Case No.
S253702

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BETHANY MODISETTE et al.,

Plaintiffs and Petitioners,

v.

APPLE, INC.,

Defendant and Respondent.

PETITION FOR REVIEW

After a Published Opinion by the Court of Appeal
Sixth Appellate District
Case No. H044811

SIMON GREENSTONE PANATIER PC
Lisa M. Barley (Cal. Bar No. 204315)
3780 Kilroy Airport Way, Suite 540
Long Beach, California 90806
Telephone: (562) 590-3400
E-mail: lbarley@sgptrial.com

LOVE LAW FIRM
Gregory P. Love (pro hac vice)
107 E. Main Street
Henderson, Texas 75652
Telephone: (903) 212-4444
E-mail: greg@lovetrialfirm.com

MARTIN WALKER PC
John F. (Jack) Walker, III (pro hac vice)
121 N. Spring Avenue
Tyler, Texas 75702
Telephone: (903) 526-1600
E-mail: jwalker@martinwalkerlaw.com

Attorneys for Petitioners BETHANY MODISETTE et al.

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INTRODUCTION AND STATEMENT OF ISSUES

"[I]n the history of captivating media, the smartphone stands out. It is an attention magnet unlike any our minds have had to grapple with before. Because the phone is packed with so many forms of information and so many useful and entertaining functions, it acts…as a 'supernormal stimulus,' one that can 'hijack' attention whenever it is part of our surroundings which it always is. Imagine combining a mailbox, a newspaper, a TV, a radio, a photo album, a public library and a boisterous party attended by everyone you know, and then compressing them all into a single, small, radiant object. That is what a smartphone represents to us. No wonder we can't take our minds off it." (Carr, *How Smartphones Hijack Our Minds*, Wall Street Journal (October 6, 2017).) "By design, they grab and hold our attention in ways natural objects never could." (*Ibid*.)

The iPhone is designed to capture and keep a user's attention, regardless of the setting. "Smartphone owners interact with their phones an average of 85 times a day, including immediately upon waking up, just before going to sleep, and even in the middle of the night." (*Brain Drain: The Mere Presence of One's Own Smartphone Reduces Available Cognitive Capacity;* Ward, Duke, Gneezy and Bos (April 3, 2017) Association for Consumer Research, vol. 2, no. 2.) According to Tristan Harris, former Google Design Ethicist, and former Apple software engineer, "people don't access their smartphones, people live by their smartphones . . . we're swimming in this digital environment that's created and hand-crafted by a handful of

companies with deliberate goals to capture human attention . . . this technology is not neutral – it is a race to the bottom of the brain stem." (Tristan Harris and Guy Raz, *Manipulation*, TED Radio Hour(Oct 13, 2017) National Public Radio.)

The level of distraction created for a driver by various applications of an iPhone (i.e. Facetime, Messages etc.) is not equivalent to talking on a cell phone, applying make-up, eating a cheeseburger, glancing at a map or "rubber necking" at an interesting sight off the roadway. With respect to driver distraction, the iPhone 6 Plus was in a separate universe unto itself because it conditioned drivers to use it compulsively and without awareness of the amount of time invested in that use. As a result, it miserably fails the National Traffic Highway Safety Administration (NHTSA) Phase 2 Guidelines which recommend a "single average glance away from the forward roadway of 2 seconds or less." Instead, the iPhone 6 Plus conditioned drivers to use it with unfettered access to its most attention demanding applications and features, even while driving at highway speed.

Approximately six years prior to the collision at issue in this appeal, Apple knew its iPhone conditioned users to use the iPhone compulsively and addictively, even while driving. Apple developed "lock-out" technology to disable the ability of drivers to use overly distracting applications on the iPhone while driving at highway speed. When it sought patent protection for its "lock-out" in 2008, Apple supported its application by citing the increased risk of collisions caused by smartphones and stated "[t]exting while driving has become so widespread that it is doubtful that law enforcement will have any significant effect on stopping the practice." {AA 15-16}

Despite its knowledge of the dangers, between 2008 and 2016, Apple continued to implement design features in the iPhone to condition users, regardless of the setting, to use the iPhone compulsively and addictively. Despite recognizing the inherent danger of an iPhone in the hands of drivers, and receiving patent protection for its "lock-out" invention, Apple chose not to implement it. Correspondingly, the crash data gathered and analyzed by NHTSA demonstrating dramatic increases in frequency, injuries and deaths adheres to the connection between crashes and smartphones.

This appeal arises out of an iPhone induced distracted driving collision. The trial court dismissed the causes of action asserted against Apple on demurrer, finding no duty and no causation. The court of appeal affirmed the dismissal in a published opinion, primarily citing the lack of a logical connection between the injuries suffered and Apple and its iPhone 6 Plus. To arrive at this conclusion, the opinion erred in two key respects: (1) it accepted key facts as true, but failed to consider them under *Rowland* and causation analyses; and (2) it disregarded key principles of California law on duty and causation. Although this case presents issues of first impression with respect to Apple and its iPhone, the present California law on duty and causation did not support dismissal on demurrer.

The court of appeal found that the mechanism of injury was foreseeable to Apple (i.e. the conduct of a third party driver) years prior to the collision, and acknowledged Apple invented a way to prevent it. The court of appeal also found that the *Rowland* factors of the certainty of injury, the policy of preventing future harm, and moral blame all weighed in favor of sustaining a duty

of care as to Apple. The opinion also accepted as true the allegation that the iPhone 6 Plus conditioned drivers to use it compulsively and addictively. (Typed opn. 17; *see also* fn 12.) Nevertheless, the court of appeal opined that the connection between the Modisettes' injuries and Apple was too tenuous under its *Rowland* analysis to impose a duty of care. (*Id.* at p. 9.) The court of appeal further held that the burden on Apple and the consequences to the community would be too great to justify imposition of a duty on Apple. (*Id.* at p. 13.)

As to causation, the court of appeal found that Apple and its iPhone 6 Plus were a "cause in fact" of the collision and injuries. Nevertheless, it found no causation between the injuries suffered and Apple because the third party driver's conduct foreclosed proximate causation as to Apple. (*Id.* at p. 21.) It arrived at this conclusion without taking into account whether the conduct of the third party driver was foreseeable to Apple.

This petition raises the following important issues for review:

1. Should Apple be categorically excused from owing a duty to prevent a risk of harm that is foreseeable and flows from its own conduct? More specifically, is Apple excused from implementing a safer design that it invented to prevent a foreseeable risk of danger which its iPhone encourages and facilitates?

2. The court of appeal's opinion is based on three erroneous assumptions the Modisettes never alleged in their complaint and are without support in the record or peer reviewed domain: (1) that all distractions are created equal; (2) that iPhone users deliberately choose to divert their attention away from the

task of driving; and 3) that the Modisettes implicitly allege that all uses of smartphones while driving are unsafe. These assumptions are clearly at odds with the allegations made in the Modisettes' complaint and which the court accepted as true. Is it proper for a court to accept critical allegations as true, but then fail to account for those allegations in its duty and causation analyses?

3. The court expanded the limited scope of the duty alleged to be owed by Apple, to a hypothetical expansive duty that all "cell-phone manufacturers owe a duty to all individuals injured by drivers who were distracted by using the phones while driving…*such that a user is incapable of using it while driving*." This is not the duty the Modisettes' alleged Apple owed to them, and this *sua sponte* expansion of what they alleged resulted in an erroneous conclusion of no duty. Is it proper for a trial court to expand the scope of duty beyond a complaint's allegations in order to support a conclusion of no duty in its public policy analysis under *Rowland*?

4. Is it proper for a court to decide proximate cause as a matter of law from the allegations of a complaint where the facts alleged and accepted as true do not demonstrate that "the only reasonable conclusions is an absence of causation?"

5. Is it proper for a court on demurrer to find that as to duty a defendant's conduct foreseeably combined with injurious conduct of a third party to cause injury, but thereafter when viewed through the lens of causation disregard foreseeability and conclude that the same injurious third party conduct renders the defendant's conduct remote or attenuated and thus not a proximate cause?

6. The court of appeal's opinion affirms the trial court's decision to not allow the Modisettes leave to amend to add factual allegations related to Apple's implementation of a lock-out mechanism in 2017 ("Do Not Disturb While Driving"). The court of appeal reasoned that Apple's implementation of a lock-out mechanism in 2017 is not relevant to this court's determination of duty or causation for failure to install a "lock-out" prior to 2014. Is it proper for a court of appeal to affirm the denial of leave to amend when amendment would include allegations that would substantially alter the duty and causation analysis?

STATEMENT OF FACTS

Apple designs, manufactures, and sells a handheld computing and communication device known as the iPhone. {AA 5} Apple released the first iPhone in June 2007, and further generations roughly once per year thereafter. {AA 9} By 2013, there were six generations of iPhones and more than 500 million units sold worldwide. {*Ibid.*} From 2007 to 2011, Apple spent some $647 million on advertising the iPhone in the United States. {*Ibid.*} Apple's iPhone is credited with reshaping the smartphone industry as well as various other sectors of industry, and helped make Apple one of the most valuable companies in the world. {*Ibid.*}

iPhone based distracted driving involves a combination of manual, visual, and cognitive distraction, and as a result "the level of impairment associated with the use of smartphones while

driving is as profound and dangerous as drunk driving."[1] {AA 8} Numerous studies and data demonstrate that smartphone use is addictive and encourages compulsive use. {AA 10} A study commissioned by AT&T found that smartphones are like "the world's smallest slot machines" because they affect the brain in similar ways. {AA 10} An iPhone triggers dopamine release, similar to a slot machine, because it operates on a "Variable Ratio Schedule of Reinforcement." The user's anticipation of incoming messages, without knowing whether they will be satisfying or discomfiting, causes a user to repeatedly check his or her iPhone in a compulsive and unconscious manner. {*Ibid.*} The Complaint alleged that "time distortion and dissociation occurs during use of smartphones," meaning that a user is not able to accurately perceive the amount of time the user is engaged with his or her smartphone. {AA 8} For every text message sent or received, the average driver's attention is off the road for twenty-three seconds. At 55 miles per hour, this is enough time to cover a third of a mile. {*Ibid.*}

An anonymous survey conducted in 2012 showed that although 97 percent of participants agreed that texting while driving was dangerous, and two-thirds agreed it was very dangerous, 43 percent still admitted to texting or emailing while driving. {AA 8} In a 2012 "Traffic Safety Culture Index" survey, over 95 percent of the people surveyed believed texting or emailing, and checking or updating social media, while driving

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[1] A driver talking on a hands free cell-phone engages in only one level of distraction – cognitive.

[2] These accepted allegations are contrary to the court of appeal's belief

are serious threats to safety. Nearly 27 percent of them admitted typing or sending a text or e-mail while driving at least once in the previously 30 days, and nearly 35 percent admitted reading a text or email while driving. {AA 9}

The connection between crashes and smartphone addiction is clear. In 2015, there was an 8.8 percent increase in traffic fatalities, the largest in 50 years. {AA 7} Deaths in the first six months of 2016 increased 10.4 percent. {*Ibid.*} As for injuries, in 2012, an estimated 421,000 people were injured in crashes involving a distracted driver, which was a 9 percent increase over the 387,000 injured in 2011. {*Ibid.*} NHTSA has concluded, and the Complaint alleged: "[C]rash data indicate that…portable devices, particularly cell phones, is often the main distraction for drivers involved in crashes." {AA 9} Mark Rosekind, the Administrator of NHTSA, stated in 2016, in conjunction with the introduction of NHTSA's Phase 2 Guidelines to apply to smartphones in vehicles, "With driver distraction one of the factors behind the rise of traffic fatalities, we are committed to working with the industry to ensure that mobile devices are designed to keep drivers' eyes where they belong—on the road." {*Ibid.*} "[T]he Phase 2 Guidelines apply the Phase 1 recommendations to the visual-manual interfaces of portable devices . . . recommending acceptance criteria for driver glance behavior where single average glances away from the forward roadway are 2 seconds or less….while performing a testable task, such as selecting a song from a satellite radio station." {RA 54} The Phase 2 Guidelines also recommend that manufacturers such as Apple include a "Driver Mode" for smartphones that "conforms with the Phase 1 Guidelines, and in particular, locks out tasks

that do not meet Phase 1 task acceptance criteria…" {RA 51-52}

According to the Modisettes' complaint and the overwhelming body of studies analyzing the distracted driving epidemic, smartphone induced distracted driving is compulsive in nature, and outside the realm of deliberate thought. The Modisettes alleged that even though Defendant APPLE, INC. recognized for years prior to the collision at issue the compulsory and dangerous nature of iPhone usage by drivers, it nevertheless voluntarily and intentionally failed to implement a safer alternative design to address this danger. {RA 17} Drivers typically do not deliberately choose to engage in smartphone based distracted driving. {AA 10-13, citing 35 studies supporting allegation that smartphone use is addictive and compulsive in nature even while driving} The court of appeal (as well as Apple) accepted as true the allegation that iPhones induce compulsive or addictive use by drivers. (Typed opn. 17, *see also* fn 12.)

Apple had the requisite knowledge and capability to help reduce the iPhone's effect on distracted driving. Apple revealed such knowledge and capability in December 2008, when it filed an application with the U.S. Patent Office for a "driver handheld computing device lock-out." {AA 14} As reflected in United States Patent No. 8,706,143 ("'143 Patent"), Apple explained such technology was designed to "disable the ability of a handheld computing device to perform certain functions, such as texting, while one is driving." {*Ibid.*} According to Apple, the purpose of such technology related "generally to safe operation of handheld computing devices, and more particularly, to providing a lock-out mechanism to prevent operation of one or more functions of handheld computing devices by drivers when operating vehicles."

{AA 15} Apple stated such technology could be implemented with relative ease, and in multiple ways. {AA 14}

To further support its patent application, Apple relied on facts demonstrating the increased risk of accidents caused by distractions "such as text messaging on handheld computing devices." {AA 15} Citing a study published in 2006 (a year before the first iPhone was released and 8 years before the collision at issue in this case) Apple stated the following in its application:

> According to the Liberty Mutual Research Institute for Safety and Students Against Destructive Decisions, teens report that texting while driving is dangerous, but this is often not enough motivation to end the practice. New laws are being written to make texting illegal while driving. However, law enforcement officials report that their ability to catch offenders is limited because the texting device can be used out of sight (e.g. on the driver's lap), thus making texting while driving even more dangerous. Texting while driving has become so widespread it is doubtful that law enforcement will have any significant effect on stopping the practice. {AA 15-16}

The U.S. Patent office granted Apple's request for a patent on its lock-out technology in April 2014. {AA 16} Despite having the technology since 2008, and enjoying patent protection against competition since 2014, Apple consistently and continuously failed to implement such technology (i.e., a safer alternative design) that would lock-out and prevent use of FaceTime while driving. {*Ibid.*} Apple not only refused to utilize its own lock-out technology, but also prevented users from installing other software on their iPhones that would prevent texting or other

functions while driving. {*Ibid.*}

On December 24, 2014, Garrett Wilhelm was compulsively engaged in a FaceTime session on his iPhone while driving at highway speed on an interstate highway in Texas. {AA 17} At the time, Texas did not have a ban on use of handheld devices while driving. Due to the level of distraction caused by the iPhone 6 Plus, Wilhelm failed to see the Modisette family vehicle stopped in a line of vehicles in the lane of travel ahead. When Wilhelm's vehicle collided with the Modisettes' vehicle, the Modisettes sustained serious injuries and 5-year old Moriah, sitting in her booster seat, died. Wilhelm admitted he was engaged in a FaceTime session on his iPhone when the collision happened, and police officers at the scene found his iPhone with the FaceTime connection still active. {AA 5-6}

The Modisettes sued Apple alleging negligence, strict product liability, public nuisance, and other causes of action. The complaint alleged that design and warning defects in Apple's iPhone (along with Wilhelm's conduct) created an unnecessary risk of harm to the Modisettes and proximately caused their injuries. The Modisettes further alleged that at a minimum, Wilhelm's conduct was derivative of and inextricably intertwined with Apple's conduct and the defective nature of its iPhone. {AA 17-18}

The Modisettes' allegations tie Apple's duty to: (1) Apple's express foreseeability of the type of dangerous use engaged in by drivers utilizing an iPhone; (2) the danger created by such compulsive/addictive use while driving at high speed; and (3) the nuanced solution invented by Apple in the '143 Patent to address the danger its product created. The express foreseeability was

defined by Apple's statements made in the '143 Patent. The Modisettes' allegations in these respects include the following:

- "Defendant APPLE, INC.'s 2008 patent application reveals that Apple expressly knew and/or should have known of the risks to human life and safety associated with, and created by, the intended or reasonably foreseeable use and misuse of certain functions available on the iPhone…(emphasis added)" {AA 20}
- "The embodiments described and Claim 1 of the '143 patent could have been configured by Defendant APPLE, INC…to allow or not allow certain applications deemed to be unsafe, or applications deemed to be necessary for the utility of the iPhone 6 Plus (emphasis added)." {AA 15}
- "As the '143 Patent states: 'Although embodiments of this invention have been fully described with reference to the accompanying drawings, it is to be noted that various changes and modifications are to be understood as being included with the scope of the embodiments of this invention as defined by the appended claims (emphasis added)." {AA 15}
- "Regarding 'Field of the Invention,' the application states: 'This relates generally to safe operation of handheld computing devices, and more particularly, to providing a lock-out mechanism to prevent operation of one or more functions of handheld computing devices by drivers *when operating vehicles*." {AA 15}

- "d. Failing to provide a safer alternative design that would have prevented or significantly reduced the risk of Plaintiffs' injuries, without substantially impairing the utility of the iPhone 6 Plus." {AA 20}
- "…no universal solution or 'built-in' method of disabling the sending or receiving of text messages, emails, video calling services, or other notification while driving had been implemented by APPLE, INC." {AA 16}
- "a. Failing to properly design the iPhone 6 Plus with a "lock-out" mechanism that is configured to "lock-out" the ability to utilize APPLE, INC.'S "FaceTime" application while driving at highway speed." {AA 20}

Apple demurred to every cause of action, arguing that Apple had no duty to warn of, or to prevent, any misuse of an inherently safe product (such as a smartphone)." {AA 55} Apple argued—contrary to the Modisettes' allegations—that Wilhelm's conduct, as opposed to any defect in the iPhone, caused the collision. {AA 65} The trial court (Hon. Theodore C. Zayner) agreed, and sustained Apple's demurrer on duty and causation without leave to amend. {AA 149}

On appeal, the court of appeal agreed with the Modisettes that "*Rowland's* foreseeability factor weighs in favor of imposing a duty of care on Apple." (Typed opn. 8.) The court of appeal (as well as Apple) recognized that iPhones induce compulsive or addictive use by drivers. (Typed opn. 17, *see also* fn 12.) The opinion also found that the "certainty that the Modisettes suffered injury, the policy of preventing future harm, and 'moral

blame'" factors also weighed in favor of imposing a duty. (Typed opn. 8.)

Despite finding that the foreseeability factor weighed in favor of imposing a duty, the court of appeal held that there was not a close connection between Apple's conduct and the Modisettes' injuries. (Typed opn. 9.) According to the opinion, Apple's design of the iPhone "simply made Wilhelm's use of the phone while driving possible" and "did not put the danger in play." (Typed opn. 10-11.) The court of appeal further opined despite accepting the Modisettes' allegations as true, that "[n]othing that Apple did induced Wilhelm's reckless driving." (Typed opn. 11.)

As to the public policy *Rowland* factor, the court held that "the 'extent of the burden to [Apple] and consequences to the community of imposing a duty to exercise care with resulting liability for breach' would be too great if a duty were recognized." (Typed opn. 8.) In so doing, the court opined that it was "not persuaded that California law imposes a duty on the manufacturer of a cell phone to design it in such a manner that a user is incapable of using it while driving." (Typed opn. 18.) The Modisettes' allegations do not allege or imply that an iPhone should be incapable of use while driving. {AA 15,16, 20}

As to causation, the court of appeal held the Modisettes' pleaded facts sufficient to establish Apple's design of the iPhone 6 Plus without appropriate safety implementations was a cause in fact of the Modisettes' injuries since it was a "necessary antecedent" of the collision. (Typed opn. 20.) However, the court found that Wilhelm, despite the Modisettes' allegations accepted as true, was the intervening and/or sole cause of the collision

"because he willingly diverted his attention from the roadway" and that Apple "did nothing more than create the condition that made Plaintiffs' injuries possible." (Typed opn. 21.) This conclusion was arrived at without taking into account and analyzing the foreseeability of Wilhelm's conduct on the part of Apple. (Typed opn. 19-23.)

The court of appeal also affirmed the trial court's decision to sustain the demurrer without leave to amend. Even though the amendment sought to allege that Apple had implemented a "lock-out" in 2017 equivalent to the "lock-out" it invented in 2008, the court of appeal opined that the implementation of similar technology did not render the connection between Apple's conduct and the Modisettes' injuries less remote, nor did it alleviate any of the court's policy concerns (i.e. burden on Apple to uphold the duty of care). (Typed opn. 24.) The court of appeal failed to consider or mention whether implementation of the "lock-out" had any effect on the burden of Apple to uphold a duty of care. (Typed opn. 24.)

LEGAL ARGUMENT

I.

Review Should be Granted Because the Court of Appeal's Opinion Misapplies California's Law On Duty under *Kesner* and Other Decisions.

Under *Kesner,* the relevant question is "whether policy exceptions weigh in favor" of creating an exception to the statutory duty of ordinary care to Apple and its iPhone. In making that determination, "the most important factors 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." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143, quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.)

As the *Kesner* court explained, "the *Rowland* factors fall into two categories. Three factors—foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevant injury, while the other four—moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (*Kesner*, at p. 1145.)

"The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated by section 1714 is whether the injury in question was foreseeable." (*Kesner*, at p. 1145.) Under *Kesner,* "the closeness of the connection between the defendant's conduct and the injury suffered is strongly related to the question of foreseeability itself." (*Kesner*, at p. 148, internal citations and quotations omitted.) "It is well established . . . that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonable foreseeable negligent conduct)

of a third person." (*Ibid,* citing *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.) The *Kesner* court explained, in clear terms, that "[i]n determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct." (*Kesner*, at p. 1148.)

Here, the court of appeal reasoned that it was "Wilhelm's conduct of utilizing FaceTime while driving at highway speed that directly placed the Modisettes in danger." (Typed opn. 11.) Regardless, Wilhelm's conduct, like the intervening conduct in *Kesner,* was "entirely foreseeable." (*Ibid.*) The Court failed to consider this foreseeability in its "closeness of connection" analysis. Such failure was erroneous.

Further, the court of appeal (as well as Apple) recognized that iPhones induce compulsive or addictive use by drivers. (Typed opn. 17, *see also* fn 12.) The danger in the design of the iPhone 6 Plus was two-fold: (1) the conditioning of users for compulsive and addictive use; and (2) the failure to provide a lock-out mechanism which engages at a threshold speed to prevent the use of overly distracting applications.[2] Instead of taking into account allegations accepted as true, the court of appeal concluded that it was not willing to assume that iPhone owners ordinarily use their phones in a dangerous manner while driving. (Typed opn. 12.) This conclusion points to no support in the record or in the peer reviewed domain.

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[2] These accepted allegations are contrary to the court of appeal's belief that Apple's design of the iPhone "simply made Wilhelm's use of the phone while driving possible. (Typed opn. 10.)

The court of appeal failed to reconcile why the risk of harm posed by the combination of Apple and Wilhelm's conduct was foreseeable, but on the other hand, why there was no logical connection between Apple and the Modisettes injuries. This failure is a clear departure from *Kesner*. Wilhelm's conduct was foreseeable, yet the court of appeal did not take this into account in analyzing the closeness of connection *Rowland* factor. This failure was erroneous.

The fact that Wilhelm's conduct was dependent upon and encouraged by the characteristics and capabilities of the iPhone, is further indication of the closeness of the connection between Apple's conduct and the harm. "An intervening third party's actions that are 'themselves derivative of defendants' conduct . . . do not diminish the closeness of the connection between defendants' conduct and the plaintiff's injury for purposes of determining the existence of a duty of care.'" (*Kesner*, at p. 1148, quoting *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573.) As alleged by the Modisettes, Wilhelm's conduct was derivative of, and thus closely connected to Apple's failure to implement a "lock-out" or other safety measure to reduce the risk of harm to the Modisettes.

Rather than follow *Kesner*, the court of appeal reasoned that the Modisettes' assertion that Wilhelm's conduct was derivative and closely connected to Apple's conduct "only highlights the attenuation between Apple's design of the iPhone and the Modisettes' injuries" and thus "significantly weakens their claim of duty on the part of Apple." (Typed opn. 11.) The opinion is clearly at odds with *Kesner*. Wilhelm's conduct was

derivative of Apple's conduct, and according to *Kesner* derivative conduct "do[es] not diminish the closeness of connection between defendants' conduct and the plaintiff's injury for purposes of determining the existence of a duty of care." (*Kesner*, at p. 1148.)

The court of appeal further failed to address the Modisettes' reliance on *Weirum,* a case in which a wrongful death judgment was affirmed against a radio broadcaster where a radio contest encouraged and awarded drivers for being the first to reach a disc jockey also driving around the area. The radio broadcaster's conduct induced reckless driving that killed the decedent. (*See, Kesner,* at 1149, citing *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40.) Because the design of the iPhone 6 Plus conditioned or induced drivers to compulsively and addictively engage in distracted driving behavior without also providing a "lock out," the Court's failure to address and reconcile this key case also constitutes error.

II.
The Court of Appeal's Opinion Is Based On Erroneous Assumptions Never Alleged By the Modisettes.

The level of distraction created for a driver by various applications of an iPhone (i.e. Facetime, Messages etc.) is not equivalent to talking on a cell phone, applying make-up, eating a cheeseburger, or "rubber necking" at an interesting sight off the roadway. iPhone based distracted driving involves a combination of manual, visual, and cognitive distraction, and "the level of impairment associated with the use of smartphones while driving is as profound and dangerous as drunk driving." {AA 8} The

court of appeal failed to acknowledge these allegations in its recitation of facts.

The court of appeal considered the NHTSA Phase 2 Guidelines, but only in a selective fashion, failing to acknowledge that NHTSA believes that portable devices, like smartphones are "the main distraction for drivers involved in crashes." {AA 9}

Further, the court of appeal did not consider that the Phase 2 Guidelines "are focused on recommending acceptance criteria for driver glance behavior where single average glances away from the forward roadway are 2 seconds or less….." {RA 54} The Phase 2 Guidelines also recommend that manufacturers such as Apple include a "Driver Mode" for smartphones that "conforms with the Phase 1 Guidelines, and in particular, locks out tasks that do not meet Phase 1 task acceptance criteria…" {RA 51-52}

The court of appeal's analysis thus fails to consider the true purpose of the Guidelines (i.e. identifying the connection between crashes and smartphone induced distraction and calling on manufacturers to address the issue). Rather than acknowledge and consider that NHTSA clearly expresses the close connection between the design of smartphones, driver distraction and crashes, the opinion erroneously assumes the iPhone (and smartphones generally) are an equivalent distraction to "a map, a radio, a hot cup of coffee, or makeup." (Typed opn. 10-11.) Based on this assumption, the opinion concludes there is no meaningful difference in the level of distraction experienced by a driver holding a cup of coffee or changing a radio station versus a driver engrossed in a Facetime video-call on her iPhone.

Further, the opinion's duty analysis related to the "public policy" and "burden on defendant" *Rowland* factors is based on

the mistaken assumption that the Modisettes claim that smartphones may never be used safely by drivers. (Typed opn. 17.) As a result, the court of appeal reasoned that since the Modisettes claim there are no safe uses while driving, the "burden on Apple" and the "consequences to the community" *Rowland* factors weighed against recognition of a duty on the part of Apple. (Typed opn. 18.)

Contrary to the court of appeal's erroneous assumption, the Modisettes specifically alleged that the iPhone 6 Plus could have been configured to "allow or not allow certain applications deemed to be unsafe, or applications to be necessary for the utility of the iPhone 6 Plus." {AA 15} The Modisettes specifically pleaded these facts because there are certain uses of the iPhone 6 Plus that *are* useful and safe even while driving (i.e. dialing 911 to report a hazard on the roadway). If the Modisettes took the position there is no utility of an iPhone while driving, summary judgment on their strict products liability claims could result on a risk/utility analysis.

NHTSA also recognizes that the iPhone can be configured to limit functionality and distraction in its Phase 2 Guidelines. The Modisettes did not attach the Phase 2 Guidelines to their complaint for the proposition that there are no safe uses of an iPhone for a driver. Rather, the Phase 2 Guidelines demonstrate that the Modisettes' allegations are consistent with NHTSA's view that there is a close connection between crashes, the design of smartphones, and distracted drivers. Because the Modisettes are not claiming there is no utility of an iPhone while driving, the opinion's public policy analysis is based on an erroneous factual assumption which then led to an erroneous result.

If the opinion would have properly analyzed the Modisettes' position to take into account the danger presented by the iPhone, the utility of the iPhone, and the ease with which the iPhone can be configured to reduce or eliminate the danger presented, it would have arrived at a different conclusion. Instead, the opinion presents a false binary presumption (i.e. full use of an iPhone or no use at all) that contradicts the Modisettes' allegations and is therefore erroneous.

III.
The Court of Appeal Erroneously Broadened the Scope of Duty Alleged by the Modisettes Resulting In an Erroneous Legal Conclusion.

The Modisettes never alleged that a user should be incapable of using a smartphone while driving." (Typed opn. 18.) The opinion erroneously inflates the limited scope of the duty alleged to be owed by Apple to this expansive duty. The Court's opinion also fails to address the "social utility of the activity concerned" (i.e. the ability to use "FaceTime" while driving) and instead creates an overly expansive activity of "cell phone use" which is not alleged by the Modisettes. (Typed opn. 16; *See, Kesner,* at p. 1150.)

According to the Modisettes' complaint, the studies recited, and Apple's '143 patent, "cell phone use" should not be conflated with smartphone use. The ultimate and erroneous conclusion reached by mis-defining the breadth of the duty owed led the Court to conclude that "the burden a contrary conclusion would place upon cell-phone manufacturers and the consequences to the community *strongly militate* toward a finding that Apple had no

duty to the Modisettes even if their injuries were foreseeable (emphasis added)." (Typed opn. 13.)

The key elements of the overly broad duty defined by the court are: (1) all cell-phone manufacturers; (2) all individuals injured by drivers; and (3) technology available to disable use of the phones . . . *such that a user is incapable of using it while driving*. This overly broad outline of a duty akin to a ban on all cell phones in vehicles, is a substantial exaggeration of the duty alleged, and not the duty Apple owed to the Modisettes.

Instead, the complaint outlines the duty owed by Apple, a smartphone manufacturer, to the Modisettes.[3] That duty included the use of "due care in the design, manufacture, and sale of its iPhone 6 Plus [a smartphone] because of the foreseeability of the very harm plaintiffs suffered. . ." {AA 19}

Apple does not manufacture simple cell phones used for just cellular voice calls. The court pointed to *Williams v. Cingular Wireless* (2004) 809 N.E.2d 473 to draw inapposite analogies to the Modisettes' allegations. In *Williams,* the Indiana Supreme Court determined that a cell phone carrier owed no duty to a person injured in a collision when a driver was talking on a cell phone and ran a red light and injured a third party. The *Williams* court observed that imposing a duty to prevent drivers from talking on their cell phones would essentially place a duty on the carrier to stop selling cellular phones. (*Williams, supra,* at p. 478.) The product at issue in the instant appeal is a smartphone. The activity involved is not talking on a cell phone,

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[3] Not to be confused with a cell-phone that is primarily used for cellular voice calls.

which requires no visual or manual distraction. The Modisettes have never claimed that "all cell phone manufacturers" owe them a duty. To define the product at issue in a products liability case in such an expansive way, misconstrues the duty beyond that which has been alleged by the Modisettes.

Further, the Modisettes' allegations tie Apple's duty to: (1) Apple's express foreseeability of the type of dangerous use engaged in by drivers utilizing an iPhone; (2) the danger created by such compulsive/addictive use while driving at high speed; and (3) the nuanced solution invented by Apple in the '143 Patent to address the danger its product created.[4] The express foreseeability was defined by Apple's statements made in the '143 Patent, many of which were alleged in the complaint and which the opinion ignores. A fair reading of the Modisettes' allegations demonstrates they do not claim the scope of the duty to be so drastic as to "disable use of the phone while the user is driving ... such that a user is incapable of using it while driving." {AA 15, 16 and 20}

The scope of duty alleged by the Modisettes is therefore tied to and takes into account the utility of the iPhone while driving versus the danger of a driver accessing overly distracting applications while driving at highway speed. The activity at issue, engaging in a FaceTime session which requires visual, manual and cognitive function, is not similar to the activity in *Williams* (talking on a cell phone). The scope of the social utility

[4] The "lock-out" mechanism identified in the '143 patent distinguishes between use by a driver and use by a passenger, allowing passengers to by-pass the "lock-out."

implicated by the Modisettes is not as drastically broad as to render a smartphone "incapable of use" while driving. The Modisettes' allegations properly defined would not impose such a heavy burden on Apple and society. The "social utility" implicated by the Modisettes' allegations is more narrow, even when viewed from a "higher level of generality". (*Kesner*, at p. 1144.) Properly framed, the court of appeal should have considered the social utility of a driver having unfettered access to overly distracting applications such as Facetime, against the backdrop of "compensatory and cost-internalization values of nelgligence liability." (*Kesner,* at p. 1150.) Or stated another way, the court should have considered the social utility of utilizing overly distracting applications while driving at highway speed, versus the burden on society and Apple in preventing such activity. Instead, the opinion applied a far more expansive scope of burden: "no use" of a smartphone while driving.

The court's opinion also ignores the Modisettes' allegation that Apple's invention was granted patent protection. No other person or company may make, use, or sell a safer alternative design that functions in an equivalent manner as that described in Apple's '143 patent. (35 U.S.C. § 1, *et seq.*; *see also, Graver Tank & Mfg. Co. v. Linde Air Prods., Inc.,* 339 U.S. 605, 608 (1950) ["if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same even though even though they differ in name, form or shape."].) The fact that every other manufacturer or application developer is discouraged by the threat of an infringement suit from developing or utilizing a "lock-out" or safer alternative design which limits functionality similar to the '143 Patent

should be considered in the Court's analysis defining the scope of the duty.

A properly defined duty, tailored to the facts of this case, the reality of smartphone induced distracted driving, intellectual property protection, and public policy could be some reasonable variation of the following: "Apple owes a duty to prevent or limit distraction of drivers by implementing a safer alternative design to prevent the use of distracting applications available while driving at highway speed." This duty is limited to Apple because of its express foreseeability and patent protection afforded the safety mechanism to prevent or limit smartphone induced distracted driving. Rather than upholding and defining the scope of Apple's duty of ordinary care, however, the court of appeal's published opinion outlines an overly expansive burden completely out of sorts with the Modisettes' allegations to carve out a categorical exception to the ordinary duty of care for all cell phone manufacturers. As a result, the exception to the general rule of duty was not "clearly supported by public policy." (*Kesner*, at p. 771.)

IV.
The Court of Appeal Committed Error in its Causation Analysis.

The court of appeal, while accepting these allegations as true, failed to properly consider them in the context of its causation analysis. The court of appeal's opinion on causation hinges only on a generalized allegation that Apple failed to utilize its lock-out technology. (Typed opn. 20.) It wholly failed to consider the conduct of Apple, the design of its iPhone to

condition drivers to use the iPhone 6 Plus compulsively and addictively, and the foreseeability of Wilhelm's conduct. (*Id.*) Instead, the court of appeal concluded that the lack of "lock-out" technology was a mere "necessary antecedent" to the collision, and that Wilhelm was the intervening and/or sole cause of the collision. (*Id.*)

Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. However, where the facts are such that "the *only* reasonable conclusion is an absence of causation, the question is one of law, not of fact (emphasis added)." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 353.) If the full range of Apple's conduct as alleged and accepted as true is actually considered, a jury could reasonably conclude that Apple's conduct was aa proximate cause of the Modisette's injuries, thus making it a question of fact for a jury. Because the opinion fails to consider or account for allegations it accepted as true (e.g., compulsive and addictive use; and the foreseeability of Wilhelm's conduct) in its causation analysis, the court of appeal undertook its causation analysis without demonstrating that the "*only* reasonable conclusion is an absence of causation." (*State Hospitals*, 61 Cal.4th at p. 353.) Thus, the court of appeal over-stepped its limited role to determine causation in the procedural setting of a demurrer.

The court relied heavily on cases from other jurisdictions with inapposite facts and/or different thresholds for determining causation to arrive at the conclusion the "injuries were not a result of Apple's conduct, [r]ather, Wilhelm caused the Modisettes' injuries when he crashed into their car while he

willingly diverted his attention from the roadway." (Typed opn. 21-22.) This conclusion does not take into account the foreseeability of Wilhelm's conduct and Apple's conditioning of Wilhelm to engage in this conduct. In other words, the court of appeal failed to consider the full range of facts that indicate there should be consequences for Apple's conduct. (*State Hospitals,* 61 Cal.4th at p. 353.)

The combination of Apple's conduct and Wilhelm's conduct, as a matter of cause in fact is not "conjectural" nor does it "depend on a long series of determinations that would have been required. . . in order for the injuries to have been prevented." (*State Hospitals, supra,* 61 Cal.4th 339, at p. 357.) For purposes of its duty analysis, the court of appeal concluded Wilhelm's conduct was foreseeable to Apple. (Typed opn. 14.) Yet, it wholly failed to reconcile how foreseeably induced conduct on the one hand, created an untenable gap between Apple and the Modisettes' injuries on the other hand when viewed through the lens of proximate cause. (Typed opn. 23.) Under California law, foreseeability is taken into account in the proximate cause inquiry. (*Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 69, citing *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 779 ["the question of the closeness of the connection between the defendant's conduct and the injury suffered is strongly related to the question of foreseeability itself."].) With respect to causation, the opinion does not conclude that Wilhelm's use of the iPhone while driving was unforeseeable. (Typed opn. 23.) More importantly, it fails to "account" for the foreseeability of Wilhelm's conduct in its proximate cause analysis and is therefore erroneous.

Finally, the court of appeal accepted as true the Modisettes' assertion that Wilhelm's conduct was derivative of Apple's conduct for purposes of discussing duty, but wholly failed to account for the Modisettes' allegation of Wilhelm's derivative conduct with respect to proximate cause. (Typed opn. 21-22, (the "injuries were not a result of Apple's conduct, [r]ather, Wilhelm caused the Modisettes' injuries when he crashed into their car while he willingly diverted his attention from the roadway").) Because of Wilhelm's conduct, the court of appeal determined the "gap between Apple's design of the iPhone and the Modisettes' injuries is too great for the tort system to hold Apple responsible." (Typed opn. 21, 23.) Yet, it arrived at this conclusion without any consideration of the derivative nature of Wilhelm's conduct to the conduct of Apple and its iPhone 6 Plus. In light of California law as to derivative conduct and the facts alleged by the Modisettes, the failure to consider the derivative nature of Wilhelm's conduct to Apple's conduct (and its iPhone 6 Plus) in the context of proximate cause was also erroneous.

V.
The "Do Not Disturb While Driving" Functionality Implemented by Apple Is Relevant.

The court of appeal affirmed the trial court's denial of leave to amend the complaint to assert allegations related to Apple's implementation of a "lock-out" in 2017 - "Do Not Disturb While Driving" ("DND"). The opinion reasoned that Apple's implementation of the "lock out" is not relevant to duty or causation because "implementation of similar technology does not

render the connection between Apple's conduct and the Modisettes' injuries less remote, nor does it alleviate any of the policy concerns addressed above." (Typed opn. 24.) This conclusion is erroneous.

The allegation that Apple has implemented technology to limit the danger presented by its iPhone is relevant to the "burden on defendant" *Rowland* factor. If Apple has actually implemented (partially or fully) a design to prevent or limit smartphone induced distracted driving, then Apple's burden to uphold the duty of ordinary care is obviously lessened. In affirming the denial of leave to amend, and analyzing the burden on Apple to "uphold the duty of ordinary care," the court of appeal completely failed to consider this crucial fact. An amendment that included the allegation related to DND would certainly have a material affect on a properly considered duty analysis under *Kesner*.

CONCLUSION

The product at issue and the causes of action asserted related to that product present a case of first impression in California courts. The Modisettes aver, however, that the same common law and statutory theories of liability that have for decades governed California tort law should be applied, and if appropriately applied, duty and causation should be found on the alleged facts for purposes of stating a cause of action.

The iPhone, a device which in numerous respects has altered the way humankind lives, behaves and thinks, cannot be equated to a cheeseburger, a tube of lipstick, or even an ordinary cell phone. The Modisettes urge this Court to review the court of

appeal's *Rowland* and causation analyses, the erroneous assumptions upon which its published opinion is based, the expansive misconstruction of the duty alleged by the Modisettes which led to an erroneous public policy analysis, the failure to consider foreseeability in the context of proximate cause, the failure to consider Wilhelm's derivative conduct in the context of proximate cause and the determination that "Do Not Disturb While Driving" is not relevant to the Modisettes' allegations.

Apple and the body of studies observing smartphone induced distracted driving recognize that law enforcement aimed at drivers will likely not be enough to effectively limit or prevent distracted driving. Civil liability for the product that is a cause and conduit of a dangerous risk of harm is the purpose of our tort system. This case therefore presents important legal issues for not only this particular case, but for the safety of everyone using California's highways and roads.

Respectfully submitted,

LOVE LAW FIRM
Gregory P. Love

MARTIN WALKER PC
John F. (Jack) Walker, III

SIMON GREENSTONE PANATIER, P.C.
Lisa M. Barley

Attorneys for Petitioners
BETHANY MODISETTE et al.

WORD COUNT CERTIFICATION [CRC 14(c)(1)]

Counsel for the Modisettes hereby certify that this brief contains 8197 words as measured by Microsoft Office Word version 16.20 word processing software.

Respectfully submitted,
SIMON GREENSTONE PANATIER, P.C.
Lisa M. Barley

/s/ Lisa M. Barley

Attorneys for Petitioners
BETHANY MODISETTE et al.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 3780 Kilroy Airport Way, Suite 540, Long Beach, California 90806. I served the following document today described as **PETITION FOR REVIEW** on the interested parties in this action by preparing true copies and delivering them as follows:

Eric H. Findlay
FINDLAY CRAFT, P.C.
102 N. College Ave., Suite 900
Tyler, Texas 75702
(electronic copy via TrueFile)

Hon. Theodore C. Zayner
Santa Clara Superior Court
191 N. First Street
San Jose, California 95113
(hard copy – via U.S. Mail)

Theodore J. Boutrous, Jr.
Christopher Chorba
GIBSON, DUNN & CRUTCHER LLP
33 South Grand Avenue
Los Angeles, California 90071-3197
(electronic copy via TrueFile)

I am familiar with the firm's practices for collection and processing of documents for mailing and/or electronic service. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 23, 2019, at Long Beach, California.

/s/ Lisa M. Barley

Lisa M. Barley

OPINION

Filed 12/14/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BETHANY MODISETTE et al., Plaintiffs and Appellants, v. APPLE INC., Defendant and Respondent.	H044811 (Santa Clara County Super. Ct. No. 16CV304364)

Bethany and James Modisette, along with their daughter Isabella, sued Apple Inc. after they were seriously injured, and their daughter Moriah was killed, when a driver using the FaceTime application on his iPhone crashed into their car on a Texas highway. The trial court sustained Apple's demurrer to the Modisettes' first amended complaint and dismissed the action. The Modisettes appeal from the judgment.

We determine that the trial court properly sustained the demurrer without leave to amend. Regarding the Modisettes' negligence claims, we conclude that Apple did not owe the Modisettes a duty of care. We also determine that the Modisettes cannot establish that Apple's design of the iPhone constituted a proximate cause of the injuries they suffered, a necessary element of their remaining claims. Accordingly, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 2014, Bethany, James, Isabella, and Moriah Modisette were traveling in their family car on Interstate 35W in Denton County, Texas.[1] Garrett

Wilhelm was also driving on the interstate, and, while driving, was using the FaceTime application on his Apple iPhone 6 Plus. Traveling at highway speed, Wilhelm crashed into the Modisettes' car, which had stopped due to police activity. The accident caused severe physical and emotional injuries to each of the Modisettes, and Moriah, aged five, subsequently died at the hospital. Wilhelm told the police that he was using FaceTime at the time of the crash. Police found Wilhelm's iPhone at the scene with FaceTime still activated.

The Modisettes sued Apple Inc., which has its principal place of business in Santa Clara County. The first amended complaint alleged causes of action for general and gross negligence, negligent and strict products liability, negligent and intentional infliction of emotional distress, loss of consortium, and public nuisance. The Modisettes alleged that the car accident "occurred . . . when a driver, distracted while using the 'FaceTime' application on an Apple iPhone 6 Plus during operation of his motor vehicle, collided at highway speed with [their] stationary motor vehicle and caused severe physical and emotional injuries to [them]," and that Apple's failure to design the iPhone "to 'lock out' the ability of drivers to utilize the 'FaceTime' application on the Apple iPhone while driving a motor vehicle, . . . resulted in the[ir] injuries." The complaint incorporated by reference the "body of studies and data that demonstrate the compulsive/addictive nature of smartphone use."

The Modisettes alleged that Apple had wrongfully failed to implement in the iPhone 6 Plus a safer alternative design that would have automatically prevented drivers from utilizing FaceTime while driving at highway speed (lockout technology). The Modisettes also alleged that Apple had failed to warn users that the iPhone "was likely to be dangerous when used or misused in a reasonably foreseeable manner." The Modisettes alleged that Apple "had a legal duty to . . . use due care in the design,

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[1] The facts are taken from the first amended complaint.

manufacture, and sale of its iPhone 6 Plus" and that Apple had "breached that duty by failing to use reasonable care to design and manufacture [the phone] with the safer, alternative 'lock-out' technology it had already developed to prevent the use of its pre-installed 'FaceTime' application during a driver's operation of a motor vehicle."

According to the first amended complaint, Apple applied for a patent for its lockout technology in December 2008. The patent application stated that the technology was designed to " 'disable the ability of a handheld computing device to perform certain functions, such as texting, while one is driving.' " (Italics omitted.) The patent for the lockout technology was issued to Apple in April 2014. Apple released the iPhone 6 Plus on September 9, 2014. FaceTime was a "factory-installed, non-optional application[] on the iPhone 6 Plus."

The Modisettes alleged that Apple knew or should have known of the risks caused by the use of the iPhone while driving and quoted portions of Apple's 2008 patent application for the lockout technology. For example, the first amended complaint alleged that Apple stated in the application that " '[t]exting while driving has become a major concern . . . . An April 2006 study found that 80 percent of auto accidents are caused by distractions such as applying makeup, eating, and text messaging on handheld computing devices.' " Attached as an exhibit to the first amended complaint was a notice of proposed federal guidelines by the National Highway Traffic Safety Administration issued on November 21, 2016. The proposed federal guidelines stated that driver "distractions can come from electronic devices, such as navigation systems and cell/smartphones, and from more conventional activities, such as viewing sights or events external to the vehicle, interacting with passengers, and/or eating." The proposed federal guidelines included statistics on the prevalence of accidents in the United States involving distracted drivers from 2007-2014. For example, in 2013, there were 71,000 "distraction-affected non-fatal crashes involving the use of a cell phone," which constituted 8 percent of all distraction-affected non-fatal crashes and resulted in 34,000

people injured. That same year, there were 411 "distraction-affected fatal crashes involving the use of a cell phone," which constituted 14 percent of fatal "distraction-affected crashes" and resulted in 455 fatalities. The proposed federal guidelines made recommendations to "reduce the potential for unsafe driver distraction" from electronic devices, but acknowledged that "it remains the driver's responsibility to ensure the safe operation of the vehicle and to comply with all state traffic laws. This includes, but is not limited to laws that ban texting and/or use of hand-held devices while driving."

The trial court sustained Apple's demurrer to the first amended complaint without leave to amend and dismissed the action on May 8, 2017. The court found that "each cause of action . . . fails, as a matter of law, to establish either the element of duty or of causation." The Modisettes timely appealed.

II. DISCUSSION

The Modisettes contend that the trial court erroneously found Apple did not owe them a duty of care, asserting that the risk created by Apple's failure to implement the lockout technology was foreseeable and unreasonable. The Modisettes also argue that the trial court inappropriately decided causation on demurrer, asserting that Apple's conduct and the resulting defect in Wilhelm's phone combined with Wilhelm's conduct to cause the collision. The Modisettes seek to amend their complaint by adding allegations that Apple recently implemented a design change that allows iPhone users to block notifications while driving.

We conclude that the Modisettes' claims for general and gross negligence, negligent products liability, negligent infliction of emotional distress, and public nuisance fail because Apple did not owe the Modisettes a duty of care. We base this determination on two considerations: first, the tenuous connection between the Modisettes' injuries and Apple's design of the iPhone 6 Plus without lockout technology; and, second, the burden to Apple and corresponding consequences to the community that would flow from such a duty. We also determine that the Modisettes' claims for strict products liability,

intentional infliction of emotional distress, and loss of consortium fail for lack of proximate cause.[2] Accordingly, we affirm the judgment.

A. *Standard of Review*

"We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law." (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1190 (*Thompson*).) "Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. Accordingly, we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law."[3] (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 (*Moore*), internal citations omitted.) "We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory." (*Thompson*, *supra*, at p. 1190, internal citation and quotation marks omitted; see also *Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

B. *Duty of Care*

"A plaintiff in any negligence suit must demonstrate a legal duty to use due care, a breach of such legal duty, and [that] the breach [is] the proximate or legal cause of the resulting injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1142 (*Kesner*),

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[2] The first amended complaint included failure to warn allegations in its negligence and product liability claims. The Modisettes do not appear to contest the trial court's dismissal of the failure to warn aspect of their claims as they do not raise the issue here by providing either analysis or argument. (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) Thus, any appellate claim the Modisettes may have had arising from the failure to warn allegations has been forfeited. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793, fn. 2.)

[3] We also accept facts appearing in exhibits to the complaint as true "and, if contrary to the allegations in the pleading, . . . give[] [them] precedence." (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 191.)

internal quotation marks omitted.) Duty is an essential element of the Modisettes' claims against Apple for general and gross negligence, negligent products liability, negligent infliction of emotional distress, and public nuisance. (See *Ibid.* [negligence]; *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640 [gross negligence]; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477-479 (*Merrill*) [negligent products liability]; *Moon v. Guardian Postacute Services, Inc.* (2002) 95 Cal.App.4th 1005, 1009 [negligent infliction of emotional distress]; *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988 [public nuisance].) "[T]he existence of duty is a pure question of law." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 363 (*O'Neil*).)

"California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others. (Civ. Code, § 1714, subd. (a).)"[4] (*Kesner*, *supra*, 1 Cal.5th at p. 1142, internal quotation marks omitted.) However, "[c]ourts . . . invoke[ ] the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act . . . . The conclusion that a defendant did not have a duty constitutes a determination by the court that public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result." (*Kesner*, *supra*, at p. 1143, internal citations and quotation marks omitted.) "[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where clearly supported by public policy." (*Ibid.*, internal quotation marks omitted.) Court-crafted exceptions to the duty rule are appropriate "when a court can promulgate relatively clear, categorical, bright-line

[4] Civil Code section 1714, subdivision (a) provides in relevant part: "Everyone is responsible, not only for the result of his or her willful acts, but also 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, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

rules of law applicable to a general class of cases." (*Id*. at pp. 1143-1144, internal quotation marks omitted.) Whether a duty exists does not depend on the facts of a particular case; instead, "analysis of duty occurs at a higher level of generality." (*Id.* at p. 1144.)

In *Rowland v. Christian*, the California Supreme Court articulated the factors to be considered when determining whether public policy supports the creation of an exception to the statutory presumption of duty set forth in Civil Code section 1714.[5] (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113 (*Rowland*).) The central factors identified by *Rowland* 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." (*Id.* at p. 113.)

The Modisettes alleged that Apple knew or should have known of the risk of harm created by the use of an iPhone while driving and supported that allegation by quoting portions of Apple's 2008 patent application for its lockout technology. The patent application stated that " '[t]exting while driving has become a major concern,' " and noted that " '[a]n April 2006 study found that 80 percent of auto accidents are caused by distractions such as applying makeup, eating, and text messaging on handheld computing devices.' " The proposed federal guidelines attached as an exhibit to the first amended complaint included statistics about the prevalence of "distraction-affected crashes" involving the use of a cell phone that occurred in the United States from 2007-2014.

Accepting the Modisettes' non-conclusory allegations as true, we determine that *Rowland*'s foreseeability factor weighs in favor of imposing a duty of care on Apple

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[5] All further statutory references are to the Civil Code unless otherwise indicated.

because "the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced . . . ." (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.) However, even if it were foreseeable that cell-phone use by drivers would result in accidents, "foreseeability is not synonymous with duty; nor is it a substitute." (*O'Neil*, *supra*, 53 Cal.4th at p. 364.) "[T]here are numerous circumstances . . . in which a given injury may be 'foreseeable' in the fact-specific sense in which we allow juries to consider that question, but . . . the 'foreseeability' examination called for under a duty analysis pursuant to [*Rowland*] is a very different normative inquiry." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476 (*Parsons*).) As explained further below, we ultimately conclude that this normative inquiry supports finding an exception to the default duty of care set out in section 1714.

We agree with the Modisettes that some of the other *Rowland* factors also weigh in favor of finding a duty on the part of Apple,[6] including the certainty that the Modisettes suffered injury,[7] the policy of preventing future harm, and "moral blame."[8]

Nevertheless, the remaining *Rowland* factors weigh more strongly against a finding of duty. In particular, we conclude, first, that there was not a "close" connection between Apple's conduct and the Modisettes' injuries and, second, that "the extent of the burden to [Apple] and consequences to the community of imposing a duty to exercise

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[6] Neither party discusses the prevalence of insurance in this context nor is insurance referenced in the first amended complaint. For this reason, we do not incorporate this consideration in our analysis.

[7] The certainty of injury factor "has been noted primarily, if not exclusively, when the only claimed injury is an intangible harm such as emotional distress." (*Kesner supra*, 1 Cal.5th at p. 1148, internal quotation marks omitted.) As the Modisettes' claims concern potential injuries suffered in car accidents, and in light of the severe injuries they actually suffered in this case, their injuries are certain and compensable.

[8] Courts have relied on moral blame to find a duty "in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue." (*Kesner*, *supra*, 1 Cal.5th at p. 1151.)

care with resulting liability for breach" would be too great if a duty were recognized. (*Rowland*, *supra*, 69 Cal.2d at p. 113.)

Turning to the *Rowland* factor examining "the closeness of the connection between the defendant's conduct and the injury suffered" (*Kesner*, *supra*, 1 Cal.5th at p. 1148, internal quotation marks omitted), we agree with the Modisettes that the involvement of a third party (the driver Wilhelm) in the accident does not, standing alone, preclude a duty of care on the part of Apple. "[O]ne's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person." (*Ibid*., internal quotation marks omitted) However, we find unpersuasive the Modisettes' contention that case law examining third-party conduct supports such a duty here given the tenuous connection between Apple's design of the iPhone and the Modisettes' injuries.

In cases where courts have found a sufficiently close connection to warrant the recognition of a duty of care notwithstanding the involvement of a third party, the relationship between the defendant's actions and the resulting harm was much more direct. For example, in *Kesner*, *supra*, 1 Cal.5th at page 1141, the plaintiffs were family members and current or former cohabitants of workers exposed to asbestos at defendants' workplaces. The plaintiffs contracted cancer from their exposure to asbestos particles that were carried home on the workers' clothing and other possessions. (*Ibid.*) The court found that the defendants' "failure to control the movement of asbestos fibers" and to "mitigate known risks associated with the use of asbestos" created a foreseeable risk of harm to plaintiffs and that there was a close connection between the defendants' conduct and the harm. (*Id.* at pp. 1145-1146, 1148-1149.) "An employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace." (*Id.* at p. 1148.)

However, the court recognized the limits of the duty owed. The court held that the employers' duty extended "only to members of a worker's household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time." (*Id.* at p. 1154.) The court, by contrast, found no duty by the employers toward others who may have come into contact with employees carrying asbestos fibers on their person. (*Id.* at p. 1155.)

In *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 708, a police officer motioned a speeding motorist to stop in the center median of a highway. The passengers in the stopped car were then seriously injured when the vehicle was hit by a third party. (*Id.* at p. 709.) The court held that "a law enforcement officer, in directing a traffic violator to stop in a particular location, has a legal duty to use reasonable care for the safety of the persons in the stopped vehicle and to exercise his or her authority in a manner that does not expose such persons to an unreasonable risk of harm." (*Id.* at p. 707.) The court emphasized that the negligence claim was based on the particular conduct of the officer: "[The officer's] affirmative conduct itself, in directing [the driver] to stop the Camry in the center median of the freeway, placed plaintiffs in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed." (*Id.* at pp. 716-717.)

In both of those cases, the defendants' conduct, whether it was the unsafe use of asbestos in *Kesner* or the stopping of a motorist in the center median in *Lugtu*, directly put the plaintiffs in danger; the plaintiffs' harm was closely tied to the defendants' actions. Apple's design of the iPhone, in contrast, simply made Wilhelm's use of the phone while driving possible, as does the creator of any product (such as a map, a radio, a hot cup of coffee, or makeup) that could foreseeably distract a driver using the product while driving.

Unlike the conduct in *Kesner* and *Lugtu*, Apple's design of the iPhone did not put the danger in play. The Modisettes' assertion in their opening brief that "Wilhelm's role

and conduct as a distracted driver is derivative of, and thus closely connected to, Apple's failure to take appropriate steps to at least limit the ability of its iPhone to create and enable such distractions" only highlights the attenuation between Apple's design of the iPhone and the Modisettes' injuries. This attenuation significantly weakens their claim of duty on the part of Apple. (See *Wawanesa Mut. Ins. Co. v. Matlock* (1997) 60 Cal.App.4th 583, 588-589 (*Matlock*) ["the concatenation between [defendant's] initial act of giving [minor] a packet of cigarettes and the later fire is simply too attenuated to show the fire was reasonably within the scope of the risk created by the initial act"].)

For the Modisettes to be injured, they had to stop on a highway due to police activity; Wilhelm had to choose to use his iPhone while driving in a manner that caused him to fail to see that the Modisettes had stopped; and Wilhelm had to hit the Modisettes' car with his car, an object heavy enough to cause the Modisettes' severe injuries. It was Wilhelm's conduct of utilizing FaceTime while driving at highway speed that directly placed the Modisettes in danger. Nothing that Apple did induced Wilhelm's reckless driving.[9]

The Modisettes employ the principles articulated in *Kesner* to try to demonstrate a sufficiently close connection between Apple's conduct and their harm, arguing that "[i]t is of no legal consequence that it was [a third party] who collided with [them]." The Modisettes highlight *Kesner*'s characterization of "the gravamen of plaintiffs' claims" there as the "defendants[']fail[ure] to mitigate known risks associated with the use of asbestos," and quote the court's determinations that "[i]ncreased risk of mesothelioma is a characteristic harm that makes the use of asbestos-containing materials unreasonably

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[9] The first amended complaint includes allegations regarding teenagers' use of cell phones while driving and references a number of studies involving smartphone addiction among young adults and young drivers. The first amended complaint does not include Wilhelm's age at the time of the crash. Thus, we conclude that these allegations are not relevant to our analysis. Even if the complaint did allege Wilhelm's age, the allegations would not change our duty analysis. (See e.g., *Matlock*, *supra*, 60 Cal.App.4th at p. 589.)

dangerous in the absence of protective measures" and that "[a]n employee's return home at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior" (*Kesner*, *supra*, 1 Cal.5th at p. 1149), to draw an analogy here. However, it was the defendants' own use of asbestos in *Kesner* that created the risk of harm (*id.* at p. 1140), which is necessarily a closer connection between conduct and harm than Apple's design of the iPhone and the Modisettes' injuries (see *Bailey v. Estate of Carroll Jett* (W.D.N.C., Jan. 31, 2011, Civ. No. 1:110cv144) 2011 WL 336133, *4 ["simply placing a product in the stream of commerce, without more, is insufficient to create a legal duty on the part of a seller"]).[10] Nor are we willing to make "a baseline assumption" that iPhone owners will ordinarily use their phones in a dangerous manner while driving. (*Kesner*, *supra*, at p. 1149; see *Estate of Doyle v. Sprint/Nextel Corporation* (2010) 248 P.3d 947, 951 ["It is not reasonable to anticipate injury every time a person uses a cellular phone while driving."].)

Lompoc Unified School Dist. v. Superior Court (1993) 20 Cal.App.4th 1688 (*Lompoc Unified*) is instructive. There, the plaintiff bicycle rider was injured by a motorist who struck him when she became distracted by athletic events occurring on property bordering the roadway, and the plaintiff sued the landowner. (*Id.* at p. 1691.) The court disagreed with the plaintiff's contention that an occupier of real property owed a duty of care not to conduct activities that would distract passing motorists. (*Id.* at p. 1694.) "[T]he occupier has no liability for injuries caused by the motorist who is not paying attention to where he or she is going. Rather, it is the motorist who has the duty to exercise reasonable care at all times, to be alert to potential dangers, and to not permit his or her attention to be so distracted by an interesting sight that such would interfere with the safe operation of a motor vehicle." (*Ibid.*)

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[10] The California Rules of Court do not restrict citation to unpublished federal opinions. (See Cal. Rules of Court, rule 8.1115; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18.)

The Modisettes argue that *Lompoc Unified* is distinguishable because it was based on a limitation to a property occupier's "duty to exercise ordinary care in the use and management of his or her land," which does not "[n]ormally . . . extend to persons outside the land, e.g., on adjacent land or on the highway." (*Lompoc Unified*, *supra*, 20 Cal.App.4th at p. 1693.) While we agree that *Lompoc Unified* recognized that limitation, its holding was premised on case law from other jurisdictions determining that "an occupier has no legal duty to provide a distraction barrier to prevent passing motorists from seeing or hearing what is occurring upon the land" because it is the motorist's "duty to exercise reasonable care at all times . . . ." (*Id.* at p. 1694.) *Lompoc Unified* "adopt[ed] these holdings as the rule in California." (*Ibid.*)

In addition to concluding that the connection between the Modisettes' injuries and Apple's design of the iPhone weighs against a duty of care on the part of Apple, we determine that the burden a contrary conclusion would place upon cell-phone manufacturers and the consequences to the community strongly militate toward finding that Apple had no duty to the Modisettes even if their injuries were foreseeable. "A duty of care will not be held to exist even as to foreseeable injuries . . . where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability." (*Kesner*, *supra*, 1 Cal.5th at p. 1150, internal quotation marks omitted.) A foreseeable harm does not " 'standing alone'[ ] impose . . . a duty to guard against injuries to [a] plaintiff." (*Parsons*, *supra*, 15 Cal.4th at p. 476.) "As we have observed, social policy must at some point intervene to delimit liability even for foreseeable injury." (*Ibid.*, internal quotation marks omitted.)

A court will craft an exception to the duty of care even for foreseeable harms if "allowing the possibility of liability would result in such significant social burdens that the law should not recognize such claims." (*Kesner*, *supra*, 1 Cal.5th at p. 1144.) "[A]ny duty rule will necessarily exclude some individuals who, as a causal matter, were harmed

by the conduct of potential defendants." (*Id.* at p. 1155.) Although we determine based on the allegations in the first amended complaint that it was foreseeable that Apple's design of the iPhone 6 Plus without the lockout technology could result in a car accident, we conclude that strong public policy considerations dictate against recognizing a duty of care.

Whether cell-phone manufacturers have a duty to design cell phones in a manner that applications like FaceTime cannot be accessed while users are driving appears to be an issue of first impression in California, but courts in other jurisdictions facing similar issues have determined there to be no duty of care. For example, in *Williams v. Cingular Wireless* (2004) 809 N.E.2d 473, 475, 478, which involved a negligence suit against a company that furnished a cell phone to a driver who was using the phone when a collision occurred, the court determined that it would "not make sound public policy to impose a duty" even though cell-phone use by a driver has "some degree of foreseeability . . . ." The court explained that although "[i]t is foreseeable to some extent that there will be drivers who eat, apply make up, or look at a map while driving and that some of those drivers will be involved in car accidents because of the resulting distraction . . . , it would be unreasonable to find it sound public policy to impose a duty on the restaurant or cosmetic manufacturer or map designer to prevent such accidents. It is the driver's responsibility to drive with due care." (*Id.* at p. 478.) The court observed that "[t]o place a duty on [the seller] to stop selling cellular phones because they might be involved in a car accident would be akin to making a car manufacturer stop selling otherwise safe cars because the car might be negligently used in such a way that it causes an accident." (*Ibid.*; see also *Durkee v. C.H. Robinson Worldwide, Inc.* (2011) 765 F.Supp.2d 742, 749 [declining to find in-truck texting-system manufacturer had duty to design system to block texts unless truck was stopped, in part because "no product that would potentially distract a driver could be marketed"].)

In addition to cases from other jurisdictions, we look to public policy in California, as articulated in legislation and similar statements of public policy. While courts have reasoned that "internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer," they have also recognized "[t]hat [such a] consideration may be outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct . . . ." (*Kesner*, *supra*, 1 Cal.5th at p. 1150.) In *Kesner*, the Supreme Court's finding of duty on the part of employers to cohabitants of individuals who had suffered longtime, repeated exposure to asbestos relied in part upon "a strong public policy limiting or forbidding the use of asbestos." (*Id.* at p. 1151.)

The legal landscape with respect to the use of cell phones is distinctly different. "There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." (*Carpenter v. U.S.* (2018) __ U.S. __ [138 S.Ct. 2206, 2211, 201 L.Ed.2d 507] (*Carpenter*).) The United States Supreme Court has described cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." (*Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2484, 189 L.Ed.2d 430].) It is not only foreseeable that millions of people will have their cell phones in their cars—it is almost a certainty. "[N]early three-quarters of smart phone users report being within five feet of their phones most of the time"; "[i]ndividuals . . . compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." (*Carpenter*, *supra*, 138 S.Ct. at p. 2218, internal citation and quotation marks omitted.)

With respect to the use of cell phones while driving, the Legislature has elected not to ban all cell-phone use by drivers in California, choosing to allow cell-phone use while driving that is "voice-operated" and "hands-free." (Veh. Code, §§ 23123, subd.

(a), 23123.5, subd. (a).) It has also permitted drivers to use non-voice-operated, non-hands-free cell phones "for emergency purposes" (Veh. Code, § 23123, subd. (c)), and to use them when the phone "is mounted on a vehicle's windshield . . . or . . . a vehicle's dashboard" and the driver can "activate or deactivate a feature or function" of the phone "with the motion of a single swipe or tap of the driver's finger" (Veh. Code, § 23123.5, subd. (c)(1)-(2); see also *id.* at subd. (b) [exempting "manufacturer-installed systems . . . embedded in the vehicle"]).[11] California statutes, therefore, indicate the Legislature's approval of certain cell-phone use by drivers and its seeming recognition that "[c]ellular phones are safely used in many different contexts every day. Indeed, many drivers use cellular phones safely for personal and business calls, as well as to report traffic emergencies. Encouraging drivers to report accidents, dangerous road conditions, or other similar threats to authorities on their cellular phones is in the public's interest." (*Williams*, *supra*, 809 N.E.2d at p. 479.)

These expressions of public policy are significant because the proper focus for "duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care." (*Kesner*, *supra*, 1 Cal.5th at p. 1152.) "[W]hen addressing conduct on the part of a defendant that is 'deliberative, and . . . undertaken to promote a chosen goal, . . . [c]hief among the factors which must be considered is the social value of the interest which the actor is seeking to advance.' " (*Parsons*, *supra*, 15 Cal.4th at p. 473, italics omitted.) The Modisettes' complaint alleges a duty that, at its core, may preclude cellular-phone manufacturers from allowing the use of phones while driving, notwithstanding California law that expressly permits such uses under certain circumstances.

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[11] Texas laws are even more permissive. (See Tex. Transportation Code, §§ 545.425, 545.4251.)

The Modisettes urge us to distinguish smartphones like the iPhone from other products that motorists may use while driving based upon the "body of studies and data that demonstrative the compulsive/addictive nature of smartphone use." Even accepting this contention as true, it does not persuade us.[12] All of the studies cited by the Modisettes in their complaint were published prior to or in 2016. In 2016, the California Legislature added a provision to the Vehicle Code that allows a driver to "activate or deactivate a feature or function of the handheld wireless telephone or wireless communications device with the motion of a single swipe or tap of the driver's finger" while the "driver is operating the vehicle." (Vehicle Code, § 23123.5, subd. (c)(2), added by Stats. 2016, ch. 660, § 2.) By referencing a "swipe or tap" (*ibid.*), the statute implicitly approves accessing smartphones while driving under some circumstances.[13] The Modisettes' complaint does not allege that Apple designed the iPhone to be particularly addictive to drivers compared to other smartphones, and the Legislature has rejected the Modisettes' implicit argument that smartphones may never be used safely by drivers.

The facts and documents cited by the Modisettes about "distracted driving" confirm how broadly they construe the scope of the duty owed to them by Apple.

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[12] At oral argument, Apple stated that, given the procedural posture of this case, we should accept as true the contention that smartphones are addictive. Absent this concession, we may have considered the Modisettes' contention that "[a]n iPhone operates on a Variable Ratio Schedule of Reinforcement, similar to a slot machine," to fall within the category of "contentions, deductions, or conclusions of fact or law" that we do not accept as true for review of an order sustaining a demurrer. (*Moore*, *supra*, 51 Cal.3d at p. 125.)

[13] The statute also requires that "[t]he handheld wireless telephone or electronic wireless communications device is mounted on a vehicle's windshield in the same manner a portable Global Positioning System (GPS) is mounted pursuant to paragraph (12) of subdivision (b) of Section 26708 or is mounted on or affixed to a vehicle's dashboard or center console in a manner that does not hinder the driver's view of the road." (Veh. Code, § 23123.5, subd. (c)(1).)

Essentially, the Modisettes argue that cell-phone manufacturers owe a duty to all individuals injured by drivers who were distracted by using the phones while driving if the cell-phone manufacturer had available the technology to disable use of the phone while the user is driving. Notwithstanding the broad brush of section 1714, we are not persuaded that California law imposes a duty on the manufacturer of a cell phone to design it in such a manner that a user is incapable of using it while driving. Given the complex public policy considerations involved in such a calculus, and the potentially sweeping implications of finding a duty by Apple here, we conclude that policy considerations dictate finding as a matter of law an exception to the general duty of care. We also observe that our conclusion constitutes a clear, bright-line rule applicable to a general class of cases that the Supreme Court has described as appropriate for a court-created exception to the general duty of care. (*Kesner*, *supra*, 1 Cal.5th at p. 1144.)

The facts in this case are tragic. We have great sympathy for the Modisettes, who suffered severe injuries through no apparent fault of their own. Nevertheless, for the reasons stated above, we conclude that Apple owed no duty of care to the Modisettes to design the iPhone 6 Plus with lockout technology. The trial court properly sustained Apple's demurrer to the negligence-based claims for the injuries the Modisettes suffered in the car accident with Wilhelm.

C. *Proximate Causation*

The Modisettes' claims against Apple for strict products liability, intentional infliction of emotional distress, and loss of consortium do not require a showing that Apple owed the Modisettes a duty of care, but they do contain the necessary element of causation. (See *Merrill*, *supra*, 26 Cal.4th at p. 479 [strict products liability]; *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050 [intentional infliction of emotional distress]; *LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 284-285 [loss of consortium].) We conclude that the tenuous connection between Apple's conduct and the Modisettes' injuries bars a finding of proximate causation.

"Traditionally, the law has asked whether defendant's conduct was the 'proximate' cause of injury." (*Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1847.) "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. . . . Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 353 (*State Hospitals*), internal quotation marks omitted.)

"[P]roximate cause has two aspects. One is cause in fact. An act is a cause in fact if it is a necessary antecedent of an event. This is sometimes referred to as but-for causation." (*State Hospitals*, *supra*, 61 Cal.4th at p. 352, citation and internal quotation marks omitted.) To establish but-for causation, the plaintiff must "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of [plaintiff's harm]."[14] (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1243 (*Viner*), internal quotation marks omitted.)

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[14] The parties argue whether Apple's conduct was a "substantial factor" in causing the Modisettes' injuries. The California Supreme Court has recently stated, however, that the substantial factor test applies "where concurrent independent causes contribute to an

The first amended complaint alleged that the accident "occurred . . . when a driver, distracted while using the 'FaceTime' application on an Apple iPhone 6 Plus during operation of his motor vehicle, collided at highway speed with [the Modisettes'] stationary motor vehicle and caused severe physical and emotional injuries to [them]," and that Apple's failure to design the iPhone "to 'lock out' the ability of drivers to utilize the 'FaceTime' application . . . while driving a motor vehicle, . . . resulted in the[ir] injuries." Taking the Modisettes' properly pleaded allegations as true, it appears to us that the first amended complaint pleaded facts sufficient to establish that Apple's design of the iPhone 6 Plus without its patented lockout technology was a cause in fact of the Modisettes' injuries because it was "a necessary antecedent" of the accident. (*State Hospitals*, *supra*, 61 Cal.4th at p. 352.)

"To simply say, however, that the defendant's conduct was a necessary antecedent of the injury does not resolve the question of whether the defendant should be liable." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 (*PPG Industries*).) As with the test for duty in negligence actions, "[t]he second aspect of proximate cause focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. Thus, 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." (*State Hospitals*, *supra*, 61

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injury." (*State Hospitals*, *supra*, 61 Cal.4th at p. 352, fn. 12.) Concurrent independent causes "are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the harm." (*Viner*, *supra*, 30 Cal.4th at p. 1240.) Because this case does not involve concurrent independent causes, "the 'but for' test governs questions of factual causation." (*State Hospitals*, *supra*, at p. 352, fn. 12; see also *Viner*, *supra*, at pp. 1239-1241.)

Cal.4th at p. 353, internal citations and quotation marks omitted; see also *Romito v. Red Plastic Co.* (1995) 38 Cal.App.4th 59, 69-70.) Both Witkin and the Restatement of Torts frame this aspect of proximate cause as "scope of liability." (6 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, §§ 1331, 1336; Rest.3d Torts, § 29.) The extent or scope of a defendant's liability is a question of law. (*Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 222 (*Mosley*) (conc. opn. of Traynor, J.); see also *PPG Industries*, *supra*, at pp. 315-316.)

"As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay." (*Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 68 (*Kumaraperu*), internal quotation marks omitted.) Although Apple's manufacture of the iPhone 6 Plus without the lockout technology was a necessary antecedent of the Modisettes' injuries (as was the police activity that slowed traffic on the interstate that day), those injuries were not a result of Apple's conduct. Rather, Wilhelm caused the Modisettes' injuries when he crashed into their car while he willingly diverted his attention from the highway. (See *Durkee*, *supra*, 765 F.Supp.2d at p. 750 ["[t]he alleged accident in this case was caused by the driver's inattention, not any element of the design or manufacture of the [in-truck texting] system that has been alleged"].) In a similar case in Texas, the trial court concluded that "a real risk of injury did not materialize until [the driver] neglected her duty to safely operate her vehicle by diverting her attention from the roadway. In that sense, Apple's failure to configure the iPhone to automatically disable did nothing more than create the condition that made Plaintiffs' injuries possible. Because the circumstances here are not 'such that reasonable jurors would identify [the iPhone or Apple's conduct] as being actually responsible for the ultimate harm' to Plaintiffs, the iPhone and Apple's conduct are too remotely connected with Plaintiffs' injuries to constitute their legal cause." (*Meador v. Apple, Inc.* (E.D.Tex., Aug. 16, 2016, No. 6:15-CV-715) 2016 WL 7665863, *4.)[15]

Disputing this analysis, the Modisettes assert that their "allegations are more than sufficient for a reasonable person to consider Apple a cause of the injury," and argue that the trial court's determination that the connection between Apple's conduct and their injuries was too " 'attenuated' " to state a cause of action "disregard[ed] the principles of comparative fault and usurp[ed] the jury's role in determining causation and comparative liability." We disagree that a reasonable person would consider Apple a cause of the accident here (see, e.g., *Durkee*, *supra*, 765 F.Supp.2d at p. 750), and the Modisettes do not point us to a single case involving similar facts suggesting otherwise. Moreover, while we acknowledge that but-for causation has been sufficiently alleged, the scope of Apple's liability is question of law. (*Mosley*, *supra*, 26 Cal.2d at p. 222 (conc. opn. of Traynor, J.).) That juries determine comparative liability in cases involving more than one tortfeasor does not foreclose this court's role in deciding whether it is just to hold a defendant liable for an injury in the first instance. (See *State Hosp.*, *supra*, 61 Cal.4th at p. 353; *PPG Industries*, *supra*, 20 Cal.4th at pp. 315-316; 6 Witkin, Summary of Cal. Law, *supra*, § 1331.)

The Modisettes also contend that product misuse "is an affirmative defense for which Apple bears the burden of proof." Although we agree that product misuse is an affirmative defense, it bears on whether a third party's misuse of a product was the "superseding cause of injury that absolves a tortfeasor of his or her own wrongful conduct [because] the misuse was so highly extraordinary as to be unforeseeable." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308.) We do not conclude here that Wilhelm's use of the iPhone while driving was unforeseeable. Rather, we determine

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15 Our proximate causation analysis echoes our consideration of the closeness of the connection between Apple's conduct and the Modisettes' harm in the duty of care determination because causation and duty are interrelated. (See *Kumaraperu*, *supra*, 237 Cal.App.4th at p. 69; *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, 781 & fn. 2; *Schrimscher v. Bryson* (1976) 58 Cal.App.3d 660, 664.)

that the gap between Apple's design of the iPhone and the Modisettes' injuries is too great for the tort system to hold Apple responsible. (See *State Hospitals*, *supra*, 61 Cal.4th at pp. 355-357.)

D. *Leave to Amend*

When a trial court sustains a demurrer without leave to amend, "we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, internal citations omitted.) The "order sustaining a demurrer without leave to amend is reviewable for abuse of discretion 'even though no request to amend [the] pleading was made.' (Code Civ. Proc., § 472c, subd. (a).)"[16] (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 667-668.)

The Modisettes argue that "Apple's recent implementation of its 'Do Not Disturb While Driving' technology" on iPhones further establishes "a causative relationship between [their] harm, Apple's conduct, and the alleged defects in Apple's iPhone [6 Plus]," and that they should be allowed to amend their complaint to allege facts related to that recent implementation. According to the Modisettes, the "Do Not Disturb While Driving" feature allows iPhone users "to limit the capability of drivers to text or receive FaceTime requests."[17] The Modisettes ask us to take judicial notice of this recent design change to the iPhone, which occurred "in or around June 2017."

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[16] The Modisettes requested general leave to amend in their opposition to Apple's demurrer.

[17] According to the Apple support pamphlet attached as an exhibit to the request for judicial notice, the technology, when activated by an iPhone user, prevents certain notifications from being "delivered" while the user is driving so that the phone "stays silent and the screen stays dark."

This court may take judicial notice of any matter specified in Evidence Code section 452, including "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, §§ 452, subd. (h), 459.) In addition, on review of a demurrer, this court "may consider other relevant matters of which the trial court could have taken judicial notice and we may treat such matters as having been pleaded." (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 538.)

We do not agree that an amendment to the complaint alleging that Apple recently implemented "Do Not Disturb While Driving" technology in iPhones gives rise to a reasonable possibility that the Modisettes can establish either a duty of care or proximate cause. The Modisettes alleged in the first amended complaint that Apple had the technology to automatically prevent drivers from utilizing FaceTime while driving when it manufactured the iPhone 6 Plus, an allegation that we have accepted as true. (See *Moore*, *supra*, 51 Cal.3d at p. 125.) The implementation of similar technology does not render the connection between Apple's conduct and the Modisettes' injuries less remote, nor does it alleviate any of the policy concerns addressed above. Therefore, we decline to take judicial notice of the recent design change because it is not relevant to our determination. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.) We conclude that the trial did not abuse its discretion when it sustained the demurrer without leave to amend.

III. DISPOSITION

The judgment is affirmed. Apple is entitled to costs on appeal.

DANNER, J.

WE CONCUR:

GREENWOOD, P.J.

GROVER, J.

Modisette, et al. v. Apple, Inc.
H044811

Trial Court:	Santa Clara County Superior Court Superior Court No. 16CV304364
Trial Judge:	Hon. Theodore C. Zayner
Counsel for Plaintiffs/Appellants Bethany Modisette, James Modisette and Isabella Modisette	Simon Greenstone Panatier Brian Patrick Barrow Nectaria Belantis Love Law Firm Gregory P. Love
Counsel for Defendant/Respondent Apple, Inc.	Gibson, Dunn, & Crutcher Theodore J. Boutrous Christopher Chorba Jessica R. Culpepper Findlay Craft Eric H. Findlay Debby Gunter