SUPREME COURT COPY

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Supreme Court Case No. S178799

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

MARIA CABRAL,

Plaintiff and Respondent,

v.

RALPHS GROCERY COMPANY,

Defendant and Appellant.

After A Decision By The Court Of Appeal
Fourth Appellate District, Division Two
4th Civil No. E044098
San Bernardino County Superior Court Case No. RCV-089849

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INTRODUCTION

Adelelmo Cabral lost control of his pickup truck while traveling at full speed on the freeway. The pickup swerved back and forth in its lane, then turned right sharply, crossed over a full lane of traffic and the paved shoulder, and hit Ralphs Grocery Company's big rig tractor-trailer, which was stopped in the dirt area past the shoulder, 16 feet from the far right travel lane. The crash killed Cabral.

In the ensuing wrongful death lawsuit by Cabral's wife and children (collectively, "plaintiff"), a jury returned a verdict for plaintiff, but found that Cabral's own negligent driving was 90% responsible for the accident. On appeal, the Court of Appeal held that Ralphs was entitled to judgment notwithstanding the verdict for three independent reasons: (1) Ralphs' driver, Hen Horn, owed no legal duty to Cabral to prevent his injuries; (2) Horn's alleged negligence did not proximately cause the collision; and (3) the trial court prejudicially erred in admitting the testimony of plaintiff's causation expert.

Plaintiff has petitioned for review. As explained below, plaintiff's petition utterly fails to address the Court of Appeal's holding that the trial court erroneously admitted plaintiff's expert testimony, a dispositive, fact-specific issue that clearly presents no grounds for review. As to the issues plaintiff does address, she has identified no conflict in the law or important unsettled legal question warranting review. The petition should be denied.

STATEMENT OF THE CASE AND RELEVANT FACTS[1]

Cabral lost control of his pickup truck while driving at 50-70 mph on an interstate freeway.[2] The pickup swerved back and forth in the number 3 (of 4) lane, then turned right sharply and crossed over the number 4 lane and the paved shoulder before hitting Ralphs' big rig tractor-trailer in the dirt area 16 feet from the far right travel lane, near a regulatory "Emergency Parking Only" sign. (1 RT 249, 254, 259; 2 RT 385-386, 469, 520, 533, 562; 3 RT 637, 764-768, 844; AA 170.)[3] The driver, Ralphs' employee, Hen Horn, had stopped for two minutes to eat and drink something.[4] (1 RT 250, 253, 283; 2 RT 324, 384-385.) Cabral was killed in the wreck. (2 RT 301.)

Plaintiff sued Ralphs and Horn for wrongful death, alleging that Horn's negligence in stopping in an "Emergency Parking Only" area for nonemergency purposes caused Cabral's death. (AA 2-5.)

At trial, Ralphs presented uncontradicted evidence that (1) the sole purpose of the regulatory "Emergency Parking Only" sign was to identify an area where vehicles with emergencies could park safely; (2) the sign was not intended to protect negligent drivers who leave the roadway and run

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[1] Given the applicable standard of review, we set forth the facts in the light most favorable to the respondent unless otherwise stated. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

[2] Why Cabral lost control is unknown. At trial, experts opined that he may have fallen asleep or become incapacitated by an undiagnosed medical condition. (2 RT 490, 600-601; 3 RT 607, 723.)

[3] "RT" refers to the reporter's transcript, preceded by volume number and followed by page number. "AA" refers to the Appellant's Appendix.

[4] Ralphs presented evidence at trial that Horn had stopped because of a fluctuating pressure gauge reading. (2 RT 387, 393-394, 416-419.)

into vehicles in the designated parking area; (3) a vehicle parked in the area did not create any hazard to drivers using the freeway with due care; and (4) there was no history of accidents caused by vehicles running off the freeway and into vehicles occupying the space. (2 RT 569-577; 3 RT 641, 645, 649-652, 655; see also 2 RT 561; 3 RT 845-846.) In addition, the uncontradicted evidence established that even absent the "Emergency Parking Only" sign, vehicles were permitted to stop on or next to the paved shoulder for emergency purposes; had Caltrans wanted to eliminate all stopping or parking in the area, it could have installed a no-stopping or no-standing sign. (2 RT 468, 471-472, 574; 3 RT 646, 847-848.)

Over Ralphs' objection, the trial court allowed plaintiffs' accident reconstruction expert, Robert Anderson, to testify, contrary to eyewitness testimony and plaintiff's own human factors expert's testimony, that when Cabral hit Ralphs' trailer, Cabral was awake and alert; he was braking, his vehicle was in a left turn and would have returned safely to the freeway had the tractor-trailer not been in its path. (2 RT 516-518, 527-529, 539-540, 542-543, 545.)

To reach his conclusion, Anderson relied on a notation, in part of a CHP report not admitted at trial, that two tire marks found at the accident site were made by Cabral's pickup. (1 RT 117, 261-262; 2 RT 303-305, 311-312, 506-511, 541; 4 RT 913-916; AA 14-22, 213.) The officer who made the notation did not testify at trial, and the only officer who did testify regarding preparation of the CHP report admitted that he had no independent basis to believe that the marks were actually from Cabral's vehicle. (1 RT 246, 290-292; 2 RT 314-315, 541-542.) Nevertheless, Anderson concluded that Cabral was turning left and returning to the freeway when he hit Ralphs' trailer, because that was the only explanation

that made sense if the marks were made by Cabral's vehicle. (2 RT 508-513, 541.)[5]

The jury returned a verdict for plaintiff, but found that Cabral's negligence was 90% responsible for his death. (AA 47-49, 51-54.) The total net award to plaintiff was $475,298.40. (AA 53.) The trial court denied Ralphs' motions for judgment notwithstanding the verdict and for new trial. (AA 99-104, 106-112.)

The Court of Appeal held that Ralphs was entitled to judgment notwithstanding the verdict for three independent reasons: (1) Ralphs' driver, Horn, owed no legal duty to Cabral (Opn. 11-19); (2) Horn's alleged negligence did not proximately cause the collision (Opn. 19-24); (3) the trial court prejudicially erred in admitting Anderson's expert testimony on causation (Opn. 24-30).

LEGAL DISCUSSION

I. THE PETITION SHOULD BE DENIED BECAUSE IT FAILS TO ADDRESS A DISPOSITIVE ISSUE.

Plaintiff's petition focuses on the Court of Appeal's holdings that Ralphs' driver, Horn, owed no duty to Cabral and that Horn's alleged negligence did not proximately cause the collision. But the Court of Appeal also held that Ralphs was entitled to judgment notwithstanding the verdict based on another, wholly independent ground: the trial court abused its discretion in admitting the testimony of plaintiff's accident reconstruction expert, Anderson, because it lacked foundation and was pure speculation,

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[5] Contrary to Anderson's opinion, Ralphs' accident reconstruction expert testified that the marks could not have been made by Cabral's pickup, and that Cabral could not have been turning left when he hit the big rig. (3 RT 900; 4 RT 901-902.)

and thus could not constitute substantial evidence of causation (viewed either by itself or with the circumstantial evidence). Thus, there was no substantial evidence that Horn's alleged negligence was the cause-in-fact of Cabral's injuries. (Opn. 24-30.)

Plaintiff does not address this issue, other than mentioning in passing that the dissenting justice believed that Anderson's testimony was sufficient to go to the jury. (Petn. 8, 12.) Plaintiff does not even attempt to explain how the Court of Appeal's decision on this point presents an important issue of law, nor does she identify any conflict of authority requiring this Court's review as required by California Rules of Court, rule 8.500(b)(1).

Indeed, the Court of Appeal's decision on this issue is unremarkable. The Court of Appeal held that the trial court abused its discretion in admitting Anderson's expert opinion testimony because the opinion depended on facts never established at trial. (Opn. 24-30.) Specifically, Anderson relied on an indication in a CHP report that two tire marks found at the accident scene came from Cabral's vehicle, and concluded, based on that assumption, that Cabral was braking and attempting to return to the freeway when he hit Ralphs' big rig. (2 RT 506-513, 519, 527-529, 531, 539-543, 545.) But the relevant parts of the CHP report were not admitted at trial, and there was no other evidence to support Anderson's assumption that the tire marks came from Cabral's vehicle. (See 1 RT 117; 2 RT 303, 311-312; AA 14-22, 125, 154, 168-172, 213; see also 1 RT 246, 290-292; 2 RT 314-315.) There is ample, uniform authority, including from this Court, that an expert's "assumption of facts contrary to the proof destroys the opinion." (E.g., *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338-339; *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["'[l]ike a house built on sand, the expert's opinion is no better than the facts on which it is based'"]; *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743; see also

Opn. 24-25, 27-30.) Moreover, the Court of Appeal's analysis of this issue was specific to the facts of this case and presents no larger issue warranting review.

In short, even if this Court were to grant review and decide the two issues identified by plaintiff in her favor, Ralphs would still be entitled to judgment notwithstanding the verdict. This Court should not grant review to render a purely advisory opinion by deciding non-dispositive issues. Nor is there any need for this Court to decide a purely fact-specific question that involves no novel legal issue.

II. THE PETITION SHOULD BE DENIED BECAUSE PLAINTIFF HAS IDENTIFIED NO CONFLICT OF AUTHORITY ON AN IMPORTANT ISSUE OF LAW WARRANTING REVIEW.

Plaintiff contends that this Court should grant review to correct the Court of Appeal's holdings that Ralphs' driver, Horn, owed no duty to Cabral and that Horn's alleged negligence did not proximately cause Cabral's injuries. But plaintiff has identified no conflict of authority or important, unsettled question of law warranting review. (See Cal. Rules of Court, rule 8.500(b)(1).)

Duty. The Court of Appeal held that under general negligence principles, Horn owed no duty to Cabral to avoid stopping in an "Emergency Parking Only" area near the freeway for nonemergency. (Opn. 11-19.) The court reasoned that "[a] reasonable person would not conclude that Horn's act of stopping on the side of the freeway, 16 feet from [the travel lanes], in the dirt area, would subject motorists using the freeway to an unreasonable risk of harm." (Opn. 13.) The court noted that thousands of motorists pass the area without incident during the time of Horn's stop (Opn. 13); there was no evidence of any similar accidents

occurring as a result of a vehicle stopped in the area (Opn. 14); there was no evidence of any unusual road conditions that would have caused Cabral to go off the road (Opn. 14); Horn's big rig was stopped in plain sight (Opn. 14); and the regulatory "Emergency Parking Only" designation meant that the area was a safe place to stop (Opn. 18). The court explained that the mere "fact that it is *possible* for a motorist to leave his or her lane on the freeway and strike something situated off the shoulder of the road, such as a defendant's vehicle, does not create a 'duty' on the part of the defendant to ensure a 'safe landing.' If it did, the defendant would be required to eliminate *all* possibilities of risk. This is simply not possible . . . . All that a defendant is required to do is to protect a plaintiff from all *reasonably foreseeable* risks." (Opn. 14, first and third emphases added, second emphasis in original.) Put differently, the court said, "[t]o expect that most people will drive with ordinary care or due caution is not negligence. Thus, the chance that chance that an unusual accident will occur is not the test of foreseeability." (Opn. 15.)

The court's analysis is not controversial, and plaintiff cites not a single case creating a conflict of authority. Indeed, no case has held that the mere fact that an unusual accident is possible or conceivable makes it legally "foreseeable" for purposes of determining the existence and scope of a duty of care. Rather, as the opinion notes, "vehicles stop along the side of the freeway every day for any number of reasons" – for example, for emergencies or because they are pulled over by a CHP officer. (Opn. 23.) In fact, the uncontroverted evidence here established that vehicles could legitimately park where Horn parked if they had emergencies. (Opn. 15; 2 RT 468, 471-472; 3 RT 646, 847-848.) Yet such vehicles apparently have no duty to avoid stopping next to the road simply because it is "possible" that a car could go off the road and hit them. (See *Whitton v. State of*

California (1979) 98 Cal.App.3d 235, 242-243 [the possibility of a collision is "no more . . . foreseeable to [an] officer than to any other user of the highway" and "cannot be eliminated"; thus, "[a]bsent some evidence of the officer's actual knowledge of some history that a particular place and . . . time an accident is likely to occur, . . . it is unjust to charge the officer with special foreseeability of such events"].) Moreover, this Court has held that absent a specific reason to think otherwise, it is not negligence to assume that people will follow the law and exercise due care. (*Richards v. Stanley* (1954) 43 Cal.2d 60, 69; see also *Whitton*, *supra*, 98 Cal.App.3d at pp. 244-245.) This Court has also held that a defendant's conduct does not subject a plaintiff to an "unreasonable risk of harm," and the defendant therefore owes the plaintiff no duty, if the risks created by the defendant's conduct is no greater than if the defendant does something he or she is legally entitled to do. (*Richards*, *supra*, 43 Cal.2d at p. 65 [driver who parked car with key in ignition owed no duty to person injured by negligent driving of thief who stole car, partly because the risk was no greater than that created if defendant lent her car to another person, which she could legally do absent reason to believe that person was an incompetent driver].)

Plaintiff contends that the Court of Appeal's decision "cannot be squared with Caltrans Traffic Manual," which states that "[a]n area clear of fixed objects adjacent to the roadway is desirable to provide a recovery zone for vehicles that have left the traveled way." (Petn. 9.) Plaintiff never raised this contention before the Court of Appeal, so it is improper for her to raise it before this Court. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 381 [petitioner "abandoned these contentions by failing to raise them in its arguments before the Court of Appeal"]; Cal. Rules of Court, rule 8.500(c)(1) ["on petition for review the Supreme Court normally will not consider an issue

that the petitioner failed to timely raise in the Court of Appeal"].) In any case, the manual's specifications merely provide guidelines or recommendations; they do not establish a standard of care. (See *Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 725, 738 [Caltrans manual's specifications for median barriers "do not reflect a determination that the lack of a barrier creates a dangerous condition"]; *Wyckoff v. State of California* (2001) 90 Cal.App.4th 45, 56-57.) Indeed, the manual does not say that a clear area is required, but only that it is "desirable." And anyone who has driven on California freeways knows that often there is *not* 30 feet of clear space next to the outermost travel lanes; for example, there may be a wall, a concrete median, or a construction barrier right next to the travel lane.[6]

Proximate cause. The Court of Appeal held, as an alternative ground for judgment notwithstanding the verdict, that Horn's alleged negligence did not proximately cause the collision because (1) Horn's conduct was not the cause-in-fact of Cabral's injuries, and (2) as a policy matter, "[p]laintiff [could not] recover against Ralphs based on the facts in the record." (Opn. 19-24.) The court's analysis of cause-in-fact is based mainly on its determination that the testimony of plaintiff's expert, Anderson, was improperly admitted and did not constitute substantial evidence of causation. As discussed above (§ I, *ante*), this issue presents no ground for review.

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[6] Plaintiff also asserts in passing that Vehicle Code section 21718 prohibits parking next to freeways, although she does not contend that the statute creates a conflict in the law. (Petn. 2, 13.) Again, plaintiff did not raise this contention in the Court of Appeal and thus cannot raise it here. (*Associated Builders & Contractors, Inc., supra*, 21 Cal.4th at p. 381.) Moreover, section 21718 is irrelevant because plaintiff explicitly repudiated a negligence per se theory and proceeded on a general negligence theory. (See Opn. 11.)

As to the court's policy analysis, plaintiff asserts that the Court of Appeal's opinion conflicts with *Thomson v. Bayless* (1944) 24 Cal.2d 543, in which this Court noted that "[t]he violation of a parking regulation *may be* the proximate cause of an accident where the unlawfully parked vehicle is struck by another vehicle." (*Id.* at p. 548, emphasis added; Petn. 3, 12.) As she herself notes, plaintiff never cited this case to the Court of Appeal. (Petn. 12, fn. 2.) To the contrary, plaintiff explicitly argued that cases addressing proximate cause in the context of negligence per se – which would include *Thomson* – are inapplicable to her lawsuit for ordinary negligence. (Respondent's Brief 31-32.) Thus, it is inappropriate for her to rely on *Thomson* now. (*Associated Builders & Contractors, Inc., supra*, 21 Cal.4th at p. 381.)

Moreover, the Court of Appeal's opinion does not conflict with *Thomson*. The opinion here nowhere suggests that the violation of a parking regulation *cannot* be the proximate cause of an accident if the unlawfully parked vehicle is struck by another vehicle, or that the question should never go to the jury; it simply holds that "Plaintiff cannot recover against Ralphs *based on the facts in the record*." (Opn. 22.) Specifically, the Court of Appeal held that Horn's stopping in the dirt area past the shoulder, 16 feet from the far right travel lane, in an area where vehicles could legitimately park, did not proximately cause Cabral's injuries from a freak accident in which he negligently and unexpectedly turned right from the number 3 lane (of 4 lanes) on the interstate, and crossed an entire traffic lane and the paved shoulder before crashing into the big rig at full freeway speed. (Opn. 23.) The Court of Appeal legitimately concluded that on these facts, the connection between Horn's alleged improper parking and

Cabral's injuries was too attenuated to constitute proximate cause.[7] The facts in *Thomson* were far different: there, defendant parked directly on a freeway, in a travel lane – an area where traffic was proper and expected – in violation of a statute expressly "designed to protect persons traveling *on* the highway." (*Thomson, supra*, 24 Cal.2d at pp. 545-546, emphasis added.) Accordingly, the Court held that the issue of proximate cause could be submitted to the jury. (*Id.* at pp. 548-549.)

The Court of Appeal's opinion here is consistent with ample case law – typically involving allegations of negligence per se – holding that a defendant's improper parking does not proximately cause an accident where the collision would have occurred even if the vehicle was properly parked and the parking restriction was not intended to protect the injured person from the type of accident that occurred.

For example, in *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, defendant parked his car in a loading zone for most of a day, in violation of an ordinance prohibiting parking there for over 24 minutes. Plaintiff, a bicyclist, was hit by a passing car as she swerved around defendant's car. (*Id.* at p. 348.) The court held that as a matter of law, defendant's overparking did not proximately cause plaintiff's injuries, because plaintiff "would have had to swerve around the car in exactly the same manner whether it had been parked there five minutes or five hours." (*Id.* at p. 354.) The court further noted, distinguishing *Thomson*, that the ordinance

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[7] The court's analysis of the policy aspect of proximate cause is essentially another way of stating that Horn owed no duty to Cabral to prevent an unforeseeable, freak accident, even if that accident was possible or conceivable. Courts have recognized that "'[a]s a practical matter, the[] elements [of negligence] are interrelated," so that "the question whether an act . . . . will be considered a breach of duty or a proximate cause of injury necessarily depends upon the scope of the duty imposed. . . .'" (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1211, citation omitted.)

was designed to provide access for loading and unloading, not to maintain an unobstructed lane for safe passage of traffic. (*Id.* at pp. 351-352.)

Other cases are in accord. (*Bentley v. Chapman* (1952) 113 Cal.App.2d 1, 4 [as a matter of law, defendant's parking in violation of ordinance prohibiting parking for longer than one hour between certain hours without a permit could not proximately cause injuries to passenger of car whose driver fell asleep and drove into defendant's truck, because the area "could legally . . . be continuously occupied by parked cars"]; see also *Arthur v. Santa Monica Dairy Co.* (1960) 183 Cal.App.2d 483, 487 [trier of fact properly found that defendant's illegal parking did not proximately cause collision, where driver of car in which plaintiff was riding was not looking at the street and "would have run into anything at that location, legally or illegally parked"].)

In short, the Court of Appeal's decision here creates no conflict with *Thomson* or any other decision of this Court or the lower appellate courts.

CONCLUSION

As shown above, plaintiff's petition fails to demonstrate a conflict in the law or an important unsettled question warranting review. The petition should be denied.

Dated: January 6, 2010

Respectfully submitted,

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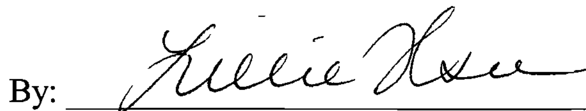
By: 
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CERTIFICATE

Pursuant to California Rules of Court, 8.204(c), I certify that this Answer to Petition for Review contains 3,542 words, not including the tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: January 6, 2010

BELL, ORROCK & WATASE, INC.
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **January 7, 2010**, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties in this action by serving:

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Executed on **January 7, 2010,** at Los Angeles, California.

(✘) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sharon Zelina