SUMMARY
October 28, 2021

2021COA129

No. 17CA1381, *Garcia v. Colo. Cab Co.* — Torts — Negligence — Rescue Doctrine

A division of the court of appeals addresses the scope of liability to a rescuer — a person who comes to the aid of another person as to whom an actor breached a duty. The division holds that the negligent actor is liable to the rescuer only for the harm resulting from a risk that is reasonably to be expected from the rescue attempt.

In this case, a passenger in a cab assaulted a cab driver inside and outside the cab and then assaulted a rescuer who came to the driver's aid. The passenger then drove off, but returned to the scene and tried to run down the driver and the rescuer. The passenger ran the cab into the rescuer, causing serious injury. Applying section 32 of the Restatement (Third) of Torts: Liability for

Physical & Emotional Harm, the division concludes that while the cab company can be liable to the rescuer for the passenger's assault of the rescuer when the rescuer approached the cab to intervene in the passenger's assault on the driver, it cannot be liable for the passenger's subsequent use of the cab as a weapon to run down the driver after the passenger had driven away and returned. That injury was not caused by a risk — use of the cab as a weapon after stealing the cab — that was inherent in the rescue attempt. Accordingly, the division remands the case for a new trial on damages.

COLORADO COURT OF APPEALS **2021COA129**

Court of Appeals No. 17CA1381
City and County of Denver District Court No. 16CV30746
Honorable A. Bruce Jones, Judge

Jose Garcia,

Plaintiff-Appellee,

v.

Colorado Cab Company LLC, a Colorado limited liability company, d/b/a Denver Yellow Cab,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE J. JONES
Navarro, J., concurs
Martinez*, J., concurs in part and dissents in part

Prior Opinion Announced on January 10, 2019, Reversed in 19SC116

Announced October 28, 2021

Foster Graham Milstein & Calisher, LLP, Daniel S. Foster, Laura M. Martinez, Chip G. Schoneberger, Denver, Colorado, for Plaintiff-Appellee

White and Steele, PC, John M. Lebsack, Keith R. Olivera, E. Catlynne Shadakofsky, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 Jose Garcia sued Colorado Cab Company LLC for negligence and unjust enrichment when Curt Glinton, who had been a passenger in one of Colorado Cab's taxis, assaulted him, first by hitting him while they were standing outside the cab and then by running him over with the cab, which Glinton had stolen.

¶ 2 Colorado Cab first challenged whether it owed a duty to Garcia. The district court ruled that it did on three bases: (1) Colorado Cab committed an act of misfeasance (the driver's calling out for help) that increased the risk of harm to Garcia; (2) there was a common carrier/passenger relationship between them; and (3) Garcia was a "rescuer," which meant that the duty Colorado Cab owed to its driver (Ali Yusuf) to protect him from assaults by passengers extended to Garcia.

¶ 3 Garcia argued to the jury that Colorado Cab breached the duty of care by failing to install partitions separating the front and back seats and interior cameras in its cabs. After Colorado Cab unsuccessfully moved for a directed verdict on the issues of duty and causation, the jury found that Colorado Cab breached its duty of care and awarded Garcia $1,605,000 in damages. (The jury allocated 45% of the fault to Colorado Cab and 55% to Glinton.)

¶ 4 Later, the court held a hearing on Garcia's unjust enrichment claim and dismissed it. (The court said it "finds against [Garcia] on his unjust enrichment claim.")

¶ 5 Colorado Cab filed post-verdict motions for judgment notwithstanding the verdict and to reduce the verdict by the amount Medicaid had paid toward Garcia's medical bills. The district court denied both motions.

¶ 6 Colorado Cab appealed. Garcia cross-appealed the district court's judgment on his unjust enrichment claim.

¶ 7 Colorado Cab raised issues of duty, causation, and setoff. A division of this court addressed only the issue of duty, holding that, as a matter of law, Colorado Cab didn't owe a duty of care to Garcia under any of the three theories advanced by the district court. The division therefore reversed the judgment and remanded the case for entry of judgment for Colorado Cab. *Garcia v. Colo. Cab Co.*, 2019 COA 3 (*Garcia I*).[1]

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[1] The division also ruled that because Garcia hadn't made any argument concerning his unjust enrichment claim in his answer brief — other than asking the division to tell the district court to decide that claim in the event it reversed on the negligence claim — he had essentially abandoned his cross-appeal because the district

¶ 8 Garcia sought certiorari review by the supreme court. The supreme court granted certiorari review only on the issue whether the division had misapplied the rescue doctrine. The supreme court held that Garcia was indeed a rescuer within the meaning of the rescue doctrine, and therefore Colorado Cab's duty to Yusuf extended to him. *Garcia v. Colo. Cab Co.*, 2020 CO 55. The court reversed and remanded the case to us with directions to address Colorado Cab's remaining contentions. *Id.* at ¶ 34.

¶ 9 We ordered the parties to submit supplemental briefs addressing (1) whether Colorado Cab had argued in its opening brief filed in this court that it didn't owe a duty to Yusuf, the driver, and (2) how the supreme court's recent decision in *Rocky Mountain Planned Parenthood v. Wagner*, 2020 CO 51, affects the analysis of whether Colorado Cab's breach of the duty of care was the proximate cause of Garcia's injuries.

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court had decided that claim. *Garcia v. Colo. Cab Co.*, 2019 COA 3, ¶ 8 n.3.

¶ 10 Having considered the parties' supplemental briefs and their original briefs, we conclude that we must answer the following remaining questions:

1. Did the district court err by allowing the jury to consider whether Colorado Cab breached its duty of care to Yusuf by failing to install partitions and interior cameras in its cabs?
2. Did the district court err by allowing the jury to determine whether Colorado Cab's breach of its duty to Yusuf was the cause of Garcia's injuries?
3. Did the district court err by denying Colorado Cab's motion for a setoff of Garcia's Medicaid payments against the damages awarded by the jury?[2]

¶ 11 We answer these questions as follows:

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[2] We necessarily determine, then, that the issues we previously resolved in *Garcia I*, and which the supreme court didn't take up, are no longer before us. These include whether Colorado Cab owed a duty to Garcia directly under the other theories adopted by the district court and whether the district court erred by rejecting Garcia's unjust enrichment claim.

1. The district court didn't err by allowing the jury to decide whether Colorado Cab breached its duty of care to Yusuf by failing to install partitions and interior cameras in its cabs.

2. The jury reasonably could have found that Colorado Cab's breach of its duty of care caused the injuries Garcia suffered when Glinton assaulted him when they fought after Glinton got out of the cab. But, as a matter of law, Colorado Cab's breach of its duty of care wasn't the cause of the injuries Glinton caused Garcia after Glinton stole the cab, drove up the road, returned to the scene, and deliberately ran over Garcia.

3. The district court didn't err by declining to set off the amount Medicaid paid toward his medical bills against Garcia's damages.

¶ 12 The net result of our conclusions is that we affirm the verdicts on liability and damages in part and reverse them in part. Because we can't apportion damages between the two assaults based on the record before us, we remand for a new trial as to (1) the amount of damages Garcia incurred as a result of the initial assault and (2)

the percentage of liability for those damages attributable to Colorado Cab and Glinton, respectively.

I. Background

¶ 13 Late one night, Yusuf picked up Glinton and Glinton's friend in Denver. The passengers, both of whom were apparently intoxicated, didn't (and perhaps couldn't) tell Yusuf where they wanted to go, but instead made it up as they went along, telling Yusuf where and when to turn. When they got to 44th Avenue and Tejon Street, Glinton told Yusuf to stop. Yusuf did so, but when he told the passengers the fare was $6.50, Glinton yelled and cursed at Yusuf, who explained the fare and told Glinton to pay. Glinton then grabbed and punched Yusuf from behind. (There wasn't a partition between the front and back seats. There was a panic button, but Yusuf wasn't able to press it.)

¶ 14 A short time earlier, Garcia, sitting in his brother's house near the intersection of 39th Avenue and Tejon Street, called for a cab. Sometime later, sitting inside the home, looking out the window, he thought he saw a taxi drive by. (It was dark, so he wasn't sure what company the taxi was from.) Thinking it might be the taxi he

had called for, he followed it for about "two, three blocks."[3] As it turned out, it was Yusuf's cab. When Garcia got closer, he saw the stopped taxi and could hear Glinton and Yusuf arguing. When he got to the taxi, he saw through the driver's side door Glinton punching Yusuf inside the cab. Garcia repeatedly told Glinton to pay the fare and leave Yusuf alone, saying "stop, stop, stop what you're doing. This is my neighborhood." Glinton told Garcia to "mind [his] own fucking business." Yusuf got out of the cab, followed by Glinton, who then continued to assault Yusuf. Garcia again told Glinton and Yusuf to stop fighting. Glinton then apparently attacked Garcia. They scuffled and someone hit Garcia on the head from behind with an object.[4] Garcia may have fallen to the ground.[5]

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[3] Given the address from which Garcia saw the taxi go by, he must have walked almost five blocks.

[4] Garcia testified initially that he thought the other passenger hit him on the head, but later testified that he believed Yusuf may have accidentally hit him on the head. Yusuf testified that he grabbed a metal bar he kept under his seat and, when Garcia and Glinton were fighting, he hit Glinton on the shoulder with it. Video from a surveillance camera near the scene shows Yusuf still holding the metal bar after the incident.

[5] Garcia testified that he fell, but Yusuf testified that Garcia stayed on his feet. Garcia admitted that his recollection of events after he

¶ 15 Glinton then got in the driver's seat of the taxi and sped off, hitting Garcia's knee as he left. Before Glinton had gone very far, however, he abruptly turned around and drove back toward Garcia and Yusuf. Yusuf was standing in a parking lot entryway while Garcia went across the street. Glinton flew past them both at high speed. Yusuf estimated that Glinton was going between 80 and 100 miles per hour and said Glinton was driving like a "crazy man." Glinton turned around, went past them again, turned around again, then swerved toward Garcia and Yusuf. Yusuf, who had been seeking cover behind a utility pole, jumped out of the way. But Garcia, who was crossing the street back toward the parking lot, wasn't so fortunate. Glinton hit Garcia with the taxi, ran him over, and dragged him into the parking lot. He backed up, then ran over Garcia again. Glinton drove off, but quickly turned around. He then chased Yusuf around the utility pole with the cab two or three times before driving off yet again. He returned a minute later to try to run down Yusuf before leaving the scene for good.

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was struck wasn't very good, going so far as to say he didn't know what happened after that.

¶ 16 Surveillance video from near the scene shows that a little more than four minutes elapsed from when Garcia first approached the cab to when Glinton ran him over. Almost three more minutes passed before Glinton drove off in the cab for the last time.

¶ 17 Garcia's injuries were extensive — they included shattered ear drums, a traumatic brain injury, a fractured eye socket, three broken ribs, a torn anterior cruciate ligament, other torn ligaments, and more injuries causing hip and back pain.

II. Discussion

¶ 18 We address the issues of breach of duty, causation, and setoff, in that order.

A. Breach of Duty

¶ 19 At this point in the case, the only duty at issue is that which Colorado Cab owed to Yusuf, its driver: Colorado Cab didn't owe any duty to Garcia directly; rather, Garcia's status as a rescuer means he is entitled to vicariously claim Colorado Cab's duty to Yusuf. *See Dillard v. Pittway Corp.*, 719 So. 2d 188, 193 (Ala. 1998) ("[U]nder the 'danger invites rescue' doctrine, one who attempts to rescue another who has been placed in peril by the defendant stands, for purposes of determining causation, in the position of the

person being rescued."); *Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 825 (Cal. 1971) (the rescue doctrine "permits the rescuer to sue on the basis of defendant's initial negligence toward the party rescued"); *Williams v. Foster*, 666 N.E.2d 678, 681 (Ill. App. Ct. 1996) ("Under the rescue doctrine, . . . one who attempts to rescue another who has been placed in a position of peril by the defendant stands in the position of the rescuee for purposes of determining causation.").

¶ 20 In its opening brief, Colorado Cab doesn't argue that it didn't owe any duty to Yusuf. Indeed, it all but concedes that it did.[6] Instead, Colorado Cab argues that it didn't owe a duty to install partitions and interior cameras. But that argument conflates duty with breach of duty. The duty to Yusuf was to exercise reasonable care to protect him from assaults by passengers. Whether it was obligated to install partitions and interior cameras goes to whether it breached that duty. That is so because breach of duty concerns

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[6] In moving for a directed verdict, Colorado Cab's counsel conceded that an assault on Yusuf was foreseeable. ("It is Defendant's position that an assault of the cab driver, based on the testimony in this case, is something that's foreseeable.")

what the actor should or should not have done under the circumstances to comply with the duty to exercise reasonable care. *See Hesse v. McClintic*, 176 P.3d 759, 764 (Colo. 2008) (a person breaches the duty of care "by acting unreasonably under the circumstances"); *United Blood Servs. v. Quintana*, 827 P.2d 509, 519 (Colo. 1992) (this is how the standard of objective behavior is measured); *see also* Restatement (Second) of Torts § 284 (Am. L. Inst. 1965).

¶ 21 Thus, we consider Colorado Cab's arguments why it didn't have any obligation to install partitions and interior cameras as an issue of breach of duty.

1. Applicable Law

¶ 22 As noted, whether Colorado Cab breached its duty to Yusuf turns on whether it "conform[ed] [its] conduct to a standard of objective behavior measured by what a reasonable person of ordinary prudence would or would not do under the same or similar circumstances." *United Blood Servs.*, 827 P.2d at 519.

¶ 23 "[W]hat constitutes reasonable care varies according to the degree of risk associated with the activity in question." *Bedee v. Am. Med. Response of Colo.*, 2015 COA 128, ¶ 13 (citing *Imperial*

Distrib. Servs., Inc. v. Forrest, 741 P.2d 1251, 1254 (Colo. 1987)). "[T]he greater the risk, the greater the amount of care required to avoid injury to others." *Imperial Distrib. Servs.*, 741 P.2d at 1254 (quoting *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579, 587 (Colo. 1984)).

¶ 24 The Restatement (Third) of Torts explains this concept more fully.

> Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages. The disadvantage in question is the magnitude of risk that the conduct occasions . . . . [T]he phrase "magnitude of the risk" includes both the foreseeable likelihood of harm and the foreseeable severity of harm that might ensue. The "advantages" of the conduct relate to the burden of risk prevention that is avoided when the actor declines to incorporate some precaution. The actor's conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention.

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 cmt. e (Am. L. Inst. 2010); *see id.* § 3; Restatement (Second) of Torts § 291.

2. Standard of Review

¶ 25 "[T]he questions of whether the defendant breached [a] duty by its actions or by its failure to act is a question of fact, and therefore a question to be decided by the jury." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 50 (Colo. 1987); *accord City of Aurora v. Loveless*, 639 P.2d 1061, 1062 (Colo. 1981); *see* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 8.

¶ 26 Because breach of duty is a question of fact for the jury, a court shouldn't grant a motion for judgment notwithstanding the verdict on that issue unless there is no evidence that could support a finding against the moving party. *Parks v. Edward Dale Parrish LLC*, 2019 COA 19, ¶ 10; *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶ 19; *see Taco Bell*, 744 P.2d at 50; *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 318 (Colo. 1980) (a directed verdict on the issue of negligence is proper "in only the clearest of cases and should normally be

reserved for the jury unless the facts are undisputed, and it is plain that reasonable persons can draw but one inference from them").[7]

¶ 27 We review the district court's denial of a motion for judgment notwithstanding the verdict de novo. *Parks*, ¶ 9. But we do so viewing the evidence in the light most favorable to the nonmoving party, applying the "no evidence" test articulated above. *Id.* at ¶ 10; *Boulders at Escalante*, ¶ 19.

3. Analysis

¶ 28 Colorado Cab argues that the risk of an assault on a driver is low and the financial burden of installing partitions and cameras in its cabs outweighs the risk. And it argues that, as a matter of public policy, it should be left to the General Assembly or the Public Utilities Commission (PUC) to decide whether cab companies should be required to install partitions and cameras.[8]

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[7] Colorado Cab also moved for a directed verdict. We review the district court's denial of that motion the same way we review the court's denial of Colorado Cab's motion for judgment notwithstanding the verdict. *See Parks v. Edward Dale Parrish LLC*, 2019 COA 19, ¶¶ 9-10.

[8] Garcia argues that the jury could have found that Colorado Cab breached the duty by doing nothing to protect its drivers — that the jury could have determined that Colorado Cab should have taken safety measures other than installing partitions and cameras. But

¶ 29 As for the degree of risk, Garcia presented evidence that there were forty-three assaults on Colorado Cab's drivers in the thirty-eight months before the incident.[9] Colorado Cab says that in light of the number of trips its cabs make per day (about 5,000), this means there is only a .001 percent chance that a driver will be assaulted on any given trip. That's one way to look at it. But the jury, as the finder of fact, was entitled to consider the raw number of assaults and give that number the weight it deemed appropriate. *Cf. Taco Bell*, 744 P.2d at 48 ("The fact that ten armed robberies had occurred at the Taco Bell restaurant in a period of three years would certainly put a reasonable person on notice that such robberies would be likely to occur in the future and that the

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these were the only measures on which Garcia relied at trial. And it was his burden to identify the precautions Colorado Cab should have adopted. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 cmt. h (Am. L. Inst. 2010).

[9] Most of these incidents involved passengers assaulting drivers in the cabs from behind. A few involved passengers assaulting drivers through the driver's side window. And a few others involved altercations between drivers and passengers outside the cab.

consequences of those robberies should be considered in determining how the restaurant should be run.").[10]

¶ 30 And Colorado Cab's statistic says nothing about the "foreseeable severity of any harm." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3; *see id.* at cmt. f ("Given a balancing approach to negligence, even if the likelihood of harm stemming from the actor's conduct is small, the actor can be negligent if the severity of the possible harm is great and the burden of precautions is limited."); *cf. Taco Bell*, 744 P.2d at 48-49 (considering the potential gravity of harm from armed robberies); *id.* at 49 ("As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution." (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 31, at 171 (5th ed. 1984) (Prosser & Keeton))). The foreseeable gravity of an assault on a driver by a

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[10] Colorado Cab also downplays the number of assaults by saying that "none of the incidents involved a cab being stolen, let alone a [sic] being stolen and then used as a deadly weapon against a person." But at this step of the analysis we are concerned with the risk to drivers, like Yusuf. Glinton's theft of the cab and use of it to run down Garcia go more to the issue of causation, which we tackle below.

passenger is profound; certainly a driver may suffer minor injuries, but the possibility of serious bodily injury or even death can't be discounted.

¶ 31 As for the burden of preventing the risk, Colorado Cab asserts (relying on testimony of its witnesses at trial) that "partitions negatively affect the customer service experience," but relies most heavily on the purported cost of installing partitions and cameras ($900 per cab multiplied by 500 cabs). These burdens are substantial. But we can't say that they are so onerous as to have required the district court to conclude as a matter of law that Colorado Cab didn't breach its duty of care.

¶ 32 This leaves Colorado Cab's argument that, as a matter of public policy, "any duty on taxi companies to install partitions or cameras in the fleets" should be imposed by the General Assembly or the PUC, not "judicial fiat." This argument suffers from a flawed premise. Neither the district court nor the jury imposed on Colorado Cab a legal duty to install partitions and cameras in its fleet. Rather, the jury in this case found, for this case only, that Colorado Cab breached its duty of care by failing to do so. Colorado Cab isn't under any legal obligation by virtue of the jury's verdict to

install partitions and cameras in its cabs. To the extent Colorado Cab posits that its failure to take such measures in the future based on the jury's verdict in this case would expose it to the prospect of punitive damages in a future case, it is mistaken. "A jury decision on the negligence issue is not a precedent for later cases involving different parties and is not even admissible in such later cases as a possible guide to later juries." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 8 cmt. c.

¶ 33 The fact that neither the General Assembly nor the PUC has required cab companies to install partitions and cameras, though perhaps relevant, isn't dispositive. "[C]ompliance with administrative safety regulations is a circumstance to be considered on the issue of due care but it is not conclusive proof of that issue." *United Blood Servs.*, 827 P.2d at 520; *see Blueflame Gas*, 679 P.2d at 591; Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 16(a) ("An actor's compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent . . . for failing to adopt precautions in addition to those mandated by the statute."); *id.* at cmt. a (this rule "also applies to . . . state administrative regulations"); Restatement

(Second) of Torts § 288C ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."), *cited with approval in Blueflame Gas*, 679 P.2d at 591.

¶ 34 In sum, based on this record, we can't conclude that, as a matter of law, Colorado Cab met its duty of care to Yusuf. We turn, then, to the issue whether Colorado Cab's breach of duty was the cause of Garcia's injuries.

B. Causation

¶ 35 Colorado Cab argues that, as a matter of law, its alleged breach of duty wasn't the factual or legal (proximate) cause of Garcia's claimed injuries because Glinton's intentional criminal acts "broke the chain of causation" — i.e., were superseding causes of Garcia's injuries.

1. Applicable Law

¶ 36 Proving breach of a duty of care gets a plaintiff only halfway home on a negligence claim. The plaintiff must also prove that the breach of duty caused his claimed injury. *Loveless*, 639 P.2d at 1063; *see HealthONE v. Rodriguez*, 50 P.3d 879, 888 (Colo. 2002).

This requirement has two parts: the plaintiff must prove both "cause in fact" and "proximate" or "legal" cause. *Rocky Mountain Planned Parenthood*, ¶ 27.[11]

¶ 37 "The test for causation [in fact] is the 'but for' test — whether, but for the alleged negligence, the harm would not have occurred." *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987), *quoted with approval in Rocky Mountain Planned Parenthood*, ¶ 28. This "but for" test is met if the breach of duty of care "in a 'natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which that result would not have occurred.'" *Id.* (quoting *Stout v. Denver Park & Amusement Co.*, 87 Colo. 294, 296, 287 P. 650, 650 (1930)); *accord, e.g.*, *Rocky Mountain Planned Parenthood*, ¶ 28; *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996); *see* Restatement (Third) of Torts: Liab. for

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[11] The Restatement (Third) of Torts criticizes the term "proximate cause" as a "poor one to describe limits on the scope of liability," preferring instead "scope of liability" because that term focuses more clearly on the risks that made the actor's conduct tortious in the first place. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 cmts. a, b, j. The supreme court, however, continues to use the term, so we will as well.

Physical & Emotional Harm § 26. As well, the breach of duty must have been a "substantial factor" in causing the plaintiff's claimed injury: if some other event contributed to the plaintiff's claimed injury, that event must not have had "such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant" in order for the plaintiff to recover from the defendant. *Smith*, 749 P.2d at 464 (quoting Restatement (Second) of Torts § 433 cmt. a), *quoted with approval in Rocky Mountain Planned Parenthood*, ¶ 28, *and N. Colo. Med. Ctr.*, 914 P.2d at 908. An intervening cause that has such an effect is often referred to as a "superseding cause." *See, e.g.*, *Ekberg v. Greene*, 196 Colo. 494, 496, 588 P.2d 375, 376 (1978); Restatement (Second) of Torts § 440; *see also* Prosser & Keeton § 44, at 312 (the defendant isn't liable for "the more unpredictable behavior of irresponsible persons").

¶ 38 Proximate or legal cause "depends largely on the question of the foreseeability of harm." *Rocky Mountain Planned Parenthood*, ¶ 30. Another way of looking at it is that the "actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." Restatement (Third) of Torts: Liab. for

Physical & Emotional Harm § 29. That risk "is evaluated by reference to the foreseeable (if indefinite) probability of harm of a foreseeable severity." *Id.* at cmt. d; *see also id.* at cmt. h ("In assessing whether the scope of an actor's liability extends to a given harm, the critical matter is the context in which the actor is tortious, including the facts establishing the risks that exist at the time of the actor's conduct and the manner in which the actor's conduct was deficient."). "This limit on liability serves the purpose of avoiding what might be unjustified or enormous liability by confining liability's scope to the reasons for holding the actor liable in the first place." *Id.* at cmt. d; *see also id.* at cmt. e.

¶ 39 A similar, though not identical, limitation on liability applies to rescuers. Liability to rescuers is limited to "harm [that] arises from a risk that inheres in the effort to provide aid." *Id.* § 32. So

> when the harm suffered by the rescuer is different from the harms whose risks would be expected to arise in the rescue, the actor is not liable because the harm is outside the scope of liability. Thus, when an unusual type of harm occurs in a rescue, the inquiry is whether, at the outset of that particular rescue, the risk of such harm would reasonably be anticipated.

Id. at cmt. c.[12]

¶ 40 The concept of intervening or superseding cause may also come into play in the context of proximate cause. "When . . . an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Id.* § 34. That is, "[a]n intervening cause that breaks the chain of causation from the original negligent act becomes the proximate cause of the plaintiff's injury, relieving the wrongdoer of liability." *Deines v. Atlas Energy Servs., LLC*, 2021 COA 24, ¶ 14 (citing *Albo v. Shamrock Oil & Gas Corp.*, 160 Colo. 144, 146, 415 P.2d 536, 537 (1966)).

¶ 41 But the fact that an intervening cause is an intentionally tortious or even criminal act doesn't necessarily break the chain of causation. If such an act was foreseeable, it won't preclude liability, so long as the harm at issue was within the scope of the risks reasonably to be foreseen from the defendant's conduct or the

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[12] This limitation on liability is analogous to, but not entirely coextensive with, the limitation on liability addressed by section 29 of the Restatement (Third) of Torts, discussed above. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 32 cmt. c.

rescuer's efforts. *See Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 306 (Colo. 2011); *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1063 (Colo. 1986) (citing Restatement (Second) of Torts § 442B); *Ekberg*, 196 Colo. at 496, 588 P.2d at 376; *see also* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 34 cmts. d-g; Restatement (Second) of Torts § 302B.

2. Standard of Review

¶ 42 Both causation in fact and proximate cause are typically questions for the fact finder. *Rocky Mountain Planned Parenthood*, ¶¶ 29, 30. Thus, we must uphold the district court's denial of Colorado Cab's motion for judgment notwithstanding the verdict on this issue unless there is no evidence supporting a finding against Colorado Cab. *See Parks*, ¶ 10.

3. Analysis

¶ 43 Colorado Cab's causation arguments focus on three of Glinton's criminal acts: (1) Glinton's physical assault of Yusuf while they were still in the cab; (2) Glinton's stealing of the cab "in the midst of a melee among himself, Yusuf, and Garcia"; and (3) Glinton's use of the cab as a weapon after driving off and returning to run down Garcia.

¶ 44 At trial, in moving for a directed verdict, Colorado Cab's counsel conceded that Glinton's assault on Yusuf was foreseeable. And, as noted, Colorado Cab doesn't really contest the point on appeal. We have already concluded that the jury could reasonably have found that Colorado Cab breached its duty to protect Yusuf from an assault by a passenger by failing to install partitions and interior cameras. Because Garcia was a rescuer, the question then becomes whether the risk of harm to Garcia could have been reasonably anticipated from the attempt to rescue. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 32 & cmt. c.

¶ 45 As to Glinton's initial assault of Garcia outside the cab, we conclude that the harm to Garcia reasonably could have been anticipated. The jury reasonably could have concluded that the harm suffered by Garcia when Glinton got out of the cab and assaulted Garcia was not different from the harm to be expected to arise from an attempted rescue of a cab driver being assaulted by a passenger. *See id.* at cmt. c.

¶ 46 But we can't say the same for the harm Garcia suffered when Glinton stole the cab, drove off, drove back, and ran down Garcia.

Several minutes elapsed from the time Garcia initially confronted Glinton to the time Glinton struck Garcia with the cab. In the interim, Glinton drove off, stopped, turned around, drove in circles, drove back down the street toward Yusuf and Garcia, passed them, turned around, passed them again, turned around again, and then struck Garcia. And the evidence at trial was that the act of stealing a cab and using it as a weapon was unprecedented. While the mere fact that an act hasn't occurred before doesn't mean the act is unforeseeable, we conclude that Glinton's conduct in stealing the cab and using it as a weapon wasn't within the scope of the risk that made Colorado Cab's failure to install partitions and interior cameras tortious in the first place, particularly given Glinton's numerous volitional acts and erratic, reckless behavior in driving the cab. Nor was the risk of harm to a rescuer occasioned by such conduct of a type reasonably to be expected to arise in the course of a rescue of a cab driver being assaulted by a passenger. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. c (though negligent or reckless operation of a vehicle by a thief may be a foreseeable result of leaving the keys in the unlocked vehicle in a high-crime area, "if the car thief uses the car

deliberately to run down the thief's estranged spouse, a finding that the harm is outside the scope of liability may be proper"); Prosser & Keeton § 44, at 312 (superseding causes include "the reckless or unusual driving of vehicles"); *cf. Mull v. Ford Motor Co.*, 368 F.2d 713, 715-17 (2d Cir. 1966) (manufacturer's alleged negligence in manufacturing vehicle was not the proximate cause of pedestrian's injuries caused when taxicab driver moved the stalled vehicle to the curb and then, after the hood had been raised, continued to "buck" the cab up the curb; though the moving of the stalled cab to the curb was foreseeable, the driver's subsequent negligent operation of the cab was not).

¶ 47 To be clear, we hold that both Glinton's theft of the cab and his subsequent use of the cab to deliberately run down Garcia were (1) outside the risks reasonably to be anticipated from Colorado Cab's failure to protect its driver from an assault by a passenger by installing partitions and interior cameras and (2) outside the risks reasonably to be anticipated from an attempt to rescue a cab driver in these circumstances. Said differently, Glinton's theft of the cab and his use of the cab as a weapon were superseding causes of the injuries Garcia suffered when Glinton ran him down with the cab.

¶ 48 In arguing to the contrary, Garcia relies on the principle that "it is not necessary that the tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur, but only that some injury will likely result in some manner as a consequence of his negligent acts." *HealthONE*, 50 P.3d at 889. But this argument proves too much. "Some aspects of the manner in which the harm occurs *are* relevant to a determination of the scope of an actor's liability." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 cmt. o. If the manner of harm is beyond the scope of the foreseeable risk giving rise to the duty, there is no liability. *Id.* (discussing illustrations). This limitation is consistent with the limiting principles described above, including the notion that an actor isn't liable for an unusual type of harm that occurs in a rescue unless, "at the outset of that particular rescue, the risk of such harm would reasonably be anticipated." *Id.* § 32 cmt. c; *see also* Prosser & Keeton § 44, at 312 (the actor isn't liable for "the more unpredictable behavior of irresponsible persons").

¶ 49 The partial dissent asserts that by applying section 32 of the Restatement and comment c thereto we are somehow departing

from the reasonable foreseeability test applicable in Colorado. Not so.

¶ 50 Though section 32 speaks in terms of the risk of harm, comment e to section 29 of the Restatement, which addresses limitations on liability for tortious conduct generally, explains that "[w]hen properly understood and framed, the foreseeability standard is congruent with the risk standard . . . ." Comment j to section 29 further explains that

> both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks — potential harms — that made the actor negligent. Negligence limits the requirement of reasonable care to those risks that are foreseeable. Thus, when scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent.

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 cmt. j (citation omitted); *see also id.* at cmt. d ("For purposes of negligence, which requires foreseeability, risk is evaluated by reference to the foreseeable (if indefinite) probability of harm of a

foreseeable severity."). Indeed, leading treatises on tort law equate the risk-of-harm and foreseeability tests, defining foreseeability in terms of foreseeable consequences from the risks created by the actor's conduct. *See* Prosser & Keeton § 43, at 281; 4 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 20.5, at 177-78 (3d ed. 2007); *see also* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 reporter's note to cmt. j (recognizing such treatment by treatises, case law, and scholarly articles). The Restatement (Second) of Torts does as well. *See* Restatement (Second) of Torts § 281 cmts. c, f, g;[13] *see also* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 cmt. a (noting that "[t]he requirement that the harm be within the scope of the risk was stated in § 281 . . . and in other Sections that addressed specific tort claims").[14]

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[13] In *Raleigh v. Performance Plumbing & Heating, Inc.*, 130 P.3d 1011, 1015 (Colo. 2006), the Colorado Supreme Court cited section 281 with approval.

[14] The Restatement (Third) of Torts posits that while the foreseeability test and the risk standard are congruent, the risk standard is preferable: it "provides greater clarity and facilitates analysis because it focuses attention on the particular circumstances that existed at the time of the actor's conduct and the risks that were posed by that conduct." Restatement (Third) of

¶ 51 Section 32 is merely an application of these principles to the particular analytical issues created by harm to rescuers. It recognizes the commonsense notion that, in terms of risks, and therefore foreseeability of harm, rescuers aren't similarly situated to those to whom the negligent actor owes the duty.[15] The harm that a negligent actor might reasonably anticipate as to a person to whom it owes a duty (in this case, a cab driver) isn't necessarily coextensive with that which the negligent actor might reasonably anticipate as to a rescuer (in this case, a bystander standing on a sidewalk).[16] Thus, section 32 and comment c thereto are entirely

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Torts: Liab. for Physical & Emotional Harm § 29 cmt. j; *see also id.* at cmt. e (the risk test "has the virtue of relative simplicity" and "provides a more refined" analytical standard).

[15] The partial dissent relies on comment b to section 32 for the proposition that section 32 "displaces the reasonable foreseeability test." *Infra* ¶ 81. But that comment only makes the point that a tortfeasor may be liable to a rescuer notwithstanding that the rescuer was an "unforeseeable plaintiff" vis-a-vis the duty owed by the tortfeasor. As discussed above, the foreseeability and the risk-of-harm tests are essentially "congruent."

[16] The partial dissent surmises that applying section 32's limitation will result in finding no liability to a rescuer where there would be liability to the person to whom the negligent actor owed the duty. In some cases, yes. But, as section 32 and its comments and illustrations make clear, sometimes applying this principle — that the negligent actor is liable to the rescuer for risks of harm inherent in the rescue attempt — will result in liability to a rescuer where the

consistent with the reasonable foreseeability test applicable in Colorado.[17]

¶ 52 *Snell v. Norwalk Yellow Cab, Inc.*, 158 A.3d 787 (Conn. App. Ct. 2017), *rev'd*, 212 A.3d 646 (Conn. 2019), on which the partial dissent principally relies, is clearly distinguishable. For starters, it wasn't a rescuer case. But perhaps more importantly, the victims in that case were injured during the course of the thief's flight with the cab — that is, while the thief was attempting to complete the theft. *Id.* at 792. In this case, though Glinton initially fled after stealing the cab, he then *returned*. And he did so not for the purpose of stealing the cab, but for the purpose of using the cab as a weapon against Yusuf and Garcia. This was a distinct volitional act accompanied by different intent. We see no reason why this fact should prove irrelevant when assessing foreseeability.

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person to whom the duty was owed wasn't faced with the same risk of harm as the rescuer.

[17] The partial dissent claims that comment c to section 32 "has not proved to be particularly influential." *Infra* ¶ 75. But it cites no case rejecting the comment. The fact is, these rescuer cases are few and far between, so there haven't been that many opportunities for courts to address the issue.

¶ 53 We recognize that Colorado doesn't reflexively adhere to pronouncements of the Restatement of Torts. But we also recognize that both the Colorado Supreme Court and the Colorado Court of Appeals have looked to the Restatement for guidance, and have found it persuasive, on numerous occasions. *See, e.g.*, *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 389-95 (Colo. 2001); *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993); *Casebolt v. Cowan*, 829 P.2d 352, 357-59 (Colo. 1992) (negligence case); *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72 (Colo. 1991); *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1326 (Colo. 1986); *Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.*, 690 P.2d 207, 210-11 (Colo. 1984); *Hiigel v. Gen. Motors Corp.*, 190 Colo. 57, 63-64, 544 P.2d 983, 987-88 (1975); *Rugg v. McCarty*, 173 Colo. 170, 177, 476 P.2d 753, 756 (1970); *Holmes v. Young*, 885 P.2d 305, 308-09 (Colo. App. 1994). We find section 32 persuasive and see no conflict between it and existing Colorado precedent.

¶ 54 We therefore conclude that the jury could reasonably have found that Colorado Cab was liable for the injuries Garcia suffered when Glinton assaulted him as they fought outside the cab, but not for those he suffered when Glinton later ran him down with the

stolen cab.[18] On this record, however, we can't determine what damages are attributable only to Glinton's initial assault on Garcia. As a result, we must reverse the award of damages and remand for a new trial on that issue. We must also remand for a redetermination of Colorado Cab's percentage of fault for the recoverable damages because the jury decided that issue by considering events (the theft of the cab and use of it as a weapon) that don't relate to the recoverable damages.

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[18] Again, we acknowledge that whether a particular risk of harm is foreseeable is ordinarily a jury question. *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 30; *see* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 cmt. q. But as with other fact questions, if reasonable minds could draw but one inference from the facts, that question may be taken from the jury. *See Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 683 (Colo. App. 2008); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 cmt. d (in determining whether there is a fact question as to foreseeability, the court must "compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter"). With all due respect to our dissenting colleague, we conclude that a reasonable jury could not find that the risk of a passenger stealing a cab, speeding away, and returning to deliberately run over a bystander was among the risks of harm reasonably to be foreseen by Colorado Cab by failing to install partitions and interior cameras.

C. Setoff

¶ 55 Lastly, Colorado Cab contends that the district court erred by refusing to set off the jury's damages awarded by the amount Medicaid paid toward Garcia's medical bills. It concedes that the division in *Pressey v. Children's Hospital Colorado*, 2017 COA 28, rejected this argument, but it urges us to decline to follow that decision and instead follow *Gomez v. Black*, 32 Colo. App. 332, 511 P.2d 531 (1973), in which the division agreed with a similar argument.

¶ 56 We agree with the reasoning in *Pressey* and therefore follow it in this case. Colorado Cab isn't entitled to a setoff for the Medicaid payments.

III. Conclusion

¶ 57 The judgment is affirmed in part and reversed in part. The case is remanded for a new trial on damages, limited to the issues of Garcia's damages incurred as a result of Glinton's initial assault on him outside the cab and Colorado Cab's percentage of fault for that injury.

JUDGE NAVARRO concurs.

JUSTICE MARTINEZ concurs in part and dissents in part.

JUSTICE MARTINEZ, concurring in part and dissenting in part.

¶ 58 I respectfully dissent from the portion of the majority's opinion overturning the jury's verdict because, as I see it, a reasonable jury could — and did — find Colorado Cab liable for the injuries Garcia sustained when Glinton ran him over with the stolen cab. In all other respects, I concur.

¶ 59 The conclusion with which I disagree is supported by two independent justifications: first, that although the initial physical assault of Garcia was reasonably foreseeable, the latter vehicular assault was not because it was not among the risks reasonably to be anticipated from Colorado Cab's breach of duty (i.e., its failure to equip the cab with a partition and camera); and second, that we should adopt a limitation from the Restatement that makes it more difficult for a rescuer to recover for injuries sustained by limiting recovery to injuries that could reasonably be anticipated at the outset of a rescue attempt. Before addressing these arguments, I pause to consider the proper role of the court when addressing questions of negligence and proximate cause.

¶ 60 Our supreme court has long recognized that "the province of the jury in determining questions of negligence . . . should not be invaded by the courts except in the clearest of cases." *Moffatt v. Tenney*, 17 Colo. 189, 191, 30 P. 348, 349 (1892); *accord Com. Carriers, Inc. v. Driscoll Truck Lines, Inc.*, 158 Colo. 552, 555-56, 408 P.2d 445, 447 (1965); *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 318 (Colo. 1980); *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 44. Only "where reasonable minds can draw but one inference from the evidence" may the question of proximate cause be determined by the court as a matter of law. *Lyons v. Nasby*, 770 P.2d 1250, 1256 (Colo. 1989), *superseded by statute on other grounds as stated in Westin*, ¶ 34. In my view, the evidence in this case, replete with inconsistencies and subject to multiple interpretations, is not clear enough to warrant taking the question of proximate cause away from the jury.

¶ 61 The majority reaches the result that some of Glinton's actions were reasonably foreseeable while others were not by dividing the incident at issue into three discrete parts: (1) the physical assault; (2) the cab theft; and (3) the vehicular assault. But that is only one way to look at the incident.

¶ 62 The incident can also be seen as a single, continuous response to a rescue beginning with a simple assault and escalating, in a matter of minutes, to an assault with a weapon (the cab). And the causal effect of Glinton's assaultive behavior should be analyzed just like any other intervening act: the jury determines whether the physical assault and its escalation into vehicular assault was reasonably foreseeable. *See Ekberg v. Greene*, 196 Colo. 494, 496, 588 P.2d 375, 376 (1978) ("[A]n intentionally tortious or criminal act of a third party is not a superseding cause immunizing the defendant from liability . . . if it is reasonably foreseeable."). I submit that this is the best approach.

¶ 63 Moreover, I am unable to find support in either Colorado law or the Restatement for the proposition implicit in the majority's approach that an episode reasonably foreseeable at its outset can, mere minutes later, without having moved to a different location, and perpetrated by the same assailant against the same victims, transform into something so unforeseeable that the breach of duty that gave rise to the episode can be rendered insignificant as a matter of law.

¶ 64 The nearest example cited by the majority in support of that proposition is the one contained in a comment to the Restatement, where, discussing the scope of a defendant's liability for unusual third-party misconduct, the authors write that while it could be foreseen that leaving one's keys in an unlocked car in a high-crime area will result in the car being stolen and driven in a negligent or reckless fashion, "if the car thief uses the car deliberately to run down the thief's estranged spouse, a finding that the harm is outside the scope of liability may be proper." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. c (Am. L. Inst. 2010).

¶ 65 In the example, the incident does not begin as an assault, but as a theft, and the victim of the assault is uninvolved in the initial incident. Here, in contrast, the incident began and ended as an assault against the same victims. And, the assailant meant to inflict physical harm on his victims before he was in the driver's seat; his intent to injure each of them was consistent throughout the assaultive episode, both before and after he stole the cab.

¶ 66 Further, the comment merely notes that finding the harm outside the scope of liability *may* be proper, and I agree with that

analysis. That is, it certainly would have been appropriate for the jury in this case to find that Glinton's deliberate use of the cab to run Garcia over resulted in a harm that was outside the scope of Colorado Cab's liability. But it found the opposite. In contrast to the majority, I think the trial court was right to leave that determination to the jury.

¶ 67 What is more, even if I accepted the premise that Glinton's assaultive behavior should be considered in separate parts, I would still let the jury decide whether Colorado Cab is liable for the injuries Garcia sustained when he was run over because I think a reasonable jury *could* find that Glinton's theft of the cab and his use of it as a weapon were reasonably foreseeable risks of Colorado Cab's breach of its duty to exercise reasonable care to protect Yusuf from assaults by passengers. My position finds support in "unattended car" cases from other jurisdictions.

¶ 68 For example, in *Snell v. Norwalk Yellow Cab, Inc.*, 158 A.3d 787 (Conn. App. Ct. 2017), *rev'd on other grounds*, 212 A.3d 646 (Conn. 2019), a driver left his unlocked cab unattended with his keys in the ignition. *Id.* at 792. Two teenagers then stole the cab and drove off. *Id.* Sometime later and in a nearby city, the teen

who was driving rear-ended the car in front of him. *Id.* The teen then attempted to flee the scene by driving up onto a sidewalk, where he hit the plaintiff. *Id.* As is relevant to this case, the defendant cab company argued that the teens' criminal activities constituted an intervening "criminal event" such that the jury should have been instructed about the doctrine of superseding cause. *Id.* at 806. The appellate court agreed, reasoning:

> The "criminal event" at issue was not limited to the theft of the taxicab, which all parties acknowledge was a situation that was foreseeable given [the cab driver's] actions, but included additional criminal acts, which were further removed in both time and distance from the initial theft, and that a jury might reasonably consider unforeseeable. . . .
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> Whether [the cab driver] reasonably should have realized that a thief, in taking advantage of his having left the keys in the ignition of his taxicab, might also avail himself of the opportunity to commit the additional criminal acts that occurred, or whether those further crimes fell so far afield of the hazard created by [his] negligence as to negate his liability, clearly implicates the doctrine of superseding cause. . . . Therefore, it was entirely appropriate for the court to submit this doctrine to the jury.

Id.

¶ 69 In reaching this conclusion, the court observed that, when faced with similar questions regarding the scope of liability, courts across the country "have recognized a legally significant distinction between injuries from a collision that occurred in close proximity to the theft and while the thief was in flight, and injuries resulting from a collision occurring several hours after the theft and several miles from the scene." *Id.* at 806 n.19. This case presents no such breaks in time and space.

¶ 70 As a division of this court recently explained after surveying intervening cause cases from this court and from our supreme court, "[t]he competing case law simply confirms for us that, in most instances, reasonable people could differ on the question of whether an intervening act is foreseeable. Hence, our strong preference [is] for allowing the jury to decide the question." *Deines v. Atlas Energy Servs., LLC*, 2021 COA 24, ¶ 33. I would do so here.

¶ 71 Which brings me to the second justification for the majority's conclusion: that Garcia's ability to recover must be limited to the extent of injuries that could have reasonably been anticipated at the outset of his rescue attempt (i.e., the injuries that a reasonable

person might expect to sustain when rescuing a cab driver from an assault). I would not adopt this limitation for a few reasons.

¶ 72 First, it does little, in light of our proximate cause doctrine, to meaningfully reduce the exposure of tortfeasors, *see Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 66 (Hart, J., dissenting in part) (explaining that "proximate cause is a fundamentally liability-limiting principle . . . 'intended to ensure that casual and unsubstantial causes do not become actionable'" (quoting *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996))), but does much to disadvantage a rescuer like Garcia who unwittingly finds himself in an escalating emergency situation.

¶ 73 Next, I suspect that the limitation will be unworkable in practice because of the inherent challenge of identifying the specific harms that might reasonably be anticipated at the start of a given rescue attempt. Not only do rescues by definition involve situations where someone is thought to be "in imminent peril," *Garcia v. Colo. Cab Co.*, 2020 CO 55, ¶ 23 — and thus, situations demanding quick action — but, to the extent the rescue involves criminal behavior, such behavior is notoriously unpredictable. *See Taco Bell,*

Inc. v. Lannon, 744 P.2d 43, 51 (Colo. 1987) (Erickson, J., dissenting) (noting that "courts agree that given the unpredictability of criminal behavior it is unfair to impose a duty to provide armed guards upon business owners because businesses would not know whether the duty is theirs or whether they have performed it").

¶ 74 Further, I have difficulty finding a principled reason why a rescuer should be treated differently from a rescuee with respect to their ability to recover for injuries sustained during a rescue, especially when the duty owed to the rescuer flows directly from the duty that is owed to the rescuee. *Garcia*, ¶ 33 ("Colorado Cab owed a duty to Garcia as a rescuer of [Yusuf] if it owed a duty to [Yusuf]."). By way of illustration, assume that Glinton succeeded in running over both Garcia *and* Yusuf, and that a jury found that Glinton's use of the cab as a weapon was (1) among the risks reasonably to be anticipated from Colorado Cab's breach of duty but (2) not a harm that Garcia could have anticipated at the outset of his rescue attempt. In that instance, were we to apply the majority's rule, Yusuf could recover from Colorado Cab for his injuries but Garcia could not, even though they faced the same risks. That is a difficult and unpersuasive distinction to make.

¶ 75 Moreover, the majority takes the limitation from a section of the Restatement that has not proved to be particularly influential. In pertinent part, section 32 states that a negligent actor is only liable for a rescuer's injuries insofar as the injuries "arise[] from a risk that inheres in the effort to provide aid." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 32. "Thus," comment c continues, "when an unusual type of harm occurs in a rescue, the inquiry is whether, at the outset of that particular rescue, the risk of such harm would reasonably be anticipated." *Id.* at cmt. c.

¶ 76 Only one state has adopted section 32 in its entirety, and as the adopting court noted, that state has a policy of adhering to the Restatement where there is no settled law on an issue. *Espinoza v. Schulenburg*, 129 P.3d 937, 939 (Ariz. 2006) ("Generally, . . . absent law to the contrary, Arizona courts follow the Restatement"). More to the point, of the opinions from the state that cite to the section, none have applied its limiting phrase, much less invoked it to bar a plaintiff's recovery.

¶ 77 Another state's treatment of section 32 is also telling. In *Apodaca v. Willmore*, 392 P.3d 529 (Kan. 2017), the court conspicuously omitted the limiting phrase from its citation to the

section, instead opining that a rescuer may recover when the rescue is foreseeable and "the initial negligent act is considered the proximate cause of any injury sustained by the rescuer during the course of the rescue." *Id.* at 534. As I have articulated above, I agree with that analytical approach.

¶ 78 Which leaves Massachusetts, the lone state to apply comment c. In *Leavitt v. Brockton Hospital, Inc.*, 907 N.E.2d 213 (Mass. 2009), a police officer sued a hospital and a pair of nurses after he was injured in a car crash while responding to a pedestrian-automobile accident involving one of the hospital's patients. *Id.* at 214. According to the plaintiff, the defendants were negligent for having released the recently sedated patient from the hospital without an escort. *Id.* The defendants moved to dismiss the case, and the trial court granted the motion, concluding that none of the defendants owed any duty to the plaintiff. *Id.* at 215.

¶ 79 Affirming, the Massachusetts high court held that in addition to a lack of duty, the defendants were not liable because they were not a proximate cause of the plaintiff's injuries. *Id.* at 219. Then, in what reads as dicta, the court explained that the rescue doctrine did not apply to the case because "[the plaintiff] cites no authority

to support his claim that a collision between a police cruiser and a vehicle unrelated to the accident to which the officer in the cruiser was responding is a risk that would be anticipated to arise from the rescue." *Id.* at 221. This is hardly a ringing endorsement of either section 32 or comment c.

¶ 80 Additionally, despite the majority's assurance to the contrary, section 32 displaces the reasonable foreseeability test with respect to rescuers. Comment b to section 32 explains that foreseeability is not a part of assessing liability for harm to a rescuer, and a jury should not consider whether harm to the rescuer was foreseeable:

> [A]n actor, whose tortious conduct puts the actor or another at risk, is subject to liability to a third person who is injured while attempting to come to the aid of the actor or of the other imperiled person. . . . The actor is subject to liability *regardless of whether the rescuer might be thought foreseeable or whether harm to the rescuer might be thought within the risk standard*. Thus, while harm to a rescuer might be found unforeseeable or the rescuer's decision to aid another might be characterized as a superseding cause, scope of liability does not prevent a rescuer from recovering for injuries suffered as a result of the rescue. . . .
>
> . . . .
>
> When the rescue doctrine is applicable, the jury should be instructed that it may find the

> defendant liable to the rescuer based on tortious conduct putting another at risk and on the harm to the other being within the scope of the risk created by the tortious conduct. *The factfinder need not be instructed about, nor address, whether the harm to the rescuer was among the risks that made the actor's conduct tortious.*

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 32 cmt. b (emphasis added).

¶ 81 It is precisely *because* section 32 displaces the reasonable foreseeability test that comment c grafts on the limiting principle that a rescuer's ability to recover ought to be limited to those injuries that could reasonably be anticipated at the outset of the particular rescue. With respect to foreseeability of the *risk* of harm, section 32 is inconsistent with Colorado tort law because it replaces that standard by instead asking whether the *extent* of the harm could reasonably be anticipated.

¶ 82 Finally, I should add that even if Colorado adopted section 32 and comment c, I do not think that the adoption would preclude Garcia from recovery because at the onset of this rescue, when Garcia responded to the driver's call for help ("they're trying to kill me"), the risk of physical harm could easily have been anticipated.

The extent of the physical harm could be minor or severe, whether resulting from fists or other weapons, but if we focus on whether Garcia could have reasonably anticipated physical harm, I see no principled way to conclude that minor harm, but not severe harm, could reasonably have been anticipated. Nor do I see where to draw the line between the two.

¶ 83 Given these concerns, I would leave it to our supreme court to decide whether to depart from our time-tested proximate cause framework and impose a new standard for rescuers.

¶ 84 For the reasons and to the extent expressed above, I respectfully dissent.