IN THE UTAH SUPREME COURT

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

BRIEF OF RESPONDENT

Writ of Certiorari to the Utah Court of Appeals

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LIST OF PARTIES

Parties to the proceedings in the court of appeals and their counsel:

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

2. Appellee/Respondent 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 court of appeals 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

On February 4, 2013, Petitioner Stuart Wood was injured when a heavy curtain rack and bracket fell from a delivery bay doorway in a warehouse that was managed and operated by KNS International, L.L.C. ("KNS"). Mr. Wood and his wife, Laurie Wood, sued respondent United Parcel Service, Inc. ("UPS"), claiming that a UPS trailer hit and damaged the building one week to one month earlier eventually leading to the curtain rack and bracket falling. After the close of fact discovery, the district court granted summary judgment for UPS because the Woods could not establish duty or proximate cause. The Utah Court of Appeals affirmed, holding that UPS owed no duty to Mr. Wood at the time of his injury.

This court should affirm the court of appeals' decision that UPS did not owe a duty to Mr. Wood at the time of his injury. The dangerous condition was located on property that was exclusively possessed and controlled by KNS, which had a non-delegable duty to protect invitees like Mr. Wood. Moreover, KNS had actual knowledge of the condition and ample opportunity to remedy it. It was immediately aware of the condition, unsuccessfully repaired the condition to its own satisfaction, and knew that the condition was worsening despite the repair. A significant period of time elapsed between KNS becoming aware of the damage and Mr. Wood's injury. UPS, on the other hand, had no ability to warn others of the condition it allegedly created, no right or ability to restrict access to the property, and no ability to otherwise remedy the condition.

Summary judgment should also be affirmed because a reasonable jury could not conclude that UPS proximately caused Mr. Wood's accident. The causal chain between UPS's alleged actions and Mr. Wood's injury was severed as a matter of law by the unforeseeable and extraordinary negligent acts and omissions of KNS.

ISSUE PRESENTED FOR REVIEW

According to this court's order granting certiorari, the issue presented for review is: "Whether the court of appeals erred in affirming the district court's grant of summary judgment to Respondent United Parcel Service, Inc." The court of appeals' decision is published at *Wood v. United Parcel Serv. Inc.*, 2019 UT App 168, 453 P.3d 949.

"On certiorari, we review the court of appeals' decision for correctness." *PC Riverview, LLC v. Xiao-Yan Cao*, 2017 UT 52, ¶ 20, 424 P.3d 162.

STATEMENT OF THE CASE

Mr. Wood was injured on February 4, 2013 while delivering packages to a warehouse that was managed and operated by KNS. (R. 57-59, 1134-1136.) As Mr. Wood stood in the warehouse, a vinyl curtain and metal bracket above one of the docking bay doorways fell, striking him in the head. (R. 58-59.)

Long before Mr. Wood's accident, KNS purchased and installed the vinyl curtain and bracket on the docking bay "to stop the hot air [from] leaving the warehouse during the cold months." (R. 404, 430.) KNS installed the vinyl curtain on the outside of the dock door. (R. 416, 507, 555, 664.) To install the metal bracket that held the vinyl curtain, KNS employees drilled holes in the top of the cinderblock doorway and used cinderblock anchor screws to affix the bracket into the doorway. (R. 654-55, 660.) After installing the vinyl curtain, KNS never performed any maintenance on it. (R. 560.)

After the vinyl curtain was installed, but before Mr. Wood was injured, KNS employee Tristin James Barney heard trucks hit the building "multiple times." (R. 666-67.) UPS, FedEx, and other delivery companies used the warehouse docking bays to either deliver or pick up shipments from the KNS warehouse. (R. 400-01.) About "one week or one month" before Mr. Wood's injury, Mr. Barney "[h]eard a bad bang" when a driver

backed into docking bay B. (R. 666, 670-71.) Immediately after hearing the bang, Mr. Barney inspected the dock and noticed that"[o]ne or two of the anchors had fallen out on the very far left side" of the bracket supporting the curtain and that the "[c]inderblock [wa]s a little cracked." (R. 667-68.) Mr. Barney, who did regular inspections of the building, had not seen any problems with the structure of the building in that area before. (R. 668-69.) Mr. Barney did not see the truck hit the building, but believed it was a UPS truck because a UPS truck was there after the bang. (R. 665-66, 677, 697.) For purposes of the motion for summary judgment, UPS accepted as true the allegations that it was a UPS truck that hit the building.

Immediately after hearing the bang, Mr. Barney attempted to repair the damage by "tighten[ing] a couple" of the concrete screws in the overhead bracket holding the vinyl curtains, but he did not put one or two of the concrete screws back into the bracket because "the structure was compromised" and no longer would have held the screw or screws. (R. 671, 675.) In Mr. Barney's opinion, these repairs were sufficient, in that the bracket was "secure enough at least for my liking." (R. 701-02.)

The Woods' expert witness, Scott Kimbrough, indicated (i) that the damage to the loading dock and curtain bracket was "highly conspicuous," (ii) that it "clearly indicated that there was a strong possibility that the integrity of some of the attachment screws used to hold the mounting bracket of the strip curtain in place had been compromised," (iii) that this "strong possibility warranted an inspection of the damage by a person competent in evaluating structural integrity," (iv) that (given the obvious fracture damage affecting anchor points) "the mounting support bracket of the strip curtain should have been removed and the damage to the concrete block should have been repaired," (v) that

Mr. Barney's repairs were destined for "ultimate failure," and (vi) that it was "unreasonable to leave the strip curtain in place after the impact at issue occurred, especially since serious injury would result if the curtain fell on someone." (R. 1915-17). Still, Mr. Barney did not report the damage or his repair, nor did he seek any further remedy of the condition.

One week to one month later, on February 4, 2013, a KNS employee reported that "some bolts and the bracket were missing" from the vinyl curtain on the dock. (R. 535-36.) A different KNS employee (Brandon Bayles) had also heard "a loud noise" that day when another truck backed into the dock. (R. 2121-22.)

Then, at approximately 1:00 p.m. on the same day, Michael Kelly, the Vice President of KNS, was driving away from the warehouse when he noticed damage to the docking bay B doorway. He "could see that" about "8 to 12 inches" of the vinyl curtain bracket "was hanging down at an angle" about "an inch and a half." (R. 425.) Mr. Kelly proceeded to drive away from the KNS facility without telling anyone about the damage and curtain "because no one should have been there and I didn't think that there was any risk of it hanging down because . . . there's a lot of bolts holding it . . . . I never would have thought it would have fallen." (R. 426.) He "could have" told KNS's warehouse manager not to let anyone else use the dock, but he "was running to a meeting" and he "didn't think there was any danger to anyone." (R. 428.) By the time Mr. Kelly returned from his meeting one to two hours later, Mr. Wood had been injured when the curtain and bracket fell on his head. (R. 461, 427, 617-18.)

After the accident, a KNS employee reported to KNS's warehouse manager that he had heard a truck hit the building, and that the vinyl curtain bracket above the dock door where Mr. Wood was injured had been loose and had been missing bolts before Mr.

Wood's injury. (R. 481-82, 542-43.) A KNS employee also told Mr. Wood after the accident that "he was sorry, that he knew that thing was going to fall. He said we should have taken care of it." (R. 970.)

In operating the warehouse, KNS employees were instructed to report any safety concerns to their supervisors so that the warehouse manager, who has safety training, could address those concerns. (R. 474, 500-01, 581.) The warehouse manager at KNS was responsible for "mak[ing] sure that, as much as possible," the warehouse was "a safe environment." (R. 489.) This responsibility required the warehouse manager to let the property manager know if something is "maybe not safe that needs to be replaced or fixed." (R. 491.) KNS also acknowledged its responsibility to keep attachments to its building and doorways "as safe as [they] can" to "prevent injury," and to investigate and fix problems that presented a safety hazard. (R. 387-88, 390-92, 491-92, 648-49.)

Based on these undisputed facts, UPS moved for summary judgment on July 21, 2017. (R. 342-995.) UPS argued that it owed no duty to Mr. Wood at the time of his injury and that even if it did, UPS's alleged actions could not be the proximate cause of Mr. Wood's injury. (R. 343.) In response, the Woods did not dispute that KNS "was negligent 1) by failing to repair the concrete holding the vinyl curtain, 2) by not taking the vinyl curtain down, and/or 3) by failing to notify drivers like Mr. Wood of the problem with the vinyl curtain in Docking Bay B." (R. 1058-59.)

The district court entered its order granting UPS's motion for summary judgment on November 20, 2017. (R. 1765-72.) It ruled that summary judgment was appropriate because, assuming a UPS truck damaged the KNS building, UPS owed no duty to Mr. Wood at the time of his injury. (R. 1766.) This ruling was based on KNS's knowledge of the damage, and its ability to repair the damage or restrict access to the area, prior to Mr.

Wood's injury. (R. 1766.) The district court also held that summary judgment was appropriate, because Mr. Wood's injury was not proximately caused by UPS. (R. 1766.) This ruling was based on two alternative facts. Specifically,

> If KNS was negligent in not repairing the door, or in the manner in which it repaired the door, there is intervening negligence by KNS that caused the injury to Mr. Wood. Alternatively, if KNS repaired the door in a manner that was reasonable and not negligent, no party's negligence caused the injury to Mr. Wood. (R. 1767.)

The Woods appealed the district court's ruling. (R. 1266-67.) They argued (1) that UPS owed a duty to use reasonable care in operating its truck to avoid creating a dangerous condition on property, (2) that they submitted sufficient evidence to establish a prima facie case of negligence against UPS, and (3) that the district court erred by finding that KNS's actions constituted an intervening cause that cut off UPS's liability as a matter of law. *Wood*, 2019 UT App 168 at ¶ 7 n.5.

Addressing only the first issue on appeal, the court of appeals held that the "district court correctly determined that UPS did not owe a duty to [Mr. Wood] at the time of his injury." *Id.* at ¶ 18. Applying the factors laid out by this court in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228, the court of appeals reasoned that (1) no legal relationship existed between UPS and Mr. Wood at the time of the injury, in contrast to the owner-invitee relationship between KNS and Mr. Wood; (2) KNS, rather than UPS, was best positioned to bear the cost of the loss of Mr. Wood's injury; (3) although future harm from the compromised building structure may have been foreseeable, the degree to which UPS may have recognized foreseeable harm was a non-factor given the continuing relationship between KNS and Mr. Wood at the time of his injury; and (4) other general policy considerations weighed against imposing a duty upon UPS under the circumstances. 2019 UT App 168 at ¶¶ 11–18.

Without an actionable duty, the Woods' negligence claim against UPS failed, and it was unnecessary to address the issue of causation as it relates to UPS. *Id.* at ¶¶ 7 n.5, 18. The district court's grant of summary judgment in favor of UPS was affirmed.

SUMMARY OF ARGUMENT

The Woods are unable to prevail on their negligence claim against UPS as a matter of law because they cannot prove that UPS owed them a duty of care at the time of the accident, or that a breach of that duty by UPS proximately caused their damages. The duty analysis focuses on categorical rules, whereas the proximate cause analysis focuses more on the foreseeability of injury based on the particular facts of each case.

UPS did not owe a duty to Mr. Wood when he was injured because UPS did not control the property, or have any relationship with Mr. Wood. Conversely, the possessor of the property (KNS) owed a non-delegable duty to Mr. Wood, had actual knowledge of the dangerous condition, and failed to remedy it despite sufficient opportunity (one week to one month) to have done so. Because a party like UPS is not in a position to remedy a condition on property it does not control, and a party like KNS who possesses property owes a non-delegable duty to correct known dangerous conditions, the law does not impose a duty on UPS in this particular category of cases. The correct application of the *Jeffs* factors leads to the conclusion that any duty UPS may have owed to protect Mr. Wood had been discharged or fulfilled by the time of his injury. Were it otherwise, a person could be perpetually liable for all harm that results from the dangerous condition he or she creates on property possessed by someone else, despite the inability to remedy the condition afterwards.

The Woods' argument that no court can decide the issue of proximate cause in this case as a matter of law must also fail. KNS's actions and failures to act, which the Woods

agree were negligent, were unforeseeable and extraordinary. One KNS employee knew of the damage allegedly caused by UPS one week to one month before Mr. Wood's accident, but negligently failed to properly remedy or report it. The Vice President of KNS noticed worsening damage just hours before Mr. Wood's accident, but failed to take any action to prevent the accident. At least one other KNS employee knew of the damage, knew that the curtain and bracket were going to fall, and knew that it should have been fixed before Mr. Wood's accident. A reasonable juror simply could not conclude that KNS's repeated failures to remedy a known hazardous condition on its own property was foreseeable and not extraordinary.

The district court and court of appeals each correctly determined UPS was entitled to summary judgment in favor of UPS based on the Woods' failure to establish the existence of a legal duty. The district court also correctly found that UPS was not the proximate cause of the accident. This court should affirm for the same reasons.

ARGUMENT

I. UPS DID NOT OWE A DUTY TO PREVENT MR. WOOD'S ACCIDENT.

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

relationships." *Id.* (quoting *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 14, 143 P.3d 283).

The Woods frame "[t]he specific issue in this case" as being "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." (Petitioners' Br., at 15.) This formulation oversimplifies the issues actually before the court, and ignores the well-established factors Utah courts should apply when determining whether a duty exists. 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. *See Wood*, 2019 UT App 168 at ¶ 7 n.5 ("[T]he 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."). The relevant policy considerations and other factors articulated under Utah law demonstrate that no such duty existed.

A. *The court of appeals correctly held that, even if UPS damaged the building in a manner that created a dangerous condition, its lack of control over the property cut off any duty owed to a person in Mr. Wood's position.*

The Woods contend that the court of appeals erred in examining UPS's duty at the time Mr. Wood was injured, rather than at the time of UPS's alleged conduct. (Petitioners' Br., at 21-22.) While the court of appeals uses the language of proximate cause in a portion of its analysis, its analysis of the duty is nevertheless correct.

The court of appeals held that UPS has a duty to operate its trucks with reasonable care so as to avoid injuring others. That general statement, however, is only the beginning of the inquiry, because the existence of a duty is not a simple generalization. In the Woods' formulation, UPS has a duty to exercise reasonable care, but the Woods conflate

that general duty with the separate question of how far the duty extends. This is a policy question.

Historically, some courts have analyzed the question under a duty-risk approach, and others have applied a proximate cause analysis to the same issue. It is no secret that these approaches are similar and even overlapping, and courts are frequently imprecise as to the model being applied. This has led to much confusion. Utah courts have not been immune to this lack of precision—particularly when discussing the issue of foreseeability, which is a factor in both approaches.[1]

The specific duty issue in this case is whether UPS owed a continuing duty to eliminate a latent risk it allegedly caused by hitting the building, or whether as a matter of policy this duty is more appropriately placed on the possessor of the property, who had exclusive control of the property and thus the sole ability to remedy the situation. This was the focus of the court of appeals' analysis.

B. *This court's factors for analyzing the existence of a duty all weigh against imposition of a duty in this case.*

A legal duty should be expressed in "relatively clear, categorical, bright-line rules of law applicable to a general class of cases." *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 23, 275 P.3d 228 (citation and internal quotation marks omitted). In *Jeffs*, the court identified five factors bearing on the existence of duty. Those factors are (1) whether the defendant's alleged conduct consists of acts or omissions; (2) whether a special relationship

[1] For example, the Woods criticize the court of appeals' reference to Restatement (Second) of Torts § 452(2), which UPS agrees is rooted in the superseding cause section of the Restatement. Any confusion regarding the element to which Section 452(2) should be applied is justified by the section's express reference to the shifting of a duty.

between the parties exists; (3) the foreseeability or likelihood of the injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general public policy considerations. *Jeffs*, 2012 UT 11, ¶ 5. Not each of those factors "is created equal," and the factors that are heavily featured in some cases play a less important role in others. *Id.* The court of appeals correctly analyzed the *Jeffs* factors to conclude that UPS did not owe a duty to Mr. Wood at the time of his accident.

The relationships (or lack thereof) between UPS, KNS, and the Woods play a crucial role in the duty analysis. The Woods do not dispute that UPS had no special relationship with them. (Petitioners' Br., at 16.) Furthermore, "UPS never assumed the responsibility to ensure that KNS's warehouse and vinyl curtain were made safe," a factor the court of appeals viewed as "critical" given that UPS had no control over the property after it was damaged. *Wood*, 2019 UT App 168, at ¶ 11. Conversely, "KNS, as the possessor of the property, had such a special relationship" with Mr. Wood, a relationship that obligated KNS to act to protect Mr. Wood from harm. *Id.* The absence of a legal relationship between UPS and Mr. Wood, combined with the existing legal relationship between Mr. Wood and KNS ("who had a responsibility to provide for Wood's safety"), means that the special relationship factor "weighs against UPS owing a duty to Wood at the time of his injury." *Id.*

Similarly, the policy considerations addressed by the *Jeffs* factors weigh against holding entities or individuals like UPS liable for injuries sustained by business invitees on the property of a third party. KNS was the party best positioned to bear the loss occasioned by the injury in this case because it had actual knowledge of the problem and exclusive control over the property. This factor "cut[s] 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." *Jeffs*, 2012 UT 11, at ¶ 30. The focus is not whether a party's "pockets are shallow," but whether the party "lacks the capacity that others have to avoid the injury by taking reasonable precautions." *See id.*

And while UPS may have been in a position to avoid damaging the building initially,[2] KNS was in a superior position of knowledge and control to avoid the loss in question. After it allegedly damaged the building, UPS had no right to repair KNS's property, to restrict access to KNS's property, or to warn others of the damage on KNS's 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 caused." *Wood*, 2019 UT App 168, at ¶ 12. Conversely, KNS had immediate knowledge of the damage. At that point, it had the ability and the responsibility to control the building and to repair defects on its property, prevent others from accessing the area, and warn others of the damage. "Succinctly put, UPS 'lack[ed] the capacity that [KNS had] to avoid injury [to others] by taking reasonable precautions.'" *Id.* (quoting *Jeffs*, 2012 UT 11 at ¶ 30.) Thus, UPS was not best situated to bear the Woods' loss.

The "other general public policy considerations" factor also weighs against imposing a duty on UPS. This is not, as the Woods imply, a scenario where innocent parties

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[2] Citing *Mower v. Baird*, 2018 UT 29, 422 P.3d 837, the Woods contend that truck drivers are "always" in the superior position to prevent the loss in the first place. (Petitioners' Br., at 19.) But the relevant inquiry is not who can prevent harm in the first place, it is whether a "third party is in a superior position of knowledge or control to avoid the loss in question." *Jeffs*, 2012 UT 11, at ¶ 30. While an individual who actually commits sexual abuse may be in a better position than a treating therapist to avoid the harm caused by the abuse, *see Mower*, 2018 UT 29, at ¶ 29, the same cannot be said of a truck driver who causes damage to property that later injures someone when the property is possessed/controlled by a third party who has knowledge of the damage and an extensive period of time to remedy it. Furthermore, the mere possibility that a possessor of property may negligently attempt to repair the damage, (*see* Petitioners' Br., at 20), does not somehow alter the possessor's superior position of knowledge or control.

(the Woods) stand to bear the loss occasioned by a tortfeasor. (*See* Petitioners' Br., at 20.) Rather, the Woods maintained and settled claims against KNS. As the possessor of property, KNS was liable to the Woods for the full harm resulting from the damage to its property, regardless of whether that damage was created by a third party.[3] *Rodriguez v. Kroger Co.*, 2018 UT 25, ¶ 28, 422 P.3d 815.

The question here is whether a party should owe a continuing duty for harm arising from a condition that it created, even when that party has no ability to remedy that condition, and a third party owes a non-delegable duty to do so. As the Court of Appeals noted, public policy weighs against imposing a duty on UPS in these circumstances because (1) "the law cannot be stretched to allocate a continuing responsibility on UPS to ensure that KNS actually took steps to repair its own property," (2) 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,[4] and (3) possessors of property like KNS (who have knowledge of the damage, control of the property, and the opportunity to take proper

[3] The Woods mistakenly argue that "each defendant shall only be liable for its percentage of fault" in this case. (Petitioners' Br., at 21.) This court in *Rodriguez* has already rejected that premise, and held that the liability of a possessor of property owing a nondelegable duty is not limited to the percentage of fault it is allocated. *See* 2018 UT 25 at ¶ 28.

[4] This court and others have declined to recognize duties that a defendant is unable to perform. *See Owens v. Garfield*, 784 P.2d 1187, 1191 (Utah 1989) (declining to recognize a duty to protect all children from abuse in all circumstances in part because "[s]uch a duty would be impossible to perform"); *Kendall v. Weingarten Realty Mgmt. Co.*, 769 So.2d 171, 174-75 (La. Ct. App. 2000) (agreeing with trial court's refusal to recognize a duty to maintain a defect-free parking lot that "would be impossible and cost-prohibitive"); *Woods v. United States Steel Corp*, No. 2:17-cv-00883-RDP, 2018 WL 6067502 at *5 (N.D. Ala. Nov. 20, 2018) (unpublished) ("It would be an odd result indeed if Alabama tort law imposed a duty (which may well be an impossible duty) on municipalities to prosecute all violations of the State's civil code.").

steps to ensure the property is safe for invitees) should be incentivized to remedy dangerous conditions on their own property. *Wood*, 2019 UT App 168, at ¶ 17.

The Woods dedicate a significant portion of their *Jeffs* analysis to the existence of an affirmative act and general foreseeability, but these factors play less important roles in this case. For example, that UPS's alleged conduct consisted of an affirmative act—hitting the building—is less important in this case than it might be in others. If this case involved a typical truck accident resulting in injury, and UPS's driver had either backed into Mr. Wood or backed into a curtain rack that immediately fell on Mr. Wood, the analysis would certainly be different. But here, UPS allegedly damaged a building that was possessed and maintained by a third party, the third party had immediate knowledge of the damage, and the damage did not injure Mr. Wood until sufficient time (one week to one month) elapsed to allow for the condition to be remedied. Under these circumstances, UPS's alleged affirmative act is not as critical as the other factors which weigh against imposing a duty of care on UPS.

The same is true of the foreseeability factor. As recognized by the court of appeals, whether a party such as UPS may have recognized foreseeable harm[5] from operating its vehicles or damaging a building is "largely a non-factor" to whether UPS owed a duty to Mr. Wood. *Wood*, 2019 UT App 168, at ¶ 15. It explained:

> 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

[5] In duty analysis, foreseeability does not question "the specifics of the alleged tortious conduct" such as "the specific mechanism of the harm." *Normandeau*, 2009 UT 44, ¶ 20 (internal quotation marks omitted). It instead relates to "the general relationship between the alleged tortfeasor and the victim" and "the general foreseeability" of harm. *Id.* (internal quotation marks omitted).

> 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.

Id. Thus, "because KNS was uniquely positioned to prevent the curtain from falling and UPS was incapable of doing so," the degree of foreseeability to UPS is ultimately irrelevant.[6]

C. *Limiting UPS's duty to Mr. Wood provides a practical approach that is consistent with Utah law.*

The Woods' oversimplified view of the question of duty ignores the well-established legal relationship that existed between KNS and Mr. Wood at the time of his injury. Their view also overlooks the limited relationship between UPS and KNS's property, the lack of any relationship between UPS and Mr. Wood, and KNS's status as the exclusive possessor of the property.

This court recently analyzed the reach of a property owner's non-delegable duty in *Rodriguez v. Kroger Co.*, 2018 UT 25, 422 P.3d 815. There, a store patron was injured when she slipped on a puddle of soapy water. The water was left on the floor by the independent contractor of a janitorial service that the store owner hired to clean the floors. *Id.* at ¶¶ 1, 4. At trial, the jury allocated 5% of the fault to the store owner, 0% of the fault to the janitorial service, and 75% of the fault to the independent contractor of the janitorial service. *Id.* at ¶ 6. The district court entered judgment against the store owner for only 5% of the damages, and refused to hold the store owner liable for the independent con-

[6] On the issue of foreseeability, the Woods cite *Holcombe v. NationsBanc Financial Services Corp.*, 248 Va. 445, 450 S.E.2d 158 (1994). *Holcombe* is inapposite for two reasons. First, the defendant in that case not only created the allegedly defective condition, but also owned and maintained the property. *Id.* at 159. Second, the issue on appeal was the existence of a defective condition, not duty. The parties in that case agreed the property owner owed a duty. *Id.* at 159-60.

tractor's fault, despite the store's non-delegable duty. *Id.* at ¶ 9. This court reversed, holding that the store owner was liable to the patron not only for its own fault, but also for the fault of the independent contractor. *Id.* at ¶ 28.

The court explained that the non-delegable duty doctrine stems from principles which impose liability on a possessor of land for harm negligently caused by a third party on the land if the possessor fails to exercise reasonable care to discover the negligence, or fails to give adequate warning to enable visitors to avoid the harm. *See id.* at ¶ 15 (quoting Restatement (Second) of Torts § 344). In fact, "[t]he very essence of the non-delegable duty doctrine is that the property owner is *fully liable* to a plaintiff who has been injured as a result of a breach of a non-delegable duty *regardless* of whether the property owner is actually at fault or the degree of fault." *Id.* (emphasis in original) (quoting *Smith v. Town of Greenwich*, 278 Conn. 428, 899 A.2d 563, 583 (2006)).

The holding in *Rodriguez* is significant to the duty analysis here. It confirms that, for policy reasons underlying the non-delegable duty doctrine, the possessor of property where a plaintiff is injured is fully liable for the harm resulting from a dangerous condition on the property, even if it was created by a third party. The plaintiff must only show that the possessor breached its non-delegable duty to keep the property in a reasonably safe condition. In Utah, this showing requires that the possessor (1) had either actual or constructive knowledge of the condition, and (2) sufficient time elapsed that in the exercise of reasonable care the possessor should have remedied the condition. *Jex v. JRA, Inc.*, 2008 UT 67, ¶ 16, 196 P.3d 576.

Similar principles and policies justify, under particular circumstances, relieving a third party who creates the dangerous condition on another's property from perpetual liability. While the party who creates the condition may initially be in a position to avoid its

creation, that party eventually becomes powerless to prevent others from being harmed when the property is possessed, controlled, and maintained by a different party. As the court of appeals recognized here, UPS had no legal ability to enter KNS's property to repair the damage it allegedly caused, to warn others of the damage, or to otherwise restrict access to the area after the warehouse was damaged. *Wood*, 2019 UT App 168, at ¶ 12. Thus, UPS could inform KNS of the damage and reimburse any repair expenses, but it could not ensure that KNS actually fulfilled its non-delegable duties to repair the damage or warn others of the danger it posed. *Id.* ¶ 17.

With this in mind, the court of appeals recognized three sound public policy considerations that warranted terminating the duty owed by a party who creates a hazardous condition on another's property after the possessor of the property has notice of the condition and sufficient time elapses for a reasonable possessor to remedy it. First, the party who creates the condition cannot be required to ensure that possessor of the property actually takes steps to repair its own property. *Id.* Second, the party who creates the condition should not be perpetually liable for the harm that results from the condition in light of its inability to remedy the condition. *Id.* And third, "[a]bsent 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." *Id.*

The Woods advocate for a perpetual legal duty that is impossible to discharge or fulfill, and argue that only a superseding cause could cut off UPS's liability. But the rule applied by the court of appeals provides a practical solution for defining the limits of the duty owed by an individual who creates a hazardous condition on property possessed by someone else.

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

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

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

Affirming, the First Circuit held that BFI was only obligated to warn the property owner of the damage, and pay for that damage. 160 F.3d at 842. Once it fulfilled these obligations, BFI had "no continuing legal duty to ensure the safety of the premises" because it did not have a continuing right to enter the premises. *Id.* at 843. If the property owner was dissatisfied with the original repair, it should have asked BFI to either remedy the situation or pay the repair costs. *Id.* In any event, after BFI's duty of ordinary care

was discharged, "the only duty that remained was the Condominium's non-delegable duty to maintain its premises in a reasonably safe condition." *Id.*

D. *The Woods' expansive reading of Sections 383 and 385 of Restatement (Second) of Torts is erroneous and contrary to Utah law.*

The Woods' reliance on Restatement (Second) of Torts § 383 to establish a duty owed by UPS is also misplaced. They take the far-reaching position that, under Section 383 (which has not been formally adopted in Utah), UPS not only owed them a duty of care, but that it owed them the same duties the landowner would owe to them. Section 383 provides:

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

On its face, this provision is inapplicable here because UPS was not doing anything on the land on behalf of KNS; rather, it was simply making a delivery.

Even if it applied, this court has rejected the Woods' expansive reading of Section 383 as "untenable." In *Hill v. Superior Prop. Mgmt. Serv., Inc.*, 2013 UT 60, 321 P.3d 1054, the plaintiff sued a landscaper for failing to remedy tree roots on a property it maintained. Rejecting this claim, this court characterized section 383 as articulating liability-limiting principles for independent contractors, and declined to read the section as imposing broad possessor-like liability on independent contractors. *Id.* at ¶ 35. The broad liability envisioned by the Woods under Section 383 "is appropriately reserved for those who exercise a level of control over property similar to that exercised by an owner in actual occupation." *Id.* at ¶ 36.

The Woods' reliance on Restatement (Second) of Torts § 385 is also misplaced. Section 385 provides:

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

Section 385 and the supporting authority the Woods reference are inapposite because they relate to the liability of a contractor for negligence in creating or constructing artificial structures on the property of another. *See, e.g.*, *Sumsion v. J. Lyne Roberts and Sons, Inc.*, 2019 UT 14, ¶ 8, 22, 443 P.3d 1199. The Restatement section itself compares the situation to that applicable to the manufacturer of a defective product, and that is the manner in which the Utah courts have applied it. *See id.*; *Tallman v. City of Hurricane*, 1999 UT 55, ¶ 11, 985 P.2d 892. UPS did not construct any condition on the property on behalf of the owner, and therefore section 385 is not applicable.

E. *Conclusion*.

In this case, imposing a duty on UPS would mean that a party who creates a hazardous condition on another party's property would owe an endless duty for any injuries resulting from the condition, despite the party's inability to correct or protect others from the hazard, and regardless of whether the property owner knows of and takes reasonable steps to remedy the hazard. Certainly, this is not the law. *See First Fed. Sav. & Loan Ass'n of Rochester v. Charter Appraisal Co.*, 247 Conn. 597, 724 A.2d 497, 502 (1999) ("Essential to determining whether a legal duty exists is 'the fundamental policy of the

law' that a tortfeasor's responsibility should not extend to the theoretically endless consequences of the wrong."). The court of appeals did not err in holding UPS owed no duty at the time of Mr. Wood's accident.

II. THE EXTRAORDINARY FAILURE OF KNS TO PREVENT HARM TO MR. WOOD WAS A SUPERSEDING CAUSE THAT RELIEVED UPS OF LIABILITY.

Alternatively, even assuming UPS owed Mr. Wood a duty and breached that duty, the trial court correctly ruled that the breach was not the proximate cause of Mr. Wood's injuries as a matter of law, because KNS's subsequent negligence was an intervening and superseding cause that cut off UPS's liability.[7] The Woods implicitly challenge this ruling on appeal to this court, and argue that the court of appeals should have applied a superseding cause analysis to conclude that the trial court erred in granting summary judgment to UPS on the issue of proximate cause. (*See* Petitioners' Br., at 32–34). But none of these arguments are availing, and the court should affirm the court of appeals and uphold the trial court's grant of summary judgment to UPS on the separate basis of proximate cause. *See Bailey v. Bayles*, 2002 UT 58, ¶ 13, 52 P.3d 1158 ("[A]n appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent in the record." (emphasis and quotations omitted)).

"Proximate cause is that cause which, in a natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the injury

[7] UPS's motion for summary judgment was granted on two grounds: (1) that UPS did not owe a duty to the Woods at the time of Mr. Wood's injury; and (2) that Mr. Wood's injuries were not proximately caused by the damage resulting from UPS's trailer allegedly hitting the KNS building. (R. 1765-1769.) The Woods' principal brief raises various other issues that were either not disputed for the purposes of UPS's motion (*i.e.*, creation of a dangerous condition [Petitioners' Br., at 27-28]), or that do not have any relationship to duty or proximate cause (*i.e.*, breach of duties [Petitioners' Br., at 26-27]). Because those issues were not determinative of UPS's motion, there is no reason to consider them at this stage.

could not have occurred." *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 486 (Utah Ct. App. 1991) (quotations omitted). In turn, "[a]n intervening cause is an independent event, not reasonably foreseeable, that completely breaks the connection between fault and damages." *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1293 (Utah Ct. App. 1996). Utah courts have adopted Section 447 of the Restatement (Second) of Torts to determine whether "the subsequent negligence of another is foreseeable" to a prior negligent actor. *See Harris v. Utah Transit Auth.*, 671 P.2d 217, 219 (Utah 1983) (quoting Restatement (Second) of Torts § 447 (1965)). Under Section 447, the intervening negligent act of a third person does not qualify as a superseding cause 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.

See id.

An independent event sufficient to "break the chain of causation and relive the liability of a prior negligent actor" is not reasonably foreseeable "and may be described with the benefit of hindsight[] as extraordinary." *Steffensen*, 820 P.2d at 488.

Whether a particular independent event was reasonably foreseeable or in hindsight extraordinary does not depend on "categorical inquiries" regarding "a reasonable person['s]" anticipation of "a general risk of injury to others. Rather, the appropriate inquiry focuses on the specifics of the alleged tortious conduct, such as whether the specific

mechanism of the harm could be foreseen." *Dee v. Johnson*, 2012 UT App 237, ¶ 5, 286 P.3d 22 (cleaned up).

A. *Superseding cause is properly decided as a matter of law where the undisputed facts leave but one reasonable conclusion to draw therefrom.*

The Woods suggest that the trial court's grant of summary judgment improperly took the questions of foreseeability and superseding cause from the jury. Citing to Restatement (Second) of Torts § 453 cmt. b, c (1965), they assert that "superseding cause is an issue for the jury" even "where the facts are not disputed." (*See* Petitioners' Brief at 38.) But established Utah law states that proximate cause "may be decided as a matter of law if 'the facts are undisputed and but one reasonable conclusion can be drawn therefrom.'" *Nebeker v. Summit Cty.*, 2014 UT App 244, ¶ 12, 338 P.3d 203 (quoting *Dee*, 2012 UT App 237, ¶ 3); *see also Jensen v. Mountain States Tel. & Tel. Co.*, 611 P.2d 363, 365 (Utah 1980) (explaining that "in appropriate cases summary judgment may be granted on the issue of proximate cause"); *Harris*, 671 P.2d at 220 ("We do not mean to imply that rulings by the court which decide a factual contention as a matter of law are never appropriate."). The Restatement section the Woods cite in support aligns directly with this established law, indicating that judgment as a matter of law on the reasonable foreseeability of an intervening cause is appropriate where the undisputed facts leave no "room for reasonable difference of opinion as to whether such act was negligent or foreseeable." *See* Restatement (Second) of Torts § 453 cmt. b.

Whether more than one reasonable conclusion can be drawn from a set of undisputed facts is determined by application of "an objective standard." *See Heslop v. Bear River Mut. Ins. Co.*, 2017 UT 5, ¶ 20, 390 P.3d 314. Thus, the question becomes "whether reasonable jurors, properly instructed, would be able to come to only one conclusion

[based on the undisputed facts], or if they might come to different conclusions, thereby making summary judgment inappropriate." *See Clegg v. Wasatch Cty.*, 2010 UT 5, ¶ 15, 227 P.3d 1243. "[I]f there can 'be no reasonable difference of opinion on a question of fact in light of the available evidence, the decision is one of law for the trial judge or for an appellate court.'" *Heartwood Home Health & Hospice LLC v. Huber*, 2020 UT App 13, ¶ 14, 459 P.3d 1060 (quoting *Heslop*, 2017 UT 5, ¶ 20). Relatedly, a court "is not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party." *Heslop*, 2017 UT 5, ¶ 21.

Here, neither party disputes that KNS acted negligently by inadequately repairing the damaged bracket assembly and by failing to otherwise prevent harm to Mr. Wood before the assembly fell and injured him. (R. 1058-59.) Thus, the question becomes "whether reasonable jurors, properly instructed," could conclude that KNS's serial negligence was anything other than unforeseeable to UPS and therefore not a superseding cause of Mr. Wood's injuries. *See Clegg*, 2010 UT 5, ¶ 15. As explained below, the trial court properly ruled that the only reasonable conclusion to be drawn from the undisputed facts was that KNS's intervening negligence superseded any liability attributable to UPS.

B. *The undisputed facts show that KNS's subsequent negligence was unforeseeable and extraordinary as a matter of law.*

The undisputed facts, viewed in context, present a scenario that was not reasonably foreseeable to UPS, and the trial court correctly determined that no reasonable jury could conclude otherwise. As a matter of law, UPS could not foresee the nature and extent of KNS's negligent conduct, nor would "a reasonable man knowing the situation" regard

KNS's subsequent conduct as anything other than "highly extraordinary" or an "[ab]normal consequence" of UPS's conduct. *See Harris*, 671 P.2d at 219 (quoting Restatement (Second) of Torts § 447).

KNS not only negligently repaired the damage but entirely failed to act when it was clear (or should have been clear) to multiple employees days or weeks later that the negligent repair was inadequate to hold the bracket and curtain in place. In possession and exclusive control of the damaged warehouse, KNS was responsible for reporting, inspecting, and repairing potential safety hazards present in the warehouse. (R. 387-88, 390-92, 474, 489, 491-92, 500-01, 581, 648-49.) KNS had immediate knowledge of the damage through its employee, Mr. Barney, and even made an unsuccessful attempt to repair the damage. (R. 667-68.) This attempted repair was limited to tightening some but not all of the concrete screws in the overhead bracket holding the vinyl curtains, because the surrounding concrete "structure was compromised" and could no longer hold the remaining bolt or bolts. (R. 671, 675.)

The Woods' expert witness, Scott Kimbrough, opined that Mr. Barney's repairs were destined for "ultimate failure," and that it was "unreasonable to leave the strip curtain in place after the impact at issue occurred, especially since serious injury would result if the curtain fell on someone." (R. 1915-17.) He further indicated that the remaining damage to the loading dock and curtain bracket was "highly conspicuous" and "clearly indicated that there was a strong possibility that the integrity of some of the attachment screws used to hold the mounting bracket of the strip curtain in place had been compromised." (R. 1915-17.) At the very least, "an inspection of the damage by a person competent in evaluating structural integrity" was warranted and, in light of the obvious fracture damage affecting anchor points, "the mounting support bracket of the strip curtain should

have been removed and the damage to the concreted block should have been repaired." (R. 1915-17.) Nevertheless, Mr. Barney did not report the damage or his repair, nor did he seek any further remedy of the condition.[8]

Approximately one week to one month later—on the day Mr. Wood was injured—at least three other KNS employees recognized the damage, which was obviously worsening despite Mr. Barney's attempted repair. One employee saw "some bolts and the bracket were missing." (R. 535-36.) Another KNS employee heard "a loud noise" on that day when another truck backed into the dock. (R. 2121-22.) Approximately one to two hours before Mr. Wood was injured, Mr. Kelly (KNS's Vice President) also saw that "8 to 12 inches" of the vinyl curtain bracket "was hanging down at an angle" about "an inch and a half" just hours before the accident, but did not tell anyone about it or do anything to restrict access to the area. (R. 425.) He failed to take these steps because he believed "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. 425–26.) Of course, multiple people—including Mr. Wood and various KNS employees—were in the docking bay around that time, and the bolts holding the bracket assembly in place failed within one to two hours.

If this were not enough, a KNS employee reported to KNS's warehouse manager after the accident that he observed that the vinyl curtain bracket above the dock door had been loose and was missing bolts before Mr. Wood was injured. (R. 481-82, 542.) In fact,

[8] Despite the Woods' assertion to the contrary, there is no dispute of fact regarding Mr. Barney's attempted repair of the vinyl curtain and bracket. (Petitioners' Br., at 39.) UPS does not argue that Mr. Barney "did nothing to fix the vinyl curtain," as the Woods suggest; UPS argues that his attempted repair was negligently deficient. (*See id.*) The Woods did not dispute Mr. Barney's negligence below. (R. 57-59, 1058-59.)

directly following the accident, a KNS employee told Mr. Wood that "he was sorry, that he knew that thing was going to fall. He said we should have taken care of it." (R. 970.)

UPS could not have foreseen, first, that Mr. Barney's attempted repair would not even address the obvious structural damage and missing bolts, or that he would negligently conclude that this partial repair "was secure enough . . . for [his] liking." (*See* R. 1113-14.) Nor could UPS reasonably predict that, on the day the bracket eventually fell, multiple employees of KNS would observe the "highly conspicuous" structural damage to the bracket assembly and loading dock, realize or unreasonably ignore the potential for the assembly to fall, and go about their normal business without taking any precaution or action at all. Such successive carelessness was not "a normal consequence" of any damage allegedly caused by UPS one week to one month prior. *See Harris*, 671 P.2d at 219. Nor would "a reasonable man knowing the situation" regard KNS's repeated failure to remedy a known hazard on its own property as anything other than "highly extraordinary." *See id.*

Nevertheless, the Woods argue that certain of these events are individually foreseeable, not highly extraordinary, or simply a normal consequence of UPS's alleged negligence. (Petitioners' Br., at 39.) Specifically, the Woods argue that a reasonable jury could find that Mr. Barney's visibly inadequate repair or individual KNS employees' failure to take any action to address a dangerous condition were foreseeable because "people see conditions every day, even dangerous conditions, and yet they do nothing." (*Id.* at 39–40.) But these arguments ignore the essential context in which Mr. Wood was injured and "the specific mechanism of [the] harm" he suffered. *See Dee*, 2012 UT App 237, ¶ 5 (emphasis omitted). KNS had the exclusive right and obligation, as sole possessor in control of the property, to remedy dangerous conditions that threatened invitees like Mr.

Wood. *See Price v. Smith's Food and Drug Centers, Inc.*, 2011 UT App 66, ¶ 26, 252 P.3d 365 ("[T]he owner of the premises has a non-delegable duty to keep the premises reasonably safe for business invitees." (cleaned up)); *De Jesus Adorno*, 160 F.3d at 843 (reasoning that a party that caused damage to another's property "could not ensure [the] safety [of the premises] because it did not have a continuing right to enter the . . . property in order to effectuate further repairs to the premises"). KNS employees not only saw a dangerous condition, they negligently attempted to repair it, allowed it to persist in a state of disrepair for at least one to four weeks, and observed that it was not remedied on the day it eventually caused harm to an invitee, but did nothing. UPS could not reasonably foresee that KNS, as the sole possessor and overseer of the property, would not only inadequately repair significant structural damage to the property, but thereafter repeatedly shirk its duty to prevent harm to invitees even after observing that the damage persisted, was worsening, and could be hazardous. Even assuming that the negligence of various KNS employees viewed in isolation was somehow ordinary, KNS's course of conduct, taken as a whole, was "highly extraordinary" and not a "normal consequence" of UPS's alleged negligence. *See Harris*, 671 P.2d at 219.[9] "[R]easonable jurors, properly instructed" in the law of proximate cause, could not conclude otherwise. *See Clegg*, 2010 UT 5, ¶ 15.

[9] The Woods seem to argue that Mr. Barney's conclusion that the bracket was "secure enough at least for [his] liking" and Mr. Kelly's belief that "no one should have been [in the loading bay]" and that the bracket wouldn't fall "because . . . there's a lot of bolts holding it" somehow made their admitted negligence more foreseeable to UPS. (*See* Petitioners' Br., at 39). It is unclear how these beliefs would excuse or otherwise explain the negligent conduct of Mr. Barney and Mr. Kelly in the mind of the factfinder, as the Woods contend. Indeed, an essential component of KNS's negligence in this case is the unreasonable failure of its employees to account for an obviously hazardous condition on property that KNS possessed and controlled. That Mr. Barney and Mr. Kelly unreasonably believed that this obviously hazardous condition was not a problem adds to the extraordinary nature of KNS's negligence, rather than diminishing it.

C. *Multiple other jurisdictions have held that a property owner's failure to remedy a known dangerous condition is an unforeseeable independent event that supersedes the liability of the condition's creator.*

This conclusion accords not only with Utah law, but with extensive analogous authority from other jurisdictions. In *Lynch v. Norton Const., Inc.*, 861 P.2d 1095, 1099-1100 (Wyo. 1993), for example, the Wyoming Supreme Court held that a property owner's negligent failure to "repair the obviously dangerous condition of [a] sidewalk, after receiving several complaints about the condition, constituted an intervening cause, relieving [a contractor] of liability for his negligence [in improperly constructing the sidewalk], if he was negligent." The court reasoned that, even if the contractor negligently created the hazard by improperly constructing the sidewalk, he

> could not reasonably have foreseen that the [property owner], when confronted with a dangerously icy sidewalk, due to a drainage problem, would not inform [the contractor] of the obvious defect, would not repair the defect itself, and would instruct its employees not to use salt and sand on the icy spots for their own safety.

Id. at 1100. Accordingly, the court held that the contractor's negligence, if any, "was the remote, not the proximate cause of [the plaintiff's] injuries." *Id.*

Applying similar logic, the Georgia Court of Appeals held in *Seely v. Loyd H. Johnson Const. Co.*, 220 Ga. App. 719, 470 S.E.2d 283, 287 (1996), *superseded on other grounds by statute as recognized in Minnix v. Dep't of Transp.*, 272 Ga. 556, 533 S.E.2d 75 (2000), that a carpentry subcontractor who negligently drove a nail through a wall and into a pipe could not be held liable for injuries caused by water leaking from the pipe after the pipe was negligently repaired by another subcontractor. 470 S.E.2d at 287. The court reasoned that, even assuming the carpentry subcontractor acted negligently in damaging

the pipe, he could not have foreseen[10] the negligent repair of the pipe as a natural consequence of his actions:

> [A]ny negligent acts that initially caused the hole and the first leak prior to the repair were not a proximate cause of any damages resulting from the second leak after the attempted repair. The alleged negligent failure of [the other subcontractor] to fix the leak after it was discovered intervened between the prior acts and became the sole proximate cause, if any, of the personal injuries [at issue].

Id. As a matter of law, the carpentry subcontractor was not liable for any injury arising after the subsequent negligent repair work failed to remedy the hazard he purportedly created. *See id.*

Finally, *Walsh v. Israel Couture Post, No. 2274 V.F.W. of the U.S.*, 542 A.2d 1094, 1095 (R.I. 1988), was a case that similarly involved property damage caused by a truck that later led to the plaintiff's injury. "The railing had become dislodged nine days earlier, when a post to which it was attached was struck by a truck owned by Fontaine. The [property owner] had actual notice of the damaged post on the day that the truck struck the post." *Id.* The Rhode Island Supreme Court held that, under these circumstances, "the failure of the [property owner], for a period of nine days, to seal off the area subject to the dangerous condition or, at minimum, to post warning signs constitutes an independent intervening cause that relieves Fontaine of liability for plaintiff's injury." *Id.* Although an "intervening act of negligence will not insulate an original tortfeasor if it appears that such

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

intervening act is a natural and probable consequence of the initial tortfeasor's act," the failure of the property owner to repair the railing or post warnings about the dangerous condition for a period of nine days "was not foreseeable and thus constitutes an independent intervening cause" as a matter of law. *Id.* at 1097. Consequently, the district court erred in refusing to grant a directed verdict in favor of the truck driver. *Id.*

Other courts have reached similar conclusions. *See De Jesus Adorno*, 992 F. Supp. at 125 (granting summary judgment because the failure of property owner to fix sinkhole was an intervening and superseding cause that cut off liability for the truck driver/owner who created the sinkhole); *Sisco v. Broce Mfg., Inc.*, 1 Fed. Appx. 420, 423-24 (6th Cir. 2001) (per curiam) (unpublished) (upholding summary judgment in favor of manufacturer because the failure to fix a vehicle's brakes after repeated notice that the brakes were malfunctioning was unforeseeable intervening and superseding cause); *Hennigan v. Atl. Refining Co.*, 282 F. Supp. 667, 679 (E.D. Pa. 1967) (municipality's failure to properly contain a known oil spill was not reasonably foreseeable and superseded any negligence by the company that caused the spill). The clear weight of authority compels a conclusion that KNS's negligence was unforeseeable and therefore supersedes UPS's negligence, if any, as a matter of law.

D. *Restatement § 452 dictates that UPS should not be liable to the Woods.*

Lastly, contrary to the Woods' arguments, application of Restatement (Second) of Torts § 452 confirms that KNS's negligent conduct was an unforeseeable and extraordinary independent event that superseded any negligence by UPS. (*See* Petitioners' Br. at 40–41). Mr. Wood relies primarily on Section 452(1), which states that "[e]xcept 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." *See* Restatement (Second) of Torts § 452(1). But the exception to this general rule, articulated in Section 452(2), is more properly applied to this case. That subsection provides:

> 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***.

Id. § 452(2) (emphasis added). This subsection "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." *See id.* § 452 cmt. d. The Restatement identifies various factors that inform a court's determination of whether "all duty and responsibility for the prevention of the harm has passed to [a] third person" under Section 452(2):

> Among them are the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations. . . . [W]hen, by reason of the interplay of such factors, the court finds that full responsibility for control of the situation and prevention of the threatened harm has passed to the third person, his failure to act is then a superseding cause, which will relieve the original actor of liability.

See id., § 452 cmt. f.

Application of these factors demonstrates that "the entire responsibility for control of the situation and prevention of the threatened harm" passed to KNS, and KNS's "failure to act is . . . a superseding cause" which relieves UPS of liability for Mr. Wood's injury. *See id.* As an initial matter, KNS's "character and position" as possessor of the property where Mr. Wood was injured obligated it "to keep the premises reasonably safe for business invitees." *See Price,* 2011 UT App 66, ¶ 26. The undisputed facts also show that KNS

and its employees specifically undertook duties to report, inspect, and repair potential safety hazards on the property, including the damaged vinyl curtain and bracket that ultimately fell and injured Mr. Wood.

Thus, KNS's "relation to the plaintiff" included a non-delegable duty to keep the premises reasonably safe and otherwise prevent harm to him as a business invitee. *See* Restatement (Second) of Torts § 452 cmt. f. KNS was legally obligated to remedy dangerous conditions when it had "knowledge of the condition" and "sufficient time" to do so. *See Cochegrus v. Herriman City*, 2020 UT 14, ¶ 17, 462 P.3d 357. The undisputed facts show that KNS had such knowledge and even attempted to repair the dangerous condition, but did so negligently. KNS also had knowledge on the day of Mr. Wood's injury that the hazardous condition was not remedied, but failed to act in any way to prevent foreseeable harm to Mr. Wood.

Given KNS's undisputed knowledge of the condition, as well as its established duty to make the premises reasonably safe for invitees, the "likelihood that [KNS] w[ould] . . . exercise proper care" was substantial. *See* Restatement (Second) of Torts § 452 cmt. f. Conversely, the "likelihood that [KNS] . . . w[ould] not exercise proper care" was slight. *See id.* In fact, KNS was the only entity that could "exercise proper care" to prevent harm to Mr. Wood once the damage occurred—neither UPS nor any other party had a right to enter upon KNS's property to remedy the condition or discourage use of the loading bay by invitees. *See De Jesus Adorno*, 992 F. Supp. at 125. Even if UPS had such a right, there is no evidence that UPS had any knowledge of KNS's negligent repair or the continued presence of the dangerous condition on KNS's property at the time of Mr. Wood's injury.

Finally, the fact that KNS was immediately aware of the damage to its warehouse, negligently attempted to repair the condition, and allowed the vinyl curtain bracket (and

surrounding concrete structure) to persist in a state of disrepair for a period of one to four weeks before it caused injury strongly indicates that the "entire responsibility for control of the situation" passed to KNS during that period. *See* Restatement (Second) of Torts § 452 cmt. d.; *id.* § 452 cmt. f (discussing the "lapse of time" as an important factor in shifting responsibility from the original actor to a third party).

The "interplay" of these factors plainly weighs in favor of shifting "full responsibility for control of the situation and prevention of the threatened harm" to KNS, and treating its "failure to act [as] a superseding cause, which will relieve [UPS] of liability." *See id.* § 452 cmt. f. In other words, the factors identified in comment f of Section 452 provide an analytical framework that confirms the unforeseeable and "highly extraordinary" nature of KNS's negligence. *See Harris*, 671 P.2d at 219.[11]

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[11] Mr. Wood's invocation of Illustration 1 to Section 452 does not change this conclusion. (*See* Petitioners' Brief, at 40–41.) As an initial matter, Illustration 1 is based on cases decided in 1908, 1911, 1913, and 1931. *See* Restatement (Second) of Torts § 452 reporter's notes. While the age of an authority is not necessarily indicative of its usefulness, these cases were decided decades before the Restatement added subsection (2) as an exception to the longstanding general rule that a third party's subsequent negligence is not a superseding cause which relieves a prior negligent actor of liability. *See id.* (indicating that the general rule articulated in subsection (1) was "changed . . . by the addition of Subsection (2)" in 1965). Further, these underlying cases deal primarily with the liability of a landlord for injuries caused in part by the actions of a tenant, a factual situation remote from the issues of this case. *See, e.g.*, *Marston v. Phipps*, 209 Mass. 552, 95 N.E. 954 (1911) (that landlord "let different parts of her building to different tenants at will" did not excuse her liability for hazardous accumulation of ice caused by defect in her building); *Kane v. Lauer*, 52 Pa. Super. 467 (1913) (landlord's maintenance of allegedly rotting grandstand on property was not excused by fact that tenant assumed responsibility for the grandstand's condition as part of the lease).

More to the point, the scenario presented in Illustration 1 is distinguishable from the facts of this case. Illustration 1 recounts the failure of a property owner and a municipality to address a contractor's negligent repair of an excavated sidewalk. *See* Restatement (Second) of Torts § 452 illus. 1. Despite the property owner and city's knowledge of the dangerous condition of the repaired sidewalk, their negligent failure to remedy the condition "is not a superseding cause relieving [the contractor] of liability" to the injured party. *See id.* In this case, on the other hand, KNS not only had full knowledge of the

Presented with analogous facts, the court in *Braun v. New Hope Township*, 2002 S.D. 67, 646 N.W.2d 737, reached the same conclusion by applying Section 452(2). In that case, a tractor driver removed and damaged a "ROAD CLOSED" sign that was placed in the middle of a road to warn drivers of an upcoming washout caused by runoff. The sign was later reinstalled by the township charged with erecting and maintaining adequate signs to protect motorists on its own roads, but the reinstalled sign was shorter than before and positioned to the side rather than in the middle of the roadway. Approximately three weeks after the township reinstalled the warning sign, a motorist was injured when he missed the sign and drove into the washed out area.

Affirming summary judgment in favor of the tractor driver and his employer on the issue of superseding cause, the *Braun* court cited Section 452(2) and noted that

> an original actor is sometimes 'free to assume that when a third party becomes aware of the danger, and is in a position to deal with it, the third person will act reasonably. It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed.' If a third person 'fully discovers the danger, and then proceeds, in deliberate disregard of it to inflict upon the plaintiff the danger which the third person has discovered' the responsibility is shifted to the third party.

2002 S.D 67, at ¶ 19 (cleaned up, quoting W. Page Keeton et al., Prosser & Keeton on the Law of Torts, § 44, at 313, 318–19 (5th ed. 1984)). Whatever negligence the tractor driver had committed in damaging the sign, the court concluded that "the lapse of time, the independent statutory duty of [the township] to erect guards and maintain an appropriate sign, and the affirmative performance of that duty in an allegedly negligent manner"

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dangerous condition left on its property, but negligently attempted to repair the condition and thereafter repeatedly failed to take further precautions despite knowledge that the condition persisted. KNS's exceptional conduct is more properly addressed under subsection (2) of Section 452, which provides the exception to the general rule of Illustration 1.

shifted liability for injury to the township, and acted as "superseding causes that relieved [the tractor driver and his employer] of liability for their alleged negligence." *Id.*, at ¶ 24.[12]

The key factors that were decisive in *Braun*—*i.e.*, the lapse of time, an independent duty to protect or make safe, and an affirmative attempt to discharge that duty—are also decisive here. As in *Braun*, a significant period of time elapsed between the purported negligence of UPS and the subsequent injury to Mr. Wood—one to four weeks. More critically, KNS owed an affirmative duty to Mr. Wood to protect him from known hazards and, like the township in *Braun*, failed to discharge that duty through negligent remediation of a known hazard. But KNS's negligence ran deeper than that of the township because KNS also repeatedly failed to take any precaution once it was aware that its attempted repair had failed. As described above, these factors weigh conclusively in favor of treating KNS's subsequent negligence as a superseding cause that relieves UPS of liability.

[12] The analysis in *Braun* is admittedly muddled as to the distinction between duty and proximate cause. *See Howard v. Bennett*, 2017 S.D. 17, ¶ 7 and n.4, 894 N.W.2d 391 (noting apparent "facially conflicting statements in *Braun*" regarding duty and proximate cause, and the role of the factfinder in each). However, the *Braun* court relied on proximate cause authority that aligns closely with Utah law, which assigns determination of the reasonable foreseeability of a superseding cause to the factfinder unless reasonable minds could not differ on the issue. *See, e.g.*, *Braun*, 2002 S.D. 67, at ¶ 21 (citing *Greenwood v. Lyles & Buckner, Inc.*, 329 P.2d 1063 (Okla. 1958)). Subsequent authority from the Supreme Court of South Dakota has likewise cited *Braun* for the principle that the issues of proximate and superseding cause are for the court "where reasonable minds cannot differ." *See Howard*, 2017 S.D. 17, at ¶ 8.

CONCLUSION

For these reasons, this Court should affirm the court of appeals and uphold summary judgment in favor of UPS in the case below.

DATED: August 21, 2020.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with page and word limitations of Utah R. App. P. 24(g), because this brief contains 12,488 words, excluding the parts of the brief exempted by Rule 24(g)(2).

2. This brief complies with Utah R. App. P. 21 regarding the filing of non-public information.

s/ Andrew M. Morse

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF RESPONDENT were served by email and U.S. Mail on August 21, 2020 as follows:

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