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CASE NUMBER: 16-2-31049-4 SEA

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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF KING**

8 HENRY SOTO and SARA SOTO, husband
9 and wife and the marital community
10 composed thereof, SARA SOTO, as
11 guardian for her minor child CALUM
12 SOTO, GREG BLAUERT and SUSAN
13 BLAUERT, husband and wife and the
14 marital community composed thereof,

15 Plaintiffs,

16 vs.

17 MICROSOFT CORPORATION, a domestic
18 corporation,

19 Defendant.

NO.

COMPLAINT FOR DAMAGES

20 COME NOW the plaintiffs, by and through their attorneys, Ben W. Wells of
21 Ben Wells & Associates and Rebecca Roe of Schroeter Goldmark & Bender, and
22 hereby assert relief and claims for damages, injunctive and declaratory relief as
23 follows:

24 **I. PARTIES**

25 1.1 Henry Soto and Sara Soto were, at all times relevant herein, husband
and wife. The Sotos have one minor child, Calum Soto, and they are residents of
Snohomish County, Washington.

1 1.2 Greg Blauert and Susan Blauert were, at all times relevant herein,
2 husband and wife and residents of King County, Washington.

3
4 1.3 At all times material hereto, Defendant Microsoft Corporation
5 (hereinafter "Microsoft") was a domestic corporation incorporated in and doing
6 business in King County, State of Washington.

7 **II. JURISDICTION AND VENUE**

8 2.1 Plaintiffs are currently residents of Snohomish County and King
9 County, Washington.

10
11 2.2 Defendant Microsoft resided in King County, Washington within the
12 meaning of RCW 4.12.025 as it transacted business, or had an office for the
13 transaction of business within King County, Washington at all times material
14 herein.

15 **III. FACTS**

16 3.1 The Online Safety Program is a part of the Customer Service section
17 of Microsoft. In 2007, Microsoft and many of its competitors were concerned about
18 customer complaints from those encountering pornography, murder films, bestiality
19 and other toxic images, videos and printed words. In 2008, new federal legislation
20 created new duties upon Microsoft and other companies in the tech industry to
21 report child pornography and other crimes to the National Center for Missing and
22 Exploited Children, hereinafter "NCMEC."
23
24
25

1 3.2 The Online Safety Team was established to review toxic depictions,
2 videos and written material to decide whether to remove them and/or to report
3 them to law enforcement.
4

5 3.3 At the inception of the program, Microsoft learned that the job of
6 reviewing these depictions would be dangerous for employees and their families,
7 and that they must take steps to protect team members against debilitating injuries
8 from viewing the toxic content.
9

10 3.4 Plaintiff Henry Soto was assigned to the team – he did not seek out
11 the position.
12

13 3.5 Plaintiffs Henry Soto and Greg Blauert were not warned about the
14 likely dangerous impact of reviewing the depictions nor were they warned they may
15 become so concerned with the welfare of the children, they would not appreciate
16 the harm the toxic images would cause them and their families.
17

18 3.6 Plaintiffs Henry Soto and Greg Blauert were entrusted with a very
19 high degree of responsibility. In 2008, Mr. Soto and others had “God like” status
20 and could literally view any customer’s communications at any time. Mr. Soto and
21 Mr. Blauert never betrayed the trust that Microsoft placed upon them. .
22 Throughout their careers at Microsoft, both plaintiffs were instrumental in saving
23 children’s lives and providing evidence for successful prosecutions.
24

25 3.7 Plaintiffs’ legal counsel has conducted extensive investigation prior to
filing this lawsuit and has asked Microsoft to correct any factual misunderstandings
that plaintiffs may have prior to filing suit. Microsoft has not provided any material

1 corrections. Plaintiffs have made significant efforts to resolve this matter prior to
2 filing, but were unsuccessful.

3
4 3.8 Plaintiffs' desire is not only to obtain full justice for all of their harms
5 and losses, but to also provide specific details on how Microsoft can materially and
6 substantially improve Online Safety. Prior to filing this lawsuit, Plaintiffs provided
7 Microsoft with a detailed list of items that would significantly improve employee
8 safety and provide additional safety to abused children and Microsoft's customers,
9 while also protecting the privacy rights of customers.

10
11 3.9 Plaintiffs have recommended many changes to Online Safety. The
12 list includes, but is not limited to mandatory rotations out of the program, for pre-
13 vacation vacations, mandatory weekly meetings with a psychologist with
14 specialized training and authority to remove employees when the content is
15 becoming too toxic, a spousal wellness program, as well as other changes
16 designed to lessen the impact of continually viewing toxic images. Some of these
17 items were also recommended to Microsoft in approximately 2007 and 2008.

18
19 3.10 Through Plaintiffs' investigation, it was discovered that the highly
20 touted Microsoft "Digital Crimes Unit," which reports to law enforcement on many
21 matters, including child sexual abuse, does not include within its jurisdiction or
22 budget the Online Safety team. Therefore, a number of important employee safety
23 protections, proper safety policies, procedures and software were not implemented
24 in Online Safety because of budgetary constraints. Incorporating the Online Safety
25 program, which is not a profit generating business for Microsoft, into the "Digital

1 Crimes Unit" may provide the additional funds necessary to properly protect
2 employees on the team who save children and gather evidence to prosecute
3 criminals.
4

5 3.11 Plaintiff Henry Soto, hereinafter Mr. Soto, grew up in Texas where he
6 discovered he had an interest in computers. Mr. Soto pursued a culinary arts
7 degree until he realized it was not a good lifestyle for raising children. He also had
8 an interest in computers. He eventually decided to pursue a career in computers
9 and computer technology. Mr. Soto worked at various companies providing
10 computer and computer technology services. However, his dream was to be
11 employed by one of the giants in the industry, Microsoft.
12

13 3.12 Mr. Soto met his wife Sara Soto in high school in approximately 1997
14 and they were married in 2003. Mrs. Soto also had an interest in computers and
15 computer technology. Mrs. Soto had similar aspirations to be employed with one
16 of the giants in the industry. In 2005, Mrs. Soto's dream came true when she was
17 hired by a vendor for Microsoft, based in Washington State, and later became
18 employed by Microsoft in 2006. Mr. and Mrs. Soto were very excited and began
19 planning their move immediately. Mr. Soto was hopeful that he would also be hired
20 by Microsoft as he had previously applied and intended to continue to apply for
21 positions at Microsoft.
22

23 3.13 The Sotos moved to Washington State and Mrs. Soto began her
24 employment with a vendor for Microsoft in 2005. Mr. Soto persistently applied for
25 positions at Microsoft and was hired as a temporary employee at Microsoft in the

1 emergency response team. He was hired as a Microsoft vendor in 2006 and hired
2 by Microsoft in February 2007. Mr. Soto received several promotions, including a
3 promotion to Service Delivery Manager where his job was to run the call center
4 operations and repair problems related to MSN.com.
5

6 3.14 In 2008 Mr. Soto was involuntarily transferred to the Online safety
7 team. Mr. Soto was not informed prior to the transfer as to the full nature of the
8 work or dangers of the work with Online Safety and was told he would be reviewing
9 violations of the "terms of use" between Microsoft and its customers.
10

11 3.15 Once transferred, according to Microsoft employment policy, a
12 Microsoft employee like Mr. Soto or Mr. Blauert must stay 1.5 years in the position
13 before he can obtain another transfer.

14 3.16 The new Online Safety team had just been created and Mr. Soto was
15 one of the initial employees with the team and had limited information about the
16 position. He did not understand the level of activity in the following areas: assisting
17 law enforcement efforts to break up significant crime rings, the mob, the triad, and
18 other violent groups, reviewing photos and video requiring him to witness horrible
19 brutality, murder, indescribable sexual assaults, videos of humans dying and, in
20 general, videos and photographs designed to entertain the most twisted and sick
21 minded people in the world.
22

23 3.17 When Mr. Soto was transferred to his new position he lacked any
24 meaningful understanding of post-traumatic stress disorder and did not understand
25

1 the serious and permanent psychological impacts that post-traumatic stress
2 disorder (hereinafter PTSD), can have on a human being and their family.

3
4 3.18 Once Mr. Soto started working with the Online Safety team he
5 became an immediate asset and demonstrated significant skills. Mr. Soto's
6 accomplishments working with the Online Safety team were numerous and
7 included: photo DNA, children aging matrix, Bing hash project, and he was
8 involved in many successful law enforcement matters where abused children were
9 rescued and criminals were successfully prosecuted. Mr. Soto fully accepted the
10 "responsibility" Microsoft placed on him and earned the "trust" of his supervisors.
11 His employment reviews were very good.
12

13 3.19 Unfortunately, although Mr. Soto was very successful at the Online
14 Safety team it was taking a significant toll on him personally. Mr. Soto was required
15 to view many thousands of photographs and video of the most horrible, inhumane
16 and disgusting content one can imagine. In fact, many people simply cannot
17 imagine what Mr. Soto had to view on a daily basis as most people do not
18 understand how horrible and inhumane the worst people in the world can be.
19

20 3.20 Mr. Soto was required to view these photographs and video as part of
21 his daily job. Mr. Soto's supervisors knew that the work was hard on Mr. Soto and
22 he was commended in his employee review for his "courage."
23

24 3.21 In approximately 2009 Microsoft began providing a form of
25 counseling for members of the Online Safety team. The counseling was to
address a condition Microsoft described as "compassion fatigue." The "Wellness

1 Program" depended significantly on input from team members such as Mr. Soto,
2 who had no education about the likely impact of viewing the images. They were
3 not told that the more they became invested in saving people, the less able they
4 would become to recognize and act on their own symptoms of PTSD. Microsoft
5 provided a counselor who lacked sufficient knowledge and training regarding
6 vicarious trauma or PTSD and lacked the authority to take employees off content
7 or rotate them entirely out of the department. The program was inadequate to
8 remediate the ongoing harm or even warn the employees of the dangers
9 associated with the program.
10
11

12 3.22 As the work on the Online Safety team began take a toll on Mr.
13 Soto's psychological health, Mr. Soto initially took advantage of the compassion
14 fatigue counselor. However he found the counseling ineffective and reached out to
15 psychiatrists in January 2010. In the year prior to meeting with psychiatrists,
16 several employees at the Online Safety team psychologically and emotionally
17 broke down in the presence of directors and supervisors.
18

19 3.23 The psychological and emotional problems within the Online Safety
20 team were communicated to supervisors and upper level managers.

21 3.24 When Mr. Soto initially met with psychiatrists he had trouble with
22 sleep disturbance, nightmares, he suffered from an internal video screen in his
23 head and could see disturbing images, he suffered from irritability, increased
24 startle, anticipatory anxiety, and was easily distractible. Psychiatrists placed him on
25 various medications that helped him significantly.

1 Unfortunately, he continued to experience trauma at work including a
2 notable event when he saw a video of a little girl who was indescribably abused
3 and killed. Thereafter, Mr. Soto began experiencing auditory hallucinations. Mr.
4 Soto was very capable in his position with Online Safety and had saved children's
5 lives due to his work. He believed the ongoing treatment with psychiatrists would
6 continue to assist him and he could continue to save and protect child victims.
7

8 3.25 In approximately May 2014 Mr. Soto felt he could no longer expose
9 himself to the violent video content and asked for a transfer. He was required to
10 apply for another job within Microsoft just like any other employee. There were no
11 protections or accommodations for him, despite the significant impairments and
12 injuries he suffered working at Online Safety. He was ultimately transferred to the
13 disability answer desk after a successful application. Unfortunately the new unit
14 was located physically near the Online Safety unit and Mr. Soto was frequently
15 approached by members of the Online Safety team to answer questions or provide
16 guidance based on his experience and expertise in the program. This continued to
17 cause psychological distress and exacerbated the underlying condition from which
18 Mr. Soto suffered.
19
20

21 3.26 In January 2015 Mr. Soto experienced a significant exacerbation of
22 his PTSD due to an interaction with his supervisor when he was advised that his
23 job was in danger. Prior to this job review Mr. Soto had always received very good
24 job reviews. Psychiatrists recommended a leave of absence as a result of the
25 traumatic review, and Mr. Soto went out on medical leave on February 3, 2015.

1 Mr. Soto was embarrassed by his symptoms, which included panic attacks in
2 public, disassociation, depression, visual hallucinations, and an inability to be
3 around computers or young children, including, at times, his own son, because it
4 would trigger memories of horribly violent acts against children that he had
5 witnessed.
6

7 3.27 Currently Mr. Soto continues to experience all the symptoms above
8 and experiences significant social anxiety to the point where he experiences
9 significant distress when he leaves his home due to the severe anxiety and
10 paranoia. He has significant memory problems and tends to repeat himself. He
11 "spaces out" during movies, particularly during violent content. Using a computer
12 triggers his PTSD and therefore he cannot use a computer. Currently Mr. Soto
13 requires significant medications, uses cannabis for insomnia, requires significant
14 ongoing psychological counseling, experiences significant financial distress,
15 including an inability to be employed. He is hyper vigilant and routinely
16 disassociates and experiences auditory and visual hallucinations. All of this takes
17 a terrible toll on his wife Sara and his son Calum.
18
19

20 3.28 After going on medical leave Mr. Soto filed a Labor and Industries
21 claim for the injuries resulting from the PTSD. On December 17, 2015 Labor and
22 Industries denied his claim based on a number of reasons including:

23 "No claim has been filed by said worker within one year after the date upon
24 which the alleged injury occurred."
25

1 “The worker’s condition is not an occupational disease.... and is excluded
2 from coverage...”

3
4 “Claims for occupational disease based on mental conditions or mental
5 disabilities caused by stress are specifically excluded from coverage by law.”

6 3.29 As a result of Labor and Industries’ denial of Mr. Soto's claim, he
7 cannot obtain a remedy through the worker’s compensation system for the harms
8 and losses he experienced as a result of his injury at Microsoft. Accordingly, Mr.
9 Soto must bring a common law action for his damages that resulted from
10 employment at Microsoft.

11
12 3.30 Mr. Soto has experienced severe harm to his reputation and has
13 suffered from being stigmatized by his significant mental health issues.
14 Additionally, he has suffered trauma to his marital relationship and his relationship
15 with his young son. Sara Soto still works for Microsoft, but has been recently
16 warned that her job is in jeopardy. If Mrs. Soto loses her job, they will lose health
17 insurance and their ability to support themselves and pay their mortgage.

18
19 3.31 Greg Blauert was born and raised in the Pacific Northwest as was his
20 wife, Susan Blauert. During the relevant time they lived in King County. They have
21 two children who are now adults.

22 3.32 Mr. Blauert first started employment at Microsoft in 1999 as a
23 customer call center employee. He worked in that capacity until 2010 when the
24 entire call center team was laid off due to restructuring.
25

1 3.33 In February 2011, Mr. Blauert was hired by a Microsoft contractor,
2 Society Consulting. When he worked for Society Consulting, he was under the
3 direction and supervision of Microsoft. He was hired as a full time employee in
4 June 2012; his job duties remained the same. Mr. Blauert worked in the Online
5 Safety Internet Team. As with Mr. Soto, his job required him to review thousands
6 of images of child pornography, adult pornography and bestiality that graphically
7 depicted the violence and depravity of the perpetrators.
8

9 3.34 Mr. Blauert became noticeably withdrawn in the workplace and at
10 home. He became listless and avoidant in the workplace. Supervisors authorized
11 him and others to leave work early when they broke down or became overwhelmed
12 by the trauma associated with viewing the depictions. Leaving early on occasions
13 of breaking down was part of the "Wellness Plan." However, Mr. Blauert was
14 criticized in employment reviews for following his wellness plan.
15

16 3.35 Mr. Blauert attended the "Compassion Fatigue" or "Wellness"
17 sessions sponsored by Microsoft. Both Greg and his wife reported his increasing
18 emotional decline as evidenced by intrusive images, nightmares, increased anger
19 and feelings of guilt. Program authorities advised remedies such as limiting
20 exposure to depictions, taking walks and smoking breaks, and redirecting his
21 thoughts by playing video games would be sufficient to manage his symptoms.
22 Ironically, Mr. Blauert was then given a poor evaluation for a lack of production and
23 too much time playing video games.
24
25

1 3.36 On September 10, 2013, Mr. Blauert suffered a physical and mental
2 breakdown from the distress engendered by the workplace conditions. His primary
3 care physician, who had treated him from 2004, reported when she saw him in
4 September 2013 he had psychomotor retardation, intractable crying, insomnia,
5 anxiety and PTSD. Mr. Blauert had no prior mental health or psychiatric illness.
6 From the outset it was clear to his medical providers that Mr. Blauert could not
7 return to the Online Safety Program, but everyone, including Mr. Blauert, hoped he
8 could return to another position at Microsoft.
9

10 3.37 However, Mr. Blauert has remained in treatment for acute and
11 debilitating PTSD. Unfortunately, the "triggers" are present in daily living. When in
12 public, Mr. Blauert "profiles" adults as potential abusers and fears for the safety of
13 children he meets. He restricts computer use to activities that avoid child related
14 content. As a result of these triggers, which are ubiquitous, Mr. Blauert has been
15 unable to return to work.
16

17 3.38 Mr. Blauert's PTSD has seriously undermined his relationship with his
18 wife and children. He is depressed, anxious, isolated and withdrawn.
19

20 3.39 Mr. Blauert's application for Workers Compensation was denied on
21 the basis his condition was not "an occupational disease" covered by Labor and
22 Industries.
23

24 **IV. CAUSES OF ACTION**

25 **A. Negligence**

 4.1 Plaintiffs hereby re-allege all preceding paragraphs herein.

1 4.2 Defendant Microsoft has a duty at common law to provide a
2 reasonably safe workplace to its employees.

3
4 4.3 The common law duty to provide a safe workplace has also been
5 codified in the Washington Industrial Safety and Health Act of 1973 and RCW
6 49.17.060.

7 4.4 Defendant Microsoft breached its duty to provide a safe workplace
8 when it exposed Plaintiffs Mr. Soto and Mr. Blauert to daily images that were
9 psychologically toxic and harmful without providing reasonable safeguards to
10 protect them when Microsoft was aware or should have been aware that the
11 workplace could be made safe if proper precautions were followed.

12
13 4.5 Plaintiffs Mr. Soto and Mr. Blauert sustained injuries, including PTSD,
14 due to Defendant Microsoft's failure to provide a safe workplace.

15 4.6 Defendant Microsoft created the Online Safety team to protect its
16 customers from viewing unsafe and highly disturbing images that could cause their
17 customers harm. Toxic images cannot be "unseen."

18
19 4.7 Defendant Microsoft knew or should have known that the same
20 images could reasonably cause harm to its employees.

21 4.8 The hazards of viewing severely graphic, violent videos and
22 photographs on a daily basis are reasonably foreseeable to cause psychological
23 harm to employees.
24
25

1 4.9 Defendant Microsoft had a duty to reasonably anticipate and foresee
2 the negative health consequences associated with the job duties of the Online
3 Safety team.
4

5 4.10 Defendant failed to foresee the health consequences and failed to
6 abate the hazard, which has caused Plaintiffs Mr. Soto and Mr. Blauert significant
7 damage.
8

9 4.11 Defendant Microsoft knew of should have known that once
10 employees became effective and competent working Online Safety they would be
11 reluctant to quit despite experiencing psychological stress because they were
12 saving children's lives.

13 4.12 Defendant Microsoft could have reasonably protected Mr. Soto and
14 Mr. Blauert and other employees by adopting safeguards to protect its employees.
15

16 4.13 Many of the safeguards were recommended by employees of
17 Defendant Microsoft, including Mr. Soto, but were rejected by Defendant Microsoft.
18

19 4.14 As a direct and proximate cause of Defendant Microsoft's failure to
20 provide a safe work environment, Plaintiffs Mr. Soto and Mr. Blauert sustained
21 severe and permanent injuries.

22 4.15 PTSD is not an occupational disease compensable under the basic
23 Worker's Compensation Act, including RCW 51.0 8.140 and RCW 5.08 .142 and
24 WAC 296-14-300.
25

 4.16 The Washington Industrial Safety and Health Act is based on a quid
pro quo compromise between employees and employers where employers agreed

1 to pay some claims in which there had been no common law liability in exchange
2 for limited liability while employees agreed to give up available common law
3 actions and remedies in exchange for sure and certain relief.
4

5 4.17 In situations where worker's compensation does not apply, an
6 employee may bring a common law action against his employer.

7 The Washington State Supreme Court has held:

8 If... the exclusiveness defense is a 'part of the quid pro quo by which
9 the sacrifices and gains of employees and employers are to some
10 extent put in balance,' it ought logically to follow that the employer
11 should be spared damage liability only when compensation liability
12 has actually been provided in its place, or, to state the matter from
13 the employee's point of view, rights of action for damages should not
14 be deemed taken away except when something for value has been
15 put in their place. *McCarthy v. Dep't of Soc. & Health Servs.*, 110
16 Wn.2d 812,817(1988)

17 4.18 When a plaintiff alleges that they were harmed as an employee and
18 that the harm is not an occupational disease compensable under the basic
19 coverage of the Industrial Insurance Act, the allegation is sufficient to withstand a
20 CR 12(b)(6) motion to dismiss based on the exclusive remedy provisions of the
21 Act. See *McCarthy* supra, p.818

22 4.19 The Plaintiffs are entitled to bring this claim for negligence against
23 Defendant Microsoft because they have no remedy under the Washington
24 Industrial Insurance Act.

25 4.20 Plaintiffs Mr. Soto and Mr. Blauert suffered from PTSD as a result of
day in and day out exposure over years to traumatic events comprised of viewing

1 extremely disturbing videos and photographs while employed with the Online
2 Safety team at Defendant Microsoft. Plaintiffs Mr. Soto and Mr. Blauert did not
3 suffer from a sudden, tangible and traumatic event. Accordingly, Plaintiffs Mr.
4 Soto and Mr. Blauert do not qualify for worker's compensation.
5

6 **B. Negligent Infliction of Emotional Distress**

7 4.21 Plaintiffs hereby re-allege all preceding paragraphs above

8 4.22 Defendant Microsoft breached its duty to Plaintiffs by exposing
9 Plaintiffs Mr. Soto and Mr. Blauert to traumatic, disturbing videos and photographs
10

11 4.23 Defendant Microsoft knew or should have known that exposure to
12 traumatic events, videos and photographs would cause employees, including
13 Plaintiffs Mr. Soto and Mr. Blauert, to experience emotional distress.

14 4.24 As a direct and proximate result of Defendant's negligence,
15 Defendant inflicted emotional distress upon Plaintiffs Mr. Soto and Mr. Blauert.
16

17 **C. Violations of the Disability Discrimination Act**

18 4.25 Plaintiffs hereby re-allege all preceding paragraphs above.

19 4.26 Plaintiffs Mr. Soto and Mr. Blauert suffered an impairment that was
20 medically recognizable or diagnosable and existed as a record or history.

21 4.27 Defendant Microsoft knew of Mr. Soto and Mr. Blauert's impairment
22 and, furthermore, said plaintiff employees gave defendant Microsoft notice of the
23 impairment.
24

25 4.28 The impairment has and continues to have a substantially limiting
effect on plaintiffs' ability to perform their job, apply for a different job or be

1 considered for a job and the impairment has a substantially limiting effect on said
2 employees' inability to access equal benefits, privileges, and terms or conditions of
3 employment.
4

5 4.29 Plaintiffs Mr. Soto and Mr. Blauert provided medical documentation to
6 Microsoft establishing a reasonable likelihood that working without an
7 accommodation would aggravate the impairment to the extent it would create a
8 substantially limiting effect.
9

10 4.30 Plaintiffs Mr. Soto and Mr. Blauert would have been able to perform
11 the essential functions of their jobs in question with timely and reasonable
12 accommodations.
13

14 4.31 The employer, Microsoft, failed to reasonably accommodate the
15 impairment.
16

17 4.32 Both Mr. Soto and Mr. Blauert alerted their supervisor that they
18 suffered from PTSD and other conditions. Mr. Blauert alerted Microsoft's wellness
19 program manager to his problems on several occasions, including that he was
20 having frequent nightmares, intrusive thoughts during the day, and emotional
21 breakdowns. Mr. Blauert witnessed other team members also having emotional
22 breakdowns and struggling from the effects of the toxic work environment. He was
23 retaliated against in his performance review because of his impairment.
24

25 4.33 The impairment substantially limited the plaintiffs' ability to perform
their jobs, apply for different jobs or be considered for other jobs. In fact, Mr. Soto
was required to apply for new position, then once in the new position suffered poor

1 employment reviews due to the disability. Mr. Blauert was unable to continue
2 employment at Online Safety due to his disability as was Mr. Soto, who, after a
3 short time in his new employment position, could no longer continue to function.
4

5 4.34 If reasonable accommodations would have been provided to the
6 plaintiffs, including important safeguards, both Mr. Soto and Mr. Blauert would
7 have been able to perform the essential functions of their job.

8 4.35 Microsoft failed to provide reasonable accommodations, including
9 following recommendations from professionals and adopting recommendations
10 from its employees to protect them from harm and to reasonably accommodate
11 them once they became impaired.
12

13 **D. Violations of the Consumer Protection Act**

14 **1. An Overview of Ch. 19.86 RCW, the Consumer Protection Act** 15 **("CPA").**

16 4.36 Plaintiffs hereby re-allege all preceding paragraphs above.

17 4.37 To prevail on a CPA action, the plaintiff must prove an "(1) unfair or
18 deceptive act or practice; (2) occurring in trade or commerce; (3) public interest
19 impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Klem*
20 *v. Washington Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179, 1185 (2013).
21

22 **i. Unfair or Deceptive Act or Practice**

23 4.27 In *Klem*, the Court stated:

24 To resolve any confusion, we hold that a claim under the Washington
25 CPA may be predicated upon a [1] *per se* violation of statute, [2] an
act or practice that has the capacity to deceive substantial portions of

1 the public, [3] or an unfair or deceptive act or practice not
2 regulated by statute but in violation of public interest.¹

3 *Id.*, at 787 (brackets added)(emphasis added). Moreover, intent to deceive
4 is not a necessary predicate to finding a violation of the CPA. *Trujillo v. Northwest*
5 *Trustee Services, Inc.*, 183 Wn.2d 820, 835, 355 P.3d 1100 (2015)(citing *Panag*,
6 166 Wn.2d at 47)(trial court erroneously dismissed CPA claim based upon alleged
7 violation of Deeds of Trust Act).
8

9 4.38 Case law has given guidance on what may be considered a
10 “deceptive” act or practice. Additionally, to a much lower degree the Washington
11 Supreme Court has spoken regarding what may be considered an “unfair” act or
12 practice.
13

14 **a. Definition of “Deceptive Act or Practice”**

15 4.39 Importantly,

16 [d]eception exists if there is a representation, omission or practice
17 that is likely to mislead a reasonable consumer. In evaluating the
18 tendency of language to deceive, the [court] should look not to the
19 most sophisticated readers but rather to the least. Under the [CPA], a
communication may be deceptive by virtue of the “net impression” it
conveys, even though it contains truthful information.

20 *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 50, 204 P.3d 885,
21 895-96 (2009) (internal citations omitted). Additionally, “It is the intent of the
22 legislature that, in construing this act, the courts be guided by final decisions of the
23 federal courts and final orders of the federal trade commission interpreting the
24
25

1 ¹ “Public Interest” is defined in RCW 19.86.093

1 various federal statutes dealing with the same or similar matters." RCW 19.86.920.
2 Federal court decisions are guiding, but not binding, authority. *State v. Reader's*
3 *Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972). A plaintiff is not required
4 to be a "consumer" in order to meet the CPA burden of proof. *Panag*, supra p. 43-
5 44. Furthermore, employers are not immune from suit by employees under the
6 CPA. See *Kirkpatrick v. Ironwood Communications*, 2006 US DIST. LEXIS 57713,
7 WD 2006 (unlawful pay practices.) See also; *Helde v. Knight Transportation, Inc.*
8 982 F.Supp 2d. 1189, WD 2013 (false advertising by employer.)
9

10
11 **b. Definition of an "Unfair Act or Practice"**

12 4.40 "[A]n act or practice can be unfair without being deceptive." *Klem*,
13 176 Wn.2d at 787. The Washington Supreme Court has not had the opportunity to
14 "explore in detail how to define unfair acts for the purposes of our CPA." *Id.*
15 However, "[t]he Washington legislature instructed courts to be guided by federal
16 law in the area." *Id. citing* RCW 19.86.920. The Court went on to say:

17
18 Although we have been guided by federal interpretations,
19 Washington has developed its own jurisprudence regarding
20 application of Washington's CPA. Current federal law suggests a
21 "practice is unfair [if it] causes or is likely to cause substantial injury to
22 consumers which is not reasonably avoidable by consumers
23 themselves and is not outweighed by countervailing benefits."

24 *Id. citing* 15 U.S.C. § 45(n).

25 4.41 Similarly, a defendant's act or practice might be "unfair" if it "offends
public policy as established 'by statutes [or] the common law,' or is 'unethical,
oppressive, or unscrupulous,' among other things." *Id.* at 786 (alteration in original)

1 (quoting *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537
2 (Div. III 1983).

3
4 **ii. Occurring in Trade or Commerce**

5 4.42 ““Trade” and “commerce” shall include the sale of assets or services,
6 and any commerce directly or indirectly affecting the people of the state of
7 Washington.” RCW§ 19.86.010. Importantly, the CPA was intended to be
8 “construed broadly” in the determination of what constitutes the conduct of trade or
9 commerce. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 173, 159 P.3d 10, 22
10 (Div. I 2007), *aff’d*, 166 Wn.2d 27, 204 P.3d 885 (2009). Acts done for the
11 purpose of increasing profits are within the sphere of trade, or commerce, and are
12 subject to the Consumer Protection Act. *State Farm Fire and Cas. Co. v. Huynh*,
13 92 Wn. App. 454, 962 P.2d 854 (Div. I 1998).

14
15 **iii. Public Interest Impact**

16 4.43 Importantly, the public interest element of the CPA is laid out under
17 the following standard in RCW 19.86.093 which was enacted in 2009² and makes
18 it easier for a plaintiff to meet the public interest impact requirement when bringing
19 a CPA claim:
20

21 In a private action in which an unfair or deceptive act or practice is
22 alleged under RCW 19.86.020, a claimant may establish that the act
23 or practice is injurious to the public interest because it:

24
25 ² See former WPI 310.05. (“Previously, this instruction addressed the public interest element for private disputes, while former WPI 310.04 addressed the same element for consumer disputes. In 2009, the Legislature enacted RCW 19.86.093, which set forth a new “public interest” test and effectively removed the distinction between private and consumer disputes.”)

1 (1) Violates a statute that incorporates this chapter;

2 (2) Violates a statute that contains a specific legislative declaration of
3 public interest impact; or

4 **(3)(a) Injured other persons; (b) had the capacity to injure other**
5 **persons; or (c) has the capacity to injure other persons.**

6
7 RCW 19.86.093 (emphasis added). The statute is permissive in that it states five
8 (5) ways a plaintiff may establish the public interest element.

9 **iv. Injury to Plaintiffs' Business or Property**

10 4.44 An injury to property occurs when:

11 [O]ne's right to possess, use, or enjoy a determinate thing has been
12 affected in the slightest degree. *Ambach v. French*, 167 Wn.2d 167,
13 172, 216 P.3d 405 (2009). A sufficient injury is therefore pleaded if a
14 plaintiff alleges that she was deprived of the use of her property for
15 even a short amount of time. *Sorrel v. Eagle Healthcare, Inc.*, 110
Wn. App. 290, 298–99, 38 P.3d 1024, review denied, 147 Wn.2d
1016, 56 P.3d 992 (2002);

16 *Handlin*, 187 Wn. App.at, 849-50.

17
18 4.45 Further, the terms of a contract may be the source of a property
19 interest. *Conard v. Univ. of Washington*, 119 Wn.2d 519, 529, 834 P.2d 17, 22
20 (1992). Importantly, "what is normally regarded as a necessary element of a
21 written contract need not be expressly addressed if it is implicit in the writing. *Kloss*
22 *v. Honeywell, Inc.*, 77 Wn. App. 294, 299, 890 P.2d 480, 484 (1995).

23 4.46 Moreover, the Supreme Court has distinguished between the terms
24 "injury" and "damages." *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792
25 P.2d 142, 148 (1990). Importantly, the distinction between "injury" and "damages":

1 makes it clear that no monetary damages need be proven, and that
2 nonquantifiable injuries, such as loss of goodwill would suffice for this
3 element of the *Hangman Ridge* test. **The fact that the Act allows**
4 **for injunctive relief bolsters the conclusion that injury without**
5 **specific monetary damages will suffice. A loss of use of property**
6 **which is causally related to an unfair or deceptive act or practice**
7 **is sufficient injury to constitute the fourth element of a**
8 **Consumer Protection Act violation.** The injury element will be met
9 if the consumer's property interest or money is diminished because of
10 the unlawful conduct even if the expenses caused by the statutory
11 violation are minimal.

12
13 *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142, 148
14 (1990)(internal citations omitted)(emphasis added); See also 16 Wash. Prac., Tort
15 Law And Practice § 8:10 (4th ed.).

16 v. Causation

17 4.47 "To establish injury and causation in a CPA claim, it is not necessary
18 to prove one was actually deceived. It is sufficient to establish the deceptive act or
19 practice proximately caused injury to the plaintiff's 'business or property.'" *Panag*,
20 166 Wn.2d 27. "Proximate cause" means a cause which in direct sequence
21 produces the injury complained of and without which such injury would not have
22 happened. WPI 310.07. **There may be one or more proximate causes of an**
23 **injury.** *Id.* (emphasis added).

24 2. Defendant Microsoft Violated the Consumer Protection Act.

25 4.48 Plaintiffs hereby re-allege all preceding paragraphs herein

4.49 Defendant's actions, as described in this Complaint, constitute
violations of Washington's Consumer Protection Act, RCW 19.86, et seq.

1 4.50 Defendant Microsoft's actions in failing to provide a safe workplace
2 constitute an unfair practice.

3
4 4.51 Microsoft failed to adopt recommendations by consultants retained to
5 advise about necessary safety protocol and failed to adopt employee
6 recommendations that would mitigate the harm to employees. f

7 4.52 Once the Plaintiffs were in the Online Safety program they felt
8 trapped financially and morally as they did not want to abandon the victims and
9 their co-workers.

10
11 4.53 Upper level managers refused to fully understand what employees at
12 Online Safety had to endure on a daily basis, which resulted in unfair treatment to
13 plaintiffs. Online Safety had a high supervisor turnover and a number of
14 supervisors refused to view content. A presentation was prepared for upper level
15 managers, but they refused to watch it as they asserted it could affect their
16 "business judgment."

17
18 4.54 Defendant Microsoft's actions in failing to provide a safe workplace
19 constitute a deceptive act.

20 4.55 Microsoft's actions were deceptive as they failed to advise Plaintiffs
21 as to the severity of possible injury from exposure to the graphic content.

22 4.56 It is not common knowledge that one could sustain the types of
23 severe injuries the Plaintiffs have sustained viewing the graphic content, including
24 but not limited to: loss of employability, loss of intimacy with spouse and loss of
25 parent-child relationship due to flashbacks and other psychological stress triggered

1 by seeing children, fear and paranoia, particularly in social settings and public
2 places.

3
4 4.57 Defendant Microsoft provided ineffective counseling. The counseling
5 failed to provide Plaintiffs with crucial information on the real dangers associated
6 with viewing the graphic content. The counseling deceptively mislead Plaintiffs as
7 to the dangers they and their families faced.

8 4.58 Defendant Microsoft's acts occurred in trade or commerce.

9
10 4.59 Online Safety was created to monitor Defendant Microsoft's cloud.
11 Defendant Microsoft was required to monitor the cloud in order to sell their services
12 to customers. Online Safety made it possible to comply with the monitoring
13 requirement and that in turn allowed Defendant Microsoft to continue its sale of
14 services to customers worldwide.

15 4.60 A number of employees, including Plaintiffs, offered proposals to
16 Defendant Microsoft that would reduce the hazardous nature of the work for
17 employees at Online Safety. Defendant Microsoft rejected a number of the
18 proposals due to the costs associated with their institution.

19
20 4.61 Defendant Microsoft's actions affected the public interest.

21 4.62 There were a number of Online Safety employees who received
22 varying levels of harm or injury from being subjected to the graphic material. A
23 number of employees quit due to troubles they experienced. Furthermore, the two
24 principal Plaintiffs, Mr. Soto and Mr. Blauert, were injured.
25

1 4.63 Viewing the graphic material had the capacity to injure others in
2 Online Safety. In fact, the purpose of the Online Safety program was to protect
3 Microsoft customers from harm in the event they accidentally viewed the graphic
4 materials. Furthermore, Plaintiffs' experts will testify that viewing the graphic
5 materials as required by Online Safety had and has the capacity to injure other
6 persons, namely other Online Safety employees, by causing "compassion fatigue,"
7 "vicarious trauma" and "PTSD."
8

9 4.64 Microsoft did not retain experts in the field to assist in developing
10 responsible policies and procedures to protect employees from harm and used
11 existing staff to develop the program who were well meaning, but lacked time and
12 resources.
13

14 4.65 Plaintiffs' experts will testify that there are a number of recognized
15 injuries that can result from viewing the content and these dangers were known
16 when the program was developed and therefore Microsoft knew or should have
17 known of the dangers and should have protected employees from the dangers to
18 ensure a safe work environment.
19

20 4.66 Defendant Microsoft's actions injured the Plaintiffs' business or
21 property.
22

23 4.67 Plaintiffs have sustained financial harm. Plaintiffs are unemployed
24 and/or have sustained injury to their earning capacity due to their injuries.
25 Plaintiffs' injuries have caused them to incur medical and psychological counseling
and treatment which resulted in significant and ongoing expense. Plaintiffs have

1 incurred other losses to property or business, including expending time and effort
2 to address their injuries.

3
4 4.68 Defendant Microsoft's unfair or deceptive acts proximately caused
5 injury to Plaintiffs Mr. Soto and Mr. Blauert, their respective spouses and marital
6 communities and families. Plaintiffs have never experienced the type of
7 psychological and physical problems prior to being employed at Microsoft.
8 Plaintiffs' exposure to the graphic content has directly caused permanent injury
9 and disability. Plaintiffs visualize the content daily and have nightmares,
10 disassociations, and many other psychological and physical problems due to
11 working at Online Safety. These symptoms have resulted in damages to business
12 and property.
13

14 4.69 Plaintiffs are not required to prove a consumer transaction existed
15 between the parties. *Panag v Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 43-
16 44, 204 P.3d 885,892 (2009)
17

18 4.70 As a direct and proximate result of Defendant's violations of RCW
19 19.86, Plaintiffs suffered damages including stigma damages in an amount to be
20 proven at trial.

21 4.71 Plaintiffs further request that Defendant Microsoft's actions be
22 enjoined to protect the public and avoid future injuries. Plaintiffs are concerned
23 that Defendant Microsoft's failure to provide significant safeguards to its employees
24 at Online Safety will lead to other employees suffering severe injuries. Plaintiffs
25 are concerned that, due to Microsoft's self-imposed budgetary restrictions for

1 Online Safety, proper resources will not be directed to protect employees at Online
2 Safety.
3

4 **E. Loss of Consortium**

5 4.72 Sara Soto is Henry Soto's wife, and has been his wife at all times
6 relevant to this litigation and Calum Soto is Henry Soto's minor son.

7 4.73 Sara Soto and minor son Calum Soto have lost the consortium of her
8 husband and his father as a direct and proximate result of the injuries and
9 damages caused by Defendant.
10

11 4.74 Susan Blauert is Greg Blauert's wife, and has been his wife at all
12 times relevant to this litigation.

13 4.75 Susan Blauert lost the consortium of her husband as a direct and
14 proximate result of the injuries and damages caused by Defendant.

15 **V. DAMAGES**

16 5.1 As a direct and proximate result of the actions of Defendant
17 Microsoft, Plaintiffs Mr. Soto and Mr. Blauert suffered serious and permanent
18 injuries.
19

20 5.2 Plaintiffs Mr. Soto and Mr. Blauert have required and received
21 medical care for their injuries.

22 5.3 Although Plaintiffs Mr. Soto and Mr. Blauert have resorted to medical
23 and psychological attention, medical and psychological care, and supportive
24 remedies, their injuries, together with pain, discomfort, and limitation of movement,
25 prevail and will continue to prevail for an indefinite time into the future such that it is

1 impossible at this time to fix the full nature, extent, severity, and duration of said
2 injuries. The injuries are alleged to be permanent, progressive, and disabling in
3 nature. Plaintiffs have incurred and will likely continue to incur medical and
4 psychological expenses, economic losses including loss of wages, earnings,
5 business opportunities, harm to reputation, harm due to stigma, harm to earning
6 capacity, and other expenses, all to their damage, in an amount now unknown but
7 which will be proven at the time of trial.
8

9
10 5.4 As a further direct and proximate result of Plaintiffs' injuries, they
11 suffered and will continue to suffer in the future from pain, mental anguish,
12 emotional distress, embarrassment, fear or apprehension of injury or death, loss of
13 enjoyment of life, loss of function, and increased likelihood of illness or disability,
14 all to Plaintiffs' damage in an amount now unknown but which will be proven at the
15 time of trial.

16
17 5.5 As a direct and proximate result of the injuries and damages to
18 Plaintiff Henry Soto, Plaintiff Sara Soto and Plaintiff minor child Calum Soto have
19 suffered loss of consortium, or loss of the fellowship of her husband/his father,
20 including loss of his company, cooperation, aid in the matrimonial relationship, aid
21 in the parental relationship, emotional support, love, affection, care, services,
22 companionship, and assistance.

23
24 5.6 As a direct and proximate result of the injuries and damages to
25 Plaintiff Greg Blauert, Plaintiff Susan Blauert suffered loss of consortium, or loss of
the fellowship of her husband, including loss of his company, cooperation, aid in

1 the matrimonial relationship, emotional support, love, affection, care, services,
2 companionship, and assistance.

3
4 5.7 As a direct and proximate result of the injures and damages Plaintiffs
5 have incurred attorney fees and costs and are entitled to enhanced and/or treble
6 damages pursuant to the Consumer Protection Act and the Washington State
7 Disability Discrimination Act.

8 **VI. NOTICE OF PLAINTIFF'S RIGHTS**

9
10 6.1 Plaintiffs assert the physician/patient privilege for 88 days following
11 the filing of this complaint. On the 89th day following the filing of this complaint,
12 Plaintiffs hereby waive the physician/patient privilege. That waiver is conditioned
13 and limited as follows: (1) Plaintiffs do not waive their constitutional right of privacy;
14 (2) Plaintiffs do not authorize contact with their health care providers of any kind
15 except by judicial proceeding authorized by the Rules of Civil Procedure; (3)
16 Representatives of the Defendants are specifically instructed not to attempt ex
17 parte contacts with health care providers of Plaintiffs; and (4) Representatives of
18 the Defendants are specifically instructed not to write letters to Plaintiffs' health
19 care providers telling them that they may mail copies of records to Defendant.
20

21 6.2 In the case of *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138
22 (1988), the Supreme Court dealt very simply with the issue of ex parte contact with
23 Plaintiff's physicians:

24 The issue presented is whether defense counsel in a personal injury
25 action may communicate ex parte with the plaintiff's treating
physicians when the plaintiff has waived the physician/patient

1 privilege. We hold that defense counsel may not engage in ex parte
2 contact, but is limited to the formal discovery methods provided by
3 court rule. *Loudon*, at 675-676.

4 **VII. PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs respectfully request judgment against Defendant
6 Microsoft in an amount to be proven at the time of trial, together with Plaintiffs'
7 costs, attorneys' fees, expert fees and disbursements incurred herein, and for
8 injunctive relief, and for such other relief and further relief as the Court may deem
9 just and equitable, including but not limited to prejudgment interest.

10 DATED this 30th day of December, 2016.

11
12 BEN WELLS & ASSOCIATES

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