S209125

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAROLYN GREGORY, Plaintiff and Appellant

v.

LORRAINE COTT et al., Defendants and Respondents

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY THE HONORABLE GERALD ROSENBERG, JUDGE PRESIDING

(Los Angeles County No. SC109507)
Court of Appeal, Second Appellate District, Division Five – No. B237645

APPELLANT'S OPENING BRIEF

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Carolyn Gregory

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I. Introduction

As stated by the Supreme Court, in its Order granting review, the sole issue for determination in this appeal is whether the doctrine of primary assumption of the risk, bars the complaint for damages, of an in-home caregiver, Ms. Gregory, against an Alzheimer's patient and her husband, for injuries the caregiver received when the Respondent Mrs. Cott, lunged at her.

Whether to apply the doctrine of Primary Assumption of the Risk, depends on the nature of the activity in which the Defendants are involved and the relationship of the parties to that activity, (see *Neighbarger v. Irwin Industries, Inc.* 8 Cal. 4th 532, 32 Cal. Rptr. 2d. *Lilley v. Elk Grove Unified School Dist.* 68 Cal. App. 4th 939, 80 Cal. Rptr. 2d 638 (3d Dist. 1998) and *Rostai v. Neste Enterprises* 138 Cal. App. 4th 326, 41 Cal. Rptr. 3d 411 (4th Dist. 2006).

Once the nature of the activity and the relationship of the parties to that activity has been established, the Court must then determine whether public policy compels the result, that under the facts of the case, the defendants have no duty to the plaintiff and the doctrine of Primary Assumption of the Risk is applied, to completely bar the Plaintiff's causes of action and recovery of damages, (see *Parsons v. Crown Disposal* (1997) 15 Cal. 4th 456).

When a Court, examines "the nature of the activity in which the Defendants are involved and the relationship of the parties to that activity," (see *Nieghbarger* Supra at p.) it can be guided in its analysis, by acknowledging the distinctions between the "sports activity" type of cases, (see *Knight v. Jewett* (1992) 3 Cal. 4th 296) from the "occupational activity" type of cases, (see *Neighbarger v. Irwin Industries, Inc.* (supra)), to determine if the doctrine of primary assumption of the

risk should be applied to the facts of that particular case.

In this case, the Judge in the Trial Court and the Majority of the Court of Appeal, erred when they failed to make a proper determination as to two distinct considerations:

First, whether the Defendants, had a duty to the Plaintiff, while the Plaintiff was working inside the Defendant's single family home and;

Second, whether Ms. Gregory was actually engaged in an occupation, which is subject to the assumption of "occupational risk" defense, as a health care provider, or whether Ms. Gregory was merely an un-certified and un-licensed caregiver, who had light housekeeping duties, who was injured while she had her back turned to Mrs. Cott the Defendant, and who was injured while washing a knife in the kitchen sink.

Clearly if the Plaintiff Ms. Gregory was a certified or a licensed health care provider, working in an institutional setting, in professional convalescent facility, the doctrine of "occupational assumption of the risk," would apply, (see *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761, i.e., The Firefighter's Rule).

However, under the facts of this case, it is the Plaintiff's contention that the Defendants Mr. and Mrs. Cott, had a duty to the Plaintiff to provide a reasonably safe working environment, inside the single family home of the Defendants.

Furthermore, Ms. Gregory was not a certified or licensed health care professional, and the Defendant Mrs. Cott was not a "patient" of Ms. Gregory's. Therefore the doctrine of "occupational assumption of the risk," cannot and should not have been applied to the facts of this case, (see *Nieghbarger* (supra) wherein

Supreme Court refused to apply the "Firefighters Rule," to plaintiffs who were not firefighters). Rather it would have been proper to apply "Secondary Assumption of the Risk," to the facts of this case, i.e. comparative negligence.

But that is not the end of the inquiry. The Plaintiff, Ms. Gregory, also sued the Defendant, Mrs. Cott, for battery; an intentional tort. An examination of the record of this matter at the trial court level, reveals that the Trial Court failed entirely to consider the Plaintiff's argument, at the hearing on the Defendants Motion for Summary Judgment, that the Plaintiff's cause of action for battery, presented a triable issue of material fact, to be determined by a jury as to whether the Defendant Mrs. Cott's behavior was intentional, when she got up from her seat at the kitchen table, walked approximately 8 feet across the kitchen floor, pushed into the Plaintiff and reached into the sink, to grapple with the Plaintiff, for the knife, which cut the Plaintiff's left wrist.

The elements of a battery are: 1) a touching of the Plaintiff by the Defendant, 2) with the intent to harm or offend 3) without the Plaintiff's consent; and 3) damages, (see CACI, 1300 et seq.).

Whether a touching is made with the intent to harm or offend, is clearly an issue of fact to be determined by a jury.

As seen by the transcript of the hearing of the Defendants Motions for Summary Judgment, (served and filed simultaneously herewith), the Trial Court ignored the Plaintiff's argument on the issue and the Court of Appeal, engaged in only the most cursory discussion of the issue, and relied on the decisions in the matters of *Knight v. Jewett* (1992) 3 Cal. 4th 296, *Avila v. Citrus Community College Dist.* (2006) 38 Cal App. 4th 148, 166 and *Hamilton v. Marintelli & Associates*

(2003) 110 Cal. App. 4th 1012, to support the argument that the defense of primary assumption of the risk is equally fatal to a negligence cause of action as it is to an intentional tort; however that is not the case in all factual circumstances involving the "occupational assumption of risk," type of cases.

There are both statutory and case precedential exceptions to the "Fireman's Rule," (see Civil Code § 1714.9 and *Donohue v. San Francisco Housing Authority* (1993) 16 Cal. App.4th 1658).

The Court of Appeal's and the Respondents' reliance on the matter of *Knight v. Jewett* (supra) to support its contention that Plaintiff's cause of action for battery, an intentional tort; is barred by the doctrine of primary assumption of the risk, in this case, is illogical. *Knight* involved a game of football. Football is a contact sport; hitting other players is an intrinsic part of the game of football. Can anyone possibly suggest that the Plaintiff in this case, agreed to engage in a "contact sport" with the Defendant Mrs. Cott, (an 84 year old woman at the time of the incident) when Mrs. Cott battered the Plaintiff.

The same is true of the Appellate Court's reliance on the matter of *Avilla v. Citrus Community College Dist* (2006) 38 Cal. 4th 148, to support its position that Plaintiff's cause of action for battery is barred by the doctrine of primary assumption of the risk. In *Avilla*, which involved injuries incurred by the plaintiff, while playing a game of baseball, the pitchers hit the plaintiff and one of the other teams' players with baseballs while pitching at the batters. Being hit by a baseball while playing the game is a risk inherent in that game. Are there any facts to suggest that the Plaintiff in this case, Ms. Gregory, was aware of and consented to being exposed to Mrs. Cott's

"killer fastball," while engaged in her daily care and feeding of the Defendant Mrs. Cott? Clearly not. Plaintiff's point is this; the "sports type" of primary assumption of the risk cases are of limited application to the facts of this case, (see *Peart v. Ferro* (2004) 119 Cal. App.4th 60, 13 Cal. Rptr. 3d 885, for a description of what a "sport type" of activity is, regarding the application of the doctrine of Primary Assumption of the Risk).

Regarding the Court of Appeal's reliance on the matter of *Hamilton v. Marintelli & Associates* (supra) to support its position the Plaintiff's cause of action for battery is barred by the doctrine of primary assumption of the risk, it should be noted that the plaintiff in Hamilton was a statutorily designated peace officer, (see Penal Code § 830 et seq.) and therefore the doctrine of primary assumption of the risk was properly applied to the plaintiff Ms. Hamilton, who was injured while participating in martial arts training; clearly, in *Hamilton* the plaintiff consented to the battery. **That is not the case herein!**

Clearly the Supreme Court in deciding, whether in this case the Plaintiff's causes of action are barred by the application of the doctrine primary assumption of the risk, should be guided by cases of the "occupational" primary assumption of the risk variety; and then should be mindful; that before a court can apply the doctrine of "occupational" primary assumption of the risk, it must first determine whether the Plaintiff Ms. Gregory was in fact actually engaged in the subject occupation, prior to applying the doctrine.

Herein, the Plaintiff Ms. Gregory, was neither, a certified nurses' aid, nor a licensed nurse. The Plaintiff's training consisted of viewing a film and visiting some Alzheimer's patients in a nursing home. The Plaintiff Ms. Gregory was not a health

care provider and Mrs. Cott was not Ms. Gregory's patient. The Plaintiff's work location was inside a single family home owned by the Defendants Mr. and Mrs. Cott. No other nurses, doctors or certified nurses' aids were present to assist the Plaintiff, (contrary to the facts in *Herrle v. Estate of Marshall* (1996) 45 Cal. App. 4th 1761), upon which the Defendants, the Trial Court and the Court of Appeal, so heavily relied.

Finally this Court must consider the legislative intent expressed in Civil Code § 41, which provides that: "A person of unsound mind of whatever degree, is civilly liable for a wrong done by the person..." Applying the doctrine of primary assumption of the risk, to defeat a cause of action for battery, may be proper in the context of the "sport type" applications of the doctrine, or in the *Herrle* case, where a certified nurse's aid was working with other health care professionals in an institutional setting; however the doctrine of primary assumption of the risk, **should not be over extended** to bar the Plaintiff's causes of action for negligence and battery, in this situation, where an un-licensed, non-certified housekeeper and care giver, was set upon from behind by a mentally infirm homeowner within the confines of that single family home.

II. ISSUE PRESENTED

Did the doctrine of primary assumption of the risk bar the complaint for damages brought by an in-home caregiver against an Alzheimer's patient and her husband for injuries the caregiver received when the patient lunged at her?

III. STATEMENT OF THE CASE, PROCEDURAL HISTORY AND APPEALABILITY

The Plaintiff filed her complaint, alleging three causes of action for negligence,

premises liability and battery, (CT 32-37). The Plaintiff seeks recovery for serious and disabling injury, i.e., loss of use of the left thumb and two fingers, (CT 147, l. 3-4).

The Plaintiff's injuries occurred while she was employed as a housekeeper and care-giver, for one of the defendants in the single family home, where the defendants; husband and wife lived, (CT 145-147). The Plaintiff was not a licensed or certified health care professional, (CT 146). The Plaintiff was not working in a professional care-facility or convalescent hospital, (CT 146).

The Defendants brought a motion for summary judgment, or in the alternative for summary adjudication of issues (CT 8-26). The Defendants contentions are; that the defense of primary assumption of risk, should be applied to disallow the Plaintiff's causes of action, which are grounded in negligence and that Plaintiff's battery cause of action, must fail, since the Defendant Mrs. Cott, suffering from Alzheimer's disease, could not form the requisite intent to harm the Plaintiff, (CT 8-26).

The Plaintiff in its opposition to the motion for summary judgment contended that the doctrine of primary assumption of risk, should not be applied to the facts of the Plaintiff's case, (CT 149-157). Plaintiff contended that the policy basis for both the fireman's rule and the sports-context assumption of risk were not present in the facts of her case. The Plaintiff also contended there was sufficient evidence of intent, based upon the Defendant's conduct in pushing into the Plaintiff, causing injury, to defeat a defense motion for summary judgment, (CT 149-157).

The Plaintiff further contended that there were triable issues of material fact as to whether Defendant Mr. Cott was negligent, in failing to have his wife, Defendant Mrs. Cott institutionalized and as to whether Defendant Mrs. Cott acted intentionally, when

she pushed into the Plaintiff and reached for the knife in the Plaintiff's hands, injuring the Plaintiff, (CT 149-157).

The trial court granted the defense motion for summary judgment, (RT p. 6, l. 25). A judgment was entered on October 4, 2011, (CT 194). This appeal was timely filed. (RT 197).

On Appeal, the Plaintiff contends that the trial court erred in granting summary judgment, because the court based its application of the doctrine of primary assumption of risk, on the Plaintiff's prior knowledge of the Defendant Mrs. Cott's mental condition and dangerous disposition, (RT pp. 3, l. 9 – p 6, l 27). The court should have looked to whether the Defendants' had a duty to the Plaintiff, as a matter of public policy, (RT p. 4, l. 5 - 15).

Plaintiff timely filed her appeal, which resulted in a majority opinion affirming the trial court's summary judgment. Plaintiff timely petitioned the Supreme Court for review, which petition was granted on April 10. 2013. This appeal is authorized by Code of Civil Procedure §§ 901 and 904.1(1) and California Rules of Court, Rule 8.100 and Rule 8.516 et seq.

IV. STATEMENT OF FACTS

The Plaintiff in this case, Ms. Carolyn Gregory, was working as an unlicensed care giver, (CT 146) to the one of the Defendants herein, Mrs. Lorraine Cott, who suffers from Alzheimer's disease, (CT 12, l. 21). The Plaintiff Ms. Gregory cared for Mrs. Cott, within the confines of a single family home located in West Los Angeles, (CT p. 12 l. 19). The Plaintiff's duties, along with caring for Mrs. Cott included, sweeping the floor, hand washing dishes and doing the laundry, (CT p. 161 l. 11-18).

The Plaintiff Ms. Gregory's training; in the care of persons suffering from

Alzheimer's disease, consisted of watching a video tape and visiting Alzheimer's patients in a care facility, (CT p. 146). Ms. Gregory is unlicensed, and does not have any credentials as a nurse or certified nurse's aid, (CT p. 146).

The Plaintiff Ms. Gregory had worked in the Respondents single family home caring for the Defendant Mrs. Cott, and doing light housekeeping, for approximately two years prior to the occurrence of the incident giving rise to this appeal, (CT p. 146). Ms. Gregory knew that Mrs. Cott had violent tendencies and had bumped, bruised or scratched Ms. Gregory in the past, (CT p. 146).

It is undisputed that on September 4, 2008, the Plaintiff Ms. Gregory was in the Defendants' single family home, in the kitchen washing dishes in the sink, (CT p. 146). At the same time the Defendant, Mrs. Cott (who was suffering from Alzheimer's disease) was seated in a chair at the kitchen table. Mrs. Cott approached the Plaintiff from behind, (CT p. 146-147), while the water was running. The Plaintiff Ms. Gregory could not hear the Defendant, Mrs. Cott approaching, due to the noise of the water running in the sink and she could not see Mrs. Cott approaching her (CT p. 146-147). Suddenly and without warning the Defendant Mrs. Cott pushed into the Plaintiff Ms. Gregory, and at the same time Mrs. Cott tried to reach into the sink with her hand and grabbed at the sharp knife, which Ms. Gregory was washing, (CT p. 147).

Because the Defendant Mrs. Cott, pushed into the Plaintiff Ms. Gregory and grabbed at the knife, the knife stabbed into Ms. Gregory's left wrist, severing vital nerves and tendons, which proximately and actually caused the Plaintiff to lose the use of her left thumb and two of her left fingers, (CT p. 147).

V. LEGAL ARGUMENTS

1. THE MAJORITY'S RELIANCE ON THE CASE OF *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761 IS ERRONEOUS, AS THE FACTS IN THE SUBJECT CASE ARE DISTINGUISHABLE FROM *HERRLE*

The court erred in applying the doctrine of Primary Assumption of Risk, to the facts in this case, as it was applied to the facts, in the case of *Herrle v. Estate of Marshall* (supra), since *Herrle* is factually distinguishable. The facts in this case are different in several significant aspects, from what occurred in *Herrle*, as follows:

In *Herrle,* the appellant Francine Herrle was a trained and certified nurse's aid, whereas the Appellant Ms. Gregory had no certification and received only informal training, consisting of watching a video and visiting a nursing home, (C.T. p. 146).

In *Herrle,* the appellant Francine Herrle, worked in a convalescent hospital with other trained professionals and certified nurses' aids. The convalescent hospital had many Alzheimer's patients, in separate rooms. In this case the Appellant was alone with the Respondent Mrs. Cott, in the small kitchen of a single family home, (C.T. p. 146) and Ms. Gregory did not have any supervision or assistance from any other nurses, certified nurse's aids or other health care professionals.

In *Herrle,* the appellant Francine Herrle worked within the controlled environment of a convalescent hospital whereas in the subject case the Plaintiff Ms. Gregory spent most of her time in the small kitchen of the single family home of the Respondents' with the Defendant Mrs. Cott. In addition to caring for Mrs. Cott, Ms. Gregory's duties included washing dishes, doing laundry or sweeping the kitchen floor, (C.T. pp. 146 and 161). In fact, it was during the execution of her duties as a

housekeeper, while washing dishes, that the Defendant Mrs. Cott, "creeped up" behind Ms. Gregory, shoved into her and reached into the sink to grab at the knife, which then slashed into and cut open the Appellant's left wrist. (C.T. p. 147, l. 1-4).

In *Herrle* the appellant Francine Herrle saw that Mrs. Marshall, (the Alzheimer's patient who struck Ms. Herrle in the face) was being moved from a chair to a bed and Ms. Herrle thought that Mrs. Marshall might fall in the process. Ms. Herrle then went into Mrs. Marshall's room to help another nurse's aid move Mrs. Marshall from the chair to the bed. In the process, Mrs. Marshall struck Ms. Herrle several times in the face severely injuring her. Therefore, Ms. Herrle was injured while working in a professional care facility, while specifically engaged in the activity of caring for an Alzheimer's patient; whereas in this, the instant case, the Ms. Gregory was washing dishes acting as a house keeper, with her back to the Respondent Mrs. Cott, when Mrs. Cott attacked the Ms. Gregory from behind, (see *Donohue v. San Francisco Housing Authority* (1993) 16 Cal. App. 4th 658 and the common law "independent cause" exception to the Firefighter's Rule). This is a significantly different set of facts, from the facts in the *Herrle*.

In the subject case, the Appellant Carolyn Gregory and the Respondent Mrs. Cott, were in the same room, i.e., the small kitchen area in the single family home, at the time the incident happened. As is clear from the facts in the case of *Herrle,* Francine Herrle, had to go into the separate room of the Alzheimer's patient Mrs. Marshall, to assist another registered nurse's aid, to perform her duties, in the moving of Mrs. Marshall from a chair to the bed. In the subject case, Ms. Carolyn Gregory did not have the protection afforded by the professional nursing home environment, but had to share

the small kitchen with the Defendant Mrs. Cott, (a person of unsound mind see Civil Code § 41).

Specifically because both Ms. Gregory and Mrs. Cott were in the same room, at the time when Ms. Gregory was washing dishes, Mrs. Cott was able to walk up behind the Plaintiff Carolyn Gregory and cause the accident which resulted in the Appellant's serious injuries.

It is clear that the risk of this type of incident happening in a professional convalescent facility, is reduced significantly, by the segregation of the patients into separate rooms and by the presence of other health care professionals in the convalescent facility environment. In this case the Appellant Ms. Carolyn Gregory did not have any of the protections, provided to employees in professional convalescent care facilities, and did not have the assistance of other health care professionals with her to protect her from the type of "sneak attack," which caused the serious and debilitating injuries the Plaintiff Ms. Gregory suffered. Therefore, the facts presented by this case are distinguished from the facts in *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761.

In short; the facts of this case are so distinguishable from the facts of Herrle that there can be no question that the Defendant Mrs. Cott, living in her own home and walking about at will, with only a single non-licensed housekeeper present, was under a duty, to avoid causing injury to the Plaintiff. (see Civil Code §§ 41 and 1714)

> "The incident resulting in plaintiff's claim occurred when Marshall became combative while another nurse's aid was moving her from a chair to a bed. Plaintiff, fearing Marshall would fall to the floor, entered the room to help. While holding Marshall and moving her onto the bed, Marshall

struck the plaintiff about the head several times causing serious jaw injuries." *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761, 1762.

"But Defendant through the agency of her relatives, took steps to protect both herself and others from the very injury suffered by the Plaintiff, **by entering a convalescent home** which cared for persons who could not control their actions. Plaintiff worked there as a nurse's aid aware of the patient's potential for violence and was trained on how to avoid or limit the possibility of injury." *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761, 1767. (emphasis added)

2. **RESPONDENTS' BERNARD COTT AND LORRAINE COTT ARE LIABLE TO THE APPELLANT FOR NEGLIGENCE, SINCE THE NATURE OF THE ACTIVITY INVOLVED IN THE APPELLANT'S CLAIMS AND THE RELATIONSHIP OF THE PARTIES TO THAT ACTIVITY, DOES NOT COMPELL OR REASONABLY RESULT IN THE APPLICATION OF PRIMARY ASSUMPTION OF RISK AS A MATTER OF PUBLIC POLICY, (see *Neighbarger v. Irwin Industries, Inc.*, (1998) 8 Cal.4th 532 [32 Cal. Rptr.2d 630])**

"In Knight v. Jewett (1992) 3 Cal.4th 296, [11 Cal.Rptr.2d 2, 834 P.2d 696], the Supreme Court undertook the task of determining the scope of primary assumption of risk and its relationship to comparative negligence. (See Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393].) Knight stated: "In cases involving 'primary assumption of risk'-where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury-the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving 'secondary assumption of risk'-where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty-the doctrine is merged into the comparative fault scheme ...." (Knight v. Jewett, supra, 3 Cal.4th at pp. 314-315.)" *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761, 1765.

In *Herrle* (supra) the Court of Appeal has carved out a narrow exception to the common law codification of liability for the mentally infirm, as found in Civil Code § 41 which provides as follows:

"A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful."

Thus in *Herrle* (supra) the Court of Appeal for the 4th District reviewed cases from other jurisdictions, (namely Wisconsin and Florida) to formulate a rule of public policy which provides a narrow exception, applicable to **institutionalized** mentally incompetent persons, towards their employed caretakers, which eliminates a duty on the part of the mentally infirm defendant, to his/her **institutional caretakers**, based upon a patient/caregiver relationship.

There are no cases in California, extending this narrow exception to a housekeeper/caregiver, who while in the course and scope of her employment, while engaged in housekeeping duties, is attacked, pushed and battered, by a mentally infirm person in the confines of a single family home.

It seems an **unlikely argument** that "public policy" would compel the application of Primary Assumption of the Risk, to benefit the owners of a single family home, who made a conscious decision to bring into their home, the Plaintiff Ms. Gregory, to act as a care giver with light housekeeping duties; who then suffered serious injuries at the hands of one of the homeowners, while washing dishes, with her back turned to the Respondent Mrs. Cott!

> "We find the reasoning of Anicet, Mujica and Gould persuasive. Like California's primary assumption of the risk doctrine, these decisions are based on the lack of a duty owed by **institutionalized** mentally incompetent persons towards their employed caretakers. Because of the nature of the activity, caring for the mentally infirm, and the relationship between the parties, **patient and caregiver**, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. Here, the very basis of the relationship between plaintiff and Marshall was to protect Marshall from harming either herself or others." *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761, 1770 (emphasis added)

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3. THE "FIREFIGHTERS RULE" WAS NEVER INTENDED TO BAR RECOVERY FOR ALL HAZARDS THAT ARE FORESEEABLE IN THE EMPLOYMENT CONTEXT (see *Neighbarger v. Irwin Industries, Inc.*, (1998) 8 Cal. 4th 532, 542 [32 Cal. Rptr.2d 630])

In *Neighbarger* (supra) a technician, who had training on how to fight industrial fires was working in close proximity to a fire which had just been started by the negligence of employees of the Defendant Irwin Industries, Inc. The plaintiff in that case Mr. Neighbarger, was burned in the fire and filed an action for negligence against Defendant Irwin Industries. The Defendant, Irwin Industries, Inc., moved for summary judgment citing the "firefighter's rule," otherwise known as the defense of "occupational" primary assumption of the risk.

The Supreme Court, in declining to apply the doctrine of primary assumption of the risk had this to say:

> "On the surface, the fairness element of the firefighter's rule would seem to apply equally to public firefighters and private safety employees, as both are employed to confront and control hazards that may be created by the negligence of others. However, the firefighter's rule was not intended to bar recovery for all hazards that are foreseeable in the employment context, but to eliminate the duty of care to a limited class of workers, the need for whose employment arises from certain inevitable risks that threaten the public welfare. An industrial safety supervisor faces a much broader range of risks, many of which we should be reluctant to regard as inevitably ripening into injury-causing accidents. Fire is inevitable, but industrial accidents, as a broader category, are not equally inevitable. Although we were prepared to admit that almost all fires can be traced to someone's negligence, and that it is simply too burdensome to identify that negligence for the purpose of compensating those most likely to be injured by fire (Walters, supra, 20 Cal.3d at p. 205), we should be hesitant to narrow the duty of care to avoid industrial accidents." *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 542.

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> "It is certainly not the case ... that private employees assume all the foreseeable risks of their employment. As we have explained above, Knight ... requires a closer analysis, focusing not on the foreseeability of the hazard or the plaintiff's subjective awareness of the risk, but on on the defendant's duty of care and the relationship of the parties." *Neighbarger* (supra) at p. 545 fn. 4.)

Likewise in this case, the court should decline to apply the defense of primary assumption of risk, but rather should apply the doctrine of "secondary assumption of the risk, which; since the Court's decision in the matter of *Knight v. Jewett* (supra) has been subsumed into the law of comparative negligence.

4. THE STATUTORY EXCEPTIONS TO THE APPLICATION OF THE "FIREFIGHTERS RULE," AS FOUND IN CIVIL CODE § 1714.9, ARE LOGICALLY APPLICABLE TO THE FACTS OF THIS CASE

The Plaintiff Ms. Gregory wants to be perfectly clear that she is arguing that the doctrine of primary assumption of the risk, **should not be applied** to the facts of this case because: 1) at the time of the incident giving rise to this litigation, she was not engaged in the occupation of being a health care provider, nor was the Defendant Mrs. Cott, her patient and 2) public policy does not compel the result that a un-licensed house keeper and care-giver of a homeowner suffering from Alzheimer's disease, be barred from suing the homeowner for a battery, which occurs within the confines of the Defendant's home.

However, in the alternative, if the Court is inclined to apply "occupational" primary assumption of the risk to the facts of this case, it must be able to logically rationalize, how the Court can ignore the application Civil Code §§ 41 and 1714.9, to the facts of this case. According to Civil Code § 41: "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person..."

Furthermore Civil Code § 1714.9, provides as follows:

> "(a) Notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations:
> (1) Where the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel.
> (2) Where the conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel.
> (3) Where the conduct causing the injury was intended to injure the peace officer, firefighter, or emergency medical personnel.
> (4) Where the conduct causing the injury is arson as defined in Section 451 of the Penal Code.
> (b) This section does not preclude the reduction of an award of damages because of the comparative fault of the peace officer, firefighter, or emergency medical personnel in causing the injury.
> (c) The employer of a firefighter, peace officer or emergency medical personnel may be subrogated to the rights granted by this section to the extent of the worker's compensation benefits, and other liabilities of the employer, including all salary, wage, pension, or other emolument paid to the employee or the employee's dependents.
> (d) The liability imposed by this section shall not apply to an employer of a peace officer, firefighter, or emergency medical personnel.
> (e) This section is not intended to change or modify the common law independent cause exception to the firefighter's rule as set forth in *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658."

Therefore, if the Court is inclined to apply the defense of primary assumption of the risk, i.e., the Firefighter's Rule; to the facts of this case, (which the Plaintiff Ms. Gregory contends would be an error, for the reasons stated above), then the Court must rationalize how the statutory and case law exceptions to the Firefighter's Rule, **would not apply** to the facts of this case and the Plaintiff's allegation of battery against the Defendant Mrs. Cott.

In the matter of *Donohue* (supra), the plaintiff Robert Donohue, slipped and fell

on wet, slick stairs while he was conducting an unannounced fire safety inspection of a building owned by the San Francisco Housing Authority, the defendant in the action. The trial court granted summary judgment in favor of the defendant and the court of appeal, First Dist., affirmed. The Supreme Court remanded the matter to the court of appeal, for reconsideration, which in essence resulted in a finding by the court, that since the plaintiff, Mr. Donahue, was not engaged in the occupation of fighting a fire at the time of his injury, that primary assumption of the risk did not apply to bar plaintiff's recovery.

The Plaintiff Ms. Gregory therefore argues that since she was not engaged in caring for the Defendant Mrs. Cott, but rather she was washing dishes and a knife in the sink, with her back turned to the Defendant, who sneaked up behind her, and battered her by pushing into her body and grabbing with her hand for the knife the Plaintiff was washing, that likewise, primary assumption of the risk should not apply to bar Ms. Gregory's recovery herein.

A Fortiori; herein, the Plaintiff Ms. Gregory has also pled a battery against the Defendant Mrs. Cott, so it would seem that not only is the Plaintiff's negligence claim the subject of an exception to the application of primary assumption of the risk, pursuant to the "independent cause exception," as found in *Donohue* (supra) but also the Plaintiff's battery claim is also not subject to the defense of primary assumption of the risk, pursuant to the statutory exceptions found in Civil Code § 1714.9.

5. DEFENDANTS OWED A DUTY OF CARE TO THE PLAINTIFF, WHICH THEY BREACHED

When a defendant moves for summary judgment on the basis of primary assumption of risk, that defendant has the burden of establishing that he/she owed no

legal duty to the plaintiff to prevent the harm of which the plaintiff complains.

Determining, whether to apply primary assumption of risk, to the facts of a particular case, is a legal question to be decided by the courts. (*Patterson v. Sacramento City Unified School District* (2007) 155 Cal. App. 4th 821, 66 Cal. Rptr.3d 337)

The relationship of the Plaintiff and the defendant in this case was not within an independently operated care giving environment or facility. Mrs. Cott was not turned over in her entirety to a caregiver or facility for care giving. On the contrary, the relationship, was one of joint custody of Mrs. Cott, where responsibility for the Mrs. Cott was shared between the defendant Mr. Cott and the plaintiff Ms. Gregory, (CT p. 119-120) as were the duties and inherent risks of the location, to wit inside a single family home, owned by the defendants.

In particular the defendants had the responsibility to insure that the location of that care was a proper and fitting location for the needs of the defendant Mrs. Cott, based on her then current condition. It was not the plaintiff's decision to keep Mrs. Cott at home. Consequently, any assumption of risk was limited to the particular decisions that the plaintiff was called upon to make, while caring for the defendant Mrs. Cott, in her own home.

In this context, the plaintiff's acts are to be adjudged according the law of secondary assumption of risk, which since the holding in *Knight v. Jewett* (supra) is synonymous with comparative negligence. It was not the expertise or training of the plaintiff to decide the proper location for the care of the defendant Mrs. Cott. The defendant's choice of using their own home as a setting for the care of Mrs. Cott was the decision of the defendants. Consequently there was a duty of reasonable care on the part of the defendants as to the conditions they created; in their own home.

6. THERE ARE TRIABLE ISSUES OF MATERIAL FACT AS TO 1) WHETHER BERNARD COTT WAS NEGLIGENT BY FAILING TO HAVE MRS. COTT INSTITUTIONALIZED AND AS TO 2) WHETHER MRS COTT ACTED INTENTIONALLY WHEN SHE BATTERED THE PLAINTIFF

Pursuant to the authorities as stated above, it is the Plaintiff's contention that this case is not subject to the application of the doctrine/defense of primary assumption of the risk. Accordingly, there are triable issues of material fact regarding the negligence of the Defendants, and whether the Defendant Mrs. Cott intentionally pushed into and battered the Plaintiff, maliciously to cause injury to the Plaintiff.

The trial court, in its decision granting summary judgment, referred to the Plaintiff's knowledge and her assumption of the risks and then ignored the distinguishing facts of the instant case, when compared to the facts in the matter of *Herrle v. Estate of Marshall* (supra), (RT p. 3 l. 9 – 13). The trial court failed to consider the body of law, which requires the court to determine if, under the facts of the case the defendants owe a duty of care to the plaintiff.

> "In cases involving primary assumption of risk – where, by virtue of the nature of the activity and the parties relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving secondary assumption of risk, where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty, the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." *Patterson v. Sacramento City Unified School District* (2007) 155 Cal. App. 4th 821, 66 Cal. Rptr. 3d 337.

The law to be applied in this case is secondary assumption of risk which, since the Supreme Court's holding in the matter of *Knight v. Jewett* (infra) is "merged into

the comparative fault scheme."

Additionally, Civil Code § 41 provides that persons of unsound mind are civilly liable, for the harm they cause.

7. THE DISSENTING OPINION "HITS THE NAIL ON THE HEAD"

In the decision of the Court of Appeal, Judge Armstrong dissented with the opinion of the majority. That dissenting opinion, "hits the nail on the head."

The Appellant Ms. Gregory had almost no specialized training, had no license or certification, was working alone within the confines of a single family home and had housekeeping duties which included, washing dishes, sweeping floors, and doing the laundry. In fact it was while Ms. Gregory was performing housekeeping duties, that she was battered and injured; not while she was caring for Mrs. Cott.

The Plaintiff Ms. Gregory was not a health care professional and the Defendant Mrs. Cott was Ms. Gregory's patient.

Additionally, the Plaintiff was aware of only the risk of being scratched or bruised when she confronted Mrs. Cott, not when her back was turned to Mrs. Cott, while the Appellant was engaged in her housekeeping duties. Applying the defense of primary assumption of the risk, to the facts of this case, clearly "untethers the doctrine from its origin moorings," (see dissent, pp. 8-9).

Over extending the application, of the doctrine of primary assumption of the risk, to the facts of this case ignores the legislative intent expressed in Civil Code § 41, and applies the doctrine to intentional conduct; contrary to the holding in *Knight v. Jewett* (supra at p. 320), which specifically states that intentional conduct does not come within the doctrine of primary assumption of the risk. Such application may be proper in the context of the *Herrle* case, where a certified nurse's aid was working with other health

care professionals in an institutional setting; but it has no application here, where a housekeeper, was set upon from behind by a mentally infirm homeowner.

VI. CONCLUSION

For the reasons cited above the trial court's granting of the defendant's motion for summary judgment and the affirmation by the court of appeal must be reversed and the matter remanded to the trial court for a jury trial on the merits.

Dated: June 10, 2013

LAW OFFICES OF ALEXANDER J. PETALE

By: /SS/
Alexander J. Petale, Esq., for Appellant
CAROLYN GREGORY

VII. CERTIFICATE OF WORD COUNT

I Alexander J. Petale, Esq., certify that this Application for an Extension of Time was prepared on a computer using Microsoft Word, and that according to that program, this documents contains approximately 7,153 words.

Dated: June 9, 2013

LAW OFFICES OF ALEXANDER J. PETALE

By: /SS/
Alexander J. Petale, Esq., for Plaintiff and Appellant CAROLYN GREGORY

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CAROLYN GREGORY, PLAINTIFF-APPELLANT, VS. BERNARD COTT, LORRAINE COTT, ET AL., DEFENDANTS-RESPONDENTS.	NO. SC109507

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE GERALD ROSENBERG, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

THURSDAY, AUGUST 18, 2011

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ANGELA MAPP, CSR NO. 7824, CRR
OFFICIAL REPORTER

M A S T E R I N D E X

CHRONOLOGICAL AND ALPHABETICAL INDEX OF WITNESSES

NONE

EXHIBITS

NONE OFFERED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE-K HON. GERALD ROSENBERG, JUDGE

CAROLYN GREGORY,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	NO. SC109507
	)	
BERNARD COTT, LORRAINE COTT, ET AL.,	)	
	)	
DEFENDANTS.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, AUGUST 18, 2011

APPEARANCES:

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ANGELA MAPP, CSR NO. 7824, CRR
OFFICIAL REPORTER

CASE NUMBER:	SC109507
CASE NAME:	GREGORY V. COTT
SANTA MONICA, CALIFORNIA	THURSDAY, AUGUST 18, 2011
DEPARTMENT WE-J	HON. GERALD ROSENBERG, JUDGE
APPEARANCES:	(AS HERETOFORE NOTED)
REPORTER:	ANGELA MAPP, CSR NO. 7824
TIME:	A.M. SESSION

THE COURT: ON GREGORY.

MR. GOWER: GOOD MORNING, YOUR HONOR. RICHARD GOWER FOR DEFENDANTS AND MOVING PARTY.

THE COURT: OKAY. APPEARANCES.

MR. PETALE: GOOD MORNING, YOUR HONOR. ALEXANDER J. PETALE FOR THE PLAINTIFF CAROLYN GREGORY.

THE COURT: OKAY. DID YOU BOTH READ THE TENTATIVE?

MR. PETALE: I DID, YOUR HONOR.

MR. GOWER: I DID ALSO, YOUR HONOR.

THE COURT: OKAY. THE TENTATIVE IS TO RULE THAT THE PLAINTIFF'S PETITION FOR ORDER PERMITTING COUNSEL TO SUBMIT REDACTED COPIES OF RECORDS IS GRANTED.

MR. GOWER: I'M SORRY, YOUR HONOR, I THINK THAT'S THE WRONG CASE.

THE CLERK: NUMBER 7.

MR. GOWER: NUMBER 7, MOTION FOR SUMMARY JUDGMENT.

THE COURT: OH, I'M SORRY. I WAS CALLING THE WRONG ONE.

OKAY. ON THE MOTION FOR SUMMARY JUDGMENT, THE TENTATIVE IS TO GRANT. ANYBODY WISH TO BE HEARD?

MR. PETALE: YES, YOUR HONOR, THE PLAINTIFF WISHES TO BE HEARD.

THE COURT: GO AHEAD.

MR. PETALE: I BELIEVE THERE'S TRIABLE ISSUES OF MATERIAL FACT, YOUR HONOR. IN PARTICULAR THERE WAS ONE MATERIAL FACT WHICH THE DEFENSE WAS CONCERNED WITH. AND THEY RAISED AS AN OBJECTION TO FACTS CITED IN MY SEPARATE STATEMENT THAT THE PLAINTIFF MADE A STATEMENT THAT THE DEFENDANT GOT UP FROM A KITCHEN TABLE, WALKED A DISTANCE OF APPROXIMATELY EIGHT FEET. AND THEN SHE DESCRIBES THAT SHE WAS BUMPED INTO, AND SHE HAD A KNIFE IN HER HAND, AND SHE WAS VERY SERIOUSLY CUT ON HER WRIST.

THE DEFENSE OBJECTED TO THAT SAYING THAT IT IS INADMISSIBLE EVIDENCE ON THE GROUNDS THAT A DECLARATION AS TO SOMEONE'S INTENT IS A MERE OPINION, AND IF AN OPPOSITION IS FILED TO SUCH AN OPINION, IT DOES NOT CREATE A TRIABLE ISSUE OF FACT. IN SUPPORT OF THAT PROPOSITION THEY'RE RAISING THE HOLDINGS IN THE CASES OF HOOVER COMMUNITY HOTEL V. THOMPSON AND TUCHSCHER DEVELOPMENT ENTERPRISES, INC. V. SAN DIEGO UNIFIED PORT DISTRICT.

NOW, IN BOTH OF THOSE CASES, YOUR HONOR, THEY WERE CONTRACT CASES THAT INVOLVE NEGOTIATIONS PRIOR TO REACHING AN AGREEMENT. AND THE HOLDING IN THAT CASE IS IT IS IMPROPER TO -- OR THE RULE IN THAT CASE IS THAT "IT IS IMPROPER TO DRAW AN INFERENCE OF INTENT BASED ON ORAL REPRESENTATIONS MADE DURING CONTRACT NEGOTIATIONS PRIOR TO AN AGREEMENT," WHICH IS VASTLY DIFFERENT THAN THE FACTS AND CIRCUMSTANCES IN THIS CASE.

AND IN TORT LAW IT IS CLEAR THAT INTENT CAN BE REASONABLY INFERRED FROM THE PHYSICAL ACTIONS OF A HUMAN BEING, OF A PERSON. IF A PERSON GETS UP AND WALKS ACROSS THE ROOM AND BUMPS INTO SOMEONE ELSE, THERE'S A REASONABLE INFERENCE THAT THE CONDUCT WAS INTENTIONAL. THE BURDEN WOULD THEN SHIFT TO THE OTHER SIDE TO PROVE THAT IT IS NOT. THEREFORE, A TRIABLE ISSUE OF MATERIAL FACT EXISTS.

THE COURT: DIDN'T SHE ASSUME THE RISK OF TAKING ON THIS JOB TO CARE FOR THIS POOR WOMAN? AND THEN WHAT ARE YOU GOING TO DO WITH THE HOLDING IN THIS HERRLE CASE -- THAT'S H-E-R-R-L-E -- WHICH DEALT WITH A NURSE DEALING WITH A SIMILAR SITUATION IN A NURSING HOME?

MR. PETALE: WELL, THAT WAS UNDER PROFESSIONAL NURSING HOME CIRCUMSTANCES, YOUR HONOR. IN THE NURSING HOME THAT NURSE WENT INTO A SEPARATE ROOM WHERE THAT PATIENT, MS. MARSHALL, WAS HOUSED IN A SEPARATE PATIENT ROOM WHERE THERE'S -- A TYPICAL SITUATION WHERE THERE'S BEDS AND THEN THERE'S A BATHROOM. AND EVERYTHING IS SET UP IN THAT ROOM FOR THE CONVENIENCE OF THE PATIENT AND THE CAREGIVER TO INSURE THE SAFETY OF ALL PERSONS PRESENT.

IN THIS CASE THE HUSBAND MADE A DECISION THAT THEY WOULD CARE FOR THIS WOMAN IN THE HOME. AND DURING HER DAYS, PURSUANT TO THE TESTIMONY OF THE HUSBAND, SHE SPENT HER TIME IN THE KITCHEN WATCHING MY CLIENT PERFORMING HOUSEHOLD DUTIES.

SO IN THE KITCHEN THERE'S KNIVES, THERE'S OTHER IMPLEMENTS WHICH COULD BE GRABBED AHOLD OF AND USED

FOR DESTRUCTIVE PURPOSES. THERE'S APPLIANCES. THERE'S A BLENDER. THERE'S GLASS OBJECTS. SO IT'S COMPLETELY FACTUALLY DISTINGUISHABLE FROM THE FACTS IN HERRLE V. ESTATE OF MARSHALL.

AND I THINK THE COURT HAD MISJUDGED THE STATE OF THE LAW REGARDING PRIMARY ASSUMPTION OF RISK WHEN IT LOOKS TO THE NOTICE OF THE PLAINTIFF AS OPPOSED TO THE APPLICATION OF THE DOCTRINE PURSUANT TO THE FACTS OF THE CASE, WHICH WAS THE HOLDING IN THE NALWA V. CEDAR FAIR, L.P. THAT'S A 2011 CASE, A SPLIT OPINION, CAL.APP.4TH, NUMBER HO34535. IN THAT CASE THE COURT HELD TO THE PROPOSITION THAT THE KNOWLEDGE AND NOTICE THAT THE PLAINTIFF HAS AT THE TIME OF THE OCCURRENCE OF THE TORT IS IRRELEVANT TO APPLICATION OF THE DOCTRINE OF PRIMARY ASSUMPTION OF RISK.

WHAT THE COURT HAS TO LOOK TO IS THE FACTUAL CIRCUMSTANCES SURROUNDING THE OCCURRENCE OF THE INCIDENT AND, BASED ON PRIOR CASES AND PRECEDENT CAN, AS A MATTER OF PUBLIC POLICY, PRIMARY ASSUMPTION OF THE RISK BE APPLIED TO THAT CASE. AND IN THE CASE OF HERRLE, THE CONTROLLED CIRCUMSTANCES OF THE NURSING HOME ARE SO VASTLY FACTUALLY DISTINGUISHABLE FROM THE CIRCUMSTANCES OF THIS CASE THAT IT IS THE PLAINTIFF'S ARGUMENT THAT PRIMARY ASSUMPTION OF RISK SHOULD NOT APPLY.

NOW, YOUR HONOR, ANOTHER SIMILAR APPLICATION OF PRIMARY ASSUMPTION OF RISK AT THE TRIAL COURT LEVEL OCCURRED IN NEIGHBARGER V. IRWIN INDUSTRIES, INC. IN THAT CASE THERE WERE SOME SAFETY ENGINEERS WHO WERE WORKING AT

IRWIN INDUSTRIES, INC.'S, FACILITY OUT THERE BY THE 605 FREEWAY IN LOS ANGELES COUNTY WHEN A FIRE BROKE OUT AT THE FACTORY.

NOW, THOSE GENTLEMEN WERE NOT FIREMAN, BUT THEY WERE SAFETY ENGINEERS WORKING ON THE FACTORY PREMISES, AND THE FIRE HAD OCCURRED BY AN ACT OF ADMITTED NEGLIGENCE OF A THIRD-PARTY CONTRACTOR. THOSE SAFETY ENGINEERS WENT TO FIGHT THAT FIRE TO TRY AND SAVE THE FACTORY, AND THEY SUED BASED ON THE INJURIES THAT THEY RECEIVED AGAINST A THIRD PARTY.

THE THIRD PARTY MOVED FOR SUMMARY JUDGMENT BASED ON WHAT IS CALLED THE "FIREMEN'S RULE," WHICH IS VERY, VERY FACTUAL AND SIMILAR TO THE SITUATION IN THE CASE HERE WHERE THE LAW SAYS, "APPLY THE PRIMARY ASSUMPTION OF RISK IN THE NURSING HOME CASE."

IN OUR CASE -- RATHER, IN NEIGHBARGER V. IRWIN INDUSTRIES, THE COURT OF APPEALS SAID, "NO, WE'RE NOT GOING TO FURTHER EXTEND THE DOCTRINE OF PRIMARY ASSUMPTION RISK TO SOMEONE WHO IS NOT SPECIFICALLY TRAINED AS A PROFESSIONAL FIREMAN. WE'RE GOING TO ALLOW THIS ACTION IN NEGLIGENCE TO PROCEED AS SECONDARY ASSUMPTION OF RISK," WHICH, AFTER THE HOLDING OF A VERY IMPORTANT CASE IN CALIFORNIA, THAT SECONDARY ASSUMPTION OF RISK IS SYNONYMOUS WITH COMPARATIVE NEGLIGENCE.

SO WHAT WE HAVE HERE, YOUR HONOR, IS THE APPLICATION OF COMPARATIVE NEGLIGENCE, NOT PRIMARY ASSUMPTION OF RISK. AND NEIGHBARGER V. IRWIN INDUSTRIES, INC., MAKES THAT CLEAR, THAT THE SUBTLE FACTUAL

DIFFERENCES IN THE CIRCUMSTANCES IS WHAT THE COURT MUST LOOK TO IN DETERMINING WHETHER IT SHOULD APPLY PRIMARY ASSUMPTION OF RISK OR WHETHER IT SHIFTS BACK TO A REGULAR COMPARATIVE NEGLIGENCE FORMULA. AND IT'S THE PLAINTIFF'S CONTENTION THAT THIS IS A CASE OF COMPARATIVE NEGLIGENCE ONLY.

THE COURT: OKAY. NOW, IN MY TENTATIVE -- AND I WANT TO STATE THIS FOR THE RECORD. I THOUGHT IT WAS A VERY TELLING QUOTE FROM -- I THINK IT'S IN THE NEIGHBARGER CASE. IT'S UNFAIR TO CHARGE THE DEFENDANT WITH A DUTY OF CARE TO PREVENT INJURY TO THE PLAINTIFF ARISING FROM THE VERY CONDITION OR HAZARD THE DEFENDANT HAS CONTRACTED WITH THE PLAINTIFF TO REMEDY OR CONFRONT.

YOUR COMMENTS, COUNSEL, FOR THE DEFENDANT.

MR. GOWER: YOUR HONOR, I THINK OUR POSITION WAS ADEQUATELY BRIEFED IN OUR MOTION. I'M NOT SURE HOW ANY OF THE CASES I'VE HEARD FROM COUNSEL THIS MORNING AS QUICKLY AS THEY WERE RUN BY ME HAVE ANY RELATIONSHIP TO THIS CASE.

I MEAN, I'M STANDING HERE WITH A CASE EXACTLY ON POINT AS FAR AS THE MAJOR ISSUES IN THE CASE ARE CONCERNED. AND I THINK THE COURT HAS NOTICED THAT IN ITS TENTATIVE AND CITED THE APPROPRIATE CASES. I JUST DON'T SEE ANY WAY AROUND OTHER THAN GRANTING THE MOTION FOR SUMMARY JUDGMENT.

THE COURT: THE COURT IS GOING TO STAND WITH ITS TENTATIVE. COUNSEL FOR THE DEFENDANT, YOU ARE TO GIVE NOTICE.

MR. GOWER: I WILL, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. GENTLEMEN, THANK YOU VERY MUCH.

MR. PETALE: THANK YOU, YOUR HONOR.

(THE PROCEEDINGS WERE CONCLUDED.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

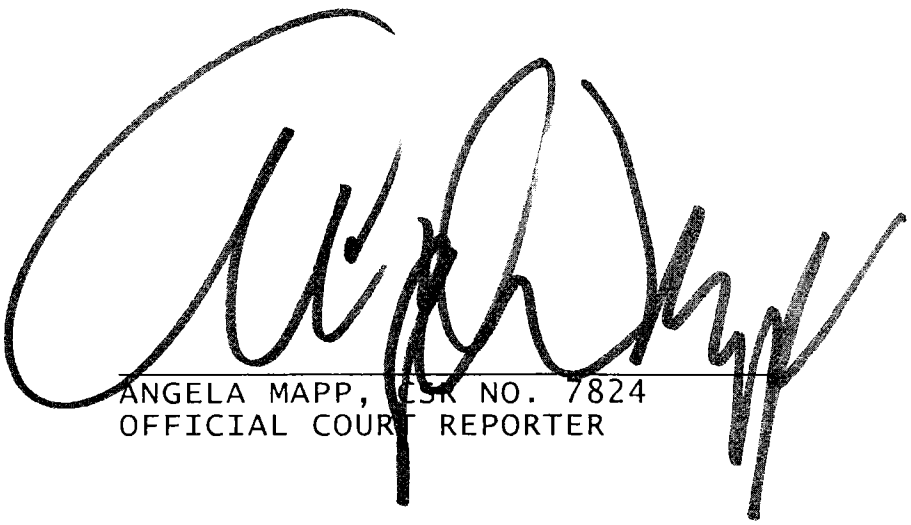
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE-K HON. GERALD ROSENBERG, JUDGE

CAROLYN GREGORY, PLAINTIFF-APPELLANT, VS. BERNARD COTT, LORRAINE COTT, ET AL., DEFENDANTS-RESPONDENTS.	NO. SC109507

I, ANGELA MAPP, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH 7, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE TESTIMONY AND PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON AUGUST 18, 2011.

DATED THIS 25TH DAY OF FEBRUARY, 2012.



ANGELA MAPP, CSR NO. 7824
OFFICIAL COURT REPORTER

PROOF OF SERVICE BY MAIL (CCP 1011 & 1013)
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, I am over the age of 18 years and not a party to this action. My business address is P.O. Box 3993, Hollywood, California 90078-3993

On June 12, 2013, I served the documents described as: Appellant's Opening Brief to the Supreme Court, in the matter of GREGORY v. COTT, LASC No. SC 109507 Appellate No. B237645, **SUPREME COURT CASE NO. S209125**

By placing true and correct copies of those documents in a sealed envelope addressed as follows:

1) Richard S. Gower, Esq., Gregory J. Bramlage, Esq., INGLIS, LEDBETTER & GOWER, LLP., 523 West Sixth Street, Suite 1134, Los Angeles CA 90014
2) Margaret M. Grignon, Esq., Tillman J. Breckenridge, Esq., REED SMITH, LLP., 355 S. Grand Avenue, Suite 2900, Los Angeles, CA 90071-1514
3) Carolyn Gregory, 16321 Grammercy Place, Gardena, CA 90247
4) Hon. Gerald Rosenberg, Dept. K, Santa Monica Superior Court, 1725 Main St., Santa Monica, CA 90401
5) The Supreme Court of the State of California, Attn: Chief Justice, 350 McAllister St., San Francisco, CA 94102-3600
6) State Compensation Ins. Fund, 655 N. Central Av., No. 200, Glendale, CA 91203 (Case No. ADJ6713466)

By Mail:_XXX__ by US First Class Mail, Postage Prepaid.
XXXX, I deposited such envelopes in the mail at Los Angeles, California, 91105, the envelop was mailed with first class postage thereon, fully prepaid.

XXXX, I am readily familiar with this firm's practice for collection and processing correspondence for mailing. Under that practice the above described documents would be deposited in the US Mail on that same day with postage thereon, first class, fully prepaid, in the ordinary course of business. I am aware that on motion of the party affected that service is presumed invalid if the postage meter date or postmark is more than one day after the date stated for deposit in the mail thereon.

By Personal Delivery
_____, I caused to be delivered the above described documents, by hand to the address shown above on the date stated herein.

I declare, under penalty of perjury, under the laws of the state of California that the foregoing is true and correct.

Dated: June 12, 2013

By: _____
Alexander Petale, Esq.