

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  _____
DEPUTY

No. 42465-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRUCE DUNBAR and LESLIE DUNBAR,

Appellants,

vs.

NATIONWIDE INSURANCE COMPANY OF AMERICA,

Respondent.

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANTS

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ORIGINAL

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I. SUMMARY OF REPLY

The trial court erred by entering summary judgment holding that Mr. Morillo owed no duty of care to the Dunbars.

“The existence of a duty turns on the foreseeability of the risk created.”¹ It’s foreseeable that a negligently-operated motorcycle going too fast around a highway curve will crash, hit a Jersey barrier, bounce and hemorrhage oil on the road.² It’s also foreseeable that other vehicles subsequently traveling on the same road in the same direction will encounter the oil (particularly on a rural highway before sufficient response time has passed for the appropriate authorities to remove the hazard), lose traction and crash.

Mr. Morillo created the risk of harm. The Dunbars’ accident predictably followed. To the extent reasonable minds can disagree whether the risk of harm to the Dunbars was foreseeable, it is a question of fact for the jury.

Legal causation is also present. It is not unfair or unreasonable to hold Mr. Morillo responsible for the real-world consequences of his negligent driving. It would be unfair and unreasonable to preclude the Dunbars from seeking compensation for the injuries they sustained

¹ DeWolf, 16 Wash. Prac., Tort Law And Practice § 1.14 (3d ed.).

² See, e.g., CP 126, 128 (photos of accident scene).

precisely because of Mr. Morillo's actions. There is no rational basis for limiting his liability as a matter of law based on proximate cause.

The trial court ruled the Fire Department could not be negligent pursuant to the public duty doctrine. The ruling was not appealed. The Fire Department's conduct is simply not before the Court and the trial court's order of dismissal is preclusive. In any event, as a matter of law the Fire Department's inaction was not an intervening force, did not break the causal chain of Mr. Morillo's negligence, was not unforeseeable and thus was not a superseding cause.

The parties agree there are no controlling Washington cases arising from identical facts. The cases relied upon by the Dunbars are persuasive and illustrate that the requirements of duty and legal causation are satisfied here.

The trial court's rulings should be reversed.

II. ARGUMENT

A. The Trial Court Erred in Holding Mr. Morillo Owed No Duty to the Dunbars as a Matter of Law

Nationwide argues that the relevant inquiry in determining the existence of a duty of care is "what type of harm may result and to

whom.”³ Nationwide also notes there is no duty to the traveling public at large.

Washington law does not formulate the duty inquiry in quite that way. In determining whether a duty is owed the inquiry is whether the plaintiff is foreseeably put at risk by the defendant’s failure to exercise ordinary care.⁴ That said, even following Nationwide’s formulation it’s clear Mr. Morillo owed a duty of care to the Dunbars.

The type of harm which resulted from Mr. Morillo’s negligent driving was foreseeable. Nationwide doesn’t argue it’s unforeseeable that a negligently operated motorcycle going around a curve at a high rate of speed can crash, that it can spill oil as a result or even that other vehicles encountering the oil on the road thereafter can lose traction and crash. None of the events that unfolded here were surprising or extraordinary.

The Dunbars were also foreseeable plaintiffs. The Dunbars were not simply members of the traveling public at large—they were within the class of persons put at risk, *i.e.*, those who could reasonably be expected to encounter the spilled oil on the road in the curve of the southbound lane of Highway 101.

Nationwide argues the Dunbars were unforeseeable plaintiffs because they were outside the “zone of danger” created by Mr. Morillo’s

³ Respondent’s Brief at 8.

⁴ Appellant’s Brief at 7.

crash. This is an entirely artificial construction and the Court should pause to consider the extent to which adopting Nationwide's argument would effectively immunize a broad range of negligent acts.

Nationwide cites no Washington or other authority that the tortfeasor's duty is limited to persons in immediate temporal and spatial proximity to the original negligent act. A risk of harm created by negligence may exist for a substantial period of time before it ultimately causes harm to the person encountering it.

The plaintiff does not need to be at the same place at the same time as the defendant when the negligent act occurs in order to fall within the class of persons who can reasonably be anticipated to be injured. That is why foreseeability rather than proximity is the test. Limiting duty as Nationwide argues would ignore the actual consequences of the tortfeasor's conduct, which are not so tidily confined. As the facts of this case illustrate, negligent driving doesn't merely endanger other vehicles or persons in immediate proximity with the negligent driver.

Nationwide argues further that Mr. Morillo could not reasonably foresee that the Fire Department or some other government agency would fail to clean up the oil spill within the thirty minutes before the Dunbars' accident occurred.

The tortfeasor is not entitled to assume that someone else will remove the hazard he created, thus excusing his duty. Moreover, the evidence in this case showed it was foreseeable that the spill, on a rural section of Highway 101, would not be cleaned up within the short period of time that passed before the Dunbars encountered it. The Fire Department contended that it had no responsibility to clean or warn of the spill (that was DOT's responsibility)⁵ and its job was to tend to the injured Mr. Morillo and transport him for immediate medical assistance. It was not disputed that the Fire Department requested that DOT clean up the spill, DOT's location was some miles away⁶ and DOT had not arrived to clean up the spill before the Dunbars' accident happened. Given those facts it was foreseeable that Dunbars would encounter the oil where it was spilled before the hazard could be mitigated.

Washington law is clear that foreseeability giving rise to a duty is a question of fact,⁷ unless the facts of the injury are "so highly improbable or extraordinary" that the court can conclude as a matter of law that they

⁵ CP 114.

⁶ Appellants' Brief at 3, fn. 2.

⁷ Nationwide incompletely cites *Christen v. Lee*, 113 Wn. 2d 479, 780 P.2d 1307 (1989). This is what the court actually said: "Foreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ." *Id.* at 492.

are not foreseeable.⁸ Nationwide does not argue that what unfolded here was highly improbable or extraordinary.

Nationwide cites to *Palsgraf*, but its holding was not based on proximity. The fireworks exploded right after the guard pushed the man onto the train, causing the scales to fall onto Mrs. Palsgraf. The issue was whether a duty could be imposed despite the unexpected nature of the event (the exploding package wrapped in newspaper).⁹ Judge Cardozo's opinion explained it could not be reasonably expected that "the falling package had in it the potency of peril to persons thus removed."¹⁰ By contrast, here it's hardly surprising that oil on the road caused by an accident poses a hazard to other motorists who will subsequently encounter it.

Nationwide cites to *Allen v. Shiroma*, 514 P.2d 545 (Or. 1973). In that case the court explained that the plaintiff's subsequent actions in leaving his car in a traffic lane and having a teenager move his car were unforeseeable and highly extraordinary. Since the defendant had only caused a fender-bender without injury to the plaintiff, it was not foreseeable that this negligent act would bring about the harm which

⁸ Appellant's Brief at 8.

⁹ "Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station." *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928).

¹⁰ *Palsgraf*, 162 N.E. at 99.

ultimately transpired. *Id.* at 547-548. The court took pains to distinguish other cases where it held negligence was a jury question. *Id.* at 547-548. *Allen* is not persuasive here because the risk of harm created by Mr. Morillo's negligence continued to operate and there were no intervening factors which caused the Dunbars to crash.

Nationwide argues Mr. Morillo owed no duty to clean up the oil or warn others. The Court need not reach this straw-man argument. Mr. Morillo's negligence lies in his failure to drive safely and the resulting consequences, not his failure to clean up the scene.

The trial court erred in granting summary judgment on the basis that Mr. Morillo owed no duty to the Dunbars.

B. Proximate Cause Exists: The Fire Department's Response Was Not a Superseding Cause and Legal Causation is Present

1. *The Fire Department's Inaction Did Not Constitute a Superseding Cause*

Nationwide's attempt to shift blame to the Fire Department is not supported by Washington law or common sense.

The trial court held that the public duty doctrine precluded any fault being attributed to the Fire Department. The trial court's ruling was not appealed and Nationwide has not sought review of that ruling. In any

event, the Fire Department's response to Mr. Morillo's accident did not constitute a "superseding" cause under Washington law.¹¹

"An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."¹² "The traditional test [for a superseding cause] is whether or not the intervening act 'has broken the causal chain between the conduct of the defendant and the injury of the plaintiff.'"¹³ Only intervening acts that are not reasonably foreseeable can be deemed superseding causes.¹⁴

The various foreign authorities cited by Nationwide all involved intervening negligent acts (not inaction), which in and of themselves ultimately caused the harm (*e.g.*, a follow-on collision).¹⁵ In those cases

¹¹ In support of its argument Nationwide cites *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975). There the Supreme Court said it wasn't foreseeable that a car crash necessitating rescue would result in a helicopter crash, "an intervening cause only tenuously related and totally unforeseeable, in a causal sense, to the original condition attributable to the defendant's conduct." *Id.* at 982-983. By contrast, a subsequent accident resulting from a still-existing hazard created by negligent driving is neither attenuated nor unforeseeable.

¹² Restatement of Torts (2d), § 441(1) (emphasis added).

¹³ DeWolf, 16 Wash. Prac., Tort Law And Practice § 4.23 (3d ed.) (emphasis added) citing *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 396, 558 P.2d 811, 816 (1976) and *Maltman*, 84 Wn. 2d at, 982. See also WPI 15.05 (instruction on superseding cause).

¹⁴ *Riojas v. Grant County Public Utility Dist.*, 117 Wn. App. 694, 72 P.3d 1093 (2003). See also *Campbell v. ITE Imperial Corp.*, 107 Wn. 2d 807, 813, 733 P.2d 969, 973 (1987); *Smith*, 16 Wn. App. at 396; *Travis v. Bohannon*, 128 Wn. App. 231, 242, 115 P.3d 342 (2005).

¹⁵ Nationwide cites *Jackson v. Howell's Motor Freight*, 485 S.E.2d 895 (N.C. Ct. App. 1997). *Jackson* is readily distinguished. There the "officials placed traffic cones and positioned emergency vehicles in the road, made decisions regarding the flow of traffic and assumed the responsibility for directing traffic through the accident scene." *Id.* at 900. The key to the court's holding was that the second driver was following the officer's direction when it caught the pole which then struck a fireman. *Id.* at 477-478.

the effects of the defendant's negligence were no longer operating other than as a but-for cause or condition.

By contrast, there was no "intervening" cause here which increased the risk of harm posed by the oil on the road and there was no break in the causal chain. The Fire Department's inaction did not bring about a harm different in kind from that which resulted from Mr. Morillo's negligence.¹⁶ The Fire Department did not do anything to make the oil spill more dangerous than it already was. Its failure to act did not make the oil any less slippery or less of an active factor in causing subsequent accidents. The effects of Mr. Morillo's negligence and risk to other drivers continued unabated.

It was reasonably foreseeable the Fire Department would not take action regarding the spill. The Fire Department explained there were sound reasons why it did not clean up or warn of the spilled oil. Fire Department vehicles did not carry absorbent, flares and cones were impractical, all personnel were needed to transport the injured Mr. Morillo to the helicopter landing pad and DOT had been summoned to respond to the spill.

Therefore the officer's action was an intervening cause. In this case the Fire Department did not direct the Dunbars into the oil on the road or otherwise increase the risk.

¹⁶ Restatement of Torts (2d), § 442(a).

The Fire Department's inaction was not unforeseeable and does not excuse Mr. Morillo's negligence as a matter of law. The Court should hold that there was no superseding cause. At best (for Nationwide) this would be an issue for the jury.¹⁷

2. *Legal Causation Exists*

Logic, common sense, justice, policy and precedent all support holding Mr. Morillo responsible for the consequences of his negligent driving.

The connection between Mr. Morillo's negligence and the Dunbars' injuries is not attenuated. The Dunbars' accident happened in the very section of road where Mr. Morillo's accident happened a mere thirty minutes earlier. The oil was still on the road and was just as slippery as it ever was. It was not unexpected that a first responder such as the Fire Department would attend to Mr. Morillo's immediate medical concerns. Not enough time had passed for DOT to arrive and clean up the spill.

Nationwide argues holding Mr. Morillo responsible would encourage negligent, injured drivers to stagger out in the road to clean up spills or debris and cause even more problems. This foray into behavioral

¹⁷ If there are varying inferences to be derived from the evidence, the range of reasonable anticipation of foreseeability is a question for the jury. *Kennett v. Yates*, 41 Wn.2d 558, 250 P.2d 962 (1952).

science is wildly speculative. The relevant social policies here are (1) requiring negligent drivers to compensate innocent victims¹⁸ and (2) encouraging safe driving in the first instance by holding drivers responsible for the consequences of their negligence. Negligent drivers should not be excused by counting on the authorities to immediately remove the hazards they created.

Legal causation exists between Mr. Morillo's negligent driving and the Dunbars' resulting injuries.

C. The Cases Cited by the Dunbars are Apposite and Persuasive

Nationwide faults the Dunbars for not citing cases on all fours. As Nationwide's lack of such citations indicates, there aren't any. That's why the Court should look to the reasoning employed in other analogous cases.

The rescue cases involving roadway hazards necessarily involve consideration of the scope of the original tortfeasor's responsibility and are persuasive.¹⁹ The cases cited illustrate that the tortfeasor's negligence will not be excused simply because there was not immediate temporal and spacial proximity between the original act of negligence and the event

¹⁸ Appellants' Brief at 21.

¹⁹ The rescue doctrine simply "allows the rescuer to negate the presumption that his intentional act of rescue is the superseding cause of his injuries"—the rescuer must still establish proximate cause as to the defendant's acts endangering the person rescued. *Estate of Keck By and Through Cabe v. Blair*, 71 Wn. App. 105, 110-111, 856 P.2d 740 (1993).

injuring the plaintiff. That is not a concept unique to rescue cases but often arises in them. It's no less foreseeable that a subsequent driver will encounter oil left on the road than danger will invite rescue.

The unsecured load cases are analogous. They differ only in the source of the duty (Mr. Morillo had a statutory and common law obligation to operate the motorcycle with reasonable care and in the unsecured load cases the duty is imposed by statute). However, the more significant point is that the tortfeasor will still be held responsible for the effects of his actions creating a roadway hazard even if the plaintiff's injury occurs hours later and miles away and/or involves other actors. An oil spill in the road resulting from a motorcycle crash is just as foreseeable as an unreasonably secured load falling into the road, as are subsequent accidents resulting from such hazards.

Likewise, the cases involving "follow-on" accidents and disabled vehicles are instructive. Nationwide cites no principled basis for distinguishing between this case (involving the Dunbars' accident thirty minutes after Mr. Morillo's) and the cases cited, involving subsequent collisions occurring anywhere from ten minutes, twenty minutes to an hour later. The original tortfeasor's negligence will not be excused by the mere passage of time where the risk of harm created continues to operate.

D. The Dunbars' Motion for Summary Judgment Regarding Mr. Morillo's Duty and Breach of Duty Should Have Been Granted

The Dunbars asked the trial of court to hold on summary judgment that Mr. Morillo owed and breached his duty of care. Nationwide, despite having conceded for purposes of its motion that Mr. Morillo's negligence deposited the oil on the road, argues Plaintiffs did not establish that fact and speculates the oil could have been deposited by a "phantom."

Nationwide can't have it both ways.

Neither Mr. Morillo nor Nationwide came forth with evidence that Mr. Morillo's crash resulted from anything other than operator error.

(That's why Nationwide conceded the point.) There was no evidence the oil was caused by anything other than the impact caused by Mr. Morillo's motorcycle striking the Jersey barrier. The oil was in the same southbound lane he was driving in and in immediate proximity to where his motorcycle was found in the road before it was moved to the shoulder.

The oil spill was "bad" and "large."²⁰ There was no evidence that the "fluid" to which Nationwide refers (in fact, the term "oil" was used in the emergency dispatch calls²¹) preexisted or caused Mr. Morillo's accident.

Neither Mr. Morillo nor Nationwide sought a continuance pursuant to CR

²⁰ Appellant's Brief at 3.

²¹ Appellant's Brief at 3.

56(f) to introduce evidence suggesting any other cause of his crash or the presence of oil on the road.

In any event, Nationwide's argument is irrelevant in light of the nature of the Dunbars' claim against Nationwide. Assuming the large patch of oil was deposited by a negligent "phantom" the Dunbars would still be entitled to underinsured motorist's benefits from Nationwide.²²

Nationwide conceded Mr. Morillo's negligent driving caused the oil on the road. Its hypothetical alternative causes were not supported by any evidence below. The Dunbars' motion for partial summary judgment should have been granted because the facts established that Mr. Morillo's negligent driving deposited the oil on the road and the law established that he owed a duty of care and breached it.

III. CONCLUSION

The trial court erred by granting Nationwide's motion for summary judgment and denying the Dunbars'. The case should be remanded to the trial court on the issue of the Dunbars' damages. In the alternative, the Court should hold the issue of foreseeability giving rise to a duty of care presents questions of fact for the jury's determination.

²² RCW 48.22.030(8) (defining "phantom vehicle" for purposes of uninsured or underinsured motorist's coverage).

DATED this 2nd day of January, 2012.

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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 3rd day of January, 2012, I caused to be served via the following means a true and accurate copy of the foregoing *Reply Brief of Appellants* upon the following person(s):

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