

NO. 64301-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CRAIG KRESSER and PAULA KRESSER, husband and wife

Appellants,

v.

THE BOEING COMPANY, a foreign corporation; KRIS A. JANSSEN
and JANE DOE JANSSEN, husband and wife, and the marital community
composed thereof,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable Michael C. Hayden)

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION

Appellants' sole cause of action is for negligence. To establish that Respondents owed a duty of care to Appellants (which is a prerequisite for a negligence claim), Appellants ask this Court to adopt the "emergency doctrine." This doctrine is a legal duty imposed on masters (here, employers) to aid their servants (here, employees) when, as a result of being severely injured or seriously ill, those servants are incapacitated and cannot help themselves. Although Appellants cite a handful of cases from foreign jurisdictions that have adopted the emergency doctrine, it is undisputed that the doctrine has never been adopted in Washington.

Even assuming, however, that this Court were to adopt the emergency doctrine, it does not apply to the facts of this case. To trigger its application, Appellants must allege an *actual and extreme emergency* in which the employee is *incapacitated, helpless and/or unable to attend to his own care*. Appellants allege **exactly the opposite**. Specifically, they allege that Appellant Craig Kresser ("Kresser") was:

- talking to his supervisor without any difficulty (not slurring his speech or unable to communicate);
- fully ambulatory (Appellants do not allege that he had any difficulty walking);

- in no apparent emergent danger (no seizures, headaches, vision or breathing difficulties); and
- completely capable of driving himself safely home after his shift (Appellants concede he drove safely home from Boeing's Everett facility to his residence in Kitsap county, approximately 90 minutes away, with no assistance from others.)

In short, Kresser's behavior -- walking, talking, and driving -- demonstrates that he was *not* helpless or incapacitated, which is required to trigger the emergency doctrine. Thus, even if this Court adopts the emergency doctrine, it is inapplicable here. Indeed, this case does not present the kind of facts that would warrant exploring whether the doctrine should even be adopted by Washington.

Recognizing that Washington has not adopted the emergency doctrine and, moreover, faced with the absence of any facts that would trigger its application, Appellants also point to other "duties" that they hope this Court will determine encompass their negligence cause of action. Accordingly, they allege that Respondents have a duty to: (a) accurately diagnose the existence and severity of employees' medical symptoms; (b) exercise reasonable care in controlling access to onsite emergency medical personnel and facilities, including hiring and training competent "gatekeepers"; and (c) exercise reasonable care when choosing

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to take charge of an employee's health crisis by providing instructions and advice. Appellants have not and cannot cite a single Washington case, statute or regulation establishing the existence or application of any of these "duties" that would govern Appellants' allegations here.

In short, accepting all of Appellants' allegations as true, Appellants have not identified any legal duty that is applicable to this case and, therefore, they have failed to establish a viable claim of negligence as a matter of law. Thus, this Court should affirm the trial Court's dismissal of Appellants' Complaint.

II. ISSUES PRESENTED

1. Have Appellants identified any legal duty that would allow them to pursue an action for negligence?

2. If the Court recognizes the "emergency doctrine" and imposes a duty to aid an incapacitated or helpless employee in an emergency situation, have Appellants successfully alleged an emergency?

3. Should this Court impose a new duty on Washington employers and supervisors that would render them liable for any medical consequences that befall an employee if his supervisor fails to diagnose an employee's medical symptoms correctly?

III. STATEMENT OF THE CASE

Respondents accept as true, solely for purposes of this motion, all of the factual allegations in Appellants' Complaint as well as the hypothetical facts alleged that are consistent with the Complaint.

A. Allegations Giving Rise to this Lawsuit

Appellants allege as follows: That on August 27, 2008, shortly before the end of his shift, Boeing employee Kresser informed his temporary supervisor, Kris Janssen ("Janssen"), that he "did not feel well, was light headed, dizzy, and that he had no feeling in his left hand and was unable to pick up objects with [his] left hand." CP 2 ¶¶ 6-7. Kresser was "most likely" suffering a TIA, or transient ischemic attack. Opening Brief at 5. After conversing with Kresser, Janssen informed Kresser that Kresser's "shift was nearly over and so he should just take it easy until he could leave for home," *Id.* ¶ 7, and "advised Mr. Kresser to see a doctor, later, for a 'check up.'" Opening Brief at 4. At the end of his shift, Kresser safely drove himself from Boeing's Everett facility to his home in Kitsap County, arriving home after midnight, approximately 90 minutes after his shift ended. CP 1-2, ¶¶ 1, 6, 9; Opening Brief at 4-5.

At the time that Kresser's shift ended and he drove from Everett to Kitsap County, he still had sufficient time to go to a hospital and receive any of the treatments that he argues would have helped him to have a

“better chance of recovery” from the stroke he suffered several hours later while at home sleeping. CP 2-3 ¶¶ 9, 11. When Kresser finally went to the hospital the next day and it was determined that he had experienced a stroke while he was sleeping, it was too late for those particular treatments. *Id.*

Thus, Kresser alleges, Boeing and Janssen should be held liable for the catastrophic effects of the stroke that Kresser had while he was at home sleeping, several hours after he left work.

IV. ARGUMENT

A. Standard of Review

Under established Washington law, a court should dismiss a claim “if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005).¹ It is equally well established, however, that “[w]hile a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court’s inquiry is whether the plaintiff’s claim is legally sufficient.” *Id.* at 215. If a court considers all of the plaintiff’s

¹ It is unclear at this time whether the Washington Supreme Court will adopt the more rigorous pleading standard set forth in *Bell Atlantic V. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). That issue is currently before the Supreme Court on appeal from *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wash. App. 900, 904, 193 P.3d 155 (2008). Respondents assert that Appellants’ claims would be dismissed under either standard.

facts, alleged and hypothetical, and finds the claim legally insufficient, dismissal is appropriate. *Id.*²

B. Appellants Do Not Allege An “Emergency” Sufficient to Trigger the “Emergency Doctrine”

Appellants’ claims can be disposed of quickly and easily on one simple and obvious basis: the facts alleged do not constitute an emergency. Thus, even accepting Appellants’ argument that Respondents have a duty to aid employees who are incapacitated by a genuine medical emergency, their Complaint must still be dismissed.

Appellants’ emergency doctrine theory is based entirely on authority from other states where the doctrine has been adopted, and one Washington case, decided in 1914, where the doctrine was *not* adopted.³ A review of all of Appellants’ authority regarding the doctrine reveals that the cases state that an employer’s duty to help an employee is only triggered in the case of an *emergency* where the complaining party is *actually incapacitated*.⁴ Indeed, Appellants’ cases explicitly state this

² Appellants argue that the facts alleged in this case are irrelevant to this appeal. Opening Brief at 11; 27-29. Contrary to Appellants’ assertions, Washington courts do consider facts, as alleged and hypothetical, in determining whether dismissal is appropriate. *Gorman*, 155 Wn.2d at 215.

³ For a treatise that surveys the history of the “emergency doctrine,” including which states have adopted it and which states have not, there is a lengthy analysis of the doctrine in C.T. Drechsler, Annotation, *Master’s Duty to Care For or to Furnish Medical Aid to Servant Stricken by Illness or Injury*, 64 A.L.R.2d 1108 (2008).

⁴ Had the *Vanderbodget* Court actually adopted the emergency doctrine rule (a/k/a humane instincts rule), the same standard would apply and a duty would only exist where

rule. For example, *Carey v. Davis* only imposes a duty where the employee suffers “serious injury or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm.” 190 Iowa 720, 721-22, 180 N.W. 889 (1921). Similarly, *Szabo v. Pennsylvania R. Co.* held that an employer has no duty except where the employee is “helpless to provide for his own care.” 40 A.2d 562, 563 (N.J. Ct. App. 1945); *see also Rival v. Atchison, Topeka and Santa Fe Railway Co.*, 62, N.M. 159, 306 P.2d 648, 649 (1957) (liability can only be established where “the emergent condition is such that the employee is in immediate danger of loss of life or great bodily harm; and that employer has knowledge, actual or constructive, of the emergency and all its elements”). Even *Vanderbodget v. Campbell Mill Co.*, 82 Wash 602 (1914), Appellants’ Washington case, stated that the doctrine would only theoretically apply where “immediate attention is required to save life or prevent great injury. It is said that the duty begins and ends with the emergency.” *Id.* at 605.

Indeed, the requirement of an actual emergency is established in all of Appellants’ cases. Each of the plaintiffs in the cited cases was, at the very least, incapacitated and unable to seek medical assistance for himself. See, *Carey, supra* (plaintiff’s repeated fainting caused him to be “stricken

“immediate attention is required to save life or prevent great injury.” 82 Wn. at 604-5.

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down and rendered helpless”); *Pulley v. Norfolk Southern Railway Company*, 821 So. 2d 1008, 1010-1011 (Ala. Ct. App. 2001) (plaintiff “collapsed with chest pain” after being sprayed with hot oil); *Szabo, supra* at 562-64 (decedent was “prostrated by the heat” so that he was “powerless to help and care for himself” and had to be carried to a car and driven home); *Rival, supra* at 649 (decedent was “flailing his arms and legs” due to his heatstroke, and had to be carried by three men to an on-site doctor’s office); *Anderson v. Atchison, Topeka & Santa Fe Railway Co.*, 333 U.S. 821, 68 S.Ct. 854, 92 L.Ed 1108 (1948) (decedent fell off train and sustained injuries which “made it impossible for him to secure help by his own efforts” causing him to die from exposure); *Troutman’s Adm’x v. Louisville & N.R. Co.*, 179 Ky. 145, 200 S.W. 488 (1918) (moving train severed decedent’s legs from his body, resulting in a fatal loss of blood); *Randall v. Reading Co.*, 344 F. Supp. 879 (M.D. Pa 1972) (decedent suffered fatal heart attack while in the caboose); *Bridgeman v. Terminal Railroad Ass’n of St. Louis*; 195 Ill. App. 3d 966, 969, 552 N.E.2d 1146 (1990) (decedent railway worker was not breathing and had no pulse).⁵ Appellants’ cases, most of which are more than fifty years old and rely on the Federal Employers Liability Act (“FELA”), a law specific

⁵ The employee’s injury cannot be ascertained from the *Vanderbodget* decision, but it resulted in his death. *Vanderbodget*, 82 Wash at 603.

to railroad employees, make it clear that the requisite emergency involves a grave and imminent danger of death that is simply not present in this case.

No reasonable person could construe the facts of this case as demonstrating the type of dire emergency required by those courts in other states that have adopted the emergency doctrine. Indeed, during his alleged TIA, Kresser showed no signs of incapacitation. To the contrary, he alleges that he was able to get a drink from the vending machine, carry on a conversation with Janssen, complete his shift, and then drive approximately 90 minutes from Everett to Kitsap County. Opening Brief at 4-5. Appellants concede in the Complaint and Opening Brief that Boeing's Everett facility has an onsite medical clinic and that it has emergency personnel on standby at all times. CP 2 ¶ 8. Kresser's supervisor advised him to see a doctor. Opening Brief at 4. In sum, Boeing provides for its employees' medical needs. Thus, even were this Court willing to adopt the emergency doctrine from other jurisdictions, it would not be triggered here because Kresser was indisputably not incapacitated or helpless (as were the plaintiffs in the cited cases).

In any event, whether or not the Appellants have alleged an emergency is a moot point, as it is undisputed that the emergency doctrine has not been adopted in Washington State. After the *Vanderbodget* court

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mentioned the existence of the doctrine, the court in *Mueller v. Winston Bros. Co.*, 65 Wash. 130, 4 P.2d 854 (1931) confirmed that it does not exist here, explaining that “independent of a contract no duty rests upon a master to furnish his servants with medical and surgical treatment. . .” *Id.* at 138. This is still the law today.

C. Appellants Fail to Establish That Respondents Owed Kresser Any Duty Under Washington Law

Appellants’ claim under the emergency doctrine is legally insufficient, and Appellants cannot identify any other duty that could give rise to a negligence claim. A duty is “an obligation recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.” *Daly v. Lynch*, 24 Wn. App. 69, 76, 600 P.2d 592 (1972) (*quoting* W. Prosser, *The Law of Torts* 30, at 143 (4th ed. 1971)). The existence of a duty owed to the complaining party is a necessary element of a negligence claim, and where there is no duty, there can be no breach of that duty and no finding of negligence. *See Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992).

Whether one owes a duty to another is a question of law. *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002). The Washington Supreme Court has refused to “create” and impose a duty

where none exists. For example, in *Doe v. Gonzaga University*, 143 Wn.2d 687, 24 P.3d 390 (2001), the Court affirmed the dismissal of a student's negligent investigation claim on the basis that no statute or administrative regulation imposed an affirmative duty on the University to investigate allegations of student behavioral problems. Therefore, absent a duty to investigate, there could be no breach of such a duty. Likewise, here, no case, statute or administrative regulation imposes an affirmative duty on supervisors to aid a sick employee (whether or not it is an emergency).

1. There is no Duty to Diagnose

There is no duty in Washington to accurately diagnose the nature and severity of an employee's medical condition based upon an employee's description of symptoms in the workplace. Although Appellants argue that they do not seek to impose a duty to diagnose, their Opening Brief belies this assertion, as evidenced by their insistence that Respondents have a duty "to recognize and respond to the classic, well-known symptoms of serious illnesses and injuries."⁶ Opening Brief at

⁶ Appellants repeatedly argue that Kresser's symptoms are "well known warning signs of a stroke," Opening Brief at 4, and that "the American Heart Association advises that everyone should recognize the warning signs of a stroke," Opening Brief at 5. However, it is undisputed that Kresser *was not having a stroke* when he was at work; Appellants allege he was having a TIA. However, the damages Kresser seeks are to compensate him for the injury done by the stroke that allegedly occurred at home hours later while he was sleeping.

26. This is essentially identical to the definition of “diagnose,” which Merriam-Webster defines as: “to identify (as a disease or condition) by symptoms or distinguishing characteristics.”⁷ As there is no such duty, Appellants’ Complaint does not rise to actionable negligence because Appellants cannot establish that Respondents had a legal duty to accurately diagnose Kresser’s symptoms and, based upon that diagnosis, summon medical assistance.

2. The Washington Administrative Code Provisions Do Not Establish an Applicable Duty

In support of their negligence claim, Appellants assert that Boeing and Janssen “failed to provide, establish, supervise and enforce a safe workplace that responds to life-threatening medical emergencies” in violation of various Washington Administrative Code (“WAC”) provisions. As noted, to establish a negligence claim, Appellants must first identify a legal duty that Respondents owed to Kresser. While Appellants assert in their Opening Brief that these regulations “provide the basis for a duty,” as shown below, these WAC provisions do not create a duty that is applicable in this case.

⁷ Webster's Third New Int'l Dictionary Unabridged 622 (2002).

a. WAC 296-800-11010 Does Not Establish an Applicable Duty

Appellants allege in their negligence claim that Respondents violated WAC 296-800-11010, which states in relevant part that:

You must:

- Provide and use safety devices, safeguards, and use work practices, methods, processes, and means that are reasonably adequate to make your workplace safe.
- ...
- Do everything reasonably necessary to protect the life and safety of your employees.

WAC 296-800-11010's provision that an employer "do everything necessary to protect the life and safety of your employees" does not allow Appellants to impose a duty on Respondents to accurately diagnose the potential severity of any symptom that an employee mentions in the workplace. If WAC 296-800-11010 imposed such a legal duty, every supervisor in the State of Washington would be legally required to possess medical skills sufficient to accurately diagnose TIA symptoms (and every other medical condition that may arise suddenly and require early intervention). Indeed, Appellants take exactly that position, stating that employees must be trained to "recognize classic symptoms of strokes, heart attacks, and *other conditions that may arise suddenly and require early intervention.*" Opening Brief at 25 (italics added). The list of these

“conditions” is endless, and it is inherently unreasonable, if not impossible, to educate every supervisor to “recognize,” i.e. diagnose, the symptoms of every possible ailment that might strike suddenly.⁸ In fact, in order to educate the Court (and, presumably, Respondents) about TIAs and bolster their assertion that “everyone” should recognize the symptoms of a TIA, Appellants had to attach two exhibits explaining TIAs and identifying the symptoms, including a nineteen-page article from a medical journal directed to Healthcare Professionals, and, more specifically, neurologists.⁹

Further, under Appellants’ theory, the following question arises: Is the supervisor legally required to act immediately, that is, summon emergency medical aid upon the report of *any* symptom by any employee

⁸ As noted above, while Appellants explicitly state that Respondents need not be able to “diagnose,” in the next breath, Appellants state that Respondents must recognize the symptoms of every condition that may require immediate medical intervention. Opening Brief at 25-27. Obviously, these two statements are inconsistent. Moreover, Appellants’ entire case is built on Respondents’ failure to meet their alleged duty to diagnose that Kresser’s symptoms resulted from a TIA requiring immediate medical attention.

⁹ These exhibits were not contained in the record below and are not properly before this Court. Rule 10.3(a)(8) of the Rules of Appellate Procedure prohibits the inclusion of materials not contained in the record on review without permission from the appellate court. Respondents have, therefore, moved this Court to strike Appellant’s Appendix C and Appendix D because neither were included in the record below and permission was not obtained. Appendix C is a pamphlet published by the American Heart Association and American Stroke Association entitled: “Let’s Talk About Stroke, TIA and Warning Signs.” Appendix D is an article entitled: Definition and Evaluation of Transient Ischemic Attack: A Scientific Statement for Healthcare Professionals From the American Heart Association/American Stroke Association Stroke Council; Council on Cardiovascular Surgery and Anesthesia; Council on Cardiovascular Radiology and Intervention; Council on Cardiovascular nursing; and the Interdisciplinary Council on Peripheral Vascular Disease: The American Academy of Neurology affirms the value of this statement as *an educational tool for neurologists*. (Emphasis added.)

and, if not, when is the supervisor required to act? A duty to summon emergency medical aid upon the report of *any* medical symptom is not reasonable, particularly in a case such as this one where, by his own admission, Kresser had sufficient time to seek his own medical care and the stroke did not occur until hours after he left the workplace. If Kresser chose not to seek medical care after his shift ended instead of heading home, under the facts as alleged here, Respondents should not, and cannot, be held liable for failing to compel Kresser to do the same.

In short, under the guise of a negligence claim, Appellants are attempting to read into the cited regulations a legal duty to accurately diagnose the nature and severity of any employee's symptoms and then, depending on their diagnosis, mandate medical treatment for the employee when appropriate. Imposing a duty on supervisors to diagnose other employees' medical symptoms, with consequent liability against the supervisor and the employer for the supervisor's failure to accurately diagnose those medical symptoms is, to put it mildly, extraordinary. Such a legal duty does not exist, was never intended, and cannot be created absent clear statutory or regulatory provisions, or common law, none of which are present here.

b. WAC 296-800-11035 and WAC 296-126-094 Do Not Establish An Applicable Duty

Neither WAC 296-800-11035 nor 296-126-094, which pertain to establishing safety rules and maintaining safe workplace conditions, establish the legal duty Appellants posit here. The regulations provide that:

You must:

- Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice. WAC 296-800-11035

...

It shall be the responsibility of every employer to maintain conditions within the work place environment that will not endanger the health, safety or welfare of employees. All facilities, equipment, practices, methods, operations and procedures shall be reasonably adequate to protect employees' health, safety and welfare. WAC 296-126-094

While Appellants state in their Complaint that Respondents violated these regulations, they do not allege any facts showing that these regulations have anything to do with their negligence claim. Rather, the crux of Appellants' claims is that Janssen, a temporary supervisor, should have summoned medical assistance based on his assessment of Kresser's symptoms. The cited regulations require the establishment of safety rules

and the maintenance of safe conditions; they do not require the extraordinary legal duty that Appellants seek to impose here, *i.e.*, that supervisors act as medical diagnosticians to determine whether and when an employee is in need of immediate medical assistance, and, if the supervisors are incorrect, that they are liable in negligence to the employee. This is obviously not the purpose of WAC 296-800-11035 and 296-126-094. The regulations do not impose a duty on Respondents which could be breached by Janssen's failure to recognize TIA symptoms and to summon emergency medical assistance.

c. Pursuant to WAC 296-800-15005 Boeing Was Not Required to Train Supervisor Janssen in First Aid

One of Appellants' ill-conceived theories is that Boeing had a legal duty to provide supervisor Janssen first aid training which would have theoretically caused him to call for medical or emergency personnel to come and evaluate Kresser or send him to the on-site medical clinic. This theory, ironically, is specifically contradicted by WAC 296-800-15005, upon which Appellants rely to establish Respondents' legal duty. WAC 296-800-15005 provides in relevant part that:

In the absence of an infirmary, clinic, or hospital in near proximity to the workplace, which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid.

Clearly, Boeing was not required to train Janssen (or any other Boeing supervisor) in the rendering of first aid because, as Appellants concede in the Complaint and Opening Brief, Boeing's Everett facility has an onsite medical clinic. CP 2 ¶ 8. It has emergency personnel on standby at all times. *Id.* Thus, pursuant to the plain language of WAC 296-800-15005, Boeing and Janssen cannot, as a matter of law, have violated any duty purportedly owed to Kresser attributable to WAC 296-800-15005.

d. Neither WAC 296-800-150 Nor WAC 296-800-15020 Establish an Applicable Duty

WAC 296-800-150, in relevant part, provides:

Your responsibility:

Make sure first-aid trained personnel are available to provide quick and effective first aid.

You must:

Make sure that first-aid trained personnel are available to provide quick and effective first aid. WAC 296-800-15005.

Make sure appropriate first-aid supplies are readily available. WAC 296-800-15020.

WAC 296-800-15020 provides: ...

You must:

- Make sure first-aid supplies are readily available.
- Make sure first-aid supplies at your workplace are appropriate to:

- Your occupational setting.
- The response time of your emergency medical services.

Note: First-aid kits from your local retailer or safety supplier should be adequate for most nonindustrial employers.

You must:

- Make sure that first-aid supplies are:
 - Easily accessible to all your employees.
 - Stored in containers that protect them from damage, deterioration, or contamination. Containers must be clearly marked, not locked, and may be sealed.
 - Able to be moved to the location of an injured or acutely ill worker.

Appellants specifically allege that Boeing's Everett facility has both (a) a medical clinic; and (b) emergency personnel on standby during the time that Kresser had his alleged TIA. CP 2 ¶ 8. Thus, Appellants' reliance on WAC 296-800-150 and WAC 296-800-15020 to establish a duty (and negligence) fails because the cited standards require only that first aid supplies and trained personnel be available. Appellants' Complaint concedes such are available.

3. Appellants' Claim Based on the Failure to Call for Medical Assistance in Alleged Violation of Boeing's Safety Programs, Policies, Procedures and Training Fails to Establish an Applicable Duty

As an initial matter, Appellants' claims in this case are based on negligence, not breach of contract. However, Appellants' allegation that Boeing violated its safety programs, policies and procedures, at best, states a breach of contract claim (See, Opening Brief at 6-7). Appellants have not articulated, nor can they, any Boeing program, policy, or procedure that constituted a contract between Boeing and Kresser requiring Janssen to accurately diagnose the nature and severity of Kresser's TIA symptoms as Kresser described them and then summon aid. There are numerous insurmountable problems with this argument.

First, Appellants misquote and ignore the fact that the Boeing Employee Safety Program upon which they rely to establish a duty addresses only "**work-related** injuries and illnesses." See Ex. B, Boeing 00016.¹⁰ Opening Brief at 6. Boeing's safety program, obviously, is not designed to address the countless non-work related illnesses and injuries of literally thousands of Boeing employees, particularly those injuries and illnesses that occur at home, such as Kresser's stroke. Appellants' attempt

¹⁰ As Appellants admit in their Opening Brief, the stroke that Kresser had after returning home from work was not the result of an industrial injury or occupational disease. Opening Brief at 8.

to rely on Boeing's safety program to transform every Boeing supervisor into a roving medical professional who has a legal duty to diagnose and refer every employee who reports any medical symptom to Boeing's medical department must be rejected.

Second, Appellants allege that Respondents are liable because Janssen allegedly should have called for aid and did not follow Boeing's procedure for when an employee presents with any medical concern. Opening Brief at 6-7. This is also incorrect. No Boeing policy or procedure states that every time an employee mentions a symptom to a supervisor that supervisor must summon immediate medical aid. Such an alleged rule would result in medical assistance being summoned for every headache, regardless of severity, as such symptom could be indicative of something completely benign or, in the worst possible case scenario, something fatal. For example, while a headache could just be a headache, it could also be a potentially fatal aneurism. Under Appellants' reading of Boeing's policy, **every** headache would have to be referred to Boeing medical personnel, regardless of the wishes of the employee.

Significantly, as Appellants concede, while Kresser *may* have had a TIA while at work, he did not suffer a stroke, and the damaging effects of that stroke, until after arriving home. While he was still at work, Kresser was talking without difficulty (not slurring his speech or unable to

communicate), fully ambulatory (Appellants do not allege that he had any difficulty walking), in no apparent emergent danger (no seizures, headaches, vision or breathing difficulties) and completely capable of driving himself safely home (or to a hospital) after his shift (Appellants concede he drove safely home with no assistance from others). Accepting all of Appellants' allegations as true, Respondents did not have a legal duty to summon emergency medical aid under Boeing policies and Appellants have not established otherwise.

Finally, Appellants also allege that Kresser was *denied* the opportunity to receive treatment because Janssen did not call for medical assistance. This is flatly contradicted by their other allegations that Kresser left work with ample time to seek treatment and that he returned home safely where, after the stroke occurred during the night, other family members called for assistance.

4. Appellants' Claim of Negligent Training of Temporary Supervisors Fails to Establish an Applicable Duty

Appellants' claim of "negligent training of temporary supervisors" does not establish that Boeing had a duty to train Janssen to identify Kresser's symptoms as those that would benefit from medical intervention within the next two hours. Indeed, as discussed above, because Boeing has on-call paramedics and an on-site clinic for the treatment of

employees, Boeing was not required to provide Janssen or any supervisor with first aid training. WAC 296-800-15005.

D. Appellants' Argument that Respondents "Volunteered" to Provide Treatment is Similarly Unavailing

Appellants allege that Respondents are liable because "liability can arise from the negligent performance of a duty undertaken voluntarily, whether gratuitously or for consideration." Opening Brief at 21. Thus, Appellants argue, because Boeing provided employees with a medical clinic, Boeing had a "duty to train supervisors and ensure that they are competent in recognizing and responding to medical emergencies." Opening Brief at 22. Appellants also allege that Janssen "took charge of Mr. Kresser's medical crisis by providing instructions and advice, giving rise to a duty to exercise reasonable care in its response." Opening Brief at 22.

Despite Appellants' best efforts, Appellants' argument suffers an obvious and fatal flaw, namely that Respondents *did not attempt to provide care* to Mr. Kresser. It simply cannot be argued that Janssen telling Kresser to "take it easy" is tantamount to voluntarily providing care; indeed, it is *exactly the opposite*. Appellants' argument is especially ironic given that the entire premise of Appellants' lawsuit is that

Respondents had a duty to render aid and breached that duty by failing to do so.

Further, Appellants cite no authority to support their conclusory argument that supervisors must be trained to recognize and respond to emergencies *if* the employer has emergency medical help available on site. This is because, again, the rule is *exactly the opposite*. As explained above in Section C(2)(c), Boeing had no duty to provide supervisor Janssen first aid training *because* Boeing had emergency personnel on staff. WAC 296-800-15005.

E. When Addressing An Employee's Medical Symptoms, Employers Should Not Be Required to Substitute Their Judgment for that of Their Employees

Appellants' theory of negligence asks this Court to find that supervisor Janssen was required to substitute his judgment regarding Kresser's need for medical care for Kresser's own judgment. Appellants' Complaint demonstrates that medical assistance was readily available, but that Kresser did not avail himself of the medical assistance that was available at Boeing and elsewhere after his shift ended at 10:30 p.m.¹¹

¹¹ Kresser's responsibility to seek aid for himself is common sense. As one of the cases cited by Appellants notes: "It is of course elementary that, when the appellant found that the respondent would not convey him to the hospital, it was his duty . . . to get to the hospital or otherwise secure medical assistance, and if he failed to do so, or to the extent that he did not do so, there is no liability upon the respondent for the damages occasioned thereby." *Harding v. Ostrander Railway and Timber Co.*, 64 Wash. 224, 231, 116 P. 635 (1911).

Kresser, instead, chose to go home after his shift rather than to a hospital. Although Kresser chose not to seek medical assistance, he alleges that Boeing should have required him to do so because Respondents should have recognized that (a) Kresser's symptoms were a TIA; or (b) Kresser, although walking, talking and able to safely drive home, was unable to understand the significance of his symptoms. Opening Brief at 6.

If this Court accepts Appellants' theory of the case, the result would be to create a rule that supervisors must make an accurate medical diagnosis following every employee's mention of anything that could constitute a medical symptom, and then, depending on the diagnosis, decide whether to summon immediate medical assistance regardless of the employee's desire. This sort of paternalistic rule would not only absolve employees of any responsibility for their own health and well being, it would transfer all of the responsibility and liability to employers and supervisors. Ironically, under Appellants' theory, employers must be more vigilant than their employees about the employees' physical well being, because the employer and supervisor would become the *de facto* guarantor of the employees' health for any symptoms of illness mentioned in the workplace. Employers and supervisors would bear the liability of all unfavorable medical outcomes if they did not ensure that every

employee received the appropriate medical care for every conceivable condition.

Appellants also submit a public policy argument that a duty should be imposed on employers to summon medical assistance because employees could theoretically be disciplined for summoning medical assistance for themselves. Opening Brief at 20. In support of this argument, Appellants argue that employees “must be excused by the employer to seek medical aid.” *Id.* Even accepting this sweeping and dubious conclusion as true, there is not (and could never be) any allegation that Kresser wanted or requested medical assistance, but was discouraged from seeking medical help, or that he would have been disciplined for seeking medical assistance.

F. Appellants’ Theory Requires Employers To Invade Employees’ Medical Privacy and Infringe Upon Their Right to Decide Upon Their Own Medical Treatment

Appellants’ negligence theory interferes with employees’ basic right to their medical privacy and to make their own determination regarding medical examinations and treatment. To avoid tort liability, employers would be required to insist that employees obtain medical treatment even if the employees preferred not to obtain that treatment or if the employees chose to pursue treatment on their own. Indeed, in this case, Appellants hypothetically allege Kresser’s medical condition could

have prevented him from recognizing the significance of his own symptoms. Thus, under Appellants' negligence theory, even if an employee refuses medical treatment, employers must require the employee to undergo medical treatment because the employer would still be liable if it is determined, after the fact and with the advantage of hindsight, that the employee lacked the ability to recognize the significance of his symptoms at the time he mentioned the symptoms to a supervisor. Moreover, Appellants' theory, which requires the invasion of employees' medical privacy and treatment, is contradicted by applicable law.

The Americans with Disabilities Act ("ADA"), recognizing an employee's right to privacy in medical information, strictly regulates an employer's medical inquiries and an employer's right to require that employees obtain medical examinations:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).

Appellants' negligence theory requires an employer to risk violating the ADA because, to avoid tort liability, and despite the ADA's restriction on medical inquiries and examinations, supervisors would be

required to inquire about their employees' medical status whenever an employee mentioned a medical symptom in the workplace.

The ADA is designed to limit, not expand, an employer's right to engage in medical inquiries and medical examinations. Appellants' theory requires the opposite result, that is, it mandates a more expansive and intrusive role for employers with regard to employee medical conditions and medical privacy. Under Appellants' theory, if an employer is to avoid tort liability, it must engage in more frequent and invasive medical inquiries and examinations, not less.

In sum, Appellants' negligence theory requires the invasion of employees' medical privacy and treatment, expands a supervisor's duty beyond that required by law and creates an inherent conflict with an employer's obligations under applicable disability laws.

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V. CONCLUSION

Appellants have not alleged facts sufficient to state a claim for negligence. Thus, Respondents respectfully request that this Court affirm the dismissal of Appellants' Complaint in its entirety.

Dated: April 5, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on this 5th day of April, 2010, I caused a copy of the foregoing document to be served on counsel of record as follows:

Jason W. Anderson Cindy G. Glynn CARNEY BADLEY SPELLMAN, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____
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Sally Swearinger

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