

No. 65359-8-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

NATHAN LOWMAN,

Plaintiff/Appellant,

v.

PUGET SOUND ENERGY, a Washington corporation;
COUNTY OF SKAGIT, a municipal corporation,

Defendants/Respondents,

and

JENNIFER WILBUR and JOHN DOE WILBUR, husband and wife and the
marital community composed thereof; COUNTRY CORNER, INC. d/b/a
COUNTRY CORNER, a Washington corporation; ANACORTES
HOSPITALITY, INC. d/b/a COUNTRY CORNER, a Washington corporation,

Defendants

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**JOINT BRIEF OF RESPONDENTS
PUGET SOUND ENERGY AND SKAGIT COUNTY**

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I. INTRODUCTION

Nathan Lowman met Jennifer Wilbur at a bar on the night of August 5, 2005. Mr. Lowman saw that Ms. Wilbur was drinking and intoxicated, and at the end of the night, he got into her car admittedly against his better judgment. Driving with a blood alcohol level well over the legal limit, Ms. Wilbur sped down a rural, meandering, two-lane road, lost control of her vehicle, and skidded off the roadway into a utility pole, injuring Mr. Lowman.

Mr. Lowman has never disputed that Ms. Wilbur's drunk driving caused the accident. Nor could he. Ms. Wilbur was convicted of felony vehicular assault. Still, Mr. Lowman seeks to hold Puget Sound Energy ("PSE") and Skagit County responsible. Mr. Lowman sued PSE and Skagit County in Snohomish County Superior Court, on the theory that one of them put the utility pole in the wrong place.¹

PSE and Skagit County sought, and the Honorable Gerald Knight granted, summary judgment under clear and longstanding Washington case law applying the doctrine of legal causation. *Medrano v. Schwendeman*, 66 Wn. App. 607, 836 P.2d 833 (1992), *Cunningham v.*

¹ Mr. Lowman also sued Ms. Wilbur, who defaulted (*see* CP 514-15), and the bar where the two were drinking, the Country Corner. CP 536. Neither is a party to this appeal.

State, 61 Wn. App. 562, 811 P.2d 225 (1991), *Braegelmann v. County of Snohomish*, 53 Wn. App. 381, 766 P.2d 1137 (1989), and *Klein v. City of Seattle*, 41 Wn. App. 636, 75 P.2d 806 (1985). The *Medrano* line of cases dictate that where the undisputed facts establish a speeding, drunk, and criminally reckless driver caused the accident, Washington law as a public policy matter precludes PSE and Skagit County from being held liable, regardless of whether they were negligent in placing the utility pole.

To reverse Judge Knight's grant of summary judgment, this Court would need to overrule this established Washington law on legal causation. Although Mr. Lowman seeks to convince the Court this case should be decided on different facts or legal theories (*e.g.*, intervening/superseding cause), those were not before the trial court on summary judgment and are outside the scope of the Court's review here. Even if considered by this Court, none of Mr. Lowman's theories supports his contention that Washington law on legal causation should be overruled. The Court should affirm the trial court's grant of summary judgment in favor of PSE and Skagit County, and affirm denial of reconsideration of the same.

II. STATEMENT OF ISSUES

1. Whether the trial court correctly determined on summary judgment that PSE and Skagit County are not the legal cause of harm to Mr. Lowman, who undisputedly was injured when a speeding, drunk, and criminally reckless driver collided with a utility pole off the roadway.

2. Whether the trial court abused its discretion in declining to reconsider its summary judgment ruling where Mr. Lowman could establish no error of law, failure of justice, or newly discovered evidence justifying reconsideration under CR 59.

III. STATEMENT OF THE CASE

A. Factual Background

1. Jennifer Wilbur Met Nathan Lowman at a Bar and Got Drunk.

The key facts are undisputed. Ms. Wilbur got drunk on the night of August 5, 2005. Mr. Lowman admitted that he met Ms. Wilbur at the Country Corner bar that evening, and both of them were drinking.

CP 317, 336 (Cardinal Dep.); CP 345 (Lowman Stmt.); CP 357-58 (Knudson Dep.); CP 376-80 (Lowman Dep.). Mr. Lowman said he saw Ms. Wilbur drinking “at least two cocktails.” CP 318 (Cardinal Dep.); CP 345-46 (Lowman Stmt.). In his complaint, Mr. Lowman stated Ms. Wilbur was “apparently intoxicated,” and due to her

“overconsumption of alcohol,” “was not fit to operate a motor vehicle.”²

CP 524-25.

2. Mr. Lowman Got Into Ms. Wilbur’s Car Against His Better Judgment.

Ms. Wilbur waved Mr. Lowman over to her outside the bar, where the two talked. CP 319 (Cardinal Dep.); CP 417-48 (Nordmark Dep.); CP 380 (Lowman Dep.). Ms. Wilbur “invited [Mr. Lowman] to come home with her,” and he agreed. *Id.* Because Mr. Lowman knew Ms. Wilbur had been drinking, he admits he “was hesitant to get into [her] car.” CP 319 (Cardinal Dep.); CP 346 (Lowman Stmt.); *see also* CP 404 (McCann Dep.) (Lowman said he “recalls having doubts” about the driver of the car); CP 408 (same) (final addiction intervention report) & CP 403 (authenticating report). Indeed, Mr. Lowman’s “gut instinct was *not* to get in the car with her.” CP 319 (Cardinal Dep.) (emphasis added); CP 346 (Lowman Stmt.); CP 382-82 (Lowman Dep.). He did so anyway. CP 319 (Cardinal Dep.); CP 404 (McCann Dep.). In retrospect, Mr. Lowman “really wished he had trusted his gut instinct” not to get into the car

² PSE’s and Skagit County’s motion for summary judgment focused on the undisputed intoxication of Ms. Wilbur (the driver and a defendant), *not* Mr. Lowman (the passenger and plaintiff). But the evidence strongly suggests Mr. Lowman, like Ms. Wilbur, was drunk. On the night of the incident, Mr. Lowman admitted to WSP Trooper William Knudsen that he had “*three or four pitchers or more*” to drink that evening. CP 358-61.

because he knew Ms. Wilbur had been drinking. CP 319-20 (Cardinal Dep.); CP 346 (Lowman Stmt.); *see also* CP 384 (Lowman Dep.).

3. Driving Drunk, Ms. Wilbur Sped Down a Two-Lane Country Road, Lost Control of Her Car, and Skidded Off of the Roadway Into a Utility Pole.

Ms. Wilbur left the bar and drove herself and Mr. Lowman along Satterlee Road, a two-lane, curvy, country road near Anacortes.³ CP 422 (Cardinal Rpt.); CP 381 (Lowman Dep.). The speed limit was posted at 25 mph. CP 312, 314-15 (Cardinal Dep.); CP 425 (Cardinal Aff.); CP 422 (Cardinal Rpt.); CP 381 (Lowman Dep.). There was also an amber warning sign for curves ahead that reiterated the 25 mph speed zone. CP 312, 314-15 (Cardinal Dep.).

Ms. Wilbur drove east on Satterlee, past the warning signs, and down the “steep hill,” attempting to negotiate turns in the roadway. CP 381 (Lowman Dep.); CP 327-28 (Cardinal Dep.). Mr. Lowman’s complaint states Ms. Wilbur “lost control of her vehicle while attempting to negotiate a curve at a high rate of speed.” CP 524; *see also* CP 385-86 (Lowman Dep.). Ultimately, she skidded off of the roadway (CP 336; CP 429-31), and “crashed into a utility pole” (CP 524).

³ Described as a “nice evening,” weather posed no obstacle to safe driving. CP 326 (Cardinal Dep.). It was 65 degrees, and the road was bare and dry. *Id.* & CP 422 (Cardinal Rpt.).

4. The Washington State Patrol Accident Investigation Confirms Mr. Lowman's Allegations that Ms. Wilbur Was Speeding While Intoxicated.

The WSP conducted an accident investigation, including digital mapping and reconstruction. The WSP investigation confirmed two of Mr. Lowman's key allegations regarding what occurred immediately before the accident:

- Ms. Wilbur was speeding.
- Ms. Wilbur was drunk.

The fact Ms. Wilbur was speeding was not disputed in the trial court. Mr. Lowman's complaint alleges Ms. Wilbur was driving "at a high rate of speed" (CP 524), and he testified at deposition that Ms. Wilbur was driving down the "steep hill" "around 35 and 40" mph and he was "concerned" (CP 381). Consistent with this, Det. Cardinal's accident reconstruction revealed that, although the area was marked as a 25 mph speed zone, Ms. Wilbur was driving between 34 and 38 mph "**at a minimum.**" CP 315-16 (emphasis added); *see also* CP 321-25, 328-34, 337-38 (discussing calculations and bases thereof); CP 438 (same); CP 427 ("Wilbur was intoxicated and drove too fast going off the road.")⁴

⁴ Ms. Wilbur also admitted that she was speeding. CP 415-16 (Nordmark Dep.) (estimating speed, albeit lower, at "about 30").

It also was undisputed that Ms. Wilbur drove drunk. Mr. Lowman acknowledges Ms. Wilbur's intoxication numerous times in his complaint:

Ms. Wilbur was *intoxicated* at the time of the collision. ***Later her blood alcohol content was measured at .14.*** She became *intoxicated* while drinking at the Count[r]y Corner.

* * *

Ms. Wilbur was served alcohol at the Country Corner at a time when she was already ***apparently intoxicated.***

As a result of her overconsumption of alcohol, Ms. Wilbur was not fit to operate a motor vehicle. She nevertheless did so and caused the collision which resulted in severe and permanent injuries to Nathan Lowman.

CP 524-25 (emphasis added). When police arrived at the accident scene, the officers smelled alcohol on Ms. Wilbur. CP 333 (Cardinal Dep.); CP 426 (Cardinal Aff.); CP 357 (Knudson Dep.). As Mr. Lowman's complaint alleges, when tested later, Ms. Wilbur in fact had ***nearly twice the legal limit*** of alcohol in her system: ***0.14g/100mL*** or 14%.⁵ CP 488 (Capron Decl.); CP 492 (Capron Toxicology Rpt.); CP 425, 427 (Cardinal Aff.); CP 313, 315 (Cardinal Dep).

The last paragraph of Det. Cardinal's affidavit succinctly summarizes the conclusions reached following the WSP investigation and accident reconstruction:

⁵ The legal limit for BAC in Washington is 0.08 or 8%. RCW 46.61.502.

Jennifer Lynn Wilbur drove her vehicle after consuming intoxicating liquor at the “Country Corner”. *Wilbur was intoxicated and drove too fast going off the road*, striking a power pole. *Wilbur was the proximate cause* of a disabling elbow fracture, received by Nathan Lowman, at the time of the collision. *Jennifer Wilbur’s blood ethanol result is 0.14 g/100mL*.

CP 427 (emphasis added). Again, Mr. Lowman’s complaint acknowledges these facts, and he did not challenge them on summary judgment. *See* CP 540-42 (Opp. Mtn. Summ. J.).

5. Ms. Wilbur Was Convicted for Her Criminally Reckless Drunk Driving.

Ms. Wilbur admitted her reckless drunk driving caused Mr. Lowman substantial bodily harm. Following the accident, Ms. Wilbur was charged with vehicular assault, a Class B Felony. CP 440-41 (Information).

Ms. Wilbur pleaded guilty as charged. CP 448 (Plea Stmt.). She made her guilty plea “freely and voluntarily” and with her own attorney present. CP 448-49. She admitted she “drove a vehicle with disregard for the safety of others” and thereby caused substantial bodily harm to Nathan Lowman. CP 448. The court further found that Ms. Wilbur had “a chemical dependency that has contributed to the offense(s).” CP 452 (Jgmt. & Sentence). In addition to monetary penalties, including over \$50,000 in restitution, the court sentenced Ms. Wilbur to three months in

jail, a year of community custody, and DUI/substance abuse treatment and conditions. CP 455-56, 460 (Jgmt. & Sentence, DUI Appx.); CP 462 (Agreed Order of Restitution).

B. Procedural History

1. The Trial Court Granted PSE and Skagit County's Motion for Summary Judgment Based Solely on the Issue of Legal Causation.

Mr. Lowman sued the Country Corner bar for alleged over-service of alcohol, as well as PSE and Skagit County for allegedly putting the utility pole in the wrong location. *See* CP 536-37 (Compl. against PSE); CP 467-68 (Compl. against Skagit County).⁶

PSE and Skagit County moved for summary judgment solely on the issue of legal causation; they conceded duty, negligence, and cause-in-fact for the purposes of their motion. CP 505 (Mtn. Summ. J.); CP 247 (Reply). On November 12, 2009, the trial court granted PSE's and Skagit County's motion and entered an order dismissing those defendants from the case. The ruling followed full briefing from the parties, extended oral argument by the lawyers, and careful consideration of the appellate case law by the court. *See, e.g.*, RP 11/12/09, at 3-5, 7-11, 30-34.

⁶ The cases were consolidated prior to PSE's and Skagit County's motion for summary judgment.

Mr. Lowman focused his arguments in opposition solely on the issue of duty, *without once mentioning* legal causation. *See generally* CP 539-57. But PSE and Skagit County had *conceded* duty for the purposes of their motion. Recognizing this, the trial court made clear its ruling was based on legal causation only:

My decision, however, comes down on the basis that I believe the defendants, moving party, has the better position. I do come to the conclusion that ***based upon legal causation***, the motions for summary judgment should be granted, and I do grant them. And those two defendants are dismissed.

RP 11/12/09, at 43 (emphasis added).

2. The Trial Court Denied Mr. Lowman's Motion for Reconsideration.

Mr. Lowman sought reconsideration of the summary judgment ruling without identifying on which prong of CR 59 he relied. He argued: (1) Washington law on legal causation was overruled by *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002); and (2) the court should have analyzed PSE's and Skagit County's motion as one based on intervening or superseding cause under *Crowe v. Gaston*, 134 Wn.2d 509, 951 P.2d 1118 (1998). CP 221-30. The trial court denied the motion. CP 63-64.

IV. ARGUMENT

A. **The Court Should Affirm Summary Judgment in Favor of PSE and Skagit County on Legal Causation Grounds.**

1. **Standard of Review**

This Court reviews the trial court's grant of summary judgment de novo, and engages in the same inquiry as the trial court on appeal.

Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 225, 59 P.3d 655 (2002).

Although review is de novo, the Court may only consider the evidence and issues before the trial court at the time it considered the summary judgment motion. RAP 9.12. On appeal, Mr. Lowman conflates what was before the trial court on summary judgment with what was later before the court on reconsideration. However, proper appellate review of the two resulting orders requires separate treatment as discussed herein.

2. **Any Negligence of PSE or Skagit County Was Not the Legal Cause of Lowman's Injuries.**

a. **Cause-in-fact v. legal cause**

Proximate cause includes two distinct elements: (1) cause-in-fact; and (2) legal causation. *Medrano*, 66 Wn. App. at 611 (citing cases).

Cause-in-fact "concerns the actual 'but for' consequences of an act—the physical connection between an act and an injury." *Id.* Legal cause, on the other hand, "is grounded in *policy determinations* as to how far the

consequences of a defendant's acts *should* extend." *Id.* (emphasis added). The focus is "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Id.* Legal cause involves determining "whether liability *should* attach as a matter of law given the existence of cause in fact; *i.e.*, whether consideration of logic, common sense, justice, policy and precedent favor finding legal liability." *Id.* (emphasis in original).

b. Legal causation is properly decided as a matter of law on summary judgment.

Because legal causation involves policy determinations regarding whether liability should attach, it is appropriate for a court to make such a determination as a matter of law on summary judgment, and Washington courts have done so. *E.g.*, *Medrano*, 66 Wn. App. 607; *Cunningham*, 61 Wn. App. 562; *Braegelmann*, 53 Wn. App. 381; *see also McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998) ("Legal cause is decided by the court as a question of law.").

c. PSE and Skagit County are not the legal cause of Mr. Lowman's harm.

Ms. Wilbur's conduct is the legal cause of Mr. Lowman's injuries. Her reckless and criminal acts that resulted in the accident are established by facts Mr. Lowman did not dispute on summary judgment:

- Ms. Wilbur got drunk and got into her car.
- So did Mr. Lowman—against his better judgment.
- Ms. Wilbur drove drunk down a steep hill on a meandering, two-lane country road.
- She was speeding.
- She was driving so fast Mr. Lowman was concerned for his safety.
- She eventually failed to negotiate one of the turns.
- She lost control of her car.
- She skidded off of the roadway.
- She collided into a power pole.
- The pole was located off of the roadway.
- She was later determined to have a BAC of .14g/100mL, nearly twice the legal limit for DUI.
- She was criminally prosecuted for her reckless drunk driving.
- She admitted she “drove a vehicle with disregard for the safety of others and thereby caused substantially bodily harm to Nathan Lowman.”
- The Court entered findings that she had a “chemical dependency” that contributed to the offense.
- She was convicted and sentenced for her criminally reckless DUI.

Part III.A, *supra*; CP 539-42 (failing to dispute facts).

When driving undisputedly rises to the reckless and criminal level of that of Ms. Wilbur, Washington courts consistently find legal causation lacking as a matter of law.

i. *Klein v. City of Seattle*

The court in *Klein* found that the City's negligent design of the roadway was not, as a matter of law, the legal cause of a motorist's death where she was hit head-on by an "extreme[ly] careless[]" driver. 41 Wn. App. at 639. Wyn Roberts was killed when Michael Mullens lost control of his vehicle while speeding on the West Seattle Bridge, crossed the center line, and collided head-on with Roberts's oncoming car. *Id.* at 637-38. Although Mullens's blood alcohol level was only 0.04—he was not legally intoxicated like Ms. Wilbur here—the court *still* found that "[a]s a matter of public policy, the City cannot be expected to guard against this degree of negligent driving." *Id.* at 639. The court noted that to impose liability given the extreme carelessness of this driver would:

force the construction of our highways, not for the use and safety of the reasonably prudent motorist, but solely for the purpose of protecting that motorist from the depredations and negligence of the reckless, careless and drunken operator. No such insurance policy has been or can be imposed upon the defendant.

Id. (emphasis added).

ii. ***Braegelmann v. Snohomish County***

In *Braegelmann*, the widow of Marvin Braegelmann sued Snohomish County for negligent design, construction, and maintenance of the gravel road where her husband was killed, claiming that the road provided inadequate sight distance at the posted rate of speed. 52 Wn. App. at 382-83. Braegelmann died when his vehicle was hit head-on by that of Harry Tom, who crossed the center line while speeding with a blood alcohol level of 0.19. *Id.* Tom later pleaded guilty to vehicular homicide. *Id.* at 383. Finding that “policy considerations dictate that the County had no duty to protect Braegelmann” from Tom’s “extreme conduct,” the court affirmed summary judgment in favor of the County for lack of legal causation. *Id.* at 386.

iii. ***Cunningham v. State***

Cunningham involved a driver’s early morning collision with a concrete bollard placed in front of the Luoto Road gate to the Naval Submarine Base at Bangor. 61 Wn. App. at 564. Chester Cunningham, who was intoxicated with a blood alcohol level of 0.22 at the time of the incident, claimed the road was improperly lighted and striped, and as a result, the State of Washington was responsible for his injuries. *Id.* The court affirmed summary judgment for the State, holding that given Cunningham’s intoxication and his admission that he saw the bollard but

failed to slow from his speed of 35 mph, “neither logic, common sense, justice, nor policy favors finding legal causation here.” *Id.* at 571. The court concluded that, given the driver’s extreme conduct, even assuming the State was negligent, its negligence would be “too remote or insubstantial to impose liability.” *Id.* at 572 (quoting *Hartley v. State*, 103 Wn.2d 768, 781, 698 P.2d 77 (1985)).

iv. *Medrano v. Schwendeman*

Since *Klein*, *Cunningham*, and *Braegelmann*, courts have continued to apply the legal causation doctrine on summary judgment where there is a high degree of negligent driving. In *Medrano v. Schwendeman*, the Court of Appeals upheld the trial court’s grant of summary judgment in favor of King County and PSE predecessor Puget Power on the basis that their alleged acts—even if negligent—were not the legal cause of the driver’s accident. 66 Wn. App. at 608.

Mr. Lowman’s case bears numerous striking resemblances to *Medrano*. In *Medrano*, David Schwendeman lost control of his pickup truck while speeding and driving recklessly, and collided with a power pole. *Id.* at 608-09. He had drinks at his home before driving. *Id.* at 609. In a separate criminal action, Schwendeman was convicted of two counts

of vehicular assault for injuries to two of his passengers. One of Schwendeman's passengers, Richard Medrano, brought a civil suit. *Id.*

The claim against Puget Power in *Medrano* is almost identical to the claim Mr. Lowman brought against PSE and Skagit County here, *i.e.*, that the power pole was allegedly put in the wrong place. *Id.* at 610. The trial court entered summary judgment against the plaintiff, and the Court of Appeals affirmed, on grounds of lack of legal causation. *Id.* at 611-14. The court analyzed the distinction between cause-in-fact and legal cause, summarized relevant case law, and ultimately held that summary dismissal was warranted:

We conclude that neither logic, common sense, justice, nor policy favor a decision that would subject . . . Puget Power to legal liability on these facts . . . ***Puget Power should not be required to protect against the consequences of criminally reckless drivers.*** The factual basis for this determination is undisputed, that being Schwendeman's conviction of vehicular assault

The question is whether, as a matter of policy, the connection between the defendant's acts and their ultimate result is "too remote or insubstantial to impose liability." Here it was Schwendeman's driving that was the legal cause of the accident. ***Considering his driving . . . the possible negligent placement of the pole by Puget Power [is] too remote to impose liability.***

Id. at 613-14 (citations omitted) (emphasis added).⁷

d. Ms. Wilbur's drunk driving undisputedly rises to the level sufficient to compel dismissal of PSE and Skagit County on legal causation grounds.

Klein, Braegelmann, Cunningham, and Medrano establish that there are legal limits on the scope of the duties owed by PSE and Skagit County, and that these legal limits may be determined on summary judgment. PSE and Skagit County acknowledge they have a duty to place utility poles they own in a manner so as to not interfere with public use of the roadways. *See Medrano*, 66 Wn. App. at 610. Municipalities and utility companies, however, “are not insurers against accidents nor the guarantors of public safety and are not required to anticipate and protect against all imaginable acts of negligent drivers.” *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (2002). In particular, “[t]he County and [PSE] should not be required to protect against the consequences of criminally reckless drivers.” *Medrano*, 66 Wn. App. at 613.

⁷ The cases where courts have found a question of fact as to legal causation are readily distinguishable. In *Ruff v. County of King*, the court reversed summary judgment for the county where there was conflicting evidence on the driver's recklessness, no evidence that the driver had been drinking, and expert testimony the driver might have regained control of the car had there been guardrails to prevent the driver from leaving the roadway. 125 Wn.2d 697, 700-01, 887 P.2d 886 (1995); *see also Stephens v. City of Seattle*, 62 Wn. App. 140, 144, 813 P.2d 608 (1991) (defendant's conduct was not sufficiently extreme to justify a finding of no legal causation).

Here, there can be no dispute that this accident never would have occurred but for the extremely reckless and criminal driving of Ms. Wilbur. Ms. Wilbur’s driving was both the cause-in-fact *and* the legal cause of the accident. As in *Medrano* and the other cases cited to the trial court, PSE and Skagit County should not, as a matter of law, be held to owe a duty to protect against the consequences of a rash, heedless driver who drove with a blood alcohol level of nearly twice the legal limit and at speeds exceeding the posted rate on a meandering and steep country road.

The following chart presents the salient factors upon which the pertinent cases rely and underscores the propriety of affirming summary judgment here:

Case	Driver Speeding	Driver Legally Drunk	Driver Criminally Convicted	Other Factors	Appellate Court Disposition
Braegelmann	✓	✓	✓	Crossed center line	SJ affirmed
Cunningham	✓	✓	X	Failed to stop	SJ affirmed
Medrano	✓	Likely ⁸	✓	Lost control; left roadway	SJ affirmed
Klein	✓	X	X	Crossed center line	Jl affirmed
This Case	✓	✓	✓	Lost control; left roadway	

⁸ The court noted the driver had been drinking before the accident and was on the way to a bar when the accident occurred. *Medrano*, 66 Wn. App. at 608-09. On appeal, Mr. Lowman acknowledges Schwendeman was “apparently drunk” and was trying to “become more drunk.” Br. of Appellant at 24.

3. *Medrano* Is Not an “Outlier” Case.

Mr. Lowman erroneously maintains that *Medrano* is an “outlier” case whose facts are “outrageous” and “bizarre.” Br. of Appellant at 1, 21-25. Mr. Lowman’s attempt to distinguish *Medrano* misses the mark. He lists a series of bullet points he claims are “stark” “contrasts” between *Medrano* and this case. *Id.* at 24-25. Each point supports the comparison, is inaccurate, or is irrelevant to a legal causation analysis:

Lowman’s <i>Medrano</i> Bullet Points	Relevant to Legal Causation	Comparison to this Case
Schwendeman “brought the action”	No	N/A – Legal causation does not depend on who the plaintiff is. It depends on who the driver is. <i>Medrano</i> was decided on legal causation grounds, not comparative fault. Plaintiff is wrong that Schwendeman “brought the action” in <i>Medrano</i> . Schwendeman, like Ms. Wilbur, was a <i>defendant</i> . <i>Medrano</i> , the plaintiff, was a passenger. So is Lowman.
Schwendeman was “the intoxicated driver whose own driving caused the accident”	Yes	So was Wilbur.
Schwendeman was “familiar with the roadway”	No	N/A – although Wilbur lived in the area and likely was familiar with the road as well.

Lowman's <i>Medrano</i> Bullet Points	Relevant to Legal Causation	Comparison to this Case
Schwendeman was "warned" "to stop driving recklessly"	No	N/A – although Lowman undisputedly was so concerned for his safety that he was about to warn Wilbur when the accident occurred.
Schwendeman was "apparently" drunk	No	N/A—it is actually drunkenness that matters. Here, Wilbur was definitely drunk, at nearly twice the legal limit.
Schwendeman was speeding	Yes	So was Wilbur.
Schwendeman struck a power pole located off the roadway	Yes	So did Wilbur.
The pole was far off the roadway	No	N/A – People should not be driving off the roadway whether it is four, 10, or 85 feet off.
No indication of regulatory violation	No	N/A – Legal causation analysis presumes breach of duty and cause-in-fact.
No evidence of other accidents	No	N/A – same.
No evidence that other conduct would have prevented accident	No	N/A – same. In any event, Lowman concedes that even his view of proper pole placement would not have prevented the accident.

4. Neither *Keller* Nor *Unger* Controls or Overrules *Medrano*, *Cunningham*, *Braegelmann*, or *Klein*.

Mr. Lowman argued on summary judgment, as he does here, that *Medrano*, *Cunningham*, *Braegelmann*, and *Klein* were overruled by the decisions in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), and *Unger v. Island County*, 118 Wn. App. 165, 73 P.3d 1005 (2003). Neither case addresses legal causation, and both are factually distinguishable.

a. ***Keller and Unger do not address legal causation.***

Keller and *Unger* concern the scope of the legal **duty** owed by a governmental entity in a road design case. Neither case addresses **legal causation**. With one immaterial exception, neither case discusses any of the four legal causation cases cited by PSE and Skagit County in its summary judgment motion and considered by the trial court: *Medrano*, *Braegelmann*, *Cunningham*, and *Klein*.⁹

Mr. Lowman argues the cases relied on by PSE and Skagit County are no longer good law because they rely on pre-*Keller* descriptions of the duty owed by governmental entities. However, PSE and Skagit County conceded for purposes of their motion that they breached the duty owed to Lowman. The question is whether, as a matter of policy, PSE and Skagit County can and should be expected to guard against Ms. Wilbur's criminally reckless drunk driving—or whether such conduct, **even assuming negligence**, is simply “too remote or insubstantial to impose liability.” *Cunningham*, 61 Wn. App. at 781. Neither *Keller* nor *Unger* alters the Court's ability to decide that question as a matter of law under the circumstances here. *Keller*, in fact, took care to mention that limits to liability in Washington still exist, and legal causation is one of them:

⁹ The one exception is *Unger*'s discussion of *Braegelmann*. However, this discussion pertains to the scope of the duty owed, not legal causation. See 118 Wn. App. at 174-75.

[T]he court still retains its gate keeping function and may determine that a municipality's actions were not the legal cause of the accident.

146 Wn.2d at 252 (emphasis added).

b. The theory of liability in *Keller* and *Unger* is different than the theory of liability against PSE and Skagit County here.

The fact that legal causation is not addressed in *Keller* and *Unger* can be explained by the plaintiff's theory of liability in those cases. Both cases are road design/maintenance cases. In such a case, the theory of liability against the designer (municipality, county, etc.) is that negligent design or maintenance of the roadway *itself* caused the driver to lose control and drive off of the roadway, cross the centerline, or collide with other cars or pedestrians. *Keller*, 146 Wn.2d at 240 (failure to add stop signs to intersection); *Unger*, 118 Wn. App. at 176-77 (failure to remove "washout" and "loose gravel, mud, and debris in the roadway"); *see also Lucas v. Phillips*, 34 Wn.2d 591, 597, 209 P.2d 279 (1949) (failure to maintain bridge); *Ruff*, 125 Wn.2d at 700-01 (failure to install guardrail).

Road design/maintenance cases differ fundamentally from this case. So does the causal connection to PSE and Skagit County. Here, Mr. Lowman does not allege—and there undisputedly is no evidence to suggest—that PSE or Skagit County did anything to cause Ms. Wilbur to lose control of her vehicle and drive off of the roadway. Unlike road

design or maintenance cases, the alleged role of PSE and Skagit County only becomes pertinent *after* Ms. Wilbur left the roadway.¹⁰ There is no dispute that the pole, even if negligently placed, was located off of the roadway. It also is undisputed that Ms. Wilbur left the roadway due to no fault of either PSE or Skagit County. Mr. Lowman has not cited a single case holding that PSE and Skagit County can or should be held legally liable in this situation.

c. *Keller* overrules some cases—but none that PSE and Skagit County rely on here.

Mr. Lowman argues the *Keller* decision “repudiated” Washington’s well-developed authority on legal causation, including *Medrano*. Br. of Appellant at 24. This is not true. *Keller* devotes a section of its opinion on “Overruling Prior Precedent.” 146 Wn.2d at 254-55. It explicitly overrules one case and distinguishes others on their facts. *Id.* These cases, however, do not include *Medrano* or any other case cited by PSE and Skagit County. *See id.*

¹⁰ Even then, Mr. Lowman concedes that its view of where the pole should have been placed *still* would have resulted in some type of accident, given Ms. Wilbur’s extreme driving. CP 251 (acknowledging that if pole were placed “in a safe location ten or more feet from the traveled portion of the roadway,” the accident still would have occurred, although Mr. Lowman’s injuries might have been less severe).

5. Post-Keller Decisions Confirm the Continuing Viability of the Legal Causation Doctrine.

While Mr. Lowman insists *Medrano* and its predecessors were overruled by *Keller*, CP 228-29, he neglects to recognize there are *post-Keller* cases applying the legal causation doctrine to relieve defendants from liability even where a duty is owed and is breached. *See, e.g., Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 73 P.3d 1019 (2003).¹¹

In *Minahan*, the plaintiff sued the Puyallup Fair and her employer (a school district) for severe injuries sustained when she was hit multiple times by a drunk driver on Fair property. *Id.* at 885. Defendants moved for summary judgment, arguing lack of legal causation. *Id.* at 888. The trial court denied the motion but the Court of Appeals reversed. *Id.* at 899. Citing *Medrano*, the court divided its analysis into two distinct parts, Part I (duty) and Part II (legal causation):

¹¹ There are several recent Washington cases that, while factually different than our case, also establish the continuing viability of the legal causation doctrine. *E.g., Ang v. Martin*, 154 Wn.2d 477, 482, 113 P.3d 637 (2005) (discussing legal causation element of proximate cause in attorney malpractice case); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311-12, 151 P.3d 201 (2006) (acknowledging lack of legal causation in plaintiff's negligence suit against Labor Ready for murder committed by one of its employees but dismissing Labor Ready on cause in fact grounds); *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 255, 139 P.3d 1131 (2006) (dismissing DOC on legal causation grounds where plaintiff argued DOC should have kept murderer in jail longer and thereby prevented plaintiff's sister's death). *Medrano* itself has been cited *nine* times in published cases for its discussion of the legal causation standard.

[W]e must first decide whether the defendants owed Minahan any duty. If the defendants did not owe the duties that Minahan suggests, then further analysis is unnecessary. ***If they did owe a duty, then we must address the remaining aspect of legal causation: whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.***

Id. at 890 (citations omitted) (emphasis added). As to Part I of the opinion—duty—the court determined that denying summary judgment was proper because there was a fact issue on foreseeability. *Id.* at 897. However, the court continued to address legal causation in Part II of its opinion. There, the court cited *Braegelmann* and other legal causation cases and focused on the policy decision that courts make in cases where harm is caused by severe, drunken behavior. *Id.* at 898-99. The court indicated that its job is to look at the precedent and other similar situations reflected in court decisions and ask on which “side of the line” does the case fall. *Id.* at 898. In *Minahan*, as here, it is on the side of summary judgment. The Court of Appeals reversed and dismissed the defendants as a matter of law. Contrary to Mr. Lowman’s position, *Minahan* makes clear that the doctrine of legal causation, as a separate and distinct inquiry from duty, breach, or cause in fact, is alive in Washington after *Keller*.

6. The Court Should Disregard Mr. Lowman’s Repeated References to Other Accidents and the Hearsay Statements of Counsel About “Road Design.”

Mr. Lowman sought at summary judgment to introduce evidence of other accidents involving the same power pole Ms. Wilbur hit in this case. Whether the pole has been involved in other accidents, either before or after Ms. Wilbur’s collision, is at best relevant to duty or the foreseeability of harm (part of a cause-in-fact analysis). It is not relevant to legal causation. The pole’s involvement in other accidents, even if verified, has nothing to do with the policy limits the Court should place on PSE and Skagit County’s liability *in this case* as a matter of law. What matters here is *this* accident. What matters here is Ms. Wilbur’s undisputed criminal conduct. Assume there were 30 prior accidents involving this same pole. If all 30 were the result of a person speeding down the road, legally drunk, and losing control of her car and driving off the road as a result, legal causation would be lacking in every case.

The Court also should disregard the numerous hearsay statements Mr. Lowman’s attorney submitted on summary judgment regarding supposed “road design” evidence, including summaries of conversations he may have had with a road design expert. *E.g.*, CP 252-53 (Keane Decl. in Opp. to Mtn. Summ. J.). Mr. Lowman’s inadmissible hearsay pertains to the issues of duty and breach. Again, those issues are conceded for

purposes of this motion. *See Medrano*, 66 Wn. App. at 610-11 (affirming summary judgment for lack of legal causation assuming for purposes of decision that utility and county breached their duty of care).¹²

7. Mr. Lowman’s Intervening/Superseding Cause Theory Was Not Before the Trial Court on Summary Judgment and Is Therefore Outside the Scope of This Court’s Review of That Order.

Mr. Lowman’s primary argument on appeal is that “whether defendants’ negligence should be excused by an intervening or superseding cause is a question for trial.” Br. of Appellant 9. But Mr. Lowman did not raise his intervening or superseding cause theories before the trial court in opposition to the summary judgment motion. *See* CP 539-52 (Opp. Mtn. Summ. J.). Mr. Lowman’s entire opposition brief focused on the question of duty—the element PSE and Skagit County conceded for the purposes of their summary judgment motion. *See* CP 505. Mr. Lowman first raised his intervening/superseding cause arguments in his motion for reconsideration of the trial court’s summary judgment decision. *See* CP 215. The only issue before the trial court on summary judgment was legal causation, and this Court should limit its

¹² For the reasons discussed *infra*, Part IV.C.1, the Court also should decline to consider the declarations of Mr. Lowman’s road design expert submitted *after* summary judgment.

review to that issue.¹³ RAP 9.12 (the Court considers only issues that were before the trial court on summary judgment); *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007) (“Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.”).

B. The Court Should Affirm the Trial Court’s Denial of Mr. Lowman’s Motion for Reconsideration.

1. Standard of Review

This Court may overturn the trial court’s denial of Mr. Lowman’s motion for reconsideration only if the decision constitutes a manifest abuse of the trial court’s discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). Abuse of discretion is found where discretion is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.*

2. The Trial Court Acted Well Within Its Discretion in Denying Mr. Lowman’s Motion for Reconsideration.

The trial court did not abuse its discretion in declining to grant Mr. Lowman’s motion for reconsideration of the summary judgment ruling. Mr. Lowman sought reconsideration based on alleged error of law

¹³ Should the Court decide Mr. Lowman’s intervening/superseding cause arguments are properly before it on review of the summary judgment order, it should reject those arguments for the reasons discussed at Part IV.B.2.c, *infra*.

and newly discovered evidence (given his submission of two new declarations). CR 59(a) provides in relevant part:

On the motion of the party aggrieved . . . any [] decision or order may be vacated and reconsideration granted . . . for any one of the following causes materially affecting the substantial rights of such parties:

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(8) Error in the law occurring at the trial and objected to at the time by the party making the application.

There was no basis for reconsideration under any CR 59 prong.

a. The court was right the first time.

The Court correctly recognized, for all the reasons discussed above with respect to summary judgment, that legal causation, as distinct from questions of duty, breach, or cause in fact, operates to relieve defendants from liability in Washington where “as a matter of policy, the connection between the defendant’s acts and their ultimate result is too remote or insubstantial to impose liability.” *Medrano*, 66 Wn. App. at 613-14.

Mr. Lowman again argued on reconsideration his theory that *Medrano* and its predecessors were overruled by *Keller*. CP 228-29. Yet

Mr. Lowman’s arguments again ignored, *inter alia*, the existence of post-

Keller cases relying on legal causation to limit liability. *E.g., Minahan*, 117 Wn. App. 881 (2003); *see also* discussion at Part IV.A.4, *supra*.

b. Mr. Lowman’s intervening/superseding cause arguments were not properly before the trial court on his motion for reconsideration.

Washington courts do not grant reconsideration based on legal theories that could have been presented in the summary judgment proceedings. Mr. Lowman’s briefing on intervening cause in his motion for reconsideration was an untimely attempt to obtain a second bite at the apple where his timely submitted arguments in opposition to summary judgment failed. Mr. Lowman asserted the Court made an error of law based on his *own failure* to bring to its attention what Plaintiff contended was “relevant authority.” CP 215. But “CR 59 does not permit a plaintiff to propose new legal theories of the case that could have been raised before entry of an adverse decision.” *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Mr. Lowman offered no explanation beyond his own oversight for why his arguments on intervening cause were not timely presented at summary judgment. If the trial court allowed him to proceed with those arguments on reconsideration—without any explanation for the delay—it would have effectively extended the deadline for responding to summary

judgment motions from 28 to 38 days given the 10-day timeframe during which motions for reconsideration may be raised. CR 56(c), 59(b). The court properly exercised its discretion in declining to do so.

Plaintiff then attempted to bring his arguments on intervening cause within the scope of those made at the summary judgment hearing with a blatant misstatement of the trial court's ruling. Plaintiff asserted: "[T]he Court's ruling that an *intervening cause* excused defendants is error and this Court's ruling should be reconsidered and reversed." CP 216 (emphasis added). The Court's ruling, however, was *not* based on intervening cause:

I do come to the conclusion that *based upon legal causation*, the motions for summary judgment should be granted, and I do grant them. And those two defendants are dismissed

RP 11/12/09, at 42-43 (emphasis added). The Court never uttered the words "intervening cause" during the summary judgment hearing. *See id.*

Mr. Lowman attempted on reconsideration, as he does in his appellate brief (Br. of Appellant at 9-10), to reframe the summary judgment ruling as based on intervening cause by arguing—erroneously—that *Medrano* "is an intervening cause case." CP 216 (citing 66 Wn. App. at 611). But none of the cases relied upon by PSE, Skagit County, and the trial court was decided based on intervening cause. Mr. Lowman's

citation was and is to an argument by the parties in *Medrano*, not the court's holdings, or even dicta. *See id.*; Br. of Appellant at 9-10. As the trial court recognized, *Medrano* is a case decided on legal causation grounds:

Here it was Schwendeman's driving that was the legal cause of the accident. Considering his driving, the County's alleged improper maintenance of the road and/or shoulder and the possible negligent placement of the pole by Puget Power are too remote to impose liability.

Medrano, 66 Wn. App. at 611-612 (citations omitted).

Likewise, *Cunningham*, *Braegelmann*, and *Klein* were decided on legal causation rather than intervening cause. *Cunningham*, 61 Wn. App. at 570 (“Based on our determination that the United States’ acts were not the legal cause of Cunningham’s accident, we affirm the trial court.”); *Braeglemann*, 53 Wn. App. at 386 (“[T]he County met its burden of showing that it was entitled to summary judgment based on the doctrine of legal causation.”); *Klein*, 41 Wn. App. at 636 (“As a matter of public policy, the City cannot be expected to guard against this degree of negligent driving.”). Neither *Cunningham* nor *Braegelmann* mentions the word “intervening” at all in the opinion. *See Cunningham*, 61 Wn. App. 562; *Braegelmann*, 53 Wn. App. 381. *Klein* involved a jury instruction

referencing intervening cause, but was ultimately decided on public policy, *i.e.*, legal causation, grounds. *Klein*, 41 Wn. App. at 638-39.

c. Even if intervening cause arguments were properly before the court, they do not support Mr. Lowman's position.

Mr. Lowman principally relied in his reconsideration motion (and relies here) on *Crowe v. Gaston* to argue the doctrine of intervening cause controls the outcome of this case. *Crowe* not only acknowledges the continuing viability of legal causation, but also decides the legal causation issue as a matter of law on review of summary judgment. The case, therefore, supports the trial court's summary judgment dismissal of PSE and Skagit County.

Crowe was a suit brought by a passenger injured in a drunk-driving collision. 134 Wn.2d 509, 513, 951 P.2d 1118 (1998). Both the injured passenger and the driver were teenagers. *Id.* The driver had consumed beer purchased by another teenager from defendant Oscar's. *Id.* Oscar's is a commercial beer and alcohol vendor. *See id.* at 514. The passenger sued Oscar's for negligence as a result of selling alcohol to a minor and failure to properly check IDs. *Id.*

Crowe's holdings on intervening cause are not pertinent here. They are relevant only to the cause-in-fact prong of proximate cause, which PSE and Skagit County conceded for the purposes of their motion.

Crowe, moreover, discusses legal causation as distinct basis for summary judgment. In determining whether Oscar's, as a commercial vendor, could be liable for injuries caused to the plaintiff by a teenager who consumed alcohol it supplied to another teenager, the court considered both the defenses of legal causation and intervening/superseding cause. *Id.* at 518-20. With regard to legal causation, the court confirmed that legal causation is an element of proximate cause distinct from cause in fact, and that legal causation is a policy matter for the court to decide as a matter of law on summary judgment. *Id.* at 518. The court examined intervening cause as a distinct inquiry germane to whether Oscar's actions could be the *cause in fact* of the teenager's injury. *Id.* at 519.

Finding no fact issue as to whether Oscar's was a cause in fact of plaintiff's injuries, the *Crowe* court next examined whether the defendant could escape liability on legal cause grounds as a policy matter. *Id.* at 518. Notably, the Supreme Court ruled on legal causation as a matter of law on review of summary judgment. The court held that there was legal

causation—and for good reason. Unlike PSE and Skagit County here, Oscar’s was closely connected to the drunken behavior that caused the accident. Oscar’s was a commercial seller of beer, and the claim against it was that it should not have sold beer to minors.¹⁴ The court in *Crowe* considered legal causation and concluded:

The policy consideration behind the legislation prohibiting vendors from selling alcohol to minors are best served by holding vendors liable for the foreseeable consequences of the illegal sale of alcohol to minors. Thus, we conclude that legal cause is satisfied in this case.

Id.

Oscar’s as a defendant in *Crowe* is analogous to defendant Country Corner bar here, to which the legal causation defense likewise does not apply. Oscar’s is a shop that sells beer and alcohol; the County Corner is a bar that sells beer and alcohol. The claim against Oscar’s was for improper service to minors; the claim against Country Corner is for improper over-service. There is a clear-cut connection to the resulting undisputed drunken behavior in both cases—assuming duty, breach, and cause in fact, as the Court must when addressing legal causation. As a result, the Court was on firm ground in deciding legal causation as a

¹⁴ Oscar’s duty to protect teenagers from injuries related to alcohol consumption arose from a Washington statute prohibiting the sale of alcohol to minors. *Id.* at 516. That same statute provided vendors with a protective device—immunity from liability if the vendor (1) checked identification, and (2) obtained certification from the purchaser of his age prior to the sale. *Id.* at 521.

matter of law against the alcohol seller in *Crowe*—just as much as this Court would be on firm ground to do so against the Country Corner bar here. For this very reason, Country Corner did not join in—and reasonably could not have joined in—the summary judgment motion filed by PSE and Skagit County.¹⁵

Crowe's holding on legal causation is the correct policy determination that alcohol sellers may be liable when they illegally sell alcohol to minors who then drive drunk and suffer injuries as a result. Washington courts have found the opposite to be true—*i.e.*, that legal causation is lacking as a matter of law—in negligent road design and pole placement claims against municipalities and utilities where reckless and/or drunk drivers caused the injuries to the plaintiff. *See Medrano, Cunningham, Braegelmann, and Klein.*

Mr. Lowman's arguments regarding duty and foreseeability were irrelevant to the court's application of the doctrine of legal causation to this case. Mr. Lowman's assertion that the duty and legal causation

¹⁵ Defendants Jennifer Wilbur and the Country Corner bar did not join in, or oppose, PSE's and Skagit County's motion for summary judgment. Yet Country Corner purported to both join in Mr. Lowman's reconsideration motion (CP 143-47) and respond to it (CP 139-42). Because Country Corner did not oppose the summary judgment motion, Country Corner had no standing to seek reconsideration, and its papers should not be considered on review here. *See* CR 59(a) (standing afforded to party "aggrieved"). Country Corner also is not a party to this appeal.

analyses are “intertwined” ignores that, in Washington, whether a negligent defendant whose actions are a but-for cause of an injury may be relieved of liability on legal causation grounds is a determination based on public policy. The Washington cases Mr. Lowman cited in his motion for reconsideration, *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998), *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985), and *Taggari v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), recognize that some of the public policy considerations germane to a legal causation analysis may also be important in determining whether a duty exists in the first place. *See* CP 228. But acknowledging that public policy is relevant to both duty and legal causation is not equivalent to requiring a fact-based foreseeability analysis as part of the court’s legal causation inquiry. No Washington court (or any of the out-of state decisions relied upon by Mr. Lowman) so holds.¹⁶ Indeed, *Schooley* itself states:

[A] court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation. This would nullify the legal causation element and along

¹⁶ *None* of the out-of-state pole placement cases cited by Plaintiff is a legal causation case. *See* Br. of Appellant at 17 n.5 (citing cases). Mr. Lowman does not provide the Court with the name of the case, but Mr. Lowman’s footnote 5 is a quote from *Laabs v. Southern California Edison Co.*, 175 Cal. App. 4th 1260 (2009). That case was decided on based on duty, *not* legal causation. *Id.* at 1279 (“We believe that the evidence has not established the absence of a duty.”).

with it decades of tort law. Legal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.

134 Wn.2d at 479 (emphasis added).

d. The court properly declined to consider Mr. Lowman's newly submitted but previously available evidence.

Mr. Lowman failed to explain why he was unable to submit the expert declarations of Timothy Moebes and Edward Stevens (together, "Expert Declarations") during the summary judgment proceedings. The trial court properly declined to consider them. *See* RP 4/21/10, at 11-12.

Under CR 59, a decision may be reconsidered on the basis of newly discovered evidence where the evidence: (1) will probably change the result of the hearing, (2) was discovered since the hearing, (3) could not have been discovered before the hearing by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 87, 60 P.3d 1245 (2003) (citing *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987)).

A motion for reconsideration is not an opportunity to submit evidence the moving party merely wishes it submitted at the summary judgment hearing. In *Go2Net*, CI Host's motion for reconsideration was denied where, *inter alia*, it relied heavily on a declaration presented for the

first time in its motion. *Id.* at 90. The court held the declaration was not newly discovered evidence where it “was not presented to the trial court at the summary judgment hearing, and CI Host has not shown that the declaration could not have been obtained earlier.” *Id.*; *see also Wagner Dev’t, Inc. v. Fidelity & Deposit Co. of Md.*, 95 Wn. App. 896, 906-07, 977 P.2d 639 (1999) (“Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.”) (citations omitted); *Adams v. W. Host, Inc.*, 55 Wn. App. 601, 779 P.2d 281(1989) (holding movant’s contention she was unable to obtain a second declaration between receipt of opponent’s memorandum and date of hearing does not satisfy the definition of newly discovered evidence).

Mr. Lowman’s Expert Declarations did not qualify as newly discovered evidence. In arguing for a continuance on summary judgment, Mr. Lowman stated he needed more time to conduct discovery for the purpose of providing his experts with sufficient information to render an opinion. CP 555 (“Neither plaintiff’s accident reconstructionist nor plaintiff’s road design experts have all the information which they need in order to render opinions about the accident.”). However, Mr. Lowman did

not conduct any discovery between the summary judgment proceedings and his motion for reconsideration. Still, he was able to submit the expert opinions he previously claimed he could not obtain. *See* CP 148-52 (Moebes Decl. providing opinion on accident reconstruction); CP 164-72 (Stevens Decl. rendering opinion on pole placement).

Mr. Lowman put forth no explanation for why he could not submit the Expert Declarations during the summary judgment proceedings.

Washington law is clear that these materials, and the exhibits attached to them (*e.g.*, newly submitted accident reconstruction drawings) could not be considered on his motion. For all these reasons, the court ruled that it did not consider the Expert Declarations:

I'm also not considering—I did not consider the new materials submitted that were submitted to be for the motion for reconsideration because it was not submitted to me as newly discovered evidence, it was submitted as additional materials. And that is not proper to submit that for a motion for reconsideration.

So we are talking semantics here. If you want to put in the order that those materials were submitted to the court, you may. But at the same time *I'm making a record here that I did not consider them, because it would be improper to consider them . . . I will sign an order that those materials were submitted, but that I did not consider them.*

RP 4/21/10, at 11-12.

e. **The Expert Declarations would not have altered the court's legal causation ruling in any event.**

Even if timely submitted, Mr. Lowman's new evidence would not have supported reconsideration. The Court made clear that its decision was based purely on an issue of law and would not have changed based on further evidence as to the circumstances of the accident:

MR. KEANE: What troubled me, Your Honor, was I thought the upshot of some of your remarks, and I don't intend to reargue anything here, but I thought the upshot of your remarks was that you pinned some of your legal causation reasoning upon the absence of material and information about roadway and off roadway.

THE COURT: No, I didn't. I truly didn't. So I don't think a motion denying the request for continuance is necessary. I considered that the motion wasn't in front of me because *I did not factor in factual matters.*

RP 11/12/09, at 45 (emphasis added).

The untimely Expert Declarations set out "factual matters" irrelevant to the legal causation analysis. Mr. Stevens opined that PSE and Skagit County placed the pole in the wrong location off the roadway. CP 168-72. This has no bearing on why Ms. Wilbur drove drunk off of the side of the roadway. Mr. Moebes opined that if the pole were properly placed, the accident still would have occurred, but the impact and resulting harm to Mr. Lowman might have been less severe. CP 151. This has nothing to do with legal causation. The trial court was clear its summary

judgment and reconsideration rulings were based solely on legal causation. Accordingly, even if considered, the declarations fail to create a genuine issue of material fact sufficient to overturn the court's ruling.

C. The Court Should Decline to Consider Evidence and Arguments Outside the Scope of the Record on Review.

1. The Court Should Not Consider the Expert Declarations on Appeal.

Mr. Lowman's appellate brief repeatedly references the Expert Declarations (*e.g.*, Br. of Appellant at 4-5, 7-8)—but the declarations were not considered by the trial court when it granted summary judgment. Nor were they made part of the record on reconsideration.

The only evidence that may be considered on appeal of a summary judgment order is that listed in the order itself. RAP 9.12 provides in relevant part:

On review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court.

Here, the summary judgment order lists the following evidence (in addition to the parties' briefing) that the trial court considered:

- b. Declaration of Brian Capron dated October 13, 2009, including exhibits A to B;
- c. Declaration of Leanne R. Wiseman dated October 13, 2009, including exhibits A to B;

- d. Declaration of Mark A. Wilner dated October 15, 2009, including exhibits A to U; and
- f. Declaration of T. Jeffrey Keane in Support of Plaintiff's Motion to Continue Defendants' Summary Judgment Motion Pursuant to CR 56(f) dated November 2, 2009, including exhibits A to K.

CP 8. The order does not list the Expert Declarations.¹⁷ As a result, the Court should disregard them on its review of the order. RAP 9.12; *Green*, 137 Wn. App. at 679 (“[The provisions of RAP 9.12] are simple, easy to comply with, and mandatory.”).

Mr. Lowman may argue the Court should consider his new evidence because it was presented to the trial court on his motion for reconsideration. This argument should likewise be rejected. In determining whether evidence was before the court, the reviewing court may look to “supplemental orders” of the trial court:

Documents or other evidence called to the attention of the trial court but not designated in the order shall be made part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12. An order on a motion for reconsideration is a “supplemental order” for the purposes of RAP 9.12. See *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 755, 162 P.3d 1153 (2007).

¹⁷ Nor could it have. The Expert Declarations were first submitted to the trial court *after* it ruled on summary judgment. The trial court granted summary judgment on November 12, 2009. CP 7. The Declaration of Edward Stevens was signed 11 days later, on November 23, 2009. CP 172. The Declaration of Tim Moebes was signed on November 19, 2009. CP 152.

But the trial court's order on Mr. Lowman's motion for reconsideration and oral rulings on entry of judgment make clear that the court *did not* consider the late-submitted Expert Declarations. CP 9; RP 4/21/10, at 11-12. PSE and Skagit County objected to the new declarations in their opposition to Mr. Lowman's motion for reconsideration. CP 134. The trial court properly declined to consider the late-submitted materials because Mr. Lowman failed to meet the standard for reconsideration based on new evidence under CR 59(a)(4). RP 4/21/10, at 11-12.

The order on appeal further reflects the court's oral ruling. The court struck Mr. Lowman's proposed language stating it had "considered" the declarations, and instead acknowledged only that they were "submitted" to the court. CP 9. Because the Expert Declarations were not before the trial court on summary judgment, or made part of the summary judgment record by supplemental order on reconsideration, the declarations are not properly part of the record on review by this Court, and all references and citations to them should be disregarded.

As noted above, *see* Part IV.B.2.e, even if the Expert Declarations were considered, they do not supply facts relevant to legal causation—the

sole basis of the trial court's summary judgment decision. As a result, the Expert Declarations would not compel reversal in any event.

2. Plaintiff's CR 56(f) Arguments Are Outside the Scope of This Court's Review Because the Trial Court Entered No Order and Made No Ruling on That Issue.

The Court also should decline to consider Mr. Lowman's CR 56(f) arguments on appeal. The trial court entered no order and made no ruling on that issue. RP 11/12/09, at 45-46; RP 4/21/10, at 9; *see also* CP 9.

This Court properly reviews only "decisions" and "parts of decisions."

RAP 2.4(a). "Decisions" include "orders," "rulings," and "judgments."

RAP 2.4(b); RAP 2.2(a).

The "Order taking no action on plaintiff's CR 56(f) Motion"

Mr. Lowman identifies in his Notice of Appeal does not exist. *See* CP 9.

Mr. Lowman attempted on multiple occasions to persuade the trial court to enter such an order, and on each occasion it declined to do so.

RP 11/12/09, at 45-46; RP 4/21/10, at 9.

The trial court properly did not enter such an order because Mr. Lowman's CR 56(f) motion had never ripened. Mr. Lowman made clear that he only sought a CR 56(f) continuance "*if* the defendants are not, in fact, conceding both negligence and cause in fact for the purpose of this [summary judgment] motion." CP 554 (emphasis added). However,

PSE and Skagit County expressly conceded both negligence and cause in fact for the purposes of the motion. CP 505 (Mtn. Summ. J.) (“[A]ssuming for the sake of this motion only that PSE and Skagit County were negligent as alleged, and that their alleged negligent acts were ‘causes-in-fact’ of the accident”); CP 247 (Reply) (“[P]laintiff acknowledges his motion [for continuance] is necessary only if PSE and Skagit County are not seeking summary judgment on the purely legal issue of causation. ***But they are.***”) (emphasis added).

Because PSE and Skagit County were unequivocal that they conceded negligence and cause-in-fact for the purposes of their motion for summary judgment, the trial court did not consider that any motion for CR 56(f) continuance before it and declined to enter any ruling on the issue:

THE COURT: ***I treated your motion as for a continuance not being argued*** if the defense was conceding [negligence and cause in fact].

MR. KEANE: What troubled me, Your Honor, was I thought the upshot of some of your remarks, and I don’t intend to reargue anything here, but I thought the upshot of your remarks was that you pinned some of your legal causation reasoning upon the absence of material and information about the roadway and off roadway.

THE COURT: ***No, I didn’t. I truly didn’t.*** So I don’t think a motion denying the request for continuance is necessary. ***I considered that the motion wasn’t in front of***

me because I did not factor in factual matters. I was asking questions about it just out of idle curiosity rather than an underpinning of my legal decision.

MR. KEANE: I understand your ruling. I guess for record purposes, I object to denial of the motion.

THE COURT: Yeah. Well, that's what we're getting at. I didn't deny the motion, so I'm not prepared to sign an order to the effect that I denied the motion.

RP 11/12/09, at 45-46.

Mr. Lowman tried once again to reargue his CR 56(f) arguments on reconsideration. CP 230-31. He again was unsuccessful. *Id.*

Mr. Lowman tried unsuccessfully for the third time when PSE and Skagit County sought entry of judgment. He again argued that the trial court should enter an order stating it had "denied" Mr. Lowman's "motion" for CR 56(f) continuance. CP 22; RP 4/21/10, at 8-9. And again, the trial court rejected Mr. Lowman's efforts to memorialize a ruling it did not make. The court stated:

THE COURT: . . . In regards to the request for a continuance, *I did not consider that there was a request for a continuance* because I specifically asked Mr. Keane . . . on the record, you stated in your brief that if the defendant concedes negligence, then you are asking for a continuance; did you not? And he stated that yes, that is correct.

. . .

MR. DEGAN: . . . But the problem is, we've got a motion that was filed, never stricken, and no order entered.

THE COURT: Actually, I'm sorry, *you did not have a motion for continuance*. There was a response to the motion for summary judgment saying that if negligence is not conceded, we're asking for a continuance. If it is conceded, we're not asking for a continuance. I'm sorry, but *the position your firm put the Court in was double speak . . .* And it was clear in the brief that we're asking for a continuance if the moving party is not conceding negligence. They conceded negligence. *The issue, therefore, in regards to a continuance, was not before the Court . . . The Court will stand by the record . . . That the motion for continuance was made in the alternative . . .*

[I]n the motion for reconsideration there was a request for continuance again, and you can't have it both ways. It was couched in the alternative . . . And I've made my ruling.

RP 4/21/10, at 8-10 (emphasis added). The court required Mr. Lowman to strike the CR 56(f) language from the order prior to entry. *See* CP 7, 9.

Finally, the Court should reject any effort by Mr. Lowman to appeal the trial court's "decision" not to enter an order or ruling on his contingent CR 56(f) motion. The decision is neither listed among those appealable as a matter of right under RAP 2.2(a), nor does it constitute an order or ruling that "prejudicially affects the decision designated in the notice" under RAP 2.4(b). A ruling prejudicially affects the order designated in the notice of appeal if "the order appealed cannot be decided without considering the merits of the previous order." *Right-Price Recreation, LLC v. Connelis Prairie Cmty. Council*, 146 Wn.2d 370, 379, 46 P.3d 789 (2002) (quotation omitted). Some connection between the

order appealed and the “decision” sought to be appealed is required “other than that the appealed order would not have occurred if the earlier order had been decided differently.” *Id.* Here, the merits of the trial court’s decision on whether a denial order should be entered (as distinct from a decision whether to grant or deny a continuance) had no bearing on its grant of summary judgment. The trial court would have granted summary judgment regardless of whether it entered any order denying Mr. Lowman’s contingent CR 56(f) motion or not. The only difference is whether Mr. Lowman would have the opportunity to appeal his CR 56(f) arguments. Mr. Lowman’s desire to appeal is not enough to render a non-existent order or a “decision” not listed in his notice appealable.

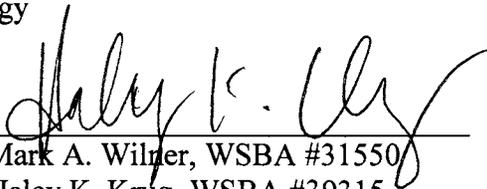
V. CONCLUSION

For all of the foregoing reasons, PSE and Skagit County respectfully request that the Court: (1) affirm the trial court’s grant of summary judgment in their favor; and (2) affirm the trial court’s denial of Mr. Lowman’s motion for reconsideration.

RESPECTFULLY SUBMITTED this 11th day of October,
2010.

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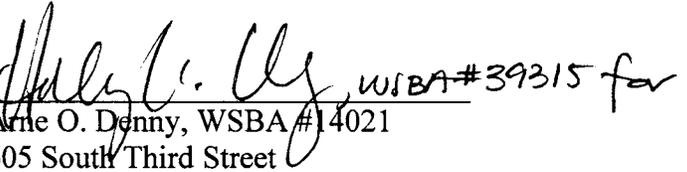
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that a copy of the foregoing document was served at the following addresses on October 11, 2010 via the methods indicated:

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