

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 28, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ESTATE OF JONNY TORRES, by and
through his Personal Representative
Manuel Banda; JAMIE VALENCIA,
parent of Jonny Torres; MARIA M.
TORRES, parent of Jonny Torres,

Plaintiffs,

v.

KENNEWICK SCHOOL DISTRICT
NO. 17, a quasi-government agency
and agents thereof with knowledge and
responsibility; TAMARA VASQUEZ,
individually and in her capacity as
nurse at Highland Middle School;

Defendants.

No. 4:19-CV-05038-MKD

ORDER DENYING THE ESTATE’S
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
AFFIRMATIVE DEFENSES

ECF No. 382

Before the Court is Plaintiffs the Estate of Jonny Torres, Jamie Valencia and Maria Torres (collectively “the Estate’s”) Motion for Partial Summary Judgment on Affirmative Defenses. ECF No. 382. On May 18, 2023, the Court held a hearing on the motion. ECF No. 407. Marshall Casey and Marcus Sweetser

1 appeared on behalf of the Estate. Michael McFarland and Rachel Platin appeared
2 on behalf of Defendants KSD and Tamara Brun (“Nurse Brun”) (collectively the
3 “KSD Defendants”).¹

4 This case concerns the death of Jonny Torres (“Torres”), a KSD student who
5 visited Nurse Brun’s office and later that day suffered a severe medical emergency
6 resulting in his death. *See* ECF No. 117. The Estate brings state law negligence
7 claims against the KSD Defendants. ECF No. 117 at 20-21. The KSD
8 Defendants, with their Answer, assert a number of affirmative defenses. ECF No.
9 120 at 25-26.

10 On April 3, 2023, the Estate moved for partial summary judgment as to
11 certain affirmative defenses. ECF No. 382.

12 For the reasons stated herein, the Estate’s motion is denied.

13 **BACKGROUND**

14 The factual circumstances underlying this litigation, disputed and
15 undisputed, have been thoroughly briefed in prior motions and orders. The Court
16

17 ¹ Joel Comfort appeared at the hearing on behalf of Defendants City of Kennewick
18 (the “City”), David Day, Anthony Marsh, Mark Cook, and Christopher Johnson
19 (collectively the “paramedics”). ECF No. 407. Since the hearing, the City and the
20 paramedics were dismissed. ECF No. 421.

1 refers to its Orders at ECF Nos. 421, 543, for the factual basis underlying the
2 instant order.

3 **LEGAL STANDARD**

4 A district court must grant summary judgment “if the movant shows that
5 there is no genuine dispute as to any material fact and the movant is entitled to
6 judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*,
7 477 U.S. 317, 322-23 (1986); *Barnes v. Chase Home Fin., LLC*, 934 F.3d 901, 906
8 (9th Cir. 2019). “A fact is ‘material’ only if it might affect the outcome of the
9 case, and a dispute is ‘genuine’ only if a reasonable trier of fact could resolve the
10 issue in the non-movant’s favor.” *Fresno Motors, LLC v. Mercedes Benz USA,*
11 *LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (quoting *Anderson v. Liberty Lobby,*
12 *Inc.*, 477 U.S. 242, 248 (1986)). The court “must view the evidence in the light
13 most favorable to the nonmoving party and draw all reasonable inference in the
14 nonmoving party’s favor.” *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir.
15 2018).

16 The moving party bears the initial burden of informing the district court of
17 the basis for its motion and identifying the portions of the record and the evidence
18 that demonstrate the absence of a genuine dispute of material fact. *Celotex*, 477
19 U.S. at 323 (quoting former Fed. R. Civ. P. 56(c)). After the moving party has
20 satisfied its burden to survive summary judgment, the non-moving party must

1 demonstrate with evidence on the record “specific facts” showing that there is a
2 genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324. “The mere
3 existence of a scintilla of evidence in support of the plaintiff’s position will be
4 insufficient[.]” *Anderson*, 477 U.S. at 252. A party may move for summary
5 judgment on part of a claim or defense. Fed. R. Civ. P. 56(a).

6 The court “must view the evidence in the light most favorable to the
7 nonmoving party and draw all reasonable inference in the nonmoving party’s
8 favor.” *Rookaird*, 908 F.3d at 459. “Credibility determinations, the weighing of
9 the evidence, and the drawing of legitimate inferences from the facts are jury
10 functions, not those of a judge” *Anderson*, 477 U.S. at 255.

11 **DISCUSSION**

12 The Estate moves for summary judgment on the following affirmative
13 defenses:

14 E. The damages and injuries claimed by Plaintiffs were
15 caused by the actions and/or inactions of an at-fault non-
party – the City of Kennewick.

16 F. The actions and inactions of the City of Kennewick
17 were the sole proximate cause of the damages and injuries
18 claimed by Plaintiffs herein and/or an
19 intervening/superseding act.
20

1 ECF No. 382 at 2-3 (quoting ECF No. 120 at 25-26).² The Estate contends that
2 summary judgment is appropriate based on: (1) procedural deficiencies in the
3 affirmative defenses; (2) the lack of factual disputes requiring summary judgment
4 as to the affirmative defenses; and (3) the legal basis of the affirmative defenses.

5 **A. The KSD Defendants Did Not Waive the Affirmative Defenses as to**
6 **Fault of the City and the Paramedics**

7 The Estate argues that the KSD Defendants “waived the affirmative defense
8 of non-party fault, stating it would not assert any non-party was at fault.” ECF No.
9 382 at 4. To apportion fault to a non-party, a defendant must affirmatively plead
10 the theory as an affirmative defense and identify the non-party. *Afoa v. Port of*
11 *Seattle*, 421 P.3d 903, 913 (Wash. 2018) (citing Wash. Super. Ct. Civ. R. 12(i)).

12 On May 24, 2021, the Estate amended its complaint with leave of court,
13 naming the City and the paramedics as defendants. *See* ECF Nos. 115, 117. On
14 June 1, 2021, the KSD Defendants amended their answer with leave of court,
15 asserting that the City and the paramedics were at fault. *See* ECF No. 115; ECF

16 ² The Estate also moves to strike affirmative defense (D), which “reserves” the
17 KSD Defendants’ right to later amend their answer. ECF No. 382 at 2-3 (quoting
18 ECF No. 120 at 25-26). This defense is a formality. Time to amend pleadings has
19 expired, and any amendment must be made with leave of court. Fed. R. Civ. P.
20 15(a)(2). The motion as to this issue is denied as moot.

1 No. 120 at 25-26. The instant briefing was submitted in April and May 2023,
2 before the Court granted summary judgment on the Estate’s claims against the City
3 and the paramedics in June 2023. *See* ECF Nos. 382, 396, 421.

4 The Estate does not assert procedural deficiency with the affirmative
5 defenses as related to then-parties the City and the paramedics, but argues that
6 KSD has waived defenses based on the fault of any other non-parties. ECF No.
7 382 at 4-5. The KSD Defendants concede that there are no other non-parties at
8 issue, and that their reference to other non-parties was an “error.” ECF No. 390 at
9 3-4. Therefore, the Estate’s motion as to an affirmative defense asserting the fault
10 of non-parties other than the City and the paramedics is denied as moot.

11 For clarity, the City and the paramedics might now be considered non-
12 parties as all claims against them have been dismissed. *See* ECF No. 421. In any
13 event, the Estate has had notice that the KSD Defendants assert the fault of the
14 City and the paramedics since, at the latest, the KSD Defendants’ Motion for
15 Leave to Amend Answer, filed February 11, 2021. ECF No. 90. Notice is
16 sufficient and the defense has not been waived. *See* Fed. R. Civ. P. 8(c); *Rosen v.*
17 *Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 797-98 (C.D. Cal. 2016)
18 (citations omitted).

1 **B. Causation Remains in Dispute**

2 The Estate argues that the KSD Defendants cannot prove that the paramedics
3 were (1) the sole proximate cause of, (2) a superseding cause of, or (3) otherwise at
4 fault for Torres’s death. ECF No. 382 at 5-9. The Estate fails to offer undisputed
5 facts precluding the KSD Defendants from offering these causation-related
6 defenses at trial.

7 *1. The Proximate Causes of the Estate’s Injuries are Disputed*

8 The Estate assumes as undisputed that the KSD Defendants’ negligence
9 caused Torres’s parents to call 911, therefore any injury arising out of the
10 paramedics’ treatment is causally traceable to the KSD Defendants. ECF No. 382
11 at 6-7.

12 It is a plaintiff’s burden to prove that the defendant’s breach of a duty was
13 the proximate cause of its injury. *Lowman v. Wilbur*, 309 P.3d 387, 389 (Wash.
14 2013) (citation omitted). Proximate causation has two elements: cause in fact and
15 legal causation. *Id.* (citation omitted). “Cause in fact refers to the ‘but for’
16 consequences of an act—the physical connection between an act and an injury.”
17 *Meyers v. Ferndale Sch. Dist.*, 481 P.3d 1084, 1089 (Wash. 2021) (citation
18 omitted).

19 “A defendant may argue another entity was the sole proximate cause of an
20 injury[.]” *Afoa*, 421 P.3d at 910. A plaintiff’s burden is not alleviated when the

1 defendant argues, as a defense, that a third party’s negligence was the “sole
2 proximate cause” of the plaintiff’s injury. *See Knight v. Borgan*, 324 P.2d 797,
3 804-05 (Wash. 1958) (noting that the defendant’s affirmative defense that a third
4 party’s negligence was the “sole proximate cause” of an injury “did not relieve [the
5 plaintiff] of the burden of proving that [the defendant’s] negligence . . . was a
6 proximate cause”) (emphasis in original).

7 The Estate argues that “KSD caused an asthmatic event that the paramedics
8 were trying to mitigate[.]” ECF No. 396 at 3. The Estate does not cite to the
9 record in support of this argument. Fed. R. Civ. P. 56(c) requires that “[a] party
10 asserting that a fact cannot be or is genuinely disputed must support the assertion”
11 by citing to materials in the record. *See also* LCivR 56(c)(1). Even if the Estate’s
12 failure to do so is excused, the Estate’s statement of facts offers no facts, disputed
13 or not, indicating that the KSD Defendants’ conduct necessitated a 911 call after
14 Torres left school. ECF No. 383. The KSD Defendants offer facts related to
15 causation, which the Estate disputes. ECF Nos. 391, 397. For example, the KSD
16 Defendants offer the opinions of several experts, “all of whom opine that
17 [Torres’s] exercise in PE did not cause his bronchospasm four hours later that
18 day.” ECF No. 390 at 16-17 (citing ECF No. 391 at 20 ¶ 88, 22 ¶ 93, 23 ¶ 96, 24-
19 25 ¶ 101). The Estate responds to each of these sections with objections and
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1 contentions that these facts are disputed. ECF No. 397 at 14 ¶ 88, 15-16 ¶ 93, 17-
2 18 ¶ 96, 20 ¶ 101.

3 It is genuinely disputed whether the paramedics were the sole proximate
4 cause of Torres’s death, or if they were a cause in tandem with the KSD
5 Defendants’ alleged breach. Summary judgment is denied.

6 *2. Whether the Paramedics Were a Superseding Cause is Disputed*

7 The Estate argues that there is no dispute that the paramedics’ response was
8 not a superseding cause of the Estate’s injuries. ECF No. 382 at 7-9.

9 A “superseding cause” is an intervening act that that “produces the injury
10 complained of” and is “not reasonably foreseeable” by the defendant. *Crowe v.*
11 *Gaston*, 951 P.2d 1118, 1122 (Wash. 1998). “Whether a third party’s intervening
12 act rises to the level of a superseding cause is generally a question of fact for the
13 jury, but it may be determined as a matter of law if reasonable minds could not
14 differ as to the foreseeability of the act.” *Roemmich v. 3M Co.*, 509 P.3d 306, 316
15 (Wash. Ct. App. 2022) (citing *State v. Frahm*, 444 P.3d 595, 601 (Wash. 2019)),
16 *review denied*, 519 P.3d 591 (Wash. 2022).

17 The Estate argues that, as a matter of law, “[m]edical aid as the result of an
18 injury is foreseeable.” ECF No. 382 at 9 (quoting *Lindquist v. Dengel*, 595 P.2d
19 934, 936-37 (Wash. 1979)). The *Lindquist* rule and its legal implications for the
20 KSD Defendants’ affirmative defenses are discussed below. *See discussion infra*

1 Section C. It is true that the factual foreseeability inquiry is shaped by legal
2 principles. *See, e.g., Pacheco v. United States*, 515 P.3d 510, 521 (Wash. 2022)
3 (foreseeability “can be a question of whether duty exists as a matter of law”);
4 *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 669 (Wash. 2015) (“[an act may
5 be] unforeseeable as a matter of law under the prior similar incidents test”);
6 *Schooley v. Pinch’s Deli Market, Inc.*, 951 P.2d 749, 755-56 (Wash. 1998) (“the
7 doctrine of superseding cause” limits foreseeability); *Meyers*, 481 P.3d at 1091
8 (same); *Campbell v. ITE Imperial Corp.*, 733 P.2d 969, 973 (Wash. 1987) (same);
9 *Albertson v. State*, 361 P.3d 808, 815 (Wash. Ct. App. 2015) (same).

10 For the instant factual analysis, the Estate’s burden at summary judgment is
11 to demonstrate the lack of disputed facts precluding judgment in its favor. *See*
12 *Barnes*, 934 F.3d at 906. Setting aside the parties’ legal disputes, the foreseeability
13 of the paramedics’ response is genuinely in dispute. KSD presents evidence
14 indicating that the paramedics deviated from the established protocols, did not
15 confirm with the medical program director when doing so, and improperly gave
16 Torres intravenous epinephrine. ECF No. 390 at 20-21 (citing ECF No. 391 at 13-
17 16 ¶¶ 63, 65-74). The Estate disputes some of these facts, ECF No. 397 at 11-12
18 ¶¶ 63, 65-74, although the Estate raised similar facts in opposition to the KSD
19 Defendants’ summary judgment motion, ECF No. 388 at 9-10 ¶¶ 30-39. In light of
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1 these factual disputes, summary judgment is denied as to the KSD Defendants'
2 superseding cause affirmative defense.

3 *3. Whether the Paramedics Were At Fault is Disputed*

4 In addition to arguing that the paramedics could not be the “sole proximate
5 cause” of the Estate’s injuries, the Estate argues it is undisputed the paramedics
6 were no cause at all. ECF No. 382 at 5-7.

7 If a party proves the fault of a non-party, the jury is to allocate the fault
8 “attributable to each party and relevant non-party.” *Afoa*, 421 P.3d at 908-09
9 (citing RCW 4.22.015, RCW 4.22.070). Parties are only responsible for damages
10 in proportion to the jury’s allocation to their fault. *Id.* at 909.

11 The only evidence the Estate offers in support is expert testimony that the
12 paramedics’ response “reduced [Torres’s] chances of survival but did not cause his
13 death.” ECF No. 382 at 7 (citing ECF Nos. 376-3, 376-4). Again, causation is
14 heavily disputed, and the Court declines to supplant its own review of the evidence
15 for that of the many experts involved in this litigation. *See Strauss v. Premera*
16 *Blue Cross*, 449 P.3d 640, 642 (Wash. 2019) (“Generally speaking, expert opinion
17 on an ultimate question of fact is sufficient to establish a triable issue and defeat
18 summary judgment.”) (citation omitted); *see also* ECF No. 549 at 15-16.

1 **C. *Lindquist* Does Not Preclude the KSD Defendants’ Superseding Cause**
2 **and RCW 4.22.070 Affirmative Defenses as a Matter of Law**

3 The Estate challenges the legal basis of the affirmative defenses, regardless
4 of the disputed facts. ECF No. 382 at 5-9; ECF No. 396. The Estate argues that
5 the paramedics cannot be the superseding cause of, or a party at fault for, the
6 Estate’s injuries as a matter of law. ECF No. 396. It is undisputed that Torres
7 attended school on September 7, 2017, ran in physical education, went home after
8 school, had a medical emergency, was treated by the paramedics, and died 18 days
9 later. *See* ECF No. 421 at 3-4; ECF No. 543 at 4-8. The parties’ instant disputes
10 of law may be resolved on these undisputed facts.

11 At issue is the applicability of *Lindquist v. Dengel*, 595 P.2d 934 (Wash.
12 1979), and whether it conflicts with the doctrine of superseding cause and
13 apportionment of fault under RCW 4.22.070.

14 *1. Lindquist Provides a Rule of Foreseeability and Legal Causation*

15 In *Lindquist*, the Washington Supreme Court applied the “original tortfeasor
16 rule” articulated in the Restatement (Second) of Torts § 457. 595 P.2d at 936-37.

17 The rule is:

18 If the negligent actor is liable for another’s bodily injury,
19 he is also subject to liability for any additional bodily harm
20 resulting from normal efforts of third persons in rendering
 aid which the other’s injury reasonably requires,
 irrespective of whether such acts are done in a proper or a
 negligent manner.

1 *Id.* at 936-37. It is a “rule of liability for harm which is foreseeable and within the
2 scope of the risk[.]” *Id.* at 937 (citation omitted). “The rationale of the rule, as
3 applied to medical treatment, is that negligent or harmful medical treatment is
4 within the scope of the risk created by the original negligent conduct.” *Id.* at 936
5 (citation omitted).

6 Proximate cause includes the element of “legal causation,” which is
7 “grounded in policy determinations as to how far the consequences of a
8 defendant’s acts should extend.” *Meyers*, 481 P.3d at 1089 (citing *Schooley*, 951
9 P.2d at 754). “Legal causation” answers the question of “whether liability should
10 attach as a matter of law given the existence of cause in fact.” *M.N. v. MultiCare*
11 *Health Sys., Inc.*, 541 P.3d 346, 352-53 (Wash. 2024) (quotation marks and
12 citations omitted). “Courts evaluate whether ‘the connection between the ultimate
13 result and the act of the defendant is too remote or insubstantial to impose
14 liability’” and “weigh ‘mixed considerations of logic, common sense, justice,
15 policy, and precedent.’” *Id.* (quoting *Schooley*, 951 P.2d at 754). Policy
16 considerations may “compel the recognition of legal causation, so long as cause-in-
17 fact is established under the relevant facts.” *Lowman*, 309 P.3d at 391 (citation
18 omitted).

1 Foreseeability is “relevant to both duty³ and causation.” *Pacheco*, 515
2 P.3d at 521. There are many rules that shape legal causation. *See, e.g., Schooley*,
3 951 P.2d at 756 (explaining “superseding cause”); *Campbell*, 733 P.2d at 972
4 (“even if the intervening act of the third person constitutes negligence, that
5 negligence does not constitute a superseding cause if ‘the actor at the time of his
6 negligent conduct should have realized that a third person might so act.’” (quoting
7 Restatement (Second) of Torts § 447 (Am. L. Inst. 1965)) & 974 (“criminal
8 conduct of a third party does not constitute a superseding cause ‘[i]f the likelihood
9 that a third person may act in a particular manner is . . . one of the hazards which
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12 ³ The *Lindquist* rule might also be considered relevant to the duty element of a
13 negligence claim. *See Schooley*, 951 P.2d at 753 (“When a duty is found to exist
14 from the defendant to the plaintiff then concepts of foreseeability serve to define
15 the scope of the duty owed.”) (citation omitted). The foreseeability inquiries of
16 duty and causation are related. *Meyers*, 481 P.3d at 1091 (“[P]olicy considerations
17 relevant to *duty*, including foreseeability, are the starting points of the legal cause
18 analysis.”) (emphasis in original). Whether considered under duty or legal cause,
19 the *Lindquist* rule’s implications for the KSD Defendants’ affirmative defenses are
20 the same.

1 makes the actor negligent.” (quoting Restatement (Second) of Torts § 449 (Am. L.
2 Inst. 1965))).

3 The *Lindquist* rule is a rule of legal causation, as the *Lindquist* court itself
4 concluded. See 595 P.2d at 938 (granting new trial because “the jury was not
5 properly instructed on a crucial aspect of causation”). The rule comes from
6 Section 457 of the Restatement (Second) of Torts, which appears in the
7 Restatement’s chapter on causation, Chapter 16. As a rule of legal causation, the
8 *Lindquist* rule establishes when “liability *should* attach as a matter of law[.]”
9 *Christen v. Lee*, 780 P.2d 1307, 1321 (Wash. 1989) (emphasis in original)
10 (citations omitted).

11 2. *Lindquist and the Superseding Cause Affirmative Defense*

12 The Estate argues that “[t]here is no plausible theory in which a superseding-
13 intervening affirmative defense theory applies under Washington law.” ECF
14 No. 382 at 9.

15 A superseding cause is an intervening cause that (1) “created a different type
16 of harm than would otherwise have resulted,” (2) “was extraordinary or resulted in
17 extraordinary consequences,” and (3) “operated independently of any situation
18 created by the [tortfeasor’s] negligence.” *Roemmich*, 509 P.3d at 315 (citation,
19 quotation marks, and emphases omitted). Not every intervening act may be
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1 considered a superseding cause, and the inquiry is shaped by doctrines of legal
2 causation. *See Campbell*, 733 P.2d at 972-74.

3 For the purposes of this case, the *Lindquist* rule explains “that negligent
4 medical treatment is a normal intervening cause, an incident within the scope of
5 the risks created by the original negligent conduct.” *See Erdman v. Lower Yakima*
6 *Valley, Wash. Lodge No. 2112 of B.P.O.E.*, 704 P.2d 150, 159 (Wash. Ct. App.
7 1985) (citing *Lindquist*, 595 P.2d at 936-37; Restatement (Second) of Torts § 457
8 & cmt. b (Am. L. Inst. 1965)). More specifically, after a tortfeasor injures
9 someone, “additional bodily harm resulting from normal efforts of third persons in
10 rendering aid which the other’s injury reasonably requires” is a foreseeable
11 consequence as a matter of law. *Lindquist*, 595 P.2d at 936-37. But each of those
12 elements—whether the efforts were “normal,” made to “render aid,” and were
13 “reasonably required”—are questions of fact for a jury to answer. *See id.* at 938
14 (remanding for new trial with proper jury instruction); *see also Henderson v.*
15 *Tyrrell*, 910 P.2d 522, 542 (Wash. Ct. App. 1996) (approving of a jury instruction
16 based on *Lindquist*). These elements comprise the foreseeability test for injury
17 resulting from the treatment of injury caused by the original tortfeasor’s
18 negligence. The Estate has not shown that these elements are undisputed, and
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1 would rather the Court hold as a matter of law that the KSD Defendants are liable
2 for any subsequent injury simply due to the timeline of events.⁴

3 As explained above, it is disputed whether the paramedics' response was a
4 proximate cause of the Estate's injuries at all. Further, there are genuine disputes
5 of fact as to whether the paramedics' response was foreseeable under the relevant
6 standard for subsequent medical negligence. Summary judgment is denied as to
7 the KSD Defendants' superseding cause affirmative defense.

8 3. *Lindquist and the RCW 4.22.070 Affirmative Defense*

9 The Estate argues that the paramedics cannot be an "at fault" party for the
10 purposes of RCW 4.22.070(1), and that no liability may be apportioned away from
11 the KSD Defendants as a matter of law. *See generally* ECF No. 396.

12 RCW 4.22.070(1) provides in relevant part that in "actions involving fault of
13 more than one entity," the fact finder "shall determine the percentage of the total
14 fault which is attributable to every entity which caused the claimant's damages[.]"

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16 ⁴ The Court found in a prior order no genuine dispute that the paramedics had
17 exercised "slight care" when treating Torres and therefore did not commit gross
18 negligence. ECF No. 421 at 30-31. The Court does not equate the "slight care"
19 used in the test for gross negligence to the "normal efforts" under *Lindquist* as a
20 matter of law.

1 These “entities” may include claimants, non-parties, third parties, and certain
2 entities immune from liability to the claimant. RCW 4.22.070(1). Then,
3 “[j]udgment shall be entered against each defendant . . . in an amount which
4 represents that party’s proportionate share of the claimant’s total damages.” *Id.*

5 The Estate argues that RCW 4.22.070 contradicts the *Lindquist* rule. ECF
6 No. 382 at 4-6. The issue is: (1) if the *Lindquist* rule holds the original tortfeasor
7 liable for injuries caused by third persons rendering aid to the injured party; and
8 (2) RCW 4.22.070(1) holds multiple tortfeasors liable for only damages
9 corresponding to their proportionate share of fault, what should a court do when
10 *Lindquist*’s “third person rendering aid” is also one of RCW 4.22.070(1)’s
11 “multiple tortfeasors?”

12 Before RCW 4.22.070, Washington courts imposed joint and several
13 liability on concurrent and successive tortfeasors. *Washburn v. Beatt Equip. Co.*,
14 840 P.2d 860, 885 (Wash. 1992). In 1986, the Washington legislature changed this
15 rule in favor of proportional liability, codified at RCW 4.22.070. *Id.* at 885-86.
16 Part of the argument for doing so was that “responsibility for harm done should be
17 distributed in proportion to the fault of all of the parties involved and not governed
18 by concepts of causation.” *Id.* (quoting Peck, *Washington’s Partial Rejection and*
19 *Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L.

1 Rev. 233, 235-36 (1987)). The Washington Supreme Court explained the purpose
2 of RCW 4.22.070 as follows:

3 The statute evidences legislative intent that fault be
4 apportioned and that generally an entity be required to pay
5 that entity's proportionate share of damages only. The
6 statute also evidences legislative intent that certain
7 entities' share of fault not be at all recoverable by a
8 plaintiff; for example, the proportionate shares of immune
9 parties.

7 *Id.* at 886. The change was a significant departure from the prior rule. *See id.* at
8 886 n.7 (noting that RCW 4.22.070 amounted to "an exception that has all but
9 swallowed the general rule" of joint and several liability).

10 "Principles of common law survive RCW 4.22.070[.]" *Afoa*, 421 P.3d at
11 910. Washington's lower courts have observed that RCW 4.22.070(1) did not
12 "abrogate[] the common law *Lindquist* rule." *Henderson*, 910 P.2d at 542 n.17;
13 *see also Crane v. Swedish Health Servs.*, No. 17-2-27430-5, 2019 Wash. Super.
14 LEXIS 12299, at *3 (Wash. Super. Ct. Nov. 12, 2019) ("*Lindquist* and RCW
15 4.22.070 can coexist; foreseeability is the touchstone.").

16 As the Washington courts instruct, the Court must apply both the *Lindquist*
17 rule and RCW 4.22.070. The *Lindquist* rule provides that a negligent actor is
18 "subject to liability for any additional bodily harm" caused by subsequent medical
19 negligence. 595 P.2d at 936-37. But it does not require that the original tortfeasor
20 be the only one subject to liability for that harm.

1 Appportionment of fault is a separate analysis from the determination of
2 which actors were the cause of an injury. For a negligence plaintiff to succeed at
3 trial, the fact finder must find that the plaintiff suffered an “injury.” *Lowman*, 309
4 P.3d at 389 (citation omitted). The fact finder must also find that the defendant’s
5 breach of duty was the “proximate cause of the injury.” *Id.* The fact finder must
6 then determine an amount of “damages,” which “are the monetary value of the
7 injury or damage proximately caused by the breach of alleged duty.” *Huff v.*
8 *Roach*, 106 P.3d 268, 270 (Wash. Ct. App. 2005). “Although ‘injury’ and
9 ‘damages’ are often used interchangeably, an important difference exists in
10 meaning.” *Id.* (citation omitted). Pursuant to RCW 4.22.070(1), “each tortfeasor
11 is liable only for damages corresponding to its proportionate share of fault as
12 determined by the trier of fact.” *Barton v. Dep’t of Transp.*, 308 P.3d 597, 602
13 (Wash. 2013).

14 Principles of legal causation are used to determine which entities are “at
15 fault” under RCW 4.22.070(1). *See* RCW 4.22.015 (“Legal requirements of causal
16 relation apply both to fault as the basis for liability and to contributory fault.”).
17 The statute does not create new rules of causation or change existing rules. When
18 comparing fault, the jury shall consider “both the nature of the conduct . . . and the
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1 extent of the causal relation between such conduct and the damages.”⁵ RCW
2 4.22.015. Legal principles of causation do not control RCW 4.22.070(1)’s
3 instruction to limit the amount of damages that may be awarded against a
4 defendant. The *Lindquist* rule provides which actors may be subject to liability for
5 an injury, but RCW 4.22.070(1) requires that any damages be apportioned.

6 The Washington legislature provided clear exceptions to several liability,
7 and no exception is applicable to the instant case. For example, vicarious liability
8 is retained, imposing joint and several liability where concurrent tortfeasors “were
9 acting in concert or when a person was acting as an agent or servant of the party.”

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11 ⁵ RCW 4.22.015 applies to comparison of fault “under RCW 4.22.005 through
12 4.22.060[.]” As the Washington Court of Appeals observed, “RCW 4.22.015 was
13 not amended by the 1986 tort reform act to include RCW 4.22.070 in the list of
14 sections to which RCW 4.22.015 applies.” *Gerrard v. Craig*, 836 P.2d 837, 843
15 n.9 (Wash. Ct. App. 1992), *rev’d on other grounds*, 857 P.2d 1033 (Wash. 1993).
16 That court concluded that the failure to amend RCW 4.22.015 was an “omission
17 . . . by oversight rather than design,” and that RCW 4.22.015 provides the relevant
18 test for comparison of fault under RCW 4.22.070(1). *Id.* The instant reliance on
19 RCW 4.22.015 is offered as evidence of the definition of “fault” under the statute,
20 and is not adoption or rejection of the *Gerrard* court’s observation.

1 *Johnson v. Recreational Equip., Inc.*, 247 P.3d 18, 24 (Wash. Ct. App. 2011)
2 (quoting RCW 4.22.070(1)(a)). Common law principles of agency are retained,
3 and if a jury finds a principal-agent relationship, the principal may not allocate
4 fault to its agent. *Afoa*, 421 P.3d at 911-13. Other statutes provide exceptions,
5 such as in products liability cases. *See Johnson*, 247 P.3d at 25-26.

6 State courts of last resort in other jurisdictions have confronted this issue and
7 appear to largely agree that the original tortfeasor rule does not supersede several
8 liability. The Arizona Supreme Court explained that it had “not expressly
9 adopted[] Second Restatement § 457,” but its lower courts had “referred to and
10 arguably relied on” the rule, and it generally follows “sound and sensible” rules
11 from the Restatements “if there is no statute or case law on a particular subject[.]”
12 *Cramer v. Starr*, 375 P.3d 69, 74-75 (Ariz. 2016). Arizona adopted statutory
13 several liability, with a law similar to RCW 4.22.070. *See id.* at 75 (discussing
14 A.R.S. § 12-2506).

15 The court explained that “[the original tortfeasor rule] is a doctrine of
16 causation and does not preclude applying [Arizona’s several liability statute].” *Id.*
17 The court cited the Third Restatement’s iteration of Section 457, which provides
18 that “[m]odern adoption of pure several liability limits the liability of each
19 defendant liable for the same harm to that defendant’s comparative share of the
20 harm.” *Id.* at 75-76 (quoting Restatement (Third) of Torts § 35, cmt. d (2009)).

1 The court found, upon a factual showing that the original tortfeasor rule's
2 conditions are met, "[the defendant] will have proximately caused the enhanced
3 harm, and her liability for such harm will be determined, consistent with [several
4 liability], by the jury's assessment of comparative fault." *Id.* at 76.

5 Facing a similar argument, the Tennessee Supreme Court concluded that
6 several liability "altered the common-law rules for determining the apportionment
7 of the liability among multiple tortfeasors, [but] did not alter the common-law rules
8 for determining when tortfeasors are liable for the harm they cause." *Banks v. Elks*
9 *Club Pride of Tenn.* 1102, 301 S.W.3d 214, 221 (Tenn. 2010). The court explained
10 that the original tortfeasor is a proximate cause of injury resulting from subsequent
11 medical negligence, but "is not the sole proximate cause of the plaintiff's
12 indivisible injury." *Id.* at 224. The court explained that "the doctrine of joint and
13 several liability does not apply in cases where the injuries caused by the negligence
14 of the original tortfeasor are enhanced by the subsequent negligence of physicians
15 and other healthcare providers." *Id.* at 226-27. Instead, a defendant may assert the
16 comparative fault of a nonparty's subsequent medical negligence as an affirmative
17 defense to apportion liability. *Id.* at 221, 226-28.

18 Finally, and succinctly, the Idaho Supreme Court explained that

19 because Idaho has adopted comparative fault, the
20 Restatement (Second) of Torts § 457 operates as a general
foreseeability rule for any subsequent medical negligence
and does not impute liability arising from all subsequent

1 negligent acts onto the original negligent actor. Any
2 liability that is the result of subsequent medical negligence
3 may be reduced by the percentage of fault attributable to
4 each party. This does not affect foreseeability, but rather
5 assigns the jury the task of distributing fault among all
6 liable actors pursuant to [Idaho’s comparative fault
7 statute].

8 *Cramer v. Slater*, 204 P.3d 508, 514 (Idaho 2009). The Estate has not presented,
9 and the Court is unaware of, any contrary case law.

10 In short, the Estate incorrectly reads the *Lindquist* rule to impose joint and
11 several liability on the original tortfeasor where there is subsequent medical
12 negligence. The *Lindquist* rule does not do so. It merely states that the original
13 tortfeasor is a proximate cause of subsequent medical negligence—not necessarily
14 the only one.

15 RCW 4.22.070 “had the effect of generally abolishing joint and several
16 liability for concurrent negligence.” *Afoa*, 421 P.3d at 909 (citation and quotation
17 marks omitted). The Washington Supreme Court called this command “clear and
18 unambiguous.” *Id.* (citation omitted). To construe the *Lindquist* rule in a manner
19 precluding apportionment would defy the Washington legislature’s intent and the
20 Washington Supreme Court’s interpretation of Washington law. Where there are
successive tortfeasors, even if one acted while treating an injury caused by the
other, “the trier of fact still must determine and apportion the responsibility based
upon the varying degrees of culpability and causation among the actors.” *Tegman*

1 *v. Accident & Med. Investigations, Inc.*, 75 P.3d 497, 503 (Wash. 2003) (quoting
2 Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability:
3 Resisting the Deconstruction of Tort Reform*, 16 U. Puget Sound L. Rev. 1, 41
4 (1992)).

5 The Estate has failed to show undisputed facts warranting judgment as a
6 matter of law as to the KSD Defendants' affirmative defense that the paramedics
7 are at fault for the Estate's injuries.

8 **CONCLUSION**

9 For the reasons stated above, the Estate's Motion for Partial Summary
10 Judgment on Affirmative Defenses is denied.

11 Accordingly, **IT IS HEREBY ORDERED:**

12 1. The Estate's Motion for Partial Summary Judgment on Affirmative
13 Defenses, **ECF No. 382**, is **DENIED**.

14 **IT IS SO ORDERED.** The District Court Executive is directed to file this
15 Order and provide copies to the parties.

16 DATED March 28, 2024.

17 *s/Mary K. Dimke*
18 MARY K. DIMKE
19 UNITED STATES DISTRICT JUDGE
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