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NO. 86584-1

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SUPREME COURT OF THE STATE OF WASHINGTON

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.

BRIEF OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS

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ORIGINAL

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Washington Defense Trial Lawyers (“WDTL”) is an organization of lawyers representing defendants in civil litigation, and appears as *amicus curiae* before this court on a pro bono basis. For the reasons that follow, WDTL respectfully urges this Court to affirm the trial court and court of appeals, both of which agreed that summary judgment should be granted on the issue of proximate cause.

II. INTRODUCTION AND STATEMENT OF THE CASE

The Petitioner, Mr. Lowman, stakes out the counterintuitive position that in *Keller*, this Court overruled an entire body of well-developed legal causation case law (a) while not so much as acknowledging it, and indeed, (b) expressly stating otherwise. *See Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002) (“... the court still retains its gatekeeper function and may determine that a municipality’s actions were not the legal cause of the accident.”). The cases, both before and after *Keller*, belie this conclusion. The Court never took such a drastic step in that case, nor should it do so now. Since *Palsgraf*,¹ trial courts have ubiquitously—and appropriately—fulfilled a gatekeeper function, deciding “whether liability *should* attach as a matter of law given the existence of cause in fact.” Lowman articulates no principled reason to question the trial court judges’ role, rewrite the law,

¹ *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, *reargument denied*, 249 N.Y. 511, 164 N.E. 564 (1928).

or ignore *stare decisis*. This Court should apply existing doctrine and affirm the conclusion of every jurist who has examined this case thus far.

A contrary conclusion would constitute a sea change. Given the egregious (and undisputed) facts, it is not an understatement to say that if proximate cause does not apply here, it does not apply anywhere.

III. ISSUE PRESENTED

Did the trial court and court of appeals rule consistent with precedent when they found that PSE and the County were not the legal cause of this accident, and placed responsibility on the conduct of a profoundly drunk causing driver?

IV. ARGUMENT

On the evening of August 5, 2005, Lowman and Jennifer Wilbur met at a bar in Anacortes and drank together. Wilbur, whose blood alcohol level nearly doubled the legal limit, offered Lowman a ride. “Against his gut instinct,” he accepted, and the two sped down a steep hill, on a two-lane country road. Wilbur lost control of the car and crashed into a utility pole. Afterwards, Wilbur—in conjunction with her conviction for a criminally reckless DUI—admitted that her “disregard for the safety of others” and chemical dependency “caused” Lowman’s injuries. *See Lowman v. Wilbur*, No. 65359-8-I, slip op. at 2-3 (Wash. Ct. App. June 27, 2011). Lowman sued Wilbur, Puget Sound Energy, Skagit County, and others.

The trial court agreed with PSE and the County that there was an absence of legal causation, and dismissed them from the case. Division I agreed, and affirmed. This Court has every reason to do the same.

A. This Court's Decision In *Keller* Represented A Fragile Balancing Of Competing Considerations—Not A Sweeping Rewrite Of Tort Law

In *Keller v. City of Spokane*, this Court crafted a social compact between road users and local agencies. The Court surveyed existing case law and concluded that agencies did indeed owe a legal duty to negligent road users. *Keller*, 146 Wn.2d at 249 (“...interpreting our cases as a whole, the language used in *Berghund* 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.”). The defendant and *amici* argued that this duty, in a vacuum, required local government to forecast and protect against “all conceivable acts” of negligent drivers. The Court responded:

We have held that municipalities are not insurers against accidents nor the guarantors of public safety and are not required to anticipate and protect against all imaginable acts of negligent drivers. Contrary to the City and WDTL’s assertion, however, by removing the challenged language from the jury instruction, we will not render municipalities liable for all acts of negligence. As discussed in *Berghund*, a municipality only has a duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways. *Furthermore, the court still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident.*

Id. at 252 (citing *King v. City of Seattle*, 84 Wn.2d 239, 247-48, 525 P.2d 228 (1974)) (emphasis added) (internal citations omitted).

Two observations are in order. *First*, and perhaps most intuitively, *Keller* was not the rewrite of Washington law that Lowman suggests. At multiple points in his brief, Lowman argues that *Keller* “changed Washington law concerning... justice, policy and precedent.” Supp. Br. at 1, 6, 9. Not so. In fact, the Court went to great pains to make it clear that it was *not* changing the law. An entire section of the opinion was dedicated to this concern. *Keller*, 146 Wn.2d at 254 (“**OVERRULING PRIOR PRECEDENT**”) (emphasis in original). *Keller*, by its own terms, only reaffirmed existing law, with the exception of one minor deviation. *Id.* at 255 (“only *Wick* [*v. Clark County*, 86 Wn. App. 376, 381, 936 P.2d 1201 (1997)] need be directly overruled.”).²

In essence, Lowman asks the Court to disregard its own limiting language, and read sweeping policy implications into an opinion that was never meant to address them. Had this Court intended to substantively address legal causation—an entirely separate element—and “overturn” its undergirding precedent (Supp. Br. at 1; 10)—it would have done so explicitly. It did not.

It is well established that binding precedent is not overruled *sub silentio*. *In re Estate of Borghi*, 141 Wn. App. 294, 301, 169 P.3d 847, 850 (2007), *aff'd*, 167 Wn.2d 480, 219 P.3d 932 (2009) (citing *State v.*

² *Wick* affirmed a jury instruction that limited the county’s duty to users “exercising ordinary care for their own safety.” *Wick*, 86 Wn. App. at 379-80.

Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999); *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 160 P.3d 1089 (2007)).

Second, the Court explicitly affirmed the trial court judge's "gatekeeper function," with respect to legal causation. *Keller*, 146 Wn.2d at 255. It is his or her job to decide "as a matter of *policy*," whether the connection between the defendant's conduct and the ultimate result is "too remote or insubstantial to impose liability." *Hartley v. State*, 103 Wn.2d 768, 781, 698 P.2d 77 (1985). All of the parties in this case seem to acknowledge, at least in varying degrees, the importance of this safeguard. *Ibid.*; see also *McCoy v. Am. Suz*, 136 Wn.2d 350, 360, 961 P.2d 952 (1998) (*en banc*) ("numerous cases illustrate" how "the court often exercises its gatekeeper function by dismissing an action without trial for lack of legal cause").

Again, if the *Keller* court intended to narrow this doctrine to the point of near-nonexistence, one would suspect that the majority would have said something about that. It did not—and for good reason. The Court intended to clarify the scope of an agency's duty, not eviscerate all of its limitations. By design, the legal causation framework still applies to allow the trial court to address instances where liability—as evidenced through uncontested facts—is too tenuous.

The law has literally been this way for decades; *Keller* did not change that. And this case presents no principled basis for deviating now.

B. The Trial Court Judge Is Amply Qualified To Apply Precedent And Dismiss Lawsuits When The Proponent Is Unable To Demonstrate Legal Causation

This case, in reality, is about the dignity and authority of the trial court judge—and whether he or she is qualified to decide whether legal cause exists in factually uncontested cases. Precedent—including *Keller*—holds that this is appropriate. Sound policy considerations also support the framework. And this case, if anything, confirms its workability.

PSE accurately points out that appellate courts have—both before and after *Keller*—upheld trial court legal cause determinations. It has been, and continues to be, viewed as a question of law for the court when the relevant facts are not disputed. See, e.g., *Lowman*, slip. op. at 4; *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998) (*en banc*) (same). In *Medrano v. Schwendeman*, 66 Wn. App. 607, 608-09, 836 P.2d 833 (1992), a reckless driver lost control of his vehicle and collided with a power pole. Notwithstanding the potentially negligent placement of the pole, the court affirmed summary judgment—finding that the driver’s conduct was the “legal cause of the accident.” *Id.* at 613-14. The same was true in *Cunningham v. State*, 61 Wn. App. 562, 811 P.2d 225 (1991), where a drunk driver ran into a negligently placed bollard. The court held that “even assuming the state was negligent,” its negligence would be “too remote or insubstantial to impose liability.” *Id.* at 572. The drunk driver was the legal cause. In *Braegelmann v. County of Snohomish*, 53 Wn. App. 381, 766 P.2d 1137 (1989), too, based upon “policy considerations,”

responsibility for the harm was placed upon the drunk driver who crossed a centerline while speeding and ran into the plaintiff, *id.* at 382-83, notwithstanding a negligent road design allegation. And most recently in *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 73 P.3d 1019 (2003), the court had no trouble finding that the severely drunk driver who hit the plaintiff with his vehicle was the legal cause of the harm. *Id.* at 898.³

This case is analytically identical, if not more egregious. Judge Gerald Knight was well within his discretion when he carefully applied precedent to the undisputed facts of this case, and concluded that reckless conduct, and not the pole, was the legal cause of the harm. Indeed, this is precisely the Gatekeeper role endorsed in *Keller*.

In response, Lowman may point to the proverbial “parade of horrors” in which trial courts usurp the role of the jury and agencies unfairly avoid liability. Three responses are appropriate. First, in theory and in practice, this doctrine is reserved for extraordinary circumstances. *Minahan*, *Medrano*, *Cunningham*, *Braegelmann*, and the instant case all involved extreme conduct—most of which was drenched in alcohol. In nearly a century of application, courts have never applied legal causation principles to ordinary negligence, such as jaywalking,⁴ and there is no danger that this will happen in the future. Second, even if the trial court errs in applying the case law, there is *de novo* appellate review. To the

³ There are legal causation cases going back almost a century that foreclose agency liability for the extreme conduct of a third party. See *Newell v. Darnell*, 209 N.C. 254 (1936) (adopted by *Klein v. City of Seattle*, 41 Wn. App. 636 (1985)).

⁴ In this context, legal causation appears to be disputed at the appellate level every five years or so. It is not an issue that can be seriously contested in most cases.

extent that the trial court misapplies precedent or resolves a case on the “wrong side of the line,” the appellate can fix the mistake. The parties’ rights are safeguarded that way, as well. And third, legal causation is only decided when the foundational facts are undisputed. If here, for example, there was credible evidence that Wilbur was *not* severely intoxicated, Lowman would be entitled to resolution of that fact by a fact finder. But that is not the case; all parties agree as to the dangerous conduct at issue. Under *these* circumstances, the trial court was justified in considering, as a matter of policy, where responsibility should lie.

This application of the legal causation doctrine serves important public policy objectives. For one thing, it is consistent with the public’s desire to hold the proper party accountable. When drunk drivers (undisputedly) cause accidents, drunk drivers should be held accountable. Blaming the pole, under these circumstances, causes the public to question the law’s basic perception of right and wrong. Additionally, even meritless lawsuits have real consequences. While it may be tempting to leave fault apportionment to a fact-finder down the road, irrespective of causal egregiousness,⁵ practical reality is not so simple. Even ill-conceived road design lawsuits cost hundreds of thousands of dollars to defend and wreak havoc on agencies’ operations. The legal causation doctrine is an important mechanism to weed out cases where, as here, liability is both insubstantial and remote.

⁵ “I am innocent of this man’s blood; see to it yourselves.” Pontius Pilate, Matthew 27:24 (ESV).

Also of note, even Lowman tacitly agrees that Judge Knight (and Division I) appropriately applied precedent to the facts of this case, and a ruling in his favor would require overturning these authorities. The case law, as it exists today, is unequivocal—and the trial court’s decision was plainly within the zone of reasonableness. See Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049, 1053 (2006) (“There is almost always a zone of reasonableness within which a decision either way can be defended persuasively...”). That is why Lowman argues in favor of sweeping “sub silentio” reversals and a broad rewrite of adverse precedent.

C. If Legal Causation Does Not Apply Here, It Is Difficult To Know When It Would

As is clear, the facts of this case are extraordinary. Lowman himself believes that Wilbur’s conduct was the cause of his accident. CP 524-25. And Wilbur—who was legally drunk and speeding—subsequently admitted as much. CP 385-86; CP 448; CP 492. To find, in spite of this, that the legal cause of this accident was *the pole* would strain credulity. It would also render the legal causation doctrine dead letter.

Even Lowman admits that to find in his favor, several cases must be overruled. The question then becomes whether this Court should do so. WDTL would submit that it should not.

As a matter of principle, “[t]he requirement that like cases be treated alike is one of the key elements of the Rule of Law.” Jeremy Waldron, *Lucky in Your Judge*, 9 *Theoretical Inquiries in Law* 185, 192

(2008). Accordingly, departures from precedent are inappropriate in the absence of a “special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). In Washington, the proponent of disregarding *stare decisis* must make “a clear showing that an established rule is incorrect *and* harmful before it is abandoned.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092, 1099 (2009) (emphasis added); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 176, 149 P.3d 616 (2006) (“Before [a case] may be overruled, it must be shown to be both incorrect and harmful.”).⁶

In this instance, precedent is neither incorrect, nor harmful. It rightly vests trial courts with authority to make reasonable, policy-driven decisions when confronted with appropriate and uncontested facts. There is no showing or reason to believe that trial judges abuse this authority. On the contrary, Judge Knight applied the law exactly as the *Keller* court contemplated.

This is an important aspect of tort litigation. There is no compelling—or even nominal—reason to rewrite this entire body of law. It, as well as the courts in this case that recently applied it here, should be affirmed.

⁶ The constraints of *stare decisis* prevent the law from becoming “subject to incautious action or the whims of current holders of judicial office.” *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1920). Although *stare decisis* limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims. Therefore, overruling prior precedent should not be taken lightly. *Keene v. Edie*, 131 Wash.2d 822, 831, 935 P.2d 588 (1997).

V. CONCLUSION

Lowman can certainly pursue his claims, but the theories against PSE and the County are a bridge too far. The rulings of the lower courts were reasonable, and overruling them would be tantamount to overruling nearly all causation case law—with no showing of error or harmfulness. WDTL respectfully urges this Court to affirm the judgment of the trial court and court of appeals.

DATED this 24th day of April, 2012.

KEATING, BUCKLIN & McCORMACK,
INC., P.S.



Adam L. Rosenberg, WSBA #39256
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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on April 24, 2012, I served the *Brief of Amicus Curiae/Washington Defense Trial Lawyers* on the following parties via email:

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Dear Mr. Carpenter:

Pursuant to the Court's prior permission, please find attached the *Brief of Amicus Curiae Washington Defense Trial Lawyers* in the above matter.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew Estes
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