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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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BRUCE DUNBAR and LESLIE DUNBAR,

Appellants,

vs.

NATIONWIDE INSURANCE COMPANY OF AMERICA,

Respondent.

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BRIEF OF APPELLANTS

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## I. INTRODUCTION

Manuel Morillo lost control of his motorcycle as he was rounding a curve on Highway 101 and crashed. The motorcycle was damaged and spilled oil on the road.

Thirty minutes later the Dunbars came around the same curve on their motorcycle. Mr. Dunbar was operating the motorcycle. He did not have time to avoid the oil spill. The motorcycle's tires lost traction when they contacted the spilled oil. The Dunbars went down and were injured.

The Dunbars and their underinsured motorist's (UIM) carrier, Nationwide, filed cross-motions for summary judgment on the issue of Mr. Morillo's negligence.

The trial court granted Nationwide's motion, held Mr. Morillo (a) did not owe a duty of care to the Dunbars and (b) his actions were not the legal cause of their accident. The Dunbars' claims were dismissed.

The Dunbars request that the Court reverse and hold (a) Mr. Morillo owed a duty not to deposit a large amount of oil on the roadway and (b) that the oil proximately caused their motorcycle to crash. In the alternative the Dunbars request that the Court remand this matter to the trial for determination of any genuine issues of material fact necessary to resolve these issues.

## **II. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

1. The trial court erred in granting Nationwide's motion for summary judgment by order entered July 15, 2011 (CP 234-237).
2. The trial court erred in denying the Dunbars' motion for summary judgment by order entered July 15, 2011 (CP 238-241).

### *Issues Pertaining to Assignment of Error*

Did the trial court err as a matter of law by holding on summary judgment that Mr. Morillo did not owe a duty of care to the Dunbars and that his breach of duty could not be the legal cause of their collision where (1) his negligent driving created the hazard the Dunbars encountered thirty minutes later, (2) spilled oil and a resulting accident were foreseeable risks of his negligent driving and (3) the facts of this case and sound policy reasons warrant the conclusion his negligent driving was the legal cause of the Dunbars' accident?

## **III. STATEMENT OF THE CASE**

### **A. The Accidents**

The basic facts of the accidents were not disputed. Mr. Morillo and a companion were riding their motorcycles southbound on Highway 101. They approached Milepost 112 near McDonald Creek. At that point Highway 101 southbound forms a banked curve and has warning lights

and signage requiring drivers to slow to 25 miles per hour around the curve.<sup>1</sup>

Mr. Morillo's motorcycle lost control going around the curve, struck a Jersey barrier and crashed. There was no evidence of any cause other than operator error.

The damage to Mr. Morillo's motorcycle caused oil to spill into the southbound lane of Highway 101. The Fire Department arrived, requested that DOT bring sand to put on the "bad patch of oil in the southbound lane"<sup>2</sup> and transported Mr. Morillo from the scene. No cones or flares were put down to mark the oil spill.

Thirty minutes after Mr. Morillo's crash<sup>3</sup> Mr. Dunbar and his wife approached the curve on their motorcycle in the southbound lane. The motorcycle made contact with the oil spill in the road, lost traction and crashed.<sup>4</sup>

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<sup>1</sup> CP 86-87.

<sup>2</sup> This happened at 3:49 p.m. DOT was coming from Mount Walker, about 11.5 miles north of the accident location. CP 116, 119 (Herbst deposition at 51, 67). See also CP 84 (excerpt from 911 transcript).

<sup>3</sup> Mr. Morillo's accident was reported at about 3:40 p.m. and the Dunbars' collision happened at about 4:10 p.m. CP 45-46.

<sup>4</sup> Photos of the accident location (after sand was applied to the spill) are contained at CP 126 and CP 128.

B. Proceedings Below

Plaintiffs filed suit against Mr. Morillo, Nationwide and the Fire Department. All parties filed cross-motions for summary judgment.

Plaintiffs sought summary judgment that Mr. Morillo owed them a duty of care and breached it.<sup>5</sup> Nationwide conceded that for purposes of summary judgment Mr. Morillo's negligence caused his crash and the resulting oil spill.<sup>6</sup> However, Nationwide contended Mr. Morillo did not owe a duty of care to the Dunbars, that any negligence did not create legal causation and therefore the Dunbars' claims should be dismissed.<sup>7</sup>

The trial court granted Nationwide's motion and dismissed Mr. Morillo and Nationwide.<sup>8</sup>

**IV. STANDARD OF REVIEW**

A grant of summary judgment is reviewed de novo. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). The appellate court considers facts and any reasonable inferences from

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<sup>5</sup> Plaintiffs did not move on the issue of proximate cause.

<sup>6</sup> CP 44, 46. (At the time of the motions Mr. Morillo was on active duty overseas and could not be deposed.)

<sup>7</sup> Nationwide also argued the Fire Department's negligence was a superseding cause. CP 46, 52 *et seq.* This argument was mooted by the trial court's dismissal of the Fire Department.

<sup>8</sup> The Dunbars initially appealed the order as to Mr. Morillo individually as well as Nationwide but the Dunbars' claims against Mr. Morillo were thereafter resolved. The Court granted the Fire Department's motion for summary judgment and dismissed the Dunbars' claims pursuant to the public duty doctrine. The Dunbars did not appeal this order.

those facts in the light most favorable to the non-moving party. *Stalter v. State*, 151 Wn.2d 148, 154, 86 P.3d 1159 (2004).

## V. SUMMARY OF ARGUMENT

The crux of Nationwide's argument is that the Dunbars were not foreseeable plaintiffs as a matter of law because they were not in Mr. Morillo's immediate vicinity when his crash happened and their crash occurred thirty minutes later. However, the foreseeability analysis which gives rise to a duty of care is not so constrained.

It was foreseeable that Mr. Morillo's motorcycle would leak oil in the road if it crashed due to negligent driving. It was foreseeable that other users of the roadway (particularly other motorcyclists) would encounter the oil spill, lose control and crash.

Mr. Morillo owed a duty of care to the Dunbars as foreseeable plaintiffs and the trial court should have so ruled as a matter of law. If there was any doubt the trial court should have ruled foreseeability was an issue for the jury rather than dismissing the Dunbars' claims.

Similarly the legal causation aspect of the negligence analysis is satisfied here. Legal cause is determined under the facts of each case and policy considerations. The Dunbars' crash was not so remote from Mr. Morillo's negligent driving that the trial court was warranted in dismissing their claims as a matter of law. Further, policy reasons favor holding

negligent drivers responsible for the consequences of their actions and Mr. Morillo's negligence does not deserve to be excused.

## VI. AUTHORITY AND ARGUMENT

### A. A Duty of Care is Owed Where the Defendant Creates the Risk of Foreseeable Harm

To establish an actionable negligence claim, the plaintiff must establish the existence of (1) a duty, owed by the defendant to the plaintiff, to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. *Parrilla v. King County*, 138 Wn. App. 427, 432, 157 P.3d 879 (2007).

As a general rule, "every actor whose conduct involves an unreasonable risk of harm to another 'is under a duty to exercise reasonable care to prevent the risk from taking effect.'" A risk is "unreasonable" pursuant to that principle only if a reasonable person would have foreseen it. Accordingly, the existence of a duty turns on the foreseeability of the risk created. If a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it.

*Parilla*, 138 Wn. App. at 436 (internal citations omitted).

The class of persons protected generally includes anyone foreseeably harmed by the defendant's conduct. *Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992). The harm sustained need only be within the general field of danger covered by the defendant's duty. *Schneider v. Strifert*, 77 Wn. App. 58, 63, 888 P.2d 1244 (1995). The

foreseeability inquiry is “whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant.” *Rikstad v. Holmberg*, 76 Wn 2d 265, 269, 456 P.2d 355, 358 (1969). Liability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained. *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940).

Harm is foreseeable if the risk from which it results was known or in the exercise of reasonable care should have been known. *Travis v. Bohannon*, 128 Wn. App. 231, 238, 115 P.3d 342 (2005). All that is required is that the plaintiff “must bring himself within the class of persons threatened by defendant’s conduct.” *Hansen v. Washington Natural Gas Co.*, 27 Wn. App. 127, 130, 615 P.2d 1351 (1980). “Usually, the dominant policy will be that of compensating all persons foreseeably put at risk by a defendant’s failure to exercise ordinary care, and the protected class will be defined to include all persons foreseeably put at risk.” *Schooley v. Pinch’s Deli Market, Inc.*, 80 Wn. App. 862, 871, 912 P.2d 1044 (1996).

The existence of a duty is a question of law for the court, to be determined by reference to considerations of public policy. *Parilla*, 138 Wn. App. at 436. If all reasonable minds would conclude that the defendant failed to exercise ordinary care, the trial court can find

negligence as a matter of law. *Pudmaroff v. Allen*, 138 Wn.2d 55, 68-69, 977 P.2d 574 (1999).

However, foreseeability is ordinarily a question of fact for the jury. *Seeberger v. Burlington Northern R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999). The court will only determine foreseeability as a matter of law only where the circumstances surrounding the injury are “so highly extraordinary or improbable as to be wholly beyond the range of expectability” and where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn. 2d 479, 492, 780 P.2d 1307, 1313 (1989); *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998).

The question whether a given defendant owes a duty is generally characterized as a question of law. But the conclusion that a given defendant owes a duty of care turns on whether injury or damage is foreseeable. And that is a question of fact, unless the facts of the injury are so highly improbable or extraordinary that we can conclude as a matter of law that they are not foreseeable.

*Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007) (internal citations omitted).

For example, no duty was found in *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975). There the court held a negligent driver owed no duty to a helicopter crew who crashed while enroute to scene of a car accident because a helicopter crash “wasn’t within the reasonably

foreseeable realm of peril created by the defendant's original negligence.”

*Id.* at 981.

B. Negligent Driving Causing Road Hazards and Subsequent Accidents Gives Rise to a Duty of Care

WPI 70.01 (General Duty—Driver or Pedestrian) provides as

follows:

It is the duty of every person using a public street or highway [whether a pedestrian or a driver of a vehicle] to exercise ordinary care to avoid placing [himself or herself or] others in danger and to exercise ordinary care to avoid a collision.

(Emphasis added.)

Collisions with the negligent driver aren't the only risk of unsafe driving. The scope of the driver's basic duty to avoid causing harm to other users of the road extends to persons placed at risk due to spills or roadway hazards caused by driver negligence.<sup>9</sup> This echoes common sense. Motor vehicles that are negligently operated can and do spill their contents on the road.<sup>10</sup> Those contents can pose a hazard to other traffic. It's foreseeable that subsequent accidents can and will result.

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<sup>9</sup> For example, in *Farm Bur. Mut. Ins. v. Henke*, Not Reported in N.W.2d, 2005 WL 3416127 (Mich. App. 2005) a truck driver drove off the driveway and a tank of ammonium nitrate spilled. The court held resulting injury, the spilling and migration of ammonium nitrate, was a foreseeable result of the driver's misuse of the truck. (GR 14.1 permits citation to foreign unpublished opinions where authorized by the foreign jurisdiction. Michigan Court Rule 7.215(C)(1) so authorizes.)

<sup>10</sup> Nationwide argued below that “unsecured load” cases are not persuasive here because there is an independent duty to secure loads. But there's no basis for distinguishing between a road hazard created by a failure to drive safely vs. failure to safely secure a

The principal authority upon which Nationwide relied below was *Palsgraf*—the “unforeseeable plaintiffs” case.<sup>11</sup> Nationwide contended the Dunbars were not in the “zone of danger” created by Mr. Morillo’s crash.

However, all *Palsgraf* stands for is that the actor’s conduct must involve a foreseeable risk of harm to the person injured for a duty to be owed — “[t]he risk reasonably to be perceived defines the duty to be obeyed...”<sup>12</sup> Nationwide’s argument misunderstood *Palsgraf*<sup>13</sup> and confused the concept of foreseeability with spacial/geographical and temporal proximity.<sup>14</sup>

Washington and foreign authorities hold that the defendant owes a duty to other users of the road when his conduct creates a roadway hazard, even if the driver’s negligent act is removed in time and place from the

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load. Either type of negligent act creates a foreseeable risk of harm to other users of the road.

<sup>11</sup> *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). *Palsgraf*’s actual holding is simple. Because the railroad guard didn’t have reason to know what was in the package the he couldn’t expect that by pushing the man the package would explode and hurt someone. *Palsgraf* wasn’t about the liability of the man with the fireworks.

<sup>12</sup> *Palsgraf*, 162 N.E. at 101.

<sup>13</sup> Mr. Morillo is like the man who dropped the package of fireworks, not the guard who pushed him. Or, as Judge Cardozo put it, “[t]he wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger.” *Palsgraf*, 162 N.E. at 100.

<sup>14</sup> *Palsgraf* was not about how far away Mrs. Palsgraf was from the fireworks, but that the guard who pushed the man with the package had no reason to know it contained fireworks.

subsequent injury-producing event. The duty is not limited to collisions or accidents occurring at the same time of the negligent act.

In *Thornton v. Eneroth*, 177 Wn. 1, 30 P.2d 951 (1934) the defendant was the first driver in a chain reaction series of five collisions that occurred over several minutes. The first driver had negligently stopped his car on the highway to clear his windshield when he was struck by a car approaching from behind, starting the chain reaction. The court held that even though the defendant was no longer even present when the fourth and fifth collisions occurred a number of minutes later, he was still liable because “he was the moving cause of what happened after he did leave.” *Id.* at 11 (emphasis added).

In *Bell v. McMurray*, 5 Wn.App. 207, 486 P.2d 1105 (1971) the court held that “[d]isposition of the question of foreseeability in this type of setting was put to rest many years ago by the Supreme Court [in *Thornton v. Eneroth, supra*] and that “whether or not the initial negligence starts a chain of events which is not completed until the final collision” could not be determined as a matter of law. *Id.* at 212 (emphasis added). The court held the original negligent act “places within the reasonable range of probability the general type of harm sustained by plaintiff in the second collision.” *Id.* at 213 (emphasis added).

In *Lasley v. Combined Transport, Inc.*, 234 Or. App. 11, 227 P.3d 1200 (Or. App. 2010) the court considered a case where a load of glass fell from a truck onto the highway. The glass caused a traffic jam. The plaintiff's vehicle was up the road from the glass spill when it was rear-ended by a drunk driver, propelling the plaintiff's vehicle into a semi-truck and causing it to catch fire and killing the plaintiff. This incident occurred four miles away from the glass spill and an hour and a half after the spill. The court rejected the trucking company's arguments that the plaintiff was outside the class of persons foreseeably injured glass spill as a matter of law and held that foreseeability was for the jury.

In *Fallon v. D. Mongillo & Sons*, 4 Conn. Sup. 156, 1936 WL 1278 at \*2 (Conn. Super. Ct. 1936) the court concluded that owners of trucks that leaked oil over the highway owed a duty to other highway travelers and that the truck owners could be held liable to occupants of a vehicle approaching from the rear who crashed due to the slippery condition, even though the defendant had leaked the oil at least three hours before the accident. The court noted that "it may be taken as a matter of common knowledge that oil discharged upon a public highway in this manner would constitute a dangerous condition and as a matter of law that the person responsible for discharging it negligently would be liable to one injured thereby." *Id.* at 157, 1936 WL 1278 at \*3 (emphasis added).

These cases illustrate that negligent drivers will owe a duty when they create hazards that other persons can reasonably be expected to encounter and be injured by—whether or not those persons are in immediate proximity when the original negligent act occurs. The only question is whether the subsequent accident is a foreseeable result of the risk created by the defendant because the plaintiffs fall within the class of persons threatened by the defendant’s actions.

C. The Dunbars Were Foreseeably Placed at Risk by Mr. Morillo’s Negligent Driving: He Owed Them a Duty of Care

It’s undisputed Mr. Morillo was required to operate his motorcycle safely in order to prevent harm to other users of the road.

It’s also undisputed (for purposes of summary judgment and this appeal) that Mr. Morillo’s negligence created the oil spill the Dunbars subsequently encountered.<sup>15</sup>

It is foreseeable that a negligently-crashed motorcycle will leak oil onto the roadway and that other vehicles on the road (particularly other motorcycles) will lose traction upon encountering such a spill.

The Dunbars’ crash upon encountering the oil was within the ambit of the hazard Mr. Morillo created and was not so highly extraordinary or

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<sup>15</sup> As noted *supra* (p. 4) Mr. Morillo’s negligent driving was conceded for purposes of summary judgment. There was no evidence that his crash resulted from a cause other than bad driving (*e.g.*, a road hazard, another vehicle, defect in his motorcycle, etc.).

improbable as to be wholly beyond the range of expectability (unlike, *e.g.*, *Maltman*, where a helicopter crash after a car accident was not reasonably foreseeable).

Nationwide argues the Dunbars were “outside the zone or field of danger.” But it makes no sense to hold that a negligent driver’s duty is confined to other vehicles or persons in the area with which the negligent driver could collide. Obviously the consequences of negligent driving can extend beyond that particular, immediate risk.

Mr. Morillo’s duty was not limited to vehicles with which he was at risk of colliding at the time he lost control, but all users of the road who were put at risk by the oil spill, which continued to pose a hazard after his crash. Oil on the road is an even bigger risk for an approaching motorist than a disabled vehicle or debris in the road from a prior accident.

It was not unforeseeable, extraordinary or improbable that the Dunbars—arriving thirty minutes later on the same road before DOT had a chance to respond to the oil spill—would encounter the spill and crash.

The Court erred in failing to hold as a matter of law that Mr. Morillo did not owe a duty of care to the Dunbars. Alternatively, the Court erred in granting summary judgment to Nationwide on this issue in lieu of submitting the issue of foreseeability to the jury.

D. Legal Causation Extends to “Follow-on” Collisions Resulting From Prior Collisions or Roadway Hazards

1. *Legal Causation Generally*

“Proximate causation includes both cause in fact and legal causation.” *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 256, 978 P.2d 505 (1999).<sup>16</sup>

Legal causation turns on whether “a defendant’s conduct should warrant legal liability as a matter of social policy and common sense.” *Yong Tao*, 140 Wn. App. at 834 (internal citation omitted).

Legal causation is concerned with how far a defendant's liability should extend, based on policy grounds....In our analysis of the issue, we focus on whether, as a matter of policy, the connection between the ultimate injury and the act of the defendant is too remote or insubstantial to impose liability.

...

Unlike factual causation, legal causation “hinges on principles of responsibility, not physics” ... and the determination of legal causation rests on policy considerations as to how far the legal consequences of a defendant's act should extend .... Consequently, the existence of legal causation between two events is determined “on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.”

*Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 148, 150, 61 P.3d 1207, 210 (2003) (emphasis added).

The issues involving duty and legal causation are intertwined; if duty and foreseeability support liability then “sound policy reasons” are

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<sup>16</sup> There was no dispute on summary judgment that the oil from Mr. Morillo’s crash was a cause-in-fact of the Dunbar’s crash (*supra*, p. 4).

considered for purposes of legal causation. *Schooley*, 34 Wn.2d at 479. Foreseeability is not an element of proximate cause.<sup>17</sup> *Rikstad*, 76 Wn.2d at 268.

The court only “exercises its gatekeeper function” by dismissing for lack of legal cause as a matter of law “if the defendant’s actions are too remote a cause of plaintiff’s injuries.” *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 360, 961 P.2d 952 (1998).

2. *Legal Causation in Roadway Hazard Cases Exists Where the Original Hazard Continues to Endanger Other Users of the Road—the Mere Passage of Time is Not Dispositive*

The weight of Washington and persuasive authorities is that the hazardous consequences of a driver’s original negligence which continue to operate and are the cause-in-fact of a subsequent accident will satisfy the requirement of legal causation (in the absence of a superseding cause).<sup>18</sup>

In *Leach v. Weiss*, 2 Wn. App. 437, 467 P.2d 894 (1970) the defendant’s car and trailer became disabled on a bridge. Fifteen to twenty minutes passed. Then another car tried to avoid the disabled vehicle and struck a third car (the plaintiff’s). The court held the defendant’s

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<sup>17</sup> Rather, foreseeability goes to whether a duty was owed in the first instance. *Id.*

<sup>18</sup> Nationwide’s argument below that the Fire Department’s negligence was an intervening cause is no longer at issue in light of the Court’s dismissal of the Fire Department. In any event, whether an independent cause is reasonably foreseeable is generally a question of fact for the jury. *McCoy*, 136 Wn.2d at 358.

negligence was “straightforward” and held there could be legal causation under the facts presented. *Id.* at 444-445.

In *McCoy* the plaintiff argued the car manufacturer’s negligence was the legal cause of his injury when he tried to rescue persons in the car that had overturned and was then struck by a hit and run driver. The court held that legal cause was not a bar as a matter of law. *Id.* at 360. *Accord, Estate of Keck By and Through Cabe v. Blair*, 71 Wn.App. 105, 113, fn. 6, 856 P.2d 740 (1993) (where the court observed that legal causation was not even an issue in the case).<sup>19</sup>

In *Skie*, *supra*, the plaintiff was injured when the driver of the car she was in crashed into a truck carrying cement blocks which fell on her. She argued the blocks were improperly secured. The trucking company argued legal causation was absent. The court held there was legal causation because the inadequate securing of the load put persons who travel on public roads at risk. *Skie*, 115 Wn. App. at 150 (emphasis added).

In *Knowles v. Barnes*, 671 So. 2d 1123, 1125 (La. Ct. App. 1996) a car slid on diesel oil that had been spilled by a truck on a highway curve. The car then spun out of control and struck a second car, injuring the

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<sup>19</sup> Admittedly *McCoy* and *Keck* were rescue case and the rule is that danger invites rescue. But that doesn’t make their reasoning less persuasive. Oil spills on the road invite crashes.

plaintiff. The court held that it was the negligent operation of the truck that was the proximate cause.

In *Fox v. Lyte*, 143 A.D.2d 390, 532 N.Y.S.2d 432 (N.Y.A.D. 2 Dept. 1988) a gasoline truck driven by the defendant's employee (Diaz) overturned and spilled gasoline onto the road, which was a possible cause of a subsequent accident. The defendant argued firefighters who responded negligently left gasoline and other contaminants on the road. The court nevertheless held Diaz' negligence satisfied proximate cause:

Nor can it be said that, as a matter of law, events subsequent to the original accident were so extraordinary and, in the ordinary course of events, not foreseeable, so as to break the causal nexus between negligence on the part of Diaz and the collision giving rise to the plaintiff's injuries.

*Id.* at 392.

In *Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823 (M.D. Pa. 1984), a volunteer fireman was struck by a car while directing traffic following a chemical spill on the highway which had occurred six hours when the driver of a truck negligently lost control, tipped over, and spilled the chemical contents of the cargo onto the highway. The spilled chemicals reacted with the water on the road and created a cloud of hydrochloric gas. Hours later and miles away, the plaintiff was directing traffic to detour around the spill and was injured when he was struck by a car driven by another negligent driver. At issue was whether the negligent

conduct of the automobile driver who struck plaintiff was a superseding cause cutting off the liability of the chemical company for the negligent spill. The court held a jury could find that the negligent transport of chemicals foreseeably could lead to the closing of an interstate highway and increase the likelihood of attendant traffic accidents. *Id.* at 828-29.

In *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 267 S.E.2d 143 (Va.1980) a truck spilled heating oil on the highway. The highway department responded. An official directed the plaintiff around the truck and into the lane where the oil spilled, causing her to lose control of her car and causing a crash. The heating oil company argued there was no proximate cause (because the official's negligence was a superseding cause). The court held the defendant's negligence in spilling the oil was the sole proximate cause of the hazardous condition of the road. *Id.* at 147-148.

In *Griego v. Marquez*, 89 N.M. 11, 546 P.2d 859 (N.M.App. 1976) the court observed that "[i]f the first accident had not occurred, plaintiff would not have been exposed to the risk." *Id.* at 862.

In *Johnson v. Sunshine Creamery Co.*, 200 Minn. 428, 274 N.W. 404 (1937) the court found that the first accident, which left two vehicles blocking the highway, could be proximate cause for the second accident even though the second accident occurred an hour after the first. *Id.* at 406

(“the fact that the ambulance did not reach the obstruction until about an hour after its creation would not seem to break the chain of causation as a matter of law”).

Additional cases involving “follow on” accidents and the proximate cause analysis can be found in “Negligence Causing Automobile Accident, or Negligence of Driver Subsequently Approaching Scene of Accident, as Proximate Cause of Injury by or to the Approaching Car or its Occupants,” 58 A.L.R.2d 270 (1958 & Supp.2003). The article notes that proximate cause was found in a number of cases, albeit not others (usually where the hazard was visible, there was an intervening cause or substantial contributory negligence). In many of the cases where proximate cause was found the initial accident left vehicles or debris in the road, creating a hazard.

E. Mr. Morillo’s Negligence Was a Legal Cause of the Dunbars’ Accident

The Dunbars’ crash occurred a mere thirty minutes after Mr. Morillo’s and at the same curve in the road. DOT was still en route to clean up the spill. The hazard was still present. The oil spill was in the same state and posed the same danger. There was no intervening or superseding cause.

It's difficult to understand why the passage of thirty minutes would break the chain of legal causation in this case. Some cases indicate the passage of time matters where the "forces" of the initial accident have "spent" themselves. But the danger posed by the oil from Mr. Morillo's accident didn't abate or diminish over the next thirty minutes. If anything the spill was more dangerous than a disabled vehicle or debris in their lane precisely because the Dunbars had no warning of it.

The cases are legion that Washington's public policy favors "assuring compensation to the victims of negligent and careless drivers." *See, e.g., Bates v. State Farm Mut. Auto. Ins. Co.*, 43 Wn. App. 720, 727, 719 P.2d 171 (1986). By contrast, there are no policy reasons which favor excusing Mr. Morillo from the foreseeable consequences of his negligent driving.

Based on the facts of this case (the analysis of legal causation is always case-specific) it's not unfair or unsound to hold Mr. Morillo accountable for the danger he created that the Dunbars encountered. The Dunbars' crash was not too remote from Mr. Morillo's negligence in time or place or sequence of events. If he wouldn't have negligently crashed his motorcycle the oil wouldn't have ended up on the road and the Dunbars wouldn't have been hurt. The trial court erred in granting summary judgment on this basis.

## **VII. CONCLUSION**

The trial court erred by granting Nationwide's motion for summary judgment and denying the Dunbars'. The Court should hold as a matter of law that Mr. Morillo owed the Dunbars a duty of care, that legal causation is present and that the case is remanded for trial on all other issues. In the alternative, the case should be remanded so the foreseeability of the risk Mr. Morillo created can be determined by the trier of fact at trial.

## **VIII. REQUEST FOR COSTS**

RAP 18.1 provides that fees or expenses must be requested in accordance with the rule where applicable law grants a party a right to recover such fees or expenses. RAP 14.2 provides that costs shall be awarded to the party that substantially prevails upon review.

Plaintiffs request costs allowable under RAP 14.3 in the event the Court determines they have substantially prevailed upon review.

DATED this 4<sup>th</sup> day of November, 2011.

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**PROOF OF SERVICE**

I, Tianna J.H. Pak, certify under penalty of perjury under the laws of the State of Washington and the United States that on the 4<sup>th</sup> day of November, 2011, I caused to be served via the following means a true and accurate copy of the foregoing *Brief of Appellants* upon the following person(s):

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DATED at Seattle, Washington this 4<sup>th</sup> day of November, 2011.

By:   
Employee, MYERS & COMPANY, P.L.L.C.