IN THE INDIANA SUPREME COURT
CASE NO.: _____

CHRISTOPHER ALEXANDER d/b/a CRYSTAL TIGER HOLDINGS, LLC	)	**Appeal from the Indiana Court of Appeals**
	)	**Case No.: 19A-CT-366**
Appellant-Plaintiff,	)	
	)	**Appeal from Lake County Superior Court 1**
	)	
v.	)	**The Honorable John M. Sedia, Judge**
	)	
DJURIC TRUCKING, INC. and WILLIAM H. WALDEN, as SPECIAL REPRESENTATIVE OF THE ESTATE OF MARK PHILLIP SOKARSKI	)	**Trial Court Cause No. 45D01-1705-CT-106**
Appellees-Defendants.	)	

REPLY BRIEF IN SUPPORT OF PETITION TO TRANSFER

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REPLY ARGUMENT ON TRANSFER

Appellees spends an inordinate amount of focus in their Response to Petition to Transfer ("Response") in a bald attempt to deflect the issues presented before this Court. However, the issues presented are much narrower and more straightforward. That is, whether the Court of Appeals' affirmation of the grant of summary judgment was erroneous.

The Court of Appeals' decision was erroneous because the Court of Appeals found that the trial court abused its discretion in striking all of Dr. Fletcher's Affidavit, yet it overlooked the remaining parts of the Affidavit that create a genuine issue of material fact. Despite Appellee's claims to the contrary, the issue presented is one of summary judgment, not negligence. Therefore, the only issue is whether the Court of Appeals' affirmation of grant of summary judgment was erroneous, not whether Sikorski was, in fact, negligent. That is the very question for the jury.

Appellees make a unique start to their argument by referencing Indiana Rule of Appellate Procedure 57(H). (Appellee's Response, p. 13). Specifically, Appellee tries to dismiss Alexander by saying "Alexander seeks transfer because – in his opinion – the Court of Appeals decided the matter wrong." (Appellee's Response, p. 13). Such statement is curious in that first, rationally speaking, an appeal from the Court of Appeals only ever occurs because one party believed the lower court was wrong. Second, an Appellant does not designate to the Indiana Supreme Court what Rule 57(H) factor controls. Instead, Rule 57(H) specifically states, "[t]he following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer."

I. Alexander Designated Evidence Creating a Genuine Issue of Material Fact

The Appellees would have this Court view the issue as: whether Sikorski was negligent? Instead, the issue is whether the evidence presented, i.e., the unstricken parts of Dr. Fletcher's

Affidavit, creates a genuine issue of material fact such that a reasonable juror could find that Sikorski was negligent. Even the trial court believed that the Affidavit created a genuine issue of material fact, but struck the Affidavit in its entirety because of the alleged "legal conclusions." Appellant's App. Vol. II. P. 11-12. The Court of Appeals found the Affidavit admissible, except for the parts contained the words "foreseeable." Memorandum Decision, pp. 20. However, the Court of Appeals erroneously affirmed the award of Summary Judgment, even though the trial court's award of summary judgment was based on the Affidavit being stricken in its entirety. What is lost on Appellee is the remaining parts of Dr. Fletcher's Affidavit, the parts relating to Sikorski's poor health, leave a genuine issue of material fact because a reasonable juror could find that Sikorski was negligent in getting behind the wheel of the semi-truck because he failed to ensure he was medically fit to drive.

Appellees' next claim that there is no evidence that Sikorski "knew or had reason to know" that he was at imminent risk and should not have been driving. (Appellee's Response, pp. 14). However, a reasonable juror could certainly find that an individual who chose to drive a semi-truck as a career, who had a duty, pursuant to 49 C.F.R. § 391.45, to continue to ensure they were medically fit to drive, and who had a long list of medical issues with no evidence of properly treating same, knew or had reason to know he should not get behind the wheel.

Finally, Appellee's again turn to the case of *Denson v. Estate of Dillard*, 116 N.E.3d 535 (Ind. Ct. App. 2018) to say that Sikorski was barred from being negligent. But, as pointed out in Appellant's Petition to Transfer, the Defendant in *Denson* followed ***all*** medical recommendations to ensure he was medically fit. *Id*. at 541-542. Furthermore, the Defendant in *Denson* was not under an on-going duty, pursuant to Federal Law, to ensure he was medically fit to drive, as was

Sikorski. An ordinary motorist driving a car as in *Denson* is hardly the same as a commercial truck driver.

II. The Present Transfer Petition Should be Granted Because the Court of Appeals' Affirmation of a Grant of Summary Judgment was Erroneous

Appellees try to broaden the issue presented before this Court by claiming that Alexander is asking this Court to impose a higher burden on all drivers on the road to ensure they are medically fit to drive. (Appellee's Response, pp. 17). Not so. To the contrary, Alexander provided a detailed analysis in the Petition to Transfer about the key distinctions between comparing Sikorski to reasonable semi-truck driver, as opposed to a normal everyday driver. Sikorski, unlike the general public, made the conscious decision to make driving a career, which requires Sikorski to be on the road for much longer periods than the general public. Furthermore, Sikorski, unlike the general public, is subject to Federal Regulation which imposes a continuing duty on drivers to ensure they are medically fit to drive. *See* 49 C.F.R. § 391.45. Finally, Sikorski is driving a vehicle (i.e., a large semi-truck), unlike the general public, which is much more likely to cause fatal injury if a crash occurs. (*see* Appellant's Petition, p. 11 for statistics).

While Appellee's claim Sikorski was "medically cleared" to drive, this does not prevent a jury from finding that Sikorski was negligent on the day of the incident. First, if a driver who was medically cleared could never become medically unfit during the two-year time period for which a license is valid, then the Federal Government would not have imposed a **continuing duty** on drivers to ensure they continue to be medically fit, regardless of whether they have a valid license. Second, compliance with a regulatory standard does not preclude a finding of negligence for failing to take additional steps. *See Northern Indiana Public Services Co. v. Sell,* 597 N.E.2d 329, 331 (Ind. Ct. App. 1992). The fact that Sikorski obtained a medical examiner's clearance does not establish an absence of genuine issue of material fact.

CONCLUSION AND SIGNATURE BLOCK

Appellant respectfully requests this Court grant transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Reply Brief in Support of Petition to Transfer contains 998 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010.

/s/ Alexander N. Moseley
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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was served upon the following this 25th day of November, 2019 via the Court's electronic filing system:

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