S178799

IN THE

CALIFORNIA SUPREME COURT

MARIA CABRAL,

Plaintiff and Respondent,

v.

RALPHS GROCERY COMPANY,

Defendant and Appellant.

REVIEW OF A DECISION OF THE
CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO
4th Civil No. E044098

APPLICATION AND BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA

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CONSUMER ATTORNEYS OF CALIFORNIA

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CERTIFICATE OF INTERESTED PARTIES

Under California Rules of Court, Rules 8.208, amicus and its counsel certify that amicus knows of no person or entity other than the parties and their attorneys with a financial or other interest in the outcome of the proceeding that amicus reasonably believes the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

September 2, 2010.

DANIEL U. SMITH

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENT MARIA CABRAL

Amicus curiae Consumer Attorneys of California respectfully requests that the attached amicus brief in support of Respondent Maria Cabral be accepted for filing in this action.

INTEREST OF THE AMICUS

The Consumer Attorneys of California, founded in 1962, is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The Consumer Attorneys' membership consists primarily of attorneys representing individuals who have been subjected to personal injuries, adverse employment actions, and other harmful business and governmental practices. The Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

Because many of the Consumer Attorneys members represent consumers injured in automobile accidents, the Consumer Attorneys has an abiding interest in the issues of duty, causation, and expert witnesses present in this case.

NEED FOR FURTHER BRIEFING

Counsel for the Consumer Attorneys is familiar with all of the briefing filed in this action to date. Amicus believes its brief will offer this Court valuable insights regarding the issues presented and authorities not previously discussed or cited by the parties.

Specifically, regarding duty and causation, this amicus brief will analyze the core principles established in the Restatement (Second) Torts and explained by Dean Prosser in Prosser and Keeton on The Law of Torts (1984). The application of these core principles to compel reversal of the Court of Appeal's judgment will be self-evident.

Regarding expert testimony, this brief will show that courts necessarily and routinely allow expert testimony based on the first-hand observations of others, and that so long as the expert has adhered to the standards applicable in his or her profession, courts should admit the testimony and leave to the jury the weight to be given to the expert opinion. This the Court of Appeal failed to do. Moreover, adopting the standards imposed by the Court of Appeal would unduly restrict the ability of courts in civil and criminal matters to reach valid judgments based on the current state of scientific knowledge.

Amicus believes that the analysis presented in the accompanying brief will (1) promote sound judicial administration by facilitating accurate trial court rulings, thus minimizing the need for appeals and reversals, and will (2) promote settlements by allowing opposing parties to develop a common perspective on the issues of duty, causation, and expert testimony.

Because these issues are so important to judges and counsel in litigation involving consumers throughout the State, amicus respectfully requests that the accompanying brief be accepted for filing.

Dated: September 2, 2010.

SMITH & MCGINTY

DANIEL U. SMITH
Attorneys for Amicus Curiae

INTRODUCTION

The standards established in the Restatement (Second) Torts, as explained by Dean Prosser, should guide this Court's rulings on the issues of (1) the duty of Ralphs' driver Hen Horn to avoid creating an unreasonable risk of harm, and (2) whether Horn's conduct in parking in an emergency area near the freeway simply to have a snack was the proximate cause of Adelelmo Cabral's death. See Parts I and II, below.

The standard for determining whether expert testimony is inadmissible as "speculative" required the Court of Appeal to credit the substantial evidence on plaintiff's accident reconstruction expert relied. See Part III, below.

I.

The duty to avoid creating an "unreasonable risk" requires weighing four factors that show Mr. Horn had a duty not to create a foreseeable fatal risk by parking near the freeway to snack when safer rest stops were nearby.

In tort cases, this Court has often referred to the Restatement (Second) Torts ("Restatement") and the commentary of Dean Prosser. *E.g., Klein v. United States* (2010) 50 Cal.4th 68, __; 112 Cal.Rptr. 722, 736; *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1191, fn. 1; 1195-1196; *Avila v. Citrus Comm. College Dist.* (2006) 38 Cal.4th 148, 167; *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249, fn 28.

As shown below, the Restatement and Dean Prosser's commentary show that Horn's duty not to create an unreasonable hazard is determined by the weighing of four factors, which here dictate that Horn had a duty not to create a fatal risk simply so that he could snack in an emergency area 16 feet from the highway when much safer rest stops were available within two miles.

A. Duty rests on four factors: (1) likelihood of the harm; (2) gravity of the harm; (3) utility of the defendant's conduct; and (4) burden on defendant to act more safely.

We urge the Court, in analyzing the issue of duty to consider the Restatement (Second) Torts and the commentary offered by the Restatement's Reporter, William L. Prosser, in his treatise, Prosser and Keeton On the Law of Torts (1984).

Specifically, we urge the Court to apply the four criteria for a duty of care cited in the Restatement and by Dean Prosser:

(1) The likelihood of harm—that drivers lose control due to falling asleep is a risk proven by substantial evidence and by common knowledge.

(2) The gravity of the harm—that a driver colliding with Horn's truck at freeway speeds would suffer serious bodily injury or death.

(3) The utility of the defendant's conduct—that stopping to snack in an area 16 feet from the freeway rather than in a designated rest area.

(4) The burden on Horn of finding a safer area to snack in—that Horn could easily have stopped at a rest area within two miles of the accident site.

1. Whether the risk of harm was "unreasonable" is determined by weighing the four factors.

The Restatement defines negligence as "conduct which falls below the standard establish by law for the protection of others against *unreasonable risk* of harm." Restatement (2d) Torts (1965) § 282, p. 9 (emphasis added).

Under the Restatement, risk is deemed unreasonable where (as here) the likelihood of harm and the gravity of the harm are significant and the utility of the defendant's conduct and the burden of acting more safely are insignificant. For example, the Restatement provides that in "determining the magnitude of the risk for the purpose of determining whether the actor is negligent," "[a]s the social value of the interest imperiled increases, the magnitude of the risk which is justified diminishes." Restatement, section 293, comment *a*, p. 58.

a. Weigh the likelihood and gravity of harm.

Whether a risk is unreasonable requires weighing the likelihood and gravity of harm:

> *d*. The extent of the chance that harm will be done is one, but only one, of the factors which determine the magnitude of the risk with which the utility of the act is too be compared in order that its reasonable or unreasonable character may be ascertained, the other factors being the value of the interest likely to be affected and the extent of the harm likely to be caused to it.

Id., section 290, comment *d*, pp. 48-49.

b. Weigh the utility of the defendant's conduct against the gravity of the potential harm.

To determine whether a risk is "unreasonable," the Restatement requires *"weighing"* "the magnitude of the risk" against the "value which the law attaches to the conduct which involves it." *Id.*, section 283, comment *e*, p. 13 (emphasis added).

> The weighing process is illustrated by the following comment:
> If the probability of the negligent conduct of another is relatively slight, and the utility of the actor's conduct is relatively great in proportion, the actor may be entitled to ignore the risk, and proceed on the assumption that others will act in a reasonable manner. On the other hand, if the actor knows or should realize that there is a serious chance of grave harm to valuable interests of others, and the utility of his own conduct is less than the risk, he is required to take precautions against the negligence of others which a reasonable man would take under like circumstances.

Id., section 302A, comment *d*, p. 87.

The weighing process is illustrated also by section 291:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Id., section 291, p. 54.

Determining the utility of the actor's conduct rests on weighing three factors stated in section 292:

> The utility of the actor's conduct rests on three factors:
>
> (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
>
> (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
>
> (c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

Id., section 292, pp. 56-57.

If the burden of achieving the same goal in a safe manner is slight, then the creation of the risk is deemed "clearly unreasonable":

> If the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable.

Id., section 292, comment *c*, p. 58.

c. If the actor's conduct threatens an important interest, then even minor risks—including the negligence of others—must be avoided.

Contrary to the rationale of the Opinion below, Horn was required to take account of drivers negligently losing control of their vehicles because the interest in protecting the life of Mr. Cabral is important.

> [I]f the known or knowable peculiarities of even a small percentage of human beings . . . are such as to lead the actor to realize the chance of eccentric and improper action, he is required to take this chance into account if serious harm to a legally important interest is likely to result from such eccentric action and his own conduct has not such pre-eminent social utility as to justify the serious character of the risk involved therein. This is often expressed by the statement that in such case the actor is bound to anticipate and provide against the negligent or intentional misconduct of the other or a third person."

Id., section 290, comment *c*, p. 48.

d. Horn was "required" to know that drivers may be negligent—including falling asleep at the wheel.

Horn is deemed to foresee that freeway drivers will act negligently. As Section 302A provides:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another *through the negligent or reckless conduct of the other* or a third person.

Id., section 302A, p. 86 (emphasis added).

> A reasonable man [lives in the] actual world and not in Utopia. The actor, as a reasonable man, must therefore take life as it is and

not as it should be, and *must realize the likelihood that third persons may act in a variety of ways, all of which are not only morally but legally wrongful.*

Id., section 290, comment *m*, pp. 52-53 (emphasis added).

[T]he actor is *required to know* that there is a certain amount of negligence in the world, and that some human beings will fail on occasion to behave as a reasonable man would behave. Where the possibility of such negligence involves an unreasonable risk of harm, either to the person who is to be negligent or to another, the actor, as a reasonable man, *is required to take it into account and to govern his conduct accordingly.*

Id., section 302A, comment *c*, pp. 86-87 (emphasis added).

Specifically, Horn is required to possess the common knowledge that drivers fall asleep at the wheel.

In general, the actor is required to know everything with respect to the risk of harm which is *a matter of common knowledge* in the community in which his conduct occurs. There is a close relation between the minimum standard of knowledge required in negligence cases and those matters of which a court will take judicial notice because they are generally known.

Id., section 290, comment *e*, p. 49 (emphasis added).

That drivers are well-known to fall asleep at the wheel is documented at http://en.wikipedia.org/wiki/Sleep_deprived_driving. [as of Sept. 2, 2010]. This article reports that 23% of adults have fallen asleep while driving. http://www.tfhrc.gov/pubrds/janfeb99/effects.htm [as of Sept. 2, 2010]. Moreover, a Harvard study estimates that 250,000 drivers fall asleep at the wheel every day. In addition, the National Highway Traffic Safety Administration reports that drowsy driving is a factor in more than 100,000 crashes, resulting in 1,550 deaths and 40,000 injuries annually.

http://www.shiftworkdisorder.com/about [as of Sept. 2, 2010]. To prevent falling asleep at the wheel, Caltrans has instituted "rumble strips" on the side of highways to create a loud vibration that will awaken the driver and allow a safe return to the highway. "Rumble Strips Alert Drivers, Save Lives and Money, TR News, March-April 1988. http://onlinepubs.trb.org/onlinepubs/trnews/rpo/rpo.trn135.pdf [as of Sept. 2, 2010]

2. Dean Prosser explained the Restatement's weighing formula for determining "unreasonable risk."

Dean Prosser has explained that a low likelihood does not make a risk reasonable where (as here) the gravity of the harm is great and the utility of the conduct is low.

> [I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railroad track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach.

Prosser & Keeton, On the Law of Torts (1984) p. 171.

"As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution." *Ibid.*

"Against this probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question." *Ibid.*

Prosser and Keeton defined the "risk-benefit form of analysis" as follows: "by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest

which the actor is seeking to protect, and the expedience of the course pursued." *Id.* at p. 173.

> The duty to take precautions against the negligence of others thus involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care.

Id. at p. 199.

This balancing formula shows that the Court of Appeal erroneously ruled that Horn had no duty to avoid creating the unreasonable risk that killed Mr. Cabral.

B. The balancing required by the Restatement shows that Horn breached his duty to avoid creating an unreasonable risk.

The risk factors identified by the Restatement show that Mr. Horn had a duty not to create a fatal risk by using the emergency area to "have something to eat and drink." Slip Opinion at p. 4.

1. The likelihood of harm and the severity of harm preclude parking for nonemergency reasons by the freeway.

The unacceptable likelihood of harm and the severity of harm, supporting a duty not to use emergency areas for snacking, was established by substantial evidence.

a. The "Emergency Parking Only" sign showed it was not safe to park so close to the freeway.

The risk of parking near a freeway was made known to Mr. Horn by the "Emergency Parking Only" that was posted in the general vicinity of the accident. AA 168 [Trial Exhibit 1A].) Horn admitted he saw the "Emergency

Parking Only" sign when he parked on the shoulder of the freeway. 2 RT 386:14-17.

The sign—by limiting parking to emergencies—necessarily implied that parking 16 feet from the freeway for any non-emergency purpose was too dangerous to be justified.

b. Ralphs' safety guidelines show that using an emergency area to snack raises a "safety concern" for motorists who "leave the roadway."

Dominick Romano was Ralphs' "person most knowledgeable" regarding Ralphs' safety guidelines and the training of Ralphs' tractor-trailer drivers. 2 RT 335:24-336:10. Romano was Ralphs Assistant Transportation Manager, in charge of driver discipline and driver safety. 2 RT 332:14-19, 333:1-8.

Romano admitted that Ralphs does not want its drivers parking in "Emergency Parking Only" areas for nonemergency reasons because of a "*safety concern*" for "both the driver" and "*motorists should they leave the roadway* . . . ." 2 RT 345:15-346:15 (emphasis added).

Romano said that if Horn parked in the freeway "Emergency Parking Only" area to ""get something to eat and drink," then Horn "violated Ralphs' company guidelines." 2 RT 346:17-25, 367:5-12.

c. Trucking expert John Riggins: Eating on the freeway shoulder is a safety "problem."

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 of a commercial truck driver under those circumstances." 2 RT 430:10-14, 446:18-22.

Riggins explained that parking the truck in the emergency area was dangerous "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." 2 RT 443:3-12.

Riggins opined that Horn would have been negligent in using the emergency area for a snack, even if the "Emergency Parking Only" sign was not there. 2 RT 444:8-11.

d. Expert Schultz: Horn should not have created an obstacle within 30 feet of the freeway.

Plaintiffs' highway and traffic safety expert, Thomas Schultz, testified that California standards require the removal or shielding of "roadside obstacles" within a 30-foot area alongside a freeway. 2 RT 562:1-563:5. But Horn, by parking his tractor-trailer so close to the freeway, created a dangerous "roadside obstacle." 2 RT 554:3-10, 562:1-6. As Schultz explained, "there should be no roadside obstacles within . . . 30 feet of the traffic lane–that would be the No. 4 lane in this case as defined by the white edge line–and Mr. Horn parked 16 feet from that line . . . . There's no question in my mind that this truck-trailer combination driven by Mr. Horn was a massive roadside obstacle." 2 RT 562:6-15, 563:3-5. Schultz's opinion was the same whether or not there was an "Emergency Parking Only" sign. 2 RT 563:20-564:4.

e. Caltrans: A recovery zone must be clear of obstacles within 30 feet of the freeway.

Shultz's testimony above reflected 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.)[1]

> 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.*

In sum, the foregoing evidence shows that the likelihood of a vehicle leaving the freeway and causing severe injury or death dictates that parking 16 feet from the freeway for nonemergency reasons creates an unreasonable risk.

2. The utility of Horn's "routine" snacking in the emergency area and the negligible burden on him to snack at a nearby rest stop was nil.

The utility of Horn's conduct and the burden of parking safely in a rest area are nil—thus showing that Horn breached his duty not to create an unreasonable risk of harm.

Horn stopped in the emergency area to have a "snack." 2 RT 317:3-10, 319:4-14; 321:3-10. Horn had done this regularly for a year: "it *was his routine* when he drove this particular route eastbound, that this was a stopping place

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[1] Plaintiff has filed a separate request for judicial notice of the relevant portion of the Caltrans Traffic Manual.

for hm to take a snack, eat part of his lunch . . . . It was just his routine over a period of time that he stopped at this particular location." 2 RT 321:11-20. Horn testified that he drove this route (down the I-10 freeway at the location of the accident) two times a week for a year before the accident. 2 RT 386:7-10. Horn admitted to an investigator that on the day of the accident he did not have any medical problems or mechanical problems. 2 RT 321:21-322:7.

Yet Horn could easily have stopped to snack in one of the rest areas within two miles of the emergency area. 1 RT 260:7-24; 3 RT 854:3-9.

II.

Proximate cause.

The Court of Appeal's policy-based rejection of the jury's finding of proximate causation is untenable.

Only in rare instances does a policy analysis preclude a finding that a cause that was a substantial factor in causing the injury is, nevertheless, not a "proximate cause." *E.g., Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (barring a former client's recovery of punitive damages from the allegedly negligent attorney); *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310 (barring an insured's recovery of punitive damages from an insurer that allegedly negligently failed to settle a claim against the insured). These decisions recognized that the policy on which punitive damages rest would not be served by requiring the attorney or the insurer—who were not culpable of malicious, fraudulent, or oppressive conduct—to pay punitive damages.

But here, no such policy problem exists to preempt the jury's finding of proximate cause. Tort law exists to impose liability on those whose misconduct was a substantial factor in causing harm, and to discourage such misconduct. Here, those policies apply precisely. Without dispute, parking 16 feet from a freeway creates a hazard—a hazard that Caltrans recognizes as unacceptable except in true emergencies. When an actor, for no substantial reason, creates a potentially fatal hazard for vehicles that foreseeably leave the freeway, that actor has no policy basis for objecting to liability when those fatal consequences materialize.

III.

Admitting Anderson's expert testimony was not an abuse of discretion.

This Court should reaffirm standards that will prevent courts in the future from rejecting as "speculative" expert opinions that accept as true facts found by first-hand investigators and facts that are discernible according to the standards of the expert's profession.

A. The abuse-of-discretion standard.

Specifically, this Court should reaffirm that trial court rulings on admissibility of expert testimony are reviewed on appeal for "abuse of discretion," and discretion is not abused unless the trial court "*exceeded the bounds of reason.* When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 (emphasis added).

Here, the abuse of discretion appears in the appellate court's substituting its judgment on whether the tire tracks could be linked to Cabral's vehicle in preference to the judgment of the Highway Patrol officers charged with conducting and recording the investigation (whose competence the appellate court did not criticize) and the judgment of accident reconstruction expert Robert Anderson.

B. Anderson's opinion about Cabral's safe return to the freeway was not prejudicial, and so did not support reversal.

The Opinion challenges as "speculation" Anderson's opinion that Cabral "would have returned safely to the freeway but for Horn's parked big rig . . . ." Slip Opinion at p. 27-28.

But this opinion, even if inadmissible, did not support reversal because the judgment rested on the undisputed fact that no obstacle, other than Horn's truck, posed a fatal risk for Mr. Cabral.

As Anderson explained, if Horn's tractor-trailer had not been there, it would have been highly unlikely for Cabral's pickup to impact anything at the scene *no matter what direction Cabral was traveling.* 2 RT 549:23-550:10.

Moreover, Ralphs' accident reconstruction expert, Fred Cady, agreed with this possibility, admitting in deposition that if Horn's tractor-trailer had not been there, Cabral could have brought his vehicle safely to a stop. 4 RT 919:19-920:23.

These opinions that, but for Horn's truck, Cabral could have brought his vehicle safely to a stop were sufficient to support the judgment.

Because a judgment may not be reversed unless an erroneous ruling created a "miscarriage of justice," Cal. Const., art. VI, section 13, admitting Anderson's opinion that Cabral would have returned to the freeway did not create a "miscarriage of justice" because that opinion was not necessary to establish causation—i.e., that Horn's truck, as the only obstacle in the area, was a substantial factor in causing Cabral's death.

C. Admitting Anderson's opinion about tire tracks was not an abuse of discretion.

1. The Opinion claimed Anderson's opinions on the tire marks were not supported by the evidence.

The Opinion rejected expert Anderson's opinions on the tire marks as in conflict with, or not supported by, the physical evidence. Slip Opinion at pp. 24-25. The Opinion claimed a "lack of evidence which established that the tire/skid marks were from Decedent's truck . . . ." Slip Opinion at p. 27.

But, as shown below, substantial evidence tied the skid marks to Cabral's truck:

1. According to the investigating officer Thibodeau, the skid marks belonged to Cabral's truck.

2. The laws of physics suggested that the tire marks belonged to Cabral's truck because, if they originated from another vehicle, they would have been obliterated by Cabral's skid into the Ralphs' truck.

2. The Highway Patrol investigation was thorough and well-documented, and satisfied the trial judge that the tire marks were "fresh" and belonged to Cabral.

Anderson's opinion rested on the findings of the Highway Patrol investigation, which was—without dispute—thorough and beyond criticism.

Officer Migliacci, the primary investigating officer for the accident, arrived at the scene at 9:00 p.m. 1 RT 245:2-4, 246:20-26.

According to Officer Migliacci, the CHP is very thorough when investigating a fatal collision as it is important that all of the physical evidence is accurately documented so that there is record of what happened if the case goes to trial. 1 RT 244:1-11, 265:18-22.

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. 2 RT 311:22-312:11; AA 133-137 [Trial Exhibit 1, at pp. S-1 - S-5], 167-168 [Trial Exhibit 1A, at p. S-6].) The diagram was admitted into evidence.[2] 2 RT 312:12-16. Photographs taken at the scene were also admitted into evidence. 1 RT 246:9-14, 248:4-18; 2 RT 303:7-12, 308:3-14.

Viewing Exhibit 1A (CHP factual diagram), 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. 2 RT 312:18-25; see also 1 RT 261:26-262:15. Officer Migliacci supported these conclusions as follows.

1. The CHP officers who documented the evidence at the scene believed the tire mark to be *"fresh at the scene.*" 1 RT 291:1-8 (emphasis added).

2. Officer Migliacci pointed out the obvious—that if tire mark No. 1 had been there before the accident, then Cabral's pickup would have obliterated the tire mark: "I believe Vehicle 1 [Cabral's pickup] would have obliterated that skid mark that traveled that path." 2 RT 315:19-316:1.

This evidence satisfied the trial judge that the tire marks belonged to Cabral's vehicle because they were "fresh."

> **The Court:** Let's look at those trucks. The truck got in there and was parked for a short time . . . and then the tracks are there. And I assumed that the Highway Patrolman would be sharp enough to see that the tire tracks from the truck had gone over those trucks–those tracks that he had in his report. And so *those tracks are fresh.*

1 RT 194:5-11 (emphasis added).

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[2]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 would permit Officer Migliacci to testify and refresh his memory from the report if needed. 1 RT 117:3-6; AA 14-11, 213.

3. Anderson's opinion about the tire marks rested on his professional expertise, his independent examination of the accident site and Cabral's vehicle, and the Highway Patrol evidence.

Anderson's opinion was based on his experience, analysis of the Highway Patrol evidence, and his independent examination of the accident scene and Cabral's vehicle. Specifically, he relied on: (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. 2 RT 506:17-20, 507:5-11, 510:7-9, 513:8-514:15; 515:5-525:20; 605:15-20.

Anderson has performed approximately 3,000 accident reconstructions. 2 RT 505:12-14, 529:19-21.

Anderson noted two tire marks documented by the Highway Patrol in photographs and in a diagram. 2 RT 507:21-508:12.

He opined 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. 2 RT 508:16-24, 509:25-510:6, 511:7-9.

He found the two tire marks consistent with the orientation of the impact–almost straight on—with Cabral's pickup parallel to the highway when it hit the tractor-trailer. 2 RT 509:2-17, 515:5-516:22, 518:6-519:10.

When asked where tire impression No. 1 came from, he explained that, based on all the information he looked at, it had come from the left rear tire of Cabral's pickup. 2 RT 508:13-24. He pointed out tire mark No. 1 in the photos he had relied on. 2 RT 509:9-18. On cross-examination about the tire marks, Anderson explained his opinion rested on "physical evidence":

> 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.

2 RT 541:13-21 (emphasis added).

Anderson explained that he believed 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. 2 RT 511:7-513:8.

CONCLUSION

For the foregoing reasons, the Court of Appeal's judgment, reversing the judgment for Maria Cabral, should be reversed and the judgment of the trial court should be reinstated.

Dated: September 2, 2010.

Respectfully submitted,

SMITH & MCGINTY

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CERTIFICATION

I hereby certify that this brief, excluding tables, consists of 5,497words.

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Daniel U. Smith

PROOF OF SERVICE BY MAIL

(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is Post Office Box 278, Kentfield, California 94914. On this date I served the interested parties in this action the within document: APPLICATION AND BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at Kentfield, California, addressed as follows:

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