IN THE UTAH COURT OF APPEALS

STUART WOOD and LAURIE WOOD Plaintiffs/Appellants, v. KNS INTERNATIONAL, L.L.C., a Utah limited liability company and UNITED PARCEL SERVICE, INC., a Delaware corporation, Defendant/Appellee.	)	Case No. 20180040-CA Dist. Ct. No. 160900437

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court, Salt Lake County, Utah
Honorable Matthew Bates, Presiding

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LIST OF CURRENT AND FORMER PARTIES

Parties to the proceeding in the appellate court and their counsel:

1. Appellants Stuart Wood and Laurie Wood, represented by Douglas B. Cannon and Christopher F. Bond, of Fabian VanCott; and Craig T. Jacobsen.

2. Appellee United Parcel Service, Inc., represented by Andrew M. Morse and Nathan R. Skeen of Snow, Christensen & Martineau.

Parties to the proceeding in the court whose order is under review that are not parties in the appellate court proceeding:

1. Defendant KNS International, L.L.C., represented in the trial court by Joseph E. Minnock and Jonathan A. Hawkins, of Morgan Minnock Rich & Miner; and Isaac K. James, an attorney in Phoenix, Arizona.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

On February 4, 2013, Appellant Stuart Wood was injured when a curtain rack and bracket weighing approximately 45 lbs. fell from a delivery bay doorway in a warehouse that was managed and operated by KNS International, L.L.C. ("KNS"). Mr. Wood and his wife, Laurie Wood (collectively "the Woods"), brought suit against Appellee United Parcel Service, Inc. ("UPS"), claiming that a UPS truck backed a trailer into the building one week to one month earlier, causing damage to the building that eventually led to the curtain rack and bracket falling. After the close of fact discovery, the district court granted summary judgment in favor of UPS on the basis that the Woods could not establish the duty and proximate cause elements of their negligence claims.

This Court should affirm the district court's ruling because UPS did not owe a duty to the Woods at the time of Mr. Wood's injury. The dangerous condition was located on property that was possessed and controlled by KNS, KNS had actual knowledge of the condition, KNS negligently attempted to repair the condition, and a significant period of time elapsed between KNS becoming aware of the damage and Mr. Wood's injury.

The district court's ruling should also be affirmed because a reasonable jury could not conclude that UPS proximately caused Mr. Wood's accident. The causal chain between UPS's alleged actions and Mr. Wood's injury was severed by the unforeseeable and extraordinary acts (or lack thereof) of KNS.

STATEMENT OF THE ISSUES

ISSUE NO. 1: Did the district court correctly rule that UPS did not owe a legal duty of care to the Woods at the time of Mr. Wood's injury?

Standard of Review: "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." *D.U. Co., Inc. v. Jenkins*, 2009 UT App 195, ¶ 7, 216 P.3d 360 (quoting *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600).

Preservation: The issue was preserved in the parties' briefing of UPS's motion for summary judgment. (R. 342-995, 1036-1154, 1165-1210.)

ISSUE NO. 2: Did the district court correctly rule that no reasonable jury could conclude that UPS proximately caused Mr. Wood's injury?

Standard of Review: "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." *D.U. Co., Inc. v. Jenkins*, 2009 UT App 195, ¶ 7, 216 P.3d 360 (quoting *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600).

Preservation: The issue was preserved in the parties' briefing of UPS's motion for summary judgment. (R. 342-995, 1036-1154, 1165-1210.)

STATEMENT OF THE CASE

The district court entered its Order Granting Defendant United Parcel Service Motion for Summary Judgment on November 20, 2017, dismissing the Woods' negligence claims against UPS. (R. 1765-1769.) On January 3, 2018, the Woods dismissed their claims against the other defendant, KNS International, LLC ("KNS"), after those parties entered into a settlement agreement. (R. 2136-2138, 2155-2159.) The Woods now appeal the dismissal of the claims against UPS.

Mr. Wood was injured on February 4, 2013 while delivering packages to a warehouse that was managed and operated by KNS ("the Warehouse"). (R. 57-59, 1134-1136.) UPS, FedEx, and other delivery companies used the Warehouse docking bays to

either deliver or pick up shipments from the KNS Warehouse. (R. 400-401.) Mr. Wood was injured when a vinyl curtain and metal bracket above one of KNS's docking bay doorways fell and struck him in the head. (R. 58-59.)

Before Mr. Wood's accident, KNS purchased and installed the vinyl curtain and bracket on the docking bay "to stop the hot air [from] leaving the warehouse during the cold months." (R. 404, 430.) KNS installed the vinyl curtain on the outside of the dock door. (R. 416, 507, 555, 664.) To install the metal bracket that held the vinyl curtain above the dock's doorway, KNS employees "drilled" holes in the top of the cinderblock doorway and drilled "cinderblock concrete screws" through holes in the bracket into the doorway. (R. 654-655, 660.) After installing the vinyl curtain, KNS never performed any maintenance on it. (R. 560.)

After the vinyl curtains were installed, but before Mr. Wood was injured, KNS employee Tristin James Barney heard trucks hit the building "multiple times."[1] (R. 666-667.) About "one week or one month" before Mr. Wood's injury, Mr. Barney "[h]eard a bad bang" when a driver backed into docking bay B. (R. 666, 670.) Immediately after hearing the bang, Mr. Barney inspected the dock and noticed that the "[c]inderblock [wa]s a little cracked" and one or two of the anchors had fallen out on the very far left side" of the overhead bracket supporting the vinyl curtain. (R. 667-668.) Mr. Barney, who did regular inspections of the building, had not seen any problems with the structure of the building in that area before. (R. 668-669.)

After the bang, Mr. Barney "tightened a couple" of the concrete screws in the overhead bracket holding the vinyl curtains, but he did not put one or two of the concrete

[1] In fact, a different KNS employee had seen Mr. Wood's delivery truck "hit the building" many times before his injury. (R. 480, 510, 512.)

screws back into the bracket because "the structure was compromised" and no longer would have held the bolt(s). (R. 671, 675.) Mr. Barney did not see the truck hit the building, but believed it was a UPS truck because a UPS truck was there after the bang.[2] (R. 665-666, 677, 697.)

Sometime on February 4, 2013, but before Mr. Wood's accident, KNS employee Gavin Thain saw that "some bolts and the bracket were missing" from the vinyl door on the dock. (R. 535-536.) A different KNS employee (Brandon Bayles) had also heard "a loud noise" on that day when another truck backed into the dock.

Then, at approximately 1:00 p.m. on the same day, Michael Kelly, the Vice President of KNS, was driving away from the KNS warehouse when he noticed damage to the KNS warehouse above one of the docking bay doorways. He "could see that" about "8 to 12 inches" of the vinyl curtain bracket "was hanging down at an angle" about "an inch and a half." (R. 425.) Mr. Kelly proceeded to drive away from the KNS facility without telling anyone about the damage and 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.) He "could have" told Mr. Thain not to let anyone else use the dock, but he "was running to a meeting" and he "didn't think there was any danger to anyone." (R. 428.) By the time Mr. Kelly

[2] For the purposes of UPS's summary judgment motion only, UPS did not argue that its truck did not strike the building and cause the damage Mr. Barney observed. It is notable, however, that no one (including Mr. Barney) ever reported to UPS or KNS that a UPS truck hit the building on that day, that Mr. Barney never worked at the times UPS delivered to the KNS warehouse one week to one month before Mr. Wood's injury, that UPS's driver denied striking the KNS warehouse, and that UPS's maintenance and inspection records for each of its trailers that was taken to the KNS warehouse one week to one month before Mr. Wood's injury do not indicate any damage that would be consistent with striking the KNS facility. (R. 445, 457, 564, 598, 678-679, 706, 720-722, 773-774, 776, 786, 861, 869-870, 883, 885, 890, 893-894, 1999-2046, 2048-2049.)

returned from his meeting one to two hours later, Mr. Wood had been injured at the KNS Warehouse by the curtain and bracket falling on his head. (R. 461, 617-618.)

After the accident, a KNS employee reported to KNS's Warehouse Manager, that he had heard a truck hit the building, and that the vinyl curtain bracket above the dock door where Mr. Wood was injured had been loose and had been missing bolts before Mr. Wood's injury. (R. 481-482, 542.) A KNS employee also told Mr. Wood after the accident that "he was sorry, that he knew that thing was going to fall. He said we should have taken care of it." (R. 970.)

In operating the Warehouse, KNS employees were instructed to report any safety concerns to their supervisors so that the Warehouse Manager, who has safety training, can address those concerns. (R. 474, 500-501, 581.) The Warehouse Manager at KNS was responsible for "mak[ing] sure that, as much as possible," the Warehouse was "a safe environment." (R. 489.) This responsibility required the Warehouse Manager to let the property manager from Draper Investors know if something is "maybe not safe that needs to be replaced or fixed." (R. 491.) KNS also acknowledged its responsibility to keep attachments to its building and their doorways "as safe as [they] can" to "prevent injury," investigate "any doorway when that part of the doorway which is overhead is hanging down," fix problems when there is a safety hazard. (R. 387-388, 390-392, 491-492, 648-649.)

Based on these undisputed facts, UPS filed a motion for summary judgment on July 21, 2017. (R. 342-995.) UPS argued that it owed no duty to Mr. Wood, and that even if it did, UPS's alleged actions could not be the proximate cause of Mr. Wood's injury. (R. 343.) In response to UPS's motion for summary judgment, the Woods did not dispute that KNS "was negligent 1) by failing to repair the concrete holding the vinyl curtain, 2) by

not taking the vinyl curtain down, and/or 3) by failing to notify drivers like Mr. Wood of the problem with the vinyl curtain in Docking Bay B." (R. 1058-59.)

The district court entered its order granting UPS's motion for summary judgment on November 20, 2017. (R. 1765-72.) It held that summary judgment was appropriate because, assuming a UPS truck damaged the KNS building, UPS owed no duty to the Woods at the time of his injury. (R. 1766.) This ruling was based on KNS's knowledge of the damage, and its position to repair the damage or restrict access to the area, prior to Mr. Wood's injury. (R. 1766.) The district court also held that summary judgment was appropriate because Mr. Wood's injury was not proximately caused by UPS. (R. 1766.) This ruling was based on two alternative facts. Specifically,

> 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.

(R. 1767.)

After the trial court granted UPS's motion, the Woods settled their claims against KNS, which resulted in the entry of a final, appealable judgment. (R. 2155-2159.)

SUMMARY OF THE ARGUMENT

To prevail on their negligence claim against UPS, the Woods were required to prove, among other things, (1) that UPS owed them a duty of care, and (2) that a breach of that duty by UPS proximately caused the Woods' damages. The duty analysis focuses on categorical rules, whereas the proximate cause analysis focuses more on the foreseeability of injury based on the particular facts of each case.

At the time of injury, UPS did not owe a duty to Mr. Wood because UPS did not control the property, and the possessor of the property had actual knowledge of the

dangerous condition but failed to remedy it. Because UPS was not in a position to remedy a situation on property it did not control, the law does not impose a duty on UPS in this situation. The Woods, comparing this action to scenarios where a truck causes immediate harm to someone else, or where a possessor of property creates a dangerous condition on its own property that leads to an injury sometime later, argue that the factors relevant to whether a duty of care exists weigh in their favor. Consideration of the undisputed facts of this case reveals otherwise. UPS did not possess or control the property with a dangerous condition—KNS did, and it had knowledge of that condition for one week to one month before Mr. Wood was injured, but failed to take reasonable steps to remedy that condition. If UPS owed a duty at the time of Mr. Wood's accident, a person would be perpetually liable for all harm that results from the hazardous condition he or she creates on property possessed by someone else. Imposing such a duty would ignore KNS's ability—and UPS's inability—to remedy the hazardous condition, as well as the remedy the Woods were able to pursue from KNS. These facts, along with the passage of time, demonstrate that UPS did not owe a duty of care to the Woods at the time of Mr. Wood's injury, consistent with RESTATEMENT (SECOND) OF TORTS § 452.

The Woods' argument that the district court could not decide the issue of proximate cause in this case as a matter of law must also fail. KNS's actions, which the Woods agree were negligent, were unforeseeable and extraordinary. One KNS employee knew of the damage allegedly caused by UPS one week to one month before Mr. Wood's accident, but negligently failed to fix it. The Vice President of KNS noticed worsening damage just hours before Mr. Wood's accident, but failed to take any action to prevent the accident because he was on his way to a meeting. At least one other KNS employee knew of the damage, that the curtain and bracket were going to fall, and that it should

have been fixed before Mr. Wood's accident. A reasonable juror simply could not conclude that KNS's repeated failure to remedy a known hazardous condition was foreseeable and not extraordinary.

The district court correctly granted summary judgment in favor of UPS based on the Woods' failure to establish the existence of a legal duty, and on the basis that UPS was not the proximate cause of the accident. This Court should affirm that ruling.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT UPS DID NOT OWE A DUTY TO PLAINTIFFS AT THE TIME OF THE ACCIDENT.

"[W]hether a duty exists is a question of law," and "[a]bsent a showing of duty, the plaintiff cannot recover." *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 319-20 (Utah 1997) (citations and quotations omitted). "A court determines whether a duty exists by analyzing the legal relationship between the parties, the foreseeability of injury, the likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations." *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶ 19, 215 P.3d 152. "Legal duty, then, is the product of policy judgments applied to relationships." *Id.* (quoting *Yardz v. Woodside Homes Corp.*, 2006 UT 47, ¶ 14, 143 P.3d 283).

A. *UPS did not owe the plaintiffs a duty because UPS did not control the property and the property owner had actual knowledge of the condition*.

This case falls within the rule stated in RESTATEMENT (SECOND) OF TORTS § 452. That section,[3] which contains a duty-shifting mechanism, provides:

> Where, because of the lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.

RESTATEMENT (SECOND) OF TORTS § 452(2). The comments to the Restatement explain this principle more fully:

> Subsection (2) covers the exceptional cases in which, because the duty, and hence the entire responsibility for the situation, has been shifted to a third person, the original actor is relieved of liability for the result which follows from the operation of his own negligence. The shifted responsibility means in effect that the duty, or obligation, of the original actor in the matter has terminated, and has been replaced by that of the third person.

RESTATEMENT (SECOND) OF TORTS § 452 cmt. d. The factors that are relevant to whether and when the duty shifts include the degree of danger and magnitude of risk of harm, the position of the third person to take responsibility, the relationship to the plaintiff, and the lapse of time. *Id.*, cmt. f.

Courts have applied § 452 to cases with facts similar to those alleged in this case, and have held that an original actor's duty of care subsequently shifts to a different party. For instance, in *Braun v. New Hope Tp.*, 2002 S.D. 67, 646 N.W.2d 737, a truck driver broke a "ROAD CLOSED" sign that was placed in the middle of a road that had been washed out by runoff. *Id.* at 739. The sign was later reinstalled by the town responsible

[3] To UPS's knowledge, section 452 has not been expressly adopted as Utah law by any Utah appellate court. The Court should take this opportunity to adopt section 452 as Utah law.

for maintaining the road, but it was shorter than before and was installed on the side of the road instead of in the middle. *Id.* Approximately three weeks after the town reinstalled the sign, a motorist was injured when he did not see the warning sign and drove into the washed out area. *Id.*

Relying on RESTATEMENT (SECOND) OF TORTS § 452, the *Braun* court held that any duty the truck driver originally owed with respect to broken sign had shifted to the town that attempted to fix the sign. *Id.* at 741-43. The facts that led to the duty-shift in *Braun* included the lapse of time, the town's independent duty to maintain the road, and the town's affirmative performance of that duty in an allegedly negligent manner. *Id.* at 743.

In this case, the district court's determination that UPS did not owe a duty to Mr. Wood at the time of the accident is consistent with section 452. UPS did not own or control the damaged property, and did not have the right to repair, warn of, or restrict access to the defective area. (R. 57-59, 1765-1769.) Conversely, KNS owed non-delegable duties to Mr. Wood as the possessor of the property, immediately knew of the defect on its property, and affirmatively acted to remedy the defect in a manner the Woods claim was negligent. (R. 57-59, 666-671, 675, 1765-1769.) Finally, a period of one week to one month elapsed between the time KNS knew of the damage and the time Mr. Wood was injured. (R. 666, 670.) These facts, which were undisputed for the purposes of UPS's summary judgment motion, demonstrate that any legal duty UPS could have owed had shifted to KNS by the time of Mr. Wood's injury. The district court correctly held that UPS did not owe a duty.[4]

[4] UPS's motion for summary judgment was granted on two grounds: (1) that UPS did not owe a duty to the Woods at the time of Mr. Wood's injury; and (2) that Mr. Wood's injuries were not proximately caused by the damage resulting from UPS's trailer allegedly hitting the KNS building. (R. 1765-1769.) The Woods' principal brief raises various other issues

B. *The relevant factors weigh against imposing a duty on UPS.*

The rule stated in section 452 is consistent with the general framework that Utah courts use to determine whether a defendant owes a duty to a plaintiff. Those factors include (1) whether the defendant's alleged conduct consists of acts or omissions; (2) whether a special relationship between the parties exists; (3) the foreseeability or likelihood of the injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general public policy considerations. *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5, 275 P.3d 228. Not each of those factors "is created equal," however, and the factors that are heavily featured some cases play a less important role in others. *Id.* Based on the factors that matter in this case, UPS did not owe a duty of care at the time of Mr. Wood's accident.

The Woods do not dispute that UPS had no special relationship with them. (Brief of Appellants, at 3.) And while UPS's alleged conduct consisted of the affirmative act of hitting the building, this factor is less important in this case than it might be in others.[5] *See id.* at ¶ 7. If this case involved a typical truck accident, and UPS's driver had either backed into Mr. Wood or backed into a building that immediately fell on Mr. Wood, the analysis would certainly be different. But in this case, UPS's alleged affirmative acts resulted in damage to a building that was possessed, controlled, and maintained by a third

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that were either not disputed for the purposes of UPS's motion (*i.e.*, creation of a dangerous condition [Brief of Appellants at 10-11]), or that do not have any relationship to duty or proximate cause (*i.e.*, breach of duties [Brief of Appellants at 9-10]). Because those issues were not determinative of UPS's motion, there is no reason to consider them at this stage.

[5] Citing to *West*, the Woods proclaim that the affirmative act factor is "the most fundamental factor." (Brief of Appellants, at 2.) In reality, *West* merely stated that this was "perhaps" the case. 2012 UT 11 at ¶ 7.

party (KNS), the third party had immediate knowledge of the damage, and the damage did not injure Mr. Wood until one week to one month later. Under these unusual circumstances, the fact that UPS allegedly acted affirmatively is not as critical as the other factors which weigh against imposing a duty of care on UPS.

The foreseeability factor weighs against imposing a duty where the property owner knew of the damage but did not fix or mitigate it. *See West*, 2012 UT 11 at ¶ 25. The broad spectrum of truck accident cases certainly includes individual cases where truck drivers could anticipate a risk of harm to others when operating a truck. What makes the duty analysis in this case different from those, however, is that the risk of harm in other cases was immediate, whereas the actual harm suffered in this case was significantly delayed, caused by a condition known to a party (KNS) that had an independent duty to remedy the condition, and on property that UPS could not repair, enter, or exclude others from.

On the issue of foreseeability, the Woods cite *Holcombe v. NationsBanc Financial Serv. Corp.*, 248 Va. 445, 450 S.E.2d 158 (1994), and argue that the passage of time between UPS's alleged acts and Mr. Wood's accident does not affect the legal determination of duty. In *Holcombe*, however, there was no third party. The defendant stacked two heavy wall partitions against a wall in a bathroom. Several months later, they fell over and injured the plaintiff. 450 S.E.2d at 159. *Holcombe* is not instructive here because the defendant in that case not only created the allegedly defective condition, but also owned and maintained the property where the accident happened. *Id.* The issue was proximate cause, not duty, and the parties agreed that the defendant property-owner owed a duty of care to the plaintiff. *Id.* For that reason, the *Holcombe* court did not focus on a broad category of cases (duty), but instead looked at the specific facts of that case (proximate cause), to hold that an issue of fact existed as to foreseeability. *Id.* at 160.

This case turns on the policy considerations contained in the *West* factors. Whether UPS owed a duty to the Woods depends on public policy considerations as to which party should bear the loss where one party had exclusive control of the property, and the other party did not. The public policy factor cuts against imposing a duty "where a victim *or some other third party* is in a superior position of knowledge or control to avoid the loss in question." *West*, 2012 UT 11 at ¶ 30 (emphasis added). "In such circumstances, the defendant is not in a position to bear the loss, not because his pockets are shallow, but because he lacks the capacity that others have to avoid injury by taking reasonable precautions." *Id.*

While UPS did not owe a special duty to the Woods, KNS did as the possessor of the property. *See DCR, Inc. v. Peak Alarm, Co.*, 663 P.2d 433, 435 (Utah 1983) (identifying the relationship between "owners and invitees" as a special relationship). UPS may have been in a position to avoid damaging the building, but KNS was clearly in a superior position to avoid the loss in question, especially at the time of the accident. After it allegedly damaged the building, UPS had no right to repair KNS's property, restrict access to KNS's property, or warn others of the damage on KNS's property. Conversely, KNS had immediate knowledge of the damage, and the rights, responsibilities, and control to repair any defects on its property, prevent others from accessing the area, and warn others of the damage. UPS lacked the capacity that KNS had to avoid Mr. Wood's injury, which is why it would be against public policy to impose a duty on UPS under the facts of this case.

Contrary to the Woods' assertion, this is not a situation where innocent parties stand to bear losses caused by a negligent tortfeasor. Rather, it is a situation where one

party's duty to prevent harm subsequently shifted to another for a variety of reasons, and the Woods retained their remedy against that other party.

In a case with similar facts, a federal district court concluded that a truck operator owed no duty of care to the plaintiff who was injured as a result of damage the driver caused to a third party's property. In *De Jesus Adorno v. Browning Ferris Indus. of P. R., Inc.*, 992 F.Supp. 121 (D.P.R. 1998), *aff'd*, 160 F.3d 839 (1st Cir. 1998), a garbage truck ("BFI") damaged a wall while emptying dumpsters at a condominium complex. *Id.* at 122. BFI paid to repair the wall, but the contractor who did the repair work left a hole in the ground behind the wall, and the Condo became aware of the hole soon afterwards. *Id.* at 122-23. The plaintiff later fell into the hole and was injured. *Id.* at 123. On the issue of duty, the district court ruled that BFI owed no duty to the plaintiff. It reasoned:

> BFI had a relationship with the Condo. When BFI's driver damaged the wall, BFI acquired several duties. BFI was obligated to ensure that the Condo, as the property owner, was made aware of the damage and any attendant dangerous conditions. BFI was also obligated to pay for the damage its driver's negligence caused. Had the driver's negligence created an immediate danger to others, the exigent situation might have required BFI to undertake additional duties. But BFI had no right, and would not be permitted (absent unusual circumstances) to enter onto the Condo's property in a capacity not authorized by their relationship, *i.e.*, to repair the hole.

Id. at 125. The court emphasized that the "fatal flaw" in the plaintiff's argument was that BFI had no power to remedy the hole, and that the most it could do was warn the Condo. *Id.* Thus, BFI could not be "perpetually liable for injuries caused by the damage it caused to the Condo's property simply because the Condo fail[ed] to restore its property to a safe condition." *Id.*[6]

[6] In affirming the district court's ruling, the First Circuit held that BFI was only obligated to warn the property owner of the damage, and pay for that damage. 160 F.3d at 842. Once it fulfilled these obligations, it had "no continuing legal duty to ensure the safety of

In this case, imposing a duty on UPS would mean that a party who creates a hazardous condition on another party's property would owe an endless duty for any injuries resulting from the condition, despite the party's inability to correct or warn of the hazard, and regardless of whether the property owner knows of and takes reasonable steps to remedy the hazard. Certainly, this is not the law. *See First Fed. Sav. and Loan Ass'n of Rochester v. Charter Appraisal Co., Inc.*, 247 Conn. 597, 724 A.2d 497, 502 (1999) ("Essential to determining whether a legal duty exists is 'the fundamental policy of the law' that a tortfeasor's responsibility should not extend to the theoretically endless consequences of the wrong."). The district court did not err in ruling that UPS owed no duty at the time of Mr. Wood's accident.

C. *The Woods' expansive reading of Section 383 of the Restatement is erroneous and contrary to Utah law.*

The Woods' reliance on RESTATEMENT (SECOND) OF TORTS § 383 for establishing a duty owed by UPS is also misplaced. They take the far-reaching position that, under Section 383, UPS not only owed them a duty of care, but that it owed them the same duties the landowner would owe to them. Section 383 provides:

> 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.

The Utah Supreme Court has rejected the Woods' expansive reading of Section 383 as "untenable." In *Hill v. Superior Prop. Mgmt. Serv., Inc.*, 2013 UT 60, 321 P.3d 1054, the plaintiff sued a landscaper for failing to remedy tree roots on a property it maintained.

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the premises" because it did not have a continuing right to enter the premises. *Id.* at 843. If the property owner was dissatisfied with the original repair, it should have asked BFI to either remedy the situation or pay the costs the fix it. *Id.*

The supreme court rejected the claim. It characterized section 383 as articulating liability-limiting principles for independent contractors, and declined to read the section as imposing broad possessor-like liability on independent contractors. 2013 UT 60, ¶ 35. The broad liability envisioned by the Woods under Section 383 "is appropriately reserved for those who exercise a level of control over property similar to that exercised by an owner in actual occupation." *Id.* at ¶ 36.

Even assuming the Woods' dubious premise that UPS was an independent contractor acting on behalf of the landowner, rather than simply making a delivery, section 383 would not apply. Unlike a property owner or possessor, UPS had no right or opportunity to fix, warn of, or restrict access to the hazardous condition at the KNS warehouse prior to Mr. Wood's accident. Section 383 applies to persons who have the ability to exercise control of the premises similar to the owner's control. UPS's lack of such control of the property rendered it unable to remedy the situation, and it is this lack of control that distinguishes UPS from "[o]ne who does an act or carries on an activity upon land on behalf of the possessor."

The Woods' reliance on RESTATEMENT (SECOND) OF TORTS § 385 is also misplaced. Section 385 provides:

> 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.

Section 385 and the supporting authority the Woods reference are inapplicable because they relate to the liability of a contractor for negligence in creating/constructing structures that create dangerous conditions on the property of another. The Restatement

section itself compares the situation to that applicable to the manufacturer of a defective product, and that is the manner in which the Utah courts have applied it. *See Tallman v. City of Hurricane*, 1999 UT 55, ¶ 11, 985 P.2d 892; *Gonzalez v. Russell Sorensen Const.*, 2012 UT App 154, ¶ 4, 279 P.3d 422. UPS did not create any condition on the property on behalf of the owner, and therefore section 385 is not applicable.

II. THE DISTRICT COURT CORRECTLY HELD THAT UPS DID NOT PROXIMATELY CAUSE THE ACCIDENT.

The district court also granted summary judgment on the alternative ground that no reasonable trier of fact could find proximate cause under the undisputed facts presented here. Even if UPS owed the plaintiffs a duty, plaintiffs must also prove that their injuries were proximately caused by the defendant's breach of duty. *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 486 (Utah Ct. App. 1991). Proximate cause is "that cause which, in a natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the injury would not have occurred." *Id.* "An intervening cause is an independent event, not reasonably foreseeable, that completely breaks the connection between fault and damages." *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1293 (Utah Ct. App. 1996).

Insofar as pertinent here, proximate cause is a question of foreseeability. Unlike the duty analysis discussed above, which describes more categorical rules, the proximate cause analysis depends more on foreseeability under the facts and circumstances of the particular case. *See B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶¶ 25-26, 275 P.3d 228 (explaining that foreseeability in duty analysis is evaluated at a broad, categorical level, but the same inquiry in the context of proximate cause questions the specific mechanism of injury). "Proximate cause is generally a question for the finder of fact but may be

decided as a matter of law if 'the facts are undisputed and but one reasonable conclusion can be drawn therefrom.'" *Nebeker v. Summit County*, 2014 UT App 244, ¶ 12, 338 P.3d 203 (quoting Dee v. Johnson, 2012 UT App 237, ¶ 3, 286 P.3d 22); *see also Jensen v. Mountain States Tel. & Tel. Co.*, 611 P.2d 363, 365 (Utah 1980) (stating that "in appropriate cases summary judgment may be granted on the issue of proximate cause").

A reasonable jury could not conclude that UPS proximately caused the Woods' damages. Therefore, the district court was correct in granting summary judgment on the alternative basis that no reasonable jury could conclude that UPS's actions were the proximate cause of plaintiffs' injury.

A. *In the context of proximate cause, the specific mechanism of harm must be reasonably foreseeable.*

Foreseeability is an element of proximate cause. *Dee v. Johnson*, 2012 UT App 237, ¶ 5, 286 P.3d 22. The determination of foreseeability for proximate cause purposes requires more than a simple showing that a general risk of injury was anticipated.

> [I]n the context of proximate cause, foreseeability is not concerned with categorical inquiries such as whether a reasonable person could anticipate a general risk of injury to others. Rather, the appropriate inquiry focuses on the specifics of the alleged tortious conduct, such as whether the specific mechanism of harm could be foreseen.

Id. (internal citations and quotations omitted). For this reason, "[a] negligent act may at times be part of a chain of events eventually leading to an injury, but still too remote to warrant holding the negligent party liable for the injury." *Id.* at ¶ 7 (quoting Justice Wilkins's concurring and dissenting opinion in *Fordham v. Oldroyd*, 2007 UT 74, 171 P.3d 411).

The notion that a tractor-trailer striking a building could damage that building, or that a structurally damaged building could cause injury to people inside of that building,

is insufficient to create a genuine issue of material fact in this case.[7] With respect to the proximate cause element of the Wood's claim against UPS, the foreseeability inquiry must account for the specific mechanism of Mr. Wood's injury, which included KNS's knowledge of damage to its building, its failure to remedy that known condition, and the lapse of time. As demonstrated below, the district court correctly held that this element could not be established as a matter of law.

B. *The specific mechanism of the Woods' harm was extraordinary and unforeseeable.*

Under Utah law, "a more recent negligent act may break the chain of causation and relieve the liability of a prior negligent actor under . . . proper circumstances." *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 488 (Utah Ct. App. 1991). "These circumstances arise when the more recent negligent . . . act was unforeseeable to the first negligent actor." *Bansasine v. Bodell*, 927 P.2d 675, 677 (Utah Ct. App. 1996) (citations and quotations omitted); *see also Steffensen*, 820 P.2d at 488 (explaining that a subsequent negligent act is sufficient to "break the chain of causation and relieve the liability of a prior negligent actor" if the subsequent act was "unforeseeable and may be described with the benefit of hindsight[] as extraordinary"). Thus, the crucial question, which a trial court judge may answer, is whether the subsequent negligent act was reasonably foreseeable to the first negligent actor. *See Bansasine*, 299 P.3d at 677 (affirming district court's ruling that a negligently aggressive driver could not have foreseen that his conduct would have resulted in a road-rage shooting that injured a passenger).

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[7] The Woods cite to multiple cases in arguing that Mr. Wood's accident was generally foreseeable to UPS. The Woods' analysis of those cases is not helpful, however, because remoteness of time is not the only factor in this case relevant to proximate cause. KNS's independent duties to Mr. Wood as possessor of property, and its knowledge of and response to the damage to its property, must also be considered.

Utah courts have adopted the factors in § 447 of the Restatement to determine when a subsequent act is unforeseeable. *Harris v. Utah Transit Auth.*, 671 P.2d 217, 219 (Utah 1983) (quoting RESTATEMENT (SECOND) OF TORTS § 447). A subsequent negligent act is sufficiently unforeseeable to be a superseding cause "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 prior actor. *Thayer v. Wash. Cty. Sch. Dist.*, 2012 UT 31, ¶ 62, 285 P.3d 1142 (quotations omitted); *see also Steffensen*, 820 P.2d at 488 (explaining that a subsequent negligent act is sufficient to "break the chain of causation and relieve the liability of a prior negligent actor" if the subsequent act was "unforeseeable and may be described with the benefit of hindsight[] as extraordinary").

In this case, the Warehouse allegedly damaged by UPS was possessed and controlled by KNS. KNS was responsible for reporting, inspecting, and repairing potential safety hazards present in the Warehouse. (R. 387-388, 390-392, 474, 489, 491-492, 500-501, 581, 648-649.) KNS had immediate knowledge of the damage, and unsuccessfully attempted to repair it. (R. 667-668.) Approximately one to three weeks later, Mr. Wood was injured, but not before at least three other KNS employees became aware of the damage, which was worsening. One employee saw "some bolts and the bracket were missing." (R. 535-536.) KNS's Vice President also saw that "8 to 12 inches" of the vinyl curtain bracket "was hanging down at an angle" about "an inch and a half" just hours before the accident, but he did not tell anyone about it, or do anything to restrict access to the area. (R. 424-426, 428) And one KNS employee actually admitted to Mr. Wood that he knew the bracket was going to fall, and that KNS should have taken care of it. (R. 970.)

The parties do not dispute that KNS was negligent in failing to repair and/or warn of the damage. (R. 57-59, 1058-1059.) UPS could not have foreseen that KNS would fail to properly repair damage to its property for a period of one week to one month, despite its knowledge of both the damage and that bracket was going to fall. It was also unforeseeable that multiple KNS employees would ignore their safety reporting responsibilities after recognizing the damage, let alone warn others of the damage. KNS's actions, or lack thereof, over a one week to one month period was unforeseeable and highly extraordinary.

Multiple other jurisdictions have held, in line with the district court's reasoning, that negligent repair of or total failure to remedy a known dangerous condition is an unforeseeable intervening event that supersedes any liability of the individual who created the dangerous condition. In *Lynch v. Norton Const., Inc.*, 861 P.2d 1095, 1099-1100 (Wyo. 1993), for example, the Supreme Court of Wyoming held that a property owner's negligent failure to "repair the obviously dangerous condition of [a] sidewalk, after receiving several complaints about the condition, constituted an intervening cause, relieving [a contractor] of liability for his negligence [in improperly constructing the sidewalk], if he was negligent." 861 P.2d at 1099–1100. The court reasoned that, even if the contractor negligently created the hazard by improperly constructing the sidewalk, he "could not reasonably have foreseen that the [property owner], when confronted with a dangerously icy sidewalk, due to a drainage problem, would not inform [the contractor] of the obvious defect, would not repair the defect itself, and would instruct its employees not to use salt and sand on the icy spots for their own safety." *Id.* at 1100. Accordingly, the court held that the contractor's negligence, if any, "was the remote, not the proximate cause of [the plaintiff's] injuries." *Id.*

Applying similar logic, the Georgia Court of Appeals held in *Seely v. Loyd H. Johnson Const. Co.*, 220 Ga. App. 719, 470 S.E.2d 283, 287 (1996), *superseded on other grounds by statute as recognized in Minnix v. Dep't of Transp.*, 272 Ga. 556, 533 S.E.2d 75 (2000), that a carpentry subcontractor who negligently drove a nail through a wall and into a pipe could not be held liable for injuries caused by water leaking from the pipe after the pipe was negligently repaired by another subcontractor. 470 S.E.2d at 287. The court reasoned that, even assuming the carpentry subcontractor acted negligently in damaging the pipe, he could not have foreseen[8] the negligent repair of the pipe as a natural consequence of his actions: "[A]ny negligent acts that initially caused the hole and the first leak prior to the repair were not a proximate cause of any damages resulting from the second leak after the attempted repair. The alleged negligent failure of [the other subcontractor] to fix the leak after it was discovered intervened between the prior acts and became the sole proximate cause, if any, of the personal injuries [at issue]." *Id.* Accordingly, the carpentry subcontractor could not be held liable for any injury arising after the subsequent negligent repair work failed to remedy the hazard he purportedly created. *See id.*

Finally, *Walsh v. Israel Couture Post, No. 2274 V.F.W. of the U.S.*, 542 A.2d 1094, 1095 (R.I. 1988), was a case that similarly involved property damage caused by a truck

[8] Although the *Seely* court did not expressly address the unforeseeable nature of the subsequent negligent repair, that finding is implicit in the court's holding that the subsequent negligent repair was an intervening and superseding cause of the injuries at issue. This reading is confirmed by the authority that *Seely* relied on, including *Black v. Ga. Southern R. Co.*, 202 Ga. App. 805, 415 S.E.2d 705, 707–08 (1992), which defines an intervening and superseding cause as "an independent, intervening act of someone other than the defendant, *which was not foreseeable by defendant*, was not triggered by defendant's acts, and which was sufficient of itself to cause the injury[,]" *id.* (emphasis added).

that later led to the plaintiff's injury. "The railing had become dislodged nine days earlier, when a post to which it was attached was struck by a truck owned by Fontaine. The VFW had actual notice of the damaged post on the day that the truck struck the post." *Id.* The Supreme Court of Rhode Island held that under these circumstances, "the failure of the VFW, for a period of nine days, to seal off the area subject to the dangerous condition or, at minimum, to post warning signs constitutes an independent intervening cause that relieves Fontaine [the truck driver] of liability for plaintiff's injury." *Id.* Accordingly, the court ruled the district court erred in failing to grant a directed verdict in favor of the truck driver. *Id.*[9]

Other courts have reached similar conclusions. *See De Jesus Adorno*, 992 F. Supp. at 125 (granting summary judgment because the failure of property owner to fix sinkhole was an intervening and superseding cause that relieved the truck driver/owner who created the sinkhole of liability); *Sisco v. Broce Mfg., Inc.*, 1 F. App'x 420, 423-24 (6th Cir. 2001) (per curiam) (unpublished) (upholding summary judgment in favor of manufacturer because the failure to fix a vehicle's brakes after repeated notice that the brakes were malfunctioning was unforeseeable intervening and superseding cause); *Hennigan v. Atl. Refining Co.*, 232 F. Supp. 667, 679 (E.D. Pa. 1967) (municipality's failure to properly contain a known oil spill was not reasonably foreseeable and superseded any negligence by the company that caused the spill).

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[9] In so ruling, the court in *Walsh* applied a standard similar to that used by Utah courts. It explained: "that intervening act of negligence will not insulate an original tortfeasor if it appears that such intervening act is a natural and probable consequence of the initial tortfeasor's act." *Id.* at 1097. The failure of the VFW to repair the railing or post warnings about the dangerous condition for a period of days, however, "was not foreseeable and thus constitutes an independent intervening cause." *Walsh*, 542 A.2d at 1097.

Based on the undisputed facts, "a reasonable man knowing the situation would regard" KNS's negligent failure to adequately repair or otherwise remedy an obvious hazard on its property "as highly extraordinary and not a normal consequence of the situation created" by UPS's purported negligence. *See Thayer*, 2012 UT 31, ¶ 62. Thus, the district court in this case properly concluded that UPS did not proximately cause Mr. Wood's injury as a matter of law.[10]

C. *The district court's conclusion that KNS's knowledge, actions, and omissions severed both duty and proximate causes as they relate to UPS was consistent with Restatement § 452.*

The Woods contend that the district court erred because it "essentially applied" a superseding cause test to both duty and proximate cause analysis. (Appellants' Brief, at 16.) That is a gross oversimplification. As previously explained, Section 452 is a duty-based rule that is employed where the situation dictates that liability should not be imposed in a certain category of cases, such as those where the alleged tortfeasor does not control the property that caused the injury. Section 452 contains a duty-shifting mechanism where a negligent actor's duty to prevent harm shifts to a third person, and "the failure of the third person to prevent such harm is a *superseding cause*." RESTATEMENT (SECOND) OF TORTS § 452(2) (emphasis added). Part of the determination

[10] The Woods argue that the district court did not apply the correct standard in deciding the issue of intervening cause. (Appellants' Brief, at 16.) The mere fact that the order granting summary judgment does not specifically contain the words "foreseeable" or "extraordinary" does not mean that the district court did not apply this standard when deciding the issue of proximately cause. Both parties' briefing on the motion identified the proper standard. (R. 353-355, 1057-1058, 1184-1186.) In any event, the standard applied by the district court is irrelevant because this Court may affirm on any basis apparent in the record. *Bagley v. KSM Guitars, Inc.*, 2012 UT App 257, ¶ 14 n.6, 290 P.3d 26.

whether an actor's duty shifts to a third person includes consideration of whether the third person's failure was foreseeable. *Braun*, 646 N.W.2d at 741.

Where the third party has an independent duty to remedy a dangerous condition the original actor creates, the original actor is "free to assume" that:

> [W]hen [the] third party becomes aware of the danger, and is in a position to deal with it, the third person will act reasonably. It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed.

Braun, 646 N.W.2d at 742 (quoting W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 313 (5th ed. 1984)).[11]

There is no evidence that UPS could have anticipated KNS's misconduct. To the contrary, UPS was free to assume that KNS would act reasonably. For these reasons, the district court's conclusion that UPS did not owe a duty to Mr. Wood, or proximately cause his injury, was correct.

D. *The district court's ruling was not based solely on KNS's knowledge of the damage UPS allegedly created.*

Finally, citing the Utah Supreme Court's decision in *Harris v. Utah Transit Authority*, 671 P.2d 217 (1983), the Woods argue that the district court's decision is contrary to Utah's comparative fault statute. Rather than viewing the proximate cause question as one of superseding cause, they argue it was a fault apportionment question. They claim that the district court applied a bright-line test to hold that the chain of causation was broken when KNS became aware of the damage to its building.

[11] In *Braun*, the court held that it was not reasonably foreseeable "that the Township, after having affirmatively acted to reinstall the sign, would do so in a negligent manner." 646 S.W.2d at 741.

In the context of proximate cause in automobile accident cases, *Harris* rejected prior law holding that where a motorist sees a stationary object on the road but negligently fails to avoid it, his negligence supersedes the negligence of the person who placed it there. *See id.* at 221. However, *Harris* did not, as the Woods suggest, hold that a negligent failure to act despite notice of a negligently created pre-existing condition "cannot on its own be an intervening cause." (Appellants' Brief, at 21). The *Harris* court explicitly reaffirmed that a subsequent negligent act may constitute a superseding cause, and emphasized that the key issue is foreseeability. *See id.* at 219 ("A person's negligence is not superseded by the negligence of another *if the subsequent negligence of another is foreseeable*." (emphasis added)). The *Harris* decision did nothing to undermine this general premise. *See Thayer*, 2012 UT 31, ¶ 61 n.18; *Williams v. Melby*, 699 P.2d 723,728-29 (Utah 1985).[12]

Harris did not preclude a district court from deciding the issue of superseding causation as a matter of law. *See id.* at 220 ("We do not mean to imply that rulings by the court which decide a factual contention as a matter of law are never appropriate."). This is why Utah appellate courts continue to recognize the authority of district courts to decide proximate and superseding causation as a matter of law "where the facts are undisputed and but one reasonable conclusion can be drawn therefrom." *E.g.*, *Nebeker*

[12] Moreover, the *Harris* court's analysis is keyed to issues of split-second decision-making that are inherent in automobile collision cases. *See* 671 P.2d at 222 (explaining that relative culpability should be decided by evaluating "the reasonableness or unreasonableness of the second driver's actions in light of all the circumstances including whatever action it takes to avoid a collision, his initial speed, the initial speed of the first car, road conditions, traffic conditions, and the like"). Indeed, the specific holding of *Harris* is expressly limited to "the doctrine of superseding causation *in cases such as this*"—*i.e.*, cases involving highway automobile accidents. *See id.* at 221.

v. Summit Cty., 2014 UT App 244, ¶ 12, 338 P.3d 203; *Bansasine*, 927 P.2d at 677. Accordingly, the district court's grant of summary judgment was not contrary to *Harris*.

CONCLUSION

For the foregoing reasons, UPS requests that this Court affirm the district court's order granting summary judgment.

DATED: August 31, 2018.

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/s/ Nathan R. Skeen

CERTIFICATE OF SERVICE

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