

NO. 65359-8-I

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

NATHAN LOWMAN,

Appellant

v.

JENNIFER WILBUR AND JOHN DOE WILBUR, COUNTRY
CORNER, INC. d/b/a COUNTRY CORNER, ANACORTES
HOSPITALITY, INC. d/b/a COUNTRY CORNER, PUGET
SOUND ENERGY and COUNTY OF SKAGIT,

Respondents

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENT OF ERROR 2

 A. Assignment of Error 2

 B. Issues Pertaining to Assignments of Error 2

III. STATEMENT OF THE CASE AND PROCEDURE 3

 A. Facts 3

 B. Procedure..... 5

IV. ARGUMENT 9

 A. Whether Defendants’ Negligence Should Be Excused by An
Intervening/Superseding Cause Is a Question for Trial 9

 B. Even if Medrano v. Schwendeman Is A Legal Causation Not An
Intervening Cause Case Its Application Should Be Limited to
Cases With Similarly Outrageous Facts..... 21

 C. Medrano Relied Upon a Duty Analysis Repudiated by the Supreme
Court in Keller v. City of Spokane..... 25

 D. The Court Did Not Rule Upon Plaintiff’s CR 56(f) Motion Since
the Court Agreed That Plaintiff Need Submit No Facts. But In
Doing so the Court Deprived Itself of a Better Understanding of
the Accident. It Then Misapplied the Law Since Liability Can Be
Imposed on Defendants Even If No Defects Existed In the Road 31

 1. It was Error to Both Express Concern About Factual Matters –
Where no Issue of Fact Was in Play – And to Deny Plaintiff’s
CR 56(f) Motion. 31

 2. The Court Abused Its Discretion by Denying Plaintiff’s Motion
for Reconsideration..... 36

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Dreis & Krump Mfg.</i> , 48 Wn.App. 432, 739 P.2d 1177 (1987)	passim
<i>Bernethy v. Walt Failor's, Inc.</i> , 97 Wn.2d 929, 653 P.2d 280 (1982).....	20
<i>Bernier v. Boston Edison Co.</i> (1980) 380 Mass. 372, 378-382, 403 N.E. 2d 391	18
<i>Braegelmann v. County of Snohomish</i> , 53 Wash.App. 381, 384, 766 P.2d 1137, review denied, 112 Wash.2d 1020 (1989).....	10, 28
<i>Brashear v. Puget Sound Power & Light Co., Inc.</i> , 100 Wn.2d 204, 667 P.2d 78 (1983, Div.I).....	16
<i>Campbell v. ITE Imperial Corp.</i> , 107 Wn.2d 807, 733 P.2d 969 (1987). 13, 19, 20	
<i>Cogle v. Snow</i> , 56 Wash.App. 499, 507, 784 P.2d 554 (1990).....	36
<i>Cramer v. Department of Highways</i> , 73 Wn.App. 516, 520, 870 P.2d 999 (1994).....	12
<i>Crowe v. Gaston</i> , 134 W.2d 509, 951 P.2d 1118 (1998).....	10, 11, 12
<i>Cunningham v. State</i> , 61 Wash.App. 562, 571-72, 811 P.2d 225 (1991) 10, 34	
<i>George v. City of Los Angeles</i> (1938) 11 Cal.2d 303, 310-313, 79 P.2d 723).....	17
<i>Gerberich v. Southern Calif. Edison Co.</i> (1935) 5 Cal.2d46, 53 P.2d 94817	
<i>Grimsrud v. State</i> , 63 Wn.App. 546, 821 P.2d 513 (1991)	38
<i>Hartley v. State</i> , 103 W.2d at 779-781, 698 P.2d 77.	26

<i>Hayes v. Malkan</i> (1970) 26 N.Y.2d 295, 298, 310 N.Y.S.2d 281, 258 N.E. 2d 695	17
<i>Jacque by and Through Dyer v. Public Serv. Co</i> (Colo.Ct. App. 1994) 890 P.2d 138, 140	17
<i>Kennett v. Yates</i> , 41 Wn.2d 558, 564-65, 250 P.2d 962 (1952).....	14
<i>Kristjanson v. Settle</i> , 25 Wash.App. 324, 606 P.2d 283 (1980)	10
<i>Mc Millan v. State Highway Com'n</i> (1986) 426 Mich.46, 58-65, 393 N.W.2d 332.....	17
<i>McCluskey v. Handorff-Sherman</i> , 125 Wn.2d 1, 882 P.2d 157 (1994)	38
<i>Mississippi Power & Light Co. v. Lumpkin</i> (Miss.1998) 725 So.2d 721-722	17
<i>Norton v. City of Pomona</i> (1935) 5 Cal. 2d 54, 60-61, 53 P.2d	17
<i>Owen v. Burlington Northern & Santa Fe Railroad Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	15, 38
<i>Petersen v. State</i> , 100 Wn.2d 421, 435-36, 671 P.2d 230 (1983).....	14
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983)	14, 20
<i>Raybell v. State</i> , 6 Wn.App. 795, 496 P.2d 559 (1972)	37
<i>Rikstad v. Holmberg</i> , 76 Wn.2d 265, 269, 456 P.2d 355 (1969).....	14
<i>Scheel v. Tremblay</i> , 226 Pa.Super. 45, 47-48, 312 A.2d 45 (1973).....	17
<i>Sligar v. Odell</i> , 156 Wash.App. 720, 233 P.2d 914 (2010).	37
<i>Smith v. Acme Paving Co.</i> , 16 Wn.App. 389, 396, 558 P.2d 811 (1976) .	14
<i>State v. Cornelius</i> (Ind.Ct.App. 1994) 637 N.E.2d 195, 201	17
<i>Unger v. Cachon</i> , 118 Wash.App. 165, 73 P.3d 1005 (2003)	passim

<i>Weeks v. Chief of Washington State Patrol</i> , 96 W.2d 893, 895-96, 639 P.2d 732 (1982)	36
<i>Weiss v. Holman</i> , 58 Wis.2d 608, 626-627, 207 N.W. 2d 660 (1973)	17
<i>White v. Kent Medical Center, P.S.</i> , 61 Wn.App. 163, 810 P.2d 4 (1991),	36
<i>White v. Southern Calif. Edison Co.</i> , 25 Cal.App.4 th 442, 30 Cal.Rptr.2d 431, (1994).....	17
<i>Wojcik v. Chrysler Corp.</i> , 50 Wn.App. 849, 751 P.2d 854 (1988)	38

Other Authorities

Restatement (Second) of Torts §447, comment on Clause (a), (1965).....	19
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I. INTRODUCTION

Defendants PSE and Skagit County moved for summary judgment but not on the basis that no questions of fact existed. Indeed, defendants conceded for the purpose of the motion that they were negligent by placing, and allowing placement, respectively, of the utility pole which the defendant driver struck, injuring plaintiff.

But the trial court mistakenly believed that unless a defect in the roadway itself existed there would be no basis for finding liability against the moving defendants. That is neither the law nor was the existence of the proper law disputed by defendants. But that mistaken belief caused the court to dismiss. Given their negligence and its contribution to the harm suffered by plaintiff, a jury should be permitted to determine whether these defendants proximately caused harm to plaintiff. The motion should have been denied. The court erroneously relied upon a case where a reckless driver who drove himself off the road struck a utility pole. Mr. Lowman was not driving when he was injured. His case should not be controlled by an 'outlier' case where the plaintiff himself was the errant driver.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred when it concluded defendants PSE and Skagit County were excused from fault because defendant driver's conduct was an intervening and superseding cause of the accident.

2. Alternatively, the trial court erred when it concluded defendants PSE and Skagit County were excused from fault because they were not the legal proximate cause of plaintiff's harm.

3. The trial court erred by first inquiring about factual matters, and then denying plaintiff an opportunity to provide more factual information, in violation of CR 56(f) and CR 59.

B. Issues Pertaining to Assignments of Error

1. Whether foreseeably errant driving, resulting in impact with a utility pole improperly placed by PSE which had been destroyed before and replaced in the same location by PSE prior to the subject accident, excuses PSE and Skagit County from placing, and permitting, respectively, the pole? (Assignment of Error numbers 1 and 2)

2. Whether the trial court correctly believed that absent a 'defect in the actual roadway' those responsible for objects in the 'clear zone' adjacent to the roadway are excused from any liability? (Assignment of Error numbers 1 and 2)

3. Whether the trial court's reliance on an extreme case which affirmed dismissal of claims brought by a reckless and drunken driver against PSE/Puget Power is applicable to a case brought by an auto's passenger, not a driver? (Assignment of Error numbers 1 and 2)

4. Whether the trial court's reliance on the same case was warranted since the application of duty analysis has been altered by the Supreme Court since the decision in *Medrano*? (Assignment of Error numbers 1 and 2)

5. Did the trial court err when it denied plaintiff's CR 56(f) motion, and denied plaintiff's CR 59 motion, each intended to provide the court with the facts which the court expressed interest in knowing? (Assignment of Error number 3)

III. STATEMENT OF THE CASE AND PROCEDURE RELEVANT TO REVIEW

A. Facts

Nathan Lowman was a passenger in a car driven by Jennifer Wilbur. Ms. Wilbur had been drinking at the Country Corner, which is where Mr. Lowman met her. They left the restaurant together in Ms. Wilbur's car, with Ms. Wilbur driving. CP 380-381. A short distance away while traveling winding downhill Satterlee Road Ms. Wilbur was speeding, slowed to 30mph in a 25mph zone and thereafter briefly left the

road pavement.¹ CP 381. Her car continued in motion and was on its wheels and returning to the roadway when it struck a PSE utility pole placed 4.47ft from the edge of the road. CP 150. The Washington State Patrol investigator estimated Ms. Wilbur's speed at 34mph at the time her car left the road. CP 316. The car's right front passenger door struck the pole, horrifically injuring Mr. Lowman's right arm, which was nearly severed. CP 542.

Placement of the pole, and Skagit County's authorization to place the pole, were a product of RCW 36.78.070, a 1990 statute which facilitates, among other things, safe placement of ground utility structures. In 2000 Skagit County adopted a policy under the statute, which required that utility poles be outside of a ten foot 'clear zone' beside roadways. CP 167, 171. In 2003 the pole struck by Ms. Wilbur's car in 2005 was struck and destroyed by another motorist. CP 168. Skagit County knew nothing of the accident. CP 171. In violation of the ten foot clear zone policy, after the 2003 accident PSE re-installed the pole in the same spot as it was originally installed. PSE did the same after plaintiff's accident in 2005. Another motorist struck and destroyed the same pole in 2006.

¹ The deposition of Nathan Lowman at pg. 39, ll. 18 (CP 381), contains an error. The transcript reads "She slowed from 30 to 40" but what was intended was: She slowed from 40 to 30.

The pole placement did not cause the accident. The pole placement did, however, convert what would have been minor errant driving with little consequence into a permanent and disabling injury to plaintiff. CP 150. A pole placed ten feet from the roadway would not have caused penetration into the passenger compartment of the car. CP 150. Such penetration is what caused plaintiff his severe injuries. CP 151.

Ms. Wilbur was arrested and her blood alcohol level at the time of the accident was .14. She pleaded guilty to vehicular assault. CP 443-449.

B. Procedure

By amended complaint, plaintiff sued the restaurant where Ms. Wilbur had been drinking, sued Ms. Wilbur (who defaulted), sued PSE for improper placement of the pole and sued Skagit County for failure to enforce its utility pole policy.

Conceding that both moving defendants were negligent and that their negligence was a factual proximate cause of the injuries to Mr. Lowman, 8 months prior to trial defendants PSE and Skagit County moved for summary judgment. The motion asserted that defendants were excused of liability because their conduct could not be considered a legal proximate cause of the harm to plaintiff. Defendants provided the trial

court with evidence regarding Ms. Wilbur's drinking, her speed at the time of the accident, and with purported evidence of the level of intoxication of the driver in the appellate case upon which defendants principally relied, *Medrano v. Schwendeman*. CP 313, 315-316, 335-336, 425-427, 440-441, 443-449, 451-460, 472-473.

Plaintiff opposed the motion, requested a continuance under CR 56(f) in the event the court was accepting the factual claims of defendants (after defendants explicitly avoided placing the facts in issue by conceding negligence and conceding that their negligence was a proximate cause of harm to plaintiff), and moved to strike the ostensible proof of how intoxicated Mr. Schwendeman was. CP 545. The trial court neither granted nor denied plaintiff's CR 56(f) motion, advised that it did not consider any evidence concerning Mr. Schwendeman, and granted summary judgment. In doing so, however, the court expressed interest in more underlying facts:

All I am getting from the plaintiff is that at one spot in the road, apparently, this pole is four feet away from the road, not necessarily where the car left the road. So that's what I would have liked to have known was this a case where the car went straight off the road and hit the pole, or was it a case where a car is skidding all over, flipping over, and, you know, hits a pole in one of the flipovers or what have you. Nobody gave me that.

Appendix 1, p.12, ll.1-8.

The court also expressed the belief that if no defect in the roadway itself (as opposed to defects in the 10 foot clear zone adjacent to the roadway) existed, defendants could not be legally liable:

[A]ll the other cases, every other case has combined factors of things that are happening on the road. This case is pure—to the extent that the sole basis, as I understand it, that the County and the power company is being sued upon, is where they placed the pole. As a result, all the negligence that occurred on the road is just a cause, and the pole placement is another cause. We can have sufficient—I mean, multiple causes. But I don't think there's any other case than *Medrano* and this case where they're seeking the whole—the defendant's liable for something that happens off the road. I got that correct?

Appendix, p. 14, ll. 12-23.

Although defendants had not placed facts in issue in their motion, it became clear that the court was concerned about (and perhaps confused about) the facts. Plaintiff timely moved for reconsideration, supporting his motion with declarations from Ed Stevens, highway design expert, and Tim Moebes, accident reconstructionist. CP 148-231. Mr. Stevens opined, in short, that Skagit County and PSE violated the ten foot roadside clear zone standard by placing a utility pole 4.47 feet from the edge of road surface. CP 170-171. He further opined that PSE knew the danger of the hazardous pole placement since records showed the same pole was struck and destroyed in 2003, before plaintiff's accident, in plaintiff's 2005 accident, and again a year later after plaintiff's accident. CP 171.

Mr. Moebes opined that Mr. Lowman would have suffered no, or only very minor, injury but for the impact of the Wilbur car with the utility pole. CP 150-151. At the time Ms. Wilbur's car struck the pole it was on a path returning to the road. CP 149.

Having previously conceded that moving defendants were negligent and factually caused or contributed to plaintiff's harm, defendants opposed the motion for reconsideration, and opposed the submission of any factual material from plaintiff. The trial court denied the motion for reconsideration. CP 62.

Regarding the motion for reconsideration, the trial court provided differing statements regarding its treatment of the motion. In a short letter ruling, the trial court stated:

I gave a great deal of thought to my original decision and to Plaintiff's motion for reconsideration. I see no reason, however, to change my decision. Accordingly, Plaintiff's motion for reconsideration is denied.

CP 63.

Defendants later presented final judgments to the trial court, and plaintiff submitted a proposed "Order Regarding Entry of Summary Judgment in Favor of Defendants PSE and Skagit County, Order Denying Plaintiff's CR 56(f) Motion, Order Confirming Denial of Plaintiff's Motion for Rconsideration, Order Granting Certification Under CR 54(b),

and Order Granting Final Judgment in Favor of Puget Sound Energy and Skagit County.” The trial court entered a hybrid of plaintiff’s order and orders submitted by defendants, indicated that it made no ruling on plaintiff’s CR 56(f) motion, and deleted language to the effect that it had considered affidavits supporting plaintiff’s motion for reconsideration. CP 66. This appeal followed.

IV. ARGUMENT

A. **Whether Defendants’ Negligence Should Be Excused by An Intervening/Superseding Cause Is a Question for Trial.**

Defendants principally relied on a single case—*Medrano v Schwendeman*—in asserting that they were excused from liability to plaintiff due to the absence of legal causation. Defendants repeatedly, and vociferously, contend that *Medrano* is a legal causation case and not an intervening/superseding cause case. The *Medrano* court itself describes Puget Power’s position in *Medrano* to be that Schwendeman’s own reckless driving was an intervening/superseding cause, cutting off any claim that the actions of Puget Power exposed it to legal liability to plaintiff:

[H]owever, the County and Puget Power claim that regardless of a duty and a possible breach thereof, Schwendeman’s reckless driving was an intervening cause breaking any causal connection, and thus the alleged failure in the design and maintenance of the road and the location of the power pole are too attenuated to be considered a

legal cause of the accident. See *Cunningham v. State*, 61 Wash.App. 562, 571-72, 811 P.2d 225 (1991); *Braegelmann v. County of Snohomish*, 53 Wash.App. 381, 384, 766 P.2d 1137, review denied, 112 Wash.2d 1020 (1989); *Klein v. Seattle*, 41 Wash.App. at 639, 705 P.2d 806; *Kristjanson v. Settle*, 25 Wash.App. 324, 606 P.2d 283 (1980).

Medrano v. Schwendeman, 66 Wash.App.607, 611, 836 P.2d 833 (1992).²

Whether analyzed under intervening/superseding cause or legal causation principles, this Court held that when Mr. Schwendeman himself drove himself off the road his conduct stood alone: in no other case could this Court find that a “driver’s negligent conduct (rose) to the level found here.” *Medrano* at 613.

More analogous to the facts in this case than *Medrano* are those in *Crowe v. Gaston*, 134 W.2d 509, 951 P.2d 1118 (1998). Crowe, like the present case, involved a plaintiff who participated in drinking with defendant and was later injured while riding as a passenger in defendant driver’s car. Crowe, like Mr. Lowman, was not the driver when he was injured. Crowe, a teen, had joined a group which had been drinking alcohol purchased by Kevin Rettenmeier, 17. Rettenmeier purchased a significant amount of alcohol (the exact amount was disputed), and gave it

² Having made that statement, this Court went on to discuss legal causation, found that having been convicted of reckless driving in causing his own accident Mr. Schwendeman was collaterally estopped from claiming otherwise, and answered its own question that relative to Mr. Schwendeman’s conduct Puget Power’s conduct was too remote and insubstantial to impose liability. *Medrano* at 613.

to his friends, including Fitzpatrick, the driver who later crashed and injured his passenger, Crowe. The friends traveled to another friend's house, where plaintiff Crowe joined them. Later that night, Crowe traveled home with Fitzpatrick who drove off the road, hit a tree, and injured Crowe.

Crowe sued Rettenmeier, and sued the store where Rettenmeier bought the beer. The store, and Rettenmeier, were dismissed on summary judgment. The Supreme Court addressed two principal issues: whether the store owed any duty to persons other than Rettenmeier, the purchaser; and, should the store be excused from liability to Crowe because the actions of Rettenmeier -- in giving the alcohol he purchased to others-- and the actions of Fitzpatrick, the driver Crowe was riding with -- were intervening causes which excused the store of liability: "Finally, Oscar's (the store's name) argues that the intervening intentional misconduct of Rettenmeier, the minor purchaser, and Fitzpatrick, the driver, serve to break the chain of causation in this case." 134 W.2d at 519. The court framed the issue in these terms:

[A] defendant's negligence is the cause of the plaintiff's injury only if such negligence, unbroken by any new independent cause, produces the injury complained of. *Id.* at 982, 530 P.2d 254. Where an intervening act does break the chain of causation, it is referred to as a "superseding cause."

Id.

The Supreme Court reversed on the basis that intervening/superseding cause will not excuse the non-driver defendant's fault if the errant driving was reasonably foreseeable. The court reversed summary judgment and addressed the proper legal standard to apply:

“Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes.’ *Cramer v. Department of Highways*, 73 Wn.App. 516, 520, 870 P.2d 999 (1994)(quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn.App. 432, 442, 739 P.2d 1177 (1987). **An intervening act is not foreseeable if it is “so highly extraordinary or improbable as to be wholly beyond the range of expectability.”** *Christen*, 113 Wn.2d at 492, 780 P.2d 1307 (quoting *McLeod v. Grant County Sch. Dist* 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)). **The foreseeability of an intervening act, unlike the determination of legal cause in general, is ordinarily a question of fact for the jury.** *Cramer*, 73 Wn.App. at 521, 870 P.2d 999. Thus, in this case it is for the jury to decide whether the acts of Rettenmeier and Fitzpatrick break the chain of causation, thus, relieving Oscar's from liability.” (emphasis added).³

Crowe relied in part upon *Anderson v. Dreis & Krump Mfg.*, 48 Wn.App. 432, 739 P.2d 1177 (1987), a product liability case where the manufacturer of a press—which had had its function altered by plaintiff's employer--sought to be excused from liability because the employer's

³ Given the history of accidents involving the same pole which Ms. Wilbur struck, it is reasonably foreseeable that cars will strike the pole given its proximity to the road surface and given its placement near the apex of a curve on Satterlee Road.

modifications purportedly represented an ‘intervening cause’ of harm to the plaintiff.

In *Anderson*, plaintiff worked at a mill using a press which had an interlock system that prevented the operator from using it unless it was activated by switches which required the use of two hands. This two handed activation system, then, was the press’s safety feature: since both hands were required to apply the start buttons, no hands would be free to become trapped in the ram area of the press. However, the press also had a foot start pedal which did not share the interlock features of the pushbuttons. Plaintiff’s employer modified the press so the pushbuttons were reduced to one, which allowed the operator to use the press by pushing only a single button. This then allowed an operator to accidentally place his hands in the ram area or, as occurred, allowed the operator to inadvertently press the single button activating the ram.

The court reversed summary judgment for the manufacturer, which had been dismissed on the basis of intervening cause. In oft cited language, the court discussed intervening cause:

Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are *not* reasonably foreseeable are deemed superseding causes. *Campbell* at 813 (and cases cited therein; also citing Restatement (Second) of Torts §440 (1965) which

provides other considerations useful in determining whether an intervening act constitutes a superseding cause). The foreseeability of an intervening act, unlike the determination of legal cause in general, is ordinarily a question of fact for the jury. *Kennett v. Yates*, 41 Wn.2d 558, 564-65, 250 P.2d 962 (1952); see also *Petersen v. State*, 100 Wn.2d 421, 435-36, 671 P.2d 230 (1983); W. Kimble & R. Leshner, *Products Liability* §251, at 276 (1979 and Supp. 1985). However, foreseeability is a flexible concept, and a defendant will not be relieved of responsibility simply because the exact manner in which the injury occurred could not be anticipated. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969); *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 396, 558 P.2d 811 (1976). *Rikstad*, at 269 (quoting *McLeod v. Grant Cty. Scho. Dist.* 128, 42 Wn.2d 316, 321-22, 255 P.2d 360 (1953) provides:

It is not, however, the unusualness of the [intervening] act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant.

.....
.....

It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. *The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.*

(Italics ours.)⁴ See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, at 316. In this context our Supreme Court has held that generally an intervening act is not a superseding cause where the intervening act (1) does not bring about a different type of harm than otherwise would have resulted from the defendant's conduct; and (2) does not operate independently of the situation created by the defendant's conduct.

Anderson v. Dreis & Krump Mfg., 48 Wn.App. 432, 442-444, 739 P.2d 1177 (1987).

Here, PSE and Skagit cannot satisfy the test for exculpation when the intervening test set forth above is applied. Applying the first criteria there is no 'different type of harm' to Mr. Lowman from the actions of PSE than from the actions of Ms. Wilbur: he suffered injury in a car accident which largely stemmed from striking an impermissibly placed object (the utility pole) which penetrated the car and hurt him. Applying the second criteria, certainly Ms. Wilbur's 'intervening' driving did not operate 'independently of the situation' created by the improperly placed pole. Indeed, the reason Ms. Wilbur's driving caused extreme harm rather

⁴ The court continued in a footnote: "Likewise, Restatement (Second) of Torts §442B, comment a (1965) provides 'that the fact that the [original] actor neither foresaw nor could have foreseen the manner in which a particular harm is brought about does not prevent his liability' Comment b to that section continues:

If the actor's conduct has created or **increased the risk** that a particular harm to the plaintiff will occur, and has been a substantial factor in causing that harm, *it is immaterial to the actor's liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate.* (Italics in original case quote). (Bold emphasis added)

than mild or no harm was the result of impact with the pole---which should not have been there.

Ms. Wilbur's driving, combined with what defendants admit was improper and negligent pole placement, were each "a" proximate cause of Mr. Lowman's harm. Cf. *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983, Div.I). There a jury verdict for Puget Power was reversed on the basis that the court failed to properly instruct regarding multiple proximate causes of a single event. Puget Power argued on appeal, unsuccessfully, that the fact the cable installer plaintiff had climbed a pole, failed to use proper safety equipment while 22 feet off the ground, failed to test a street lamp to assure it was grounded before touching it, and then made simultaneous contact with a possible voltage source and a ground, that plaintiff's negligence and/or the negligence of plaintiff's employer were the sole causes of the accident: "If the acts...are within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence." *Brashear*, 33 Wn.App. 63, 69, 651 P.2d 770, rev'd on other grounds, 100 Wn.2d 204, 667 P.2d 78 (1983).

Plaintiff here, defendants concede, was the victim of negligence committed by both PSE and Skagit County. The negligence of each, plaintiff asserts, is that each allowed pole placement too close to the

traveled road to prevent the foreseeable harm which follows when a motorist leaves the road.⁵ That is why the placement of such implements

⁵ Examining appellate cases alone makes it clear that hitting utility poles off the road surface is eminently foreseeable driver conduct: “We begin by noting that the concept that a public utility may owe a general duty to motorists to use reasonable care when placing light poles adjacent to roadways is not novel. In *Gerberich v. Southern Calif. Edison Co.* (1935) 5 Cal.2d46, 53 P.2d 948, our Supreme Court stated a “general rule that where a pole is located in too close proximity to the traveled portion of the highway,...recovery [by a plaintiff injured in a collision with the pole] may be justified.”(*Id.* at p. 53, 53 P.2d 948; accord, *Norton v. City of Pomona* (1935) 5 Cal. 2d 54, 60-61, 53 P.2d; *George v. City of Los Angeles* (1938) 11 Cal.2d 303, 310-313, 79 P.2d 723). The *Gerberich* court explained that a public utility’s light pole “may by reason of its location or maintenance without warning signs, lights, guards or other precautions, constitute a danger to traffic; and if the danger is sufficiently great, and it can be avoided by the exercise of reasonable care, either in relocation or the placing of effective warning devices or guards, then the jury might find negligence in the failure to take such steps.” (*Gerberich v. Southern Calif. Edison Co.*, *supra*, at pp. 51-52, 53 P.2d 948, italics added.) More recently a Court of Appeals noted the continuing validity of these authorities in *White v. Southern Calif. Edison Co.*, 25 Cal.App.4th 442, 30 Cal.Rptr.2d 431, (1994), which stated that a “public utility, which negligently places a power pole too close to the road, may be liable to the occupants of a motor vehicle injured when their vehicle collides with the pole.” (*Id.* at pp. 447-448, 30 Cal. Rptr.2d 431 [dictum].

In a footnote, the court continued:

This is in accord with numerous judicial decisions in other states. (See, e.g., *Mc Millan v. State Highway Com'n* (1986) 426 Mich.46, 58-65, 393 N.W.2d 332 [electric company owed duty of care to occupants of vehicle that left roadway and struck utility pole located on median]; *Scheel v. Tremblay*, 226 Pa.Super. 45, 47-48, 312 A.2d 45 (1973) [liability of a utility may be imposed when a light pole struck by a motorist is so close to the edge of the road as to constitute a “foreseeable and unreasonable risk of harm to users of the highway”]; *Weiss v. Holman*, 58 Wis.2d 608, 626-627, 207 N.W. 2d 660 (1973) [utility company may be liable to passenger in a car who was injured when, after a collision, the car struck a light pole four feet off the roadway]; *Mississippi Power & Light Co. v. Lumpkin* (Miss.1998) 725 So.2d 721-722 [“utility company may be liable for injuries suffered by a passenger where a negligent driver strikes one of its poles in a public right of way, off the traveled portion of a highway”] *Jacque by and Through Dyer v. Public Serv. Co* (Colo.Ct. App. 1994) 890 P.2d 138, 140 (summary judgment in favor of utility reversed because a duty of care to motorists may exist even when the accident occurs off the paved portion of a roadway); *Hayes v. Malkan* (1970) 26 N.Y.2d 295, 298, 310 N.Y.S.2d 281, 258 N.E. 2d 695, fn. omitted [“placement of poles...in close proximity to the pavement and within the highway right of way, raises a question of fact for jury determination as to whether the placement of that object was such as to create an unreasonable danger for travelers on the highway”]; *State v. Cornelius* (Ind.Ct.App. 1994) 637 N.E.2d 195, 201 [because analytic factors weighed in favor of imposing a duty

is regulated by code, by policy of the county, and by highway design principles. It is entirely foreseeable that a motorist will leave the road and strike an improperly placed pole. Rules regarding where to place poles are adopted to avoid the very harm which comes from striking them. There is no *other* reason for regulating their placement: it is the harm which comes from striking them which causes their placement to be governed.

Accordingly, the negligence of PSE and Skagit is not excused since Ms. Wilbur's driving cannot constitute a superseding cause at all:

The Restatement (Second) of Torts §449, at 482 (1965) provides the negligence of a third party does not constitute a superseding cause “[i]f the likelihood that a third person may act in a particular manner is...one of the hazards which makes the [original] actor negligent.”

Anderson, supra at 447. The negligence of defendants stems from the foreseeable risk of harm arising from utility poles being placed too near the roadway. When the very hazard which creates the duty of the negligent party is the hazard which befalls the plaintiff and injures him the party creating that hazard is not excused using superseding causation analysis.

on a utility company to a motorcyclist that struck utility pole and there were factual issues regarding foreseeability, summary judgment was properly denied]; *Bernier v. Boston Edison Co.* (1980) 380 Mass. 372, 378-382, 403 N.E. 2d 391 [electric company liable to injured pedestrians for negligent design and maintenance of light pole that fell on them after being struck by car). 175 Cal.App. 4th at 1269-1270.

The Washington Supreme Court has so held and, in language which directly repudiates PSE's claim that a criminal actor's conduct constitutes superseding cause, states:

Pursuant to §447(a) of Restatement (Second) of Torts, even if the intervening act of the third person constitutes negligence, that negligence does not constitute a superseding cause if "the actor at the time of his negligent conduct should have realized that a third person might so act". In fact, if the likelihood that a third person may act in a particular manner is...one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Restatement (Second) of Torts §447, comment on Clause (a), (1965).

Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 733 P.2d 969 (1987).

The court goes on to explain that the 'theoretical underpinning' of the doctrine of superseding cause is that the conduct of the superseding actor is not foreseeable.

Thus, to find on summary judgment that an intervening cause excused PSE and Skagit County from liability to plaintiff, this Court must find the unfindable: that even after another motorist struck the pole previously in 2003 PSE may nevertheless argue that it was unforeseeable that a motorist would strike the pole. But of course it was foreseeable that a motorist would strike the improperly placed pole: one did, then another, then a third, all within three years:

In *Herberg v. Swartz, supra*, the owner of a hotel ridden with numerous fire code violations claimed that the negligence of the local fire department was an intervening act which constituted a superseding cause. This court disagreed, stating that the “theoretical underpinning of an *intervening* cause which is sufficient to break the original chain of causation [i.e., constitute a superseding cause] is the *absence of its foreseeability*.”

Campbell, 107 Wn.2d at 813. In *Campbell*, the manufacturer’s liability for faulty design of electronic circuits was not excused by the superseding negligence of plaintiff’s employer in failing to lock out the circuits before maintenance work began, during which plaintiff was electrocuted. The court found that the employer’s negligence was foreseeable. In *Anderson*, the employer’s modification of the drill press to disable part of its protective features did not constitute a superseding cause because it was foreseeable the employer might do just that. Here it was foreseeable that a driver might leave the roadway and, while regaining control of her car, might strike a utility pole which should not have been placed where it was. This conduct, too, was foreseeable.⁶

⁶ The courts have not permitted superseding cause as a defense even in cases where the alleged superseding ‘actor’ actively and intentionally committed criminal acts against the plaintiff, e.g. *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982) defendant gun shop was not excused from fault after it sold a rifle to intoxicated gunman who walked across street and killed his estranged wife in a tavern, using the gun); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983)(releasee from Western State Hospital, who should not have been released, killed plaintiff’s decedent when running a red light, driving substantially over the speed limit apparently while ‘greatly influenced’ by drugs).

B. Even if *Medrano v. Schwendeman* Is A Legal Causation—Not An Intervening Cause—Case Its Application Should Be Limited to Cases With Similarly Outrageous Facts

The holding in *Medrano*, if it is a legal causation case, warrants application to those few cases where a similarly outlandishly reckless driver causes harm to himself. Far from being a main stream legal causation case, *Medrano* is procedurally unique and arose from bizarre facts.

At the time he drove off the road leading to his home, Mr. Schwendeman had lived on flat, arrow straight Byers Road for 13 years. See aerial view of Byers Road, CP 558. Mr. Schwendeman was obviously familiar with a road he lived on for more than a decade. The speed limit on Byers Road was 25 mph. What follows is this Court's description of Mr. Schwendeman's conduct:

After drinking beer and dining at his house, Schwendeman and his guests decided to go to a nearby tavern to continue the party. Most of the group rode in the back of Schwendeman's pickup truck, which had a canopy covering the truck bed. Schwendeman drove to the tavern in a manner that was described as rough, fast, and swerving to avoid potholes. After some time at the tavern, the group set out to return to Schwendeman's house. On the way back from the tavern Schwendeman made a right turn onto Byers Road and then 'punched the accelerator' causing the passengers riding in the bed of the pickup to be pitched about. The canopy's door was not latched and bounced open. One passenger crawled up to the window of the cab, pounded on the window, and shouted to

Schwendeman to slow down. About that time, Schwendeman lost control of the truck.

Schwendeman said he was driving 'normally' at 35-40 mph when he moved onto the right shoulder to allow an oncoming car to pass; that his tires got stuck in the gravel; and 'having driven the truck in lots of similar conditions,' he accelerated to attempt to regain control.⁷ Eighty five feet from where he left the road, he hit a power pole owned by Puget Power. The truck spun around, traveled an additional 80 feet, rolled onto its side, and then continued on for another 30 feet before coming to a stop. As a result of the accident at least one person was seriously injured.

Schwendeman left the scene of the accident and did not return until later. The officer who investigated the accident determined that before leaving the road's surface Schwendeman's truck was traveling at an extreme angle in relation to the shoulder. The officer indicated the truck went into a side slip before it went onto the shoulder. An expert for the county testified that Schwendeman was traveling at a minimum speed of 43 mph at the time the truck hit the pole and that the truck had been traveling at a higher rate of speed when it initially left the roadway.

66 Wn.App. at 608-609.

The case started when Mr. Medrano, a passenger in Mr. Schwendeman's truck, sued him. Mr. Schwendeman responded by suing King County and Puget Power, who Mr. Medrano then added by amended complaint. The case ended up on appeal without Mr. Medrano's involvement, presumably because he had settled with some, or all, of the

⁷ In reaction to this benign description by Mr. Schwendeman, this Court notes that Mr. Schwendeman's claim that he was driving in a 'normal and safe manner' was refuted by his criminal conviction for reckless driving, which he was collaterally estopped from re-litigating. 66 Wash.App. at 611-612.

defendants. Thus Mr. Medrano, who was the only party to the Schwendeman case situated similarly to Mr. Lowman—a passenger in a vehicle driven by someone else—was not a party to the appeal. Indeed, Mr. Schwendeman appeared *pro se* in the Court of Appeals. If Mr. Schwendeman could do anything more improvident than blaming King County and Puget Power in the first place, proceeding through the appeal as a *pro se* appellant was probably it.

Puget Power (now PSE) took a different position in *Medrano* than it took here. In *Medrano*, the County and Puget Power did no more than submit that their conduct ‘may’ have contributed to Mr. Schwendeman’s actions. They neither acknowledged any violation of duty nor even factual proximate cause.⁸ This Court again acknowledged that ‘hedge’ by Puget Power and the County in its opinion (“However, the County and Puget Power claim that regardless of a duty and a *possible* breach thereof, Schwendeman’s reckless driving was an intervening cause....”)(emphasis

⁸ “[T]he County and Puget Power assumed for the sake of the argument on summary judgment that the design, construction, and maintenance of the road and shoulder and the placement of the power pole *may* have contributed as a “cause in fact” of the accident.” *Medrano*, at 610. An additional limit in *Medrano* is that at that time defendants only owed a duty to a ‘reasonably prudent driver.’ *Id.* This Court affirmed that Mr. Schwendeman could not be a ‘reasonably prudent driver’ when it found Schwendeman collaterally estopped from claiming he was other than a reckless driver, the charge which he was found guilty of committing. Since that time Washington’s departure from its prior law limiting duty in this context to only ‘reasonably prudent’ drivers/persons is discussed, *infra*.

supplied). *Medrano* at 610. Here, in filing their motion defendants granted more:

As discussed below, assuming 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 that resulted in Mr. Lowman’s injuries, summary judgment is warranted because there is no legal causation to support liability against PSE or Skagit County.

CP 505.

The contrasts between the circumstances in *Schwendeman* and the present case are stark, and plentiful:

- Mr. Schwendeman brought an action against the County and Puget Power, yet he was the intoxicated driver whose own driving caused the accident.
- Mr. Schwendeman was as familiar with the roadway he drove off as a person could be: he had lived at the end of the one mile road for 13 years;
- Mr. Schwendeman was warned by his own passenger, whom he injured, to stop driving recklessly;
- Mr. Schwendeman was apparently drunk when he left his house, before going to become more drunk at the tavern nearby (this Court stated specifically: “After drinking beer and dining at his house, Schwendeman and his guests decided to go to a nearby tavern to continue the party.”) *Medrano* at 608. It was when returning from that tavern that the accident occurred;
- Mr. Schwendeman was driving nearly twice the speed limit, if not more, when he left the roadway (he was by his own admission going 35-40 mph; testimony in his criminal case indicated he was traveling 43 mph when he hit the pole, which was 85 feet from where he left the road, so he was traveling even faster when he left the road). He was likely exceeding the speed limit of 25 mph by nearly 100%. Ms. Wilbur according to the WSP was traveling as slowly

as 34 mph when she left the road--36% faster than the 25 mph speed limit;

- Byers Road, which Mr. Schwendeman managed to leave, is straight, and flat, unlike downhill curving Satterlee Road;
- Nothing in the record of the case suggested, or proved, that the County or Puget Power had violated any standard, or had any prior knowledge that the pole Mr. Schwendeman struck was a hazard (i.e., it had not been struck before—resulting in serious injury to another--- then been replaced in the same location);
- Nothing in the record of the case suggested, or proved, that some other action by King County or Puget Power would have prevented the accident or lessened the harm. It appeared Mr. Schwendeman would have created harm no matter where he drove, given his condition.

Mr. Lowman was a passenger, not a driver. There is nothing to suggest he caused or contributed to Ms. Wilbur's driving decisions. There is no evidence he was familiar with Satterlee Road, or its hazards. His conduct, and the extent of his drinking, have never been adjudicated as 'reckless.' And while Ms. Wilbur had been traveling faster moments before the accident, Mr. Lowman testified that she slowed just prior to the accident. CP 381.

C. **Medrano Relied Upon a Duty Analysis Repudiated by the Supreme Court in Keller v. City of Spokane**

Legal causation analysis requires consideration of an amalgamation of elements: "(legal cause) involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact; i.e., whether considerations of logic, common sense, justice,

policy and precedent favor finding legal liability.” *Medrano*, 66 Wash.App. at 611, quoting from *Hartley v. State*, 103 W.2d at 779-781, 698 P.2d 77.

After *Medrano* was decided in 1992, the Washington Supreme Court decided *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.2d 845 (2002) which in this setting altered Washington law regarding three of the legal cause elements: justice, policy, and precedent. This Court relied upon *Keller* in reversing dismissal of *Unger v. Cachon* (Island County was also a defendant), 118 Wash.App. 165, 73 P.3d 1005 (2003). The facts in *Unger* are extraordinary. Believing he was being chased by his girlfriend’s family, Unger drove in the following manner:

[W]hile Joey and his girlfriend waited at the marina, Unger passed by in his Jeep and saw him. Unger sped up, and Joey followed him. The pursuit began on State Road 532, to Cross-Island Road, then onto Camano Ridge Road. It lasted about 30 minutes and involved high rates of speed, swerving, crossing center lines, and turning headlights on and off. The weather that evening was severe.....Jeremy Unger successfully “lost” Joey several minutes before the accident on Camano Ridge Road. Unger’s single-car accident occurred on a different road, called Camano Hill Road. There were no witnesses to the accident. Unger was injured and airlifted to Harborview Medical Center. He died two days later from his injuries.

Unger, 118 Wash.App. at 168-169. If anything, Mr. Unger's driving made Ms. Wilbur's look tame by comparison.⁹

The trial court dismissed. In doing so it appears it excused Island County from owing any duty to Unger since Unger was driving negligently, if not recklessly, at the time of the accident. That may have been the law before *Keller*, but no longer.¹⁰ While applying *Keller* in its decision in *Unger*, this Court reminded that pre-*Keller* whether a duty was owed in this context ceased being in issue once plaintiff's own conduct deviated from 'reasonably prudent' behavior:

[I]n addition, they (the Ungers) argue that the trial court erred in concluding as a matter of law that the County does not owe a duty to a negligent driver. In response, the County argues that the trial court properly granted summary judgment because the undisputed evidence shows that Unger was driving recklessly, the county owes no duty to a reckless driver, and it is an unreasonable inference that Unger suddenly changed his behavior within a quarter mile of the accident. [W]e agree with the Ungers because the trial court relied upon case law that was later affected by the Supreme Court's opinion in *Keller v. Spokane County*, and there are material issues of genuine fact that should be resolved by a jury.

Unger, at 174.

⁹ "It is undisputed that up to one quarter mile from the accident site, which is where the chase ended and the last time anyone saw Unger, he was driving in excess of 70 mph where the posted speed was between 35 mph and 50 mph, and he was driving with his headlights off." *Unger* 118 Wash.App. at 174.

¹⁰ "We therefore hold 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." *Keller*, 146 W.2d at 249.

This Court's treatment of *Keller* is significant since it also appears that the *Unger* Court concluded *sub silentio* that *Braegelmann v. County of Snohomish*, 52 Wn.App. 381, 766 P.2d 1137 (1989), was no longer good law after *Keller v. City of Spokane*. And *Braegelman* was one of the cases relied upon by this Court in deciding *Medrano v. Schwendeman*. 66 Wash.App. at 611. There should be little doubt that *Keller* altered legal proximate cause law as well, for it changed Washington precedent, and policy, from a state where a negligent driver (again, Mr. Lowman was never driving anyway) was owed no duty by the municipality controlling the roadway to a state where the actions of each actor, negligent driver and municipality, are implicated in any liability analysis:

The Ungers contend that the Washington Supreme Court's opinion in *Keller* overrules our opinion in *Braegelmann*. In *Keller*, the plaintiff was traveling by motorcycle as fast as 50 miles over the posted speed limit when it hit a car at intersection with no stop signs. A jury found that Keller and the other driver were at fault and the City was not. The Supreme Court reversed because it concluded the instructions improperly permitted the jury to determine the City had no duty at all if it found Keller was negligent. In its analysis, the Supreme Court discussed conflicting opinions about the proper scope of a municipality's duty in building and maintaining roads. Interpreting the case as a whole, the Supreme Court concluded that the cases "do not limit the scope of a municipality's duty to only those using the roads and highways in a nonnegligent manner." 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." The

court noted that its conclusion is supported by the comment in Washington's pattern instruction for duty, which states that "[d]uty, as defined by this instruction, is not determined by the negligence, if any, of a plaintiff."

Unger, 118 Wash.App. at 175-176.

This Court continued:

[A]lthough the jury instruction approved in *Keller* does not say so, we read the opinion to require the court to determine, or properly instruct a jury to determine, that a municipality's duty is independent of the plaintiff's negligence. Thus, the County owed Unger a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. It is for the jury to decide whether the County's construction or maintenance of Camano Hill Road created a condition that was unsafe for ordinary travel and whether the condition of the road contributed to Unger's accident and death. Genuine issues of material fact exist about the proximate cause of Unger's death, which makes summary judgment improper.

Id.

Keller impacts considerations of justice, policy, and precedent when applied to cases like the present one. Regarding justice, *Keller* expands the reach of potentially liable parties by not analyzing a defendant's duty based upon what the plaintiff was doing. This is a more pure analytical approach and avoids excusing culpable parties due to the conduct of others. It permits a fact finder to allocate between all potentially liable parties the fault for an accident, without excusing a defendant from having a duty when the plaintiff has causative fault. This

appears to be a shift from pre-*Keller* law, which is the law relied upon in *Medrano*.

Regarding policy, *Keller* analyzes the disparate case authority (or, as this Court described it, “The court lists an array of conflicting views and the cases supporting them in its opinion.” See *Keller*, 146 W.2d at 246-47, 44 P.3d 845. *Unger*, 118 Wash.App. at 176) which the Supreme Court sought to clarify. In doing so, it defined the policy of the highest court to be that a wrongdoer will not have its fault analyzed on the basis of what *someone else, presumably the plaintiff, did*. Instead, that analysis will occur without regard for the fault of the plaintiff. This, too, represents a change from the law in place at the time *Medrano* was decided.

And, obviously, precedent influences proximate cause analysis since as the law changes reliance upon cases which themselves relied upon now modified or overruled case law is misplaced.

For all of these reasons, the trial court erred in concluding that *Medrano* compelled it to dismiss plaintiff’s case.

D. The Court Did Not Rule Upon Plaintiff's CR 56(f) Motion Since the Court Agreed That Plaintiff Need Submit No Facts. But In Doing so the Court Deprived Itself of a Better Understanding of the Accident. It Then Misapplied the Law Since Liability Can Be Imposed on Defendants Even If No Defects Existed *In the Road*

1. It was Error to Both Express Concern About Factual Matters – Where no Issue of Fact Was in Play – And to Deny Plaintiff's CR 56(f) Motion.

The trial court held that it did not rule upon plaintiff's CR 56(f) motion because there was no need to:

Plaintiff's Counsel:

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.

Appendix 1, p. 45

Trial Court:

No, I didn't. I truly didn't. So I don't think a motion (sic) 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.

Id. But in earlier discussing its thinking, the trial court *did* want more detail regarding the accident:

All I am getting from the plaintiff is that at one spot in the road, apparently, this pole is four feet away from the road, not necessarily where the car left the road. *So that's what I would have liked to have known was this a case*

where the car went straight off the road and hit the pole, or was it a case where a car is skidding all over, flipping over, and, you know, hits a pole in one of the flipovers or what have you. Nobody gave me that.

Appendix 1, p.12, ll.1-8 (emphasis added).¹¹

Plaintiff was entitled to rely upon defendants' concession, for purposes of responding to the motion, that defendants were negligent and that their negligence made the difference between this being a trivial accident involving little harm, and a catastrophic and life changing accident for plaintiff.

Defendants agreed the pole should not have been placed where it was. And the effect of that placement, on the outside of a curve on a downhill winding road, was to greatly alter what resulted from the conduct of Ms. Wilbur. As plaintiff's accident reconstruction expert, Tim Moebes, stated on reconsideration:

6. I was asked to provide opinions regarding several issues. I was asked to estimate specifics regarding how far the pole was located from the traveled portion of the road. I was asked to evaluate what would have happened if the pole were located in the same plane but at a point ten feet from the pavement of the road. I can address each of these questions and do so below;

7. I have included as Exhibit A a depiction of the car at the time it hit the pole assuming the car struck the pole where it was actually located. Based upon my analysis, the pole was located 4

¹¹ It was neither. Ms. Wilbur drifted off the roadway and her car was on a path returning to the roadway when her car slid into the utility pole. The car did not strike the pole immediately after leaving the road surface, nor did the car ever 'skid all over' or 'flip over' at all. It never left its wheels. CP 149.

½ feet (4.47') from the traveled portion of the road. Exhibit A also shows that the path of the car was predominantly parallel to the road but was actually moving back towards the road when it struck the pole, and was not moving further onto the shoulder.

8. I have attached as Exhibit B a depiction of how the car would have impacted the pole were it ten feet away. If the pole had been located at a point ten feet from the pavement of the road at the time of the accident, Ms. Wilbur's car would have still hit the pole. However, impact would have occurred at the far passenger rear corner of her vehicle. In my opinion, at the point of impact with the pole, the vehicle would have overlapped the pole by about 25 inches.

9. The major and significant difference, to the car and its occupants, between the accident which occurred and what would have occurred were the pole located ten feet from the road, is that the injuries sustained by Mr. Lowman would not have been sustained. *I can unequivocally state that nothing would have impacted or intruded upon the passenger compartment of the vehicle were the pole ten feet from the road.* Moreover, because of the highly-offset impact to the extreme corner, the car would not have been as slowed as much on contact with the pole and the overall risk level would have been lessened.

10. The car would not have struck the pole at all had the pole been located 12 ½ feet or more from the edge of the road.

CP 149-150. It is apparent the trial court did want more factual information. And in anticipation of that potential, plaintiff sought relief under CR 56(f). Plaintiff did not seek relief for the usual reason: time needed to develop evidence which would create a genuine issue of material fact. Defendants had already conceded, factually and legally, that their breach of duty had factually contributed to plaintiff's harm.

What defendants then did, however, was to argue their version of the facts in support of their interpretation of the law.¹² Had it allowed and considered the additional factual information submitted by plaintiff, the court would have learned that the accident did not occur at high speed, Ms. Wilbur's driving error on a dark, twisting, hilly road was rather

¹² PSE's counsel argued, variously:

And so we have this line of cases. And, as a policy matter, when you have such bad driving that is not only bad driving but speeding, leaving the roadways, crossing centerlines, driving drunk, really drunk. At some point, courts have said you know what, as a policy matter, we can't find that an ancillary defendant, *who played no role in causing this accident*, liable. And that's the *Medrano* case, the *Klein* case, the *Cunningham* case, the *Braegelman* case. (Appendix 1, p. 9, ll. 16-24)

.....

What happened here, if you look at the diagram, is, according to the State Patrol, the car went off the roadway here, traveled, using their scale, around 80-odd feet, and hit the pole over here...what actually happened here is that the car went off the roadway, was skidding for awhile, hit the passenger side where Mr. Lowman was sitting. So broadsided the pole and then spun around. (Appendix 1, p. 13, ll. 6-9, 16-19)

....

We don't have those problems here because it's undisputed what the driver was doing. And it's undisputed she was drunk and speeding and was convicted and pleaded guilty and said she was the proximate cause.

We're right square in the middle of the case law on this, Your Honor. The facts, again, about Ms. Wilbur's driving are undisputed. Reasonable minds could disagree on where exactly on this you are, but—we are, but I would submit we're somewhere—somewhere around here (indicating). I mean, speeding, drunk, criminally convicted, drove off of the roadway. You don't have to pinpoint exactly where we are to issue the ruling because we're square in the middle of that. (Appendix 1, p. 15, ll. 16-25, p. 16, ll. 1-3)

.....

PSE is not responsible for every accident where drivers go off the road and hit a pole. And the cases where you know they're not liable is when you have cases involving drunk drivers speeding, getting criminally convicted. This whole business that it was a different prong, she was convicted of DUI, there's a DUI appendix to her judgment. The judge found she had a chemical dependency problem that contributed to her offense. There's no dispute about that. That's the evidence before you. They don't challenge it. (Appendix 1 p. 38, ll. 1-9)

modest, the accident occurred right where other similar accidents had occurred, the same pole had been struck in the same manner before, and the applicable regulations prohibited the pole from being placed where it was.

Out of concern that just such a shifting target might emerge at hearing, plaintiff had requested additional time under CR 56(f) to place more information before the court. With eight months remaining before trial there was no time urgency. It is evident the trial court was interested in the facts and it is further evident that PSE first conceded fault and factual proximate cause and then argued against its own fault *based upon its version of how the accident occurred*. In this circumstance, plaintiff's CR 56(f) motion was well taken and should have been granted since the trial court ended up examining the accident's facts.

But it was never clear what facts the court relied upon in making its decision. It wondered if the Wilbur car had flipped over or driven straight into a pole. It indicated there were no defects in the road, but ignored the roadside defects which defendants admitted were their responsibility. If these facts mattered to the court, as it appeared they did, a proper remedy was to invite further information about the event.

When deciding whether to apply CR 56(f), "the trend of modern law is to interpret court rules and statutes to allow (a) decision on the

merits of the case.” *Coggle v. Snow*, 56 Wash.App. 499, 507, 784 P.2d 554 (1990)(citing *Weeks v. Chief of Washington State Patrol*, 96 W.2d 893, 895-96, 639 P.2d 732 (1982). “The trial court’s primary consideration on a motion for such a continuance should be justice.” *Id.* It was an abuse of discretion to deny plaintiff’s CR 56(f) motion.

2. The Court Abused Its Discretion by Denying Plaintiff’s Motion for Reconsideration

CR 59(a)(8) provides for reconsideration when the court does not properly apply the law to the facts of the case. CR 59(a)(9) provides for reconsideration when substantial justice has not been done. Either, or both, apply here.

Although not strictly a violation of the *White v. Kent Medical Center, P.S.*, 61 Wn.App. 163, 810 P.2d 4 (1991), rule against altering summary judgment theories between moving and replying, it is apparent that defendants both acknowledged duty and breach and yet still argued the facts of the underlying accident. But in making their concession for purposes of the motion, they had removed from plaintiff the need to provide facts to the trial court. If defendants conceded duty, conceded breach of duty, and conceded factual proximate cause, plaintiff needed no facts to argue the motion.

Yet as colloquy with the trial court began to make clear, the trial court was unclear about very basic facts, e.g., did the car just strike a pole, or flip first, or neither? While these facts did exist in the record, it is also clear that the court was uninformed about them and sought more detail than what was provided. Absent allowing a continuance to provide additional material, as requested, the court received all the necessary material on reconsideration. But the court, having said it reviewed plaintiff's reconsideration motion, later stated that it did not read the material in support of the motion.

Though courts rarely grant reconsideration under CR 59(a)(8) or (9), it was appropriate to do so here. Substantial justice is lacking when the trial court is confused, seeks additional facts, and then thwarts the ability of a party to provide them. *Sligar v. Odell*, 156 Wash.App. 720, 233 P.2d 914 (2010). It only compounded the injustice that the court (even in the presence of a concession that defendants violated the law and factually contributed to plaintiff's harm) expressed doubt that any case has held that without a defect in the road bed itself, defendants could have no liability to plaintiff. Of course, multiple cases hold otherwise.¹³

¹³ Cases for the proposition that liability exists for highway defects other than defects in the roadbed itself abound. A sampling follows:

- *Raybell v. State*, 6 Wn.App. 795, 496 P.2d 559 (1972) (Judgment for decedent's estate upheld where decedent's car left roadway at an unguarded area with

Further, it was an abuse of discretion to deny plaintiff's motion for reconsideration since once it was clear the Court was unaware of how pole placement converted a minor traffic event into great harm to Mr. Lowman. By refusing to consider that proof the court placed itself in the position of accepting PSE's arguments without allowing plaintiff to prove facts which undercut those arguments.

Finally, the court erred in its belief that only a roadway bed defect can expose defendants to liability. As the California case discussion, *supra*, and the sampling of Washington cases, makes clear, it is well known in the legal and road design communities that cars go off roads.

temporary guardrail equipped with flashing lights supported by rocks and sandbags. Absence of a properly installed guardrail was the source of defendant's liability).

- *Wojcik v. Chrysler Corp.*, 50 Wn.App. 849, 751 P.2d 854 (1988) (Plaintiff's vehicle went into broadside slide and hit utility pole; issue of fact existed as to whether proper maintenance of road shoulder and installation of guardrail would have prevented harm to plaintiff).
- *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994) (Judgment affirmed for decedent where State's failure to construct roadway median and erect proper signage permitted oncoming vehicle to cross sand median, strike decedent's car, and force it down an embankment).
- *Grimsrud v. State*, 63 Wn.App. 546, 821 P.2d 513 (1991) (Liability imposed when, in presence of offset between paved lanes no warning regarding same provided to plaintiff motorcyclist who flipped as he attempted to return to his lane after passing. Respondents had failed to provide signs warning of the offset in pavement; held, summary judgment reversed).
- *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005) (Decedent Nelsons stopped for traffic in the railroad's right of way, after which the railroad light and bell signals activated and the Nelsons tried to move off the tracks, but traffic would not allow it. Court found that the "unusual circumstances" present at the railway crossing required more than routine signage and warnings).

There are many features of our roadways designed expressly in contemplation of that fact.

It is also well known that preventing certain impacts and penetrations at roadside will lessen or eliminate the harm which comes to motorists, or as here, passengers, when vehicles leave the road.

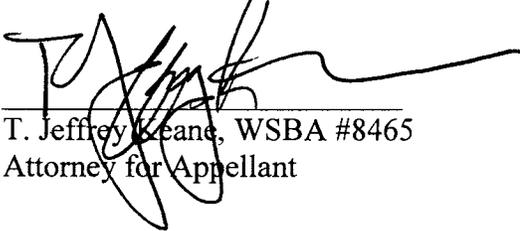
V. CONCLUSION

For the foregoing reasons, plaintiff requests that this Court reverse the trial court and reinstate plaintiff's case against defendants PSE and Skagit County

Respectfully submitted this 7th day of September, 2010.

KEANE LAW OFFICES

By:


T. Jeffrey Keane, WSBA #8465
Attorney for Appellant

APPENDIX 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

NATHAN LOWMAN, a single person,)	
)	
Plaintiff,)	
)	
vs.)	NO. 08-2-04958-1
)	CT. OF APPEALS
)	NO. 65359-8-I
JENNIFER WILBUR and JOHN DOE)	
WILBUR, husband and wife and)	
the marital community composed)	
thereof, et al.,)	
)	
Defendants.)	

DEFENDANTS PUGET SOUND ENERGY AND SKAGIT COUNTY'S MOTION
FOR SUMMARY JUDGMENT

BE IT REMEMBERED, that on November 12, 2009, the above-named and numbered cause came on regularly for hearing before the HONORABLE GERALD L. KNIGHT sitting as judge in the above-entitled court, at the Snohomish County Courthouse, in the city of Everett, County of Snohomish, State of Washington;

The plaintiff appeared through his attorney, Thomas Keane;

The defendant Puget Sound Energy appeared through its attorney, Mark Wilner;

The defendant Skagit County appeared through its attorney, Paul Reilly;

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The defendant Country Corner, Inc., appeared through its counsel, Thomas Collins.

WHEREUPON, the following proceedings were had to-wit:

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cited, actually, many different cases. We just particularly like Medrano for obvious reasons, and we'll get to that. But there's State Supreme Court decisions like Hartley that use the same language.

The key point is, as we say it in here, given the existence of cause in fact, the job for the Court is to assess, as a matter of law, due considerations of logic, common sense, justice, policy, precedent, favor a finding of legal liability. This is a policy determination, and it's for the Court to decide. Juries don't decide legal causation. They don't get an instruction on legal causation. This is a judicial policy determination, and that is the way the courts in Washington have dealt with it. It's been primarily in the egregious driving situations.

And so we have this line of cases. And, as a policy matter, when you have such bad driving that is not only bad driving but speeding, leaving the roadways, crossing the centerlines, driving drunk, really drunk. At some point, courts have said you know what, as a policy matter, we can't find that an ancillary defendant, who played no role in causing this accident, liable. And that's the Medrano case, the Klein case, the Cunningham case, the Braegelman case.

What I've done with this handwritten chart here, I

10:45:07 1 All I am getting from the plaintiff is that at one spot
10:45:12 2 in the road, apparently, this pole is four feet away from
10:45:15 3 the road, not necessarily where the car left the road. So
10:45:20 4 that's what I would have liked to have known was this a
10:45:24 5 case where the car went straight off the road and hit the
10:45:27 6 pole, or was it a case where a car is skidding all over,
10:45:31 7 flipping over, and, you know, hits a pole in one of the
10:45:36 8 flipovers or what have you. Nobody gave me that.

10:45:39 9 MR. WILNER: Two responses. First, on the just
10:45:41 10 the pure doctrinal response, because we're here on summary
10:45:45 11 judgment, the pure doctrinal response on legal causation is
10:45:48 12 the pole is off the roadway. If you leave the roadway,
10:45:51 13 there's no way that the person or entity responsible for
10:45:55 14 the pole caused you to do that. So we are off roadway.

10:46:00 15 THE COURT: I understand.

10:46:00 16 MR. WILNER: As a factual matter, if you turn to
10:46:04 17 Exhibit M in my declaration, this is the Washington State
10:46:08 18 Patrol Accident Reconstruction.

10:46:09 19 THE COURT: Is that the diagram?

10:46:10 20 MR. WILNER: Correct.

10:46:11 21 THE COURT: That didn't tell me a lot. I mean, I
10:46:13 22 looked at it several times, and I got little arrows and I
10:46:17 23 got pieces of things on the road. But what I really wanted
10:46:21 24 to know, did this car flip over?

10:46:22 25 MR. WILNER: I don't think there's any evidence

10:46:24 1 that the car flipped over. But just to compare it to
10:46:28 2 Medrano, the key thing about Medrano is the pole wasn't
10:46:34 3 located 85 feet off of the roadway, the pole was located
10:46:37 4 within a normal place within the right of way. What the
10:46:41 5 Court said was the car went off the road, traveled 85 feet,
10:46:45 6 and hit the pole. What happened here, if you look at the
10:46:50 7 diagram, is, according to the State Patrol, the car went
10:46:52 8 off the roadway here, traveled, using their scale, around
10:46:57 9 80-odd feet, and hit the pole over here. (Indicating.)

10:47:01 10 THE COURT: O.K., well --

10:47:02 11 MR. WILNER: We shouldn't get too confused over
10:47:04 12 that.

10:47:04 13 THE COURT: That's why I wanted to know. What
10:47:06 14 one -- the way you say it conjures up that the car just
10:47:10 15 left the road and went on a straight path and hit the pole.

10:47:16 16 MR. WILNER: What actually happened here is that
10:47:18 17 the car went off the roadway, was skidding for a while, hit
10:47:20 18 the passenger side where Mr. Lowman was sitting. So
10:47:24 19 broadsided the pole and then spun around.

10:47:28 20 But, again, this is not -- this is nice for background,
10:47:31 21 but for purposes of legal causation, all that matters is --

10:47:34 22 THE COURT: No. I understand your point. I
10:47:38 23 understand your point.

10:47:40 24 MR. WILNER: In Medrano, Puget sued for improper
10:47:43 25 pole placement, the same claim Lowman asserts here. The

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Court granted summary judgment on legal causation. Division One affirmed. And Medrano has never been overruled.

THE COURT: Frankly, gentlemen, I do think that Medrano is the most, in regards to the defense position, is the most important case because it is laying down a demarkation, I think, in regards to -- it's really, unless I misread the cases or am getting them confused, is the only case where you have -- where the pure reason why the utility company or whether it's the County is in the case is in regards to where they place the pole.

All the other cases, every other case has combined factors of things that are happening on the road. This case is pure -- to the extent that the sole basis, as I understand it, that the County and the power company is being sued upon, is where they placed the pole. As a result, all the negligence that occurred on the road is just a cause, and the pole placement is another cause. We can have sufficient -- I mean, multiple causes. But I don't think there's any other case than Medrano and this case where they're seeking the whole -- the defendant's liable for something that happens off the road. I got that correct?

MR. WILNER: I think that's correct insofar as published decisions.

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THE COURT: That's all I can reply upon.

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MR. WILNER: That's correct. I just wouldn't go

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so far as to say that's the only case out there. There are

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others, but Medrano is -- I mean, doesn't happen too often

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that you, as a party, can go into court and say not only is

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this analogous facts, but my client was there and it's the

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same claim. Doesn't happen that often.

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I wanted to mention two things about there are cases

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that go on the other side of the line. Ruff vs. King

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County and Stevens vs. City of Seattle. And in those

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cases, you know, there's conflicting evidence on the

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driver's conduct, at least in Ruff. And there's no

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evidence of intoxication. Still the trial court in that

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case granted summary judgment on legal causation, but it

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got reversed.

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We don't have those problems here because it's

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undisputed what the driver was doing. And it's undisputed

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she was drunk and speeding and was convicted and pleaded

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guilty and said she was the proximate cause.

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We're right square in the middle of the case law on

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this, Your Honor. The facts, again, about Ms. Wilbur's

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driving are undisputed. Reasonable minds could disagree on

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where exactly on this you are, but -- we are, but I would

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submit we're somewhere -- somewhere around here.

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(Indicating.) I mean, speeding, drunk, criminally

11:25:06 1 PSE is not responsible for every accident where drivers
11:25:20 2 go off the road and hit a pole. And the cases where you
11:25:25 3 know they're not liable is when you have cases involving
11:25:32 4 drunk drivers speeding, getting criminally convicted. This
11:25:38 5 whole business that it was a different prong, she was
11:25:41 6 convicted of DUI, there's a DUI appendix to her judgment.
11:25:45 7 The judge found she had a chemical dependency problem that
11:25:49 8 contributed to her offense. There's no dispute about that.
11:25:55 9 That's the evidence before you. They don't challenge it.
11:25:58 10 They allege she was .14 in their Complaint.

11:26:02 11 These are the cases where, as a policy matter, the
11:26:06 12 courts say enough is enough. We can't hold a defendant
11:26:09 13 like PSE or, in this case, Skagit County, we can't hold
11:26:15 14 them liable as a matter of judicial policy.

11:26:23 15 I thought maybe one of the questions you had today
11:26:26 16 could be, well, how would Keller or Unger be decided if
11:26:29 17 they were decided on legal causation grounds? And I
11:26:32 18 thought to myself I would come prepared for that. And
11:26:39 19 plaintiff's counsel talked about the facts of Keller and
11:26:42 20 really, really misstated them in material ways. This is an
11:26:50 21 intersection accident in Spokane.

11:26:55 22 And it's important -- misstatements are important
11:26:57 23 because they tell you who is the party that would be
11:26:59 24 asserting the legal causation defense, who was the
11:27:04 25 negligent driver, that kind of thing. So it's important to

11:40:47 1 THE COURT: Well, let's -- Mr. Keane, do you think
11:40:50 2 that's necessary?

11:40:54 3 MR. KEANE: Interesting question, Your Honor. I
11:40:59 4 frankly think it would have influenced your decision to
11:41:02 5 have additional information and the fact that you didn't
11:41:05 6 has colored your view of the motion. And specifically your
11:41:09 7 remarks about things being off the roadway didn't matter in
11:41:12 8 your legal causation analysis. And those proofs were not
11:41:17 9 placed before you.

11:41:19 10 THE COURT: I treated your motion as for a
11:41:24 11 continuance not being argued if the defense was conceding
11:41:32 12 that.

11:41:34 13 MR. KEANE: What troubled me, Your Honor, was I
11:41:36 14 thought the upshot of some of your remarks, and I don't
11:41:39 15 intend to reargue anything here, but I thought the upshot
11:41:41 16 of your remarks was that you pinned some of your legal
11:41:44 17 causation reasoning upon the absence of material and
11:41:48 18 information about roadway and off roadway.

11:41:51 19 THE COURT: No, I didn't. I truly didn't. So I
11:42:01 20 don't think a motion denying the request for continuance is
11:42:06 21 necessary. I considered that the motion wasn't in front of
11:42:09 22 me because I did not factor in factual matters. I was
11:42:15 23 asking questions about it just out of idle curiosity rather
11:42:23 24 than an underpinning of my legal decision.

11:42:26 25 MR. KEANE: I understand your ruling. I guess for

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

NATHAN LOWMAN,)	
)	
Appellant,)	CERTIFICATE OF
)	SERVICE
vs.)	
)	
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)	
HISPITALITY, INC. d/b/a COUNTRY)	
CORNER, a Washington corporation,)	
PUGET SOUND ENERGY, a)	
Washington corporation, COUNTY OF)	
SKAGIT, a municipal corporation,)	
)	
Respondents.)	

I hereby certify that on September 8, 2010, copies of Appellant’s
Brief was served on counsel at the following address and by the method(s)
indicated:

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- U.S. Mail
- Fax
- Legal messenger
- Express mail
- Email, read receipt requested

I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 8th day of September, 2010, at Seattle, Washington.



Donna M. Pucel

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