

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2012 MAY 15 P 2: 24

BY RONALD R. CARPENTER

NO. 86584-1

---

THE SUPREME COURT OF  
THE STATE OF WASHINGTON

---

CLERK

NATHAN LOWMAN,

Petitioner

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

---

PETITIONER'S BRIEF IN RESPONSE TO AMICI WASHINGTON  
DEFENSE TRIAL LAWYERS AND WASHINGTON STATE  
ASSOCIATION FOR JUSTICE FOUNDATION

---

KEANE LAW OFFICES  
T. Jeffrey Keane, WSBA 8465  
100 NE Northlake Way, Suite 200  
Seattle, WA 98105  
206/438-3737 / fax 206/632-2540  
Email: [tjk@tjkeanelaw.com](mailto:tjk@tjkeanelaw.com)  
Attorneys for Petitioner

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

## TABLE OF CONTENTS

<b>I. Effect of <i>Keller v. Spokane</i> on Legal Causation Analysis: Gatekeeping Still Lives .....</b>	<b>3</b>
<b>II. Close Inspection Shows That the Underlying Case Authority Was Never On Firm Ground .....</b>	<b>6</b>
<b>III. WDTL Never Mentions <i>Unger v. Cachon</i> Since It Cannot Reconcile Division One's Decision There With Its Decision in <i>Lowman v. Wilbur</i> .....</b>	<b>8</b>
<b>IV. Conclusion .....</b>	<b>11</b>

**TABLE OF AUTHORITIES**

**Cases**

*Braegelmann v. Snohomish County*, 52 Wn.App. 381, 766 P.2d 1137,  
(1989)..... 3

*Cunningham v. State*, 61 Wn.App. 562, 811 P.2d 225 (1992)..... 3, 7

*Keller v. Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002)..... passim

*Klein v. Seattle*, 41 Wn.App. 638, 705 P.2d 806 (1985)..... passim

*Lowman v. Wilbur*, noted at 162 Wn.App. 1029 (2011), review granted,  
173 Wn.2d 1016 (2012)..... 8, 10

*Minahan v. W. Wash. Fair Ass'n*, 117 Wn.App. 881, 73 P.3d 1019 (2003)  
..... 4, 12

*Unger v. Cachon*, 118 Wn.App. 165, 73 P.3d 1005 (2003)..... passim

*Wick v. Clark County*, 86 Wash.App. 376, 936 P.2d 1201 (1997) ..... 8

**I. Effect of *Keller v. Spokane* on Legal Causation Analysis:  
Gatekeeping Still Lives**

*Keller v. Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) was a frank assessment of the varying but confusing statements of the law regarding government liability for highway design and maintenance contained in the cases which preceded it. This Court identified an analytical flaw that that review revealed—a sometimes failure to remove the plaintiff’s conduct from the equation when examining whether a duty exists—and fixed it. It is now clear in this context that whether the plaintiff has any fault has no role in determining whether a duty existed to plaintiff which may have been breached.

The signal clarity of this rule was not in play when any of the cases the courts used to decide Mr. Lowman’s case were decided. This result has decreased the relevance of those cases—*Medrano v. Schwendeman*, 66 Wn.App. 607, 836 P.2d 833 (1992), *Cunningham v. State*, 61 Wn.App. 562, 811 P.2d 225 (1992), *Klein v. Seattle*, 41 Wn.App. 638, 705 P.2d 806 (1985), *Braegelmann v. Snohomish County*, 52 Wn.App. 381, 766 P.2d 1137, (1989)—even if it did not ‘overrule’ them. *Keller* demands that duty analysis stand alone. It corrected the result that flowed when courts conflated duty and legal cause analysis—murky and less than pure assessment of either, or both.

The WDTL's protestations aside, gatekeeping lives. As suggested in the brief by WSAJ, a construct which asks (following a determination that duty exists) whether the conduct of the defendant increased the risk of harm to the plaintiff provides a clear rule and just the sort of guidance trial courts need to navigate legal cause cases.

*Minahan v. W. Wash. Fair Ass'n*, 117 Wn.App. 881, 73 P.3d 1019 (2003), and the result in it, provides a good example of how this rule would work. Though it was arguably foreseeable that intoxicated or incompetent drivers would smash into parked cars adjacent to the fairgrounds, by their conduct defendants did nothing to increase the risk of harm to plaintiff. Plaintiff lawfully parked her car. Thereafter her risk of harm was not increased by the conduct of defendants.

Applying such a rule here is instructive. The fairgrounds defendant in *Minahan* did nothing to increase the risk of harm to the plaintiff. Defendants here, by contrast, unquestionably increased the risk of harm to plaintiff. Cars have been striking objects adjacent to roadways for a hundred years. It has long been known that highway design can accommodate to some such driving through materials used (soft not hard), technology employed (breakaway light standards), or design or engineering applied (tapered ends of guardrails; clear zones and setbacks of poles; avoidance of the use of objects which penetrate passenger

compartments). Placing a utility pole within a few feet of the edge of a winding steep road—at the precise location where other motorists previously struck the pole—ignored what experience has taught about driver behavior and performance. Petitioner’s highway design expert stated as much:

[R]ecognized highway design standards call for clear zones adjacent to the travel way on roadways. A clear zone is just what it sounds like: a zone clear of hard, placed objects adjacent to the travel way. This allows a vehicle to leave the roadway and return without harm, and it gives the driver of the vehicle time and space to accomplish that. For that reason clear zones are also referred to as ‘control zones’ since that is the area where motorists can regain control if they have left the travel way. The reason highway design standards call for clear zones is that it is well known that vehicles will leave the travel way, for any of the reasons described above, from driver or vehicle failure, to weather, to the threatening actions of other drivers, to animals....the absence of a ten foot clear zone, at the place where PSE placed a utility pole 4.5 foot from the travel way, is a violation of the 10-foot industry standard.

(CP 170, 171, Declaration of Edward Stevens).

It is clear that failing to abide by these standards greatly increased the harm to Mr. Lowman. Though Ms. Wilbur lost control of her car as she drove the winding downhill road, petitioner’s expert testified that her car was returning to the roadway in recovery from her driving error when the passenger side of the car nearest Mr. Lowman struck the PSE utility pole:

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.

(CP 150, Timothy Moebes, Accident Reconstructionist).

The hazard that following the *Klein* line of cases creates is that it leads to deciding whether duty exists---the existence of which should already be established before the analysis moves on to legal cause---by examining the plaintiff's conduct. But the plaintiff's conduct has nothing to do with examining duty.

Adhering to a formulation which requires--as *Keller* demands--that duty is analyzed without regard for the plaintiff's conduct is simple recognition of a maturing view of the law. Mashing duty analysis with legal cause inquiry does justice to neither. After clearly and cleanly establishing that a duty is owed to the plaintiff one can then turn to whether policy, precedent and justice should, nevertheless, deny the plaintiff his day before a jury.

## **II. Close Inspection Shows That the Underlying Case Authority Was Never On Firm Ground**

WSAJ has painstakingly deconstructed the legal cause analysis in each of the cases relied upon by the Court of Appeals. As shown in that analysis, the conception of duty owed by governmental entities, after

*Keller*, is different from the pre *Keller* conception of duty. More importantly to this discussion, the cases were never on firm analytical ground in the first place. WDTL's wish that those cases remain as proper statements of the law of legal causation ignores their weak foundation and their flawed lineage given the problem of relying upon *dicta* in *Klein*.

The cases which follow *Klein v. Seattle* turn on language in *Klein* which is *dicta*, and which has been overcome by this Court's ruling in *Keller*: "The City was under no duty to protect Roberts from the extreme carelessness of Mullens." *Klein v. Seattle*, 41 Wn.App. at 639. What this Court's thorough discussion in *Keller* makes clear is that when the *Klein* court analyzed Seattle's duty in part by looking to Mullens's extreme carelessness—in *dicta* no less—it started a wayward journey for the Courts of Appeal, which continued with Division One's decision in this case.

*Klein* begat *Braegelman* which begat *Cunningham* and *Medrano* lazily followed. To be sure *Medrano v. Schwendeman* did not present a very appealing or, in view of the fact Mr. Schwendeman was *pro se* and handling his own appeal, very competent case for rigorous consideration of the *Klein* string of legal cause cases.

Worse, the record in *Medrano* is poorly developed. The case was prosecuted through appeal by the *pro se* driver—apparently drunk, and

certainly reckless, leading to his conviction for vehicular assault—which likely contributed to the very murky record of what occurred. It is never clear where the utility pole he struck was placed, whether any regulation or standard prohibited its placement, whether any errant driver had ever struck it before, or whether given the outlandish conduct and litigation strategy of Mr. Schwendeman it can even be said that Puget Power increased his risk of harm by its actions. One cannot tell from the opinion what happened or how. In contrast, here it is evident that Ms. Wilbur did leave the roadway but not at extreme speed, nor at an extreme angle, and she struck the pole just as she was returning to the road surface. She also was not traveling on a flat, straight, familiar roadway leading to her home of 13 years standing.

**III. WDTL Never Mentions *Unger v. Cachon* Since It Cannot Reconcile Division One’s Decision There With Its Decision in *Lowman v. Wilbur***

Significantly, WDTL never discusses *Unger v. Cachon*, 118 Wn.App. 165, 73 P.3d 1005 (2003). It never even cites *Unger*. The *Lowman* Court of Appeals did little to address the conflict itself, making no effort to compare the plaintiffs’ conduct in both with the quite disparate treatment of both. While repudiating the suggestion that *Keller* actually overruled anything other than *Wick v. Clark County*, 86 Wash.App. 376, 936 P.2d 1201 (1997), the *Lowman* court never discussed whether *Keller*

weakened, or called into question, the *Klein* line of cases which the Court of Appeals, and WDTL, insist remain as viable as ever post *Keller*. But if the *Unger* court reasoned like the *Lowman* court did, summary judgment would have been affirmed in *Unger*. Instead, the *Unger* court understood what this Court taught in *Keller*, and applied it:

Accordingly, the trial court erred in this case by concluding that because Unger was driving recklessly, the County owed him no duty as a matter of law. Although 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 alleged negligent conduct, to make the road safe for ordinary travel.

118 Wn.App. at 176.

In contrast, this panel of Division One continues to march down the *Klein* line of cases without regard for their analytical frailty. The court also appears to ignore the un rebutted fact that Mr. Lowman's injuries were so severe because the conduct of PSE and Skagit County, when combined with Ms. Wilbur's, increased the risk of and the resulting magnitude of his harm. Division One focused on whether the dismissed defendants 'precipitated' plaintiff's departure from the road, which is not the test and should not be the test:

[N]either PSE nor Skagit County did anything to precipitate the departure of Wilbur's vehicle from the roadway. In such circumstances, policy considerations—as evidenced by prior case law addressing legal causation—dictate a determination that the

connection between the alleged negligent acts of PSE and Skagit County and Lowman's injuries is too remote to impose liability.

*Lowman v. Wilbur*, noted at 162 Wn.App. 1029 (2011), review granted, 173 Wn.2d 1016 (2012).

Had that same formulation been applied in *Unger*, it seems the absence of proof that the county 'precipitated' Mr. Unger's car leaving the highway would have produced a similar result. *Unger* is a correct and appropriate parsing of *Keller*, and illustrates why defendants who increase the risk of harm should not be excused under legal causation principles. The better view, and one consistent with the pure comparative fault scheme in Washington, is the policy recognition that multiple defendants as well as plaintiffs can share fault, something *Unger* recognized and the trial court in this case did not.

If defendants here choose to ignore their duty to motorists, expecting to later argue that same are owed no duty if negligent in any way, they should do so at their peril. They should not be excused from discharging their duty because the plaintiff, or others, did not act entirely with reasonable care. Allowing cases like this to proceed to trial fairly balances duty and legal causation principles, while doing nothing to deprive defendants of their opportunity to blame Mr. Lowman, or Ms. Wilbur, or the bar, or any other actor in this event sequence.

But inhering in the WDTL's arguments is a not well disguised scorn which appears more moral than legal. Just such thinking leads to analytical imprecision. This case is not about whether anyone was 'drenched' in alcohol (WDTL brief, p. 7), nor is it about whether parroting text from a criminal guilty plea somehow disposes of civil duty and causation analysis (WDTL brief, p. 2).

Whether *Keller* 'changed' the law is not nearly as important as the light it shed upon what the law is. It taught that the ground floor of this analytical structure is the existence—or lack of existence—of a duty owed to the plaintiff. After that point, when justice, policy and precedent warrant, gatekeeping will remain alive and well. Drivers drag racing with each other and drivers engaging in drinking contests to the point of incoherence who then crash their cars will likely remain on the 'other side' of the legal causation line, for good reason.

#### **IV. Conclusion**

WDTL describes this as an 'extraordinary' case (WDTL Brief, p. 9). It is not. As any traveling motorist has seen, cars and drivers leave roadways. Contrary to what the trial judge assumed--about this car rolling over and over, or the like--Ms. Wilbur was modestly exceeding the speed limit, at night, on a winding downhill road. Her car had slid off the road surface but was returning to the road surface when it hit the utility pole. If

this is an ‘extraordinary’ case then so was *Unger*, and so was *Keller*. And in both the flawed driving of the plaintiff did not excuse the breach of duty by the defendant. As well, the result should be the same if the issue present is analyzed on the basis of legal causation.

To be clear, plaintiff does not entirely blame the accident on *the pole* (WDTL Brief, p. 9). It would be silly to do so. But the pole, its placement, the past experience of PSE in replacing the pole in the exact location where it had previously been struck, the county’s ignorance of PSE’s actions, the conduct of the bar where Ms. Wilbur was served, Ms. Wilbur’s behavior, and Mr. Lowman’s all reside in the causation mix.

There are, and will be, cases like *Minahan* where the defendant’s conduct did not increase the risk of harm to the plaintiff. Whether analyzed on the basis of the absence of duty or, even where duty is present, analyzed on the basis that the law should not allow liability against the defendant, the dire consequences WDTL threaten are unlikely to occur.

//

//

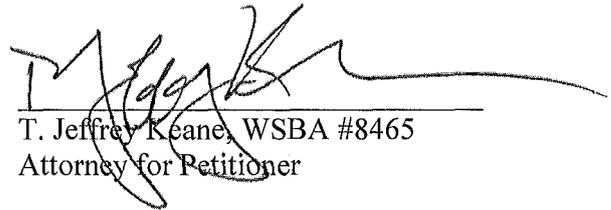
//

//

Petitioner requests that the Court adopt the reasoning advanced in his, and in the WSAJ's brief and resolve this appeal accordingly.

Respectfully submitted this 15<sup>th</sup> day of May, 2012.

KEANE LAW OFFICES



T. Jeffrey Keane, WSBA #8465  
Attorney for Petitioner

## OFFICE RECEPTIONIST, CLERK

---

**To:** Donna M. Pucel; [arned@co.skagit.wa.us](mailto:arned@co.skagit.wa.us); [mwilner@gordontilden.com](mailto:mwilner@gordontilden.com);  
[hkrug@gordontilden.com](mailto:hkrug@gordontilden.com); [sestes@kbmlawyers.com](mailto:sestes@kbmlawyers.com); [arosenberg@kbmlawyers.com](mailto:arosenberg@kbmlawyers.com)  
**Cc:** Jeff Keane; Bryan Harnetiaux; George Ahrend  
**Subject:** RE: Lowman v. Wilbur

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.

-----Original Message-----

**From:** Donna M. Pucel [<mailto:dmp@tjkeanelaw.com>]  
**Sent:** Tuesday, May 15, 2012 2:16 PM  
**To:** OFFICE RECEPTIONIST, CLERK; [arned@co.skagit.wa.us](mailto:arned@co.skagit.wa.us); [mwilner@gordontilden.com](mailto:mwilner@gordontilden.com);  
[hkrug@gordontilden.com](mailto:hkrug@gordontilden.com); [sestes@kbmlawyers.com](mailto:sestes@kbmlawyers.com); [arosenberg@kbmlawyers.com](mailto:arosenberg@kbmlawyers.com)  
**Cc:** Jeff Keane; Bryan Harnetiaux; George Ahrend  
**Subject:** Lowman v. Wilbur

The attached is to be filed with the court in the case of: Lowman v. Wilbur, 86584-1 Filing party: T. Jeffrey Keane, WSBA 8465; [tjk@tjkeanelaw.com](mailto:tjk@tjkeanelaw.com); 206/438-3737

Donna M. Pucel  
Paralegal to T. Jeffrey Keane

Keane Law Offices  
100 NE Northlake Way, Suite 200  
Seattle, WA 98105  
Direct: 206/438-3730  
Fax: 206/632-2540