S178799

SUPREME COURT OF CALIFORNIA

MARIA CABRAL,

Plaintiff and Respondent,

v.

RALPHS GROCERY COMPANY,

Defendant and Appellant.

4th Civil No. E044098

(San Bernardino County
Sup. Ct. No. RCV-089849)

REPLY BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two

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PRELIMINARY STATEMENT

Ralphs urges this Court to create a rule that would give big-rig truck drivers an absolute right to park on the shoulders of California freeways. Though Ralphs frames its argument in terms of drivers having "no duty" to stay off of the shoulder, viewed more accurately, its position relates to the appropriate standard of care. In essence, Ralphs asks this Court to declare that truck drivers *always* satisfy their duty of care to other motorists as long as they park on the freeway shoulder, out of traffic lanes.

No court has adopted this narrow standard of care for truck drivers, and Ralphs cannot point to any finding by Caltrans or any other agency that supports its position for public-policy reasons. "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 82-83.) To that end, California freeways are designed with a 30-foot "clear recovery zone" to protect vehicles that stray from the roadway. Allowing big-rig trucks to occupy that zone purely for their drivers' convenience would undermine this important safety feature — needlessly increasing the probability of deadly collisions between passing automobiles and parked trucks that create 40-ton roadside obstacles.

Nor can Ralphs suggest that recognizing a duty of reasonable care would unduly burden the trucking industry. Even before the accident Ralphs prohibited its drivers from parking on the shoulder in nonemergencies because it foresaw the danger that motorists could leave the roadway and strike its trucks. Horn violated that policy when he parked alongside the freeway to have a snack. He could have easily used one of the truck stops that was two miles away. Instead, he chose to pull over in his customary spot and created the very danger that Ralphs sought to prevent.

Like the Court of Appeal majority, Ralphs argues that recognizing a duty of care in this case would create a "duty to provide a safe landing" That would foist liability on homeowners for putting mailboxes in their yards and on drivers for parking along residential streets. But landowners and drivers face no liability for these activities because they are objectively reasonable things to do on residential streets. It is hardly novel to recognize that different standards should and do apply to freeways.

The only truly innovative legal theory in this case comes from Ralphs, which suggests that no liability exists because "it was sheer coincidence that Horn happened to be stopped for a nonemergency, rather than legally and nonnegligently for an emergency." (RB at 28.) While one can imagine an alternative reality where Horn faced an emergency and reasonably pulled onto the shoulder, that is not what happened here. Ralphs cannot seriously argue that because Horn might have stopped for an actual emergency in some counter-factual scenario, the legal rules that would govern that hypothetical situation should also apply here — when he stopped to pour himself a cup of tea.

Ralphs' logic seems to be that, if an activity is reasonable in some situations it must be "safe" and universally acceptable. But parking on the freeway shoulder is always potentially dangerous — regardless of the reason for the stop. Society tolerates this risk for drivers experiencing emergencies because forcing them to continue to drive would create a host of other hazards. But the fact that parking on a freeway shoulder in an emergency is acceptable does not mean that parking alongside freeways is always acceptable.

Ralphs complains that Cabral's family will receive an unfair windfall if the jury's verdict is allowed to stand, because his negligence was the principal cause of the crash. Although Cabral may have borne the lion's share of the fault for the accident here, the legal argument that Ralphs

advances would bar recovery for anyone involved in a similar accident, regardless of their fault.

Ralphs' caviling also ignores California's comparative-fault system, which allows juries to fairly apportion responsibility between parties with disproportionate culpability for an accident. The verdict in this case already reflects Cabral's negligence — the jury assessed 90% responsibility to Cabral and only 10% to Horn. This outcome was just because of the danger Horn created by needlessly parking a big-rig truck on the freeway shoulder. In light of that danger, this Court should not create a rule that would encourage truck drivers to replicate that hazard statewide.

ARGUMENT

A. Big-rig truck drivers owe other motorists a duty of reasonable care, which they can breach by negligently parking on freeway shoulders

1. By arguing that truck drivers can reasonably park on freeway shoulders, Ralphs improperly recasts a standard-of-care issue into one about whether a duty exists

The "foreseeability" that strongly influences whether a duty exists must be distinguished from "foreseeability" as it pertains to the questions of whether that duty was breached and what damage its breach proximately caused. (*Laabs v. Southern California Edison* Co. (2009) 175 Cal.App.4th 1260, 1272-1273.) As this Court has admonished, the failure to recognize that distinction has often been a source of confusion in this state. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 601 fn.6.)

The foreseeability that plays a central role in a court's calculus about whether to recognize a duty of care is a purely legal question. (*Id.*) When courts are weighing whether a duty exists, they do not consider whether the particular plaintiff's injury was a reasonably foreseeable result of the particular defendant's conduct. (*Id.*) Rather, they consider whether the category of negligent conduct at issue is likely to cause the type of harm

that occurred. (*Id.*) Questions focused on the particular defendant's conduct pose factual questions for the jury. (*Id.*)

The Court of Appeal majority in this case failed to adhere to that dichotomy. It erroneously based its conclusion that Horn owed passing motorists no duty of care on the specific factual circumstances surrounding his conduct — namely, that his truck was parked on the unpaved shoulder, sixteen feet from the right lane of the freeway, in a spot with no history of accidents.[1] ([Typed Opn. at pp. 13-14].) Ralphs now champions that reasoning in its brief, which it also frames as concerning the threshold question of duty. (RB at 1.)

Ralphs' thesis bears a strong resemblance to the defendant's position in *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1841, which argued that it was unforeseeable the decedent would be struck by an errant vehicle "while standing on the shoulder of the roadway four feet inside the fog line." (*Id.*) *Jackson* rejected that attempt to narrow the foreseeability test by defining the risk encountered in an "ultra-specific manner." Because whether a duty exists depends on the risk of a given *class* of harm, "the precise details of the decedent's accident in the present case are not dispositive in deciding whether the harm he suffered was reasonably foreseeable." (*Id.*)

Even if Ralphs' discussion of the particular facts of this case were stripped away — distilling its argument to the contention that a truck driver has no duty to avoid parking on the shoulder — its position would still relate to the appropriate standard of care rather than whether a duty exists. This Court emphasized that distinction in *Lugtu v. California Highway*

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[1] Ralphs asserts that plaintiffs are wrong to describe the area where Horn parked as part of the shoulder. (RB at 6, fn.4.) But by using the phrase "unpaved shoulder," plaintiffs are following this Court's nomenclature from *Willis v. Gordon* (1978) 20 Cal.3d 629, 632.

Patrol (2001) 26 Cal.4th 703, 718-719, where the defendants argued that law-enforcement officers had "no duty" to avoid directing motorists onto the center median of freeways when pulling them over.

This Court held that, once it concluded that officers owed a duty of care to the motorists they pulled over, argument about the specific procedures they should use touched on the appropriate standard of care — not the threshold question of duty. (*Id.*) Allowing judges to consider case-specific facts under the "duty" rubric would transform the question of whether a defendant breached the duty of care under the circumstances of a given case into a legal issue to be decided by the court. (*Id.* at p. 734, fn.13.) That would effectively eliminate the jury's role in negligence cases. (*Id.*)

Because *Lugtu* considered the concepts of duty and standard of care as they related to parking safely on freeways, it provides an especially apt blueprint for examining those issues in this case. First, this Court must determine whether big-rig truck drivers owe other motorists a duty of care when parking their trucks on California's freeways. Second, this Court must decide whether to adopt a specialized standard of care under which big-rig drivers could never breach their duty by parking on the freeway shoulder. As explained below, big-rig drivers obviously have a duty to avoid harming other motorists, and no justification exists for narrowing that duty from the general standard of reasonable care.

2. When big-rig drivers park their trucks during trips on California freeways, they should not be exempted from the general duty of reasonable care

Civil Code section 1714's rule that all persons have a duty to use ordinary care to prevent their conduct from injuring others represents one of California law's fundamental principles. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1191.) Courts will not recognize an exception to that

general duty of care unless it is declared by statute or clearly supported by public-policy. (*Id.*) In determining whether to recognize a public-policy based exception, courts consider the factors articulated in *Rowland v. Christian*, generally according the greatest weight to foreseeability and the extent of the burden to the defendant. (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213, citing, *inter alia*, *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

Ralphs purports to analyze the *Rowland* factors, but its conflation of the existence of a duty with the appropriate standard of care taints its approach. When properly framed only as they pertain to duty, the factors confirm that big-rig drivers should not receive an exemption from the general duty of care when they park their trucks.

Foreseeability of harm. As explained above, Ralphs' arguments about foreseeability erroneously focus on the risk of a collision on the unpaved shoulder, 16 feet from the right travel lane. But for purposes of the *Rowland* factors the proper focus is the probability of deadly collisions with other vehicles if big-rig drivers are not required to exercise reasonable care in parking their trucks.

Degree of certainty that Cabral was injured. Ralphs concedes that Cabral lost his life in a gruesome accident. No injury could be more certain.

Connection between Horn's conduct and Cabral's death. According to Ralphs, "[t]here was no connection between Horn's conduct and the accident except coincidence" because Horn did not increase the risk that Cabral would go off the roadway. (RB at 32.) But Horn routinely parked on that area of the shoulder. It was foreseeable that his ongoing negligence might eventually injure or kill a passing motorist — the "coincidence" in that sense was that the motorist was Cabral. If Horn had not parked his truck there, the roadside would have been completely clear, and Cabral

could have returned safely to the freeway. (2RT-549:23-550:10; 2RT-529:1-11.)

Preventing future harm. Applying the general standard of care to drivers will allow them to use the shoulder in emergencies, while preventing needless accidents like the one that killed Cabral. Truck drivers need not be given the right to park alongside freeways in all circumstances to foster parking in actual emergencies.

Moral blame attached to defendant's conduct. Ralphs concedes, as it must, that Horn bears at least "some moral blame" for illegally parking in an "Emergency Parking Only" area for his own convenience.[2]

Burden imposed on the defendant by recognizing a duty. Ralphs' brief strategically avoids addressing the burden it would face by combining that factor with two others. Truck drivers have ample opportunities to park their vehicles in areas where they will not endanger passing motorists — Horn stopped a mile past one truck stop and two miles from the next. (1RT-260:21-24.)

Availability, cost, and prevalence of insurance. Ralphs' contention that insurance premiums would radically increase wrongly assumes that landowners will face unbridled liability for failing to eliminate obstacles near any road. The actual duty at issue — exercising reasonable care when parking a truck — already exists and is included in the premiums motorists currently pay for automobile insurance.

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[2] Ralphs suggests that Horn did not violate Vehicle Code section 21718, which prohibits parking "upon freeways" because he stopped on the unpaved shoulder — not the travel lanes. (RB at 6, fn.4.) Not so. The Vehicle Code sections that prohibit highway parking apply to the *entire* public highway area unless their text specifies only "the main traveled portions." (*Patterson v. Delta Lines, Inc.* (1956) 147 Cal.App.2d 160, 163; *Accord Gibson v. State* (1960) 184 Cal.App.2d 6, 9.)

In sum, the *Rowland* factors reveal no compelling reason to exempt big-rig drivers from a duty to exercise reasonable care when parking their trucks alongside California freeways.

3. This Court should not impose a fixed standard of care that would allow big-rig truck drivers to park on freeway shoulders with impunity

a. Parking big-rig trucks on freeway shoulders creates a foreseeable risk of accidents with other motorists

(1) Government and industry standards weigh against parking big-rig trucks on freeway shoulders

In *Lugtu*, this Court rejected the defendant's position that "public policy" required that CHP officers have an unfettered right to pull motorists onto the center median of freeways — holding that no legislative or administrative pronouncements existed to support that standard. (*Id.*, 26 Cal.4th at p. 719.) In this case the applicable government and industry standards also strongly weigh against creating a rule that would give truck drivers an absolute right to park on freeway shoulders.

California freeways are designed with the expectation that drivers will sometimes lose control of their vehicles and veer onto the shoulder. Plaintiffs' traffic-safety expert, Schultz, testified that California standards require all roadside obstacles within 30 feet of the traffic lanes to either be removed or shielded — a safety measure that would be completely undermined by allowing 40-ton vehicles to park in that area. (2RT-561:26-562:15.) Standing on its own, Schultz's testimony demonstrates the strong public-policy considerations that weigh against Ralphs' proposed standard of care.

The Caltrans Traffic Manual simply bolsters this conclusion. Schultz's testimony essentially described the "clear recovery area" concept articulated in Section 7-02, virtually verbatim. (Caltrans Traffic Manual, § 7-02, http://www.dot.ca.gov/hq/traffops/saferesr/Chapter-7-Traffic-Manual-9-2008.pdf.) As an official document of a State executive department, the Traffic Manual can properly be considered in formulating the standard of care, consistent with this Court's recognition that "fundamental public policy may be enunciated in administrative regulations." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80.)[3]

Section 7-02 deals with freeway design, and therefore does not directly establish a standard of care for truck drivers. But this Court can properly take into account the design principles that Caltrans uses to keep California's freeways safe when it decides whether truck drivers should be allowed the unfettered right to park alongside freeways.

Ralphs complains that, even if the risk of accidents on the shoulder is foreseeable to Caltrans when it designs freeways, truck drivers like Horn may not appreciate the danger. But foreseeability is an objective test, which does not hinge on a particular defendant's appreciation of a risk. (*John B. v. Superior Court*, 38 Cal.4th at p. 1192.)

Ralphs' efforts to discount the foreseeable risk of accidents on the freeway shoulder are difficult to reconcile with its company policy prohibiting its truck drivers from parking on the shoulder for non-emergencies. (2RT-344:8-16; 2RT-346:21-25.) Ralphs' transportation manager testified that Ralphs thought parking there posed a safety hazard to

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[3] California appellate courts have consistently taken the Caltrans Traffic Manual into account. (*See, e.g., Wyckoff v. State* (2001) 90 Cal.App.4th 45, 56-57; *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1162; *People v. Goodrich* (1994) 33 Cal.App.4th Supp. 1, 4.)

the drivers and any motorists who might leave the roadway. (2RT-345:25-346:15.)

Ralphs argues that the existence of those safety rules is irrelevant because duty is a legal question. (RB at 16.) But while an employer's safety rules cannot create a legal duty from whole cloth, they are powerful evidence about the appropriate standard of care. (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 588.) "Such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise." (*Id.*)

(2) California law recognizes the foreseeable risk of vehicles striking roadside obstacles

The concept of a "foreseeable" risk is not limited to those dangers that are more probable than not to occur; the test is whether a risk is sufficiently likely in modern life that reasonably thoughtful people would take account of it to guide their practical conduct. (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57.) This means that a person can be held liable for creating even the risk of a slight possibility of injury if a reasonably prudent person would not do so. (*Id.*)

The foreseeability test measures a harm's general character — here, a vehicle leaving a freeway's travel lanes and striking a roadside obstacle — not the precise manner by which it occurred. (*Id.* at pp. 57-58.) Ralphs grouses that a duty to stay off the shoulder would violate the principle that defendants may presume that others will obey the law. But while Cabral may have been negligent, his conduct is not pertinent to the broader question of the foreseeability of vehicles deviating from freeway travel lanes. (*Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1296 fn.6.)

This is especially true because vehicles often veer off freeways without any negligent conduct by their driver — causes include mechanical failures, tire blowouts, sudden illness, animals on the road, or being struck by another vehicle. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 719-720.)[4] "All of these events are, of course, easily foreseeable for purposes of an analysis of duty." (*Laabs v. Southern California Edison Co.*, 175 Cal.App.4th at p. 1260.)

Ralphs' authorities do not suggest otherwise. It cites *Arthur v. Santa Monica Dairy Co.* (1960) 183 Cal.App.2d 483, 489, for the proposition that it is not ordinarily to be expected that cars "will run head-on into cars ahead of them which are in plain sight and have been long stopped." But *Arthur* held that, by stopping in the middle of a city street, the defendant undeniably acted negligently. (*Id.* at p. 486.) The portion of the opinion that Ralphs cites simply held that the defendant's negligent parking of his car was not the cause-in-fact of that particular accident. (*Id.* at p. 488.)

Ralphs also claims that *Whitton v. State of California* (1979) 98 Cal.App.3d 235, 242 held that collisions with vehicles parked on freeway shoulders are unforeseeable. But as this Court recognized in *Lugtu*, *Whitton* only rejected the absurd argument that a CHP officer who pulls over a motorist faces *automatic* liability for any accident that occurs. (*Lugtu*, 26 Cal.4th at p. 717.) In *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1852, the court recognized the foreseeable risk of

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[4] Ralphs represents that "plaintiffs' own traffic engineering expert acknowledged that parking in the area created no hazard to drivers using the freeway with due care." (RB at 17.) But the only testimony Ralphs cites from Schultz expresses his opinion that parking in the area *did* create a hazard for motorists exercising due care — he simply acknowledged that his opinion was not based on any Caltrans studies of the particular area. (*See*, 2RT-576:25-577:22; *see, also,* 2RT-560:16-563:5.)

vehicles crashing into obstacles on the shoulder, holding that *Whitton* was inapplicable outside of cases involving traffic officers' duties to the motorists they pull over.

Ralphs cites *Victor v. Hedges* (1999) 77 Cal.App.4th 229, 242-244, for the proposition that Horn could not have foreseen the risk of a vehicle leaving the roadway because there were no hazardous road conditions or prior accidents in the area. But *Victor* held that being struck by an errant vehicle was not a foreseeable result of standing on a public sidewalk. In contrast, freeways have no sidewalks — precisely because cars leaving the roadway at high speeds present an obvious risk.

Ralphs also argues that Horn did not create an "unreasonable risk of harm" to Cabral, relying on *Richards v. Stanley* (1954) 43 Cal.2d 60, 66, and its progeny, which articulate the "special circumstances doctrine." (RB at 22.) But this Court has disapproved of those cases to the extent that they require a risk of harm to be not just foreseeable, but "unreasonable." (*Ballard v. Uribe*, 41 Cal.3d at pp. 588-589.) It now treats the "special circumstances" test as a cumbersome tool that can only obfuscate when used outside of the "key in the ignition" context. (*Id.* at pp. 585-586.) As a result, *Jackson v. Ryder Truck Rental, Inc*, declined to apply the test to the risk of a vehicle leaving the freeway and striking a car on the shoulder — a risk it viewed as direct and obvious. (*Id.*, 16 Cal.App.4th at pp. 1843-1844.)

The same distinction separates this case from *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 779-780, where a tow-truck driver was killed when a car ran into him as he was attempting to remove the defendant's vehicle from the side of the road after the defendant had been arrested for driving while intoxicated. The court held that an accident between a third party and a tow-truck driver was not the kind of harm normally to be expected from the initial act of driving while intoxicated. (*Id.*) But, citing

this Court's opinion in *Bigbee*, 34 Cal.3d at p. 58, the *Bryant* court recognized that it is foreseeable that drivers may leave the roadway and strike nearby obstacles.

(3) The general standard of care's flexibility best promotes safety under the varying circumstances motorists face on freeways

Ralphs argues that "a duty to avoid stopping near a freeway for nonemergencies would adversely impact roadway safety." (RB at 28.) It suggests that, to avoid deterring drivers who have real emergencies from making use of emergency parking areas, any driver must be allowed to stop in them at any time — even for non-emergency reasons. Nonsense.

Even Ralphs' traffic-engineering consultant testified that vehicles must be kept off the freeway shoulder in non-emergency circumstances to keep emergency-parking areas open for drivers who actually need them. (3RT-844:26-845:15.) Whatever road-safety benefits Ralphs ascribes to its approach must be weighed against the countervailing threat of truck drivers using freeway shoulders as their personal parking spaces.

Public policy may justify a rule that prevents drivers who properly use emergency-parking areas from being held liable for initially creating the emergencies that caused them to pull over. (*See, Bryant v. Glastetter*, 32 Cal.App.4th at pp. 782-783.) But drivers should still be required to exercise due care to avoid creating needless risks to others when parking their vehicles. (*See, Lane v. Jaffe* (1964) 225 Cal.App.2d 172, 176.)[5]

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[5] Ralphs suggests that *Lane v. Jaffe* supports its position because it held that parking in an emergency-parking area was not the proximate cause of an accident. But the court simply held that a jury *could* make that factual finding. (*Id.*, 225 Cal.App.2d at p. 117.) Here, the jury reached the opposite conclusion.

That requirement will not deter drivers who experience real emergencies from using emergency parking areas — the measure of due care reflects whatever exigent circumstances they experience and will not subject them to undue scrutiny. (*See, Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 48-49.)

By suggesting that juries cannot be trusted to make these determinations, Ralphs functionally rejects the "reasonable care" concept that underlies negligence law. Its position has no logical end point. By Ralphs' logic, because drivers can stop in the middle of the street in an emergency, they must also be afforded an absolute right to stop there whenever they want. (*See, Mason v. Crawford* (1936) 17 Cal.App.2d 529, 531 [rejecting argument that drivers have an absolute right to stop in the street for their convenience].) The better approach is to maintain the general standard of care, which permits drivers to take all necessary precautions in emergencies, but does not allow them to endanger the lives of others for their convenience.

b. Recognition of a duty to use reasonable care when parking big-rig trucks is not tantamount to adopting a "duty to provide a safe landing"

Like the majority opinion below, Ralphs continues to characterize plaintiff's position as creating a "duty to provide a safe landing." In effect, it adopts the position advanced by the dissent in *Laabs v. Southern California Edison Co.* (*Id.*, 175 Cal.App.4th at p. 1296, fn.10.) But, as the *Laabs* majority explained, the duty to exercise reasonable care in placing objects adjacent to a roadway is a settled part of California law, which in no way countenances strict liability for the owners of any property that a vehicle crashes into. (*Id.*)

Nor is it clear how requiring big-rig drivers to exercise due care in parking their trucks alongside freeways would impose absolute liability on drivers and landowners adjacent to *any* road. (*See*, RB at 30.) This Court has resisted the "slippery slope" mode of analysis in other contexts, and it should reject Ralphs' particularly unconvincing attempt to invoke it here. (*See, e.g., Strauss v. Horton* (2009) 46 Cal.4th 364, 451.)

Ralphs argues that, if liability exists in this case, drivers could also be held liable for parking along suburban or rural roads if their vehicles are hit by drunk, speeding teenagers. (RB at 30.) But California has long recognized that drivers who negligently park their vehicles on city streets can be held liable for accidents that they cause. (*See, e.g., Sipperly v. San Diego Yellow Cabs* (1949) 89 Cal.App.2d 645, 653 [taxicab parked in wrong direction while loading passenger caused accident]; *Flynn v. Bledsoe Co.* (1928) 92 Cal.App. 145, 150 [negligently parking vehicle at an angle on residential street caused accident]; *Mason v. Crawford* (1936) 17 Cal.App.2d 529, 531 [double-parking to drop off passengers caused accident].)

The unjust outcomes that Ralphs envisions do not occur because all of the conduct that it describes is reasonable as a matter of law — not because no duty exists. And even if defendants sometimes face liability when their negligently-parked cars are struck by reckless drivers, California's comparative-fault system can adequately account for the disparity in their responsibility. (*Lugtu v. California Highway Patrol*, 26 Cal.4th at pp. 725-726.)

Freeways are radically different in their purpose and design from other public roads. (*People ex rel. Dept. of Transportation v. Wilson* (1994) 25 Cal.App.4th 977, 982.) Society already recognizes these differences with respect to the conduct that it tolerates — many California freeways allow motorists to travel 70 mph, but that would indisputably be

negligent and dangerous on a city street. By the same principle, parking a vehicle adjacent to a "high speed, heavily traveled freeway" may be negligent, even though that is a routine and acceptable practice on many city streets. (*See, Morris v. State of California* (1979) 89 Cal.App.3d 962, 965-966 [defective median barrier was dangerous because of particular risks posed by freeway].)

Ralphs relies on *Scott v. Chevron USA* (1992) 5 Cal.App.4th 510, 517, but the court there did not hold that accidents on the shoulder are so unforeseeable that no duty should be imposed on landowners to remove roadside obstacles. In *Scott*, the defendant installed a piece of electrical equipment adjacent to a highway, and the State subsequently erected a guardrail between it and the travel lanes. (*Id.* at p. 514.) A truck drifted off the road, struck the guardrail, and then veered back over the center median and into the opposing traffic lanes, where it crashed into the decedent. (*Id.*) The *Scott* court said that "certainly it is foreseeable that a vehicle might leave a highway and strike a fixed object located on adjacent property." (*Id.* at p. 516.) But it held that once the State installed the guardrail, the defendant could reasonably believe that the risk to motorists had been eliminated. (*Id.* at p. 517.) As a result, *Scott* has been distinguished from cases like this one — where a driver was directly harmed by striking a roadside obstacle. (*Laabs v. Southern California Edison Co.* 175 Cal.App.4th at pp. 1274-1276.)

B. Horn's act of parking Ralphs' truck on the freeway shoulder can properly be considered a proximate cause of Cabral's death in the ensuing accident

1. Cabral's negligence cannot be a superseding cause because vehicles foreseeably veer off freeways

Because being struck by a negligently-driven vehicle when parked alongside a freeway is a foreseeable risk it cannot constitute a superseding cause. (*Lugtu*, 26 Cal.4th at pp. 725-726.) The Court of Appeal majority's

finding to the contrary directly contradicts this Court's decision in *Willis v. Gordon*, 20 Cal.3d at p. 634. In response to *Willis* Ralphs has wisely abandoned the majority's argument about Cabral's erratic driving. (RB at 38.)

2. Parking on the shoulder can proximately cause accidents — irrespective of whether society tolerates the risks posed by roadside parking in emergency circumstances

Ralphs argues that it should not be held liable for the accident because Horn *could* have reasonably parked on the shoulder during an emergency. Though its brief advances this position in two separate sections — framing it at first as a question of duty (RB at 28-30), then as pertaining to proximate cause (RB at 33-38) — it is simply the same argument in different guises. (*See, Jackson v. Ryder Truck Rental, Inc.*, 16 Cal.App.4th at pp. 1847-1848 ["The policies urged by defendant to thwart a conclusion of proximate cause are the same policies that defendant advanced to negate a duty of care"].)

In arguing that a given truck that is parked for nonemergency reasons poses no more of a danger than a different truck parked for an emergency, Ralphs misses the point. Emergency parking along freeways is not tolerated because it is without risks. Regardless of the reason that a vehicle is parked alongside a freeway it creates a foreseeable danger of collisions with other vehicles. (2RT-576:4-11; 2RT-578:7-10.) But society tolerates that risk because forcing disabled cars to continue on the freeway would create even greater hazards to public safety. (*Lane v. Jaffe*, 225 Cal.App.2d at p. 176.) Where that consideration is absent — such as where a truck driver wants to stop to eat a snack or drink a cup of tea — civil liability is entirely appropriate.

At its core, Ralphs' position amounts to this: If a defendant's conduct *would* have met the amount of care required under some hypothetical circumstance other than the one that actually existed, the defendant cannot be liable. That is not the law of this State, and it never has been. "Because application of the reasonable person standard is inherently situational, the amount of care deemed reasonable in any particular case will vary." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.)

If Horn shot and killed Cabral in cold blood, he would not be able to escape liability by arguing that — under different circumstances — he *could* have been acting in self defense. If Horn was a doctor who did nonemergency surgery on Cabral without obtaining informed consent, he could not escape liability by arguing that the operation *would* have been reasonable if there had been an emergency. In this case, Horn negligently parked his truck on the side of the freeway, and he cannot escape liability by arguing that his conduct *could* have been reasonable if he had been experiencing an actual emergency instead of stopping for his convenience.

By advancing this argument Ralphs attempts to revive a theory that the courts of this state soundly rejected in the early California jurisprudence on automobile negligence. In the 1936 case of *Mason v. Crawford*, 17 Cal.App.2d at p. 530, the defendant double-parked his automobile to drop off his wife, and another vehicle ran into it. He argued that he could not be held liable because he had a right to stop his car in the street for an emergency. (*Id.* at pp. 531-532.) The court rejected that argument, holding that the lack of parking places was not an emergency and declining to create a rule that would allow drivers to park anywhere they wanted for their convenience, irrespective of the hazards to others. (*Id.*) It explained that if the privileges enjoyed by a tow truck or ambulance that stops on the roadway were extended to all vehicles— even those not stopping for an

emergency — the safety rules of the Vehicle Code would be rendered meaningless. (*Id.* at p. 535.)

This Court has consistently applied this principle to cases involving negligently-parked vehicles. In *Thomson v. Bayless* (1944) 24 Cal.2d 543, 548, the Court held that parking a big rig on the right lane of a four-lane highway was negligence that could proximately cause an accident — despite the fact that, under Vehicle Code section 582, the defendant *could* have parked on the highway if it was impracticable to park elsewhere.

Decades later the *Thomson* rule was applied in *Willis v. Gordon*, 20 Cal.3d at pp. 634-635, holding that whether the defendant's vehicle had been so disabled by a flat tire that it was impracticable to park anywhere but the shoulder constituted a triable issue of fact. And in *Fennessy v. Pacific Gas & Elec. Co.* (1942) 20 Cal.2d 141, 144, the Court affirmed a verdict against PG&E after one of its service trucks caused an accident when it was parked in a manner that partially blocked traffic — despite the fact that the municipal ordinance at issue contained an exemption for "emergency" work by public utilities.

Ralphs purports to distinguish these cases on the grounds that they were all negligence per se cases. (RB at 37-38.) But elsewhere in its brief — in a section extolling the relevance of the authorities that it cites — Ralphs counters its own argument. In its words, "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." (RB at 35; *citing Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285.)

Plaintiffs agree with that portion of Ralphs' brief. The proximate-cause analysis in negligence per se cases can certainly be considered here. Although the standard of care in those cases was established by statute, and here by expert testimony about what constituted reasonable care — both

situations created the same proximate-cause question: If the standard of care permitted emergency parking, can a defendant be held liable for parking in a nonemergency? *Mason*, *Thomson*, *Willis*, and *Fennessy* each provide an unambiguous affirmative answer.

But Ralphs errs when it suggests that "this is essentially a negligence per se case masquerading as an ordinary negligence case," and that plaintiffs must satisfy that doctrine's requirements — such as proving that the statute's purpose was to protect the class of persons including the decedent. (RB at 3-4, 35-36.) This case does not involve negligence per se — Ralphs' repeated insinuations cannot change that. It insists that plaintiffs "are attempting to invoke a presumption of negligence based on a statutory violation". (RB at 4.) But plaintiffs' commercial trucking expert testified that parking on the shoulder is dangerous and should only be done in an emergency — regardless of whether the area is marked with an emergency parking sign. (2RT-444:8-11.)

The jury in this case was never instructed on negligence per se. It held Ralphs liable based on a theory that Horn failed to use reasonable care. (AA 101.) Plaintiffs never sought to establish a presumption of negligence based on the emergency-parking sign. Accordingly, the sign's purpose remains wholly irrelevant. (*See, e.g. Victor v. Hedges*, 77 Cal.App.4th at p. 234, ["If [Defendant] is not to be presumed negligent, and we will conclude that he is not, the ordinary negligence analysis may proceed uncontaminated by the infraction charge.]

The problem with Ralphs' authorities — *Bentley v. Chapman* (1952) 113 Cal.App.2d 1, 4, and *Capolungo v. Bondini* (1986) 179 Cal.App.3d 346, 355 — is that the specific parking ordinances at issue in both cases were not designed to keep the areas free of vehicles. They both limited how long any one vehicle could park as a way to *maximize* the aggregate number of vehicles that could use the limited number of spaces.

As the *Capolungo* court put it, the parking ordinance "clearly contemplates that the zone may be legally in use by vehicle after vehicle so that traffic in that lane might be constantly obstructed." (*Id.*, 179 Cal.App.3d at p. 352.) As a result, "any excess in the length of time respondent's car was parked in the yellow zone had no causal connection with the accident." (*Id.* at p. 354.) The *Capolungo* court went out of its way to explain that liability *would* be appropriate in cases where a statute sought to keep an area clear in all but emergency circumstances:

> It is easy to see a traffic safety purpose in prohibiting stopping or parking on the highway. By limiting stopping or parking to extreme situations where off-highway parking is not "practicable", the obvious purpose is to keep the highway completely clear of stopped vehicles whenever possible and to thereby provide for the safe, unobstructed passage of traffic. (*Id.* at p. 351, citations omitted.)

Courts in other states have reached the same conclusion when construing emergency-parking statutes. (*Dowling v. Consolidated Carriers Corp.* (N.Y. App. Div. 1984) 103 A.D.2d 675, 677, aff'd (1985) 65 N.Y.2d 799, 482 ["The statute and the regulation were clearly designed with an awareness, based on general experience, that from time to time vehicles on high speed state highways go on to the shoulder under circumstances that make the presence of standing or parked vehicles a source of danger."]; *Storer Communications, Inc. v. Burns* (Ga. Ct. App. 1990) 195 Ga.App. 230, 230, citation omitted ["It cannot be denied that the collision occurred at the place that it did only because another vehicle was negligently parked in the emergency lane"]; *Mayer v. Rockett* (1972) 362 Mass. 22, 23 ["violation of the statute and regulations cited was not only evidence of negligence but also could properly have been found to be a proximate cause of the accident which occurred"].)

The one case Ralphs cites that nominally supports its position is *Arthur v. Santa Monica Dairy Co.*, 183 Cal.App.2d 483, 488-490, which held that a defendant whose truck was rear-ended had not caused the accident by illegally double-parking on a city street. But the court was simply affirming the verdict reached in a bench trial — it held that "the issue of proximate cause in the instant case is essentially one of fact." (*Id.* at p. 486.) Were this Court to reach that conclusion, plaintiffs would prevail because they have already secured a favorable verdict below.

C. Substantial evidence supported the jury's finding that the presence of Ralphs' truck was a cause-in-fact of the accident

1. The jury properly weighed the causation evidence — Ralphs deserves neither a new trial nor JNOV

In many cases, testimony from an accident-reconstruction expert can greatly assist a jury. (*People v. Haeussler* (1953) 41 Cal.2d 252, 260, *Overruled on unrelated grounds by People v. Cahan* (1955) 44 Cal.2d 434, 445.) In the accident-reconstruction field expert testimony's admissibility necessarily rests with the common sense and discretion of the trial court. (*Id.*) Common sense allows an expert who has years of experience investigating traffic accidents to form an opinion by inspecting marks on the pavement and the location of vehicular debris at a crash site. (*Id.* at p. 261.)

That is what happened in this case — nothing less, nothing more. To prove that Horn caused Cabral's death by parking Ralphs' truck on the shoulder, the plaintiffs retained Robert Anderson, an expert with 25 years of experience in forensic reevaluation, who had reconstructed approximately 3,000 accidents. (2RT-530:24-26; 2RT-505:12-14.) Anderson conducted a thorough investigation of the accident. He reviewed all the information in the CHP report, independently reproduced the police measurements by visiting the accident site, and personally inspected

Cabral's vehicle. (2RT-506:15-20; 2RT-519:11-20; 2RT-513:8-22.) He then used his training and experience to analyze the information he gathered, concluding that Cabral's pickup would probably have returned to the roadway if Ralphs' tractor-trailer had not been parked on the unpaved freeway shoulder. (2RT-527:4-528:13; 2RT-529:1-21.)

Unable to attack Anderson's credentials and experience as an accident-reconstruction expert, Ralphs takes aim at the reliability of two pieces of evidence on which he based his opinion: (1) tire marks found at the accident scene and (2) his examination of the damage to Cabral's pickup.

Though Ralphs makes a litany of specific complaints, its two attacks share an implicit premise — that accident-reconstruction experts' opinions are admissible only in cases where accidents can be completely reconstructed with perfect accuracy. Courts consistently reject that standard because it would make the perfect the enemy of the good. "The object of accident reconstruction is to reach satisfactory — not infallible — conclusions as to the operational factors and dynamic situation contributing to the collision." (*Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, 274.)

The fact that certain indefinite factors may enter into an accident-reconstruction expert's determinations goes to their opinion's weight, not its admissibility. (*Id.* at p. 275.) This Court has specifically applied that principle when accident-reconstruction experts rely on skid marks — uncertainty about the marks' origins presents a factor for the jury to weigh. (*Robinson v. Cable* (1961) 55 Cal.2d 425, 428.)

Ralphs also misstates the record when it claims that, absent the testimony that Cabral was turning left toward the freeway, the record contains no substantial evidence of causation. To the contrary, Anderson testified that if Cabral's truck continued straight ahead there were no

structures that could have caused an accident — the truck would have simply gone down a gravel shoulder. (2RT-549:23-550:10.) To hit a structure other than Ralphs' truck, Cabral would have needed to make a hard right turn and then traveled over four-hundred feet. (*Id.*) This alone constitutes substantial evidence that the location of Ralphs' truck was a substantial factor in causing Cabral's death.

Ralphs argues that, even if Cabral were in the process of turning towards the freeway his truck could still have struck other cars when it reentered the travel lanes. This turns the substantial-evidence test on its head. Once the plaintiffs meet the threshold burden of producing substantial evidence, it is for the jury to evaluate the various scenarios advanced by the parties and to reach a finding about causation. (*Moore v. Belt* (1949) 34 Cal.2d 525, 545.) Ralphs' contention that Cabral *could* have struck another vehicle is the purest form of speculation.

a. Anderson could consider reliable materials — like the CHP's accident report — even if they were not admissible

According to Ralphs, Anderson's testimony carries no evidentiary value if his opinions were based on materials not in evidence — such as the portions of the CHP accident report that identified the tire marks as belonging to Cabral's vehicle. But expert testimony can be premised on material that is not admitted into evidence so long as that material falls within the category of information reasonably relied on by experts in the relevant field. (*People v. Montiel* (1993) 5 Cal.4th 877, 918-919.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*In re Fields* (1990) 51 Cal.3d 1063, 1070.)

For example, in *People v. Gardeley* (1996) 14 Cal.4th 605, 620, this Court permitted a detective to testify to hearsay information he relied on in

concluding that defendants were members of a criminal street gang — including "information from his colleagues and various law enforcement agencies." (*Id.*) The latter category presents a direct analogy to the information provided by the CHP report here.

The CHP report clearly represents the type of material on which accident-reconstruction experts reasonably rely. In fact, Ralphs' accident-reconstruction expert, Fred Cady, considered the same information in his analysis. (3RT-899:11-900:2.)

Ralphs' proffered authority — *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742 — does not suggest that Anderson could not rely on the CHP report. *Garibay* simply acknowledged that experts can rely on inadmissible hearsay materials, but emphasized that those materials still need to be authenticated. (*Id.*) Here, there is no dispute that the CHP report Anderson relied on — portions of which were placed into evidence — was authenticated.

b. Anderson concluded that the tire marks came from Cabral's pickup by conducting a valid independent investigation

Ralphs continues to insist that Anderson could not conclude that the tire marks had been made by Cabral's pickup by uncritically adopting the labels they received in the CHP report. But Anderson testified that he conducted his own analysis of the accident and independently concluded that the skid marks were from Cabral's pickup — based on a comparison of the CHP photos documenting the skid marks, the resting point of the vehicles, and the damage they sustained during the accident. (*See,* AOB at pp. 35-37.)

Though the CHP report was not placed into evidence, the diagram and photographs of the accident that it contained were. (AA 167-172; 2RT-303:7-20; 2RT-311:22-16.) Ralphs concedes that those items were properly admitted; Vehicle Code section 20013 requires courts to exclude accident reports, but not relevant evidence within them. (*Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp. 22, 31.)

On their face, the CHP diagram and photographs support an inference that the two tire marks came from Cabral's pickup — they line up with the rear of the wrecked vehicle and are consistent with the general direction it was traveling. (AA 172 ; AA 168.) By examining the diagram and accompany information in the police report, Anderson was able to consider the tire marks' precise coordinates in relation to the vehicles' points of rest and other physical evidence at the crash site. (2RT-506:21-507:20; 2RT-510:10-511:6.) He even visited the crash location and reproduced the police measurements himself. (2RT-519:11-20.)

Based on the totality of the evidence — including the geometry of the accident scene and the damage to the truck's "DOT bar" — Anderson concluded that the tire marks had probably been created by Cabral's pickup. (2RT-511:7-513:7; 2RT-508:16-24; 518:6-519:10.) Anderson went out of his way to clarify that he based his opinions directly on the documented physical evidence, which he could personally see, and that he did not adopt his conclusions from Officer Migliacci or the CHP report. (2RT-541:13-21; 2RT-532:13-17.) He looked at the photographs of the crash site, observed the marks himself, and compared them with the other physical evidence, all of which supported his conclusion. (2RT-541:13-21.)

Ralphs argues that Anderson's accident reconstruction fails to qualify as substantial evidence because it was allegedly inconsistent with the testimony of truck-driver Juan Perez, who never saw the brake lights on Cabral's pickup activate. But Anderson testified that, though he believed that Cabral applied his brakes, application of the brakes was not a necessary part of his accident reconstruction. (2RT-542:16-22.) Anderson also based his opinion on Perez's admission that there was a period of time when he was unable to see Cabral's pickup because a tractor-trailer obstructed his view. (2RT-522:26-523:17.)

Because there was conflicting evidence to support varying expert opinions, this case bears no resemblance to the authority that Ralphs cites rejecting expert opinions that are premised on facts contradicted by all the evidence in the record. (*See, Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415-1416 ["opinion that the brake fluid leaked from the screws does not even rise to the level of speculation or conjecture" because it directly contradicted all testimony and physical evidence]; *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510-511 [sole factual support for medical-expert declaration was the mistaken belief that the "anterior side of the abdomen" meant the back, not the front].)

2. Anderson supported his opinion that Cabral's pickup had been traveling approximately 60 mph with a reasoned explanation

Ralphs argues that Anderson's estimate of Cabral's speed was not supported by a reasoned explanation. Even were that true, the verdict would still be supported by substantial evidence because Anderson's accident reconstruction overlapped with the speed estimates that Ralphs' expert made. After examining the damage to Cabral's pickup, Anderson estimated that it was traveling 60 mph at the time of the accident, but

admitted that it could have been traveling approximately 10 mph faster than his estimate. (2RT-545:17-545:14; 2RT-516:26-518:5.)

Ralphs' accident-reconstruction expert estimated that Cabral's truck had been traveling between 70 and 80 mph. (4RT-904:22-905:5.) The jury could have simply relied on the lower end of Ralph's estimate to make a finding consistent with Anderson's version of how the accident occurred.

Regardless, Anderson's estimate of Cabral's speed constituted substantial evidence because it *was* accompanied by a reasoned explanation. Anderson explained that much of the damage to the Cabral's pickup exaggerated the speed of the impact because the tractor trailer's bumper slid over the stiffest parts of Cabral's truck, such as the engine. (2RT-517:17-25.) The frame of the pickup was only shortened three feet at the driver's side — that ruled out a higher speed crash, which would have compacted it more. (2RT-517:26-518:5.)

Ralphs fails to cite any cases that deal with accident reconstruction. Those cases establish that Anderson was entitled to use the skills he had developed in investigating thousands of accidents to estimate Cabral's speed based on the damage to the pickup's frame. (*See, Hoffman v. Slocum* (1963) 219 Cal.App.2d 100, 104-105 [CHP veteran's experience allowed him to estimate vehicle's speed by examining wreckage]; *Accord Davis v. Ward* (1963) 219 Cal.App.2d 144, 148.)

CONCLUSION

Ralphs fails to articulate any basis — beyond its desire to avoid liability in this case — to justify a rule that would allow truck drivers to parks alongside California freeways because it was more convenient than stopping at a rest area or a truck stop. Settled principles of duty and proximate cause support the jury's verdict in this case. The Court of Appeal majority misapplied those principles in reversing the judgment.

Accordingly, the order denying Ralphs' motion for JNOV should be affirmed and the judgment reinstated.

Dated: August 2, 2010.

Respectfully submitted,

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Dated: August 2, 2010.

Jeffrey Isaac Ehrlich

Cabral v. Ralphs
Supreme Court No. S178799
Court of Appeal No. E044098
Case No. RCV 089849

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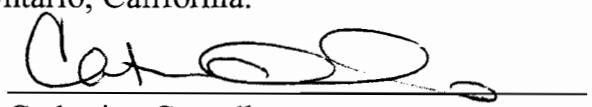

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