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SUPREME COURT
STATE OF WASHINGTON
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SUPREME COURT OF THE STATE OF WASHINGTON

NATHAN LOWMAN,

Plaintiff/Appellant,

v.

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

Defendants/Respondents,

and

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

Defendants.

NO. 86584-1

RESPONDENT PUGET
SOUND ENERGY, INC.'S RAP
10.8 STATEMENT OF
ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Respondent Puget Sound Energy, Inc.

submits the decision in *Tolliver v. United States*, slip op., No. 10-cv-5056-

RBL, 2012 WL 3157134 (W.D. Wash. Aug. 3, 2012), as additional

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authority regarding the issue of legal causation. In *Tolliver*, United States District Court Judge Ronald Leighton granted the defendants' summary judgment motion on legal causation grounds in Part II.E of the opinion, stating:

Under similar circumstances, Washington courts have repeatedly found proximate cause lacking. Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). "Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." *Id.* at 778, 698 P.2d 77 (citation omitted). Legal causation, on the other hand, "is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Crowe v. Gaston*, 134 Wash.2d 509, 518, 951 P.2d 1118 (1998). "It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Hartley*, 103 Wash.2d at 779, 698 P.2d 77. Even where negligence is proved, the determination of legal liability depends upon " 'mixed considerations of logic, common sense, justice, policy, and precedent.' " *Id.* (quoting *King v. City of Seattle*, 84 Wash.2d 239, 250, 525 P.2d 228 (1974)). "[T]he question in a legal causation analysis is whether, as a matter of policy, the connection between the defendant's act and its ultimate result is too remote or insubstantial to impose liability." *Cunningham v. State*, 61 Wash.App. 562, 572, 811 P.2d 225 (1991). "Where the facts are not in dispute, legal causation is for the court to decide as a matter of law." *Crowe*, 134 Wash.2d at 518, 951 P.2d 1118.

Numerous Washington courts have held that extreme negligence by a driver may preclude legal causation. For example, in *Lowman v. Wilbur*, No. 65359-8-I, 2011 WL 2535511 (Wash.Ct.App. June 27, 2011) (unpublished opinion), the Washington State Court of Appeals addressed similar facts and discussed at length the precedent analyzing negligent drivers and legal causation. There, the

plaintiff got into a car with an intoxicated driver, who subsequently lost control of the vehicle and struck a utility pole. *Id.* at * 1. The driver later pleaded guilty to vehicular assault. *Id.* In addition to the driver, the plaintiff sued the utility company and Skagit County, arguing that negligent placement of the pole in a “sharp curve” exacerbated the injuries. Even though the utility company and the county expressly *conceded negligence*, both the trial court and court of appeals held that legal causation was lacking. *Id.* at *5. Given the intoxication of the driver, and the fact that defendants had done nothing “to precipitate the departure of [the] vehicle from the roadway,” policy considerations “dictate[d] a determination that the connection between the alleged negligent acts ... [was] too remote to impose liability.” *Id.*

Similarly, in *Cunningham v. State*, 61 Wash.App. 562, 811 P.2d 225 (1991), the state court found legal cause lacking where an intoxicated driver ran into a barricade. The driver sued, arguing that negligent striping and lighting caused the accident. *Id.* at 570, 811 P.2d 225. The court noted that the plaintiff was intoxicated and could see the barricade, yet still struck it. *Id.* The court concluded that “neither logic, common sense, justice, nor policy favors finding legal causation here.” *Id.* at 571, 811 P.2d 225.

In *Klein v. Seattle*, 41 Wash.App. 636, 705 P.2d 806 (1985), the court refused to hold that negligent road design legally caused an accident in which a speeding driver with a BAC of .04% crossed the center line and collided with another vehicle. The court noted that the city “cannot be expected to guard against this degree of negligent driving.” *Id.* at 639, 705 P.2d 806. To impose liability would essentially impose an insurance policy protecting against the “depredations and negligence of the reckless, careless and drunken operator.” *Id.* Thus, where the precipitating factor to an accident is a driver's own extreme negligence, Washington courts may find legal causation lacking.

As in the cases cited above, the Court must conclude that the driver's extreme negligence—intoxication, speeding,

texting, and Ms. Kalama's failure to listen to her passengers telling her to stop—precipitated the accident and precludes legal causation. Ms. Kalama was ignoring the signs present—specifically, the posted speed limit. Even with her highbeams on, she was quite obviously driving at a speed that did not allow her time to see and react to the terrain ahead (especially given her intoxication). She was swerving off the road. She was using her phone. She was relying on her passengers to tell her when to stop. She did not so much as brake before going into the river. Moreover, Plaintiffs have presented no authenticated evidence that any person other than Sela Kalama has ever actually driven over the boat launch. While the Tribe, or the United States, or the County might have barricaded the end of the road or might have supplied reflective signs, it was Ms. Kalama's intoxication, speed, and inattentiveness that were the immediate and legal causes of the accident.

Tolliver, 2012 WL 3157134, at *12-13.

In *Tolliver*, Judge Leighton also discussed the effect of *Keller v.*

City of Spokane on the legal causation doctrine, stating:

The Court notes that the parties rely on *Keller v. City of Spokane*, 146 Wash.2d 237, 44 P.3d 845 (2002). *Keller* did not change the legal causation analysis: trials courts “still retain[] [their] gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident.” *Keller*, 146 Wash.2d at 252, 44 P.3d 845; see also *Lowman*, 162 Wash.App. 1029, 2011 WL 2535511, at *4 (providing a thorough analysis of *Keller*' s effect).

Id. at *12 n.11.

RESPECTFULLY SUBMITTED this 5th day of March, 2013.

**GORDON TILDEN THOMAS &
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that a copy of the foregoing RESPONDENT PUGET SOUND ENERGY, INC.'S RAP 10.8 STATEMENT OF ADDITIONAL AUTHORITIES, was served via email to the following pursuant to the parties' agreement for accepting email service:

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Signed this 5th day of March, 2013, at Seattle, Washington.

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Rec'd 3-5-13

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Subject: Lowman v. Wilbur; Washington Supreme Court Cause No. 86584-1

Dear Clerk:

Attached for filing is Respondent Puget Sound Energy, Inc.'s RAP 10.8 Statement of Additional Authorities in *Nathan Lowman v. Jennifer Wilber, et al.*; No. 86584-1.

This email is being sent on behalf of Mark Wilner, WSBA #31550
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