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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

NO. 65359-8-I 2011 SEP -8 PM 3:15

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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NATHAN LOWMAN,

Appellant

v.

JENNIFER WILBUR AND JOHN DOE WILBUR, COUNTRY  
CORNER, INC. d/b/a COUNTRY CORNER, ANACORTES  
HOSPITALITY, INC. d/b/a COUNTRY CORNER, PUGET  
SOUND ENERGY and COUNTY OF SKAGIT,

Respondents

Unpublished Opinion Filed June 27, 2011

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**PETITION FOR REVIEW**

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

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

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

Petitioner seeks review of a decision by Division I of the Court of Appeals: *Lowman v. Wilbur*, No. 65359-8-I; unpublished decision filed June 27, 2011, motion to publish denied on August 9, 2011.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

### **C. ISSUES PRESENTED FOR REVIEW**

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

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

## D. STATEMENT OF THE CASE

### 1. Background

Nathan Lowman was a passenger in a car driven by Jennifer Wilbur. Ms. Wilbur had been drinking at the Country Corner, where Mr. Lowman met her. They left the restaurant together. Ms. Wilbur was driving her car. CP 380-381. Winding downhill Satterlee Road lay a short distance away. Ms. Wilbur was speeding down Satterlee, but slowed to 30mph in a 25mph zone and thereafter briefly lost control and left the road pavement. CP 381. Her car continued in motion and was on its wheels and returning to the roadway when it struck a PSE utility pole placed 4.47ft from the edge of the road. CP 150. The Washington State Patrol investigator estimated Ms. Wilbur's speed at 34mph at the time her car left the road. CP 316. The car's right front passenger door struck the pole, horrifically injuring Mr. Lowman's right arm, which was nearly severed. CP 542.

Placement of the pole and Skagit County's authorization to place the pole were a product of RCW 36.78.070, a 1990 statute which facilitates, among other things, safe placement of ground utility structures. In 2000 Skagit County adopted a policy under the statute, which required that utility poles be placed outside of a ten foot 'clear zone' beside roadways. CP 167, 171. In 2003 the pole struck by Ms. Wilbur's car in

2005 was struck and destroyed by another motorist. CP 168. Skagit County knew nothing of the accident. CP 171. In violation of the ten foot clear zone policy, after the 2003 accident PSE re-installed the pole in the same spot where it was originally installed. PSE did the same after plaintiff's accident in 2005. Another motorist struck and destroyed the same pole in 2006.

The trial court, relying upon *Medrano, id.*, ruled that legal causation principles required dismissal of plaintiff's case against PSE and the County. *Medrano* involved a *pro se* appellant arguing that his own intoxicated driving on a flat road in front of his home of 13 years should not preclude him from suing Puget Power for its placement of a utility pole which Mr. Schwendemann struck. *Medrano* relied upon pre-*Keller* authority for its analysis. Each of the cases cited as controlling in *Medrano* relied upon the prior rule that the duty of non motorist defendants to a motorist turns upon whether the motorist is fault free.

This Court altered that rule in *Keller*:

“We therefore hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.” *Keller*, 146 Wn.2d at 249.

Since *Keller*, Division I decided *Unger*, where it recognized that pre-*Keller* ‘no duty’ analysis was no longer valid:

[I]n addition, they (the Ungers) argue that the trial court erred in concluding as a matter of law that the County does not owe a duty to a negligent driver. In response, the County argues that the trial court properly granted summary judgment because the undisputed evidence shows that Unger was driving recklessly, the county owes no duty to a reckless driver, and it is an unreasonable inference that Unger suddenly changed his behavior within a quarter mile of the accident. [W]e agree with the Ungers because the trial court relied upon case law that was later affected by the Supreme Court's opinion in *Keller v. Spokane County*, and there are material issues of genuine fact that should be resolved by a jury.

*Unger*, 118 Wn.App. 165, at 174.

In the present case, a different panel of Division I ignored *Unger*, held that *Keller* has no application in this setting, did not reconcile its ruling with the holding in *Unger*, and affirmed dismissal of plaintiff's case.

## **2. Conflict with *Keller v. Spokane***

Legal causation analysis requires consideration of an amalgamation of elements: "(legal cause) involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact; i.e., whether considerations of logic, common sense, justice, policy and precedent favor finding legal liability." *Medrano*, 66 Wn.App. at 611, quoting from *Hartley v. State*, 103 W.2d at 779-781, 698 P.2d 77.

After *Medrano* was decided in 1992, this Court decided *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.2d 845 (2002) which in this setting

altered Washington law regarding three of the legal cause elements: justice, policy, and precedent. Division I recognized the change the *Keller* decision brought and in *Unger* (Island County was also a defendant), reversed dismissal after the trial court analyzed legal causation and duty by examining whether the plaintiff driver was fault free. The facts in *Unger* are extraordinary. Believing he was being chased by his girlfriend's family, Unger drove in the following manner:

[W]hile Joey and his girlfriend waited at the marina, Unger passed by in his Jeep and saw him. Unger sped up, and Joey followed him. The pursuit began on State Road 532, to Cross-Island Road, then onto Camano Ridge Road. It lasted about 30 minutes and involved high rates of speed, swerving, crossing center lines, and turning headlights on and off. The weather that evening was severe.....Jeremy Unger successfully "lost" Joey several minutes before the accident on Camano Ridge Road. Unger's single-car accident occurred on a different road, called Camano Hill Road. There were no witnesses to the accident. Unger was injured and airlifted to Harborview Medical Center. He died two days later from his injuries.

*Unger*, 118 Wn.App. at 168-169. If anything, Mr. Unger's driving made Ms. Wilbur's look tame by comparison.<sup>1</sup>

The trial court dismissed. It excused Island County from owing any duty to Unger because Unger was driving negligently, if not recklessly, at the time of the accident. That may have been the law before

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<sup>1</sup> "It is undisputed that up to one quarter mile from the accident site, which is where the chase ended and the last time anyone saw Unger, he was driving in excess of 70 mph where the posted speed was between 35 mph and 50 mph, and he was driving with his headlights off." *Unger* 118 Wn.App. at 174.

*Keller*, but no longer.<sup>2</sup> While applying *Keller* in its decision in *Unger*, Division I reminded that pre-*Keller*, whether a duty was owed in this context ceased being in issue once plaintiff's own conduct deviated from 'reasonably prudent' behavior:

[I]n addition, they (the Ungers) argue that the trial court erred in concluding as a matter of law that the County does not owe a duty to a negligent driver. In response, the County argues that the trial court properly granted summary judgment because the undisputed evidence shows that Unger was driving recklessly, the county owes no duty to a reckless driver, and it is an unreasonable inference that Unger suddenly changed his behavior within a quarter mile of the accident. [W]e agree with the Ungers because the trial court relied upon case law that was later affected by the Supreme Court's opinion in *Keller v. Spokane County*, and there are material issues of genuine fact that should be resolved by a jury.

*Unger*, at 174.

Division I's application of *Keller* is significant since the *Unger* Court *sub silentio* undercut or overruled *Braegelmann v. County of Snohomish*, 52 Wn.App. 381, 766 P.2d 1137 (1989), after *Keller v. City of Spokane* was decided. *Braegelman* was one of the cases relied upon by this Division I when deciding *Medrano v. Schwendeman*. 66 Wn.App. at 611.

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<sup>2</sup> "Thus, interpreting our cases as a whole, the language used in *Berglund* and other decisions by this court does not limit the scope of a municipality's duty to only those using the roads and highways in a nonnegligent manner." *Keller*, 146 Wn.2d at 249.

*Keller* altered legal proximate cause law analysis for it changed Washington from a State where a negligent driver was owed no duty by the municipality controlling the roadway to a State where the conduct of each actor, negligent driver and municipality, is implicated in any liability analysis:

The Ungers contend that the Washington Supreme Court's opinion in *Keller* overrules our opinion in *Braegelmann*. In *Keller*, the plaintiff was traveling by motorcycle as fast as 50 miles over the posted speed limit when it hit a car at intersection with no stop signs. A jury found that Keller and the other driver were at fault and the City was not. The Supreme Court reversed because it concluded the instructions improperly permitted the jury to determine the City had no duty at all if it found Keller was negligent. In its analysis, the Supreme Court discussed conflicting opinions about the proper scope of a municipality's duty in building and maintaining roads. Interpreting the case as a whole, the Supreme Court concluded that the cases "do not limit the scope of a municipality's duty to only those using the roads and highways in a nonnegligent manner." It held "that a municipality owes a duty to all persons, *whether negligent or fault-free*, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." The court noted that its conclusion is supported by the comment in Washington's pattern instruction for duty, which states that "[d]uty, as defined by this instruction, is not determined by the negligence, if any, of a plaintiff."

*Unger*, 118 Wn.App. at 175-176.

The *Unger* Court continued:

[A]lthough the jury instruction approved in *Keller* does not say so, we read the opinion to require the court to determine, or properly instruct a jury to determine, that a

municipality's duty is independent of the plaintiff's negligence. Thus, the County owed Unger a duty, regardless of his allegedly negligent conduct, to make the road safe for ordinary travel. It is for the jury to decide whether the County's construction or maintenance of Camano Hill Road created a condition that was unsafe for ordinary travel and whether the condition of the road contributed to Unger's accident and death. Genuine issues of material fact exist about the proximate cause of Unger's death, which makes summary judgment improper.

*Id.*

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

Regarding policy, the *Keller* Court discusses the disparate case authority (or, as the *Unger* Court put it: "The court lists an array of conflicting views and the cases supporting them in its opinion." See *Keller*, 146 Wn.2d at 246-47, 44 P.3d 845. *Unger*, 118 Wn.App. at 176) which it sought to clarify. This clarified that a defendant's fault will not

be analyzed on the basis of what someone else, presumably the plaintiff, did. Analysis should instead occur without consideration of the fault of the plaintiff. This represents a change from the law in place at the time *Medrano* was decided.

### E. CONCLUSION

*Braegelmann*, *Cunningham*<sup>3</sup>, *Medrano* and *Klein*<sup>4</sup> were decided at a time when analyzing who was a member of a protected class was performed in the same breath as analyzing to whom a duty was owed. As Judge Morgan points out, those are two completely separate questions. *Wick v. Clark County*, 86 Wn.App. 376, 936 P.2d 1201 (1997). This point is never discussed in any of the foregoing quartet of cases which -- at best -- discuss the doctrine of legal causation in cursory fashion.

The law has matured. And with that maturity comes strong doubt about the continuing vitality of any of the cases relied upon by the trial court here.

The result in *Keller* was not possible if this Court followed the reasoning in the referenced quartet of cases---for in each a driver failed to exercise reasonable care, in large or small measure. There is no room for

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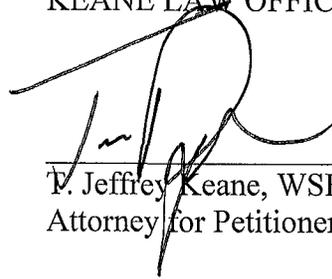
<sup>3</sup> *Cunningham v. State*, 61 Wn.App. 562, 811 P.2d 225 (1991)

<sup>4</sup> *Klein v. Seattle*, 41 Wn.App. 638, 705 P.2d 806 (1985)

debate on that subject for, obviously, Mr. Keller himself failed to exercise reasonable care on the day he was injured.

Submitted this 8<sup>th</sup> day of September, 2011.

KEANE LAW OFFICES



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Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NATHAN LOWMAN, a single person,	)	
	)	DIVISION ONE
Appellant,	)	
	)	No. 65359-8-1
v.	)	
	)	
JENNIFER WILBUR and JOHN DOE	)	UNPUBLISHED OPINION
WILBUR, husband and wife and the	)	
marital community composed thereof,	)	
COUNTRY CORNER, INC., d/b/a	)	
COUNTRY CORNER, a Washington	)	
corporation, ANACORTES	)	
HOSPITALITY, INC., d/b/a COUNTRY	)	
CORNER, a Washington corporation,	)	
	)	
Defendants.	)	
	)	
PUGET SOUND ENERGY, a	)	
Washington corporation, and COUNTY	)	
OF SKAGIT, a municipal corporation,	)	
	)	
Respondents.	)	FILED: June 27, 2011
	)	

Dwyer, C.J. — Nathan Lowman appeals from the trial court’s summary judgment dismissal of his negligence claims against Puget Sound Energy (PSE) and Skagit County. Because the trial court properly determined that the alleged negligent acts of PSE and Skagit County were not the legal cause of Lowman’s injuries, we affirm.

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

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

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

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roadway following a sharp curve in the road” and that such placement of the pole “constituted a hazard” that caused the collision resulting in Lowman’s injuries. CP at 525.

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

On November 12, 2009, after oral argument by the parties, the trial court granted PSE’s and Skagit County’s joint motion for summary judgment, concluding that the alleged negligent acts of PSE and Skagit County were not the legal cause of Lowman’s injuries. Lowman thereafter filed a motion for reconsideration, which the trial court denied.

Lowman appeals.

## II

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

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

Legal causation, on the other hand, “is grounded in policy determinations as to how far the consequences of a defendant’s acts should extend.” Crowe v. Gaston, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998). “It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.” Hartley, 103 Wn.2d at 779. Where the factual elements of negligence are proved, the determination of legal liability depends upon “mixed considerations of logic, common sense, justice, policy, and precedent.” Hartley, 103 Wn.2d at 779 (quoting King v. City of Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)). “[T]he question in a legal causation analysis is whether, as a matter of policy, the connection between the defendant’s act and its ultimate result is ‘too remote or insubstantial to impose liability.’” Cunningham v. State, 61 Wn. App. 562, 572, 811 P.2d 225 (1991). “Where the facts are not in dispute, legal causation is for the court to decide as

a matter of law.” Crowe, 134 Wn.2d at 518.

In their joint motion for summary judgment, PSE and Skagit County conceded duty, breach, and cause in fact, asserting that Lowman’s claims against them should be dismissed solely because their alleged acts were not the legal cause of Lowman’s injuries. It is undisputed that Wilbur was driving at a high rate of speed on a meandering country road, that she was legally intoxicated while so doing, and that she lost control of her vehicle as a result. Indeed, Lowman alleged these facts in his complaint. Moreover, Wilbur pleaded guilty to felony vehicular assault based upon the incident. Because the relevant facts herein are undisputed, it was appropriate for the trial court to determine as a matter of law whether legal causation existed.<sup>1</sup> See Crowe, 134 Wn.2d at 518.

Because policy considerations govern the determination of legal causation, case law is a valuable guide when considering whether liability should attach. Such precedent is used to “furnish illustrations of situations which judicious [people] upon careful consideration have adjudged to be on one side of the line or the other.” Minahan v. W. Wash. Fair Ass’n, 117 Wn. App. 881, 898, 73 P.3d 1019 (2003) (alteration in original) (quoting 1 Thomas Atkins Street, The Foundations of Legal Liability 110 (1906)). Here, our precedent is

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<sup>1</sup> Lowman contends on appeal that the trial court erred by not granting his CR 56(f) motion, in which Lowman requested additional time to conduct discovery regarding various factual issues. Because the facts relevant to the trial court’s decision were undisputed, the trial court had no reason to allow additional time for discovery regarding superfluous facts. Moreover, Lowman explained in the motion that he was requesting additional time for discovery only “if the defendants are not, in fact, conceding both negligence and cause in fact.” CP at 554. Because PSE and Skagit County did concede negligence and cause in fact for purposes of summary judgment, the trial court properly declined to consider Lowman’s CR 56(f) motion.

clear: in at least four different cases with facts similar to those presented herein, we have held that legal causation was absent. Medrano v. Schwendeman, 66 Wn. App. 607, 836 P.2d 833 (1992); Cunningham, 61 Wn. App. 562; Braegelmann v. County of Snohomish, 53 Wn. App. 381, 766 P.2d 1137 (1989); Klein v. City of Seattle, 41 Wn. App. 636, 705 P.2d 806 (1985).

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

Finding no legal causation, the trial court granted summary judgment to King County and Puget Power. Medrano, 66 Wn. App. at 610. Noting that the

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<sup>2</sup> Lowman contends that Medrano's "outrageous facts" make that case inapplicable here. However, those facts upon which we relied in Medrano in determining that legal causation was absent—that the driver was speeding, may have been intoxicated, and was convicted of vehicular assault—are also present herein. Moreover, many of the differences between the facts presented in Medrano and those presented here that Lowman cites as significant are not relevant to the issue of legal causation.

county and Puget Power “should not be required to protect against the consequences of criminally reckless drivers,” we held that the allegedly inadequate maintenance of the road by the county and the allegedly improper placement of the pole by the utility company were “too remote [from the plaintiff’s injury] to impose liability.” Medrano, 66 Wn. App. at 613, 614. Moreover, we noted that, because Schwendeman had been convicted of vehicular assault, the factual basis for the court’s determination was undisputed. Medrano, 66 Wn. App. at 613.

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

Similarly, in Braegelmann, we affirmed the summary judgment dismissal of a negligence claim against Snohomish County for negligent construction, design, and maintenance of a county road. 53 Wn. App. at 382-83. There,

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

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

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

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

After reviewing its prior decisions regarding the scope of a municipality's duty to build and maintain its roadways, our Supreme Court determined that it had not limited the scope of that duty "to only those using the roads and highways in a nonnegligent manner." Keller, 146 Wn.2d at 249. Thus, the court held, the jury instruction was erroneous to the extent that it permitted the jury to

find that the city owed no duty to Keller if Keller was negligent. Keller, 146 Wn.2d at 250-51. The court noted, however, that the trial court “still retains its gatekeeper function and may determine that a municipality’s actions were not the legal cause of the accident.” Keller, 146 Wn.2d at 252.

Accordingly, pursuant to the Keller decision, we subsequently reversed a trial court’s summary judgment dismissal of a plaintiff’s negligence claim against Island County. Unger v. Cauchon, 118 Wn. App. 165, 176-78, 73 P.3d 1005 (2003). The Ungers brought a wrongful death action against Island County after their son died in a single-car collision on a county roadway. Unger, 118 Wn. App. at 169. The trial court determined as a matter of law that Island County owed no duty to the Ungers’ son because he was driving recklessly; thus, the trial court dismissed the Ungers’ claim on summary judgment. Unger, 118 Wn. App. at 169-70. We reversed, and, relying upon Keller, held that the county owed Unger a duty, regardless of Unger’s allegedly negligent conduct. Unger, 118 Wn. App. at 176. Thus, we determined, “[t]he extent to which Unger’s reckless driving and the County’s failure to maintain the road contributed to Unger’s death” was a question of fact for the jury.<sup>3</sup> Unger, 118 Wn. App. at 178.

It is true that “[t]he analysis of whether a duty is owed and legal causation exists are intertwined.” Michaels v. CH2M Hill, Inc., No. 84168-3, 2011 WL

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<sup>3</sup> Lowman contends that “the Unger Court concluded *sub silentio* that Braegelmann . . . was no longer good law after Keller.” Appellant’s Br. at 28. Although the Ungers contended on appeal that Keller overruled Braegelmann, we did not endorse the Ungers’ position. Unger, 118 Wn. App. at 175. Indeed, we noted that Keller explicitly overruled only one case, and that case was not Braegelmann. Unger, 118 Wn. App. at 175 n.28.

2077653, at \*10 (Wash. May 26, 2011). Indeed, our Supreme Court has explained that the question of “whether liability should attach is essentially another aspect of the policy decision which [is] confronted in deciding whether the duty exists.” Hartley, 103 Wn.2d at 780 (quoting Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 476, 656 P.2d 483 (1983)). However, duty and legal causation are not synonymous—an analysis of duty focuses primarily on the defendant, while legal causation analysis, in cases such as this, involves consideration of the egregiousness of the principal actor’s conduct. “Although the question of legal cause is closely intertwined with the question of whether the defendant owed a duty of care to the plaintiff, it would be a mistake to assume that every time a duty of care has been established, legal cause is necessarily present.” 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 4.21, at 161 (3rd ed. 2006) (footnote omitted). Thus, the duty analysis set forth in the Keller decision does not directly impact our previous decisions regarding legal causation.

Here, Lowman sustained injury when Wilbur, who was driving above the posted speed limit on a curvy country road while intoxicated, drove her vehicle off of the roadway and struck a telephone pole. Neither PSE nor Skagit County did anything to precipitate the departure of Wilbur’s vehicle from the roadway. In such circumstances, policy considerations—as evidenced by prior case law addressing legal causation—dictate a determination that the connection

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between the alleged negligent acts of PSE and Skagit County and Lowman's injuries is too remote to impose liability. Thus, the trial court did not err by following directly controlling authority and dismissing on summary judgment Lowman's claims against PSE and Skagit County.<sup>4</sup>

Affirmed.

Dupe, C. S.

We concur:

Schneider, J.      Cox, J.

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<sup>4</sup> Lowman also contends on appeal that the trial court improperly dismissed his claims against PSE and Skagit County based upon an incorrect determination that Wilbur's actions were a superseding cause of Lowman's injuries. The record does not support this claim. The trial court's decision was based solely upon its determination that the alleged negligent acts of PSE and Skagit County were not the legal cause of Lowman's injuries.

**COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON**

NATHAN LOWMAN,	)	
	)	
Appellant,	)	<b>CERTIFICATE OF</b>
	)	<b>SERVICE</b>
vs.	)	
	)	
JENNIFER WILBUR and JOHN DOE	)	
WILBUR, husband and wife and the	)	
marital community composed thereof;	)	
COUNTRY CORNER, INC. d/b/a	)	
COUNTRY CORNER, a Washington	)	
corporation, ANACORTES	)	
HISPITALITY, INC. d/b/a COUNTRY	)	
CORNER, a Washington corporation,	)	
PUGET SOUND ENERGY, a	)	
Washington corporation, COUNTY OF	)	
SKAGIT, a municipal corporation,	)	
	)	
Respondents.	)	

I hereby certify that on September 8, 2011, copies of Appellant's  
Petition for Review was served on counsel at the following address and by  
the method(s) indicated:

**FILED**  
**COURT OF APPEALS DIV 1**  
**STATE OF WASHINGTON**  
**2011 SEP -8 PM 3:15**

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

DATED this 8<sup>th</sup> day of September, 2011, at Seattle, Washington.

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