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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEBORAH GONZALEZ et al., Plaintiffs and Respondents, v. SOUTHERN CALIFORNIA GAS COMPANY, Defendant and Appellant.	D054677 (Super. Ct. No. L-01518)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Reversed and remanded with directions.

C. Larry Davis; Horvitz & Levy, Barry R. Levy, Felix Shafir, John A. Taylor, Jr.; Higgs, Fletcher & Mack, William M. Low and Loren G. Freestone for Defendant and Appellant.

Wolfe Legal Group, Lann G. McIntyre; O'Mara & Padilla, Michael D. Padilla and Jeffrey M. Padilla for Plaintiffs and Respondents.

Defendant Southern California Gas Company (SCG) appeals a judgment following a jury verdict finding SCG liable to plaintiffs Peter and Deborah Gonzalez (Plaintiffs) for the wrongful death of their daughter, Tiffany. She died after driving her

car off a street, over a curb and striking an SCG gas meter assembly located 11 feet, 4 inches beyond the curb. On appeal, SCG contends the trial court erred by denying its motions for judgment notwithstanding the verdict (JNOV) and for new trial because: (1) it did not owe Tiffany a legal duty of care in the circumstances of this case; (2) its conduct was not the proximate cause of her injuries; (3) the court erred in instructing the jury; and (4) the court erred by excluding certain evidence showing Plaintiffs negligently entrusted Tiffany with a vehicle.

On November 5, 2010, we issued an opinion reversing the judgment based on our conclusion SCG did not owe Tiffany a legal duty of care. (*Gonzalez v. Southern California Gas Co.* (Nov. 5, 2010, D054677) [nonpub. opn.].) On January 26, 2011, the California Supreme Court granted Plaintiffs' petition for review. On April 27, it transferred the case to this court for reconsideration in light of *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 (*Cabral*). We requested, and have received and considered, supplemental briefing by the parties on the impact of *Cabral* on this case.[1] We issue this revised opinion reversing the judgment based on our conclusion that SCG did not owe Tiffany a legal duty of care.

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1 SCG subsequently requested that we strike pages 24 through 30 of Plaintiffs' supplemental brief on the ground the arguments set forth on those pages were not limited to the impact of *Cabral* on this case. We hereby grant in part that request and strike pages 24 through 28 of Plaintiffs' supplemental brief as beyond the scope of our request for supplemental briefing on the impact of *Cabral*. We deny in part SCG's request as to pages 28 through 30 of Plaintiffs' supplemental brief, but nevertheless note that *Carroll v. Central Counties Gas Co.* (1925) 74 Cal.App. 303, discussed therein, does not persuade us to reach a contrary result.

FACTUAL AND PROCEDURAL BACKGROUND

In 1988, SCG, a natural gas distributor, installed a new gas main and service line to provide gas service to the portion of Gio's Mobile Home Estates (Gio's) located south of Lincoln Avenue in El Centro.[2] Gio's and its engineers proposed plans for the location of SCG's new gas meter assembly that were reviewed and approved by SCG. The meter assembly was installed 11 feet, 4 inches from the southern curb of Lincoln Avenue, near the outside of Gio's perimeter wall, and 13 feet from the driveway entrance to the southern portion of Gio's. Both the meter assembly and perimeter wall were located on Gio's property. A riser gas line was connected to the above-ground meter assembly that had a regulator reducing the pressure from 40 pounds per square inch to five pounds per square inch. Individual customer lines were connected to the meter assembly and installed underground to individual regulators at each of the approximately 50 mobile homes.

In 1989, SCG installed three concrete-filled, steel posts around the meter assembly. Two were set in the concrete sidewalk and the third was set in dirt with a 12-inch deep concrete footing. Each of the three posts was four-and-one-half inches in diameter and rose three feet above the ground. SCG intended the posts to protect the meter assembly from damage from being hit by vehicles traveling at less than 10 miles per hour. SCG engineers were capable of designing other barriers that would provide a higher level of protection.

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2 Another portion of Gio's is located north of Lincoln Avenue.

At about 5:00 p.m. on August 3, 2002, 17-year-old Tiffany was driving home from work in her Ford Escort. She was traveling westbound on Lincoln Avenue at a speed of about 25 miles per hour (the posted speed limit). Lincoln Avenue is about 39 feet, 6 inches wide and has one westbound lane and one eastbound lane. When another vehicle apparently attempted to pass Tiffany's vehicle on its right side, her vehicle drifted to the left into the eastbound lane and jumped the eight-inch southern curb without any apparent braking. Continuing at a speed of about 25 miles per hour, her vehicle apparently rotated counter-clockwise and struck and bounced off of Gio's perimeter block wall. With her vehicle continuing to rotate, its passenger door then struck the eastern steel post of SCG's gas meter assembly, which was set in dirt and guarded the meter assembly. The force of the collision knocked that post onto the meter assembly, breaking the gas line on the high-pressure side of the assembly. A spark ignited gas that escaped from the ruptured gas line, causing a fire that engulfed Tiffany's vehicle. After a minute or two, Tiffany was able to escape the burning vehicle.

Tiffany's father, Peter, arrived while paramedics were assisting her. Tiffany told him she had swerved to miss a gray car. She was transported by ambulance to a hospital for emergency treatment of her severe burn injuries. In the hospital emergency room, she told a police officer that she had turned to avoid a silver car. Two days later, Tiffany died from burn injuries to 80 percent of her body's surface.

In July 2003, Plaintiffs filed the instant action against SCG and Gio's, alleging wrongful death claims based on theories of general negligence, negligence per se, and

premises liability.[3] The complaint alleged SCG created a dangerous condition by placing the gas meter assembly near a roadway without adequate protection. SCG filed a motion for summary judgment, apparently arguing that it did not owe Tiffany a legal duty of care.[4] The trial court denied that motion.

In October 2005, the first trial in this matter was held, resulting in a mistrial after the jury could not reach a verdict. In October 2008, the second trial in this matter was held. Eleven of 12 jurors found SCG was negligent and that its negligence was a substantial factor in causing Plaintiffs' damages. The jury found Plaintiffs' past and future damages were $2 million. The jury apportioned 40 percent of the fault for the accident to SCG, 50 percent to Tiffany, and 10 percent to Gio's. The trial court ordered judgment entered against SCG in the amount of $800,000, plus costs.

SCG filed motions for JNOV and for new trial based on the absence of a legal duty, instructional and evidentiary error, and excessive damages. The trial court denied both motions. SCG timely filed a notice of appeal.

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3 Gio's agreed to a settlement with Plaintiffs before trial.

4 The record on appeal does not contain a copy of SCG's motion for summary judgment.

DISCUSSION

I

Negligence and the Legal Duty of Care Generally

"The elements of a cause of action for negligence are: the 'defendant had a duty to use due care, that he [or she] breached that duty, and that the breach was the proximate or legal cause of the resulting injury.' " (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278 (*Vasquez*).) "Under general negligence principles, . . . a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others, and this legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.) Civil Code section 1714, subdivision (a), provides: "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 . . . , except so far as the latter has, . . . by want of ordinary care, brought the injury upon himself or herself."

In *Vasquez*, we noted: "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." (*Vasquez, supra,* 118 Cal.App.4th at p. 278.) An appellate court determines de novo the existence and scope of a legal duty in a particular case. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, disapproved on another ground in *Reid v. Google, Inc.* (2005) 50 Cal.4th 512, 527, fn. 5.)

The element of a legal duty of care generally acts to limit otherwise potentially infinite liability that would follow from every negligent act. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) "A public utility [like other persons or entities] has a general duty to exercise reasonable care in the management of its personal and real property." (*White v. Southern Cal. Edison Co.* (1994) 25 Cal.App.4th 442, 447.) For example, "[a] public utility, which negligently places a power pole too close to the road, may be liable to the occupants of a motor vehicle injured when their vehicle collides with the pole." (*Id*. at pp. 447-448.)

A determination that a legal duty of care exists is a "shorthand expression of the sum total of public policy considerations which lead the law to protect a particular plaintiff from harm." (*Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 504.) No exception to the general rule of Civil Code section 1714 liability for negligence "should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 (*Rowland*).) *Rowland* stated:

> "A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are 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." (*Rowland*, at pp. 112-113.)

"The foreseeability of the harm, though not determinative, has become the chief factor in duty analysis." (*Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515.) In considering

the foreseeability of harm in a particular case for purposes of determining whether a legal duty of care existed, "[t]he proper focus is on the foreseeability of a harmful event of the general type that occurred. The relevant foreseeability is not the foreseeability of the particular and possibly unique details of how and why a particular harmful event came to pass." (*Robison v. Six Flags Theme Parks Inc.* (1998) 64 Cal.App.4th 1294, 1297 (*Robison*).) As we noted in *Vasquez*, "foreseeability depends not on whether a particular plaintiff's injury was foreseeable as a result of a particular defendant's conduct, but instead on whether the conduct at issue created a foreseeable risk of a ' "particular kind of harm." ' " (*Vasquez, supra*, 118 Cal.App.4th at p. 286.) Alternatively stated, it is the general character of the event or harm, not its specific nature or manner of occurrence, that must be reasonably foreseeable for a legal duty to exist. (*Robison*, at pp. 1298-1299; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58 (*Bigbee*).) In determining the question of reasonable foreseeability, *Bigbee* stated:

> "[I]t is well to remember that 'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' [Citation.] One may be held accountable for creating even ' "the risk of a slight possibility of injury if a reasonably prudent [person] would not do so." ' " (*Bigbee*, at p. 57.)

"An act must be *sufficiently likely* before it may be foreseeable in the legal sense. That does not mean simply imaginable or conceivable. Given enough imagination, *everything* is foreseeable. To paraphrase Justice Eagleson, with apologies to Bernard Witkin, on a clear judicial day, you can foresee forever. [Citation.] If the law imposed a duty to protect against every *conceivable* harm, nothing could function." (*Jefferson v. Qwik*

Korner Market, Inc. (1994) 28 Cal.App.4th 990, 996.) Foreseeability and the extent of burden to the defendant have become the primary *Rowland* factors to be considered on the question of legal duty. (*Vasquez*, *supra*, 118 Cal.App.4th at p. 280, fn. 5.)

In *Cabral*, the California Supreme Court reaffirmed the general legal duty of care described above, which is set forth in Civil Code section 1714 and imposes liability for injuries caused by a person's failure to exercise ordinary or reasonable care in the circumstances. (*Cabral*, *supra*, 51 Cal.4th at p. 771.) The court also reaffirmed *Rowland*, stating: "In the *Rowland* decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714 . . . ." (*Cabral*, at p. 771.) However, absent a statutory exception to the general legal duty rule, "courts should create one only where 'clearly supported by public policy.' " (*Ibid*.) *Cabral* stated: "[T]he *Rowland* factors are evaluated at a relatively broad level of factual generality." (*Id*. at p. 772.) *Cabral* further stated:

> "[A]s to foreseeability, we have explained that the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed . . . .' (*Ballard v. Uribe* (1986) 41 Cal.3d 564, [572], fn. 6 . . . ; [citations].) [¶] In applying the other *Rowland* factors, as well, we have asked not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Cabral*, *supra*, 51 Cal.4th at p. 772.)

Cabral explained: "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make."[5] (*Cabral, supra,* 51 Cal.4th at p. 772.)

II

Motion for JNOV

SCG contends the trial court erred by denying its motion for JNOV because it did not owe Tiffany a legal duty of care in the circumstances of this case.

A

At the second trial the jury found SCG was negligent and that its negligence was a substantial factor in causing Plaintiffs' damages. The jury found Plaintiffs' past and future damages were $2 million. The jury apportioned 40 percent of the fault for the accident to SCG, 50 percent to Tiffany, and 10 percent to Gio's. The trial court entered judgment against SCG in the amount of $800,000, plus costs. SCG filed a motion for JNOV based on the absence of a legal duty. The trial court denied the motion.

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5 *Cabral* noted: "California law accords with the Restatement [Third of Torts] view. 'No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.' (Rest.3d Torts, Liability for Physical and Emotional Harm, § 7, com. a, p. 78.)" (*Cabral, supra,* 51 Cal.4th at p. 773, fn. 3.)

B

In determining independently, or de novo, the question of law whether SCG owed Tiffany a legal duty of care in the circumstances of this case, we must decide whether a categorical exception to Civil Code section 1714's general duty of ordinary care should apply based on *Rowland*'s foreseeability and policy considerations. (*Cabral, supra*, 51 Cal.4th at pp. 771-772.) We primarily consider whether it was reasonably foreseeable that the category of alleged negligent conduct in this case would cause the general type of harm in this case. (*Id*. at p. 772; *Vasquez, supra*, 118 Cal.App.4th at p. 286; *Robison, supra*, 64 Cal.App.4th at p. 1297.) We also consider the extent of the burden on SCG were a legal duty of care imposed on it, as well as the other *Rowland* factors discussed above. (*Rowland, supra*, 69 Cal.2d at p. 113.) The California Supreme Court observed: "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." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)

Foreseeability. In the circumstances of this case, we conclude, as a matter of law, it was *not* reasonably foreseeable that the category of conduct consisting of the installation of a fixed object (e.g., SCG's installation of the gas meter assembly) on private property a substantial distance (e.g., 11 feet, 4 inches) from a straight, level, and curbed public street with a 25-mile-per-hour speed limit would cause injuries to an occupant of an errantly driven vehicle (e.g., fatal burn injuries from the conflagration caused by natural gas escaping from SCG's ruptured gas line damaged by Tiffany's errantly driven vehicle). It is common knowledge that 25 miles per hour is a fairly slow

speed for vehicles. When a two-lane residential or other street has a speed limit of 25 miles per hour, owners of property adjacent to that street generally do not anticipate or reasonably foresee that drivers of vehicles on that street will, for whatever reason, veer off the street a substantial distance and strike objects on their private property.[6] That unforeseeability is increased when the two-lane street has substantial curbs (e.g., eight inches high) that can reasonably be expected to alert or constrain a driver driving his or her vehicle at a slow speed (e.g., 25 miles per hour) which begins to veer off the street, presumably causing that driver to take corrective action or otherwise preventing the vehicle from veering off a substantial distance from the street. In the general circumstances of this case, it is not reasonably foreseeable a vehicle on a curbed, two-lane street with a relatively low 25-mile-per-hour speed limit with no apparent dangerous conditions (e.g., sharp curves, dips, descents, or ascents) would deviate from, or veer off, the street, go over the curb (e.g., eight-inch-high curb), and strike a fixed object located a substantial distance from the street (e.g., 11 feet, 4 inches beyond the street's curb).[7]

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[6] We tend to agree with the testimony of Richard Gailang, an SCG employee, who stated: "Typically, [in] 25-mile an hour zones you don't anticipate—you wouldn't foresee cars leaving the roadway at that speed. Most of us live in neighborhoods in which the speed is 25 miles an hour. [¶] If you truly drive that speed—not 35, but 25—you realize how slow 25 miles an hour is. And even if you had a blowout, I would think—or had to correct your vehicle, you can stop quite quickly by only going 25 miles an hour. It is a very slow rate of speed."

[7] The fact there had not been any previous collision with the gas meter assembly in this case during the 14-year period since its installation supports, rather than detracts from, our conclusion regarding the absence of reasonable foreseeability. (Cf. *Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 895 [the "requisite degree of foreseeability

Alternatively stated, we conclude the general event in this case was *not* sufficiently likely to occur in the setting of modern life that a reasonably thoughtful or prudent person would take account of it in deciding where and how to install and maintain a fixed object (e.g., gas meter assembly) on private property adjacent to a curbed, two-lane street with a 25-mile-per-hour speed limit.[8] (*Bigbee*, *supra*, 34 Cal.3d at p. 57; *Jefferson v. Qwik Korner Market, Inc.*, *supra*, 28 Cal.App.4th at p. 996.) We conclude it was not reasonably foreseeable under *Rowland* that SCG's installation of the gas meter assembly on private property a substantial distance (i.e., 11 feet, 4 inches) away from Lincoln Avenue, a curbed street with a 25-mile-per-hour speed limit, would cause the general type of harmful event in this case.[9]

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rarely, if ever, can be proven in the absence of prior similar incidents"]; *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1306-1307.)

8 We note that even in cases involving high-speed highways, "the mere placing of a fixed object next to a highway does not necessarily create an unreasonable risk of harm." (*Scott v. Chevron U.S.A.*, *supra*, 5 Cal.App.4th at p. 516.) Based on our review of cases cited in one annotation, it appears an overwhelming majority of cases in California and other states have not imposed negligence liability on public utilities for placement of utility poles within three feet (much less 11 feet) of a roadway when those poles are struck by vehicles. (Annotation, Placement, Maintenance, or Design of Standing Utility Pole as Affecting Private Utility's Liability for Personal Injury Resulting from Vehicle's Collision with Pole Within or Beside Highway (1987) 51 A.L.R.4th 602.) Nevertheless, we do not rely on that annotation, or its cited cases, in reaching our conclusion regarding reasonable foreseeability in this case.

9 Although we do not rely on this testimony in determining the reasonable foreseeability factor, Plaintiffs' own expert witness (Harry Krueper) testified at trial that he "can't say it's reasonably foreseeable" that vehicles "would leave the roadway [i.e., Lincoln Avenue], travel off 11 feet or more, and do some damage."

As SCG asserts, *Cabral* is factually inapposite to this case and does not persuade us the general event in this case was reasonably foreseeable. In *Cabral*, a Ralphs truck driver was driving his delivery tractor-trailer on an interstate freeway when he pulled over and parked on the dirt portion of the freeway's shoulder to eat a snack. (*Cabral*, *supra*, 51 Cal.4th at p. 769.) His truck was parked about 16 feet from the outermost freeway lane in an area posted for "Emergency Parking Only." (*Ibid*.) Adelelmo Cabral was driving his pickup truck on that freeway at a speed of about 70 or 80 miles per hour when he abruptly left the freeway as if he were exiting it. (*Ibid*.) Cabral's truck travelled parallel to the freeway on its dirt shoulder until it collided at high speed with the rear of the parked Ralph's trailer without any apparent attempt to slow down. (*Id*. at pp. 768-769.) Cabral was killed in the collision. (*Id*. at p. 768.) In the wrongful death lawsuit filed by Cabral's widow, the jury found Ralphs was 10 percent at fault for the accident. (*Ibid*.) The Court of Appeal reversed the judgment against Ralphs, concluding it did not owe a legal duty of care to Cabral. (*Ibid*.) The California Supreme Court granted the widow's petition for review. (*Id*. at p. 770.)

In *Cabral*, after considering the *Rowland* factors, the court concluded there was no exception to the general duty rule that would shield Ralphs from liability for Cabral's death. (*Cabral*, *supra*, 51 Cal.4th at p. 768.) *Cabral* stated: "*That drivers may* lose control of their vehicles and *leave a freeway for the shoulder area, where they may collide with any obstacle placed there, is not categorically unforeseeable*. Nor does public policy clearly demand that truck drivers be universally permitted, without the possibility of civil liability for a collision, to take nonemergency breaks alongside

freeways in areas where regulations permit only emergency parking." (*Ibid*., italics added.) The court phrased the issue before it as "whether a categorical exception to [the] general rule [that drivers have a duty of ordinary care in operating their vehicles] should be made exempting drivers from potential liability to other freeway users for stopping alongside a freeway." (*Id*. at p. 774.)

On the first *Rowland* factor of foreseeability, *Cabral* noted that it was clearly foreseeable a vehicle parked alongside a freeway may be struck by another vehicle leaving the freeway, resulting in injuries to that vehicle's occupants. (*Cabral*, *supra*, 51 Cal.4th at p. 775.) The court also took judicial notice of freeway safety standards that "disapproved placing any 'massive obstacle' within 30 feet of the [freeway's] traffic lanes." (*Ibid*.) Caltrans apparently designated this area as the "recovery zone." (*Id*. at p. 779.) The court stated: "The existence of guidelines seeking to keep the shoulder area free of massive obstacles supports a conclusion the possibility of vehicles leaving the freeway and colliding with obstacles is generally foreseeable." (*Id*. at p. 776.) It also noted that Ralphs' transportation manager had instructed its drivers not to stop on freeways for nonemergency reasons. (*Id*. at pp. 775-776.) *Cabral* concluded the "general foreseeability of a collision between a vehicle leaving the freeway and one stopped alongside the [freeway] . . . weigh[ed] against creating a categorical exception to the duty of ordinary care." (*Id*. at p. 781, fn. omitted.)

Because *Cabral* involved a vehicle that veered off a high-speed freeway with no curb and collided with a tractor-trailer parked on the freeway's dirt shoulder in an area designated as a recovery zone and where placement of massive obstacles was prohibited,

we conclude *Cabral* is factually inapposite to this case and does not persuade us it is reasonably, or "categorically," foreseeable that a vehicle on a curbed, two-lane street with a 25 mile-per-hour speed limit will veer off the street, go over the curb, and strike a fixed object located a substantial distance from the street. Considering the first, and most important, *Rowland* factor of foreseeability, the lack of foreseeability of the harmful event in this case tends to support an exception to the general duty rule. (*Rowland, supra*, 69 Cal.2d at pp. 112-113.)

Certainty of injury and closeness of connection between SCG's conduct and injury. We next consider two other *Rowland* factors related to the foreseeability of the harmful event—i.e., "the degree of certainty that the plaintiff suffered injury [and] the closeness of the connection between the defendant's conduct and the injury suffered." (*Rowland, supra*, 69 Cal.2d at p. 113; *Cabral*, *supra*, 51 Cal.4th at pp. 779-780, 781, fn. 9.) Although it was certain Tiffany and Plaintiffs suffered injuries or damages from the incident in this case, that factor alone does not weigh strongly against creating a categorical exception to the general duty rule in this case. (*Rowland, supra,* 69 Cal.2d at p. 113.) Similarly, although there is a causal connection between SCG's conduct (i.e., installation of the gas meter assembly on private property over 11 feet from Lincoln Avenue) and Tiffany's and Plaintiffs' injuries or damages, that connection in the circumstances of this case is not sufficiently close to weigh strongly against creating a categorical exception to the general duty rule. The factual series of events leading to Tiffany's injuries and Plaintiffs' damages involved an extended sequence of multiple occurrences not reasonably foreseeable generally, and even less so in the circumstances

of this case. Apparently in response to a vehicle passing on her right side, Tiffany drove her westbound vehicle into the eastbound lane of Lincoln Avenue and over its southern eight-inch curb without any apparent braking. Her vehicle continued at a speed of about 25 miles per hour, apparently rotated counter-clockwise, and struck and bounced off of Gio's perimeter block wall. With her vehicle continuing to rotate, its passenger door then struck the eastern steel post guarding SCG's gas meter assembly. The force of the collision knocked that post onto the gas meter assembly, breaking the gas line on the high-pressure side of the assembly. A spark ignited gas that escaped from the ruptured gas line, causing a fire that engulfed Tiffany's vehicle, burning her severely and fatally. Under *Rowland*, we conclude there was not a close connection between SCG's conduct, and Tiffany's and Plaintiffs' injuries or damages. (*Ibid*.)

Burden on SCG and community. Considering the *Rowland* factor of the extent of the burden on SCG and the community, which *Cabral* identified as one of the "public policy" factors, we conclude there presumably would be a significant burden imposed on SCG were a legal duty of care imposed on it with resulting liability for breach in the circumstances of this case. (*Rowland*, *supra*, 69 Cal.2d at p. 113; *Cabral*, *supra*, 51 Cal.4th at p. 781.) Although the record does not contain any definitive evidence regarding the specific number of SCG gas meter assemblies located a similar (or lesser) distance from streets or other roadways in California, a survey of all SCG gas meter assemblies would be required to determine which are located adjacent to a street or other roadway, which presumably would require substantial time and effort of SCG employees. However, if a legal duty were imposed on SCG, it would not have any definitive

guidelines regarding the exact distance away from those streets and roadways a meter assembly would have to be before that duty no longer existed. For example, SCG would not know whether a legal duty existed if a meter assembly were located 20 feet, 100 feet, 500 feet, or more from a street or roadway. Furthermore, if a duty were imposed on SCG, it would have to incur substantial design and construction costs to provide sufficient protection against vehicles that deviate from, or veer off, streets and other roadways. As SCG notes, that design and construction may require additional effort and costs to protect against atypical vehicles (e.g., motorcycles, large trucks, etc.) that may deviate from, or veer off, streets and other roadways. The burden on SCG would be substantial if a legal duty of care were imposed on it in this case, thereby weighing in favor of creating a categorical exception to the general duty rule. (*Ibid*.)

More importantly, the burden on the community strongly weighs in favor of creating an exception to the general duty rule. The consequences to the community of imposing a duty of care in these circumstances include the likelihood that there would be uncertainty regarding whether, and in what circumstances, a duty would be imposed on all owners of real or personal property near any street or roadway to protect the occupants of all errantly driven vehicles from striking any fixed objects. Were a broad duty to be imposed, the burden on owners of real and personal property adjacent to streets and other roadways presumably would require them to incur substantial demolition, design and/or construction costs to prevent errantly driven vehicles from colliding with fixed objects even though it is not reasonably foreseeable an errantly driven vehicle would do so. If a general duty of care were imposed on all owners of private property located adjacent to

curbed, two-lane streets with a 25-mile-per-hour speed limit, millions of property owners would be required to evaluate all fixed objects on their private property and take reasonable measures to prevent collision or other injuries to occupants of vehicles that deviate from those streets. However, those private property owners will not know the exact extent of that duty (i.e., how far away from the street must an object be before preventive measures are no longer required and what specific preventive measures are required to be taken regarding each type of fixed object). Would imposition of that duty require all homeowners to remove all trees, mailboxes, fences, and other fixed objects located on their private property that "foreseeably" could be struck by errantly driven vehicles that veer off a curbed, two-lane residential street with a 25-mile-per-hour speed limit? Or, if removal is not required, exactly what other preventive measures must an owner of a home or other private property take to avoid facing a jury trial and potential liability for substantial damages in the event a vehicle deviates from a quiet, residential street and strikes a tree, mailbox, fence, or other fixed object located on that private property? The imposition of a legal duty in this category of cases "would effectively require landowners to dedicate a portion of their property as a safety zone to protect errant drivers." (*Scott v. Chevron U.S.A., supra*, 5 Cal.App.4th at p. 517.) The benefit to the community of imposing a legal duty in this category of conduct is uncertain, at best. In contrast, the tremendous burden (e.g., widespread adverse financial, environmental, aesthetic, lifestyle, and psychological impacts) on the community of imposing a legal duty in this category of cases strongly weighs in favor of creating a categorical exception

to the general duty rule in this case.[10] Therefore, weighing the benefit to the community of imposing a legal duty against its substantial burden on the community, we conclude this factor strongly supports the creation of a categorical exception to the general duty rule in this case.

Other public policy factors. None of the other "public policy" *Rowland* factors weigh strongly, if at all, against creating a categorical exception to the general duty rule in this case. There was no more "moral blame" associated with SCG's conduct than would otherwise be found in an ordinary negligence case. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270 ["the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability"].) Although we presume, as Plaintiffs' assert, that had SCG taken additional measures to protect the gas meter assembly (e.g., stronger posts, different location), Tiffany's injuries and their damages could have been avoided, it was not SCG's moral responsibility to undertake all possible measures to protect Tiffany from injury when her injuries were not reasonably foreseeable in the circumstances of this case.[11] (Cf. *Scott v. Chevron U.S.A.*,

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10 Because *Cabral* involved a collision with a tractor-trailer parked on the dirt shoulder of a high-speed freeway, it is factually inapposite to this case and its reasoning does not persuade us the burdens on SCG and the community would not be unduly substantial were a legal duty imposed in the instant category of cases. *Cabral* noted that " 'freeways are radically different in their purpose and design from other public roads,' making extrapolation of liability rules from freeways to other urban, suburban, or rural roads an uncertain exercise at best." (*Cabral*, *supra*, 51 Cal.4th at p. 783.)

11 Contrary to Plaintiffs' apparent assertion, the record does not show SCG had a policy against protection of gas meter assemblies located more than three feet from a

supra, 5 Cal.App.4th at p. 517 ["[n]o moral blame can be attached to [defendant's] conduct, as there is nothing inherently wrong with placing a fixed object on one's property"].) Furthermore, considering the general nature of the category of conduct with respect to owners of private property adjacent to curbed, two-lane streets with 25-mile-per-hour speed limits, there would appear to be little, if any, moral blame attributed to a property owner who locates trees, a mailbox, a fence, and/or other fixed objects on his or her private property and an errantly driven vehicle strikes one of those objects. (Cf. *Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1278 [in a case involving a vehicle that collided with a light pole located 18 inches from the curb of a road with a 55-mile-per-hour speed limit, the court stated that "although there is nothing inherently wrong with installing and maintaining streetlights, some moral blame may be found in placing streetlights attached to concrete poles close to the street [i.e., 18 inches away] when they could be placed up to 12 feet away from the traveling portion of the roadway. [Fn. omitted.]"] (*Laabs*).)

The policy of preventing future harm also does not strongly weigh against creating a categorical exception to the general duty rule in this case. Although SCG presumably could take additional preventive measures that would avoid or diminish future injuries like those suffered by Tiffany in this case, the policy of preventing future harm should not be extended so far as to unduly burden defendants by requiring them to take such preventive measures when the general type of event, as in this case, is not reasonably

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roadway. Rather, its planners were allowed to require specially designed protection if they believed vehicle impact was reasonably foreseeable.

foreseeable. Like *Scott*, we "doubt that society is willing to so restrict property rights. Imposing liability in these circumstances would effectively require" SCG and other real or personal property owners to forego or limit certain property rights or incur substantial burdens. (*Scott v. Chevron U.S.A., supra*, 5 Cal.App.4th at p. 517.) We believe the imposition of that burden in these circumstances should be a legislative, not judicial, decision. (*Ibid*.)

To the extent insurance (e.g., whether from an insurance company or through self-insurance) would be available were a duty of care to be imposed in these circumstances, that cost presumably would effectively be borne by the customers of SCG, a public utility, in the form of higher rates for natural gas. Although there is no information in the record regarding what that cost might be, the availability of insurance does not weigh heavily in favor of imposing a legal duty of care in the circumstances of this case. (*Rowland, supra*, 69 Cal.2d at p. 113.)

Categorical exception to general duty rule. Balancing all of the *Rowland* factors discussed above, we conclude public policy supports the creation of a categorical exception to the general legal duty of care in the circumstances of this case. The most important factor is that it was not reasonably foreseeable the installation of a fixed object (e.g., SCG's gas meter assembly) on private property a substantial distance (e.g., 11 feet, 4 inches) away from a curbed, two-lane street with a 25-mile-per-hour speed limit would cause the general type of harmful event in this case. Furthermore, we believe the imposition of a legal duty of care in this category of cases would be an undue and unreasonable burden on SCG as well as on all owners of real and personal private

property located adjacent to such streets. (*Jefferson v. Qwik Korner Market, Inc.*, *supra*, 28 Cal.App.4th at p. 996.) Based on public policy, we apply a categorical exception to the Civil Code section 1714 duty of ordinary care generally owed to occupants of vehicles as to all owners and possessors of real and personal property who install and/or maintain fixed objects on private property a substantial distance (e.g., 11 feet, 4 inches) away from curbed, two-lane streets with 25-mile-per-hour speed limits, when those vehicles veer off the streets and strike the fixed objects, resulting in damage to the vehicles and/or injuries to their occupants.

In the circumstances of this case, we conclude that categorical exception applies and therefore SCG did not owe Tiffany or Plaintiffs a legal duty of care. Accordingly, the trial court erred by denying SCG's motion for JNOV, which was based on the absence of a legal duty of care. (Code Civ. Proc., § 629 ["[t]he court . . . shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made"]; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [A motion for JNOV "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 verdict].)[12]

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12 Code of Civil Procedure section 629 further provides that "[i]f the motion for [JNOV] be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for [JNOV] should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for [JNOV]." (See also *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1044.)

C

None of the cases cited by Plaintiffs persuade us to reach a contrary conclusion. *Bigbee* was a summary judgment case involving a vehicle that veered off a six-lane major thoroughfare (with a posted speed limit of 35 to 40 miles per hour) and struck an occupied telephone booth, located 15 feet from that street in a parking lot and near a driveway, which booth had been the site of a previous accident and was difficult for its user to exit. (*Bigbee*, *supra*, 34 Cal.3d at pp. 52-55, 58.) The trial court granted the defendants' motion for summary judgment and dismissed the negligence action by the injured telephone booth user. (*Id*. at p. 55.) On appeal, the California Supreme Court addressed the question of "whether foreseeability remains a triable issue in this case" that would preclude summary judgment. (*Id*. at p. 56.) Alternatively, it phrased the question: "Is there room for a reasonable difference of opinion as to whether the risk that a car might crash into the phone booth and injure an individual inside was reasonably foreseeable under the circumstances [in this case]?" (*Id*. at p. 57.) *Bigbee* answered that question as follows:

> "Under these circumstances, this court cannot conclude as a matter of law that it was unforeseeable that the booth might be struck by a car and cause serious injury to a person trapped within. A jury could reasonably conclude that this risk was foreseeable. [Citation.] This is particularly true where, as here, there is evidence that a booth at this same location had previously been struck." (*Bigbee*, at p. 58.)

The court concluded: "Since the foreseeability of harm to plaintiff remains a triable issue of fact, the judgment is reversed and the case is remanded to the trial court for further proceedings consistent with the views expressed in this opinion." (*Bigbee*, *supra*, 34

Cal.3d at p. 60.) Some courts have interpreted *Bigbee* as addressing the issue of foreseeability in terms of whether it is a triable issue for the jury (i.e., whether defendants breached a duty of care) and not in the context of whether a legal duty of care exists. (See, e.g., *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 157, fn. 19; *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 780.) Based on our reading of the somewhat brief opinion in *Bigbee*, those courts appear to be correct. In any event, *Bigbee* did not substantively address the issue of the existence of a legal duty of care by expressly discussing the *Rowland* factors or otherwise. Its reasoning is not sufficiently persuasive to compel us to reach a contrary result in this case (i.e., that SCG owed Tiffany or Plaintiffs a legal duty of care), especially because the facts in this case are inapposite to those in *Bigbee*.[13]

Robison does not persuade us to reach a contrary conclusion. In *Robison*, the defendant installed a picnic table in a grassy area directly in line with the parking lot's flow of traffic without any protective measures. (*Robison, supra*, 64 Cal.App.4th at p. 1299, fn. 1.) The court stated: "[F]or a car to crash into a picnic table, the picnic table must first be placed in harm's way. If traffic and picnic tables are placed in a configuration in which the cars can hit the tables, the resulting danger can be identified by simple observation." (*Id*. at p. 1301.) Because of that observable danger, *Robison*

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13 For instance, in *Bigbee*, unlike in this case, there had been a previous collision with the telephone booth 20 months before the instant collision and the major thoroughfare had a posted speed limit of 35 to 40 miles per hour. (*Bigbee, supra*, 34 Cal.3d at pp. 54-55.)

concluded a legal duty of care existed even though there had not been a previous accident involving the picnic table. (*Id*. at pp. 1301, 1305.) The court reversed the summary judgment for the defendant and remanded for further factual development and analysis regarding the extent of the defendant's duty of care. (*Id*. at p. 1305.) Because SCG did not install the gas meter assembly in the direct line of traffic on Lincoln Avenue, *Robison* is factually different from this case and does not support Plaintiffs' assertion that SCG owed Tiffany a legal duty of care.

Likewise, *Laabs, supra*, 175 Cal.App.4th 1260 does not persuade us to reach a contrary conclusion. In *Laabs*, the plaintiff was a passenger in a car that collided with another car and struck defendant's light pole, located 18 inches from the curb of a road where vehicle speeds commonly reached 62 miles per hour. (*Id*. at pp. 1263-1264, 1273.) *Laabs* cited a general rule that a public utility could be found liable in negligence for injuries sustained from a collision with a pole located too close to a highway. (*Id*. at pp. 1269-1270.) In the circumstances of that case, *Laabs* concluded "it is reasonably foreseeable (for purposes of the analysis of duty) that a vehicle involved in a collision with another car would 'deviate from the highway' and collide with a light pole placed 18 inches from the curb." (*Id*. at p. 1276.) After weighing all of the *Rowland* factors, *Laabs* reversed the summary judgment for the defendant, holding the evidence submitted in support of and in opposition to the motion for summary judgment did not establish the

absence of a legal duty of care.[14] (*Laabs, supra,* 175 Cal.App.4th at p. 1279.) Nevertheless, *Laabs* did not conclude defendant owed plaintiff a duty of care as a matter of law. (*Ibid*.) Rather, it concluded additional evidence on the issue of duty may be presented at trial, effectively allowing the trial court to consider that issue anew at trial. (*Ibid*.) Because *Laabs* addressed the question of whether a duty of care existed regarding location of a pole situated 18 inches from a curb of a road where vehicle speeds commonly reached more than 60 miles per hour, we conclude it is factually different from the instant case that involves a gas meter assembly located 11 feet, 4 inches from a curb of a street with a 25-mile-per-hour speed limit. Furthermore, *Laabs* did not conclude the defendant owed the plaintiff a legal duty of care in those circumstances. *Laabs* does not persuade us to reach a contrary conclusion.

D

Although Plaintiffs argue a legal duty of care is imposed on SCG by a federal regulation (i.e., 49 C.F.R. § 192.353(a)) requiring gas meters and service regulators to be protected from damage, they do not cite any case holding that regulation independently establishes a negligence duty of care or supplants the common law *Rowland* balancing test in determining whether a public policy exception to the general duty of care should

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14 In discussing the moral blame factor under *Rowland*, *Laabs* noted the defendant could have placed the light pole up to 12 feet away from the roadway. (*Laabs, supra,* 175 Cal.App.4th at p. 1278.)

apply in the circumstances of a particular case.[15] To the contrary, as SCG notes, "a negligence duty cannot be derived from an administrative regulation." (*Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 793; see also *California Service Station etc. Assn. v. American Home Assurance Co.*, *supra*, 62 Cal.App.4th at p. 1175.) We conclude the regulation cited by Plaintiffs does not impose a legal duty of care on SCG in the circumstances of this case.[16] At most, that regulation would be relevant in determining the *standard* of care were a legal duty of care first determined to exist.[17] (*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 430 ["[t]he presumption of negligence created by Evidence Code section 669 concerns the *standard* of care, rather than the *duty* of care"].) Furthermore, Plaintiffs do not, and presumably could not, assert a private right of action (independent of their negligence

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15 Plaintiffs do not cite any specific *statutory* language that purportedly would impose a legal duty of care on SCG in the circumstances of this case. Their reference to general federal statutes regarding the regulation of natural gas pipelines (i.e., 49 U.S.C. § 60101 et seq.) is insufficient to show a legislative intent by the United States Congress to impose a legal duty of care for purposes of negligence causes of action. Although we presume a legislative body may create a negligence duty of care, a regulatory or administrative agency cannot impose a duty of care absent delegation to it of that authority by the Legislature. (*California Service Station etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175-1176.) Plaintiffs do not cite any language in any federal statute (or otherwise) showing that legislative intent regarding the federal regulation on which they base their argument (i.e., 49 C.F.R. § 192.353(a)).

16 SCG has *not* conceded federal statutes and regulations impose a legal duty of care on it in the circumstances of this case.

17 Similarly, the actions taken by SCG to comply with federal and state regulations did not create a legal duty of care if one did not exist as a matter of law by application of the *Rowland* balancing test. (Cf. *Rice v. Center Point, Inc.* (2007) 154 Cal.App.4th 949, 958-959; *Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 907-908.)

claim) exists based on their cited federal regulation. (*California Service Station etc. Assn. v. American Home Assurance Co.*, *supra*, 62 Cal.App.4th at pp. 1178-1179.) Regardless of any federal (or state) regulations, the question of whether SCG owed Tiffany or Plaintiffs a legal duty of care in the circumstances of this case remained a question of law for determination, by the trial court initially and on appeal by this court de novo, by application of the *Rowland* balancing test. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)

III

Remaining Contentions

Because we resolve this appeal based on the absence of a legal duty of care owed by SCG to Tiffany or Plaintiffs and resultant trial court error in denying SCG's motion for JNOV, we need not address the other contentions made by SCG on appeal.

DISPOSITION

The judgment against SCG is reversed and the matter is remanded with directions that the trial court vacate its order denying SCG's motion for JNOV, issue a new order granting that motion, and enter judgment for SCG. SCG is awarded its costs on appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.