IN THE UTAH SUPREME COURT

STUART WOOD and LAURIE WOOD, Petitioners and Appellants v. UNITED PARCEL SERVICE, INC., a Delaware corporation, Respondent and Appellee	**APPELLANTS' BRIEF** Supreme Court Case No. 20200052-SC Court of Appeals Case No. 20180040-CA Trial Court Case No. 160900437

APPEAL ON GRANT OF PETITION FOR REVIEW OF APPELLATE COURT DECISION

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LIST OF CURRENT AND FORMER PARTIES

Parties to the proceedings in the appellate court and their counsel

1. Appellants Stuart Wood and Laurie Wood, represented by Douglas B. Cannon and Madelyn L. Blanchard of Fabian Vancott and Crag 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.

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INTRODUCTION

This appeal arises from a negligence case. In early 2013, a UPS truck driver backed up and crashed hard into KNS International, L.L.C.'s ("KNS") loading bay. UPS's collision into the loading bay cracked the loading bay's concrete that held an overhead vinyl curtain. UPS's collision dislodged and loosened some bolts holding the vinyl curtain in the concrete. KNS discovered the loading bay damage caused by UPS. KNS tightened some of the loosened bolts, but KNS did not fix the cracked concrete nor did KNS replace the one or two bolts which had fallen out of the concrete and vinyl curtain bracket.

One week to a month after the UPS driver hit the KNS loading bay, the vinyl curtain dislodged from the damaged concrete and fell on Stuart Wood, causing severe, permanent brain and neck injuries. The Woods filed a negligence lawsuit against both KNS and UPS.

The district court granted UPS's motion for summary judgment, holding that UPS's duty to Mr. Wood ended when KNS discovered the loading bay damage. The appellate court upheld the district's court grant of summary judgment for UPS. The appellate court held that UPS initially owed a duty to Mr. Wood, but that KNS's actions terminated UPS's duty by the time of the injury.

The appellate court erred in this case 1) when it failed to properly use the factors in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228, to define UPS's duty to Mr. Wood and 2) when it applied a *Jeffs* duty analysis instead of a superseding cause analysis to find UPS's duty had shifted to KNS. First, UPS owed a duty to Mr. Wood to use

reasonable care to avoid creating dangerous conditions on property which could injure property users such as Mr. Wood. Second, the Woods established a prima facia case against UPS for breach of this duty. Finally, this Court's precedent requires a superseding cause analysis, not a duty analysis, be applied to determine whether a third party's subsequent actions terminate a party's earlier negligence, and this is a question for the jury.

The Woods request that this Court overturn the appellate court's affirmance and the district court's grant of summary judgment with instructions that 1) UPS owed a duty to Mr. Wood as outlined in the brief, 2) the Woods established a prima facie case of negligence against UPS, and 3) the issue of whether KNS's actions superseded UPS's negligence must be analyzed under Utah **superseding cause law**, which requires submission of the issue to the jury.

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, AND PRESERVATION

Issue as Framed by Supreme Court Granting Certiorari

Whether the Court of Appeals erred in affirming the district court's grant of summary judgment to Respondent United Parcel Service, Inc.

Standard of Review

Standard of Review for Cases Under Certiorari Jurisdiction.

When exercising certiorari jurisdiction, this Court reviews the decision of the court of appeals, not the trial court. *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 17,

16 P.3d 1214. The court of appeals' ruling receives no deference; it is reviewed for legal correctness. *Id*.

General Standard of Review for Summary Judgment

The appellate court "review[s] the district court's decision to grant summary judgment for correctness, affording the trial court no deference. An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Torrie v. Weber Cty.*, 2013 UT 48, ¶ 7, 309 P.3d 216 (citations and internal quotation marks omitted).

Standard of Review for Determination of Duty

"Duty must be determined as a matter of law and on a categorical basis for a given class of tort claims." *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 23, 275 P.3d 228. The court reviews "de novo a lower court's determination of whether a duty exists." *Cope v. Utah Valley State Coll.*, 2014 UT 53, ¶ 10, 342 P. 3d 243.

Standard of Review for Proximate Cause

"[B]reach [of duty] and proximate cause are questions for the fact finder determined on a case-specific basis." *Jeffs*, 2012 UT 11, ¶ 25. "Proximate cause is a factual issue that generally cannot be resolved as a matter of law." *Butterfield v. Okubo*, 831 P.2d 97, 106 (Utah 1992). "Because proximate cause is an issue of fact, [a court should] refuse to take it from the jury if there is any evidence upon which a reasonable jury could infer causation." *Id*.

"[S]ummary judgment is appropriate in negligence cases only in the clearest instances." *Dwiggins v. Morgan Jewelers*, 811 P.2d 182, 183 (Utah 1991) (citation omitted).

Standard of Review for Superseding Cause

"A person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable." *Harris v. Utah Transit Auth.*, 671 P.2d 217, 219 (Utah 1983). *See also* *Thayer v. Washington Cty. Sch. Dist.*, 2012 UT 31, ¶ 62, 285 P.3d 1142, 1156 (Lee, J., dissenting) ("conduct would supersede (and cut the causal chain to the authorization) if the alleged subsequent negligence was sufficiently unforeseeable—e.g., if 'a reasonable man knowing the situation' would regard the subsequent negligence as 'highly extraordinary' and not a 'normal consequence' of the situation created by the authorization"); *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 488 (Utah Ct. App. 1991), *aff'd*, 862 P.2d 1342 (Utah 1993) (quoting *Robertson v. Sixpence Inns of Am., Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990)) ("[a] superseding cause, sufficient to become the proximate cause of the final result and relieve defendant of liability for his original negligence, arises only when an intervening force was unforeseeable and may be described with the benefit of hindsight as extraordinary.")

The foreseeability of a third party's subsequent act is a question of fact for the fact finder. *Prince v. Leesona Corp.*, 720 F.2d 1166, 1169 (10th Cir. 1983). A court should not take that issue away from the jury unless a reasonable jury could only reach one conclusion based on the evidence. *Trask v. Franco*, 446 F.3d 1036, 1047 (10th Cir. 2006) (citing Restatement (Second) of Torts § 453).

Preservation of Issue for Appeal

The Woods preserved this claim by opposing UPS's motion for summary judgment and specifically arguing that a duty existed, UPS breached its duty, and KNS's actions were not a superseding cause as part of their summary judgment briefing and argument. Appellate Record ("R") 1036-60. *Cf.* *Heritagewest Fed. Credit Union v. Workman*, 2010 UT App 342 (per curiam) (unpublished) (explaining that Appellant failed to preserve a claim against summary judgment "[b]ecause [he] failed to oppose the motion for summary judgment.")

STATEMENT OF THE CASE

Procedural History of Case

This appeal stems from a negligence case brought by the Woods against UPS and KNS after a heavy vinyl curtain fell on Mr. Wood's head, permanently injuring him. Following the close of fact discovery, UPS filed for summary judgment. R 342. Ruling from the bench, the district court granted UPS's motion for two reasons: first, the district court found that UPS's "duty ended when KNS became aware of the defect upon its building," R 1720:13–14; and second, the district court found "that the injury to Mr. Wood . . . was not proximately caused by UPS's damage to the building." R 1720:22–24.

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

> Based on the undisputed facts, summary judgment is appropriate as a matter of law, because UPS owed no duty to the plaintiffs at the time of injury. UPS's duty ended when KNS became aware of the damage UPS caused to its building. At that time, KNS was in a superior position to repair the damage and defects to the

> building, or restrict access to the bay so that it could not be used. At this point, UPS had no further duty to people injured by the damage it caused to the building.

R 1766.

The district court's order stated the following concerning proximate cause:

> Summary judgment in favor of UPS is also appropriate because the injury to Mr. Wood was not proximately caused by the damage UPS caused to the building. The defective property was in the sole possession of KNS for ~~for several weeks to 30 days~~ one week to one month before the injury to Mr. Wood occurred. If KNS was negligent in not repairing the door, or in the manner in which it repaired the door, there is intervening negligence by KNS that caused the injury to Mr. Wood. Alternatively, if KNS repaired the door in a manner that was reasonable and not negligent, no party's negligence caused the injury to Mr. Wood. Under either scenario, UPS did not proximately cause Mr. Wood's injury, and cannot be liable as a matter of law.

R 1766–67.

Following UPS's dismissal on summary judgment, the Woods and KNS reached a settlement, and on January 3, 2018, KNS was dismissed from the case. R 2136–38; 2155–59. At that point, no defendants remained in the case, and the district court's prior summary judgment ruling in favor of UPS became a final appealable order. *See* Docketing Statement. The Woods filed a notice of appeal two days later. R 2166–67.

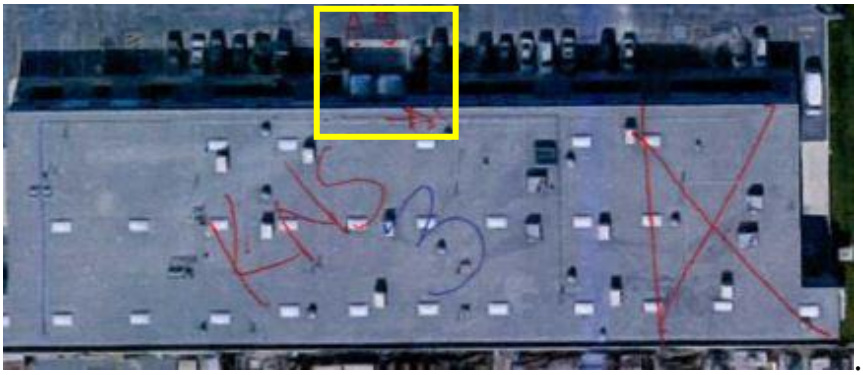
On October 18, 2019, the Court of Appeals upheld the district court's decision granting summary judgment. *Wood v. United Parcel Service, Inc.*, 2019 UT App 168. The appellate court ruled on the duty issue. *Id.* ¶ 7 n. 5. The appellate court did not reach the proximate cause issue. *Id.* The appellate court held that "while UPS initially owed a duty to Wood because UPS's truck caused damage to the loading dock, the duty owed to invitees such as Wood shifted to KNS when it learned of and failed to adequately remedy

the dangerous condition on its property that UPS created." *Id.* ¶ 10. The appellate court supported its holding by relying on the duty factors outlined in *Jeffs. Id.* ¶¶ 11-18.

The Woods filed a motion for rehearing on October 20, 2019 which was denied on December 19, 2019. The Woods filed a petition for writ of certiorari on January 16, 2020. This Court granted that petition on April 23, 2020.

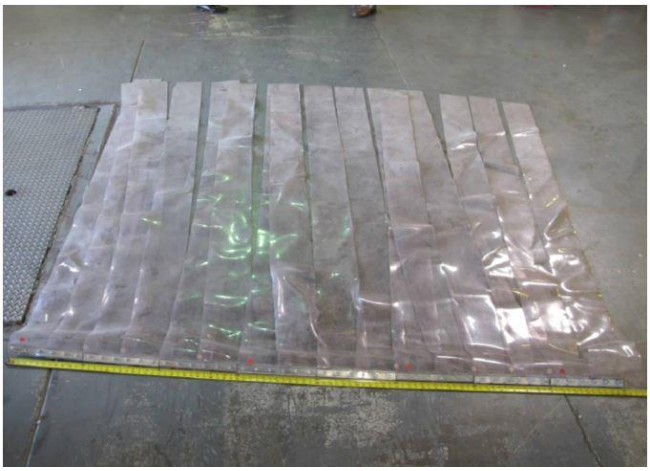
Factual Background

In 2012–2013, KNS operated and managed a warehouse from which it would receive and distribute its products. R 1071:9-15; 1167. The KNS warehouse has a docking bay designed to receive tractor trailers. R 1037-1038; 1072:7–1073:23; 1080; 1167. Docking Bays A and B in Building 3 are shown below, R 1037–38; 1167.



TJ Barney was an employee of KNS from late 2007 through early to mid-2013. R 1085:5–11. During part of his tenure at KNS, Mr. Barney worked as an assistant

manager/supervisor/assistant warehouse manager. R 1085:12–21. After September 1, 2011, but before Mr. Wood was injured, KNS installed a number of vinyl curtains on its docking bay doors including a vinyl curtain on the outside of the door for Docking Bay B. R 1089:14–1091:17. A photograph of the vinyl curtain from Docking Bay B is shown below. R 1038 & 1168.



The vinyl curtain components included a metal bracket with 16 bolt holes. R 1096:10–20. Mr. Barney helped install some of the vinyl curtains. R 1090:2-6. Mr. Barney testified about how KNS installed the vinyl curtains over the warehouse doors:

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

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

<u>UPS's Tractor-Trailer Crashed into Docking Bay B Causing Structural Damage to the Vinyl Curtain Bracketing/Bolting System and the Concrete Holding the Vinyl Curtain.</u>

After KNS installed the vinyl curtains, Mr. Barney was working in the KNS warehouse when he heard a "bad bang." R 1099:19–1100:10; 1101:20–1102:22. Mr. Barney felt the building shake because the building had been hit so hard. R 1103:2-10. Mr. Barney described the impact as "like a mini bomb went off." R 1112:22-1113:2. After Mr. Barney walked over to the source of the "bad bang," he saw that a UPS tractor-trailer had backed down Docking Bay B and had hit the KNS building. R 1099:20–1100:21; 1112:16–21. Mr. Barney knew it was a UPS tractor-trailer that had hit the KNS building because he testified, "I was standing there and it was a UPS truck that was there after the building shook." R 1109:19–23. Mr. Barney also talked to the UPS driver about hitting the building. R 1109:22–1110:13. After the collision, Mr. Barney saw the "cinderblock" holding the vinyl curtain bracket had cracked. R 1113:7–12. Mr. Barney also saw that one or two of the bolts holding the vinyl curtain bracket had fallen out of the concrete. R 1105:22–1106:15; 1108:12–17;. Mr. Barney testified that after the collision, the concrete holding the vinyl curtain would no longer hold the one or two bolts which had come out of the vinyl curtain bracket. R 1105:12–24.

Mr. Barney testified he had to tighten one or two other bolts which had loosened because of the UPS truck's collision with the KNS building. R 1106:16–1108:11. Mr. Barney guessed the UPS truck hit the KNS building "multiple weeks" before the vinyl curtain bracket fell on Mr. Wood's head. R 1104:9–20. Mr. Barney testified, to the best of his recollection, that the UPS tractor-trailer hit the KNS building one week to one month before the vinyl curtain fell on Mr. Wood. R 1104:9–20. Prior to the UPS collision, Mr. Barney had constantly inspected the KNS building and he had not seen any

damage around Docking Bay B before the UPS truck hit the KNS building. R 1102:23–1103:25. Mr. Barney concluded the UPS tractor-trailer had caused the damage to the KNS building because 1) the tractor-trailer hit the building "so hard" and 2) he personally observed the damage after the UPS tractor-trailer hit the KNS building. R 1102:20–1103:25; 1111:18–25; 1112:16–1113:3. Mr. Barney believed that after he had tightened the bolts, he felt the vinyl curtain was "secure enough at least for my liking." R 1113:13–1114:4.

The UPS Tractor-Trailer That Hit the KNS Building Broke Both UPS's and Common Safety Rules, thus Breaching its Duty of Reasonable Care.

UPS used tractors to deliver the UPS trailers. R 1073:24–1075:13. Mr. Keeling, UPS's Global Health and Safety Compliance Director, R 1117; 1120:5–8, testified concerning the UPS safety rules for tractor-trailer drivers when backing into a building. R 1121:23–1122:2. Mr. Keeling testified that UPS tractor-trailer drivers, when backing their tractor-trailers, must follow certain rules, including the following: (a) a UPS driver must do "a controlled back," R 1125:5–7; (b) a UPS driver must not go fast when backing, R 1125:5–7; and (c) a UPS driver backing to a dock must get out and check the distance if he/she is unsure of where his/her trailer is in relation to the dock. R 1126:1–16. Mr. Keeling testified UPS's backing safety rules are designed to prevent injury to people, the building/dock and the UPS trailer. R 1125:5–15; 1127:15–1128:3. UPS assumes a UPS driver is not backing properly if the UPS driver's trailer hits a building so hard that it causes structural damage to the building. R 1123:8–16. UPS cannot think of any circumstance under which a UPS driver would hit a building hard if the UPS driver is

following UPS's rules for safe backing. R 1128:10–1129:2. UPS agrees that it is possible to cause structural damage to a building if the driver hits a building hard enough. R 1123:17–1124:4.

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

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

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

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

First, KNS, through Mr. Barney, knew before the vinyl curtain fell on Mr. Wood that a UPS tractor-trailer had caused significant damage to the vinyl curtain bracketing/bolting system and the concrete holding the vinyl curtain, and that Mr. Barney

had attempted to fix the bracket. *See e.g.*, R 1099:22–1100:10; 1101:20–1102:22; R 1105:25–1107:8; R 1108:12–17; R 1109:22–1110:13.

Second, on February 4, 2013, before the vinyl curtain bracket fell on Mr. Wood, Mike Kelly, the now President of KNS, saw the vinyl curtain bracket in Docking Bay B hanging down. R 423:16–23; 425:1–426:12. Mr. Kelly proceeded to drive away from the KNS facility without telling anyone about the damage and the curtain "because no one should have been there and I didn't think that there was any risk of it hanging down because . . . there's a lot of bolts holding it . . . I never would have thought it would have fallen." R 426:16–22.

Third, after the vinyl curtain bracket fell on Mr. Wood, Mr. Wood overheard a KNS employee state that he knew the "thing was going to fall" and we should have fixed it. R 970:15–25.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred by not applying the proper law to this case. The appellate court erred when it failed to properly use the factors in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228, to define UPS's duty to Mr. Wood. The appellate court further erred when it applied the *Jeffs* factors in terminating UPS's duty to Mr. Wood because of the actions of KNS. The appellate court should have applied Utah superseding cause law to analyze whether KNS's actions constituted a superseding cause. This brief outlines the analysis the appellate court (and the district court) should have followed in considering UPS's motion for summary judgment.

First, the appellate court should have conducted a duty analysis using the *Jeffs* factors. A proper application of those factors results in the recognition that truck drivers (and others similarly situated) owe a duty to property users to use reasonable care to avoid creating dangerous conditions on another's property that can cause injury to property users. The appellate court actually recognized this duty. The appellate court, however, erred by revisiting the duty analysis 1) at the time of the injury and 2) using case-specific facts rather than conducting a duty analysis on a broad, categorical level.

Second, the appellate court should have acknowledged that the Woods established a prima facie negligence case against UPS. The Woods established a duty existed; that UPS breached that duty; that UPS's breach was the proximate and actual cause of Mr. Wood's injuries; and that Mr. Wood suffered substantial, permanent damages due to UPS's negligence.

Finally, the appellate court erred by not conducting a superseding cause analysis in determining whether KNS's actions cut off UPS's liability. That analysis would have established that UPS was not entitled to judgment as a matter of law and that the issue of superseding cause was for the jury, not the court.

ARGUMENT

I. UPS OWED A DUTY TO MR. WOOD AND THE APPELLATE COURT ERRED BY REEVALUATING UPS'S DUTY AT THE TIME OF MR. WOOD'S INJURY USING CASE-SPECIFIC FACTS.

A. Courts Determine Duty Using Factors Analyzed at a Broad Categorical Level Rather Than on a Case-Specific Level.

"In negligence cases, a duty is 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5 (quoting *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 321 (Utah 1997) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 356 (5th ed. 1984))).

The Utah Supreme court in *B.R. ex rel. Jeffs v. West* outlined "several factors relevant to determining whether a defendant owes a duty to a plaintiff":

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

2012 UT 11, ¶ 5 (citations and internal quotation marks omitted). "[E]ach factor must be 'analyzed at a broad categorical level for a class of defendants' rather than a factually intensive inquiry 'decided on a case-by-case basis.'" *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶ 29, 356 P.3d 1172.

This Court in *Jeffs* discussed how these factors should be applied:

> Not every factor is created equal, however. As we explain below, some factors are featured heavily in certain types of cases, while other factors play a less important, or different, role. . . . [T]he legal-relationship factor is typically a "plus" factor—used to impose a duty where one would otherwise not exist, such as where the act complained of is merely an omission. . . . [T]he final three factors . . . are typically "minus" factors—used to eliminate a duty that would otherwise exist.

Jeffs, 2012 UT 11, ¶ 5.

B. The Application of The Five *Jeffs* Factors Establishes UPS Owed a Duty to Property Users to Use Reasonable Care to Avoid Creating Dangerous Conditions on Another's Property Which Could Injure Property Users.

The specific issue in this case is whether truck drivers (or others similarly situated) have a legal obligation to property users to use reasonable care in the operation of their trucks to avoid creating dangerous conditions on property which could cause injury to property users. Applying the *Jeffs* factors to this case establishes that UPS owed such a duty to Mr. Wood.

1. The *Jeffs* "Plus" Factors Favor Recognizing a Duty.

a. UPS's Conduct Consisted of an Affirmative Act Which Carried an Obligation to Use Reasonable Care.

"The long-recognized distinction between acts and omissions—or misfeasance and nonfeasance—makes a critical difference and is perhaps the most fundamental factor courts consider when evaluating duty." *Jeffs*, 2012 UT 11, ¶ 7. "Acts of misfeasance, or 'active misconduct working positive injury to others,' typically carry a duty of care." *Id.* (citation omitted). "As a general rule, we all have a duty to exercise care when engaging in affirmative conduct that creates a risk of physical harm to others." *Id.* ¶ 21; *see also* *Graves v. North Eastern Services, Inc.*, 2015 UT 28, ¶ 19, 345 P.3d 619 ("[W]e all generally have a duty of due care in the performance of our affirmative acts . . . .").

In this case, UPS engaged in the affirmative act of improperly backing its tractor-trailer hard into the KNS loading bay. Applying this "most fundamental factor," the UPS truck driver had a duty to use reasonable care when backing so as not to injure people or damage property which could then cause injury to others, including Mr. Wood. *See* *Jeffs*, 2012 UT 11, ¶ 21.

b. A Special Relationship Between UPS and Property Users Like Mr. Wood Was Not Necessary to Establish UPS's Duty In this Case.

The Utah Supreme Court recognizes a special relationship as a "plus" factor in establishing a duty. However, "[o]utside the government context . . . a special relationship is not typically required to sustain a duty of care to those who could foreseeably be injured by the defendant's affirmative acts." *Jeffs*, 2012 UT 11, ¶ 10.

As discussed below, Mr. Wood is one of those "who could foreseeably be injured by" UPS's improper backing of its trucks. *Id.* Hence, a special relationship is not required. *Id.* ¶ 19 (plaintiffs alleged that defendants' affirmative act of prescribing medication caused David Ragsdale to take his wife's life; "a special relationship or physician-patient relationship need not underlie the defendants' duty to the plaintiffs in this case.")

2. The *Jeffs* "Minus" Factors Favor Recognizing a Duty.

a. The Foreseeability Factor Weighs in Favor of Recognizing a Duty.

This Court in *Normandeau v. Hanson Equipment, Inc.*, outlined the foreseeability factor:

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

2009 UT 44, ¶ 20, 215 P.3d 152. The *Jeffs* court emphasized the difference between foreseeability as it relates to duty formation and foreseeability in proximate cause. The Court noted "that duty is a question of law determined on a categorical basis, while breach and proximate cause are questions for the fact finder determined on a case-specific basis." *Jeffs*, 2012 UT 11, ¶ 25. The "appropriate foreseeability question for duty analysis is whether a category of cases includes individual cases in which the likelihood of some type of harm is sufficiently high that a reasonable person could anticipate a general risk of injury to others." *Id*. 28.

In *Jeffs*, for example, the court was faced with "whether healthcare providers have a legal obligation to nonpatients to exercise reasonable care in prescribing medications that pose a risk of injury to third parties." 2012 UT 11, ¶ 5. The *Jeffs* court recognized that certain drugs, such as powerful narcotics, carry a highly foreseeable risk to third parties, while other, "innocuous drugs," do not. *Id*. ¶ 28. The court nonetheless concluded that a duty exists in both circumstances:

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

Id.

The relevant category of cases here consists of truck drivers or heavy vehicle operators who cause damage to property which can then injure property users. The

foreseeability question is whether there are circumstances within that category of cases in which a truck driver could foresee injury. *Id.* ¶ 27. The answer here, is "Yes."

Common experience establishes that large, heavy vehicles striking a building hard can cause structural damage to that building. UPS's own corporate representative acknowledged that a driver can cause structural damage if the driver hits the building hard enough. R 1123:17–1124:4.

It is equally common knowledge that a damaged or compromised building can cause injury to people underneath that structure by something collapsing or falling on that person. UPS would likely concede it is foreseeable that a tractor trailer striking a building might dislodge part of the building causing *immediate* injury to a third party. The appellate court in this case recognized it was foreseeable that such damage could cause injury in the future to a third party.

> We agree with Wood that it is foreseeable that harm may result from a compromised building structure and that the mere passage of time does not take an injury from the danger posed by the unsafe condition out of the realm of foreseeability.

Wood, 2019 UT App 168 ¶ 15. *See, e.g.*, *Holcombe v. NationsBanc Fin. Servs. Corp.*, 248 VA 445, 448, 450 S.E. 2d 158 (1994) (denying summary judgment in a negligence case on the issue of foreseeability because "[t]he fact, stressed by the defendant, that the [two heavy] partitions had remained in the bathroom for several months without incident does not detract from the foreseeability of injury occurring, albeit the injury occurred later rather than sooner" after the partition fell over and injured plaintiff.)

Thus, the foreseeability factor weighs in favor of imposing a duty on UPS because the class of cases "includes some in which a risk of injury to third parties is reasonably foreseeable." *Jeffs*, 2012 UT 11, ¶ 28.

b. The Public Policy Factor Weighs in Favor of Recognizing a Duty in this Case.

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

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

2012 UT 11, ¶¶ 30-31 (concluding that physicians were in the best position to avoid the loss because of their expertise).

Truck drivers (or heavy equipment operators) are always in the "superior position . . . [of] control" to prevent the loss in the first place. *See Mower v. Baird*, 2018 UT 29, ¶ 29, 422 P.3d 837, 846 (in assessing this factor in a case involving a therapist's duty to an alleged sexual abuser for treatment of the alleged victim, the court stated: "The third-party abuser is in a better position to avoid the potential harms, namely by not committing the abuse in the first place."). In this case, the UPS driver could have prevented this injury entirely if the driver had chosen to follow UPS's safety rules and backed the tractor-trailer at a slow speed. R 1125:5–7; 1126:1–16. Instead, the driver chose to back the tractor-trailer into the building at a reckless rate of speed, causing damage to the building and, eventually, to Mr. Wood. R 1123:8–16; 1128:10–1129:2; *supra* at 9-10.

In contrast, property owners are not necessarily the best ones to protect against the loss. A property owner may not be aware of the damage. Moreover, as demonstrated in this case, property owners may attempt to fix the problem but do it poorly. KNS's specific knowledge of the property damage in this case and KNS's failure to fix the vinyl curtain properly are specific facts more relevant to a proximate/superseding cause analysis than a duty analysis.

c. Other Policies Favor Recognizing a Duty in this Case.

Other policy considerations weigh in favor of finding a duty in this case. For example, after this Court remanded *Normandeau*, the appellate court recognized that "the public policy behind tort law is to hold tortfeasors accountable for harms occasioned by their fault. . . . Accordingly, as between an innocent party and a negligent tortfeasor, public policy requires that any loss should be borne by the tortfeasor." *Normandeau v. Hanson Equip., Inc.*, 2010 UT App 121, ¶ 4, 233 P.3d 546. In this case, UPS acted negligently when it backed its tractor trailer into the docking bay and bracket assembly; that negligence caused Mr. Wood's injury. UPS should bear that responsibility.

Holding UPS responsible also serves public policy in that it incentivizes professionals to act reasonably and consider the effect of their actions on third parties. *Jeffs*, 2012 UT 11, ¶ 34 ("tort duties incentivize professional—whether physicians, mechanics or plumbers—to consider the potential harmful effects of their actions on . . . third parties.")

Finally, Utah has by statute recognized that each defendant shall only be liable for its percentage of fault. Utah Code Ann. 78B-5-818(4)(a) . Public policy favors UPS being held liable for its fault and KNS liable for its fault.

The consideration of all the above *Jeffs* factors establishes that UPS owed a duty to Mr. Wood to use reasonable care to avoid creating a dangerous condition on property which could injure Mr. Wood.

C. The Appellate Court Erred by Improperly Applying the *Jeffs* Factors to Terminate UPS's Duty at the Time of Injury.

1. A Court Should Not Use the *Jeffs* Factors to Reanalyze Duty at the Time of the Injury Using the Specific Facts of the Case.

The Utah Court of Appeals, consistent with the analysis above, initially recognized that UPS owed Mr. Wood a duty to use reasonable care not to cause damage to KNS's loading bay which could then injure Mr. Wood.

> Applying [the five factors in *Jeffs*], **we determine that while UPS initially owed a duty to Wood because UPS's truck caused damage to the loading dock**, the duty owed to invitees such as Wood shifted to KNS when it learned of and failed to adequately remedy the dangerous condition on its property that UPS created.

Wood, 2019 UT App 168, ¶ 10 (emphasis added).

It is at this point that the appellate court committed error. The appellate court having initially recognized UPS's duty then reapplied the *Jeffs* factors at the time of injury to terminate UPS's duty. The appellate court held that UPS did not owe that duty "**at the time of his injury**" because KNS had learned of and failed to adequately remedy the dangerous condition." *Wood*, 2019 UT App 168, ¶¶ 10, 19. This was error.

A court should not conduct a duty analysis on a case-by-case basis but on a broad categorical level.[1] *Jeffs*, 2012 UT 11, ¶ 23. Nor should a court reexamine duty at the time of the injury. Reanalyzing duty at the time of the injury should not yield a different outcome. Rather, the appellate court (and the district court) should have conducted a superseding cause analysis under Utah law in considering whether KNS's actions cut off UPS's liability. Superseding cause analysis takes into account the case-specific facts and timing.

The proper analysis the courts should have applied is explained in Section III below.

2. The Appellate Court's Error is Further Illustrated by Its Citing Restatement Section 452 as a Basis for Conducting a Duty Analysis Instead of a Superseding Cause Analysis.

The appellate court relied on Section 452 of the Restatement Second of Torts to support shifting UPS's entire duty to KNS. The appellate court cited Section 452(2) to "explain[] how a duty can shift from one party to another: 'Where, because of 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**.'" *Wood*, 2019 UT App 168, ¶ 9

[1] The district court made the same error. The district court held "Based on the undisputed facts, summary judgment is appropriate as a matter of law, because UPS owed no duty to the plaintiffs **at the time of injury**. UPS's duty ended when KNS became aware of the damage UPS caused to its building." *Wood v. KNS Intern., LLC*, No. 160900437, 2017 WL 11470876, at *1 (Utah Dist. Ct. Nov. 20, 2017) (emphasis added). R 1720; 1766 (emphasis added).

(citing Restatement (Second) of Torts § 452(2) (1965))) (emphasis added). Instead of conducting a superseding cause analysis, the appellate court then reanalyzed duty at the time of injury using the *Jeffs* factors. *Id.* ¶ 10.

Section 452 has nothing to do with duty formation but rather whether the third party's failure to act or actions constitute a superseding cause. Section 452 reinforces that the appellate court should have conducted a superseding cause analysis to determine whether KNS's actions relieved UPS of responsibility. See Section III below.

D. UPS's Duty Is Consistent with Sections 383 and 385 of the Restatement of Torts.

1. Section 383 Recognizes Parties Have a Duty to Use Reasonable Care to Avoid Creating Dangerous Conditions on Property Which Could Cause Injury to Others.

Section 383 of the Restatement Second of Torts[2] recognizes that UPS is responsible for dangerous conditions it creates on another's property. Section 383 states as follows:

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

Restatement (Second) of Torts, § 383. Utah law recognizes that "[l]andowners may be liable for injuries caused by dangerous conditions which they create, and which they should reasonably foresee would expose others to an unreasonable risk of harm." *English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct. App. 1989), *aff'd*, 848 P.2d 153 (Utah 1993).

[2] Utah has not yet adopted Section 383.

In such cases where the defendant "created the condition . . . he is deemed to know of the condition; and no further proof of notice is necessary." *Allen v. Federated Dairy Farms, Inc.*, 538 P.2d 175, 176 (Utah 1975).

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

2. Section 385 of the Restatement Second of Torts Recognizes a Duty on Third Parties to Use Reasonable Care to Avoid Creating a Dangerous Condition on Property Which Could Cause Injury to Property Users.

Section 385 of the Restatement Second of Torts states:

> One who on behalf of the possessor of land erects a structure **or creates any other condition thereon** is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

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

In *Tallman v. City of Hurricane*, 1999 UT 55, 985 P.2d 892, the Utah Supreme Court adopted Section 385 as part of Utah's common law. *Id.* ¶ 9. In *Tallman*, the Supreme Court recognized that a party working on *another's* property could be held liable for the dangerous condition it created on the property. *Id.* *See also* *Gonzalez v. Russell Sorensen Const.*, 2012 UT App 154, ¶¶ 24–25, 279 P.3d 422 (discussing *Tallman's* adoption of §385 and explaining that a contractor is directly liable for physical harm caused by conditions that he created on the land).

UPS drove its trucks onto KNS property "on behalf of" KNS. KNS requested that UPS pick up and deliver packages at its warehouse. UPS "create[d]" a dangerous condition on KNS property when it negligently backed hard into the KNS building causing structural damage to the cinder block holding the vinyl curtain and the vinyl curtain's fixation system. UPS's negligent driving weakened and compromised the cinder block holding the vinyl curtain and the vinyl curtain bracketing system. The vinyl bracket and curtain eventually failed because of that damage and injured Mr. Wood. UPS owed a duty to Mr. Wood and other potential victims.

II. THE WOODS ESTABLISHED A VIABLE CLAIM OF NEGLIGENCE AGAINST UPS.

To establish a claim for negligence, the plaintiff must establish 1) defendant owed plaintiff a duty of care, 2) defendant breached that duty and 3) the breach was the proximate cause of 4) plaintiff's injuries or damages. *Jeffs*, 2012 UT 11, ¶ 5, n. 2. The Woods have demonstrated each of these elements against UPS sufficient for the case to go to a jury.

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

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

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

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

Mr. Barney, a KNS employee, testified he was working in the KNS building when he heard a loud bang. Mr. Barney testified the building shook, and he described the impact like a "mini-bomb." R 1099:22–1100:10; 1101:20–1102:22; 1112:22-1113:12. Mr. Barney walked over to the bang's source and saw a UPS driver had backed his tractor-trailer into the KNS building. R 1099:20–1100:24: R 1112:16–1113:6. Mr. Barney saw the UPS driver's tractor-trailer had caused structural damage to the KNS building and even talked to the driver about it. R 1105:22-1108:11; 1109:22–1110:13; 1113:7-12.

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

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

R 1125:5–7; 1126:1–16.

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

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

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

Mr. Barney testified he had inspected the KNS building before the UPS tractor-trailer hit the KNS building and he had not seen any damage around loading bay B. R 1102:23–1103:25. Mr. Barney testified the UPS tractor-trailer collision damaged the vinyl curtain bracketing/bolting system and compromised the concrete holding the vinyl curtain. R 1105:10–1106:15; 1108:12–17; 1113: 7–12. Mr. Barney testified he saw 1) one or two of the bracketing bolts had come out of the bracket and had fallen to the floor, 2) that one or two of the bracketing bolts were loose, and 3) the cinderblock holding the vinyl curtain was cracked. *Id.* Mr. Barney concluded the UPS tractor trailer caused the

damage to the KNS building because 1) the UPS tractor trailer hit the KNS building hard and 2) the damage was observed after the UPS tractor trailer hit the KNS building. R 1102:23–1103:14; 1111:18–25; 1112:16–1113:3.

Mr. Thain, the warehouse manager, testified the damage caused to the concrete by the UPS tractor-trailer backing into the KNS building ultimately caused the vinyl curtain bracket to fall. R 1142:15-1143:9; 1149:3–14. The Woods' expert, Scott Kimbrough, opined that UPS's collision with KNS's building caused the vinyl curtain bracket to fall on Mr. Wood. R 1899–1900; 1908–1918.

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

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

Causation in negligence cases consists of two requirements. First, the person's act produced the harm directly or set in motion events that produced the harm in a "natural and continuous sequence," without which the injury or result would not have occurred. *Magana v. Dave Roth Constr.*, 2009 UT 45, ¶ 27, 215 P.3d 143. This is also known as "but for" causation. Second, the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature. *Steffensen*, 862 P.2d at 1346.

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

The Woods have provided ample evidence that UPS's driver caused the vinyl curtain to fall. Said another way, but for UPS hitting the building, the bracket would have never fallen on Mr. Wood's head. Mr. Barney testified a UPS tractor-trailer hit loading bay B hard. R 1099:22–1100:10; 1101:20–1102:22. The UPS driver's negligence damaged the vinyl curtain's bracketing/bolting system and the concrete holding the bracketing system, causing one or two bolts from the vinyl curtain bracket to fall out and one or two bolts to loosen. R 1105:10-1108:17. As a result, the vinyl curtain bracketing system in Docking Bay B partially detached and then completely detached from the concrete between one week to one month later, injuring Mr. Wood. R 423:16–424:4; 425:1–426:121134:23–1135:14; 1136:1–25; 1142:15-1143:9; 1149:3-14. The vinyl curtain that failed, injuring Mr. Wood, was the only curtain with documented damage to the bracket and concrete. R 1104:21-1108:17; 1149:3–20. None of the other vinyl curtains failed. *Id.* Mr. Thain, KNS's warehouse manager, concluded from his inspection that the damage caused by a truck backing into the KNS building at Docking Bay B ultimately caused the vinyl curtain to fall. R 1142:15–1144:8. The Woods' expert also opined that the building damage caused by UPS led the vinyl curtain to fall. R 1899–1900; 1908–1918.

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

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

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

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

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

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

The fact that the building part UPS damaged—the vinyl curtain bracket and the surrounding concrete—failed one week to a month after the blow rather than immediately does not take this case out of the foreseeable general harm identified above. *Skollingsberg v. Brookover*, 484 P.2d 1177, 1179 (Utah 1977) ("where there is proper

proof of proximate causation, remoteness of time alone will not ordinarily prevent imputation of liability for a subsequent injury to a prior act of negligence."); *see also* *Holcombe*, 450 S.E. 2d at 160 (denying summary judgment in a negligence case on the issue of foreseeability because "[t]he fact, stressed by the defendant, that the [two heavy] partitions had remained in the bathroom for several months without incident does not detract from the foreseeability of injury occurring, albeit the injury occurred later rather than sooner" after the partition fell over and injured plaintiff.)

In fact, the appellate court in this case concluded that "it is foreseeable that harm may result from a compromised building structure and that the mere passage of time does not take an injury from the danger posed by the unsafe condition out of the realm of foreseeability." *Wood*, 2019 UT App 168, ¶ 15.

Nor does it matter to the analysis what specific part of the building failed. *Mountain States Tel & Tel. Co. v. Consol. Freightways*, 242 P.2d 563, 565 (Utah 1952) ("Negligence is the proximate cause of damage even though the actor was not able to foresee the injury in the precise form in which it occurred, nor to anticipate the precise damage which would result from his negligence."). Rather, Mr. Wood's mechanism of injury and type of injury fall within the general type of injury which can be expected from a tractor-trailer hitting and structurally damaging a building; that is, it is generally foreseeable that a damaged item hanging above an area where people frequently walk could fall and injure someone walking underneath. *See Id*.

Therefore, the appellate court erred in affirming the district court's grant of summary judgment to UPS because the Woods established a prima facie case of negligence against UPS.

III. THE APPELLATE COURT ERRED WHEN, AFTER RECOGNIZING DUTY, IT RE-ANALYZED DUTY "AT THE TIME OF INJURY," INSTEAD OF CONDUCTING A SUPERSEDING CAUSE ANALYSIS.

The *Jeffs* factors are inapplicable to whether a duty has shifted to a third person. To shift UPS's duty and liability to KNS, the appellate court should have applied Utah **superseding cause** precedent and analyzed whether KNS's actions amounted to a superseding cause, using the well-established tests of whether KNS's actions were foreseeable or extraordinary.

A. A Court Must Apply Utah Superseding Cause Precedent When Determining Whether a Subsequent Negligent Action or Failure to Act Relieves the Original Negligent Actor of Liability.

The appellate court's ruling was in error because it applied the wrong law to the facts when it recognized UPS's duty but then shifted that duty to KNS without conducting a superseding cause analysis. A superseding cause is "an unforeseeable act of subsequent negligence that severs the causal connection to an initial causal act." *Thayer v. Washington County Sch. Dist.*, 2012 UT 31, ¶ 61, 285 P.3d 1142 (Lee, J., dissenting). "A superseding cause is a magical thing: it operates to relieve the original actor from all liability for [its] original (and potentially tortious) act." *State v. Oliver*, 2018 UT App 101, ¶ 33, 427 P.3d 495, 504. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement

(Second) of Torts § 440 (1965). "A reasoning and normative process is required in order to separate background causes from intervening forces and to decide which intervening forces under what circumstances are superseding, thus avoiding the liability of an actor who engaged in tortious conduct." Restatement (Third) of Torts: Phys. & Emot. Harm § 34 (2010).

A court must apply Utah superseding cause precedent when a defendant asserts that a more recent act relieves the original tortfeasor of liability. "The issue of what constitutes a superseding cause can not be determined by the simplistic formula that the cause which occurs last in time is, as a matter of law, a superseding cause." *Williams v. Melby*, 699 P.2d 723, 728 (Utah 1985) (reversing summary judgment for defendants because it was for the finder of fact to determine whether a contractor's negligence in the design of a bedroom window was superseded as a matter of law by the tenant's later negligence in positioning the bed near the window or the fact that the contractor no longer possessed or controlled the property). *See also* *Godesky v. Provo City Corp.*, 690 P.2d 541, 544 (Utah 1984) (affirming non-party employer's subsequent negligence did not supersede defendant Provo City's initial negligence); *Harris*, 671 P.2d 217 (remanding as to whether the Jeep driver's later negligence superseded the bus driver's earlier negligence); *Bansasine v. Bodell*, 927 P.2d 675, 677 (Utah Ct. App. 1996) (affirming the later act of the third party driver's road rage shooting and killing of plaintiff's father superseded the earlier reckless driving negligence of the driver of which father was a passenger).

Here, Utah law required the court conduct a superseding cause analysis because

the appellate court recognized that UPS owed a duty to Wood,[3] and UPS asserted that KNS's actions/inaction cut off UPS's liability. The appellate court erred in shifting UPS's breached duty to KNS without conducting a superseding cause analysis.

B. A Third Party's Action or Failure to Act Will Not Be a Superseding Cause If the Subsequent Act or Failure to Act is Foreseeable or Not Highly Extraordinary.

The proper analysis for whether a later negligent act supersedes the original negligent act is well-established in *Harris*, *Steffensen*, and the Restatement (Second) of Torts. Subsequent negligence will **not be** a superseding cause if the subsequent negligence was (1) foreseeable by the original actor, or (2) not "highly extraordinary," or (3) a normal consequence of the situation created by the original actor.

In *Harris v. Utah Transit Authority*, this Court stated "[a] person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable." 671 P.2d at 219. In *Steffensen*, the Court of Appeals stated, "[a] superseding cause, sufficient to become the proximate cause of the final result and relieve defendant of liability for his original negligence, arises only when an intervening force was unforeseeable and may be described with the benefit of hindsight, as extraordinary." 820 P.2d at 488. *See also Thayer*, 2012 UT 31, ¶ 62 (Lee, J., dissenting) ("conduct would supersede (and cut the causal chain to the authorization) if the alleged subsequent negligence was sufficiently unforeseeable—e.g., if 'a reasonable man knowing the

[3] The appellate court stated "we determine that while UPS initially owed a duty to Wood because UPS's truck caused damage to the loading dock . . . ." *Wood*, 2019 UT App 168, ¶ 10.

situation' would regard the subsequent negligence as 'highly extraordinary' and not a 'normal consequence' of the situation created by the authorization.").

This Court also adopted the Restatement (Second) of Torts § 447 regarding superseding cause:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Restatement (Second) of Torts § 447 (1965) . *See* *Harris*, 671 P.2d at 219 (citing *Jensen v. Mountain States Tel. & Tel. Co.*, 611 P.2d 363, 365 (Utah 1980) and recognizing adoption of § 447).

Section 447's subparts illustrate the high bar which UPS must clear to establish superseding cause. A defendant seeking to establish its innocence based on a subsequent negligent act must establish that none of the conditions in subsections (a) through (c) are satisfied. Subsection (a) recognizes a subsequent act will not be a superseding cause if the original actor can foresee the subsequent act. Subsection (b) recognizes a subsequent act will not be a superseding cause if a reasonable person would not consider the subsequent act "highly extraordinary." Subsection (c) recognizes a subsequent act will

not be a superseding cause if the subsequent act is a "normal consequence" and the way it was done was "not extraordinarily negligent." The term "normal" "means that the court or jury, looking at the matter after the event, and therefore knowing the situation which existed when the new force intervened, does not regard its intervention as so extraordinary as to fall outside of the class of normal events." Restatement (Second) of Torts § 443 cmt. b (1965). Accordingly, a negligent intervening act is not a superseding cause if it was foreseeable, not highly extraordinary, or the normal consequence of the situation created by the original actor, assuming the intervening act is "not extraordinarily negligent."

This Court applied the foreseeability superseding cause analysis in *Godesky v. Provo City Corporation*. In *Godesky*, the plaintiff suffered severe injuries when he touched a live wire while working a roofing job. 690 P.2d at 543. The jury allocated fault to three parties. The jury allocated 10% fault to the plaintiff's employer, Pride Roofing Company ("Pride"); Pride had instructed plaintiff to touch the wire above the roof. *Id.* at 543-44. The jury allocated 20% to Monticello Investors; Monticello Investors had not requested Provo City to turn off the power to the wire. *Id.* The jury then allocated 70% to Provo City; Provo City had violated four provisions of the National Electric Safety Code for stringing an uninsulated high-voltage wire over a residential property. *Id.*

Provo City appealed, arguing Pride's more recent negligent act relieved Provo City of its liability. *Id.* at 544. The Court determined that "[t]he trial court acted properly when it refused to rule as a matter of law that Pride's negligence was the sole proximate

cause of plaintiff's injury." *Id.* at 545.

> An intervening negligent act does not automatically become a superseding cause that relieves the original actor of liability. The earlier actor is charged with the foreseeable negligent acts of others. Therefore, if the intervening negligence is foreseeable, the earlier negligent act is a concurring cause. . . . The proper test is whether the subsequent negligence was foreseeable by the earlier actor.

Id. at 545.

Here, the appellate court erred when it shifted UPS's breached duty to KNS without determining whether (1) it was foreseeable to UPS that KNS might inadequately remedy the vinyl curtain system damaged by UPS, (2) whether KNS's actions to remedy the vinyl curtain were highly extraordinary, or (3) whether KNS's actions were a normal consequence of UPS's affirmative act, done in manner that was not extraordinarily negligent. Instead, re-analyzing duty in a case-specific manner diverged from this Court's precedent in *Harris*, *Williams*, and *Godesky*. As explained below, the appellate court erred in making this determination on its own when superseding cause is for the jury.

C. Whether a Subsequent Act or Failure to Act is Foreseeable Is a Fact Question for the Jury.

Whether a duty has shifted is a question of fact for the jury, even when the facts are undisputed. "[T]he general rule is that mere intervening negligence does not normally supersede a prior act of negligence and the question of shifting responsibility is a question of fact for the jury." *Prince v. Leesona Corp.*, 720 F.2d 1166, 1169 (10th Cir. 1983); *see also Trask v. Franco*, 446 F.3d 1036, 1047 (10th Cir. 2006) (the jury should resolve superseding cause if there is reasonable difference of opinion on whether an act

was foreseeable). "[P]roximate causation is generally a matter of fact to be determined by the jury." *Godesky*, 690 P.2d at 544. In *Harris*, this Court "left the determination of relative fault (including causation) to the jury." *Godesky*, 690 P.2d at 544 (citing *Harris*, 671 P.2d at 222). "The allocation of liability should be made on the basis of the relative culpability of both parties. To do that the jury must assess the reasonableness or unreasonableness of the [intervening third person's] actions in light of all the circumstances . . . ." *Harris*, 671 P.2d at 222 (discussing the intersection of superseding cause and the Comparative Negligence Statute).

> Even where the facts are not disputed, superseding cause is an issue for the jury.
>
> If . . . the negligent character of the third person's intervening act or the reasonable foreseeability of its being done (see §§ 447 and 448) is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the *undisputed facts* there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, *the question should be left to the jury.*

Restatement (Second) of Torts § 453 cmt. b (emphasis added). *See also id.* cmt. c. ("if there is a reasonable doubt as to whether [the intervening third person's] act . . . was or was not negligent, this question should also be left to [the jury]."

D. The Appellate Court Erred in Affirming the District's Court's Grant of Summary Judgement Because the Woods Presented Evidence Whereby the Jury Could Find KNS's Actions or Failure to Act Were Reasonably Foreseeable.

UPS relied on three events to claim KNS's actions superseded UPS's duty. A reasonable jury could conclude these events, either alone or combined, are foreseeable or in hindsight not highly extraordinary, or a normal consequence and not extraordinarily negligent.

First, UPS provided evidence that KNS through Mr. Barney saw the damage and then did nothing to fix the vinyl curtain fixation device once it discovered the damage. *Supra* at 11-12. That fact is disputed. Mr. Barney, a KNS employee, believed that after UPS's collision with the warehouse dock and once he had tightened the bolts holding the vinyl curtain bracket, it was "secure enough at least for my liking." R 1113:15-1114:4. A jury at trial could find that Mr. Barney's attempt to fix the bracket was foreseeable, a normal consequence, and certainly not "highly extraordinary."

Second, UPS pointed to the testimony of Mr. Kelly, KNS's Vice-President at the time. *Supra* at 12-13. Mr. Kelly's testimony explains why he took no action at that time. On the same day Mr. Wood was injured, Mike Kelly saw the vinyl curtain bracket hanging down and 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." R 426:17–22. Although he was ultimately incorrect, Mr. Kelly had two separate reasons for not immediately fixing the bracket: first, his belief that no one would be working there, and second, his belief that he did not think "it would have fallen." At trial, a jury could conclude Mr. Kelly's actions not to take immediate action were foreseeable based on his experience and certainly not "highly extraordinary."

Finally, Mr. Wood testified that after he was injured, a KNS employee apologetically remarked that he/she knew the bracket was going to fall and they should have fixed it. *Supra* at 13. That testimony alone does not warrant summary judgment. Many people see conditions every day, even dangerous conditions, and yet they do

nothing. Again, this person's actions in not fixing the vinyl curtain bracketing system were not "highly extraordinary"—they were foreseeable.

Accordingly, based on precedent in Utah law regarding superseding cause and foreseeability, the appellate court erred in shifting UPS's duty to KNS, and it is for a jury to make the call on whether KNS's actions were foreseeable.

E. Section 452 of the Restatement Second of Torts Supports the Woods' Position that KNS's Actions Were Not a Superseding Cause.

The appellate court relied on Section 452 of the Restatement Second of Torts to support its holding that UPS's duty shifted to KNS as a matter of law. *Wood*, 2019 UT 168, ¶ 9. Section 452, however, supports the Woods' position that KNS's actions or inactions are not a superseding cause.

Subsection 1 of Section 452 recognizes the general rule that a party's inaction is not a superseding cause.

> (1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm.

Restatement (Second) of Torts § 452 (1965).

Section 452's Illustration 1 of the general rule is useful here, because it mirrors the facts of this case.

> 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.

Restatement (Second) of Torts § 452, Ill. 1. (1965).

Rewriting Illustration 1 for the facts of this case illustrate the point. A is KNS, C is UPS and D is Mr. Wood.

> 1. ~~A,~~ [KNS] the owner of a [ware]house ~~abutting on a street in B City~~, [invites] ~~employs C~~ [UPS] to ~~dig a trench across the highway to make a connection with a sewer~~ [make a delivery at KNS]. ~~C~~ [UPS] does the work of ~~replacing the sidewalk~~ [making the delivery] so negligently that ~~it~~ [the warehouse dock] is left in a condition dangerous for ~~travel~~ [future deliveries]. ~~A~~ [KNS] knows of this, ~~and B City is notified,~~ but ~~neither~~ [does not] take~~s~~ any steps to put the ~~sidewalk~~ [warehouse dock] into safe condition. Several weeks after ~~C~~[UPS] has ~~completed the work~~ [made the delivery], ~~D~~ [Mr. Wood], ~~walking on the sidewalk at night~~ [making a delivery at KNS], and without any negligence of his own, is hurt by a fall resulting from the bad condition of the ~~sidewalk~~ [warehouse dock]. The failure of ~~A~~ [KNS], ~~and of B City~~, to have the ~~sidewalk~~ [warehouse] repaired makes ~~both~~ [KNS] subject to liability to ~~D~~ [Mr. Wood], but is not a superseding cause relieving ~~C~~ [UPS] of liability to ~~D~~ [Mr. Wood].

Restatement (Second) of Torts § 452, Illustration 1 (1965) (as modified). Just like the timeline in Illustration 1, several weeks passed between the time UPS created the dangerous condition and Mr. Wood was hurt from the dangerous condition. Just like A in Illustration 1, KNS had control of the property and knew of the dangerous condition and did not take appropriate steps to restore the warehouse dock to a safe condition. Based on the conclusion of Illustration 1, while KNS is also liable, KNS's failure to repair the warehouse dock is not a superseding cause relieving UPS's liability to Mr. Wood. Accordingly, the appellate court incorrectly applied Section 452 when it found KNS's actions superseded the negligence of UPS.

CONCLUSION

The Woods request that the Supreme Court overturn the appellate court decision affirming the district court's opinion to grant summary judgment. The Woods request the Supreme Court send instructions that 1) UPS owed a duty to Mr. Wood to use reasonable care to avoid creating dangerous conditions on another's property which could injure property users, 2) the Woods established a prima facie case of negligence against UPS, and 3) the issue of whether KNS's actions superseded UPS's negligence must be analyzed under Utah superseding cause law, which requires submission of the issue to the jury.

Respectfully submitted,

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DATED June 8, 2020.

/s/ Douglas B. Cannon
Douglas B. Cannon

/s/ Craig T. Jacobsen (signed with permission)
Craig T. Jacobsen

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2020, I caused two true and correct copies of the foregoing, SUPREME COURT APPELLANTS' BRIEF, to be served via electronic mail and first-class mail, postage pre-paid, to the following:

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Addendum

A. Opinion Issued by the Court of Appeals

2019 UT App 168

Stuart WOOD and Laurie Wood, Appellants,

v.

UNITED PARCEL SERVICE INC., Appellee.

No. 20180040-CA

Court of Appeals of Utah.

Filed October 18, 2019

Petition for Rehearing Denied December 19, 2019

Background: Driver for delivery service used by warehouse brought negligence action against different delivery company and operators of warehouse, alleging each was liable for injuries he sustained when part of loading dock door dislodged following collision by company's truck. The Third District Court, Salt Lake Department, Matthew Bates, J., granted company's motion for summary judgment. Driver appealed.

Holdings: The Court of Appeals, Christiansen Forster, P.J., held that:

(1) no legal relationship was created between driver and company;

(2) company was not best situated to bear loss from injury; and

(3) policy considerations weighed against imposing duty on company.

Affirmed.

1. Negligence ⚿1692

Whether a duty of care is owed by one party to another is entirely a question of law to be determined by the court.

2. Negligence ⚿210, 1692

Duty of care must be determined as a matter of law and on a categorical basis for a given class of tort claims.

3. Appeal and Error ⚿3727

Appellate court reviews the district court's determination on duty for correctness, giving no deference to that decision.

4. Negligence ⚿202

In order to prevail in an action for negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused (4) the plaintiff to suffer legally compensable damages.

5. Negligence ⚿210

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.

See publication Words and Phrases for other judicial constructions and definitions.

6. Negligence ⚿211, 214, 215

Legal duty is the product of policy judgments applied to relationships; not every factor relevant to question of whether a duty exists is created equal, as some factors are featured heavily in certain types of cases, while other factors play a less important, or different, role.

7. Automobiles ⚿197(2)
Negligence ⚿1010

No legal relationship was created between delivery driver, who was injured while walking through loading dock door at warehouse, and delivery company at which he was not employed, as would create a duty of care owed to driver by delivery company, although employee of delivery company created dangerous condition by crashing truck into loading dock, where warehouse operators were aware of dangerous condition and failed to remedy it, and delivery company never assumed the responsibility to ensure warehouse was made safe.

8. Negligence ⚿210

As a general rule, every person has a duty to exercise care when engaging in affirmative conduct that creates a risk of physical harm to others.

9. Negligence ⚿214

"Nonfeasance," a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant, in contrast to an affirmative

duty, generally implicates a duty only in cases of special legal relationships.

See publication Words and Phrases for other judicial constructions and definitions.

10. Negligence ⚿1010, 1037(4)

The relationship between property owners and invitees gives rise to a duty of the owner to exercise due care on behalf of the invitee.

11. Negligence ⚿1011, 1020

Delivery company, which employed driver who backed up and collided with loading dock at warehouse, was not best situated to bear loss of non-employee delivery driver's injury at time bracket fell on his head as he walked through loading dock door, where delivery company was itself an invitee to the warehouse and was not in superior position to the warehouse operators to inspect property and determine extent of damage, and warehouse operators had immediate knowledge of the damage, control of the property, the right to warn others about the dangerous condition caused by damaged loading dock door, the right to restrict access to the area of the dangerous condition, and the right to repair the damage.

12. Negligence ⚿210

To determine which party is best positioned to bear the loss occasioned by the injury, for purposes of duty inquiry in negligence action, court looks to who is in a superior position of knowledge or control to avoid the loss in question.

13. Negligence ⚿210

In context of duty inquiry in negligence action, a party is not in a position to bear the loss occasioned by injury to another party, not because his pockets are shallow, but because he lacks the capacity that others have to avoid injury by taking reasonable precautions.

14. Negligence ⚿213

Foreseeability of injury in the context of a duty analysis is evaluated at a broad, categorical level.

15. Negligence ⚿213

In determining a duty, "foreseeability" does not question the specifics of the alleged tortious conduct such as the specific mechanism of the harm but instead relates to the general relationship between the alleged tortfeasor and the victim and the general foreseeability of harm.

See publication Words and Phrases for other judicial constructions and definitions.

16. Negligence ⚿1037(8)

Drivers delivering goods purchased by the occupier of premises are invitees that have the right to expect to find the premises in a reasonably safe condition.

17. Negligence ⚿213

In determining foreseeability of injury in a duty analysis, a plaintiff is not required to show certainty that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature.

18. Negligence ⚿1010, 1011

Policy considerations weighed against imposing duty on delivery company for injuries of delivery driver who was not employed by company, although delivery company employee created dangerous condition to warehouse loading dock door which caused bracket to fall on driver's head, where warehouse operators failed to adequately remedy known damage to loading dock door, had control of the warehouse to remedy condition, and had ability to take proper steps to ensure premises were safe for invitees.

Third District Court, Salt Lake Department, The Honorable Patrick Corum, The Honorable Matthew Bates, No. 160900437

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Judge Michele M. Christiansen Forster authored this Opinion, in which Judges David N. Mortensen and Diana Hagen concurred.

Opinion

CHRISTIANSEN FORSTER, Judge:

¶1 Stuart Wood and Laurie Wood appeal from the district court's grant of summary judgment in favor of United Parcel Service Inc. (UPS). We affirm.

BACKGROUND

¶2 In 2013, a UPS truck driver backed up and collided with a loading dock at a warehouse managed and operated by KNS International LLC (KNS).[1] The collision damaged the loading dock and an overhead vinyl curtain system KNS had purchased and installed to regulate warehouse temperature. To install the curtain system, KNS drilled sixteen holes in the cinderblock above the loading dock and attached a metal bracket in line with the holes using sixteen concrete anchors. Vinyl curtains were then attached to the overhead bracket.

¶3 On inspection of the area after the collision, one of KNS's assistant managers noticed that the cinderblock to which the curtain system was attached had cracked, that several of the concrete anchors were loose, and that one or two of the concrete anchors had fallen out altogether.[2] The assistant manager recalled that he "probably tightened a couple" of the concrete anchors on the overhead bracket, but he did not put the dislodged anchors back into the bracket, because "the structure was compromised" and no longer would have held the anchors. No evidence was submitted to demonstrate that KNS took any further steps to fix the cracked cinderblock or install new concrete anchors to replace the one or two that had fallen out. After tightening the anchors, the assistant manager felt that the curtain system was "secure enough at least for [his] liking."

¶4 On February 4, 2013, sometime from a week to a month after the collision, the vice president of KNS noticed the damage to the same vinyl curtain system above the loading dock door.[3] As he was driving away from the warehouse, he "had a clear view" and could see that approximately "8 to 12 inches" of the curtain bracket was "hanging down at an angle." The vice president did not immediately contact anyone at KNS because he "didn't think that there was any risk [in] it hanging down" as there were "a lot of bolts holding it." He also "didn't think there was any danger to anyone," because "no one, to [his] knowledge, ever goes there throughout the rest of the day."

¶5 Unfortunately, that same day, Stuart Wood, a driver for a delivery company used by KNS, was present at that same loading dock. As Wood walked through the loading dock door, the curtain system dislodged from the cinderblock, and a bracket fell on his head, knocking him to the ground. The bracket weighed approximately forty-five pounds. After Wood was able to stand, a KNS employee helped him wash blood off of his face. Another employee approached and asked Wood if he was all right. The employee told Wood that "he was sorry, [and] that he knew [the bracket] was going to fall," saying that KNS "should have taken care of it."

1. In its summary judgment motion, UPS did not dispute that one of its trucks collided with the building. But the record also indicates that Stuart Wood's own delivery truck had, "on multiple occasions," struck the loading dock, "connecting with the building and causing damage." KNS's warehouse manager explained that some delivery trucks, including the one used by Wood, were "non-dock high" and should not have been backed up to the dock because their bumpers would make contact with the building below the rubber pads that protected the dock door. The warehouse manager also stated that he recalled multiple trucks "sounding like they were hitting the building, but [he did not] know if they actually did." He said these incidents occurred about once a month. The assistant manager also recalled that trucks hit the dock "multiple times." KNS's vice president stated that he was unaware of any efforts KNS took to investigate how the company could have prevented trucks from hitting the dock.

2. The assistant manager, who had helped install the curtain system, claimed that there was no problem with the installation of the vinyl curtains. The assistant manager also performed regular inspections of the building and claimed that he had not seen any problems with the structure of the building in that area before the collision.

3. The record is silent as to the exact date that the UPS truck collided with the dock. UPS did not have any records indicating that damage was sustained by one of its trucks hitting the KNS warehouse during the relevant time period.

Wood suffered permanent injuries from the accident.

¶6 Thereafter, Wood filed negligence claims against UPS and KNS, alleging each was liable for his injuries. Wood argued that UPS was negligent as the party that caused the dangerous condition and that KNS was negligent as the party on whose property the dangerous condition existed. At the close of fact discovery, UPS moved for summary judgment, arguing that (1) UPS owed no duty to Wood because UPS did not possess or control the property and (2) UPS's actions were not the proximate cause of Wood's injury. The district court granted UPS's motion on both bases, and the Woods appeal.[4]

ISSUE AND STANDARD OF REVIEW

[1–3] ¶7 To answer whether UPS is liable for the harm to Wood, the threshold issue is whether UPS owed a legal duty of care to Wood at the time of his injury.[5] "Whether a duty of care is owed is entirely a question of law to be determined by the court." *Rose v. Provo City*, 2003 UT App 77, ¶ 8, 67 P.3d 1017 (quotation simplified). "Duty must be determined as a matter of law and on a categorical basis for a given class of tort claims." *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 23, 275 P.3d 228. We therefore review the district court's determination on duty for correctness, giving no deference to that decision. *See Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997).

ANALYSIS

[4] ¶8 "In order to prevail in an action for negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused (4) the plaintiff to suffer legally compensable damages." *Cope v. Utah Valley State College*, 2014 UT 53, ¶ 11, 342 P.3d 243. Wood and UPS dispute the duty that is at issue in this case. Wood argues that "UPS owed a duty to . . . Wood" because "UPS's drivers have a duty to use reasonable care to avoid creating a dangerous condition on property which could cause injury to the property's users." (Quotation simplified.) UPS, not disputing the duty of truck drivers to use reasonable care, argues that it owed no duty to Wood at the time of his injury "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." The district court concluded that UPS owed no duty to Wood because "UPS's duty ended when KNS became aware of the damage UPS caused to its building." We agree and affirm.

[5] ¶9 "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, 275 P.3d 228 (quotation simplified). The Restatement (Second) of Torts explains how a duty can

4. The Woods settled their claims against KNS, resulting in the entry of a final, appealable judgment.

5. On appeal, Wood raises three discrete issues, but our determination concerning UPS's duty to Wood at the time he was injured by the curtain dictates our approach to all the issues raised on appeal. Wood contends (1) that UPS owed him a duty to use reasonable care in the operation of its truck to avoid creating a dangerous condition on property that could injure him, (2) that he submitted sufficient evidence to establish a prima facie case of negligence against UPS, and (3) that the district court erred when it took the issue of causation away from the jury and found that KNS's actions were an intervening cause that cut off UPS's liability. Because UPS does not dispute that it had a duty to use reasonable care in operating its trucks, we do not address Wood's first issue on appeal. But the duty question relevant to our resolution of this appeal is not UPS's general duty to safely operate its vehicles but its specific duty owed to Wood at the time he was injured. Because we determine that UPS did not owe a duty to Wood at the time of his injury, Wood's prima facie negligence claim necessarily fails. *See Young v. Salt Lake City School Dist.*, 2002 UT 64, ¶ 12, 52 P.3d 1230 ("Absent a showing that the defendant owed any duty, the plaintiff's [negligence] claim has no merit, and he or she may not recover."). And absent a duty, it is also unnecessary for us to address the issue of causation as it relates to UPS. *See Smith v. Frandsen*, 2004 UT 55, ¶¶ 9, 12, 94 P.3d 919 (explaining that to prevail in an action for negligence, "a plaintiff must demonstrate the existence of a duty running between the parties" and pointing out that "it is well-established in our law that without a duty, there can be no negligence as a matter of law" (quotation simplified)).

shift from one party to another: "Where, because of 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) (Am. Law Inst. 1965). This rule "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." *Id.* § 452 cmt. d. Because the responsibility shifts, "the duty, or obligation, of the original actor in the matter has terminated, and has been replaced by that of the third person." *Id.*

[6] ¶10 Our courts have identified several factors relevant to the question of whether a duty exists, including "(1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission, (2) the legal relationship of the parties, (3) the foreseeability or likelihood of injury, (4) public policy as to which party can best bear the loss occasioned by the injury, and (5) other general policy considerations." *Jeffs*, 2012 UT 11, ¶ 5, 275 P.3d 228 (quotation simplified). "Legal duty, then, is the product of policy judgments applied to relationships." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 17, 143 P.3d 283. "Not every factor is created equal .... [S]ome factors are featured heavily in certain types of cases, while other factors play a less important, or different, role." *Jeffs*, 2012 UT 11, ¶ 5, 275 P.3d 228. Applying these factors to this case, we determine that while UPS initially owed a duty to Wood because UPS's truck caused damage to the loading dock, the duty owed to invitees such as Wood shifted to KNS when it learned of and failed to adequately remedy the dangerous condition on its property that UPS created. We now consider the duty factors articulated in *Jeffs* in turn.

I. The Act in Question and the Legal Relationship Between the Parties

[7–10] ¶11 "As a general rule, we all have a duty to exercise care when engaging in affirmative conduct that creates a risk of physical harm to others." *Sumsion v. J. Lyne Roberts & Sons, Inc.*, 2019 UT 14, ¶ 12, 443 P.3d 1199 (quotation simplified). "Nonfeasance—passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant—by contrast, generally implicates a duty only in cases of special legal relationships." *Jeffs*, 2012 UT 11, ¶ 7, 275 P.3d 228 (quotation simplified). This case involves both an affirmative act, namely UPS's truck damaging KNS's warehouse, and an omission, namely KNS's failure to remedy the dangerous condition created by UPS. But the critical question in establishing responsibility is whether UPS owed a continuing duty to prevent harm to Wood once UPS no longer had any control over the damaged loading dock. While normally we would look to whether a special relationship existed between Wood and UPS, Wood concedes that there was not an external circumstance that created a special relationship between Wood and UPS post-accident—and no facts in the record demonstrate otherwise. UPS never assumed the responsibility to ensure that KNS's warehouse and vinyl curtain were made safe, and nothing in the record suggests that UPS deprived KNS of the ability to fix its building. But KNS, as the possessor of the property, had such a special relationship with Wood. Our supreme court has held that "[i]n cases where the alleged negligence consists of a failure to act, the person injured by another's inaction must demonstrate the existence of some special relationship between the parties creating a duty on the part of the latter to exercise ... due care in behalf of the former." *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 435 (Utah 1983). And the relationship between "owners and invitees" gives "rise to such a duty." *Id.*; *see also Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98, 108 (1944) (stating that delivery drivers are invitees). Because nothing created a legal relationship between Wood and UPS, and because Wood already had a legal relationship with a present third party, i.e., KNS, who had a responsibility to provide for Wood's safety, this factor weighs against UPS owing a duty to Wood at the time of his injury.

II. The Party Best Positioned to Bear the Loss

[11–13] ¶12 To determine which party is best positioned to bear the loss, we look to who "is in a superior position of knowledge or control to avoid the loss in question." *Jeffs*, 2012 UT 11, ¶ 30, 275 P.3d 228. A party "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.* UPS initially was in a position to avoid damaging KNS's warehouse and vinyl curtain, but after the damage was done and had become known to KNS, UPS had (1) no ability or obligation to warn others of the damage it caused to KNS's property, (2) no right or ability to restrict access to KNS's property, and (3) no further ability to repair the property. UPS, being an invitee itself, was also not in a superior position to inspect the property to determine the extent of the damage it had caused. KNS, on the other hand, had (1) immediate knowledge of the damage, (2) control of the property, (3) the right to warn others about the condition, (4) the right to restrict access to the hazardous area, and (5) the right to repair the damage. KNS's control of its own property also provided it with a superior position to know the extent of the damage. Succinctly put, UPS "lack[ed] the capacity that [KNS had] to avoid injury [to others] by taking reasonable precautions." *See id.* Thus, given the facts of this case, UPS was not best situated to bear the loss of Wood's injury at the time the vinyl curtain fell on Wood.

III. The Foreseeability and Likelihood of Injury

¶13 Wood contends that it was foreseeable "that a damaged or compromised building could injure people in, and particularly underneath, that structure" and that his injury falls within the "same general nature" as the type of injuries a person could be expected to suffer from a truck negligently and forcefully hitting a building and overhead bracket assembly. Wood further argues the fact that the damaged part of the building "failed one week to a month after the blow rather than immediately does not take this case out of the foreseeable general harm identified above." He also argues that "it is equally foreseeable that an owner of the property may not properly fix the damaged building part."

[14–17] ¶14 "[F]oreseeability in [the context of a] duty analysis is evaluated at a broad, categorical level." *Jeffs*, 2012 UT 11, ¶ 25, 275 P.3d 228. In determining a duty, "foreseeability does not question the specifics of the alleged tortious conduct such as the specific mechanism of the harm" but "instead relates to the general relationship between the alleged tortfeasor and the victim and the general foreseeability of harm." *Id.* (quotation simplified). "Drivers delivering goods purchased by the occupier of premises are invitees" that have "the right to expect to find the premises in a reasonably safe condition." *Johanson*, 152 P.2d at 108–09; *see also Price v. Smith's Food & Drug Centers, Inc.*, 2011 UT App 66, ¶ 26, 252 P.3d 365 ("Store operators and other business owners have a nondelegable duty to the public to keep their place of business in a reasonably safe condition and free from danger of personal injury." (quoting 41 Am. Jur. 2d *Independent Contractors* § 45 (2005))). In determining foreseeability, a plaintiff is not required to show certainty "that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature." *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1346 (Utah 1993) (quotation simplified).

¶15 Because Wood's injury did not happen contemporaneously with UPS's truck colliding with the dock, but one week to one month after that collision, no continuing relationship existed between UPS and Wood. This lack of a continuing relationship informs our foreseeability analysis. It was certainly foreseeable that damaging the loading dock created a potentially unsafe condition. The key here is not the foreseeability of the potential harm to a third person but UPS's inability to do anything to prevent that injury. On the other hand, KNS had a relationship with Wood and owed him, as its invitee, a continuing duty to keep its property safe. *See Hill v. Superior Prop. Mgmt. Services, Inc.*, 2013 UT 60, ¶ 21, 321 P.3d 1054 ("[P]ossessors owe significant

duties to invitees who come onto their property—including affirmative duties to remedy or warn against dangerous conditions."). We agree with Wood that it is foreseeable that harm may result from a compromised building structure and that the mere passage of time does not take an injury from the danger posed by the unsafe condition out of the realm of foreseeability. But given that KNS owed a duty to Wood to maintain safe premises and that it alone had the ability to rectify the unsafe condition on its property, the extent to which the potential harm was foreseeable to UPS is largely a non-factor in our analysis. Though future harm from the damaged vinyl curtain to an invitee may well have been foreseeable to UPS, UPS was not in a position to adequately remedy the condition giving rise to it. In other words, because KNS was uniquely positioned to prevent the curtain from falling and UPS was incapable of doing so, *see supra* ¶ 11, the degree to which UPS may have recognized foreseeable harm to a third party is irrelevant here.

IV. Other General Policy Considerations

¶16 Wood acknowledges public policy considerations cut "both for and against imposing a duty," stating that "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." And KNS, as the owner of "the damaged bracket system, also had an opportunity to fix the problem and prevent the injury." Therefore, Wood argues, he should be allowed to pursue a remedy against both KNS and UPS, and the jury should allocate fault between KNS and UPS.

[18] ¶17 In this instance, the public policy considerations weigh against imposing a duty on UPS when KNS was the party that failed to adequately remedy known damage to its building. Our conclusion is meant to incentivize the party that has knowledge of a dangerous condition, has control of the property to remedy that dangerous condition, and can take the proper steps to ensure that its premises are made safe for invitees. Certainly UPS may be liable to pay the cost of any required repairs for the damage its truck caused, but the law cannot be stretched to allocate a continuing responsibility on UPS to ensure that KNS actually took steps to repair its own property. As UPS argues, imposing a duty on UPS in this circumstance could leave "a person . . . perpetually liable for all harm that results from the hazardous condition he or she creates on property possessed by someone else," which would "ignore KNS's ability—and UPS's inability—to remedy the hazardous condition." Absent such a rule, property owners might be incentivized to not remedy a hazard caused by a third party on their own property in order to limit the property owner's liability despite the third party's inability to repair or warn others about the hazard.

¶18 In considering the relevant factors, we conclude that the district court correctly determined that UPS did not owe a duty to Wood at the time of his injury. And without a duty owed by UPS, Wood's negligence claim against the company necessarily fails. *See Hughes v. Housley*, 599 P.2d 1250, 1253 (Utah 1979) ("A finding of negligence requires the presence of certain elements, one of which is a duty running between the parties.").

CONCLUSION

¶19 The district court correctly determined that UPS owed no duty to Wood at the time of his injury. Accordingly, we uphold the district court's grant of summary judgment in favor of UPS.

¶20 Affirmed.

2019 UT App 186

STATE of Utah, Appellee,

v.

Dale Harland HEATH, Appellant.

No. 20180076-CA

Court of Appeals of Utah.

Filed November 21, 2019

Petition for Rehearing Denied December 19, 2019

Background: Defendant, a chiropractor, was convicted in the Fourth District Court,

B. Order of the Trial Court

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

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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

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

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

undisputed:

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

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

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

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

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

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

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

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

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

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

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

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