

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2012 MAY 15 P 2:54

BY RONALD R. CARPENTER

No. 86584-1

SUPREME COURT OF THE STATE OF WASHINGTON CLERK

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.

**RESPONDENTS' JOINT ANSWER TO BRIEF OF
AMICUS CURIAE WSAJ FOUNDATION**

GORDON TILDEN THOMAS & CORDELL LLP

Jeffrey M. Thomas, WSBA #21175

Mark A. Wilner, WSBA #31550

Haley K. Krug, WSBA #39315

1001 Fourth Avenue, Suite 4000

Seattle, WA 98154

Attorneys for Respondent Puget Sound Energy, Inc.

SKAGIT COUNTY PROSECUTING ATTORNEY

A.O. Denny, WSBA #14021

605 South Third Street

Mount Vernon, WA 98273

Attorneys for Respondent Skagit County

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DISCUSSION	1
	A. Footnote 12	1
	B. Washington’s Well-Developed Legal Causation Case Law Provides Helpful Precedent for Courts.	4
	C. Overdrinking Was Not Ms. Wilbur’s Only Undisputed Transgression.	6
III.	CONCLUSION	7

TABLE OF AUTHORITIES

Cases

<i>Ang v. Martin</i> , 154 Wn.2d 477 (2005)	1
<i>Braegelmann v. County of Snohomish</i> , 53 Wn. App. 381 (1989)	3, 5
<i>Cunningham v. State</i> , 61 Wn. App. 562 (1991)	5
<i>Hartley v. State</i> , 103 Wn.2d 768 (1985)	3, 5
<i>Hungerford v. Dep't of Corr.</i> , 135 Wn. App. 240 (2006)	1
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237 (2002)	1, 2, 4, 5
<i>King v. Seattle</i> , 84 Wn.2d 239 (1974)	3, 4
<i>Klein v. Seattle</i> , 41 Wn. App. 636 (1985)	3, 5
<i>Kristjanson v. City of Seattle</i> , 25 Wn. App. 324 (1980)	3, 5
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn. App. 295 (2006)	1
<i>McCoy v. Am. Suzuki Motor Corp.</i> , 136 Wn.2d 350 (1998)	1, 4
<i>Medrano v. Schwendeman</i> , 66 Wn. App. 607 (1992)	1, 3, 4, 5
<i>Minahan v. W. Wash. Fair Ass'n</i> , 117 Wn. App. 881 (2003)	1, 5

TABLE OF AUTHORITIES

Schooley v. Pinch's Deli Market,
134 Wn.2d 468 (1998)..... 3

Other Authorities

1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 100 (1906)..... 4

W. PAGE KEETON, *et al.*, PROSSER & KEETON ON TORTS § 42 (5th ed.
1984)..... 4

I. INTRODUCTION

Respondents Puget Sound Energy (“PSE”) and Skagit County jointly submit this answer to the brief filed by amicus curiae the Washington State Association for Justice (“WSAJ”) Foundation, formerly known as the Washington State Trial Lawyers Association (“WSTLA”) Foundation.

II. DISCUSSION

A. Footnote 12

The WSAJ Foundation argues that *Keller v. City of Spokane*, 146 Wn.2d 237 (2002) fundamentally altered legal causation analysis such that an entire body of Washington precedent—the “*Medrano* line of cases” (Br. of Amicus Curiae WSAJ Foundation at 16 n.12)—should be overruled. Putting aside that *Keller* says otherwise,¹ and putting aside that post-*Keller* case law illustrates otherwise,² the WSAJ Foundation (then the WSTLA Foundation) itself contended otherwise when it briefed the issue to the Court 10 years ago in *Keller*. In footnote 12 of its brief here, the

¹ *Keller* explicitly recognized legal causation as a trial court “gatekeeper function” that operates as “a safeguard against making [a governmental entity] liable for every accident that occurs on its roadways. *Keller*, 146 Wn.2d at 252.

² “[N]umerous cases illustrate” how “the court often exercises its gatekeeper function by dismissing an action without trial for lack of legal cause.” *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 360 (1998). Many were published *after Keller*. See, e.g., *Ang v. Martin*, 154 Wn.2d 477 (2005); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295 (2006); *Hungerford v. Dep’t of Corr.*, 135 Wn. App. 240 (2006); *Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881 (2003).

WSAJ Foundation notes that its amicus curiae brief in *Keller* “suggested” that the legal causation doctrine would be “unaffected” by a “reformulation of the duty of care.” Br. of Amicus Curiae WSAJ Foundation at 16 n.12. As discussed below, the WSTLA Foundation’s position in *Keller* was far more than a mere “suggestion.”

The WSTLA Foundation’s brief in *Keller* was authored by one of the same authors of the WSAJ Foundation brief here, as well as a now-sitting Justice on the Court. The WSTLA Foundation presented a thorough treatment of the legal causation doctrine precisely to show how, if accepted, its position on duty (the main issue in *Keller*) would not amount to a “parade of horrors” for non-motorist defendants in egregious driving cases.³ On legal causation, the WSTLA Foundation’s brief in *Keller* may have well been written by PSE or Skagit County here. Much of it is directly at odds with what the WSAJ Foundation now contends:

- Duty is not “outcome determinative.” Br. of Amicus Curiae WSTLA Foundation at 7.
- “[A] court may also be asked to determine whether the defendant should avoid liability as a matter of law because its conduct is not a ‘legal cause’ of the

³ Even then, WSTLA acknowledged a governmental entity may owe *no duty* as a matter of law when egregious driving occurred as it *falls outside* the “general field of danger.” Br. of Amicus Curiae WSTLA Foundation at 3, 9. This too is an about-face from what it now asserts: “A Motorist’s Negligent Or Reckless Driving, Even While Intoxicated, *Is Within* The General Field of Danger.” Br. of Amicus Curiae WSAJ Foundation at 16 (emphasis added).

resulting harm.” *Id.* (citing *Hartley v. State*, 103 Wn.2d 768 (1985)).

- Although certain “issues” for duty and legal cause may be “intertwined,” “legal cause tends to be a policy-based inquiry.” *Id.* (citing *Schooley v. Pinch’s Deli Market*, 134 Wn.2d 468, 479 (1998)).
- “[T]he court may separately determine that legal cause does not exist.” *Id.*
- “This determination is dependent upon ‘mixed considerations of logic, common sense, justice, policy, and precedent.’” *Id.* (quoting *King v. Seattle*, 84 Wn.2d 239, 250 (1974)).
- Defendants’ “liability may be limited as a matter of law, as in other tort cases, under . . . a policy-based legal cause analysis.” *Id.* at 9.
- Four of the significant legal causation cases here—*Kristjanson v. City of Seattle*, 25 Wn. App. 324 (1980), *Klein v. Seattle*, 41 Wn. App. 636 (1985), *Braegelmann v. County of Snohomish*, 53 Wn. App. 381 (1989), and *Medrano v. Schwendeman*, 66 Wn. App. 607 (1992)—were resolved “consistent with traditional tort law analysis.” *Id.* at 14.
- These four cases (all of which WSAJ now contends should be overruled) reflect “a conceptual threshold grounded in the ‘legal cause’ prong of proximate cause, relieving a [defendant] of liability as a matter of law, under the court’s ‘gate keeping’ function, where there is particularly egregious conduct by a motorist.” *Id.* at 15.
- “The result in [these four] cases is consonant with traditional tort analysis, which recognizes there is an outer limit to the defendant’s duty.” *Id.*

- Perhaps most notable: “*This line of authority* [what WSAJ calls the “*Medrano* line of cases”] *would be unaffected by any re-examination and modification of the . . . duty formulation.*” *Id.* (emphasis added).

Of course, in *Keller*, this Court “re-examined” and “modified” the “duty formulation,” as the WSTLA Foundation desired, at least in part due to legal causation as supplying a policy-based “gatekeeper” limit on liability, again, as WSTLA Foundation desired. *Compare Keller*, 146 Wn.2d at 252, *with* Br. of Amicus Curiae WSTLA Foundation at 15. Now, after achieving the victory it sought in *Keller*, the WSAJ Foundation contends that its view of legal causation was “incorrect” all along. Br. of Amicus Curiae WSAJ Foundation at 16 n.12. The plaintiff trial lawyers cannot have it both ways.

For the Court’s reference, we attach a copy of the WSTLA Foundation’s amicus curiae brief in *Keller* as Appendix A.

B. Washington’s Well-Developed Legal Causation Case Law Provides Helpful Precedent for Courts.

As noted in our supplemental brief, the cornerstone to performing a sound legal cause analysis is ascertaining on which “side of the line” a particular case falls given its undisputed facts. *See* Supp. Br. of Resp. at 7 (quoting W. PAGE KEETON, *et al.*, PROSSER & KEETON ON TORTS § 42 (5th ed. 1984) (quoting 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 100, 110 (1906)) (citing *McCoy*, 136 Wn.2d at 360; *King*, 84 Wn.2d at 250;

Minahan, 117 Wn. App. at 898). Washington courts, consistent with leading tort law commentators (and the WSTLA Foundation during *Keller*), understand that this determination is best made through application of analogous precedent. *Id.*; Br. of Amicus Curiae WSTLA Foundation at 14-15.

Four of the cases on which the WSTLA Foundation relied as exemplars for the legal causation doctrine in *Keller* are four of the same cases on which PSE and Skagit County rely here: *Kristjanson*, *Klein*, *Braegelmann*, and *Medrano*. These same cases, together with *Hartley*, *Cunningham v. State*, 61 Wn. App. 562 (1991), and *Minahan*, supply numerous examples where Washington courts have determined legal causation is lacking in egregious driving situations.⁴

Although the WSAJ Foundation asks the Court to throw out this well-developed precedent, the above cases provide the relevant factual analogs to evaluate the undisputed facts here. From *Hartley*, *Medrano*, *Cunningham*, *Braegelmann*, *Klein*, *Kristjanson*, to *Minahan*, our case law illustrates that Judge Knight and Division I properly exercised their legal causation “gate keeper” function and determined that Ms. Wilbur’s

⁴ The fundamental tort doctrine of legal causation has not changed before or after *Keller*. The WSAJ Foundation says the above cases rely on a pre-*Keller* conception of duty, although it concedes *Minahan* was decided after *Keller*.

undisputed speeding, drunk, and criminally reckless driving preclude liability for PSE and Skagit County under the legal causation doctrine.

C. Overdrinking Was Not Ms. Wilbur's Only Undisputed Transgression.

The WSAJ Foundation attempts to perform its own legal causation analysis despite contending that our state's legal causation case law is "without precedential value." Br. of Amicus Curiae WSAJ Foundation at 16. The WSAJ Foundation's analysis, however, fails to consider most of the pertinent undisputed facts. It references Jennifer Wilbur's intoxication generally but essentially ignores the rest—and there is much more than just intoxication. Ms. Wilbur was speeding down a steep two lane country road in the middle of the night. She lost control of her car. She skidded off of the roadway. She was convicted for her criminally reckless DUI. She admitted she "drove a vehicle with disregard for the safety of others and thereby caused substantial bodily harm to Nathan Lowman." The court entered findings that she had a chemical dependency that contributed to the offense. Finally, to be clear, Ms. Wilbur was not just barely intoxicated; she was driving at nearly twice the legal limit for DUI.

All of these facts are undisputed. All of these facts were presented to the trial court and Division I. All of these facts are relevant to a legal causation analysis. Given these undisputed facts, if the legal causation

doctrine does not apply here in favor ancillary non-motorist defendants
PSE and Skagit County, it does not apply anywhere.

III. CONCLUSION

PSE and Skagit County request that this Court affirm the Court of Appeals decision and affirm Judge Knight's dismissal of Mr. Lowman's claims against PSE and Skagit County.

RESPECTFULLY SUBMITTED this 15th day of May, 2012.

**GORDON TILDEN THOMAS &
CORDELL LLP**
Attorneys for Respondent Puget Sound
Energy, Inc.

By s/ Mark Wilner

Jeffrey M. Thomas, WSBA #21175
Mark Wilner, WSBA #31550
Haley K. Krug, WSBA #39315
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Telephone: (206) 467-6477
Facsimile: (206) 467-6292

**SKAGIT COUNTY PROSECUTING
ATTORNEY**
Attorneys for Respondent Skagit County

By s/ A.E. Denny

A.O. Denny, WSBA #14021
Courthouse Annex – 605 South Third
Mount Vernon, WA 98273
Telephone: (360) 336-9460
Facsimile: (360) 336-9497

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 RESPONDENTS' JOINT ANSWER TO BRIEF OF AMICUS CURIAE WSAJ FOUNDATION, together with APPENDIX A, was served via email to the following pursuant to the parties' agreement for accepting email service:

T. Jeffrey Keane
Keane Law Offices
100 NE Northlake Way, Suite 200
Seattle, WA 98105

Thomas J. Collins
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121

A. O. Denny
Skagit County Prosecuting Attorney
605 South 3rd Street
Mount Vernon, WA 98273

Stewart Andrew Estes
Adam Rosenberg
Keating, Bucklin & McCormack,
Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Bryan P. Harnetiaux
517 E. 17th Avenue
Spokane, WA 99203-2210

George M. Ahrend
Ahrend Albrecht PLLC
100 E. Broadway Avenue
Moses Lake, WA 98837-1740

Signed this 15th day of May, 2012, at Seattle, Washington.

s/ Jacqueline Lucien
Jacqueline Lucien, Legal Secretary
Gordon Tilden Thomas & Cordell LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
(206) 467-6477

APPENDIX A

No. 70866-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JEAN KELLER, as General Guardian of
CASEY KELLER, an incompetent,

Plaintiff/Respondent,

vs.

CITY OF SPOKANE,

Defendant/Petitioner,

and

WALTER BALINSKI and HAZEL BALINSKI, husband and wife,

Defendants.

BY C. J. HARNETIAUX

01 OCT -9 11 16 13

RECEIVED
ST. SUPERIOR COURT
CITY OF SPOKANE, WA

BY C. J. HARNETIAUX

01 OCT 16 11 16 13

RECEIVED
ST. SUPERIOR COURT
CITY OF SPOKANE, WA

BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

Bryan P. Harnetiaux
WSBA No. 05169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

Debra L. Stephens
WSBA No. 23013
6210 E. Lincoln Lane
Spokane, WA 99217
(509) 465-5702

Gary N. Bloom
WSBA No. 06713
P.O. Box 1461
Spokane, WA 99210
(509) 624-4727

On Behalf of Washington
State Trial Lawyers
Association Foundation

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE 1

II. STATEMENT OF FACTS 1

III. ISSUE PRESENTED 3

IV. SUMMARY OF ARGUMENT 3

V. ARGUMENT 4

 1. Governmental Entities Are Liable In Tort To
 The Same Extent As Private Defendants, Absent
 A Statutory Modification Of The Particular Duty,
 Or Application Of Narrowly-Drawn Common
 Law Immunities..... 4

 2. Under The Common Law A Defendant's Duty Of
 Care Requires It To Reasonably Anticipate Acts
 Or Events Within The General Field Of Danger,
 Subject Only To Narrow Policy-Based Exceptions
 Under The "Legal Cause" Prong Of Proximate
 Cause..... 6

 3. The General Zone Of Danger A Governmental
 Entity Must Reasonably Anticipate Includes
 All Driving Behavior, Other Than Particularly
 Egregious Conduct..... 9

 4. The First Paragraph Of Instruction #13 Misstates
 The Duty Of Care Owed By A Governmental Entity
 And Should Be Reformulated Consistent With
 Traditional Tort Analysis..... 17

VI. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Baumgardner v. American Motors, 83 Wn.2d 751,
522 P.2d 829 (1974) 7

Bender v. Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983) 5

Berglund v. Spokane County, 4 Wn.2d 309,
103 P.2d 355 (1940)..... Passim

Bernethy v. Walt Failor’s, Inc., 97 Wn.2d 929,
653 P.2d 280 (1982) 6, 7

Bodin v. City of Stanwood, 130 Wn.2d 726,
927 P.2d 240 (1996) 5, 6

Braegelmann v. Snohomish Cy., 53 Wn. App. 381,
766 P.2d 1137 (1989) 15

Breivo v. Aberdeen, 15 Wn. App. 520, 550 P.2d 1164 (1976) 13

Chase v. Knabel, 46 Wash. 484, 90 Pac. 642 (1907) 10

Davison v. Snohomish County, 149 Wash. 109,
270 P. 422 (1928) 4

Gunshows v. Vancouver Tours, 77 Wn. App. 430,
891 P.2d 46, *review denied*, 127 Wn.2d 1008 (1995) 13

Hansen v. Washington Natural Gas Co., 95 Wn.2d 773,
632 P.2d 504 (1981)..... Passim

Hansen v. Wash. Natural Gas Co., 27 Wn. App. 127,
615 P.2d 1351 (1980), *reversed*, 95 Wn.2d 773,
632 P.2d 504 (1981) 12

Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985) 7, 15

Keller v. City of Spokane (C.A. #14170-5-III; unpublished
opinion noted at 82 Wn. App. 1061 (1996) 1, 5

Keller v. City of Spokane, 104 Wn. App. 545,
17 P.3d 661, *review granted*, 144 Wn.2d 1001 (2001) 1, 2, 9

<u>Khristjanson v. Seattle</u> , 25 Wn. App. 324, 606 P.2d 283 (1980)	14
<u>King v. Seattle</u> , 84 Wn.2d 239, 225 P.2d 228 (1974)	7
<u>Klein v. Seattle</u> , 41 Wn. App. 636, 705 P.2d 806, <i>review denied</i> , 104 Wn.2d 1025 (1985)	15
<u>Lucas v. Phillips</u> , 34 Wn.2d 591, 209 P.2d 279 (1949)	13, 14
<u>Lutheran Day Care v. Snohomish County</u> , 119 Wn.2d 91, 929 P.2d 746 (1992)	5
<u>McCluskey v. State</u> , 125 Wn.2d 1, 882 P.2d 157 (1994)	11, 12
<u>McKee v. Edmonds</u> , 54 Wn. App. 265, 773 P.2d 434 (1989)	13
<u>McLeod v. Grant County School Dist.</u> , 42 Wn.2d 316, 255 P.2d 360 (1953)	6, 7, 8, 11
<u>Medrano v. Schwendeman</u> , 66 Wn. App. 607, 836 P.2d 833 (1992)	15
<u>Olds-Olympic v. Commercial Union</u> , 129 Wn.2d 464, 918 P.2d 923 (1996)	10
<u>Overton v. Wenatchee Beebe Orch. Co.</u> , 28 Wn.2d 377, 183 P.2d 47 (1947)	17
<u>Provins v. Bevis</u> , 70 Wn.2d 131, 422 P.2d 505 (1967)	8
<u>Rikstad v. Holmberg</u> , 76 Wn.2d 265, 456 P.2d 355 (1969)	8
<u>Ruff v. County of King</u> , 125 Wn.2d 697, 887 P.2d 886 (1995)	9, 10, 12
<u>Schooley v. Pinch's Deli Market</u> , 134 Wn.2d 468, 951 P.2d 749 (1998)	7
<u>State v. Ray</u> , 130 Wn.2d 673, 926 P.2d 904 (1996)	16
<u>Stephens v. Seattle</u> , 62 Wn. App. 140, 813 P.2d 608, <i>review denied</i> , 118 Wn.2d 1004 (1991)	14
<u>Stewart v. State</u> , 92 Wn.2d 285, 597 P.2d 101 (1979)	5, 9, 11

<u>Tanguma v. Yakima County</u> , 18 Wn. App. 555, 569 P.2d 1225, <i>review denied</i> , 90 Wn.2d 1001 (1978)	14
<u>Wells v. Vancouver</u> , 77 Wn.2d 800, 467 P.2d 292 (1970)	6
<u>Wick v. Clark County</u> , 86 Wn. App. 376, 936 P.2d 1201, <i>review denied</i> , 133 Wn.2d 1019 (1997)	9, 13

OTHER AUTHORITIES

Washington State Constitution, Article II, §26	4
6 WASH. PRAC., Washington Pattern Jury Instructions (Civil), WPI 140.01 (3 rd ed, 1994 supp.)	2

STATUTES

Laws of 1961, Ch. 136, §1	4
Laws of 1967, Ch. 164, §1	4
Laws of 1993, Ch. 449, §2	4
RCW 4.24.210	5
RCW 4.92.090	4
RCW 4.96.010	4

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a Washington not-for-profit organization and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). It now operates the amicus curiae program formerly operated by WSTLA, and has an interest in the rights of injured persons.¹

II. STATEMENT OF FACTS

The basic facts are set forth in the Court of Appeals opinion and the parties' briefing. See Keller v. City of Spokane, 104 Wn. App. 545, 17 P.3d 661, *review granted*, 144 Wn.2d 1001 (2001); Keller Br. at 2-20; City Amended Br. at 2-8; Keller Reply Br. at 2-3. For purposes of this brief, the following facts are relevant: Casey Keller was injured in a motorcycle-car accident at the intersection of Wellesley and Freya in Spokane, Washington. Jean Keller, as guardian for Casey Keller (Keller), sued the driver of the car, Walter Balinski, et ux (Balinski), and the City

¹ WSTLA Foundation filed an amicus curiae memorandum in support of review in this appeal, and a similar memorandum in support of direct review of this same case. See Washington State Trial Lawyers Association Foundation Amicus Curiae Memorandum in Support of Petition for Review; Washington State Trial Lawyers Association Amicus Curiae Memorandum in Support of Supreme Court Review (S.C. #69581-4). Also, WSTLA appeared amicus curiae in the Court of Appeals in a prior appeal in this case. See Brief of Amicus Curiae Washington State Trial Lawyers Association (C.A. #14170-5-III) (addressing scope of "discretionary immunity" doctrine).

Roger Felice, co-counsel for Respondent Keller, was a member of the WSTLA Foundation Amicus Committee for portions of 2000 and 2001, but did not participate as a Committee member in Committee decision-making regarding this case, or preparation of Committee work product on behalf of WSTLA Foundation.

of Spokane (City) for negligence. The claim against the City was based upon its negligence in failing to maintain the intersection in a reasonably safe condition, particularly in failing to install a 4-way stop at the intersection. See Keller Br. at 14, 18; Keller Supp. Br. at 1. The City contended that negligence on the part of Keller and Balinski caused the accident. See City Amended Br. at 30,32. The trial court instructed the jury with respect to the City's duty of care as follows:

A city has a duty to exercise ordinary care in the signing and maintaining of its public streets to keep them in a condition that is reasonably safe for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety.

It is the duty of the city to eliminate an inherently dangerous condition, if one exists, and its existence is known, or should have been known to the city in the exercise of reasonable care.

Inherently dangerous, as used herein, means a danger existing at all times so as to require special precautions to prevent injury.

See Keller, 104 Wn. App. at 550 (quoting Instruction #13).

The first paragraph of Instruction #13 is based upon 6 WASH. PRAC., Washington Pattern Jury Instructions (Civil), WPI 140.01 (3rd ed, 1994 supp.). See Keller, at 556. Keller challenged that portion of Instruction #13 framing the scope of the City's duty only in terms of those persons using its public streets in a proper manner and exercising ordinary care for their own safety. Keller Br. at 20; see also City Amended Br. at 10-11; Keller, at 550. The jury returned a verdict finding Balinski 40% at fault, Keller 60% at fault, and the City fault-free. Keller, at 550.

The Court of Appeals, Division III, reversed and remanded for a

new trial on liability only. Id., at 559. It determined that the first paragraph of Instruction #13, based upon the current version of WPI 140.01, is an erroneous statement of law. Id., at 556. This Court granted the City's petition for review.

III. ISSUE PRESENTED

Does a governmental entity's duty of ordinary care regarding roads and highways only apply with respect to persons using them in a proper manner and exercising ordinary care for their own safety?

IV. SUMMARY OF ARGUMENT

The first paragraph of trial court Instruction #13, based upon the current version of WPI 140.01, is an erroneous statement of the law. The instruction improperly limits a governmental entity's duty of care, by only requiring it to reasonably anticipate the acts of motorists using its roads and highways *in a proper manner and exercising ordinary care for their own safety*. This highlighted language should be stricken from any description of the duty of care. Such a limitation is inconsistent with traditional tort analysis requiring defendants to reasonably anticipate all conduct within the general field of danger. In this context, all driving behavior, other than that involving particularly egregious conduct, is encompassed within the general field of danger. Nor is the limited duty reflected in Instruction #13 required by any statute that relaxes the duty owed by governmental entities under common law. Lastly, the limitation cannot be justified on any policy grounds under the "legal cause" prong of proximate cause.

To the extent Hansen v. Washington Natural Gas Co., 95 Wn.2d 773, 632 P.2d 504 (1981), cannot be reconciled with the above views, it should be overruled as incorrect and harmful precedent, as should other similar precedent.

V. ARGUMENT

1. Governmental Entities Are Liable In Tort To The Same Extent As Private Defendants, Absent A Statutory Modification Of The Particular Duty, Or Application Of Narrowly-Drawn Common Law Immunities.

Under Article II, §26 of the Washington State Constitution, “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” Until the 1960’s, for the most part, State and local governments enjoyed sovereign immunity.² In 1961, the Legislature waived sovereign immunity as to the State. Laws of 1961, Ch. 136, §1 (codified as RCW 4.92.090). The Legislature withdrew sovereign immunity from local governments in 1967. See Laws of 1967, Ch. 164, §1 (codified as RCW 4.96.010).³ These waivers of sovereign immunity each provided that the government would be liable for its tortious conduct “to the same extent . . . as a private person or corporation.” RCW 4.92.090; RCW 4.96.010(1). Since these general

2 There were exceptions. For example, quasi-municipal corporations such as counties could be sued in negligence for some functions, including design, construction, maintenance and repair of roads and highways. See e.g. Berglund v. Spokane County, 4 Wn.2d 309, 103 P.2d 355 (1940) (duty of care regarding roads and highways); Davison v. Snohomish County, 149 Wash. 109, 270 P. 422 (1928) (same).

3 RCW 4.96.010 was amended in 1993. See Laws of 1993, Ch. 449, §2.

waivers, the Legislature has only sparingly restored immunity as to certain activities or altered the nature of the common law duty of care owed by a governmental entity. See e.g. RCW 4.24.210 (recreational use statute, providing a form of qualified immunity for certain public and private land owners).⁴

Notably, the Legislature has not enacted any form of immunity, nor statutorily altered the duty of care of governmental entities with respect to roads and highways. See City Amended Br., at 18-19. In the absence of such legislative action the common law controls, and governmental entities are held to the same standards as private tortfeasors. See Stewart v. State, 92 Wn.2d 285, 293-95, 597 P.2d 101 (1979). Thus, for example, this Court recently rejected a municipality's argument that it should be allowed to present evidence of fiscal strategies as bearing upon the reasonableness of its conduct in maintaining a diking system. See Bodin v. City of Stanwood, 130 Wn.2d 726, 927 P.2d 240 (1996) (disapproving admission of "poverty defense"-type evidence; majority

⁴ The responsibility of governmental entities in tort after the waiver of sovereign immunity is also subject to certain narrow common law limitations based upon the notion that it is not a tort to govern. These limitations have constitutional underpinnings grounded in the plenary power of government and the separation of powers between the coordinate branches of government. "Discretionary immunity" and "judicial" (or "quasi-judicial") immunities are examples. See Bender v. Seattle, 99 Wn.2d 582, 588, 664 P.2d 492 (1983) (discretionary immunity for acts at truly executive level); Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 125-27, 929 P.2d 746 (1992) (judicial immunity, involving governmental adjudicative functions). These limitations are not involved in this appeal. In fact, the City unsuccessfully raised discretionary immunity in the first appeal in this case. See Keller v. City of Spokane (C.A. #14170-5-III; unpublished opinion noted at 82 Wn. App. 1061 (1996)).

holding consisting of 4-justice dissent authored by Justice Johnson and concurring opinion of Justice Alexander).⁵

Thus, the relevant question in this appeal is how common law tort principles are applied in framing the duty of care of governmental entities in maintaining their roads and highways. A brief review of these principles is warranted in advance of this inquiry.

2. Under The Common Law A Defendant's Duty Of Care Requires It To Reasonably Anticipate Acts Or Events Within The General Field Of Danger, Subject Only To Narrow Policy-Based Exceptions Under The "Legal Cause" Prong Of Proximate Cause.

In any case involving negligence, the court first decides, as a matter of law, whether a duty is owed under the circumstances.

Bernethy v. Walt Faylor's, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982).

A jury (when the trier of fact) then determines whether the duty is breached under the particular facts. Wells v. Vancouver, 77 Wn.2d 800, 803, 467 P.2d 292 (1970); McLeod v. Grant County School Dist., 42 Wn.2d 316, 322-23, 255 P.2d 360 (1953).⁶ Under the court's duty analysis, it asks whether the harm involved is within the "general field of danger" which could have been anticipated by the defendant. McLeod,

⁵ In light of Bodin, and the absence of any statute permitting consideration of fiscal concerns in framing a governmental entity's duty of care regarding roads and highways, the City's suggestion that its duty may be "[m]ore [l]imited" regarding mis-users of its roads, in order to protect its treasury, must be rejected. See City Pet. for Rev. at 16-17.

⁶ Of course, on appropriate motion the court may exercise its "gate keeping" function and remove a fact question from jury consideration when it concludes reasonable minds could not differ in resolving the question.

42 Wn.2d at 321-22; see also Baumgardner v. American Motors, 83 Wn.2d 751, 756-58, 522 P.2d 829 (1974). The anticipated zone of danger may involve tortious conduct of others; this is not necessarily outcome determinative. See McLeod, at 322-24; Bernethy, 97 Wn.2d at 934; Berglund v. Spokane County, 4 Wn.2d 309, 321, 103 P.2d 355 (1940).

In addition to the duty-based general zone of danger analysis, a court may also be asked to determine whether the defendant should avoid liability as a matter of law because its conduct is not a "legal cause" of the resulting harm. See Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985) (finding the legal cause prong of the proximate cause rule not met, relieving State of liability for failure to revoke driver's license). This Court has recognized that issues regarding duty analysis and legal cause are "intertwined." Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). However, the question of legal cause tends to be a policy-based inquiry. Under this concept, even though there may be a triable issue under the "cause-in-fact" prong of proximate cause, the court may separately determine that legal cause does not exist. This determination is dependent upon "mixed considerations of logic, common sense, justice, policy and precedent." King v. Seattle, 84 Wn.2d 239, 250, 225 P.2d 228 (1974). Ultimately, the Court asks whether, as a matter of law, the defendant's conduct with respect to the claimed injury is "too remote or insubstantial to impose liability." Hartley, 103 Wn.2d at

781; see also Schooley, 134 Wn.2d at 479-82.

Once it is determined that duty and legal cause exist, it is a question of fact for the jury whether the particular conduct should have been reasonably anticipated or foreseen by the defendant in the exercise of ordinary care. See Rikstad v. Holmberg, 76 Wn.2d 265, 270, 456 P.2d 355 (1969) (finding a jury issue because reasonable minds could differ on whether the conduct was within the foreseeable scope of the risks arising from the duty); McLeod, at 320-24 (same). Similarly, under the duty-based concept of "intervening cause," if reasonable minds could differ on whether the intervening conduct is so improbable or extraordinary as to relieve a defendant of liability, it is for a jury to resolve this issue under appropriate instructions. McLeod, at 323-24; see also WPI 12.05 (intervening cause pattern instruction). The tortious conduct of another will not relieve a defendant of its duty *as a matter of law* under an intervening cause analysis undertaken by the court unless such conduct is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." McLeod, at 323.

It remains to ask how these well-established tort principles have been followed with respect to the duty of care owed by governmental entities in maintaining roads and highways.

3. The General Zone Of Danger A Governmental Entity Must Reasonably Anticipate Includes All Driving Behavior, Other Than Particularly Egregious Conduct.

As the City points out, City Amended Br. at 12, this Court has made clear that a governmental entity is not required to “‘anticipate and protect against all imaginable acts of negligent drivers’ for to do so would make [it] an insurer against all such acts.” Ruff v. County of King, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (quoting from Stewart, 92 Wn.2d at 299; bracket inserted). However, this statement should not be viewed as a license for governmental entities to assert a restrictive duty of care out of keeping with traditional negligence principles. Instead, it merely reflects that their liability may be limited as a matter of law, as in other tort cases, under a duty-based “general field of danger” analysis, a policy-based legal cause analysis, or when an intervening cause exists as a matter of law. Nothing more.

Unfortunately, as the Court of Appeals opinion below reflects, there is confusion in Washington case law regarding the duty of care owed by governmental entities in maintaining roads and highways. See Keller, 104 Wn. App. at 552-56; see also Wick v. Clark County, 86 Wn. App. 376, 936 P.2d 1201, *review denied*, 133 Wn.2d 1019 (1997).⁷ This confusion is traceable to this Court’s decision in Berglund v.

⁷ Preliminarily, the City appears to argue that the “inherently dangerous condition” formulation in Instruction #13 allowed Keller to recover on that separate theory. It further argues that since the verdict form reflects the jury rejected the inherently dangerous condition theory, Keller’s argument regarding the first paragraph of Instruction #13 is irrelevant. See City Amended Br. at 10-11 &

Spokane County, and has persisted to this day. What the Court said in Berglund, and what it did, are two different things.

In Berglund, plaintiff sued Spokane County for negligence for injuries sustained when she was injured by an automobile while walking across a county bridge. 4 Wn.2d at 311-13. The County argued, *inter alia*, that the automobile that hit plaintiff must have been operated negligently and therefore no duty of care was owed by it under the circumstances. Id., 4 Wn.2d at 320. The trial court dismissed the complaint on a demurrer, and this Court reversed. In the forepart of the opinion the Court stated the rule that a governmental entity is "obligated to exercise ordinary care to keep its public ways in a reasonably safe condition for persons using such ways in a proper manner and exercising due care for their own safety." Id., at 313 (citations omitted). As stated, this rule purports to limit the duty by encompassing only non-negligent conduct by motorists. (Clearly, this is the City's argument here. See,

n. 2, 24-25, 31-33. This argument should be rejected. First, the verdict form does *not* specifically address, nor segregate, the inherently dangerous condition issue, and thus the Court cannot infer what the jury found on this question. See City Amended Br. at Appendix (verdict form); see also Chase v. Knabel, 46 Wash. 484, 488, 90 Pac. 642 (1907); Olds-Olympic v. Commercial Union, 129 Wn.2d 464, 476-77, 918 P.2d 923 (1996). Secondly, if the first paragraph of Instruction #13 is erroneous, it necessarily infected the verdict because the jury could have found that as a result of the negligence of Keller (and Balinski) *no duty of any kind was breached by the City*.

Case law suggests that a governmental entity's failure to eliminate or warn of a known "inherently dangerous" condition is a free-standing theory of liability. See Ruff, 125 Wn.2d at 705; Provins v. Bevis, 70 Wn.2d 131, 138, 422 P.2d 505 (1967). However, it appears this theory of liability suffers from the same infirmity discussed in the main text because this theory presupposes "a traveler exercising reasonable care." Id.

City Amended Br. at 14, 32.) Yet, how the Court resolved Berglund belies a literal application of its purported rule.

In seeking to avoid liability in Berglund, the county specifically argued that because the motorist was negligent it had no duty. 4 Wn.2d at 320. This Court gave “several answers” as to why this argument was misguided, the last of which is important here:

In the third place, the question is, in any event, one of “foreseeability.” If, under the surrounding conditions, the negligence of drivers at the particular point was reasonably to be anticipated, it would be the county’s duty to exercise reasonable care to protect the public against the resulting dangers.

Id., at 321 (emphasis added). The Court also rejected the county’s contention that any negligence by the motorist was an intervening cause of the plaintiff’s injuries. Id., at 321-22; see also McLeod, 42 Wn.2d at 323 (explaining this aspect of Berglund).

There is an unquestionable dissonance between the apparent rule announced in Berglund and its ultimate holding. This dissonance permeates subsequent Washington case law. A number of opinions by this Court have repeated the Berglund duty formulation. See e.g. Stewart v. State, 92 Wn.2d at 299 (*dicta*); Hansen v. Washington Natural Gas Co., 95 Wn.2d at 776; McCluskey v. State, 125 Wn.2d 1, 6, 882 P.2d 157 (1994); Ruff v. County of King, 125 Wn.2d at 704. However, only in Hansen is the Berglund duty formulation directly challenged.⁸

⁸ In Ruff, WSTLA urged the Court to reexamine the rule announced in Berglund, but it found this issue was not preserved for review. 125 Wn.2d at 704 n. 2.

Notably, and for unexplained reasons, both Ruff and McCluskey omit the words

In Hansen, the plaintiff urged the Court to extend governmental entities' common law duty to "all foreseeable travelers." 95 Wn.2d at 777. The Court rejected this argument on the basis that the authority cited in support of this contention related to the doctrine of contributory negligence, concluding:

That is not the question here. Rather, it is the negligence of the City of Seattle or the Gas Company. There is, to use the language of instruction No. 10, simply no evidence of any failure by defendants to "exercise ordinary care to keep the public ways in such a condition that they are reasonably safe for ordinary travel by persons using them in a manner that can be reasonably anticipated."

Id. The irony here is that the Court ultimately upheld vacation of the jury verdict for the plaintiff, as a matter of law, based upon its perception of the evidence under an instruction that did *not* rely on the Berglund formulation, but was more in keeping with traditional tort analysis.⁹ Otherwise, the Court did not discuss in any detail whether the Berglund duty formulation squared with traditional tort duty analysis.

The Berglund duty formulation, as reaffirmed in Hansen, also has

"and exercising due care for their own safety" in describing the duty owed by governmental entities to persons using roads and highways. See Ruff, at 704; McCluskey, at 6.

⁹ The Court's conclusion in Hansen is also troubling insofar as the Court's view of the evidence: "[t]here was no reason for the Gas Company to believe that portion of the street [where the injury occurred] would be utilized by pedestrians." 95 Wn.2d at 777. The Court of Appeals opinion in Hansen specifically referenced testimony that suggested in fact it was foreseeable that pedestrians would use the area where the plaintiff was injured. See Hansen v. Wash. Natural Gas Co., 27 Wn. App. 127, 131, 615 P.2d 1351 (1980) (recounting testimony indicating that "it was foreseeable that a pedestrian may walk on the planks within the barricade, and the company was constantly replacing them because they would become slippery, endangering pedestrians walking on them"), *reversed*, 95 Wn.2d 773, 632 P.2d 504 (1981).

been applied by the Court of Appeals in subsequent decisions. See e.g. McKee v. Edmonds, 54 Wn. App. 265, 773 P.2d 434 (1989); Gunshows v. Vancouver Tours, 77 Wn. App. 430, 891 P.2d 46, *review denied*, 127 Wn.2d 1008 (1995); Wick v. Clark County, 86 Wn. App. 376, 936 P.2d 1201, *review denied*, 133 Wn.2d 1019 (1997).

However, like Berglund itself, there is Supreme Court and Court of Appeals precedent after Berglund that is at odds with the notion that a governmental entity's duty of care requires it to reasonably anticipate only the acts of motorists using roads and highways in a proper manner and exercising ordinary care for their own safety. See e.g. Lucas v. Phillips, 34 Wn.2d 591, 597-98, 209 P.2d 279 (1949) (concluding "[t]he actions of [two drivers approaching a county bridge], even though negligent, would not be superseding causes with respect to the county's negligence, if the county, under the circumstances, should have realized that drivers on the bridge might act as they did"); Breivo v. Aberdeen, 15 Wn. App. 520, 522-24, 550 P.2d 1164 (1976) (citing Berglund, but nonetheless upholding judgment against a governmental entity notwithstanding palpable negligence by a motorist); Tanguma v. Yakima County, 18 Wn. App. 555, 560-62, 569 P.2d 1225 (relying on Lucas v. Phillips in reversing a dismissal of plaintiff's claim against a governmental entity because negligent driving by motorists was a foreseeable risk which the county was required to guard against), *review denied*, 90 Wn.2d 1001 (1978); Stephens v. Seattle, 62 Wn. App. 140, 142-44, 813 P.2d 608 (reversing

summary judgment of dismissal of claim against governmental entity despite plaintiff's excessive speed and use of alcohol), *review denied*, 118 Wn.2d 1004 (1991). These cases simply cannot be harmonized with the Berglund duty formulation relied upon by the City here.¹⁰

In addition to the two post-Berglund lines of cases described above, there are other Court of Appeals opinions that appear to have been resolved *consistent with* traditional tort analysis, either on the basis of 1) the trial court's exercise of its gate-keeping function in finding no disputed issue upon which reasonable minds could differ, or 2) a determination of no "legal cause" as a matter of law, due to the particularly egregious nature of a motorist's conduct. See e.g., Khristjanson v. Seattle, 25 Wn. App. 324, 606 P.2d 283 (1980) (upholding dismissal of intoxicated plaintiff's claim against city because evidence was "purely speculative" that a warning sign would have prevented the accident); Klein v. Seattle, 41 Wn. App. 636, 639, 705 P.2d 806 (upholding judgment on a verdict for the governmental entity because intoxicated motorist's "extreme carelessness" should not be reasonably

¹⁰ It should make no difference whether the motorist negligence a governmental entity has an obligation to reasonably anticipate is that of the plaintiff or another, insofar as the question of duty. It is the *type* of conduct, not who commits it, that is the relevant factor. For this reason, the City's attempt to distinguish Berglund because there the plaintiff was fault-free should be rejected. See City Amended Br., at 30-32. Moreover, under the Berglund duty formulation, relied upon by the City here, it would owe no duty of care based upon the negligence of Balinski alone.

The proper manner for considering the negligence of a plaintiff or other motorist that falls within conduct that should be reasonably anticipated by the governmental entity is to treat it as an issue of comparative fault.

anticipated as a matter of public policy; citing Hartley), *review denied*, 104 Wn.2d 1025 (1985); Braegelmann v. Snohomish Cy., 53 Wn. App. 381, 766 P.2d 1137 (1989) (upholding summary judgment of dismissal for governmental entity under legal cause analysis based upon extreme recklessness by motorist); Medrano v. Schwendeman, 66 Wn. App. 607, 610-13, 836 P.2d 833 (1992) (upholding dismissal of claim because of criminally reckless conduct by motorist; collecting cases).

These latter cases suggest a conceptual threshold grounded in the "legal cause" prong of proximate cause, relieving a governmental entity of liability as a matter of law, under the court's "gate keeping" function, when there is particularly egregious conduct by a motorist.¹¹ The result in such cases is consonant with traditional tort analysis, which recognizes there is an outer limit to the defendant's duty. This line of authority would be unaffected by any re-examination and modification of the Berglund duty formulation.

The foregoing illustrates that jurisprudence since Berglund is hopelessly confused in attempting to reconcile its duty formulation with traditional tort analysis. The Court should modify the formulation announced, but not applied, in Berglund, and subsequently affirmed in Hansen, and remove the limitation on a governmental entity's duty. Just as private defendants, governmental entities should be required to anticipate all reasonably foreseeable conduct by motorists, unless it is so

particularly egregious as to fall outside the general field of danger or not constitute legal cause.

In order to modify the existing duty, the Court must conclude that the offending language in Berglund, Hansen and similar precedent is "incorrect and harmful." See State v. Ray, 130 Wn.2d 673, 677-78, 926 P.2d 904 (1996) (discussing doctrine of *stare decisis* and criteria for overruling precedent). This stringent test is met here. The Berglund formulation is incorrect because it runs counter to traditional tort analysis, and is not otherwise justified by any statutory modification of governmental entities' common law duty. It is also at odds with common experience, as road and highway accidents frequently involve negligence by motorists. The Berglund formulation is harmful because it has not been consistently applied by this Court or the Court of Appeals, and the inconsistency has had a destabilizing effect in this area of tort law. This destabilization is evidenced in the rocky history of WPI 140.01. See WPI 140.01, Comment [Revision] (1994 Supp.). It is also harmful because governmental entities responsible for designing and maintaining roads and highways may be underestimating their responsibility by reliance upon a rule that the courts are not enforcing literally. This could both increase government exposure and increase the risk to the traveling public.

As a result, Berglund should be modified, and Hansen and similar precedent should be overruled, if necessary. The duty of care owed by

11 No such argument is made by the City in this appeal.

governmental entities with respect to roads and highways should be restated in a manner consistent with traditional tort analysis.¹² WSTLA Foundation's proposal for how this should be done is set forth below.

4. The First Paragraph Of Instruction #13 Misstates The Duty Of Care Owed By A Governmental Entity And Should Be Reformulated Consistent With Traditional Tort Analysis.

Based upon the argument in §3, supra, the Court should disapprove of the language in paragraph one of Instruction #13, limiting the City's duty to exercise ordinary care only with respect to "persons using them [public streets] in a proper manner and exercising ordinary care for their own safety." See Instruction #13 text, supra at 2. Corresponding language in the current WPI 140.01 should likewise be disapproved. A WPI along the following lines would comport with traditional tort duty analysis and the common law actually applied in Berglund:

A [county] [city] [town] [state] has a duty to exercise ordinary care in the [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to [keep] [construct] them in a [manner] [condition] that is reasonably safe for travel.¹³

¹² The City notes that the standard applied in Berglund has also been applied in a similar claim against a private sector defendant, citing Overton v. Wenatchee Beebe Orch. Co., 28 Wn.2d 377, 183 P.2d 47 (1947) (involving privately-owned bridge). See City Amended Br., at 19-22. This is yet another example of how the Berglund duty formulation has undermined traditional tort analysis. Its duty formulation cannot be justified because it is also applied in the private sector. If it is wrong, it is wrong in both contexts.

¹³ WSTLA Foundation agrees with Keller that the phrase "for ordinary travel" in the current WPI 140.01 is itself misleading. See Keller Supp. Br. at 17-18. This is the second usage of "ordinary" in the instruction, the first being in the phrase "ordinary care," which is defined in WPI 10.02. The use of the undefined term "ordinary" to modify "travel" could lead a jury to take it upon itself to find a motorist's negligent conduct extraordinary, and deny recovery on this basis. This might occur even though the trial court had previously determined that the subject conduct is within the general field of danger and not so particularly egregious as to

A statement of duty along these lines will conform the duty owed by governmental entities in this context with common law duty principles applicable to all defendants generally. Any modification of the duty regarding roads and highways should be left for the Legislature.

VI. CONCLUSION

The Court should adopt the argument advanced in this brief and resolve this appeal accordingly.

DATED this 9th day of October, 2001.

BRYAN P. HARNETIAUX*DEBRA L. STEPHENS*

GARY N. BLOOM*

On Behalf of WSTLA
Foundation

(*Brief transmitted for filing by e-mail; signed original retained by counsel.)

constitute an intervening cause as a matter of law. The absence of the word "ordinary" will not disadvantage the governmental entity. In the proper case, when it demonstrates a right to argue that particular acts or events could not have been reasonably anticipated, it may seek an instruction on intervening cause. See WPI 12.05 (first paragraph).

OFFICE RECEPTIONIST, CLERK

To: Jacqueline Lucien
Cc: tjk@tjkeanelaw.com; arned@co.skagit.wa.us; sestes@kbmlawyers.com; arosenberg@kbmlawyers.com; amicusWSAJF@wsajf.org; gahrend@ahrendalbrecht.com; Jeff Thomas; Mark Wilner; Haley Krug; tcollins@mhlseattle.com
Subject: RE: Lowman v. Wilbur; Washington Supreme Court Cause No. 86584-1

Rec. 5-15-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jacqueline Lucien [<mailto:jlucien@gordontilden.com>]
Sent: Tuesday, May 15, 2012 2:51 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: tjk@tjkeanelaw.com; arned@co.skagit.wa.us; sestes@kbmlawyers.com; arosenberg@kbmlawyers.com; amicusWSAJF@wsajf.org; gahrend@ahrendalbrecht.com; Jeff Thomas; Mark Wilner; Haley Krug; tcollins@mhlseattle.com
Subject: Lowman v. Wilbur; Washington Supreme Court Cause No. 86584-1

Attached is Respondents' Joint Answer to Brief of Amicus Curiae WSAJ Foundation, filed in *Lowman v. Wilbur, et al.*, Cause No. 86584-1, by Mark Wilner (WSBA #31550), Gordon Tilden Thomas & Cordell LLP, Seattle, WA 98154, 206-467-6477.

GORDON TILDEN THOMAS & CORDELL LLP

Jacqueline Lucien
Legal Secretary to
Jeffrey M. Thomas
Franklin D. Cordell
Mark A. Wilner
David M. Simmonds

1001 Fourth Avenue
Suite 4000
Seattle, WA 98154-1007
tel: (206) 467-6477
fax: (206) 467-6292
jlucien@gordontilden.com
www.gordontilden.com