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THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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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

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SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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Opinion in *Lowman v. Wilbur*, 162 Wn.App. 1029, Case No. 65359-8-1

### **A. IDENTITY OF PETITIONER**

Petitioner Nathan Lowman was injured in single car accident when the vehicle in which he was a passenger struck a roadside utility pole installed by Puget Sound Energy in a manner prohibited by Skagit County.

### **B. COURT OF APPEALS DECISION**

Petitioner seeks review of a decision by Division I of the Court of Appeals: *Lowman v. Wilbur*, 162 Wn.App. 1029, Case No. 65359-8-I; unpublished decision filed June 27, 2011; motion to publish denied on August 9, 2011. A copy of the decision is included in the Appendix, attached hereto.

### **C. ISSUES ACCEPTED FOR REVIEW**

1. Whether this Court's decision in *Keller v. Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) clarifying that analyzing whether non motorist defendants have a duty to plaintiff cannot rest upon whether the motorist (and her passenger) are fault free, overturned *sub silentio* the legal causation holding in *Medrano v. Schwendemann*, 66 Wn.App. 607, 836 P.2d 833, (1992).

2. Whether the Division I decision in *Unger v. Cachon*, 118 Wn.App. 165, 73 P.3d 1005 (2003), which held that plaintiff's claims were not barred under legal causation principles, is in conflict with the underlying decision by Division I in this case.

## D. STATEMENT OF THE CASE

### 1. Factual Background

Nathan Lowman was a passenger in a car driven by Jennifer Wilbur. Ms. Wilbur had been drinking at the Country Corner, where Mr. Lowman met her. They left the restaurant together. Ms. Wilbur was driving her car. CP 380-381. Winding downhill Satterlee Road lay a short distance away. Ms. Wilbur was driving over the speed limit down Satterlee. She slowed to 30mph in a 25mph zone and thereafter briefly lost control. Her car left the road pavement. 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 placed 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 2003 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 where it was originally installed. PSE did the same after plaintiff's accident destroyed the pole in 2005. Another motorist struck and destroyed the same pole in 2006.

**2. Summary of Trial Court and Court of Appeals Decisions**

The trial court, relying upon *Medrano v. Schwendemann*, 66 Wn.App. 607, 836 P.2d 833, (1992), dismissed plaintiff's case against PSE and the County. The Court ruled that no legal causation linked PSE and Skagit County -- and their admitted breaches of duty to plaintiff -- to this accident. *Medrano* involved a *pro se* appellant arguing that his own crash while intoxicated of his pickup on a flat straight road in front of his home of 13 years did not preclude him from suing Puget Power for its placement of the utility pole he struck. *Medrano* relied upon cases decided before *Keller v. Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) was decided. Each of the cases relied upon by the *Medrano* court assumed that assessing the duty of non motorist defendants to a motorist plaintiff includes considering whether the motorist is fault free.

The Court of Appeals agreed with the trial court that *Medrano* controlled the outcome of this case and affirmed dismissal on summary judgment. Reading *Keller* narrowly, the Court of Appeals, in its unpublished decision filed on June 27, 2011, approved of continuing reliance upon *Medrano*: “The facts presented in *Medrano* are strikingly similar to those presented here.”

The Court of Appeals also noted that *Keller* “(E)xplicitly overruled only one case and that case was not *Braegelmann*.” *Id.*, p. 4, fn. 3. The Court explained its view of why *Keller* had no bearing on its decision:

“However, duty and legal causation are not synonymous – an analysis of duty focuses primarily on the defendant, while legal causation analysis, in cases such as this, involves consideration of the egregiousness of the principal actors conduct.”

*Lowman Op.* at 5.

The Court of Appeals did not discuss or address the problem inhering in *Medrano* – and in each of the cases upon which *Medrano* was based – that whether a duty was owed must be analyzed independently of whether the injured party was also negligent. Further, the Court of Appeals did not discuss the problem of relying upon precedent which has been undercut by subsequent decision of this Court.

The appellate court, in each of the cases *Medrano* relied upon

discussed analysis of duty as if it could be conditional:

“Further the county and Puget Power recognize the existence of their respective duties to keep the roadways in a reasonable safe condition for persons using them and to place poles in a manner to protect against what *may happen to a reasonably prudent driver.*” (emphasis added).

*Medrano v. Schwendemann*, 66 Wn.App. 607, 610, 836 P.2d 833, (1992).

“The county argues that it satisfied this burden by demonstrating that, as a matter of law, the county had no duty to foresee and protect Marvin Braegelmann against the extremely reckless driving of Tom involved in this case.”

*Braegelmann v. County of Snohomish*, 53 Wn.App. 381, 385, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989).

In *Klein*, the Court addressed whether the following jury instruction was a correct statement of the law:

“All parties including the City have the right to assume that persons using the public streets will comply with the law and will use them with due regard for their own safety and for the safety of others.”

*Klein v. Seattle*, 41 Wn.App. 636, 638, 705 P.2d 806 (1985).

*Cunningham* was affirmed by reliance on the statement of the rule in *Klein*:

“The duty owed by a governmental body is to exercise ordinary care to keep its public ways in a reasonably safe condition for persons using them in a proper manner *and exercising due care for their own safety.*” (emphasis added)

*Cunningham v. State*, 61 Wn.App. 562, 570, fn. 4, 811 P.2d 225 (1991).

## E. ARGUMENT

### 1. **By Clarifying How Duty Analysis is to be Performed, The Decision in *Keller v. Spokane* Also Affected How Legal Causation is Analyzed.**

Analyzing legal causation 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. If the factual elements of the tort are proved, determination of legal liability will be dependent on ‘mixed considerations of logic, common sense, justice, policy, and precedent.’” *Hartley v. State*, 103 W.2d 768, 779, 698 P.2d 77 (1985), quoting from *King v. Seattle*, 84 Wn.2d at 250, 525 P.2d 228 (quoting 1 T. Street, *Foundations of Legal Liability* 100, 110 (1906)).

This Court advanced Washington’s law of legal causation when it decided *Keller*. *Keller* conflicts with *Medrano*. *Keller* changed Washington law concerning three of the five elements of legal cause: justice, policy and precedent.

This case presents another factual iteration of some of the elements addressed in *Keller*: is an arguably negligent plaintiff stripped of the duty owed to him because of his negligence?

The cases which this Court discussed in *Keller* did present a confusing maze concerning the proper scope of a municipality's duty with

regard to building and maintaining roads. In response, this Court did what all trial courts and counsel look to it to do: clarify the status of the law once confusion about it is shown. This case calls into question whether in a legal causation case the “conditional” concept of duty analysis described in *Medrano*, *Braegelmann*, *Cunningham* and *Klein* remains viable in Washington.

When deciding *Keller* this Court agreed with Division III that clarity regarding the duty owed to an arguably negligent plaintiff was needed:

However, this court’s precedent has been inconsistent in the language it uses to define a municipality’s duty; thus, a more thorough review of our cases is needed to determine the appropriate scope of this duty.

*Keller*, 146 Wn.2d at 246. The problem dated back to the decision in *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940):

Much of the current confusion as to a municipality’s duty seems to stem from the language used in *Berglund*.

*Keller*, 146 Wn.2d at 248. This Court explicitly identified the analytical flaw it was remedying:

[T]o make the plaintiff’s negligence part of a municipality’s duty would, in effect, bar the plaintiff’s recovery before determining whether the municipality breached its duty.

Continuing, the Supreme Court said:

Thus, interpreting our cases as a whole, the language used in *Berglund* and other decisions by this court does not limit the scope of a municipality's duty to only those using the roads and highways in a non negligent manner.....

.....

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 Wn. 2d at fn. 13 and 248.

A few years before this Court decided *Keller*, in a concurring opinion Judge Dean Morgan discussed potential confusion with the application of WPI 140.01 if it were interpreted so as to deny any duty to a negligent acting plaintiff:

"[I] write to suggest that WPI 140.01 may be unduly confusing because, at least arguably, it fails to make clear whether the phrases "in a proper manner and exercising ordinary care for their own safety" modify the standard of care, the protected class, or both. In a negligence case, duty includes at least three questions: (1) By whom is it owed? (2) To whom is it owed? (3) What is its nature? (footnote omitted) To answer the first question is to define an obligated class; to answer the second is to define a protected class; and to answer the third is to define a standard of care. (footnote omitted) In a road case like this, the standard of care (i.e., the county's "duty") is to maintain the roads in a reasonably safe condition for travel by persons using them *in a proper manner and exercising ordinary care for their own safety*. (footnote omitted) The protected class, however, includes anyone foreseeably harmed, regardless of whether that person was using the roads *in a proper manner and exercising reasonable care for his or her own safety*. (footnote omitted) I conclude that WPI 140.01 is correct if read so that the italicized

phrases modify the standard of care, but incorrect if read so that the italicized phrases narrow the protected class.”

*Wick v. Clark County*, 86 Wn.App. 376, 385, 936 P.2d 1201 (1997).

*Keller* altered analysis of three of the elements in legal causation: justice, policy, and precedent. Regarding justice, *Keller* made clear that it is improper to analyze the existence of a defendant’s duty based upon what the plaintiff was doing. This more rigorous analytical approach avoids the error of excusing potentially culpable parties based upon the conduct of others. It permits a fact finder to allocate fault between all potentially liable parties for an accident, and does not excuse a defendant from owing a duty merely because the plaintiff has causative fault as well.

Regarding policy, *Keller* clarified that it is not Washington’s policy to deny that a duty is owed to even sometimes negligent plaintiffs. Regarding precedent – which this case implicates – *Keller* calls into question the viability of those legal causation cases where legal causation was not found in part because an allegedly negligent acting plaintiff was denied the benefit of a duty owed to him because of his negligence.

In cases decided since *Keller* this Court has discussed the intertwined nature of duty and legal causation analysis, which was recently at issue in a case involving a failure at a sewer plant in Spokane,

where the defendant had provided engineering services regarding the structure which failed:

“[H]ere, the question is whether we should hold that an engineering firm is potentially liable when it gives engineering advice, people follow its advice, and that advice is a contributing cause of a collapse of a structure. The analysis of whether a duty is owed and legal causation exists are intertwined. “[W]hether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists.” *Hartley v. State*, 103 W.2d 768, 780, 698 P.2d 77 (1985)(quoting *Harbeson v. Parke-Davis, Inc.*, 98 W.2d 460, 476, 656 P.2d 483 (1983).

*Michaels v. CH2M Hill*, 171 W.2d 587, 611, 257 P.3d 532 (2011).

The *Michaels* Court continued with a discussion directly relevant to the present case:

“In essence, CH2M contends that its alleged negligence should not be deemed a legal cause of plaintiffs’ injuries because those injuries are too remote. But, again, contractors have been potentially liable for their own negligence at least since the time of Hammurabi. Again, the trial court found that CH2M’s breach of duty set into motion events that were one of the causes of the collapse of the digester and the cause of the plaintiffs’ injuries, and that but for the breach of duty, the collapse would not have occurred. We find no error.”

*Id.*, at 612.

The same logic applies here. For over 100 years Washington has held that municipalities and state agencies have a duty to maintain highways and roadways in reasonably safe condition for their users.

*Sutton v. City of Snohomish*, 11 Wash. 24, 39 P.2d 273 (1895); *Einseidler v. Whitman County*, 22 Wn. 388, 60 P. 112 (1900); *Larsen v. Sedro-Woolley*, 49 Wn. 134, 94 P. 938 (1908); *Archibald v. Lincoln County*, 50 Wn. 55, 96 P. 831 (1908); *Neel v. King County*, 53 Wn. 490, 102 P. 616 (1909); *Leber v. King County*, 69 Wn. 134, 124 P. 397 (1912). This duty extends to areas adjacent to roadways. *Raybell v. State*, 6 Wn.App. 795, 496 P.2d 559 (1972); *Wojcik v. Chrysler Corp.*, 50 Wn.App. 849, 751 P.2d 854 (1988); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994). Shoulders, guardrails and their anchors, and solid roadside objects of any kind are regulated because errant drivers are often protected from catastrophic harm precisely because the roadways and their surroundings are designed to mitigate harm to humans.<sup>1</sup>

Here, a driver who had been drinking drove down a sloping, curvy road, briefly lost control and struck a pole – located at the apex of a curve, where it should not have been – 4.46 feet from the road surface. The very purpose of the utility pole placement statute is to assure safety is

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<sup>1</sup> “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.*, 5 Cal.2d 46, 53 P.2d 948 (1935), 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*, 5 Cal.2d 54, 60-61, 53 P.2d 948 (1935); *George v. City of Los Angeles*, 11 Cal.2d 303, 310-313, 70 P.2d 723 (1938).” *Laabs v. Southern California Edison Co.*, 175 Cal.App.4th 1260, 1270, 97 Cal.Rptr.3d 241, 248 (2009).

considered when locating hazardous roadside objects. Without this avoidable impact, plaintiff would have suffered little, if any, harm.

After *Keller*, the authority upon which the courts dismissed Mr. Lowman's case has been altered, if not overruled, by the decision in *Keller v. Spokane*.

**2. Different Panels of Division I Differed Markedly in Their Interpretation and Application of *Keller v. Spokane*.**

The respective panels of Division I which decided *Unger v. Cauchon*, 118 Wn.App. 165, 73 P.3d 1005 (2003), and this case, took very different views of the application of *Keller v. Spokane*. To be accurate, *Unger* explicitly addressed whether a duty was owed to decedent, notwithstanding his erratic driving.<sup>2</sup> The present case and the underlying motion to dismiss it addressed legal causation. Yet in performing its legal

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<sup>2</sup> "On the evening of December 31, 1996, Connie Cauchon, Christine's mother, saw Jeremy getting into his Jeep with a girl she believed was her daughter. The Cauchons pursued the Jeep for several minutes, during which Unger was traveling in excess of the posted speed, running red lights, and swerving erratically around other vehicles. After losing the vehicle, Connie telephoned her son, Joey, at home and told him to go to the entrance of Camano Island where she believed Unger was headed to wait for Unger's Jeep. She instructed him to follow Unger and find out if Christine was in the car. While 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. It was raining and reports indicated alert conditions for slides as rising temperatures melted a heavy snowfall that occurred on December 26-27, 1996. Island County declared a state of emergency on December 29, 1996, because of the weather conditions. It urged motorists "to be especially cautious of standing water in the roadways [and warned that the] [t]reachorous driving conditions include[d] snow, ice and slush.'" *Unger* at 168-169.

causation analysis, the panel deciding this case believed *Keller* and its explanation of duty principles had almost nothing to do with the case. The *Lowman* Court first acknowledged that whether a duty is owed and legal causation are intertwined. It went on to note that every time a duty of care has been established, legal cause is not necessarily present, and concludes:

Thus, the duty analysis set forth in the *Keller* decision does not directly impact our previous decisions regarding legal causation.

*Lowman*, Op. p. 5.

There is no mention in the decision that the prior decisions all relied upon a now superseded duty analysis. There was no effort to reconcile, discuss, or analyze whether those prior decisions had been eroded or affected by the decision in *Keller*. It may be true that *Keller* did not explicitly overrule all the cases the Court relied upon, but it is not true that *Keller* had no effect on the continuing vitality of those cases.

The *Unger* panel of Division I, by contrast, embraced the recent teachings of this Court. Despite the fact that *Unger* inarguably involved more erratic, even reckless, driving than the present case, Judge Agid noted that decedent was not deprived of a duty owed to him (and, inferentially, whether legal causation to hold the defendants liable was a question of fact) simply because of his driving:

[I]n 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. We 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. City of Spokane*, and there are material issues of genuine fact that should be resolved by a jury.

*Unger*, at 174.

The opinion goes on to discuss the fact that the trial court in *Unger* dismissed based upon *Braegelmann v. County of Snohomish*, confirms that Division I previously affirmed the trial court's dismissal of the *Braegelmann* case and explained why: "Because there was no duty, we concluded there was no legal causation." But Division I reversed dismissal of *Unger* because *Braegelmann* was no longer a correct statement of the law after *Keller*. The *Unger* court readily accepts that *Braegelmann* was influenced by the *Keller* decision and could no longer be relied upon to support dismissal of *Unger*:

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 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.

*Unger*, at 176.

In short, the *Unger* panel concluded that *Keller* had sufficiently eroded the holding in *Braegelmann* to preclude it from relying upon *Braegelmann*.

In the present case Mr. Lowman argued that *Medrano* relied upon *Braegelmann*, *Braegelmann* had been overruled *sub silentio* by *Keller*, and that therefore the holding in *Medrano* was in question. The *Lowman* Court discussed *Braegelmann*, gave no indication that *Braegelmann's* holding had eroded in any way and seemed to conclude that even after *Keller*, *Braegelmann* remained good law:

Lowman contends that "the *Unger* Court concluded *sub silentio* that *Braegelmann*...was no longer good law after *Keller*." Appellant's Br. at 28. Although the Ungers contended on appeal that *Keller* overruled *Braegelmann*, we did not endorse the Ungers' position. *Unger*, 118 Wn.App. at 175. Indeed, we noted that *Keller* explicitly overruled only one case, and that case was not *Braegelmann*. *Unger*, 118 Wn.App. at 175, n. 28.

*Lowman*, Op., p. 4, fn. 3.

The foregoing illustrates the conflict within Division I regarding whether *Keller's* more explicit duty principles analysis should be

incorporated into legal causation analysis. The *Lowman* Court repelled any suggestion that the post-*Keller* misstatement of duty in the legal causation cases it relied upon weakened, if not overruled, those cases. Yet a different panel refused to deny the extension of duty to a motorist who was unquestionably driving faster, and more dangerously, than the driver in the present case.

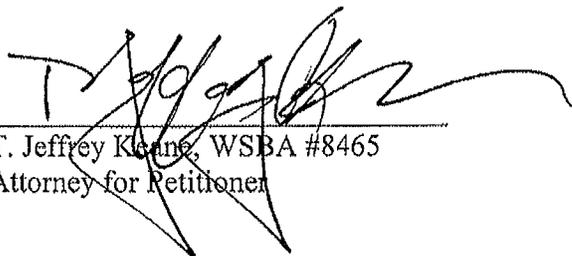
#### F. CONCLUSION

The present status of legal causation law was affected by this Court's decision in *Keller v. Spokane*. The foregoing illustrates the path that brought us here, and the need to clarify what strength remains in the cases the *Lowman* Court relied upon.

Mr. Lowman urges this court to reverse the Court of Appeals and reinstate his case against PSE and Skagit County.

Respectfully submitted this 9<sup>th</sup> day of March, 2012.

KEANE LAW OFFICES



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## APPENDIX

162 Wash.App. 1029

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED  
OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,  
Division 1.

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, a Washington  
corporation, and County of Skagit, a  
municipal corporation, Respondents.

No. 65359-8-I. | June 27, 2011.

Appeal from Snohomish Superior Court; Honorable Gerald  
L. Knight, J.

#### Attorneys and Law Firms

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respondent.

#### Opinion

#### UNPUBLISHED OPINION

DWYER, C.J.

\*1 Nathan Lowman appeals from the trial court's summary  
judgment dismissal of his negligence claims against Puget  
Sound Energy (PSE) and Skagit County. Because the trial  
court properly determined that the alleged negligent acts of

PSE and Skagit County were not the legal cause of Lowman's  
injuries, we affirm.

#### I

On August 5, 2005, Nathan Lowman met Jennifer Wilbur  
at Country Corner Bar and Grill. Wilbur invited Lowman  
to go home with her, and Lowman agreed. Despite the fact  
that she had been drinking, Wilbur drove. Before they reached  
Wilbur's home, she lost control of the vehicle and hit a utility  
pole. Due to the collision, Lowman sustained severe injuries  
to his right arm.

Lowman thereafter sued Wilbur, Country Corner, PSE,  
and Skagit County, contending that their negligent acts  
caused his injuries. Lowman's complaint alleged that Wilbur  
"lost control of her vehicle while attempting to negotiate  
a curve at a high rate of speed." Clerk's Papers (CP)  
at 524. The complaint further alleged that Wilbur was  
intoxicated at the time of the collision, with a blood alcohol  
content of 0.14g/100mL, almost twice the legal limit of  
0.08g/100mL RCW 46.61.502(1)(a). Wilbur later pleaded  
guilty to vehicular assault, admitting that she "drove a vehicle  
with disregard for the safety of others" and thereby caused the  
substantial bodily harm suffered by Lowman. CP at 448.

Lowman's complaint additionally alleged that PSE and Skagit  
County were negligent in the placement of the utility pole. It  
alleged that PSE and the county have "a duty to place ... utility  
poles in such a manner so as not to interfere with the public's  
use of the road or cause injury to members of the traveling  
public." CP at 525. The complaint further alleged that the  
utility pole struck by Wilbur's vehicle "was apparently four  
feet from the edge of the roadway following a sharp curve  
in the road" and that such placement of the pole "constituted  
a hazard" that caused the collision resulting in Lowman's  
injuries. CP at 525.

PSE and Skagit County filed a joint motion for summary  
judgment seeking dismissal of Lowman's claims against  
them. For the purpose of the summary judgment motion  
only, they conceded that they were negligent as alleged and  
that their actions were causes in fact of Lowman's injuries.  
However, they asserted that Lowman's claims against them  
should nonetheless be dismissed because, as a matter of  
law, their alleged negligent acts were not the legal cause of  
Lowman's injuries.

On November 12, 2009, after oral argument by the parties,  
the trial court granted PSE's and Skagit County's joint motion

for summary judgment, concluding that the alleged negligent acts of PSE and Skagit County were not the legal cause of Lowman's injuries. Lowman thereafter filed a motion for reconsideration, which the trial court denied.

Lowman appeals.

## II

Lowman contends that the trial court erred by determining that the alleged negligent acts of PSE and Skagit County were not the legal cause of his injuries and, thus, by dismissing on summary judgment his claims against those parties. We disagree.

\*2 To prove a claim of negligence, a plaintiff must establish "duty, breach, and resultant injury; and the breach of duty must also be shown to be a proximate cause of the injury." *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Proximate cause consists of two elements—cause in fact and legal causation. *Hartley*, 103 Wn.2d at 777. Cause in fact refers to the physical connection between an act and an injury and, because it involves a determination of what actually occurred, is generally left to the jury. *Hartley*, 103 Wn.2d at 778.

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 Wn.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 Wn.2d at 779. Where the factual elements of negligence are proved, the determination of legal liability depends upon " 'mixed considerations of logic, common sense, justice, policy, and precedent.' " *Hartley*, 103 Wn.2d at 779 (quoting *King v. City of Seattle*, 84 Wn.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 Wn.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 Wn.2d at 518.

In their joint motion for summary judgment, PSE and Skagit County conceded duty, breach, and cause in fact, asserting that Lowman's claims against them should be dismissed solely because their alleged acts were not the legal cause of Lowman's injuries. It is undisputed that Wilbur was driving

at a high rate of speed on a meandering country road, that she was legally intoxicated while so doing, and that she lost control of her vehicle as a result. Indeed, Lowman alleged these facts in his complaint. Moreover, Wilbur pleaded guilty to felony vehicular assault based upon the incident. Because the relevant facts herein are undisputed, it was appropriate for the trial court to determine as a matter of law whether legal causation existed.<sup>1</sup> *See Crowe*, 134 Wn.2d at 518.

Because policy considerations govern the determination of legal causation, case law is a valuable guide when considering whether liability should attach. Such precedent is used to " 'furnish illustrations of situations which judicious [people] upon careful consideration have adjudged to be on one side of the line or the other.' " *Minahan v. W. Wash. Fair Ass'n*, 117 Wn.App. 881, 898, 73 P.3d 1019 (2003) (alteration in original) (quoting 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 110 (1906)). Here, our precedent is clear: in at least four different cases with facts similar to those presented herein, we have held that legal causation was absent. *Medrano v. Schwendeman*, 66 Wn.App. 607, 836 P.2d 833 (1992); *Cunningham*, 61 Wn.App. 562; *Braegelmann v. County of Snohomish*, 53 Wn.App. 381, 766 P.2d 1137 (1989); *Klein v. City of Seattle*, 41 Wn.App. 636, 705 P.2d 806 (1985).

\*3 The facts presented in *Medrano* are strikingly similar to those presented here. Therein, we affirmed the trial court's summary judgment dismissal of claims against King County and Puget Power and Light Company (PSE's predecessor), holding that the alleged negligence of the county and the utility company was not the legal cause of the plaintiffs injuries. *Medrano*, 66 Wn.App. at 613–14. There, Schwendeman lost control of his vehicle and hit a utility pole owned by Puget Power; *Medrano*, his passenger, was injured. *Medrano*, 66 Wn.App. at 608–09. Although our opinion does not indicate the level of Schwendeman's intoxication, he had been drinking alcohol on the night of the collision and was speeding when he lost control of the vehicle. *Medrano*, 66 Wn.App. at 608–09. As a result of the incident, Schwendeman was convicted of two counts of vehicular assault.<sup>2</sup> *Medrano*, 66 Wn.App. at 609.

Finding no legal causation, the trial court granted summary judgment to King County and Puget Power. *Medrano*, 66 Wn.App. at 610. Noting that the county and Puget Power "should not be required to protect against the consequences of criminally reckless drivers," we held that the allegedly inadequate maintenance of the road by the county and the allegedly improper placement of the pole by the utility

company were "too remote [from the plaintiff's injury] to impose liability." *Medrano*, 66 Wn.App. at 613, 614. Moreover, we noted that, because Schwendeman had been convicted of vehicular assault, the factual basis for the court's determination was undisputed. *Medrano*, 66 Wn.App. at 613.

In *Cunningham*, we similarly held that the allegedly inadequate striping and lighting of a military base gate was not the legal cause of the injuries that resulted when a vehicle collided with a concrete bollard situated in front of that gate. 61 Wn.App. at 564, 572. Therein, the driver was intoxicated, with a blood alcohol content of at least 0.22g/100mL, and admitted to seeing the bollard before driving into it at a speed of 35 miles per hour. *Cunningham*, 61 Wn.App. at 571. Thus, we held, the connection between the alleged negligent design and construction of the road and gate and the injuries sustained in the collision was "'too remote or insubstantial to impose liability.'" *Cunningham*, 61 Wn.App. at 572 (quoting *Hartley*, 103 Wn.2d at 781).

Similarly, in *Braegelmann*, we affirmed the summary judgment dismissal of a negligence claim against Snohomish County for negligent construction, design, and maintenance of a county road. 53 Wn.App. at 382–83. There, Braegelmann was killed and his daughter severely injured when their vehicle was struck head-on by the vehicle of Harry Tom, who crossed the center line while highly intoxicated and travelling at 40 miles per hour in a 25 mile-per-hour zone. *Braegelmann*, 53 Wn.App. at 382–83. Tom pleaded guilty to vehicular homicide. *Braegelmann*, 53 Wn.App. at 383. The county conceded, for purposes of summary judgment only, that it was negligent in the design and maintenance of the road but contended that it had no duty to protect against Tom's extremely reckless driving. *Braegelmann*, 53 Wn.App. at 385. We concluded that the alleged acts of the county were not the legal cause of Braegelmann's death or his daughter's injuries. *Braegelmann*, 53 Wn.App. at 386.

\*4 Finally, in *Klein*, we declined to hold that negligent road design was the legal cause of a collision where the driver of a vehicle, speeding on the West Seattle Bridge, crossed the center line and collided with another vehicle. 41 Wn.App. at 637–39. At the time of the incident, "westbound traffic was being detoured over one-half of what had been an eastbound bridge." *Klein*, 41 Wn.App. at 637. The driver, although not legally intoxicated, was traveling between 49 and 63 miles per hour in a 30 mile-per-hour zone. *Klein*, 41 Wn.App. at 637–38. We concluded that "[a]s a matter of public policy, the City cannot be expected to guard against this degree of negligent driving." *Klein*, 41 Wn.App. at 639.

Faced with the existence of this authority in support of the trial court's ruling, Lowman contends that the analysis set forth in those cases has been repudiated by subsequent case law addressing the scope of a municipality's duty in building and maintaining its roadways. Specifically, Lowman contends that our Supreme Court's decision in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), altered the considerations of justice, policy, and precedent underlying a determination of legal causation.

In *Keller*, our Supreme Court 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." 146 Wn.2d at 249. The plaintiff therein alleged that the intersection where his motorcycle collided with another vehicle was dangerous and that the city negligently failed to establish the intersection as a four-way stop. *Keller*, 146 Wn.2d at 240. The jury was instructed that the city has a duty to maintain its roadways such that they are reasonably safe "for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety." *Keller*, 146 Wn.2d at 241.

After reviewing its prior decisions regarding the scope of a municipality's duty to build and maintain its roadways, our Supreme Court determined that it had not limited the scope of that duty "to only those using the roads and highways in a nonnegligent manner." *Keller*, 146 Wn.2d at 249. Thus, the court held, the jury instruction was erroneous to the extent that it permitted the jury to find that the city owed no duty to Keller if Keller was negligent. *Keller*, 146 Wn.2d at 250–51. The court noted, however, that the trial court "still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident." *Keller*, 146 Wn.2d at 252.

Accordingly, pursuant to the *Keller* decision, we subsequently reversed a trial court's summary judgment dismissal of a plaintiff's negligence claim against Island County. *Linger v. Cauchon*, 118 Wn.App. 165, 176–78, 73 P.3d 1005 (2003). The Lingers brought a wrongful death action against Island County after their son died in a single-car collision on a county roadway. *Unger*, 118 Wn.App. at 169. The trial court determined as a matter of law that Island County owed no duty to the Lingers' son because he was driving recklessly; thus, the trial court dismissed the Lingers' claim on summary judgment. *Unger*, 118 Wn.App. at 169–70. We reversed, and, relying upon *Keller*, held that the county owed Unger a duty, regardless of Unger's allegedly

negligent conduct. *Unger*, 118 Wn.App. at 176. Thus, we determined, “[t]he extent to which Unger’s reckless driving and the County’s failure to maintain the road contributed to Unger’s death” was a question of fact for the jury.<sup>3</sup> *Unger*, 118 Wn.App. at 178.

\*5 It is true that “[t]he analysis of whether a duty is owed and legal causation exists are intertwined.” *Michaels v. CH2M Hill, Inc.*, No. 84168–3, 2011 WL 2077653, at \*10 (Wash. May 26, 2011). Indeed, our Supreme Court has explained that the question of “whether liability should attach is essentially another aspect of the policy decision which [is] confronted in deciding whether the duty exists.” *Hartley*, 103 Wn.2d at 780 (quoting *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 476, 656 P.2d 483 (1983)). However, duty and legal causation are not synonymous—an analysis of duty focuses primarily on the defendant, while legal causation analysis, in cases such as this, involves consideration of the egregiousness of the principal actor’s conduct. “Although the question of legal cause is closely intertwined with the question of whether the defendant owed a duty of care to the plaintiff, it would be a mistake to assume that every time a duty of care has been established, legal cause is necessarily present.” 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4.21, at 161

(3rd ed.2006) (footnote omitted). Thus, the duty analysis set forth in the *Keller* decision does not directly impact our previous decisions regarding legal causation.

Here, Lowman sustained injury when Wilbur, who was driving above the posted speed limit on a curvy country road while intoxicated, drove her vehicle off of the roadway and struck a telephone pole. Neither 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. Thus, the trial court did not err by following directly controlling authority and dismissing on summary judgment Lowman’s claims against PSE and Skagit County.<sup>4</sup>

Affirmed.

We concur: SCHINDLER and COX, JJ.

#### Parallel Citations

2011 WL 2535511 (Wash.App. Div. 1)

#### Footnotes

- 1 Lowman contends on appeal that the trial court erred by not granting his CR 56(f) motion, in which Lowman requested additional time to conduct discovery regarding various factual issues. Because the facts relevant to the trial court’s decision were undisputed, the trial court had no reason to allow additional time for discovery regarding superfluous facts. Moreover, Lowman explained in the motion that he was requesting additional time for discovery only “if the defendants are not, in fact, conceding both negligence and cause in fact.” CP at 554. Because PSE and Skagit County did concede negligence and cause in fact for purposes of summary judgment, the trial court properly declined to consider Lowman’s CR 56(f) motion.
- 2 Lowman contends that *Medrano*’s “outrageous facts” make that case inapplicable here. However, those facts upon which we relied in *Medrano* in determining that legal causation was absent—that the driver was speeding, may have been intoxicated, and was convicted of vehicular assault—are also present herein. Moreover, many of the differences between the facts presented in *Medrano* and those presented here that Lowman cites as significant are not relevant to the issue of legal causation.
- 3 Lowman contends that “the Unger Court concluded *sub silentio* that *Braegelmann* ... was no longer good law after *Keller*.” Appellant’s Br. at 28. Although the Ungers contended on appeal that *Keller* overruled *Braegelmann*, we did not endorse the Ungers’ position. *Unger*, 118 Wn.App. at 175. Indeed, we noted that *Keller* explicitly overruled only one case, and that case was not *Braegelmann*. *Unger*, 118 Wn.App. at 175 n. 28.
- 4 Lowman also contends on appeal that the trial court improperly dismissed his claims against PSE and Skagit County based upon an incorrect determination that Wilbur’s actions were a superseding cause of Lowman’s injuries. The record does not support this claim. The trial court’s decision was based solely upon its determination that the alleged negligent acts of PSE and Skagit County were not the legal cause of Lowman’s injuries.

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

NATHAN LOWMAN,	)	
	)	
Appellant,	)	<b>CERTIFICATE OF</b>
	)	<b>SERVICE</b>
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 March 9, 2012, copies of the Supplemental Brief of Petitioner was served on counsel at the following address and by the method(s) indicated:

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

DATED this 9<sup>th</sup> day of March, 2012, at Seattle, Washington.

  
\_\_\_\_\_  
Donna M. Pucel

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