Supreme Court Case No. S209125

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

CAROLYN GREGORY,

Plaintiff and Appellant

vs.

LORRAINE COTT, et al.,

Defendants and Respondents

After a Decision of the Court of Appeal, Second Appellate District, Case No. B237645
Los Angeles County Superior Court Case No. SC 109507

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW **PAGE(S)**

STATUTES

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The Court should deny review because the Court of Appeal correctly held that defendants Bernard Cott and Lorraine Cott were entitled to summary judgment in their favor because plaintiff Carolyn Gregory assumed the risk of being injured by Lorraine Cott when she contracted to provide in-home care services for Lorraine Cott, who suffers from Alzheimer's disease. Plaintiff Gregory asks this Court to create a distinction between claims made by healthcare workers for injuries sustained while tending to Alzheimer's patients

in convalescent homes/hospitals (the assumption of risk doctrine has barred claims by such healthcare workers for the last 16 years since the ruling in *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761) and claims made by in-home healthcare workers for injuries sustained providing in-home care to Alzheimer's patients. The Court should reject plaintiff's argument because the *Herrle* Court based its ruling on the nature of the relationship between the patient and the caregiver (the protection of the patient and others from violent outbursts often associated with Alzheimer's patients), not the location where the services were provided.

STATEMENT OF THE CASE

On September 7, 2010, plaintiff filed a complaint for damage for injuries related to an incident that allegedly occurred on September 4, 2008 while working at the Cotts' home as a caregiver for defendant Lorraine Cott, who was suffering from Alzheimer's disease. (CT 32-37) The complaint purported to state causes of action for general negligence and premises liability against both defendants and an additional cause of action for battery against defendant Lorraine Cott. (CT 32-37) In the general negligence cause of action plaintiff alleged that defendants knew that "the elderly occupant had violent tendencies" and that the defendants had breached their duty to warn plaintiff of the potential

harm arising from the violent conduct of the "elderly occupant." (CT 35) As for the premises liability cause of action, plaintiff alleged that defendants knew that the elderly occupant of their home presented a danger to plaintiff but failed to warn plaintiff of the risk of harm. (CT 36) Finally, as for the battery cause of action, plaintiff alleged that Mrs. Cott hit, struck, and cut her without her consent and without her permission to do so. (CT 37)

Plaintiff was trained to deal with Alzheimer's patients. (CT 41) When asked in deposition whether she was trained to deal with Alzheimer patients she responded: "Very much so." (CT 41) Plaintiff understood that Alzheimer's patients required "constant supervision for protection, both patient (sic), family members, [and] the caregiver." (CT 42) Plaintiff understood that one aspect of Alzheimer's disease is that Alzheimer's patients can become violent. (CT 42) Prior to providing care to Mrs. Cott, plaintiff had provided care to five other Alzheimer's patients. (CT 43-44) Two of the five previous Alzheimer's patients that plaintiff had cared for had become violent on multiple occasions. (CT 44) On several occasions, plaintiff required medical care for injuries she sustained while caring for Alzheimer's patients. (CT 44-45)

When plaintiff started providing care to Mrs. Cott she knew that Mrs. Cott was suffering from Alzheimer's disease. (CT 27-28, 47) When plaintiff started caring for Mrs. Cott in approximately 2005, Mrs. Cott was unable to

carry on a coherent conversation with plaintiff. (CT 48) When plaintiff first began to care for Mrs. Cott she was told by Mr. Cott that his wife was becoming more combative, including biting, kicking, scratching and flaying. (CT 50-51) Plaintiff witnessed Mrs. Cott injure Mr. Cott. (CT 52) Mrs. Cott injured plaintiff approximately half a dozen times prior to September 4, 2008. (CT 53-54) Over time, plaintiff noticed that Mrs. Cott was becoming even more physically combative. (CT 49) Plaintiff never asked her employer to assign her to a different patient. (CT 55-56)

On or about the date of the alleged incident Mrs. Cott was almost totally incoherent; she could not connect her words and merely babbled when she attempted to speak. (CT 28) According to plaintiff, on the day of the incident Mrs. Cott was "delusional as usual." (CT 69-70, 78) Earlier on the day of the incident Mrs. Cott had been very combative with plaintiff and with others. (CT 57-58)

On September 4, 2008, plaintiff was injured while washing dishes at the Cotts' home. (CT 67-70, 75-76, 78) On that date, Mrs. Cott was 85 years old, was approximately 5 feet tall, weighed approximately 100 pounds, and could barely walk. (CT 27) While plaintiff was in the process of washing the dishes, Mrs. Cott's body made contact with plaintiff's right back and shoulder. (CT 59-60) At the moment of contact between plaintiff and Mrs. Cott, plaintiff had a

large carving or boning knife in her right hand. (CT 61) Upon contact the knife slipped from her right hand and the tip of the knife cut her left wrist. (CT 62-65)

THE COURT OF APPEAL'S DECISION

The Court of Appeal relied primarily on the precedent established 16 years ago in the case of *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, which established the rule that a caretaker of an Alzheimer's patient who is injured by that patient is barred from holding the patient liable for their injuries on the grounds that the caretaker assumed the risk of being injured. The plaintiff in *Herrle* was a nurse's aide employed by a convalescent hospital. She was injured when one of the patients struck her. (*Herrle, supra,* 45 Cal.App.4th 1763-1764.) The Court ultimately held that the primary assumption of risk doctrine barred the claim because "plaintiff, by the very nature of her profession, placed herself in a position where she assumed the duty to take care of patients who were potentially violent and to protect such patients from committing acts which might injure others. The danger of violence to the plaintiff was rooted in the ' "very occasion for [the plaintiff's] engagement.' " (*Herrle, supra,* 45 Cal.App.4th at p. 1766.) The Appellate Court cogently noted that *Herrle* was handed down in 1996 and that there had been no legislative action to change the law.

The Appellate Court correctly found that there was no meaningful distinction between taking care of an Alzheimer's patient in a convalescent hospital as opposed to taking care of an Alzheimer's patient in a private residence because the nature of the activity undertaken by plaintiff was the same in both situations, as was the risk inherent in that activity. The Appellate Court noted that in *Herrle* the court focused almost exclusively on the relationship, "rather than the geography." The Appellate Court agreed with the observation that a mentally disabled person should not be forced into an institution " ' in order to be relieved of liability to a paid caregiver when at-homecare is more appropriate under all of the circumstances.' " As the court recognized, any other ruling would provide the wrong incentive to confine mentally disabled patients when this may not be in their best interest.

REASONS TO DENY REVIEW

The petition for review should be denied because there are no grounds for a Supreme Court review and because the law and the facts support the Appellate Court's findings that the Cotts did not owe a duty to plaintiff.

I.

THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW

The "issue" that plaintiff seeks to have this court review is not necessary to decide an important legal question or to secure uniformity of decisional law.

There is no important legal question to decide because the Appellate Court's decision was based on well-established law which has been the law since 1996. (*See Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761.) Further, plaintiff does not argue that the Appellate Court's decision is in conflict with any other Appellate Court decisions. Plaintiff relies exclusively on the dissent, which is hostile to the holding in *Herrle* altogether and which is based on a misapplication of the assumption of risk doctrine as established in *Knight v. Jewett* (1992) 3 Cal.4th 296. The dissent's hostility to the *Herrle* court's decision to adopt the assumption of risk analysis is not a basis for Supreme Court review. The important legal question as to whether or not to extend the occupational assumption of risk doctrine to healthcare workers was decided by *Herrle* and there have been no subsequent challenges to that decision.

II.

THE LAW AND THE FACTS SUPPORT THE APPELLATE COURT'S FINDING THAT THE COTTS DID NOT OWE A DUTY TO PLAINTIFF

As previously noted, the petition is based almost exclusively on the argument set forth in the dissent. It is clear from reading the dissent that Justice Armstrong does not approve of *Herrle* in its totality because it was an unwarranted extension of the assumption of risk doctrine. The dissent begins by referring to the assumption of risk doctrine as "long and tangled." While it

may be long, it is not tangled. Even the dissent notes that it is based on the "almost century-old, common law firefighter's rule." The dissent also correctly notes that the firefighter's rule has been extended to other public safety employees. However, the dissent takes issue with the extension of the firefighter's rule to caretakers for Alzheimer's patients as first enunciated in *Herrle*. The dissent notes that *Herrle* was a departure from the *Knight v. Jewett* holding. The dissent incorrectly notes that *Knight* only involved negligent conduct. That is not accurate. In *Knight*, the plaintiff brought an action for negligence as well as the intentional torts of assault and battery for injuries she sustained when the defendant knocked her over and stepped on her finger during an informal touch football game. (*Knight, supra* 3 Cal.4th 296, 300-301.) The dissent clearly disapproves of the holding in *Herrle* insofar as it included intentional conduct. The dissent also takes issue with *Herrle* on the grounds that the policy rationale for the firefighter's rule was not present in *Herrle*. Obviously, the dissent is not enamored of the *Herrle* holding despite the fact that it has gone unchallenged by any other court or by the legislature in the 16 years since it was handed down.

Plaintiff also argues, unconvincingly, that the cause of action for battery should survive the application of the primary assumption of risk doctrine because Civil Code section 41 establishes that a mentally incompetent person is

civilly liable for wrong done by that person. This same argument was made in *Herrle* and was summarily rejected as follows:

> The short answer to this argument is that section 41 is intended to place the incompetent person in the same posture as a competent, not in a legally worse position. Where no duty exists in the first place, section 41 does not create one. Competent persons can avail themselves of the doctrine of primary assumption of risk. Likewise, the defense is available to the incompetent." (*Herrle, supra,* 45 Cal.App.4th at p. 1766.)

Here, plaintiff is making the same argument and it should be rejected for the same reason.

CONCLUSION

Respondents Lorraine Cott and Bernard Cott respectfully request that the Court deny review.

DATED: 3/26/2013

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 2165 words as counted by the Microsoft Word word processing program used to generate this brief.

DATED: 3/26/2013

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PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Inglis, Ledbetter, Gower & Warriner, LLP, 523 West Sixth Street, Suite 1134, Los Angeles, California 90014. March 27, 2013, I served the following:

ANSWER TO PETITION FOR REVIEW

parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope and mailed it to the address below:

Alexander J. Petale, Esq
P.O. BOX 3993
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Hon. Gerald Rosenberg
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1725 Main Street
Santa Monica, CA 90401

Court of Appeal
Second Appellate District
300 S. Spring Street, 2nd Floor
N. Tower
Los Angeles, CA 90013-1213

[X] I placed a true and correct copy thereof in a sealed envelope addressed as indicated above, on March 27, 2013. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

By Facsimile:

[ ] From facsimile machine telephone number 213-622-2857, on , and complete copy of the above-referenced document(s) by facsimile transmission to the person(s) at the number(s) indicated:

[ ] **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee. Executed on _____, 2011, at Los Angeles, California.

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

Executed on March 27, 2013, Los Angeles, California.

Jill Skylar