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NO. 102414-2

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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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PAUL ADGAR,

Plaintiff/Appellant,

v.

MARTIN A. DINSMORE and “JANE DOE” DINSMORE,  
husband and wife, and their marital community composed  
thereof, and LAKEWOOD WATER DISTRICT,

Defendants/Respondents.

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PAUL ADGAR’S ANSWER TO PETITION FOR REVIEW

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**I. IDENTITY OF ANSWERING PARTY**

The party answering the Petition for Review is Plaintiff Paul Adgar. Mr. Adgar requests that this Court deny the Petition for Review.

**II. CITATION TO COURT OF APPEALS DECISION**

The Petitioner is seeking review of *Adgar v. Dinsmore*, 26 Wn.App.2d 866, 530 P.3d 236 (2023), Court of Appeals Division II, No. 56142-5.

**III. ISSUE PRESENTED FOR REVIEW**

Whether this Court should accept review when the Court of Appeals decision is not in conflict with a decision of the Supreme Court and is not in conflict with a published decision of the Court of Appeals.

**IV. STATEMENT OF THE CASE**

***LWD's Factual Errors***

LWD states two important factual errors in its Petition for Review.

First, LWD states that Mr. Bosma had never seen Mr. Dinsmore before the date of the collision. Petition for Review at 14. That is incorrect. On February 6, 2018, the day prior to the collision, an employee of a soil compaction contractor at the Forrest Road/Rose Road job site was approached by Mr. Dinsmore. CP 179-184 (80:4-85:11). Mr. Dinsmore offered the worker \$50 if he would give Mr. Dinsmore a ride to the store to get some more alcohol. CP 183 (84:3-7). The worker declined. CP 183 (84:8-11). That same day, February 6, 2018, the worker told Mr. Bosma about his interaction with Mr. Dinsmore. CP 183 (84:15-17). Later that day, Mr. Bosma saw Mr. Dinsmore walking, apparently returning from the store. CP 183 (84:23-85:4). Mr. Bosma thought Mr. Dinsmore's encounter with the worker was "strange." CP 184 (85:9-11).

Second, LWD characterizes this case as a "keys in the ignition" case, and erroneously states that Mr. Bosma simply left his keys in the ignition of the LWD truck. Petition for Review at 4, 8. In fact, Mr. Dinsmore testified that the LWD truck was

unattended with the engine running and the driver's door open while the LWD truck was out of Mr. Bosma's sight. CP 198-199 (67:2-68:11). As the Court of Appeals correctly noted, for purposes of LWD's motion for summary judgment and this appeal, the facts are taken in the light most favorable to Mr. Adgar, the non-moving party. Court of Appeals Decision at 3.

### **Brief Statement of Facts**

On February 7, 2018, Mr. Bosma, while on duty for the LWD, was driving a 2016 Ford F250 Pickup owned by LWD to a site in Lakewood, Washington. CP 169 (29:7-18), CP 170 (36:11-24). Mr. Bosma proceeded to park the LWD truck on the public right of way, exit the vehicle and walk away from the truck to meet with an LWD contractor. CP 172 (41:23-42:12). Mr. Bosma left the LWD truck unattended, and out his sight, with the engine running and the driver's door open. CP 198-199 (67:2-68:11).

As Mr. Bosma was walking away from the truck, he saw Mr. Dinsmore acting erratically. CP 177 (65:16-66:15). Mr.

Bosma testified that Mr. Dinsmore appeared to be intoxicated, trying to get into a vehicle, setting off the car alarm and stumbling back from the vehicle after he tried to open the door to the vehicle. CP 178 (66:3-15). After this observation, Mr. Bosma then walked down the street approximately 200 feet where he met the contractor with the LWD truck out of Mr. Bosma's sight. CP 173 (43:18-45:4); CP 176 (56:9-12); CP 233.

While Mr. Bosma was talking to the contractor, Mr. Dinsmore walked over to the LWD truck, got in the truck and drove away. CP 198-200 (67:13-69:25); CP 201 (83:8-21). He drove the LWD truck northeast on Portland Avenue SW near the 15200 block in Lakewood, Washington. *Id.* Plaintiff Paul Adgar was heading to work in his 1999 Dodge Dakota Pickup and driving southwest on Portland Avenue SW near the 15200 block in Lakewood, Washington. CP 242 (1:19-21). Mr. Dinsmore swerved into the southwest-bound lane and struck Mr. Adgar's vehicle head-on moments after stealing the LWD truck. CP 242-243 (1:21-2:2); CP 246; CP 235-237.



Mr. Adgar sustained serious injuries, requiring multiple surgeries and spending over two weeks at Madigan Army Medical Center. CP 243.

LWD's General Manager, Randall Black, testified that at the time of the incident, LWD's employees were required to take the keys out of the ignition and lock the doors when the vehicle is out of the employee's sight: "[I]f the vehicle was going to be out of the employees' sight or wasn't able to get back to that vehicle in a reasonable amount of time, they needed to secure those vehicles, the vehicles." CP 210-211 (11:20-12:2). After the collision, Mr. Black issued a Memorandum to all LWD staff stating "Effective immediately, keys to District vehicles are not to be left in the vehicle unattended. Further, no District vehicle is to be left running unattended". CP 209-210 (10:12-11:9); CP 215.

Plaintiff's water utility district expert, Daniel Kimbler, testified that LWD and Mr. Bosma failed to meet industry standards. CP 240 (3:8-11). He has also testified that Mr.

Bosma's conduct in leaving an LWD truck unattended in a public right of way, with the engine running and the door open, fell below the standard of care for water utility inspectors. CP 240 (3:8-11). He testified that there was no utility or benefit for Mr. Bosma leaving a utility vehicle in the public right of way, unattended, with the engine running or keys in the ignition. CP 239 (2:21-3:1). He further testified that one reason for properly securing a utility vehicle parked in a right of way is to prevent someone stealing the vehicle and causing damage to the vehicle or injuring people. CP 240 (3:1-2).

### ***Procedural History***

At the trial court, LWD moved for summary judgment, arguing that LWD did not owe a duty and that if it did, LWD's breach of its duty did not proximately cause Plaintiff's damages. CP 20:8-10. The trial court judge held a hearing on December 6, 2019 and heard oral argument from Plaintiff and LWD. RP (12-6-19) 1. At the conclusion of the hearing, the trial court judge found that the issue of duty should go to the jury. RP (12-6-19)

30:25-31:5. However, the trial court judge continued the hearing because he could not decide the issue of proximate cause and requested additional briefing from the parties on the specific issue of whether Mr. Dinsmore's conduct – specifically his attempted suicide – was a superseding cause such that there is no proximate cause as a matter of law. RP (12-6-19) 30:25-31:15, CP 276. The trial court judge ultimately held that as a matter of law LWD's breach of its duty was not a proximate cause of Plaintiff's injuries and granted LWD's motion for summary judgment dismissing Plaintiff's claims against LWD. RP (1-17-20) at 31:15-17; CP 454-456. The trial court held that Mr. Dinsmore's act of attempted suicide was a superseding act such that there was no proximate cause as a matter of law. RP (1-17-20) 31:20-32:6, CP 456.

The Court of Appeal addressed the issues of duty and proximate cause and reversed the trial court's order granting LWD's motion for summary judgment and remanded the case to the trial court. Petition for Review, Appendix 1. LWD does not

raise the proximate cause issue as an issue for review by the Supreme Court.

## V. ARGUMENT

### A. **Considerations Governing Acceptance of Review**

LWD appears to argue that the Court of Appeals decision is in conflict with a Supreme Court decision or a published Court of Appeals decision. RAP 13.4(b). However, LWD does not cite any holding in a Supreme Court or Court of Appeals case that is in conflict with Court of Appeals decision. LWD's only basis for the Supreme Court's acceptance of review is that the Court of Appeals "focus[ed] on the public vs. private nature of the roadway where the truck was parked." Petition for Review at 8. This is incorrect. The Court of Appeals examined all of the circumstances and merely noted that "we are not holding that the duty extends to a car running in one's own driveway or garage." Decision at 11. This is the Court of Appeals' only reference to a "private" roadway in the Court of Appeals analysis related to duty.

**B. The Court of Appeals followed the holdings of *Kim* and *Parrilla* regarding the duty owed by LWD.**

LWD does not identify a specific holding of any Washington Supreme Court or Court of Appeals case that is in conflict with the Court of Appeals decision in the case at bar. In fact, the Court of Appeals followed the analysis set forth in *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 15 P.3d 1283 (2001) and *Parrilla v. King County*, 138 Wn.App. 427, 157 P.3d 879 (2007).

The Court of Appeals followed the rule set forth in *Kim*:

“An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.”

Court of Appeals Decision at 8, quoting *Kim*, 143 Wn.2d at 196 (quoting RESTATEMENT (SECOND) § 302B).

Moreover, the Court of Appeals accurately stated the factors to consider set forth in *Parrilla*:

It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases

of negligence, it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. *Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take.*

Court of Appeals decision at 9, citing *Parrilla* at 434, (alterations in original) (quoting Restatement (Second) of Torts § 302 B cmt. f).

The Court of Appeals did not “focus” on the public nature of the roadway, as LWD states. The Court of Appeals focused on Mr. Bosma's observations of Mr. Dinsmore's character, past conduct, and tendencies – on the day of the incident and the day prior – the opportunity Mr. Bosma provided Mr. Dinsmore by leaving the LWD's truck unattended with the engine running with and the door open, and the gravity of the harm that could result

from Mr. Bosma's actions. This is precisely the analysis required under *Kim* and *Parrilla*.

The Court of Appeals held:

Here, Bosma saw an intoxicated person in close proximity to his truck attempting and failing to get into another vehicle. It was foreseeable that such a person might attempt to get into and drive the LWD truck if the truck was left running with the door open and unattended. Doing so created a high degree of risk that was foreseeable for purposes of establishing a duty on the part of LWD. Therefore, under the specific facts of this case, Bosma owed a duty not to leave the truck running and unattended with the door open.

Court of Appeals Decision at 11.

The Court of Appeals also noted that the determination on the scope of this duty is left the jury:

Even though we conclude that LWD owed a duty to Adgar here, we do not reach the issue of whether the scope of the duty extends to these facts. As recognized by our Supreme Court, while

[t]he first inquiry . . . is whether a duty to protect against third party criminal conduct is owed at all. The second inquiry . . . , foreseeability of harm as a limit on the scope of the duty, considers whether the harm sustained is reasonably perceived as being within the

general field of danger covered by the duty owed by the defendant. . . . In this way, foreseeability plays a role in both the legal and factual inquiries regarding duty and its scope.

*McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 764, 344 P.3d 661 (2015) (internal citations omitted). This latter question is a question of fact for the jury. *Id.*

Court of Appeals Decision at 11.

LWD repeatedly states that Court of Appeals focused on the public vs. private roadway. That is simply wrong. The Court of Appeals focused on the factors identified in *Kim* and *Parrilla* – Mr. Bosma’s observations of Mr. Dinsmore’s erratic behavior, the opportunity Mr. Bosma created by leaving the LWD truck unattended with the engine running and the front door open, and the significant risk of harm created by Mr. Bosma’s conduct.

## **VI. CONCLUSION**

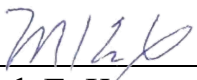
The Court of Appeals decision is not in conflict with a Washington Supreme Court or Court of Appeals case. The Court of Appeals followed the analysis set forth in *Kim* and *Parrilla*. The Supreme Court should deny the Petition for Review.



This document contains 2,158 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of October, 2023.

MORGAN & KOONTZ, PLLC

By:   
Mark E. Koontz, WSBA #26212  
Attorney for Plaintiff Paul Adgar

**CERTIFICATE OF SERVICE**

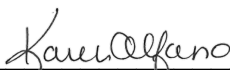
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 23<sup>rd</sup> day of October 2023, at Tacoma, Washington.


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Karen Alfano

# MORGAN & KOONTZ, PLLC

October 23, 2023 - 1:04 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
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