SUPREME COURT COPY

S178799

SUPREME COURT OF CALIFORNIA

MARIA CABRAL, Plaintiff and Respondent, v. RALPHS GROCERY COMPANY, Defendant and Appellant.	4th Civil No. E044098 (San Bernardino County Sup. Ct. No. RCV-089849)

APR 2 2 2010

OPENING BRIEF ON THE MERITS

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

Frank N. Darras (#128904)
Lissa A. Martinez (# 206994)
DARRASLAW
3257 East Guasti Road, Suite 300
Ontario, California 91761
Telephone: (909) 390-3770
Facsimile: (909) 974-2121

Michael B. Horrow (# 162917)
DONAHUE & HORROW LLP
1960 East Grand Avenue, Suite 1215
El Segundo, California 90245
Telephone: (310) 322-0300
Facsimile: (310) 322-0302

Jeffrey Isaac Ehrlich (#117931)
EHRLICH LAW FIRM
411 Harvard Avenue
Claremont, California 91711
Telephone: (909) 625-5565
Facsimile: (909) 625-5477

Attorneys for Plaintiff and Respondent
Maria Cabral

COPY

S178799

SUPREME COURT OF CALIFORNIA

MARIA CABRAL, Plaintiff and Respondent, v. RALPHS GROCERY COMPANY, Defendant and Appellant.	4th Civil No. E044098 (San Bernardino County Sup. Ct. No. RCV-089849)

OPENING BRIEF ON THE MERITS

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

Frank N. Darras (#128904)
Lissa A. Martinez (# 206994)
DARRASLAW
3257 East Guasti Road, Suite 300
Ontario, California 91761
Telephone: (909) 390-3770
Facsimile: (909) 974-2121

Michael B. Horrow (# 162917)
DONAHUE & HORROW LLP
1960 East Grand Avenue, Suite 1215
El Segundo, California 90245
Telephone: (310) 322-0300
Facsimile: (310) 322-0302

Jeffrey Isaac Ehrlich (#117931)
EHRLICH LAW FIRM
411 Harvard Avenue
Claremont, California 91711
Telephone: (909) 625-5565
Facsimile: (909) 625-5477

Attorneys for Plaintiff and Respondent
Maria Cabral

TABLE OF CONTENTS

ISSUES FOR REVIEW 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 4

A. Statement of Facts 4

1. Horn routinely and illegally stops his truck alongside Interstate 10 in an "Emergency Stopping Only" zone 4

2. On February 27, 2004, Adelemo Cabral loses control of his pickup truck, veers off the roadway, and smashes into Horn's truck, suffering fatal injuries 5

B. Procedural Summary 6

1. The trial 6

a. Testimony about the CHP investigation of the accident scene 6

b. Plaintiffs' traffic-safety expert testifies about the 30-foot clear-recovery area 8

c. Plaintiffs' trucking-industry expert testifies that parking on the shoulder to have a snack falls below the standard of care for commercial truckers 8

d. Ralphs' Assistant Transportation Manager testifies that its safety guidelines prevent its truck drivers from parking in "Emergency Parking Only" areas for non-emergency reasons 9

e. Plaintiffs' accident-reconstruction expert testifies about causation 10

2. The verdict — Horn is held 10% at fault for the accident 12

3. The trial court denies the JNOV 12

4. The Court of Appeal reverses, finding that a JNOV was required 12

a. The majority opinion 12

b. Justice Miller's dissent 14

C. Standard of Review 16

ARGUMENT 17

A. The Court of Appeal erred in holding that truck operators owe no duty of care to passing motorists if they park their trucks alongside California freeways 17

1. Controlling legal principles 17

a. A general duty of care exists unless public policy requires otherwise 17

b. Courts apply the *Rowland v. Christian* factors to determine whether a departure from the general rule is appropriate — focusing principally on foreseeability and burden 18

2. The *Rowland v. Christian* factors point to the existence of a duty here 18

a. The danger posed by parking trucks alongside freeways is plainly foreseeable 18

b. The burden of avoiding the danger posed by parked trucks is minimal 22

c. The remaining *Rowland* factors all support the existence of a duty 23

3. Recognition of a duty not to park big-rig trucks along freeways is not tantamount to creating a duty to ensure a "safe landing" 24

4. The fact that Horn stopped his truck in an "Emergency Stopping Only" zone did not negate his duty of care 25

B. The Court of Appeal erred in holding that parking the truck alongside the freeway could not constitute a proximate cause of Cabral's death 27

1. Substantial evidence supported the finding that Horn's conduct was a substantial factor in causing the collision 27

a. The majority's finding that a violation of a parking regulation cannot constitute the proximate cause of an accident is contrary to this Court's holding in *Thompson v. Bayless* 28

b. The availability of the area where Horn parked for emergency parking does not negate causation 30

c. Cabral's erratic driving before the collision does not negate causation 31

2. There are no public-policy considerations that should limit a trucker's responsibility for illegally parking a truck alongside a freeway 32

C. Justice Miller's dissent correctly explains why the testimony of Plaintiffs' accident-reconstruction expert, Anderson, was not unduly speculative and was therefore admissible 34

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Alvis v. Ribar
(Ill. 1981) 85 Ill.3d 1, 421 N.E.2d 886 33

Bentley v. Chapman
(1952) 113 Cal.App.2d 1 .... 28, 29, 30

Bogovich v. Nalco Chem Co.
(Ill. App.1991) 213 Ill. App.3d 439, 572 N.E.2d 1043 33

Capolungo v. Bondini
(1986) 179 Cal.App.3d 346 .... 28, 29, 30

Castaneda v. Olsher
(2007) 41 Cal.4th 1205 18

Citizens of Humanity, LLC v. Costco Wholesale Corp.
(2009) 171 Cal.App.4th 1 29

Delgado v. American Multi-Cinema, Inc.
(1999) 72 Cal.App.4th 1403 16

Ducey v. Argo Sales Co.
(1979) 25 Cal.3d 707 2

Duff v. Lykins
(Ky. 1957) 306 S.W.2d 252 33

Fennessy v. Pacific Gas & Elec. Co.
(1942) 20 Cal.2d 141 .... 3, 26, 31

Ferguson v. Lieff, Cabraser, Heimann & Bernstein
(2003) 30 Cal.4th 1037 16

Godwin v. Nixon
(N.Car.1953) 236 N.C. 632, 74 S.E.2d 24 33

John B. v. Superior Court
(2006) 38 Cal.4th 1177 17

Korsak v. Atlas Hotels, Inc.
(1992) 2 Cal.App.4th 1516 17

Lane v. Jaffe
(1964) 225 Cal.App.2d 172 26

Long v. Soderquist
(Ill. App.1984) 126 Ill.App.3d 1059, 467 N.E.2d 1153 33

Lugtu v. California Highway Patrol
(2001) 26 Cal.4th 528 .... 2, 19, 20, 32

Merrill v. Navegar, Inc.
(2001) 26 Cal.4th 465 17

People ex rel. Dept. of Transportation v. Wilson
(1994) 25 Cal.App.4th 977 25

PPG Industries, Inc. v. Transamerica Ins. Co.
(1999) 20 Cal.4th 310 .... 16, 27

Rowland. v. Christian Rowland v. Christian
(1968) 69 Cal.2d 108 .... passim

Scott v. Hoosier Engineering Co.
(W. Va. 1936) 117 W.Va. 395, 185 S.E. 553 33

Sheehan v. Janesville Auto Transport
(Ill. App.1981) 102 Ill.App.3d 507, 511, 430 N.E.2d 131 33

Smith v. Penn Line Service, Inc.
(W.Va.1960) 145 W.Va. 1, 113 S.E.2d 505 33

Strauss v. Horton
(2009) 46 Cal.4th 364 25

Sweatman v. Department of Veterans Affairs
(2001) 25 Cal.4th 62 17

Thomson v. Bayless
(1944) 24 Cal.2d 543 .... 3, 28, 30, 31

Whitton v. State of California
(1979) 98 Cal.App.3d 235 .... 19, 20

Willis v. Gordon
(1978) 20 Cal.3d 629 .... 31, 32

Statutes

California Evidence Code § 801, subd. (b) 35

California Vehicle Code § 16020 24

California Vehicle Code § 21718 ....1, 5, 29

California Vehicle Code § 35551, subd. (a) 22

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 they park their trucks?

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?

PRELIMINARY STATEMENT

After working a full day at a construction site, Adelmo Cabral had almost completed his 60-mile commute home when it appears that he fell asleep and veered off the I-10 freeway. Cabral was killed when his pickup slammed into the back of a big-rig truck that had been parked along the side of the freeway by Hen Horn.

Horn, an employee of Ralphs Grocery Company, stopped his truck in the same spot twice a week to have a snack when he drove an eastbound route. Parking along California freeways is illegal[1] (Veh. Code § 21718), and the particular spot where Horn stopped was marked with an "Emergency Parking Only" sign. Horn never claimed that he stopped because of an emergency. He had just poured himself a cup of tea when Cabral crashed into his truck.

---

[1] The general prohibition is subject to certain exceptions that are not relevant here.

Cabral's wife and children filed this wrongful death action against Horn and Ralphs. The jury ruled that Horn had been negligent, but it attributed 90% of the fault to Cabral. Ralphs appealed, and a two-justice majority held that the trial court erred in denying Ralphs' JNOV. In the majority's view, the *Cabral* lawsuit failed as a matter of law because Horn owed no duty of care to the motorists who drove past his parked truck (and hence no duty to Cabral) and because Horn's act of parking his truck on the side of the freeway could not be a proximate cause of the collision with Cabral's truck.

The appellate court's finding on the absence of duty rests principally on its belief that it was not reasonably foreseeable that by parking his big-rig 16-feet off the right lane of the freeway Horn might create a risk of harm to passing motorists. That conclusion is at odds with this Court's recognition in *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 718-720, that the risk that freeway motorists might veer off the roadway was sufficient to support a claim against the State for its failure to take adequate measures to mitigate that hazard. It is also at odds with this Court's conclusion in *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 528, 544, that the negligence of a freeway driver in veering off the roadway and striking a vehicle stopped on the shoulder was foreseeable and therefore could not constitute a superseding-cause.

The Caltrans design standards for California freeways recognize that drivers will occasionally leave the roadway and explains that, in 80% of the cases when this occurs, a driver can regain control if there is a 30-foot "clear recovery area" alongside the roadway. Accordingly, Caltrans requires that roadway obstacles within this 30-foot area be removed, if possible. Obstacles that cannot be removed must be shielded. Fully-loaded tractor-trailer rigs in California can lawfully weigh up to 40 tons. If truck drivers are allowed to park alongside California freeways in the manner that

Horn did here, the concept of the clear-recovery area will be eliminated, making California freeways far more dangerous.

The Court of Appeal's holding on proximate cause is also at odds with this Court's prior decisions. The majority held that Horn's act of parking in an emergency-parking-only zone for non-emergency purposes could not be the proximate cause of the collision because parking was permitted in emergencies. The majority observed, "If an emergency situation had caused Horn to stop in the same place, it would not have been any safer." But the fact that certain risks may be acceptable during an emergency does not mean that defendants should be entitled to routinely expose the public to those risks. Thus, in *Fennessy v. Pacific Gas & Elec. Co.* (1942) 20 Cal.2d 141, 144, this Court affirmed a negligence judgment against PG&E based on the fact that its truck was parked for non-emergency purposes in an area where emergency parking was permitted. And in *Thomson v. Bayless* (1944) 24 Cal.2d 543, 548, 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."

It is true that the risk posed by a truck parked alongside the freeway is unlikely to vary based on the reason why it was parked. But this overlooks the fact that emergencies happen infrequently and are typically of short duration. Hence, the risk of allowing parking for emergencies only is much lower than the risk of allowing trucks to park alongside freeways whenever the driver feels like stopping for a snack or a nap.

Ultimately, the majority's hostility to the plaintiff's case is probably best understood in terms of the fears it expressed about creating a duty to ensure a "safe landing." In the majority's view, recognizing that truck drivers have a duty to refrain from parking their trucks on the side of freeways would make all motorists liable for parking their cars along

residential streets, would make landowners liable for installing brick mailboxes along curbs, and would make cities liable for planting trees along boulevards. This is not a reasonable fear.

Freeways serve a different purpose than residential streets and are accordingly subject to different rules. A tree planted alongside a city street poses only a minimal risk to cars passing at 25 mph. The same tree would constitute a lethal obstacle if placed close to a freeway. Accordingly, rules that govern what is inappropriate conduct on freeways will not necessarily govern what is proper along residential or commercial streets. Recognizing that illegally parking trucks alongside freeways for non-emergency purposes can be the predicate for a negligence action does not open the floodgates to tort claims based on wholly different conduct that presents qualitatively different risks.

STATEMENT OF THE CASE

A. Statement of Facts

1. Horn routinely and illegally stops his truck alongside Interstate 10 in an "Emergency Stopping Only" zone

Hen Horn was employed by Ralphs Grocery Company as a tractor-trailer truck driver. (2RT-381:4-18.) In the year before the Cabral accident, when he drove an eastbound delivery route twice a week, he would stop his big-rig truck at a particular spot on the shoulder of the eastbound I-10 freeway in San Bernardino County, just east of the I-15 freeway, to eat his lunch or to have a snack. (2RT-321:5-20; 386:7-10.)

An R45 "Emergency Parking Only" sign is posted in the general vicinity of the spot where Horn would park. (AA 168; 3RT-637:3-23.[2]) He was aware of the sign when he parked along the freeway shoulder.

---

[2] The California Highway Patrol had requested that Caltrans place the sign. Based on that request, Caltrans installed the sign. (3RT-642:6-16; 644:16-21.)

(2RT-386:14-17.) Vehicle Code section 21718 expressly forbids parking alongside freeways, subject to certain limited exceptions that do not apply here.

There are truck stops within 2 miles east and west of the spot where Horn stopped his truck. (1RT-260:7-24.) Horn chose not to stop at these truck stops to avoid paying a parking fee. (AA 107.)

2. On February 27, 2004, Adelemo Cabral loses control of his pickup truck, veers off the roadway, and smashes into Horn's truck, suffering fatal injuries

Adelemo Cabral was a construction worker. (3RT-614:18-19.) On February 27, 2004, after working a full day in Manhattan Beach, Cabral was driving home to Rialto when his pickup left the freeway and collided with Horn's tractor-trailer. (1RT-263:18-264:2, 278:26-279:25; 2RT-482:18-26.) Cabral was killed in what the testifying CHP officer described as a "horrific" collision scene. (1RT-281:19-21.)

Witness Juan Perez observed that Cabral's pickup was weaving back and forth within the number 3 lane, then swerved to the right into the number 4 lane, exited the freeway and hit the back of the Ralphs tractor-trailer. (1RT-285:23-286:3; 3RT-765:21-768:6; see, also, 2RT-310:12-311:1.) Perez lost sight of Cabral's pickup just before the accident because his view was screened by another vehicle. (3RT-776:7-777:1; see, also, 2RT 522:9-523:17; 3RT-746:11-15, 768:14-22; 4RT-922:2-6.)

A toxicology report on Cabral showed no evidence of intoxication. (1RT-285:18-22.) According to his brothers, Cabral did not have any medical problems. (2RT-491:16-24; 3RT-686:16-687:10.) Plaintiff's human-factors expert, Mark Sanders, opined that Cabral left the roadway because he got drowsy and fell asleep. (2RT-600:22-601:15.)

B. Procedural Summary

1. The trial

a. Testimony about the CHP investigation of the accident scene

Cabral's wife and children filed a wrongful-death lawsuit against Horn and his employer, Ralphs. During the trial, testimony about the accident scene and the CHP investigation of the collision was provided by Officer Michael Migliacci, the primary investigating officer for the accident. He arrived at the scene at 9:11 p.m. (1RT-245:2-4, 246:20-26.) He had investigated approximately 700 vehicle accidents before the Cabral accident. (1RT-243:4-6.) It was his responsibility to make sure everything was documented, including witness statements and physical evidence. (1RT-243:7-23.) He delegated responsibility for collecting evidence of the wreckage and taking measurements to other officers while he focused on the drivers and information collection. (*Id.*) He testified that the CHP is very thorough when investigating a fatal collision because it is important that all of the physical evidence be accurately documented to create a record of what happened if the case goes to trial. (1RT-244:1-11, 265:18-22.)

During the investigation, Officer Migliacci found physical evidence at the scene, which was documented in the Traffic Collision Report with the assistance of other officers. (1RT-260:25-261:5.) The CHP factual diagram at page S-6 of the report was prepared by Officer Thibodeau based on the physical evidence and measurements documented at the scene. (2RT-311:22-312:11; AA 133-137, 167-168.) The diagram was admitted into evidence.[3] (2RT-312:12-16.) Photographs taken at the scene were also

---

[3] The court granted Ralphs' motions in limine to exclude the CHP report, except for photographs, physical measurements and the factual diagram, ruling that the court would not receive the CHP report into evidence, but

admitted into evidence. (1RT-246:9-14, 248:4-18; 2RT-303:7-12, 308:3-14.)

Viewing Exhibit 6A (CHP photograph, AA 169), Officer Migliacci identified the back of the collision scene, the wreckage of Cabral's pickup smashed into the tractor-trailer, and a regulatory "Emergency Parking Only" sign on the right shoulder. (1RT-249:5-15.) Viewing Exhibit 6D (CHP photograph, AA 171), Officer Migliacci identified tire impressions in the dirt and testified that he saw skid marks at the scene of the accident and stated that they were from the wreckage of the two vehicles. (2RT-303:7-23, 304:11-20.)

Officer Migliacci also testified that the physical evidence at the scene included "tire impressions in the dirt, skid marks, side skids in the dirt, the shoe from Party 1, license plate from the Vehicle 1, various vehicle parts and debris from the vehicle, and the points of rest for all the vehicles." (1RT-261:19-25.)

Viewing Exhibit 1A (CHP factual diagram, AA 167), Officer Migliacci testified that mark No. 1 recorded on the diagram was determined to be a tire impression in the dirt from Cabral's pickup and mark No. 2 recorded on the diagram was determined to be a side skid in the dirt from the left rear tire of Cabral's pickup. (2RT-312:18-25; see, also, 1RT-261:26-262:15.)

When asked if there was any evidence to support the conclusion that tire mark No. 2 came from either of the two vehicles involved in the accident, Officer Migliacci stated that the CHP officers who were responsible for documenting the evidence believed the tire mark to be fresh at the scene. (1RT-291:1-8.) He also stated that if tire mark No. 1 had been there before the accident, then Cabral's pickup would have obliterated

---

permitted Officer Migliacci to testify and refresh his memory from the report if needed. (1RT-117:3-6; AA 14-22, 213.)

the tire mark. (2RT-315:19-316:1.) And when asked why Cabral's pickup hit the right side of the tractor-trailer rather than the left side, Officer Migliacci explained it was because either Cabral exercised steering input or that, when the tires hit the dirt shoulder, they caused the wheel to turn. (2RT-308:20-309:7, 311:2-12.)

b. Plaintiffs' traffic-safety expert testifies about the 30-foot clear-recovery area

Plaintiffs' highway and traffic safety expert, Thomas Schultz, testified that the risks from large trucks and other objects becoming dangerous roadside obstacles had been studied for over 50 years, and that California standards in effect at the time of the accident required that there should be no roadside obstacles alongside a freeway within 30-feet of the traffic lane — the edge of the number 4 traffic lane (slow lane). (2RT-562:1-563:5.) He explained that "roadside obstacles" are things that can cause rapid deceleration or a rapid change in direction. (*Id.*) He explained that smaller items that will bend or break if struck are permitted within this 30-foot area, such as sign posts. (*Id.*) But "rocks, boulders, trees greater than five inches in diameter, wooden posts greater than 4x6s" or any "massive things" should be removed from this 30-foot area, if possible. (*Id.*) If removal is not possible, then they should be positioned further from the roadway or protected from impacts with guardrails. (*Id.*)

Schultz explained that Horn's tractor-trailer combination constituted a "massive roadside obstacle" that was parked 16 feet from the edge of the traffic lane. (*Id.*)

c. Plaintiffs' trucking-industry expert testifies that parking on the shoulder to have a snack falls below the standard of care for commercial truckers

Plaintiffs' commercial trucking-industry expert, John Riggins, testified that when Horn parked on the shoulder of the I-10 freeway in an

area marked "Emergency Parking Only" to get something to eat and drink, his conduct fell "below the standard of care for a commercial truck driver under those circumstances." (2RT-430:10-14, 446:18-22.) As Riggins explained, it is a very dangerous thing to do "because of the size of the vehicle, the maneuverability of the tractor-trailer, the visibility of it, and getting it off the freeway [onto] the shoulder of the road is a problem. That's why it's an emergency only area. If you want to get something to eat, you pull off somewhere where it's restful for the driver . . . A truckstop's good." (2RT-443:3-12.) Riggins also opined that Horn would have been negligent even if the "Emergency Parking Only" sign had not been there. (2RT-444:8-11.)

d. Ralphs' Assistant Transportation Manager testifies that its safety guidelines prevent its truck drivers from parking in "Emergency Parking Only" areas for non-emergency reasons

Ralphs' Assistant Transportation Manager, Dominick Romano, was designated by Ralphs as its person most knowledgeable about Ralph's safety guidelines and training for tractor-trailer drivers. (2RT-335:24-336:10.) Romano was in charge of driver discipline and driver safety for Ralphs. (2RT-332:14-19, 333:1-8.) He testified that Ralphs does not want its drivers parking in "Emergency Parking Only" areas for nonemergency reasons because of safety concerns for both the driver and for other motorists who might leave the roadway. (2RT-341:26-342:13, 345:15-346:15.) According to Romano, if Horn pulled over on the side of the freeway on February 27, 2004 in an "Emergency Parking Only" area to get something to eat and drink, then he violated Ralphs' safety guidelines. (2RT-346:17-25, 367:5-12.)

e. Plaintiffs' accident-reconstruction expert testifies about causation

Before trial, Ralphs moved to exclude testimony by plaintiffs' accident reconstruction expert, Robert Anderson. (AA 23-36.) The trial court denied the motion as to Anderson's testimony, but granted the motion as to his graphic presentation. (1RT-192:15-23.)

During the trial, Anderson testified that if Ralphs' tractor-trailer had not been parked on the side of the freeway, Cabral's pickup would have continued the path it was traveling at the time of impact and returned safely to the freeway. (2RT-529:1-18.) Anderson's opinion is based on his experience, analysis of the accident and his training applied to the accident; Anderson has performed approximately 3,000 accident reconstructions. (2RT-505:12-14, 529:19-21.)

Anderson reviewed the CHP factual diagram, photographs, and report. (2RT-506:15-20.) Anderson went to the accident scene, took measurements and photographs, and actually reproduced the police measurements. (2RT-519:11-20.) He also examined Cabral's pickup and, based on its condition, determined that Cabral was going 60 mph (plus or minus 10 mph) at the time of impact. (2RT-516:23-518:5.)

According to the physical evidence documented at the scene, Cabral's pickup was partially underneath the right rear corner of the tractor-trailer. There are two tire marks documented by the police and shown in the diagram. (2RT-507:21-508:12.) From the photographs, Anderson saw the two tire marks and learned the orientation of the impact – the collision was almost straight on and Cabral's pickup was essentially parallel to the highway when it hit the tractor-trailer, which is consistent with the tire marks. (2RT-509:2-17, 515:5-516:22, 518:6-519:10.)

After considering all the physical evidence, Anderson's opinion was that tire mark No. 1 was a tire impression from the left rear tire of Cabral's pickup and tire mark No. 2 was a side skid from the same tire. (2RT-508:16-24, 509:25-510:6, 511:7-9.) Anderson was not aware of any contrary physical evidence. (2RT-541:6-21.) Moreover, the rotation of Cabral's pickup after impact was consistent with all the tire marks. (2RT-545:5-8.)

Anderson explained at length that there were four possible options for the origin of tire mark No. 1, but only one worked based on the placement of the mark and how the pickup hit the tractor-trailer (2RT-511:1-513:7.)

Anderson opined that, at the time of impact, Cabral's pickup was in a left turn – "it was still going to the right, but it was turning to the left." (2RT-527:4-17.) Anderson also opined that based on the length (15 feet) and location ("looks like it starts suddenly") of tire mark No. 1, it appears that Cabral's brakes were applied: "It's just logical that any explanation for that is that the brakes were now starting to be applied at the point where it starts to change the tire mark." (2RT-527:18-528:13, 546:26-547:7.)

Anderson also testified that if the tractor-trailer had not been there that evening, it would have been highly unlikely for Cabral's pickup to impact anything at the scene, regardless of the direction in which it was traveling. (2RT-549:23-550:10.) 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). (2RT 549:23-550:10.)

Ralphs' accident reconstruction expert, Fred Cady, acknowledged that, if the tractor-trailer had not been parked along the roadway when Cabral lost control, it was possible that Cabral might have recovered and brought his vehicle safely to a stop. (4RT-919:19-920:23.)

2. The verdict — Horn is held 10% at fault for the accident

The jury returned a verdict for plaintiffs on the complaint and for Ralphs on its cross-complaint for property damage to its trailer. (AA 47-54.) The jury found that both Horn and Cabral were negligent and that each one's negligence was a substantial factor in causing plaintiffs' harm. (AA 47-48, 51-52.) The jury assessed 90% responsibility to Cabral and 10% to Horn. (AA 48, 52.) The jury awarded plaintiffs economic damages totaling $470,234.00 and non-economic damages totaling $4,330,000.00. (AA 49.) It also awarded Ralphs $5,250.00 for the damage to its trailer. (*Id.*) The trial court adjusted the awards to reflect the jury's allocation of fault, resulting in a net award of $475,298.40 to plaintiffs. (AA 53.) On July 25, 2007, the court entered judgment against Ralphs in that amount. (AA 53-54.)

3. The trial court denies the JNOV

On August 6, 2007, Ralphs moved for judgment notwithstanding the verdict on the grounds that Horn owed no duty to Cabral and Horn's negligence did not cause Cabral's death. (AA 77-86.) Ralphs also moved for a new trial. (AA 59-76.) Both motions were denied on August 17, 2007. (AA 99-113.)

4. The Court of Appeal reverses, finding that a JNOV was required

a. The majority opinion

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. (*Cabral v. Ralphs Grocery Co.* (2009) 101 Cal.Rptr.3d 474, 482-484.) ("*Cabral v. Ralphs*.")

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. 483.)

The majority explained that the possibility that a passing motorist might leave the traffic lanes and strike the parked truck did not create a duty for Horn to "ensure a 'safe landing.'" (*Id.* at p. 484.) 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 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. 484-485.) 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.* at p. 484.)

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. 485.) 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.* at p. 486.)

Second, the majority ruled that, even if a duty could be found, Horn's parking his truck alongside the roadway could not, as a matter of law, be the proximate cause of the collision. 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. (*Id.* at pp. 487-488.)

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. 488.) 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.*)

Finally, third, the majority held that the trial court erred in allowing the plaintiffs' causation expert, Anderson, to testify, because his testimony was too speculative. (*Id.* at p. 489.) Specifically, the majority concluded that there was insufficient evidence to show that the tire marks and skid marks on which Anderson based his opinion actually came from Cabral's truck. (*Id.* at p. 490.)

b. Justice Miller's dissent

Justice Miller disagreed with the majority on each of its points and filed a dissenting opinion. 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. (*Id.* at pp. 492-494.) Under the factors articulated in *Rowland. v. Christian* (1968) 69 Cal.2d 108,112-113, which California courts balance to determine whether or not a departure from the general duty of due care is

warranted,[4] he concluded that the trial court correctly held that Ralphs owed Cabral a duty of due care. (*Cabral v. Ralphs* at pp. 492-494.)

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. 483.) 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 remaining *Rowland* factors favored imposing a duty on Ralphs and none supported the majority's conclusion. (*Id.* at pp. 492-494.)

With respect to the majority's observation that a motorist stopped by the side of the road owes no duty to create a "safe landing," Justice Miller agreed, but noted that the true issue is 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 pp. 495-496.) In essence, he explained that the majority's fears that motorists would face liability for parking alongside residential streets, or that landowners would be held liable for having mailboxes near the curb, were greatly overstated. (*Id.*)

On the issue of proximate cause, Justice Miller concluded that the testimony of Anderson, plaintiffs' expert, was sufficient to support a

---

[4] 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.)

finding of causation in fact. (*Id.* at p. 497.) 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 disagreed with 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. 498-501.)

C. Standard of Review

The existence of a legal duty is a question of law that is reviewed de novo. (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406-1407.)

The issue of proximate cause involves two elements — cause in fact and public-policy considerations. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315.) The cause-in-fact issue is a factual question, while the public-policy aspect presents a question of law. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) This Court has explained that, given this interplay of issues, the overall issue of proximate cause "is ordinarily 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." (*Id.*, internal quotation marks omitted.) Hence, it is a legal issue that is subject to de novo review.

A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in

support of the motion. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

Whether a trial court erroneously admitted the testimony of plaintiffs' expert on causation is reviewed for abuse of discretion. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1522-1523.)

ARGUMENT

A. The Court of Appeal erred in holding that truck operators owe no duty of care to passing motorists if they park their trucks alongside California freeways

1. Controlling legal principles

a. A general duty of care exists unless public policy requires otherwise

Civil Code section 1714 states that, "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ." In light of this provision, the general rule in California is that all persons have a duty to use ordinary care to prevent others being injured as the result of their conduct. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1189.)

But this Court has explained that "duty" is not an immutable fact of nature. Rather, it is "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." (*John B. v. Superior Court* (2006) 38 Cal.4th at p. 1189, citing *Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) Hence, there are exceptions to the general rule. Some are established by the Legislature through the enactment of statutes, while others are judicially established. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) This Court has cautioned that, in the absence of a statutory provision creating an exception to the generally-applicable duty of care, no exception should be made unless it is clearly supported by considerations of public policy. (*John B.*, 38 Cal.4th at p. 1191.)

b. Courts apply the *Rowland v. Christian* factors to determine whether a departure from the general rule is appropriate — focusing principally on foreseeability and burden

The factors that courts consider when they decide whether to create a public-policy based exception to the general duty of care were articulated in *Rowland v. Christian*. These factors 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.'" (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213, citing, *inter alia*, *Rowland v. Christian,* 69 Cal.2d at p. 113.)

In *Castaneda* this Court observed that foreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations, but in a given case one or more of the other *Rowland* factors may be determinative of the duty analysis. (*Id.*, 41 Cal.4th at p. 1213.)

2. The *Rowland v. Christian* factors point to the existence of a duty here

a. The danger posed by parking trucks alongside freeways is plainly foreseeable

The lynchpin of the Court of Appeal's finding that Ralphs owed Cabral no duty with respect to how its truck was parked was its conclusion that it was not reasonably foreseeable that parking a big-rig truck 16-feet — approximately the width of one traffic lane —from the slow lane of a busy urban freeway creates a danger to passing motorists, since those motorists are expected to stay within the roadway if they exercise due care. (*Cabral v. Ralphs* at p. 484.)

The majority acknowledged that it was "possible" for a vehicle to leave the freeway and strike an object stopped off the shoulder. (*Id.*) But relying on *Whitton v. State of California* (1979) 98 Cal.App.3d 235, 243, the majority stated that this possibility "is not the foreseeability upon which the law of negligence is based." (*Id.* at p. 486.)

In *Whitton*, the plaintiff sought to fix liability on the CHP for injuries she sustained during a traffic stop when a drunk driver veered off the freeway and into the CHP officer's patrol car, causing it to strike her. Her argument was that the CHP officer should be automatically liable for the accident because any time a motorist is stopped alongside the freeway it is theoretically possible that another driver could leave the roadway and cause a collision. (*Whitton*, 98 Cal.App.3rd at p. 243.)

Understandably, the *Whitton* court rejected this view. It was in that context that it made the comment that the possibility of a collision was not sufficient to find that it was foreseeable that an otherwise lawful and proper traffic stop placed the plaintiff at unreasonable risk. (*Id.* at p. 243.) But the *Whitton* court did not hold that CHP officers did not owe the motorists they stopped a duty of reasonable care. To the contrary — it expressly recognized that, in making a traffic stop, CHP officers had a duty "to perform their official duties in a reasonable manner." (*Id.* at p. 241.) The court ultimately affirmed a jury verdict in favor of the CHP because it determined that it was supported by substantial evidence.

This Court has held that, "under California law, a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops, and that this duty includes the obligation not to expose such persons to an unreasonable risk of injury by third parties." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 528, 538.) *Lugtu* illustrates that the risk that freeway motorists may leave the traveled roadway and strike objects parked alongside the road is not unforeseeable.

In *Lugtu*, this Court reversed a summary judgment in favor of the CHP because there were triable issues of fact about whether the officer's decision to stop the plaintiffs' car in the median of the freeway, instead of directing them to pull over to the shoulder, subjected them to an unreasonable risk of being struck by a motorist who veered off the roadway. (*Lugtu*, 26 Cal.4th at pp. 539, 541-543.) Not only did the Court reject the claim that public policy dictated that no duty was owed, it also rejected the CHP's contention that the negligence of the driver leaving the roadway constituted a superseding cause that relieved it of liability. (*Id.* at pp. 544-545.)

The Court explained that, in order for a defendant to rely on a superseding-cause defense, the intervening act must produce harm of a kind and a degree so far beyond the risk that the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible. (*Id.* at p. 544.) This defense was not available to the CHP in *Lugtu* because "the risk of harm posed by the negligence of an oncoming driver[5] is one of the foremost risks against which [the CHP officer's] duty of care was intended to protect." (*Id.* at p. 545.) In other words, the defense was not available because the risk of vehicles veering off the freeway and striking cars stopped on the shoulder is plainly foreseeable.

The majority opinion below explains that the principles of legal duty deal with "reasonable expectations and a common-sense approach to fault not physics." (*Cabral v. Ralphs* at p. 486, citing *Whitton*, 98 Cal.App.3rd at p. 243.) But anyone who has driven on a California freeway has observed that freeways are designed with the prospect in mind that drivers may lose control of their vehicles and leave the roadway. That risk is why abutments

---

[5] The "oncoming driver" referred to in *Lugtu* was travelling in the same direction as the plaintiff who had been pulled over by the CHP and struck the rear of his car. (*Lugtu*, 26 Cal.4th at p. 531.)

and obstacles are shielded with energy-absorbing barrels or guardrails. This approach to freeway design was discussed in the testimony of plaintiffs' traffic-safety expert, Schultz, who explained that California standards require the removal or shielding of "roadside obstacles" within a 30-foot area alongside a freeway. (2RT-562:1-563:5.)

Shultz's testimony tracks almost verbatim the standards contained in the section of the Caltrans Traffic Manual dealing with "traffic safety systems," titled "Clear Zone Concept," ch. 7-02. (http://www.dot.ca.gov/hq/traffops/saferesr/Chapter-7-Traffic-Manual-9-2008.pdf.)[6] This section confirms Shultz's testimony about why it is important to keep the areas alongside freeways clear of obstacles:

> 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.*)

Plainly, Caltrans not only foresaw the risk of roadside obstacles along California freeways, it studied the problem and concluded that a 30-foot clear recovery zone should be part of California's freeway design to

---

[6] Plaintiffs have filed a separate request for judicial notice of the relevant portion of the Caltrans Traffic Manual.

minimize exactly the kind of accident that occurred here. California allows the combined weight of a loaded tractor-trailer to reach 40 tons. (Veh. Code § 35551, subd. (a) [setting maximum gross vehicle weight at 80,000 lbs.].) Plainly, a 40-ton truck parked 16 feet from the roadway wholly negates the concept of a clear recovery area designed into the freeway. This case vividly illustrates the foreseeable risk that such large obstacles pose to motorists who lose control of their vehicles.

The dissent also correctly notes that the majority's conclusion that the risk of parking big-rig trucks alongside freeways was unforeseeable is contradicted by the testimony of Romano, Ralphs' Assistant Transportation Manager, that Ralphs' trucking safety guidelines do not allow its truck drivers to park in emergency-only areas for non-emergency reasons because of safety concerns for both the driver and other motorists who might leave the roadway. (2RT-341:26-342:13, 345:15-346:15.) Hence, Ralphs itself was aware of the risk that Horn's conduct posed.

In sum, neither common sense nor the record support the majority's conclusion that the risk of parking a big-rig truck alongside a freeway is unforeseeable and that public policy therefore justifies the creation of an exemption for truckers from the general duty of care required by Civil Code section 1714.

b. The burden of avoiding the danger posed by parked trucks is minimal

The majority opinion's evaluation of the *Rowland* factors was truncated, focusing almost exclusively on foreseeability. But the majority also found that, "the burden…of imposing a duty would be significant." (*Cabral v. Ralphs* at p. 485.) Unfortunately, the opinion does not explain the basis for this statement.

But in light of the testimony that Ralphs already advises its truck drivers not to stop in emergency-parking only areas for non-emergency

purposes, and the fact that Horn had available to him a truck stop within 2 miles in either direction along his route, this conclusion is untenable. There is simply nothing in the record to suggest that Horn specifically, or truck drivers in general, would face any type of undue burden if the law allowed them to be held potentially liable for parking alongside freeways for non-emergency purposes.

c. The remaining *Rowland* factors all support the existence of a duty

Because the risk was foreseeable and the burden of preventing the harm was minimal, it is clear that public policy does not require (or permit) the courts to fashion an exemption to the general duty of care that allows trucks to be parked alongside freeways with impunity. In addition, not one of the additional *Rowland* factors would support the creation of an exemption from a duty of care here.

Degree of Certainty that Cabral Suffered Injury. Cabral is dead as a result of the accident. His injury is certain and irreversible.

Connection between Horn's Conduct and Cabral's Death. Horn's truck was the only obstacle that Cabral might have struck within hundreds of feet from the spot where he left the freeway. (2RT 549:23-550:10.) Anderson testified that if Ralphs' tractor-trailer had not been parked on the side of the freeway, then Cabral could have returned safely to the freeway. (2RT-529:1-11.)

Moral Blame Attached to Horn's Conduct. Horn's conduct was careless, though not malevolent. But he violated state law for his own convenience,and he ignored the risk that his conduct created for passing motorists. Horn's fault in creating an unreasonable risk of harm to others rather than park his truck off the freeway at the nearby truck stops warrants some measure of moral blame.

Preventing Future Harm. As the dissent noted, imposing liability on Ralphs for Horn's conduct may help to prevent future accidents by encouraging big-rig drivers to stop at safer locations for non-emergency purposes.

The policy in question involves discouraging drivers from parking their tractor-trailers next to the roadway for nonemergency reasons. There is a strong desire to prevent accidents such as this one. By holding Ralphs liable, the jury indicated its desire that conduct like Ralphs be deterred in the future.

Availability, cost, and prevalence of insurance. Automobile insurance is widely available, and state law requires all drivers to carry insurance. (Veh. Code § 16020.) The accident that occurred here was not an esoteric risk that could not be insured.

In sum, all of the *Rowland* factors support the dissent's view that Horn and Ralphs owed Cabral a duty of reasonable care. There is no public-policy basis to exempt truck drivers from a duty of care concerning the manner in which they park their trucks alongside California freeways.

3. Recognition of a duty not to park big-rig trucks along freeways is not tantamount to creating a duty to ensure a "safe landing"

The majority's unwillingness to recognize that Horn may have owed Cabral a duty of care appears to have been grounded on its belief that, if such a duty were recognized, it would operate to create a duty to ensure a "safe landing." The majority feared that, "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 a street, or a homeowner who chooses to 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 [and] collides with the offending object . . . ." (*Cabral v. Ralphs* at pp. 485-486.)

This Court has been skeptical of what it has called "the 'slippery slope' mode of analysis" in other contexts (*see, e.g., Strauss v. Horton* (2009) 46 Cal.4th 364, 451), and the majority's use of that approach is not compelling here. Freeways are not residential streets. Hence, the rules that apply to freeways will not necessarily apply to residential streets. (*People ex rel. Dept. of Transportation v. Wilson* (1994) 25 Cal.App.4th 977, 982 [explaining the fundamentally different purpose between freeways versus public roads and highways].) It is because of this difference that the design standards in the California Traffic Manual described above, by their terms, apply only to high-speed roadways.

While it is wholly appropriate for cities to beautify their streets by planting trees, no one would suggest that Caltrans could undertake a beautification plan that included lining freeway medians and shoulders with large palm trees. Plainly, the risk that a car travelling 25 mph down a residential street might strike a parked car is qualitatively different than the risk posed by a 40-ton big-rig parked along a high-speed freeway. Different risks require different rules. Recognition that Horn owed passing motorists a duty of care (or more precisely, that there is no valid reason to create an exemption from his general duty of care), would not create a duty to ensure a safe landing, nor would it affect parking on or beautification efforts for residential streets.

4. The fact that Horn stopped his truck in an "Emergency Stopping Only" zone did not negate his duty of care

The majority also found that Horn's stopping in an "emergency parking only" area for non-emergency purposes did not create an unreasonable risk of injury because there was no difference between the risk to passing motorists posed by emergency and non-emergency parking. (*Cabral v. Ralphs* at p. 486.) This argument seems to speak more to the

issue of causation or breach than duty. Indeed, it is also advanced in the majority's discussion of proximate cause.

Regardless of how it is categorized, the majority's approach is inconsistent with this Court's decision in *Fennessy v. Pacific Gas & Elec. Co.* (1942) 20 Cal.2d 141, 144. There, a municipal ordinance prohibited parking along a street between the "safety zone" and the curb, but contained an exemption in favor of public utilities while engaged in "emergency" duties. A PG&E driver servicing street lights parked his truck at 10th & Market Street in San Francisco, partially obstructing traffic. A passing motorist swerved to avoid the parked truck and struck and injured a pedestrian. At trial, PG&E argued that the maintenance work on the street lights qualified as "emergency" work within the meaning of the ordinance. But this Court rejected that view, and it affirmed the jury's verdict against PG&E for negligence based on how the truck was parked.

Fennessy plainly shows that conduct that is expressly permitted in an emergency may nevertheless form the predicate for a negligence action when there is no emergency.

Conceptually, the fact that Horn might have appropriately stopped in the area for an emergency does not eliminate his duty of care. Rather, if he had experienced an emergency that required him to stop his truck, he would still owe a duty of care, and would be required to take reasonable measures to avoid creating needless risk to others. (*Lane v. Jaffe* (1964) 225 Cal.App.2d 172, 176.) The *Lane* court explained that, "Motorists whose cars become disabled on crowded freeways have the unenviable responsibility of choosing a course of action which will create the minimum hazard to others lawfully using the freeway." (*Id.*) It noted that there are no hard-and-fast rules, but the test is this: "[D]id the driver exercise due care and caution under the circumstances then present to avoid injury to others lawfully using the freeway? (*Id.*)

The very flexibility that the law understandably extends to motorists who face an emergency while using a freeway wholly undercuts the rule adopted by the majority here. The fact that a driver facing a bona fide emergency is permitted to take a certain course of action does not legitimize that course of action for all drivers in all circumstances.

Moreover, it is not true that allowing trucks to park alongside freeways in non-emergency situations poses no greater risk to passing motorists than allowing them to park in emergencies. While it is true that once a truck is parked alongside the freeway it will pose a risk to passing motorists regardless of the reason why its driver parked it there, true emergencies are uncommon and their duration is limited. Hence, the overall risk posed by emergency parking is relatively low. Society tolerates that risk because allowing drivers to stop in an occasional emergency outweighs the risk.

By contrast, allowing trucks to park alongside freeways for non-emergency purposes means more parked trucks, for longer periods, and necessarily increases the risk to passing motorists for no discernable beneficial purpose. Indeed, nowhere in the majority opinion is there any explanation of the social utility of allowing big-rig trucks to be parked along freeways for non-emergency purposes.

B. The Court of Appeal erred in holding that parking the truck alongside the freeway could not constitute a proximate cause of Cabral's death

1. Substantial evidence supported the finding that Horn's conduct was a substantial factor in causing the collision

As noted above in the discussion of the standard of review, the issue of proximate cause involves two elements — cause-in-fact and public-policy considerations. (*PPG Industries, Inc. v. Transamerica Ins. Co.*,

20 Cal.4th at p. 315.) The majority concluded that plaintiffs' case was insufficient on both grounds.

With respect to cause-in-fact, the majority held that, "Our review of the record persuades us that there is no substantial evidence to support a finding that the accident was due to the negligence of Horn." (*Cabral v. Ralphs* at p. 487.) Four reasons are advanced in support of this finding, but each is problematic.

a. The majority's finding that a violation of a parking regulation cannot constitute the proximate cause of an accident is contrary to this Court's holding in *Thompson v. Bayless*

The majority first explains that the fact that Horn parked in an "emergency-parking only" area was irrelevant, relying on *Bentley v. Chapman* (1952) 113 Cal.App.2d 1, 4, and *Capolungo v. Bondini* (1986) 179 Cal.App.3d 346, 355. Both cases are cited for the proposition that where parking is permitted, parking over the time limit cannot be the proximate cause of the accident. Neither case justifies a finding that Horn's conduct was not a substantial factor in causing the collision here.

In *Bentley,* the defendant parked his truck along El Camino Real in Redwood City in violation of a municipal ordinance that limited parking to only one hour between the hours of 1:30 a.m. and 6:00 a.m. It was struck by the driver of the car in which the plaintiff was riding at 5:30 a.m. Plaintiff sought to rely on the doctrine of negligence per se based on the overtime parking. The court rejected this argument, finding that the law allowed the spot to be continuously occupied between 1:30 a.m. and 6:00 a.m., and that violation of a per-car time limit did not violate any duty of care owed to the plaintiff. (*Id.* at p. 4.) The court also found that the parking violation could not be deemed a proximate cause of the accident. (*Id.*)

Capolungo is similar. There, the defendant parked his car in violation of a 24-minute parking ordinance. He was sued by a bicyclist who swerved to avoid his car and was struck by a passing car. She unsuccessfully sought to rely on the violation of the parking ordinance to establish negligence per se. The court held that the doctrine was not available because the parking ordinance was designed to provide access to curb space, not to regulate traffic safety. (*Id.*, 179 Cal.App.3d at pp. 351, 352.) The court also found that defendant's overtime parking was not the proximate cause of the accident because parking was expressly permitted where he parked, and therefore overtime parking could not be the proximate cause. (*Id.* at p. 355.)

The Court of Appeal has subsequently interpreted *Capolungo* as standing "for the unremarkable proposition that when a plaintiff seeks to recover in negligence for a defendant's statutory violation, the plaintiff's injury must have been proximately caused by the statutory violation." (*Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal.App.4th 1, 17.) Thus, the court in *Capolungo* did not allow the plaintiff to recover "because the *purpose* of the loading zone time restriction was to provide access for loading and unloading, not to enhance traffic safety." (*Id.*, original italics.)

Here, negligence per se is not an issue. Plaintiffs have not maintained that Horn's violation of Veh. Code section 21718 or that his parking in violation of the terms of the R45 sign constituted negligence per se. Nor is this a case where parking was generally permitted and the prohibition at issue was designed only to facilitate turnover of parked cars. Unlike *Bentley* or *Capolungo*, the defendant's parking did create a foreseeable risk to passing motorists because it interfered with the 30-foot clear-recovery zone along the freeway.

More important, the majority's position directly conflicts with this Court's decision in *Thomson v. Bayless* (1944) 24 Cal.2d 543, 548, which unequivocally recognizes 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 difference between *Capolungo* and *Bentley*, on one hand, and *Thomson*, on the other, is that the parking regulation at issue in the former two cases was not designed to serve traffic-safety goals, whereas the prohibition in *Thomson* was.

In *Thomson*, Bayless parked his truck and trailer in the right lane of a northbound 4-lane highway to take a nap. This violated Vehicle Code section 582, which prohibited parking on the highway outside of a business or residential district when it was practicable to park off the roadway. Thomson was riding as a passenger in a car proceeding northbound in the right lane of the road. The car's driver did not see the parked vehicle until it was too late, and crashed into it. Thomson was injured and sued Bayless. The jury ruled in his favor.

On appeal, this Court affirmed, finding that Bayless's violation of Veh. Code section 582 constituted negligence. The Court also rejected Bayless's contention that Thomson failed to establish proximate cause. As explained above, the Court stated that a violation of a parking regulation can be the proximate cause of an accident when the unlawfully-parked vehicle is struck by another vehicle and that whether or not a violation of section 582 constitutes a proximate cause of an accident is a factual question for the jury. (*Id.*, 24 Cal.2d at pp. 548, 549.)

b. The availability of the area where Horn parked for emergency parking does not negate causation

The court next noted that even though Horn's reason for parking did not involve an emergency, "the fact remains that the area is available for

emergency parking." (*Cabral v. Ralphs* at p. 487.) The majority's contention cannot be squared with this Court's decisions in *Fennessy*, 20 Cal.2d at p. 144, or *Thomson*, 24 Cal.2d at pp. 548, 549. In the former, parking was allowed for emergencies and, in the latter, when parking off the pavement was impracticable. In each case, the defendant was unable to satisfy that exemption, was held liable, and the Court expressly affirmed a finding on proximate cause. If the majority's approach represented the law, both cases would necessarily have come out the other way.

c. Cabral's erratic driving before the collision does not negate causation

The next reason given by the majority for finding no cause-in-fact is that Cabral's driving was erratic before the accident. The opinion does not explain why this negates causation-in-fact as a matter of law, particularly in light of the jury's allocation of 90% of the fault for the collision to Cabral. Apparently, the majority was making a superseding-cause argument, although without couching it in those terms.

Regardless of how it is characterized, the majority's position runs afoul of this Court's decision in *Willis v. Gordon* (1978) 20 Cal.3d 629, 634, 635. In *Willis*, the defendants parked their car along the shoulder of a two-lane state highway after suffering a flat tire. The roadway consisted of a traffic lane in each direction, and a narrower "fog lane" to the right of the traffic lane, separated from the traffic lane by a white painted "fog line." The defendants parked entirely to the right of the fog line. Carol Willis and her husband approached from behind, with Mrs. Willis driving. She was straddling the fog line as she approached. Evidently, she did not see the parked car until just before she was upon it and swerved left to avoid hitting it. She crossed the center line and collided head-on with an oncoming car. She was killed, and her husband and the other driver suffered serious injuries. They sued the defendants.

The trial court granted nonsuit for the defendants at the close of opening statements, finding that, "it was clear that the accident was caused as the proximate result of the negligence of the deceased in driving her automobile and in moving upon the parking lane." (*Id.*, 20 Cal.3d at pp. 632-633 [brackets omitted].) This Court reversed, rejecting the defendants' contention that Mrs. Willis's poor driving was the sole and proximate cause of the accident. The Court first noted that there was no requirement that the defendant's negligence be the sole cause of the accident. (*Id.* at p. 635.) Rather, all that was required was that it be a substantial factor in causing the collision. (*Id.*)

The Court also explained that, even if the jury decided that the immediate cause of the accident was Mrs. Willis's excessive reaction, the defendants would not be relieved of liability if the risk of harm that resulted in plaintiffs' injuries through the intervening act of Mrs. Willis's swerving was foreseeable. (*Id.*)

Like the majority opinion, the *Willis* opinion does not use the term "superseding cause." But it is clear that the argument that a collision is not caused by the manner in which the defendant parked, but rather by the plaintiff's negligent driving, is a superseding-cause argument. It is therefore subject to the rule that the defense of superseding cause is not available unless the intervening force is unforeseeable. (*Lugtu*, 26 Cal.4th at pp. 544-545.)

2. There are no public-policy considerations that should limit a trucker's responsibility for illegally parking a truck alongside a freeway

The majority also concluded that, even if Horn's conduct could be considered a substantial factor in causing the accident, "as a matter of public policy, Plaintiff cannot recover against Ralphs based on the facts in the record." (*Cabral v. Ralphs* at p. 488.) The opinion does not identify

what the public policy is that should preclude liability, other than to say that, "the nature and degree of the connection between Horn's act of stopping and Decedent's collision with Horn's big rig . . . was, as a matter of public policy, too attenuated to support imposing liability on Ralphs." (*Id.*) This sentence concludes with a footnote stating that the court's holding is in accord with numerous decisions in other jurisdictions.[7] (*Id.* n.12.)

The majority's conclusion on this issue is not based on any independent analysis or discussion of law. Rather, it appears to be a synthesis derived from the premises previously stated in the majority opinion — that the risk from Horn's conduct was unforeseeable; that no duty was owed because parking was permitted in an emergency; that violation of a parking regulation can never be considered the proximate cause of an accident; and that Cabral's driving was a superseding cause. Each of these premises has been discredited. The resulting conclusion is therefore unsound.

---

[7] The opinion cites at footnote 12 *Bogovich v. Nalco Chem Co.* (Ill. App.1991) 213 Ill. App.3d 439,443-444, 572 N.E.2d 1043, 1046; *Long v. Soderquist* (Ill. App.1984) 126 Ill.App.3d 1059, 467 N.E.2d 1153; *Sheehan v. Janesville Auto Transport* (Ill. App.1981) 102 Ill.App.3d 507, 511, 430 N.E.2d 131, 133; *Smith v. Penn Line Service, Inc.* (W.Va.1960) 145 W.Va. 1, 19-20,113 S.E.2d 505, 515-516; *Duff v. Lykins* (Ky. 1957) 306 S.W.2d 252, 254-255; *Godwin v. Nixon* (N.Car.1953) 236 N.C. 632, 642-643, 74 S.E.2d 24, 31; and *Scott v. Hoosier Engineering Co.* (W. Va. 1936) 117 W.Va. 395, 185 S.E. 553, 554. Of these decisions, only the two most recent Illinois decisions were decided under a comparative-fault system. The Illinois Supreme Court did not adopt comparative fault until 1981. (*Alvis v. Ribar* (Ill. 1981) 85 Ill.3d 1, 25, 421 N.E.2d 886 [abolishing contributory negligence and adopting comparative fault].) None of the cases involved a vehicle parked on an interstate freeway.

C. Justice Miller's dissent correctly explains why the testimony of Plaintiffs' accident-reconstruction expert, Anderson, was not unduly speculative and was therefore admissible

The final portion of the majority opinion concludes that the trial court erred in admitting the testimony of Anderson, plaintiffs' accident-reconstruction expert. In the majority's view, his testimony was simply too speculative to be admissible, and without it there was insufficient evidence to support the element of causation in plaintiffs' case.

The crux of the majority's criticism was that Anderson's opinion depended on his belief that the tire marks described in the accident report as mark No. 1 and mark No. 2 came from Cabral's pickup, but that there was insufficient foundation to support this view. The CHP officer who documented the marks, Officer Thibodeau, did not testify. According to the majority, the CHP officer who testified, Officer Migliacci, did not take the measurements, did not know how long the marks had been in the dirt, did not match the tread on the marks to the tread on the pickup's tires, was not aware of any other physical evidence that would confirm the marks' origin, and had no basis to believe that the marks were made by Cabral's pickup, other than the fact that Officer Thibodeau, who documented the marks, labeled them as such. (*Cabral v. Ralphs* at p. 490.)

Anderson testified that in forming his opinions, he relied on the following: (1) the CHP diagram; (2) the CHP photographs; (3) the CHP report; (4) measurements from the police report; (5) depositions; (6) his own inspection of Cabral's pickup; (7) his own observation and measurements of the scene of the accident; (8) pictures he took of the accident scene; and (9) witness statements. (2RT-506:17-20, 507:5-11, 510:7-9, 513:8-514:15, 515:5-519:10-525:20.)

Ralphs argued and the majority found that Anderson merely assumed that the tire marks were made by Cabral's pickup because the

CHP report labeled them as such. Not so. Anderson's testimony was that he reviewed the police report to determine the date of the accident, the geometry of the roadway, the point of rest of the vehicles, and any other physical evidence that the investigating officers determine are part of the accident. (2RT-507:5-11.) While the CHP accident report itself was excluded, the diagram of the accident and the accident photos were properly admitted, and Ralphs does not contend otherwise. As an expert who had done more than 3,000 accident reconstructions (2RT-505:12-14), Anderson was entitled to rely on inadmissible material in the course of formulating his opinion. (Evid. Code § 801, subd. (b).) Ralphs has not suggested that police reports are not within the scope of materials upon which an accident-reconstruction expert can rely. So the fact that the tire marks are depicted in the portion of the accident report that was not admitted is not determinative.

Anderson was asked where, in his opinion, tire impression No. 1 came from. He answered that, based on the sum of the information he looked at, he believed it had come from the left rear tire of Cabral's pickup. (2RT-508:13-24.) He was then asked to examine the photos he had relied on, and he was asked whether he saw tire mark No. 1. He pointed it out to the jury:

> Q: This is a CHP photograph?
>
> A: It is.
>
> Q: Okay. Is this one of the photographs that you looked at in doing your analysis?
>
> A. Yes.
>
> Q: Okay. Do you see tire mark No. 1?
>
> A: Yes.
>
> Q: Is that this right here?
>
> A: That's correct. Yes. (2RT-509:9-18.)

Similarly, during cross-examination, when confronted by Ralphs' counsel with Officer Migliacci's statements about the limits of his knowledge about the tire marks, and then asked about the basis for his opinion that the tire mark came from the pickup and whether it was based on a tread analysis, Anderson testified:

> A: I did not do a tread analysis. However, if you ask me what basis, first of all, I understand that the officer that testified is not the one that saw the marks and documented the marks. And they're labeled in the police report as a side skid for No. 2 and the tire mark from No.1 — to No. 1. *I can see them in the photographs* that they're physical evidence. I'm not aware of any contrary physical evidence. And so it's based on physical evidence."
> (2RT-541:13-21, emphasis added.)

Anderson explained in his testimony that he believed that the tire marks came from the left rear tire of Cabral's pickup truck because of the way the marks matched up against the other physical evidence at the scene, including the damage to the pickup and to the Ralph's truck. (2RT-511:7-513:8.)

As for Officer Migliacci, he testified that more than 11 CHP officers responded to the accident scene during the investigation, in addition to 12 fire department personnel, two emergency-medical response, plus the coroner and their assistants. (1RT-247:9-15.) As the primary investigating officer, he was required to delegate the tasks of collecting evidence of the wreckage and taking physical measurements to other officers at the scene. (1RT-243:11-23.)

Officer Migliacci testified that the tire marks, skid marks, impressions in the dirt, and other debris from the vehicles were part of the physical evidence documented in the report. (1RT-261:19-25.) When

asked what indicated to him that the tire marks referenced in the report came from either of the vehicles involved in the accident, he explained that the officers who documented the evidence believed that they were "fresh at the scene." (1RT-291:1-5.)

After his examination, the trial judge asked Officer Migliacci a question about the tire marks:

> Q: If you look up there on that tire mark No. 1 . . . if it had been there before the big rig, which you have V2, if it had been there before then, would the big rig have obliterated part of the tire mark?
>
> A: I don't know about the big rig. I believe Vehicle 1 [Cabral's pickup] would have obliterated that skid mark that traveled that path." (2RT-315:19-316:1.)

The dissent correctly notes that Officer Migliacci's belief that the tire mark was from Cabral's pickup because the pickup truck would have obliterated a previous tire mark is a reasonable, credible inference. (*Cabral v. Ralphs* at p. 499.) Likewise, the dissent correctly explains that Anderson's testimony made it clear that he conducted his own analysis of the accident and independently concluded that the skid marks were from Cabral's pickup truck based on the manner in which the pickup truck struck the big rig and the damage to the vehicle. His assessment was based, in part, on the photos taken by the CHP that depict the tire marks and the damage. (*Id.*) Accordingly, Anderson's opinion was based on his expert interpretation of the evidence in the record, and it was for the jury to determine how much weight it warranted.

Because his opinion was based on the underlying physical evidence, which was documented in the record, Anderson's testimony was not unduly speculative and constituted substantial evidence. It was not an abuse of discretion for the trial court to admit it or for the jury to rely on it.

CONCLUSION

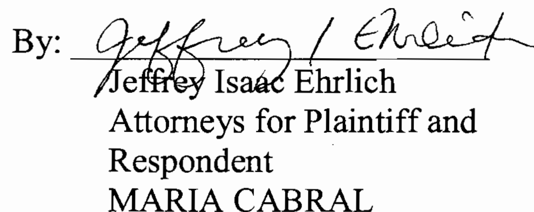
The Court of Appeal majority concluded that affirming the judgment in this case would create a dangerous precedent that would unleash a tide of lawsuits against innocent cities, landowners, and motorists. Based on its determination to avoid this harm, the majority strained to find reversible error in the judgment when none existed and authored an opinion that is at odds with the basic concepts of negligence law in California. Ironically, the approach taken by the majority would pose real dangers to all who use California freeways, by shielding the drivers and owners of trucks who are illegally parked along the freeways from potential liability for accidents like the one that took Cabral's life. The order denying Ralphs' motion for JNOV should be affirmed and the judgment reinstated.

Dated: April 20, 2010. Respectfully submitted,

Frank N. Darras
Lissa A. Martinez
DARRASLAW

Michael B. Horrow
DONAHUE & HORROW, LLP

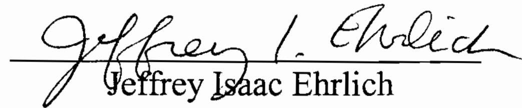
Jeffrey Isaac Ehrlich
THE EHRLICH LAW FIRM

By: 
Jeffrey Isaac Ehrlich
Attorneys for Plaintiff and Respondent
MARIA CABRAL

Certificate of Word Count
(Cal. Rules of Court, Rule 8.504(d)(1).)

The text of this petition consists of 11,216 words, according to the word count generated by the Microsoft Word word-processing program used to prepare the brief.

Dated: April 20, 2010.



Jeffrey Isaac Ehrlich

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

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 **April 20, 2010,** I served the foregoing documents described as **OPENING BRIEF ON THE MERITS** 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

[XX] 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.

[XX] 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.

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

Executed on **April 20, 2010,** at Ontario, California.

Catherine Carvalho

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

SERVICE LIST

Timothy T. Coates, Esq. Lillie Hsu, Esq. GREINES, MARTIN, STEIN & RICHLAND LLP 5900 Wilshire Blvd., 12th Floor Los Angeles, CA 90036 Telephone: (310) 859-7811 Facsimile: (310) 276-5261	Attorneys for Defendant and Real Party in Interest RALPHS GROCERY COMPANY (1 copy)
Michael Brian Horrow, Esq. DONAHUE & HORROW LLP 1960 E. Grand Avenue, Suite 1215 El Segundo, California 90245 Telephone: (310) 322-0300 Facsimile: (310) 322-0302	Attorneys for MARIA CABRAL (1 copy)
Jeffrey Isaac Ehrlich, Esq. EHRLICH LAW FIRM 411 Harvard Avenue Claremont, California 91711 Telephone: (909) 625-5565 Facsimile: (909) 625-5477	Attorneys for MARIA CABRAL (1 copy)
Clerk, Superior Court San Bernardino County-West District 8303 N. Haven Avenue Rancho Cucamonga, CA 91730	Respondent (1 copy)
Clerk, Court of Appeal Fourth Appellate District - Division Two 3389 Twelfth Street Riverside, CA 92501-3819	(1 copy)
California Supreme Court Clerk of the Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	Filed via Overnight Delivery (original plus 13 copies)