SUPREME COURT COPY

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Supreme Court Case No. S178799

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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MARIA CABRAL,

Plaintiff and Respondent,

vs.

RALPHS GROCERY COMPANY,

Defendant and Appellant.

SUPREME COURT
FILED

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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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MISCELLANEOUS

INTRODUCTION

Adelelmo Cabral lost control of his pickup truck while traveling full speed on the freeway. The pickup swerved back and forth, then turned right sharply, crossed over a full lane of traffic and the paved shoulder, and hit Ralphs Grocery Company's tractor-trailer, which had been stopped for two minutes in the dirt by an "Emergency Parking Only" sign. The crash killed Cabral.

Cabral's wife and children (collectively, "plaintiffs") sued Ralphs and its driver, Hen Horn, for wrongful death, alleging that Horn's negligence in stopping in an emergency parking area for a nonemergency caused Cabral's death. The jury returned a verdict for plaintiffs, but found Cabral's negligent driving 90% responsible for the accident.

The Court of Appeal held that Ralphs was entitled to judgment notwithstanding the verdict for three independent reasons: (1) Horn owed Cabral no legal duty to prevent the accident; (2) Horn's alleged negligence did not proximately cause the accident; and (3) the trial court prejudicially erred in admitting the testimony of plaintiffs' causation expert.

The Court of Appeal was correct.

Duty. Ralphs cannot be held liable for negligence because Horn owed Cabral no duty to avoid stopping near the freeway for a nonemergency. As the Court of Appeal reasoned, Horn's conduct did not create a foreseeable, unreasonable risk of harm. Horn stopped in the dirt past the shoulder, 16 feet from the slow lane, beyond any area where passing vehicles might ordinarily travel. There was nothing particularly dangerous about the location; to the contrary, the "Emergency Parking Only" sign indicated the area was safe for parking and plaintiffs' own experts testified that drivers could stop there safely in emergencies. Moreover, the risk Horn created by stopping beyond the freeway shoulder

for a nonemergency was no greater than if he or another driver had parked there for an emergency – which they could do safely, lawfully and nonnegligently.

Plaintiffs contend the accident was "foreseeable," essentially because everyone knows that cars can and do go off the road anywhere, so it is foreseeable that a car could go off the road and hit an object in this particular spot. But an accident is not "foreseeable" for purposes of imposing a legal duty simply because it is conceivable. Rather, to hold an accident "foreseeable" in any meaningful sense contemplated by basic tort liability principles, this court and others have required evidence of specific circumstances that make an accident in a particular place likely to happen. (E.g., *Richards v. Stanley* (1954) 43 Cal.2d 60, 63, 65-66.) No such circumstances existed here.

The Court of Appeal also correctly held that public policy considerations precluded imposing a duty on Horn to avoid stopping in the dirt near the freeway to provide a "safe landing" for Cabral. First, the connection between Horn's conduct and Cabral's accident was simply too attenuated. Horn's nonemergency stop did not increase the risk to passing motorists using the freeway with due care, nor did it increase the risk that Cabral would go off the road – it had no connection to the accident other than coincidence. Indeed, imposing a duty would give plaintiffs a windfall: Because Cabral happened to run into a vehicle stopped for an alleged improper reason that had no effect in bringing about the accident – when he could just as easily have hit another vehicle parked in the same manner for a proper reason, foreclosing a negligence claim – Cabral could reach into a deep pocket to compensate himself for his own negligence. Such an unfair result defies common sense and public policy.

Moreover, plaintiffs have framed their case as one for ordinary negligence and essentially urge this court to establish a "safe landing" next to every freeway, with potential liability for any vehicle that violates that zone, simply because it is "foreseeable" that cars may go off the road. There is nothing to distinguish this case from *any* situation where a vehicle parks near a roadway or a landowner places a fixed object near a road, and an errant vehicle – whether a drunk, speeding teenager or a shift worker who simply falls asleep – goes off the road and hits it, resulting in an unbounded expansion of liability untethered to fault.

Proximate cause. The Court of Appeal also correctly determined that as a matter of law, Horn's nonemergency stopping near the freeway did not proximately cause the accident. Numerous courts have held that improper parking cannot be deemed a legal cause of injury if the same injury could have occurred had the vehicle been parked properly. (E.g., *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354-355.) Here, Horn or any other driver could park safely, legally and nonnegligently in the dirt, 16 feet from the freeway, in the designated "Emergency Parking Only" area for an emergency. In that case, Cabral would still have hit the vehicle and been injured in exactly the same way.

To extricate themselves from these proximate-causation principles, articulated in cases involving negligence per se, plaintiffs assert that Horn owed Cabral a duty based *not* on the regulatory "Emergency Parking Only" sign – which was intended to keep a safe area available for emergencies, and not to protect motorists like Cabral who go off the road – but on their expert's testimony that even absent the sign, nonemergency parking next to freeways is prohibited to protect motorists who go off the road. Because this de facto emergency-only rule was intended to protect persons like

Cabral, plaintiffs argue, nothing prohibits Horn's nonemergency parking from being deemed a proximate cause of the accident.

Plaintiffs cannot have it both ways. The doctrine of negligence per se allows a plaintiff to rely on a statute or regulation (equivalent to the regulatory "Emergency Parking Only" sign here) to create a duty, but only if the statute's purpose was to protect the class of persons including the plaintiff. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285.) Plaintiffs cannot satisfy that requirement here, so they have substituted expert testimony mirroring the sign's emergency-only restriction – effectively attempting to invoke a presumption of negligence based on a statutory violation, as in negligence per se, without having to satisfy that doctrine's other requirements. But the regulatory "Emergency Parking Only" sign is the guest who will not leave – it exists whether plaintiffs rely on it or not; it establishes that the place where Horn stopped, in the dirt 16 feet away from the travel lanes, was safe; and it highlights that there was no connection between Horn's nonemergency stopping and Cabral's accident, other than coincidence. Coincidence does not equal proximate cause.

Plaintiffs' expert testimony on causation. The Court of Appeal correctly found that the trial court erroneously admitted plaintiffs' expert testimony on causation, and without that evidence there was no substantial evidence to support the verdict. Plaintiffs' accident reconstruction expert, Robert Anderson, testified that when Cabral hit Ralphs' tractor-trailer, he was turning left and would have returned safely to the freeway but for the tractor-trailer. To reach this conclusion, Anderson ignored eyewitness testimony and assumed, based on a notation in a CHP accident report never admitted at trial – made by an officer who did not testify – that tire marks found at the scene were made by Cabral's vehicle. But the jury heard no

evidence that the marks actually were from Cabral's vehicle. Without such evidence, Anderson's testimony lacked foundation and was unbridled speculation, inadmissible and insufficient to support the verdict.

The Court of Appeal's decision was correct and should be affirmed.

STATEMENT OF FACTS[1/]

Adelelmo Cabral was driving in the eastbound number 3 (of 4) lane on Interstate 10 in San Bernardino County when he lost control of his Dodge Ram pickup truck. (1 RT 254; 2 RT 385; 3 RT 764, 766-767.)[2/] The pickup swerved back and forth, then abruptly turned right as if attempting to exit the freeway. (3 RT 765-766.) Traveling at 50 to 70 mph,[3/] the pickup crossed lane 4 and the paved shoulder before hitting Ralphs' big rig tractor-trailer, which was stopped in the dirt beyond the shoulder, 16 feet from the freeway's far right travel lane, near a regulatory R45 "Emergency Parking Only" sign.[4/] (1 RT 249, 254, 259; 2 RT 386, 469, 520, 533, 562; 3 RT 637, 764-768, 844; AA 170.) The driver, Ralphs' employee, Hen

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

[2/] "RT" denotes the reporter's transcript, "AA" the appellant's appendix, "RB" the respondent's brief, "OBOM" the opening brief on the merits, and "ORJN" Ralphs' opposition to plaintiffs' request for judicial notice.

[3/] Plaintiffs' expert opined that Cabral was traveling 60 mph, plus or minus 10 mph. (2 RT 518, 531, 545.)

[4/] Plaintiffs incorrectly suggest Horn parked *on* the shoulder. (OBOM 4.)

Contrary to plaintiffs' assertion, Vehicle Code section 21718 does not prohibit parking "alongside freeways," but only "upon" freeways – i.e., in the travel lanes. (OBOM 1, 5, 29; Veh. Code, § 21718, subd. (a); *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1184 [discussing predecessor statute]; *Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 184.)

Horn, had stopped two minutes earlier to eat something.[5/] (1 RT 250, 253, 283; 2 RT 324, 384-385.) Cabral was killed. (2 RT 301.)

STATEMENT OF THE CASE

A. The Lawsuit.

Cabral's wife and children sued Ralphs for wrongful death, alleging Horn's negligence in stopping on the shoulder in an "Emergency Parking Only" area for nonemergency purposes, violating various statutes and regulations, caused Cabral's death. (AA 2-5.) Ralphs cross-complained for property damage to its trailer. (AA 9-11.)

At trial, after opening statements, and again at the close of plaintiffs' evidence, Ralphs moved for a nonsuit on the grounds that Horn violated no duty to Cabral and his alleged negligence did not cause Cabral's death. (AA 37, 43-46; 1 RT 233-234.) The trial court denied the motions. (1 RT 234, 238-239; 3 RT 689-691, 695, 699.)

B. Testimony Regarding the "Emergency Parking Only" Area.

Syed Raza, Deputy Director of Operations for California Department of Transportation (Caltrans) Region 8, which included the accident site, testified that the sole purpose of the regulatory R45 "Emergency Parking Only" sign was to identify an area where vehicles with emergencies could park safely. (3 RT 641, 651-652, 655; see also 2 RT 561; 3 RT 845-848.) Several witnesses, including plaintiffs' experts, concurred that no statute or

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

Contrary to plaintiffs' assertion (OBOM 1, 4), Horn testified he had never previously parked in the area. (2 RT 386, 391-392, 410-414.)

other written standard defines "emergency"; rather, "emergency" parking is permitted if a driver feels incapacitated or believes he is a danger to motorists for any reason, including mechanical problems or a need to eat. (1 RT 292-293, 296-299; 2 RT 468, 470-472, 576, 587; 3 RT 654, 727, 743-745.)

Raza testified the R45 sign was not intended to protect negligent drivers who leave the roadway and run into vehicles within the designated parking area. (3 RT 645; see also 3 RT 845-848.) In addition, as plaintiffs' traffic engineering expert also acknowledged, a vehicle parked in the area created no hazard to motorists using the freeway with due care. (3 RT 650-651, 845-848; see 2 RT 576-577.) Indeed, during a 10-year period before the incident (and even before the R45 sign was installed) there were no accidents involving vehicles running off the freeway and into vehicles occupying the space. (2 RT 569-570; 3 RT 649.)

Plaintiffs' truck driving expert and Ralphs' traffic engineering expert both testified that, even absent the "Emergency Parking Only" sign, vehicles are permitted to stop on the paved shoulder (or next to it) for emergency purposes. (2 RT 468, 471-472; 3 RT 847-848; see also 2 RT 354.) Had Caltrans wanted to eliminate all stopping in the area, it could have installed a no-stopping or no-standing sign. (2 RT 574; 3 RT 646-647, 847.)

C. Testimony Regarding the Accident.

Juan Perez, who was driving a big rig behind Cabral before the accident, testified that Cabral was driving 70 to 80 mph, faster than surrounding traffic, and appeared intoxicated or sleepy. (1 RT 284; 3 RT 765, 767, 771, 775, 780-781; see also 1 RT 284-285; AA 130.) Perez saw Cabral's pickup swerving back and forth before it suddenly turned right

from lane 3 as if trying to exit the freeway, crossed lane 4 in front of another big rig, left the roadway and hit Ralphs' tractor-trailer. (2 RT 454; 3 RT 765-768; see also 1 RT 285-287.) The brake lights and turn signals on Cabral's vehicle did not activate, nor was there any indication Cabral tried to slow down or avoid the tractor-trailer. (1 RT 286-288, 290, 299; 2 RT 300-301, 314; 3 RT 768.)

Officer Migliacci, the primary investigating officer for the accident, testified that the CHP's investigation of the accident – which included interviewing another eyewitness – revealed the same facts. (1 RT 286-288, 290, 299; 2 RT 300-301, 314; see also AA 130.) The evidence further established that there were no unusual conditions that would cause Cabral to leave the roadway. (1 RT 273-274; 3 RT 766, 840-841.) The CHP's investigation concluded that Cabral's unsafe, illegal turn from lane 3 was the accident's sole cause. (1 RT 271, 274-276; 2 RT 302; see also AA 131.)

Plaintiffs' human factors expert opined that Cabral was fighting drowsiness and fell asleep, which caused him to leave lane 3. (2 RT 600-601; 3 RT 607.) Ralphs' human factors expert opined that an undiagnosed medical condition caused Cabral to leave the freeway. (2 RT 490; 3 RT 723.)

D. Testimony Regarding Cabral's Attempt to Return to the Freeway.

Before trial, the trial court granted Ralphs' motions in limine to exclude (1) a CHP accident report, except for photographs, physical measurements and a diagram of the scene, and (2) any reference to the excluded portions of the report, including opinions regarding the accident. At trial, a single page from the CHP report containing physical

measurements and a diagram of the accident scene was admitted (the factual diagram). (2 RT 311; AA 167-168.)

Before trial, Ralphs also moved to exclude testimony by plaintiffs' accident reconstruction expert, Robert Anderson, on the grounds that his opinions were speculative, lacked foundation, and were unduly prejudicial, confusing and misleading. (AA 23-32, 35-36; 1 RT 176, 178-181, 193-200.) The trial court denied the motion. (1 RT 192; AA 213.) Over the same objections at trial, the court allowed Anderson to testify, contrary to Perez's eyewitness testimony and plaintiffs' own human factors expert's testimony, that when Cabral hit Ralphs' trailer, Cabral was awake and alert; 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 527, 529, 539-540.) Anderson further testified, over objection, that based on eyeballing the damage to Cabral's vehicle, Cabral was going at most 60 mph – plus or minus 10 mph – and braking when he hit the trailer. (2 RT 516-518, 527-528, 531, 542-543, 545.)

To reach his conclusion that Cabral was awake and returning to the freeway, Anderson relied on the factual diagram and a CHP photograph. Over Ralphs' objection – and contrary to its ruling excluding the CHP report's contents – the trial court permitted Anderson to testify that two marks recorded on the factual diagram were labeled elsewhere in the CHP report as tire marks from Cabral's pickup truck. (1 RT 261-262; 2 RT 303-305, 312, 506-511; 4 RT 913-916.)

Officer Migliacci was the only witness who testified regarding preparation of the CHP report. (1 RT 245-246.) He testified he had not taken the measurements on the factual diagram or the photographs and had no basis to believe the marks were actually from Cabral's vehicle, other than that the officer who had taken the measurements – and who did not

testify – had labeled them that way. (1 RT 246, 290-292; 2 RT 314-315.) No one had compared the treadmark with the pickup's tires or found any other physical evidence indicating the marks actually were from that vehicle. (1 RT 290-291; 2 RT 541-542.)

Despite this testimony, Anderson concluded that Cabral was turning left and attempting to return 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.)

Contrary to Anderson's opinion, Ralphs' accident reconstruction expert, Fred Cady, testified that the marks could not have been made by Cabral's pickup, Cabral could not have been turning left immediately before the impact, and any opinion on what would have happened to Cabral's vehicle absent Ralphs' tractor-trailer would be speculative because there were too many unknowns – for example, the pickup could have hit bumps or ruts, or rolled over. (3 RT 900; 4 RT 901-902, 904-912.)

E. Jury Verdict.

The jury returned a verdict for plaintiffs on the complaint, and for Ralphs on its cross-complaint. (AA 47-49, 51-54.) The jury found both Horn and Cabral were negligent, each one's negligence was a substantial factor in causing plaintiffs' harm, and Cabral's negligence was a substantial factor in causing damage to Ralphs' trailer. (AA 47-48; 51-52.) The jury assessed 90% responsibility for the accident to Cabral and 10% to Horn. The jury awarded plaintiffs economic damages totaling $470,234.00 and non-economic damages totaling $4,330,000.00; it awarded Ralphs $5,250.00 for the damage to its trailer. (AA 49.) The trial court adjusted the awards to reflect the jury's fault allocation, resulting in a net award of

$475,298.40 to plaintiffs. (AA 53.) The court entered judgment against Ralphs on that amount. (AA 53-54.)

F. Posttrial Motions and Appeal.

Ralphs moved for judgment notwithstanding the verdict, on the grounds that Horn owed Cabral no duty and Horn's negligence did not cause Cabral's death. (AA 77, 82-86.) Ralphs also moved for a new trial. (AA 59-76.) The trial court denied both motions. (AA 99-104, 106-112.) Ralphs appealed. (AA 114.)

G. The Court of Appeal's Decision.

In a 2-1 decision, the Court of Appeal reversed the judgment and remanded with directions to grant Ralphs' motion for judgment notwithstanding the verdict. (*Cabral v. Ralphs Grocery Company* (2009) 179 Cal.App.4th 1, 23.) The court based its decision on three independent grounds: (1) Horn owed Cabral no duty to avoid stopping near the freeway (*id.* at p. 11); (2) there was no substantial evidence that Horn's alleged negligence proximately caused the collision (*id.* at p. 16); and (3) the trial court erred in admitting plaintiffs' expert's opinion that Cabral was attempting to return to the freeway when he hit Ralphs' tractor-trailer, and thus there was no substantial evidence of causation (*id.* at pp. 19-23).

STANDARD OF REVIEW

Judgment notwithstanding the verdict. Judgment in favor of a defendant notwithstanding the verdict is proper where the evidence, viewed in the light most favorable to the plaintiff, establishes that "'there is no substantial evidence to support the verdict.'" (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

Negligence and duty. In negligence cases, the existence and scope of a legal duty of care are questions of law reviewed de novo. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.)

Expert testimony. A trial court's decisions on the reliability of the data underlying an expert's opinion, and whether that expert should be allowed to testify regarding that opinion, are reviewed for abuse of discretion – "subject to the limitations of legal principles . . . and to reversal on appeal where no reasonable basis for the action is shown." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1522-1523.)

LEGAL DISCUSSION

I. THE COURT OF APPEAL CORRECTLY HELD THAT A DRIVER OWES NO DUTY TO AVOID STOPPING NEXT TO A FREEWAY SO AS TO PROVIDE A "SAFE LANDING" FOR PASSING MOTORISTS WHO GO OFF THE ROAD.

Actionable negligence requires (1) a legal duty "'to use due care toward an interest of another that enjoys legal protection against unintentional invasion,'" (2) a breach of that duty, and (3) the breach as the proximate or legal cause of the resulting injury. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614; *Victor v. Hedges* (1999) 77 Cal.App.4th 229, 238.) Thus, there can be no liability unless the defendant owes a duty of care "'to the person injured, or to a class of which he is a member.'" (*Richards, supra,* 43 Cal.2d at p. 63; see also *Victor*, *supra*, 77 Cal.App.4th at pp. 238-239.)

The concept of "duty" is "a legal device" created by courts "to curtail the feared propensities of juries toward liberal awards." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) Thus, "duty is not an immutable fact of nature but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6, internal quotation marks omitted; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) The essential question in analyzing duty is "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." (*Dillon*, *supra*, 68 Cal.2d at p. 734.)

In particular, this court and others have repeatedly established that a defendant owes a duty only to avoid creating a foreseeable, unreasonable risk of harm:

> [T]he obligation to refrain from . . . particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.

(*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 779, internal quotation marks omitted; see also *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 184-185; *Hergenrether v. East* (1964) 61 Cal.2d 440, 444-445; *Scott v. Chevron USA* (1992) 5 Cal.App.4th 510, 515-516.)

Here, the Court of Appeal correctly determined that Horn owed Cabral no duty to avoid stopping near the shoulder, 16 feet from the freeway, to provide a "safe landing" on the off chance Cabral might lose control of his car and go off the road. This is because (1) the accident was not foreseeable, and Horn's conduct did not create an unreasonable risk of harm, simply because it was possible a vehicle could go off the road, and (2) public policy precludes imposing such a duty.

A. The Court Of Appeal Correctly Determined That the Accident Was Not Foreseeable, and Horn's Conduct Did Not Create an "Unreasonable Risk of Harm" to Cabral, Merely Because It Was Conceivable That a Vehicle Could Go off the Road.

1. Horn's conduct did not create a foreseeable, unreasonable risk.

The foreseeability of harm "has become the chief factor" in determining the existence and scope of a duty. (*Scott*, *supra*, 5 Cal.App.4th at p. 515; see also *Ann M.*, *supra*, 6 Cal.4th at p. 676.) "'[T]o limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others

which to defendant at the time were reasonably foreseeable.'"[6] *(Bryant, supra*, 32 Cal.App.4th at p. 778.)

Like duty analysis in general, the question of foreseeability is interlaced with policy considerations. The court's task "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard, supra*, 41 Cal.App.3d at p. 572, fn. 6, original emphasis.)

Here, the Court of Appeal properly concluded there was no evidence a reasonably prudent driver would have foreseen that a car would leave the freeway and crash into his vehicle if he stopped near the shoulder, 16 feet from the slow lane, where Horn stopped. (1 RT 254; 2 RT 386, 469, 533, 562; 3 RT 767-768, 844; AA 170; see also 1 RT 249, 259; 3 RT 637.) Rather, the undisputed evidence established that the "Emergency Parking Only" sign was intended to identify a safe place to park for emergencies. (2 RT 561; 3 RT 641, 645, 651-652, 655, 845-848.) There was no time limit, nor any requirement that the area ever remain unoccupied. Thus, the sign ostensibly meant Caltrans had determined the area was always a safe place to stop in an emergency, without an unreasonable risk of being hit by other vehicles. Had Caltrans determined otherwise, it could have installed a no-stopping or no-standing sign. (2 RT 574; 3 RT 646; see also 3 RT 847.) Indeed, plaintiffs' own experts testified that even without the sign, drivers with emergencies could – and should – stop on the shoulder for their own safety and that of other motorists. (2 RT 468, 471-472; 3 RT 847-848; see

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[6] "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law." (*Ann M., supra*, 6 Cal.4th at p. 678.)

also 2 RT 354.) Thus, the area was a safe place to stop for an emergency – and a safe place to stop, period. If a vehicle stopped for a nonemergency, it was no less safe.[7/]

Indeed, there was no evidence this location was particularly dangerous to motorists. Undisputed evidence established that during the 10-year period before Cabral crashed, there were no accidents involving motorists running off the freeway and into vehicles occupying the area. (2 RT 569-570; 3 RT 649.) Nor were there any obstacles or unusual road conditions that would cause a motorist to go off the road. (1 RT 273-274; 3 RT 766, 840-841.) Indeed, plaintiffs' own traffic engineering expert acknowledged that parking in the area created no hazard to drivers using the freeway with due care. (3 RT 650-651, 845-848; see 2 RT 576-577.) Thus, it was not foreseeable that Cabral would go off the road and hit Ralphs' tractor-trailer. (Cf. *Victor*, *supra*, 77 Cal.App.4th at pp. 239, 243-244 ["an ordinarily prudent person" would not foresee that he "was subjecting plaintiff to an unreasonable risk of harm" by taking her to the sidewalk near a construction zone, where defendant was unaware of prior accidents or hazardous road conditions that would make a vehicle leave the road]; *Arthur v. Santa Monica Dairy Co.* (1960) 183 Cal.App.2d 483, 489 ["it is not ordinarily to be expected" that car drivers "will run head-on into cars ahead of them which are in plain sight and have been long stopped"].)

[7/] Plaintiffs contended below, and hint here, that Horn was negligent in stopping based on their expert's testimony that parking a tractor-trailer near the freeway created a "dangerous roadside obstacle." (RB 21; AA 91, 94-95; 2 RT 562-564, 578; OBOM 8, 21-22, 25.) But a vehicle stopped for an emergency would, by plaintiffs' expert's definition (2 RT 562, 578), create just as much a "dangerous roadside obstacle" as Ralphs' tractor-trailer – as would a Volkswagen Beetle – rendering that term meaningless.

Plaintiffs contend that it is foreseeable "freeway motorists may leave the traveled roadway and strike objects parked alongside the road." (OBOM 19-21; see *Cabral*, *supra*, 179 Cal.App.4th at p. 12.) Essentially, plaintiffs assert the accident here was foreseeable because vehicles can and do go off the road anywhere – i.e., because it is *conceivable* a motorist could go off the road and hit an object in this particular spot. But an accident is not "foreseeable" merely because it is conceivable or possible in the abstract. Rather, to hold an accident "foreseeable" for purposes of imposing a legal duty, there must be evidence of specific circumstances that make an accident in a particular location particularly likely to happen.

Whitton v. State of California (1979) 98 Cal.App.3d 235 is instructive. There, officers pulled over plaintiff for speeding and conducted sobriety tests on the highway shoulder next to the patrol car. A drunk driver ran into the patrol car, injuring plaintiff. (*Id.* at p. 239.) Plaintiff contended the officers were negligent as a matter of law because the collision was "foreseeable" and they had positioned her where she could be injured by it. (*Id.* at p. 241.)

The court rejected plaintiff's theory, noting that it amounted to "a liability-extending doctrine of 'risk in the air'" and would subject officers to "absolute liability . . . because any stop on the shoulder of a highway carries a risk of harm that a drunken driver will crash into the stopped vehicles." (*Id.* at p. 242.) The court noted the possibility of a collision was "no more . . . foreseeable to the officer than to any other user of the highway." (*Id.* at pp. 242-243.) Similarly, there was no evidence "any of the risks to plaintiff, . . . which are common to all users of the public area, was increased" by the officers' conduct. (*Id.* at p. 244.) Thus, "[a]bsent some evidence of the officer's actual knowledge of some history that *at that particular place and at that particular time* an accident is likely to

occur, . . . it is unjust to charge the officer with special foreseeability of such events." (*Id.* at p. 243, emphasis added.)

> The court observed that plaintiff's notion of "foreseeability" is not the foreseeability upon which the law of negligence is based . . . . When the law says a person substantially contributes to the injury, the law is dealing with responsibility based on reasonable expectations and a common-sense approach to fault not physics. [Citations.] . . . Therefore, even if the likelihood of being hit while . . . parked . . . near a freeway possibly can be calculated in terms of mathematical probabilities, such mathematic computation is immaterial.

(*Id.* at p. 243.)

In *Bryant, supra*, 32 Cal.App.4th 770, officers stopped defendant on the freeway shoulder for drunk driving, arrested her and called a tow truck to remove her vehicle. The tow truck driver was hit by a car while removing the vehicle; his family sued, alleging negligence. (*Id.* at pp. 774, 776-777.)

The court held the accident was unforeseeable and defendant owed decedent no duty to prevent it. (*Id.* at pp. 778-780.) The court reasoned that "[o]ther than making it more probable that decedent would be in the place in which the accident happened, [defendant's] consumption of alcohol did not make more probable the accident that occurred . . . . " (*Id.* at p. 780.) "Even without being intoxicated, . . . [defendant] might well have ended up by the side of the road and in need of a tow truck for any number of reasons . . . ." (*Id.* at p. 779.)

Both *Whitton* and *Bryant* concluded the mere fact cars go off the freeway and hit objects on the shoulder does not mean a particular accident is "foreseeable" for purposes of imposing a duty. Although those cases involved officers and a tow truck driver who arguably had a public

obligation that brought them to the freeway shoulder, the court's reasoning applies equally where the defendant's conduct is *not* mandated. In a line of cases involving vehicles parked with keys in the ignition, this court has established that the mere fact that theft and negligent driving may lead to accidents does not make such accident "foreseeable" so as to warrant imposing a duty to prevent it.

In *Richards*, *supra*, 43 Cal.2d 60, defendant Mrs. Stanley parked her car on a public street, unlocked with the key in the ignition. A thief stole the car and drove negligently, injuring plaintiff. Plaintiff sued for negligence. (*Id.* at pp. 61-62, 69.)

This court held the car owners owed plaintiff no duty. (*Id.* at p. 66.) The court rejected plaintiff's contention that Mrs. Stanley "created an unreasonable risk to persons on the street" because it was foreseeable that leaving the key in the car would lead to the theft and negligent driving. (*Id.* at p. 64.) The court reasoned that Mrs. Stanley left the car "in a position where it could harm no one" and created merely a *possibility* that the car would be stolen and driven. (*Id.* at p. 65.) Moreover, Mrs. Stanley had no reason to believe that any thief "would be an incompetent driver." (*Id.* at p. 66.) That risk, the court reasoned, is no greater than when a car owner lends her car to another, which she is legally entitled to do – and which does not create an "unreasonable" risk – absent reason to believe the borrower is an incompetent driver. (*Id.* at pp. 63, 65.) The court noted "special circumstances" might warrant a different result – for example, if Mrs. Stanley left her car "in charge of an intoxicated passenger," or "in front of a school where she might reasonably expect irresponsible children to tamper with it."[8/] (*Id.* at p. 66.)

[8/] See also *Avis Rent a Car System, Inc. v. Superior Court* (1993) 12 Cal.App.4th 221, 233 [car rental company's parking cars in negligently

This court elaborated on the "special circumstances" doctrine in *Richardson v. Ham* (1955) 44 Cal.2d 772, where a contractor left a 26-ton bulldozer parked atop a mesa, missing the locking component. Three young intoxicants started the bulldozer and abandoned it when they could not stop it, causing serious damage. Plaintiffs, whose persons or property were in its path, sued the contractor for negligence. (*Id.* at p. 774-775.)

This court held the incident was foreseeable and defendants owed plaintiffs a legal duty. (*Id.* at pp. 776-777.) The court reasoned that unlike cars, defendant's bulldozers had "aroused curiosity and attracted spectators" and "were attractive to children when left unattended." (*Id.* at p. 776.) Thus, it was reasonably foreseeable the bulldozers would be tampered with, that an intermeddler would be unable to stop a bulldozer, and that an uncontrolled bulldozer "left on top of a mesa" would cause enormous damage. (*Id.* at p. 776; see also *Hergenrether*, *supra*, 61 Cal.2d at pp. 441-443, 445 [thief stole loaded two-ton truck and hit plaintiffs' car; "special circumstances" existed because defendants parked truck overnight, unlocked with key in ignition, in "skid row," and truck's proper operation was "was not a matter of common experience"].)

In *Palma*, *supra*, 36 Cal.3d at pp. 184-185, this court explained that the "special circumstances" considered in determining duty is simply "a test of foreseeability of harm." (*Id.* at p. 186.)

These cases illustrate two related principles that dictate there is no foreseeability and no duty here.

First, for an accident to be "foreseeable" to create a legal duty, the negligent conduct must create a risk beyond the risk that generally exists –

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attended lot with keys in ignitions "is not equivalent to inviting or enticing an incompetent driver to tamper with a vehicle"]; *Brooker v. El Encino Co.* (1963) 216 Cal.App.2d 598, 601-603 [similar facts].

in other words, the defendant's conduct must create unusual or "special" circumstances that make a particular accident especially likely to happen. Absent such circumstances, "' . . . every person has a right to presume that every other person will perform his duty and obey the law . . . .'" (*Richards*, *supra*, 43 Cal.2d at p. 69.) As explained, there were no "special circumstances" here.

By the same token, the defendant's conduct does not create an "unreasonable risk of harm" – and the defendant owes no duty – to the plaintiff if the risk created by that conduct is no greater than the risk created when the defendant does something he can do legally and nonnegligently. That is the situation here. As discussed, the "Emergency Parking Only" sign established, and plaintiffs' experts conceded, that a vehicle driver could – and should – stop on a freeway shoulder for as long as necessary in case of emergency. (2 RT 468, 471-472, 561; 3 RT 641, 651-652, 655, 845-848.) Thus, the risk Horn created by stopping beyond the shoulder for two minutes to eat was no greater than the risk had he stopped for an emergency – which he or any other driver could do legally, safely and nonnegligently.

2. Plaintiffs' authorities are inapposite.

Plaintiffs rely on *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703 to argue the accident here was foreseeable. (OBOM 19.) Plaintiffs there were injured when a vehicle ran into their car in the highway's center median strip, where a CHP officer had pulled them over. (*Id.* at p. 707.) Plaintiffs sued, alleging the officer was negligent in directing them to stop *on the center median rather than the right shoulder.* (*Id.* at p. 707.) Plaintiffs presented evidence that center-median stops create an increased risk of injury because motorists do not expect such stops and

are more likely to be distracted by them, and vehicles travel faster in the left lane, so drivers are more likely to lose control of their vehicles. (*Id.* at p. 723.) This court found triable factual issues regarding whether the CHP officer breached his duty of reasonable care. (*Id.* at p. 707.)

Here, in contrast, Horn stopped past the right shoulder, beyond the area where plaintiffs in *Lugtu* asserted the CHP officers *should* have stopped them safely. (1 RT 254; 2 RT 469, 562.) Moreover, in *Lugtu* plaintiffs presented evidence that an accident was more likely on the center median – so the officer's conduct increased the risk beyond the risk had he properly stopped plaintiffs on the right shoulder, and created a hazard to drivers using due care. Here, the area where Horn stopped was safe in emergencies, and his vehicle posed no hazard to drivers using due care. (2 RT 468, 471-472, 561, 576-577; 3 RT 641, 650-652, 655, 845-848.)

Plaintiffs cite *Fennessy v. Pacific Gas & Electric Co.* (1942) 20 Cal.2d 141, 144, to assert that conduct permitted in an emergency may support a negligence action absent an emergency. (OBOM 26.) There, defendant utility's driver parked a truck between a safety zone and an adjacent curb, violating an ordinance prohibiting such parking but exempting public utilities' vehicles "'while . . . engaged in . . . emergency duties.'" (*Id.* at pp. 142-143.) A car swerved to avoid the truck and hit a pedestrian. (*Id.* at p. 146.) In the pedestrian's personal injury action, this court affirmed a jury verdict against the utility. (*Id.* at pp. 142, 145.) The court held the truck was not responding to an "emergency," and it was a jury question whether the car hit plaintiff because of the truck. (*Id.* at pp. 144-145.)

Unlike in *Fennessy,* where the truck was parked in a travel lane, obstructing traffic, Ralphs' tractor-trailer was parked 16 feet from the travel lanes and posed no hazard to passing motorists using due care. (1 RT 254;

2 RT 386, 469, 533, 562, 576-577; 3 RT 650-651, 767-768, 844, 845-846; AA 170.) Moreover, *Fennessy* was a negligence per se case in which the ordinance prohibiting parking was obviously intended to prevent vehicles from obstructing traffic and hitting pedestrians. Here, the "Emergency Parking Only" sign purpose was *not* to prevent cars from going off the freeway and hitting vehicles parked in the area, but to identify an area where vehicles with emergencies could park safely. (2 RT 561; 3 RT 641, 645, 651-652, 655, 845-848.) Finally, the issue in *Fennessy* was the definition of "emergency," so the court never addressed whether defendant's truck failed to create an unreasonable risk of injury because the same risk would exist absent an emergency. Had plaintiff disavowed reliance on the ordinance and alleged defendant was negligent based on *ordinary* negligence (as plaintiffs do here), the court might well have agreed with that argument.

Plaintiffs cite *Lane v. Jaffe* (1964) 225 Cal.App.2d 172, 176 to assert that even if Horn stopped for an emergency, he would owe a duty "to take reasonable measures to avoid creating needless risk to others." (OBOM 26.) That case is inapposite because it addresses whether a stop was "necessary" under a statute. Moreover, *Lane* actually supports Ralphs' position. The court there held that the jury could find defendant's alleged negligence in stopping in the center median did not proximately cause the accident because the motorist who hit defendant's car was improperly traveling "off the traveled portion of the freeway," defendant's car was parked in an area used for emergency parking and was clearly visible, and traffic had passed safely for over one hour. (*Lane, supra*, 225 Cal.App.2d at p. 177.) Here, similarly, "[a] reasonable person would not conclude that Horn's . . . stopping" beside the freeway, in the dirt "16 feet from lane four," "would subject motorists using the freeway to an unreasonable risk of

harm" – particularly "[g]iven the thousands of motorists who pass the area during the time of Horn's stop." (*Cabral, supra*, 179 Cal.App.4th at p. 12.)

3. Plaintiffs' factual contentions are meritless.

Plaintiffs also argue the accident was foreseeable because (1) their traffic engineering expert, Thomas Schultz, testified there should be no "roadside obstacles" within 30 feet of freeway traffic lanes; and (3) Caltrans Traffic Manual, section 7-02, of which plaintiffs request judicial notice, says that a clear 30-foot area "adjacent to the roadway is desirable" because it "permits about 80 percent" of vehicles leaving the roadway "to recover." (OBOM 20-21.) These assertions do not help plaintiffs.

As explained, plaintiffs' experts, including Schultz, testified that drivers with emergencies could stop safely on the shoulder, parking there created no hazard to drivers using due care, and nonemergency stopping created no greater risk. (2 RT 468, 471-472, 563, 576-578, 589; 3 RT 650-651, 846-848.) And any Southern California driver knows that many freeways have *no* open space – not to mention 30 feet – next to the travel lanes, but are immediately bordered by brick walls, concrete median barriers, construction barriers, or other structures.

Plaintiffs' "evidence" is also irrelevant. Schultz testified as a traffic engineering expert (2 RT 558), and according to plaintiffs, the manual addresses "freeway design." (OBOM 21.) Thus, this evidence, at most, might establish a standard of care for *roadway design* or show that Caltrans, through engineering studies, foresaw that drivers might go off the road with a particular frequency – but not that a particular accident would be foreseeable to a reasonable *truck driver* so as to establish a legal duty.

Plaintiffs' reliance on the Traffic Manual's section 7-02 is improper for additional reasons, explained in Ralphs' opposition to plaintiffs' request

for judicial notice: (1) plaintiffs never presented that section to the trial or appellate courts; (2) the manual is inadmissible hearsay; (3) plaintiffs need expert testimony interpreting the manual; (4) the manual merely provides recommendations and does not establish a standard of care. (ORJN 1-7.)

Finally, plaintiffs rely on Ralphs' transportation manager's testimony that Ralphs did not want its drivers to park in "Emergency Parking Only" areas for nonemergencies due to concerns about safety of its drivers and motorists who might leave the freeway. (OBOM 22; 2 RT 341-342, 345-346.) But this testimony, at most, reiterates the truism that cars may go off the road. As explained, that general proposition does not establish the specific foreseeability or "special circumstances" necessary to impose a duty of care. Moreover, the existence of duty is "entirely" a legal question, to be determined "only by the court" "by reference to the body of statutes, rules, principles and precedents which make up the law." (*Stout v. City of Porterville* (1983) 148 Cal.App.3d 937, 941; *Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406 [duty is "a policy determination"].) Ralphs' subjective concerns are irrelevant because this court's precedents establish there is no foreseeability and no duty here. (*Rice v. Center Point, Inc.* (2007) 154 Cal.App.4th 949, 958 [residential drug treatment facility's failure to comply with safety policies or procedures does "not give rise to a duty where none otherwise existed"].)

B. The Court Of Appeal Correctly Held That Public Policy Precludes Imposing a Duty on Drivers to Avoid Stopping Next to Freeways to Provide a "Safe Landing" for Motorists Who Go off the Road.

The Court of Appeal correctly held that, besides the fact that Horn's conduct did not create a foreseeable, unreasonable risk of harm, public policy considerations preclude imposing a duty on drivers to avoid stopping near a freeway to provide a "safe landing" for motorists who go off the road. (*Cabral*, *supra*, 179 Cal.App.4th at p. 15 & fn. 10.)

First, the connection between Horn's conduct and the accident was simply too attenuated. As discussed, Horn's stopping 16 feet from the roadway did not increase the risk Cabral would go off the road and created no hazard to passing motorists using due care. (2 RT 577, 3 RT 650-651, 846.) Cabral did not "deviate from the highway in the ordinary course of travel," but abruptly turned right from lane 3, crossing an entire traffic lane and the paved shoulder before hitting Ralphs' tractor-trailer. (*Scott*, *supra*, 5 Cal.App.4th at p. 517, fn. 3; 1 RT 254; 2 RT 386, 469, 533, 562 ; 3 RT 765-766.) In short, Horn did nothing to place Cabral in harm's way – he merely created a condition that allowed the collision to occur from Cabral's negligence. But as shown, that minimal connection does not support a legal duty. (See § I.A.1, *ante*; *Richards*, *supra*, 43 Cal.2d at p. 65; *Bryant*, *supra*, 32 Cal.4th at pp. 780, 782 [no duty where "no logical cause and effect relationship" between negligence and injury "except . . . that it placed decedent in a position to be acted upon"]; *Scott*, *supra*, 5 Cal.App.4th at pp. 516-517 [landowner who places fixed object next to highway has no duty to protect public from cross-median accidents; the connection is "too attenuated"].)

Indeed, adopting plaintiffs' duty theory would give them a windfall because the circumstance that made Horn's conduct negligent – his nonemergency reason for stopping – had nothing to do with the accident. Had Cabral hit a driver who was legally drunk but driving within her lane at a safe speed under the speed limit, Cabral could not recover from that driver on a theory that her drunk driving caused the collision. Here, similarly, Horn's reason for parking – the critical fact plaintiffs had to establish to hold Ralphs liable – is irrelevant to how Cabral was injured. From Cabral's perspective, it was sheer coincidence that Horn happened to be stopped for a nonemergency, rather than legally and nonnegligently for an emergency. Thus, creating a duty here would arbitrarily provide a deep pocket to compensate plaintiffs who, due to their own negligence, run into vehicles that are stopped where parking is legal and safe, but happen to be parked in violation of some standard (whether imposed by statute or common law) due to a circumstance that has no effect on why or how the accident occurs. And it would violate the principle that a defendant may "presume that every other person will perform his duty and obey the law" absent "reasonable grounds to think otherwise." (*Richards, supra*, 43 Cal.2d at p. 69.)

Second, creating a common-law duty to avoid stopping near a freeway for nonemergencies would adversely impact roadway safety. Both parties' witnesses agreed that no statute or other written standard defines an "emergency"; rather, a driver should use common sense to determine whether he has a personal or mechanical situation that might render him dangerous on the freeway. (1 RT 296-299; 2 RT 468-472, 576, 587; 3 RT 654, 727, 743-744.) Indeed, such situations might include feeling tired or weak from hunger, so stopping to eat, as Horn allegedly did, could constitute an emergency. (1 RT 296-299; 3 RT 743-744.) Allowing juries

to define "emergency" ad hoc would create great uncertainty and discourage drivers from pulling over for suspected emergencies, for fear of liability.

Plaintiffs' expert opined that even if Horn in fact stopped for a fluctuating pressure gauge (as Horn testified he did), that situation was not a true emergency. (2 RT 393, 445.) But even if Horn was mistaken, traffic safety would best be served by allowing drivers who believe they have emergencies to err on the side of stopping briefly to dispel their suspicions, rather than allowing juries to second-guess their decisions in omniscient hindsight. (See *Bryant*, *supra*, 32 Cal.App.4th at pp. 782-783 [drunk driver owed no duty to tow-truck driver hit by car while removing her vehicle from freeway shoulder; imposing duty would create incentive for drivers with disabled cars "to attempt self-help . . . rather than . . . call for assistance," endangering all motorists].)

Plaintiffs assert that nonemergency parking next to freeways poses a "greater risk to passing motorists" than emergency-only parking because "true emergencies are uncommon and their duration is limited," so "[s]ociety tolerates that risk," whereas allowing nonemergency parking "means more parked trucks, for longer periods." (OBOM 27.) Wrong. Horn pulled over for two minutes to eat; he would likely have been there longer for an emergency. Moreover, the regulatory "Emergency Parking Only" designation established that drivers stopping for nonemergencies could be ticketed. (1 RT 273; 3 RT 636.) Whether to ticket a particular driver would be the decision of the state – presumably Caltrans and the ticketing officer – but not the court or jury. And the possibility of a ticket does not give plaintiffs a basis to hold Horn liable for negligence, particularly when the area was designated safe for parking. (See *Rice*, *supra*, 154 Cal.App.4th at p. 959 [drug treatment facility owed public no duty to control residents' criminal behavior; such facilities nonetheless are

"[]accountable for public safety" via penalties for noncompliance with state regulations].)

Finally, imposing a duty here would have far-reaching consequences. Plaintiffs have framed their case as one for ordinary negligence and essentially urge this court to establish a 30-foot recovery zone next to every freeway, with potential liability for any vehicle that violates that zone, regardless of whether the area is particularly dangerous or the parked vehicle increases the already-existing risk to passing motorists using due care. Despite plaintiffs' contention that freeways create greater risks than residential streets (OBOM 25), there is no real basis to distinguish this case from *any* situation where a vehicle stops near a roadway or a landowner places a fixed object near a road. If the court imposes a duty here, a car owner could be liable if she parks beside a suburban or rural road with a 45- or 55-mph speed limit, and a drunk, speeding teenager crashes into it, because it is always *possible* that such accidents can happen. In that case, a jury could be asked to decide whether the car owner had a good enough reason for parking, even though no statute prohibits it. Similarly, if a landowner or public utility places a fixed object – such as a streetlight, telephone pole, wall, tree or brick mailbox – next to a road and a motorist falls asleep and hits it, the jury can be asked to decide whether the landowner had a good enough reason for placing the object there – even if it means second-guessing a public entity's complex engineering and design decisions. Such a radical expansion "should be reached through legislative action rather than tort law." (*Scott*, *supra*, 5 Cal.App.4th at p. 517.)

Indeed, in *Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, an intoxicated, teenage driver drove at speeds up to twice the posted 55-mph speed limit and crashed into a lightpole on the opposite side of the road. A different panel of the same Court of Appeal

here held the utility company that maintained the lightpole might owe an injured passenger a duty to place it "as far as possible" away from the road to prevent the collision. (*Id.* at pp. 1267, 1279 (maj. opn.); *id.* at pp. 1280, 1295 (conc. & dis. opn. of Hollenhurst, J.), 1280, 1293.) That decision illustrates the lengths to which courts will go to find a deep pocket to compensate an injured plaintiff, regardless of fault – as long as this court places no bounds on the concepts of foreseeability and duty.

C. The *Rowland* Factors Confirm That the General Duty of Ordinary Care Does Not Include a Duty to Avoid Stopping On or Near a Freeway Shoulder to Provide a "Safe Landing" for Drivers Who Go off the Road.

Plaintiffs rely on *Rowland v. Christian* (1968) 69 Cal.2d 108 to argue that Horn owed Cabral a legal duty. (OBOM 18-24.) There, this court set forth factors relevant to determining whether, in a given situation, public policy supports relieving the defendant of a general duty to use ordinary care to avoid injuring others. (*Rowland, supra*, 69 Cal.2d at p. 113.)

Here, there is no need to apply the *Rowland* factors because as shown, this court's long-standing precedent establishes the result. (See *id.* at pp. 112-113 [factors are used to determine exceptions to general duty rule].) Moreover, the *Rowland* factors simply provide another way of conceptualizing the basic tort analysis discussed above. Nevertheless, those factors confirm Horn owed Cabral no duty.

Foreseeability of harm to plaintiff. As discussed, the accident was not foreseeable.

Closeness of the connection between defendant's conduct and plaintiff's injury. As discussed, Horn's stopping 16 feet off the freeway

neither increased the risk Cabral would go off the road nor endangered drivers using the freeway with due care. (2 RT 577; 3 RT 650-651, 846.) There was no connection between Horn's conduct and the accident except coincidence.

Policy of preventing future harm; consequences of imposing a duty and liability; availability and cost of insurance. As discussed, if a duty is imposed, motorists with emergencies that might prevent them from driving safely will hesitate to pull over for fear of liability, endangering other freeway drivers – including those, unlike Cabral, using due care. And since such a duty would rest on general negligence principles, it could easily extend to any driver or landowner who parks or places a fixed object next to a roadway – quickly rendering liability insurance unaffordable.

Moral blame attached to defendant's conduct. Horn parked 16 feet from the slow lane, in the dirt past the shoulder, in an area designated safe for emergency parking. Even if Horn bore some moral blame for occupying an "Emergency Parking Only" space for a nonemergency, he bears none for believing he stopped in a safe place.

Degree of certainty that plaintiff suffered injury. Cabral suffered a tragic injury. But given that Ralphs is not to blame for it and reaching into that deep pocket would have far-reaching adverse consequences, it is inappropriate to impose a duty here.

In short, Horn's stopping in the dirt 16 feet from the freeway in an "Emergency Parking Only" area did not create a foreseeable, unreasonable risk that Cabral would go off the road and hit Ralphs' tractor-trailer, and public policy precludes imposing a duty to prevent the accident. Thus, Ralphs was entitled to judgment notwithstanding the verdict.

As explained next, judgment for Ralphs was also proper because Horn's conduct did not proximately cause the collision.

II. THE COURT OF APPEAL CORRECTLY HELD THAT HORN'S CONDUCT IN STOPPING 16 FEET FROM THE FREEWAY IN AN "EMERGENCY PARKING ONLY" AREA DID NOT PROXIMATELY CAUSE THE COLLISION.

A defendant cannot be held liable for negligence unless his breach of duty proximately caused the plaintiff's injury. (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 772.) Proximate cause involves two elements: (1) cause in fact, and (2) public policy considerations. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.)

A tort is a cause in fact "only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572-573 & fn. 9.) "'[I]f the accident would have happened anyway, whether defendant was negligent or not, then his negligence was not a cause in fact and . . . cannot be a legal . . . cause.'" (*Arthur v. Santa Monica Dairy Co.* (1960) 183 Cal.App.2d 483, 487 [defendant's illegal parking did not proximately cause collision, where car driver was not looking and "would have run into anything at that location, legally or illegally parked"].) Cause in fact is usually a factual question for the jury. (*Ferguson, supra,* 30 Cal.4th at p. 1045.) But "it becomes a question of law when the facts . . . permit only one reasonable conclusion." (*Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354.)

The public policy element of proximate cause is concerned "not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." (*Ferguson, supra,* 30 Cal.4th at p. 1045.) "Because the purported causes of an event may be traced back to the dawn of humanity, the law has imposed additional 'limitations on liability other than simple causality.'" (*Id.* at

p. 1045.) This element is a legal question for the court. (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 835.)

Here, the Court of Appeal correctly found that Horn's conduct in stopping near the freeway in an "Emergency Parking Only" zone was not the cause in fact of the collision because, as explained later, plaintiffs' expert testimony on causation was flatly incompetent and could not constitute substantial evidence. (§ III, *post.*) In addition, Horn's conduct was not the cause in fact, and policy considerations preclude deeming it a proximate cause, because Cabral would have suffered the same injury absent Horn's negligence.

Capolungo, *supra*, 179 Cal.App.3d at pp. 354-355, is on point. There, defendant parked his car in a loading zone all day, violating an ordinance prohibiting parking over 24 minutes. Plaintiff bicyclist was hit by a 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 the accident 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," and defendant's car was not parked in a "manner that made the car intrude abnormally into the traffic lanes." (*Id.* at pp. 354-355; see also *Bentley v. Chapman* (1952) 113 Cal.App.2d 1, 4 [parking overnight, in violation of ordinance prohibiting parking over one hour between certain hours without permit, could not proximately cause collision because the area "could legally . . . be continuously occupied by parked cars"].)

Here, plaintiffs alleged that Horn breached a duty to Cabral by parking 16 feet from the freeway for a nonemergency. (1 RT 254; 2 RT 386, 469, 533, 562; 3 RT 767-768, 844; 4 RT 958-959, 963-965; OBOM 3, 26-27.) Had Horn parked in the same location for an

emergency – as he could do legally, safely and nonnegligently, according to plaintiffs' experts – Cabral would still have run into the tractor-trailer and been injured in the same way. (1 RT 292-293, 296-299; 2 RT 471-472, 576, 587; 3 RT 727, 743, 847-848.) Because the same injuries would have occurred whether or not Horn was negligent, as a matter of law his negligence cannot be deemed a proximate cause of Cabral's injuries.

Plaintiffs attempt to distinguish *Bentley* and *Capolungo* on the grounds that "[h]ere, negligence per se is not an issue." (OBOM 29.) Plaintiffs' argument fails.

First, although Ralphs' authorities involve negligence per se, they are directly on point because proximate-cause analysis is the same for negligence per se and ordinary negligence. Negligence per se is an evidentiary doctrine that allows a plaintiff to prove an element of negligence (breach of duty) through a rebuttable presumption where a defendant violated a statute, ordinance or regulation and certain other conditions are met – notably, the plaintiff's injury resulted from the type of occurrence the statute was designed to prevent, and the statute was adopted to protect "the class of persons" including the plaintiff. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285.) In short, negligence per se is simply a species of ordinary negligence. (*Ibid.*) The plaintiff must still prove the other elements of negligence, including proximate cause. (See *Victor, supra*, 77 Cal.App.4th at pp. 233-234.)

Moreover, despite plaintiffs' insistence that this case involves only ordinary negligence, this is essentially a negligence per se case masquerading as an ordinary negligence case. As in *Capolungo* and *Bentley*, plaintiffs' case turns on Horn's reason for stopping in the area. Plaintiffs' experts testified that had Horn stopped for an emergency, he would have acted within the standard of care – i.e., he would not be

negligent. (2 RT 468, 471-472; 3 RT 847-848.) Thus, the essential question here is the same as in a negligence per se case: Did Horn's stopping violate the conditions that would make it permissible (i.e., lawful under a negligence per se theory, or reasonable under an ordinary negligence theory)?

Further, plaintiffs' experts' emergency-only restriction is identical to the restriction imposed by the regulatory R45 "Emergency Parking Only" sign (equivalent to a statute or regulation). Like the ordinances in *Capolungo* and *Bentley*, the regulatory sign gave Horn or any driver the right to stop in the area indefinitely and established that the area was safe for parking. (2 RT 561; 3 RT 641, 651-652, 655, 845-858.) It was also undisputed that parking there created no hazard to passing drivers using due care. (3 RT 650-651, 845-848; see 2 RT 576-577.) Thus, plaintiffs cannot divorce their case from the regulatory "Emergency Parking Only" sign – whether they frame their case in a negligence per se theory or an ordinary negligence theory, and whether they rely on the sign or an expert's testimony to establish the standard of care.

Apparently recognizing this problem, plaintiffs point to their expert's testimony (and section 7-02 of the Caltrans Traffic Manual) that Horn's stopping interfered with the 30-foot "clear recovery zone" next to the freeway. (OBOM 21, 29.) But this evidence cannot remove the sign, which – along with plaintiffs' own experts' testimony – established that the area was safe for parking. (2 RT 561, 576-577; 3 RT 641, 645, 650-652, 655, 845-848.)

Indeed, plaintiffs themselves seem unable to decide whether negligence per se is or isn't an issue. After distinguishing Ralphs' authorities on the grounds they address negligence per se, they argue *another* negligence per se case controls: *Thomson v. Bayless* (1944)

24 Cal.2d 543, 548, recognizes 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.'" (OBOM 29-30.) The deciding factor, plaintiffs argue, is that "the parking regulation at issue in [*Capolungo* and *Bentley*] was not designed to serve traffic-safety goals, whereas the prohibition in *Thomson* was." (OBOM 30.) Exactly.

In *Thomson*, defendant parked his truck in an outer lane on a four-lane highway, violating a statute prohibiting parking on the traveled portion of a highway when practicable to park elsewhere. (24 Cal.2d at pp. 545-546.) A car approaching in the same lane hit the truck, injuring the car's passenger. (*Id.* at p. 545.) The jury returned a verdict for the passenger. (*Id.* at p. 544.) This court affirmed, finding substantial evidence that defendant violated the statute and that this negligence proximately caused the accident. (*Id.* at pp. 548-549.)

As plaintiffs note, defendant in *Thomson* violated a statute expressly designed to prevent the type of accident that occurred; the statute's obvious purpose was to allow unimpeded traffic on the travel lanes. Here, in contrast, the regulatory "Emergency Parking Only" sign was designed to keep a safe place clear for vehicles to park in emergencies – so *Thomson* suggests the jury could *not* reasonably find Horn's stopping proximately caused Cabral's accident. Even though plaintiffs have disavowed reliance on the sign and substituted expert testimony that a de facto emergency-only restriction exists to protect motorists who go off the road, the sign expressly permits parking and denotes the area is safe. (2 RT 354, 468, 471-472, 561; 3 RT 641, 645, 651-652, 655, 845-848.) Moreover, in *Thomson*, defendant's vehicle was parked *on* the highway, in a travel lane – unlike Ralphs' tractor-trailer, stopped in the dirt 16 feet from the freeway.

Fennessy, *supra*, 20 Cal.2d 141, and *Willis v. Gordon* (1970) 20 Cal.3d 629, 634, 635, cited by plaintiffs (OBOM 31), are inapposite for similar reasons. In *Fennessy*, defendant's truck was parked in a travel lane and obstructing traffic, in violation of an ordinance obviously intended to prevent vehicles from obstructing traffic. (20 Cal.2d at pp. 142-143.) In *Willis*, plaintiffs proffered evidence that the paved "fog lane" where defendants parked was actually a traveled part of the highway. (*Id.* at pp. 632, 634.) Thus, a jury could reasonably find that defendants' conduct in those cases exposed others to a foreseeable, unreasonable risk of harm – unlike here, where the collision with Ralphs' tractor-trailer – parked in the dirt 16 feet from the travel lanes – was not foreseeable within any proper meaning of that term. (§ I.A, *ante*.)

Willis is further inapposite because, as plaintiffs note, that case addresses superseding cause. Ralphs has not argued on appeal that Cabral's negligence was a superseding cause relieving Horn of liability.

In short, even if Horn was negligent in stopping 16 feet from the freeway in an "Emergency Parking Only" area for a nonemergency, as a matter of law that negligence did not proximately cause Cabral's accident. Thus, Ralphs was entitled to judgment notwithstanding the verdict.

III. THE COURT OF APPEAL CORRECTLY HELD THAT RALPHS WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFFS' CASE WAS BASED ON FLATLY INCOMPETENT EXPERT TESTIMONY THAT DID NOT CONSTITUTE SUBSTANTIAL EVIDENCE OF CAUSATION.

As discussed, to prevail in negligence, plaintiffs had to prove causation – specifically, that Horn's stopping next to the freeway "was a substantial factor in bringing about" Cabral's death. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 481.)

Plaintiffs' proof of causation consisted of the testimony of their accident reconstruction expert, Robert Anderson, who opined, over objection and contrary to eyewitness testimony, that when Cabral hit Ralphs' trailer, he was awake, alert and attempting to return to the freeway. More specifically, Anderson testified Cabral was braking, traveling at most 60 mph (plus or minus 10 mph), turning left toward the freeway, and would have returned there safely but for the trailer. (2 RT 519, 527-529, 531, 539-540, 542-543, 545.)

Anderson's testimony was flatly insufficient to support the judgment. His opinion that Cabral was turning left and braking depended on facts never established at trial; thus, it lacked foundation and was inadmissible. His opinion that Cabral was traveling no faster than 60 mph was rank speculation, based on no methodology whatsoever. Without Anderson's purported "expert" testimony, there was no substantial evidence of causation, and the judgment must be reversed.

A. Anderson's Opinion That Cabral Was Returning to the Freeway Was Based on Facts Never Established at Trial and Was Utter Speculation.

An expert may base an opinion only on his own personal observations or matters "of a type . . . reasonably . . . relied upon" by experts. (Evid. Code, § 801, subd. (b).) "Any material that forms the basis of an expert's opinion testimony must be reliable . . . . Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; see also *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)

More specifically, an expert's opinion is inadmissible if based on factual assumptions "without evidentiary support" – such as facts set forth in records never admitted at trial – or on "speculative or conjectural" factors. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) "[A]n expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist," does not assist the jury. (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117, original emphasis; see also *Hyatt v. Sierra Boat Co.* (1970) 79 Cal.App.3d 325, 338-339.)

To reach his conclusion that Cabral was awake and returning to the freeway, Anderson relied on the CHP report and a CHP photograph. Over objection, the trial court permitted Anderson to testify that a measurement numbered 1 on the factual diagram ("Mark 1") was labeled in the CHP report as a tire mark from Cabral's pickup truck, and a second measurement numbered 2 on the factual diagram ("Mark 2") was labeled a side skid from that vehicle. (2 RT 506-511.) Anderson concluded that Marks 1 and 2 on the factual diagram came from the pickup's left rear tire, because that was

the only explanation that made sense if those marks were indeed from the pickup. (2 RT 511-513.)

Specifically, Anderson said, "if I visualize [the pickup] being in a left turn as if it were trying to regain the Interstate 10 highway here, and the left rear tire is making [Mark 1]," it matched the damage to the pickup – "[a]nd *that's the only combination I could come up with of tires that would make that mark.*" (2 RT 512, emphasis added.) Anderson said Mark 2 must have been made by the pickup's left rear tire when the pickup rotated after the impact, because "I have trouble finding an explanation for any other reason why marks of this nature would be out there." (2 RT 512-513.)

Anderson's opinion that Cabral was braking also depended on the assumption that Mark 1 was from the pickup. Specifically, Anderson said that Mark 1 "looks like it starts suddenly"; "one of the most plausible explanations I have for that tire mark starting there was that the brakes are being applied and that's when they actually engaged enough to start making a difference in the tire mark." (2 RT 527-528.)

But how did Anderson know the tire marks came from the pickup? He "knew" because the CHP report labeled them as such. When asked what basis he had for concluding that Cabral's pickup had made the marks, he testified: "*[T]hey're labeled in the police report as a side skid for No. 2 and the tire mark from No. 1* . . . . I can see in the photographs that they're physical evidence. I'm not aware of any contrary physical evidence. And so it's based upon physical evidence." (2 RT 540-541, emphasis added.)

In sum, Anderson assumed the tire marks were made by Cabral's pickup based on an officer's opinion, in the CHP report, that they were. Accordingly, for Anderson's testimony to have any evidentiary value, the officer's opinion had to be in evidence. (See *Garibay, supra*, 161 Cal.App.4th at pp. 742-743.) It wasn't. The officer never testified at

trial; and neither the CHP report, nor Anderson's own testimony, nor the testimony of Officer Migliacci – the only witness who testified about preparation of the CHP report and factual diagram – provided evidence the tire marks were actually from the pickup.

1. *The CHP report.* The CHP report itself provided no evidence that Marks 1 and 2 came from Cabral's pickup, because no part of that report – except the one-page factual diagram and certain photographs – was in evidence.[9/] (*Garibay, supra*, 161 Cal.App.4th at pp. 742-743; see 2 RT 303, 311-312; AA 167-172.) Before trial, the trial court granted Ralphs' motions in limine to exclude the report. (1 RT 117; AA 14-22, 213.)

Moreover, the trial court's ruling was correct. Vehicle Code § 20013 "flatly prohibits the use of accident reports as evidence in any civil . . . trial." (*Carlton v. Dept. of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1432, fn. 1.) And it is well settled that accident reports prepared by police, including opinions and conclusions therein – such as the officer's opinion here that Marks 1 and 2 came from Cabral's pickup – are inadmissible hearsay. (*Id.* at pp. 1432-1433; *Hoel v. City of Los Angeles* (1955) 136 Cal.App.2d 295.)

2. *Anderson's testimony.* Anderson's own testimony regarding the CHP report's contents – specifically, the officer's opinion that Cabral's pickup had made Marks 1 and 2 (2 RT 506-511, 541) – was not admissible evidence of those facts, and the trial court should not have allowed that testimony. Although experts may rely on inadmissible matter in forming their opinions, they "may not testify as to the details of such matters."

[9/] The designation of Marks 1 and 2 as a tire mark and side skid from Cabral's vehicle, respectively, appears on pages 6 and S-4 of the CHP report, never admitted at trial. (AA 119, 125, 154.)

(*People v. Coleman* (1985) 38 Cal.3d 69, 93.) Similarly, "'a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact.'" (*Garibay, supra*, 161 Cal.App.4th at p. 743 [expert's recitation of facts in medical records not presented to court did not provide foundation for opinion]; see also *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894-895.)

3. *Officer Migliacci's testimony.* The testimony of Officer Migliacci, the primary investigating officer for the accident and the only witness who testified regarding the CHP report's preparation (1 RT 245), did not establish that Marks 1 and 2 came from Cabral's pickup. Although Migliacci testified, over objection, that Marks 1 and 2 respectively represented a tire mark and side skid from the pickup (1 RT 261-262; 2 RT 303-305, 312), he testified that (1) he personally did not take the measurements indicated on the factual diagram or the photographs; (2) he didn't know how long the marks had been in the dirt and didn't know of any evidence collected in the investigation that would determine that information; (3) he had not matched the treadmarks with the pickup's tires, nor was he aware of any other physical evidence that would confirm the marks' origin; and (4) he had no basis to believe the marks were made by the pickup, except that the officer who had documented the marks – Officer Thibodeau, who did not testify – labeled them as such. (1 RT 246, 290-292; 2 RT 314-315; see also AA 119, 125, 154.)

Given this testimony, if plaintiffs wanted to rely on Officer Thibodeau's opinion that the marks came from the pickup, they had to call him to the stand. Whether his conclusion was properly "based upon observation of [a] . . . condition or event or upon sound reason or whether [he was] qualified to form it and testify to it [could] only be established by

[examining him] under oath," subject to cross-examination. (*People v. Reyes* (1974) 12 Cal.3d 486, 503; see also *Hutton v. Brookside Hospital* (1963) 213 Cal.App.2d 350, 355.) Accordingly, Officer Thibodeau's conclusion was not properly before the jury. (See Evid. Code, § 702, subd. (a) [testimony inadmissible absent "personal knowledge"]; see also *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1498.) Indeed, plaintiffs' failure to call Officer Thibodeau to testify suggests he had no real basis or qualifications to conclude the tire marks came from the pickup.

Plaintiffs assert that (1) as the primary investigating officer, Officer Migliacci had to "delegate the tasks of collecting evidence . . . and taking physical measurements to other officers;" and (2) Officer Migliacci testified the tire marks were part of the physical evidence documented in the CHP report, and the officer who documented the marks believed they were "fresh at the scene." (OBOM 36-37.) But this argument does not cure the fundamental problem – Officer Migliacci lacked personal knowledge of the marks, he testified he believed the marks were made by Cabral's vehicle only because Officer Thibodeau labeled them as such, and his testimony as to what Officer Thibodeau wrote (or thought) was inadmissible hearsay. (Evid. Code §§ 1200, subds. (a) & (b), 702, subd. (a).)

Plaintiffs note that the trial court spontaneously asked Officer Migliacci, "if you look up there on that tire mark No. 1 – . . . if it had been there before [Ralphs'] big rig, . . . would the big rig have obliterated part of the tire mark?" Officer Migliacci responded, "I don't know about the big rig. I believe Vehicle 1 [Cabral's pickup] would have obliterated that skid mark that traveled that path." (OBOM 37 [citing 2 RT 315-316].) Plaintiffs assert "Officer Migliacci's belief that the tire mark was from Cabral's pickup because the pickup truck would have obliterated a previous tire mark is a reasonable, credible inference." (OBOM 37.)

To the contrary, this exchange confirms that Anderson's testimony completely lacked foundation. Officer Migliacci actually *disagreed* with the court's speculation that Ralphs' tractor-trailer would have obliterated part of the tire mark, and instead offered his own unfounded speculation that Cabral's pickup would have obliterated the mark. Far from showing that Officer Migliacci's comment was a "reasonable, credible inference," this exchange shows that anyone could speculate about where the marks came from and reach different conclusions.

4. *Eyewitness and other testimony regarding the crash.* Not only was Anderson's opinion based on facts not in evidence, it ignored and directly contradicted eyewitness testimony detailing Cabral's driving behavior before the collision, as well as the opinion of plaintiffs' own human factors expert. Juan Perez, who was driving a big rig behind Cabral before the accident, testified the pickup was traveling at 70 to 80 mph, swerving back and forth, when it turned right as if attempting to exit the freeway, crossed lane 4 and the shoulder, and drove directly into Ralphs' trailer. (2 RT 454; 3 RT 765-768, 780-781; see also 1 RT 285-286; AA 148.) According to Perez (and Officer Migliacci's testimony about the CHP investigation, which included interviewing another eyewitness) the brake lights and turn signals on Cabral's pickup did not activate, nor was there any indication Cabral tried to slow down or avoid the trailer. (1 RT 286-288, 290, 299; 2 RT 300-301, 314; 3 RT 768; see also AA 148.) Consistent with this evidence, plaintiffs' human factors expert opined that Cabral was fighting drowsiness and fell asleep, which caused him to leave lane 3. (2 RT 600-601; 3 RT 607.)

Nonetheless, Anderson simply disregarded this testimony because it didn't fit his theory that Cabral was turning left to return to the freeway – which, as shown, was based on the unfounded assumption that the tire

marks found at the scene came from Cabral's pickup. (2 RT 531-532, 539-544.)

Given the above evidence, Anderson's opinion that Cabral was awake, braking and heading back to the freeway was sheer speculation. Moreover, as the Court of Appeal noted, "[e]ven if [Cabral] were in a turn toward the freeway, it is sheer speculation that he would enter traffic under control," without hitting other cars. (*Cabral, supra*, 179 Cal.App.4th at p. 21.)

Courts uniformly have rejected such speculation. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 285, 293 [expert opinion on damages, based on unreliable projections, was "speculation" incapable of supporting award]; *Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1414-1416 [expert opinion that failure to close "bleeder" screws caused accident, which contradicted and ignored inconsistent eyewitness testimony, was speculation insufficient to submit to jury]; *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510-511 [experts' opinion that "'more probably than not'" plaintiff had been dropped, or his arm stretched or improperly positioned during surgery, was "speculation" because there was no evidence any of these things happened and experts merely "assume[d] the cause from the fact of the injury"].)

Plaintiffs argue Anderson's testimony was proper because (1) he relied on the CHP report and factual diagram, CHP photographs, depositions and witness statements, his own inspection of Cabral's vehicle, and his own photographs, measurements and observation of the accident scene; (2) he pointed out Mark 1 in a CHP photograph and commented the marks were "physical evidence"; (3) he said he believed the marks came from Cabral's left rear tire because of how the marks matched the other

physical evidence at the scene, including the damage to Cabral's pickup and Ralphs' trailer; (4) as an expert, he "was entitled to rely on inadmissible material." (OBOM 34-37.)

These arguments miss the mark because they fail to address the real point: as explained, a close examination reveals that Anderson's opinion that Cabral was returning to the freeway when he hit Ralphs' trailer *depended on* proof that Cabral's pickup made the marks labeled 1 and 2 on the factual diagram, and *there was no such proof before the jury.*

Plaintiffs never actually respond to this argument. Nor do they explain why they didn't call Officer Thibodeau, who labeled the marks as being from Cabral's pickup, to testify, even though it would have been easy to ask him why he believed Cabral's pickup made Marks 1 and 2. By these omissions, plaintiffs effectively concede Anderson's opinion lacked foundation and should never have been admitted.

B. Anderson's Opinion That Cabral Was Traveling at 60 mph Was Equally Baseless and Inadmissible.

"[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value." (*Jennings*, *supra*, 114 Cal.App.4th at p. 1117; *Lockheed Litigation Cases, supra,* 115 Cal.App.4th at pp. 558, 563 [expert's conclusion based on matters "not reasonably relied upon by other experts," or on "speculative, remote or conjectural" factors lacks evidentiary value].)

To reach his conclusion that Cabral was going no faster than 60 mph, plus or minus 10 mph – contrary to eyewitness testimony that he was traveling 70 to 80 mph (1 RT 284-285; 3 RT 765, 767-768, 780-781; see also AA 148) – Anderson simply examined the damage to Cabral's pickup

in the wrecking yard. (2 RT 513, 517-518, 531, 545, 549.) At trial, he gave a seeming explanation for his conclusion: he said the rear portion of Ralphs' trailer box slid over the pickup's engine and frame, wedging the pickup beneath it, and intruded about a foot into the windshield area, particularly on the driver's side.

> So even though there was intrusion back that far, [Cabral's] vehicle was only shortened on the driver's side about three feet, so at the frame level. So what that's saying is that there's a lot of damage, but . . . it's not consistent with anything over probably about 60 miles an hour.

(2 RT 517-518; see also 2 RT 549.)

Anderson's testimony was sophistry. Conspicuously absent from his "explanation" was any methodology for determining that a particular type or extent of damage on a particular vehicle, under particular collision conditions, meant the damage occurred from a particular speed at impact. To the contrary, Anderson admitted he had not done a physical reconstruction – i.e., using mathematical equations to determine speed at impact (or other factors such as angles of departure or impact) by comparing dimensions of deformation of the vehicles with crash test results. (2 RT 531-532.) Nor did he establish that other accident reconstruction experts reasonably rely on the "eyeball" method to estimate speed at impact – especially given eyewitness testimony to the contrary. Rather, he simply made up the method himself. (2 RT 531-534.)

This sort of speculative testimony, unsupported by any rational methodology, was improper, and the trial court erred in admitting it. (*Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th 77, 92-93, disapproved on other grounds in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 [expert opinion regarding amount of asbestos dust present in a worksite, based on photographs of the site, was inadmissible; method was "highly suspect,"

and "no foundation was laid that industrial hygienists reasonably rely upon photographs to assess asbestos levels"]; *Korsak*, *supra*, 2 Cal.App.4th at pp. 1525-1526 [error to allow expert opinion on how hotel's maintenance procedures caused accident, based on unscientific sample of hotel employees in city].)

C. Ralphs Is Entitled to Judgment as a Matter of Law Because Anderson's Rampant Speculation Did Not Constitute Substantial Evidence to Support the Verdict.

Speculation is not substantial evidence. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585.) And expert testimony cannot constitute substantial evidence when "based upon conclusions or assumptions not supported by evidence in the record" or on other improper matters. (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1137; see also *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1136.)

Anderson's opinion that Cabral would have returned safely to the freeway but for Ralphs' tractor-trailer was plaintiffs' only evidence on causation. Because that testimony was incompetent, it cannot constitute substantial evidence to support the verdict.[10/] (See *Leslie G.*, *supra*, 43 Cal.App.4th 472, 483-484 [expert opinion based on "mere possibility" was "speculation" insufficient to raise a triable issue on causation];

[10/] Even if the trial court properly admitted Anderson's opinions that Cabral was braking and traveling 60 mph, Ralphs is still entitled to judgment as a matter of law. Absent Anderson's testimony that Cabral was turning left toward the freeway, there is no substantial evidence that Horn's stopping caused Cabral's death. Anderson's opinion regarding speed and braking simply compounded the error.

Zuckerman, *supra*, 189 Cal.App.3d 1113, 1135-1136 [expert's valuation of natural gas storage rights, based on his own methodology, founded on flawed assumptions and speculation, was not substantial evidence].) The judgment must be reversed and a new judgment entered for Ralphs.[11/] (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919.)

[11/] As stated, Ralphs believes that it is entitled to judgment notwithstanding the verdict. But even if this court should somehow disagree and find that substantial evidence supported the verdict, admission of Anderson's testimony was prejudicial error mandating a new trial. Numerous courts have ordered a new trial in similar circumstances. (See, e.g., *Smith*, *supra*, 31 Cal.App.4th at pp. 93, 98; *Solis v. Southern Cal. Rapid Transit Dist.*, (1980) 105 Cal.App.3d 382, 390-391; *Korsak*, *supra*, 2 Cal.App.4th at pp. 1525-1527.)

CONCLUSION

For the foregoing reasons, Ralphs respectfully submits that the Court of Appeal's decision and judgment should be affirmed.

Dated: June 21, 2010

Respectfully submitted,

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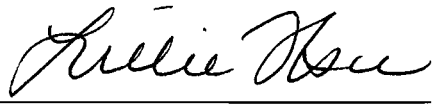
By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 28.1(d) , I hereby certify that this **ANSWER BRIEF ON THE MERITS** contains 13,448 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page relied on by the computer program used to generate this brief.

Dated: June 21, 2010

Lillie Hsu

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 **June 21, 2010**, I served the foregoing document described as: **ANSWER BRIEF ON THE MERITS** on the parties in this action by serving:

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

Sharon Zelina