IN THE UTAH COURT OF APPEALS

STUART WOOD and LAURIE WOOD, Plaintiffs and Appellants v. KNS INTERNATIONAL, L.L.C., a Utah limited liability company and UNITED PARCEL SERVICE, INC., a Delaware corporation, Defendants and Appellees	**BRIEF OF APPELLANTS** Appeal No. 20180040-CA

Appeal from the Third District Court, Salt Lake County, Judge Bates

Andrew M Morse #4498
Nathan R. Skeen #12662
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 4500
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
amm@scmlaw.com
nrs@scmlaw.com

Attorneys for Appellee

Douglas B. Cannon #4287
Christopher F. Bond #15547
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, Utah 84111
Telephone: (801) 531-8900
Facsimile: (801) 596-2814
dcannon@fabianvancott.com

Craig T. Jacobsen, #5492
Craig T. Jacobsen, Attorney at Law
893 North Marshall Way, STE A
Layton, UT 84041
Telephone: (801) 953-9501
ctjacobsenlegal@gmail.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

This appeal arises from a negligence case.

In early 2013, a United Parcel Service ("UPS") truck driver backed up and crashed his/her tractor-trailer into the loading dock at the warehouse of KNS International, L.L.C. ("KNS"). The collision damaged the loading bay's concrete and partially dislodged and loosened some bolts to an overhead vinyl curtain and fixation system. KNS discovered the damage and tightened some of the loosened bolts, but did not fix the concrete nor replace the one or two bolts which had fallen out.

One week to a month after the UPS driver hit the KNS docking bay, the vinyl curtain dislodged from the damaged concrete and fell on Plaintiff Stuart Wood, permanently injuring him. The Woods then filed claims against both KNS and UPS.

UPS moved for summary judgment on two grounds 1) UPS owed no duty to Mr. Wood because UPS did not own the KNS property and 2) KNS's actions constituted an intervening cause as a matter of law. In response, the Woods 1) discussed UPS's duty, 2) showed the UPS truck driver acted negligently when he/she hit the docking bay hard, 3) explained that UPS's actions caused the vinyl curtain to eventually fall, and 4) demonstrated that the injury to Mr. Wood was foreseeable. The Woods also discussed how KNS's actions could only be an intervening cause as a matter of law if the undisputed facts showed KNS actions "were in hindsight extraordinary."

The district court granted UPS's motion for summary judgment. In that ruling, the district court did not rule that the Woods had not established a prima facia case of negligence against UPS. Nor did the district court rule that UPS owed no duty to Mr.

Wood. To the contrary, the district court recognized such a duty existed initially. Nevertheless, the district court ruled as a matter of law that 1) UPS's duty "ended" when KNS became aware of the damage UPS caused to its building and 2) UPS's actions could not be the proximate cause of Mr. Wood's injury; without explicitly saying so, the district court in essence ruled that KNS's actions were an intervening act relieving UPS of responsibility. In short, the district court denied the Woods a jury trial by making the factual determination that a reasonable jury could only conclude that KNS's actions after UPS caused the damage were in hindsight "extraordinary"—the key standard in this case—and therefore an intervening cause as a matter of law.

As discussed in this brief, the district court's decision was wrong for three reasons. First, UPS owed a duty to Mr. Wood to use reasonable care in the operation of its truck to avoid creating a dangerous condition on property which could injure Mr. Wood. Second, the Woods provided ample evidence to support a jury verdict against UPS 1) for breaching UPS's standard of care and 2) establishing UPS's actions proximately caused Mr. Wood's injury. Third, UPS did not provided facts sufficient for the district court to take the intervening cause issue away from the jury. The facts relied on by UPS below are insufficient for the district court to conclude that *all* reasonable jurors would have found that KNS's actions were, in hindsight, "extraordinary" or "highly extraordinary." While the district court obviously felt this way, the district court erred by supplanting its own judgement for that of the jury on the intervening cause issue.

///
///

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, AND PRESERVATION

The Woods challenge the district court's grant of summary judgment in favor of UPS on these three issues: first, whether UPS had a duty to use reasonable care when backing its truck to not create a dangerous condition on property; second, whether the Woods established a prima facie case of negligence against UPS; and third, whether the district court correctly took the issue of causation away from the jury and found that an intervening cause cut off UPS's liability as a matter of law.

***Summary judgment standard of review*:** The court of appeals "review[s] the district court's decision to grant summary judgment for correctness, affording the trial court no deference. An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Torrie v. Weber County.*, 2013 UT 48, ¶ 7, 309 P.3d 216 (citations and internal quotation marks omitted). Moreover, our supreme court has explained that "summary judgment is appropriate in negligence cases only in the clearest instances." *Dwiggins v. Morgan Jewelers,* 811 P.2d 182, 183 (Utah 1991) (citation omitted).

ISSUE 1: Does UPS owe a Duty to Use Reasonable Care in the Operation of its Trucks to Avoid Creating a Dangerous Condition on Property Which Could Injure Users of that Property?

Standard of Review: "[W]hether a duty exists is a question of law which we review for correctness." *Wood v. Salt Lake City Corp.,* 2016 UT App 112, ¶ 8, 374 P.3d

1080 (alteration in original) (citation and internal quotation marks omitted). The existence of a duty is a question of law which is "determined on a categorical basis" for a given class of cases rather than on those cases individual facts or the "specific mechanism of the harm." *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 25, 275 P.3d 228.

Preservation: The Woods preserved this claim by opposing UPS's motion for summary judgment and specifically arguing that a duty existed as part of their summary judgment briefing and argument. Appellate Record ("R") 1059, 60. *Cf Heritagewest Fed. Credit Union v. Workman*, 2010 UT App 342 (per curiam) (unpublished) (explaining that Appellant failed to preserve a claim against summary judgment "[b]ecause [he] failed to oppose the motion for summary judgment.")

ISSUE 2: Did the Woods present a prima facia negligence case against UPS?

Standard of Review: "A prima facie case of negligence requires a showing of: (1) a duty of reasonable care extending to plaintiff; (2) breach of that duty; (3) proximate and actual causation of the injury; and (4) damages suffered by plaintiff." *Clark v. Farmers Ins. Exch.*, 893 P.2d 598, 600–01 (Utah Ct. App 1995) (citations omitted).

Preservation: The lower court did not address this issue, but it was raised in the responsive memorandum filed by Plaintiffs. R 1059, 60.

ISSUE 3: Under the facts in this case, could a reasonable jury only conclude with the benefit of hindsight that KNS's actions were so "extraordinary" as to constitute an intervening cause, cutting off UPS's negligence liability as a matter of law?

Standard of Review: Because "summary judgment is appropriate in negligence cases only in the clearest instances," *Dwiggins*, 811 P.2d at 183, this court has explained that "'[i]t is only when the facts are undisputed and but one reasonable conclusion can be drawn therefrom' that proximate cause becomes a question of law." *Kranendonk v. Gregory & Swapp, PLLC*, 2014 UT App 36, ¶ 20, 320 P.3d 689 (quoting *Apache Tank Lines, Inc. v. Cheney,* 706 P.3d 614, 615 (Utah 1985)). Otherwise, questions of "breach and proximate cause are questions of fact for the fact finder determined on a case-specific basis." *Jeffs*, 2012 UT 11, ¶ 25. In Utah, "[a] superseding cause, sufficient to become the proximate cause of the final result and relieve defendant of liability for his original negligence arises only when an intervening force was unforeseeable and may be described with the benefit of hindsight, as extraordinary." *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 484, 488 (Utah Ct. App. 1991) (quoting *Robertson v. Sixpence Inns of America, Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990)).

Preservation: The Woods preserved their causation claim by opposing UPS's motion for summary judgment and arguing that UPS breached its duty to Mr. Wood as part of their summary judgment briefing and argument. R 1054–1059. *Cf Heritagewest*, 2010 UT App 342 (*per curiam*).

JURISDICTION: This Court has jurisdiction pursuant to Utah Code § 78A-4-103 because the case arises from a final order over which the Court of Appeals does not have original appellate jurisdiction but was transferred to the Court of Appeals. Appellant's docketing statement contains a thorough explanation of how the district court's grant of summary judgment became a final, appealable order.

STATEMENT OF THE CASE

***Procedural History*:** This appeal stems from a negligence case brought by the Woods against UPS (the party which caused the dangerous condition) and KNS (the party on whose property the condition existed) after a heavy vinyl curtain fell on Mr. Wood's head, permanently injuring him. Following the close of fact discovery, UPS moved for summary judgment. R 342. The Woods opposed the motion, UPS replied, and oral argument was scheduled for September 10, 2017. R 1036–1154; 1165–1210; 1235–36. Both sides appeared at the hearing and argued their respective positions. R 1659. Ruling from the bench, the district court ultimately granted UPS's motion for two reasons: first, the district court found that UPS's "duty ended when KNS became aware of the defect upon its building," R 1720:13–14; and second, the district court found "that the injury to Mr. Wood . . . was not proximately caused by UPS's damage to the building." R 1720:22–24. Tellingly, the district court noted that the proximate cause issue was "a very close question legally." R 1724:12–13

The court's oral ruling was later captured in a written order entered on November 20, 2017. R 1765–67. On the duty issue, the district court stated the following:

> Based on the undisputed facts, summary judgment is appropriate as a matter of law, because UPS owed no duty to the plaintiffs at the time of injury. UPS's duty ended when KNS became aware of the damage UPS caused to its building. At that time, KNS was in a superior position to repair the damage and defects to the building, or restrict access to the bay so that it could not be used. At this point, UPS had no further duty to people injured by the damage it caused to the building. R 1766.

On the proximate cause issue, the district court stated the following:

> Summary judgment in favor of UPS is also appropriate because the injury to Mr. Wood was not proximately caused by the damage UPS caused to the building. The defective property was in the sole possession of KNS for one week to one month before the injury to Mr. Wood occurred. If KNS was negligent in not repairing the door, or in the manner in which it repaired the door, there is intervening negligence by KNS that causes the injury to Mr. Wood. Alternatively, if KNS repaired the door in a manner that was reasonable and not negligent, no party's negligence caused the injury to Mr. Wood. Under either scenario, UPS did not proximately cause Mr. Wood's injury, and cannot be liable as a matter of law. R 1766–67.

Importantly, the district court did *not* reference Utah's "extraordinary" standard or otherwise discuss the foreseeability of KNS's actions—the necessary hurdles for a ruling as a matter of law on a proximate cause issue for intervening cause in Utah.

Following UPS's dismissal on summary judgment, the Woods and KNS reached a settlement, and on January 3, 2018, KNS was dismissed from the case. R 2136–38; 2155–2159. At that point, no defendants remained in the case, and the district court's prior summary judgment ruling in favor of UPS became a final appealable order. *See* Docketing Statement. The Woods filed a notice of appeal two days later. R 2166–67.[1]

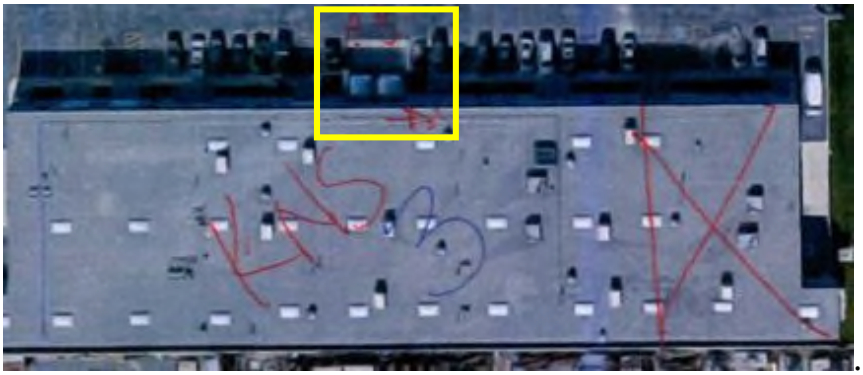
Factual background:

Background Facts:

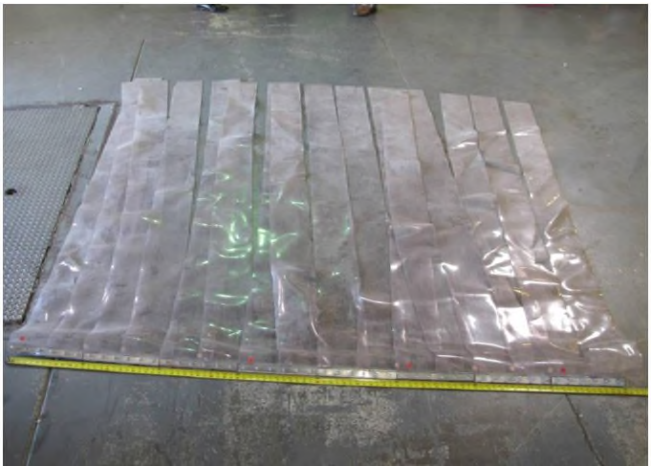
KNS has been in business since 2001. R 1071:9–10. KNS fulfills customer orders from website purchases mainly involving women's fashion apparel and shoes. R 1067–68. In 2012–2013, KNS operated and managed a warehouse from which it would receive

[1] The Wood's also filed a Rule 59 Motion to Alter or Amend Judgment which was withdrawn after the Wood's learned that KNS would be dismissed from the case, making the court's earlier, non-final summary judgment ruling in favor of UPS a final, appealable order. R 2147; *see* Docketing Statement.

and distribute its products. R 1071:13–15. Mike Kelly, the current President of KNS, identified this warehouse as Building 3, shown below. R 1070:13–14. The KNS warehouse has a docking bay designed to receive trucks, and in particular, receive the trailers of tractor trailers. R 1072:7–1073:23; 1821:24–1822:13. Docking Bays A and B in Building 3 are shown below, R 1037–38:



TJ Barney was an employee of KNS from late 2007 through early to mid-2013. R 1085:5–10. During part of his tenure at KNS, Mr. Barney worked as an assistant manager/supervisor/assistant warehouse manager. R 1085:12–21. He had responsibility over a number of KNS employees. R 1086:20–1087:22. After September 1, 2011, but before Mr. Wood was injured, KNS installed a number of vinyl curtains on its warehouse doors including a vinyl curtain on the outside of the door for Docking Bay B. R 1089:14–1091:17. A photograph of the vinyl curtain from Docking Bay B is show below, R 1038:



The vinyl curtain components included a metal bracket with 16 bolt holes. R 1096:10–20. Mr. Barney helped install some of the vinyl curtains. R 1090:5–6. Mr. Barney testified about how KNS installed the vinyl curtains over the warehouse doors:

-KNS used the bracket bolt holes to measure where to place the bolts;
-KNS hammer drilled 16 holes into the cinderblock;
-KNS then placed the bracket to line up with the bolt holes;
-KNS drilled the bolts through the metal bracket into the concrete;
-KNS then placed the vinyl stripping over the small extended posts; and
-KNS secured the vinyl stripping with a nut.

R 1090:5–1091:17; R 1093:9–1099:1. Mr. Barney testified there were no problems with the installation of the vinyl curtains. R 1098:6-14.

A UPS Tractor-Trailer Crashed Into Docking Bay B Causing Structural Damage to the Vinyl Curtain Bracketing/Bolting System and the Concrete Holding the Vinyl Curtain.

Mr. Barney was working in the KNS warehouse when he heard a "bad bang." R 1099:22–1100:10; 1101:20–1102:22. Mr. Barney felt the building shake because the building had been hit so hard. R 1103:2-10. Mr. Barney described the impact as "like a mini bomb went off." R 1113:1–2. The "bad bang" occurred after KNS installed the vinyl curtains. R 1099:22–1100:2. After Mr. Barney walked over to the source of the

"bad bang," he saw that a UPS tractor-trailer had backed down Docking Bay B and had hit the KNS building. R 1099:20–1100:24: R 1112:16–25. Mr. Barney knew it was a UPS tractor-trailer that had hit the KNS building because he testified, "I was standing there and it was a UPS truck that was there after the building shook." R 1109: 19–23. Mr. Barney also talked to the UPS driver about hitting the building. R 1109:22–1110:13. After the collisions, Mr. Barney saw the "cinderblock" holding the vinyl curtain had cracked. R 1113: 7–12. Mr. Barney also saw that one or two of the bolts holding the vinyl curtain had fallen out of the concrete. R 1108:12–17; R 1105:25–1106:15. Mr. Barney testified that the concrete holding the vinyl curtain would no longer hold the one or two bolts which had come out of the vinyl curtain bracket. R 1105:12–24.

Mr. Barney testified he had to tighten one or two other bolts which had loosened because of the UPS truck's collision with the KNS building. R 1106:16–1108:11. Mr. Barney guessed the UPS truck hit the KNS building "multiple weeks" before the vinyl curtain bracket fell on Mr. Wood's head. R 1104:9–20. Mr. Barney testified, to the best of his recollection, that the UPS tractor-trailer hit the KNS building one week to one month before the vinyl curtain fell on Mr. Wood. R 1104:9–20. Prior to the UPS collision, Mr. Barney had constantly inspected the KNS building and he had not seen any damage around Docking Bay B before the UPS truck had hit the KNS building. R 1103:23–1104:25. Mr. Barney concluded the UPS tractor-trailer had caused the damage to the KNS building because 1) the tractor-trailer hit the building "so hard" and 2) he personally observed the damage after the UPS tractor-trailer hit the KNS building. R 1102:23–1103:14; 1111:18–25; 1112:16–1113:3. Mr. Barney believed that after he had

tightened the bolts he felt the vinyl curtain was "secure enough at least for my liking." R 1113:15–1114:4.

The UPS Tractor-Trailer That Hit the KNS Building Broke Both UPS's and Common Safety Rules.

UPS uses tractors to deliver the UPS trailers. R 1073:24–1075:13. UPS produced David Keeling as a UPS 30(b)(6) witness. Mr. Keeling is UPS's Global Health and Safety Compliance Director. R 1117; 1120:5–8. Mr. Keeling testified he was prepared to testify concerning the safety rules used by UPS tractor-trailer drivers when backing into a building. R 1121:23–1122:2. Mr. Keeling testified that UPS tractor-trailer drivers, when backing their tractor-trailers, must follow certain rules. These rules include the following:

a. A UPS driver must do "a controlled back," R 1125:5–7;

b. A UPS driver must not go fast when backing, R 1125:5–7; and

c. A UPS driver backing to a dock must get out and check the distance if he/she is unsure of where his/her trailer is in relation to the dock. R 1126:1–16.

Mr. Keeling testified that UPS's backing safety rules are designed to prevent injury to people, the building/dock and the UPS trailer. R 1125:5–15; 1127:15–1128:3. UPS assumes a UPS driver is not backing properly if the UPS driver's trailer hits a building so hard that it causes structural damage to the building. R 1123:8–16. UPS cannot think of any circumstance under which a UPS driver would hit a building hard if the UPS driver is following UPS's rules for safe backing. R 1128:10–1129:2. UPS

agrees that it is possible to cause structural damage to a building if the driver hits a building hard enough. R 1123:17–1124:4.

The UPS Tractor-Trailer Collision with KNS's Building at Docking Bay B Caused the Vinyl Curtain To Eventually Detach From the Concrete and Hit Mr. Wood on the Head.

Mr. Wood was injured on February 4, 2013 when the vinyl curtain in Docking Bay B detached from the concrete and fell on Mr. Wood's head as he was delivering packages to KNS. R 1134:23–1135:13; 1136:1–25. That day, KNS warehouse manager Gavin Thain looked at the concrete after the vinyl curtain bracket detached from the top of Docking Bay B. *See* R 1144:3–8. Mr. Thain believed the damage caused to the concrete by the UPS truck backing into the KNS building ultimately caused the vinyl curtain bracket to fall. R 1142:15–1144:8. None of the other vinyl curtains installed by KNS failed or had any problems except the bracket and curtain assembly struck by UPS. R 1149:3–14.

Scott Kimbrough, Plaintiff's expert, submitted a report which explained his belief that UPS's collision with the KNS building caused the vinyl curtain bracket to fall on Mr. Wood. R 1899–1900; 1908–1918.

UPS Relies Upon the Following Three Facts to Assert KNS's Actions Constitute an "Intervening Act" Sufficient to Cut Off UPS's Own Negligence.

First, KNS through Mr. Barney knew before the vinyl curtain fell on Mr. Wood that a UPS tractor-trailer had caused significant damage to the vinyl curtain bracketing/bolting system and the concrete holding the vinyl curtain and that Mr. Barney had attempted to fix the bracket. *See e.g.* R 1099:22–1100:10; 1101:20–1102:22: R 1109:22–1110:13. R 1108:12–17; R 1105:25–1106:15.

Second, on February 4, 2013, before the vinyl curtain bracket fell on Mr. Wood, Mike Kelly, the now President of KNS, saw the vinyl curtain bracket in Docking Bay B hanging down. R 423:16–23; 425:1–426:12. Mr. Kelly described it as follows:

> Q. You saw [the vinyl curtain bracket] was hanging down. How far was it hanging down?
> A. Rough guessing, an inch and a half.
> Q. How much of the bracket was hanging down?
> A. Not a very—guessing, once again, maybe a foot.
> Q. So a foot was hanging down at an angle?
> A. Yeah, 8 to 12 inches, roughly, yea. Yes, it was hanging down at an angle.

R 425:15–23. Mr. Kelly proceeded to drive away from the KNS facility without telling anyone about the damage and the curtain "because no one should have been there and I didn't think that there was any risk of it hanging down because . . . there's a lot of bolts holding it . . . I never would have thought it would have fallen." R 426:17–22.

Third, after the vinyl curtain bracket fell on Mr. Wood, Mr. Wood overheard a KNS employee state as follows:

> Gavin, yeah. He was cleaning me up. He was washing me off, and the older guy, gray hair, the owner—I think he's the owner—was there with him. He was talking about how Gavin was-used to be a surgery assistant and I was in good hands. He was washing all the blood off my face and cleaning me up. And CJ came in and was asking me if I was all right**. Told me he was sorry, that he knew that thing was going to fall. He said we should have taken care of it**. Then the older guy said we're not talking about that right now. He took him out.

R 970:15–25 (emphasis added).

SUMMARY OF THE ARGUMENT

The district court erred in three ways when it granted UPS's motion for summary judgment. The district court first erred when it ruled that UPS's duty "ended" or

otherwise held that UPS had no duty toward Mr. Wood or anyone else working at the KNS facility to not create a dangerous condition on the property. The district court second erred when it failed to realize that the Wood's had established a prima facie case of negligence, sufficient to bring the case to the fact-finder. The district court third erred when it took the question of causation—including the specific issue of intervening cause—away from the jury and held as a matter of law that UPS could not be liable for its direct role in Mr. Wood's injury.

First, this brief explains that the existence of a duty is *purely* a question of law. The court conducts the duty analysis on a broad, categorical basis for all classes of defendants similarly situated—not on a case-by-case basis. Here, that class of defendant is truck or tractor-trailer drivers similar to the UPS driver that hit KNS's building and damaged the overhead bracket and curtain assembly. After analyzing the relevant policy factors set forward by our supreme court, this court should hold that truck drivers (and others similarly situated) owe a duty to not create a dangerous condition that could potentially hurt others, *even if that condition is created on another's property*. The district court's statement that UPS's duty "ended" dealt with the issue of causation, not duty.

Second, this brief outlines how the Woods established a Prima Facia negligence case against UPS. The Woods have established that a duty existed; that UPS breached that duty; that UPS's breach was the proximate and actual cause of Mr. Wood's injuries; and that Mr. Wood has suffered substantial, permanent damages due to UPS's negligence.

Third, this brief explains that in Utah, a district court cannot supplant its own reasoning for the fact finders on an issue of proximate cause—specifically, whether intervening cause existed—except in "extraordinary" or "highly extraordinary" circumstances. The facts of this case are not "extraordinary" and intervening cause as a matter of law is incorrect here. The three specific facts that UPS argues meets this standard, 1) that Mr. Barney saw the damage and improperly fixed the bracket; 2) that then KNS vice-president Mr. Kelly saw the bracket hanging down as he left to a meeting, but decided to drive away anyways given his belief that no one would be working in that area; and 3) that another employee commented after the accident that "he knew [the bracket] was going to fall," fail to meet Utah's high-threshold for intervening cause as a matter of law.

ARGUMENT

I. Truck Drivers Have a Duty to Use Reasonable Care to Avoid Creating a Dangerous Condition on Property Which Could Cause Injury to the Property's Users.

"In negligence cases, a duty is 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5 (quoting *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 321) (Utah 1997) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 356 (5th ed. 1984))). "[W]e all generally have a duty of due care in the performance of our affirmative acts . . . ." *Graves v. North Eastern Services, Inc.*, 2015 UT 28, ¶ 19, 345 P.3d 619.

The specific issue in this case is whether truck drivers have a legal obligation to use reasonable care in the operation of their trucks to avoid creating dangerous conditions on another's property which can cause injury to the property users.

The Utah Supreme court in *B.R. ex rel. Jeffs v. West* outlined the factors the court should use to determine whether a defendant owes a duty to a plaintiff:

> (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general policy considerations.

2012 UT 11, ¶ 5 (citations and internal quotation marks omitted).

The court then discussed how these factors should be applied:

> Not every factor is created equal, however. As we explain below, some factors are featured heavily in certain types of cases, while other factors play a less important, or different, role. . . . [T]he legal-relationship factor is

> typically a "plus' factor—used to impose a duty where one would otherwise not exist, such as where the act complained of is merely an omission. . . . . [T]he final three factors . . . are typically "minus" factors—used to eliminate a duty that would otherwise exist.

Id. at ¶ 5.

Applying these factors to this case establishes that UPS had a duty toward Mr. Wood.

A. The Application of The Five West Factors Shows that UPS Owed a Duty to Mr. Wood to Use Reasonable Care to Avoid Creating a Dangerous Condition on KNS's Property Which Could Injure Mr. Wood.

1. UPS's Tortious Conduct Arose Out of UPS's Affirmative Act.

"In almost every instance, an act carries with it a potential duty and resulting legal accountability for that act." *Webb v. University of Utah*, 2005 UT 80, ¶ 10, 125 P.3d 906 (overruled on other grounds by *Cope v. Utah Valley State College*, 2014 UT 53, ¶ 27, 342 P.3d 243). "The long-recognized distinction between acts and omissions—or misfeasance and nonfeasance—makes a critical difference and is perhaps the most fundamental factor courts consider when evaluating duty." *West*, 2012 UT at ¶ 7. "Acts of misfeasance, or 'active misconduct working positive injury to others,' typically carry a duty of care." *Id.* (citation omitted).

In this case, UPS engaged in the affirmative act of backing its tractor-trailer into the KNS dock. Applying this "most fundamental factor," UPS therefore had a duty to use reasonable care when backing so as not to injure people or damage property which could then cause injury to others, including Mr. Wood. *See id.*

2. The Lack of a Special Relationship between UPS and Mr. Wood Did Not Alter UPS's Duty to Mr. Wood.

The Utah Supreme Court recognizes a special relationship as a "plus" factor in establishing a duty. However, "[o]utside the government context . . . a special relationship is not typically required to sustain a duty of care to those who could foreseeably be injured by the defendant's affirmative acts." *West,* 2012 UT at ¶ 10.

In this case, there is no special relationship between UPS and Mr. Wood. But the lack of this special relationship does not eliminate UPS's duty of care to Mr. Wood. *Id.* at ¶ 19.

3. It is Foreseeable That UPS's Affirmative Act Could Cause Injury to a User of KNS's Property.

The court in *Normandeau v. Hanson Equipment, Inc,* outlined the foreseeability factor:

> Foreseeability as a factor in determining duty does not relate to the specifics of the alleged tortious conduct but rather to the general relationship between the alleged tortfeasor and the victim. "Whether a harm was foreseeable in the context of determining duty depends on the general foreseeability of such harm, not whether the specific mechanism of the harm could be foreseen." [citation omitted]; *see also Steffensen v. Smith's Mgmt. Corp.,* 862 P.2d 1342, 1346 (Utah 1993) ("What is necessary to meet the test of negligence . . . is that [the harm] be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature." (alteration in original) (internal quotation marks omitted)).

2009 UT 44, ¶ 20, 215 P.3d 152. The foreseeability factor focuses on the "general foreseeability" of the harm, not the "specific mechanism" of harm. *Id.* In *West,* for example, the court was faced with "whether healthcare providers have a legal obligation to nonpatients to exercise reasonable care in prescribing medications that pose a risk of injury to third parties." 2012 UT at ¶ 5. The *West* court recognized that certain drugs,

such as powerful narcotics, carry a highly foreseeable risk to third parties, while other, "innocuous drugs," do not. *Id.* at ¶ 28. The court nonetheless concluded that a duty exists *in both circumstances*:

> Because the class of cases includes some in which a risk of injury to third parties is reasonably foreseeable (as even defendants concede), the foreseeability factor weighs in favor of imposing a duty on healthcare providers to exercise care in prescribing medications so as to refrain from affirmatively causing injury to nonpatients. Whether in a particular case a prescription creates a risk of sufficient foreseeability that the physician should have exercised greater care to guard against injury is a question of breach.

Id.

The same analysis applies to this case. Common experience establishes that a large, heavy tractor-trailer striking a building hard can cause structural damage to that building. UPS's own corporate representative acknowledged that a driver can cause structural damage if the driver hits the building hard enough. R 1123:17–1124:4.

It is equally common knowledge that a damaged or compromised building can cause injury to people underneath that structure by something collapsing or falling on that person. UPS would likely concede it is foreseeable that a truck or vehicle striking a building might dislodge part of the building causing *immediate* injury to a third party. Such general foreseeability is sufficient to establish a duty to all third parties who might be injured by a compromised structure, whether the building part falls immediately or a week or a month later. *See Holcombe v. Nations Banc Fin. Serv. Corp.*, 248 VA 445, 448, 450 S.E. 2d 158 (1994) (denying summary judgment in a negligence case on the issue of foreseeability because "[t]he fact, stressed by the defendant, that the [two heavy]

partitions had remained in the bathroom for several months without incident does not detract from the foreseeability of injury occurring, albeit the injury occurred later rather than sooner" after the partition fell over and injured plaintiff.)

4. Public Policy Favors Finding a Duty in this Case.

The Court in *West* outlined the public policy factor:

> [T]his factor considers whether the defendant is best situated to take reasonable precautions to avoid injury. Typically, this factor would cut against the imposition of a duty where a victim or some other third party is in a superior position of knowledge or control to control or avoid the loss in question.

2012 UT at ¶ 30.

In this case, UPS was in the best position to prevent the loss in the first place. The UPS driver could have prevented this injury entirely if he/she had chosen to follow UPS's safety rules and backed his/her tractor-trailer at a slow speed. R 1125:5–7; 1126:1–16. Instead, the driver choose to back his/her tractor-trailer into the building at a reckless rate of speed, causing damage to the building and, eventually, to Mr. Wood. R 1123:8–16; 1128:10–1129:2.

5. Other Policies Favor Finding a Duty in this Case.

Other policy considerations weigh in favor of finding a duty in this case. In *Normandeau v. Hanson Equipment, Inc.*, this court recognized that "the public policy behind tort law is to hold tortfeasors accountable for harms occasioned by their fault. . . . Accordingly, as between an innocent party and a negligent tortfeasor, public policy requires that any loss should be borne by the tortfeasor." 2010 UT App at ¶ 4. In this case, UPS acted negligently when it backed its truck into the docking bay and bracket

assembly, and that negligence directly led to Mr. Wood's injury. Not finding that UPS has a duty to Mr. Wood puts the loss on the innocent party, Mr. Wood, rather than the negligent tortfeasor who actually created the dangerous condition, UPS.

6. The District Court Actually Recognized UPS Had a Duty to Mr. Wood, But Held That UPS's Duty Ended When KNS Discovered the Damage. Such a Ruling Is Simply a Different Way of Saying KNS's Actions Constituted an Intervening Cause.

The consideration of all the above *West* factors establishes that UPS owed a duty to Mr. Wood to use reasonable care to avoid creating a dangerous condition on property which could injure Mr. Wood. In fact, the lower court recognized UPS had a duty to Mr. Wood. The district court, however, ruled that UPS's duty "ended when KNS became aware of the damage UPS caused to its building." R 1720; 1766.

The district court's incorrectly labeled duty analysis was simply another way of saying that KNS's actions constituted an intervening cause. Section III, below, shows how intervening cause is a fact issue for the jury not the court.

B. UPS's Duty Is Consistent with The Restatement Second of Torts §§ 383, 385, and Utah Case Law Which Also Recognize that UPS Had a Duty to Use Reasonable Care to Avoid Creating a Dangerous Condition on Property Which Could Cause Mr. Wood Injury.

1. Section 383 Imposed a Duty on UPS to Use Reasonable Care to Avoid Creating a Dangerous Condition on KNS's Property Which Could Cause Mr. Wood Injury.

Section 383 of the Restatement Second of Torts states:

> One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

Restatement (Second) of Torts, § 383. Utah law recognizes that a "[l]andowner may be liable for injuries caused by dangerous conditions which they create, and which they should reasonably foresee would expose others to an unreasonable risk of harm." *English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct. App. 1989). In such cases where the defendant "created the condition . . . he is deemed to know of the condition and no further proof of notice is necessary." *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 176 (Utah 1975).

In this case, UPS came onto the land at the request of KNS. UPS's obligation when conducting activity on the land is the same as that for KNS: UPS must not create a dangerous condition on another's land which would expose others to an unreasonable risk of harm. *See English*, 774 P.2d at 1156. UPS is responsible for any dangerous condition it caused to the property whether it specifically knew about that dangerous condition or not. *Allen*, 538 P.2d at 176. In this case, UPS created a dangerous condition by backing its truck into and damaging the vinyl curtain bracketing system. UPS is responsible for foreseeable injuries caused by that dangerous condition which it created at the KNS docking bay. *See id.* The risk that a damaged overhead curtain could fall on someone walking underneath is entirely foreseeable here.

2. Section 385 Imposed a Duty on UPS to Use Reasonable Care to Avoid Creating a Dangerous Condition on Property Which Could Cause Mr. Wood Injury.

Section 385 of the Restatement Second of Torts states:

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of

> the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Restatement (Second) of Torts, § 385. This liability arises even if the person creating the dangerous condition does not know it created the dangerous condition: "neither a negligent servant or contractor, nor a negligent manufacturer or repairman is relieved from liability by the fact that he does not know of the dangerous condition of the land or chattel." *Id.*, comment d.

In *Tallman v. City of Hurricane,* 199 UT 55, 985 P.2d 892, the Utah Supreme Court adopted Section 385 as part of Utah's common law. *Id.*, ¶ 9. In *Tallman*, the supreme court recognized that a party working on *another's* property could be held liable for the dangerous condition it created on the property. *Id.; see also Gonzalez v. Russell Sorensen Const.*, 2012 UT App 154, ¶¶ 24–25, 279 P.3d 422 (discussing *Tallman's* adoption of §385 and explaining that a contractor is directly liable for physical harm caused by conditions that he created on the land).

UPS's actions fall under the plain language of Section 385. UPS drove its trucks onto KNS property "on behalf of" KNS. KNS requested that UPS pick up and deliver packages at its warehouse. UPS "create[d]" a dangerous condition on KNS property when it negligently backed hard into the KNS building causing structural damage to the cinder block holding the vinyl curtain and the vinyl curtain's fixation system. UPS's negligent driving weakened and compromised the cinder block holding the vinyl curtain and the vinyl curtain bracketing system. The vinyl bracket and curtain eventually failed

because of that damage and injured Mr. Wood. UPS owed a duty to Mr. Wood and other potential victims.

II. The Woods Have Established a Viable Claim of Negligence Against UPS.

To establish a claim for negligence, the plaintiff must establish 1) defendant owed plaintiff a duty of care, 2) defendant breached that duty and 3) the breach was the proximate cause of 4) plaintiff's injuries or damages. *West,* 2012 UT at ¶ 5, n. 2. Plaintiff has demonstrated each of these elements against UPS for purposes of a summary judgment motion.

A. UPS's Drivers Have a Duty to Use Reasonable Care to Avoid Creating a Dangerous Condition on Property Which Could Cause Injury to the Property's Users.

As discussed in Section I, above, the Woods have established that UPS owed a duty of care.

B. The Woods Have Provided Evidence By Which a Jury Could Find UPS's Driver Breached His/Her Duty of Care to Mr. Wood When He/She Negligently Backed Hard into KNS's Docking Bay Damaging the Cinder Block and the Vinyl Curtain Bracketing System Which Eventually Caused the Vinyl Curtain to Fall on Mr. Wood.

1. The UPS Driver Negligently Backed Hard Into the KNS Building.

Mr. Barney, a KNS employee, testified he was working in the KNS building when he heard a loud bang. Mr. Barney testified the building shook, and he described the impact like a "mini-bomb." R 1099:22–1100:10; 1101:20–1102:22. Mr. Barney walked over to the bang's source and saw a UPS driver had backed his tractor-trailer into the KNS building. R 1099:20–1100:24: R 1112:16–25. Mr. Barney saw the UPS driver's tractor-trailer had caused structural damage to the KNS building and even talked

to the driver about it. R 1109:22–1110:13; R 1106:16–1108:11; R 1104:9–20. R 1104:9–20.

A UPS driver must follow the following safety rules when backing a tractor trailer:

1. A UPS driver must do a controlled back;
2. A UPS driver must not go fast when backing; and
3. A UPS driver backing to a dock must get out and check the distance if he/she is unsure of where his/her trailer is in relation to the dock.

R 1125:5–7; R 1126:1–16.

UPS testified that UPS would assume a UPS tractor trailer driver was backing improperly if the UPS driver's trailer hit the building so hard it caused structural damage. R 1117; 1120:5–8. R 1121:23–1122:2; R 1123:8–16. Moreover, UPS could not think of any circumstances under which a UPS tractor-trailer driver would hit a building hard if he/she was following UPS's rules for safe backing. R 1128:10–1129:2.

A jury could easily find the UPS driver breached its duty to use reasonable care when backing his/her tractor-trailer toward the KNS building.

2. <u>The UPS Driver's Actions Created a Dangerous Condition on KNS's Property.</u>

Mr. Barney testified he had inspected the KNS building before the UPS tractor-trailer hit the KNS building and he had not seen any damage around Docking Bay B. R 1103:23–1104:25. Mr. Barney testified the UPS tractor-trailer collision damaged the vinyl curtain bracketing/bolting system and compromised the concrete holding the vinyl

curtain. R 1113: 7–12. R 1108:12–17; R 1105:25–1106:15. Mr. Barney testified he saw 1) one or two of the bracketing bolts had come out of the bracket and had fallen to the floor, 2) that one or two of the bracketing bolts were loose, and 3) the cinderblock holding the vinyl curtain was cracked. Facts *Id.* Mr. Barney concluded the UPS tractor trailer caused the damage to the KNS building because 1) the UPS tractor trailer hit the KNS building hard and 2) the damage was observed after the UPS tractor trailer hit the KNS building. R 1102:23–1103:14; 1111:18–25; 1112:16–1113:3.

Mr. Thain testified the damage caused to the concrete by the UPS tractor-trailer backing into the KNS building ultimately caused the vinyl curtain bracket to fall. R 1149:3–14. The Wood's expert, Scott Kimbrough, will testify that UPS's collision with KNS's building caused the vinyl curtain bracket to fall on Mr. Wood. R 1899–1900; 1908–1918.

Using the available evidence, a jury could easily find that the UPS driver created a dangerous condition on KNS's property.

C. The Woods Have Provided Sufficient Evidence by Which a Jury Could Find UPS's Negligent Backing was the Proximate Cause of Mr. Wood's Injury.

Causation in negligence cases consists of two requirements. First the person's act produced the harm directly or set in motion events that produced the harm in a "natural and continuous sequence," without which the injury or result would not have occurred. *Magana v. Dave Roth Constr.,* 2009 UT 45, ¶ 27, 215 P.2d 143. This is also known as "but for" causation. Second, the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature. *Steffensen v. Smith's*

Mgmt. Corp., 862 P.2d 1342, 1346 (Utah 1993). This is known as proximate, or legal, causation.

1. UPS's Damage to KNS's Docking Bay B In Fact Caused the Vinyl Curtain to Fall on Mr. Wood.

Plaintiffs have provided ample evidence that UPS's driver caused the vinyl curtain to fall. Said another way, but for UPS hitting the building, the bracket would have never fallen on Mr. Wood's head. Mr. Barney's testified a UPS tractor-trailer hit Docking Bay B hard. R 1099:22–1100:10; 1101:20–1102:22. The UPS driver's negligence damaged the vinyl curtain's bracketing/bolting system and the concrete holding the bracketing system, causing one or two bolts from the vinyl curtain bracket to fall out and one or two bolts to loosen. R 1108:12–17; R 1105:25–1106:15; 1106:16–1108:11. As a result, the vinyl curtain bracketing system in Docking Bay B partially detached and then completely detached from the concrete between one week and one month later, injuring Mr. Wood. R 1134:23–1135:13; 1136:1–25; R 423:16–23; 425:1–426:12. The vinyl curtain that failed, injuring Mr. Wood, was the only curtain with documented damage to the bracket and concrete. R 1149:3–14. None of the other vinyl curtains failed. *Id.* Mr. Thain, KNS's warehouse manager, concluded from his inspection that the damage caused by a truck backing into the KNS building at Docking Bay B ultimately caused the vinyl curtain to fall. R 1142:15–1144:8. The Wood's expert also believed that the building damage caused by UPS led the vinyl curtain to fall. R 1899–1900; 1908–1918.

///

///

2. A Reasonable Person Could Foresee that UPS's Backing Hard Into the Building Could Cause Damage to the Building and Attached Structures Which Might Injure a Person using the Building.

The Utah Supreme Court has outlined the legal requirements on foreseeability within the element of proximate cause:

> What is necessary to meet the test of negligence and proximate cause is that it be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature.

Steffensen, 862 P.2d at 1346 (quoting *Rees v. Albertson's Inc.*, 587 P.2d 130, 133 (Utah 1978)).

In this case, Mr. Wood's injury falls within the "same general nature" of the type of injuries a person could be expected to suffer from a tractor-trailer negligently hitting a building and overhead bracket assembly "hard." A reasonable jury could foresee that a large, heavy tractor-trailer striking a building hard or at high speed could cause structural damage to the building. UPS, through Mr. Keeling, acknowledged that possibility in his deposition. R 1123:17–1124:4.

A reasonable jury could also foresee that a structurally damaged building could cause injury to people in that building. For example, a reasonable jury could foresee a vehicle striking a building might cause the building to collapse or dislodge part of the building causing injury to people. *See Jacobs-Peterson v. United States*, 219 F. Supp. 3d 1091, 1098 (D. Utah 2016) (holding that it was generally foreseeable that a fire started by the army on its own land would spread to other property which would lead to need to evacuate large animals, whose evacuation could cause injury to people).

The fact that the building part UPS damaged—the vinyl curtain bracket and the surrounding concrete—failed one week to a month after the blow rather than immediately does not take this case out of the foreseeable general harm identified above. *Skillingsberg v. Brookover,* 484 P.2d 1177, 1179 (Utah 1977) ("where there is proper proof of proximate causation, remoteness of time alone will not ordinarily prevent imputation of liability for a subsequent injury to a prior act of negligence."); *see Holcombe v. NationsBanc Fin. Serv. Corp.*, 248 VA 445, 448, 450 S.E. 2d 158 (1994) (denying summary judgment in a negligence case on the issue of foreseeability because "[t]he fact, stressed by the defendant, that the [two heavy] partitions had remained in the bathroom for several months without incident does not detract from the foreseeability of injury occurring, albeit the injury occurred later rather than sooner" after the partition fell over and injured plaintiff.)

Nor does it matter to the analysis what specific part of the building failed. *Mountain States Tel & Tel. Co. V. Consolidated Freightways,* 242 P.2d 563, 565 (Utah 1962) ("Negligence is the proximate cause of damage even though the actor was not able to see the injury in the precise form in which it occurred, nor to anticipate the precise damage which would result from his negligence."). Rather, Mr. Wood's mechanism of injury and type of injury fall within the general type of injury which can be expected from a tractor-trailer hitting and structurally damaging a building; that is, it is generally foreseeable that a damaged item hanging above an area where people frequently walk could fall and injure someone walking underneath. *See id*.

III. The Woods' Factual Record Provides Sufficient Evidence for a Jury to Conclude That KNS's Action Were Not So Extraordinary in Hindsight to Be an Intervening Cause.

A. Summary Judgment is Generally Inappropriate to Resolve Proximate Cause Issues.

"[T]he right to trial by jury is a basic principle of our system that cannot be allowed to be eroded by improper intrusions on the jury's prerogative." *Harris v. Utah Transit Authority*, 671 P.2d 217, 220 (Utah 1983). On summary judgment, a court must resolve all factual disputes in favor of the nonmoving party and adopt all appropriate inferences. *Torrie v. Weber County.*, 2013 UT 48, ¶ 7, 309 P.3d 216. Summary judgment is only appropriate if the court determines that "no reasonable factfinder" could find for the plaintiff on an issue. *Salo v. Tyler*, 2018 UT 7, ¶ 30, 417 P.3d 581.

Because of this standard, "[s]ummary judgment is generally inappropriate to resolve negligence claims and should be employed 'only in the most clear-cut cases.'" *Berry v. Greater Park City Co.,* 2007 UT 87, ¶ 27, 171 P.3d 442 (abrogated by *Penunuri v. Sundance Partners, Ltd.*, 2017 UT 54, on other grounds). "Proximate cause is a factual issue that generally cannot be resolved as a matter of law." *Butterfield v. Okubo,* 831 P.2d 97, 106 (Utah 1992). "Only in rare cases may a trial judge rule as a matter of law on the issue of proximate cause." *Steffensen*, 820 P.2d at 486.

B. The District Court Erred by Not Applying the Proper Standard for When an Act Constitutes an Intervening Cause.

The district court, in its ruling on summary judgment, made two key rulings. First, the district court found UPS's duty "ended when KNS became aware of the damage UPS caused to its building." Second, the district court ruled that UPS was not the proximate

cause of Mr. Wood's injury because KNS's actions were an intervening cause as a matter of law. In short, the district court found KNS's knowledge and actions after learning about the damaged curtain and fixture severed both duty and proximate cause. Without explicitly saying so, the district court essentially applied an intervening cause test to both the duty and proximate cause analysis. As discussed below, the district court erred because it never used the proper standard to establish intervening cause as a matter of law; but even it if did, the facts of this case are insufficient for judgment as a matter of law because KNS's action were not, in hindsight, so "extraordinary" that every juror must find that KNS's actions were outside the realm of foreseeability.

1. UPS Has the Burden of Proof on Establishing an Intervening Cause.

UPS has the burden of proof on establishing an intervening cause. *Fox v. Brigham Young Univ.*, 2007 UT App 406, ¶ 23 n. 3, 176 P.3d 446 (explaining that intervening cause is "an affirmative defense" upon which the defendant has the burden of proof).

2. Utah Courts Recognize a Subsequent Act Can Only Be an "Intervening Act" if the Subsequent Act is So Unforeseeable it is in fact "Extraordinary" or "Highly Extraordinary."

The Utah courts have steadily moved away from using intervening negligence to bar negligence claims as matter of law, particularly after Utah adopted comparative negligence rules which allowed a jury to apportion fault among defendants. 1n 1991, the Utah Appellate court in *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482 (Utah Ct. App. 1991) *aff'd* 862 P.2d 1342 (Utah 1993) outlined the high standard a defendant must meet to establish an intervening act as the sole proximate cause:

> A superseding cause, sufficient to become the proximate cause of the final result and relieve defendant of liability for his original negligence arises only when an intervening force was unforeseeable **and may be described with the benefit of hindsight, as extraordinary.**

Id. at 488 (citation omitted).

In a more recent case, the Utah Supreme Court in *Thayer v. Washington County. Sch. Distr.*, 2012 UT 31, 285 P.3d 1142 recognized that the subsequent negligent act must be "highly extraordinary" to cut off prior negligence:

> That conduct would supersede (and cut the causal chain to the authorization) if the alleged subsequent negligence was sufficiently unforeseeable—e.g., if "a reasonable man knowing the situation" **would regard the subsequent negligence as "highly extraordinary"** and not a "normal consequence" of the situation created by the authorization.

Id., ¶ 62 (emphasis added) (citing *Harris v. Utah Transit Authority*, 671 P.2d at 219.

C. UPS Has Not Established That KNS's Actions After UPS Created the Dangerous Condition Were So Unforeseeable to be "Highly Extraordinary" or "Extraordinary."

To grant summary judgment on intervening cause, a court must conclude that a reasonable jury could only reach one conclusion on intervening cause: KNS's actions were so unforeseeable that "with the benefit of hindsight" they may be described as "extraordinary" or "highly extraordinary." *Thayer*, at ¶ 62; *Steffensen*, 820 P.2d at 488. The facts cannot meet this standard here.

This brief looks specifically at the three facts which UPS relied on below to establish intervening cause as a matter of law. All of these facts, either alone or

combined, are foreseeable and do not support a finding as a matter of law that KNS's action or inaction was "highly extraordinary." *See Thayer*, at ¶ 62.

First, UPS argues that KNS through Mr. Barney saw the damage and then did nothing to fix the vinyl curtain fixation device once it discovered the damage. That fact is disputed. Mr. Barney observed the damage. He then retightened one or two of the bolts. Mr. Barney concluded based on his observation and his attempted repair that the vinyl bracket was fine. Mr. Barney has provided testimony on this point. Specifically, he stated that after attempting to fix the bracket that it was "secure enough at least for my liking." R 1113:15–1114:4. A jury at trial could conclude Mr. Barney's attempt to fix the bracket was foreseeable and certainly not "highly extraordinary."

Second, UPS pointed to the fact that the same day Mr. Wood was injured, KNS's Vice President at the time, Mike Kelly, saw the vinyl curtain bracket hanging down and he took no action. Mr. Kelly testified that he did not take action "because no one should have been there and I didn't think that there was any risk of it hanging down because . . . there's a lot of bolts holding it. . . . I never would have thought it would have fallen." R 426:17–22. Mr. Kelly's testimony explains why he took no action at that time. Although he was ultimately incorrect, Mr. Kelly had two separate reasons for not immediately fixing the bracket: first, his belief that no one would be working there, and second, his belief that he did not think "it would have fallen." A jury at trial could conclude Mr. Kelly's actions not to take immediate action were foreseeable and certainly not "highly extraordinary."

Finally, Mr. Wood testified that after he was injured a KNS employee apologetically remarked that he/she knew the bracket was going to fall and they should have fixed it. That testimony alone does not warrant summary judgment. Many people see conditions every day, even dangerous conditions, and yet they do nothing. Again, this person's actions in not fixing the vinyl curtain bracketing system was foreseeable not "highly extraordinary"—they were foreseeable.

UPS is asking this court to hold that KNS's inaction was so extraordinary that it was unforeseeable as a matter of law. In fact, UPS's argument requires this court to rule that human procrastination is "highly extraordinary." But procrastination is not "highly extraordinary," if anything, it is foreseeable and certainly should not be used as a means to grant summary judgment. Moreover, as discussed below, a second person's knowledge of a prior action can never be used on its own to establish an intervening act as a matter of law.

The jury needs to make the call on whether KNS's actions were "highly extraordinary," not the court.

D. The Utah Supreme Court Long Ago Rejected the Premise That a Second Actors' Knowledge of the Danger Created by a First Actor is an Intervening Act.

In this case, the district court ruled that UPS's duty ended when KNS became aware of the damage to the building and further ruled that KNS discovery of the damage and failure to fix it constituted an intervening cause. The Utah Supreme court in *Harris v. Utah Transit Authority* rejected these bright line distinctions.

In *Harris*, the district court directed a verdict against the plaintiff in favor of a defendant bus driver. 671 P.2d 217, 218. In that case, the driver of a jeep ran into the back of a bus. The jeep driver's passenger brought a claim against bus driver. *Id.* The lower court concluded the jeep driver's actions constituted an intervening cause because the bus was clearly visible in front of the jeep. The Utah Supreme reversed the district court's decision. *Id.* at 222. The Utah Supreme court's decision recognized that the district court's decision relied upon *Hillard v. Utah By-Products Co.*, 1 Utah 2d 143, 151, 263 P.2d 287, 292 (1953). The court in *Hillard* held that a subsequent negligent act will be a superseding cause when the second actor is aware of the dangerous condition created by the first actor but fails to avoid it. *Hillard* described this circumstance as follows:

> The first situation is where one has negligently created a dangerous condition [such as parking a truck] and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. . . . In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor.

Hillyard, at 292.

The *Harris* court expressly overruled this part of *Hillard* because it created an improper distinction. *Harris*, 671 P.2d 217, 222 (Utah 1983) ("To avoid further confusion in the doctrine of superseding causation in cases such as this, we hereby overrule the first prong of the *Hillyard* test as stated in *Hillyard, McMurdie, Valesquez,* and *Anderson.*") The court added that *Hillyard* frustrated the purpose of the Comparative Negligence Statue "by precluding the kind of comparison of fault that a jury ought to

make. The allocation of liability should be made on the basis of the relative culpability of both parties." *Harris*, at 222.

Under *Harris,* the fact that KNS knew UPS had damaged the building and created a dangerous condition cannot on its own be an intervening cause. Rather, the jury must decide how fault should be allocated—exactly why Utah adopted a Comparative Fault statute in the first place. The jury, using the Utah Comparative Fault statute, can then allocate fault between UPS and KNS as it sees fit.

CONCLUSION

Plaintiffs request this court reverse the lower court's decision and 1) find UPS owed a duty to the Plaintiffs and 2) remand the case with instructions for the intervening cause issue to go to the jury.

DATED this 18th day of June, 2018.

Douglas B. Cannon
Christopher F. Bond
FABIAN VANCOTT
&
Craig T. Jacobsen
CRAIG T. JACOBSEN, ATTORNEY AT LAW
Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

This brief, submitted under Utah Rule of Appellate Procedure 24, complies with the type-volume limitation. The word processing system used to prepare these brief states that it contains 10,300 words, exclusive of the Tables of Contents and Authorities, in 13-point Times New Roman type, which is a proportionally spaced font.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2018, I caused two (2) true and correct copies of the within and foregoing BRIEF OF APPELLANTS to be hand-delivered to:

SNOW, CHRISTENSEN & MARTINEAU
Andrew M. Morse
Nathan R. Skeen
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant/Appellee

Shelby S. Noffsinger
Legal Assistant to Douglas B. Cannon

ADDENDUM

See attached 1) Order Granting Defendant United Parcel Services, Inc.'s Motion for Summary Judgment entered by Judge Matthew Bates on November 20, 2017; and 2) Summary Judgment Motion Transcript argued on October 10, 2017.

The Order of the Court is stated below:
Dated: November 20, 2017 01:20:54 PM **/s/** MATTHEW BATES District Court Judge

Andrew M. Morse (4498)
NATHAN R. SKEEN (12662)
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000
amm@scmlaw.com
nrs@scmlaw.com
Attorneys for United Parcel Service, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY STATE OF UTAH	
STUART WOOD and LAURIE WOOD Plaintiffs, v. KNS INTERNATIONAL, LLC, a Utah limited liability company and UNITED PARCEL SERVICE, INC., a Delaware corporation Defendants.	**ORDER GRANTING defendant united parcel services, inc.'s motion for summary judgment** Case No. 160900437 Judge: Matthew Bates (Tier 3)

This matter came before the Court on October 10, 2017, on Defendant United Parcel Service, Inc.'s ("UPS") Motion for Summary Judgment. Having reviewed the briefing and heard oral argument, and for good cause appearing, the Court entered the following findings and conclusions:

1. For the purposes of UPS's Motion for Summary Judgment, the following facts are

undisputed:

a. Defendant KNS International, LLC ("KNS") operates a warehouse in Draper, Utah, and is responsible for maintaining that warehouse.

b. KNS receives deliveries to the warehouse by tractor-trailer or other delivery truck, and has docking bays for receiving those shipments.

c. KNS installed vinyl curtains above one or more bay doors by bolting them into concrete using a bracket.

d. ~~Several weeks to 30 days~~ One week to one month before the injury to Mr. Wood, a truck owned by UPS hit docking bay B very hard, cracked the cinderblocks where the vinyl curtain was installed, and knocked a couple of bolts loose that were holding the curtain bracket in place.

e. Before the injury in this case, KNS knew of that damage.

2. Based on the undisputed facts, summary judgment is appropriate as a matter of law, because UPS owed no duty to the plaintiffs at the time of injury. UPS's duty ended when KNS became aware of the damage UPS caused to its building. At that time, KNS was in a superior position to repair the damage and defects to the building, or restrict access to the bay so that it could not be used. At this point, UPS had no further duty to people injured by the damage it caused to the building.

3. Summary judgment in favor of UPS is also appropriate because the injury to Mr. Wood was not proximately caused by the damage UPS caused to the building. The defective property was in the sole possession of KNS for ~~several weeks to 30 days~~ one week to one month

before the injury to Mr. Wood occurred. If KNS was negligent in not repairing the door, or in the manner in which it repaired the door, there is intervening negligence by KNS that caused the injury to Mr. Wood. Alternatively, if KNS repaired the door in a manner that was reasonable and not negligent, no party's negligence caused the injury to Mr. Wood. Under either scenario, UPS did not proximately cause Mr. Wood's injury, and cannot be liable as a matter of law.

4. Therefore, the Court grants summary judgment in favor of UPS on Plaintiffs' claims, which are dismissed with prejudice and on the merits.

---------- END OF ORDER----------

JUDGE'S ELECTRONIC SIGNATURE APPEARS AT THE TOP
OF THE FIRST PAGE OF THIS DOCUMENT

4847-5607-9185, v. 1

Return of Electronic Notification

Recipients

DOUGLAS B CANNON	- Notification received on 2017-11-20 13:22:01.767.
CRAIG T JACOBSEN	- Notification received on 2017-11-20 13:22:01.573.
JONATHAN L HAWKINS	- Notification received on 2017-11-20 13:22:02.73.
JOSEPH E MINNOCK	- Notification received on 2017-11-20 13:22:01.45.
ROBERT T DENNY	- Notification received on 2017-11-20 13:22:01.583.
NATHAN R SKEEN	- Notification received on 2017-11-20 13:22:01.64.
ISAAC K JAMES	- Notification received on 2017-11-20 13:22:01.537.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 160900437

Judge:

MATTHEW BATES

Official File Stamp:	11-20-2017:13:21:40
Court:	3RD DISTRICT COURT - SALT LAKE
	District
	Salt Lake
Case Title:	WOOD, STUART, et al. vs. KNS INTERNATIONAL LLC, et al.
Document(s) Submitted:	Order Granting Defendant United Parcel Service Motion for Summary Judgment
Filed by or in behalf of:	MATTHEW BATES
Note from the Court:	Signed with amendments as agreed by the parties in strikeout and underline.

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

CRAIG T JACOBSEN for STUART WOOD et al

JOSEPH E MINNOCK for KNS INTERNATIONAL LLC

NATHAN R SKEEN for UNITED PARCEL SERVICE INC

JONATHAN L HAWKINS for KNS INTERNATIONAL LLC

ROBERT T DENNY for UNITED PARCEL SERVICE INC

ISAAC K JAMES for KNS INTERNATIONAL LLC

DOUGLAS B CANNON for STUART WOOD et al

The following people have not been served electronically by the Court. Therefore, if service is required, they must be served by traditional means:

IN THE 3RD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STUART WOOD, PLAINTIFF, vs. KNS INTERNATIONAL LLC, DEFENDANT.	SUMMARY JUDGMENT MOTION CASE 160900437 JUDGE MATTHEW BATES

BE IT REMEMBERED that this matter came on for hearing before the above-named court on 10-10-17.

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

ONLINE REQUEST # 20017

OFFICIAL CERTIFIED TRANSCRIPT

(From Electronic Recording)

0001

A-P-P-E-A-R-A-N-C-E-S

FOR PLAINTIFF:

DOUGLAS B. CANNON, ESQ.
FABIAN VANCOTT
215 SOUTH STATE STR. #1200
SALT LAKE CITY UT 84111

FOR DEFENDANTS:

NATHAN R. SKEEN, ESQ.
SNOW CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE 11TH FLOOR
SALT LAKE CITY UT 84145

ISAAC K. JAMES, ESQ.

==========

TABLE OF CONTENTS

==========

0002

PROCEEDINGS

(October 10, 2017).

THE JUDGE: How is everybody doing?

MR. CANNON: Good.

MR. SKEEN: Good, Your Honor.

THE JUDGE: Good. This is case 160900437, Stuart and Laurie Wood versus KNS International and United Parcel Service.

Can I get appearances please?

MR. CANNON: Sure. Doug Cannon appearing on behalf of the Woods, Your Honor.

THE JUDGE: Thank you.

MR. SKEEN: Nathan Skeen for UPS.

THE JUDGE: Thank you, Mr. Skeen.

This is the time set for argument on UPS's motion for summary judgment. I've had the time to read the pleadings that were submitted. I appreciate the courtesy copies. Looked at the cases and the exhibit.

Mr. Skeen, whenever you're ready.

MR. SKEEN: I should point out too, Your Honor, counsel for KNS is here as well.

THE JUDGE: Okay.

MR. SKEEN: Codefendant KNS.

ARGUMENT BY MR. SKEEN

MR. SKEEN: So UPS has filed a motion for summary

judgment. We believe there's two bases for which UPS should be granted summary judgment in this case. The first is that UPS does not believe that it owes a duty of care to the plaintiffs in this case. And the second reason is that even if UPS does owe a duty it believes that its action, the chain of causation for its actions was broken by the intervening actions of KNS, another codefendant here.

The facts in this case as they relate to the motions, the motion for summary judgment for the most part I think are completely undisputed. The important facts are that UPS, that KNS leases a warehouse in Draper, Utah. At that warehouse there are two docking bays where tractor trailers will back down their trailers to pick up or deliver goods from the warehouse.

Above the two docking bays above the doorway there KNS installed a metal, I've called them curtains racks. They're, it's a metal bar with weather stripping hanging down from them. The purpose is to keep cold air out in the winter from the warehouse. The racks weigh, I don't know if we have an exact, I think somebody probably has, has weighed it before but I think it's between about 40 and 50 pounds. It's pretty heavy.

About a week or a month before February 4th, 2013 one KNS employee heard a loud bang outside which he believed was the sound of a truck trailer hitting the building. He

went outside and he saw a UPS trailer there. And he identified some damage to the building. There were some bolts holding in the, the curtain rack that had fallen out and there was cracking around the bolt holes.

Now, UPS does deny that in this case that its vehicle did damage to the building, but for the purposes of this motion it is assuming that it was its trailer that hit the building, caused damage to it about one week or one month before February 4th, 2013.

So back to the facts. A KNS employee observed damage on the day of the accident. About one week or one month later a different KNS employee saw damage, saw the curtain rack actually hanging down about eight to 12 inches. That employee was a manager at KNS. He identified that the a, the condition it was in was a dangerous condition but he didn't do anything to a, either remedy the condition right then by fixing it or by restricting access to it or warning others about it. He left. A few hours later he comes back and the curtain rack had actually fallen onto Mr. Wood's head in the meantime.

And after that accident happened Mr. Wood was told by another KNS employee that that other, a third KNS employee had also seen the damage and knew that the curtain rack was going to fall.

So to UPS's first argument that they didn't owe a

duty in this case is that's premised on UPS's status with regards to the building. It was not the possessor of the building, it was not owner of the building. What this... Due to the passage of time between the damage that UPS allegedly caused to the building to the time of the accident, this really is a premises liability case. It's not a truck accident case.

In Utah only the possessors of property owe a duty to keep their property in a reasonably safe condition. And a, what is crucial is the passage of time here. UPS hits a building and then a week or a month later the damage that it causes hurts somebody else. If it were the fact, if it were the case that UPS owed a duty in this circumstance to the plaintiffs and there really is no cut off reliability for people who cause dangerous conditions on other people's property. Once the damage was caused UPS couldn't do anything to fix the damage, it didn't have the authority to go onto the property to fix the damage or to exclude others from the property. At that point in time it really became a premises liability issue where the duty is on KNS.

THE JUDGE: What if there was evidence, and obviously I'm speaking hypothetically here, that UPS knew that the warehouse in this case was owned by a notoriously negligent property manager who never repaired anything.

It was obvious from the outside that there were many aspects of the building that had been in serious disrepair for a long time. And that if they damaged the building in some way that it likely was not going to get fixed.

Does that change their, their duty towards anybody who is on the property?

MR. SKEEN: I'm not really sure what UPS could have done at that time is the problem.

THE JUDGE: Well, not hit the building.

MR. SKEEN: Well, not hit the building in the first place. But afterwards what can they do to, to remedy that condition. If UPS knows that this caused some damage to somebody else's property but it is not its property and it has no right to do anything about it, what can it do I guess is the point that I have there.

I think it's important...

Now let's get to the second argument. There's a case from Rhode Island that we cited to from the Supreme Court of Rhode Island. In that case it kind of, the supreme court there recognized that the trucking company that caused damage to the building similarly, similarly had no right to enter the property, it would be a trespasser if it did so to try to fix the damage.

And so to the hypothetical, first, I don't think there is any evidence of that happening in this case. But

second, would there ever be a cut off for what UPS did if it has nothing, if it can do nothing to fix the damage that it causes.

So if, you know, if there's this property like you've had in your hypothetical that is notoriously not maintained, you cause damage to it and somebody gets hurt by the damage a year later, is that the property owner's fault or the, the person who causes the damage in the first place. And there's really just not much that the property, that the person that causes the damage in the first place can do to fix it.

What I was thinking about more in this case would be like somebody who goes to a super market and spills something on the floor in the super market. And the owner of the super market sees the, the spilled product on the floor immediately but does nothing about it for several weeks and somebody slips and gets hurt. Does that go to the patron who spilled something on the floor in the super market or is it for the property owner to, to answer for it.

I think the answer there is that there has to be a cut off. At some point in time there has to be a cut off to relieve the initial actor of liability, and maybe the liability as to the property owner, and not to the plaintiffs in the first place.

The duty that's owed in premises liability cases

is a nondelegable duty. And our position here is that the duty that was owed to the, to the a, to the Woods for the damage that happened a week or a month before the accident happened was a nondelegable duty and owed solely by them.

On the second note, on the second issue that we have, even if there is a duty UPS believes that as a matter of law the chain of causation for its conduct was cut off by the subsequent acts by KNS, which are also not factually disputed here.

This is under the intervening cause doctrine. An intervening cause is an independent event that is not foreseeable that completely breaks the chain of causation between fault and damages. In many instances the determinatin of whether an act, a subsequent act cuts off liability for the first act is a fact issue but there's also instances where it's not. And we believe this is one of those instances.

One of the instances actually was recognized by the Utah Supreme Court in the Massey (phonetic) case that we cited to. In that case a power company allegedly had powerlines that were hanging too low, it was dangerous. The plaintiff and the employer both recognized the danger posed by those low hanging powerlines but they ignored it and they proceeded to do some work next to it. They had a truck and they put up a boom next to it. It ended up getting the

plaintiff electrocuted.

In that case the Utah, the district court found and then the Utah Supreme Court affirmed that the subsequent negligence as a matter of law cut off liability posed by the initial actor, by the power company's act of putting the powerlines too low. And that's what we believe we have here is the same kind of, similar facts. We have an initial alleged negligent act by UPS causing a dangerous condition that was subsequently ignored by the property owner KNS and that resulted in damage to, to the Woods or harm to the Woods.

The Rhode Island case I talked about earlier had facts that were similar to our case, almost identical. And they applied the same reasoning and law that we have here. In that case a truck backed into a railing, caused the railing to become dislodged. The property owner in that case recognized the damage the day that the, the damage was caused but it failed to take any steps to fix the railing. Nine days later the plaintiff was injured by it. The supreme court in that case found that as a matter of law the proximate cause was not the initial damage caused by the truck but it was the subsequent omissions by the property owner failing to fix the property.

So to wrap things up UPS believes that KNS's conduct in this case satisfies every element for an

intervening cause that would be sufficient to cut off its liability caused by the damage that it, that it caused.

KNS's acts were subsequent in time to that UPS's acts, I guess acts or omissions by KNS. Those acts were that KNS recognized the harm, the damage caused by it on the day of the accident and then one week or one month earlier when the, when the damage was originally caused. They failed to take proper steps to eliminate, eliminate the harm that could be caused by it or to restrict access to the property, or warn others of the damage.

And then these acts were unforeseeable. I don't think, I don't think there is a fact issue on this, on this. I don't believe that UPS could have foreseen that KNS would know of the damage that its tractor caused and then wait on it, sit on it for a week or a month. And then even just a few hours before the accident happened the manager of KNS sees the, the curtain rack hanging down about to fall, recognizing it to be a dangerous condition, but leaves that there. And then just a few hours later it falls on Mr. Wood's head.

So the purpose of the intervening act cause doctrine is to insure that the isolated and remote acts of a, of a negligent actor don't make that party responsible in perpetuity. In other words, if a subsequent act comes along and commits a negligent act that's not foreseeable by the

first party, the first party should not be responsible as a matter of law.

Are there any questions you have, Your Honor?

THE JUDGE: No. Thank you.

MR. SKEEN: Okay. Thank you.

THE JUDGE: Mr. Cannon?

ARGUMENT BY MR. CANNON

MR. CANNON: Thanks, Your Honor.

I'd just like to step back and look at what we did in our responsive memorandum. Because what we did there is we outlined our prima facie case against UPS. We said why they're negligent. They ran into the building, they ran into it hard, they caused the damage.

We took the deposition of UPS, a 30(b)(6) deposition and asked them what are the rules as far as backing goes and we established and showed in our, in our memorandum how they violated the rules on backing. That's negligence. And then we also went through a detailed analysis of the causation that by backing into the door and causing the damage that's what eventually caused it to fail.

And so what we did there, and we now have expert reports and expert reports are going to supplement that and talk about how that initial collision with the UPS truck caused the damage to the overhead door, which caused one or

two bolts to fall out, one or two bolts to loosen and the concrete to be compromised. And that blow eventually led to the failure of the a, metal bracket and fell on my client, Mr. Wood. And so we've gone through to establish that point.

Now, the argument I heard today is a little bit different from what UPS is arguing in the brief. What they're saying is well, you don't, they don't have responsibility as a property owner. That's true. But as an actor you can go onto another person's property and cause damage to that property which injures somebody and you're responsible for that. Timing is not the key issue.

I mean, you can have a defective product put into the stream of commerce that doesn't cause harm for many years down the road. That's not issue.

So what we did was methodically go through and say okay, here is our claim for negligence, here is the negligence, here is the causation, here is our prime facie case.

What practically speaking, the danger you have here, I think the main argument that UPS is making is that well, this was an intervening cause that KNS's failure to take action somehow relieves them of their responsibility.

The practical problem you have with granting a motion at this stage is when we go to trial against KNS,

what they are going to try to do is do two things. They're going to say one, UPS is partially at fault, they are going to try and allocate fault to UPS. And the second thing is KNS I assume is going to say hey, we're not negligent. At that point if UPS is not in the case we are put in a real bind. Because the point of the whole comparative fault is to allow the jury to look at the fault of both parties and say okay, let's compare the fault and if there's fault here or fault here we're going to allocate fault. And so that's, that's, we established the prima facie case and that's where what the intent that should be done.

I don't think KNS is going to agree today that they are negligent. I don't know that the court could rule that as a matter of law today that KNS is negligent. For example, if KNS, if the jury decides KNS is not negligent then that takes out the intervening cause argument. That's, that's the issue there.

On the intervening cause issue specifically going at that specific point, the courts have sort of set two threshold analyses. One, you've got the cases out there that say on--

THE JUDGE: Sorry. I'm still turning over in my head what you were just saying. If, if hypothetically KNS was not negligent in failing to repair the door, under what set of facts would UPS be negligent for striking the door?

Because it, I'm just trying to imagine how, I mean how, (short inaudible, two speakers, same track).

MR. CANNON: I don't think that's the case.

THE JUDGE: Sure.

MR. CANNON: But anything could happen with a jury, Your Honor. I've been there, I've seen it.

I mean, I think, if I can be so bold I think what KNS would say, and I could talk about this a little bit, but they would say okay, T.J. Barney who was the employee who saw the damage, screwed the bolts back in and he thought it was okay. And that's going to be their argument. Now, I don't agree that that is going to carry the day. But that's the argument I think that's going to be made to the jury.

THE JUDGE: Okay.

MR. CANNON: I mean, I don't agree with it. I mean, I think they are negligent.

But my issue is are we deciding KNS's negligence as a matter of law today. And I don't think we're doing that. I mean, they, they've received the pleadings in this case but I don't think they are going to say oh, yes, we acknowledge, we're going to stipulate to liability. Maybe they'll do that at trial. But that, that may not happen.

I mean I, I mean, I'm with Mr. Skeen on this. I mean, there are three instances of where they saw the

damage and, and a, they should have, they should have fixed it.

But let me just talk about intervening cause. There are two important legal things that go to that issue. One is the cases, and we cited them in our memorandum, is the court has indicated that summary judgment on negligence and causation are rarely granted because these are often factual issues.

And the second issue is on the intervening cause doctrine. I think the key case to look at is the a, it's the cause of the guy going into the back of the bus. It is the a, not Massey case, it's the Harris, the Utah Transit Authority case. Because what they do in there, and also the Stevenson case, is they make the point that for an act to be a true intervening cause so it breaks the causation it has to be such an extraordinary act by the second defendant that it's unforseeable. And so that's the burden. And so what they are asking the court to do today is to say no reasonable jury could conclude anything but what KNS did was extraordinary.

THE JUDGE: And whose burden is that?

MR. CANNON: On the superceding cause? That's their burden, because intervening cause is an affirmative defense.

THE JUDGE: Okay.

MR. CANNON: That would be I believe their, their burden.

And so what you have to do is you sort of have to break down in looking at that and say okay, what evidence do we have as to what KNS did. And there are three events that happened.

The first event is the UPS truck hits the building and causes the damage. And so Mr. Barney, who works for KNS, testified in his deposition, I assume will testify at trial, he walks over, he sees the damage, he sees one or two bolts have come out, he sees one or two bolts have loosened, he knows it's compromised. And he sees it's a UPS truck there. That's what he sees. So what he does is he can't put in the one or two bolts have come out but he retightens the one or two bolts that are loose. So he does take action to fix the problem.

And we put in our brief he testifies that based on what I did I thought I had fixed it. Now, we disagree with that but that's going to be his testimony. And that's a foreseeable event that somebody would do that.
And the inference a jury could make was that what he did was foreseeable given the damage that was done to the overhead door. So that's one. And the inference would have to be drawn in our favor.

The second event that is focused on is on the day

of the incident Mr. Kelly is out in the parking lot. And he's going to a meeting and he looks over to the dock door and he sees eight to 12 inches of the bracket is coming off of the concrete. And his testimony that's in the briefing is oh, I looked over at it, I thought it would be okay and I could do it when I came back. Now again, is that a foreseeable event by somebody? He saw it as foreseeable, he saw it as reasonable. And that's what he did. And so I think that's a foreseeable event.

And the third event is when Mr. Wood is sitting in the, he's in the break room and an employee for KNS comes in and says oh, I knew, I knew that was going to fall, we needed to fix it. And we have no context of when that a, employee, we know there's an admission, we haven't been able to find who that employee is, we've deposed everybody. But there is that admission.

And again, I don't think you can take that, and if you take those events can you say as a matter of law what KNS did he, and no reasonable jury could conclude, would conclude that that is such an extraordinary event that it's going to break the causation.

And the courts in looking at this specific issue have mentioned, in fact, I think it's in the UTA case, they talk about how because of the comparative fault statute, I mean, the place for this thing to be resolved is the jury,

because of the comparative fault statute that's where it is supposed to take place. And they are moving away, in fact in the UTA case they move away from this concept that you're going to let the second, these first tortfeasors off because of what takes place.

Let me just talk briefly in the a, Rhode Island case. A couple of points. I brought a, I sent over to a, defendant's yesterday, it's a, it's a subsequent Rhode Island case and if I could hand that to the court. And I gave a copy to counsel, I emailed it to them yesterday.

This is just a, (inaudible word, moved off record) supreme court case. It discusses the case Mr. Skeen talked about. And it notes in this case you sort of have a little bit of similar facts. You had a party, a first party, well, there, this is a Subway store. And their ice machine went out. And so they hired an electrician. The electrician came and fixed the machine. And when he was leaving he gave an extension cord to the owner. And the owner took that extension cord and then used it to hook up the machine to some other plug. And then the extension cord overheated and the building burned down. So they sued the Subway owner, he was responsible, they also sued the electrician for giving him the extension cord.

And the argument was sort of made in this case well, the intervening act of the Subway owner in using the

cord breaks our negligence.

And the court said no, what the lower court did was looked at the facts, they cited this case and said that's a case that's going to go to the jury.

Another point I'd make that distinguishes this Rhode Island case from our case is that in this case, the Rhode Island case, you had the second party who did cause the initial damage, the second party who was supposed to discover it, get it repaired, and they said their failure to get it was intervening act, took no action to fix the situation.

In our case we've got Mr. Barney testifying he did take action to try to fix the situation. And he thought he had fixed the situation. That's why he left it as it, as it was.

So, I know I've covered a lot of ground, Your Honor. You know, when you get into these things sometimes you lose the forest for the trees. But the main point is we've tried to just methodically go through and outline for the court a prima facie case against UPS and why they are responsible for what they did.

I mean, if what happens today, if the court says oh, KNS's intervening cause, UPS's negligence and the fact they caused this, they are the original actors that started this thing, they walk. And then we come in to trial and we

try it against KNS, and if we lose against KNS we have no resort against the party who, for purposes today, has acknowledged that they are negligent.

And so I think--.

THE JUDGE: But that happens sometimes, doesn't it?

MR. CANNON: It does.

THE JUDGE: I mean, there's an expression that is probably not appropriate for this situation, but things happen.

MR. CANNON: Yes.

THE JUDGE: People get hurt and sometimes it's nobody's fault.

MR. CANNON: Well, that's true. But where we've got, where we set up a case against UPS and we're here on a motion for summary judgment, and they are not disputing that they are negligent for what they did.

THE JUDGE: So if, if I'm the UPS driver and I'm backing my truck up towards this dock and I'm sort of weighing the risks of, you know, just how careful do I need to be to make sure I don't hit the building. How am I to know that if I'm not careful enough and I smack that building petty hard, that the building owner is either not going to repair it or is going to mess up repairing it and 30 days later it's going to fall and hurt somebody?

MR. CANNON: I don't know if I understand your question.

THE JUDGE: I guess I'm asking how is the UPS driver supposed to know if 30 days later this guy is going to get hit by a bar on the head.

MR. CANNON: Oh, I mean, they may not know.

THE JUDGE: Well, then how is it foreseeable?

MR. CANNON: Well, no. I mean, if you, I mean, foreseeability is not that this specific thing happens. Foreseeability if you've got, for example, if you put a defective drug into the stream of commerce and you put that drug out there, you may not think that drug has any problems, but then it is consumed by somebody else. And if that drug is defective, whether the company knew about that or not, they are still going to be responsible for that.

What they do know and what we have established in this case is that he hit the building and that he violated the UPS trucking rules when he hit that building. And that's the negligence. What did he cause. The fact that he doesn't know he causes it, he still caused it. And therefore he has responsibility.

It's not that you have to know that exact event is going to happen but you have to know generally if you hit a building and cause a collision where it's going to damage

it--

THE JUDGE: If it--

MR. CANNON: -- it could cause damage to somebody else.

THE JUDGE: It's not so much that he knows somebody is going to get hurt but it seems like he at least has to have some reason to believe that the property owner isn't going to fix it. Or if the property does owner, owner does try to fix it that they are going to do it wrong and it's going to continue to be a hazard. Why, why would he know--

MR. CANNON: But that's a factual issue, that's a factual issue.

THE JUDGE: Well, give me the facts that demonstrate that he would know that.

MR. CANNON: That what?

THE JUDGE: That the UPS driver would know that the warehouse was going to be negligent in either not repairing the building or repairing it in a way that allowed it to continue to be a hazard.

MR. CANNON: But I don't think, Your Honor, the truck driver has to know that. He doesn't have to know that, that the, I mean, the only question is whether it's foreseeable as to what KNS did in reaction to that. It's not--

THE JUDGE: How is it forseeable--

MR. CANNON: -- whether it's not foreseeable. It's not foreseeable to this UPS driver. I mean--

THE JUDGE: Well, foreseeable to who then?

MR. CANNON: I mean, it's foreseeable, for example, to Mr. a, Mr. Barney. I mean, he was the one who fixed it.

THE JUDGE: But Mr. Barney is not the one moving for summary judgment here. I mean, if it's not foreseeable to UPS. I guess I'm, I'm not tracking.

MR. CANNON: We're not, we're not matching up. On foreseeability,--

THE JUDGE: Uh-huh (affirmative).

MR. CANNON: -- the issue on forseeability is not that the specific party who caused the injury has to foresee, specifically know that that took place. It's just you have to know if you cause, if you cause damage to that overhead door is it foreseeable. Okay. Is it foreseeable that the action they took would, could happen. Could, could happen.

THE JUDGE: Okay. So assuming that, what evidence is there that that was foreseeable to UPS or to the driver?

MR. CANNON: Okay. Let me, I mean, it's foreseeable because of the evidence that, I mean I... Maybe

I'm not making the point.

It's foreseeable because Mr. Barney who fixed it, actually screwed the screws back to the top and he looked at it and he said it's okay.

I mean, the question of proximate cause is, is this the cause in fact.

THE JUDGE: Uh-huh (affirmative).

MR. CANNON: Okay. The answer is was it a cause in fact? Yes. Is it foreseeable that a driver who hits an overhead door and causes damage to it with a bracket in it, that that could fall and injure somebody. That's foreseeable.

The question isn't whether they foresee, it's just, I mean, is there evidence that that's, that's foreseeable. You don't have to go through each individual circumstance and say a--

THE JUDGE: So how long is UPS on the hook for?

MR. CANNON: Well, that's a question the jury is going to have to make. I mean, if you've got a defective product which you negligently manufacture and put into the stream of commerce, that injury may not happen for years.

I mean that's, that's a question that the jury has to determine.

THE JUDGE: But this isn't a product. This is a building that's been damaged. How long--

MR. CANNON: Well, it's the same thing. If you, if you--

THE JUDGE: So five, five years later they could still be on the hook?

MR. CANNON: Well, I don't know, Your Honor. Again, that's a factual determination we're trying to make and that's what the jury is, is tasked with doing.

I mean, if you construct a building and you construct it negligently you're going to be on the hook for a long time on the negligent construction of that building.

But that again, that's for the jury to make the decision so that they can allocate fault. And they may decide it's not foreseeable. But that is their call.

And if you look, for example, if you look at a, the UTA case where it talks about a situation, if I could just talk about that briefly. But you've got a UTA, you've got a, a driver who is behind the UTA bus and he is in a Jeep. Okay. And he's going down the road. And he a, there's a UTA bus and he rear ends a UTA bus. And the passenger sues. He sues the driver of the UTA bus.

And the lower court said okay, we're going to say the action of the driver who hit the UTA bus is the intervening cause and we're not going to hold UTA responsible because it's not, it talks about this intervening cause of foreseeability. And the, the a, the

bus driver may say it's not foreseeable that, you know, that I should be at fault for that collusion.

But the court said no, what you're going to do is you're going to let the jury decide were they negligent, the UTA bus, in what they did. And we're going to let the jury make that decision.

I hope I'm being clear. I mean, I think it's, this, I mean, and I get back to the point.

We've gone through, and I think we have established, I mean, they have said, you know, for purposes of this dispute we've got negligence. And if we didn't have, I mean, if KNS, for some reason the jury says they are not at fault we've got a party who has admitted they are negligent and then all of a sudden they are like like oh, because a, there's some view that there is no a, a reasonable jury couldn't conclude, conclude that KNS must have fixed it. I mean, that's what we're saying is no reasonable, a reasonable jury would conclude that the KNS had to fix it.

Does that make sense? I don't know if I'm making sense.

THE JUDGE: You, the, the Jackson-Hicks case a, I'm sorry, this is a completely unrelated question, the second to the last paragraph of that case states that,

> Plaintiff carries the burden of

showing that any subsequent injury is one that might reasonably, might be reasonably expected to follow from the original tort and not one due to an unforeseeable and independent cause.

MR. CANNON: Correct.

THE JUDGE: So that seems to contradict when I asked, when I asked you earlier where the burden was, I mean, the court seems to suggest in Jackson-Hicks that the burden lies with you.

MR. CANNON: Could you read that to me again, Your Honor?

THE JUDGE: Sure. And I apologize for kind of ambushing you with this.

MR. CANNON: No, no. This--

THE JUDGE: I think this case was cited by the (short inaudible, away from mic) and so, so it's the second to the last paragraph. The full paragraph says,

> In Skulingsberg v. Berkover (phonetic) we hold that a plaintiff carries the burden of showing that any subsequent injury is one that might be reasonably expected to follow from the original tort and not one due to an unforeseen and independent cause.

0028

To me they, the seem to be saying there that the burden of demonstrating foreseeability lies on the plaintiff, that the burden is not on the defendant to show unforeseeability.

MR. CANNON: Well, I think there are two things.

THE JUDGE: Uh-huh (affirmative).

MR. CANNON: We have the burden as far as our proximate cause argument that if a, if the truck hits the building and causes the damage, which we have sort of acknowledged it did.

THE JUDGE: Uh-huh (affirmative).

MR. CANNON: And that's, and that's negligent, okay. Is that the cause of Mr. Wood's injury. We have that.

And causation consists of his two factors; one is cause in fact and foreseeability. That is the type of, that this can happen. And we have the burden on that. And I believe in our briefing we have established that. We have established negligence, we have established and we've gone through and said they hit the building, they violated the rules, that's negligent, they have acknowledged it was negligent. Causation, is that what caused the, the bracket to eventually fall. We put in facts that if you, it says that it damaged it, it caused it. No other places had any problems, this is the only one that fell. And we've got

the warehouse manager saying that based upon the collision that's why it fell. We've got cause in fact.

So then the question, do we have foreseeability. Do we have foreseeability that if you back into a door and you cause damage to something that has a bracket, is it foreseeable to the general person that that can, not that it's foreseeable, specifically the driver, that he knows that could happen because you can have a lot of things happen where people don't know what the results are. But is it foreseeable. And the answer is it is foreseeable.

And that's I think where you get into this question on timing and stuff like that. Is it foreseeable that that damage can then cause the injury one week later or four weeks later. And I think that is foreseeable. And that's, and we put in evidence that, you know, that's. That's what caused it.

And then on the intervening cause though if what they are going to come in and say okay, yes, we caused it, we were negligent, we caused it. But now because KNS didn't fix it, they saw the problem and they didn't fix it, we are off the hook because it's such an extraordinary event that we don't have to do it. I think that's their, at that point that is their burden to come forward to show the intervening cause.

But even if it's my, even if it's, if it's my

burden, what I've tried to establish through the pleadings, Your Honor, is that if you look specifically at what was done in response to that damage to the overhead door, is what KNS done foreseeable. Can a jury see, conclude that that is foreseeable. And I think they can based upon the testimony of the people at KNS as to what they did.

For example, Mr. Barney says I tried to fix it, it looked okay to me. Mike Kelly said I looked at it, it looked okay to me, it didn't look like it was going to fail. A jury based on those facts could find that KNS not doing everything perfectly, I mean, they did some things but they didn't do it perfectly, could they find that negligence of KNS was foreseeable. And I think they certainly can.

And I think to grant summary judgment at this stage to say what KNS did was so extraordinary and unforeseeable it is going to somehow break the causation I think doesn't allow us our right to a jury trial. Because at the trial that's what the jury is going to do is they are going to allocate fault.

And I think the view is let it go to trial and then if you hear the evidence and then decided that that's the case then the court can rule on a directed verdict or something like that.

But I, I think there's plenty of evidence as to the fact that what KNS did in this case, when you look at it,

what they are trying to say is well, he just didn't do anything. And that's not the case. The testimony on the record is they did do some things and they did look at it, and they have explanations of why they did it. And that's to me the key point is why it needs to go to the jury because you've got those factual issues.

THE JUDGE: Okay.

MR. CANNON: Helpful, Your Honor?

THE JUDGE: Uh-huh (affirmative).

MR. CANNON: Anything else I can help you with?

THE JUDGE: No. Thank you.

MR. CANNON: Thanks. I hope I've aided it, not confused it. Thank you.

THE JUDGE: Thank you.

Mr. Skeen?

FURTHER ARGUMENT BY MR. SKEEN

MR. SKEEN: I'll try to go through my notes that I've taken. I'm kind of scattered on the issues a little bit.

But I guess to start out maybe the first thing I should talk about is the foreseeability. It's the foreseeability of the subsequent negligent act. We have three different people from KNS who knew of the damage; one immediately after it happened, one the day that, two the day that it happened.

I don't believe Mike Kelly ever said I thought it would be okay. I think his testimony actually was I didn't think anybody would be going there. And that's why he didn't fix it. He recognized that it was dangerous.

But Mr., Mr. Wood, the plaintiff in this case, his testimony is that the third employee told him, he told me he was sorry, that he knew the thing was going to fall. He said that we should have taken care of it.

I don't think it's reasonable, I don't think it is reasonably foreseeable for UPS to have, to have foreseen that three different KNS employees would have seen the damage and not done enough to fix it or to rope it off.

Even on the day of the accident he put the bolts back up that he could. But they were bolts that still couldn't be up there because the cracks were too big.

I don't know--

THE JUDGE: What if the, I mean, if the damage is irreparable. I mean, UPS hits the building in a way that there's nothing you can do, you've just got this dangerous condition now. I mean, does that alter anything?

MR. SKEEN: I think, no, I don't think it does. I think that if you can't fix it then, and it's dangerous then you should rope it off and warn, either warn people about it or tell people not to go there.

And that's what the court in the Rhode Island case,

and the facts are about the same as our case, said that was not done. They didn't fix it and they also didn't warn of it and they also didn't restrict access to it.

And those are three things that I brought up already that UPS could not have done. They didn't have the authority to do any of that.

One issue that was, that was, that I think you already addressed was this was not a products liability case. And I think that's important here because the duties are that, the duty to keep the property safe was KNS's duty. Now KNS is a party here. KNS has not opposed the summary judgment motion.

If the court rules today that UPS was not, was not, as a matter of law cannot be negligent then UPS won't be on the special verdict form. And so there's no risk of KNS trying to allocate fault to UPS, they can't do it as a matter of law if the court says as a matter of law UPS was not the proximate cause of the damage.

Now, for the purposes of today not only is, is UPS saying that KNS was negligent, the plaintiffs are saying KNS was negligent. And they brought up a lot of facts in their opposition about what KNS failed to do.

And it's our position that all of these things are unforeseeable. And I don't know, regardless of who the duty, who the duty is to establish unforeseeable,

unforeseeability lies with, either way I don't think there's a, you can't show that that was foreseeable that, that UPS would hit a building, cause some damage that three weeks later would still be ignored by KNS and not, and including just an hour before this happened that, that KNS's manager would recognize that as a dangerous condition and think that it's okay to leave and then fix it later on.

Those are three, there are three people from KNS. And it would be unforeseeable I believe for UPS to, to see their negligence in the future.

Let's see. I'm not sure if there's any, if it's worth really getting into the, the Rhode Island case law any further.

I guess one thing I would address with the case that's been brought up today, the Pantalon (phonetic) case. The Supreme Court of Rhode Island in that case it referenced at length the, the VFW case which is the one that is factually similar to ours. And it said that at the very end of the decision that they affirm the principles in the VFW case. Its determination was just that the facts of the Pantalon (phonetic) case were different and that they could raise a fact issue on unforeseeability. It wasn't a situation where a third party caused damage to a building. It was a third party knowing of a, of an outlet that was dangerous and saying you can use my extension cord but just

temporarily. And was it foreseeable that the owner who said I don't have time to fix it right now, we'll use it longer than temporarily. That's why, that's why there was a factual, a fact issue on foreseeability in that case. The facts really are different from ours.

And just a year, and earlier the VFW case is pretty clear that striking a building and then having, having an injury caused 10 days later would be unforeseeable, specifically if the property owner knew of the damage.

THE JUDGE: What if in this case there's no negligence by, by KNS? That they took, took steps to repair the building in a non-negligent way. Despite that the bar falls and injures the plaintiff. Is UPS on the hook?

MR. SKEEN: I don't think so. Because if, if KNS sees what UPS did to the building. Let's just put UPS and KNS issues, okay. So UPS backs into the building and it sees the cause, it sees the damage that it caused but it, it doesn't believe that, that the damage would progress to the point where the bar would fall down, and it would be not negligent to do that. Just like you, just like KNS would be in that situation. There would be no negligence by anybody here, it would be an unforeseeable act by anybody.

THE JUDGE: Well, but I mean in that hypothetical UPS has already been negligent by striking the building and

causing the damage to begin with.

MR. SKEEN: Causing the damage. But not the proximate cause. Remember there is foreseeability for an initial negligent act no matter what. It's not strict liability if you cause damage to this building and it hurt somebody later on, you're on the hook for it. If you non-negligently respond to that damage, if KNS does or UPS does, then there's no negligence in the end.

THE JUDGE: Well, I guess in the, in the example I'm giving you, if UPS strikes the building--

MR. SKEEN: Right.

THE JUDGE: -- that's negligence. They damage the building. We can see that that could injure somebody. KNS says oh, we'll go fix it, and they do fix it. But despite fixing it in a non-negligent way the damage is such that it still falls. I mean, doesn't it seem that it's, there's no, there's no intervening negligence to break the causal chain? UPS hit the building, somebody got injured by it 30 days later. It doesn't, I mean, isn't there still approximal cause in that example?

MR. SKEEN: I don't think there is proximate cause there because I think you, in that situation you would be saying okay, we have the initial person causing the damage.

THE JUDGE: Uh-huh (affirmative).

MR. SKEEN: Somebody in between fixing it in a non-negligent manner and the damage, the harm results anyway. If that were the case that UPS could be on the hook for that then I think there really would be, it would be strict liability. I don't think there's any difference there. If you cause damage to a building and it hurts somebody else then you're on the hook for it. I think there is a proximate cause aspect to it.

And I think it also is ignoring what we have here again which is that this isn't a truck accident case, it really did become a premises liability case. When it came, when it, it was no longer about damage to the building, it was about the failure to repair that damage. And so if KNS didn't fail to repair that damage then I think it's just an accident.

I don't think, like you said earlier, not every accident requires somebody to be on the hook for it.

Any other questions, Your Honor?

THE JUDGE: No.

MR. SKEEN: Okay. Thank you.

MR. CANNON: Your Honor, can I just respond quick to two points?

THE JUDGE: Sure. I'll give Mr. Skeen the last word. But if you'd like to make a few more points that's fine.

FURTHER ARGUMENT BY MR. CANNON

MR. CANNON: Maybe I can just get a little more clear. On the intervening cause, the issue on foreseeability is in this case the evidence is Mr. Barney saw the problem, he tried to fix it, he thought he fixed it as best he could. Is that a foreseeable act. And I think that's what the issue to look at on intervening cause is that, is what he did, is trying to fix it, although he didn't fix it, so extraordinary that it takes it outside. So I think the foreseeability is that, is it foreseeable he would try to fix it, and he did. And I think that's foreseeable and a jury issue.

I think the second issue, and I think if I can be clear, there's foreseeability on the intervening cause but there's also foreseeability on proximate cause. And the question on foreseeability and proximate cause is, can a jury conclude it's foreseeable that you could have this damage and that it could fall on somebody's head. Now here we've got that that could have occurred within one week and, and four weeks. That's sort of the testimony that's in the record. And I think it is foreseeable that if you cause that type of damage that it is foreseeable. I mean, it's the cause in fact. We've got evidence it is the cause in fact. Is it foreseeable that it would fail within that period of time and could potentially injure somebody. I

think the answer to that is yes.

Thank you.

THE JUDGE: Okay. Mr. Skeen, anything you'd like to add.

MR. SKEEN: Sure. Just one more thing.

FURTHER ARGUMENT BY MR. SKEEN

MR. SKEEN: Even if the conduct of Mr. Barney would be foreseeable, what would not be foreseeable is the manager seeing that Mr. Barney's attempt to fix it failed before the accident happened. And the other KNS employee knowing the same thing and saying we should have fixed it before this happened, we knew it was going to fall. So even if Mr. Barney's negligence in failing to fix it properly could be foreseeable, the other two employees who had knowledge from KNS about the damage, you know, just a couple hours before the accident happened and failed to do anything about it would be unforeseeable.

Thank you.

THE JUDGE: Okay. Thank you. All right. I'd like to take about 15 minutes. I want to read over the a, Pantalon (phonetic) case and look at a couple of things. So if the, if the parties wouldn't mind waiting a, around. I'll take some time. I'll try to be out by about 35 or maybe 20 until and a, I should be ready to make a ruling at that point.

(Recess)

COURT'S RULING

THE JUDGE: Okay. We're back in the record. It's case number 160900437. The party or the a, attorneys are present, the parties aren't here.

I've had the time to review the moving papers, to look at a, the applicable cases a, to consider the policies at play here. And I have to say this is, this is a very interesting fact pattern. This would maybe make a good law school question. I, at first glance I didn't think I'd wrestle with it quite the way I have. But I, I guess I appreciate getting to look at this. And I appreciate argument from the parties, it was very very helpful.

For the reasons that I'm going to put on the record I'm going to grant the motion to, I'm going to grant the motion for summary judgment and I'll explain why.

First off, I find that the facts are undisputed that party KNS operates a warehouse in Draper and that KNS is responsible for maintaining that warehouse.

KNS receives shipments at the warehouse by tractor trailer or, or by other delivery truck and has docking bays for receive those shipments. It's undisputed that KNS installed vinyl curtains on one of the bay doors, at least one of the bay doors, bay door B I think it was. And that

they were bolted into the concrete using a bracket.

And it also for purposes of this motion it is undisputed that several weeks, 30 days to several weeks before the injury in this case a truck owned by UPS hit docking bay B very hard and has cracked the cinder blocks and knocked a couple of bolts loose that were holding that bracket in.

It's also undisputed that before the injury in this case that KNS knew about that damage.

Based on those undisputed facts I find that summary judgment is appropriate as a matter of law because a, UPS had no duty towards the plaintiff in this case at the time of the injury. UPS's duty ended when KNS became aware of the defect upon its building. At that point KNS as the owner of the property is in a superior position to repair the damage or to block off the a, to block off that bay so that it is not used. And at that point UPS has no further duty towards people who might be injured by the door. They obviously have a, they have continuing liability toward KNS for damaging the building but their duty at that point ends.

Additionally I find that the, that the injury to Mr. Wood is not the proximate cause, it was not proximately caused by UPS's damage to the building.

I make this ruling without deciding as a matter of

law whether KNS was negligent. But where the defective property in this case was in the possession of a third party for what appears to be at least 30 days it seems to me that as a matter of law UPS cannot be liable and is not the cause of the injury to, to Mr. Wood in this case.

It seems to me there are essentially two, two possible fact scenarios relating to causation. First, UPS hits the door and KNS is negligent in either not repairing the door or is negligent in how it repairs the door and the and the door falls. And if that is the case then clearly we have intervening negligence and KNS is liable for the injury to Mr. Wood.

Second possible fact scenario would be that UPS hits the door, KNS repairs that door in a way that everybody agrees and the jury agrees is not negligent, repairs it in a reasonable manner, and despite that the door falls. And that is a case in which, as I mentioned earlier, stuff happens and nobody at that point would be liable for the injury to the plaintiff. It was just an unfortunate accident.

So based on that I find UPS, UPS's actions cannot be the proximate cause of Mr. Wood's injury and I'm going to grant the motion for summary judgment.

Does either party need a clarification on that?

MR. CANNON: Does that mean that UPS can't be on

the verdict form, Your Honor?

THE JUDGE: That's a question I think that's left to the comparative, to the comparative negligence statute.

MR. CANNON: Your Honor, if they, if they can be put on the verdict form then that puts us, that's puts us at extreme disadvantage, Your Honor.

THE JUDGE: I understand that.

MR. CANNON: I mean, you can't say they are not, they are not liable as a matter of law, and then allow them to be on the verdict form.

THE JUDGE: So 78B-5a-21-4 (phonetic?) describes when fault can be allocated to a non-party. Based on my ruling today UPS would become a non-party at the time of trial.

You know, I'm not going to make a ruling on, about that now simply because I think I, I think I would be error, I mean not error, but it would be kind of stupid for me to do that without a little briefing on the question.

MR. CANNON: Well Your Honor, you've just, I mean by ruling as a matter of law that no jury could conclude that they could be at fault, you basically said they are not at fault.

THE JUDGE: That's right.

MR. CANNON: And you can't then turn around and put them on the verdict form and say jury, you can allocate

fault to them because they can be at fault.

THE JUDGE: Well, Mr. Cannon, I'm not saying they are going to go on the jury form. I'm just saying I'm not ready to make that decision.

MR. CANNON: Your Honor, you've put us in a terrible position. I mean, okay. I mean, it's just, I mean it, you can't, you cannot grant summary judgment and say they're not liable as a matter of law and then allow them to turn around and be put on the verdict form so the jury can allocate fault to them.

THE JUDGE: Okay. Well--

MR. CANNON: Because then, then you're saying that they can be held liable for their fault.

THE JUDGE: Well that, that sounds like an excellent opening paragraph for a motion in limine to keep UPS off the jury form.

MR. CANNON: But Your Honor, if (short inaudible) do that because it should be just, it should be just you can, I mean--

THE JUDGE: Well, you may be right but I'm not Judge Learned Hand and I need a little briefing on the subject before I make, make that ruling so--

MR. CANNON: Well I get stung by--

THE JUDGE: I appreciate your frustration.

MR. CANNON: I get stung by this ruling,

Your Honor, because a, it's a factual issue. We're entitled to a jury trial. The court has basically said that I make the factual determination. I'm just stunned by this ruling.

THE JUDGE: Okay. Well there, there are a whole group of people upstairs who are happy to correct this ruling if it's wrong. I would honestly welcome their input if either party is interested in taking this up.

MR. CANNON: We will, Your Honor. We will.

THE JUDGE: Because I think it's, like I said, I've wrestled with this a great deal. I mean, it's a very close question legally. It's a very interesting fact pattern.

MR. CANNON: But Your Honor, if it's a close question then you should let it go to the jury.

THE JUDGE: Well, it's not a close question for the jury, it's a close question legally. I mean this, Mr. Cannon, this really is a question of legal duty and causation.

I mean to be honest, at first glance I, it seemed to me that holding UPS liable for something that happened 30 days after they struck the bay door was completely ridiculous. Just a sec, before you stand up. But as I dug into the case law and as I listened to your argument I realized that the Utah Supreme Court is drifting closer and

closer and is headed in the direction that maybe disagrees with that at first look.

I still am not convinced that legally UPS should be on the hook. But I appreciate it's a very close legal question, and the Utah Supreme Court or the Court of Appeals may disagree with me.

But for now my ruling is going to be that it's not going to go to a jury. UPS will be out of the case on summary judgment.

I'll leave the question as to whether or not they can be on the verdict form for an appropriate motion. And simply because I, I'm not going to make that decision without briefing. Okay. I made this decision after reading the four inch binder of materials and looking at about a dozen cases. I'm not going to make that decision just off the cuff.

MR. CANNON: May I just make a quick comment, Your Honor?

THE JUDGE: Sure.

MR. CANNON: I mean two comments. On the factual record is that it happened within a week to 30 days. It wasn't 30 days. The factual record is it's a week.

The second thing, Your Honor, if the court were to somehow say okay, based on briefing I'm going to put UPS back on the verdict form and say okay, now you can do it. Then is

the court going to go back and stick them back in the case? And I think the answer is no to that.

It just, you cannot have a party which you've dismissed as a matter of law and let them show up on the verdict form.

THE JUDGE: Well, Mr. Cannon, you seem very convinced by that position. I think you'll have, you may be successful in convincing me or another judge. Just FYI, I will not be the judge on this case after January. There's likely going to be one of the new appointees by the governor taking this calendar and I'm being involuntarily reassigned out to Tooele for a tour of duty out there. But a, that's my ruling.

Mr. Skeen, if you'll draft up an appropriate order. And then we'll leave, then we'll leave the question for what happens to UPS for an appropriate motion at a later date.

Okay. Any other questions?

MR. SKEEN: No, Your Honor.

THE JUDGE: Okay.

MR. CANNON: Thank you, Your Honor.

THE JUDGE: Thank you. We'll be in recess.

WHEREUPON, the hearing was concluded.

==========

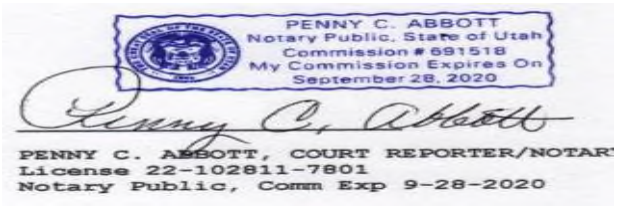
REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded proceedings in the matter of Wood vs. KNS, hearing date 10-10-17, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 48, inclusive, including where it is indicated that the recording was inaudible.

I further certify that I am not of kin nor otherwise associated with any of the parties to this cause of action and am not interested in the event thereof.

WITNESS my hand and official seal this 29th day of October, 2017.



PENNY C. ABBOTT, COURT REPORTER/NOTARY
License 22-102811-7801
Notary Public, Comm Exp 9-28-20

0049