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, Defendant and Appellee.	**APPELLANTS REPLY BRIEF** Appeal No. 20180040-CA

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

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UPS admits UPS had a duty to use reasonable care to avoid creating a dangerous condition on property which could cause *immediate* injury to property users. UPS stated in its brief "[i]f 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 be quite different." UPS Brief at 11. UPS, however, argues that its duty disappeared at some point[1] after UPS damaged the building because of three facts: 1) UPS did not own or control the damaged property and did not have the right to repair the damaged area, 2) KNS knew of the damage and, in hindsight, negligently repaired the damage, and 3) one week to one month elapsed between the time UPS damaged the vinyl curtain and Mr. Wood was injured. UPS Brief at 10.

A. RESTATEMENT (SECOND) OF TORTS §§ 452 Supports the Woods' Position That UPS Owed a Duty to Mr. Wood at the Time of Mr. Wood's Injury.

UPS argues that at some point after UPS damaged the vinyl curtain, UPS's duty "shifted" to KNS pursuant to Section 452(2), completely relieving UPS of responsibility. UPS Brief at 9–10. Section 452 actually supports the Woods' position that UPS had a duty to Mr. Wood up to and including the date of injury.

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[1] UPS does not state when its duty disappeared, just that it was gone when the vinyl curtain fell on Mr. Wood.

1. Section 452 Supports the Woods' Position that UPS Owed a Duty to Mr. Wood at the Time of Mr. Wood's Injury.

Section 452(1) states the general rule that a third person's actions **will not** constitute an intervening[2] cause or shift duty:

> §452. Third Person's Failure to Prevent Harm.
> (1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threated by the actors' negligent conduct is not a superseding cause of such harm.

Subsection (2), upon which UPS relies, discusses the "exceptional case" when the duty will shift:

> (2) Where, because of lapse 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.

Section 452 gives two illustrations which both show UPS's duty would not shift to KNS because of the three facts discussed above, i.e., control of property, negligence of property owner, and time passage:

> Illustrations 1.
>
> 1. A, the owner of a house abutting on a street in B City, employs C to dig a trench across the highway to make a connection with a sewer. C does the work of replacing the sidewalk so negligently that it is left in a condition dangerous for travel. **A knows of this, and B City is notified, but neither takes any steps to put the sidewalk into safe condition. Several weeks after C has completed the work,** D, walking on the sidewalk at night, and without any negligence of his own, is hurt by a fall resulting from the bad condition of the sidewalk. The failure of A, and of B City, to have the sidewalk repaired makes both subject to liability to D, **but is not a superseding cause relieving C of liability to D.**

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[2] The cases often use the term "superseding" and "intervening" interchangeably. For purposes of this reply, the Woods will use the term "intervening cause".

Id., Illustration 1 (Emphasis added).

In Illustration 1, C digs a trench but negligently replaces the sidewalk. D is subsequently injured by the "bad condition of the sidewalk." In our case, UPS damaged the KNS vinyl curtain at docking bay B which eventually fell on Mr. Wood. In Illustration 1, **several** weeks passed between C's original negligence and D's injury. In our case, one week to a month passed between UPS's original negligence and Mr. Wood's injury. In Illustration 1, the injury occurred on a sidewalk over which C had no control after it finished its work. In our case, the injury occurred on a site over which UPS had no control after it damaged the building. Finally, in Illustration 1, A, the owner of the property, and B, the city, knew about the danger but did nothing "to put the sidewalk into safe condition." In our case, KNS knew about the damaged vinyl curtain but did not properly fix it.

Illustration 1's fact pattern considers all the facts cited by UPS (control of property, negligence of property owner, and time) and rejects UPS's argument.

Illustration 3.

> 3. The A Railroad Company negligently sets fire to the timber land of B, in a state in which, at common law or by statute, it is the duty of a landowner to use reasonable care to prevent a fire, no matter how set, from spreading to adjacent land. **B, knowing that the fire has been set, either makes no effort to prevent its spread or fails to exercise reasonable care in making his efforts effectual.** The fire spreads to the land of C. The failure of B to perform his duty is not a superseding cause which relieves the A Railroad Company from liability to C.

Id., Illustration 3 (Emphasis added).

In Illustration 3, A Railroad Company started a fire on land over which the A Railroad Company had no control. B, the landowner, had a duty to use reasonable care to

prevent the fire from spreading to C's land. Under this illustration, B, "knowing that the fire has been set, either makes no effort to prevent its spread or fails to exercise reasonable care in making his effort effectual." Section 452 Illustration 3 recognizes the "failure of B to perform his duty is not a superseding cause which relieves the A Railroad Company from liability to C."

Illustration 3's fact pattern is important because it looks at two of the facts cited by UPS—control of property and negligence of property owner—and rejects UPS's argument.

UPS's reliance on the split (2-1) decision in *Braun v. New Hope Township*, 646 N.W.2d 737 (S.D. 2002)[3] is also misplaced. In *Braun,* the court used a different standard for assessing intervening cause than applies in Utah, stating that a subsequent negligent act would constitute a superseding cause unless the act was "reasonably foreseeable." *Id.* at 741. Utah requires the subsequent act be "extraordinary." *See* Woods' Opening Brief at 16–17; *Infra*, Part II. Moreover, as discussed in Section II, our case facts are different.

2. Section 452 Should not be Used to Define a Plaintiff's Initial Duty.

UPS's attempt to pigeon hole RESTATEMENT (SECOND) OF TORTS §§ 452(2) as a "duty" provision is also misleading. Section 452 is housed under subchapter "Title C. Superseding Cause," which in turn is housed under Chapter 16, "The Causal Relation Necessary to the Existence of Liability for Another's Harm." Other courts which have analyzed and applied this section have explained that Section 452 primarily involves the issue of intervening causation, not duty formation. *See Filer v. Foster Wheeler LLC*, 994

[3] The dissenting justice in *Braun* believed the superseding cause question was one for the jury to determine. *Id.,* at 744.

F.Supp.2d 679, 690, 692 (holding that the defendant's reliance on §§ 442 and 452 "confuses the issue of existence of a duty with excuse of the breach of that duty based on the availability of an affirmative defense."). Ultimately, the practical difference between intervening cause and so-called "duty shifting" is negligible. The Woods analyze intervening cause in Section II, below.

B. UPS's Analysis of the *West* Factors Do Not Support UPS's Position That UPS Did Not Have a Duty to Mr. Wood.

1. A Court Must Use the *West* Factors to Determine Duty, not Section 452.

UPS argues that "section 452 is consistent with the general framework that Utah courts use to determine whether a defendant owes a duty to a plaintiff." UPS Brief at 11. Such a statement is incorrect.

"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 (citation omitted). "The question of whether a duty exists is a question of law." *Smith v. Robinson*, 2018 UT 30, ¶ 8, 422 P.3d 863, 865 (citation and internal quotation marks omitted).

Utah courts determine duty on a "broad, categorical level" for a given class of defendants, not on the case-by-case basis as argued by UPS. *West*, 2012 UT 11, ¶ 23. *West* made this clear: "[d]uty determinations should be articulated in 'relatively clear, categorical, bright-line rules of law applicable to a general class of cases.' The duty factors are thus analyzed at a broad, categorical level for a class of defendants." *Id.* (citation omitted).

Section 452, on the other hand, requires a factual analysis to determine whether the legal principles outlined in Section 452 apply. That is, a fact finder must determine whether there are enough "exceptional" facts for a defendant's legal obligation to be terminated by a subsequent party's actions. RESTATEMENT (SECOND) OF TORTS §§ 452, comment d & f. This is similar to Utah's intervening cause test, explained in Section II.

2. The *West* Factors Establish 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. This Duty Covered Mr. Wood at the Time of his Injury.

a. Affirmative Act.

The most important factor in finding a duty focuses on whether the action involves an affirmative act. An entity's affirmative action normally carries a duty to use reasonable care. In this case, UPS's duty arises out of UPS's affirmative act of backing its trailer. Hence, UPS had a duty to use reasonable care to avoid creating a dangerous condition on KNS's property which could injure Mr. Wood.

UPS claims this factor is less important because UPS's affirmative act involved a building it did not control. UPS Brief at 11–12. UPS provides no legal support for this position.

b. Special Relationship.

The Woods admit they did not have a special relationship with UPS, but the lack of a special relationship does not eliminate UPS's duty of care. Drivers do not have a special relationship with other drivers on the road, but their duty to use reasonable care in driving their vehicles is not somehow terminated.

c. Foreseeability.

UPS recognizes UPS owed a duty to Mr. Wood if the injury had been immediate. UPS Brief at 12. However, UPS argues that the foreseeability factor weighs in UPS's favor because 1) there was a delay of "one week to one month" between UPS negligently damaging the building and Mr. Wood's injury, 2) UPS caused a dangerous condition which KNS had an independent duty to fix, and 3) UPS had no control over the property nor could UPS fix the damage. UPS Brief at 12.

An analysis of each of these facts actually strengthens the Woods' position that a duty existed.

i. It is Foreseeable That an Incident May Lead to an Injury Many Months After the Incident Occurred.

"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." *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶ 20, 215 P.3d 152. Utah courts have long recognized that it is foreseeable that an incident can cause injury even if there is substantial time passage between the incident and the injury. For example, courts universally recognize it is foreseeable that a defective product can cause injury many months, if not years, after a defendant manufactures a defective product and places it into commerce. Courts also recognize it is generally foreseeable that defective construction can cause injury many months, if not years, after a defendant defectively builds a structure.

It is for this principle that the Woods cited the *Holcombe* case. *Holcombe v. Nations Banc Fin. Serv. Corp.*, 248 VA 445, 448, 450 S.E.2d 158 (1994). *Holcombe* demonstrated

that the passage of time did not detract from the foreseeability of eventual injury. The court in *Holcombe* recognized it was foreseeable that someone would get injured at a later point in time from the negligent placement of "partitions" many months before. Similarly, it is generally foreseeable that UPS's structural damage to another's building, just like structural damage caused by defective construction, could injury someone in the future. *See Skillingsberg v. Brookover*, 484 P.2d 1177, 1179 (Utah 1977) ("[W]here 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.")

UPS argues imposing a duty on UPS would mean UPS "would owe an endless duty for any injuries resulting from the condition, despite the party's inability to correct or warn of the hazard . . ." UPS Brief at 15. This argument is wrong.

A jury and the court are well equipped to handle this situation using proximate cause. A jury, under its fact-finding responsibilities for proximate cause, is instructed to consider whether "the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature." MUJI 2nd Ed. CV209 (defining "cause"). If an injury is so far removed from a breach of duty—including through the passage of time—a jury can make a finding of no proximate cause. Utah already prevents "endless liability" through application of proximate cause. *See also Infra*, Part II.

Finally, UPS's position goes against Utah's long-time recognition of similar tort duties. Utah law recognizes a manufacturer has a duty even if the injury or damage occurs 1) many years after the product's defective design/manufacture, and 2) when the product is no longer under the manufacturer's control. *E.g., Ernest W. Hahn, Inc. v. Armoc Steel*

Co., 601 P.2d 152 (Utah 1979) (manufacturer of defective steel joists held strictly liable for roof collapse which occurred **three months** after building completed). Utah law recognizes a contractor has a duty even though the injury from defective constructions occurs 1) many years after the construction and 2) when the structure is no longer under the control of the contractor. *See Williams v. Melby,* 699 P.2d 723, 729 (Utah 1985) (contractor potentially liable for injury that occurred at least 4 months after alleged defective construction of apartments).

ii. It is Foreseeable That a Subsequent Actor Might Fail to Properly Fix a Damaged Building.

The key focus on foreseeability is on whether structural damage to the building can generally lead to an injury to a party in that building. *See Normandeau*, 2009 UT 44, ¶ 20. Here, it is common knowledge that a damaged or compromised building could injure people in, and particularly underneath, that structure. Moreover, it is equally foreseeable that an owner of the property may not properly fix the damaged building part. *See infra* Section II, B.

iii. It is Foreseeable That UPS's Actions Could Injure Someone on Property Not Owned or Controlled by UPS.

UPS recognizes it is foreseeable that UPS hitting someone else's building could cause immediate injury to someone on or in that building. UPS Brief at 11. Hence, UPS's argument that the injury occurred on someone else's property does not support UPS's argument here on foreseeability. Moreover, Utah case law recognizes that it is foreseeable that defective construction of a building can cause injury to someone in the future. *See*

Williams, 699 P.2d at 729 (contractor potentially liable for injury to plaintiff even though contractor had finished work and plaintiff occupies apartment).

d. Public Policy Considerations.

The Woods acknowledge this factor cuts both for and against imposing a duty. UPS, as the original tortfeasor, was in the best position to prevent injury in the first place if it had simply followed the proper rules for backing. KNS, as the observer of the damaged bracket system, also had an opportunity to fix the problem and prevent the injury. Utah's comparative fault statute allows Mr. Wood to pursue a remedy against *both* UPS and KNS. Utah Code Ann. §§ 78B-5-817 to -823. A jury gets to allocate fault between both tortfeasors.

e. Other Policy Considerations.

Other policy considerations cut in favor of imposing a duty on UPS.

First, "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." *Normandeau,* 2010 UT App 44, ¶ 4. UPS does not meaningfully dispute this point. UPS, as the tortfeasor, should be responsible for its role in injuring Mr. Wood, the innocent party.

Second, overtime Utah has been "drift[ing] away" from using intervening cause as a matter of law and instead letting these cases go to the jury. *Harris v. Utah Transit Authority,* 671 P.2d 217, 221 (Utah 1983) (noting the "strong drift away" from finding

superseding cause as a matter of law in automobile collisions).[4] Our legislature's enactment of the Utah Comparative fault statute, which requires juries to allocate fault between the parties, only reinforces this policy.

f. The *Browning* Case is Distinguishable.

UPS cites to *De Jesus Adorno v. Browning Ferris Indus. of Puerto Rico, Inc.*, 992 F. Supp. 121, 125 (D.P.R.), *aff'd* (citation omitted), arguing the court found no duty on "similar facts". UPS Brief at 14. This case is distinguishable.

In *Browning*, a BFI garbage truck hit and damaged a condominium retaining wall which housed the condo's garbage dumpster. BFI paid to repair the wall, which was completed within several weeks. The contractor who did the repair left a hole in the ground directly behind the rebuilt wall which injured the plaintiff ***5 years*** afterwards as she was throwing her garbage into the dumpster. *Id.* at 122–123. BFI is distinguishable on two factual grounds. First, the contractor hired by BFI created the dangerous condition, not BFI itself; in our case, UPS's truck directly hit and damaged the overhead curtain assembly, causing the dangerous condition. Unlike in BFI, UPS's direct actions caused the vinyl curtain to fall on Mr. Wood. *See* Wood's Opening Brief at 12. Second, the injury in BFI occurred ***5 years*** after the dangerous condition was created; in our case the dangerous condition existed for 1 week to 1 month.

C. The Woods' Reliance on The Restatement (Second) of Torts §§ 383 and 385 Is Appropriate in Defining UPS's Duty.

[4] The lower court actually recognized at the hearing that its ruling on legal duty and causation might get overruled: "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." R at 2229.

1. Section 383 Applies.

UPS argues Section 383 cannot be read to cover UPS's actions and cites *Hill v. Superior Prop. Mgmt. Serv., Inc.,* 2013 UT 60, 321 P.3d 1054.

Hill supports the Woods' position. The court in *Hill,* recognized Section 383 "reaches only 'physical harm caused' by affirmative 'act[s]' or 'activit[ies]' actually carried out by the independent contractor." *Id* at ¶ 35 (citing section 383) (alteration in original). "It does not impose liability for mere conditions on the land." In *Hill,* the plaintiffs sued a landscaper for failing to remedy tree roots on the property it maintained. The landscaper did ***not create*** the tree root problem, nature did. In other words, because the landscaper did not affirmatively create the condition it therefore had no responsibility to remove the roots.

In our case, UPS through the "affirmative act" of negligently hitting KNS's building, affirmatively created the damage which eventually lead to Mr. Wood's injury. The Woods' reading of Section 383 is entirely consistent with *Hill.*

UPS also argues that Section 383 only "applies to persons who have the ability to exercise control of the premises similar to the owner's control." UPS Brief at 16. UPS cites no support for this broad premise and such a restrictive reading is not in the text of Section 383 or its comments.

2. Section 385 applies.

UPS suggests that Section 385 only applies to the "liability of a contractor for negligence in creating/constructing structures that create dangerous conditions on the property of another." UPS Brief at 16. Such an argument should be rejected.

First, UPS provides no support for this statement.

Second, the text of Section 385 does not limit itself to "construction" cases. Instead, comment (b) states it applies "to any person who on behalf of the possessor of land erects thereon a structure ***or creates any other artificial condition.***" Comment (c) indicates this Section applies to a servant or independent contractor who "otherwise changes [the land's] physical condition." Here, UPS created a dangerous condition upon the land when it backed hard into the KNS building, compromising the building's structural integrity.

II. A Jury Must Decide Whether KNS's Actions Constitute an Intervening Cause, Not the Court.

The Woods and UPS agree that whether KNS's actions constitute an intervening cause is a factual question turning on the case's facts. The difference is the Woods believe that decision should be made by a jury, while UPS believes the judge can take the issue from a jury.

UPS's argument ignores both the legal standard and the facts.

A. KNS's Acts Can Only Be an Intervening Cause if KNS's Acts, in Hindsight, Can Be Described as "Extraordinary".

Utah courts have set a very high bar for when the original tortfeasor can be relieved of liability. Such a shifting of liability may only occur when the subsequent act "was unforeseeable and may be described with the benefit of hindsight, as extraordinary." *Steffensen v. Smith's Mgmt. Corp.,* 820 P.2d 482, 488 (Utah Ct.

App. 1991) *aff'd* 862 P.2d 1342 (Utah 1993) (citation and internal quotation marks omitted). Justice Lee in his dissenting opinion in *Thayer v. Washington County Sch. Distr.,* 2012 UT 31, 285 P.3d 1142,[5] stated that under Utah law another actor's subsequent negligence will only be an intervening 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 authorization." *Id.*, ¶ 62 (quoting *Harris v. Utah Transit Authority,* 671 P.2d 217, 219 (Utah 1983)).

Extraordinary is defined in the dictionary "as very unusual or remarkable."

B. KNS's Actions, in Hindsight, Were Reasonably Foreseeable and Certainly Not "Extraordinary".

UPS's analysis should focus on the facts of the case. UPS, however, does not do that; UPS, in its brief, recites three facts and then in conclusory fashion, states that KNS's actions were "unforeseeable and highly extraordinary". UPS Brief at 20–21. UPS then cites a number of cases from non-Utah jurisdictions in an attempt to persuade the court.

An examination of these facts shows the district court erred in removing this case from a jury. An examination of the cases cited by UPS show these cases do not control.

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[5] The Woods in their initial brief mistakenly cited *Thayer* as though it was the court's opinion. However, the *Thayer* cite referenced in the Woods' initial brief (Woods Initial Brief at 17) was from Judge Lee's dissent where he cited the *Harris* case, which, in turn discussed the "highly extraordinary" standard. The Woods' counsel apologize for this mistake.

1. KNS's Actions Were Reasonably Foreseeable and Not Extraordinary.

a. Fact One.

On the day UPS crashed into the KNS building, a KNS employee saw that the UPS truck had damaged the concrete holding the vinyl curtain. The KNS employee saw that one or two bolts holding the vinyl curtain had fallen out of the concrete onto the floor and one or two bolts had loosened. The KNS employee tightened the one or two bolts. After tightening the loose bolts, the KNS employee observed that 14 of the 16 bolts still secured the vinyl curtain. He then concluded, based on his observation, that the repair was "secure enough at least for [his] liking." UPS Brief at 3–4, 20; Woods' Initial Brief at xiii–xvi.

A jury could find the KNS employee's actions here were not only reasonably foreseeable but expected. A jury could foresee a KNS employee would examine the damage caused by the UPS truck. A jury could expect the KNS employee might try to repair the damage by tightening the bolts. After the repair, the KNS employee observed that the vinyl curtain was still secured by at least 14 of the 16 bolts and that the bracket was "secure enough for [his] liking." A jury could foresee a KNS employee would perform no further repairs after thinking he had fixed the bracket, especially when 14 of the 16 bolts holding the bracket were still in place and the vinyl curtain was still in place.

In sum, the KNS employee's actions in trying to fix the bracket were not so "extraordinary" to allow the court to remove this issue from a jury.

b. Fact Two.

On the day of the incident, **shortly before the vinyl curtain fell on Mr. Wood**, Mr. Kelly, the Vice President of KNS, saw approximately one foot of the vinyl curtain hanging down from the concrete about an inch and a half, but he took no action. Mr. Kelly stated two separate reasons for not acting at that precise moment: 1) his belief that no one would be working underneath the partially detached vinyl curtain, and 2) his perception that the vinyl curtain would not fall. He specifically testified he took no 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." UPS Brief at 4 & 20; Woods Initial Brief xvii.

A jury could find Mr. Kelly's actions reasonably foreseeable. A jury could foresee Mr. Kelly taking no immediate action in connection with the partially detached vinyl curtain because Mr. Kelly thought no one would be working under the vinyl curtain that day. A jury could also foresee Mr. Kelly's taking no action because he perceived that the vinyl curtain would not fall. Mr. Kelly testified "there's a lot of bolts holding it." Finally, a jury could also foresee Mr. Kelly taking no action because humans procrastinate.

Mr. Kelly's actions were not so "extraordinary" in hindsight to allow the court to remove this issue from a jury.

c. Fact Three.

After Mr. Wood's injury, while Mr. Wood was recovering in the break room and having blood washed off his face, Mr. Wood heard an unidentified KNS employee state that he/she "was sorry," knew the bracket was going to fall, and they should have "taken care of it." UPS Brief 5, 20; Woods Initial Brief at xvii.

A jury could see that this statement as apologetic, rather than affirmative evidence that the KNS employee knew the bracket was going to fall.

But even if the jury believed this statement was something more than an apology, a jury could also reasonably foresee that a KNS employee would fail to fix the problem before it fell on Mr. Wood. People procrastinate. There is no information about when this KNS employee discovered the problem or what the employee intended to do. Even under the most favorable inference to UPS (which should not be done for purposes of summary judgment), a jury would see a KNS employee with self-proclaimed knowledge of the danger procrastinating fixing the vinyl curtain, which up until Mr. Wood's injury, had not actually failed. A jury could easily view this as a reasonably foreseeable consequence of UPS's actions.

This KNS employee's actions were not so "extraordinary" so that the court should remove this issue from a jury.

d. UPS's Argument Leads to Unacceptable Consequences.

UPS, in essence, argues a property owner's failure to properly fix a known problem will always constitutes an intervening cause. Such an analysis has far reaching consequences. For example, a surgeon's negligent failure to fix an obvious broken bone from a car collision would, under UPS's analysis, be an intervening

cause barring any claim against the negligent driver who originally caused the injury. A landlord owner's failure to fix a contractor's construction defect would under UPS's analysis be an intervening cause baring any claim against a negligent contractor. This is directly contrary to *Williams v. Melby*, which demonstrated that it was a jury question whether or not a contractor was liable for a tenant's injury allegedly caused by defective window construction. 699 P.2d 723, 729 (Utah 1985).

e. The Woods and UPS are Entitled to Have a Jury Resolve the Intervening Cause Issue.

The parties' right to a jury trial is "a basic principle of our system that cannot be allowed to eroded by improper intrusions on the jury's prerogative." *Harris,* 671 P.2d at 220. The Woods are entitled to have a jury resolve this case. The Woods should be allowed to show the jury how KNS's actions, although not ideal, were not "extraordinary." UPS is afforded the same right. UPS can use the facts above and other facts, if it has them, to try to argue to a jury that KNS's actions were so extraordinary that UPS should bear no responsibility.

2. Utah Cases Support Sending this Case to the Jury.

The Utah Supreme Court in *Harris* held that a following driver's own negligence in a car collision case could not be an intervening cause simply because the following driver saw the bus in front but still failed to avoid it. In *Harris*, the court recognized that a jury could find the bus contributed to the collision if it stopped too rapidly or "failed to drive out of the lane of traffic, or had faulty brake lights." *Harris*, 671 P.2d at 220. The court recognized "a momentarily inattentive driver would not have been so 'extraordinary' as to

be unforeseeable." *Id.* The Court, referencing the existence of the Utah Comparative Fault Statute, stated the jury should allocate fault not the court. *Id.* at 222. Similarly, in this case, UPS has acknowledged for purposes of this motion it negligently created the dangerous condition. A jury could conclude that KNS's failure to fix it properly "would not have been so 'extraordinary' as to be unforeseeable. *Id.* A jury using the comparative fault statute must make the allocation not the court.

The Utah Supreme Court's decision in *Williams v. Melby* also supports the Woods' position. 699 P.2d 723 (Utah 1985). In this case, the defendant Trayner built an apartment building which was eventually owned by the other defendants, the Melbys. The plaintiff moved into one of the apartments on September 1980. Four months later, the plaintiff fell though the apartment window when she awoke one night disoriented. The plaintiff sued both the contractor, Trayner, and the apartment owners, the Melbys, claiming the design of the apartment window created an unreasonable risk to an occupant's safety. The lower court granted summary judgment for both defendants.

On appeal, the apartment owners claimed the plaintiff knew about the window design and plaintiff had placed her bed next to the window. The defendant owner claimed that this conduct "was an intervening proximate cause that superseded whatever cause may have flowed from their negligence." *Id.* at 728. The Utah Supreme Court, citing *Harris*, reversed summary judgment in favor of the apartment owners, stating "[t]he issue of what constitutes a superseding cause cannot be determined by the simplistic formula that the cause which occurs last in time is, as a matter of law a superseding cause." *Id.* The court also reversed summary judgment in favor of the contractor, holding "[w]hether [the

contractor] was negligent in the construction of [the apartments] and, if so, whether his negligence was greater than that of the plaintiffs are questions for the jury." *Id.* at 729.

This case is significant because our Supreme Court sent the case back to the jury despite the existence of three facts similar to those argued by UPS here: 1) the plaintiff had inspected the apartment numerous times, knew the location of the window, and voluntarily placed her bed next to the window; 2) the contractor no longer had control over the apartments; and 3) the injury occurred many months after the apartments were finished and turned over to the occupants.

3. The Cases Cited by UPS Do Not Support A *Utah* Court Pulling the Intervening Cause Issue From a Jury.

UPS's main focus is not on the Utah standard or on the facts. UPS's main focus is in scouring the country for cases with seemingly similar fact patterns and then presenting them to the court, arguing that since these courts have found intervening cause as a matter of law, so should this court. Each of these cases are distinguishable upon the facts and/or the standard applied.

UPS first cites to *Lynch v. Norton Constr. Inc.*, a Wyoming slip and fall case. 861 P.2d 1095, 1099–100 (Wyo. 1993). In *Lynch*, a school custodian slipped and fell on an icy school sidewalk which had originally been installed by subcontractor Norton. For over one year after the school district accepted Norton's work, the school district knew of the ice problems on the sidewalk. In fact, the school district submitted a work order to fix the problem one year before the accident. The Wyoming court held that the school district's

negligence in failing to repair the "obvious dangerous condition of the sidewalks" was an intervening cause, relieving Norton of liability. *Id.* at 1099.

This case is distinguishable both legally and factually. First, in *Norton*, the school district knew of the dangerous condition **for over one year** before the injury and had received numerous complaints. In our case, between 7 and 30 days had passed and two KNS employees believed there was no immediate danger from the vinyl curtain. Second, under Utah law, UPS must show KNS's actions were "extraordinary". The Wyoming court did not apply that test. *Id.* at 1100.

UPS next cites to *Seely v. Loyd H. Johnson Const. Co.*, 220 Ga. App. 719, 722, 470 S.E.2d 283 (1996) (superseded by statute on other grounds). In *Seely*, a recent homebuyer, Ms. Seely, slipped and fell in a pool of water in her bathroom after a pipe leaked water onto the floor. The carpentry subcontractor initially caused the leaky pipe when he drove a nail through a pipe. A plumber was hired to fix the leak, but that repair failed. Ms. Seely then slipped on the water from the leaky pipe. The court granted the carpentry subcontractor's motion on the grounds that the subsequent repair was the proximate cause of Ms. Seely's injury.

This case is distinguishable because the *Seely* court applied a standard which is not followed in Utah and has in fact, been rejected. In *Seely*, the court recognized that the second negligent act will be the proximate cause over the first negligent act simply by the fact that the second actor knew about the prior negligent act. *Seely* at 287. The Utah Supreme court in *Harris* expressly rejected that the first actor can be relieved of negligence simply because the second actor is aware of the first party's actions. *Harris*, 671 P.2d at

222. In Utah, a subsequent act will only be an intervening cause if the subsequent act is "in hindsight extraordinary".

UPS next cites to *Walsh v. Israel Couture Post, No. 2274 V.F.W. of the U.S.*, a Rhode Island premises liability case. 542 A.2d 1094 (R.I. 1988). The Woods acknowledge the *VFW* case is similar to this case, but there are important differences. In *VFW,* the property owner knew about the damage but did nothing. In this case, KNS knew about the damage and one of the employees retightened two loose bolts to the point where he felt the vinyl curtain was secure enough, being held with 14 of the 16 total bolts still in place. Moreover, in this case, both of the identifiable witnesses have provided specific reasons why they did what they did. These are different facts a jury must consider when determining whether the subsequent acts were "extraordinary." Finally, the *Walsh* court does not apply the Utah standard that the intervening act must be "extraordinary".

Of note, eight years after the *Walsh* decision, the Rhode Island Supreme Court reached the opposite result in a case called *Pantalone v. Advanced Energy Delivery Systems, Cinc.,* 694 A.2d 1213 (R.I. 1997). In that case, the owner of the building hired a service technician (Smeltz) to fix an ice machine. The service technician fixed the ice machine but was unable to fix the nearby plug, claiming he did not have the electrical experience. The service technician told the owner he would need to call an electrician. The service technician then lent the owner an electric cord so the owner could attach the ice machine to a distant plug. The owner's business caught on fire 16 days later because of an overheated extension cord. The service technician claimed he was absolved from his negligence because 1) the owner knew about the problem and had failed to summons an

electrician to fix the nearby plug and 2) the owner continued to use the an extension cord for 16 days. *Id.* at 1215.

The trial court sent the case go to the jury and on appeal the Rhode Island Supreme Court agreed the intervening cause issue was one for the jury:

> We are of the opinion that the trial justice did not err in deciding this motion. The lending of the extension cord for this use could certainly have been found to be negligent. **Whether it was reasonably foreseeable that Pantalone might have used this extension cord for a considerable period without implementing the repairs recommended by Smeltz could not be determined as a matter of law**. This was a question of fact for the jury.

Id. at 1216 (emphasis added).

The other cases cited by UPS are also distinguishable.

In *Sisco v. Borce Mfg., Inc.,* 1 F. App'x 420 (6th Cir. 2001), the second actor was frequently warned about the extreme danger of not having working brakes on a street sweeper which was used to clean roads, including steep hills, yet did nothing. In our case, the KNS employee attempted to fix the bracket after he saw the damage and thought he had fixed the problem. And another KNS witness explained that he did not take any immediate action because 1) he did not think anyone would be working in that area, and 2) he did not consider the situation dangerous.

Lastly, in *Hennigan v. Atl. Refining Co.,* 232 F. Supp. 667 (E.D. Pa. 1967), the jury found the second actor's actions, in this case the City of Philadelphia, "so grossly negligent as to amount to a reckless disregard of the safety of others." In this case, KNS's actions could be characterized as negligent, but not grossly negligent or reckless.

4. Key Lessons on Intervening Cause.

The key lessons learned from the above discussion is that each case is unique and must be examined using this two-step process.

First, the court must apply the correct legal standard. In Utah, a subsequent act will only be an intervening act if such act is in hindsight "extraordinary" or "highly extraordinary" as discussed in *Harris.*

Second, the court must evaluate the facts under the "extraordinary"/"highly extraordinary" standard. In this case, a court errs in granting summary judgment if a reasonable jury could conclude that KNS's actions as discussed above were not "extraordinary". The Woods submit that most jurors would agree with the Woods that not only were KNS's actions not "extraordinary" but expected under the circumstances and consistent with human nature.

CONCLUSION

The Woods 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 a jury.

DATED this 1st day of October, 2018.

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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 6,901 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 1st day of October, 2018, I caused two (2) true and correct copies of the within and foregoing **APPELLANTS REPLY BRIEF** to be hand-delivered to:

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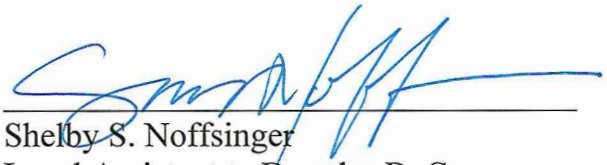

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