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Supreme Court No. _____
Court of Appeals No. 65359-8-I

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SUPREME COURT OF THE STATE OF WASHINGTON

NATHAN LOWMAN, a single person,

Appellant,

v.

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,

PUGET SOUND ENERGY, INC. a Washington corporation, and
COUNTY OF SKAGIT, a municipal corporation,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals, Division I, affirmed the dismissal of defendants Puget Sound Energy, Inc. (“PSE”) and Skagit County from plaintiff Nathan Lowman’s personal injury lawsuit in a straightforward, unpublished decision grounded in the long line of Washington case law governing the legal causation doctrine. *See, e.g., Medrano v. Schwendeman*, 66 Wn. App. 607, 836 P.2d 833 (1992); *Cunningham v. State*, 61 Wn. App. 562, 811 P.2d 225 (1991); *Braegelmann v. County of Snohomish*, 53 Wn. App. 381, 766 P.2d 1137 (1989); *Klein v. City of Seattle*, 41 Wn. App. 636, 75 P.2d 806 (1985). Applying this well-established doctrine, the Court of Appeals, like the trial court, properly determined that the alleged conduct of PSE and Skagit County could not have been the legal cause of Mr. Lowman’s injuries given defendant Jennifer Wilbur’s undisputed, criminally reckless, drunk driving that led to the accident.

Mr. Lowman contends that two other appellate decisions overruled the legal causation doctrine in Washington. However, in the main case he cites—*Keller v. City of Spokane*—the Washington Supreme Court explicitly stated that the trial court “still retains its gatekeeper function and may determine that a [defendant’s] actions were not the *legal cause* of the accident.” 146 Wn.2d 237, 252, 44 P.2d 845 (2002) (emphasis added).

Cases *after Keller*, like the Court of Appeals' decision here, have continued to apply the legal causation doctrine, including on summary judgment. *See, e.g., Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 73 P.3d 1019 (2003). The second decision Mr. Lowman cites—*Unger v. Cachon*, 118 Wn. App. 165, 73 P.3d 1005 (2003)—does not even mention legal causation, much less overturn the doctrine.

As the Court of Appeals properly determined, abundant Washington authority issued both before and after *Keller* and *Unger* establishes that legal causation remains a valid ground for dismissal under the undisputed circumstances presented in this case. Contrary to Mr. Lowman's assertions, the Court of Appeals directly addressed the appellate decisions he claims conflict with the decision here, and the court cogently explained why those decisions did not affect its ruling. In short, there is no "conflict with a decision of the Supreme Court" and no "conflict with another decision of the Court of Appeals." RAP 13.4(b). Mr. Lowman's petition, therefore, should be denied.

II. STATEMENT OF THE CASE

The Court of Appeals correctly summarized the facts and procedural background of this case. *Lowman v. Wilbur, et al.*, No. 65359-8-I, slip op. at 2–3 (Wash. Ct. App. June 27, 2011). Further detail is as follows:

A. Factual Background

The key facts are undisputed. Nathan Lowman met Jennifer Wilbur at a bar. He watched her drink “at least two cocktails.” CP 318 (Cardinal Dep.); CP 345–46 (Lowman Stmt.). By the end of the night, Mr. Lowman saw that Ms. Wilbur was “apparently intoxicated,” and due to her “overconsumption of alcohol,” “was not fit to operate a motor vehicle.” CP 524–25. Despite this, and against his “gut instinct,” Mr. Lowman got into a car with Ms. Wilbur behind the wheel. CP 319 (Cardinal Dep.); CP 346 (Lowman Stmt.); CP 382–82 (Lowman Dep.); CP 404 (McCann Dep.).

The two left the bar and proceeded along Satterlee Road, a two-lane, curvy, country road near Anacortes. CP 422 (Cardinal Rpt.); CP 381 (Lowman Dep.). 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.* and CP 422 (Cardinal Rpt.). 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 speeded down the “steep hill.” CP 315–16, 321–25, 328–34, 337–38, 438

(Cardinal accident reconstruction) (emphasis added). When she “attempt[ed] to negotiate a curve at a high rate of speed,” Ms. Wilbur “lost control of her vehicle.” CP 524 (Lowman Compl.); *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,” causing injuries to Mr. Lowman (CP 524).

Mr. Lowman has never disputed that Ms. Wilbur’s drunk driving caused the collision. *See* CP 540–42 (Opp. Mtn. Summ. J.). He alleges such conduct explicitly 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).

Discovery confirmed Mr. Lowman’s allegations about Ms. Wilbur’s criminally reckless conduct. The Washington State Patrol (“WSP”) conducted a full accident reconstruction, and tested Ms. Wilbur at 0.14 g/100mL or 14 percent, nearly *twice* the legal limit for blood

alcohol content. CP 488 (Capron Decl.); CP 492 (Capron Toxicology Rpt.); CP 425, 427 (Cardinal Aff.); CP 313, 315 (Cardinal Dep).

Ms. Wilbur later pleaded guilty to vehicular assault, a Class B Felony. CP 448 (Plea Stmt.). She admitted she “drove a vehicle with disregard for the safety of others” and thereby caused substantial bodily harm to Nathan Lowman. *Id.* 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).

The fact Ms. Wilbur was speeding is also not in dispute. 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).

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

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. He also did not challenge them on summary judgment. *See* CP 540-42 (Opp. Mtn. Summ. J.).

B. Procedural History

Mr. Lowman sued PSE and Skagit County (and others not parties to this appeal), alleging that they put the utility pole in the wrong place. CP 536-37 (Compl. against PSE); CP 467-68 (Compl. against Skagit County). PSE and Skagit County jointly moved for summary judgment on the grounds that, given Ms. Wilbur's undisputed drunk, speeding, criminal driving, they could not be the legal cause of Mr. Lowman's injuries. For the purposes of the motion, PSE and Skagit County conceded they had a duty to protect Mr. Lowman, and that they breached that duty. They also conceded the cause-in-fact prong of proximate cause, leaving only the

question of legal causation for the court. CP 505 (Mtn. Summ. J.); CP 247 (Reply); *see also Lowman*, slip op. at 2–3.

On November 12, 2009, the trial court granted PSE’s and Skagit County’s motion, having concluded any alleged negligence on the part of PSE and Skagit County was not the legal cause of Mr. Lowman’s injuries. 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. The trial court denied Mr. Lowman’s motion for reconsideration. CP 63–64; *see also Lowman*, slip op. at 3.

Mr. Lowman appealed the trial court’s decision. On June 27, 2011, the Court of Appeals, Division I, affirmed in an unpublished decision. *Lowman*, slip op. at 1.

III. ARGUMENT

The Supreme Court’s acceptance of review is governed by RAP 13.4(b). Mr. Lowman’s petition does not set out the test under which he contends review should be accepted. *See* RAP 13.4(c)(7). It appears, however, that Mr. Lowman seeks review pursuant to RAP 13.4(b)(1)—claiming a conflict between the Court of Appeals’ decision in this case and this Court’s decision in *Keller*—and RAP 13.4(b)(2)—claiming a conflict between the Court of Appeals’ decision in this case and that court’s

decision in *Unger*. Pet. 1. Under RAP 13.4, the only question before this Court is whether those conflicts exist. They do not. The Court, therefore, should deny the petition for review.

A. The Court of Appeals Correctly Described the Doctrine of Legal Causation.

As the Court of Appeals recognized, proximate cause includes two distinct elements: (1) cause-in-fact; and (2) legal causation. *Lowman*, slip op. at 4 (citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). Cause-in-fact “refers to the physical connection between an act and an injury and, because it involves a determination of what actually occurred, is generally left to the jury.” *Id.* (citing *Hartley*, 103 Wn.2d at 768). 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.* (quoting *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998)) (emphasis added). The focus is “whether, as a matter of policy, the connection between the defendant’s act and its ultimate result is too remote or insubstantial to impose liability.” *Id.* (quoting *Cunningham*, 61 Wn. App. at 572).

As the Court of Appeals also properly recognized, “[w]here the facts are not in dispute, legal causation is for the court to decide as a

matter of law.’” *Lowman*, slip op. at 4–5 (quoting *Crowe*, 134 Wn.2d at 518).

B. The Court of Appeals’ Decision Is Consistent with Abundant Pre- and Post-*Keller* Authority Applying the Legal Causation Doctrine.

The trial court granted summary judgment in PSE’s and Skagit County’s favor under clear and longstanding Washington case law applying the doctrine of legal causation in similar factual circumstances. RP 11/12/2009, at 42–43; *Medrano*, 66 Wn. App. 607; *Cunningham*, 61 Wn. App. 562; *Braegelmann*, 53 Wn. App. 381; *Klein*, 41 Wn. App. 636.

The Court of Appeals affirmed, relying on this same line of established cases:

Here, *our precedent is clear*: in at least four different cases with facts similar to those presented herein, we have held that legal causation was absent.

Lowman, slip op. at 6 (emphasis added).

1. Pre-*Keller* Legal Causation Case Law

The *Medrano* line of cases dictates 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:

- *Medrano*

As the Court of Appeals noted, “[t]he facts in *Medrano* are strikingly similar to those presented here.” *Lowman*, slip op. at 6. In *Medrano*, David Schwendeman lost control of his pickup truck while speeding and driving recklessly, and collided with a power pole. 66 Wn. App. 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 (PSE’s predecessor) and King County 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 . . . 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).

- *Cunningham*

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*, 103 Wn.2d at 781).

- *Braegelmann*

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.

- *Klein*

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[ly]” 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.

2. Post-Keller Legal Causation Case Law

While *Medrano*, *Cunningham*, *Braegelmänn*, and *Klein* remain the most factually similar cases to *Lowman*, they are far from the only cases decided on legal causation grounds in Washington. In arguing that *Keller* abrogated the doctrine of legal causation in Washington, Mr. Lowman ignores completely the numerous cases decided *after Keller* which uphold the validity of legal causation.

By our count, at least 27 Washington cases post-*Keller* have applied the legal causation doctrine, including on summary judgment.¹ For example, in *Minahan v. Western Washington Fair Ass’n*, the plaintiff sued the Puyallup Fair and her employer (a school district) for injuries sustained when she was hit multiple times by a drunk driver on Fair property. 117 Wn. App. at 885. Defendants moved for summary judgment, arguing lack of legal causation. *Id.* at 888. The trial court

¹ See, 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); *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); *Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881, 73 P.3d 1019 (2003). *Medrano* itself has been cited *nine* times in published cases for its discussion of the legal causation standard.

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):

[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*, and here, as determined by both the trial court and the Court of Appeals, it is on the side of summary judgment.

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.

C. The Court of Appeals' Decision Does Not Conflict with *Keller* or *Unger*.

Mr. Lowman's appeal brief, like his petition for review here, argued this Court's 2002 decision in *Keller*, "altered the considerations of justice, policy, and precedent underlying a determination of legal causation." *Lowman*, slip op. at 9. Mr. Lowman also argued the Court of Appeals' decision in *Unger* overruled the *Medrano* line of cases, abrogating legal causation in Washington. The Court of Appeals properly rejected those contentions. *Id.* at 11.

Neither *Keller* nor *Unger* is a legal causation case. Both cases turn solely on the *duty* element of negligence—the element PSE and Skagit County conceded for the purposes of their summary judgment motion. In *Keller*, plaintiff was injured when a car hit his motorcycle in an intersection at which the City of Spokane had failed to place a stop sign. *Keller*, 146 Wn.2d at 240–41. The City argued that because the plaintiff was not fault free (he was speeding and not wearing eye protection at the time of the accident), it owed no duty to protect him. *Id.* at 242. This Court disagreed. It held that "a municipality owes a duty to all persons,

whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.” *Id.* at 249.

Similarly, in *Unger*, the trial court dismissed Island County from a wrongful death suit on the grounds that the County owed no duty to the Ungers’ son because he was driving recklessly. *Unger*, 118 Wn. App. at 176. The Court of Appeals reversed, holding that pursuant to *Keller*, the County owed a duty to the plaintiff regardless of his negligence. *Id.*

Contrary to Mr. Lowman’s assertions, nothing in *Keller* or *Unger* conflicts with the Court of Appeals’ decision here. Indeed, *Keller* expressly recognized that legal causation remains a ground on which dismissal may be appropriate, even where a duty is found to exist:

[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).

Following this Court’s lead in *Keller*, the Court of Appeals here explained that while the duty and legal causation analyses may be intertwined:

[D]uty and legal causation are not synonymous—an analysis of duty focuses primarily on the defendant, while legal causation analysis, in cases such as this, involves consideration of the egregiousness of the principal actor’s conduct . . . “[I]t would be a mistake to assume that every time a duty of care has been established, legal cause is necessarily present.”

Lowman, slip op. at 11 (quoting 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 4.21, at 161 (3d ed. 2006)) (emphasis added). As a result, and by *Keller*'s own terms, *Keller* and *Unger* do not "directly impact [Washington courts'] previous decisions regarding legal causation." *Id.* Legal causation was simply not at issue in either case.²

In sum, as the Court of Appeals correctly determined, neither *Keller* nor *Unger* "overturned" Washington's legal causation doctrine "*sub silentio*" (Pet. 1) or otherwise. *Lowman*, slip op. at 9–11.

IV. CONCLUSION

For the foregoing reasons, Respondents PSE and Skagit County respectfully request that the Court deny Nathan Lowman's Petition for Review.

² 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). Here, as the Court of Appeals acknowledged, "neither PSE nor Skagit County did anything to precipitate the departure of Wilbur's vehicle from the roadway." *Lowman*, slip op. at 11. Under those circumstances, when the driver of the vehicle is intoxicated, speeding, and criminally reckless, "policy considerations—as evidenced by prior case law addressing legal causation—dictate a determination that the connection between the alleged negligent acts of PSE and Skagit County and Lowman's injuries is too remote to impose liability." *Id.* at 11–12.

RESPECTFULLY SUBMITTED this 10th day of October, 2011.

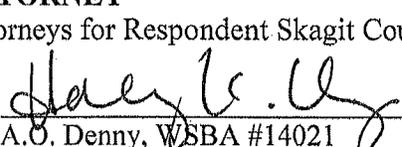
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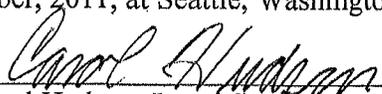
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that a copy of the foregoing ANSWER TO PETITION FOR REVIEW was hand-delivered by ABC Legal Services on October 10, 2011, to:

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Signed this 10th day of October, 2011, at Seattle, Washington.



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Dear Clerk:

Attached for filing in *Lowman v. Wilbur, et al.*, Court of Appeals No. 65359-8-I, is respondents' Answer to Petition for Review.

Thank you.

GORDON TILDEN THOMAS & CORDELL LLP

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Legal Secretary
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