FILED
Court of Appeals
Division II
State of Washington
8/30/2019 1:48 PM

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 RESPONDENTS THE ESTATE OF ALONZO MCPIKE AND PIERCE TRANSIT

Caryn Geraghty Jorgensen
WSBA No. 27514
John Fetters
WSBA No. 40800
Raymond S. Weber
WSBA No. 18207
Samantha K. Pitsch
WSBA No. 54190
Attorneys for Respondents Estate of Alonzo McPike and Pierce Transit
Mills Meyers Swartling P.S.
1000 Second Avenue, Suite 3000
Seattle, Washington 98104
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE ISSUE.....1

III. STATEMENT OF THE CASE.....2

A. Mr. McPike's Sudden Incapacitation.....3

B. Alonzo McPike's Employment with Pierce Transit and his January 2015 CDL Renewal.....4

C. Alonzo McPike's March 2015 Health Assessments 6

D. The Proceedings Below 7

IV. ARGUMENT.....9

A. Standard of Review on Summary Judgment.....9

B. Pierce Transit and the Estate of Alonzo McPike were Subject to Washington State Regulations. 10

C. A Driver's Sudden, Unforeseeable Loss of Consciousness is a Complete Defense to a Motor Vehicle Accident Negligence Claim.....12

D. Mr. McPike's Sudden Loss of Consciousness was Unforeseeable as a Matter of Law. 16

E. Appellants' Medical Expert Concedes Mr. McPike's Sudden Cardiac Arrest Was the First Manifestation of Coronary Artery Disease. 20

F. Dr. Fletcher Erroneously Presumed, with No Evidentiary Support, that Pierce Transit had Mr. McPike's DOT Long Form or Information Regarding his Sleep Apnea. 24

1. Mr. McPike's January 2015 medical examination certificate and intrastate medical waiver. 24

2. Pierce Transit does not and would not have access to a driver's medical records.....25

G. Dr. Fletcher Can Only Speculate (and, therefore, ask the jury to speculate) Regarding What Further Medical Analysis May Have Shown.....26

1. Dr. Fletcher cannot show that a fitness for duty evaluation was triggered in 2015. 27

2. Dr. Fletcher cannot opine on a more probable than not basis that further medical evaluations would reveal coronary artery disease. 30

3. Dr. Fletcher cannot show that it is more probable than not that any follow-up evaluations in 2015 would have revealed disqualifying conditions. 31

H. Appellants Did Not Preserve and the Trial Court Did Not Err in Any Respect Regarding Alleged Spoliation. 33

V. CONCLUSION.....35

APPENDIX A 37

TABLE OF AUTHORITIES

Cases

Brown v. Peoples Mortgage Co.,
48 Wn. App. 554, 739 P.2d 1188 (1987) 9

Kaiser v. Suburban Transp. Sys., 65 Wn.2d 461, 398 P.2d 14,
(1965), *amended sub. nom. Kaiser v. Suburban Transp. Sys.*,
65 Wn.2d 461, 401 P.2d 350 (1965) 13, 15

Kave v. McIntosh Ridge Primary Rd. Ass'n,
198 Wn. App. 812, 394 P.3d 446, 451 (2017) 34

Lee v. Willis Enterprises, Inc.,
194 Wn. App. 394, 377 P.3d 244 (2016) 15

Rikstad v. Holmberg,
76 Wn.2d 265, 456 P.2d 355 (1969) 15

Schaaf v. Highfield,
127 Wn.2d 17, 896 P.2d 665 (1995) 9

Schooley v. Pinch's Deli Mkt., Inc.,
134 Wn.2d 468, 951 P.2d 749 (1998) 16

Tavai v. Walmart Stores, Inc.,
176 Wn. App. 122, 307 P.3d 811 (2013) 35

Wilcox v. Bayshore,
187 Wn.2d 772, 389 P.3d 531 (2016) 34

Young v. Key Pharmaceuticals, Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 9

Out of State Cases

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S. Ct. 2548 (1986) 9

Cole v. Layrite Prod. Co.,
439 F.2d 958, (9th Cir. 1971) 13

Deason v. State Farm Mut. Auto. Ins. Co.,
209 So. 2d 576, (La. Ct. App. 1967)..... 17

Solorio v. United States,
228 F. Supp. 2d 1280, (D. Utah 2002)..... 17

Solorio v. United States,
85 Fed. Appx. 705 (10th Cir. 2004)..... 17

Van Dyke v. Merchants Indem. Corp. of New York,
215 F. Supp. 428, (E.D. Wis. 1963)..... 17

Wingate v. United Servs. Auto. Ass'n,
480 So. 2d 665, (Fla. Dist. Ct. App. 1985) 17

Statutes

RCW 36.57A..... 12

RCW 36.57A.010(7)..... 12

RCW 46.25 10

RCW 46.25.010(11)..... 10

RCW 46.25.030(3)..... 11

RCW 46.25.040 11

RCW 46.25.050 10

RCW 46.25.055 10

RCW 46.25.140 10

WAC 308-100-100..... 11

Other Authorities

Timothy E. Travers, *Liability for automobile accident allegedly caused by driver's blackout, sudden unconsciousness, or the like*, 93 A.L.R.3d 326..... 13

RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 11(b) (2010)..... 13, 14, 16

Rules

CR 56(c)..... 9

RAP 2.5(a) 33

Regulations

49 C.F.R. § 383.71(b) 12

49 C.F.R. § 390.3T..... 12

49 C.F.R. § 390.3T(f)(2)..... 12

49 C.F.R. § 390.5T..... 12

49 C.F.R. Sec. 391.67 10

I. INTRODUCTION

As mandated by state law, Alonso McPike obtained a commercial driver's license and a medical certificate qualifying him to serve as a bus driver for Pierce Transit. A federally authorized medical examiner certified Mr. McPike's fitness to drive for Pierce Transit. The examiner and all of Mr. McPike's treating doctors uniformly testified that he was medically qualified to hold a commercial driver's license and operate a public bus. Appellants asked the trial court and now ask this Court to find that Pierce Transit and Mr. McPike should have second guessed the experts upon whom they had a right to rely. Appellants' arguments fail because Appellants presented no evidence to the trial court that either Mr. McPike or Pierce Transit had any reason to second guess Mr. McPike's physicians or any basis on which they could anticipate Mr. McPike's sudden incapacitation. As Appellants' own expert opined, Mr. McPike's first manifestation of coronary artery disease was his sudden cardiac arrest.

II. STATEMENT OF THE ISSUE

Did the trial court properly apply Washington's sudden incapacitation defense and grant summary judgment when: (1) a federally certified medical examiner qualified Mr. McPike to operate Pierce Transit buses, (2) Mr. McPike suffered a sudden incapacitating cardiac event while driving, and (3) no intervening event provided notice that would cause a

reasonable person to foresee Mr. McPike's sudden incapacitating cardiac event.

III. STATEMENT OF THE CASE

On May 26, 2015, Pierce Transit bus operator Alonzo McPike reported to Pierce Transit headquarters at 4:04 a.m. and began his shift at 4:38 a.m. operating Coach 228 on Route 41. CP 74 (Curry Decl. ¶ 6); CP 77–79 (McPike Schedule); CP 81 (Badge Swipe Record). Route 41 operates between the 72nd Street Transit Center and the 10th and Commerce Street Zone E in Tacoma, boarding and unloading passengers along the way. CP 74 (Curry Decl. ¶ 6). Just after 8:30 a.m., Mr. McPike was driving northbound on Portland Avenue East, on his fifth trip that morning along Route 41. *Id.*; CP 85–86 (CCTV video packages from Coach 228). According to several passengers, there was nothing unusual about Mr. McPike's actions or demeanor and the bus ride itself was completely normal. CP 93–96 (Gu Decl.); CP 97–99 (Lang Decl.); CP 90–92 (Charles Decl.); CP 87–89 (Alexander Decl.).[1]

[1]Two passengers, Pamela Corba and Robert Bennet, provided Appellants' counsel declarations asserting that the driver missed a stop and forgot to open the back door at a stop, prior to the accident. Although these declarations are contrary to the four passengers who attested there was nothing wrong with either Mr. McPike or the operation of the bus that day, neither the Corba declaration nor the Bennet declaration support the proposition that either Mr. McPike or Pierce Transit knew or should have known that Mr. McPike was at imminent, foreseeable risk of a sudden, incapacitating cardiac event.

A. **Mr. McPike's Sudden Incapacitation.**

As the bus approached the intersection at East 28th Street, passengers witnessed Mr. McPike suddenly slump over in his seat. CP 87–89 (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 93–96 (Gu Decl. ¶¶ 3, 5). He was slumped over so far to the right that "the only thing keeping him in his chair was the seatbelt." CP 97–99 (Lang Decl. ¶ 4).

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); CP 85 (video PT 1466, at 08:33:05–08:33:18). The pickup truck—occupied by driver Colleen Robinson and front-seat passenger plaintiff Christopher Sartin—then struck a 1999 Toyota Sienna minivan. CP 42–65 (Tacoma Police Department. Traffic Collision Report); CP 85 (video PT 1466, at 08:33:05–08:33:18).

When paramedics arrived on scene, they found Mr. McPike unconscious in the driver's seat of the bus. CP 120–29 (Dr. Thompson Decl. ¶ 5). The paramedics determined that his heart had stopped. *Id.* They restored cardiac rhythm before transporting Mr. McPike to Tacoma General Hospital. *Id.* Mr. McPike never regained consciousness. *Id.* He died

approximately one month later due to brain damage from lack of oxygen during the time in which his heart had stopped. *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. The ventricles may flutter or quiver uselessly instead of pumping blood. *Id.* Cardiac arrest symptoms are often immediate and drastic. *Id.* Coronary artery disease can cause sudden cardiac arrest, but "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). Plaintiff's expert, Dr. Fletcher, opined that "this is what occurred here." *Id.*

Notably, a cardiac evaluation performed on Mr. McPike during his 2015 post-incident hospitalization did not reveal the presence of coronary artery disease. *See* CP 1269–73 (Fletcher Dep. at 42:14–46:12); *see also* CP 1282–84 (May 26, 2015 Echocardiogram MHS 000083–85); CP 1286–91 (May 26, 2015 Cardiology Clinic Note MC 000597–602).

B. <u>Alonzo McPike's Employment with Pierce Transit and his January 2015 CDL Renewal.</u>

Mr. McPike served as a Pierce Transit bus operator for approximately 18 years. CP 73–81 (Curry Decl. ¶ 7). To qualify to operate Pierce Transit buses, Mr. McPike was required to maintain a Commercial

Driver's License ("CDL"). *Id.* ¶ 8. Dr. Richard Gilbert, a federally-certified CDL medical examiner, examined Mr. McPike on January 30, 2015, for purposes of a Commercial Driver Fitness Determination. CP 105–08 (Dr. Gilbert Decl. ¶¶ 2–11); CP 115 (CDL Fitness Determination Medical Examination Report).

To renew his CDL for purposes of his employment with Pierce Transit, Mr. McPike had to pass the CDL Fitness Determination examination and obtain an intrastate medical waiver due to his insulin-dependent diabetes. CP 130–33 (Dr. Wang Decl. ¶¶ 3–7); CP 134 (January 23, 2015 Intrastate Medical Waiver Application). Mr. McPike obtained the necessary intrastate medical waiver and passed the Fitness Determination examination. CP 105–08 (Dr. Gilbert Decl. ¶¶ 2–11); CP 115–17 (CDL Fitness Determination Medical Examination Report); CP 119 (Intrastate Medical Waiver Approval).

According to Mr. McPike's supervisor at Pierce Transit, Hazel Whitish, Mr. McPike never reported any cardiac conditions or irregularity to her or Pierce Transit. CP 67 (Whitish Dep. at 47:1–24). Mr. McPike's wife, Christina, then a certified nursing specialist, testified that Mr. McPike never exhibited any symptoms attributable to high blood pressure and his medical conditions never interfered with his daily life. CP 70–71 (Christina McPike Dep. at 23:15–23, 28:3–7).

C. **Alonzo McPike's March 2015 Health Assessments.**

At routine appointments with his endocrinologist, Dr. Wang, and with his long-term primary care physician, Dr. Brooks, there were no indications of any medical conditions that would have invalidated Mr. McPike's CDL or intrastate medical waiver or that otherwise affected his fitness to drive buses for Pierce Transit. CP 130–34 (Dr. Wang Decl. ¶¶ 4–6); CP 100–04 (Dr. Brooks Decl. ¶¶ 2–8). As his primary care physician, Dr. Brooks treated Mr. McPike over the course of two decades. CP 100–04 (Dr. Brooks Decl. ¶ 2). Dr. Brooks monitored Mr. McPike's overall health and coordinated his care with specialists. *Id.* As a patient, Mr. McPike was conscientious, competent, intelligent, and compliant with his various prescribed medical therapies. *Id.* ¶ 3.

Dr. Brooks considered Mr. McPike to be "a compliant seeker and user of medical care." *Id.* Although Mr. McPike had comorbidities, he never presented to treating physicians with any precursor signs or symptoms of sudden cardiac arrest, *id*. ¶ 4, he did not exhibit evidence of ventricular vulnerability due to his comorbid medical conditions, *id*. ¶ 5. He did not have a history of coronary artery disease, myocardial infarction, cardiac enlargement, cardiomyopathy, valvular heart disease, congenital heart disease, cardiac electro-pathophysiology, peripheral vascular disease, or cerebral vascular disease. *Id*. According to Dr. Brooks, "[n]othing about

Mr. McPike's medical conditions prevented him from safely operating a transit vehicle, nor was he taking any medications that would have impaired his driving." *Id.* ¶ 8. Although Mr. McPike's comorbidities increased the risk of developing a heart condition at some unknown point in the future, there is no way to predict one's risk of sudden cardiac arrest. *Id.* ¶ 6.

D. <u>The Proceedings Below.</u>

On January 23, 2018, the trial court denied Pierce Transit's and the Estate of Alonzo McPike's motion for summary judgment (Summary Judgment I), relying on the declaration of Appellants' CDL medical certification expert Dr. David Fletcher's declaration to find a material issue of fact.[2]

After Summary Judgment I, Pierce Transit deposed Dr. Fletcher on October 18, 2018. In his deposition Dr. Fletcher admitted:

---

[2] One of the arguments suggested but not pursued in opposition to Pierce Transit's initial motion for summary judgment was that Pierce Transit destroyed evidence by failing to retain the complete digital file containing closed circuit footage showing the bus interior for Mr. McPike's entire route on the day of the accident. Consistent with its policies, Pierce Transit retained footage for approximately 3 minutes prior to the accident and 32 minutes following the accident. Appellants did not move for a finding that Pierce Transit spoliated evidence. "Plaintiffs are not intending for the Court to rule on the spoliation issue as part of this briefing, but rather to note that if the facts are considered in a light most favorable to the plaintiff, then the issuance of a spoliation instruction on its own would create an additional material question of fact to prelude summary judgment." CP 155–56. In response, Pierce Transit requested that "if the Court determines that Plaintiffs' spoliation argument is pertinent to the motion," it be provided "an opportunity to present evidence on this issue, including presentation of witnesses, and brief the applicable spoliation standard under Washington law." CP 681. In denying Pierce Transit's first motion for summary judgment, the trial court made no findings regarding the issue. CP 972–73; *see also* § IV.H. *infra*.

- he can point to no evidence to show that Pierce Transit and/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 cannot 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 cannot opine, on a more probable than not basis, that further evaluations would reveal a disqualifying condition CP 1062 (Fletcher Dep. at 132:5–12).

Based on Dr. Fletcher's admissions, Pierce Transit and the McPike Estate filed a renewed motion for summary judgment. CP 1009–24 (Summary Judgment II).[3] That motion was granted and gives rise to this appeal.

Appellants filed a motion for reconsideration arguing that "the Court misapplied the summary judgment standard and failed to hold Pierce Transit to its burden." CP 1298. Appellants, in their motion for reconsideration, asserted that they were entitled to an adverse inference instruction based upon Pierce Transit's alleged spoliation of evidence. CP 1300. The Court, pursuant to PCLR 79(c)(3) denied the motion for reconsideration without

[3] At the trial court level, Appellants attempted to defeat summary judgment by introducing innumerable immaterial facts – facts that do not impact the foreseeability determination. Appellants attempt to do the same here – conflating and mischaracterizing the record in an attempt to create the perception of an issue of fact where none exists. Appendix A to this brief highlights examples where Appellants' citations attempting to present issues of fact are not only inaccurate but also are immaterial to the legal determination of foreseeability in the context of the sudden incapacitation defense.

requesting a response from Pierce Transit. CP 1585–86.

IV. ARGUMENT

A. Standard of Review on Summary Judgment.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). A "party seeking to avoid summary judgment cannot simply rest upon the allegations of his pleadings, he must affirmatively present the factual evidence upon which he relies." *Brown v. Peoples Mortgage Co*., 48 Wn. App. 554, 557–58, 739 P.2d 1188 (1987); *see also Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225–26, 770 P.2d 182 (1989).

Here, summary judgment for Pierce Transit and the McPike Estate was proper because, at the time of the accident, Mr. McPike held a current CDL, supported by an intrastate medical waiver and medical-examination certificate, indicating that he was medically certified as physically qualified to operate the bus. Appellants presented no admissible evidence to support the proposition that either Mr. McPike or Pierce Transit knew or should have known Mr. McPike was at risk of sudden incapacitation on the morning of the incident. Because Mr. McPike's loss of consciousness was

sudden and unexpected, Pierce Transit and the McPike Estate cannot be liable, as a matter of law, for the subject accident.

B. **Pierce Transit and the Estate of Alonzo McPike were Subject to Washington State Regulations.**

Washington's Uniform Commercial Driver's License Act ("UCDLA"), RCW 46.25 *et seq.* establishes Washington's requirements for the issuance of CDLs and empowers the Washington Department of Licensing ("DOL") to promulgate rules necessary to carry out the chapter.[4] RCW 46.25.050; 46.25.140. RCW 46.25.055 states: "A person may not drive a commercial motor vehicle unless he or she is physically qualified to do so and, except as provided in 49 C.F.R. Sec. 391.67, 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."[5]

Although the stated purpose of the UCDLA is to implement the federal Commercial Motor Vehicle Safety Act of 1986, the UCDLA sets forth differing requirements for interstate and intrastate drivers, such as Mr. McPike. Intrastate drivers are subject to the following physical

---

[4] Unlike the Federal Motor Carrier Safety Administration ("FMCSA"), 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).

[5] 49 C.F.R. § 391.67 is an exemption for "farm vehicles" and is not relevant or applicable here.

requirements:

> 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 instills discretion in medical examiners and DOL to assess and approve the medical fitness of intrastate drivers. This discretion is unconstrained by the FMCSA regulations. The duties owed by employers—which, unlike the FMCSA regulations, include "a state, or a political subdivision of a state" such as Pierce Transit—under the UCDLA are limited 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, despite Appellants' persistent protestations to the contrary,

the 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 Transit busses exclusively within the state of Washington and within the definition of "intrastate."[6]

C. <u>A Driver's Sudden, Unforeseeable Loss of Consciousness is a Complete Defense to a Motor Vehicle Accident Negligence Claim.</u>

A "driver who becomes suddenly stricken by an unforeseen loss of

[6] 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).

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, 17 (1965), *amended sub. nom. Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 401 P.2d 350 (1965); *see also Cole v. Layrite Prod. Co.*, 439 F.2d 958, 960 (9th Cir. 1971) (applying Washington law).

A defendant establishes the complete defense of sudden loss of consciousness by proving that (1) he suffered a sudden loss of consciousness prior to the allegedly negligent conduct; and (2) the loss of consciousness was neither foreseen nor foreseeable. *Kaiser*, 65 Wn.2d at 466; RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 11(b) (2010) (citing *Kaiser*, 65 Wn.2d at 466, as part of the body of cases that are "impressively unanimous in accepting the rule that the party does not bear liability if the party's substandard behavior is due to an unforeseeable . . . loss of consciousness.").

This complete defense is necessary because, as noted by the *Kaiser* Court, "[h]uman actions can hardly be considered as culpable, either in law or in morals, unless an intelligent consent of the mind goes with the actions; and to punish where there is no culpability would be the most reprehensible tyranny." *Kaiser*, 65 Wn.2d at 467; *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").

As set forth in the Restatement, "when the incapacitation is itself unforeseeable, it follows that no reasonable precautions were available to the driver that could have avoided the risk of harm." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 11(b) (2010). In this case, there is no dispute about the first element of the sudden incapacitation defense; all parties agree that Mr. McPike suffered a sudden loss of consciousness prior to the allegedly negligent conduct. App. Br. at 18 ("Mr. McPike's heart stopped while driving his Pierce Transit Bus, causing the collision.").

There is, however, a fundamental disagreement about the second element, starting with the standard for assessing liability. Appellants contend "the [trial] court erred in inquiring whether the sudden cardiac arrest was foreseeable." *Id.* at 25. Appellants then reframe the issue as "whether a sudden incapacitating event fell within a general field of danger, which should have been anticipated." *Id.*

Appellants' proposed statement of the issue is a misapplication of Washington law on foreseeability which holds that "harm is foreseeable when the result of the act is within the general field of danger which should have been anticipated." *Id.* at 24 (citing *Lee v. Willis Enterprises, Inc.*, 194

Wn. App. 394, 377 P.3d 244 (2016)). In *Lee*, the plaintiff suffered hearing loss when a fellow employee, attempting to fix a fan, struck an energized portion of a high voltage capacitor cabinet with a screwdriver. *Lee*, 194 Wn. App. at 397. A resulting "electrical arc blast" damaged the plaintiff's hearing. *Id.* at 398. The court rejected the defendant's argument that the injury was not foreseeable, noting "the result of the [negligent] act" is within the "general field" of anticipated danger, and that a defendant will not be relieved of responsibility "simply because the exact manner in which the injury occurred could not be anticipated." *Id.* at 402 (citing *Rikstad v. Holmberg*, 76 Wash. 2d 265, 269, 456 P.2d 355 (1969) ("the question is whether the actual harm fell within a general field of danger which should have been anticipated.")).

This general legal proposition has nothing to do with the issue in this case. The "actual harm" or the "result of the act" in this case was the injury to Mr. Sartin. It is self-evident that an injury like the one that befell Mr. Sartin could result when the driver of a motor vehicle becomes suddenly incapacitated. The *Kaiser* case poses a fundamentally different question: whether the sudden incapacity itself was unforeseen. *Kaiser*, 65 Wn.2d at 466. Thus, whether Mr. Sartin's injury fell within the general field of danger resulting from Mr. McPike's sudden incapacitation does not answer the question framed in *Kaiser*, which is whether that incapacitation was

foreseeable. The trial court, therefore, asked the right question.

D. **Mr. McPike's Sudden Loss of Consciousness was Unforeseeable as a Matter of Law.**

Where reasonable minds cannot differ, the court may decide the issue of foreseeability as a matter of law. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998). Here, there are no genuine issues of material fact regarding the unforeseeable nature of Mr. McPike's sudden loss of consciousness due to cardiac arrest. "Whether the reasonable-foreseeability standard is satisfied . . . depends on what information was available to the actor indicating that at some uncertain point in the future the actor might suffer an instance of incapacitation while engaging in a potentially dangerous activity such as driving." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 11 (2010). Evidence bearing on reasonable foreseeability includes:

> [T]he number and frequency of episodes of incapacitation in the past; the circumstances of those episodes, insofar as those circumstances bear on the likelihood of a recurrence; the extent to which medical treatment the actor is receiving can be expected to control the underlying medical problem; and whatever advice the actor's physician has provided.

Id.

Courts across the country have granted summary judgment to drivers where there were no genuine issues of material fact that the driver suffered an unforeseen medical incapacitation. *See, e.g., Wingate v. United*

Servs. Auto. Ass'n, 480 So. 2d 665, 666 (Fla. Dist. Ct. App. 1985) (the defendant presented affidavits from physicians and lay persons that the driver had no reason to expect a heart attack, and the driver's statements shortly before the crash that he "was not feeling well" failed to raise a genuine issue of material fact that the impending heart attack was foreseen); *Solorio v. United States*, 228 F. Supp. 2d 1280, 1282–84 (D. Utah 2002), *aff'd sub nom. Solorio v. United States*, 85 Fed. Appx. 705 (10th Cir. 2004) (summary judgment evidence established that the driver suffered a first-time, unforeseeable seizure in the moments leading up to the collision); *Van Dyke v. Merchants Indem. Corp. of New York*, 215 F. Supp. 428, 428–30 (E.D. Wis. 1963) (driver entitled to summary judgment because the plaintiff failed to introduce evidence to rebut sudden incapacitation defense); *cf Deason v. State Farm Mut. Auto. Ins. Co.*, 209 So. 2d 576, 578 (La. Ct. App. 1967) (reversing trial judgment in favor of the plaintiff and entering judgment in favor of the defendant-driver because evidence established that the driver, who had a heart attack and lost control of his car, had never been treated for a heart condition).

Here, reasonable minds can reach only one conclusion—Mr. McPike's sudden loss of consciousness due to cardiac arrest was neither foreseen nor reasonably foreseeable. *See* CP 120–-29 (Dr. Thompson Decl. ¶¶ 9–11); CP 100–04 (Dr. Brooks Decl. ¶¶ 4–8); CP 130-34 (Dr. Wang

Decl. ¶¶ 5–6); CP 105–19 (Dr. Gilbert Decl. ¶¶ 3–10). A life-threatening arrhythmia, such as that suffered by Mr. McPike on May 26, 2015, typically develops in a person with a pre-existing heart condition, such as coronary artery disease. CP 120–29 (Dr. Thompson Decl. ¶ 9). Here, Mr. McPike's medical records do not contain any diagnosis or treatment for any heart condition, including but not limited to, coronary artery disease. *Id*.

Although Mr. McPike had comorbidities known to increase the risk of developing coronary artery disease, Mr. McPike's hypertension and diabetes had been well-controlled, and he never exhibited any precursor signs or symptoms of sudden cardiac arrest. CP 100–04 (Dr. Brooks Decl. ¶¶ 4–5); CP 120–29 (Dr. Thompson Decl. ¶ 9). Mr. McPike's medical records are devoid of warnings or instructions not to drive or operate heavy machinery due to the risk of cardiac arrest. CP 120–29 (Dr. Thompson Decl. ¶ 10); CP 1056–70 (Fletcher Dep. at 122:9–123:3, 136:11–18, 137:1–14, 140:8–22, 143:24–144:21). Further, Mr. McPike never reported any cardiac conditions or irregularity to Pierce Transit. CP 67 (Whitish Dep. at 47:1–24). Mr. McPike's wife testified that Mr. McPike never exhibited any symptoms attributable to high blood pressure, and his medical conditions never interfered with his daily life. CP 70–71 (Christina McPike Dep. at 23:15–23, 28:3–7).

Mr. McPike's federally-certified medical examiner, Dr. Gilbert,

evaluated Mr. McPike's history of irregular cardiac rhythm and determined that it "was not likely to interfere with his ability to safely operate a commercial motor vehicle, and therefore did not disqualify him from receiving a CDL medical certificate with intrastate waiver." CP 105–19 (Dr. Gilbert Decl. ¶ 7). Mr. McPike obtained the necessary intrastate medical waiver for his insulin-dependent diabetes, and he passed the required Fitness Determination examination. *Id.* ¶¶ 2–11); CP 115–17 (CDL Fitness Determination Medical Examination Report); CP 119 (Intrastate Medical Waiver Approval). Thus, Mr. McPike's treating physicians and a federally-certified CDL medical examiner all concluded that Mr. McPike's medical conditions did not prevent him from safely operating transit vehicles intrastate. CP 100–04 (Dr. Brooks Decl. ¶¶ 4–8); CP 130–34 (Dr. Wang Decl. ¶¶ 5–6); CP 105–08 (Dr. Gilbert Decl. ¶¶ 3–10).

According to cardiologist Dr. Robert Thompson, "[t]ogether, this demonstrates that Mr. McPike's sudden cardiac arrest on May 26, 2015, was not reasonably foreseeable to his treating physicians or to his federally-certified CDL medical examiner." CP 123 (Dr. Thompson Decl. ¶ 11). "Consequently, if these medical professionals could not reasonably foresee Mr. McPike's cardiac arrest on May 26, 2015, then, certainly, the cardiac arrest was not reasonably foreseeable to Mr. McPike or to Pierce Transit."

Id.

E. <u>Appellants' Medical Expert Concedes Mr. McPike's Sudden Cardiac Arrest Was the First Manifestation of Coronary Artery Disease.</u>

Appellants' own medical expert admitted that neither Mr. McPike nor Pierce Transit had notice from a medical provider that Mr. McPike was not fit to drive Pierce Transit buses.

> Q. Is there any evidence in the record that Dr. Wang advised Mr. McPike that the clinical findings on March 3rd, 2015, affected his fitness to drive?
> A. That is not contained in his medical records.
> Q. Do you have any evidence in the case that you've reviewed that suggested any physician advised Mr. McPike that he was not fit to continue to drive for Pierce Transit after January, 2015, when he received his medical certificate from Dr. Gilbert?
> A. I do not see that.
> Q. Do you have any evidence to suggest that any medical provider or document provided to Pierce Transit informed Pierce Transit that Mr. McPike was no longer fit to drive after January 2015?
> A. No.

CP 1056–57 (Fletcher Dep. at 122:9–123:3).

> Q. Do you know what information Pierce Transit had, if any, about Mr. McPike's hypertension?
> A. I don't know the precise answer to that.
> Q. Okay. So you don't know if they knew? "They" being Pierce Transit, knew he had hypertension medically controlled?
> A. I don't know the answer to that.

CP 1065 (Fletcher Dep. at 136:11–18).

Q. Did any medical provider ever advise Mr. McPike that he should not operate a Pierce Transit coach because of his blood pressure?
A. Not that I've seen.
[MS. POTVIN: Asked and answered.]
Q. Did any medical provider ever advise Alonzo McPike that he should not operate a Pierce Transit coach in the course of his employment because of his diabetes?
A. I've not seen that in the records.
Q. Did any medical provider ever advise Mr. McPike that he should not operate a Pierce Transit coach because of his sleep apnea?
A. No.

CP 1066 (Fletcher Dep. at 137:1–14).

Q. Okay. You understand that Dr. Brooks had been looking at Mr. McPike's total picture for approximately two decades?
A. I'm aware of that.
Q. Is that your understanding?
A. Yes.
Q. And that Dr. Wang had been looking at the picture from an endocrinologist's point of view for at least two years. Are you aware of that?
A. I would say more than two years.
Q. Okay. And neither one of them ever advised Mr. McPike that he should stop driving for Pierce Transit, is that correct?
A. That is correct.

CP 1068 (Fletcher Dep. at 140:8–22).

Q. Okay. So, with all of those clinical points of contact where irregular heartbeat or arrythmia was discussed with Mr. McPike, did any of those providers tell Mr. McPike that the presence of that irregular heartbeat meant he shouldn't drive for Pierce Transit?
A. I have not seen that.

Q. And other than your assumption that Pierce Transit had access to his DOT long form, do you have any information to support the suggestion that Pierce Transit knew about any clinical findings of irregular heartbeats or PVCs or PACs or tachycardia?
A. Well, I've not seen that anyone has acknowledged that.
Q. Have you seen any document within Pierce Transit's files that would suggest they were on notice of anything to do with an irregular heartbeat?
A. Well, if they had read the long form they would have known in January of 2015, Dr. Gilbert had noted it.

CP 1069–70 (Fletcher Dep. at 143:24–144:21).

Q. So there's no information, if Dr. Harmon had inquired or Dr. Gilbert had inquired or Pierce Transit had inquired, are you aware of any information that would have put any of the three of them on notice that Mr. McPike was using marijuana in 2015?
A. I don't see that he was ever sent for a reasonable cause test to be able to conclusively say that he wasn't using that.
Q. Do you have any information to suggest that he was using marijuana in 2015?
A. I do not.

CP 1072 (Fletcher Dep. at 151:9–23).

Q. Can you say, can you point to any document that Pierce Transit had in its files, that if I'm Pierce Transit, of the results of his sleep apnea study?
A. I don't see that. They didn't ask the question. I don't see any evidence of that.
Q. And do you have any document in the materials that you've reviewed where it shows a provider advised Mr. McPike after he had the sleep apnea study that he should stop driving until he pursued therapy for the sleep apnea?
A. I'm referring you to the note of December 18th, 2014, by Nurse Bailie, where the patient admits to

> her that he feels drowsy when driving at times. She discusses the significance of the severity of his sleep disorder. And that warns him not to drive or operate heavy equipment until he feels if he feels sleepy. So, I think that's a pretty strong warning about the severity of his condition after the sleep study that was ordered by Dr. Harmon. And he was allowed to continue to drive without having treatment after this diagnosis was made.
>
> ...
>
> Q. Okay. So the nurse, Nurse Bailie did not tell him to stop driving all together, correct?
>
> A. She did not. I think the note speaks for itself.

CP 1080–81 (Fletcher Dep. at 161:24–162:22); CP 1082 (Fletcher Dep. at 163:13–17).

> Q. And did any provider refer him for a cardiac work-up after November of 2012?
>
> A. They did not.

CP 1084–85 (Fletcher Dep. at 173:24–174:2).

Dr. Fletcher's deposition confirms, indisputably, that no medical professional advised either Mr. McPike or Pierce Transit that Mr. McPike was no longer fit to drive. As such, the Appellants are unable to show that either Pierce Transit or Mr. McPike had notice that Mr. McPike was not fit to drive in 2015 or that he was at risk of a sudden loss of consciousness.[7]

[7] Dr. Fletcher does point out that Pierce Transit could have had notice of Mr. McPike's sleep apnea if it tracked employee's health insurance claims. CP 1066–67 (Fletcher Dep. at 137:15–138:1). However, he then noted it would be speculation to assume Pierce Transit tracked that information. *Id.*

F. Dr. Fletcher Erroneously Presumed, with No Evidentiary Support, that Pierce Transit had Mr. McPike's DOT Long Form or Information Regarding his Sleep Apnea.

Dr. Fletcher erroneously relies on the DOT long form[8] as proof of notice to Pierce Transit of Mr. McPike's medical issues. CP 1064–65 (Fletcher Dep. at 135:13–136:10); CP 1067 (Fletcher Dep. at 138:2–14); CP 1070–71 (Fletcher Dep. at 144:7–145:3); CP 1075–76 (Fletcher Dep. at 156:20–157:4). Dr. Fletcher also points to the fact that, in November 2014, Dr. Harmon only gave Mr. McPike a "short card"[9] as giving notice to Mr. McPike and Pierce Transit of Mr. McPike's sleep apnea. CP 1080 (Fletcher Dep. at 161:14–23). Two fundamental flaws are fatal to Dr. Fletcher's reliance on these documents as providing notice. First, both the long form and short card preceded the issuance of Mr. McPike's January 30, 2015 CDL medical certificate. Second, Pierce Transit does not have access to a driver's medical records.

1. Mr. McPike's January 2015 medical examination certificate and intrastate medical waiver.

Dr. Fletcher mistakenly relies on the DOT long form and Dr. Harmon's short card to suggest notice to Pierce Transit. Yet, these documents preceded the issuance of the January 30, 2015 medical

[8] A DOT long form is the form filled out by the patient before the physical examination. CP 1092 (Gilbert Dep. at 76:23–24).
[9] A short card is a short duration CDL authorization. CP 1091 (Gilbert Dep. at 21:15–20).

examination certificate, the intrastate medical waiver, and the CDL. *See* CP 1091 (Gilbert Dep. at 21:15–20) (short card given by Dr. Harmon November 7, 2014); CP 1092 (Gilbert Dep. at 76:23–24) (long form filled out by patient before certification examination); CP 1096 (Medical Examination Certification and CDL dated January 30, 2015); CP 1098 (intrastate medical waiver dated February 5, 2015).

Pierce Transit, like other Washington transit agencies, had neither the obligation nor ability to validate, confirm, or otherwise assess the validity of Mr. McPike's medical certificate after the January 30, 2015 evaluation by Dr. Gilbert. CP 1115 (Pierce Transit's Executive Director of Administration Amy Cleveland Decl. ¶¶ 5–6); *see also,* CP 1030 (Whatcom Transportation Authority's Human Resource Director Andy Rowlson Decl. ¶¶ 3–4); CP 1026 (King County Metro Transit's Bus Operations Superintendent of Training Carri L. Brezonick Decl. ¶¶ 3–4); CP 1034 (Kitsap Transit's Human Resource Director Jeff Cartwright Decl. ¶¶ 3–4, 6); CP 1038 (Snohomish County Public Transportation Benefit Area's Human Resources Generalist Tina Guzinski Decl. ¶¶ 3–4).

2. Pierce Transit does not and would not have access to a driver's medical records.

The second fatal flaw in Dr. Fletcher's reliance on the long form and short card is that Pierce Transit does not have access to its driver's medical

records. CP 1115 (Cleveland Decl. ¶ 7). The long form is the form filled out by the patient before the physical examination. CP 1092 (Gilbert Dep. at 76:23–24). The short card in this case was a three-month medical certificate McPike was issued in November 2014. CP 1091 (Gilbert Dep. at 21:15–20.) The information explaining this short certification is contained in a driver's medical records. CP 1104 (Dr. Harmon's records).

Transit agencies in Washington do not require that their drivers produce or otherwise release their medical records to the agencies in the ordinary course. CP 1115 (Cleveland Decl. ¶ 7); *see also* CP 1030 (Rowlson Decl. ¶ 4); CP 1026 (Brezonick Decl. ¶ 4); CP 1034 (Cartwright Decl, ¶ 4); CP 1038 (Guzinski Decl. ¶ 4). It would be inappropriate for Pierce Transit to obtain these forms from drivers because it would be an unjustified invasion of privacy. CP 1115 (Cleveland Decl. ¶ 9); *see also* CP 1035 (Cartwright Decl. ¶ 7); CP 1038 (Guzinski Decl. ¶ 5). Therefore, the long form did not provide notice to Pierce Transit because Pierce Transit did not have it. The short card did not provide notice to Pierce Transit because Pierce Transit did not have the underlying medical records.

G. <u>Dr. Fletcher Can Only Speculate (and, therefore, ask the jury to speculate) Regarding What Further Medical Analysis May Have Shown.</u>

Dr. Fletcher maintains that Pierce Transit should have done more to evaluate whether Mr. McPike was safe to drive. His general objection to

Pierce Transit's actions is that Pierce Transit did not order fitness for duty evaluations. *See* CP 1060–62 (Fletcher Dep. at 130:8–132:24); CP 1078–80 (Fletcher Dep. at 159:5–161:13). Dr. Fletcher, however, failed to show beyond speculation that there was a triggering event for such an evaluation, that an evaluation would have revealed coronary artery disease, or that, if a medical issue was found, it would have been disqualifying.

1. Dr. Fletcher cannot show that a fitness for duty evaluation was triggered in 2015.

Dr. Fletcher points to no triggering event that would have required Pierce Transit to order a fitness for duty evaluation in 2015. He argues that Pierce Transit should have done a fitness for duty evaluation after Mr. McPike's January 2014 or April 2014 FMLA leaves to address his diabetes. CP 1060–62 (Fletcher Dep. at 130:8–132:24). However, Mr. McPike *was* evaluated by Dr. Gilbert and was approved for a medical waiver by Dr. Wang in January 2015, many months after these medical leaves, thus demonstrating that he remained fit for duty. CP 1093 (Gilbert Dep. at 112:13–20); CP 1113 (Mr. McPike's waiver application signed by Dr. Wang on January 23, 2015). Additionally, even if FMLA leave acted as a triggering event, Dr. Fletcher admits that Mr. McPike did not take medical leave for cardiac conditions, sleep apnea, or diabetes in 2015; therefore, no

evaluation would be triggered after Dr. Gilbert's certification evaluation in January 2015. CP 1054–55 (Fletcher Dep. at 112:24–113:5).

Dr. Fletcher also points to the long form as a trigger for Pierce Transit to request a fitness for duty evaluation of Mr. McPike in 2015. CP 1078–79 (Fletcher Dep. at 159:18–160:5). But, as discussed above, Pierce Transit does not have access to those forms. CP 1115 (Cleveland Decl. ¶ 7). Even if Pierce Transit did have access, the long form preceded the CDL medical certificate and Pierce Transit has neither the obligation nor the ability to second guess the issuance of the medical certificate. *Id.* ¶¶ 5–6.

Dr. Fletcher then points to Mr. McPike's sleep apnea as a trigger for a fitness of duty evaluation in 2015. *See* CP 1079 (Fletcher Dep. at 160:6–24). In support of this, he notes Dr. Harmon's November 2014 short card as giving Pierce Transit notice of Mr. McPike's medical condition. CP 1080 (Fletcher Dep. at 161:14–23). Similar to the long form, however, the short card preceded the issuance of the January 30, 2015 medical certificate and Pierce Transit did not have either the obligation or the ability to validate, confirm, or evaluate that issuance. CP 1115 (Cleveland Decl. ¶¶ 5–6). Even if the short card had provided notice after it was issued in November 2014, Mr. McPike *did* pursue therapy for sleep apnea in December 2014. CP 1082 (Fletcher Dep. at 163:8–12). And, at the time of the medical examination on January 30, 2015, Mr. McPike provided Dr. Gilbert reports

demonstrating compliance with his CPAP sleep apnea therapy. CP 1058–59 (Fletcher Dep. at 126:14–127:17). Thus, the medical examination on January 30, 2015 negated any trigger for evaluation that the short card would have provided.

Pierce Transit, similar to other transit agencies, does not inquire into a driver's medical qualifications absent a triggering event. CP 1116 (Cleveland Decl. ¶ 10); *see also* CP 1030 (Rowlson Decl. ¶ 5); CP 1026 (Brezonick Decl. ¶ 7); CP 1038 (Guzinski Decl. ¶¶ 7–8). A triggering event must call the driver's physical or mental state into question. CP 1116 (Cleveland Decl. ¶ 10).

> Q. Are you aware of whether Mr. McPike had ever had a motor vehicle accident due to some health condition on his part?
> A. Well, he had multiple accidents. I mean, I've never saw an investigation about preventability or so forth. So, I've not seen any definitive opinion that they were related to medical conditions.
> Q. You haven't seen anything one way or the other as to whether medical conditions contributed to any motor vehicle accidents, is that correct?
> A. Other than the accident of May of 2015, I have not.

CP 1076 (Fletcher Dep. at 157:10–22).

> Q. Any evidence in the records you reviewed that suggested his diabetes affected his ability to operate the bus, or a bus for Pierce Transit at any time?
> A. Well, I never saw any episode of a crash revolving (sic) his diabetes.

CP 1077 (Fletcher Dep. at 158:5–10).

> Q. So, are you aware of any behaviors, any documents that suggest behaviors by Alonzo McPike that would have triggered or should have triggered a fit for duty at Pierce Transit?
> A. No. Not in the 2014-2015 time period.

CP 1083 (Fletcher Dep. at 164:15–19).

2. Dr. Fletcher cannot opine on a more probable than not basis that further medical evaluations would reveal coronary artery disease.

Dr. Fletcher does not opine, because he cannot, that it is more probable than not that coronary artery disease would have been revealed if a fitness for duty evaluation had been done on Mr. McPike. Although Dr. Fletcher states that he is "100 percent convinced" that coronary artery disease would have been revealed if a work-up had been done in 2015, CP 1063 (Fletcher Dep. at 134:11–20), this conflicts with his own deposition testimony.

Dr. Fletcher admits that "20 percent of the time the first manifestation of coronary artery disease is sudden death." CP 1047–48 (Fletcher Dep. at 51:24–52:3). He further admits that, even if an EKG is done, it could come out clean because coronary artery disease can be sudden and without symptoms. CP 1048–49 (Fletcher Dep. at 52:24–53:5). Thus, although Dr. Fletcher generally states that he is convinced, he provides no evidence, medical or otherwise, to support his gratuitous conviction with

respect to Mr. McPike.

3. Dr. Fletcher cannot show that it is more probable than not that any follow-up evaluations in 2015 would have revealed disqualifying conditions.

Dr. Fletcher does not opine, because he cannot, that, even if a medical issue was revealed, it would have affected Mr. McPike's qualification for an intrastate qualification. Dr. Fletcher admits that assessing what may have been revealed by a hypothetical medical evaluation would be speculation.

> Q. So, there are things that could have been done. If a fit for duty had been done in say April of 2014 after the second FMLA leave, what evidence do you have that would support the proposition that he would not have passed the fit for duty at that time?
> A. What evidence do I have? It wasn't done, so that would be speculation.

CP 1062 (Fletcher Dep. at 132:5–12). Beyond reiterating medical factors, Dr. Fletcher could not and did not state if there would be disqualifying results if further evaluations were done. Rather than stating that, on a more probable than not basis, further evaluations would identify disqualifying issues, Dr. Fletcher's deposition testimony merely states that certain issues had the potential to be disqualifying.

> Q. Right. But, in and of itself coronary artery disease isn't going to be a disqualifying factor?
> A. Well, you just can't say -- you have to say in what context the coronary artery disease? The severity? The treatment that's been done. I don't think you can

> just eliminate and say, coronary artery disease is not a concern. It is a concern.

CP 1050 (Fletcher Dep. at 65:2–10).

> Q. Is the finding of PACs a disqualifying factor?
> A. In itself it's not disqualifying

CP 1051 (Fletcher Dep. at 66:8–10).

> Q. Okay. So, you've taken a look at the case with all the records. So, would his past psych history have disqualified him from certification?
> A. Would his past psychiatric history have disqualified him from certification? Potentially it could. It's something that I would want to further explore.

CP 1052 (Fletcher Dep. at 76:14–21).

> Q. And under the CFRs for disqualifying related to alcohol, it's got to be a current diagnosis of alcoholism, isn't that correct?
> A. That is correct.
> Q. And we don't have that here, do we?
> A. We have some suspicion. We don't have confirmation.

CP 1053 (Fletcher Dep. at 78:2–8).

Dr. Fletcher's deposition testimony defeated any attempted by Appellants to create an issue of material fact because he failed to state that any issue found would, more probably than not, disqualify Mr. McPike from operating a Pierce Transit bus. Dr. Fletcher could only speculate and note that findings of hypothetical evaluations possibly could be disqualifying.

And, critically, Dr. Fletcher did not testify that any potentially,

theoretically disqualifying condition would have caused Mr. McPike's sudden incapacitation.[10]

Rather, Dr. Fletcher merely states that it was the "constellation" of Mr. McPike's medical issues that suggests he was susceptible to a sudden, incapacitating, cardiac event. CP 1278–79 (Fletcher Dep. at 169:14–170:9). But this is mere speculation. Dr. Fletcher summarily aggregates Mr. McPike's health conditions because he cannot identify a single change in condition in 2015 that even theoretically could have provided notice to Pierce Transit and Mr. McPike, not to mention Mr. McPike's treating providers, of a particularized risk of sudden loss of consciousness. In the absence of notice to either Mr. McPike or Pierce Transit that Mr. McPike's medical conditions had changed so as to present a particularized risk of a sudden loss of consciousness, Pierce Transit and the McPike Estate were entitled to summary judgment as a matter of law.

H. <u>Appellants Did Not Preserve and the Trial Court Did Not Err in Any Respect Regarding Alleged Spoliation.</u>

Appellate courts generally do not consider arguments raised for the first time on appeal. *See* RAP 2.5(a). "The purpose of this rule is to ensure that [the court] engages in the same inquiry as the trial court." *Kave v.*

[10] Dr. Fletcher admits the accident was not caused by marijuana, CP 1072, a psychological or psychiatric condition, CP 1073, prescription medication, CP 1073, or uncontrolled sleep apnea, CP 1074.

McIntosh Ridge Primary Rd. Ass'n, 198 Wn. App. 812, 823, 394 P.3d 446, 451 (2017). While "this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality." *Wilcox v. Bayshore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2016).

Appellants cannot assign error to the absence of an adverse inference below because they did not present such an inference to the Court for determination. In Appellants' opposition to Pierce Transit's first motion for summary judgment, they advised the court that they "are not intending for the Court to rule on the spoliation issue as part of this briefing . . . ." CP 155–56. Appellants had another opportunity to raise their spoliation claim in response to Pierce Transit and Mr. McPike's second motion for summary judgment. In fact, Appellants could have raised their spoliation claim at any time – irrespective of the pendency of any dispositive motions. They chose not to do so.

Had Appellants requested a ruling on the issue, the trial court could have addressed it with the benefit of Pierce Transit's evidence and argument.[11] While Appellants correctly observe that a trial court's ruling

[11] Pierce Transit would have presented evidence demonstrating that the video preservation was consistent and compliant with Pierce Transit's policies and procedures regarding extracting video footage in the event of an accident. In addition, Pierce Transit would have

on spoliation in the context of a summary judgment is reviewed de novo, *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 135, 307 P.3d 811 (2013), in this case there was no trial court ruling because Appellants did not ask for any such ruling.

Even if this court were to consider this issue for the first time on appeal, the application of an adverse inference regarding Mr. McPike's condition immediately preceding the accident, such an inference would not support the contention that his sudden incapacity was foreseeable. It would not have changed the outcome in the trial court.

V. CONCLUSION

Mr. McPike suffered a sudden loss of consciousness due to an unforeseen cardiac event, causing him to lose control of the bus. Appellants failed to produce evidence that either Mr. McPike or Pierce Transit were put on notice after the issuance of his January 30, 2015 medical certificate that he had developed a disqualifying medical condition. Further, Appellants have failed to demonstrate that additional medical review of Mr. McPike would have revealed a disqualifying condition. As such, the McPike Estate and Pierce Transit, as a matter of law, cannot be liable to

---

explained the rationale behind those policies and procedures. In short, Pierce Transit would have defended itself against the allegation of spoliation.

Appellants and the trial court's decision below must, as required by Washington law, stand.

RESPECTFULLY SUBMITTED this August 30, 2019.

MILLS MEYERS SWARTLING P.S.

By: *s/Raymond S. Weber*_____
Caryn Geraghty Jorgensen
WSBA No. 27514
John Fetters
WSBA No. 40800
Raymond S. Weber
WSBA No. 18207
Samantha K. Pitsch
WSBA No. 54190
Attorneys for Estate of Alonzo McPike and Pierce Transit

Mills Meyers Swartling P.S.
1000 Second Avenue,
Suite 3000
Seattle, Washington 98104
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

APPENDIX A

Appellants' Claim	App. Brf. Pg.	Citation/Source	Correction of Appellants' Characterization
There are varying accounts from bus passengers as to Mr. McPike's behavior prior to the collision.	5	Citation: See CP at 90-99 Source: Declarations of Holly Lang, Michelle Gu, and Markell Charles	This statement mischaracterizes these declarations which consistently state that there was nothing unusual about the driver's behavior until the accident. See CP 91 (Charles Decl. ¶ 5); CP 94 (Gu Decl. ¶ 3); CP 98 (Lang Decl. ¶ 3).
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.	6	Citation: CP at 351-54. Source: Fletcher Declaration	This statement mischaracterizes Dr. Fletcher's declaration which merely states that "As part of his initial licensing, Mr. McPike was required to learn the physical requirement to be fit for duty." CP 352. Moreover, Dr. Fletcher provides no support for this requirement nor is there support for it found in local or state law.
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.	7	Citation: CP 237-43 Source: McPike's FLMA leave requests	The records cited contain no support for the assertion that doctors noted any episodes of non-compliance by Mr. McPike.
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.	8	Citation: CP at 349-51, 1214-15, 1239-40. Source: Fletcher Decl., Fletcher Dep.	This statement is a mischaracterization in that Mr. McPike did not have a significant medical, psychological, or substance abuse history. Further, it depends solely on the speculation of Dr. Fletcher who states, without support, that Mr. McPike falsified information.
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.	8	Citation: CP at 341-59, 360-76. Sources: Fletcher Decl., Lew Grill Decl.	This statement is a mischaracterization in that Mr. McPike did not have a significant medical, psychological, or substance abuse history. Further, it depends solely on the speculation of Dr. Fletcher and Mr. Grill who state, without support, that Mr. McPike falsified information.
Mr. McPike's supervisor at Pierce Transit, Marvino 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.	8	Citation: CP 333-34 Source: Gilliam Dep.	This statement reflects a mischaracterization of Mr. Gilliam's deposition testimony. Mr. Gilliam was asked a hypothetical in which driver was diagnosed with all the conditions at the same time; he was not discussing Mr. McPike.
Additionally, if known, Mr. McPike' s history of substance abuse would have triggered an evaluation by a substance abuse professional.	8	Citation: CP 1234-40 Source: Fletcher Dep.	This statement is not supported by the record. Appellants' cite to Dr. Fletcher's opinion, not to Pierce Transit policy and provide no documentary support of a substance abuse issue.
This would have included information from the employment file that he had been previously terminated for cannabis use and never got tested again.	8	Citation: CP 1241-44 Source: Fletcher Dep	This statement mischaracterizes Dr. Fletcher's deposition testimony in which he admitted that "there's no suggestion in the records that there is another violation [of marijuana use after 2007]." CP 1242.
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.	9	Citation: CP 183 Source: McPike medication list	This statement is not supported by the record. CP 183 contains no "detailed education material."
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.	11	Citation: CP 245-46 Source: McPike Absence Slip	This statement mischaracterizes the record. CP 245 contains no reason for Mr. McPike's absence. CP 246 then states that "diabetes was out of control, due to being sick" reflecting Mr. McPike's self-regulation in which he removed himself from work while ill.
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	11	No citation to evidence or law.	Appellants provide no support for the assertion that Pierce Transit could access medical records through the Department of Licensing. In fact, medical reports are protected by HIPPA and a release is needed to obtain these records. *See* https://www.fmcsa.dot.gov/faq/will-my-employer-have-access-my-medical-evaluation.
A February 14, 2011, Medical Examination Report that details Mr. McPike's health history including diabetes, frequent alcohol use, and narcotic use.	11	Citation: CP at 272-74 Source: Medical Examination report	This statement mischaracterizes the record. At CP 272, both the yes and no boxes are checked with circling and arrows, demonstrating a correction to the record.
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.	12	Citation: CP 290 Source: criminal background authorization	This statement mischaracterizes the release signed by Mr. McPike. CP 290 is a criminal background check release. The release does not authorize Pierce Transit to obtain its employee's medical records.

Appellants' Claim	App. Brf. Pg.	Citation/Source	Correction of Appellants' Characterization
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.	12	Citation: CP 293 Source: Dupille dep.	This statement mischaracterizes the deposition testimony. Ms. Dupille was responding to a hypothetical question about receiving the results of a fit for duty examination. CP 293.
But there was no other culture within the corporation to encourage operator health and wellness.	13	Citation: CP 302 Source: Hovde Dep.	This statement mischaracterizes the deposition testimony. Mr. Hovde did not state that there was no culture to encourage operation health and wellness. Moreover, Mr. Hovde stated that Pierce Transit has a written safety culture statement. CP 303.
Thus, Pierce Transit did not expect or encourage its operators to be honest with their examining physicians for purposes of getting their medical card.	14	Citation: CP 329-30 Source: Marvino Dep.	This statement mischaracterizes the deposition testimony. Mr. Gilliam merely stated that Pierce Transit did not have an official or written policy.
For example, Pierce Transit did not assign anyone to be in charge of operator health.	14	Citation: CP 332 Source: Marvino Dep.	This statement mischaracterizes the deposition testimony in which Mr. Gilliam noted that the doctor providing the CDL is responsible for the driver's health.
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 at346. • 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.	16	Citation: CP 349, 1728 Fletcher Decl., Harmon Dep.	Appellants provide no support for the assertion that these blood pressure readings were disqualifying per CDL regulations. Additionally, the December 18, 2014 and January 29, 2015 readings, see CP 1728, were not included in the record on Pierce Transit' motions --they were only included in the record on MultiCare and Dr. Gilbert's motion.
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.	17	49 CFR 391.43(f)	Appellants provide no support for this assertion. The regulation cited does not contain this requirement.
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.	18	Citation: CP 532-33 Source: Wang Chart Notes	This record provides no support for the assertion that Dr. Wang chastised Mr. McPike or that he acted contrary to doctor's instruction.
Mr. McPike had been warned by his medical providers of the serious implications of his medical conditions.	18	Citation: CP 351-52, 373-75 Source: Fletcher Decl., Grill Decl.	Appellants provide no support for this assertion. Neither Dr. Fletcher nor Mr. Grill alleged that Mr. McPike had been warned about serious implication of his medical conditions. Further, Dr. Fletcher admitted that there was no evidence that Pierce Transit or Mr. McPike was put on notice that Mr. McPike was not fit to drive after he received his 2015 CDL. CP 1056–70 (Fletcher Dep. at 122:9–123:3, 136:11–18, 137:1–14, 140:8–22, 143:24–144:21).
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. 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.	26	Citation: CP 335-59 Source: Fletcher Decl.	Appellants' source provides no support for the assertion that Mr. McPike had any knowledge that his medical conditions disqualified him from driving. Further. Dr. Fletcher admitted that Mr. McPike was, in fact, not put on notice that he 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)

CERTIFICATE OF FILING AND SERVICE

I, Anna Armitage, hereby certify that I filed the foregoing with the Court of Appeals, Division II, and served same upon the following counsel of record:

Via Appellate Courts' Portal:

Attorneys for Appellants Christopher W. Sartin and Rose M. Ryker:

Sok-Khieng K. Lim
Richard H. Benedetti
Davies Pearson, P.C.
920 Fawcett Avenue
P.O. Box 1657
Tacoma, WA 98401
slim@dpearson.com
rbenedetti@dpearson.com

Kathryn N. Potvin
Putnam Lieb Potvin, Attorneys at Law
9074 Legion Way SE
Olympia, WA 98501
kathyp@putnamlieb.com

Attorneys for Respondents Multicare and Richard Gilbert, M.D.

Dan Mullin
Mullin, Allen & Steiner PLLC
101 Yesler Way, Ste 400
Seattle, WA 98104
dmullin@masattorneys.com

Co-Counsel Respondents Estate of Alonzo McPike and Pierce Transit:

Timothy P. Malarchick
Malarchick Law Offices
4423 Point Fosdick Dr. NW, Ste 302
Gig Harbor, WA 98335
tim@malarchicklaw.com

DATED August 30, 2019.

s/Anna Armitage
Legal Assistant

MILLS MEYERS SWARTLING P.S.

August 30, 2019 - 1:48 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53248-4
Appellate Court Case Title:	Christopher W. Sartin, et al, Appellants v. Alonzo McPike, et al, Respondents
Superior Court Case Number:	16-2-10601-9

The following documents have been uploaded:

- 532484_Briefs_20190830134650D2939856_1394.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was 190830 PT McPike App Brief.pdf

A copy of the uploaded files will be sent to:

- cjorgensen@millsmeyers.com
- dmullin@masattorneys.com
- eboehmer@masattorneys.com
- jfetters@millsmeyers.com
- kathrynp@putnamlieb.com
- lwheeler@millsmeyers.com
- rbenedetti@dpearson.com
- slim@dpearson.com
- spitsch@millsmeyers.com
- tduany@masattorneys.com
- tim@malarchicklaw.com

Comments:

Sender Name: Anna Armitage - Email: aarmitage@millsmeyers.com
Filing on Behalf of: Raymond Stillman Weber - Email: rweber@millsmeyers.com (Alternate Email: aarmitage@millsmeyers.com)

Address:
1000 Second Avenue
30th Floor
Seattle, WA, 98104
Phone: (206) 382-1000

Note: The Filing Id is 20190830134650D2939856