

No. 86584-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

NATHAN LOWMAN,

Plaintiff/Petitioner,

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
HOSPITALITY, INC., d/b/a COUNTRY CORNER, a Washington
corporation,

Defendants,

and

PUGET SOUND ENERGY, INC., a Washington corporation, and
COUNTY OF SKAGIT, a municipal corporation,

Defendants/Respondents.

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BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the relationship between the concepts of duty and legal cause.

II. INTRODUCTION AND STATEMENT OF THE CASE

This review requires the Court to address the interrelationship between the tort concepts of duty and legal cause. More particularly, the Court must decide, as to negligence claims against governmental entities for failure to properly maintain their roadways, whether its opinion in Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2002), alters the legal cause analysis in this context, rendering an earlier line of Court of Appeals cases no longer of precedential value.

This action, commenced by Nathan Lowman (Lowman) against Jennifer Wilbur (Wilbur) et ux., Puget Sound Energy (PSE), Skagit County (Skagit) and others, arises out of a one-car accident in which Lowman sustained serious injuries. The underlying facts are drawn from

the unpublished Court of Appeals opinion, the briefing of the parties and an extract from the record relating to the underlying criminal proceedings against Wilbur. See Lowman v. Wilbur, noted at 162 Wn.App. 1029 (2011), review granted, 173 Wn.2d 1016 (2012); Lowman Br. at 1, 3-9; Joint PSE/Skagit Br. at 1-10; Lowman Pet. for Rev. at 2-3; PSE/Skagit Ans. to Pet. for Rev. at 1-7; Lowman Supp. Br. at 2-5; Joint PSE/Skagit Supp. Br. at 1-4; CP 440-62 (extracts from criminal proceedings).

For purposes of this amicus curiae brief, the following facts are relevant: On August 5, 2005, Lowman met Wilbur at a tavern where they both drank alcohol. Wilbur invited Lowman home with her. While driving with Lowman as her passenger, Wilbur lost control of her vehicle and hit a utility pole approximately 4 ½ feet off the roadway. Lowman sustained severe injuries to his right arm.

At the time of the accident, Wilbur's car was traveling at an excessive speed and she was legally intoxicated, with a blood alcohol content almost twice the legal limit. Wilbur pleaded guilty to vehicular assault, a Class B felony, admitting that she "drove a vehicle with disregard for the safety of others," causing substantial bodily harm to Lowman. Lowman Slip Op. at 2 (quoting CP 448); PSE/Skagit Ans. to Pet. for Rev. at 5 (citing CP 448).¹

¹ Although not referenced in the Court of Appeals opinion or briefing of the parties, the statute governing vehicular assault is RCW 46.61.522, the current version of which is reproduced in the Appendix to this brief. Under this statute, there are three bases for establishing guilt. Wilbur pled guilty under subsection (1)(c) of the statute, requiring proof the defendant was driving "[w]ith disregard for the safety of others and cause[d] substantial bodily harm to another."

In this civil action, Lowman contends PSE and Skagit were each negligent regarding the placement of the utility pole too close to the roadway. PSE and Skagit filed a joint motion for summary judgment, seeking dismissal of Lowman's claims against them because any negligence on their part was not a "legal cause" of Lowman's injuries under Washington's proximate cause rule. Lowman Slip Op. at 5. For purposes of summary judgment, PSE and Skagit conceded that they owed a duty of care to Lowman, that they breached their duty, and that this breach is a cause in fact of Lowman's injuries. See id. at 3; PSE/Skagit Ans. to Pet. for Rev. at 6-7. The superior court dismissed Lowman's claims against PSE and Skagit for lack of legal cause.

The Court of Appeals, Division I, affirmed. In so doing, the court relied on a series of Court of Appeals opinions, culminating in Medrano v. Schwendeman, 66 Wn.App. 607, 836 P.2d 833 (1992), concluding that a governmental entity's negligence cannot be a legal cause of injury or death when it arises out of criminally reckless driving involving excessive speed, violations of other rules of the road, and/or legal intoxication. See Lowman Slip. Op. at 5-8. The Court of Appeals rejected Lowman's argument that these cases are no longer controlling after Keller v. City of Spokane, supra, which clarified the duty of care owed by governmental entities in maintaining their roadways. The court concluded that Keller's clarification "does not directly impact ... previous decisions regarding legal causation." Lowman Slip. Op. at 11.

Lowman petitioned this Court for review, and raised the issue of whether Keller effectively overruled Medrano, *supra*, *sub silentio*. See Lowman Pet. for Rev. at 1. This Court granted review.

III. ISSUE PRESENTED

What effect, if any, does the duty analysis in Keller v. City of Spokane, *supra*, have on whether Lowman's negligence claims against PSE and Skagit should be dismissed under a legal cause analysis?

IV. SUMMARY OF ARGUMENT

Keller v. City of Spokane, *supra*, clarified the nature of the duty of care owed by governmental entities to persons using their roadways. In Keller, this Court resolved uncertainty in Washington case law and rejected any formulation that limits a governmental entity's duty to those exercising ordinary care for their own safety, overruling precedent to the contrary. The Court held a governmental entity owes a duty to all persons—whether or not fault-free—to maintain its roadways in a condition that is reasonably safe for ordinary travel.

This clarification of the duty owed by governmental entities renders the line of pre-Keller Court of Appeals cases, culminating in Medrano v. Schwendeman, *supra*, without precedential value because they upheld dismissal of claims against governmental entities under a legal cause analysis premised on an incorrect notion of duty.

The clarification in Keller also requires a reassessment of when imposition of liability for negligence on a governmental entity may offend public policy or be deemed too remote under a legal cause analysis. Under

a duty analysis, fault-based conduct by others, including driving while intoxicated, does not relieve a governmental entity (or others) of the duty of care, nor should such conduct serve as a basis for allowing the governmental entity to escape liability based upon lack of legal cause. More particularly, the largely undisputed facts here do not support the conclusion that any negligence by PSE and Skagit is not a legal cause of Lowman's injuries. The Court should reverse dismissal of Lowman's claims against PSE and Skagit and remand for trial.

V. ARGUMENT

A. Overview Of Relationship Between Concepts Of Duty And Legal Cause.

Proof of negligence requires a plaintiff to establish (1) the existence of a duty, (2) breach of that duty, (3) proximate cause, and (4) injury. See Keller, 146 Wn.2d at 242. The question of whether a duty exists is one of law. See Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982). In determining whether a duty should be recognized, among other factors, the court takes into consideration relevant public policy. See id.; Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 480, 951 P.2d 749 (1998).

When a duty is found to exist, the concept of foreseeability serves to limit the scope of the duty owed by the defendant. The question is whether the harm involved is within the "general field of danger" which could have been anticipated by the defendant. See Schooley, 134 Wn.2d at 475; McLeod v. Grant County School Dist., 42 Wn.2d 316, 321-22, 255

P.2d 360 (1953), The issue of foreseeability is one for the trier of fact, unless reasonable minds cannot differ on the question. See Taggart v. State, 118 Wn.2d 195, 224, 822 P.2d 243 (1992).

The proximate cause requirement is met in a negligence case not only by proof of “cause in fact,” but also by establishing the defendant’s conduct is a “legal cause” of plaintiff’s harm. See generally Hartley v. State, 103 Wn.2d 768, 777-85, 698 P.2d 77 (1985). Like the question of duty, legal cause is a question for the court and “rests on policy considerations as to how far the consequences of defendant’s acts should extend.” Id., 103 Wn.2d at 779. The court examines the defendant’s conduct based on logic, common sense, justice, policy and precedent in determining whether the defendant’s negligence is too remote and insubstantial to impose liability. See id. at 779, 784.

This Court has recognized that the concepts of duty and legal cause are “intertwined.” See id. at 779-80. The imposition of duty in any given case does not automatically foreclose revisiting the policy considerations at issue in determining whether a defendant is a legal cause of plaintiff’s injuries, although on occasion the Court has found the duty analysis dispositive of legal cause. See Schooley at 479-80 (stating existence of duty does not automatically establish legal cause); Beal v. City of Seattle, 134 Wn.2d 769, 787-88, 954 P.2d 237 (1998) (concluding recognition of duty foreclosed legal cause challenge).

B. *Keller v. City of Spokane* Clarifies That The Duty Governmental Entities Owe In Maintaining Their Roadways Runs To All Persons Using The Roadways, Whether Negligent Or Fault-Free.

In Keller, this Court resolved considerable confusion in Washington case law regarding the duty of care owed by governmental entities in maintaining their roadways. See 146 Wn.2d at 244-49. Keller involved a claim by a guardian on behalf of a motorcyclist (Keller) who was severely injured in an intersection collision with another motorist. The theory of liability against the City of Spokane was that it was negligent in not having a 4-way stop at the intersection. The City presented evidence at trial that Keller was not wearing eye protection, the motorcycle headlights were not on, and his speed was excessive. See id. at 241.²

The case was tried on the merits and the jury returned a defense verdict as to the City. See id. at 242. Keller sought reversal on appeal on the basis that the trial court had erroneously instructed the jury as to the City's duty of care. The challenged instruction provided in relevant part:

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.*

Id. at 241 (emphasis added; footnote omitted).³

² The estimates of Keller's speed were anywhere between 30 and 80 miles per hour at the point of impact, with a speed limit of 30 miles per hour. See Keller at 240. There was no claim that Keller was intoxicated or had been drinking. See id. at 240-41.

³ This language was drawn from former WPI 140.01. See Keller at 241 n.2. The current version of WPI 140.01 and comments are reproduced in the Appendix to this brief.

Keller argued that the instruction was erroneous because it allowed the jury to conclude the City owed him no duty of care if he operated his vehicle negligently. See id. The Court agreed, and reversed and remanded. After surveying a considerable body of inconsistent Washington precedent on the subject, and recognizing the confusion resulting therefrom, the Court held that the above-quoted language and the pattern instruction on which it was based “are inherently misleading and legally erroneous to the extent that they allow a jury to premise a municipality’s duty on the absence of negligence by the plaintiff.” Id. at 251. The Court clarified that under Washington law a governmental entity “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.” Id. at 249.

Keller only examined the proper duty of care, and not the legal cause prong of the proximate cause rule. However, in the course of resolving the duty of care issue the Court noted, without elaboration, that “a 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 (citations and footnote omitted).⁴

Aside from acknowledging that a court may conduct a separate legal cause analysis with respect to whether a governmental entity is liable

⁴ The Court also noted that a governmental entity may be relieved of liability if the trier of fact concludes its negligence is not a cause in fact of the plaintiff’s injuries. See Keller at 252; see also Edgar v. City of Tacoma, 129 Wn.2d 621, 630, 919 P.2d 1236 (1996) (recognizing jury may conclude immune employer’s fault is sole cause of injury).

in negligence, the Court in Keller did not address whether its clarification of the duty of care of governmental entities in maintaining their roadways had any impact on a series of Court of Appeals decisions relieving governmental entities of tort liability based upon a legal cause analysis, when the injuries arise out of criminally reckless behavior. This question is addressed in § C, below.⁵

C. The *Keller* Clarification Of Governmental Entities' Duty Renders Prior Court of Appeals Cases, Upholding Dismissal Of Claims Against Governmental Entities Under A Legal Cause Analysis, No Longer Precedential Because These Cases Are Premised On A Misguided Notion Of Duty.

This Court's Keller opinion postdates a series of Court of Appeals opinions relied upon by PSE and Skagit as the basis for affirming dismissal of Lowman's negligence claims against them based upon a legal cause analysis: Klein v. Seattle, 41 Wn.App. 636, 705 P.2d 806, *review denied*, 104 Wn.2d 1025 (1985); Braegelmann v. Snohomish Cy., 53 Wn.App. 381, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989); Cunningham v. State, 61 Wn.App. 562, 811 P.2d 225 (1991); and Medrano v. Schwendeman, *supra*, referred to in this brief as the Medrano line of cases.⁶ The Court of Appeals below relied upon these same cases in affirming dismissal. See Lowman Slip Op. at 5-8.

⁵ WSTLA Foundation, a predecessor in interest to WSAJ Foundation, appeared as amicus curiae in Keller in support of the duty of care recognized by the Court. See Keller Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation at 3-4 (S.Ct. #70866-5) (hereafter WSTLA Fdn. Keller Am. Br.).

⁶ PSE and Skagit filed joint briefing on appeal and are treated as having identical interests for purposes of this brief, although PSE does not appear to be a governmental entity.

Close examination of these cases reveals that the legal cause analysis in each of them is influenced by a conception of the duty owed by governmental entities that, after Keller, is no longer valid. As a result, these cases should not be deemed controlling in resolving the legal cause question presented here. Each of these cases is discussed briefly below.

* * *

Klein relies on the *pre-Keller* duty analysis in resolving legal cause. Klein involves an appeal in a wrongful death action of a verdict concluding that the City of Seattle was negligent, but that its negligence was not a proximate cause of the plaintiff-decedent's death. Wyn Roberts was killed in a head-on collision on the West Seattle bridge when his vehicle collided with one driven by Michael Mullens, who was traveling in the wrong lane at an excessive rate of speed, with some evidence of alcohol use, although he was not legally intoxicated. See 41 Wn.App. at 637-38. The Court of Appeals rejected a challenge to one of the trial court's instructions to the jury regarding the City's duty of care to persons using the public streets, and then commented in dicta that, "in any event, the City's negligence was not, as a matter of law, a proximate cause of Roberts' death." Id. at 639. The court explained:

On that subject, our Supreme Court recently stated:

It is quite possible, and often helpful, to state every question which arises in connection with "proximate cause" [legal causation] in the form of a single question: Was the defendant under a duty to protect the plaintiff against the event which did in fact occur?

(Footnote omitted.) *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) (quoting W. Prosser, *Torts* §42, at 244 (4th ed. 1971)). The City was under no duty to protect Roberts from the extreme carelessness of Mullens. As a matter of public policy, the City cannot be expected to guard against this degree of negligent driving. See *Newell v. Darnell*, 209 N.C. 254, 183 S.E. 374 (1936). To impose liability on the City under these circumstances would:

force the construction of our highways, not for the use and safety of the reasonably prudent motorist, but solely for the purpose of protecting that motorist from the depredations and negligence of the reckless, careless and drunken operator. No such insurance policy has been or can be imposed upon the defendant.

Warda v. State, 45 Misc.2d 385, 388, 256 N.Y.S.2d 1007, 1010 (1964).

Id. The Klein dicta, in particular the statement that “[t]he City was under no duty,” incorporates into its legal cause analysis the pre-Keller view that a governmental entity owed no duty to protect against those not using its roadways in a reasonably prudent manner.

Braegelmann follows Klein. In Braegelmann, the Court of Appeals upheld a summary judgment of dismissal in favor of Snohomish County. The County was sued for wrongful death and personal injuries by the estate of Marvin Braegelmann and the guardian for Lynn Braegelmann, respectively. Marvin Braegelmann was killed while driving a vehicle on a county road with Lynn Braegelmann as a passenger. A vehicle driven by Harry Tom at an excessive speed, and while Tom was in a highly intoxicated condition, struck the Braegelmann vehicle, resulting in Marvin Braegelmann’s death and Lynn Braegelmann’s serious injuries. See 53 Wn.App. at 382. The Braegelmanns claimed the County was liable

for negligent construction, design and maintenance of the road on which the accident occurred. Id. at 383. In upholding the summary judgment of dismissal, the Court of Appeals framed the issue as follows:

The County argues that it satisfied this burden [of establishing no issues of material fact] 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. If the County is correct, then the design and construction of the roadway was not the legal cause of the accident.

Id. at 385 (brackets added).

Relying solely on Klein, the court in Braegelmann upheld dismissal under what seems to be a combined duty/legal cause analysis:

Applying *Klein* to the facts of this case, policy considerations dictate that the County had no duty to protect Braegelmann. Here, as in *Klein*, we have a head-on collision in which the at-fault driver was speeding, crossed the center line, and struck an oncoming vehicle. The present case also involves the additional factor of Tom, the at-fault driver, being highly intoxicated at the time of the collision. The court in *Klein* determined that, as a matter of public policy, there is no duty to guard against such extreme conduct. Therefore, the County met its burden of showing that it was entitled to summary judgment based on the doctrine of legal causation. Having decided the case on the ground of no duty and therefore no legal causation, cause in fact issues need not be discussed.

Id. at 386. The reliance of Braegelmann on Klein confirms the court's pre-Keller view that the duty owed by governmental entities runs only to those using roadways while exercising ordinary care for their own safety.

See Braegelmann at 386; Klein at 649.⁷

⁷ PSE and Skagit's legal cause argument relies on Minahan v. Western Wash. Fair Ass'n, 117 Wn.App. 881, 73 P.3d 1019 (2003), which cited Braegelmann, and found no legal cause in a case involving whether a landowner and lessee had a duty to protect against events occurring on an adjacent roadway. See Joint PSE/Skagit Supp. Br. at 12-13. Minahan is discussed infra at n.13.

Cunningham follows Klein and Braegelmann. In Cunningham, Patrick Cunningham sued the law firm that represented him regarding a personal injury claim because of its failure to file a claim against the United States before the statute of limitations expired. Cunningham was injured when he drove his vehicle on a federal roadway and struck a concrete bollard in front of a federal facility. See 61 Wn.App. at 564-65. Cunningham contended that the signage, lighting and striping on the roadway were substandard, and that the United States was negligent in constructing the roadway and gate involving the concrete bollard. See id. at 564. At the time of the accident, Cunningham was legally intoxicated.

The Court of Appeals upheld the superior court's dismissal of Cunningham's claim against the law firm, concluding that there was no potential tort liability on the part of the United States in any event because any negligence on its part was not a legal cause of Cunningham's injuries. See id. at 564-65, 570-72. In reaching this result, the court held that the United States *did* owe a duty to Cunningham, even though he was intoxicated, but that, based on Klein and Braegelmann, the underlying claim would have failed. See id. at 570-72 & n.4.⁸

Cunningham relied upon the legal causation analysis in Klein and Braegelmann, in affirming dismissal of the claim against the United

⁸ In finding a duty of care, the court in Cunningham described the pre-Keller duty, yet found that it applied to those who may be intoxicated, citing Wojcik v. Chrysler Corp., 50 Wn.App. 849, 751 P.2d 854 (1988) (reversing summary judgment of dismissal against county, concluding causation question for jury regarding county's failure to maintain roadway, notwithstanding driver's excessive speed and drinking). See Cunningham at 570 n.4.

States. See id. at 571-72.⁹ The Cunningham analysis is perplexing in two respects: First, it mistakenly suggests that Klein did not address the issue of the City of Seattle's duty of care. Compare Cunningham at 570 n.4 with Klein at 639. Second, although Cunningham recognized the pre-Keller formulation of a governmental entity's duty of care only contemplates those persons using the roadways in a proper manner and exercising ordinary care for their own safety, the court nonetheless indicated the duty would extend to those who may be intoxicated. Cunningham at 570, n.4.

Medrano follows Klein, Braegelmann and Cunningham. In Medrano, which the Court of Appeals below described as involving facts "striking similar" to those involved here, Lowman Slip. Op. at 6, Amos Schwendeman sued King County and Puget Sound Power and Light Company for injuries sustained when he drove his vehicle into a utility pole alongside a roadway. Schwendeman contended the county and utility company had negligently located the power pole along the roadway. Schwendeman had been drinking prior to the accident, and was driving in a reckless manner and at an excessive speed. He was convicted of two counts of vehicular assault for driving in a rash or heedless manner, indifferent to the consequences of his acts. See Medrano, 66 Wn.App. at 608-10.

⁹ Cunningham also relied on Kristjanson v. Seattle, 25 Wn.App. 324, 606 P.2d 283 (1980), portraying this case as upholding dismissal based on a lack of legal causation. See 61 Wn.App. at 571. Kristjanson is discussed infra at n.11.

The Court of Appeals affirmed dismissal under a legal cause analysis, concluding “[t]he County and Puget Power should not be required to protect against the consequences of criminally reckless drivers.” Id. at 613. In reaching this result, the court appears to rely on the reasoning in Klein, Braegelmann and Cunningham. See Medrano at 612.¹⁰

* * *

Given the influence of the pre-Keller duty formulation on the legal cause analysis in the Medrano line of cases, these cases should no longer be deemed precedential in resolving the legal cause challenge raised by PSE and Skagit in this case. See Unger v. Cauchon, 118 Wn.App. 165, 174-76, 73 P.3d 1005 (2003) (concluding Keller duty of care analysis affected analysis in Medrano line of cases, and rejecting legal cause argument notwithstanding reckless driving under severe weather conditions). Instead, the Court should resolve the legal cause issue based upon the duty of care analysis in Keller, along with other relevant considerations, discussed below in §D.¹¹

¹⁰ As in Cunningham, the court referenced Kristjanson, describing that case as affirming dismissal on legal causation grounds. See Medrano at 612. Kristjanson is discussed infra at n.11.

¹¹ While the Court of Appeals opinion in Kristjanson is also referenced in the legal cause analysis in Cunningham and Medrano, Kristjanson is not really one of the Medrano line of cases because the claim against the governmental entity was dismissed under the cause in fact prong of the proximate cause rule. See Kristjanson, 25 Wn.App. at 326; see also Stephens v. Seattle, 62 Wn.App. 140, 144, 813 P.2d 608 (reversing summary judgment dismissal of negligence claim against a municipality for failure to properly maintain a roadway, notwithstanding defendant’s claim motorcyclist was speeding excessively and had been drinking, as disputed evidence created a question of fact for the jury; distinguishing Braegelmann), *review denied*, 118 Wn.2d 1004 (1991).

D. After *Keller*, A Motorist's Negligent Or Reckless Driving, Even While Intoxicated, Is Within The General Field Of Danger, And Governmental Entities Must Anticipate Such Conduct In Maintaining Roadways; Their Negligence In Failing To Do So Should Not Be Excused Under A Legal Cause Analysis.

In clarifying the duty of care owed by governmental entities in maintaining roadways, which applies regardless of whether the plaintiff or others are negligent or fault-free, Keller did not undertake a separate legal cause analysis, as this issue was not before the Court. See 146 Wn.2d at 249, 252. The Court acknowledged that recognizing a duty of care would not necessarily foreclose a legal cause challenge in a proper case. See id. at 252. Moreover, Keller did not involve undisputed evidence of aggravated driving conduct and/or intoxication, so it was unnecessary for the Court to come to terms with the Medrano line of cases discussed above in §C, or for it to comment on the impact of its clarification of the duty analysis on the precedential value of these cases.¹²

This issue is squarely presented here, and, based upon the analysis in §C, the Court should conclude that the Medrano line of cases are no longer controlling because they are premised on a duty analysis rejected in Keller. From Klein through Medrano a now-repudiated notion of duty is intertwined with the legal cause analysis. After Keller, the legal cause analysis in these cases must be recognized as flawed, and these cases deemed to be without precedential value.

¹² WSTLA Foundation suggested in its Keller amicus brief that the legal cause analysis in the Medrano line of cases would be unaffected by a reformulation of the duty of care. See WSTLA Fdn. Keller Am. Br. at 3, 15. This assessment was incorrect for the reasons set forth in §C.

If the Medrano line of cases is set aside as not controlling, then the Court must undertake a legal cause analysis here with due regard for the duty of care imposed on governmental entities, as clarified in Keller. For the reasons set forth below, the Court should conclude that PSE and Skagit's legal cause challenge must fail, notwithstanding Wilbur's reckless conduct and intoxication.

First, PSE and Skagit rightfully concede, for purposes of summary judgment, that they owe a duty of care. See text supra at 3. That Lowman, as a passenger in a vehicle, may be injured by a utility pole negligently placed too close to the roadway, is clearly within the "general field of danger" that PSE and Skagit should have anticipated. A vehicle may collide with this type of obstacle for any number of reasons, including, but certainly not limited to, reckless driving by an intoxicated person. See Rikstad v. Holmberg, 76 Wn. 2d 265, 269, 456 P.2d 355 (1969) (noting that in assessing whether a harm falls within the general field of danger, the focus is not on the "unusualness of the act" that resulted in injury, but rather whether the act is "within the ambit of the hazards covered by the duty imposed upon defendant"); Unger, 118 Wn.App. at 176 (rejecting legal cause argument in light of Keller, and concluding "[i]t is for the jury to decide whether the County's construction or maintenance of Cannon 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").¹³

Second, under the public policy expressed in Washington statutes *Wilbur's* conduct would not foreclose her from bringing a negligence claim against PSE and Skagit, so it should not prevent her passenger Lowman from doing so based upon a legal cause analysis. Under RCW 4.22.005, addressing the effect of contributory fault by a plaintiff, and RCW 4.22.015, defining "fault" to encompass a variety of non-intentional acts or omissions, *Wilbur's* conduct does not offend public policy so as to preclude her recovery as a matter of law, however offensive it may be.¹⁴ RCW 4.22.015 encompasses non-intentional conduct. See Welch v. Southland Corp., 134 Wn. 2d 629, 630, 634, 952 P.2d 162 (1998). "Fault" under the statute includes acts or omissions that are

¹³ In Minahan, the Court of Appeals held that that the owner and lessee of property adjacent to a roadway was not a legal cause of the plaintiff's injuries when a drunk driver struck her on the roadway, relying in part on Braegelmann. See 117 Wn.App. at 898. Minahan does not involve a duty to maintain the particular roadway, but rather the duty of one engaged in an unreasonably dangerous activity. See id. at 896-98. At one level, the legal cause analysis of Minahan is based on the fact that the plaintiff's injuries were caused by a drunk driver, although this fact "weigh[ed] lightly" in the court's judgment. See id. at 898. At another level, the legal cause analysis is based on the fact that the adjacent landowner and lessee did nothing to increase the risk of harm. See id. at 886, 898-99 (noting that plaintiff chose parking space, that all parkers would face the same hazards, and that the adjacent landowner and lessee did nothing more than direct plaintiff where to unload her car); see also 16 David K. DeWolf & Keller W. Allen, Wash. Prac., Tort Law & Practice § 4.22 (3d ed. 2011-12) (noting use of legal cause to bar claims where defendants did not increase the risk of harm). The question of increased risk of harm did not surface in the legal cause analysis in any of the Medrano line of cases. In this case, the negligence of PSE and Skagit in placement of the utility pole arguably increased the risk of injury under the plaintiff's theory of liability. See Lowman Br. at 7-8.

¹⁴ The current versions of RCW 4.22.005 and 4.22.015 are reproduced in the Appendix to this brief.

“reckless.” RCW 4.22.015(1).¹⁵ This term is undefined in the statute, but its plain and ordinary meaning should include acts or omissions “[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless, rash.” Black’s Law Dictionary, s.v. “reckless” (9th ed. 2009).¹⁶

Wilbur’s conduct is properly viewed as being within the definition of fault under RCW 4.22.015. Notably, the meaning of “disregard for the safety of others” in the criminal statute under which Wilbur was charged and convicted, RCW 46.61.522(1)(c), also involves non-intentional conduct, less culpable than recklessness. See WPIC 90.05 (instructing that disregard for the safety of others “means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a

¹⁵ RCW 4.22.015 states “[l]egal requirements of causal relation apply both to fault as the basis for liability and to contributory fault,” which appears to incorporate rather than change the case law regarding proximate cause. The statute further provides “[a] comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.” This language should be read as relating to the cause in fact prong of proximate cause, not legal cause, because there is no “comparison” of legal causes.

¹⁶ Although not at issue here, there is some uncertainty whether “fault” would encompass “willful conduct,” as in “willful and wanton misconduct.” In Schmidt v. Cornerstone Investments, Inc., 115 Wn. 2d 148, 161-62, 795 P.2d 1143 (1990), the Court quoted legislative history stating that the definition of fault in RCW 4.22.015 “is intended to encompass all degrees of fault in tort actions short of intentionally caused harm,” including “negligence, gross negligence, recklessness, willful and wanton misconduct and strict liability”; quoting Senate Journal, 47th Legislature (1981), at 635. Willful and wanton misconduct seems to include both intentional (willful) and reckless (wanton) conduct. See Vioen v. Cluff, 69 Wn. 2d 306, 323, 418 P.2d 430, 441 (1966) (“Willful and wanton misconduct has been distinguished from negligence by a long line of modern cases which adopt the *Adkisson* definition that ‘willful’ refers to an intentional behavior, and ‘wanton’ refers to behavior in reckless disregard of the consequences pertaining to the safety of others”); see also Adkisson v. City of Seattle, 42 Wn. 2d 676, 683-87, 258 P.2d 461, 465 (1953) (defining and distinguishing willful and wanton conduct, recklessness and negligence).

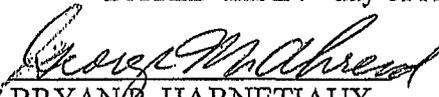
more serious dereliction than ordinary negligence”); see also WPIC 90.01 (defining vehicular assault under RCW 46.61.522); WPIC 90.02 (stating elements of vehicular assault).¹⁷

Lastly, under Washington law, the intoxication of a plaintiff driver (or passenger) is not a complete defense to a claim of negligence unless the trier of fact finds that the plaintiff’s intoxication is a proximate cause of the injury or death and that s/he is “more than fifty percent at fault.” RCW 5.40.060(1); see also Schooley, 134 Wn.2d at 481 (discussing RCW 5.40.060).¹⁸ If intoxication does not preclude a civil recovery in all instances, then it should not serve as a basis for disallowing such recovery under a legal cause analysis. All of the foregoing statutes represent policy choices already made by the Legislature, and should not be second guessed by a court under a legal cause analysis.¹⁹

VI. CONCLUSION

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

DATED this 24th day of April, 2012.


FOR BRYAN P. HARNETIAUX,
WITH AUTHORITY On Behalf of WSAJ Foundation


GEORGE M. AHREND

¹⁷ The current versions of WPIC 90.05, 91.01 and 91.02, including comments, are reproduced in the Appendix to this brief.

¹⁸ The current version of RCW 5.40.060 is reproduced in the Appendix to this brief.

¹⁹ Of course, in finding that any negligence on PSE and Skagit’s part constitutes a legal cause of Lowman’s injuries in no way assures him of a recovery from PSE and Skagit. In addition to reduction in damages based upon any contributory fault on the part of Lowman, the trier of fact may determine Wilbur’s conduct is the sole proximate cause of Lowman’s injuries, or that Wilbur’s conduct is a superseding cause of the injuries. See Edgar, 129 Wn.2d at 630 (sole proximate cause); Schooley at 482 (superseding cause). These are all matters for the jury.

Appendix

RCW 4.22.005. Effect of contributory fault

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

[1981 c 27 § 8.]

RCW 4.22.015. "Fault" defined

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

[1981 c 27 § 9.]

RCW 5.40.060. Defense to personal injury or wrongful death action-- Intoxicating liquor or any drug

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard

established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

[1994 c 275 § 30; 1987 c 212 § 1001; 1986 c 305 § 902.]

RCW 46.61.522. Vehicular assault--Penalty

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

(2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

[2001 c 300 § 1; 1996 c 199 § 8; 1983 c 164 § 2.]

WPI 140.01 Sidewalks, Streets, and Roads—Duty of Governmental Entity

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

NOTE ON USE

Use bracketed material as applicable.

A revised or separate instruction may be needed to address the standards that apply to particular types of cases, such as cases involving warning signs or guardrails. See the Comment below.

COMMENT

Background. In *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), the Supreme Court set out the instruction to be used in these cases: “A [County] [City] [Town] [State] has a duty to exercise ordinary care in the [construction] [repair] [maintenance] of its public [roads] [streets] [highways] to keep them in a reasonably safe condition for ordinary travel.” *Keller v. City of Spokane*, 146 Wn.2d at 254. The *Keller* opinion describes the evolution of the law in this area. 146 Wn.2d at 244-49.

Scope of duty. In *Keller*, the Supreme Court set forth the general duty owed by governmental entities to all persons on public roadways as follows: “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.” 146 Wn.2d at 249.

More recently, in *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 787-88, 108 P.3d 1220 (2005), the Supreme Court described this duty as follows:

Tukwila acknowledges that it has a duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition. A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. See *Keller*, 146 Wn.2d at 249, 44 P.3d 845. The inherently dangerous formulation recognizes that “[a]s the danger becomes greater, the actor is required to exercise caution commensurate with it.” *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957). Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings.

This duty may include designing, constructing or maintaining reasonably safe roadways or keeping them in proper repair so that they are reasonably safe for ordinary travel. This duty may also include a duty to eliminate or warn of hazards, the removal of snow and ice from public roadways, or the removal of roadside hazards. See *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994) (warning signs); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) (low bridge); *Raybell v. State*, 6 Wn.App. 795, 802, 496 P.2d 559 (1972) (guardrail); *Owen v. Burlington*

N. & Santa Fe R.R., supra (eliminating hazards); Wright v. City of Kennewick, 62 Wn.2d 163, 381 P.2d 620 (1963); (removal of snow and ice); Nelson v. City of Tacoma, 19 Wn.App. 807, 577 P.2d 986 (1978) (snow and ice on sidewalk). The general instruction should not single out any of the several available methods of discharging the duty of the governmental entity. Although relevant to a determination of whether a duty has been breached, evidence of a particular physical defect or violation of a roadway safety measure is not essential to a claim that a governmental entity breached a duty of care owed to travelers; breach of a duty is based upon the totality of the circumstances. Ziao Ping Chen v. City of Seattle, 153 Wn.App. 890, 223 P.3d 1230 (2009), review denied 169 Wn.2d 1003 (2010), 234 P.3d 1172 (2010).

For some cases, the pattern instruction may need to be revised or supplemented with a separate instruction. For example, case law analysis of issues relating to warning signs or guardrails sometimes differs from the traditional analysis. See below with regard to warning sign cases. The bracketed options in the pattern instruction may need to be expanded, and other revisions may be needed, to account for any more particularized analysis in the case law.

Limits on duty. Although a governmental entity is not required to make its public streets, roads, and sidewalks absolutely safe, a governmental entity must use ordinary care to provide against such dangers to the traveling public as may reasonably be anticipated having due regard to the character of travel, the incidental purposes for which the street, highway, or sidewalk may be lawfully used, and the nature of possible dangers at the point in question. Berglund v. Spokane County, 4 Wn.2d 309, 358–59, 103 P.2d 355 (1940). “[T]he duty [to maintain a roadway in a reasonably safe condition does not] require a [county] to ‘anticipate and protect against all imaginable acts of negligent drivers’ for to do so would make a [county] an insurer against all such acts.” Ruff v. King County, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (holding that this duty of care does not require a governmental entity to update every road and roadway structure to present-day standards; that is, “there is no duty to make a safe road safer”).

Warning signs. If there is an inherently dangerous or deceptive condition in the roadway itself, the duty of ordinary care may include the duty of erecting and maintaining proper warning signs where necessary: “This obligation includes posting warning signs when required by law or when the State has actual or constructive knowledge that the highway is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care.” McCluskey v. Handorff-Sherman, 125 Wn.2d 1, 6, 882 P.2d 157 (1994); see also Provins v. Bevis, 70 Wn.2d 131, 138, 422 P.2d 505 (1967); Meabon v. State, 1 Wn.App. 824, 827–828, 463 P.2d 789 (1970).

Federal manual. RCW 47.36.020 requires that the State adopt specifications for a uniform system of traffic control devices for public highways that so far as possible conform to the system current as approved by the American Association of State Highway Officials (AASHTO) and as set out in the Manual on Uniform Traffic Control Devices for streets and highways (MUTCD) (<http://mutcd.fhwa.dot.gov/index.htm>), published by the Federal Highway Administration for compliance by the states as a condition of federal funding. The State Highway commission adopted the MUTCD with certain revisions. See WAC Chapter 468-95. RCW 36.86.040 requires each county legislative authority to erect signs that conform with this standard. The MUTCD in many cases is deemed to have the force of law. *Schneider v. Yakima County*, 65 Wn.2d 352, 357, 397 P.2d 411 (1964); *Kitt v. Yakima County*, 93 Wn.2d 670, 673-74, 611 P.2d 1234 (1980). Failure to comply with uniform state traffic control standards may be evidence of negligence. *Wojcik v. Chrysler Corp.*, 50 Wn.App. 849, 751 P.2d 854 (1988). If a case involves a violation of the MUTCD, it may be appropriate to draft an instruction consistent with WPI 60.01, Statute, Ordinance or Administrative Rule, and with WPI 60.03, Violation of a Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence.

[Current as of October 2010.]

**WPIC 90.05 Reckless Manner—Disregard for Safety of Others—
Definition—Ordinary Negligence Distinguished**

[To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.]

[Disregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence. Ordinary negligence is the failure to exercise ordinary care. Ordinary negligence is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. Ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide.]

Note on Use

Use this instruction for vehicular homicide or vehicular assault cases if the case involves either operating a motor vehicle in a reckless manner or operating a motor vehicle with disregard for the safety of others. Do not use this instruction for cases of reckless driving. See the Comment below.

Use bracketed material as applicable. For directions on using bracketed phrases, see the Introduction to WPIC 4.20.

Comment

For purposes of the vehicular assault and vehicular homicide statutes, operating a vehicle in “a reckless manner” means driving in a rash or heedless manner, indifferent to the consequences. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) (abrogating *State v. Hursh*, 77 Wn.App. 242, 890 P.2d 1066 (1995)) (vehicular assault); *State v. Miller*, 60 Wn.App. 767, 773, 807 P.2d 893 (1991) (vehicular homicide); and *State v. McAllister*, 60 Wn.App. 654, 658–59, 806 P.2d 772 (1991) (vehicular homicide).) This definition of “reckless manner” is distinct from the definition of “reckless driving,” which is a separate criminal offense. See *Roggenkamp*, 153 Wn.2d at 628, 106 P.3d 196 (finding that the Legislature had always intended that, for purposes of vehicular homicide and vehicular assault, the term “reckless manner” should *not* be defined in terms of the meaning of “reckless driving”); RCW 46.61.500 (defining reckless driving as involving “willful or wanton disregard for the safety of persons or property”); see also *State v. Curran*, 116 Wn.2d 174, 804 P.2d 558 (1991). For the instructions on the separate offense of reckless driving, see WPIC Chapter 95, Reckless Driving.

The second paragraph of this instruction is an adaptation of the majority opinion in *State v. Eike*, 72 Wn.2d 760, 435 P.2d 680 (1967), which has been cited with approval in several cases: *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970); *State v. Knowles*, 46 Wn.App. 426, 730 P.2d 738 (1986); and *State v. May*, 68 Wn.App. 491, 843 P.2d 1102 (1993). Evidence of some conscious disregard of the danger to others is necessary. *State v. Vreen*, 99 Wn.App. 662, 994 P.2d 905 (2000), affirmed 143 Wn.2d 923, 26 P.3d 236 (2001); see also *State v. A.G.*, 117 Wn.App. 462, 72 P.3d 226 (2003) (discussing vehicular homicide by disregard for the safety of others), affirmed in *State v. Graham*, 153 Wn.2d 400, 103 P.3d 1238 (2005).

For further discussion, see the Comment to WPIC 90.03, Vehicular Homicide and Assault—Jury Interrogatory.

The definition of ordinary negligence in this instruction is adapted from the civil jury instructions, WPI 10.01 and WPI 10.02.

WPIC 10.03, Recklessness—Definition, which is based on RCW 9A.08.010(1)(c), applies to crimes included in RCW Title 9A, but it does not apply to vehicular homicide/assault, see *Roggenkamp*, 153 Wn.2d at 624 n.3, 106 P.3d 196, nor to driving offenses under RCW Title 46. See the Comment to WPIC 10.03.

[Current as of 2005 Update.]

WPIC 91.01 Vehicular Assault—Definition

A person commits the crime of vehicular assault when he or she operates or drives any vehicle *[in a reckless manner] [or] [while under the influence of [intoxicating liquor] [or] [any drug]] [or] [with disregard for the safety of others]*, and proximately causes substantial bodily harm to another.

Note on Use

Use this instruction for vehicular assault cases that occurred after July 22, 2001, if it will help the jury understand the charged offense or if it is necessary to define this particular offense for the jury. See the Comment to WPIC 4.24, Definition of the Crime—Form.

Use bracketed material as applicable. For directions on using bracketed phrases, see the Introduction to WPIC 4.20.

Use with WPIC 91.02 (Vehicular Assault—Elements), WPIC 90.07 (Vehicular Homicide and Assault—Proximate Cause—Definition), and WPIC 2.03.01 (Substantial Bodily Harm—Definition). Use, as applicable, WPIC 90.05 (Reckless Manner—Disregard for Safety of Others—Definition—Ordinary Negligence Distinguished) and WPIC 90.06 (Vehicular Homicide and Assault—Under the Influence of or Affected By—Definition). Use WPIC 98.01, Traffic Cases—Vehicle—Definition, if it is necessary to define the term vehicle.

Comment

RCW 46.61.522.

See the Comment to WPIC 91.02 (Vehicular Assault—Elements) and WPIC 90.03 (Vehicular Homicide and Assault—Jury Interrogatory).

[Current as of 2005 Update.]

WPIC 91.02 Vehicular Assault—Elements

To convict the defendant of the crime of vehicular assault, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date), the defendant *[operated]* *[or]* *[drove]* a vehicle;

(2) That the defendant's *[vehicle operation]* *[or]* *[driving]* proximately caused substantial bodily harm to another person;

(3) That at the time the defendant

[(a) [operated] [or] [drove] the vehicle in a reckless manner; or]

[(b) was under the influence of [intoxicating liquor] [or] [drugs]; or]

[(c) [operated] [or] [drove] the vehicle with a disregard for the safety of others;] and

(4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4), and any of the alternative elements *[(3)(a),] [(3)(b),] or [(3)(c)]*, have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives *[(3)(a),] [(3)(b),] or [(3)(c)]* has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

Note on Use

Use this instruction for vehicular assault cases that occurred after July 22, 2001.

The instruction is drafted for cases in which the jury needs to be instructed using two or more of the alternatives for element (3). Care must be taken to limit the alternatives to those that were included in the charging document and are supported by sufficient evidence. For directions on when and how to draft instructions with alternative elements, see the Introduction to WPIC 4.20 and the Note on Use and Comment to WPIC 4.23, Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form. For any case in which substantial evidence supports only one of the alternatives in element (3), revise the instruction to remove references to alternative elements, following the format set forth in WPIC 4.21, Elements of the Crime—Form.

Along with this instruction, use WPIC 2.03.01, Substantial Bodily Harm—Definition. Also use, as applicable, WPIC 90.05 (Reckless Manner—Disregard For Safety of Others—Definition—Ordinary Negligence Distinguished), WPIC 90.06 (Vehicular Homicide and Assault—Under the Influence or Affected By—Definition) .

Use WPIC 90.03 (Vehicular Homicide and Assault—Jury Interrogatory) and WPIC 160.00 (Concluding Instruction—Special Verdict—Penalty Enhancements) with this instruction.

For a discussion of the phrase “this act” in the jurisdictional element, see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21, Elements of the Crime—Form.

If the facts on which jurisdiction is based are in dispute, a special verdict form may need to be submitted to the jury. See the Introduction to WPIC 4.20, and WPIC 190.10, Special Verdict Form—Jurisdiction.

Comment

RCW 46.61.522.

Vehicular assault may be committed by driving while under the influence of alcohol or drugs, or by driving in a reckless manner, or by driving with a disregard for the safety of others. Vehicular homicide cases interpreting these means are also applicable to vehicular assault. See *State v. Hill*, 48 Wn.App. 344, 739 P.2d 707 (1987). See the Comment to WPIC 90.02, Vehicular Homicide—Elements, for an extensive discussion of each of the comparable means of committing vehicular homicide.

In 2001, the Legislature amended the vehicular assault statute adding the disregard for the safety of others prong, changing the injury prong to substantial bodily harm, and rewording the statute to track the causation requirement in the vehicular homicide statute. See Laws of 2001, Chapter 300, § 1. Vehicular assault cases occurring after July 22, 2001, like vehicular homicide cases, are strict liability crimes. The only causal connection the State is required to prove is the connection between the defendant's act of driving and the accident or collision. *State v. Rivas*, 126 Wn.2d 443, 451–52, 896 P.2d 57 (1995). The “conduct of the defendant must be both (1) the actual cause, and (2) the ‘legal’ or ‘proximate’ cause.” *Rivas*, at 453, 896 P.2d 57; *State v. Meekins*, 125 Wn.App. 390, 397, 105 P.3d 420 (2005). For a more extensive discussion of *Rivas*, refer to the Comment to WPIC 90.02, Vehicular Homicide—Elements.

The vehicular assault statute does not require that the defendant's actions be the sole proximate cause of the injury notwithstanding language in the statute that the defendant's conduct be “the proximate cause” of the victim's injury. *State v. Neher*, 112 Wn.2d 347, 771 P.2d 330 (1989); see

also *State v. Parker*, 60 Wn.App. 719, 806 P.2d 1241 (1991) (a defendant can be guilty of vehicular assault even if the defendant's car was not physically involved in the accident). For a similar discussion, see the Comment to WPIC 90.02, Vehicular Homicide—Elements.

Negligent driving in the first degree is not a lesser included offense of vehicular assault. *State v. Bosio*, 107 Wn.App. 462, 27 P.3d 636 (2001).

A verdict can be reached even though the jurors do not unanimously agree upon the means by which the offense was committed. See Comment to WPIC 90.02, Vehicular Homicide—Elements.

[Current as of 2005 Update.]

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Subject: Lowman v. Wilbur (S.C. #86584-1) - Proposed Amicus Curiae Brief

Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is attached to this email. A letter request to appear as amicus curiae was submitted on behalf of the Foundation by email on April 19, 2012. Counsel are being served simultaneously by copy of this email by prior arrangement.

Respectfully submitted,

--

George Ahrend
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