

NO. 65359-8-I

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

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

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

Dozens of pages of briefing do not lessen defendants' heavy reliance on a single Washington case—*Medrano v. Schwendeman*—in support of their initial motion and position in this appeal. That case, and this, bear little resemblance: no court, trial or appellate, wanted to bless the notion that a drunken fool who crashed his own truck on a straight road he had lived on for 13 years could recover against anyone for anything.

Tellingly, PSE claims that the case is akin to the present case because it was 'brought by a passenger.' This ignores the plain facts. Passenger Medrano brought claims against the county and PSE but he played no part in prosecuting the case which was heard on appeal. Thus, the holding had no application to Mr. Medrano or one in his status. It strains the bounds of sophistry to link analysis of a vehicle passenger's claim to one brought by Mr. Schwendeman, who most certainly created his own peril.

While much is made of intoxication there, and here, intoxication alone has little analytical significance in legal causation analysis. The behavior which produced Mr. Schwendeman's harm may have been influenced by his intoxication but it is his personal driving behavior, and not his drinking, which mattered to this Court. Mr. Keller in *Keller v.*

Spokane may have been sober but at least some proof showed that he was driving a motorcycle 50 mph over the speed limit at the time of his accident. Mr. Unger may have been sober at the time of his death but high speed driving on a wild and wet night with one's headlights off compares readily to driving while intoxicated in terms of use of reasonable care. Neither Mr. Keller nor Mr. Unger's estate was denied the chance to have his case considered by a jury. The same should be true for Mr. Lowman.

PSE's further arguments—that legal causation is divorced from duty analysis and has no connection to intervening and superseding causation—ignores that the cases, and Washington Practice, describe these as 'intertwined' doctrines.

The trial court erred by dismissing. This case lies well within the bounds of cases which should be decided by a fact finder.

A. The Trial Court Erred in Relying Upon Distinguishable Legal Causation Authority

1. None of the Four Principal Cases Advanced by Defendants Support the Trial Court's Action

Defendants below relied upon a quartet of cases---*Medrano v. Schwendeman*, *Klein v. Seattle*, *Braegelmann v. Snohomish County* and *Cunningham v. State*—to argue that legal causation did not exist to support plaintiff's case.

Plaintiff discussed, and distinguished, each of these cases. In doing so, plaintiff focused on a shared flaw underlying each of the four cases: they arose at a time when Washington precedent addressing the duty of a municipality in the road defect context excused the municipality if the errant driver failed to exercise reasonable care. Precedent, of course, is one of the elements which must be analyzed in any legal causation case.

Rather than allow the trial court to believe that the law remained static between the time the four cases were decided and the time of the hearing, plaintiff showed that *Keller v. Spokane* substantially clarified existing law in a manner that compromised the viability of the legal causation discussion in each of the cases. Plaintiff factually distinguished each of the four cases, and showed that in each the appellate court relied upon a pre *Keller* statement of duty which weakened if not eliminated any support for defendants' legal causation argument.

Medrano v. Schwendeman, 66 Wn.App. 607, 836 P.2d 833 (1992), has probably not received as much attention since it was decided. Despite its age it has never garnered much attraction and for good reason: it involves facts so outlandish, and claims so ridiculous, as to shout 'there is no case here.' Further, it is unlikely that whatever meager support Mr. Schwendeman could muster for his case was ever raised since he was *pro se* while his foe, the same foe as here, was represented by the then largest

law firm in Seattle. To suggest that he developed whatever record might have supported his claims--if the imagination could strain that far--ignores the obvious which is that he was a fool on a fool's mission.

Schwendeman and his guests had partied at his house and all then traveled with Schwendeman in a canopied pick up truck to continue the party at a local tavern. Schwendeman was driving. The road he lived on was arrow straight. While returning from the tavern Schwendeman lost control on a 25 mph road he'd lived on for 13 years, traveled 85 feet off the road and still struck a power pole going 43 mph. One can only wonder how fast he was going when he left the straight road. In the interim he had been warned by his passengers to slow down. Nothing in the record of the case ever showed that PSE had violated or even apparently violated any regulation regarding roadside hazards.¹

¹ Of note here is that PSE never conceded in Schwendeman that it actually violated any duty to Schwendeman and Schwendeman never created a record that PSE had violated any duty to him. At most PSE conceded that it *may have* violated a duty and that such violation *may have* proximately caused harm to Schwendeman. For analytical purposes, such concessions border on the meaningless: it appears the concessions were merely for the purpose of rapidly disposing of the case since the record contains nothing stating what duty was actually violated, what negligence actually was present, or even what connection existed between PSE and Schwendeman's accident. The statement of facts is so murky that the reader cannot tell what happened, exactly, though it appears: 1) Schwendeman left the road at nearly a right angle to the road ("The officer who investigated the accident determined that before leaving the road's surface Schwendeman's truck was traveling at an extreme angle in relation to the shoulder."); 2) Schwendeman's truck then traveled nearly 85 feet (presumably continuing on the extreme angle to the roadway, though the facts do not so state); 3) Schwendeman's truck then hit a power pole owned by Puget Power; 4) Schwendeman's truck traveled yet another 80 feet, then rolling onto its side; and, 5) the truck traveled another 30 feet before coming to a stop.

As pointed out to the trial court in this case, Schwendeman was decided at a time when even the existence of a duty to the plaintiff turned on whether the plaintiff was himself fault free. Mr. Schwendeman was assuredly not fault free. This court, in that case, relied upon a rule now overruled: “Further the county and Puget Power recognize the existence of their respective duties to keep the roadways in a reasonably safe condition for persons using them and to place poles in a manner to protect against what *may happen to a reasonably prudent driver.*” *Medrano*, 66 Wn.App. at 610.

This court in *Braegelmann v. Snohomish County*, 53 Wn.App. 381, 766 P.2d 1137 (1989), relied upon the same pre *Keller* statement of duty in excusing Snohomish County from liability to plaintiff. Whether satisfaction of a condition precedent is a part of analyzing existence of duty is precisely what *Keller* addressed. For, pre *Keller*, no duty was owed to a driver like Schwendeman. And legal causation analysis requires, in part, review of the precedent upon which past cases were premised:

[I]f 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.” *King v. Seattle*, 84 W.2d at 250, 525 P.2d 228 (quoting 1 T. Street, *Foundations of Legal Liability* 100, 110 (1906)). See also *Prosser*, at 244.

Hartley v. Seattle, 103 W.2d 768, 779, 698 P.2d 77 (1985).

The defendant driver in *Braegelmann* had been drinking all night, was speeding (approximately 40 mph in a 25 mph zone), and crested a hill while driving in the oncoming lane of travel, where he hit plaintiff head on. During this Court's discussion of legal causation principles, the defendant county and this court still resorted to pre *Keller* analytical language: "The county argues that it satisfied this burden by demonstrating that, as a matter of law, the county had no duty to foresee and protect Marvin Braegelmann against the extremely reckless driving of Tom involved in this case." 53 Wash.App. at 385.

In making this statement, the *Braegelmann* court cited to the Supreme Court's statement of legal causation in *Klein*, a case which arose at a time when duty analysis turned in part upon the conduct of the at fault driver, rather than upon a stand alone analysis of the presence of duty. Discussing *Klein* this Court held that:

"..Seattle's negligence was not the proximate cause (legal cause) of decedent's death and that the City had no duty to protect the decedent from the 'extreme carelessness' of the at-fault driver (citation omitted). The court reasoned that, as a matter of public policy, the city could not be expected to guard against this degree of negligence. Otherwise, highways would have to be constructed to protect reasonably prudent motorists from the negligence of the reckless, careless, drunken drivers, rather than for the use and

safety of the reasonably prudent motorist.”

53 Wash. App. at 386.²

Conducting a conditional analysis of duty actually confuses duty analysis by injecting contributory or unrelated third party negligence into the mix. It does not belong. This sometimes then results in denial of the existence of duty, and in some cases denial of the existence of legal causation, when in actuality duty and legal causation are both present. The resulting legal causation analysis is flawed by reliance on the wrong duty analysis.

Braegelmann relied upon *Klein* but the threshold duty analysis in *Klein* became conflated with analysis of the at fault driver’s conduct. And once at fault driver conduct deviates from faultless to something less, non driver defendants are excused from having any duty to plaintiff. And once duty no longer exists, it is a simple matter to conclude that no legal causation supports plaintiff’s case. This precise point is made by examining the jury instruction to which plaintiff assigned error in *Klein* but which the *Klein* court approved:

All parties including the City have the right to assume that persons using the public streets will comply with the law and will use them

² An excellent repudiation of this exact statement of the absence of duty is this court’s holding in *Unger*, where dismissal was reversed despite the careless and arguably reckless conduct of the decedent in the events leading up to his fatal accident. *Klein v. Seattle*, 41 Wn.App. 638, 705 P.2d 806 (1985).

with due regard for their own safety and for the safety of others.

41 Wash.App. at 638. This court approved that instruction.

Thus, under *Klein* a driver's violation of traffic laws excused others from liability to the plaintiff no matter the relative weight of misconduct as between defendant driver and city. What this lacks in analytical purity becomes clearer when accidents with multiple culpable parties or multiple harm causing factors are examined.³

Cunningham v. State, 61 Wn.App. 562, 811 P.2d 225 (1991), also relied upon by defendants at summary judgment, suffers from the same reliance on pre *Keller* duty and legal causation analysis.

Cunningham was drunk, with a .22 BAC. He was driving his passenger McBride toward the main gate at SubBase Bangor in Kitsap County. Traveling 35 mph, Cunningham drove into the protective bollard placed at the gate entrance, seriously injuring himself and McBride. McBride filed a Federal Tort Claim Act case against the United States. Part of his federal case was dismissed, but McBride resolved the case by settlement, leaving only Cunningham, the .22 BAC driver as plaintiff. His

³ Mr. Lowman's case presents a perfect example. Concededly, driver Jennifer Wilbur drove a slight distance off the road and briefly lost control of her car. At the very place where she did that, however, it was known that others had done the same thing and others had impacted the very pole which harmed Mr. Lowman. In fact in the view of the expert accident reconstructionist, the difference between this being a minor 'walk away' accident and one causing grievous permanent harm was the improper location of the pole—even a small clear zone at road's edge would have precluded the harm which Mr. Lowman suffered.

lawyers also pursued a federal tort claim but filed it too late. The case then devolved to one against Cunningham's lawyers.

The lawyers defended on the basis that the same law which applied to the former defendant—the United States—applied to Cunningham's case against his former lawyers. Using *Klein* and *Braegelmann*, they argued that no duty was owed to Cunningham since he was driving drunk (without reasonable care) when he was injured. They also contended that the absence of factual proximate cause doomed the case since Cunningham admitted seeing the base entrance bollard somewhere between 50 and 200 feet before he hit it, so no facts supported Cunningham's road defect claim: he admitted seeing the object he drove into.

The appellate court simply affirmed dismissal on the basis of the *Klein* rule--no duty was owed to Cunningham for he himself failed to exercise due care:

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

61 Wash.App. at 570, fn. 4 (emphasis added). The point is not that Mr. Cunningham's conduct competed for outrageousness on a scale akin to Mr. Schwendeman's. The point is that in each of the four cases relied

upon by PSE the determination that no legal cause supported the plaintiff's case itself rested upon the presence of at fault driver conduct which demonstrated a lack of reasonable care. And, per the *Klein* court, once that occurred the duty analysis ended and the plaintiff's case with it.

2. It Is Not Possible to Correctly Analyze Legal Causation Using A Superseded Duty Construct

While consistently urging that the law of legal causation does not support plaintiff's case, defendants ignore that the law of duty directly ties to analysis of legal causation. Even before *Keller*, at least one appellate judge framed how easily the confusion in this area occurs.⁴ The effect of the confusion was clear when the trial court decided to dismiss Mr.

⁴ That this thread of confusing law existed pre *Keller* was partially the subject of Judge Dean Morgan's concurring opinion in *Wick v. Clark County*, 86 Wash.App. 376, 936 P.2d 1201 (1997), decided five years prior to the Supreme Court decision in *Keller*. Judge Morgan identified the exact problem which *Keller* addressed, stating:

Although I do not perceive error warranting reversal, I write to suggest that WPI 140.01 may be unduly confusing because, at least arguably, it fails to make clear whether the phrases "in a proper manner and exercising ordinary care for their own safety" modify the standard of care, the protected class, or both. In a negligence case, duty includes at least three questions: (1) By whom is it owed? (2) To whom is it owed? (3) What is its nature? To answer the first question is to define an obligated class; to answer the second is to define a protected class; and to answer the third is to define a standard of care. In a road case like this, the standard of care (i.e., the county's "duty") is to maintain the roads in a reasonably safe condition for travel by persons using them *in a proper manner and exercising ordinary care for their own safety*. The protected class, however, includes anyone foreseeably harmed, regardless of whether that person was using the roads *in a proper manner and exercising reasonable care for his or her own safety*. I conclude that WPI 140.01 is correct if read so that the italicized phrases modify the standard of care, but incorrect if read so that the italicized phrases narrow the protected class. (emphasis in original).

86 Wash. App. at 385-86.

Lowman's claims against defendants. Once the duty analysis is performed incorrectly, a person situated like Nathan Lowman stops being a member of a protected class. If his status as a member of a protected class is removed, analyzing almost any set of facts which includes driver misconduct results in legally excusing other culpable or potentially culpable parties. As far as the trial court was concerned, once it was shown that Ms. Wilbur was drunk and was driving erratically, there was nothing left which the law owed to Mr. Lowman. This is not the law, though it may have appeared to be the law when *Medrano* was decided.

The matter is more complicated than that. *Braegelmann*, *Cunningham*, *Medrano* and *Klein* 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. 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 outcome in *Keller* would have flipped if the Supreme Court followed the reasoning in the challenged quartet of cases---for in each a

driver failed to exercise reasonable care, in large or small measure. There is no room for debate on that subject for, obviously, Mr. Keller himself failed to exercise reasonable care on the day he was injured.

Mr. Keller was riding a motorcycle on a 30 mph arterial in the City of Spokane. The defendant driver was stopped at a cross street perpendicular to Mr. Keller's path of travel. The defendant driver faced a stop sign. Mr. Keller did not. The record—even the record submitted by Mr. Keller—made clear that Mr. Keller was speeding. His experts testified that he was driving 150% of the speed limit, 45 mph. Other testimony placed his speed at 80 mph, 266% of the speed limit.

Defendant driver pulled out in front of Mr. Keller and the resulting T-bone collision between motorcycle and car produced significant injury to Mr. Keller. The jury returned a defense verdict, having been instructed that no duty to Mr. Keller existed unless he was fault free. Given that Mr. Keller's own experts testified he was driving 45 mph in a 30 mph zone at impact it was an easy conclusion to draw that Mr. Keller was not fault free. With no duty owing, no more jury deliberation than the most elemental was required.

Division III identified the long standing defect in this form of duty analysis. The Supreme Court agreed with Division III:

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

146 Wn.2d at 246.

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

146 Wn.2d at 248.

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

The court held:

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

.....

We therefore hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.

3. The Trial Court Did Not Appreciate, or Ignored, the Distinction Between *Medrano*, where PSE Never Admitted the Presence of or the Breach of a Duty to Plaintiff, and Here, Where Breach of Duty and Factual Causation Were Conceded by PSE/Skagit County.

The trial court began and ended its consideration of this case with its erroneous conclusion that *Medrano* controlled. And it even misinterpreted *Medrano*:

Frankly, gentlemen, I do think that *Medrano* is the most, in regards to the defense position, is the most important case because it is laying down a demarcation, I think, in regards to—it's really, unless I misread the cases or am getting them confused, is the only case where you have—where the pure reason why the utility company or whether it's the County is in the case is in regards to where they place the pole.....But I don't think there's any other case than *Medrano* and this case where they're seeking the whole—the defendant's liable for something that happens off the road. I got that correct?⁵

Tr. P. 14.

The only factors which mattered to the trial court were that Ms. Wilbur was intoxicated and that the defect claimed by plaintiff existed four feet from the road edge, not upon the road itself. The court overlooked the fact that in *Medrano* Puget Power never conceded it breached any duty or that any such breach was a factual proximate cause of the accident. The court ignored the fact that the plaintiff in *Medrano* was the errant driver himself. The court overlooked the fact that plaintiff was entitled to every inference in his favor with regard to the admitted fault of PSE and Skagit County causing harm to plaintiff. And the court seized upon the legally irrelevant point, in light of the concessions by defendants, that other cases involved defects in roads.

⁵ Even this conclusion was incorrect. Of the quartet of cases, *Medrano* involved pole placement off road, *Braegelmann* involved sight lines on a hilly roadway, *Klein* involved roadway design on a bridge, and *Cunningham* involved failure to properly sign or warn of upcoming hazards. Thus, two of the four cases involved defects 'off road' and two involved defects in the road design itself. Defense counsel advised the court that it had correctly stated the law, notwithstanding the foregoing.

4. *Minahan v. W. Wash. Fair Ass'n, 117 Wash.App. 881, 73 P.3d 1019 (2003) Provides Nothing of Value in the Present Legal Matter*

Defendants respond to plaintiff's arguments that *Keller* altered legal causation law by discussing *Minahan*, which was decided after *Keller*. *Minahan* offers little support for defendants' arguments. Tellingly, defendants provide almost none of the facts of *Minahan*.

The Puyallup School district sponsored a prom dance, to be held at the Western Washington fairgrounds in Enumclaw. *Minahan* was hired by the disc jockey to assist. *Minahan* traveled to the dance in a car which was parked on a street adjacent to the fairgrounds, and equipment was unloaded from the car and brought to the dance hall on fairgrounds property.

Defendant *Skrivan* began drinking at the local Eagles Lodge starting at 6:45 pm. She weighed 127 pounds, and drank 17 or 18 mixed drinks in a five hour period. She left the Eagles, drove toward the fairgrounds and repeatedly struck *Minahan*, who was then loading the car trunk with equipment after the dance ended. *Skrivan* and the Eagles settled without suit. *Minahan* sued the fairgrounds, arguing that her employer, the School District, and the fairgrounds, essentially had a duty to provide her with a safe place to park, away from *Skrivan's* path of travel. But the court concluded no duty existed since the claimed

dangerous condition—Skrivan’s drunken driving—existed off the premises of the fairgrounds.

Minahan next argued that her employer exposed her to danger in parking where she did, and pointed to an accident which occurred one block away *almost 40 years earlier*. The court found that these facts did not support a claim that what happened to Minahan was foreseeable.⁶

Finally, the court considered Minahan’s argument that she was engaged in ‘unreasonably dangerous activity’ stemming from the fairground’s manager not having keys to allow Minahan to park on fairgrounds property. Somewhat incredibly, for ‘dispositional purposes’ the court of appeals ‘assume(d)....that the actions did involve unreasonable risks,’ noting in a footnote that the fairgrounds manager knew that Minahan’s employer was the prom’s disc jockey “..and that he therefore needed to unload equipment from the vehicle. A reasonable person might have realized that such an activity concentrates the worker’s physical efforts and powers of perception, to a significant degree, on the

⁶ The most obvious defense to this claim, that the employer was immune under the Industrial Insurance Act, was never pleaded by defendant employer. As a consequence the Court of Appeals found itself discussing the foreseeable risk of harm to an employee in a setting where virtually any other such claim would be dismissed under the immunity provisions of the industrial insurance act.

equipment moved rather than the work environs. It is thus likely that Hanson's actions involved unreasonable risks." 117 Wash.App. at 897.

Finding that the existence of a duty to Minahan by her employer involved a question of foreseeability, which would normally require a decision by a factfinder, the Court concluded by finding that principles of legal causation prevented liability from being imposed upon any others besides the drunken errant driver, and the bar which overserved her.

Minahan provides scant support for any proposition, given its unique factual and procedural setting. The Court of Appeals labored to discuss a principle of unreasonable risk concerning the liability of an employer when such a discussion would almost never arise because employers are immune from suit in all but the rarest factual settings. *Vallandigham v. Clover Park School District*, 119 Wn.App. 95, 79 P.3d 18 (2003), 154 Wn.2d 16, 109 P.3d 805 (2005). There was no showing the fairgrounds knew a drunk was driving nearby who might harm Minahan. There was no showing of prior similar acts, as in Mr. Lowman's case, involving the same location and instrumentality, like a utility pole. There was no established duty owed to plaintiff other than one by her employer which, in real terms, never existed but for the default by the employer's lawyer in failing to raise its dispositive immunity

defense. And, unlike here, there was no concession that a duty existed or that factual proximate cause was present.

Minahan adds nothing of value to the present discussion. It, like *Medrano*, is an ‘outlier’ case which offers no precedent of analytical significance.

B. The Trial Court Erred in Refusing to Continue the Hearing Pursuant to CR 56(f).

When responding to defendants’ motion for summary judgment—in which defendants conceded the presence of duty, breach of that duty, and factual proximate cause—plaintiff rightfully assumed that the court would accept those concessions. But as the trial court’s remarks made clear, and as argument from defendants further made clear, defendants repudiated their concessions and argued their version of factual matters. Such factual matters had not been developed by plaintiff, nor should plaintiff have had to develop them, since the concessions made by defendants eliminated any need to do so.

Having conceded the presence of duty and breach, defendants proceeded to argue their own view of the facts which had the effect of distancing them from the very concessions made in support of the motion. Plaintiff was entitled to rely upon the concessions. *Hollenbeck v. Shriners Hospital for Children*, 149 Wash.App. 810, 822, 206 P.3d 337 (2009);

Nguyen v. Sacred Heart Medical Center, 97 Wash.App. 728, 987 P.2d 634 (1999).

But as the comments by the Court made clear, it did not accept the facts in the light most favorable to the plaintiff and sought more facts by raising questions about how the accident occurred. Indeed, it appears that the Court was grasping to see whether it would even accept a concession of duty, breach and factual causation. Otherwise, there was no point in raising the questions the Court did.

p. 11, ll. 19-25; p. 12, ll. 1-8

No, I understand. And that's what I was getting at in regards to not knowing the factual details of this accident. I'm making no assumptions where the vehicle—where the driver started losing control. The vehicle happened (sic) as *vis a vis* as to where the pole was, I don't know. That's a black hole. Neither one of you gave me that.

All I am getting from the plaintiff is that at one spot in the road, apparently, this pole is four feet away from the road, not necessarily where the car left the road. So that's what I would have liked to have known was this a case where the car went straight off the road and hit the pole, or was it a case where the car is skidding all over, flipping over, and, you know, hits a pole in one of the flipovers or what have you. Nobody gave me that.

p. 12, ll.21-24

That didn't tell me a lot. I mean, I looked at it several times, and I got little arrows and I got pieces of things on the road. But what I really wanted to know, did this car flip over?

.....

p. 13, ll. 13-15

That's why I wanted to know. What one—the way you say it conjures up that the car just left the road and went on a straight path and hit the pole.⁷

.....

p. 20, ll. 24-25

How far did she slide? We're talking facts here.

.....

p. 21, l. 3

Did she brake?

.....

The court thought the hearing was occurring two weeks before trial. The hearing occurred November 12, 2009 and the court thought the trial was November 30, 2009:

p. 21, ll. 6-12

Court: Don't you have a trial November 30?

Keane: She didn't have a trial.

Court: No, don't you have a trial November 30th?

⁷ The car deviated very little from exactly that pattern having left the road in a path parallel to the road, and was returning to the roadway when the passenger side struck the improperly placed utility pole. Defense counsel's remarks, however, sought to compare this car's path to the path of the vehicle in *Medrano*, and offered unsubstantiated descriptions of the accident:

p. 13, ll. 16-23

What actually happened here is that the car went off the roadway, was skidding for a while, hit the passenger side where Mr. Lowman was sitting. So broadsided the pole and then spun around.

But, again, this is not—this is nice for background, but for purposes of legal causation, all that matters is---

Keane: No. The trial is in June (2010).

Court: OK. My law clerk thought she saw the trial was for November 30th, the end of this month.

.....
p. 22, ll. 19-25

Well, I understand all that. But the thing you said that is causing me to respond, you're saying that, well, if it's important for me either to approve by way of an expert that she was going to hit this pole irregardless of whatever she did, if that's what you're saying, you know, that could be important. I'd be very surprised if you could get an expert that would say that. That's why I was asking about skid marks and things like that.

What began then as a legal argument premised upon defendants' concessions of duty, breach and factual causation became a discussion with a court which inquired about multiple factual matters which were not in issue. But those factual matters obviously influenced its decision, even though the facts were not in issue.

The content of defendants' motion was curious because, having conceded duty, breach and factual causation, the motion materials still obviously labored to portray a certain 'version' of events which excused defendants of any liability. If, in truth, the motion was purely a legal causation motion, the many evidentiary submittals and the overarching emphasis on Ms. Wilbur's intoxication and 'reckless' driving, were unnecessary and largely irrelevant.

Out of concern that defendants would, at hearing, argue for their ‘version’ of the facts, which is exactly what defendants did, in advance of the hearing plaintiff moved for a continuance under CR 56(f). Plaintiff was entitled to such a continuance if the court was going to render a decision based upon factual matters since the motion was posited as one which did *not* require addressing factual matters.

Based upon the motion filed by defendants, plaintiff was entitled to all favorable inferences of any kind which could flow from the evidence. The court should have inferred that PSE knew the utility pole placement was dangerous and placed it there anyway. The court should have inferred that Ms. Wilbur’s driving, while careless, was hardly of the kind seen in the *Medrano* case. Her speed was lower, her impact with a utility pole occurred just a few feet from the roadway edge and she was nearly back on the roadway when she struck the pole. The court should have inferred prior impacts with the same pole on the same windy downhill road warranted placement of the pole elsewhere. The court should have inferred that applicable roadside construction standards prohibited such placements for the very reason seen here: impact with poles placed in hazardous locations transform what could have been an innocuous property damage event into a catastrophic loss for Mr. Lowman. It appears, instead, that the court inferred none of these things and indeed

considered nothing further than Ms. Wilbur's criminal conviction and the fact she struck an object not resting in the middle of the roadway in dismissing plaintiff's case.

Plaintiff was entitled to better treatment. Plaintiff was entitled to all reasonable inferences flowing from the evidence. *Hearst Commc'sn, Inc., v. Seattle Times*, 154 W.2d 493, 501, 115 P.3d 262 (2005). If, as was evident here, different and competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. *Johnson v. UBAR, LLC*, 150 Wash.App. 533, 537, 210 P.3d 1021 (2009); *Kuyper v. Department of Wildlife*, 79 Wash.App. 732, 739, 904 P.2d 793 (1995).

Given its interest in the facts, the appropriate response from the court should have been to grant the CR 56(f) motion made by plaintiff. That motion was directed at the very peril which arose at the hearing: what was cast as a discussion about legal causation ended up being a discussion very much about the facts of the accident and defendants only wanted to talk about their version of the facts of the accident.

If the court wanted to know more facts and have more facts, and identify where the parties' respective interpretations of the facts differed, no harm would have come from delaying hearing and inviting factual submittals. The materials submitted by plaintiff on reconsideration amply

showed what ‘inferences’ could flow from the facts and it is evident that the trial court ignored all such inferences in its decision.

By acting as it did, the Court abused its discretion in denying plaintiff’s CR 56(f) motion. In view of the time to trial, no harm would come from granting that motion and permitting the information the Court sought being added to the record.

C. Denial of Reconsideration Was An Error of Law: Reconsideration Was Brought to Allow the Court to Cure Its Error in Refusing Plaintiff’s CR 56(f) Motion

Defendants argue that permitting plaintiff to submit information in the form of declarations from Ed Stevens and Tim Moebes would ‘effectively convert the time period for responding to summary judgment from 28 days to 38 days.’ Response brief, p. 31-32. In a case with a trial date 8 months away, on a record where the trial court repeatedly raised questions regarding the facts of the accident, it was an abuse of discretion to not grant reconsideration.

The trial court committed multiple errors of law at the time of summary judgment. Its failure to infer facts favorably to plaintiff was one. Its failure to grant plaintiff’s CR 56(f) motion was another. And its *sub silentio* determination of ‘the facts’ was another.

Adding clarificatory and expert information about the accident dynamics, the applicable standards violated by defendants, and the giant

harm caused by striking a utility pole—where virtually no harm would have otherwise occurred—were all matters which were properly before the court.

In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. And, here, it needed to permit reconsideration since it had an insufficient understanding of and grounding in the facts. *Applied Indus. Materials Corp. v. Melton*, 74 Wash.App. 73, 77, 872 P.2d 87 (1994). Furthermore, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Sellsted*, 69 Wash.App. 852, 865 n. 19, 851 P.2d 716 (1993). Motions for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court. *See Trohimovich v. Department of Labor & Indus.*, 73 Wash.App. 314, 318, 869 P.2d 95 (1994) (trial court did not abuse discretion by failing to grant reconsideration motion); *Ghaffari v. Department of Licensing*, 62 Wash.App. 870, 816 P.2d 66 (1991) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court).

Adding to the confusion in this record is not knowing what, exactly, the trial court did with the motion for reconsideration. In its letter, it said it considered the motion. At order presentation, it said it did

not. It should have. The material presented was pertinent to its inquiries and warranted consideration. The addition of ten days to the time within which the court considered summary judgment materials was insignificant and, had it considered that material, no prejudice would have been suffered by defendants. But the trial court would have been better informed that its failure to grant plaintiff the benefit of the concessions ostensibly made by defendants, and its failure to understand how the acts of defendants harmed plaintiff, would have generated a better and more informed decision.

II. CONCLUSION

For the reasons stated, plaintiff respectfully requests that the Court reverse the dismissal and remand to the trial court for further proceedings.

Submitted this 20 day of January, 2011.

KEANE LAW OFFICES



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

| | | |
|-------------------------------------|---|-----------------------|
| NATHAN LOWMAN, |) | |
| |) | |
| Appellant, |) | CERTIFICATE OF |
| |) | SERVICE |
| 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 January 20, 2011, copies of Appellant's Reply Brief was served on counsel at the following address and by the method(s) indicated:

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- Email, read receipt requested

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

DATED this 20th day of January, 2011, at Seattle, Washington.



Donna M. Pucel