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NO. 64301-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION I

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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.*

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

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**APPELLANTS' REPLY BRIEF**

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DIVISION I

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## I. INTRODUCTION

Boeing<sup>1</sup> offers no serious opposition to the existence of any of the duties the Kressers allege were breached in this case. Instead, Boeing argues that, for various reasons, the duties should not apply to the facts as alleged in the Complaint. Boeing's arguments are meritless. Its main argument is that the allegations in the Complaint rule out the existence of a medical emergency—*i. e.*, create an “insuperable bar to relief”<sup>2</sup> justifying dismissal under CR 12(b)(6). But Boeing relies not upon the allegations, but upon inferences drawn in its own favor, contrary to the requirement that all reasonable inferences and conceivable facts be considered in *plaintiffs'* favor.

Boeing's other arguments why its duty to act in the event of a medical emergency does not apply are equally without merit. For instance, Boeing argues that, under the Kressers' theory of the case, it had to diagnose Mr. Kresser's TIA, and there is no duty to diagnose. But there is a material difference between diagnosing a health condition and assessing whether a situation exists that warrants a medical evaluation, which an employer can do without determining the cause of the employee's symptoms. Boeing also argues it has no duty to train supervisors in responding to medical emergencies because it has onsite

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<sup>1</sup> As in the Opening Brief, “Boeing” refers to both defendants.

<sup>2</sup> *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff'd on reh'g*, 113 Wn.2d 148, 776 P.2d 963 (1989), quoting 5 WRIGHT & MILLER, FED. PRAC. § 1357, at 604 (1969).

medical personnel. But that argument ignores the Boeing safety procedures that designate supervisors as the gatekeepers to onsite care, and thus permit a supervisor's negligence to prevent an employee from receiving needed emergency care. Indeed, Boeing's safety procedures give rise to duties beyond what is required by the common law, requiring Boeing to ensure that an employee who reports any illness or injury receives proper care. Therefore, this Court need not decide whether to adopt and apply a common law duty.

In a particularly puzzling section of its brief, Boeing argues that contributory negligence is a complete bar to recovery, even though that common law doctrine was abolished by the legislature in 1973.

Finally, it is difficult to take seriously Boeing's argument that assessing whether a medical emergency exists would require it to violate the Americans with Disabilities Act and employee privacy rights, when Boeing's safety procedures already require employees to "[r]eport all injury/illnesses regardless of severity to your supervisor immediately." CP 56. No one contends that this requirement violates the ADA or employee privacy rights, yet that is the result of Boeing's argument.

The trial court's order of dismissal should be vacated and the case remanded for further proceedings.

## II. ARGUMENT

### A. Boeing Owed Mr. Kresser a Common Law Duty to Provide or Summon Medical Aid for His Medical Emergency.

#### 1. The Court Can Adopt and Apply the Humane Instincts Doctrine; Boeing Offers No Serious Opposition.

Boeing offers no serious argument against the existence of a duty under the humane instincts doctrine, which it terms the “emergency doctrine.”<sup>3</sup> Boeing’s lack of resistance is appropriate because the Supreme Court recognized and approved the doctrine in *Vanderboget v. Campbell Mill Co.*, 82 Wash. 602, 604-05, 155 P. 905 (1914), and only did not formally adopt the doctrine because it was inapplicable to the facts of the case. Although the Supreme Court has not had occasion to revisit the doctrine since *Vanderboget*,<sup>4</sup> no doubt largely due to the adoption in 1911 of employer immunity for workplace injuries under Title 51

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<sup>3</sup> The Kressers have found no case that refers to the humane instincts doctrine as the “emergency doctrine,” which, at least in this state, is the name of an unrelated doctrine. See *Kappelman v. Lutz*, 167 Wn.2d 1, 10, 217 P.3d 286 (2009).

<sup>4</sup> Boeing cites *Mueller v. Winston Bros. Co.*, 165 Wash. 130, 4 P.2d 854 (1931), as confirming that the humane instincts doctrine does not exist in Washington. The court there stated that “independent of a contract no duty rests upon a master to furnish his servants with medical and surgical treatment[.]” 165 Wash. at 138.

In *Mueller*, the employer had undertaken to provide medical care by arranging for the maintenance of an onsite hospital, but negligently failed to furnish a qualified physician. Boeing misses the distinction between a duty to furnish medical and surgical treatment, which does not exist absent a contractually or otherwise voluntarily undertaken duty, and a duty to give first aid and summon medical attention when appropriate, which is all the humane instincts doctrine requires. Boeing also tries to ignore the even broader duties it assumed through the adoption of its safety procedures and placement of trained medical personnel on site. See § B, *infra*.

(inapplicable here), the humane instincts doctrine is well established and continues to be followed in other states.<sup>5</sup>

2. Under the Humane Instincts Doctrine, It Is Sufficient that an Emergency Exists; the Employee Need Not Be “Incapacitated” or “Helpless.”

Boeing’s main argument is that the humane instincts doctrine cannot apply because the Complaint alleges facts that negate the existence of a medical emergency which, according to Boeing, means the employee was “incapacitated” or “helpless to secure aid on his own.” *Resp. Brief* at 6-7. As discussed in the next subsection, Boeing’s argument should be rejected because it relies upon factual inferences drawn in its own favor, contrary the requirement that all reasonable inferences and conceivable facts be considered in *plaintiffs’* favor.

Before reaching that argument, however, the Court should recognize that the humane instincts doctrine requires only the existence of an “emergency.” As described by the Washington Supreme Court in *Vanderboget*, the duty imposed by the doctrine “begins and ends with the emergency.” 82 Wash. at 605. An “emergency” does not necessarily mean that the employee is “incapacitated” or “helpless.” The Supreme Court observed that the doctrine applies “where immediate attention is

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<sup>5</sup> Boeing asserts that the Kressers cited only “a handful of cases” that applied the humane instincts doctrine. But the Kressers cited 15 cases—quite a bit more than a handful—not to mention the Restatement (Second) of Torts, two treatises, and an American Law Reports article, which itself cites numerous cases. More to the point, Washington courts have been less concerned with following other states or even a majority of states than with protecting the health and safety of its workers and citizens.

required to save life *or prevent great injury.*” *Id.* (emphasis added). Although courts in other states have observed that recovery historically was permitted where the employee was “helpless to secure aid on [his] own,”<sup>6</sup> public policy does not support limiting the duty to circumstances where the employee is literally incapacitated or unable to summon aid.

Today, when employers’ duties to provide for employees’ safety and well being have been expanded extensively and even codified (*see* title 296 WAC), it is reasonable and reflects current public policy to hold an employer responsible to provide or summon medical attention for an employee who may be suffering a medical emergency, even if not literally incapacitated or helpless. “Humane instincts” dictate that employers not be required or encouraged, in the face of a medical emergency—whether a severed finger, a chemical burn, or a possible stroke—to make fine distinctions based on whether the employee is capable of making his own 911 call, driving himself to the hospital, or otherwise securing his own aid.

Significantly, Boeing does not contend that its duties under its own safety procedures and the WAC regulations depend upon whether the employee is incapacitated or helpless.

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<sup>6</sup> *See Bridgeman v. Terminal R. Ass’n of St. Louis*, 195 Ill. App. 3d 966, 552 N.E.2d 1146, 1148 (1990).

3. Boeing Improperly Draws Inferences from the Complaint in Its Own Favor. The Allegations in the Complaint Are Consistent With the Existence of a Medical Emergency, in Which Mr. Kresser Was Incapacitated or Helpless.

Even if “incapacitated or helpless” is the standard for applying the humane instincts doctrine, one could prove, consistent with the allegations in the Kressers’ Complaint, that Mr. Kresser met that standard when he sought assistance during his TIA. In arguing that the Complaint “alleges” facts that rule out any medical emergency, Boeing relies upon inferences, not allegations. Worse, while paying lip service to the requirement of “accepting all of Appellants’ allegations as true,” *Resp. Brief* at 3, Boeing relies upon inferences drawn in *its* favor, when case law requires all reasonable inferences and conceivable facts to be considered in *plaintiffs’* favor:

- Boeing asserts that the Complaint alleges Mr. Kresser was “talking to his supervisor without any difficulty (not slurring his speech or unable to communicate).” *Resp. Brief* at 1. Boeing *infers* from the alleged fact that Mr. Kresser had a brief conversation with his supervisor that he was able to speak normally. But the Complaint contains no facts concerning Mr. Kresser’s speech. Thus, one could prove, consistent with the Complaint, that Mr. Kresser’s speech was impaired.
- Boeing asserts that the Complaint alleges that Mr. Kresser was “fully ambulatory (Appellants do not allege that he had any difficulty walking).” *Resp. Brief* at 1. Boeing *infers* from the allegations in the Complaint that Mr. Kresser was walking normally about the Boeing

facility during his TIA. But the Complaint does not allege that Mr. Kresser could walk unimpaired. Thus, one could prove, consistent with the Complaint, that Mr. Kresser's ability to walk was impaired.

- Boeing asserts that the Complaint alleges Mr. Kresser was “in no apparent emergent danger (no seizures, headaches, [or] vision or breathing difficulties).” *Resp. Brief* at 2. Boeing *infers* from the lack of allegations that Mr. Kresser suffered the specific problems it identifies that Mr. Kresser was “in no apparent emergent danger.” But the allegations in the Complaint are consistent with Mr. Kresser being in “emergent danger.” The Complaint alleges that Mr. Kresser was light-headed, dizzy, was unable to grasp objects with his left hand, which was numb, and generally did not feel well, all of which Boeing was made aware of and should indicate to a properly-trained supervisor the existence of a medical problem requiring immediate evaluation by medical personnel.

- Boeing asserts that the Complaint alleges Mr. Kresser was “completely capable of driving himself home after his shift (Appellants concede he drove safely home from Boeing's Everett facility to his residence in Kitsap [C]ounty, approximately 90 minutes away, with no assistance from others).” *Resp. Brief* at 2. Boeing *infers* from the allegation that Mr. Kresser “went home” following his shift that he drove himself there, and did so “safely.” But the Complaint does not allege *how* Mr. Kresser got home. Thus, one could prove, consistent with the

Complaint, that Mr. Kresser relied on others for transportation on his commute home.

In summary, the Complaint alleges sufficient facts to establish the existence of a medical emergency, and facts that are consistent with Mr. Kresser being incapacitated or helpless to secure aid for himself due to his TIA symptoms.<sup>7</sup> The Complaint does not establish an “insuperable bar to relief.” *Hoffer, supra* note 2, at 420.

Not only do Boeing’s self-serving inferences not bar the Kressers’ case, the Court is required to draw all reasonable inferences in the Kressers’ favor, not Boeing’s. *See Chambers-Castanes v. King County*, 100 Wn.2d 275, 277, 669 P.2d 451 (1983) (“Since this matter has come before us on a CR 12(b)(6) motion, we must treat all facts alleged by appellants and the reasonable inferences therefrom as true.”). The Court must therefore assume that Mr. Kresser’s speech and mobility were impaired, that he exhibited physical indications that he was in emergent danger due to illness, and that he was unable to arrange his own transportation to a hospital, because all of those facts are *consistent with* the Complaint. *See Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d

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<sup>7</sup> Boeing repeatedly attempts to distinguish between a stroke and TIA in terms of degree, asserting that Mr. Kresser “did not suffer a stroke, and the damaging effects of that stroke, until after arriving home.” *Resp. Brief* at 21. But the only real distinction between a TIA and a stroke is the duration, a fact the Court must accept for purposes of CR 12(b)(6). *See* Appendices C and D to Opening Brief. *See also* [http://en.wikipedia.org/wiki/Transient\\_ischemic\\_attack](http://en.wikipedia.org/wiki/Transient_ischemic_attack).

147 (1995). Boeing's argument improperly relies upon the *opposite* inferences, drawn in its own favor.

The Supreme Court addressed a similar situation in *Bravo*. There, ten employees appealed from the dismissal of their suit against their employer, Dolsen Companies. 125 Wn.2d at 748. The complaint had alleged that Dolsen violated RCW 49.32.020, which prohibited employers from interfering with, restraining, or coercing employees involved in organizing to seek improved labor conditions. *Id.* The Court of Appeals affirmed dismissal of the complaint on the basis that it failed to specifically allege union involvement in the employees' activities. *Id.* at 749.

The Supreme Court reversed and held that union involvement was not an essential element of a claim under the statute. *Bravo*, 125 Wn.2d at 750. The court further held that, even if union involvement was an essential element, "[t]he employee's allegations were *consistent with* union involvement, and the Court of Appeals would have been required to deem as true any assertions consistent with the complaint, even if made for the first time on appeal." *Id.* (emphasis added). The court held that dismissal of the complaint was "particularly inappropriate" because there was no prior state court decision setting forth the elements of a claim under RCW 49.32.020. *Id.* The court cautioned that courts should be reluctant to dismiss an action on the pleadings when the area of law involved is undeveloped. *Id.*

Similarly, here, there was no Washington decision formally adopting the humane instincts doctrine, much less holding that an essential element of the doctrine is that the employee was incapacitated or otherwise helpless to secure aid on his own. But, even assuming there was such a decision, the Kressers' allegations were *consistent with* Mr. Kresser being incapacitated or helpless during his TIA for the reasons discussed above.

The Court of Appeals also addressed a similar situation in *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995). There, Clyde Fondren was convicted of murder but later acquitted in a second trial after the conviction was reversed. *Id.* at 853. He and his wife alleged false arrest, malicious prosecution, and other claims against Klickitat County and various public officials. *Id.* The trial court dismissed the complaint for failure to allege that the conviction was obtained by fraud, perjury, or other corrupt means, absent which the conviction would conclusively establish a complete defense to the Fondrens' claims: probable cause. *Id.* at 854-55.

The Court of Appeals reversed and held that, even though the Fondrens would be required to establish fraud, perjury, or other corrupt means at trial, the burden for purposes of the motion to dismiss was upon the defendants to show that no set of facts would entitle the Fondrens to relief. 79 Wn. App. at 858. Although the complaint did not specifically allege fraud, perjury, or other corrupt means, "the Fondrens' complaint

and their brief on appeal...identified factual scenarios that may establish those facts.” *Id.*, citing *Bravo*, 125 Wn.2d at 750. The defendants thus failed to establish an “insuperable bar to relief,” and the dismissal of the Fondrens’ complaint was reversed. *Id.*

Just as in *Fondren*, the Complaint and briefing here identify factual scenarios that, if proven, will establish a claim for relief. The court need not find that any support for the alleged facts exists because the question under CR 12(b)(6) is a legal one, and the facts are considered only as a conceptual background for the legal determination. *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977). Because the allegations in the Complaint do not establish an insuperable bar to relief, it was error to dismiss under CR 12(b)(6).<sup>8</sup>

**B. Boeing Owed a Duty to Mr. Kresser as a Result of Its Voluntary Undertaking of Control of Mr. Kresser’s Medical Situation, Both Through the Written Safety Procedures and Supervisor Janssen’s Actions.**

Despite the applicability of the humane instincts doctrine, the Court need not rely upon that doctrine to find a duty on the part of Boeing to Mr. Kresser because Boeing undertook duties even beyond what the common law requires, through (1) the adoption of safety procedures

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<sup>8</sup> Dismissal was also error under the “plausible claim for relief” standard applicable to federal cases under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), which Washington has not adopted. The Kressers’ Complaint did not merely contain a “formulaic recitation of the elements,” *Twombly*, 550 U.S. at 555, but stated facts that, if proven, would entitle them to relief. *See* CP 1-6.

requiring employees to report injuries and illnesses and requiring supervisors to ensure that employees receive proper care and (2) the actions of temporary supervisor Kris Janssen in assessing and responding to Mr. Kresser's report of a medical problem.

Boeing argues it owed no voluntarily-undertaken duty to Mr. Kresser because Boeing did not attempt to provide care to Mr. Kresser, and Mr. Janssen's advising him to "take it easy" was the *opposite* of providing care. Boeing might have a point if Mr. Janssen had simply said, "I'm sorry, I can't help you." But advising Mr. Kresser to "take it easy" and complete his shift involved an assessment that Mr. Kresser's situation did not require immediate medical evaluation or attention. Boeing claims it even advised Mr. Kresser to see a doctor for a check-up—*later*. Boeing owed Mr. Kresser a duty to exercise reasonable care in assessing Mr. Kresser's condition and giving instruction.

Furthermore, Boeing's voluntarily-undertaken duty arose not only from Mr. Janssen's response to Mr. Kresser but from Boeing's written safety procedures that require supervisors to ensure that *all* injured and ill employees receive proper care. CP 50, 59. Boeing's three arguments to the contrary are without merit and should be rejected.

First, Boeing contends that the procedures are not relevant because the Kressers claimed negligence, not breach of contract. But, as discussed in the Kressers' Opening Brief, Washington has long recognized a negligence cause of action where an employer undertook to provide

medical care by arranging for the maintenance of an onsite hospital, but failed to exercise reasonable care in doing so. *Mueller, supra* note 4, at 136-38 (employee's cause of action "sounded in tort").

Second, Boeing asserts that its procedures only apply to *work-related* injuries and illnesses. *Resp. Brief* at 20. Although some Boeing documents refer to "work-related injuries and illnesses," the Boeing Manufacturing Employee Safety Manual states: "**All** injuries shall be reported immediately" to a supervisor. CP 53 (emphasis added). And employee badges instruct employees: "Report **all** injury/**illnesses** regardless of severity to your supervisor immediately." CP 56 (emphasis added). Supervisors are instructed: "Ensure that immediate medical care is provided." CP 50. "Ensure your employee receives proper care." CP 59. There is no reason to distinguish between work-related and non work-related illnesses and, particularly in an emergency, it may be difficult to tell the difference quickly.

Third, Boeing argues it had no obligation under its procedures because Mr. Kresser's symptoms were not sufficiently acute to warrant immediate medical attention. Again, Boeing is making factual inferences in its own favor. The Complaint alleged facts regarding Mr. Kresser's symptoms from which a properly-trained supervisor exercising reasonable care should have concluded that an "illness" or "injury" existed under Boeing's safety procedures, which required, at minimum, evaluation by a qualified medical professional.

Because Boeing voluntarily undertook a duty to Mr. Kresser through its written safety procedures and through Mr. Janssen's conduct in assessing Mr. Kresser's condition and providing instruction and advice, it was error to dismiss.

**C. Boeing Owed a Duty under Washington Statutes and Regulations.**

Washington employers are given this mandate: "Do everything reasonably necessary to protect the life and safety of your employees." WAC 296-800-11010. The regulations also require an employer to establish, supervise, and enforce rules, practices, and procedures to protect employees' health, safety, and welfare. WAC 296-800-11035; WAC 296-126-094. Boeing does not dispute that these regulations can establish the applicable standard of conduct. *See Hansen v. Friend*, 118 Wn.2d 476, 480-81, 824 P.2d 483 (1992). In response to the argument that these regulations create a duty to summon medical attention for a seriously injured or sick employee, Boeing repeats its mantra: "no duty to diagnose."

An employer ordinarily does not have a duty to diagnose, and the Court need not impose such a duty. Boeing attempts to obscure the distinction between (1) recognizing that employee's physical symptoms indicate *something* serious that needs qualified medical evaluation and (2) determining what the "something" is. *Cf. Szabo v. Penn. R. Co.*, 132 N.J.L. 331, 40 A.2d 562, 563-64 (1945) ("While [the foreman] was not called upon to correctly diagnose decedent's particular ailment he could or

should have known of his physical and mental collapse, and inability to care for himself, whatever the cause, if it existed.”). Although everyone should recognize the classic symptoms of strokes and TIAs,<sup>9</sup> Mr. Kresser’s symptoms were serious enough that medical personnel should have been summoned for immediate evaluation and treatment even if the precise cause was not yet known.

Likewise, it is not necessary to impose “a duty to summon emergency medical aid upon the report of *any* medical symptom.” *Resp. Brief* at 15. An employer can make a decision whether immediate medical attention is warranted—as Boeing did here—which will be judged against the standard of reasonable care. Reasonable care usually does not require summoning emergency medical aid if an otherwise healthy employee complains of a headache. *See Resp. Brief* at 21. But the jury could find that a properly-trained supervisor exercising reasonable care should recognize that the combination of numbness on one side of the body, including inability to grasp objects with the left hand, feeling light-headed and dizzy, plus generally feeling ill, indicates a potentially serious problem that warrants immediate medical evaluation and attention. An employer cannot satisfy its duty to do “everything reasonably necessary to protect the life and safety of [its] employees” if it ignores obvious or potential medical emergencies.

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<sup>9</sup> *See* Appendix C to Kressers’ Opening Brief.

Other regulations require an employer to make sure that first-aid trained personnel and first-aid supplies are readily available. WAC 296-800-150; WAC 296-0800-15005; WAC 296-800-15020. A supervisor, particularly one the employer has designated as a gatekeeper to emergency medical care, should be capable of determining if a medical emergency exists or if the employee should be evaluated by medical personnel. Boeing argues it had no duty to train Mr. Janssen to address employee medical problems “because Boeing has on-call paramedics and an on-site clinic for the treatment of employees.” *Resp. Brief* at 22-23. Boeing’s argument highlights the tragedy of what occurred here: trained medical professionals were on site and available at a moment’s notice who could have diagnosed Mr. Kresser’s TIA and ensured that he received proper treatment, but were not called due to Mr. Janssen’s negligence. Boeing had designated Mr. Janssen the gatekeeper to the onsite resources, and thus had a duty to train Mr. Janssen for that role. Mr. Janssen, in turn, had a duty (a breach of which triggers Boeing’s vicarious liability) to exercise reasonable care in carrying out his gatekeeper role.

**D. Contributory Negligence as a Complete Bar to Recovery Was Abolished by the Legislature in 1973, and Boeing’s Attempt to Resurrect It Should Be Rejected.**

Boeing emphasizes Mr. Kresser’s “responsibility to seek aid for himself” and argues that this Court should not recognize a duty because doing so “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.” *Resp. Brief* at 24 n.11, 25. Boeing’s argument ignores the existence of comparative fault.

The common law rule that contributory negligence is a complete bar to recovery was abolished in 1973 with the adoption of comparative fault. *See ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 830, 959 P.2d 651 (1998). Contributory negligence is now only a damage-reducing factor: “While a plaintiff’s negligence may reduce the amount of damages, perhaps even to nothing in an appropriate case, it does not preclude finding the defendant negligent.” *Id.*, quoting *Clements v. Blue Cross*, 37 Wn. App. 544, 547, 682 P.2d 942 (1984).

Although Boeing will argue that Mr. Kresser’s going home after his shift rather than to a hospital could be a basis for the jury to find contributory negligence and reduce his damages—possibly even to zero—it does not negate the existence of a duty.<sup>10</sup> Even if the trial court believed

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<sup>10</sup> Boeing cites *Harding v. Ostrander Railway & Timber Co.*, 64 Wash. 224, 231, 116 P.2d 635 (1911), a case that predates the adoption of comparative fault, as authority for the proposition that an employer has “no liability” for injuries suffered by an employee who failed to secure his own medical assistance. *Resp. Brief* at 24 n.11. Boeing omits a material clause from its quotation of *Harding*, italicized below, which states that the plaintiff only had a duty to make reasonable efforts to secure aid for himself, if physically and mentally able:

It is, of course, elementary that, when the appellant found that the respondent would not convey him to the hospital, it was his duty, *if physically and mentally able, to make reasonable efforts to minimize the damages*—that is, to get to the hospital, or to otherwise secure medical assistance; and that 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.

64 Wash. at 231. Boeing also ignores the fact that, even though contributory negligence ordinarily was a complete bar to recovery at that time, the court stated

that Mr. Kresser's contributory negligence was the sole cause of his injuries, that is an issue to be considered in the context of a motion for summary judgment under CR 56, not a motion to dismiss for failure to state a claim under CR 12(b)(6).

**E. Boeing's Privacy Concerns Are Unfounded.**

Boeing's argument that recognizing a duty would require employers to violate employee privacy rights and even the Americans with Disabilities Act (ADA) is unfounded. Boeing's safety procedures printed on employee badges require employees to "[r]eport all injury/illnesses regardless of severity to your supervisor immediately." CP 56. The Kressers do not contend, and Boeing does not likely concede, that this requirement violates employee privacy rights or the ADA. Yet that is the result of Boeing's argument.

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that the employer would be relieved of liability only "to the extent that" the employee failed to make reasonable efforts to secure aid for himself. *Id.*

*Harding* supports the Kressers' claim. The employer in *Harding* undertook a duty to provide emergency medical care by agreeing to maintain a company hospital. 64 Wash. at 226. The plaintiff employee was injured by a falling limb during logging work, and a manager was notified but did nothing. *Id.* at 226-27. Because of a 24-hour delay in getting to a hospital for treatment, the plaintiff's arm became so swollen it was untreatable and permanently damaged. *Id.* at 227, 229. The trial court dismissed the case for failure to state a claim. *Id.* The Supreme Court reversed on the ground that the facts alleged "show[ed] that there was an implied duty upon the respondent to proceed with reasonable diligence to convey the appellant to the hospital." *Id.* at 229.

Similarly, here, Boeing's written safety procedures and maintenance of onsite medical personnel and facilities gave rise to a duty to summon medical personnel.

The Court's recognition of a duty will not, as asserted by Boeing, require employers to force employees to "undergo medical treatment" against their will. *See Resp. Brief* at 26-27. The Kressers believe that Mr. Kresser's TIA may have precluded him from fully comprehending the significance of his own symptoms. But Mr. Kresser did make a report of illness to his supervisor, as he was required to do. That is all that was needed to trigger Boeing's duty. Boeing did not have to examine Mr. Kresser for a disability in violation of the ADA or force him to undergo treatment against its will. All it had to do was exercise such reasonable care as a properly-trained lay person can be expected to exercise in determining whether immediate medical attention was warranted and, if so, summon appropriate medical personnel. Tragically, Mr. Kresser was instructed to take it easy and complete his shift, and thus missed an opportunity to receive treatment that could have prevented his injuries.

### **III. CONCLUSION**

The trial court erred in dismissing the Kressers' Complaint, which alleged sufficient facts to state a claim under the liberal pleading standards of the Civil Rules. The Court should conclude that Boeing owed Mr. Kresser a duty to summon medical personnel if a properly-trained supervisor exercising reasonable care should have concluded that evaluation by medical personnel was warranted. Whether the duty was breached and whether there was contributory negligence are questions for

the jury. The order of dismissal should be vacated and the case remanded for further proceedings.

DATED this 5<sup>th</sup> day of May, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By 

Jason W. Anderson, WSBA No. 30512

Cindy G. Flynn, WSBA No. 25713

Attorneys for Appellants Kresser

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.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on this date I caused copies  
of *Appellants' Reply Brief* and this *Certificate of Service* to be served upon  
counsel of record as follows:

James G. Zissler Joanna Marie Silverstein Ryan Hammond <b>Little Mendelson PC</b> 600 University St Ste 3200 Seattle, WA 98101-3122 Ph: (206) 623-3300 Fax: (206) 447-6965	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email Other _____
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 DIVISION I

DATED this 5<sup>th</sup> day of May, 2010.

  
 Catherine A. Norgaard  
 Legal Assistant to Jason W. Anderson

## **INDEX OF APPENDICES**

APPENDIX A: Complaint (CP 1-6)

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CRAIG KRESSER and PAULA  
KRESSER, husband and wife,

Plaintiffs,

v.

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

Defendants.

NO.

COMPLAINT FOR DAMAGES

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DIVISION ONE  
MAY 05 2010

PARTIES AND JURISDICTION

1. At all times material hereto, Plaintiffs Craig and Paula Kresser (hereinafter "Kresser") were married and residents of Kitsap County, Washington.

2. At all times material hereto, Defendant The Boeing Company (hereinafter "Boeing"), was a foreign company doing business in King County, Washington.

3. At all times material hereto, Defendants Kris A. Janssen and Jane Doe Janssen (hereinafter "Janssen") were married and residents of Snohomish County, Washington. The

COMPLAINT FOR DAMAGES – 1

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1 acts or omissions of defendant Kris Janssen were on behalf of the marital community.

2 4. Jurisdiction is proper under RCW 4.28.185.

3 5. Venue is proper in King County as defendant Boeing resided in King County  
4 within the meaning of RCW 4.12.025 at the time these allegations arose.

5 NATURE OF OCCURRENCE

6 6. On or about August 27, 2008, plaintiff Craig Kresser was an employee at  
7 defendant Boeing's Everett/Mukilteo facility. Craig Kresser was working the 2<sup>nd</sup> shift from  
8 2:00p.m. - 10:30 p.m. Approximately an hour before the end of his shift, Craig reported to his  
9 supervisor that he did not feel well, he was light-headed, dizzy, and that he had no feeling in his  
10 left hand and was unable to pick up objects with the left hand.

11 7. The incident took place the week before a pending labor strike and Boeing had a  
12 temporary supervisor in Craig Kresser's section. The temporary supervisor, Kris Janssen,  
13 informed Craig that his shift was nearly over and so he should just take it easy until he could  
14 leave for home.

15 8. Boeing's Everett facility has its own fully-equipped medical clinic and  
16 emergency medical personnel on standby. Supervisor Kris Janssen never called for any medical  
17 or emergency personnel to come and evaluate Craig Kresser's symptoms nor did he send Craig  
18 to the on-site medical clinic for evaluation.

19 9. Craig Kresser did as instructed and went home following his shift. The  
20 symptoms that Craig Kresser reported to his supervisor were the result of a TIA restricting the  
21 blood to his brain. His family found him the next morning and called an ambulance. By the  
22 time he reached Harborview Medical Center at 8:00 a.m., he was beyond the 3 hour time

COMPLAINT FOR DAMAGES - 2

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1 window for tissue plasminogen activator (tPA) and the 6 hour window for neuroangio  
2 intervention and other stroke treatment.

3 NEGLIGENCE OF DEFENDANTS

4 10. Defendants' negligence includes, but is not limited to:

5 (a) failure to provide, establish, supervise and enforce a safe workplace that  
6 responds to life-threatening medical emergencies in violation of WAC 296-800-11010, WAC  
7 296-800-11035, WAC 296-126-094, WAC 296-800-150, WAC 296-800-15005, WAC 296-800-  
8 15020 and/or OSHA's Best Practice Guide: Fundamentals of a Workplace First-Aid Program  
9 (OSHA 3317-06N 2006);

10 (b) failure to call for medical assistance in violation of defendants' Safety  
11 Program, First Aid/CPR program, and other policies, procedures, and training;

12 (c) failure to make reasonable provisions for medical assistance for foreseeable  
13 emergencies as part of the special relationship that exists between an employer and an employee;  
14 and

15 (d) negligent training of temporary supervisors.

16 11. Defendants' negligent acts and/or omissions were the proximate cause of the  
17 Plaintiffs' injuries. Craig Kresser suffered complete and permanent paralysis of his left leg and  
18 left arm as well as cognitive impairment. Medical evidence will demonstrate that had Craig  
19 Kresser been provided with medical treatment at or near the time he reported the onset of  
20 symptoms to the defendants, he would have had a better chance of recovering without the  
21 resulting paralysis or cognitive impairment. The defendants' conduct and/or omissions  
22 substantially reduced the chance of a better outcome or recovery for Craig Kresser. [See,

COMPLAINT FOR DAMAGES – 3

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1 *Herskovits v. Group Health Co-op of Puget Sound*, 99 Wn.2d 609 (1983) setting out the  
2 applicable causation standard].

3 DAMAGES AND LOSS OF CONSORTIUM

4 12. Plaintiff Craig Kresser has suffered, and will continue to suffer damages,  
5 including, but not limited to, past medical expenses, future medical expenses, lost wages, loss  
6 of earning capacity, past and future pain and suffering, loss of enjoyment of life, paralysis,  
7 cognitive impairment, mental anguish, disability, and emotional trauma.

8 13. Plaintiff Paula Kresser has suffered damages and will continue to suffer the  
9 loss of her husband's support, care, society, consortium, companionship, assistance, and his  
10 prior support as a husband and father to their children.

11 14. Plaintiffs hereby waive the physician-patient privilege ONLY to the extent  
12 required by RCW 5.60.060 and the provisions of the Uniform Health Care Information Act,  
13 RCW 42.17 and RCW Chapter 70. Plaintiffs hereby waive the physician-patient privilege  
14 only after 90 days, and insofar as necessary to place any and all alleged damages at issue at  
15 time of trial, as might be required by an act or statute or case law interpreting said statutes or  
16 acts in the State of Washington. This limited waiver does not constitute a waiver of any of  
17 the plaintiffs' constitutional or statutory rights and defendants are not to contact any treating  
18 physician, past, present or future, without first notifying counsel for plaintiffs, as required by  
19 and in compliance with the Uniform Health Care Information Act, so that they might bring  
20 the matter to the attention of the Court and secure appropriate relief to include limitations and  
21 restrictions upon any such defendant's desire or intent to contact past or subsequent treating  
22 physicians ex parte, or otherwise. Plaintiffs further state that *Loudon v. Mhyre*, 110 Wn.2d

COMPLAINT FOR DAMAGES – 4

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1 675, 756 P.2d 138 (1988) and *Kime v. Niemann*, 64 Wn.2d 394 (1964) set forth the correct  
2 law governing waiver of physician-patient privilege in this State, and that the Uniform Health  
3 Care Information Act, RCW 42.17 and RCW Chapter 70 sets forth the legal procedures  
4 required to secure a plaintiff's medical records and any related health care information.

5 15. The lawsuit is not pre-empted by Title 51 pursuant to the Department of Labor  
6 and Industries' Order dated March 17, 2009 since the condition is not an industrial injury or  
7 occupational disease as defined by the Industrial Insurance Laws.

8 PRAYER FOR RELIEF

9 WHEREFORE, plaintiffs pray for judgment as applicable against Defendants as  
10 follows:

- 11 1. For general damages as shall be determined at the time of trial;
- 12 2. For special damages including, but not limited to, medical expenses past and  
13 future; lost earnings past and future; impairment to future earning capacity and opportunities;  
14 costs and expenses, past and future, for necessary care, help, accommodations, and other  
15 professional services; loss of consortium; and other special and general damages to be shown  
16 at trial, including pre-judgment interest thereon at the highest rate permitted by law;
- 17 3. For plaintiffs' costs incurred herein; and
- 18 4. For such further and other relief as the Court may deem just and equitable
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COMPLAINT FOR DAMAGES – 5

**CARNEY  
BADLEY  
SPELLMAN**

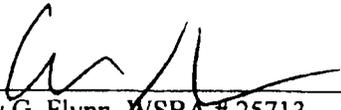
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DATED this 23 day of June, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By   
Cindy G. Flynn, WSBA # 25713  
Attorney for Plaintiffs

COMPLAINT FOR DAMAGES – 6

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