No. S209125

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CAROLYN GREGORY, Plaintiff and Appellant

v.

LORRAINE COTT et al., Defendants and Respondents

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B237645

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

Los Angeles County Superior Court Case No. SC109507

APPELLANT'S REPLY BRIEF

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1. INTRODUCTION IN REPLY

Contrary to the Respondents' contention that this case is resolved by the application of the doctrine of primary assumption of the risk; a detailed analysis of the facts and the application of the law to those facts, leads to the conclusion that Mr. and Mrs. Cott were negligent in the management of their single family home, and that Lorrain Cott committed a battery upon the Plaintiff, to which the doctrine of primary assumption of the risk is not a defense.

Merely because the Plaintiff Ms. Gregory, knowingly encountered a potential risk of being scratched or hit by Mrs. Cott, does not result in a finding that Ms. Gregory consented to being battered by the Defendant, while her back was turned to the Defendant, while she was washing dishes in the kitchen sink of the Defendants' single family home.

Knowingly encountering some risk in the course of one's employment, leads to the application of secondary assumption of the risk, NOT primary assumption of the risk. This court has never held that the doctrine of assumption of the risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.

The protections provided to professional health care providers in convalescent facilities are many and redundant. Numerous professional licensed or certified nurses, nurses' aids and/or orderlies are present within such a facility; whereas in this case the Plaintiff was alone with the Defendant on a daily basis.

In professional care facilities, glass walls are used to allow the nurses and their licensed aids and orderlies to watch the patients, and "back each other up," to help prevent "sneaking" or "creeping" attacks which predictably can occur when moving or directing an Alzheimer patient from a bed to a chair or down the hall to

another room.

In this case nothing like that was available to the Plaintiff for her protection in the single family home of the Defendants, Bernard and Lorraine Cott.

In a professional convalescent hospital, hand rails are secured along the hall way walls, which can be used to anchor strap restraints to secure the mentally infirm who may be wandering in a portion of the facility where they are not allowed to be. Bed restraints, in the form of straps with buckles, or velcro are readily available in a professional convalescent facility which serves the mentally infirm. Wide angle mirrors are placed overhead so that the members of the professional health care team can watch behind themselves, when attending to their duties, in front of them.

In a professional convalescent facility, lists and schedules are maintained and updated, so that the mentally infirm can be readily identified and re-located to their proper bed room or day room location to prevent feelings of insecurity and fear in the mentally infirm, which can provoke a sudden and unexpected movement or violent reaction.

Routine and systematic segregation, of Alzheimer's sufferers, into their proper assigned areas, by a team of health care professionals are all procedures routinely conducted in a professional care facility, where-as, in this case there is no evidence of any such equipment, staffing, procedures, wide angle mirrors, restraints or segregation of any kind in the single family home family home of the Defendants.

If fact, it is clear from the evidence that the Defendant Mrs. Cott was permitted to wander about the single family home at will, while the Plaintiff was occupied with her housekeeping chores of washing clothes, sweeping the floors and

hand washing the dishes, in the small kitchen of the single family home.

It was while the Plaintiff was hand washing a sharp knife, in the kitchen sink, that the Defendant Mrs. Cott; "creeped up" from behind the Plaintiff, (who could not hear the approach of the Defendant, because the water was running in the sink) and reached into the kitchen sink, battering the Plaintiff and causing the knife to stab into the Plaintiff's wrist, severing vital tendons, nerves and arteries.

Furthermore the nature of the relationship between the Plaintiff Ms. Gregory and the Defendant Mrs. Cott was not one of health care provider and patient. Ms. Gregory was a housekeeper who provided services of care giving to Mrs. Cott, which included washing, dressing, feeding and driving Mrs. Cott to and from her doctor's appointments. Mrs. Cott was not the "patient" of Ms. Gregory.

Additionally, Bernard and Lorraine Cott did not employ Ms. Gregory. It has long been the law in the state of California that a person injured while in the course and scope of her employment, can maintain both a workers' compensation claim against the employer and at the same time maintain a civil action for negligence and battery against the third party, (not the employer) who breached a duty of care, negligently causing the employee's injuries and/or who intentionally battered the employee, causing injury. Third party "liability cases" proceed simultaneously in the state of California on a daily basis and this case is no different. In fact the workers' compensation carrier has a statutory lien (see Labor Code §3856(b)) on Plaintiff's recovery in this case.

The two prong test for the application of the doctrine occupational primary assumption of the risk is, first; the plaintiff is professionally engaged in an inherently dangerous activity, of which she is fully aware and second; the nature of that

inherently dangerous activity and relationship between the plaintiff and the defendant is one which compels, by reason of public policy, that the defendant should not be held liable for harm which occurs to the plaintiff because of the activity in which she is engaged. Herein, the Plaintiff Ms. Gregory urges that neither prong is met.

First of all, the Plaintiff was only aware of a mild risk of harm of being bumped into or scratched by the Defendant, when confronted. Ms. Gregory was not aware of the risk that Mrs. Cott would sneak up from behind and lurch, lunge or push into the Plaintiff, while the Plaintiff was in no way confronting or engaging the Defendant Mrs. Cott; therefore the first prong of "full awareness" of the risk is not met.

Second, public policy does not compel the application of occupational assumption of the risk to a plaintiff in Ms. Gregory's position, being poorly trained and lacking any licensure or certification as a health care provider while working as a housekeeper in the single family home of the Defendants, which lacks any of the protections afforded professional health care workers in an institutional convalescent hospital facility. Therefore the second prong of the test, is clearly NOT met.

Therefore when the Respondents argue that "the Plaintiff is in the best position to ensure her own safety," Respondents are engaging in nothing but a gratuitous fantasy, which bears no relationship to the actual facts of this case. Ms. Gregory was not in a position to instruct or require Mr. Cott to install restraining devices and fixtures inside the single family home, wherein Ms. Gregory cared for

Mrs Cott, all by herself. If Mr. Cott should have installed such restraining fixtures and devices and failed to do so, than he was negligent. As stated by Judge Armstrong in his dissenting opinion in Court of Appeals' decision, in this case, the law of negligence should be applied and not occupational assumption of the risk.

But this is by no means the end of the Plaintiff's argument. Civil battery is an intentional tort, which does not require an intent to harm, but only requires an intentional act! It does not matter what type of mental infirmity, insanity or incapacity caused the defendant to reach out and touch or lurch or lunge at and hit the Plaintiff. It is still a battery and the law is clear that when a person suffering from a mental infirmity commits a battery, she is liable for all the damages which flow from the harmful touching, except punitive damages.

It is only in cases where forceful physical contact, is an inherent part of the game, that the doctrine of primary assumption of the risk, precludes a cause of action for battery. A Fortiori, in the occupational assumption of the risk cases, there are statutory exceptions to the application of the doctrine of primary assumption of the risk, e.g., when a defendant intentionally harms a firefighter, policeman or rescue worker.

Therefore in this case the law to be applied as to the Plaintiff's causes of action grounded in negligence, is secondary assumption of the risk, i.e., comparative negligence. Regarding the Plaintiff's cause of action for battery, the evidence is clear that the defendant Mrs. Cott, got up from the kitchen table and walked 8 feet across the kitchen floor, of her own volition, while sneaking up behind the Plaintiff and lunged into her, causing severe injury. This is a battery, and the Defendant Mrs. Cott

is liable to the Plaintiff for special and general damages.

2. ISSUE

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.

3. RELEVANT FACTS IN REPLY

The Respondents erroneously urge the Court, that: "The mere fact that in *Herrle* (see *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761, 53 Cal. Rptr.2d 713) the incident occurred in a convalescent hospital, rather than in the patient's home is of absolutely no significance." Appellant disagrees.

What the Respondents are attempting to "cover up" or "gloss over," is the fact that at the time of the incident, the Appellant was alone in the kitchen of the house with the Respondent Lorraine Cott. (C.T. p. 146). Immediately prior to the incident, the Appellant was washing dishes and a sharp knife, in the kitchen sink, with the water running, and had last seen the Respondent Lorraine Cott, when she was seated at the kitchen table, (C.T. pp. 146). Due to the fact that the water was running in the sink, the Appellant could not hear the Respondent Lorraine Cott approaching from behind, (C.T. 146). The Respondent suddenly and without warning shoved into the Appellant and the Respondent also reached into the sink and grabbed at the knife that the Appellant was washing, (C.T. pp. 146-147). As the Appellant and the Respondent grappled for the knife, the knife cut into the Appellant's left wrist, severing nerves, a tendon and an artery, (C.T. p. 147).

The facts in this case are vastly different 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 the Appellant 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 Appellant Carolyn Gregory, spent most of her time in the small kitchen of the single family home of the Respondents' with the Respondent Mrs. Cott. In addition to caring for the Respondent Mrs. Cott, the Appellant's duties included washing dishes, doing laundry and 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, the Respondent Mrs. Cott, "creeped up" behind the Appellant, 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.

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 Appellant was washing dishes acting as a housekeeper, with her back to the Respondent Mrs. Cott, when Mrs. Cott attacked the Appellant from behind. 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. Whereas, in the subject case, Ms. Carolyn Gregory did not have the protection afforded by the professional nursing home environment, but had to share a common area, i.e., the small kitchen with the Alzheimer's patient Mrs. Cott. 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 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, by the presence of other health care professionals in the convalescent facility environment and by the utilization of glass walls and the availability of personal restraint devices none of which were available to the Plaintiff Ms. Gregory . In this case,

Ms. Carolyn Gregory did not have any of the protections, provided to employees in professional convalescent care facilities. Therefore, the facts presented by this case are distinguished from the facts in *Herrle v. Estate of Marshall* (1996) 45 Cal. App.4th 1761.

4. ARGUMENT IN REPLY

4A
UNLESS THE MENTALLY INFIRM ARE INSTITUTIONALIZED, OR UNDER THE CARE OF A LICENSED HEALTH CARE PROFESSIONAL,THEY SHOULD NOT BE ABLE TO AVAIL THEMSELVES OF THE DEFENSE OF OCCUPATIONAL ASSUMPTION OF THE RISK

Civil Code Section 41, which was amended relatively recently in 1994, makes it clear that in California the mentally infirm are to be held responsible for the injuries they cause, except they shall not be required to pay punitive damages, unless the mentally infirm person, is capable of knowing that her act was wrongful. This is the law of the state and it is a good law because it requires persons having the responsibility for caring for and managing the lives of the mentally infirm, to do so in a competent manner.

The law in California regarding torts has always been **a fault based system**. By making the individual responsible for his own negligence, people are deterred from acting in a careless, reckless or less than prudent manner. Mr. and Mrs. Cott, by making the decision to keep Lorraine Cott at home, and not putting her in an institution, made that decision freely; **with that freedom comes the responsibility** of maintaining a reasonable degree of safety for business invitees, like the Plaintiff, who came into the single family home of the Cotts' for employment as a caregiver and housekeeper.

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"We conclude that an evidentiary showing that respondent suffered a sudden and unanticipated mental illness which rendered it impossible for her to control her vehicle at the time of the alleged tort does not, as a matter of law, preclude her liability for negligence. This is based on a policy rational. Clearly the insane or mentally disabled individual is not considered at fault in the traditional sense. However, because such individuals do create harm, the general rational is that they should be held financially responsible to those they harm. Therefore, mental disability is not a defense. Liability is therefore predicated on an objective reasonable person standard. Unlike the rational behind suspension of a liability for sudden physical illness which is based on fault, the fault concept is not analogous to a sudden mental disability. Thus, we do not perceive any logical rational for barring mental illness as a defense to negligence but allowing sudden mental illness as a complete defense. We conclude sudden mental illness may not be posed as a defense to harmful conduct and that the harm caused by such individual's behavior shall be judged on the objective reasonable person standard in the context of a negligence action as expressed in Civil Code section 41." *Bashi v. Wodarz* 45 Cal. App.4th 1314, 1323, 53 Cal. Rptr.2d 635.

The sudden and unexpected act of Mrs. Cott, when she got up from the kitchen table of her own volition, and creeped up behind the Plaintiff, while the water was running in the kitchen sink, so that Ms. Gregory could not hear the Defendant approaching her, while Ms. Gregory was performing her housekeeping duties, was not at all like the minor scratching and bruising that Ms. Gregory had experienced in the past when she was confronting Mrs. Cott. This "sneak attack," was something new and entirely unexpected. Ms. Gregory never assumed the risk of being attacked from behind, while washing dishes in the kitchen sink of the Cott's single family home.

4B
THE LAW IS CLEAR THAT ASSUMPTION OF THE RISK DOES NOT APPLY TO RISKS WHICH THE PLAINTIFF IS NOT AWARE OF

As previously explained, the Plaintiff Ms. Gregory had experienced some minor scratching and bruising by Mrs. Cott, when Ms. Gregory was confronting Mrs.

Cott; but never experienced being approached from behind, while she was occupied with housekeeping duties. This was totally unexpected.

In the matter of *Pribe v. Nelson* (2006) 39 Cal.4th 1112, 47 Cal. Rptr.3d 553, this court refused to apply the defense of occupational primary assumption of the risk to the bar plaintiff's recovery under a common law, strict liability cause of action against the defendant Mr. Nelson, for exposing the plaintiff Ms. Priebe to an unknown risk.

Herein, likewise this court should refuse to apply the defense of occupational primary assumption of the risk, to bar the Plaintiff Ms. Gregory's common law cause of action for battery, **for two reasons. First of all**, intentional conduct is not subject to the defense of primary assumption of the risk, (see *Knight v. Jewett* (1992) 3 Cal.4th 296, 319-320). **Second**, the defense of primary assumption of the risk cannot be applied to risks of which the Plaintiff is not aware, (see *Pribe v. Nelson* (supra)).

4C
CONTRARY TO THE REPEATED ASSERTIONS OF THE RESPONDENTS, MS. GREGORY WAS NOT IN THE BEST POSITION TO PROTECT HERSELF WITHIN THE SINGLE FAMILY HOME OF THE COTTS

It is nothing but a gratuitous fantasy to suggest, as the Respondents do repeatedly in their Answer Brief that "Ms. Gregory was in the best position to protect herself" within the confines of the single family home of the Cotts'. **In truth and in fact, Ms. Gregory wasn't given anything to protect herself with!**

There is no evidence that the house was equipped with any type of personal restraints to place upon Mrs. Cott as her condition continued to deteriorate after

suffering from Alzheimer's disease for nine years. There is no evidence that Mr. Cott took any steps buy or acquire any type of restraining devices for use in the house. No effort was made to install wide angle mirrors in the house, to facilitate Ms. Gregory's ability to watch Mrs. Cott, while Ms. Gregory was washing the dishes.

There is no evidence that the agency which employed Ms. Gregory ever sent a health care professional to the Cott residence to make recommendations to improve safety precautions in the single family home of the Cotts. Nothing was done to prepare a separate "day room" for Mrs. Cott to remain in, safely segregated away from the other areas of the house in the single family home, while the Plaintiff was busy with her household chores.

The truth is that Mr. Cott was in the best position to and did in fact, **have a duty as the owner of the house** to provide for the safety of guests and invitees. It is abundantly clear that the only reason why the Respondents' are repeatedly stating that "Ms. Gregory was in the best position to protect herself," is because the Respondents have taken that phrase from the language and dictum in the case of *Herrle v. Estate of Marshall*, (supra at p. 1770) without examining the evidence to see if it bears any factual or rational relationship to the actual facts of this case.

In fact, **all of the cases** which the Court of Appeal considered when it decided that application of occupational assumption of the risk would be proper in the *Herrle* case, were cases in which the mentally infirm patient was in a professional institutional convalescent hospital and **not within a single family home**, (see *Anicet v. Gant*, Fla.Dist.Ct. App. (1991) 580 So.2d 273, *Mujica v. Turner* (Fla.Dist.Ct.App. (1996) 582 So.2d 24 and *Gould v. American Family Mut. Ins. Co.* (1996) 198 Wis.2d 450, [542 N.W.2d 282]). It is for that reason that the Appellant in

this case agrees with the wisdom of the decision in the matter of *Herrle v. Estate of Marshall* (Supra) because it is true that in the professional convalescent hospital environment, working with a team of health care professionals, who are there to "back each other up," and who are equipped with restraining devices , in an environment which is specifically designed with glass walls, hallway mirrors and segregated areas, to accommodate the unpredictable actions of the mentally infirm, **that then it is true** that those health care professionals are in the best position to protect themselves and others from the unpredictable, and sometimes violent behavior of the mentally infirm patients they are paid to care for.

However, that set of rules, with the conditions and equipment found in the professional convalescent hospital, do not apply to the facts of this case.

Herein, a poorly trained unlicensed individual, who was busy with housekeeping chores, and who was expected to be acting as a caregiver at the same time, and doing this while inside a single family home, which was never intended to function as a convalescent facility and was not properly equipped, is being denied her rightful opportunity to seek compensation for the serious loss she suffered.

It would appear that encouraging families to refrain from institutionalizing family members in the advanced stages of Alzheimer's disease, by creating a policy whereby tort remedies are unavailable to those injured in the homes where these mental patients are improperly cared for, is a recipe for disaster; in light of the fact that we live in an age when human life expectancy is increasing, thereby increasing the number of Alzheimer patients to be dealt with in the future.

It would be far better to teach homeowners, how to properly equip and

remodel their homes to accommodate the specific needs of caring for the mentally infirm, in a reasonably safe manner within those homes; then to eliminate all liability, by applying primary assumption of the risk, to preclude tort recovery as a matter of law, to those persons unfortunate enough to be injured inside a single family home while caring for an Alzheimer's sufferer.

Just as the fault based system of traffic tickets and traffic schools, forces drivers to become better and safer drivers; so should a fault based system of care for the mentally infirm teach homeowners, family members and loved ones, how to properly equip their homes and hire properly trained professionals, to act as respite care, to care for their elderly, during those times when the disease has not progressed to the extent that institutionalization is necessary.

Relief from all liability is not the answer. **Education and training is the answer.**

4D
WHILE IT IS TRUE THAT PUBLIC POLICY DISCOURAGES UNNECESSARY INSTITUTIONALIZATION, PUBLIC POLICY DOES NOT DISCOURAGE, NECESSARY INSTITUTIONALIZATION

"Alzheimer disease is a degenerative disease of the brain that causes dementia, which is a gradual loss of memory, judgment and ability to function." (see Genetics Home Reference found at: http://ghr.nlm.nih.gov). As the disease progresses, institutional care may become necessary depending on the progress of the disease. The failure to institutionalize an unmanageable Alzheimer sufferer or the failure to take reasonable precautions, to provide a safer home environment for the Alzheimer sufferer and her caregiver can give rise to liability for negligence.

In this case the Respondent Bernard Cott, as the owner and master of the

house, wherein he chose to care for his wife. Both Mr. and Mrs. Cott, as homeowners were under a duty to take reasonable steps to provide a reasonably safe environment within the home, for the caregiver Ms. Gregory to perform her duties. When the Cotts failed to take any reasonable steps, such as installing wide angle mirrors, to enable Ms. Gregory to watch Mrs. Cott from multiple positions in the house, failed to install gates and/or barriers to segregate Mrs. Cott in to a particular area of the home and/or failed to remodel or make allowance for a "day room" or solarium on the first floor of the house, to prevent Mrs. Cott from wandering about at will, then he was negligent. In the alternative Mr. Cott could have had Mrs. Cott institutionalized; but to do nothing was clearly a failure of a duty to maintain the single family home in a reasonably safe condition, to properly accommodate caring for a mentally infirm loved one.

4E
IT IS A QUESTION OF FACT, FOR DETERMINATION BY A JURY AS TO WHETHER THE COTTS WERE NEGLIGENT IN THE MANAGEMENT OF THEIR HOUSE

CACI Jury Instruction No. 401 explains the "Basic Standard of Care," to the jurors in the state of California. The instruction provides that a person can be negligent by acting or **by failing to act.** In this case the Defendants Mr. & Mar. Cott did not take any reasonable steps to make their house more suitable as a safe environment in which to care for his wife as her dementia grew progressively worse and he did not have her institutionalized.

As stated in the Appellant's Petition, in her Opening Brief and in this Brief in Reply, Ms. Gregory contends that occupational assumption of the risk should not be applied in this case, to prevent Ms. Gregory from taking this case before a jury on the

issue of negligence, because as the dissenting opinion of Justice Armstrong, in the Court of Appeal pointed out; Ms. Gregory is **not** a healthcare provider or a "professional caregiver" and Mrs. Cott was **not** a patient of Ms. Gregory's and was **not** "placed in plaintiff's care." Occupational assumption of the risk should not apply to someone who is not a member of that occupation. Moreover none of the protections of persons working in a professional convalescent facility were available to Ms. Gregory, when Ms. Gregory was working in the single family home of the Cotts' as were available to the Plaintiffs in the matters of *Herrle v. Estate of Marshall*, (supra), *Anicet v. Gant*, (supra), *Mujica v. Turner (supra)* and *Gould v. American Family Mut. Ins. Co.* (supra). Therefore to apply occupational assumption of the risk to the facts of this case, precluding Ms. Gregory from putting her causes of action for negligence before a jury, would be manifestly unjust.

4F
MS. GREGORY SHOULD NOT BE PRECLUDED FROM SEEKING RECOVERY FOR THE DAMAGES SHE SUFFERED, BECAUSE OF THE BATTERY COMMITED BY MRS. COTT

As was made clear in the decision of the matter of *Knight v. Jewett* (1992) 3 Cal.4th 296, 319-320) intentional conduct is not subject to the defense of primary assumption of the risk.

A narrow exception to this rule has been carved out by the decision in *Herrle v. Estate of Marshall* (supra) by which the licensed and certified health care professionals, in the employ of a convalescent facility, cannot sue an institutionalized mentally infirm patient, because of injuries suffered by the health care professional, at the hands of the mentally infirm, by application of the defense of primary assumption of the risk. However there is no case in California which holds that this

exception should be applied to injuries sustained by an unlicensed caregiver, working alone in a single family home with an Alzheimer's sufferer.

4G
PRIMARY ASSUMPTION OF THE RISK IS NOT A DEFENSE TO INTENTIONAL TORTS, EXCEPT IN THE MOST LIMITED OF CIRCUMSTANCES

As Justice Armstrong pointed out in his dissenting opinion in the decision of the, Court of Appeal, Second Appellate District; on page 9, "Expanding assumption of the risk to encompass intentional conduct untethers the doctrine from its origin moorings." Relying on the decision in the matter of *Knight v. Jewett* (supra at pp. 319-320) Justice Armstrong relates that decision to the *Herrle* decision by saying: "Thus to the extent that Ms. Marshall intentionally rather than negligently, injured her caretaker, Knight does not support invocation of the doctrine..." [of primary assumption of the risk].

Therefore Plaintiff contends that Civil Code Section 41 is the law to be applied in this case regarding Ms. Gregory's cause of action for battery against Mrs. Cott.

The Plaintiff Ms. Gregory contends that to apply primary assumption of the risk to the facts of this case, would be manifestly unjust; in light of the facts that the Plaintiff was unlicensed and was working alone in a single family house, without any equipment or accommodations, which would have enabled her deal with the challenges of caring for a mentally infirm person, who was potentially dangerous.

The proper law to apply to the facts in this case is Civil Code Section 41, because the evidence is clear that the Defendant Mrs. Lorraine Cott, got up from a chair at the table in the kitchen of her house and of her own volition and intent, walked eight feet across the kitchen floor and pushed and lunged into the body of the

Plaintiff and reached with her hand into the kitchen sink to grab at the knife, which the Plaintiff was washing in the kitchen sink, causing the Plaintiff to suffer severe, disabling injury.

"A battery is any intentional, unlawful and harmful contact by one person with the person of another. (Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 480 [184 Cal.Rptr. 787]; and see Rest.2d Torts, § 18.) A harmful contact, intentionally done is the essence of a battery." (See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 347, p. 437.) A contact is "unlawful" if it is unconsented to. (Estrada v. Orwitz (1946) 75 Cal. App. 2d 54, 57 [170 P.2d 43].) *Ashcraft v. King* (1991) 228 Cal. App.3d 604, 611.

" 'It has long been established, both in tort and criminal law, that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe,..." People v. Mansfield (1988) 200 Cal. App.3d 82, 88, 245 Cal. Rptr. 800

"In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 [278 Cal.Rptr. 900], internal citation omitted.)

"As a general rule, California law recognizes that '. . . every person is presumed to intend the natural and probable consequences of his acts.' Thus, a person who acts willfully may be said to intend ' " 'those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).' " ' The same definition is applied to many intentional torts." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746 [57 Cal.Rptr.2d 821]

Therefore it is clear that this matter must be remanded to the trial court, so that a jury can determine, as a question of fact, whether the Defendant Mrs. Cott, intended to harmfully or offensively lunge at the Plaintiff Ms. Gregory.

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4H
PRIMARY ASSUMPTION OF THE RISK IS NOT THE SOLUTION TO THE PROBLEM OF OVER INSTITUTIONALIZATION OF THE EXPANDING ELDERLY AND MENTALLY INFIRM POPULATION

Application of the doctrine of primary assumption of the risk, to the facts in this case is not a solution at all; **in fact it is a dead end!** It is the legal equivalent of a statement which says "we are sorry that you got hurt, but there is nothing we can do about it." The law in the state of California is more concerned, is more pro-active, is more creative and is more didactic than that.

If the state is truly concerned with the problem of over institutionalization of our growing elderly population, then the solution lies in education, training of the younger generations to better care for and engage with the elderly members of their families and demonstrating to families how they can equip their homes to help them better deal with the aged and mentally infirm members of the family. By imposing liability, the law generates practical real solutions to the problems we face in our society.

By way of example, clearly the liability created by automobile accidents has within the last 40 years, (since the introduction of the mandatory seat belt laws) generated a beneficial reduction in the seriousness of injuries and highway fatalities. This improvement in highway safety would not have occurred, if the law determined 40 years ago that driving an automobile was inherently dangerous and therefore you cannot recover compensation from a motor vehicle accident because you have assumed the risk!

Expanding the application of the defense of primary assumption of the risk, to prevent in home caregivers from recovering for injuries they receive at the hands of

the mentally infirm they are caring for, would have the negative effect of discouraging efforts to improve home based methods of caring for the mentally ill and those afflicted with Alzheimer's disease. By limiting the recovery available to a person injured by a mentally infirm defendant, the incentive for creating better and more effective ways of dealing with the mentally infirm, is reduced, if not eliminated.

4I
THE COTTS' WERE NEGLIGENT BY FAILING TO TAKE ANY REASONABLE STEPS TO PROPERLY EQUIP OR RENDER THEIR HOME SUITABLE FOR USE AS A CONVALESCENT FACILITY FOR MRS COTT, WHO HAD BEEN SUFFERING FROM ALZHEIMERS DISEASE FOR NINE YEARS

Regarding Plaintiff's causes of action for negligence, Justice Armstrong, in his dissenting opinion to the Court of Appeal's decision in this case, goes on to say:

> "Mrs Cott was not placed in Plaintiff's care, first and foremost because having no medical or nursing license or certification, Plaintiff was completely unqualified to provide medical care to Mrs. Cott. Rather, Plaintiff provided housekeeping and personal care services to the Cotts, duties which required virtually no training or specialized skill or knowledge. And she provided these services in the Cott's home, which afforded none of the protections available in an institutional setting such as the convalescent hospital in Herrle." "...I appreciate the dilemma facing Mr. Cott due to his wife's deteriorating physical and mental condition. Given that Mrs. Cott was unable to care for herself, and knowing that she was at times aggressive and combative, Mr. Cott chose no doubt at great personal sacrifice to care for her at home. He required outside help to do so, and so contracted with an in-home care provider, who was made aware of her medical condition. However that condition posed a risk of harm to others, most especially the person providing the in-home care. Given this increased risk of harm to Mrs. Cott's in-home caregivers, fairness demands that defendants bear responsibility for that risk, and not shift the burrden of loss to the hapless worker who happened to be assigned to the home of one suffering from Alzheimer's disease, rather than, for instance, one recovering from foot surgery."

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PUBLIC POLICY COMPELS THE IMPOSITION OF LIABILITY AGAINST THE DEFENDANTS IN THIS CASE

The Fireman's rule, (see *Neighbarger v. Irwin Industries, Inc.*, (1998) 8 Cal.4th 532 [32 Cal. Rptr.2d 630]) the Veterinarians rule,(see *Pribe v. Nelson* (2006) 39 Cal.4th 1112, 47 Cal. Rptr.3d 553, the Lifeguard's rule, (see *City of Oceanside v. Superior Court* (*McDonald* (2000)) 81 Cal. App.4th 269, are all examples of the proper application of the doctrine of primary assumption of the risk.

To this list of rules, we have since the decision in the matter of *Herrle v. Estate of Marshall* (supra), added the Convalescent Health Care Professional rule; and rightly so. But the expansion of the application of the rule in the case of *Herrle v. Estate ofMarshall* (supra) outside of a professional convalescent facility, under the facts of this case, would be wrong for at least two reasons: 1) it is manifestly unjust to an unlicensed poorly trained caregiver/housekeeper, who was not properly equipped to deal with the mentally infirm and 2) it would have the negative effect of discouraging efforts to improve home based care for the mentally infirm, **and that is contrary to public policy.**

Furthermore, there is a **very strong public policy interest** in keeping worker's compensation insurance affordable in the state of California so that young healthy people can maintain employment in our state and employers can afford to keep their workforces properly insured. By applying and expanding the doctrine of occupational assumption of the risk to a home based non-professional unlicensed caregiver, working in a private home, not equipped as a convalescent facility, the Court would be depriving the Workers' Compensation carrier, in this case, of its right to its statutory lien for reimbursement in this case, (see Lab C. 3856(b)). The

4K
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continued vitality of the economy in the state of California and the affordability of maintaining employees, who are properly insured is a critically important public policy, which this court cannot ignore.

Therefore the law that should be applied in this case, regarding Plaintiff's negligence causes of action, 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, and accordingly, the Defendant Mrs. Cott, should be required to present her defenses at a jury trial in this matter.

CONCLUSION

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

Dated: ~~[redacted], 2012~~
10/11/2013

LAW OFFICES OF ALEXANDER J. PETALE

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

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CERTIFICATE OF WORD COUNT

I Alexander J. Petale, Esq., certify that this Appellant's Reply Brief was prepared on a computer using Microsoft Word, and that according to that program, this documents contains approximately 6.921 words.

I declare, under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on October 10, 2013 in Los Angeles, CA 90036.

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

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 October 11, 2013, I served the documents described as: Appellant's Reply 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)

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

Dated: October 11, 2013

By:_____
Alexander Petale, Esq.