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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.

**JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS PUGET
SOUND ENERGY, INC. AND COUNTY OF SKAGIT**

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I. INTRODUCTION

The Court of Appeals decision should be affirmed because:

1. The court properly recognized that legal causation is rooted in policy determinations regarding the limits of liability. *Lowman v. Wilbur*, No. 65359-8-I, slip op. at 4 (Wash. Ct. App. June 27, 2011).

2. The court properly followed factually analogous decisions illustrating that “logic, common sense, justice, policy, and precedent” support summary judgment on legal causation grounds where, as here, the undisputed facts establish that a speeding, drunk, and criminally reckless driver caused the accident. *Id.* at 6-8.

3. The court properly rejected the plaintiff’s argument that *Keller v. City of Spokane*, 146 Wn.2d 237 (2002), and *Unger v. Cachon*, 118 Wn. App. 165 (2003), fundamentally altered legal causation in Washington. *Keller* and *Unger* hold that a governmental entity owes a duty of building and maintaining reasonably safe roadways even to negligent drivers; however, the liability of ancillary, non-motorist defendants is not unlimited. As *Keller* itself stated, even where such a duty is owed, trial courts retain a “gatekeeper function” to limit liability on legal causation grounds. 146 Wn.2d at 252. In fact, numerous appellate courts cases after *Keller* have continued to rely upon legal causation to limit defendants’ liability where the evidence, policy, and precedent

justify doing so—including on summary judgment. *See, e.g., Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881 (2003).

Such a fact-specific, policy-driven, precedent-based analysis is precisely what The Honorable Gerald Knight performed at the trial court, and precisely what Division I performed at the Court of Appeals here. Both courts applied analogous case law to the undisputed evidence of Jennifer Wilbur’s extreme conduct, and both courts correctly reasoned that Nathan Lowman’s claim against non-motorist defendants Puget Sound Energy (“PSE”) and Skagit County exemplifies a dispute that properly falls on the “side of the line” where legal causation is lacking. *Id.* at 898.

II. STATEMENT OF ISSUE

Whether an injured passenger’s claim against defendants for negligently installing a utility pole should be dismissed as a matter of law for lack of legal causation, where the evidence undisputedly establishes that the accident resulted from a speeding, drunk, and criminally reckless driver who lost control over her car and skidded off the road into the pole.

III. STATEMENT OF THE CASE

Division I correctly summarized the factual and procedural context. *Lowman*, slip op. at 2-3. The operative facts are not in dispute:

- Nathan Lowman met Jennifer Wilbur at a bar in Anacortes on the night of August 5, 2005.

- Both were drinking.
- Ms. Wilbur got drunk and offered Mr. Lowman a ride.
- Mr. Lowman knew Ms. Wilbur was drunk but got into her car—admittedly against his better judgment.
- Ms. Wilbur drove drunk down a steep hill on a meandering, two-lane country road.
- She was speeding.
- She failed to negotiate one of the turns.
- She lost control of the car.
- She skidded off the roadway into a utility pole.
- The pole was located off the roadway.
- She was later determined to have a BAC of .14g/100mL—nearly twice the legal limit for DUI.
- She was criminally prosecuted for her reckless drunk driving.
- She admitted she “drove a vehicle with disregard for the safety of others and thereby caused substantially bodily harm to Nathan Lowman.”
- The court entered findings that she had a “chemical dependency” that contributed to the offense.
- She was convicted and sentenced for her criminally reckless DUI.

Further factual background with record citations is set forth in Respondents’ Court of Appeals brief, as well as in their Answer to Petition

for Review. *See* Joint Resp. Br. at 3-9; Answer at 3-6. The procedural history is detailed in the Answer.¹ *See* Answer at 6-7.

IV. ARGUMENT

A. Legal Causation Places Policy Limits on Liability.

As the Court of Appeals recognized, proximate cause includes two distinct elements: cause in fact and legal causation. *Lowman*, slip op. at 4 (citing *Hartley v. State*, 103 Wn.2d 768, 777 (1985)). 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.” *Id.* (citing *Hartley*, 103 Wn.2d at 768). Legal cause, on the other hand, “is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend.” *Id.* (quoting *Crowe v. Gaston*, 134 Wn.2d 509, 518 (1998)). It is an issue of law for the court to decide where, as here, the relevant facts are not in dispute. *Id.* at 4-5 (citing *Crowe*, 134 Wn.2d at 518). The focus 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.” *Id.* at 4 (quoting *Cunningham v. State*, 61 Wn. App. 562, 572 (1991)).

¹ The relevant record is different here than in Division I. In Division I, Mr. Lowman appealed the summary judgment decision, as well as the denial of his requests for reconsideration and continuance. *See* Joint Resp. Br. at 29-50 (addressing latter issues). His petition for review to this Court, however, raises issues relevant only to the summary judgment decision. *See also* RAP 13.7(b) (scope of review limited by petition).

The Court of Appeals correctly recognized that legal cause places policy limits on liability. In *Hartley*, a car driven by Eugene Johnson collided into Janet Hartley's car and killed her. 103 Wn.2d at 770. Johnson was drunk and later pleaded guilty to negligent homicide. *Id.* The estate sued the state and Pierce County for failing to revoke Johnson's driver's license. The trial court denied summary judgment. *Id.* at 772.

This Court reversed. Citing Prosser, the Court summarized the policy basis of legal causation:

Legal causation . . . rests on policy considerations as to how far the consequences of defendant's acts should extend. It 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."

Id. at 779 (quoting *King v. Seattle*, 84 Wn.2d 239, 250 (1974) (quoting 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 100, 110 (1906); citing W. PROSSER, TORTS 244 (4th ed. 1971)) (emphasis in original).

Drawing on these policy considerations, the Court held the state and county were not the legal cause of Hartley's death as a matter of law:

[N]either the State nor County falls within these boundaries of legal causation, even assuming the validity of plaintiffs' factual allegations. Johnson's drunk driving was cause in fact and the legal cause of Mrs. Hartley's tragic death. This is not to say that there cannot be more than one party who is legally liable; but here the failure of the government to

revoke Johnson's license is too remote and insubstantial to impose liability for Johnson's drunk driving.

Id. at 784 (citations omitted). As a result, the Court concluded that "summary judgment should have been granted on the basis of lack of legal causation" and reversed the trial court. *Id.* at 785.

The Court's policy-based analysis of legal causation has continued after *Hartley*. In numerous cases (many published after *Keller*), the Court has reiterated that legal causation analysis rests on policy considerations regarding whether liability "should" attach even assuming proof of negligence and cause in fact. *See, e.g., Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611-12 (2011); *Ang v. Martin*, 154 Wn.2d 477, 482 (2005); *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204 (2001); *Tyner v. State*, 141 Wn.2d 68, 82 (2000); *Hertog v. City of Seattle*, 138 Wn.2d 265, 283-84 (1999); *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359-60 (1998); *Crowe*, 134 Wn.2d at 518-19; *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478-79 (1998); *Christen v. Lee*, 113 Wn.2d 479, 508 (1989); *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 146 (1986).

As the Court stated in *Schooley*:

Legal causation is, among other things, a concept that ***permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.***

134 Wn.2d at 479 (emphasis added).

B. The Court of Appeals Properly Used Precedent to Guide Its Legal Causation Analysis.

The Court of Appeals viewed case law as a “valuable guide” in evaluating the policy considerations underlying legal causation. *Lowman*, slip op. at 5. This analytical tool is supported by leading tort law commentators and appellate decisions in this state. The key to a sound legal cause analysis is reviewing prior analogous precedent and determining on which “side of the line” the case at bar falls:

“Proximate cause” [legal cause] cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of Street: “It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.”

W. PAGE KEETON, *et al.*, PROSSER & KEETON ON TORTS § 42 (5th ed. 1984) (quoting STREET, *supra*, at 110); *see also McCoy*, 136 Wn.2d at 360; *King*, 84 Wn.2d at 250; *Minahan*, 117 Wn. App. at 898.

C. The Court of Appeals Correctly Determined this Case Falls on the No-Legal-Causation “Side of the Line.”

Judge Knight and Division I applied factually analogous legal causation precedent to determine on which “side of the line” this case falls. RP 11/12/2009, at 42-43; *Lowman*, slip op. at 6-8. Both courts focused primarily on four decisions. *Id.* The Court of Appeals noted that

“our precedent is clear”—legal causation is lacking “in at least four different cases with facts similar to those presented herein.” *Lowman*, slip op. at 6. These four cases, and others,² illustrate that public policy precludes PSE and Skagit County from being held liable, regardless of any negligence on their part, given Ms. Wilbur’s undisputed speeding, drunk, and criminally reckless driving.

1. *Medrano*

As the Court of Appeals recognized, “the facts in *Medrano* are strikingly similar to those presented here.” *Id.* at 6. In *Medrano v. Schwendeman*, David Schwendeman lost control of his pickup truck while speeding and driving recklessly, and collided with a power pole. 66 Wn. App. 607, 608-09 (1992). In a separate criminal action, Schwendeman was convicted of two counts of vehicular assault for injuries to two of his passengers. One of Schwendeman’s injured passengers, Richard Medrano, brought a civil suit. *Id.*

The claim Medrano brought against Puget Power (PSE’s predecessor) and King County is almost identical to the claim Mr. Lowman brings against PSE and Skagit County here, *i.e.*, that the pole was allegedly put in the wrong place. *Id.* at 610. The *Medrano* trial court

² See, for example, *Hartley* (discussed above), *Kristjanson v. City of Seattle*, 25 Wn. App. 324 (1980) (discussed below), and *Minahan*, 117 Wn. App. 881 (2003) (same).

entered summary judgment against Medrano for lack of legal causation, and the Court of Appeals affirmed. *Id.* at 611-14. The court reasoned:

We conclude that neither logic, common sense, justice, nor policy favor a decision that would subject the County and Puget Power to legal liability on these facts.

* * *

The question is whether, *as a matter of policy*, the connection between the defendant's acts and their ultimate result is "too remote or insubstantial to impose liability." Here it was Schwendeman's driving that was the legal cause of the accident. *Considering his driving . . . the possible negligent placement of the pole by Puget Power [is] too remote to impose liability.*

Id. at 613-14 (quoting *Hartley*, 103 Wn.2d at 781) (emphasis added).

2. *Cunningham*

Cunningham is another legal causation decision on which Division I relied. *Cunningham* involved a driver's early morning collision with a concrete bollard placed in front of the Luoto Road gate to the Naval Submarine Base at Bangor. 61 Wn. App. at 564. Chester Cunningham, who was intoxicated with a blood alcohol level of 0.22 at the time of the incident, claimed the road was improperly lighted and striped, and as a result, the state was responsible for his injuries. *Id.* The court affirmed summary judgment for the state. It held that given Cunningham's intoxication and his admission that he saw the bollard but failed to slow from his speed of 35 mph, "neither logic, common sense, justice, nor

policy favors finding legal causation here.” *Id.* at 571. The court concluded that, given the driver’s extreme conduct, even assuming the state was negligent, its negligence would be “too remote or insubstantial to impose liability.” *Id.* at 572 (quoting *Hartley*, 103 Wn.2d at 781).

3. *Braegelmann*

Courts, like the Court of Appeals here, also cite *Braegelmann v. County of Snohomish*, 53 Wn. App. 381 (1989), to further illustrate where legal cause can be lacking in motor vehicle cases. *See, e.g., Medrano*, 66 Wn. App. at 612; *Cunningham*, 61 Wn. App. at 571. In *Braegelmann*, Marvin Braegelmann’s widow sued Snohomish County for negligent design, construction, and maintenance of the gravel road where her husband was killed, claiming that the road provided inadequate sight distance at the posted rate of speed. 52 Wn. App. at 382-83. Braegelmann died when his vehicle was hit head-on by Harry Tom, who had crossed the center line while speeding with a blood alcohol level of 0.19. *Id.* Tom pleaded guilty to vehicular homicide. *Id.* at 383. Similar to *Medrano* and *Cunningham*, the Court held that “policy considerations” dictate that the county should not be responsible for Braegelmann’s death given Tom’s “extreme conduct” and affirmed summary judgment for lack of legal causation. *Id.* at 386.

4. *Klein*

Courts similarly cite *Klein v. City of Seattle*, 41 Wn. App. 636 (1985), as an example where reckless driving can justify dismissal on legal causation grounds, although *Klein* only once references legal causation. *See, e.g., McCoy v. Am. Suzuki Motor Corp.*, 86 Wn. App. 107, 118 (1997), *aff'd*, 136 Wn.2d 350 (1998); *Medrano*, 66 Wn. App. at 611-12; *Braegelmann*, 53 Wn. App. at 386; *Cunningham*, 61 Wn. App. at 571. The court in *Klein* found that the city's negligent road design was not, as a matter of law, the legal cause of a motorist's death where she was hit head-on by an "extreme[ly] careless[]" driver. 41 Wn. App. at 639. Wyn Roberts was killed when Michael Mullens lost control of his vehicle while speeding on the West Seattle Bridge, crossed the center line, and collided with Roberts' oncoming car. *Id.* at 637-38. Mullens' blood alcohol level was only 0.04—he was not legally intoxicated like Ms. Wilbur here. *Id.* at 638. Still, the court cited *Hartley* and determined "[a]s a matter of public policy" that liability should not be imposed on the city. *Id.* at 639.

5. *Kristjanson*

Similar to *Klein*, courts cite *Kristjanson* as a decision where legal cause is lacking even though the case does not explicitly label its analysis as grounded in the legal causation doctrine. *See, e.g., Medrano*, 66 Wn. App. at 611-12; *Cunningham*, 61 Wn. App. at 571. In *Kristjanson*,

Timothy Kristjanson suffered serious injuries in a two-car collision that occurred on a “steep, sharply-curving, 2-lane road through a wooded area” in Golden Gardens. 25 Wn. App. at 325. Kristjanson was driving down the hill, while Drew Tolliver was driving up. *Id.* Tolliver had picked up two hitchhikers at the bottom of the hill. *Id.* One sat on the center console and steered while Tolliver operated the gas and brake pedals. *Id.* Tolliver then sped up the hill, driving 54 mph in a 30 mph zone. *Id.* He crossed the center line at one point and struck Kristjanson’s vehicle. *Id.* Forty-five minutes later, Tolliver’s BAC read 0.21g/100mL. *Id.*

Kristjanson sued the City of Seattle for negligent design and maintenance of the road. *Id.* at 284. The trial court granted summary judgment for the city, and Division I affirmed. *Id.* The court determined that Tolliver’s “incredibly reckless driving” was the “sole proximate cause” of Kristjanson’s injuries—even if “all doubts” were resolved in Kristjanson’s favor regarding the city’s alleged negligence. *Id.* at 326.

6. *Minahan*

Minahan is a recent, well-reasoned decision further illustrating the propriety of Division I’s decision here. In *Minahan*, the plaintiff sued the Puyallup Fair and her employer (a school district) for injuries sustained when she was hit multiple times on Fair property by a drunk driver who later was convicted for vehicular assault. 117 Wn. App. at 885-87. The

defendants moved for summary judgment, arguing lack of legal causation. *Id.* at 888. The trial court denied the motion but the Court of Appeals reversed. *Id.* at 899. Citing *Medrano*, the court divided its analysis into two distinct parts, Part I (duty) and Part II (legal causation):

[W]e must first decide whether the defendants owed Minahan any duty. If the defendants did not owe the duties that Minahan suggests, then further analysis is unnecessary. *If they did owe a duty, then we must address the remaining aspect of legal causation: whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.*

Id. at 890 (citations omitted) (emphasis added). As to Part I of the opinion—duty—the court determined that denying summary judgment was proper because there was a fact issue on foreseeability. *Id.* at 897.

However, the court went on to address legal causation in Part II of its opinion. The court cited *Braegelmann* and other legal causation cases and focused on the policy decisions courts make in cases where harm is caused by severe, drunken behavior. *Id.* at 898-99. The court indicated that it was required to analyze similar situations reflected in court decisions and ask on which “side of the line” does the case fall. *Id.* at 898. In *Minahan*, and here, as determined by both the trial court and the Court of Appeals, it is on the side of summary judgment.

7. Summary of Key Legal Causation Factors in Motor Vehicle Accident Cases.

Division I was correct when it stated that the factually analogous legal causation precedent “is clear.” *Lowman*, slip op. at 5-6. The above decisions show that, in motor vehicle cases, there are limits to the liability of non-motorist defendants like utilities and governmental entities, and these limits may be determined as a matter of law. The following chart presents the salient factors upon which the analogous cases rely and underscores the propriety of affirming summary judgment here:

Case	Driver Speeding	Driver Legally Drunk	Driver Criminally Convicted	Other Factors
<i>Hartley</i>	X	✓	✓	<i>Crossed center line</i>
<i>Medrano</i>	✓	Maybe ³	✓	<i>Lost control; left roadway</i>
<i>Cunningham</i>	✓	✓	X	<i>Failed to stop</i>
<i>Braegelmann</i>	✓	✓	✓	<i>Crossed center line</i>
<i>Klein</i>	✓	X	X	<i>Crossed center line</i>
<i>Kristjanson</i>	✓	✓	X	<i>Crossed center line</i>
<i>Minahan</i>	X	✓	✓	<i>Crossed into parking lane</i>
<u>Lowman</u>	✓	✓	✓	<i>Lost control; left roadway</i>

³ The court noted the driver had been drinking beer before the accident and was on the way to a bar when the accident occurred. *Medrano*, 66 Wn. App. at 608-09.

D. The Court of Appeals Correctly Concluded that Neither Keller nor Unger Undercuts Legal Causation Analysis.

Mr. Lowman argues *Keller* “altered” or “overturned *sub silentio*” the “justice, policy, and precedent” analysis for legal causation by holding that municipalities owe a duty even to negligent drivers to build and maintain roadways reasonably safe for ordinary travel. Pet. for Review, *passim*. Judge Knight and the Court of Appeals properly rejected Mr. Lowman’s argument. Six reasons support those courts:

1. Keller Is Not a Legal Causation Case.

Although *Keller* comments on legal cause (*see* Part IV.D.2 *infra*), the case turns on duty—an element PSE and Skagit County conceded for summary judgment purposes. In *Keller*, the plaintiff was injured when a car hit his motorcycle in an intersection at which the City of Spokane had failed to place a stop sign. 146 Wn.2d at 240-41. The city argued it owed no duty because the plaintiff was not fault free. *Id.* at 242. This Court disagreed. It held “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.” *Id.* at 249.

Mr. Lowman’s view that *Keller* overruled legal causation cases ignores *Keller* itself. *Keller* devotes a part of its opinion to “Overruling Prior Precedent.” *Id.* at 254-55. It overruled one case and distinguished others on their facts. *Id.* None, however, includes *Medrano* or any other

legal causation case relied on by PSE, Skagit County, Judge Knight, or the Court of Appeals. *Id.*; *see also Lowman*, slip op. at 10 n.3.

2. *Keller* Confirms that Legal Causation Remains a Separate Limitation on Liability.

Contrary to Mr. Lowman’s analysis, *Keller* confirms that legal causation remains a limit on liability despite its holding clarifying a municipality’s duty. In response to the concern that its holding would require governmental entities to “anticipate and protect against all imaginable acts of negligent drivers,” the Court made clear that trial courts may grant dismissal on legal causation grounds even where a duty exists:

[T]he court still retains its gatekeeper function and may determine that a municipality’s actions were *not the legal cause* of the accident.

146 Wn.2d at 252 (emphasis added). This “gatekeeper function” operates as “a safeguard against making the municipality liable for every accident that occurs on its roadways.” *Id.*; *see also McCoy*, 136 Wn.2d at 360 (“numerous cases illustrate” how “the court often exercises its gatekeeper function by dismissing an action without trial for lack of legal cause”).

If *Keller*’s view about legal causation’s “gatekeeper function” is applied here, the Court of Appeals decision must be affirmed. Every key factor gleaned from analogous cases undisputedly is present: speeding,

severe drunk driving, losing control and driving off the roadway, and criminal conviction. *See* Part IV.C.7 *supra*.

3. Keller's Duty Analysis Does Not Alter Legal Causation Analysis.

Keller focused on duty, not legal cause. *Keller* did nothing to change courts' ability to consider the egregiousness of a driver's conduct when deciding the limits of liability under the legal causation doctrine. Although some issues a court may address in analyzing duty and legal cause may be the same or similar, the two elements remain distinct:

[A] court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation. This would nullify the legal causation element and along with it decades of tort law. ***Legal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.***

Schooley, 134 Wn.2d at 479 (emphasis added).

Consistent with *Schooley*, Division I concluded that duty and legal causation have different focuses in motor vehicle cases like *Lowman*:

[D]uty 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 . . . “[I]t would be a mistake to assume that every time a duty of care has been established, legal cause is necessarily present.”

Lowman, slip op. at 11 (quoting 16 DAVID DEWOLF & KELLER ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4.21, at 161 (3d ed.

2006)). The Court of Appeals recognizes that, in egregious driving cases like this one, the trial court must consider the “principal actor’s conduct” when performing a legal causation analysis, as all Washington courts have done in similar circumstances. *See* Part IV.C *supra*.

4. The Court of Appeals Decision Would Not Conflict with *Keller* Even if *Keller* Had Analyzed Legal Causation.

The claim in *Keller* would have survived a legal cause challenge had it been asserted. *Keller* involved an accident at a intersection with a two-way stop; the crossing road had no stop sign. 146 Wn.2d at 240. Balinski (the “principal actor”) had come to a stop at the stop sign. *Id.* He looked to his left where Keller (the motorcyclist) was coming, but Balinski did not see Keller. *Id.* Balinski then pulled out into the intersection. *Id.* Significantly, unlike here, there was no evidence that Balinski was drunk, speeding, or criminally convicted for reckless driving. *Id.* In fact, the evidence suggests Balinski was fairly attentive; he just did not see Keller. *Id.* The evidence of Balinski’s driving is nowhere close to Ms. Wilbur’s undisputed speeding, drunk, and criminally reckless driving here, or the egregious driving in each of the legal cause cases described above.

5. Courts After *Keller* Apply Legal Cause Like They Did Before *Keller*.

Were Mr. Lowman’s view of *Keller* accurate, one might expect that at least one case published in the decade following *Keller* would have

referenced a change in the legal causation doctrine. To the contrary, numerous cases decided after *Keller* have applied the doctrine without modification. Although *Medrano* and the other cases discussed above (*see* Part IV.C *supra*) remain the most factually relevant cases to *Lowman*, they are not the only ones decided on legal causation grounds. By our count, at least 27 Washington cases after *Keller* have applied the legal causation doctrine, including on summary judgment like in *Minahan* (*see* Part IV.C.6 *supra*).⁴ Nothing about *Keller*'s discussion of duty would change the result in these legal causation cases.

6. *Unger Does Not Conflict with Lowman.*

Mr. Lowman contends that *Unger* "held that plaintiff's claims were not barred under legal causation principles" and, as a result, "conflicts" with the Court of Appeals decision here. Pet. for Review at 1. However, *Unger* does not analyze legal causation. The trial court dismissed Island County from a wrongful death suit because the county owed no duty to the Ungers' recklessly driving son. 118 Wn. App. at 176. The Court of Appeals reversed, holding that the county owed a duty regardless of the son's negligence, pursuant to *Keller*. *Id.*

⁴ See, e.g., *Ang*, 154 Wn.2d at 482; *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311-12 (2006); *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 255 (2006). Excluding unpublished cases, *Medrano* itself has been cited three times after *Keller* with respect to legal causation. See *Lynn*, 136 Wn. App. at 311-12; *Minahan*, 117 Wn. App. at 890; *Owen v. Burlington N. Santa Fe R.R., Inc.*, 114 Wn. App. 227, 240-41 (2002).

Mr. Lowman argues that the Court of Appeals “ignored” its own decision in *Unger* in that *Unger* “*sub silentio* undercut or overruled *Braegelmann*” on which *Medrano* relied. Pet. for Review at 4, 6. This is not an accurate view of *Unger*. Were there any ambiguity about this, the Court of Appeals clarified it in its decision below:

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 [the Court of Appeals] 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, slip op. at 10 n.3.

Ultimately, Mr. Lowman’s *Unger* argument is a restatement of his *Keller* argument, *i.e.*, that *Keller* undermines the legal cause doctrine. This is wrong for the reasons detailed above. See Part IV.D.1-5 *supra*.

V. CONCLUSION

For the foregoing reasons, PSE and Skagit County respectfully request that this Court affirm the Court of Appeals decision and affirm Judge Knight’s dismissal of Mr. Lowman’s claims against PSE and Skagit County.

RESPECTFULLY SUBMITTED this 9th day of March, 2012.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that a copy of the foregoing JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS PUGET SOUND ENERGY, INC. AND COUNTY OF SKAGIT was served via email to the following pursuant to the parties' agreement for accepting email service:

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Signed this 9th day of March, 2012, at Seattle, Washington.

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Dear Clerk:

Attached for filing is the Joint Supplemental Brief of Respondents Puget Sound Energy, Inc. and County of Skagit in *Nathan Lowman v. Jennifer Wilbur, et al.*, No. 86584-1.

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

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