FILED
COURT OF APPEALS
DIVISION II
07 APR 11 PM 1:03
STATE OF WASHINGTON
BY_____
CLERK

NO. 35412-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

GLENN JOHNSON and DOLLIE JOHNSON, husband and wife,

Respondents,

v.

GOLDEN EAGLE EXPRESS, INC., a Washington corporation,

Appellant.

BRIEF OF APPELLANT

WIGGINS & MASTERS, P.L.L.C.

Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Golden Eagle Express, Inc.

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF THE CASE 4

A. Glenn Johnson, a 71-year-old independent longhaul truck driver, suffered from numerous medical problems that rendered him susceptible to infection and from a painful callous on the bottom of his left foot, but Golden Eagle knew nothing about his conditions. 4

B. When he was on the road, Johnson normally called his wife every day, and sometimes several times a day. 7

C. On Tuesday, October 29, 2002, Johnson carried a load to Sacramento and called his wife three times. 7

D. On Wednesday, October 30, 2002, Johnson picked up a load in Oakdale, California, but his foot began to bother him so much that he had to stop driving, he made his last call to his wife for four days, and he then fell, perhaps hitting his head on the shifting lever. 8

E. On Thursday, October 31, 2002, Johnson informed Golden Eagle that he could not finish his run; Golden Eagle picked up the trailer, but Johnson refused medical assistance, yet claimed that Golden Eagle promised to get him a ride to Portland. 9

F. On Friday, November 1, 2002, two Golden Eagle drivers looked in on Johnson, one of them bringing food and drink, and various drivers discussed making arrangements to bring Johnson back to Portland, but Crofoot allegedly told them all not to do anything because he was taking care of it – even though he was not doing anything. 15

G. On Saturday, November 2, 2002, Johnson's condition had worsened, and two drivers brought him from California to Woodburn, Oregon. 19

H. Early on Sunday, November 3, 2002, the drivers left Johnson in a parking lot, called an ambulance whose EMT also left Johnson in the parking lot, and 11 hours later Sanchez brought Johnson home, from where he was rushed to the hospital. 20

I. All of the relevant testimony on causation focused on the failure to get medical care as soon as possible after Johnson could no longer drive. 28

J. Procedural History 29

ARGUMENT 30

A. The "voluntary rescue doctrine" – Johnson's only liability theory – does not support a duty in this case, so the Court should reverse and dismiss. 30

1. No general duty to rescue exists. 30

2. The classic "rescue doctrine" does not apply here. 31

3. Nor do the "duty to warn" cases apply here. 32

4. *Folsom* and *Webstad* reject a duty here. 35

a. Under *Folsom* and *Webstad*, Golden Eagle assumed no duty to rescue Johnson because it had no knowledge of any imminent peril to Johnson on Thursday, when Golden Eagle allegedly made a promise to rescue 37

b. Crofoot's alleged subsequent (virtually identical) statements to the other three drivers also fail to establish a duty due to the lack of imminent peril 40

5. Johnson failed to establish reasonable reliance. 42

a. Glenn Johnson did not reasonably rely 42

b. The other three drivers did not reasonably rely 43

B. No reasonable jury could conclude that no one was contributorily negligent in this case. 46

CONCLUSION 50

TABLE OF AUTHORITIES

STATE CASES

Borden v. City of Olympia, 113 Wn. App. 359, 53 P.3d 1020 (2002) 31

Estate of Bordon v. Department of Corrections, 122 Wn. App. 227, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005) 48

Brown v. MacPherson's, Inc., 86 Wn.2d 293, 545 P.2d 13 (1975) 33, 34, 35, 36

Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998) ..... *passim*

French v. Chase, 48 Wn.2d 825, 297 P.2d 235 (1956) 32, 36

Highland v. Wilsonian Investment Co., 171 Wash. 34, 17 P.2d 631 (1932) 31, 32

Lauritzen v. Lauritzen, 74 Wn. App. 432, 874 P.2d 861 (1994), *rev. denied*, 131 Wn.2d 1016 (1997) 30

Meneely v. S.R. Smith, Inc., 101 Wn. App. 845, 5 P.3d 49 (2000), *rev. denied*, 142 Wn.2d 1029 (2001) 31, 34, 35

Osborn v. Mason County, 157 Wn.2d 18, 134 P.3d 197 (2006) 33, 35, 42

Osborn v. Mason Cy., 122 Wn. App. 823, 95 P.3d 1257 (2004), *reversed*, 157 Wn.2d 18 (2006) 33

Wagner v. Int'l Railway Co., 232 N.Y. 176, 180-81, 133 N. E. 437 (1921) 32

Webstad v. Stortini, 83 Wn. App. 857, 924 P.2d 940 (1996) ..... *passim*

MISCELLANEOUS

PROSSER AND KEETON ON THE LAW OF TORTS, § 56 at 380 (5th ed.1984), *rev. denied*, 149 Wn.2d 1012 (1993)..... 31

INTRODUCTION

Unknown to Golden Eagle Express, 71-year-old independent longhaul truck driver Glenn Johnson was peculiarly susceptible to infections. He had put off having a painful callous removed from the bottom of his left foot for months. He drove until his callous became a painful wound that made him pull over. He used his cell phone to call Golden Eagle's terminal hundreds of miles away. They suggested calling an ambulance. Johnson refused.

Johnson claimed that Golden Eagle offered him a ride hundreds of miles to Portland. Other drivers (who saw Johnson first hand, but repeatedly left him) said Golden Eagle subsequently told them not to worry, they were taking care of it. But Golden Eagle never undertook to rescue Johnson, believing he was in no danger – he repeatedly refused medical care. Over four days laying in his truck in increasingly dire circumstances, Johnson's leg became badly infected, and had to be amputated above the knee.

The "voluntary rescue" exception to the general no duty to rescue rule applies only when a defendant knows the plaintiff is in imminent peril and undertakes to rescue him, or prevents others from rescuing him. It does not apply here because Golden Eagle never knew his medical condition. The Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Golden Eagle's motion for directed verdict at the close of plaintiffs' case. RP 636-37.

2. The trial court erred in denying Golden Eagle's motion for judgment as a matter of law at the close of defendant's case. RP 725-29.

3. The trial court erred in denying Golden Eagle's motion for judgment as a matter of law or a new trial. CP 1090.

4. The trial court erred in entering judgment. CP 1086-89.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Washington's voluntary rescue exception to the common law no duty to rescue rule, does a duty arise where promises or assurances allegedly are given at a time when the alleged rescuer had no knowledge or reason to believe any danger was imminent?

2. Under this voluntary rescue exception, can a plaintiff repeatedly refuse offers or suggestions of medical assistance from a dispatcher hundreds of miles away, and yet establish reasonable reliance on an alleged promise to get him a ride, where the cause of his injuries was the failure to seek immediate medical attention?

3. Under the voluntary rescue exception, can three drivers who themselves failed to rescue the plaintiff for several days establish reasonable reliance on alleged promises or assurances given after the drivers had left the plaintiff, or after they had undertaken to rescue the plaintiff on their own initiative?

4. Can a jury reasonably find no contributory negligence by the plaintiff where, as here, the plaintiff ignores a festering foot sore for months, has to pull into a rest stop due to the pain, falls and hits his head, and yet repeatedly refuses medical assistance?

5. Can a jury reasonably find no contributory negligence where, as here, the wife of a 71-year-old longhaul truck driver who routinely calls her every day from the road hears that he has stopped due to the pain from his longstanding foot problem, fallen and hit his head, and she then hears nothing from him for four days, yet she does nothing?

6. Can a jury reasonably find no contributory negligence where, as here, a driver undertakes a rescue due to imminent peril by driving a seriously ill person hundreds of miles before seeking medical assistance, then calls an ambulance that leaves the plaintiff at the scene, and the driver then leaves and calls no one?

7. Can a jury reasonably find no proximate cause, where it finds the above mentioned ambulance negligent and every expert witness agreed that it was impossible to know when the plaintiff's leg became unsalvageable?

STATEMENT OF THE CASE

Respondent Glenn Johnson had been driving trucks since 1955. RP 529. He was an independent trucker, meaning that he owned his truck and was responsible for it and his health insurance, but he leased his cab to Golden Eagle. RP 542-43. Golden Eagle's terminal manager, Vance Crofoot, hired Johnson; Johnson had been driving for Golden Eagle for about five or six months at the time of the incident at issue here. *Id.*, RP 704-05. Although Crofoot thought that Johnson was "kind of pushing it as far as his ages goes" to continue longhaul truck driving at age 71, Crofoot liked Johnson, found him "spry," and found that his physical and driving tests were fine. RP 704-05.

A. Glenn Johnson, a 71-year-old independent longhaul truck driver, suffered from numerous medical problems that rendered him susceptible to infection and from a painful callous on the bottom of his left foot, but Golden Eagle knew nothing about his conditions.

Johnson presented testimony that he had no restrictions on his physical activities prior to October 2002. *See, e.g.*, RP 58. Yet

Johnson had long suffered from a number of chronic and debilitating diseases, including rheumatoid arthritis; coronary artery disease (and congestive heart failure) for which he had open heart surgery five years earlier; Peripheral Vascular Disease (PVD); and a callous on his left foot that sometimes caused him pain. RP 148-49, 151, 152, 650; Ex. 30. Johnson was "fairly infirmed" by his arthritis, including a contracture of his knee. RP 650.

To treat his arthritis, Johnson was on the steroid Prednisone. RP 158-59, 650. Johnson's doctor typically counsels his patients on the side effects of Prednisone, including increased susceptibility to infection. RP 159, 517. Johnson's PVD affected his circulation, also making him more susceptible to infection. RP 653. PVD is a "systemic, generalized disease that is an indicator of a likelihood of poor survival." RP 656. People with PVD should be told that if they have a sore on their foot, they must see a doctor right away because PVD makes them more susceptible to infection, the likelihood of infection is high, and the ability to treat the infection is reduced by the diminished blood supply. RP 654, 659, 668.

Johnson sought treatment for the painful callous on the bottom of his left foot on July 17, 2002. RP 148-49. The callous hurt with pressure, particularly when he had to apply pressure on

the clutch for a long time, such as in heavy traffic. CP 148-49, 155. The condition was not serious in July 2002, so the doctor recommended over-the-counter medicated callous pads, which Johnson felt did more harm than good because they made his foot more sore. RP 150, 545.

Johnson was married to Dollie Johnson for 49 years. RP 573-74. They had lived in Portland for 48 of those years. *Id.* She testified that her husband's foot problem was ongoing, that the doctors kept checking it, that it was hard for him to walk on it, and that he was going to have to have it taken out, but he kept putting it off. RP 620-21. Johnson's doctor counseled him that if the area on his foot became infected, did not go away, or worsened, he should call for a referral to a podiatrist. RP 157.

Johnson presented no evidence that Golden Eagle knew anything about any of his medical conditions, or had any reason to know that he was unusually susceptible to infection. Indeed, Johnson's expert on the "standard of care" for trucking companies acknowledged that Johnson would likely under-report his condition to Golden Eagle to avoid jeopardizing their ongoing business relationship. RP 295.

B. When he was on the road, Johnson normally called his wife every day, and sometimes several times a day.

When he was driving longhaul, Johnson typically called his wife every day. RP 688. He sometimes talked to her more than once a day. RP 552. He was in the habit of talking to her at night before she went to bed. RP 557. Mrs. Johnson did not call him every day because he usually called her. RP 549, 574. When Johnson left Portland on a trip down to California in late October 2002, Mrs. Johnson was expecting him home by Friday or Saturday, November 1 or 2, 2002. RP 576.

C. On Tuesday, October 29, 2002, Johnson carried a load to Sacramento and called his wife three times.

On Tuesday, October 29, 2002, Johnson picked up a load in Woodburn, Oregon, and dropped it in Roseville, California. RP 529-30. He drove to Golden Eagle's lot in Sacramento (about 30 minutes away) where he spent the night. *Id.* Johnson had a cell phone with him, which he used to call home three times that day. RP 556; Ex 39 (Johnson's phone record). Johnson spoke to his wife for four minutes at 11 p.m. on October 29. RP 556-57; Ex 39.

D. On Wednesday, October 30, 2002, Johnson picked up a load in Oakdale, California, but his foot began to bother him so much that he had to stop driving, he made his last call to his wife for four days, and he then fell, perhaps hitting his head on the shifting lever.

On Wednesday, October 30, 2002, Johnson called Golden Eagle at 8:53 a.m. to request his next load. RP 557-58; Ex 39. Golden Eagle called him back in about 20 minutes with instructions to pick up his next load. *Id.* Johnson drove to Oakdale to pick up that load sometime in the afternoon. RP 530-31. On that trip to Oakdale, Johnson's sore foot was bothering him. RP 531.

After loading, Johnson drove a while and stopped at a rest stop. RP 531. He had planned to drive further than Richfield, which is 100 to 150 miles from Oakdale (a three hour drive), landing him somewhere around 6 p.m. (RP 531-32) but his foot was bothering him too much to continue driving, so he stopped at the rest stop, northbound in Williams, California. RP 116, 546. The rest stop had bathroom facilities and pay phones. RP 551.

Johnson called his house at about 2:25 p.m. and talked to his wife for about nine minutes. RP 558; Ex 39. About 30 minutes later, Johnson called Golden Eagle for about one minute. *Id.* Johnson does not remember what those two calls were about. RP 543-44, 558-59. His afternoon call to his wife would be the last

time Johnson called his home for the better part of four days. RP 564-65, 558; Ex 39.

At the rest stop, Johnson decided to lay down and rest, but he fell, perhaps hitting his head on the shifting lever, and woke up to find himself laying on the floor of his truck. RP 532.

E. On Thursday, October 31, 2002, Johnson informed Golden Eagle that he could not finish his run; Golden Eagle picked up the trailer, but Johnson refused medical assistance, yet claimed that Golden Eagle promised to get him a ride to Portland.

When Johnson woke up on Thursday, October 31, 2002, he pulled himself into the sleeper in the back of his truck and called Golden Eagle. RP 532-33, 559, 691-92; Ex 39. Christopher Clohessy, formerly Golden Eagle's trucking dispatcher, received Johnson's call. RP 693. Johnson told Clohessy that he was not feeling well, so Golden Eagle should find another driver to finish his run. *Id.* Johnson sounded "like Glenn always sounded, sounded fine. You know, his voice was maybe a little bit more subdued, you know, because he, you know, said he wasn't feeling well, so." *Id.* Johnson did not ask Clohessy for medical assistance. RP 694.

Golden Eagle called Johnson back several minutes later, most likely to discuss who would pick up the load. RP 559-60; Ex 39, 45. Golden Eagle called two other times that morning,

presumably talking about picking up the load; but at trial, Johnson did not remember those calls. *Id.* Indeed, at the beginning of his testimony, Johnson acknowledged that his ability to remember things had changed even since his deposition in December 2005. RP 544. By the time of trial in August 2006, he was more forgetful because of "old age." *Id.*

In his deposition (read to the jury) Johnson testified that he and Crofoot discussed getting an ambulance for Johnson:

> Q: . . . At any point do you recall Vance [Crofoot] asking you if you wanted him to call an ambulance?
>
> A: No. He told me maybe I should call one.
>
> Q: And what did you say in response?
>
> A: I said I wanted to get home. That's all that was said.
>
> Q: Did you think about calling an ambulance?
>
> A: No.
>
> Q: And was there anything that would [have] prevented you from calling an ambulance?
>
> A: No.
>
> Q: And what else do you remember about your conversations with Vance on the phone from the rest stop?
>
> A: Not a thing. No.
>
> Q: Do you know how many times you talked to him?
>
> A: Probably I would say three to four times.

RP 688-89. At trial, Johnson also affirmed that he did not want Crofoot to get him any medical help. RP 550.

This aspect of Johnson's testimony jibes well with Crofoot's recollection: Crofoot spoke with Johnson three or four times while Johnson was at the rest stop. RP 706. Crofoot was concerned about him and wanted to make sure he was okay. RP 706-07. Crofoot asked Johnson several times if he needed help, offering an ambulance to get him out of there. *Id.* But Johnson told Crofoot that he was fine and acted like this problem had happened before and he just needed to relax for a while. *Id.* Crofoot had no reason to doubt Johnson's statements. *Id.*

At trial, while Johnson admitted that Crofoot called him several times and that he could not recall these conversations (RP 548-49) Johnson nonetheless asserted that Crofoot said he would "send help down to get me back" when suggesting an ambulance and sending someone to pick up the load. RP 533. Johnson presented no evidence that Crofoot ever took a single step toward sending anyone hundreds of miles to pick him up. As each of the drivers involved in this case acknowledged, like Johnson they were all independent owner/operators (RP 88-89, 113-14, 117, 209-10,

217); Johnson presented no evidence that Golden Eagle had any legal authority to make any drivers "volunteer" for such a trip.

Johnson did present expert testimony that the industry "custom and practice" was to treat independent truckers and employee truckers the same when it comes to obtaining emergency aid for them. RP 284, 288. But this consisted of doing whatever seemed appropriate under all of the known facts and, if the situation was unclear, calling the State Patrol. RP 288-89. Johnson's expert did not explain why Golden Eagle should have called the State Patrol at this point on Thursday morning, when the only thing Crofoot knew was what Johnson was telling him – I'm fine and I don't want an ambulance (RP 706-07) – and the expert did not explain why Crofoot should have doubted Johnson's word at this point. RP 281-98.

Crofoot asked another driver, Gabriel Sanchez,[1] to pick up Johnson's load on Thursday. RP 83. Sanchez lives in Woodburn, Oregon (RP 106) but he was in Golden Eagle's Sacramento yard when Crofoot called him. RP 69. Sanchez asked Crofoot for a

---

[1] Mr. Sanchez gave his name as "Gabriel Sanchez Worta." RP 68. He is referred to as "Sanchez" throughout the record.

load, and Crofoot told him to pick up Johnson's load at the Williams rest area. *Id.*

Sanchez reached the rest area at around noon. RP 70, 560-61, 715. Sanchez knocked on the door of Johnson's truck and Johnson took some time in getting to the door. RP 70. Sanchez told Johnson that he was going to take the load. RP 70. Sanchez had almost no conversation with Johnson, but just told Johnson to stay in bed. RP 83-84. Sanchez did not ask Johnson about his condition or what had happened to him. RP 84.

At trial, Johnson remembered that Sanchez picked up the trailer, that they talked a little, and that Sanchez gave him some water and something to eat. RP 535. Johnson does not remember any specifics about the conversation, but he did not ask Sanchez for a ride back to Portland because he did not want to leave his truck at the rest stop; Johnson believed this would be illegal. RP 547-48, 550-51.

Sanchez initially testified that Johnson told him not to call an ambulance, but he then denied this. RP 84, 85. Sanchez later asserted that Crofoot told him that Johnson did not want an ambulance. RP 108. Even though Johnson looked like he might

need medical attention, Sanchez did not call an ambulance or otherwise seek medical attention for Johnson. RP 85, 91, 97.

Rather than calling an ambulance, Sanchez called and asked his brother-in-law to stop in, check on Johnson, and bring him some lunch. RP 70-71. Sanchez also called Crofoot and told him that Johnson might need some help. RP 70. According to Sanchez, Crofoot said, "Don't worry, we're going to take care of it." RP 70. Sanchez felt comfortable with this situation, so he did not attempt to call Johnson's wife. RP 92. Sanchez knew that Crofoot had offered Johnson an ambulance, which Johnson had refused. RP 91-93, 98.

Johnson received a several minute call at 5:00 p.m. on Thursday. RP 560-61; Ex 39. Johnson did not remember this call. RP 560-61. His wife does not remember the date, but she claims that Johnson called her and said he fell and split his head and was having trouble with is foot. RP 575-76. When he talked with her, it was not very clear, it was kind of "mushy." *Id.* Mrs. Johnson testified that her husband said Crofoot was sending someone to pick up him and the truck. RP 576. But the last call from Johnson to his home was on Wednesday, October 30, at 2:25 p.m., before Johnson fell and before Crofoot allegedly promised to have him

picked up. Ex 39. The October 30 call could not have been the one in which Johnson told his wife about his fall, yet Mrs. Johnson claimed she never got through to her husband during his entire absence. RP 598.

Johnson's treating physician, Dr. Pleudeman, testified that the kind of call Mrs. Johnson described (husband injured, unable to drive, slurring speech) should have resulted in a 911 call. RP 164-66. This seems particularly true in light of Mrs. Johnson's awareness of Johnson's above-noted preexisting problems with his foot, his heart, his circulation and his arthritis. If Johnson was out of it or feeling ill and needed help, someone should have taken him to the emergency room. RP 165.

F. On Friday, November 1, 2002, two Golden Eagle drivers looked in on Johnson, one of them bringing food and drink, and various drivers discussed making arrangements to bring Johnson back to Portland, but Crofoot allegedly told them all not to do anything because he was taking care of it – even though he was not doing anything.

On Friday, November 1, 2002, Golden Eagle called Johnson at 8:24 a.m. RP 561-62; Exs 39, 45. Crofoot testified that he asked Johnson several times whether he needed any help while he was at the rest stop. RP 707. Crofoot asked Johnson whether he needed an ambulance to "get out of there." *Id.* Johnson said no,

he would be fine, and acted like he just needed to relax for a while. *Id.* Johnson acknowledged that Crofoot's Friday-morning call would be consistent with Crofoot checking up on him, but Johnson did not remember the call. RP 561-62. Nor did Johnson remember two unidentified incoming calls on November 1, or whether either call was from his wife. RP 562; Ex 39.

As Sanchez had requested, his brother-in-law Jesus Mendez stopped to visit Johnson at the rest stop, bringing him food and drink. RP 119. Johnson took a little while to open the cab door wearing underwear and a t-shirt. *Id.* He had two glasses full of urine, and his underwear was wet, like he had urinated on it. *Id.*[2] Johnson looked bad. RP 120. But it did not appear to Mendez that Johnson needed medical attention at that time. RP 124.

Johnson did not ask Mendez for medical attention. RP 125. He did not ask Mendez for a ride, nor did Mendez offer him one. RP 124. Mendez testified that Johnson said Crofoot had already arranged for someone to pick him up. RP 120, 121. Johnson does not remember Mendez. RP 535-36.

---

[2] Mendez noted that it is not unusual for drivers to have glasses of urine in their trucks. RP 126. Urine could not have contributed to Johnson's infection because it is sterile. RP 663 .

Johnson showed Mendez the bottom of his foot. RP 120. It had red sores, and a red circle on it. RP 121, 171. Mendez also noted a wound, and some blood. RP 186. Something about Johnson's speech made Mendez think Johnson was not talking normally. RP 171. But Mendez did not call for an ambulance because, although Johnson's condition was bad, it was not serious; *i.e.*, not life or death. RP 125-26.

As Mendez was leaving the rest area, he called Crofoot, who was at lunch. RP 125. Mendez spoke to Crofoot some hours later, telling him that Johnson looked sick. RP 126-27. Mendez offered to arrange to take Johnson home to Portland, but Crofoot allegedly again said, "Don't worry about it. It's not your problem. I already took care of it." RP 171-72. Mendez had no further conversations with Crofoot about Johnson after this. RP 169.

Also on Friday, Gabriel Sanchez spoke to Jose Gomez, another Golden Eagle-affiliated owner-operator. RP 95, 209-10. Gomez said that he was trying to get other drivers to bring Johnson's rig home. RP 95. Gomez had heard from Jesus Sanchez, Israel, and Gabriel Sanchez that Johnson could not drive because of his leg. RP 188-89. Sanchez told Gomez to get

Johnson back to Portland if he could. RP 95-96. Gomez said that he was going to get another driver to bring Johnson home. *Id.*

Although Johnson does not remember Gomez (RP 535-36) they had met some time before at the Winco Food Center Store in Woodburn, Oregon. RP 188. Gomez was picking up a load there and he helped Johnson with his load because Johnson could not get the landing gear down due to his age. RP 188. Gomez does not know what day he first saw Johnson at the rest stop. RP 206-07. When Gomez saw him, Johnson could barely talk. RP 203. At that point, Johnson was in poor health, but he never asked for medical help, Gomez did not call an ambulance, and Gomez did not offer Johnson a ride because he could not get Johnson out of his truck. RP 203-04, 207, 210.

Gomez acknowledged that when he first saw Johnson he should have called 911, but he did not. RP 210-11. Instead, he called Crofoot to get help for Johnson; once again, Crofoot allegedly said, don't worry about it, he would take care of it. RP 190, 210. Based on Crofoot's alleged statement, Gomez took no action, even though Crofoot was in Vancouver, Washington — 520 miles away — and plainly had not "taken care of" the situation for two days. RP 204-05.

Other drivers also were discussing Johnson's situation on their CB radios. RP 189, 200-01. In fact, "everybody" was talking about how to help Johnson, even though Crofoot allegedly said not to worry about it, he was going to take care of it. RP 189-90. Crofoot had heard that various drivers were talking about giving Johnson a ride if he wanted one, but Johnson had told Crofoot that he wanted to stay with his truck. RP 707-08.

G. On Saturday, November 2, 2002, Johnson's condition had worsened, and two drivers brought him from California to Woodburn, Oregon.

On Gomez's next trip he found someone to drive Johnson's truck up to Oregon with him. RP 193. When they got to Johnson's cab, Johnson's condition had worsened. RP 194. Johnson had defecated on his bed, there was more urine, and it smelled very bad. RP 194. Johnson could not talk or understand what he was saying. RP 193-94. Gomez asked Johnson for his home telephone number, but Johnson could barely talk. RP 192. This was totally different from when Gomez had previously met him. *Id.*

Gomez did not call Crofoot. RP 213. He did not call an ambulance. RP 203. He did not offer to take Johnson to the Williams truck stop or to the hospital in nearby Sacramento. RP 215. Gomez did not call 911, but rather he and another driver

drove Johnson from California to Oregon. RP 99-100, 194-95, 212. This probably took about 10 hours. RP 690.

Johnson does not remember Gomez, and only faintly recalls another driver coming and driving him back to Oregon. RP 535-36, 550. Crofoot remembers Johnson calling him at some point to say that he was doing great, feeling good, and on his way back to Portland. RP 709-10. Crofoot could hear the sound of a truck motor and road noise in the background. *Id.* Johnson told Crofoot that he would call him when he was ready to go out again, and Crofoot had no reason to doubt this. *Id.* After that conversation, Crofoot thought it would be a couple of days before he heard from Johnson, so there was no reason to worry about him. RP 710-11.

H. Early on Sunday, November 3, 2002, the drivers left Johnson in a parking lot, called an ambulance whose EMT also left Johnson in the parking lot, and 11 hours later Sanchez brought Johnson home, from where he was rushed to the hospital.

On Sunday, November 3, 2002, Gomez and the other driver (who was driving Johnson's truck, with Johnson in it) reached a lot near a McDonald's in Woodburn, Oregon. RP 196. This was around one a.m., Sunday morning. *Id.* Gomez then called an ambulance. *Id.*; RP 214.

The ambulance arrived at 1:33 a.m. RP 457; Ex. 26.[3] The temperature was in the 20s. RP 465. The ambulance left the scene 15 minutes later. RP 457-58; Ex 26. According to Johnson's expert EMT, the ambulance personnel could make only a minimal assessment in their 11 minutes with Johnson. RP 460-61. There is no way that a paramedic could make a proper assessment of someone in Johnson's condition in those 11 minutes. RP 461. The minimum time to make an assessment of a geriatric under these circumstances is 20-to-30 minutes. RP 461-62.

As discussed below, an EMT report taken many hours later states that Johnson "refused ambulance yesterday thinking his insurance wouldn't pay." Ex 30 (relevant page appended). But ordinarily, refusing transport is a lengthy process, involving informing the patient of the potential risks, being realistic even if the risk is death, and making an assessment that the patient understands the risks. RP 464-65. If the EMT could not convince Johnson, he or she should have called a doctor, Johnson's own physician, or his family. *Id.* Simply put, it was unreasonable to accept Johnson's refusal given his reported condition at 1:30 a.m.

---

[3] Exhibit 26 is the Norcom Communications record, which is the 911 service for North Marion County, in Oregon.

on Sunday. RP 465. If Johnson refused, the ambulance personnel should have evoked an implied consent and taken him to the emergency room. RP 466-67, 48-84. Johnson's own experts affirmed that the Woodburn ambulance fell below the standard of care for paramedics in Oregon. RP 467, 476.

Gomez stayed inside his rig while the ambulance came and left. RP 196. He did not then speak to Johnson. RP 197. Gomez left Johnson in the Woodburn lot, but called no one, including Golden Eagle. RP 213. Thus, Golden Eagle had no way of knowing where Johnson was or what condition he was in.

When Sanchez pulled into the Woodburn lot Sunday evening he was surprised to see Johnson's truck still there. RP 74, 108. Sanchez called Gomez, who said that he left Johnson there because he called an ambulance, they came, and they did not help Johnson. *Id.* When Sanchez looked in on Johnson, he was doing very poorly. RP 75. He was bleeding, the cab stunk badly, and it was dirty. RP 75. Johnson was out of it. RP 80.

Sanchez decided to take Johnson to the emergency room. RP 75. In his deposition (read to the jury) Johnson admitted that when Sanchez offered to take him to the hospital, Johnson raised concerns about whether his insurance would cover it:

Q: After you dropped in Woodburn with your truck, what happened next?

A: The next thing I remember is Gabriel [Sanchez] was over there and he said he was going to take me to the doctor and take me home.

Q: Did he offer to take you to the hospital?

A: Yeah.

Q: And what did you say when he offered that?

A: I said I don't think my insurance would cover it.

RP 690-91. Johnson's own EMT expert read this testimony and noted that it is quite normal for a geriatric to refuse medical care on the basis that his insurance will not cover the cost. RP 480-81.

Nonetheless, Sanchez drove Johnson to the hospital in Johnson's truck. RP 103. The hospital in Woodburn is a small clinic. RP 77. The clinic told Sanchez to bring Johnson inside, but Sanchez could not lift him by himself. *Id.* Sanchez asked the doctor to come outside, but he refused. *Id.* Sanchez realized that he needed to do something and could not leave Johnson without medical attention, so he called Crofoot and asked for Mrs. Johnson's number. RP 76, 77.

Crofoot remembered speaking with Johnson Sunday night. RP 710-11, 723-24. Johnson said that he was weak and not feeling well. *Id.* Crofoot could tell that he was in bad shape, and

tried to find out where he was, but Johnson could not give Crofoot a clear answer. *Id.* All that Crofoot could tell was that Johnson was in Woodburn, somewhere near a medical facility. *Id.* Johnson does not remember talking with Crofoot on Sunday night. RP 563-64. Nor does Johnson remember four unidentified incoming cell phone calls on November 3, or the one from Crofoot on Sunday at 8:41 p.m. *Id.*; Ex 39.

When Crofoot got off the phone with Johnson he called Mrs. Johnson, who sounded surprised. RP 711-12. Crofoot told her that Johnson did not sound well, of which she seemed to be aware. *Id.* Crofoot suggested that they call an ambulance, but Mrs. Johnson said that would be too expensive. *Id.* Crofoot pointed out that she should not worry about the cost because this was Johnson's life, but she flatly refused to call an ambulance. *Id.* Mrs. Johnson did not remember Crofoot's call. RP 577.

Sanchez also called Mrs. Johnson. RP 78. Sanchez said that her husband was in very bad shape, but she told him that she could not drive, so Sanchez said that he would call his wife and have her meet him, and they would bring Johnson home. RP 576-77. Sanchez also testified that Mrs. Johnson told him the last time

she had talked to her husband, he told her that everything was okay and that he was on his way home. RP 80.

When Sanchez arrived at the Johnsons' home, Mrs. Johnson came out and looked in the cab, which she described as a "slaughterhouse," with feces, urine, and blood all over everything. RP 578. She got her husband some water, then called 911. *Id.* The ambulance received the call at 10:47 p.m. and arrived on the scene at 10:52 p.m. RP 359-60; Ex 27.[4] Tina Beeler was the senior paramedic on the call. RP 347-48, 352. The Portland Fire Department was there, and they retrieved Johnson from his truck. RP 350-51. Beeler said that Johnson had urinated and defecated all over himself and was in a t-shirt and underwear. RP 354. Johnson was not speaking clearly, although he was able to talk a little. RP 355-57.

Beeler thought this was a case of elder abuse, and she became angry with Sanchez. RP 357-58. Mrs. Johnson explained that Sanchez was the one who brought Johnson home. RP 358. Beeler got angry at Sanchez because she thought that someone had beaten Johnson. RP 375. Johnson's doctor testified that

---

[4] Exhibit 27 is the Norcom Communications record for this call.

Johnson had quite a bit of bruising because of his chronic steroid use. RP 501.

Beeler testified that it is not uncommon for her to find geriatrics who have soiled themselves or have been on the ground for a day or so. RP 369-71. To determine how long they have been in that condition, Beeler will look at the color of the urine, including urine stains, and whether the fecal stains are old. RP 371-72. In this situation, the stains appeared more than a day old. RP 371-72. Beeler opined that Johnson was in an "altered mental state" for 24 hours; *i.e.*, from midnight on Saturday evening to midnight on Sunday evening. RP 379.

The other EMT spoke with Johnson and prepared the incident report, which is Ex 30. This is the report stating that Johnson refused medical care the night before:

> Code 3 on TR3 for 71 y/o [male] has sore on bottom of [left foot]. [Patient] drives semi & got sore [about] 4 days ago. someone drove [patient] back up here to his home where they called 911. [Patient] has been in back of semi for past 4 days unable to move. **[Patient] refused ambulance yesterday thinking his insurance wouldn't pay.** He has been eating/drinking but unable [to] get up to void so is very soiled. family said [patient] fell but [patient] denied to EMS. Skin covered in sores & [lacerations] but [patient] doesn't know why. . . . open heart surgery 5 yrs ago; story hard to understand, differs [between patient] & family.

Ex 30 (emphasis added; appended). This EMT gave Johnson a "Glascow" of 15, which meant that he could spontaneously open his eyes, talk, and move his limbs.[5] RP 364-66.

The jury saw and heard very graphic evidence regarding Johnson's injuries and the amputation of his leg above the knee. *See*, *e.g.* RP 490-91; Exs 1-3. The surgeon determined that a below-the-knee amputation was not possible, primarily due to Johnson's arthritic knee joint, which would have prevented him from successfully using a below-the-knee prosthetic. RP 499. Johnson's leg went on to heal normally and he did not seem to experience any particular problems with his recovery. RP 519. Johnson has experienced a great deal of pain and his movements have been greatly restricted by his injuries. *See*, *e.g.*, RP 537-41, 574-75, 582-95. Johnson's life expectancy has not been adversely affected. RP 520.

---

[5] This is a perfect Glascow score, but does not necessarily mean that Johnson was able to get up and walk around or make decisions for himself. RP 365-66. The Glascow scale measures how close a person is to a coma; 10 and under means the person is at a risk of dying. *Id.*

I. All of the relevant testimony on causation focused on the failure to get medical care as soon as possible after Johnson could no longer drive.

Everyone who testified about the causation of Johnson's injuries agreed that he should have called 911 or otherwise obtained medical assistance immediately upon discovering that the problem with his foot prevented him from driving. *See*, *e.g.*, RP 522, 669. Even Johnson admitted that he should have obtained immediate medical attention. RP 569. Johnson's family doctor, Dr. Rippey, agreed that it would have been reasonable for Johnson to seek medical care when the pain in his foot prevented him from driving and when he had a noticeable red circle on the bottom of his foot. RP 516-17. Dr. Rippey agreed that Johnson should have called 911 because the sooner Johnson sought medical care, the more potential for a successful outcome. RP 522, 523.

Dr. Rippey testified that lying in the cab in his own waste without medical care over four days materially contributed to Johnson's injuries. RP 502-08. But none of the medical experts could testify as to when Johnson's leg deteriorated to the point that it could no longer be saved. RP 515, 658, 668-69. When Johnson's foot became unsavable is almost impossible to know. RP 658. Infection can occur very rapidly and result in the foot

becoming unsalvageable within 24 hours, or it could take days and days. *Id.* The processes are very unpredictable, and cannot be judged in hindsight. *Id.* Indeed, it would be possible for the foot to be savable from 1:00 p.m. to 1:44 p.m. but then be unsavable at 1:48 p.m. RP 668-69.

J. Procedural History

The case went to trial on August 7, 2006, and lasted 5 days. Golden Eagle moved for directed verdict on liability at the close of the plaintiff's case. RP 626-38. The trial court dismissed any issues of negligent training (RP 625) and gross negligence (RP 627) but denied the motion as to the voluntary rescue doctrine and justifiable reliance. RP 635-38. Golden Eagle also moved for directed verdict at the close of its own case (RP 725-29) and plaintiffs moved to dismiss certain affirmative defenses (RP 730-34) but all of these motions were denied.

The jury returned a verdict for the plaintiffs of $2.24 million. CP 1034-37. It found the Johnsons and the three drivers each free of contributory negligence. *Id.* It found Woodburn ambulance negligent, but not a proximate cause. *Id.* Golden Eagle brought a motion for judgment as a matter of law or remittitur, which was denied. CP 1055, 1090. Golden Eagle timely appealed. CP 1084.

ARGUMENT

A. The "voluntary rescue doctrine" – Johnson's only liability theory – does not support a duty in this case, so the Court should reverse and dismiss.

The trial court instructed the jury on the "voluntary rescue doctrine" as the Johnsons' sole liability theory in this case. CP 1013-14 (appended). As discussed below, this doctrine is an exception to the general no-duty rule that is related to – but not the same as – the classic rescue doctrine and the "duty to warn" doctrine. The voluntary rescue exception on which the Johnsons relied cannot apply here, however, because (a) Johnson was not in imminent peril when Golden Eagle allegedly promised to rescue him; (b) Johnson's initial refusal of medical assistance cut off Golden Eagle's alleged duty to rescue; and (c) no one could or did reasonably rely on anything that Golden Eagle said. This Court should reverse and dismiss.

1. No general duty to rescue exists.

Whether a duty exists is a question of law, reviewed *de novo*. ***Webstad v. Stortini***, 83 Wn. App. 857, 865, 924 P.2d 940 (1996) (quoting ***Lauritzen v. Lauritzen***, 74 Wn. App. 432, 438, 874 P.2d 861 (1994)), *rev. denied*, 131 Wn.2d 1016 (1997). Under the common law, no one has a legal duty to come to the aid of another.

See, e.g., ***Folsom v. Burger King***, 135 Wn.2d 658, 667, 673-74, 958 P.2d 301 (1998). But Washington has recognized an "exception" to this rule called the "voluntary rescue doctrine." ***Folsom***, 135 Wn.2d at 675. This Court recently formulated the basis of this exception as the necessity to use reasonable care when undertaking to act in a given situation:

> As a general rule, one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance.

Borden v. City of Olympia, 113 Wn. App. 359, 369 & n.20, 53 P.3d 1020 (2002) (citing ***Folsom***, 135 Wn.2d at 676; ***Meneely v. S.R. Smith, Inc.***, 101 Wn. App. 845, 857, 5 P.3d 49 (2000), *rev. denied*, 142 Wn.2d 1029 (2001); and PROSSER AND KEETON ON THE LAW OF TORTS, § 56 at 380 (5th ed.1984)), *rev. denied*, 149 Wn.2d 1012 (1993).

2. The classic "rescue doctrine" does not apply here.

The classic "rescue doctrine" case is like ***Highland v. Wilsonian Inv. Co.***, 171 Wash. 34, 17 P.2d 631 (1932), in which the rescuer sued the tortfeasor and in which our Supreme Court first adopted Justice Cardozo's famous aphorism:

> Danger invites rescue. . . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.

> . . . The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.

Highland, 171 Wash. at 40 (quoting ***Wagner v. Int'l Railway Co.***, 232 N.Y. 176, 180-81, 133 N. E. 437 (1921)). In cases like ***Wagner*** and ***Highland***, *supra*, and like ***French v. Chase***, 48 Wn.2d 825, 830, 297 P.2d 235 (1956), a rescuer suffers injury while affecting a rescue of someone in imminent peril, and then sues the party whose negligence created the need for the rescue. The early cases adopted this classic "rescue doctrine" in part to mitigate the harsh rule (then prevalent) that contributory negligence by the rescuer would completely bar his or her action.

This traditional rescue doctrine has nothing to do with this case because Johnson is not suing a tortfeasor for injuries he suffered while attempting a rescue. Rather, for months Johnson negligently failed to treat his sore foot, drove until it became a wound, and then repeatedly refused offers or suggestions to call an ambulance. In short, Johnson negligently created the need for his own rescue.

3. Nor do the "duty to warn" cases apply here.

Another line of cases in the same family as the rescue doctrine cases, but also not directly applicable here, is the duty to

warn cases, which begin with ***Brown v. MacPherson's, Inc.***, 86 Wn.2d 293, 545 P.2d 13 (1975). There, plaintiffs sued the State, alleging that a state employee assumed a duty to warn by receiving notice of imminent peril from an avalanche expert (who said that the plaintiffs' cabins were in a high-risk avalanche area), leading the expert to believe he would convey the warning to the plaintiffs, and instead telling the plaintiffs' real estate broker that no danger existed. ***Brown***, 86 Wn.2d at 289-99. The Supreme Court held that the state employee assumed a duty to warn. *Id.*

In another duty to warn case, our Supreme Court very recently emphasized a substantial limitation on the rescue doctrine in general: privity of reasonable reliance. *See* ***Osborn v. Mason County***, 157 Wn.2d 18, 134 P.3d 197 (2006). In ***Osborn***, parents of young woman raped and murdered by a convicted sex offender sued the County for failure to warn them of the offender's move into their neighborhood. Specifically, the plaintiffs' neighbor knew of the offender's presence and inquired with the detective in charge, who assured the neighbor that he would post warnings in the neighborhood; he then failed to do so. ***Osborn***, 157 Wn.2d at 20. The Superior Court denied the County's motion for summary judgment, the County appealed, and this Court affirmed. ***Osborn***

v. Mason Cy., 122 Wn. App. 823, 95 P.3d 1257 (2004), *reversed*, 157 Wn.2d 18 (2006).

In reversing, the Supreme Court held that the only way a plaintiff could establish a duty in these circumstances was to show that the plaintiffs themselves relied on the defendant's assurances:

> [T]he Osborns do not assert facts sufficient to show Mason County had a duty to warn them of Rosenow's presence because they do not claim they relied on Mason County's assurances. A duty exists under the rescue doctrine **only** if an injured party reasonably relies on the assurances of a negligent rescuer. The Court of Appeals held Mason County had a duty to warn the Osborns under the rescue doctrine because Dracobly assured Wiseman he would post fliers, failed to post fliers, and discouraged Wiseman from posting fliers. *Id.* In other words, it held Mason County had a duty to warn the Osborns because Wiseman relied on its assurances. **But that cannot support a duty under the rescue doctrine unless the Osborns reasonably relied on Wiseman**. And the Osborns fail to show such reliance. Because Mason County had no duty to warn the Osborns – under the rescue doctrine or any other theory of liability – it is entitled to summary judgment.

157 Wn.2d at 23 (emphasis added). Thus, a third-party's reliance on the defendant's assurances is insufficient; there must be "privity" of reliance:

> [I]n ***Brown***, a duty existed because the injured parties reasonably relied on their broker to warn them of danger, a public entity promised a third party it would warn the injured parties of danger, and the public entity caused the broker to believe no danger existed. 86 Wn.2d at 301-02. And in ***Meneely***, a duty existed because the injured parties relied on a manufacturer to warn them of danger, a trade

> association promulgated "industry wide safety standards," and the manufacturer relied on the safety standards. 101 Wn. App. at 857-62. **No duty can exist under the rescue doctrine without this privity of reliance**.

157 Wn.2d at 26 (emphasis added). In short,

> Under the rescue doctrine, both public, ***Brown***, 86 Wn.2d at 301, and private, ***Meneely***, 101 Wn.App. at 860, entities have a duty to warn those who reasonably rely on a promise to warn. But no duty to warn exists under the rescue doctrine without reasonable reliance on such a promise.

157 Wn.2d at 28.

While these cases (***Brown***, ***Meneely***, and ***Osborn***) are part of the general duty to rescue framework, they each concern to a promise to warn, not a promise to rescue. Here, no promise to warn is at issue: Again, Johnson does not allege that Golden Eagle failed to warn him of anything, but rather that it failed rescue him.

4. *Folsom* and *Webstad* reject a duty here.

This case thus involves the voluntary rescue exception discussed in ***Folsom***, *supra*. There, a company installed a security system in a restaurant, but did not remove it when the restaurant canceled the security contract. When the security company received an actual alarm, it did nothing, not even dialing 911. 135 Wn.2d at 674. Two employees were murdered. *Id.* at 661.

The ***Folsom*** Court held that the "duty to rescue arises when a rescuer [1] knows a danger is present and [2] takes steps to aid

an individual in need." 135 Wn.2d at 677 (citing ***French***, 48 Wn.2d at 830; ***Brown***, 86 Wn.2d at 298). When the company installed the security system, no imminent danger existed. When the alarm came in, the contract had terminated. The company's failure to call 911 "was not an affirmative act creating the harm, making the situation worse, or inducing reliance." 135 Wn.2d at 677. Thus, the company had no duty to rescue. *Id.* at 677-78.

In ***Webstad***, *supra*, while in the defendant/paramour's home, the victim and her paramour were arguing about him leaving his wife, the victim allegedly threatened to kill herself and took some pills in his presence, and the victim repeatedly refused his offers to dial 911 or to take her to the hospital, even while throwing up in his bathroom. 83 Wn. App. at 862-83 & n.4. When she passed out, he finally called 911, but even then he attempted to prevent the use of sirens and lights to protect his reputation. *Id.* at 863-64.

This Court held that even in these immoral circumstances, a paramour – present in the same room – who allegedly brought on the victim's upset, actually saw her take the pills (allegedly with knowledge of her history of trying to commit suicide) and did nothing to rescue her until she passed out (by which time it was

allegedly too late to save her) had no duty to rescue, or even to immediately summon aid (*id.* at 875-76):

> [W]e have held that Stortini had no duty to anticipate Susan Webstad's decision to attempt suicide before she collapsed and to prevent her from harming herself by immediately calling for help. We decline to impose a legal duty to immediately summon aid whenever a person has reason to suspect that another person may be attempting suicide. Susan Webstad created the risk of her own injury and the necessity that she rely on others to save her. Therefore, no "special relationship" existed because Stortini did not create or increase the risk of harm to Susan Webstad, or induce her reliance, or prevent her from seeking assistance from others. We thus conclude that Stortini and Susan Webstad did not have a "special relationship" giving rise to a duty for Stortini to protect her from herself.

Simply put, if no duty to summon assistance arises when a security company has actual knowledge of imminent peril due to an alarm, or when a paramour has actual knowledge of imminent peril through threatened suicide, ingested pills, and throwing up, then a terminal manager hundreds of miles away cannot have a duty to rescue a driver who neglects his own injury and repeatedly refuses medical assistance. This Court should reverse and dismiss.

a. Under *Folsom* and *Webstad*, Golden Eagle assumed no duty to rescue Johnson because it had no knowledge of any imminent peril to Johnson on Thursday, when Golden Eagle allegedly made a promise to rescue.

Under ***Folsom*** and ***Webstad***, Golden Eagle had no duty to rescue Johnson because it had no knowledge that he was in any

imminent peril when it allegedly promised him a rescue on Thursday, October 31, 2002. *See also*, Court's Instruction 20 (requiring Johnson to prove that Golden Eagle "knew or should have known that plaintiff Glenn Johnson was in imminent peril or danger" and that it "promised to provide assistance to plaintiff to avoid peril or danger"). CP 1013 (appended). Johnson failed to establish these essential elements.

Preliminarily, Johnson testified in deposition that when he spoke to Crofoot on Thursday, Crofoot suggested that Johnson call an ambulance, Johnson rejected the suggestion (while admitting nothing stopped him from calling), and Johnson otherwise remembers "[n]ot a thing" from his several Thursday conversations with Crofoot. RP 688-89. If this testimony is true (and Johnson admitted that his recall was better at the time of his deposition, RP 544) then Golden Eagle never offered a rescue to Johnson at all. The Court should reverse and dismiss.

On the other hand, assuming *arguendo* that Johnson could honestly claim a promise at trial, it is nonetheless undisputed that when Crofoot allegedly promised to send someone to get him, Johnson told Clohessey and Crofoot virtually nothing about his condition and insisted that he did not require medical assistance.

Supra, Fact § E. Johnson's repeated denials that he needed or wanted medical assistance lulled Golden Eagle into believing that he was not in imminent danger. *Id.*

Moreover, there is no evidence that anyone at Golden Eagle had any reason to believe that Johnson was peculiarly susceptible to infections or otherwise in fragile condition. *Id.* While Sanchez testified that Johnson looked like he might need medical attention later on Thursday afternoon when he picked up Johnson's load, he too had virtually no conversation with Johnson, knew that Johnson had refused an ambulance, and did not offer him an ambulance or a ride. *Id.* Sanchez did not see any imminent peril.

While Sanchez (after he had left Johnson) did tell Crofoot that he should send Johnson some help, this was well after Crofoot's alleged promise to Johnson, and it gives no indication of imminent peril in any event. *Id.* Indeed, Sanchez called his brother-in-law and asked him to bring Johnson lunch the next day. *Supra,* Fact § F. When Mendez arrived on Friday, he too thought Johnson looked bad, but "not serious," and he unequivocally denied that there was any imminent peril on Friday afternoon. RP 125-26.

As noted above, ***Folsom*** found no duty (in part) because, when the company installed the security system and entered into a

contractual promise to come to the rescue, it had no knowledge of any imminent peril. 135 Wn.2d at 677 ("The act . . . plaintiffs rely on to trigger the voluntary rescue doctrine took place in this case before any danger existed"). Similarly, in ***Webstad*** this Court found no duty (in part) because the paramour had no direct knowledge that the victim was committing suicide. 83 Wn. App. at 875-76. Here too, Johnson relies on an alleged promise before Golden Eagle had any knowledge of imminent peril – indeed, before any peril was imminent according to the drivers on the scene, including Johnson himself. As in ***Webstad***, Johnson's repeated assertions that he needed no medical care are subject to only one interpretation: He is fine, and no imminent peril exists.

The facts of ***Folsom*** and ***Webstad*** each presented a stronger case for assumption of a duty to rescue than Crofoot's alleged Thursday promise. This Court should reverse and dismiss.

b. Crofoot's alleged subsequent (virtually identical) statements to the other three drivers also fail to establish a duty due to the lack of imminent peril.

Remarkably, the three drivers that Johnson offered each testified that Crofoot said virtually the identical phrase to each of them at three different times:

Sanchez on Thursday:	"[D]on't worry, we're going to take care of it."
Mendez on Friday:	"Don't worry about it. It's not your problem. I already took care of it."
Gomez (Thurs. or Fri.):	"Not to worry about that, he was going to take care of it."

RP 70, 171-72, 190. Notwithstanding the striking coincidence of this testimony, and notwithstanding that while he was supposedly saying this, Crofoot was taking absolutely no steps to "rescue" Johnson, none of these alleged statements was made when Crofoot had any knowledge of imminent peril, so none of them establishes a duty under ***Folsom*** and ***Webstad***.

As noted above, Sanchez left Johnson without help on Thursday afternoon, asked someone else to look in on him the next day, and in no way even suggested to Crofoot that Johnson was facing imminent danger on Thursday. *Supra*, Fact § E. Similarly, when Mendez saw Johnson on Friday, he asserted that Johnson was not in imminent danger. *Supra*, Fact § F. These two alleged statements cannot give rise to a duty under ***Folsom*** and ***Webstad***.

Gomez could not identify when he first saw Johnson, and he did not testify that he told Crofoot that Johnson was in imminent peril or indeed that he told Crofoot anything about Johnson's

condition. RP 190-91, 211. Rather, he just asked if Golden Eagle was going to help Johnson, and Crofoot allegedly again said that he was going to take care of it. RP 190-91. Gomez seemed to suggest that he should have called 911 the first time he saw Johnson, but he did not; and the second time Johnson was much worse, but Gomez did not call Crofoot. RP 194, 210-13. Gomez's vague testimony is insufficient to establish that Crofoot knew Johnson was in imminent peril when he allegedly said he would "take care of it." Again, the Court should reverse and dismiss.

5. Johnson failed to establish reasonable reliance.

"A duty exists under the rescue doctrine only if an injured party reasonably relies on the assurances of a negligent rescuer." ***Osborn***, 157 Wn.2d at 23. The trial court thus instructed the jury that the Johnsons had to prove "that plaintiffs or others relied upon defendant's promise by failing to seek assistance elsewhere" and that their "reliance was reasonable." CP 1013 (appended). The Johnsons failed to establish a duty.

a. Glenn Johnson did not reasonably rely.

No reasonable jury could have found that Glenn Johnson reasonably relied on Golden Eagle's alleged Thursday promise to him – the only alleged promise from Golden Eagle to him –

because he refused Golden Eagle's immediate offer or suggestion to obtain medical assistance. Just as in ***Webstad***, where the victim repeatedly refused offers to call 911 (albeit from someone in the same room) Johnson could not refuse an immediate proffer of medical assistance and still claim that he reasonably relied on a supposed offer to get him home – over 500 miles away.

Indeed, every medical expert agreed that what caused Johnson's injuries was his failure to obtain medical assistance as soon as possible. *Supra*, Fact § I. Consistent with ***Webstad***, this Court should hold that where, as here, an alleged rescuer immediately offers or suggests calling an ambulance, which every expert agrees would have avoided significant harm to the plaintiff, but the plaintiff refuses that offer, the plaintiff cannot establish reasonable reliance as a matter of law. This is particularly true where, as here, the so-called rescuer was hundreds of miles away.

b. The other three drivers did not reasonably rely.

When Sanchez left Johnson after picking up his load on Thursday, he had not offered Johnson medical assistance or a ride. RP 83-84, 85, 91, 97. When he subsequently called Crofoot, he obviously could not reasonably rely on Crofoot's alleged statement at that point to justify not rescuing Johnson earlier. Indeed,

Sanchez obviously did not rely on Crofoot because he called his brother-in-law to check on Johnson the next day. RP 70-71. And since Sanchez had a load to deliver, he could not have given Johnson a ride, so he did not rely upon Crofoot's alleged statement he was taking care of it to forgo giving Johnson a ride himself.

When Mendez checked on Johnson on Friday afternoon, he took him food and drink, but did not offer him a ride or medical care. RP 120-25. He did nothing because Johnson's condition was not serious at that time. RP 125-26. Again, he could not have relied on a phone conversation with Crofoot many hours later to justify not rescuing Johnson on Friday afternoon. RP 125-27.

And even assuming *arguendo* that Mendez could have been found to have relied on Crofoot, by Friday afternoon "everyone" – meaning all the drivers – were talking about how to bring Johnson home. RP 189-90. Sanchez spoke with Gomez, who agreed to find another driver and bring Johnson home. RP 95-96, 188-89. He did so. *Supra*, Fact § G. Thus, even assuming *arguendo* that the three drivers had at some point reasonably relied on Crofoot, by Friday afternoon they had taken matters into their own hands and were no longer relying on him.

Furthermore, once Gomez undertook to act on his own behalf on Saturday by driving Johnson for ten hours from California to Oregon, it is simply impossible to conclude that he was reasonably relying on Crofoot to help Johnson. Gomez testified that when he began to move Johnson his condition had badly worsened to the point that he was unquestionably in imminent peril: He had defecated on his bed,[6] and he could not talk or understand Gomez. RP 192-94. Yet Gomez took it on himself to drive Johnson back to Oregon: he called no ambulance, bypassed nearby hospitals and truck stops, and never called Crofoot. RP 99-100, 194-95, 212, 215.

And when Gomez called the Woodburn Ambulance, again he did not call Crofoot, even after the ambulance left Johnson in the lot. *Supra*, Fact § H. Thus, during the Saturday trip from California, and from and after Johnson's arrival in Oregon early Sunday morning, no one was relying on Golden Eagle because no one told Crofoot where Johnson was. Since Johnson failed to establish reasonable reliance, this Court should reverse and dismiss.

---

[6] Johnson produced evidence suggesting that this may have been the source of the dire infection Johnson suffered. RP 455-56.

B. No reasonable jury could conclude that no one was contributorily negligent in this case.

If the Court finds no duty, then it can end its analysis here. But the trial court also gave a contributory negligence instruction (CP 1021) and the special verdict form listed Glenn Johnson, Mrs. Johnson, the three drivers, and Woodburn Ambulance each as potentially negligent in this case. CP 1034-35. Of these, only the Johnsons knew that Glenn Johnson had a longstanding foot problem, was infirmed, and was peculiarly susceptible to infections. And only the three drivers and the ambulance company saw Johnson first hand.

As the facts set forth and argued at length above make abundantly clear, there was plenty of negligence to go around in this case. Glenn Johnson himself negligently put off having his foot treated (RP 621), continued to ignore the problem for months, and repeatedly refused medical care and told various people his insurance would not cover it and that he wanted to stay with his truck. While Johnson put on expert testimony that he was in an "altered mental state" for 24 hours prior to his arrival at his home at midnight on Sunday (RP 379) that leaves Wednesday, Thursday, Friday and Saturday during the day in which Johnson could (1)

accept Golden Eagle's repeated offers or suggestions of an ambulance; (2) ask one of the three drivers to call an ambulance or drive him to a hospital; (3) call his wife and ask her to send an ambulance; or (4) dial 911. The jury's conclusion that Glenn Johnson had no responsibility for his own plight is insupportable.

Similarly, a reasonable jury could not find that Mrs. Johnson bore no responsibility here. It is undisputed that Johnson called his wife virtually every day when he was on the road and that Mrs. Johnson expected her husband home on Thursday or Friday. RP 576, 688. Yet the last call she received from him was Wednesday afternoon (RP 564-65; Ex 39) and she allegedly did nothing to inquire with Golden Eagle or otherwise try to find out what had happened to him until someone called her Sunday night. Mrs. Johnson nonetheless claimed that she knew her husband had stopped and had fallen and hit his head. While she latter claimed that she could not "get through" on his cell phone (RP 598) she admitted that she did not even bother to contact Golden Eagle to see what was the matter. RP 602-03. The jury's verdict absolving Mrs. Johnson of all responsibility for her husband's welfare is irrational.

Aside from the Johnsons themselves, the most disturbing negligent actors in this case are Gomez and Woodburn Ambulance. On Saturday, Gomez found Johnson much worse, unable to speak, with feces and urine all over his bed and a horrible smell, yet he did not call 911 or take him to a nearby hospital, but rather drove him hundreds of miles and dropped him in a parking lot. While he did finally call an ambulance, he simply left – and notified no one, including Golden Eagle – when the ambulance left the scene.

Johnson's own experts testified that Woodburn Ambulance was negligent in leaving Johnson (*supra*, Fact § H) yet the jury found no proximate cause. CP 1034-35. One theory is that the jury thought Johnson was too far gone late Saturday night, so leaving him there caused no additional harm. Yet Johnson was unquestionably suffering during the ensuing 12 hours, and every expert agreed that it was impossible to know when Johnson's leg was too far gone. *Supra*, Fact § I. If this was the jury's reasoning, it is based wholly on speculation and guesswork, and cannot stand. *See, e.g.*, ***Estate of Bordon v. Dep't. of Corrections***, 122 Wn. App. 227, 240, 95 P.3d 764 (2004) ("Cause in fact does not exist if the connection between an act and the later injury is indirect and speculative"), *rev. denied*, 154 Wn.2d 1003 (2005).

Alternatively, the court gave the jury a subsequent medical negligence instruction: "Negligent or harmful medical treatment is within the scope of risk created by the original negligent conduct." CP 1016. This instruction might well apply to Gomez, who (unbeknownst to Golden Eagle) both negligently delayed obtaining medical treatment for Johnson and also finally called the ambulance on his own initiative and then left Johnson in the Woodburn lot. But it cannot apply to Golden Eagle, who had nothing to do with bringing Johnson to Oregon, calling the ambulance, or leaving Johnson in the lot. Johnson's theory stretches proximate cause far beyond its breaking point.

In sum, the jury's verdict absolving everyone of responsibility but Golden Eagle is insupportable in law or fact. Given the size of the verdict, it is apparent that the jury was inflamed by passion or prejudice toward Golden Eagle. If the Court finds a duty, then it should reverse and remand for a new trial.

CONCLUSION

For the reasons stated above, this Court should reverse and dismiss or, at a minimum, remand for a new trial.

DATED this 10th day of April, 2007.

Wiggins & Masters, P.L.L.C.

Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

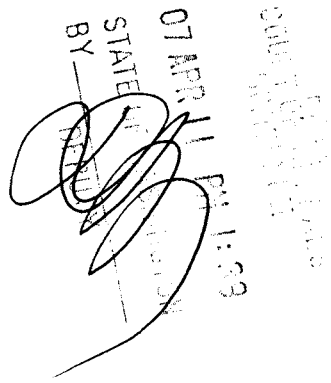
I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 10th day of April 2007, to the following counsel of record at the following addresses:

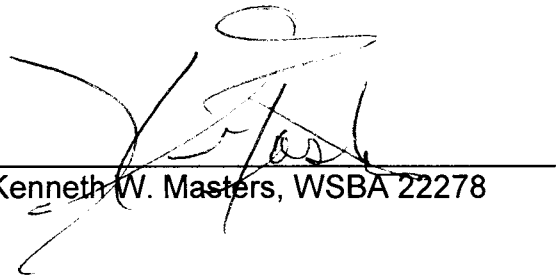
Attorneys for Glenn and Dollie Johnson

Thomas S. Boothe
7635 SW Westmoor Way
Portland, OR 97225

Attorneys for Golden Eagle Express, Inc.

Patrick D. Gilroy
Wade R. Keenon
The Gilroy Lawfirm, P.C.
7307 SW Beveland St., Ste. 200
Tigard, OR 97223-8609





Kenneth W. Masters, WSBA 22278

Johnson, Glen — Unk

PATIENT HOME OR MAILING ADDRESS: 46 SE 103 Ave, Port q. de			DATE OF SERVICE: 11-3-02
			SERVICE: 2670
DOB: 8-7-31	AGE: 71	☒ MALE ☐ FEMALE	WEIGHT KG:
			UNIT I.D. NO.: M322
PHONE: 503-760-2269	PT'S PHYSICIAN: Dr. Pleideman	NAME RESPONS. PARTY/RELATIONSHIP: self	RUN NO. AMR: 2393977
RESIDENT: STREET, CITY, ZIP: SAA			RUN NO. PSAR: 1688

ALLERGIES (MEDS) ☐ UNKNOWN ☒ DENIED

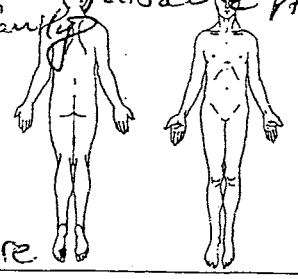
CURRENT MEDICATIONS ☐ UNKNOWN ☐ DENIED
Guaifenesc, Zestril, Docusate, Norvasc

REASON FOR CALL/MECHANISM OF INJURY
Code 3 on TR3 for 71y/o ♂ has sore on bottom of (1) ft. pt drives semi & got sore ≈ 4 days ago. someone drove pt back up here to his home where they called 911. pt has been in back of semi for past 4 days unable to move. pt refused ambulance yesterday thinking his insurance wouldn't pay. he has been eating/drinking but unable to get up to void so is very soiled. family said pt fell but pt denied to EMS. skin covered in sores & lacs but pt doesn't know why. hx of open heart surg ago, HTN, A-Fib, Arthritis, hip replacement. pt request PA. denies SOB, story hard to understand, dissociative & confused

UNREMARKABLE (UNR), NOT ASSESSED (N/A), OR AS ASSESSED

SKIN SIGNS	☒ UNR	☐ N/A — PWD, covered in bruises & lacs old & new, unk cause
HEAD	☐ UNR	☐ N/A — blood around mouth, unk cause
NECK	☒ UNR	☐ N/A
CHEST	☒ UNR	☐ N/A
ABDOMEN	☒ UNR	☐ N/A
BACK	☒ UNR	☐ N/A
PELVIS	☒ UNR	☐ N/A
LEGS	☐ UNR	☐ N/A — (A) sore on bottom of (1) ft. leg very red, swollen, tender
NEURO	☒ UNR	☐ N/A

☐ LACERATION
☐ BLUNT
☐ PENETRATING
☐ BURN
☐ FRACTURE
☐ AMPUTATION



GCS
EYES 4 + VERBAL 5 + MOTOR 6 = TOTAL 15

PROTOCOL/ASSESSMENT

TRAUMA ENTRY CRITERIA
N/A

OLMC CONTACT ☐ MADE ☐ ATTEMPTED ☐ NOT ATTEMPTED
REASON CONTACTED: ORDERS:
PERSON CONTACTED: TIME:

Vitals	BP	Pulse	Resp	Skin	LOC/G	SaO_2
Meds	Dose	Route	Result	Change		
EKG	Rhythm	Rate	Ectopy	Rate	Lead	
IV	Size	Site	Solution	Rate	Amount	

Time	Tech	Action	BP	Pulse	Resp	Skin	LOC/G	SaO_2
2254	FD	1° HX						
2258	FD	backboard to get pt out of semi						
2302	FD	pt → squad						
2305	SG	2° head-to-toe						
2307	SG	V/S unable to get SaO_2 on pt	144/61	94	30	PWD	15	—
2309	SG	Monitor (2)	A-Fib	100	Ø	Ø	11	—
2312	SG	V/S	121/61	92	30	PWD	15	90
2315	SG	pt care trans. & incident						

ON SCENE	AT PATIENT	TO HOSPITAL	AT HOSPITAL	CLEARED	AVAILABLE			
2247	224740	2248	225247	2306	2313			

PATIENT TRANSFERRED TO: AGENCY PA
RECEIVING PT. RN TIME
PERSONAL BELONGINGS:
GIVEN TO:

CREW MEMBER 1 (PRINT) S. Goodson	PIC	CERT 7
CREW MEMBER 2 (PRINT) T. Beeler	PIC	CERT
CREW MEMBER 3 (PRINT)	PIC	CERT
FIRST RESPONDER (PRINT) FD	PIC	UNIT #
CHART WRITTEN BY: (SIGNATURE)		

☐ CONTINUATION FORM USED

APPENDIX

INSTRUCTION NO. 20

To recover in this case, plaintiffs must prove:

1. That defendant knew or should have known that plaintiff Glenn Johnson was in imminent peril or danger;
2. That defendant promised to provide assistance to plaintiff to avoid peril or danger;
3. That plaintiffs or others relied upon defendant's promise by failing to seek assistance elsewhere;
4. That plaintiffs' or others reliance was reasonable;
5. That defendant failed to exercise reasonable care to perform its promise;
6. That plaintiff suffered damages as a result.

INSTRUCTION NO. 21

Where a person knows, or reasonably should know, that an individual is injured and takes steps to aid that individual, the person making an effort to provide aid is required to use reasonable care in his or her efforts. If the rescuer fails to use reasonable care in his or her efforts, then the rescuer is liable to the injured individual for his worsened condition proximately caused by the rescuer's failure.

Where a person's promise to render aid leads an injured individual not to seek aid elsewhere and the promise results in the injured individual not obtaining aid that would otherwise have been available, thereby worsening the injured individual's condition, the person who promised aid is liable to the injured individual for his worsened condition proximately caused by the rescuer's failure.

Where a person's promise to another person in a position to provide aid to an injured individual leads that other potential rescuer not to provide aid and the injured individual's condition is thereby worsened, the person who made the promise is liable to the injured individual for his worsened condition proximately caused by the rescuer's failure.

However, a rescuer or promissor is only liable under the above circumstances when others have reasonably relied on the promise or efforts.