

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

MARIA CABRAL,

Plaintiff and Respondent,

vs.

RALPHS GROCERY COMPANY,

Defendant and Appellant.

SUPREME COURT
FILED

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Deputy

PETITION FOR REVIEW

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
4th Civil No. E044098;
San Bernardino County Sup. Ct. No. RCV-089849

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ISSUES FOR REVIEW

1. Do the owners and operators of big-rig trucks who park illegally along California freeways owe passing motorists a duty of care with respect to how and where the truck is parked?
2. If a driver illegally parks a big-rig truck alongside a California freeway, and a passing motorist who has lost control of his vehicle collides with it and is killed, does California public policy forbid a finding that the parked truck was a substantial factor in causing the collision?

INTRODUCTION

Hen Horn drove a big-rig truck for Ralphs Grocery Company. When he drove his route eastbound along Interstate 10 twice a week through San Bernardino, he routinely stopped his truck in an area alongside the freeway marked "Emergency Parking Only" to have a snack. This was a violation of state law, which generally forbids parking alongside freeways, and of Ralphs' trucking guidelines.

Adelelmo Cabral died when he lost control of his pickup truck, swerved off the freeway, and slammed into the back of Horn's truck. In the resulting wrongful-death lawsuit, the jury found that Horn had been negligent in parking the truck next to the freeway, and it assigned him 10% of the fault for crash. 90% of the fault was assigned to Cabral. Judgment was entered on the verdict against Ralphs on a respondeat-superior theory. After its post-trial motions were denied, Ralphs appealed.

In a published decision, over a dissent, the Court of Appeal for the 4th District, Division 2, held that as a matter of law, (a) owners and operators of a big-rig trucks owe no duty of care to passing freeway motorists with respect to how the trucks are parked alongside freeways; (b)

that illegally parking a big-rig truck alongside a freeway cannot be the proximate cause of an accident where the unlawfully-parked truck is struck by another vehicle; and (c) that the testimony of plaintiff's expert about the cause and mechanics of the crash was too speculative. Accordingly, the court reversed the judgment, finding that the trial court erred in denying Ralphs' motion for judgment notwithstanding the verdict.

The majority's conclusion on duty is based primarily on its belief that no reasonable person could foresee that parking a 35,000 pound big-rig truck 16 feet from the slow lane of a busy interstate freeway might subject the motorists using the freeway to an unreasonable risk of harm. But the type of accident that killed Cabral was not just foreseeable, it was foreseen.

As the dissent pointed out, Ralphs itself understood that it was dangerous for drivers to stop in "emergency only" parking areas for non-emergency reasons because a parked truck put motorists who might leave the roadway at risk. It therefore instructed its drivers not to park in this manner. Plaintiff's trucking expert also testified that it was below the standard of care for a trucker to use emergency-only parking areas to stop to eat and drink.

Vehicle Code section 21718 expressly forbids parking alongside freeways, subject to certain limited exceptions that do not apply here. Plainly, the Legislature considered parked vehicles alongside freeways a risk. Caltrans is of the same view. Its Traffic Manual states that the area alongside freeways should be clear of fixed objects for a minimum of 30-feet from the roadway to provide a "clear recovery zone" for vehicles that have left the traveled way. (Cal. Traffic Manual, § 7-02.) Any obstacles in this area must either be removed, relocated, made breakaway, or shielded by guardrails or crash cushions. (*Id.*)

The majority's conclusion on proximate cause is equally problematic. It is directly contrary to this Court's decision in *Thompson v.*

Bayless (1944) 24 Cal.2d 543, 548, where this Court acknowledged that, “the violation of a parking regulation may be the proximate cause of an accident where the unlawfully parked vehicle is struck by another vehicle.” The majority concluded that, as a matter of public policy, “Horn’s act of stopping and [Cabral’s] collision with Horn’s big rig [was] too attenuated to support imposing liability on Ralphs.” (Typed opn. at 23.)

In reality, the causal connection between the presence of the truck and the fatal collision is tangibly clear. If the truck had not been parked where it was, Cabral would not have hit it — he had hundreds of additional feet of clear recovery zone beyond the truck to regain control of his pickup.

If allowed to stand, the appellate court’s opinion would mean that owners and operators of big-rig trucks can park their trucks with impunity along California freeways. This might be convenient for truckers, but poses a plain hazard for passing motorists, since it will eliminate the clear recovery zone that Caltrans designs into freeways.

Cars travelling along freeways swerve out of traffic lanes for a variety of reasons, including mechanical failures or being cut off by another driver. The presence of trucks parked illegally along the side of the freeway is a guarantee that these incidents will result in additional fatal accidents like the one that killed Cabral. By effectively immunizing truck owners and operators from liability for this kind of accident, the majority’s opinion not only makes California freeways more dangerous, it robs the victims of such accidents of any redress.

STATEMENT OF THE CASE

A. Factual Summary

Horn told plaintiff's investigator that it was his routine when he drove his route eastbound, twice a week, to pull over on the shoulder of the I-10 freeway at the spot where the accident occurred and have a snack. (2-RT-321:11-20.) Horn was aware that the area was marked with an "Emergency Parking Only" sign. (2-RT-386:14-17.)

Ralphs' person-most-knowlegeable about the company's safety guidelines and training for its truck drivers testified that Ralphs did not want its drivers parking in "Emergency Parking Only" areas for non-emergency reasons because of concerns about safety for its drivers and for other motorists who left the roadway. (Dissent at p.2; 2-RT-341:26-342:13, 345:15-346:15.) He further testified that if Horn had pulled over in an "Emergency Parking Only" area to get something to eat and drink, then he violated Ralphs' safety guidelines. (*Id.*; 2-RT-346:17-25, 367:5-12.)

The accident happened on February 27, 2004. (Typed opn. at 2.) Cabral was driving his pickup truck east on the I-10, lost control of his vehicle for unknown reasons, swerved across several lanes of traffic, and crashed into the back of Horn's truck. (*Id.* at 4.) Horn had just poured himself a cup of tea when he felt the impact. (2-RT-387:4-7). Testimony at trial was that Cabral either fell asleep, or suffered some kind of medical problem. (*Id.* at p. 5.) A toxicology report showed no evidence of intoxication. (*Id.*)

Plaintiff's expert, Anderson, testified that, based on his investigation, the evidence showed that when Cabral struck Horn's truck he was awake and alert, his pickup was in a left turn, and he could have returned safely to the freeway if the truck had not been in his path. (Typed opn. at p. 6.) He explained that there was approximately 400 feet of space between the spot where Cabral left the freeway and any obstacles he might

strike (other than Horn's truck). (2 RT 549:23-550:10.)

B. Procedural Summary

1. The wrongful-death action

Cabral's family brought a wrongful-death action against Horn and Ralphs. (On appeal, Ralphs is the sole defendant.) The jury found that Ralphs (through Horn) was negligent, and that its negligence was a substantial factor in causing the collision that killed Cabral. (Typed opn. at p. 8.) The jury assessed 90% of the fault for the accident to Cabral, and 10% to Horn. (In addition, the jury ruled in favor of Ralphs on its cross-complaint for damages to its big rig.) The net amount awarded to plaintiffs was \$474,298.40. (*Id.*) Ralphs's post-trial motions for a new trial and judgment notwithstanding the verdict were denied. (*Id.* at p. 9.)

2. The majority's decision on appeal

Justice Hollenhorst wrote the majority opinion, with Justice McKinster joining. They held that the trial court erred in not granting Ralphs' motion for judgment notwithstanding the verdict, for three reasons.

First, they concluded that Ralphs owed no duty to Cabral (or to any other passing motorist) with respect to parking his truck along the side of the freeway in the "Emergency Parking Only" zone. (Typed opn. at pp 11, 13, 14.) The majority summarized its reasoning in these terms, "A reasonable person would not conclude that Horn's act of stopping on the side of the freeway, 16 feet from lane four, in the dirt area, would subject motorists using the freeway to an unreasonable risk of harm." (*Id.* at p. 13.)

The majority explained that, simply because it was possible that a passing motorist might leave the traffic lanes and strike the parked truck, this did not create a duty for Horn to "ensure a 'safe landing.'" (*Id.*, at p. 14.) If in the majority's view, if it did, then the defendant would be required to eliminate *all* possibilities of risk. (*Id.*, emphasis in text.) The majority explained that all that a defendant is required to do is to protect a

plaintiff from reasonably foreseeable risks, and since it was not reasonably foreseeable that parking the truck alongside the freeway created any risk, there was no duty. (*Id.*)

The majority found it significant that emergency parking was permitted in the area where Horn stopped. Hence, if Horn had stopped in the same spot because of an emergency, “it would not have been any safer.” (*Id.* at p. 15.) This observation caused the majority to conclude that the reason for Horn’s stop was “a red herring,” and “wholly immaterial to the duty analysis.” (*Id.*)

The majority wondered, “If duty is imposed under the facts of this case, where does it end? Taken to its logical conclusion, whenever there is no safe landing, liability will be found.” (*Id.* at p. 17.) Hence, motorists could be held liable for parking their cars alongside residential streets, and property owners could be liable for having mailboxes near the curb, or trees alongside streets. (*Id.*)

Second, the majority ruled that, even if a duty could be found, Horn’s parking his truck alongside the roadway could not be the proximate cause of the collision, as a matter of law. In the majority’s view, the causal connection between Horn’s act of parking and the collision was so attenuated that the former could not be considered a cause in fact of the latter. (Typed opn. at p. 21.)

In addition, the majority concluded that even if Horn’s conduct could be seen as a cause in fact, public policy should prevent Cabral’s family from obtaining any recovery against Ralphs. (*Id.* at p. 22.) This conclusion was based on the majority’s view that the causal connection between Horn’s conduct and the collision was too attenuated to support liability. (*Id.* at p. 23.)

Finally, third, the majority held that the trial court erred in allowing the plaintiff’s causation expert, Anderson, to testify, because his testimony

was too speculative. (*Id.* at p . 24.)

3. The dissent

Justice Miller disagreed with the majority on each of its points, and wrote a substantial dissent. With respect to the issue of duty, he concluded that the majority had erred in departing from the general rule that every person has a duty of due care to avoid injuring others by their careless conduct. (Dissent, pp 2-4.) Under the *Rowland v. Christian* factors that California courts balance to determine whether or not a departure from the general duty of due care is warranted,¹ he concluded that the trial court correctly held that Ralphs owed Cabral a duty of due care. (*Id.*)

Unlike the majority, he concluded that the accident was plainly foreseeable, particularly in light of the testimony of Ralphs' assistant transportation manager that it violated Ralphs safety guidelines for its truckers to stop in "Emergency Parking Only" areas for non-emergency purposes, because such stops posed a hazard to its drivers and to motorists who might leave the road. (*Id.* at p. 2.) Since Ralphs itself had foreseen the kind of accident that occurred, it was plainly foreseeable. (*Id.*)

Justice Miller concluded that application of each of the factors favored imposing a duty on Ralphs, and none supported the majority's conclusion. (*Id.* at pp. 2-4.)

With respect to the majority's observation that a motorist stopped by

¹ The *Rowland* factors include "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113.)

the side of the road owes no duty to create a “safe landing,” Justice Miller agreed, but noted that the true issue was whether there was a reason to depart from the general rule that every person has a duty of care to avoid injuring others by careless conduct. (*Id.* at p. 8.) In essence, he explained that the majority’s fears that liability would be imposed on landowners based on having mailboxes near the curb, or on motorists for parking on residential streets, was overblown. (*Id.*)

On the issue of proximate cause, Justice Miller concluded that the testimony of Anderson, plaintiff’s expert, was sufficient to support a finding of causation in fact. (*Id.* at p. 10.) With respect to public policy, he concluded that holding Ralphs responsible for its driver negligently parking along the side of the freeway might encourage other truck drivers to stop in safer locations. Accordingly, public policy supported the imposition of liability. (*Id.*)

Finally, with respect to the admission of Anderson’s testimony, Justice Miller offered a point-by-point rebuttal of the majority’s findings, concluding that Anderson’s testimony was based on his own observations and expertise, and was therefore admissible. Its weight was for the jury to determine. (*Id.* at pp 13-19.)

WHY REVIEW IS WARRANTED

A. By giving truck owners and operators carte blanche to park along California freeways, the majority’s opinion makes freeways more dangerous

The majority’s view is that a big-rig truck parked 16-feet — approximately the width of one traffic lane — from the slow lane of a busy urban freeway creates no foreseeable danger to passing motorists, since they are expected to stay within the roadway if they exercise due care. (Typed opn. at p. 14.) But the flaws in this reasoning are obvious. Even careful motorists can veer off the roadway if they should experience a flat

tire or mechanical problem, or if they are cut off by another car and must swerve to avoid a collision. And even the negligent drivers, whom the majority shows no concern for, may be carrying passengers.

The majority's view cannot be squared with the Caltrans Traffic Manual. (<http://www.dot.ca.gov/hq/traffops/saferesr/Chapter-7-Traffic-Manual-9-2008.pdf>.) Section 7-02 of the chapter on "traffic safety systems," titled "Clear Zone Concept," explains the importance of keeping the areas alongside freeways clear:

An area clear of fixed objects adjacent to the roadway is desirable to provide a recovery zone for vehicles that have left the traveled way. Studies have indicated that on high-speed highways, a clear width of 30 feet from the edge of the traveled way permits about 80 percent of the vehicles leaving the roadway out of control to recover. Therefore, 30 feet should be considered the minimum, traversable clear recovery area for freeways and high-speed expressways. High-speed is defined as operating speeds greater than 45 mph. (*Id.*)

The manual adds that "Obstacles located in the clear recovery zone should be removed, relocated, made breakaway, or shielded by guardrail or crash cushions . . ." in accordance with the manual's guidelines. (*Id.*)

By holding that truck owners and operators who park their trucks alongside freeways cannot be held liable if their trucks are struck by a motorist who leaves the roadway, the majority opinion gives truckers permission to park anywhere alongside a freeway. While the opinion focuses on the fact that Horn's truck was 16 feet from the roadway, there is no limiting rule in the opinion for how close to the roadway is too risky. As the majority explains, truckers should be allowed to assume that passing cars will not crash into trucks that are parked in clear sight on the side of

the road. (Typed opn. at p. 14.)

If trucks can park alongside freeways, even 16 feet from the roadway, the concept of the “clear recovery zone” that is designed into California freeways is eliminated. The recovery zones will no longer be clear, but will instead often contain 35,000-pound trucks, which are not shielded in any way. As a result, there will be more crashes exactly like the one that took Adelmo Cabral’s life.

B. The majority relies on a legal analysis that is at odds with California law

1. The majority’s duty analysis is flawed

a. The accident was plainly foreseeable

The cornerstone of the majority’s duty analysis is its conclusion that the kind of accident that occurred was simply not the foreseeable result of Horn’s decision to park his truck 16-feet off the roadway. This view is, frankly, difficult to fathom. The majority would have been on better footing if it had held that, *even though* such an accident was foreseeable, other factors militated against the recognition of a duty of care. But plainly, it is foreseeable that parking a big rig 16-feet away from a Southern-California freeway creates a risk that someone will crash into the truck.

As already explained, Ralphs itself was aware of the risk, and admitted that Horn’s conduct in parking in an “emergency parking only” zone for non-emergency reasons violated company policy. Moreover, the risk of collisions between stationary roadside objects and cars veering off the pavement was not only foreseen by Caltrans — it was studied. It was those studies that caused Caltrans to conclude a 30-foot clear recovery zone would be sufficient to prevent 80% of vehicles that leave the roadway to regain control.

Since the accident was clearly foreseeable, the majority’s concern about creating a duty to ensure a “soft landing” was misplaced. Properly

understood, Horn's duty was not to ensure that Cabral enjoyed a soft landing if he veered off the roadway, it was simply not to increase Cabral's risk of dying if he lost control of his car. By illegally parking along the freeway, and eliminating the clear-recovery zone that Cabral needed, Horn created a foreseeable risk.

b. The parade of horrors that would purportedly flow from recognizing a duty is overstated

The balance of the majority's duty analysis is equally flawed. It finds that, "the burden to defendants of imposing a duty would be significant." (Typed opn. at p. 17.) No explanation is provided for this finding. The record here showed that Horn parked within two miles of a truck stop. (Dissent at p. 3.) Stopping at a rest stop or a truck stop to have his tea would plainly not have imposed any significant burden on Horn.

Apparently, the majority's conclusion about the burden of recognizing a duty is that it would result in limitless liability for those who park a car alongside a residential street, or for property owners whose mailboxes or trees are adjacent to streets. (Typed opn. at p. 18.) As the dissent explains, this concern is unwarranted. "The only duty Horn owed to Decedent was to avoid injuring Decedent. Moreover, requiring motorists to exercise due care when stopping along a highway does not affect the accepted standard of care applicable to landowners." (Dissent at p. 8.)

2. The majority's proximate-cause analysis conflicts with this Court's finding in *Thompson v. Bayless* that unlawful parking can be the proximate cause of a collision

As the majority explains, "proximate cause involves two elements," cause-in-fact as well as a public-policy determination that the defendant should be held liable for causing the plaintiff's injury. (Typed opn. at p. 19, citing *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315, 316.) In the majority's view, neither element was satisfied here.

Given this Court's recognition in *Thompson v. Bayless*, 24 Cal.2d at p. 548, that unlawful parking can be the proximate cause of a collision between the parked vehicle and another vehicle that runs into it, proximate cause would not appear to be an issue.²

With respect to cause-in-fact, the majority first noted that, whether or not Horn's reason for parking involved an emergency, the area where he stopped was available for emergency parking. In the court's view, this attenuated the causal link between Horn's presence and the collision, since it was possible that someone might have lawfully been parked in the spot where Horn stopped. But those are not the facts of this case. The fact that drivers who experience actual emergencies are permitted to park in the area where Horn did does not mean that there was no risk in parking there; only that society views the risk as acceptable, given the circumstances. It does not change the causal link between Horn's presence, the lack of a clear-recovery area, and the crash.

Next, the majority notes that Cabral's driving before the crash was erratic. True — and this is why the jury assigned 90% of the fault for the crash to Cabral. It does not change the causal analysis.

Third, the majority attacks the sufficiency of Anderson's testimony concerning causation. As the dissent shows, however, Anderson's testimony was sufficient to go to the jury. (Dissent at pp. 13-19.)

The majority also found that even if there was causation in fact, "as a matter of public policy, Plaintiff cannot recover against Ralphs based on the facts in the record." (Typed opn. at p. 22.) The court noted that vehicles stop along the side of the freeway for a variety of reasons every day, including emergencies and being pulled over by the CHP. (*Id.* at p.

² In fairness, it does not appear that either side cited *Thompson v. Bayless* to the Court of Appeal.

23.) This is true, but the law expressly permits stopping in these circumstances, because they fall with the exceptions within Veh. Code section 21718 to the prohibition of stopping alongside the freeway.

The court's public-policy finding is not really based on a public policy that assigns some measure of utility to having trucks parked alongside freeways; it is simply another way to express the majority's view that the causal connection between Horn's conduct and the accident was too attenuated to support the imposition of liability. (Typed opn. at p. 23.)

CONCLUSION

The majority's opinion not only wrongly denies the Cabral family any recovery for the death of Adelelmo Cabral, it puts every California motorist who drives on a freeway at risk. This Court should grant review to make clear that big-rig trucks cannot park with impunity along California freeways whenever the urge strikes the driver to have a cup of tea.

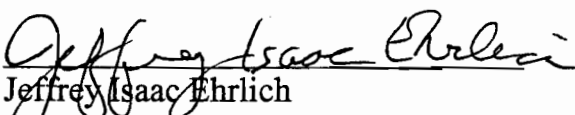
Dated: December 17, 2009.

Respectfully submitted,

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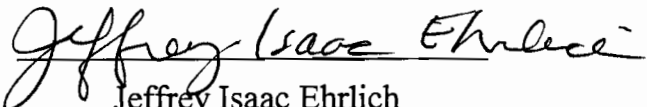
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Dated: December 17, 2009.


Jeffrey Isaac Ehrlich



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FOURTH APPELLATE DISTRICT
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Defendant and Appellant.

E044098

(Super.Ct.No. RCV089849)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kenneth Andreen, Judge. (Retired Associate Justice of the Court of Appeal, Fifth Appellate District assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded with directions.

Bell, Orrock & Watase, Stanley Orrock; Greines, Martin, Stein & Richland, Timothy T. Coates and Lillie Hsu, for Defendant and Appellant.

Shernoff Bidart Darras Escheverria, Frank N. Darras, Lissa A. Martinez; Donahue and Horrow and Michael B. Horrow for Plaintiff and Respondent.

On February 27, 2004, Adelelmo Cabral's pickup truck collided with a tractor-trailer (big rig) driven by Hen Horn, an employee of defendant and appellant, Ralphs Grocery Company (Ralphs),¹ while it was stopped on the side of the freeway. As a result of the collision, Adelelmo Cabral (Decedent) died. On August 26, 2005, Decedent's wife, plaintiff and respondent Maria Cabral (Plaintiff)² sued Ralphs and Horn for wrongful death, contending Horn's negligence in stopping in an "Emergency Parking Only" area for a nonemergency caused Decedent's death. On September 29, 2005, Ralphs cross-complained for property damage to the big rig. The case went to trial on June 20, 2007, and the jury returned a verdict for Plaintiff on the complaint and for Ralphs on its cross-complaint.

Ralphs appeals, contending that (1) as a matter of law, Horn owed no duty to decedent to avoid stopping in the emergency parking area; (2) Horn's alleged negligence did not proximately cause the accident; and (3) the trial court erred in admitting the testimony of Plaintiff's expert on causation, and thus, the evidence is insufficient to support the verdict. We agree with Ralphs and reverse the judgment.

¹ Although Ralphs Grocery Company and Hen Horn were parties at the trial level, Ralphs is the only named defendant on appeal.

² Although Maria Cabral and her children were parties at the trial level, Maria Cabral is the only named plaintiff on appeal.

I. PROCEDURAL BACKGROUND AND FACTS

A. Pretrial Motions

The trial court granted motions by Ralphs to exclude (1) an accident report prepared by the California Highway Patrol (CHP), except for photographs, physical measurements and a diagram of the accident scene, and (2) any reference to the excluded portions of the report, including any opinions regarding the accident. Ralphs's motions were based on the grounds that, among other things, the accident report was inadmissible under Vehicle Code section 20013, the report was inadmissible hearsay, and the opinions in the report were inadmissible lay opinions. At trial, a single page from the accident report containing physical measurements and a diagram of the accident scene was admitted.

The trial court denied the request of Ralphs to exclude testimony by Plaintiff's accident reconstruction expert, Robert Anderson, on the grounds that his opinions were speculative, lacked foundation, and were unduly prejudicial, confusing, and misleading.

B. Motion for Nonsuit

Following Plaintiff's opening statement, Ralphs moved for nonsuit under Code of Civil Procedure section 581c on the grounds that Plaintiff failed to present evidence to prove defendants Ralphs and Horn owed any duty to Decedent or to Plaintiff, and that defendants' negligence, if any, was the cause of Decedent's death. Ralphs emphasized the cases of *Robert Arthur v. Santa Monica Dairy Co.* (1960) 183 Cal.App.2d 483, 487 through 488, *Bentley v. Chapman* (1952) 113 Cal.App.2d 1, and *Victor v. Hedges* (1999)

77 Cal.App.4th 229, 238. The trial court denied the motion, and the case proceeded to trial.

C. Trial Testimony

On February 27, 2004, around 9:00 p.m., Decedent was driving an F-150 pickup truck (pickup) eastbound in the number three lane (of four lanes) on Interstate 10 (I-10) in San Bernardino County. Juan Perez testified that he was driving a big rig behind Decedent for some distance. He estimated Decedent's speed to be around "70, 80," miles per hour.³ Perez opined that Decedent appeared to be intoxicated or falling asleep because his pickup was swerving left and right within the number three lane. Perez saw the pickup suddenly turn right, cutting in front of another big rig truck in the number four lane, as if attempting to exit the freeway. The pickup crossed the number four lane and the paved shoulder of the freeway and then hit the back of Ralphs's big rig, which was stopped⁴ in the dirt area approximately 16 feet from the number four lane.⁵ Perez did not see brake lights activated on the pickup, nor was there any indication that Decedent tried to reduce speed or avoid hitting the big rig. There was an "Emergency Parking Only"

³ Plaintiff's expert opined that, based on the damage to the pickup truck, Decedent was traveling 60 miles per hour, plus or minus 10 miles per hour.

⁴ Horn had stopped to have something to eat and drink.

⁵ Prior to the accident, someone had called 911 to report Decedent's erratic driving.

sign (R45 sign) posted in the area (about 100 feet away) where the big rig had stopped.⁶

As a result of the collision, Decedent suffered massive injuries and died at the scene.

Officer Michael Migliacci, the primary investigating officer for the collision, testified that the CHP's investigation of the collision revealed the same facts as observed by Perez. The evidence further revealed that the road surface was dry and there were no unusual conditions that would have caused Decedent to go off the road. A CHP inspection disclosed no mechanical defects that would have hindered the normal operation of Decedent's pickup. The CHP's investigation concluded that Decedent's unsafe turn from the number three lane, a violation of Vehicle Code section 22107, was the sole cause of the accident. Because the cause of Decedent's death was clear, no autopsy was performed. A toxicology report showed no evidence of intoxication.

Plaintiff's human factors expert, Dr. Mark Sanders, opined that Decedent was fighting drowsiness and finally fell asleep, which caused him to leave the number three lane. The human factors expert for Ralphs, Dr. Antony Stein, opined that an undiagnosed medical condition caused Decedent, who was 5 feet 11 inches tall and weighed 350 pounds, to leave the freeway.

⁶ The R45 sign was installed on August 30, 2001, at the request of the CHP. The sole purpose of the R45 sign was to identify an area where vehicles with emergencies could park safely. The deputy district director of traffic operations for the California Department of Transportation (Caltrans) Region 8 testified that the R45 sign was not designed or intended to protect negligent drivers who leave the roadway and run into vehicles within the designated parking area.

Plaintiff's expert, Anderson, testified that when Decedent hit the big rig, he was awake and alert, his pickup was in a left turn, and he would have returned safely to the freeway had the big rig not been in his path. Anderson further opined that Decedent was going no faster than 60 miles per hour (plus or minus 10 miles per hour) and that he was braking when he hit the big rig. Anderson relied on the factual diagram and a photograph taken by the CHP. Over the objection of Ralphs, and contrary to the motion in limine ruling, 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 Decedent's pickup. Officer Migliacci was the only witness who testified regarding preparation of the CHP report. He did not take the measurements or the photographs. He had no basis to believe the marks came from Decedent's vehicle other than the fact that the officer who had taken the measurements had labeled the marks that way. No one had compared the tread marks with the pickup's tires or found any other physical evidence indicating that the marks were from the pickup.

In contrast, the accident reconstruction expert for Ralphs, Fred Cady, testified the marks could not have been made by Decedent's pickup because (1) the marks did not align with how the pickup contacted the big rig, (2) eyewitnesses reported there was no indication that Decedent applied his brakes or reacted in any way, and (3) the pickup had antilock brakes, which would not have left a braking mark. Using eyewitness testimony and physical evidence, Cady performed a time-distance study and concluded that

Decedent would not have had time to begin turning left, as Anderson claimed, before hitting the big rig.

D. Ralphs's Motion for Nonsuit

At the close of Plaintiff's evidence, Ralphs again moved for a nonsuit, incorporating its prior written motion, on the grounds that Horn owed no duty to Decedent or Plaintiff, and Horn's negligence, if any, did not proximately cause the collision. In response, Plaintiff argued that, regardless of the R45 sign, the presence of Ralphs's big rig "creat[ed] a roadside obstacle." Specifically, Plaintiff's counsel argued, "There is no superseding intervening cause because when you place that roadside obstacle where it is, sign or no sign, it creates the risk of death." The court denied the motion. Ralphs sought clarification and the following exchange occurred:

"[COUNSEL FOR RALPHS]: Your Honor, may I just inquire? . . . [I]f I could go back just for a moment to the motion for judgment nonsuit. Is the court finding that [Decedent] is within a protected class?

"THE COURT: I think he is. And I think that's based on one of the experts that was talking about the danger. He talked about the danger of the deceleration and acceleration, and that did not get included at all. But one of the experts . . . testified as to the requirement that people don't park there for reasons that—of avoiding the very sort of thing that happened here. This freeway is used there and parking spot is there because of some shade and trucks pull off there and they shouldn't. And the CHP has decided that they shouldn't. And that's the attraction is the shade [*sic*]."

E. Jury's Verdict

The jury returned a verdict for Plaintiff on the complaint and for Ralphs on its cross-complaint. On the special verdict form, the jury found both Ralphs (through Horn) and Decedent were negligent, that each one's negligence was a substantial factor in causing Plaintiff's harm, and that Decedent's negligence was a substantial factor in causing damage to Ralphs's big rig. The jury assessed 90 percent responsibility for the accident to Decedent, and 10 percent to Horn. Both parties were awarded damages based on their claims. After adjusting the awards to reflect the jury's allocation of fault, a final judgment was entered against Ralphs in the amount of \$475,298.40.

F. Posttrial Motions

On August 1, 2007, Ralphs filed notice of its intent to move for a new trial or judgment notwithstanding the verdict on the following grounds: (1) irregularity in proceedings; (2) conduct of the jury; (3) excessive damages; (4) insufficiency of the evidence to justify the verdict; and (5) error of law occurring at trial. The motions were filed on August 6. Specifically, Ralphs argued that (1) there was no evidence that Horn owed any duty to Decedent; (2) the intervening superseding negligence of Decedent exonerated defendants from all liability; (3) the court erred in allowing Officer Migliacci to testify that he could have given Horn a ticket; (4) the verdict is against the law because there is no evidence that Horn's actions created a risk different than that which already existed at the time of Decedent's negligent conduct; (5) the noneconomic damages are excessive; and (6) the trial court erred in denying costs and fees to defendants. In the

motion for judgment notwithstanding the verdict, Ralphs argued that Horn owed no duty to Decedent and that the intervening superseding negligence of Decedent exonerated Ralphs from all liability.

Plaintiff opposed Ralphs's motions, arguing that "the issue is whether Mr. Horn was negligent in his duty to operate Ralphs' tractor-trailer in a safe manner and whether parking that truck on the side of the I-10 freeway in an 'Emergency Parking Only' area was a breach of that duty." Regarding the R45 sign, Plaintiff claimed "the issue is whether Mr. Horn had a duty to operate Ralphs' tractor-trailer safely, independent of the R45 sign, and whether he was negligent in stopping in an 'Emergency Parking Only' area to drink some water and have a banana. Mr. Horn's status as a driver confers his duty of care, not the R45 sign." (Underlining in original.) Regarding superseding cause, Plaintiff argued that the basic rule is that "the negligence of a third person which is the immediate cause of the injury may be viewed as a superseding cause only when it is *so highly extraordinary as to be unforeseeable*." (Bolding and italics in original.) Thus, in this case, Plaintiff asserted "it is reasonably foreseeable that a 'speeding and/or intoxicated driver' would lose control while driving on the I-10 freeway, veer off the freeway and crash into a truck parked on the side of the freeway."

Following argument, the trial court denied Ralphs's motions. Regarding the motion for judgment notwithstanding the verdict, the court found that emphasis by Ralphs on the R45 sign was misplaced because the jury was "not instructed on a negligence per se theory" As to Decedent's negligence as a superseding cause, the

court found that it was foreseeable “that a negligent driver could drift off the freeway and onto the dirt next to the shoulder” Regarding the motion for new trial, the court found that whether Horn owed a duty to Decedent “is dependent on the foreseeability of risk” and “[i]t was foreseeable that a driver on that highway could lose control of his vehicle, that it would depart the traveled portion at a high speed and that it would collide with any vehicle parked [on] the dirt area beyond the shoulder.” As for the superseding cause, the court found that it was within the scope of the evidence for the jury to find that if Horn had not been parked there, Decedent might have decelerated without hitting anything, or that he could have finished his left turn and made it back to the freeway. The court further found that the verdict was not against the law and that the noneconomic damages were supported by the evidence.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

“A party is entitled to a judgment notwithstanding the verdict on a timely motion if there is no substantial evidence to support the verdict and the evidence compels a judgment for the moving party as a matter of law. [Citations.] If the motion challenges the sufficiency of the evidence to support the verdict, we review the ruling under the substantial evidence standard. [Citations.] If the motion presents a legal question based on undisputed facts, however, we review the ruling de novo. [Citation.] If we determine that the trial court denied a motion for judgment notwithstanding the verdict that should have been granted, we must order the entry of judgment in favor of the moving party. [Citation.]” (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1043-1044.)

A. Duty

Ralphs contends that it is entitled to judgment notwithstanding the verdict because, as a matter of law, it (via its driver Horn) owed no duty to Decedent. We agree.

Plaintiff claimed that Horn was negligent in stopping in an “Emergency Only Parking” area on the side of the freeway for a nonemergency. While Plaintiff denies that the case proceeded on a negligence per se theory, and the trial court stated that the jury was not instructed on negligence per se, we note that Plaintiff emphasized both the R45 sign and the fact that Horn stopped in an “Emergency Only Parking” area. Nonetheless, we accept the representations of the court and Plaintiff and proceed to analyze the existence of a duty, if any, on the part of Horn under a general negligence theory.

“The well-known elements of a cause of action for negligence are duty, breach of duty, proximate cause, and damages. [Citation.] The threshold element of the existence of duty is a question of law to be resolved by the court. [Citation.]” (*Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 900-901.) On appeal, we apply a de novo standard of review. (*Garcia v. Paramount Citrus Assn., Inc.* (2008) 164 Cal.App.4th 1448, 1453.) “In a posttrial procedural setting, we view the facts, where supported by substantial evidence, in the light most favorable to the plaintiff. [Citation.]” (*Ibid.*)

In the late 1800’s, the concept of duty was created as a legal means “to curtail the feared propensities of juries toward liberal awards.” (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) In analyzing duty, we must ask “whether the plaintiff’s interests are entitled

to legal protection against the defendant's conduct. . . . It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' [Citation.]" (*Ibid.*)

As a general rule, a person is liable for injuries caused by his or her failure to exercise reasonable care. (*Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 828.) However, the decision to depart from this general rule requires courts to balance the following policy considerations, which include "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]" (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

The foreseeability of harm has become a chief factor in determining whether a duty exists. (*Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515-516.) Nonetheless, our task "is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but to evaluate '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.’ [Citation.]” (*Avis Rent A Car System, Inc. v. Superior Court* (1993) 12 Cal.App.4th 221, 232.)

According to Plaintiff, “it was reasonably foreseeable that a ‘speeding and/or intoxicated driver’ would lose control while driving on the I-10 freeway, veer off the freeway and crash into a vehicle parked on the shoulder of the freeway. In addition, Horn knew that he was parked next to a busy freeway and that at any moment a vehicle could exit the road for any reason. In fact, [Ralphs] told [its] drivers not to park in emergency parking only areas for nonemergency reasons because of safety concerns for both the driver and other motorists should they leave the roadway.” More importantly, Horn stopped to use the area as his “personal lunch spot.”

Under the facts of this case, we find, as a matter of law, that Horn’s conduct was not wrongful towards Plaintiff. A reasonable person would not conclude that Horn’s act of stopping on the side of the freeway, 16 feet from lane four, in the dirt area, would subject motorists using the freeway to an unreasonable risk of harm. Given the thousands of motorists who pass the area during the time of Horn’s stop, it is not reasonable to foresee this type of accident.

Plaintiff relies on the following to support her claim of negligence: (1) Horn stopped on the side of a freeway; (2) the motorists were traveling at high rates of speed; (3) the area was marked as “Emergency Stopping Only”; (4) Horn did not have an emergency; and (5) Ralphs advised its drivers not to stop on the side of a freeway.

However, there was no evidence of any similar accidents that occurred as a result of a motorist who was stopped in the dirt area, off the shoulder of the freeway. Nor was there evidence of any obstacles or unusual road conditions that would have caused Decedent to go off the road. Further, there is no evidence that an ordinarily prudent person would have understood that he or she was subjecting Decedent to an unreasonable risk of harm by having stopped off the shoulder of the freeway, some 16 feet from lane four. (*Robert Arthur v. Santa Monica Dairy Co.*, *supra*, 183 Cal.App.2d at p. 489 [“[I]t is not ordinarily to be expected that drivers of automobiles will run head-on into cars ahead of them which are in plain sight and have been long stopped. . . .”].) The collision did not occur as a result of Horn attempting to pull over to the side of the freeway (decelerating) or getting back on the freeway (accelerating). Horn’s big rig was stopped in plain sight.

The fact that it is possible for a motorist to leave his or her lane on a freeway and strike something situated off the shoulder of the road, such as a defendant’s vehicle, does not create a “duty” on the part of a defendant to ensure a “safe landing.”⁷ If it did, the defendant would be required to eliminate *all* possibilities of risk. This is simply not possible. “All possibilities of risk even if ‘foreseeable’ in the abstract as possibilities cannot be eliminated.” (*Whitton v. State of California* (1979) 98 Cal.App.3d 235, 244.)

⁷ Our dissenting colleague claims he is not creating a duty to ensure a “safe landing.” (Dis. opn., *post*, at p. 8.) Instead, he asserts that he is merely staying with the general rule that “each person has a duty to use due care to avoid injuring others by their careless conduct.” (*Ibid.*) We assume such rule equally applies to a motorist who has suddenly left his lane of traffic, cut in front of another motorist, crossed over the paved shoulder of the freeway, and entered the dirt side of the freeway at a high rate of speed.

All that a defendant is required to do is to protect a plaintiff from all reasonably foreseeable risks. (*Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 778 [Fourth Dist., Div. Two] [“In order to 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.”].) To expect that most people will drive with ordinary care or due caution is not negligence. Thus, the chance that an unusual accident will occur is not the test of foreseeability.

As Ralphs points out, because the area was designated as a safe place to stop for emergency purposes, “a motorist stopping in the area could conceivably owe a duty only to other motorists who might need to stop for emergencies but could not do so because the area was already occupied.” Under such circumstances, it is reasonably foreseeable that the presence of Ralphs’s big rig could subject a motorist to harm if the motorist was unable to make an emergency stop. There is no evidence that such was the case here. Thus, the reason for Horn’s stop is wholly immaterial to the duty analysis. Plaintiff’s emphasis that Horn stopped to have a bite to eat is a red herring. If an emergency situation had caused Horn to stop in the same place, it would not have been any safer.

In support of the argument that Ralphs owed a duty to Decedent, Plaintiff relies on *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830 (*Jackson*) and *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49 (*Bigbee*). In *Jackson*, the plaintiff’s decedent was struck by a passing motorist after the decedent had pulled his truck off the road because its electrical system failed. (*Jackson, supra*, at p. 1835.) The defendant had

contracted with the decedent's employer to maintain the employer's trucks. (*Ibid.*) Our colleagues in the Third District reversed summary judgment for the defendant, holding that the evidence was sufficient to support a conclusion that the defendant negligently maintained the truck, and that such negligence caused the truck to pull off the road. (*Id.* at pp. 1837, 1852.) The court further held that "the general duty of exercising due care toward the [employee] to protect him against the type of risk he encountered was properly imposed on [the defendant] as a matter of law"

In *Bigbee*, the plaintiff was injured when a drunk driver struck the telephone booth in which he was standing, situated approximately 15 feet from a busy Los Angeles street. (*Bigbee, supra*, 34 Cal.3d at pp. 52, 54.) Our state's highest court reversed summary judgment in favor of the defendants, holding that foreseeability remained a triable issue of fact for the jury. (*Id.* at p. 60.) The court explained that "'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' [Citation.]" (*Id.* at p. 57.)

Plaintiff's reliance on *Jackson* and *Bigbee* is misplaced. In each case, the defendants placed the victims in positions where they were exposed to harm from other third party negligent motorists. Here, Ralphs did nothing to place Decedent in harm's way. Decedent was driving his pickup on the I-10 freeway and perhaps fell asleep at the wheel. The fact that Horn stopped in an "Emergency Parking Only" area is of no consequence because it was not reasonably foreseeable that this category of victims (ones

like Decedent) would be harmed in this manner in light of Horn's conduct. Horn's big rig was 16 feet away from lane four, off the shoulder of the freeway. Imposition of a duty of care under the facts of this case would do little to prevent future injuries, since Decedent, perhaps, fell asleep at the wheel before the accident. However, the burden to defendants of imposing a duty would be significant. More importantly, we note that *Bigbee* analyzed foreseeability as a jury question (*Bigbee, supra*, 34 Cal.3d at p. 56), not the legal question presented by the duty analysis in our case (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674). *Jackson* followed *Bigbee*.⁸ (*Jackson, supra*, 16 Cal.App.4th at pp. 1839-1840.)

If a duty is imposed under the facts of this case, where does it end?⁹ Taken to its logical conclusion, wherever there is no safe landing, liability will be found. Thus, a motorist who parks his car on the side of the street, or a homeowner who chooses to

⁸ Both *Bigbee* and *Jackson* were summary judgment cases. In reversing the grant of summary judgment, both cases noted that duty is a question of fact. After *Ann M.* determined duty is a legal issue, it appears these two cases no longer have any vitality.

⁹ Our colleague responds by asking: "If a duty is *not* imposed under the facts of this case, then where does it begin? Are drivers only required to exercise reasonable care while moving in the flow of traffic? If not, when a driver who has stopped on the shoulder of the interstate starts to rejoin the flow of traffic, then at what distance from the flow of traffic does that driver's duty to use reasonable care begin, three feet, nine feet? It is my opinion that parking along the shoulder of an interstate does not exempt a person from the general duty to avoid injuring others by acting carelessly." (Dis. opn., *post*, at p. 9.) Our colleague is comparing apples to oranges. We freely acknowledge that, had Horn been merging into (or departing from) traffic, our analysis might differ. However, such is not the case. Horn's vehicle was stopped, 16 feet from the freeway, in plain view, in an area where emergency stopping was permitted. Horn was not stopped in the roadway, nor was Decedent's ability to navigate road surfaces impaired in any way.

install a brick mailbox, even a public entity that wants to beautify its streets with trees, will be subject to liability if a vehicle leaves the road, collides with the offending object, and the driver or passenger suffers injury. As the dissent holds, “a person . . . has the general duty to avoid injuring others by acting carelessly.” (Dis. opn., *post*, at p. 9.) The question becomes, what amounts to careless actions. Given the dissent’s broad definition, the possibilities are endless.

Moreover, Ralphs argues the presence of the R45 sign means the area is a safe place to stop.¹⁰ If it is not, then Caltrans would install a no-stopping or no-standing sign. Ralphs notes that Plaintiff’s experts agreed that “even if the sign had not been there, drivers with emergencies could—and should—stop on the shoulder for their own safety and that of other motorists.” Plaintiff’s traffic engineering expert, Dr. Thomas Schultz, agreed that a vehicle stopped for such a purpose would create the same risk as was created by Horn’s big rig. Because the risk created by Horn’s nonemergency stop was no greater than if he or another motorist had stopped for an emergency, Horn’s conduct did not create an “unreasonable risk of harm.” (Cf. *Richards v. Stanley* (1954) 43 Cal.2d 60, 64-65.)

Again, while it is possible for a vehicle to leave the freeway and strike an object stopped off the shoulder, “[t]his is not the foreseeability upon which the law of negligence is based. The conduct of [Horn] was not the cause-in-fact or the substantial factor in law

¹⁰ What if there had been a tree, a sign, or a ditch at the exact location of the impact between Decedent’s truck and Ralphs’s big rig? Would this make a difference?

in bringing about the harm to [Decedent]. 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 [a vehicle leaving the freeway and hitting another vehicle stopped off the shoulder] . . . can be calculated in terms of mathematical probabilities, such mathematic computation is immaterial.” (*Whitton v. State of California, supra*, 98 Cal.App.3d at p. 243.) Clearly, there are some risks that are not reasonably foreseeable. Thus, there is no duty. Such is the case before this court.

B. Proximate Cause

Notwithstanding the above, Ralphs argues it was also entitled to judgment notwithstanding the verdict because there is no substantial evidence that Horn’s alleged negligence proximately caused the collision. Again, we agree.

Proximate cause involves two elements: (1) cause in fact, and (2) the extent to which public policy considerations limit a defendant’s liability for its acts. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-316 [holding that an insurer’s negligent failure to settle a personal injury lawsuit was a cause in fact, but not a proximate cause, of the award of punitive damages].) The first element, cause in fact, is established if an act “is a necessary antecedent of an event,” and this element “is a factual question for the jury to resolve.” [Citation.]” (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) The second element 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.” [Citation.]” (*Ibid.* [holding that public policy considerations strongly militated against allowing a plaintiff to recover lost punitive damages as compensatory damages in a legal malpractice action].) “Because the purported causes of an event may be traced back to the dawn of humanity,” the law imposes additional limits on liability that are not related to “simple causality.” (*Ibid.*)

Assuming that Horn owed Decedent a legal duty of care, Ralphs is still not liable for Plaintiff's injuries unless Horn's breach of that duty was a substantial factor in causing such injuries. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 772, 765-767 [property owner not liable to plaintiff who had been assaulted where evidence showed merely a “speculative possibility” that additional security would have prevented the assault].) Although proximate cause ordinarily presents a question of fact, “it becomes a question of law when the facts of the case permit only one reasonable conclusion. [Citations.]” (*Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354.)

“A tort is a legal cause of injury only when it is a substantial factor in producing the injury. [Citation.]” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572-573, fn. 9.) Abstract negligence is insufficient to support a judgment against a defendant. Instead, there must be “substantial evidence of a causal connection between [a defendant's] negligent acts or omissions and plaintiffs' injuries. [Citations.]” (*Dixon v. City of Livermore* (2005) 127 Cal.App.4th 32, 43.)

Our review of the record persuades us there is no substantial evidence to support a finding that the accident was due to the negligence of Horn. To begin with, the fact that the area where Horn stopped was for “Emergency Parking Only” is irrelevant. (*Bentley v. Chapman, supra*, 113 Cal.App.2d at p. 4 [discussing negligence per se and holding that parking over the time limit “could not, as a matter of law, be deemed a proximate cause of plaintiffs’ injuries”]; see also *Capolungo v. Bondi, supra*, 179 Cal.App.3d at p. 355.)

Next, the Plaintiff’s expert, Anderson, concluded that, but for Horn’s presence, Decedent would have returned safely to the freeway. There are three reasons why this opinion cannot support liability. First, whether or not Horn’s reason for parking involved an emergency, the fact remains the area is available for emergency parking. Second, according to the testimony of the witnesses, Decedent’s driving was erratic. He was speeding, swerving within his lane, he made an abrupt change of lanes causing another big rig driver to apply his brakes to avoid collision, and he never attempted to slow down or apply his brakes according to percipient witnesses. And third, as we discuss in the next section, we find Anderson’s opinion to be faulty and incompetent, amounting to nothing more than total speculation.¹¹ We find that it is speculative to conclude the

¹¹ Had the trial court correctly followed its original rulings and not allowed Anderson to base his conclusion on unreliable facts and/or assumptions that are not supported by the record (see discussion, *post*), this case never would have been decided by a jury. However, because it did proceed to a jury verdict, the dissent overlooks the procedural errors and applies a deferential review of the record. (Dis. opn., *post*, at pp. 12-13.) The problem with the dissent’s approach is that it puts the cart before the horse. Because the court erred in allowing the jury to hear Anderson’s testimony, the basis for the jury’s verdict is suspect. When the faulty testimony is removed, there is nothing to

accident would not have occurred but for the presence of Horn's big rig. The record does not contain substantial evidence that Plaintiff's injuries were caused by the negligent act or omission of Horn. Accordingly, there is no basis to hold Ralphs liable for Horn's negligence, and we must reverse the judgment.

Notwithstanding our conclusion that the record does not contain substantial evidence that Horn's negligent act or omission caused Plaintiff's injuries, we also conclude that, as a matter of public policy, Plaintiff cannot recover against Ralphs based on the facts in the record.

In *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, the court explained that the public policy considerations element of proximate causation is a "policy-based legal filter on "but for" causation" that courts apply "to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." [Citation.] (*Id.* at p. 464.) Because this prong focuses on the public policy considerations limiting liability, and not on the fact of causation, it is a question of law for the court. (*Milwaukee Electric Tool Corp. v. Superior Court* (1993) 15 Cal.App.4th 547, 563; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1035 ["Whether a defendant's conduct is an actual cause of a plaintiff's harm is a question of fact, but the existence and extent of a defendant's liability is a question of law and social policy."].)

[footnote continued from previous page]

support the jury's verdict, much like when a foundational card is removed and the house of cards falls.

Here, Plaintiff's theory of liability is that Horn was negligent in stopping in the dirt area approximately 16 feet from the number four lane of the I-10. However, vehicles stop along the side of the freeway every day for any number of reasons. Some experience emergencies, while others are stopped by a CHP officer who is issuing a moving violation citation. Nonetheless, the nature and degree of the connection between Horn's act of stopping and Decedent's collision with Horn's big rig of which Plaintiff complains was, as a matter of public policy, too attenuated to support imposing liability on Ralphs.¹²

¹² Our holding is in accord with numerous judicial decisions in other states. (See, e.g., *Bogovich v. Nalco Chemical Co.* (1991) 213 Ill.App.3d 439, 443-444 [572 N.E.2d 1043, 1046] [automobile accident was not proximately caused by defendant's alleged negligence in parking on the median]; *Long v. Soderquist* (1984) 126 Ill.App.3d 1059, 1064 [467 N.E.2d 1153, 1156] [placement of defendant's vehicle was not a proximate cause of a subsequent collision as a matter of law]; *Sheehan v. Janesville Auto Transport* (1981) 102 Ill.App.3d 507, 511 [430 N.E.2d 131, 133] [defendant's vehicle, even if parked illegally, was not proximate cause of collision]; *Smith v. Penn Line Serv.* (1960) 145 W.Va. 1, 19-20 [113 S.E.2d 505, 516] [plaintiff passenger, whose car struck a truck that was parked on the highway, was denied recovery of damages because the driver of the car was the proximate cause of plaintiff's injuries]; *Duff v. Lykins* (Ky. 1957) 306 S.W.2d 252, 254-255 [1957 Ky. Lexis 21] [owner of truck parked on a state highway within the city limits was not liable for injuries sustained by occupant of a vehicle that collided with the unlighted truck at night where such parking was not prohibited by city ordinance]; *Godwin v. Nixon* (N.C. 1953) 236 N.C. 632, 641, 642 [74 S.E.2d 24, 30-31] [plaintiff, whose car struck rear of tractor-trailer which was negligently parked, was denied recovery as a matter of law because the sole proximate cause of such accident was the driving of the car into the parked trailer when the driver saw or should have seen the parked trailer]; *Scott v. Hoosier Eng'g Co.* (1936) 117 W.Va. 395, 397-398 [185 S.E. 553] [plaintiff had a duty to pay attention to his view of the road and thus manner in which defendant's truck was parked, even though in violation of statute, did not proximately cause the accident]. There is also limited contrary authority. (Cf. *Hicks v. Tilquit* (La. 1955) 82 So.2d 100, 102 [1955 La.App. Lexis 936].)

Accordingly, judgment for Ralphs notwithstanding the verdict on Plaintiff's negligence claim was proper.

C. Admission of Evidence

In proving causation, Plaintiff primarily relied on the testimony of Anderson. Despite numerous objections by Ralphs, the trial court allowed Anderson to opine that Decedent was awake and alert, attempting to return to the freeway, at the time of the collision. More specifically, Anderson testified, contrary to the eyewitness testimony, that Decedent was braking and not traveling faster than 60 miles per hour. Based on Anderson's testimony, Plaintiff argued that the presence of Ralphs's big rig was a substantial factor in bringing about Decedent's death.

Ralphs contends that Anderson's opinions were based on facts that were never established at trial, and thus, the trial court erred in admitting them. We agree.

"A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. [Citations.]" (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476.) Evidence Code section 801, subdivision (b), permits an expert to base an opinion only on his personal observations or on matters "of a type that reasonably may be relied upon" by experts in forming opinions on the particular subject. "[A]ny material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.]" (*People v. Gardeley*

(1996) 14 Cal.4th 605, 618.) “Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.]” (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135; *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338-339 [an expert’s “assumption of facts contrary to the proof destroys the opinion”].)

Anderson relied on the CHP report and a photograph taken by the CHP. Over Ralphs’s objection, the trial court permitted Anderson to testify that mark No. 1 on the factual diagram was labeled in the CHP report as a tire mark (impression in the dirt) from Decedent’s pickup, and a second mark, No. 2, on the factual diagram was labeled a side skid from the pickup.¹³ Anderson thus concluded these marks came from the pickup’s left rear tire. Anderson explained that, if the pickup’s right side tires were placed on the first mark, the pickup would hit the trailer “across the entire front of the pick-up truck,” which would be inconsistent with the damage on the pickup. However, he stated, if the first mark represented the left side tires, and the pickup was going straight, then the pickup would have missed the big rig. But, Anderson testified, “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 that mark [No. 1], . . . it matches [the damage to the

¹³ While the factual diagram was admitted into evidence, the designation of mark Nos. 1 and 2 as being made by Decedent’s pickup was not part of the factual diagram and appears in a part of the CHP report not admitted at trial.

pickup]. And that's the only combination I could come up with of tires that would make that mark." Anderson reasoned that the second mark (No. 2) must have been made by the pickup's left rear tire when it rotated after the impact because he had "trouble finding an explanation for any other reason why marks of this nature would be out there."

Anderson also opined that Decedent was applying his brakes when he hit the big rig. However, as Ralphs notes, such opinion depends on the assumption that mark No. 1 was from the pickup. Such assumption is based solely on the CHP report that labeled those marks as coming from the pickup. However, the officer who documented the marks (T. Thibodeau) never testified at trial. (Evid. Code, § 702, subd. (a) [a witness's testimony "is inadmissible unless he has personal knowledge of the matter."].) No other documentary evidence or testimony supported a conclusion that the marks came from the pickup. The CHP report (with the exception of the one-page factual diagram and certain photographs) was excluded from admission. (Veh. Code, § 20013; *Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1432, 1433 & fn. 1 [police officer's opinion in traffic accident report that plaintiff was "most responsible for the accident" was inadmissible hearsay].) Officer Migliacci, the only investigating officer to testify, did not establish that the marks represented a tire mark and skid mark from the pickup. He stated that he did not take the measurements; he did not know how long the marks had been in the dirt; he did not match the tread on the marks with the pickup's tires, nor was he aware of any other physical evidence that would confirm the marks'

origin; and he had no basis to believe that the marks were made by the pickup other than that Officer Thibodeau, who documented the marks, labeled them as such.

Given the lack of any evidence which established that the tire/skid marks were from Decedent's truck, Anderson's opinion that Decedent would have returned safely to the freeway but for Horn's parked big rig was speculation. (*Hyatt v. Sierra Boat Co.*, *supra*, 79 Cal.App.3d 325, 338-339 ["an expert's assumption of facts contrary to the proof destroys the opinion."].) Even if Decedent were in a turn toward the freeway, it is sheer speculation that he would enter traffic under control.

According to eyewitness testimony, Decedent's driving prior to the collision was erratic. Perez testified that Decedent was traveling between 70 and 80 miles per hour when he suddenly turned right as if attempting to exit the freeway. Decedent crossed the number four lane and the shoulder of the freeway, and then drove directly into the big rig. Decedent never applied his brakes or his turn signals, nor was there any indication that he tried to reduce his speed or avoid the big rig. As Ralphs points out, Plaintiff's own human factors expert opined that Decedent was fighting drowsiness and finally fell asleep, causing him to leave the number three lane.¹⁴

Given the above, we agree with Ralphs and conclude that Anderson's opinions were unfounded and speculative. "Although it is true that the testimony of a single witness may be sufficient to constitute substantial evidence [citation], '[w]here an expert

¹⁴ In contrast, Ralphs's human factors expert opined that an undiagnosed medical condition caused Decedent, who was 5 feet 11 inches tall and weighed 350 pounds, to leave the freeway and drive into the big rig.

bases his conclusion upon . . . factors which are speculative, remote or conjectural, . . . the expert's opinion cannot rise to the dignity of substantial evidence.' [Citation.] As . . . explained in *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396 . . . (an action against the manufacturer of a contraceptive drug where the plaintiff claimed she developed cancer after taking the pills), '[t]here can be many possible "causes," indeed, an infinite number of circumstances which can produce an injury A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. *This is the outer limit of inference upon which an issue may be submitted to the jury.* . . . [¶] The fact that a determination of causation is difficult to establish cannot . . . provide a plaintiff with an excuse to dispense with the introduction of some reasonably reliable evidence proving this essential element of his case. *[Expert testimony] can enable a plaintiff's action to go to the jury only if it establishes a reasonably probable causal connection between an act and a present injury.*' [Citation.]" (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487, fn. omitted.)

For the above reasons, we agree with Ralphs and find that "Anderson's opinion on causation was not factual analysis, but whimsical theory." As such, it does not constitute substantial evidence of causation. Moreover, the trial court abused its discretion in allowing admission of the expert's opinion. "[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact

without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when 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 because an 'expert opinion is worth no more than the reasons upon which it rests.' [Citation.]

"Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide? [Citation.] Therefore, an expert's opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities. [Citation.] Similarly, an expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury. In this latter circumstance, the jury remains unenlightened in how or why the facts *could* support the conclusion urged by the expert, and therefore the jury remains unequipped with the tools to decide whether it is more probable than not that the facts *do* support the conclusion urged by the expert. An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury

by *declaring* what occurred.” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117-1118.)

Anderson’s testimony, when viewed by itself or with the circumstantial evidence, failed to create a triable issue of material fact on causation. Accordingly, the trial court abused its discretion in overruling Ralphs’s objection and allowing the jury to hear the testimony.¹⁵

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to grant Ralphs’s motion for judgment notwithstanding the verdict. Ralphs is entitled to costs on appeal.

CERTIFIED FOR PUBLICATION

HOLLENHORST

Acting P. J.

I concur:

MCKINSTER

J.

¹⁵ Without going into an extensive discussion, we likewise find that Anderson’s opinion that Decedent was traveling no faster than 60 miles per hour is also unsupported by the record.

[*Cabral v. Ralphs Grocery Company*, E044098]

MILLER, J., dissenting.

I respectfully dissent. In my opinion (1) Ralphs, through its truck driver, Horn, owed a duty to Decedent; (2) substantial evidence supports the jury's finding that Horn's actions were the proximate cause of the accident; and (3) the trial court properly admitted Anderson's expert testimony. I would affirm the judgment.

A. Duty of Care

Ralphs contends the trial court erred by denying its motion for judgment notwithstanding the verdict because Horn owned no duty of care to Decedent. I disagree.

In determining whether to grant a motion for judgment notwithstanding the verdict, a trial court must (1) accept the evidence supporting the verdict as true; (2) disregard all conflicting evidence; and (3) indulge in every legitimate inference that may be drawn in support of the judgment. The court may grant the motion only if there is no substantial evidence to support the verdict and the evidence compels a judgment for the moving party as a matter of law. On appeal from the denial of such a motion, an appellate court determines de novo whether there is any substantial evidence, contradicted or uncontradicted, supporting the verdict, and whether the moving party is entitled to judgment as a matter of law. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68; *Paykar Const., Inc. v. Spilat Const. Corp.* (2001) 92 Cal.App.4th 488, 493-494.)

“The general rule of duty is that each person has a duty to use due care to avoid injuring others by their careless conduct [citations]” (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1197; see also Civ. Code, § 1714.) There are various considerations that may be taken into account to determine whether a departure from the general rule is appropriate, for example, (1) the foreseeability of the harm, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant’s conduct and the injury suffered, (4) the moral blame attached to the defendant’s conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 465; see also *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)

First, as to the foreseeability of the harm, the assistant transportation manager for Ralphs testified that it was contrary to the Ralphs guidelines for its truck drivers to stop in emergency areas for nonemergency purposes, and that Ralphs would tell its truck drivers not to park in emergency-only areas for nonemergency reasons, because trucks leaving the roadway were a safety concern for both the truck drivers and other motorists. Accordingly, the harm was foreseeable because Ralphs was aware of the danger created by trucks leaving the roadway.

The majority concludes that the type of accident at issue in this case was not foreseeable, because a reasonable person would not foresee a motorist crashing into a big rig that is parked 16 feet from the traffic lanes. I cannot concur with my colleagues

because the majority's opinion does not disregard all evidence that conflicts with the judgment, and it does not indulge in every legitimate inference that may be drawn in support of the judgment. I believe that the testimony of the assistant transportation manager shows that the harm suffered by Decedent was foreseeable.

Second, as to the degree of certainty that Decedent suffered an injury; the record reflects that he died as a result of the injuries that he sustained in the accident. Accordingly, his injuries are certain.

Third, in regard to the closeness of the connection between Horn's conduct and Decedent's injury, testimony was presented that if the big rig had not been parked on the side of the interstate, then Decedent may have been able to return safely to the roadway. Additionally, Decedent died at the accident site. Consequently, there is a close connection between the conduct of Horn and Decedent's death.

Fourth, in regard to the moral blame attached to Horn's conduct, "moral blame attaches to the fact a defendant's conduct is negligent—i.e., to defendant's fault in creating an unreasonable risk of harming others—not to the motive underlying the defendant's negligent conduct." (*Ludwig v. San Diego* (1998) 65 Cal.App.4th 1105, 1113.) In this case, Horn's action of stopping by the side of the interstate was unreasonable in light of evidence that there were truck-stops located within two miles of the accident site. Accordingly, there is some moral blame attached to Horn's actions, because he could have stopped in a more reasonable and safe location.

Fifth, in regard to the policy of preventing future harm, imposing liability on Ralphs may help to prevent future accidents by encouraging big rig drivers to stop at safer locations during nonemergencies.

Sixth, I address the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach. The Ralphs assistant transportation manager testified that Ralphs tells its truck drivers not to park in emergency-only areas for nonemergency reasons, because trucks leaving the roadway were a safety concern for both the truck drivers and other motorists. As a consequence, truck drivers who want to stop their trucks for nonemergency purposes would not be allowed to do so along a highway; however, the burden should be minimal, because big rig drivers could stop at various truck-stops or rest areas. Further, the community would benefit from not having unnecessary roadside obstacles along the interstates.

Seventh, as to the availability, cost, and prevalence of insurance for the risk involved, all drivers should carry vehicle insurance. (Veh. Code, § 16020.) Accordingly, insurance is readily available, although there may be a range of costs depending on the driver or company involved.

In sum, based on the foregoing factors, I see no reason to depart from the general rule that each person has a duty to use due care to avoid injuring others by their careless conduct. Therefore, I would conclude that the trial court did not err by denying Ralphs's motion for judgment notwithstanding the verdict.

Ralphs contends the foregoing analysis involving the various factors is unnecessary because the Supreme Court has already determined that “a vehicle driver owes no duty to a plaintiff injured by the driver’s conduct if the driver can engage in the exact same conduct lawfully and nonnegligently.” Ralphs contends the same accident would have occurred if Horn stopped for an emergency, and therefore Ralphs’s motion should have been granted. Ralphs relies on *Richards v. Stanley* (1954) 43 Cal.2d 60 (*Richards*), to support its argument. *Richards* involved a plaintiff who was injured when his motorcycle collided with an automobile owned by the defendant, which was being driven at the time by a thief. (*Id.* at p. 61.) The owner of the automobile had left her key in the car, in violation of the municipal code. (*Ibid.*) The court concluded that the duty to exercise reasonable care in the management of an automobile does “not encompass a duty to protect [a] plaintiff from the negligent driving of a thief.” (*Id.* at p. 66.) I do not find *Richards* to be persuasive authority on this issue. Contrary to Ralphs’s position, *Richards* does not hold that there is no duty owed if the conduct at issue could have been engaged in lawfully and non-negligently; rather, it holds there is no duty to protect a plaintiff from a thief’s negligent driving.

Ralphs also relies on the case of *Victor v. Hedges* (1999) 77 Cal.App.4th 229 (*Victor*). In *Victor*, the plaintiff was standing on a sidewalk looking at a compact disk player in Hedges’s vehicle. (*Id.* at p. 233.) Hedges had parked his vehicle on the sidewalk. A second vehicle, driven by Williams, struck the plaintiff and Hedges’s vehicle. (*Ibid.*) The plaintiff “argue[d] that Hedges must be presumed negligent because he violated Vehicle Code section 22500, subdivision (f), which prohibits parking on a

sidewalk.” (*Id.* at p. 234, fn. omitted.) The reviewing court concluded that the Vehicle Code section was not meant to prevent the type of accident that occurred in the case, which involved being struck on the sidewalk by a vehicle other than the illegally parked vehicle. (*Id.* at p. 238.) The appellate court determined that the trial court properly denied the plaintiff’s requested presumption that the defendants failed to exercise due care. (*Ibid.*)

In regard to ordinary negligence, the reviewing court noted that Hedges could only be liable if his conduct fell “below the standard established by law for the protection of those in plaintiff’s situation against ‘unreasonable risk of harm.’ [Citation.]” (*Victor, supra*, 77 Cal.App.4th at p. 243.) The reviewing court concluded that there was no evidence showing that “an ordinarily prudent person would have understood that he or she was subjecting [the] plaintiff to an unreasonable risk of harm by standing on the public sidewalk at this location.” (*Id.* at pp. 243-244.)

In regard to the negligence per se issue in *Victor*, I find the case distinguishable from the instant case because the instant case was not argued on a theory of negligence per se. Plaintiffs did not argue that Ralphs was at fault based upon a parking violation; rather, they argued a theory of ordinary negligence. Additionally, the trial court instructed the jury on ordinary negligence. Consequently, I find any reliance on the negligence per se discussion in *Victor* to be unpersuasive.

Next, in regard to ordinary negligence, I find *Victor* unpersuasive because *Victor* involved the actions of a third party. In the instant case a third party was not responsible for the crash, i.e., Ralphs is not being held responsible for a third person harming

Decedent. Mr. Riggins, a commercial trucking consultant, testified that, in his opinion, it would fall below the standard of care for a commercial truck driver to stop on the side of the road to eat and drink. The assistant transportation manager for Ralphs testified that Ralphs would tell truck drivers not to park in emergency-only areas for nonemergency reasons, because trucks leaving the roadway were a safety concern for both the truck drivers and other motorists. Accordingly, in the instant case, there is evidence that Horn's conduct fell below a reasonable standard of care for the protection of people driving on the highway, such as Decedent.

Next, Ralphs contends no duty was owed because the "Emergency Parking Only" sign was not intended to protect negligent drivers who leave the interstate. Plaintiffs did not argue that Ralphs was at fault based upon a parking violation; rather, they argued a theory of ordinary negligence. Accordingly, the Ralphs argument concerning negligence per se is unpersuasive.

Independent of the parking sign, Ralphs argues Horn owed no duty to Decedent because plaintiffs did not show that Horn's actions subjected Decedent to an unreasonable risk of harm. Ralphs contends there was no evidence that an ordinarily prudent driver would have known he was subjecting motorists to a risk by stopping at the accident site. Contrary to Ralphs's position, Mr. Riggins, a commercial trucking consultant, testified that, in his opinion, it would fall below the standard of care for a commercial truck driver to stop on the side of the road to eat and drink. Further, the assistant transportation manager for Ralphs testified that Ralphs would tell truck drivers not to park in emergency-only areas for nonemergency reasons, because trucks leaving

the roadway were a safety concern for both the truck drivers and other motorists. Accordingly, there was evidence that an ordinarily prudent driver would have known he was subjecting motorists to an unreasonable risk by stopping at the accident site.

The majority concludes that a motorist stopped by the side of the road does not have a duty to create a “safe landing” place for other drivers who may veer onto the shoulder. It is not my opinion that motorists have a duty to create a “safe landing” place for other motorists; rather, my position is that there is no reason to depart from the general rule that each person has a duty to use due care to avoid injuring others by their careless conduct.

The majority expresses concern that every time a motorist crashes into a tree or mailbox by the side of the road, the person or entity that owns the roadside object will be liable for the motorist’s injuries for failing to provide a safe landing place. The majority’s opinion blurs the lines between the standard of strict liability and the standard of negligence. (See *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 376-377 [distinguishing strict liability from negligence].) The only duty Horn owed to Decedent was to use due care to avoid injuring Decedent. Moreover, requiring motorists to exercise due care when stopping along a highway does not affect the accepted standard of care applicable to landowners, i.e., that a property owner must exercise “ordinary care or skill in the management of his or her property.” (Civ. Code, § 1714, subd. (a); *Davert v. Larson* (1985) 163 Cal.App.3d 407, 410.) Accordingly, contrary to the majority’s conclusion, a landowner would not be held liable every time a motorist crashed into a tree or mailbox, if the tree or mailbox was maintained with ordinary care or skill.

Additionally, in their opinion, the majority asks, “If a duty is imposed under the facts of this case, where does it end?” In turn, I ask: If a duty is *not* imposed under the facts of this case, then where does it begin? Are drivers only required to exercise reasonable care while moving in the flow of traffic? If not, when a driver who has stopped on the shoulder of the interstate starts to rejoin the flow of traffic, then at what distance from the flow of traffic does that driver’s duty to use reasonable care begin, three feet, nine feet? It is my opinion that parking along the shoulder of an interstate does not exempt a person from the general duty to avoid injuring others by acting carelessly.

B. Proximate Cause

Ralphs argues that it is entitled to judgment notwithstanding the verdict because substantial evidence does not support the finding that Horn was the proximate cause of the accident. I disagree.

An appellate court reviews a trial court’s denial of a motion for judgment notwithstanding the verdict to determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the trial court’s denial of the motion. (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730.) We “““must read the record in the light most advantageous to the plaintiff, resolve all conflicts in [their] favor, and give [them] the benefit of all reasonable inferences in support of the original verdict.”” [Citation.]” (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320.)

“Proximate cause involves two elements. [Citation] One is cause in fact. An act is a cause in fact if it is a necessary antecedent of an event.” (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315.) The second element concerns public policy. (*Id.* at pp. 315-316.) The policy element “asks the . . . abstract question: should the defendant be held responsible for negligently causing the plaintiff’s injury? [Citation.]’ [Citation.]” (*Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1847.)

As to the first element, Anderson, an engineer, studied the police report, the accident site, photographs, and damages to Decedent’s pickup truck. Anderson believed Decedent was applying the pickup truck’s brakes at the time of the crash, and if the big rig had not been parked at that location, then Decedent would have been able to return his pickup truck to the interstate. Anderson’s testimony is substantial evidence to support the finding that the act of parking the big rig at the accident site was a cause in fact of Decedent’s death.

In regard to the policy prong, holding Ralphs responsible for its driver negligently parking on the side of the interstate may encourage other truck drivers to find safer locations to park during nonemergencies. Accordingly, for policy purposes, Ralphs should be held responsible.

Ralphs argues that Horn’s actions were not the proximate cause of Decedent’s death because the same accident would have occurred if Horn had stopped along the interstate due to an emergency, i.e. a non-negligent reason. Ralphs contends that since Decedent’s death could have occurred in the same manner from a non-negligent act, then

the actions of the Ralphs driver cannot be the proximate cause of Decedent's death. In support of this argument, Ralphs relies on *Bentley v. Chapman* (1952) 113 Cal.App.2d 1 (*Bentley*). In *Bentley*, the plaintiff's host was driving along a highway when he fell asleep, and his vehicle struck the back of a truck that had been parked along the curb. (*Id.* at pp. 2-3.) The truck had been parked along the curb overnight, in violation of a local ordinance that allowed only for one-hour parking; however, the court concluded that the city's ordinance likely did not apply because the truck was parked along a state highway. (*Id.* at pp. 3-4.) The reviewing court noted that if the ordinance did apply to the state highway, then parking for a longer period than allowed "would not seem to constitute, as a matter of law, a violation of a duty of care toward the plaintiff." (*Id.* at p. 4.) The appellate court also concluded that such a violation could not, as a matter of law, be deemed a proximate cause of the plaintiffs' injuries. (*Ibid.*)

"Negligence per se" and "negligence as a matter of law" are equivalent expressions. (*Kastel v. Stieber* (1932) 215 Cal. 37, 46.) The instant case is not a case of negligence per se, rather it is based on the concept of ordinary negligence, i.e., the failure to use reasonable care. Accordingly, *Bentley's* conclusion that the violation did not constitute proximate cause as a matter of law is not controlling here.

A second case relied upon by Ralphs is *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346. In *Capolungo*, the plaintiff, who was on a bicycle, was struck by a car as she tried to pass the defendant's parked car. (*Id.* at p. 348.) The defendant's car had been parked in a 24-minute zone for most of the day. (*Ibid.*) The reviewing court concluded that "any excess in the length of time [the defendant's] car was parked in the

yellow zone had no causal connection with the accident[, because the plaintiff] would have had to swerve around the car in exactly the same manner whether it had been parked there five minutes or five hours.” (*Id.* at p. 354.) In the current case, plaintiffs did not argue that Ralphs was negligent because Horn parked in an area that was reserved only for emergencies; rather, plaintiffs argued that Ralphs was negligent because Horn’s actions fell below a reasonable standard of care, i.e. ordinary negligence. Plaintiffs did not contend that the negligence finding should be based on negligence per se.

Accordingly, I do not find *Capolungo* to be controlling.

The majority concludes that substantial evidence does not support a finding that the act of parking the big rig along the side of the interstate was the proximate cause of Decedent’s injuries. The majority finds a lack of substantial evidence because (1) the big rig was parked in an emergency parking area; (2) Decedent’s driving was erratic; and (3) Anderson’s opinion was faulty.

The majority’s reasoning is compelling, and if I had served as a juror on this case, I likely would have found in favor of Ralphs and Horn on the element of proximate cause; however, when reviewing the record in the light most advantageous to the plaintiffs and resolving all conflicts in their favor, I must conclude that the record includes substantial evidence that Horn’s act of parking the big rig along the interstate was the proximate cause of Decedent’s injuries. In other words, if I were permitted to weigh the evidence or draw inferences contrary to the verdict, then I would likely find that parking the big rig was not the proximate cause of Decedent’s injuries, but since I cannot substitute my deductions for those of the jury, and must view the record in the

light most favorable to the verdict, I would affirm the judgment, based upon the evidence delineated *ante*.¹

C. Admission of Evidence

Ralphs contends that the trial court erred by admitting Anderson's expert opinion testimony because Anderson's opinions were based on facts that were not established at trial. I disagree.

"The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [Citation.]" (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136; see also *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108.)

In other words, "proffering an expert opinion that there is some theoretical possibility the negligent act *could have been* a cause-in-fact of a particular injury is insufficient to establish causation. [Citations.] Instead, the plaintiff[s] must offer an

¹ There are some cases in which a court is justified in taking the question of proximate cause away from the jury, such as when "it can be said as a matter of law that the negligence of [the defendants] in no way contributed to the happening of the accident." (*Reese v. Day* (1955) 131 Cal.App.2d 730, 737.) I believe reasonable minds can differ as to whether defendants' negligence contributed to the accident in the instant case. Accordingly, I view this issue as one involving substantial evidence review, rather than a review de novo.

expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* [that] the negligent act was a cause-in-fact of the plaintiff's injury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 (*Jennings*).

I review the trial court's decision to admit the expert's opinion for an abuse of discretion—determining if the expert testimony “would (if credited by the jury) provide legally sufficient support for a finding in the plaintiff[s'] favor on the issue of causation.” (*Jennings, supra*, 114 Cal.App.4th at p. 1119, fn. 9.)

Anderson testified that he reconstructed the accident based upon the police report, police pictures, depositions, a physical examination of Decedent's pickup truck, a visit to the accident site, his own measurements of the accident scene, and his own photographs of the accident scene. From the foregoing sources, Anderson learned the road at the accident site is flat and straight, the big rig was parked on the right side of the road near the interchange, Decedent's pickup truck struck the right rear corner of the big rig, and two tire marks were at the accident scene. The tire marks were designated “Item No. 1 and No. 2.” Anderson believed Item No. 2 showed a side slide from the left rear tire of Decedent's pickup truck. Anderson explained that he believed the tire mark came from the left rear tire because of the manner in which the pickup truck struck the big rig and the damage to the pickup truck—Anderson's opinion was not solely based upon the conclusions in the police report. Anderson opined that the most plausible explanation for the tire mark was that Decedent had been applying the brakes and trying to turn left towards the interstate at the time of the impact. Anderson said another possible

explanation for the tire mark was that there was more gravel in that area, which made it easier to see the tire mark at that point; however, he believed “a logical explanation” was that the brakes had started being applied where the tire mark was made. At minimum, Anderson believed Decedent had been trying to turn left towards the interstate. Anderson opined that if the big rig had not been parked by the side of the road then Decedent would have returned to the interstate.

Officer Magliacci testified that the tire marks came from Decedent’s pickup truck. Officer Magliacci believed the tire marks came from Decedent’s pickup truck because “the people who documented the evidence believed [the tire marks] to be fresh at the scene.” The officer opined that Decedent’s pickup truck “would have obliterated that skid mark” if it had been there before the accident. Officer Magliacci was not aware of anybody matching the tire marks on the ground with the tread on Decedent’s pickup truck.

Anderson’s testimony made it clear that he conducted his own analysis of the accident and independently concluded that the skid marks were from Decedent’s pickup truck, due to the manner in which the pickup truck struck the big rig and the damage to the vehicle. Anderson’s opinion that the marks were left by Decedent’s pickup truck was further supported by Officer Magliacci’s opinion that a tire mark that had been at the site before the accident would have been obliterated by Decedent’s pickup truck.

Accordingly, Anderson’s opinion does rise to the level of substantial evidence because his opinion that the tire marks show that Decedent could have returned to the interstate, but for the big rig, is supported by the record; Anderson relied on materials that are

commonly relied upon by experts; and the factors he relied upon, such as damage to the pickup truck and photographs, were not speculative, remote or conjectural. (See *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, 274-275 [discussing expert testimony].) Consequently, I conclude that the trial court did not abuse its discretion by admitting Anderson's testimony, because Anderson's expert opinion provides legally sufficient support for a finding in the plaintiffs' favor on the issue of causation.

Ralphs contends Anderson's opinion does not rise to the level of substantial evidence because the reason Anderson believed the tire marks came from Decedent's pickup truck was due to a notation in the police report that labeled the marks as such. Ralphs asserts that Anderson assumed the tire marks were made by Decedent's pickup truck based upon the opinion of the officer who wrote the report, and that particular officer's opinion was not in evidence. Ralphs contends the trial court excluded the police report during motions in limine, and therefore the report was also not in evidence. Ralphs argues that Anderson's reliance on the opinions in the police report does not transform the opinions into fact, which means the fact that the tire marks came from Decedent's pickup truck was never established at trial.

Anderson did not explicitly testify that he determined the skid marks were from Decedent's pickup truck based solely upon the police report; however, when asked what physical evidence he gleaned from the police report, Anderson did discuss the tire marks. Nevertheless, as noted *ante*, Anderson testified that he believed the tire marks came from Decedent's pickup truck because of the manner in which the pickup truck struck the big rig and the damage to the pickup truck—Anderson's opinion was not solely based upon

the conclusions in the police report. Further, Officer Magliacci testified that he did not know if the tire marks existed before the accident; however, he believed Decedent's pickup truck would have obliterated any tire mark left prior to the accident. The inference to be drawn from that testimony is that Officer Magliacci believed the tire mark came from Decedent's pickup truck based in part upon his own assessment of the accident site. The officer's belief that the tire mark was from Decedent's pickup truck because the pickup truck would have obliterated a previous tire mark, is reasonable and credible. (See *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336 [substantial evidence means evidence that is reasonable, credible, and of solid value].) Accordingly, while the evidence regarding the tire marks was not overwhelming, there was substantial evidence supporting the theory that the skid mark was left by Decedent's pickup truck. Therefore, Anderson's opinion about the tire marks was properly admitted.

Ralphs goes on to contend that Anderson's testimony does not constitute substantial evidence because it is contradicted by other evidence. Ralphs argues that Anderson ignored witnesses who indicated that Decedent did not use his brakes or try to avoid the tractor-trailer. "When an expert's opinion is premised upon facts contradicted by the only evidence of record, the expert's opinion does not constitute substantial evidence in support of the judgment." (*Maples v. Kern County Assessment Appeals Bd.* (2002) 103 Cal.App.4th 172, 198.) Anderson's opinion was based, in part, on law enforcement photographs that were in evidence. The photographs showed the tire marks and damage to the vehicles. Anderson's opinion that the skid mark came from Decedent's pickup truck was also supported by Officer Magliacci's testimony that he

believed Decedent's pickup truck would have obliterated any previous skid marks.

Accordingly, Anderson's opinion was not based solely upon facts contradicted by the evidence of record; rather, his opinion was based on an interpretation of the evidence.

The majority concludes that no evidence was introduced to support Anderson's testimony that the tire marks were from Decedent's pickup truck, and therefore, Anderson's opinion—that the tire marks reflect (1) Decedent would have returned to the interstate but for the big rig, and (2) Decedent might have been braking—was pure speculation. I disagree with the majority's conclusion.

Photographs of the tire impressions were admitted into evidence. The diagram of the accident scene prepared by Officer Magliacci, which depicts the tire marks, was admitted into evidence. Officer Magliacci testified that the skid mark in the photograph would have been "obliterated" by Decedent's truck if it had been made prior to the accident. Officer Magliacci further testified, without objection, that the skid mark was from Decedent's pickup truck. Given the foregoing evidence, I disagree with the majority's conclusion that no documentary evidence or testimony supported a conclusion that the tire impressions came from Decedent's pickup truck.

The majority also concludes that Anderson's expert testimony was faulty because eyewitnesses testified defendant did not apply his brakes or attempt to avoid the big rig. I disagree with the majority's reasoning because the jury was not required to accept the eyewitness testimony as true. (*Temple v. De Mirjian* (1942) 51 Cal.App.2d 559, 562.) Additionally, it is the task of the trial court to determine if expert testimony "would (*if credited by the jury*) provide legally sufficient support for a finding in the plaintiff[s']

favor on the issue of causation.” (*Jennings, supra*, 114 Cal.App.4th at p. 1119, fn. 9, italics added.) Therefore, even if Anderson’s testimony was contradicted by eyewitness testimony, it would not be an abuse of discretion to admit the testimony, if it was legally sufficient. I have concluded *ante* that Anderson’s testimony was legally sufficient, and therefore, I do not believe the trial court abused its discretion by admitting the testimony.²

D. Conclusion

I would affirm the judgment.

CERTIFIED FOR PUBLICATION

/s/ MILLER

J.

² In the majority’s discussion of Ralphs’s proximate cause contention, the majority asserts that I have “put the cart before the horse,” because if Anderson’s testimony had been excluded then the case would not have been submitted to the jury. As noted *ante*, it is my opinion that the trial court did not abuse its discretion by admitting Anderson’s testimony. Accordingly, I respectfully disagree that I have “put the cart before the horse” by “overlook[ing] procedural errors.”

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3257 East Guasti Road, Suite 300, Ontario, California 91761.

On **December 17, 2009**, I served the foregoing documents described as **Petition for Review** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Ontario, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY FACSIMILE ("FAX") In addition to the manner of service indicated above, a copy was sent by FAX to the parties indicated on the service List.

BY OVERNIGHT MAIL/COURIER To expedite service, copies were sent via FEDERAL EXPRESS.

BY PERSONAL SERVICE I caused to be delivered such envelope by hand to the individual(s) indicated on the service list.

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

Executed on **December 17, 2009**, at Ontario, California.



Catherine Carvalho

Cabral v. Ralphs
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Court of Appeal No. E044098

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