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' REPLY BRIEF** Supreme Court Case No. 20200052-SC Court of Appeals Case No. 20180040-CA Trial Court Case No. 160900437

REPLY TO APPELLEE RESPONSE TO APPEAL ON GRANT OF PETITION FOR REVIEW OF APPELLATE COURT DECISION

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UPS's and the lower courts' errors in this case stem from their failure to apply the proper legal framework.

In determining duty, a court must apply the factors set out in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228 ("*Jeffs*") on a broad, categorical level. The court determines duty as a matter of law.

In determining superseding cause, a court must apply the test outlined in Restatement (Second) of Torts Section 447 as adopted by the Utah Supreme Court in *Harris v. Utah Transit Auth.*, 671 P.2d 217 (Utah 1983) ("*Harris*"). Normally, a jury, not the court, decides whether a third-party's actions are a superseding cause. A court may take this issue away from the jury in the exceptional case where a reasonable jury could only reach but one conclusion given the facts.

This reply examines UPS's arguments in the context of the legal frameworks outlined in *Jeffs* and Section 447.

I. UPS OWED A DUTY TO MR. WOOD TO USE REASONABLE CARE TO AVOID CREATING A DANGEROUS CONDITION ON KNS'S PROPERTY WHICH COULD CAUSE INJURY TO PROPERTY USERS LIKE MR. WOOD.

In *Jeffs*, this Court provided the legal framework for evaluating duty. The Woods used this framework in their initial brief. UPS, however, muddled this framework and misapplied the *Jeffs* factors. In this reply, the Woods apply the *Jeffs* legal framework to respond to UPS's arguments.

A. A Court Determines Duty by Applying the *Jeffs* Factors at a Broad, Categorical Level.

Jeffs outlined the factors relevant to determining duty.

> (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; *Mower v. Baird*, 2018 UT 29 ¶ 17, 422 P.3d 837, 843, *as corrected*, (July 11, 2018) ("In *Jeffs*, we established a five-factor test for determining 'whether a defendant owes a duty to a plaintiff' . . . .").

Jeffs also recognizes a defendant's duty is not determined using case-specific facts but is determined by applying the *Jeffs* factors at a broad, categorical level. This Court provided key guidance on how the duty analysis should be conducted.

> Plaintiffs assert (without citation) that we have "repeatedly held that whether a duty exists must be decided on a case-by-case basis." They further claim that this court has "long emphasized that duty determinations should be fact specific." This is not a proper approach to the duty analysis. Duty must be determined as a matter of law and on a categorical basis for a given class of tort claims. Duty determinations should be articulated in "relatively clear, categorical, bright-line rules of law applicable to a general class of cases." The duty factors are thus analyzed at a broad, categorical level for a class of defendants.

Jeffs, 2012 UT 11, ¶ 23.

B. The *Jeffs* Factors Establish 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.

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

a. UPS Improperly Downplayed and Misapplied the Affirmative Act Factor.

UPS argues UPS's negligent act of damaging the building "is not as critical as the other factors" in determining UPS's duty. UPS Br. at 14. UPS argues this affirmative act is not important because: 1) "UPS allegedly damaged a building that was possessed and maintained by a third party," 2) "the third party had immediate knowledge of the damage," and 3) "the damage did not injure Mr. Wood until sufficient time (one week to one month) elapsed to allow for the condition to be remedied." UPS Br. at 14.

This Court stated "[i]n cases of misfeasance the "plus" factor analysis almost always rests on the first factor—the affirmative misconduct creates a duty of care and a special legal relationship isn't required." *Mower*, 2018 UT 29, ¶ 20. Such "[a]cts of misfeasance, or active misconduct working positive injury to others, typically carry a duty of care." *Id.* ¶ 19 (quoting *Jeffs*, 2012 UT 11, ¶ 7).

In this case, the Woods are suing UPS for the affirmative act of hitting and damaging the loading dock bay and the vinyl curtain bracket. The Woods are not suing UPS for failure to repair the damaged loading bay. Hence, UPS's reference to case-specific facts which involve events which occurred after the affirmative act are irrelevant to determining UPS's duty in backing its truck. The specific facts UPS cites here are appropriately used in arguing superseding cause to the jury.

b. The Special Relationship Factor Is Irrelevant in this Case

UPS argues there is no "special relationship" between UPS and Mr. Wood and thus, this factor "'weighs against UPS owing a duty to Wood at the time of his injury.'" UPS Br. at 11. This factor is irrelevant in this case.

This Court stated "[o]utside the government context, however, 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.

In *Jeffs*, for example, this Court recognized the plaintiff was suing the health care provider for the "affirmative act of prescribing medication." *Id.* ¶ 18. For that reason, the court held that "a special relationship or physician-patient relationship need not underlie the defendants' duty to the plaintiffs." *Id.* ¶ 19. Here, Mr. Wood is suing UPS for the affirmative act of negligently backing into the building and damaging the vinyl curtain which later fell. No special relationship between UPS and Mr. Wood is required to establish a duty.

2. The Minus Factors Favor Recognizing UPS's Duty.

a. UPS Improperly Analyzed the Foreseeability Factor.

UPS argues the foreseeability factor is irrelevant because KNS was "uniquely positioned to prevent the curtain from falling and UPS was incapable of doing so." UPS Br. at 15. UPS's argument that the foreseeability factor is irrelevant is wrong.

First, *Jeffs* does not recognize that the foreseeability factor can be so easily ignored. The Woods have set out in detail in their initial brief how the foreseeability factor favors recognition of a duty. *See* Appellants Br. at 16-20.

Second, UPS's argument and the appellate court's position that the foreseeability factor is irrelevant because of KNS's unique position to fix the vinyl curtain bracket misreads *Jeffs*. *Jeffs* holds the foreseeability analysis must be 1) done at a broad, categorical level, and 2) evaluated using the "'the general foreseeability' of harm."

2012 UT 11, ¶ 25 (citation omitted). The Court of Appeals recognized the general foreseeability of the harm to Mr. Wood. The Court of Appeals recognized 1) it was "certainly foreseeable that damaging the loading dock created a potentially unsafe condition." and (2) a future injury like Mr. Wood's was foreseeable. *Wood v. United Parcel Serv. Inc.*, 2019 UT App 168, ¶ 15, 453 P.3d 949, 954, reh'g denied (Dec. 19, 2019), cert. granted sub nom. *Wood v. UPS*, 462 P.3d 797 (Utah 2020).

> 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.

Id.

The Court of Appeals' statement also undercuts UPS's main argument in this case that UPS's duty disappeared by the time of Mr. Wood's injury. UPS and the Court of Appeals recognized that UPS would have had a duty if "UPS's driver had either backed into Mr. Wood or backed into a curtain rack that immediately fell on Mr. Wood." UPS Br. at 14; *see also id.* at 9 ("court of appeals held that UPS has a duty to operate its trucks with reasonable care so as to avoid injuring others"). UPS, however, argues that this duty disappeared by the time of the injury based on the specific circumstances of this case. UPS Br. at 9 ("Properly framed, the question of duty is whether UPS owed a legal duty of care to the Woods at the time of Mr. Wood's injury.") The Court of Appeals' statement shows the initial duty recognized by UPS will extend to Mr. Wood because it was generally foreseeable that UPS's actions could injure someone like Mr. Wood in the future.

When the broad, categorical analysis stated by the Court of Appeals is applied, the *Jeffs* foreseeability factor weighs in favor of finding a duty because it is foreseeable a truck striking a building can create an unsafe condition which will cause injury to subsequent property users.

b. The Public Policy Factor Favors Recognizing UPS's Duty.

The public policy factor "considers whether the defendant is best situated to take reasonable precautions to avoid injury." *Jeffs*, 2012 UT 11, ¶ 30.

UPS argues KNS was in the best position to avoid the loss because 1) UPS had no right to repair KNS's property, 2) KNS had immediate knowledge of the damage, and 3) KNS had responsibility to control the building. UPS Br. at 12. These arguments do not tip this factor in favor of UPS for two reasons.

First, the party which causes the damage in the first place—such as UPS—will always be in the best and superior position to avoid the injury. *Mower*, 2018 UT 29, ¶ 18. An individual will never be injured by a building defect created by a negligent truck driver if that truck driver follows reasonable precautions.

Second, UPS uses facts specific to this case to argue this duty factor. A court must analyze this factor at a broad, categorical level not using case-specific facts. On a broad categorical level, a property owner may not always be in the best position to protect against the loss. The property owner may not discover a building defect caused by a third-party truck driver.

c. UPS's Other Policy Arguments Do Not Favor a Finding that UPS Had No Duty.

UPS makes three policy arguments in support of its position that UPS owes no duty to Mr. Wood. We examine each of these arguments.[1]

First, UPS argues UPS should have no duty because "the law cannot be stretched to allocate a continuing responsibility on UPS to ensure that KNS actually took steps to repair its own property." UPS Br. at 13 & 17. The Woods are not asking that UPS take responsibility for KNS's actions. The Woods are asking that UPS be held responsible for its affirmative act in causing the damage to the vinyl curtain which fell on Mr. Wood. UPS will only be held responsible for its fault as recognized in Utah Code Ann. § 78B-5-818(4)(a).

Second, UPS argues it should have no duty because "UPS should not be perpetually liable for all harm that results from the damage it allegedly created in light of its inability—and KNS's ability—to remedy the condition." UPS Br. at 13 & 17. In essence, UPS argues it should have no duty because its liability for future injuries would be limitless. UPS's assertion is not correct. In addition to breach of duty, a plaintiff must establish proximate cause. Proximate cause places a limitation on an actor's liability. A plaintiff must establish as part of proximate cause that "a person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature."

[1] UPS makes these three policy arguments in two places. First on pages 13-14 when discussing the *Jeffs* factors and then again on pages 16-17 when discussing the nondelegable duty doctrine. We address these arguments once here.

Model Utah Jury Instructions, Second Edition CV209. UPS can argue to the jury that at some point it is not reasonably foreseeable that its breach could cause injury many years after the breach.

UPS's situation is also no different from an entity that manufactures a defective product or defectively constructs a building. A product manufacturer, distributor or seller is responsible for design, manufacturing, and warning defects which exist when the product is manufactured, distributed or sold. That manufacturer, distributor or seller will be responsible for injuries proximately caused by those defects which occur many years after the product has been sold. A building contractor is responsible for the defective design or construction of a building even after the building contractor has no control over that building. *See* *Williams v. Melby*, 699 P.2d 723, 729 (Utah 1985) (finding a contractor's responsibility for defective construction a question for a jury even though contractor no longer has possession of property). UPS is responsible for the defect it created in the building even though it has no control over that building and time has passed. *See* I.B.2.a. regarding foreseeability.

UPS cites several cases in footnote 4 in support of its argument concerning limitless liability. UPS Br. at 13, fn. 4. UPS cites these cases for the premise that courts have declined to recognize a duty when the "defendant is unable to perform." These cases do not apply here. The Woods are not suing UPS for UPS's failure to fix the damage it caused, but because UPS negligently backed its trailer into the KNS building. UPS's actions damaged the vinyl curtain which fell on Mr. Wood.

Third, UPS argues that it should have no duty because "possessors of property like KNS (who have knowledge of the damage, control of the property, and the opportunity to take proper steps to ensure the property is safe for invitees) should be incentivized to remedy dangerous conditions on their own property." UPS Br. at 13-14. This reason provides no basis for not recognizing UPS's duty here. Under Utah Code Ann. § 78B-5-818(4)(a), KNS will be held responsible for its fault which will incentivize property owners and UPS will be held responsible for its fault which will incentive truck drivers to drive safely.

C. The Non-Delegable Duty Doctrine Does Not Define UPS's Duty.

UPS argues that its duty should terminate because of the non-delegable duty doctrine as articulated in *Rodriguez v. Kroger Co.*, 2018 UT 25, 422 P.3d 815. The nondelegable duty doctrine does not apply at all in this case because the nondelegable duty doctrine defines the landowner's duty, not the duty of third parties like UPS.

In *Rodriguez*, Smith's operated a grocery store. Smith's contracted with J&I to clean its floors. In turn, J&I contracted with Galeno to perform the cleaning services. One night, Galeno left a puddle of water at the end of an aisle. After the store opened, the plaintiff slipped on the puddle of water. At trial, the jury allocated 5 percent to Smith's, none to J&I, 75 percent to Galeno and 20 percent to the plaintiff. The plaintiff argued that Smith's should be jointly responsible for Galeno's fault under the nondelegable duty doctrine.

In *Rodriguez*, this Court analyzed Smith's obligations under the nondelegable duty doctrine which recognizes that an "owner of a premises has a nondelegable duty to keep her premises reasonably safe for business invitees." *Id.* ¶ 14.

> As our court of appeals has noted, a "nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed."

Id. (citation omitted). In this case, the Supreme Court held that Smith's was jointly responsible for Galeno's actions because Smith's had hired Galeno to perform Smith's duty to keep the property reasonably safe.

Rodriguez does not apply for the simple reason that the nondelegable duty outlined in *Rodriguez* defines the landowner's duty, not the duty of third parties such as UPS. The case does not analyze the duty of third parties nor even the duty of independent contractors as it relates to the landowner's property. For example, the court's holding in *Rodriguez* that Smith's was jointly liable for Galeno's negligence did not alter or eliminate Galeno's duty in the case. Similarly, *Rodriguez* does not alter or define UPS's duty.

Moreover, UPS was not an independent contractor hired pursuant to KNS's duty to safely maintain its premises, but a vendor**.** The jury can allocate between UPS's fault and KNS's fault.

D. The *De Jesus* Case Supports the Woods' Position that KNS's Actions Should be Analyzed Under a Superseding Cause Analysis, Not a Duty Analysis.

UPS cites to *De Jesus Adorno v. Browning Ferris Indus. of Puerto Rico, Inc.*, 992 F. Supp. 121, 125 (D.P.R.), *aff'd* (citation omitted), arguing the court found no duty on "similar facts." UPS Bri.at 14. But *De Jesus* supports the Woods, not UPS, because the court used a superseding cause analysis to cut off BFI's liability, not a duty analysis.

In *De Jesus*, a BFI garbage truck hit and damaged a condominium retaining wall which housed the condo's garbage dumpster. BFI paid a contractor to repair the wall, who completed the repair within several weeks. However, the contractor left a hole in the ground directly behind the rebuilt wall which injured the plaintiff ***5 years*** afterwards as he threw garbage into the dumpster. *Id.* at 122–23. Four years before, a Ms. Gonzalez had been injured by the same hole. Ms. Gonzalez had sued BFI and the Condo and then settled her case.

In reaching its conclusion that BFI did not owe a duty to plaintiff, the *De Jesus* court did not engage in a duty analysis similar to *Jeffs* but conducted a superseding cause analysis.

> BFI cannot be perpetually liable for injuries caused by the damage it caused to the Condo's property simply because the Condo fails to restore its property to a safe condition. **At some point, the Condo's failure to remedy the situation becomes a superseding, intervening cause**. That point is a reasonable time after the Condo becomes aware of the danger. The Condo became aware of the danger in this case no later than it found out about Hada Gonzalez's injury. And a reasonable time to fix the hole was certainly less than the several years between the Condo's becoming aware of the hole and Plaintiff's accident. Therefore, the Condo's failure to repair the hole is clearly the **superseding, intervening cause** of Plaintiff's injury in this case. To hold BFI liable would be unprincipled and unfair.

Id. at 125 (emphasis added). The court's decision was based on the specific facts, as a court conducting a superseding cause analysis would use, not Utah's categorical approach to duty.

Finally, the facts of *De Jesus* are significantly different. In addition to BFI already having a settled a claim for an injury from the same hole, and the passage of five years from affirmative act to injury, BFI did not create the hole that was left by the contractor. In our case, Mr. Wood was injured by UPS's damage to the KNS building.

E. UPS's Duty is Consistent with Sections 383 and 385 of the Restatement of Torts.

Both Section 383 and 385 recognize that third parties have a duty to use reasonable care not to create dangerous conditions on the property of others which can cause injury.

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

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

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

UPS argues that Section 385 does not apply because "UPS did not construct any condition on the property on behalf of the owner." UPS Br. at 20. Section 385, however, does recognize that third parties have a duty not to create dangerous conditions on other's land and that such third parties will be responsible for injuries caused by those dangerous conditions. In this case, UPS created a dangerous condition on KNS's land for which it is responsible.

II. A JURY, NOT A COURT, SHOULD DETERMINE WHETHER KNS'S ACTIONS CONSTITUTE A SUPERSEDING CAUSE.

UPS recognizes the appropriate framework for a superseding cause analysis. UPS recognizes that Section 447, as adopted by *Harris*, outlines the correct superseding cause test. UPS Br. at 22. Section 447 recognizes that a third party's action will not be a superseding cause if a reasonable person knowing the situation "would not regard it as highly extraordinary that the third person had so acted." UPS Br. at 22.[2] UPS recognizes that superseding cause is generally a factual issue for the jury. UPS Br. at 23. UPS recognizes that a court may only take the superseding cause from the jury if "the facts are undisputed and but one reasonable conclusion can be drawn therefrom." UPS Br..at 23.

[2] Throughout its brief, UPS suggests that the test is whether KNS's actions were foreseeable to UPS. UPS Br. at 24, 27 & 28. That is not the test. The test is whether KNS's actions were highly extraordinary to a reasonable person.

UPS bears the burden of establishing KNS's actions were "highly extraordinary" as a matter of law. That is, UPS must not only provide facts which meet this extremely high standard, but it must show that every reasonable juror would agree that KNS's actions were "highly extraordinary."

A. A Jury Could Easily Find KNS's Actions Foreseeable.

1. A Jury Could Find Mr. Barney's Repair was Foreseeable and Not Highly Extraordinary.

KNS assistant warehouse manager, Mr. Barney, installed the vinyl curtains on the docking bay doors, including Docking Bay B. R 1085:12-21, 1089:14-1091:17. After the UPS truck struck Docking Bay B, Mr. Barney saw the cinderblock holding the vinyl curtain bracket had cracked. R 1113:7-12. He saw one or two of the bolts holding the vinyl curtain bracket had fallen out and that the concrete would no longer be able to hold those bolts. R 1105:22-24; 1113:7-12. Mr. Barney tightened the one or two other bolts that had loosened because of the collision. R 1106:16-1108:11. Mr. Barney testified that after tightening the two loose bolts, the bracket was "secure enough at least for my liking." R 1114:3-4.

Members of a jury, drawing upon their experience of human nature, could find Mr. Barney's actions foreseeable. A jury could foresee Mr. Barney's decision to inspect the damage and tighten the one or two loose bolts as foreseeable. Mr. Barney had installed the curtains; thus, he knew how he had secured the bolts in the concrete. R 1085:12-21, 1089:14-1091:17. A jury could also determine as foreseeable and not highly extraordinary Mr. Barney's decision not to make further repairs to the vinyl curtain

bracket. Mr. Barney knew that 14-15 of the 16 bolts still secured the vinyl curtain bracket. Based on this knowledge, Mr. Barney considered the bracket secure enough. Mr. Barney's decisions were ultimately ill-fated, but his actions were foreseeable and not highly extraordinary, and thus not a superseding cause.

2. A Jury Could Find Mr. Kelly's Actions on the Day the Vinyl Curtain Fell Were Foreseeable and Not Highly Extraordinary.

At approximately 1:00 p.m. on the day Mr. Wood was injured, Mr. Michael Kelly, KNS's then-Vice President, was leaving the warehouse in his car for a meeting when he noticed about eight to twelve inches of the metal bracket in Docking Bay B hanging down about an inch and a half. R 349; 1068:21; 425:15-25. Mr. Kelly made a mental note to instruct the warehouse manager to re-secure the bracket. R 426:15. Mr. Kelly did not immediately instruct someone to re-secure the bracket because "no one should have been there" because Docking Bay B is not used that late in the day. R 426:17-427:5. Mr. Kelly never saw trucks in Docking Bay B after around 8:30-9 a.m. R. 427:3-5. Additionally, Mr. Kelley "didn't think that there was any risk of it hanging down because . . . there's a lot of bolts holding it in." R 426:16-22. He "never would have thought it would have fallen." R 426:21-22. If Mr. Kelly had "thought there was danger to someone," he would have stopped driving away and told an employee to not allow anyone to park there, but he "didn't think there was any danger to anyone." R 428:18-19. He was so certain "[n]o one would have parked there [that] [i]t didn't even cross my mind." R 428:5-6.

A jury evaluating these facts could find Mr. Kelly's actions foreseeable and certainly not "highly extraordinary." Mr. Kelly was familiar with the traffic patterns of Docking Bay B and believed no trucks would be coming near the hanging bracket that afternoon while he was at his meeting. He knew that despite eight to twelve inches of the bracket hanging down, there were still a lot of bolts holding the bracket. Again, Mr. Kelly's decision was ultimately ill-fated, but his actions were foreseeable and not highly extraordinary, and thus not a superseding cause.

3. A Jury Could Find that Other KNS Employee Actions Before Mr. Wood's Injury Were Foreseeable and Not Highly Extraordinary.

Following Mr. Wood's injuries, a KNS employee reported to the KNS warehouse manager, Mr. Gavin Thain, that before the injury, "they had seen screws loose." R 482:6-23. Mr. Wood recalled that soon after he was injured, "CJ came in and was asking me if I was all right. Told me he was sorry, that he knew that thing was going to fall. He said we should have taken care of it." R 970:21-24.

A reasonable jury evaluating these facts could find these employees' actions or failures to act foreseeable. In *Godesky* and *Harris* as discussed below, defendants sought to escape liability by claiming the last negligent actor saw the danger but did not prevent the injury. This Court recognized that the last-in-time negligent actor's action did not, as a matter of law, supersede another's party's negligence. Here, these employees saw a danger, but did not fix it. The one employee did not report the incident until after Mr. Wood's injury. The other employee procrastinated. These decisions, although negligent, are foreseeable. People often delay taking action; it is human nature. Moreover, the

evidence showed that 14-15 of the bolts still held the vinyl curtain. Hence, the decisions by other KNS employees were foreseeable and not highly extraordinary, and thus not a superseding cause.

4. A Jury Could Find KNS's Collective Actions/Inactions Were Foreseeable and Not Highly Extraordinary.

A jury could also find KNS's collective action/inactions foreseeable. UPS has suggested the following actions would have been foreseeable: 1) a decision to take down the vinyl curtain; 2) a decision to remove the vinyl curtain, repair the concrete and reattach the vinyl curtain with 16 bolts; or 3) restricting access to Docking Bay B. Such actions have disadvantages. Removing the vinyl curtain defeats the purpose of the curtain, that is, keeping the outside air out of the building. A decision to make a full repair is expensive. Restricting access makes the docking bay not usable. Mr. Barney and the other employees believed the best response at the time was to repair the vinyl curtain as noted above rather than take the actions UPS viewed as foreseeable. A reasonable jury could find KNS's actions just as foreseeable as the actions UPS saw as foreseeable.

B. Utah Precedent Supports Sending this Issue to the Jury.

This Court has determined that proximate cause, and thereby superseding cause, "is generally a matter of fact to be determined by the jury." *Godesky v. Provo City Corp.*, 690 P.2d 541, 544 (Utah 1984). Because more than one reasonable conclusion can be drawn from the facts at hand, the issue of superseding cause in this case should have been sent to a jury. *See Dee v. Johnson*, 2012 UT App 237, ¶ 3, 286 P.3d 22, 23.

In *Godesky*, this Court affirmed that the jury was the proper entity to allocate fault between the parties even though the last actor (the employer) had been negligent. 690 P.2d at 545. Plaintiff sued Provo City and the owner of the apartment building for injuries he sustained when his employer instructed him to tie off two wires, one of which was live. The trial court included plaintiff's employer on the verdict form. The jury returned a verdict finding Provo City 70% at fault, the apartment building owner 20% at fault, and the employer 10% at fault.

On appeal, Provo City argued the plaintiff's employer's actions were a superseding cause because 1) the employer told the plaintiff to tie off the wire, 2) the employer knew or should have known the wire was live and 3) the employer's negligence was more recent in time. *Id.* at 544. In rejecting Provo City's arguments, this Court implicitly recognized that it is foreseeable that people will make bad, even negligent decisions, and those decisions will not supersede earlier negligence.

In *Harris*, this Court articulated its strong preference for letting juries resolve the superseding cause issue: "But the right to trial by jury is a basic principle of our system that cannot be allowed to be eroded by improper intrusion on the jury's prerogative." 671 P.2d at 220. This Court recognized the superseding cause issue needed to go to the jury even though the subsequently negligent actor should have seen and avoided a dangerous condition in front of him. *Id.*

UPS argues the only foreseeable action by KNS would have been for KNS to recognize the danger created by UPS and fix it so no one would be injured. Mr. Barney thought he had done so. Both *Godesky* and *Harris* recognize that it is foreseeable that

people like Mr. Barney and other KNS employees will see a danger but not react properly to that danger.

This Court's decision in *Williams v. Melby*, 699 P.2d 723 (Utah 1985), also supports the Woods' position because this Court sent the case back to the jury despite the existence of facts similar to those here. In *Melby*, the plaintiff fell though her apartment window after waking one night, disoriented. *Id.* at 725. The plaintiff sued both the contractor, Trayner, and the apartment owners, the Melbys, claiming the design of the apartment window created an unreasonable risk to an occupant's safety. *Id.* The lower court granted summary judgment for both defendants. *Id.*

On appeal, the Melbys claimed the plaintiff knew about the window design and plaintiff had placed her bed next to the window. *Id.* at 728. The Melbys claimed that this conduct "was an intervening proximate cause that superseded whatever cause may have flowed from their negligence." *Id.* This Court, citing *Harris*, reversed summary judgment in favor of the Melbys, stating "[t]he 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." *Id.* The Court also reversed summary judgment in favor of the contractor, holding "[w]hether [the contractor] was negligent in the construction of [the apartments] and, if so, whether his negligence was greater than that of plaintiff's, are questions for the jury." *Id.* at 729.

This case is significant because this Court sent the case back to the jury despite the existence of three facts similar to those argued by UPS here: 1) the plaintiff had inspected the apartment numerous times, knew the location of the window, and voluntarily placed

her bed next to the window; 2) the contractor no longer had control over the apartments; and 3) the injury occurred many months after the apartments were finished and turned over to the occupants.

C. UPS's Cited Cases Are Distinguishable.

UPS cites the Wyoming Supreme Court case of *Lynch v. Norton Const., Inc.*, 861 P.2d 1095, 1100 (Wyo. 1993). In *Lynch*, Norton Construction built a school sidewalk pursuant to plans provided by the school district. *Id*. at 1096. The sidewalk, as designed and constructed, provided no runoff, thus creating an ice problem on the sidewalk during winter. *Id*. Over one year after the construction was finished, the plaintiff, a school custodian, slipped and fell on the ice on the sidewalk. *Id.* The school district had received several complaints about the icy condition of the sidewalk and one year before the plaintiff's fall had placed a work order to fix the problem. *Id.* The Wyoming Supreme Court held that the school district's actions and knowledge constituted a superseding cause as a matter of law. *Id.* at 1099–100.

This case is distinguishable for three distinct reasons. First, the Wyoming Supreme Court failed to analyze the facts using Section 447 as required by *Harris*. Second, the school district knew of the dangerous conditions for over one year before the injury and had received numerous complaints. *Id.* at 1096-97. In our case, between 7 and 30 days had passed and two KNS employees believed there was no immediate danger from the vinyl curtain. Third, it was the property owner school district's own negligence that created the original sidewalk defect. Norton constructed the sidewalk pursuant to school district's construction plans and instructions. *Id*.

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

Seely is distinguishable because it used a different legal test in determining what is a superseding cause. The *Seely* court does not discuss whether the intervening act was foreseeable, highly extraordinary, or the normal consequence of the situation created by the original actor. *Seely* instead relies on precedent from another Georgia case, *Ethridge*,[3] as cited in *Black*:

> '[I]f the author of the latter negligence, with the intermediate effects of the former negligence consciously before him, is guilty of a new negligent act which preponderates in producing the injurious effect, we say that the first negligent cause is not the proximate cause, that the intervention of the latter negligence breaks the chain of causal connections so far as juridic purposes are concerned.' *Ethridge v. Nicholson*, 80 Ga.App. 693, 696, 57 S.E.2d 231 (1950)." *Black v. Ga. Southern, etc., R. Co.*, 202 Ga.App. 805, 807, 415 S.E.2d 705 (1992).

[3] Based on the quotation marks surrounding the end of the *Ethridge* citation, the *Seely* court only relied on the *Ethridge* language as cited in *Black*. UPS incorrectly asserts that *Seely* relied on *Black's* language regarding foreseeability. *See* UPS Br. at 30 n. 10.

Seely, 220 Ga. App. at 722. Utah precedent has rejected this test. *See, e.g.*, *Godesky*, 690 P.2d at 544 (affirming employer's subsequent negligence did not supersede defendant Provo City's initial negligence); *Williams*, 699 P.2d at 728 ("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.").

UPS then relies on *Walsh v. Israel Couture Post, No. 2274 V.F.W. of the U.S.*, 542 A.2d 1094, 1096 (R.I. 1988), which is distinguishable. In *Walsh*, the property owner knew about the damage but did nothing. In this case, KNS knew about the damage and one of the employees retightened two loose bolts to the point where he felt the vinyl curtain was secure enough, being held with 14-15 of the 16 bolts still in place. Moreover, in this case, both identifiable witnesses have provided specific reasons why they did what they did. These are different facts a jury must consider when determining whether the subsequent acts were "highly extraordinary." Finally, the *Walsh* court does not apply the Utah standard that the intervening act must be "highly extraordinary."

More recently, the Rhode Island Supreme Court did not follow its *Walsh* precedent when it recognized the lower court correctly sent the superseding cause issue to a jury. In *Pantalone v. Advanced Energy Delivery Systems, Inc.*, the building owner hired a service technician, Smeltz, to fix an ice machine. 694 A.2d 1213, 1214 (R.I. 1997). Smeltz fixed the ice machine but was unable to fix the nearby plug, claiming he did not have the electrical experience. Smeltz then lent the owner an electric cord so the owner could attach the ice machine to a distant plug. The owner's business caught on fire 16 days later because of the overheated extension cord. Smeltz claimed he was absolved from his negligence

because 1) the owner knew about the problem and had failed to summon an electrician to fix the nearby plug and 2) the owner continued to use the extension cord for 16 days. *Id.* at 1215.

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

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

Id. at 1216 (emphasis added). This case is more like *Pantalone* than *Walsh* because a reasonable jury could come to more than one conclusion about the facts.

As discussed in detail in Section I.C. above, the *De Jesus* case is distinguishable. First the truck driver did not create the hole which caused plaintiff's injury. Second, the injury occurred 5 years after the truck driver damaged the retaining wall.

Sisco v. Broce Manufacturing, Inc., 1 F. App'x 420 (6th Cir. 2001), is also distinguishable. The sweeper manufacturer had not had any contact concerning the sweeper for 10 years. *Id.* at 425.

D. Restatement 452 Supports the Woods' Position that KNS's Actions Were Not A Superseding Cause.

1. UPS Fails to Distinguish the General Rule That a Third Party's Failure to Take Action Will Generally Not Be a Superseding Cause.

UPS tries to distinguish Illustration 1 by claiming it is based on old case law. This argument can be rejected. Example 1 recognizes that it is foreseeable that an owner of

property will not repair hazardous conditions on its property created by third parties, and, therefore, a property owner's failure to fix the danger will not be a superseding cause. There is nothing outdated about that analysis and conclusion.

2. Section 452(2) Does Not Support UPS's Position That KNS's Negligence Was a Superseding Cause.

The test for meeting Section 452(2) is extremely high. A party arguing Section 452(2) must not only satisfy the hurdles of Section 447 but Section 452 as well. *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 496 (3d Cir. 1985). *See also DiRago v. American Export Lines, Inc.*, 636 F.2d 860, 865 (3d Cir. 1981) (burden on a defendant seeking to invoke § 452(2) is a heavy one, and superseding cause charge will be given only in exceptional cases).

As discussed extensively above, KNS's actions are not highly extraordinary as a matter of law. Hence, Section 452(2) does not apply.

The Court should not give any significant weight to the *Braun* decision.[4] The South Dakota Court in *Braun* held it was unforeseeable that a township would negligently replace a stop sign. The Utah courts have rejected the premise that a subsequent actor's negligence will automatically constitute a superseding cause. Rather, the court must determine whether that negligence is "highly extraordinary."

CONCLUSION

[4] *Braun* is a 4-1 decision with the dissenting justice arguing the case should have been sent to the jury. *Braun v. New Hope Twp.*, 2002 S.D. 67, ¶ 31, 646 N.W.2d 737, 744.

The Woods request that the Supreme Court overturn the appellate court decision affirming the district court's decision 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 and 2) the issue of whether KNS's actions superseded UPS's negligence must be submitted to the jury.

Respectfully submitted,

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DATED September 21, 2020.

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Douglas B. Cannon

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

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2020, I caused two true and correct copies of the foregoing, REPLY TO APPELLEE RESPONSE TO APPEAL ON GRANT OF PETITION FOR REVIEW OF APPELLATE COURT DECISION, to be served via electronic mail and first-class mail, postage pre-paid, to the following:

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