP at 302.

Pierce Transit Safety Officer Jason Hovde admitted in his deposition that, as a safety officer, he did not encourage or educate operators about being medically qualified to operate their vehicles. CP at 302. Similarly, Mr. McPike's former Pierce Transit assistant manager, and then-CDL Compliance Officer, Marvin Gilliam testified there was no obligation for a driver to report if they felt they were too ill to operate a vehicle. *Infra*.

He testified:

A It was an unspoken requirement. But in most cases, I will say operators fear for their employment, and they may or may not tell us. They were not required to.

Q When you took over in safety and quality service, did you -- was that an open conversation that you would

have with your drivers about feeling comfortable raising that topic?

A No.

CP at 331.

Thus, Pierce Transit did not expect or encourage its operators to be honest with their examining physicians for purposes of getting their medical card. CP at 329-30. Pierce Transit likewise did not have an effective management system in place to monitor operator health and wellness. CP at 355-59, 373-76. For example, Pierce Transit did not assign anyone to be in charge of operator health. CP at 332. In the five years before the collision, the Safety Committee never discussed improving operator health and welfare, with the only discussion on the medical qualification regulations and standards being a *one-time discussion* in which Marvino Gilliam briefed the committee about changes to CDL medical card requirements. CP at 296-97. Thus, Pierce Transit's systems prevented its various departments from communicating with each other about its drivers' critical medical conditions. CP at 374-75.

In the context of this lack of safety culture, Mr. McPike did not disclose, and Pierce Transit did not attempt to discover, that he had been experiencing the warning signs of cardiovascular disease for years before the collision, including chest pain and dizziness in 2007 and 2009. CP at

1233-1234. He also had fatigue in 2015, notwithstanding compliance with sleep apnea treatment. CP at 1233-34. Mr. McPike also had multiple instances of arrhythmias and had tachycardia noted in 2005, 2012, and 2014. CP at 1235, 1775.

Mr. McPike's general health was deteriorating in the months prior to the collision. CP at 1339-34. In November 2014, five months before the collision, Mr. McPike presented to Dr. Kirk Harmon, a certified CDL medical examiner, for a medical evaluation to renew his CDL. CP at 277-79. Dr. Harmon *denied a full-year renewal* of Mr. McPike's CDL because his blood pressure was 150/72 on the date of the exam. CP at 1714-16. In a letter to Mr. McPike dated November 7, 2014, Dr. Harmon warned Mr. McPike that his *blood pressure was too high*, and that DOT regulations required his blood pressure to be no higher than 140/90 to maintain licensure. CP at 1728, 1105. Dr. Harmon also ordered an additional examination for obstructive sleep apnea. CP at 1713, 1202.

As required by DOT standards, Mr. McPike underwent regular blood pressure checks with his primary care provider, Dr. Brooks, in December 2014 and January 2015. CP at 1481. Mr. McPike's blood pressure was recorded as 134/70, 138/68, and 132/70 over the course of these two months. CP at 1481. But, by comparison, Mr. McPike had *five*

disqualifying blood pressures taken by other Multicare providers and documented in chart notes between November 7, 2014 and March 3, 2015.

- November 7, 2014: 150/72 (Dr. Harmon). CP at 346.
- December 18, 2014: 146/78 (ARNP Bailey). CP at 1728.
- January 29, 2015: 148/75 (ARNP Bailey). CP at 1728.
- January 30, 2015: 162/64 (Dr. Gilbert). CP at 346.
- March 3, 2015: 140/78 (Dr. Wang). CP at 346, 351-52.

Despite these five disqualifying blood pressure readings, on January 30, 2015, Mr. McPike presented to Dr. Gilbert for his required medical re-examination to renew his CDL. CP at 10. At this appointment, Mr. McPike completed a medical history section in his medical examination report. CP at 115. Mr. McPike checked boxes marked “Yes” next to “Any illness or injury in the last five years,” “High blood pressure,” “Diabetes or elevated blood sugar...,” and “Sleep disorders, pauses in breathing while asleep, daytime sleepiness, or loud snoring.” CP at 115.

Dr. Gilbert’s exam included his own physical examination of Mr. McPike and a review of his medical history through records supplied by Mr. McPike’s treating providers, including Dr. Harmon’s November 2014 letter refusing to renew Mr. McPike’s CDL because of his high blood pressure reading. CP at 1101-06. Dr. Gilbert noted that Mr. McPike had current conditions of: (1) insulin-dependent type 2 diabetes (which required a special waiver for licensure); (2) hypertension; (3) sleep apnea; (4) irregular cardiac rhythm identified as premature atrial contractions;

and (5) overweight. CP at 115, 1690. Dr. Gilbert recorded Mr. McPike's blood pressure on the day of the exam as 162/64, a Stage 2 hypertension level. CP at 116, 1674. An individual diagnosed with Stage 2 Hypertension (blood pressure is 160/100 to 179/109) should be treated, and can only be issued a one-time certificate for three months. *Infra*. The industry standard is memorialized at 49 CFR 391.43(f)², which provides:

Blood pressure (BP). If a driver has hypertension and/or is being medicated for hypertension, he or she should be recertified more frequently. An individual diagnosed with Stage 1 hypertension (BP is 140/90-159/99) maybe certified for one year. At recertification, an individual with a BP equal to or less than 140/90 maybe certified for one year; however, if his or her BP is greater than 140/90 but less than 160/100, a one-time certificate for 3 months can be issued. An individual diagnosed with Stage 2 (BP is 160/100-179/109) should be treated and a one-time certificate for 3-month certification can be issued. Once the driver has reduced his or her BP or equal to or less than 140/90, he or she may be recertified annually thereafter. An individual diagnosed with Stage 3 hypertension (BP equal to or greater than 180/110) should not be certified until his or her BP is reduced to 140/90 or less, and may be recertified every 6 months.

² The FMCSA Medical Examiner Handbook details the dangerous risks associated with hypertension. It says:

Hypertension alone is unlikely to cause sudden collapse; however, hypertension is a potent risk factor for the development of more serious cardiovascular disease (CVD), peripheral vascular disease, and chronic renal insufficiency. BP greater than or equal to 140/90 is deemed high for most individuals without other significant cardiovascular risk factors. In individuals ranging from 40 to 89 years of age, for every 20 mm Hg systolic or 10 mm Hg diastolic increase in BP, there is a doubling of mortality from both ischemic heart disease and stroke. The relationship between BP and risk of a CVD event is continuous, consistent, and independent of other risk factors. Both elevated systolic and diastolic BP are risk factors for coronary heart disease (CHD). CP at 1605-06.

Despite these conditions, Dr. Gilbert, without further investigation, determined that Mr. McPike's health problems would not interfere with his ability to safely drive a commercial vehicle and did not disqualify him from receiving a CDL medical certificate in spite of the Stage 2 disqualifying blood pressure taken on the day of the exam. CP at 1674, 1682. Dr. Gilbert signed-off on Mr. McPike's fitness determination on January 30, 2015, with an expiration date of January 30, 2016. CP at 118.

In the months following his January 2015 CDL examination with Dr. Gilbert, Mr. McPike's health continued to deteriorate. *Infra*. On March 3, 2015, Mr. McPike visited his endocrinologist, Dr. Wang, in relation to his diabetes and complained of joint and muscle pains. CP at 532-33. Once again, Mr. McPike's blood pressure was too high – 140/78. *Id.* Dr. Wang noted that Mr. McPike's blood gas levels had worsened as a result of uncontrolled diet and irregular eating habits. *Id.* He was chastised by Dr. Wang for, contrary to doctor's instructions, not regularly checking his blood gas levels, again failing to not bring in his log books, and allowing his weight to balloon to its highest level ever at 305 pounds. *Id.* Mr. McPike had been warned by his medical providers of the serious implications of his medical conditions. CP at 351-52, 373-75. Less than three-months after this doctor visit, Mr. McPike's heart stopped while driving his Pierce Transit bus, causing the collision. CP at 1645.

At the hospital on the day of the collision, Mrs. McPike confirmed her husband's deteriorating health and his refusal to take care of his health; she even told social worker, Lisa Ryan, she has "always feared that his self-inflicted health problems would cause something this, and it would all land on me. And now it has happened". CP at 378.

Procedural Background

Plaintiff Christopher Sartin filed a Complaint for Personal Injuries against Defendants Pierce Transit and the Estate of Alonzo McPike (collectively "Pierce Transit").³ CP at 1-6. On December 18, 2017, Pierce Transit brought a Motion for Summary Judgment seeking dismissal of the complaint. CP at 16. The trial court denied these motions on January 23, 2018. CP at 972.

Thereafter, Mr. Sartin filed a Complaint against Defendants Multicare Health System and Richard Gilbert, M.D. (collectively referred to as "Multicare") for negligence causing injuries arising from the same motor vehicle accident, and the parties filed a joint motion to consolidate the two cases, which the court granted. CP at 974, 983.

On November 30, 2018, Pierce Transit filed a Renewed Motion for Summary Judgment for dismissal. CP at 1009-24. On January 4, 2019, the

³ Defendant Pierce Transit is also known as the Pierce County Public Transportation Benefit Area Corporation. For clarity, this brief refers to this Defendant solely as "Pierce Transit" and also refers to the Pierce Transit and the Estate of Alonzo McPike collectively as "Pierce Transit."

trial court granted Pierce Transit's renewed summary judgment motion, stating on the record that it was granting the motion because Mr. McPike's loss of consciousness was not foreseeable as a matter of law. CP at 1294. Mr. Sartin filed a Motion for Reconsideration of Pierce Transit's summary dismissal, however, the court denied reconsideration without responsive briefing or oral argument. CP at 1295, 1585.

After the court granted Pierce Transit's renewed summary judgment motion, Multicare filed a Motion for Summary Judgment seeking dismissal of Mr. Sartin's complaint against it. CP at 1379. On March 1, 2019, the court issued an order striking Mr. Sartin's expert witness, Dr. Fletcher, on the causation and cardiac issues, and granting Multicare's Motion for Summary Judgment without any explanation. CP at 1837. Mr. Sartin appeals . CP at 1840.

V. ARGUMENT

A. This court's review is de novo.

The purpose of summary judgment is not to cut litigants off from their right to "trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exist[s]." *Keck v. Collins*, 184 Wn. 2d 358, 369, 357 P.3d 1080 (2015). Thus, summary judgment is appropriate only when the record before the court "shows that there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c). A fact is material if it affects the outcome of the litigation. *Keck*, 184 Wn.2d at 370, n.8. In analyzing a motion for summary judgment, Washington courts must consider all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party and summary judgment is proper only when reasonable persons could reach only one conclusion from the evidence presented. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

The party moving for summary judgment bears the burden to prove by uncontroverted facts that no genuine issue of fact exists. *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979). In reviewing summary judgment orders, this court’s review is de novo, with all evidence and reasonable inferences viewed in the light most favorable to the non-moving party. *Keck*, 184 Wn.2d at 370.

B. A reasonable person could foresee that Mr. McPike, Pierce Transit, and Dr. Gilbert knew or should have known that Mr. McPike’s serious, co-occurring health problems created a risk that he would become incapacitated while driving; therefore, the trial court erred in determining that Mr. McPike’s loss of consciousness was unforeseeable as a matter of law.

The duties owed by Mr. McPike, Pierce Transit, Dr. Gilbert and Multicare are separate and distinct. *See e.g.*, CP at 360-76. In the case of each defendant, there are material issues of fact as to whether a reasonable

person in the position of the defendant could have foreseen that Mr. McPike would lose consciousness while driving and whether he was medically fit to be operating a commercial vehicle.⁴ *See e.g.*, CP at 342-59. Pierce Transit has stated that it did not have a duty to monitor Mr. McPike's fitness to operate a commercial vehicle and that Mr. McPike did not breach any duty despite his serious and ongoing and well documented health conditions. CP at 1017-19. They did not address Mr. McPike's negligence. Similarly, Dr. Gilbert and Multicare have stated they do not have a duty here. CP at 1394. In sum, the defendants contend that no one had a duty here. Conversely, Mr. Sartin contends that each defendant had a duty. Any other result would be illogical and contrary to the regulations and existing law. As such, the trial court erred in granting summary judgment for the defendants.

⁴ Mr. McPike and Pierce Transit each had separate responsibilities to recognize that Mr. McPike's health conditions created a foreseeable risk that he would become incapacitated while driving. However, Pierce Transit is not only liable for its own failure to recognize this risk, but also for Mr. McPike's failure to recognize this risk under the doctrine of respondeat superior. Under this doctrine, an employer is liable for its employee's negligence causing injury to a third party if the employee was acting in the scope of employment at the time of the occurrence. *Rahman v. State*, 450 Wn. App. 345, 350, 208 P.3d 566 (2009). Although a jury typically decides whether a person is working in the scope of employment at a given time, when there can only be one reasonable inference from undisputed facts, the issue may be determined as a matter of law. *Id.* at 351. Here, there is no dispute that Mr. McPike was driving a bus on his scheduled route in accordance with his job duties directed by Pierce Transit at the time of the accident. CP at 9. The only reasonable inference to draw from these facts is that Mr. McPike was acting in the scope of employment at the time of the collision, and Pierce Transit is liable for the negligent acts of Mr. McPike.

Under black-letter law, the driver of an automobile has a duty to operate it in a reasonable manner. *Presleigh v. Lewis*, 13 Wn. App. 212, 214–15, 534 P.2d 606 (1975). This duty is breached when a driver gets behind the wheel when he knows his ability to drive in a reasonable manner might be affected in some way. *Id.* Simply because the driver does not know the precise way in which his ability to drive safely might be affected, does not relieve the driver of his duty of care under the law. *Id.* Although a driver's sudden, unforeseeable loss of consciousness is a complete defense to any claims of negligence attributable to the driver's incapacitation, that defense is not available if the incapacitation was foreseeable or reasonably might have been foreseeable. *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 465-66, 398 P.2d 14 (1965) amended by 401 P.2d 350 (1965).

In *Kaiser*, a bus passenger was injured when the bus driver lost consciousness and hit a telephone pole. 65 Wn.2d at 462. The bus driver was prescribed medication that caused drowsiness, but he testified that the doctor did not warn him of this side effect. *Id.* at 462-63. The accident occurred when the driver, on the first day he took the medication, began feeling groggy a few miles before the accident occurred and blacked out just before the bus left the road. *Id.* at 463.

The plaintiffs in *Kaiser* brought an action in negligence against the bus driver, the bus company, and the doctor. *Id.* at 462. The court determined that it was for the jury to decide whether the bus driver was negligent in driving with a condition he knew to be potentially incapacitating or continuing to drive after the onset of his drowsiness. *See id.* at 468-69. The court further instructed the jury that the driver's doctor would be liable for negligence if they found that the doctor failed to warn the driver of the side effects of the drug when prescribing it. *Id.*

Foreseeability is a question of fact for the jury and should only be determined as a matter of law when reasonable minds could not differ. *Lee v. Willis Enterprises, Inc.*, 194 Wn.App. 394, 401-02, 377 P.3d 244 (2016). Harm is foreseeable when the result of the act is within the general field of danger which should have been anticipated. *Id.* The general field of danger in the commercial driving setting is codified in Chapter 49 CFR, the regulatory scheme which sets industry standards for commercial drivers. CP at 339-41, 365-71. 49 CFR 392.3 states:

- A. No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the commercial motor vehicle....

In other words, the court erred in inquiring whether the sudden cardiac arrest was foreseeable. Rather, the question should have been whether there was a material question of fact as to whether a sudden incapacitating event fell within a general field of danger, which should have been anticipated. As a commercial driver, the general field of danger is well defined by the industry standards codified in 49 CFR 392.3. More specifically, the question would be whether there are material questions of fact as to whether each Defendant, within their own scope of duty, should have anticipated that Mr. McPike was impaired, or so likely to become impaired, as to make it unsafe for him to begin or continue to drive a Pierce Transit bus.

1. Mr. McPike knew or should have known that he was at risk for incapacitation while driving.

Mr. McPike knew or should have known that he was generally at risk of becoming incapacitated while driving and based on his behavior leading up to the collision in accelerating unpredictably, speeding, and missing stops, he specifically knew or should have known that it was unsafe for him to continue driving the bus. *See* CP at 381-84. But Mr. McPike withheld his dangerous medical history from his employer and DOT medical examiner. CP at 349-51. Finally, Pierce Transit's spoliation of

key video creates a presumption that Mr. McPike exhibited actual signs of illness on May 26, 2015.

a. Mr. McPike knew of and withheld his dangerous medical history from his employer and medical examiners.

In order to obtain a CDL, Mr. McPike had to submit to testing and demonstrate a working knowledge of disqualifying medical conditions for commercial drivers. CP at 335-59. Thus, Mr. McPike was aware that his long-term health issues of diabetes, heart arrhythmia, and obesity had been compounded with disqualifying hypertension and obstructive sleep apnea in the year before the accident such that his health status at the time of the accident disqualified him from driving. CP at 335-59. 352-55.

Mr. McPike was warned in the November 2014, letter from Dr. Harmon that he would not be qualified for licensure if his blood pressure was not adequately controlled to remain under 140/90. CP at 1105. By the date of his exam with Dr. Gilbert on January 30, 2015, his blood pressure had increased to a Stage 2 Hypertension at 162/64. CP at 115-17, 1674, 1682. Despite knowing that his blood pressure was not adequately controlled, and that the blood pressure readings physically disqualified him from driving a commercial vehicle, Mr. McPike continued to drive Pierce Transit buses. CP at 351-55. In addition, Mr. McPike reported to physicians throughout 2015 that he was experiencing fatigue, despite his

ongoing treatment for sleep apnea. CP at 349-50. Still, Mr. McPike continued to drive. *Id.*

Thus, under *Presleigh*, Mr. McPike breached his duty of care by driving his Pierce Transit route because he was aware that his ability to drive in a reasonably safe manner might be affected in some way due to his myriad health conditions. 13 Wn. App. at 215. Mr. McPike knew or should have known that driving while fatigued was dangerous, yet he drove while he experienced ongoing bouts of fatigue. *Supra.* Mr. McPike had been warned that driving with blood pressure readings over 140/90 was dangerous, yet he drove knowing his blood pressure was hovering in the 140/78 to 162/64 range in the months before the collision. Mr. McPike should have foreseen that his ability to drive in a reasonably safe manner would in some way be affected by his health problems. His non-compliance in regards to treatment for his many medical conditions was a significant contributing factor in causing his sudden incapacitation and resulting collision on May 26, 2015. CP at 349-51.

In addition to the warnings that Mr. McPike had of the general risks of driving in his condition, the record before the court supports a finding that Mr. McPike was experiencing symptoms that should have alerted him to stop driving his bus on the day of the accident. *See* CP at 381-84. Under *Kaiser*, if Mr. McPike was experiencing symptoms that indicated

he was becoming impaired, Mr. McPike would have breached his duty of care by continuing to drive at the onset of those symptoms. 65 Wn.2d at 468. Because there is evidence in the record that Mr. McPike was acting unusual up to 30 minutes before the accident, including the eye-witness accounts that Mr. McPike was driving at inappropriate speeds, missing scheduled stops, and behaving out of character before the accident, there is a genuine factual question regarding Mr. McPike's compliance with his duty of care. CP at 381-84. As such, summary judgment in favor of Pierce Transit was inappropriate.

b. Pierce Transit's destruction of video footage creates a presumption that Mr. McPike exhibited signs of illness on the date of the collision.

In addition to the eye-witness reports of Mr. McPike's irregular behavior, Mr. Sartin is also entitled to an inference that the video footage of the time before the accident (except for the two minutes that were preserved by Pierce Transit) that was destroyed, was harmful to Mr. McPike and Pierce Transit. Indeed,

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Tavai v. Walmart Stores, Inc., 176 Wn. App. 122, 134-35, 307 P.3d 811 (2013). In determining whether a spoliation inference is warranted, the court considers: (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the party in control of the evidence. *Id.* at 135. The importance of the evidence turns on the particular circumstances of the case, and the controlling party's culpability turns on its conscious disregard of the importance of the evidence or whether there is an innocent explanation for the destruction. *Id.*

Although the trial court did not rule on the issue of spoliation before summarily dismissing Pierce Transit, the issue was thoroughly briefed and called to the trial court's attention during the summary judgment proceedings.⁵ CP at 146. Pierce Transit's Public Safety Records Supervisor, Katie Marcellia, testified in her deposition that she was aware that the accident caused several injuries, and that claims would likely be filed as a result; yet, she chose to preserve a total of eight minutes of video footage, only two of which preceded the accident. CP at 166-67. Additionally, Ms. Marcellia testified that she could have easily preserved the footage of Mr. McPike's entire shift driving the bus, but simply chose

⁵ Because the trial court did not rule on this issue and only considered the issue in reference to summary judgment proceedings, the issue is reviewed de novo. *Tavai*, 176 Wn. App. at 135.

to extract merely eight minutes and then allowed all other footage of the day of the accident to be written over. CP at 168-69.

This testimony establishes that Ms. Marcelia knew of the importance of the footage, yet consciously disregarded the importance of it by simply allowing the bulk of the footage to be written over despite the ease of preserving it. This testimony is strong enough to support an inference that the evidence destroyed by Pierce Transit showed that Mr. McPike was exhibiting signs of physical or mental distress, or was driving erratically, putting him on notice that it was unsafe for him to continue to drive and his later loss of consciousness was foreseeable. As such, summary judgment was improper.

2. Pierce Transit knew or should have known that Mr. McPike was at risk for becoming incapacitated while driving.

Pierce Transit's obligation to ensure that their drivers are physically qualified to drive extends beyond merely ensuring they have a valid CDL medical certificate. Indeed, Pierce Transit has a non-delegable duty to make sure the bus operator is physically able to safely operate the bus. *See e.g.*, CP at 1151-52, 1171-72, 1180.

Mr. Sartin introduced expert testimony from David Fletcher, MD, and Lew Grill. *See e.g.*, CP at 335, 360. David Fletcher is an occupational medicine physician and expert on commercial vehicle fitness for duty. CP

at 335-59. Lew Grill is an expert on the regulations and industry standards that apply to commercial operators and motor carriers such as Mr. McPike and Pierce Transit. CP at 360-76.

It is Dr. Fletcher's opinion on a more probable than not basis that (1) the cardiac arrest was foreseeable; (2) Mr. McPike was medically unfit to operate a commercial vehicle prior to, and at the time of, the collision; and (3) that this collision was preventable. CP at 342-52.

Lew Grill agrees that it is foreseeable that bus operators can cause significant harm if suffering from high risk medical conditions while operating the commercial vehicle. CP at 373-76. These experts agree that Pierce Transit failed to adequately train or supervise Mr. McPike or investigate Mr. McPike's known serious medical conditions in violation of industry standards and applicable statutes and regulations. CP at 335-59, 360-76. Further, but for Mr. McPike and Pierce Transit's unreasonable actions, the collision would not have occurred. CP at 346, 376. Mr. Grill testified as to Pierce Transit's responsibilities:

- A. ...no motor carrier should allow a person to drive, no driver shall drive if their ability or alertness is so impaired or so likely to become impaired by fatigue, illness, or any other cause as to make it unsafe for him/her to begin or continue the operation of a commercial motor vehicle. That's a motor carrier's call. That's our custom and practice. If it looks like they're not going to be able to – as a reason of health and waning health to be able to do this type of a job on

a day-by-day basis and become cured from whatever illness they have, let alone illnesses, plural, it's on us as a motor carrier. CP at 1169-70.

As part of this duty, Pierce Transit should receive and review DOT medical examination long forms and other medical records available to them and analyze whether there are inconsistencies or red flags that may make that driver a risk to himself and the general public. CP at 1155-64. Pierce Transit had access to medical records in their workers compensation division, operations division, occupational health, and FMLA departments. CP at 1182. It has “the ability to request other information” about customers, the public, and the bus operator. CP at 1182. This requires hiring someone who understands the industry standards, works in the business, understands the safety culture, and is qualified to make the determination as to whether the driver is impaired, or likely to become impaired by illness or fatigue. CP at 1183.

It is insufficient to rely upon the DOT medical examiner who may not fully understand the employer's operation and “the rigors of operating commercial motor vehicles day in and day out.” CP at 1167-68, 1177-78.

Indeed, Mr. Grill testified:

- A. ...Having a medical waiver is one thing, passing him on a DOT physical – and if you give the impression that the person is absolutely good to go no matter what, he can handle the job, don't worry about a thing, and if the motor carrier on the other end. . . is willing to accept

that without any other further looking into it, then that in itself is total institutional negligence and it's aiding and abetting. CP at 1177-78.

Federal guidelines regarding transportation safety require motor carriers to ensure that their drivers are properly trained, supervised, and monitored to ensure that they do not pose a risk of harm to the general public. CP at 339-41, 365-73. If motor carriers fail to implement management systems that effectively prevent violations of federal transportation regulations, they essentially "permit" violations of the regulations. CP at 373-76.

49 CFR §391.41(b) details 13 medical conditions that are statistically significant risk factors for preventable crashes. CP at 345-46. ***Mr. McPike exhibited symptoms of 8 of the 13 conditions at the time of the collision.*** *Id.* Mr. Gilliam, a Pierce Transit assistant manager and then-CDL Compliance Officer, testified at deposition that he would have approached human resources and recommended that Mr. McPike undergo an additional medical examination had he become aware of Mr. McPike's particular co-occurring medical conditions. CP at 334.

Pierce Transit doesn't have an effective management system in place to monitor operator health and wellness. CP at 355-59, 373-76. For example, Pierce Transit did not assign anyone to be in charge of operator health. CP at 332. In the five years before the collision, the Safety

Committee never discussed improving operator health and welfare. CP at 296. Committee discussions on the medical qualification regulations and standards were limited to a one-time discussion in which Mr. Gilliam briefed the committee about changes to CDL medical card requirements. CP at 297.

Jason Hovde was the Safety Officer at Pierce Transit. CP at 297. As the Safety Officer his job requires ensuring compliance with state and federal safety rules. CP at 1198. In the five years before the collision, there was no stability to the structure of the Safety Department. CP at 373-76. Mr. Hovde could not remember any specific Pierce Transit written policies about their operators being medical qualified to operate the vehicle. CP at 302-03. He was unable to define Pierce Transit's safety culture and the Executive Order that preceded it. CP at 303.

Further, Pierce Transit did not require recertification examinations when psychological or medical conditions gave rise to questions of Mr. McPike's fitness for duty. CP at 373-76. Pierce Transit inadequately monitored and supervised Mr. McPike's medical conditions and Pierce Transit did not investigate inconsistencies in Mr. McPike's medical records and licensing records that were known to it. CP at 373-76, 355-59. By not investigating Mr. McPike's various serious medical conditions

more thoroughly, Pierce Transit knowingly placed the public and Pierce Transit's passengers at an unacceptable risk of a crash. CP at 355-59.

Indeed, prior to the collision, Pierce Transit had access to records placing them on notice that Mr. McPike had one or more serious medical conditions. CP at 355-59, 360-76. Dr. Harmon's 90-day short card put Pierce Transit on notice that there was a serious health condition at issue. CP at 1246. Pierce Transit had authorizations, signed by Mr. McPike, for release of medical information. Had Pierce Transit performed even cursory due diligence, it would have discovered Mr. McPike was so likely to become impaired as to make it unsafe for him to continue to operate a commercial motor vehicle. Faced with these health concerns, Pierce Transit should have ordered a fit for duty examination to have him evaluated further and "really look at his fitness for driving." CP at 1228. A competent examiner would have engaged in the medical investigation necessary to determine whether Mr. McPike was medically fit to operate a commercial vehicle. Both Mr. Grill and Dr. Fletcher testified that had it done so and discovered the multitude of medical conditions, he would not have been granted his CDL license and the collision would not have occurred. CP at 355-59, 373-76. Mr. Grill testified:

- A. I don't know what Pierce Transit knows. I only know what they should know. They should know it. They should know it by interviewing the individual, by

delving into his past records, by taking to heart that it is so important to make sure you don't have an ill or fatigued operator that's so likely to become impaired by a multitude of physical conditions, that it's going to be unsafe for them to be operating the bus that you're going to dispatch them to on a daily basis. CP at 1125.

Both Mr. Grill and Dr. Fletcher agree: it is not a matter of isolating the individual medical conditions; rather, Pierce Transit should look at the aggregate and in the aggregate, Mr. McPike was medically unfit to drive.

Mr. Grill Testified:

A. an individual with all of these problems, in terms of being dispatched on a day-by-day basis into a routine schedule, is not a healthy person and would not be able to do it is – by reason of experience or by reason of illness, fatigue, or any other condition. CP at 1125-26.

Thus, there are material facts in dispute regarding Pierce Transit's knowledge and regarding whether that Mr. McPike and Pierce Transit breached duties owed to the Plaintiffs. Plaintiffs have produced expert testimony on this issue. In addition to failing to implement the Federal guidelines for monitoring drivers like Mr. McPike, the evidence also shows that Pierce Transit created a workplace culture that disregards safety and discourages drivers from reporting illnesses by failing to implement an effective management system, failing to appoint someone to take charge of operator health, not providing written policies for driver health, making safety meetings optional, and failing to ensure that

information regarding its drivers' alarming and potentially disqualifying medical conditions were communicated between departments. CP at 335-59, 360-76. As such, Pierce Transit failed to meet its duty to protect other drivers on the road from foreseeable harm and breached its duties to Mr. Sartin and the public. Thus, summary judgment is not appropriate.

3. Dr. Gilbert knew or should have known that Mr. McPike was at risk for becoming incapacitated while driving.

Mr. McPike's co-occurring conditions were such that a doctor operating under the minimum standard of care in administering a CDL exam would recognize the foreseeable the risk that Mr. McPike would cause injury to another in the course of driving a commercial vehicle. Indeed, in a deposition, Dr. Fletcher testified the available records would have triggered an examination that would have resulted in Mr. McPike's disqualification from commercial driving:

A. I believe that a competent medical examiner that followed the DOT FMCSA physical requirements, as well as the advis[ory] guidelines, and followed common medical practices, would have disqualified Mr. McPike from driving until he had a very thorough vetting, that he did not have underlying coronary artery disease. That with the constellation of complaints of his obstructive sleep apnea, his insulin dependent diabetes, his weight, his hypertension, his hyperlipidemia, his past smoking history, wouldn't have been significant risk for immediate incapacitation. CP at 1229-30.⁶

⁶ The DOT medical examination is designed to make sure that commercial drivers can safely perform the job. CP at 339-40. Commercial motor vehicle drivers are required to meet the medical standards of the FMCSA), which are provided by the DOT CP at 339-

The record provides evidence that Dr. Gilbert knew that Mr. McPike was suffering from a host of co-occurring, potentially disqualifying medical conditions. CP at 341-59, 1673-1702. Not only did Dr. Gilbert have the opportunity to discover these conditions during his January 30, 2015, examination of Mr. McPike, Dr. Gilbert also had easy access to Mr. McPike's extensive medical history through the record-preservation system utilized by Multicare. CP at 1598-1601. Dr. Gilbert knew or should have known from the red flags raised by his own examination of Mr. McPike, and a reasonable investigation into Mr. McPike's recent medical history, that Mr. McPike's co-occurring conditions put Mr. McPike at an exceedingly high risk of incapacitation while driving. CP at 341-59, 1739-41, 1759-60.

In light of these considerations, there is a genuine issue of fact as to whether Dr. Gilbert knew or should have known that Mr. McPike was at risk of sudden incapacitation that could cause harm to people sharing the

341. Since 2014, the law has required that a certified medical examiner perform DOT medical examinations. CP at 336 Dr. Gilbert's employer, Multicare, admits that the regulations found in Chapter 49 CFR contain the standards that registered CDL examiners like Dr. Gilbert are required to follow. CP at 1570-73, 1597-98. Further, 49 CFR § 391.43(c) provides "medical examiners shall":

- (1) Be knowledgeable of the specific physical and mental demands associated with operating a commercial motor vehicle and the requirements of this subpart, including the medical advisory criteria prepared by the FMCSA as guidelines to aid the medical examiner in making the qualification determination; and
- (2) Be proficient in the use of and use the medical protocols necessary to adequately perform the medical examination required by this section.

road with Mr. McPike as he drove a public bus. Consequently, summary dismissal of Dr. Gilbert and Multicare was not appropriate.

C. Dr. Gilbert owed Mr. Sartin a duty to protect him from the foreseeable injuries caused by Mr. McPike's sudden loss of consciousness when precedent supports imposing the duty, the public interest in protection from dangerous drivers is high, and CDL examiners have the clear ability to control the actions of commercial drivers by refusing to provide necessary certification to commercial drivers.

The existence of a legal duty is a question of law to be determined by reference to considerations of public policy. *Parilla v. King County*, 138 Wn. App. 427, 432, 157 P.3d 879 (2007). Questions of whether a duty exists are reviewed de novo. *Id.* The Restatement (Second of Torts) § 315 (1965) explains:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Petersen v. State, 100 Wn.2d 421, 426, 671 P.2d 230 (1983).

Generally, a person has no duty to prevent a third party from causing harm to another absent a special relationship between the actor and the third party; however, this rule is not without exception. *Volk v.*

DeMeerleer, 187 Wn.2d 241, 255, 386 P.3d 254 (2016). “Duty is not sacrosanct in itself,” but is only an expression of the policy considerations which lead the law to determine that the plaintiff is entitled to protection. *Id.* at 263.

In determining whether the law imposes a duty of care and to determine the scope of that duty, the court must weigh “considerations of logic, common sense, justice, policy, and precedent” and balance the interests at stake. *Volk*, 187 Wn.2d at 263. Under these factors, physicians who perform CDL certification examinations have a duty to protect third-parties from foreseeable harm.

First, precedent supports the application of a duty of physicians who perform CDL certification exams to third parties. The Washington Supreme Court has already determined that a doctor is liable for harm to third-party plaintiffs who are within the general field of danger which should be foreseen by the doctor when he administers treatment to a patient. *Kaiser*, 65 Wn.2d at 462. Typically, in order for a special relationship to form between a doctor and patient, the relationship must be definite, established, and ongoing. *Volk*, 187 Wn.2d at 259. However, these requirements are not written in stone, and should be considered in light of all of the other interests at stake.

In 2016, the court indicated a willingness to expand the duty that physicians owe to third parties foreseeably harmed by patients. *See Volk*, 187 Wn.2d at 274. In *Volk*, the court determined for the first time that a “special relationship” could exist between a psychiatrist and his patient in the outpatient (as opposed to inpatient) setting. *Id.* There, the court focused on the nature of the relationship as the basis for liability because the doctor has “unique insight” into the potential dangerousness of the patient as well as foreseeable victims. *Id.* at 261.

In addition to the court’s willingness to expand the duties of physicians in the outpatient setting to third parties in *Volk*, the court’s decision in *Kaiser* indicates that the traditional requirements of a special relationship were not of particular importance to the court in the commercial driver context. *See Kaiser*, 65 Wn.2d. 461. The *Volk* court also distinguishes between medical malpractice and medical negligence claims. A medical malpractice claim is specific to cases involving a physician-patient relationship. A medical negligence claim, such as here, does not have that restriction.

In *Kaiser*, although it is not explicitly stated, the doctor who administered the medication that later caused the bus driver to become drowsy may have been the driver’s treating physician. *See id.* at 462-63. However, the court did not focus on the special relationship between the

doctor and the driver as the basis for liability. *See id.* at 463-65 There is nothing in *Kaiser* that indicates that the result would be different if the doctor and driver did not have an established or ongoing relationship. The doctor in *Kaiser* claimed as a defense that the driver was hypersensitive to the medication he prescribed. *Id.* at 463. Despite the possible established relationship between the doctor and driver, the doctor did not know of the driver's hypersensitivity to the medication, much like a doctor who did not have an established relationship with the driver would not know of this condition. Instead, the court focused on the foreseeability of harm to those in the general field of danger. *Id.* at 465.

Although a physician conducting a CDL certification may not have a definite, ongoing, and established relationship with his examinees, the physician is in a unique position to gauge the potential danger an examinee may pose to foreseeable victims of injury. There is no question that the foreseeable victims here are those motorists, pedestrians, and passengers that share the road with a public bus. As a specially certified CDL examiner, Dr. Gilbert is in a unique position to understand the dangers that an unfit driver presents to those foreseeable victims.

Another factor considered by the courts in determining whether a duty to third parties exists is the level of control a physician has over the actions of a patient. *See Volk*, 187 Wn.2d at 259. In certain situations, like

the parole officer/parolee or corrections officer/offender settings, a duty exists between the party in control of another and those that may be foreseeably injured by the controlled party. *Id.* at 261. This duty is defined under Restatement (Second) of Torts §319 (1965) as a duty of one who takes charge of another, whom he knows or should know is likely to cause bodily harm to others if not controlled, to exercise reasonable care to control the other to prevent him from harming others. *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992).

The “take charge” duty under Restatement §319 exists because the controlling party has been granted statutory authority to supervise the party to be controlled, the controlling has the express ability to regulate the behaviors of the party to be controlled, and can impose special conditions on the party to be controlled. *See Id.* at 219-20.

In the present context, those same factors relating to control apply. Registered CDL examiners like Dr. Gilbert are granted authority by statute to control whether commercial drivers are licensed. Registered CDL examiners also have express control over the actions of commercial drivers; they have the ability to issue temporary licensure for shortened time periods while a condition of concern is monitored (much like Dr. Harmon issued in November 2014), and they have the ability to deny licensure altogether when the risk of injuries to others is too high to justify

certification. Additionally, Dr. Gilbert was specially trained to identify conditions that would cause foreseeable injury to others in the context of commercial driving.

Although the duties expressed by Restatement §315 and §319 are typically considered separate and distinct duties, these guidelines are not written in stone. *See Volk*, 187 Wn.2d at 263-64. Duty must be considered holistically in light of the policy considerations surrounding the issue. *Id.* at 263. In the present context, the CDL examiner's unique insight into the disqualifying conditions of commercial drivers and the high level of control the examiner has over drivers' ability to maintain the status as a commercial driver support imposing a duty of care on physicians who undertake to certify commercial drivers as fit to operate their vehicles on roadways shared by the general public.

Courts in other jurisdictions have imposed liability in the context of DOT examinations in a number of settings, including by imposing: (1) liability to third-parties for death or injury caused by an improperly certified driver; *Wharton Transport Corp. v. Bridges*, 606 S.W.2d 521 (Tenn. 1980); (2) liability to the Company who employs the driver based on a poorly performed examination (*Hollywood Trucking, Inc. v. Watters*, 385 Ill. App. 3d 237, 895 N.E.2d 3 (2008)); (3) liability to the driver who is injured due to improper certification, or interference with employment

due to improper withholding of certification; and (4) disability discrimination actions by drivers against employers or potential employers. *EEOC v. Texas Bus Lines*, 923 F.Supp. 965 (S.D. Tex. 1996). These cases are persuasive and this court should follow them.

Indeed, the *Wharton Transport* Court addressed the duty a doctor performing a CDL exam owes a duty to third parties who suffer foreseeable injuries at the hands of improperly licensed drivers. *Supra*. In *Wharton Transport*, a doctor performed a pre-employment examination for a commercial driver, but failed to recognize a disqualifying eye condition. *Id.* at 523. Shortly after the driver was certified to drive, he caused a collision which resulted in severe injuries to the occupants of another vehicle. *Id.* The Supreme Court of Tennessee determined that, while not an insurer of highway safety, a physician conducting certification exams of commercial drivers owes a duty of care to those affected by the foreseeable consequences (i.e., the motoring public) of a negligent certifying physician. *Id.* at 527-28. This court should follow the *Wharton Transport* Court's analysis.

This result is also supported by the purpose and scope of the federal requirements and penalties governing the issuance of CDLs, which is to "...help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver's

license and by disqualifying drivers who operate commercial motor vehicles in an unsafe matter.” 49 CFR 383.1. This stated purpose establishes that the very injuries sustained by Mr. Sartin in this case are those that Congress sought to prevent by enacting FMCSA regulations. To decline to hold registered CDL examiners to a duty to act reasonably to protect the very people for which the regulations were created is counter-intuitive and against public policy.

Here, Dr. Fletcher opined that Dr. Gilbert fell below the standard of care in failing to conduct a reasonable investigation that more likely than not would have resulted in Mr. McPike’s decertification or, at a minimum, a more detailed examination of his multitude of serious health conditions and this collision could have been avoided. CP at 1753-54, 1759-60. At a minimum, a genuine factual dispute remains for resolution at trial and the trial court erred in summarily dismissing Mr. Sartin’s complaint.

D. Public policy favors holding the defendants accountable.

The industry standards require that drivers, employers, and medical examiners be educated in the physical requirements for safely operating a commercial vehicle. If the driver, employer, and medical examiner are permitted to ignore these safety standards, public safety suffers.

Public policy favors holding the driver, employer, and medical examiner accountable for collisions caused by known driver medical conditions. Compared to a regular driver, commercial drivers like bus drivers are driving more frequently, in higher traffic areas, in larger and more dangerous vehicles, and carrying more people; therefore, they have the potential to cause more damage. The risk to the public warrants increased scrutiny by those who are responsible for protecting public safety to ensure the driver is fit to operate the commercial vehicle. Without accountability, drivers are not deterred from hiding dangerous medical histories from the examiners; the medical examiner is not deterred from routinely granting certification to get paid or to please the transit company or commercial operator; and the employer is not deterred from passively accepting the CDL certification without further investigation.

E. As an expert in occupational medicine, Dr. Fletcher offered testimony on Mr. McPike's fitness to drive a commercial vehicle and, therefore, the trial court erred when it struck Dr. Fletcher's expert testimony when ruling on Multicare's Motion for Summary Judgment.

As discussed above, Dr. Fletcher is board certified in occupational medicine, preventative medicine, and public health and he is also an expert on commercial fitness for duty. *Supra*. Dr. Fletcher's qualifications include:

- Certified medical review officer. CP at 335-37.

- Expert in sleep apnea and fatigue. *Id.*
- Performs an average of 1000 DOT physicals per year. *Id.*
- Conceiving and proctoring the first national training program for physicians regarding DOT medical certification. *Id.*
- Designed DOT medical certification examiner competency benchmarks some of which were implemented as part of the May 2014 launch requiring of the National Registry of Certified Medical Examiners (NRCME). *Id.*
- Member of the national advisory panel for the DOT Federal Highway Administration. *Id.*

Dr. Fletcher has provided opinion testimony that Mr. McPike was medically unfit to operate a commercial vehicle prior to and at the time of the collision. CP at 341-59. Consequently, had Mr. McPike been prevented from commercial driving, the collision would not have occurred. Dr. Fletcher further testified that Mr. McPike had a high risk cardiac profile because of his many medical conditions, including but not limited to, hypertension, diabetes, high blood cholesterol, sleep apnea, smoking, and morbid obesity all of which led to his sudden cardiac incapacity on May 26, 2015. CP at 342-46.

Dr. Fletcher's testimony is germane to the issue before the trier of fact: whether Dr. Gilbert, as a CDL medical examiner, breached a duty owed to Mr. Sartin, as a member of the general public, causing harm that is in the general field of danger which should reasonably have been foreseen by him. This issue does not include whether Dr. Gilbert negligently failed to diagnose a cardiac condition so as to cause Mr.

McPike's death. The former and actual issue before the jury requires expert testimony as to the duties owed by a CDL medical examiner in assessing risk and preventing harms within the general field of danger to the general public. The latter and unrelated issue would require a more intimate assessment of diagnosis and treatment of cardiovascular disease for the prevention of Mr. MCPike's sudden cardiac arrest.

With regard to duties owed by Dr. Gilbert to the general public, in the interest of public safety, the medical examiner is required to certify that the driver does not have any physical, mental, or organic condition that *might* affect the driver's ability to operate a commercial motor vehicle safely. 49 C.F.R. § 391.43. This does not mean that Dr. Gilbert had to foresee and/or prevent Mr. MCPike's sudden cardiac arrest, it simply means he has to assess whether Mr. MCPike might represent a danger to the public and if so, deny renewing his access to a commercial driver's license.

Dr. Fletcher is admittedly not a cardiologist or endocrinologist. However, as a preventative medicine specialist, he is qualified to testify in regards to preventative cardiology, hypertension and diabetes and the type of preventative health screening they should have. CP at 1738. He is also aware of the management of diabetes as an essential function of being in

an occupational medicine. CP at 1736. He is further qualified to address the standard of care applicable to a certifying medical examiner. ER 703.

The Court did not strike Dr. Fletcher's testimony in ruling on Pierce Transit's Motion for Summary Judgment but did so in ruling on Dr. Gilbert and Multicare's Motion for Summary Judgment. CP at 1837. The Court gave no explanation for these inconsistent rulings. The Court erred in striking Dr. Fletcher's testimony against Dr. Gilbert and Multicare. In any event, Dr. Fletcher's declaration was called to the trial court's attention on both Summary Judgment Motions and is properly before the court on appeal. RAP 9.12.

VI. CONCLUSION

There are numerous material questions of fact relating to each Defendant. For purposes of Summary Judgment, all evidence and reasonable inferences are to be viewed in the light most favorable to Mr. Sartin. Due to the multiple genuine factual and legal disputes as set forth above, the trial court erred in summarily dismissing Mr. Sartin's complaint.

RESPECTFULLY SUBMITTED on this 2nd day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of Davies Pearson, P.C., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served via the Washington State Court of Appeals, Division II, e-filing system the Brief of Appellants and this Certificate of Service on:

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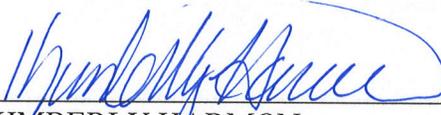
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The undersigned further certifies that on this date I electronically filed the foregoing documents with the Washington State Court of Appeals, Division II, via the Washington State Appellate Court's Portal upload (<https://ac.courts.wa.gov/>).

SIGNED and DATED this 2nd day of July, 2019 at Tacoma, Washington.



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