No. S209125

In the Supreme Court of the State of California

CAROLYN GREGORY,
Plaintiff and Appellant,

vs.

LORRAINE COTT AND BERNARD COTT,
Defendants and Respondents.

ANSWER BRIEF ON THE MERITS

After a Decision By The Court Of Appeal
Second Appellate District, Division Five, Case No. B237645

Appeal From A Summary Judgment
Los Angeles County Superior Court, Case No. SC109507
Honorable Gerald Rosenberg

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S209125 - GREGORY v. COTT

Full Name of Interested Entity/Person	**Party / Non-Party**		**Nature of Interest**
Interinsurance Exchange of the Automobile Club	[ ]	⋈	Insurance Carrier For Defendant
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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Submitted by: ~~Alexander J. Petale~~
Richard S. Gower

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I.
INTRODUCTION

This case is resolved by the accepted proposition that an individual may not recover in tort from the persons who hired him or her, when the injuries sustained arose from the very risk the individual was hired to confront. Under this Court's precedent, the primary assumption of risk doctrine bars recovery for occupational hazards when (1) the risk causing injury was inherent in the job to be performed, and (2) the nature of the relationship of the parties to the risk requires it. The occupational hazard here—injury to a caregiver from violence by her Alzheimer's patient—meets both prongs of the test.

The risk of injury due to violent behavior is endemic to caring for someone with Alzheimer's disease. Alzheimer's progressively destroys a person's ability to think and reason, rendering the Alzheimer's patient depressed, anxious, and combative. As such, the Court of Appeal and courts in several other states have recognized that caregivers for Alzheimer's patients inherently face a risk of injury from the effects of the disease. In her deposition testimony, plaintiff and appellant Carolyn Gregory agreed: dealing with violence is part of the job when one is a caregiver for an Alzheimer's patient.

The nature of the relationship between Gregory and defendants and respondents Lorraine and Bernard Cott also requires

application of primary assumption of the risk. This Court has been clear that the second factor is met when the defendants are the parties who contracted for the plaintiff's services. There is no dispute here that the Cotts contracted for Gregory's services when they contracted with CarenetLA, Gregory's employer, to provide an in-home caregiver for Lorraine. Given the fact that Lorraine is the person for whom care was needed and given the Cotts' relationship with Gregory, it would be unfair to place liability on the Cotts for that reason.

On the other hand, it would not be unfair to apply primary assumption of risk to Gregory and other caregivers for Alzheimer's patients because they are in the best position to protect themselves from the inherent risks of the job. Thus, as a matter of policy, the burden should fall on the caregiver, rather than the Alzheimer's patient, or the family that hired the caregiver specifically to deal with these challenges. Ruling otherwise would contravene established legislative policy to minimize institutionalization of the elderly.

This case is not about expanding the firefighter's rule or any other doctrine, as Gregory claims. (See AOB 15.) As this Court has recognized, "[t]he firefighter's rule should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk[.]" (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 (*Neighbarger*).) Similarly, this case involves a straightforward analysis of basic

primary assumption of risk principles. And, while cases in other contexts are useful by analogy and to set forth the basic parameters of the primary assumption of risk doctrine, they do not represent the boundaries of factual contexts within which assumption of risk is applicable. Under the principles laid out by this Court in *Neighbarger*, as applied to the facts of the employment involved in this case, the ineluctable conclusion is that primary assumption of risk applies, and Gregory cannot recover from the Cotts for injuries sustained as a result of the violent outbursts and lack of motor control Gregory was hired to confront.

In that regard, Gregory does not quibble with application of primary assumption of risk to those who accept the occupational risk of caring for Alzheimer's patients. She concedes that "[c]learly if the Plaintiff Ms. Gregory was a certified or a licensed health care provider, working in an institutional setting, in [a] professional convalescent facility, the doctrine of 'occupational assumption of the risk,' would apply." (AOB 2.) But Gregory claims that standard does not apply to her because she is relatively untrained and was working in the Cotts' home. She does not cite any authority or provide any reason *why* a license or an institutional environment is a *requirement* for finding primary assumption of risk. They are not. Nor does Gregory explain or even address how her reasoning could possibly be consistent with this Court's application in *Priebe v. Nelson* (2006) 39 Cal.4th 1112 (*Priebe*) of primary assumption of risk in the context of an unlicensed worker in a non-clinical setting.

Given the clear legislative policy support for in-home care and against unnecessary institutionalization of the elderly, no duty of care can exist here. Placing crushing liability on those who contract for in-home care for their loved ones would create great incentive to institutionalize them instead, in derogation of the Legislature's expressly stated policy against unnecessary institutionalization of the elderly. Moreover, the policies underlying the imposition of a duty of care on individuals with mental illness do not apply in the context of an Alzheimer's patient injuring her caregiver. Nor does this Court's precedent support finding such a duty. For those reasons, the Court should hold that the primary assumption of risk doctrine precludes finding that the Cotts owed a duty of care to Gregory.

The Court should affirm the judgment of the Court of Appeal.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Cotts Contract With A Home Care Agency That Sends Carolyn Gregory To Be Lorraine Cott's In-Home Caregiver

In 2004, Bernard Cott contracted with a home care agency, CarenetLA (the "Agency"), "to provide in-home care at a

single family home for his 85-year-old wife, Lorraine, who had suffered from Alzheimer's disease for at least nine years."[1] (Opn. 2; CT 117.) In 2005, the Agency assigned Gregory to provide that care. (Opn. 2; CT 27, 117.) According to Gregory, her duties included "lift[ing] wheelchair bound client [and] transportation," "rotat[ing] hospice client [for] bathing and continence," "assist[ing] Alzheimer['s] [patient] w[ith] transportation [and] bathing," and "[g]rocer[ies,] [l]aundry [and] housekeeping." (CT 173.)[2]

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[1] The facts presented are undisputed. (Opn. 2, fn. 2.) Neither party petitioned for rehearing, and thus, there is no dispute that the majority opinion's recitation of the facts is correct. (Cal. Rules of Court, rule 8.500(c)(2) ["as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing"].)

[2] The Agency "provide[s] in home care in the greater Los Angeles area." (http://www.carenetla.com/.) The service is available so that one's "elderly loved ones can live independently with dignity, safety and security in the comfort of their own home." (http://www.carenetla.com/in-home-care-services-for-eldercare-in-los-angeles/.) According to the Agency, its caregivers are employees of CarenetLA, and "for [patients'] protection, [the Agency] insure[s] all CarenetLA caregivers with California Workers' Compensation." (http://www.carenetla.com/about-us/.) The Agency states that it has three plans for receiving home care. (http://www.carenetla.com/in-home-caregivers-in-los-angeles/.) All plans include companionship, light housekeeping, meal preparation, and medication reminders, but only the Platinum plan includes oral hygiene, incontinence care, feeding assistance, and transferring and positioning. (*Ibid.*)

B. Gregory Is Injured By Lorraine Cott In The Course Of Performing Her Caregiver Duties

In 2008, years after she was assigned to the Cotts, Gregory held a knife in her hand as she washed dishes. (Opn. 3.) "Lorraine made contact with [her] and reached for" the knife. (*Ibid.*) "As a result, [Gregory] was cut on the wrist by the knife, suffering significant injuries." (*Ibid.*) Gregory then filled out an "Incident Report" for the Agency that stated Lorraine did not act confused or different than usual, and that she "has severe/advanced [A]lzheimer['s]." (CT 76.) Gregory never returned to work for the Cotts, and she was replaced by another Agency caregiver. (CT 162.) Gregory made a workers' compensation claim, [appellant's certificate of interested parties] and filed this suit [CT 32].

C. Gregory Has Prior Training And Experience As A Caregiver For Alzheimer's Patients

Injuries from caring for Alzheimer's patients were not new to Gregory. Gregory "said that she had training in dealing with clients suffering from Alzheimer's disease and had provided services for Alzheimer's patients in the past." (Opn. 2.) In her deposition, when Gregory was asked whether she was "trained in how to deal with a client suffering from Alzheimer's," she responded: "Very much so." (CT 41.) That training included video presentations and site visits to "senior homes specializing in dementia[.]" (*Ibid.*) In her training, Gregory learned that one of the "extra duties" involved in caring for an Alzheimer's patient is "[c]onstant supervision for

protection, both the patient, family members, *the caregiver.*" (CT 42 [emphasis added].)

Gregory acknowledged that she had developed "[f]ull and complete knowledge of both the physical and the mental/psychological aspects of" Alzheimer's and suggested that such knowledge was necessary to take on the role of caring for an Alzheimer's patient. (CT 42.) When asked if violence was "an aspect of the disease that [she was] referring to," Gregory responded: "Yes, sir." (*Ibid.*)

Gregory had years of experience caring for Alzheimer's patients and had done so with another agency before working with CarenetLA. (CT 41.) She cared for at least five Alzheimer's patients before Lorraine. (CT 43-44.) At least two became violent with her. (CT 44.) As a result of these prior violent outbursts, Gregory had to receive chiropractic treatment three times. (CT 44-45.)

D. Gregory Knows Of And Personally Experiences Lorraine Cott's Physical Combativeness Before The Injury

When Gregory first began caring for Lorraine, "she was aware that Lorraine had Alzheimer's and knew that Alzheimer's patients could become violent." (Opn. 2.) Lorraine could not hold a coherent conversation, but she did not have physical limitations. (CT 48.) Bernard told Gregory from the beginning that Lorraine

had become combative. (CT 50-51.) He told her Lorraine did not recognize him, and so she would bite, kick, scratch, and flail. (CT 51.) And Gregory saw the "minor injuries" Bernard had sustained. (CT 52.)

As Gregory recounted, "[a]s time and her disease progressed, [Lorraine] became more combative physically, verbally. She required more physical restraint during bathing for her protection." (CT 49.) Some years before the injury, Gregory had to restrain Lorraine every time Lorraine had a bath. (*Ibid.*) Approximately a year before the injury, Gregory witnessed a violent incident that resulted in Bernard receiving stitches. (CT 52.) And by the time of the injury, Gregory herself had sustained "[m]inor bruis[es], small scrapes, [and] minor scrapes" due to violent conduct by Lorraine. (CT 54.) Gregory never requested to be placed with a different patient because she "could handle the job." (CT 56.)

E. Gregory Sues The Cotts And The Trial Court Enters Summary Judgment In The Cotts' Favor

Gregory suffered injuries to her non-dominant hand [CT 68] causing shooting pains and numbness in her thumb and two fingers that "p[e]rplexed" her doctors [CT 78]. After filing a workers' compensation claim, [appellant's certificate of interested parties] Gregory sued Bernard and Lorraine [CT 32-37]. She alleged three causes of action. (CT 35-37.) She alleged general negligence—that Bernard and Lorraine knew Lorraine had "violent

tendencies" and failed to warn her. (CT 35.) Gregory's second cause of action was for premises liability against Bernard and Lorraine, again based on a failure to warn. (CT 36.) And the third cause of action alleged battery by Lorraine. (CT 37.) Gregory also requested punitive damages against Lorraine. (*Ibid.*)

After discovery, the Cotts moved for summary judgment. (CT 4-5.) The trial court entered summary judgment, explaining "[i]t'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." (RT 6.)

F. Gregory Appeals, And After The Court Of Appeal Affirms, Petitions This Court For Review

Gregory appealed, and in a 2-1 decision, the Second District affirmed. The Court of Appeal recognized that Gregory "had been trained to deal with Alzheimer's patients and was aware of the physical dangers from such patients. She was an experienced, contracted caretaker." (Opn. 9-10.) Thus, the Second District held Gregory could not recover from the Cotts in light of the facts that (1) the danger of injury from violence by the patient is inherent in caring for someone with Alzheimer's and (2) the defendants hired Gregory specifically to deal with Lorraine's condition and conduct arising out of her Alzheimer's symptoms. (Opn. 8-10.) The court further noted that "[c]aretakers generally may look to other sources

of available compensation rather than to the victim of a debilitating disease or to a spouse who has undertaken to care for the Alzheimer's patient at home and must endure the patient's misfortune." (Opn. 10.) After the decision, Gregory eschewed the opportunity to petition for rehearing and instead sought review in this Court. The Court granted review.

III.

ARGUMENT

A. Primary Assumption Of Risk Analysis Has Evolved From An Individualized Question Of Consent To An Evaluation Of The Nature Of The Activity In Light Of The Relationship Of The Parties To The Activity

1. Primary Assumption Of Risk Arose From Activities Carrying Inherent Risks In Myriad Contexts

The only issue here is whether Bernard and Lorraine Cott owed any duty to Gregory to prevent her injury, in light of the primary assumption of risk doctrine. As a general rule, all persons have a duty of care not to injure others. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315 (*Knight*).) And, when one breaches that duty, he or she will be liable for any injury caused to other persons or property. (*Ibid.*)

The general rule of a duty of care is not without exceptions, however. "Duty is not an immutable fact of nature but only an expression of the sum total of those *considerations of policy*

which lead the law to say that the particular plaintiff is entitled to protection." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 [internal quotation marks and citations omitted].) Naturally, then, when policy considerations weighing in favor of encouraging an activity by limiting liability outweigh the policy considerations that support asserting liability, no duty exists. (*Id.* at pp. 473-475 [the social utility of garbage collection outweighed policy interests supporting liability for injuries sustained when horse spooked by noise from garbage truck threw the plaintiff].)

One of those duty exceptions is the primary assumption of risk doctrine. That doctrine dictates that, when an individual assumes the risk of injury inherent in an activity voluntarily engaged in, the defendant may have no duty, as a matter of law, to protect the plaintiff from such injury. (*Walters v. Sloan* (1977) 20 Cal.3d 199, 204-205, disapproved on other grounds in *Neighbarger*, *supra*, 8 Cal.4th 532 (*Walters*) [primary assumption of risk is an outgrowth of public policy "adopted by progressive courts and based on fundamental concepts of justice"].)

Initially, the policy considerations were viewed as arising from the injured party's antecedent knowledge and consent. "[T]he elements of the defense of assumption of risk [were] a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk." (*Prescott v. Ralph's Grocery Co.* (1954) 42 Cal.2d 158, 162 (*Prescott*).) Thus, in *Prescott*, when the plaintiff sued the defendant grocery store for injuries incurred when

she fell on a wet sidewalk outside of the store, fully aware of the water and voluntarily stepping onto the sidewalk, this Court ruled that the trial court correctly instructed the jury that "'[o]ne is said to assume a risk when she freely . . . and voluntarily exposes herself to [a] danger, or when she knows, or in the exercise of ordinary care would know, that a danger exists.'" (*Id.* at p. 161.)

Later, the Court's adoption of comparative negligence changed the method by which assumption of risk was evaluated. In *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 (*Li*), the Court declared that the doctrine of contributory negligence was no longer valid in California. The Court posited that its adoption of comparative fault would affect application of the assumption of risk doctrine. (*Id.* at pp. 824-825.) Assumption of risk overlapped "contributory negligence to some extent and in fact [was] made up of at least two distinct defenses." (*Id.* at p. 824.) The first defense was that the plaintiff unreasonably took on a known risk, and the second was that the plaintiff "is held to agree to relieve defendant of an obligation of reasonable conduct toward him." (*Ibid.*)

When contributory negligence was abandoned, the Court explained that "the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence." (*Li*, *supra*, 13 Cal.3d at p. 825.) Thus, the first form of assumption

of risk was subsumed in comparative fault, and all that remained was the principle that a plaintiff relieved the defendant of some duties by consent.

Two years after deciding *Li*, the Court confronted an attack on the century-old application of primary assumption of risk to firefighters and police officers. (*Walters*, *supra*, 20 Cal.3d at p. 203.) Noting that its ruling was consistent with that of other jurisdictions [*ibid.*], the Court reaffirmed application of the assumption of risk doctrine in this context based on two rationales. First, the doctrine was "based on a principle as fundamental to our law today as it was centuries ago . . . one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby." (*Id.* at p. 204.) Second, as a matter of public policy, "firemen . . . 'cannot complain of negligence in the creation of the very occasion for (their) engagement.'" (*Id.* at p. 205.) Thus, a police officer injured by drunk minors at a party could not recover against the person who gave the alcohol to the minors when the officer was called to the scene for the purpose of breaking up the party. (*Id.* at p. 202.)

Five years later, the Court focused on the second rationale for primary assumption of risk in the firefighting context. (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 368.) The Court summarized *Walters* as holding that "[s]ince firefighting is an occupation which by its very nature exposes firemen to particular

hazards, firemen cannot complain of negligent or reckless conduct which forms the basis for their being summoned." (*Ibid.*)

Seventeen years after adopting comparative negligence in *Li*, the two rationales offered by the Court in *Walters* became one in *Knight*. "Prior to the adoption of comparative fault principles of liability, there often was no need to distinguish between the different categories of assumption of risk cases, because if a case fell into either category, the plaintiff's recovery was totally barred." (*Knight*, *supra*, 3 Cal.4th at pp. 300, 304 [woman who was injured in a game of touch football when the defendant collided with her during a play assumed the risk by participating in the game].) But in light of *Li*, the first category—which entailed a measure of fault by the plaintiff—merged into comparative negligence and is now called secondary assumption of risk. (*Id.* at p. 308.) In this way, the Court obviated the knowing and voluntary confrontation rationale of *Walters*.

By abrogating the "knowing and voluntary" strand of assumption of risk, the Court also eliminated any reliance on implied consent. (*Knight*, *supra*, 3 Cal.4th at p. 311.) It noted that "it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself." (*Ibid.*) Thus, primary assumption of risk now rests on whether, "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[.]" (*Id.* at pp. 314-315.)

2. In The Occupational Hazard Context, Primary Assumption Of Risk Focuses On The Job Itself

In the occupational hazard context, determining whether primary assumption of risk applies depends on (1) the nature of the employment activities, and (2) the relationship of the parties to the risky aspect of the job. (*Neighbarger*, *supra*, 8 Cal.4th at p. 538; AOB 1.) This analysis is based on the public policy that "it is 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." (*Neighbarger*, *supra*, 8 Cal.4th at p. 542.)

In *Neighbarger*, the Court confronted a case involving injuries to "a private safety employee who has occasional firefighting duties." (*Neighbarger*, *supra*, 8 Cal.4th at p. 534.) The employee stated claims "against a third party, not the employer, for injuries caused by the third party's negligence in starting a fire." (*Id.* at pp. 534-535) Neighbarger was a safety supervisor for an oil company. (*Id.* at p. 535.) Employees of a third-party maintenance services company negligently caused a fire when installing a machine part at a refinery where Neighbarger worked. (*Ibid.*)

Neighbarger was injured and sued the third-party maintenance services company. (*Ibid.*)

To determine whether Neighbarger had assumed the risk, the Court focused on the basic two-pronged test for primary assumption of risk. (*Neighbarger*, *supra*, 8 Cal.4th at pp. 538-539, 542-543.) The Court recognized that it would be inadequate to simply compare the interests at issue in that case to those at issue under the firefighter's rule. (*Neighbarger*, *supra*, 8 Cal.4th at pp. 538-539 ["The firefighter's rule should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk"].) Instead, the Court analyzed the question utilizing the two prong test for primary assumption of risk.

On the first prong of the primary assumption of risk test, the Court ruled that the risk of injury in a fire was not inherent in employment as a private safety worker. (*Neighbarger*, *supra*, 8 Cal.4th at p. 542.) "An industrial safety supervisor faces a much broader range of risks, many of which [the Court] should be reluctant to regard as inevitably ripening into injury-causing accidents." (*Ibid.*) Thus, while the Court deemed fire "inevitable," it ruled that industrial accidents, as a broader category, are not equally inevitable." (*Ibid.*) And the Court, as a policy matter, was "hesitant to narrow the duty of care to avoid industrial accidents." (*Ibid.*)

Primary assumption of risk also did not apply under the second prong. (*Neighbarger*, *supra*, 8 Cal.4th at p. 542.) The fact that the plaintiff was privately employed by a company other than the defendants meant that there was no relationship with third-parties absolving them from duty. (*Id.* at p. 543.) In the public employment context, everyone is the firefighter's employer: "the public, having secured the services of the firefighter by taxing itself, stands in the shoes of the person who hires a contractor to cure a dangerous condition." (*Id.* at p. 542.) Thus, in *Neighbarger*, the lack of an employment relationship, direct or indirect, between the parties themselves was dispositive. (*Id.* at pp. 542-543.) "Having no relationship with the employee, and not having contracted for his or her services, it would not be unfair to charge the third party with the usual duty of care towards the private safety employee." (*Id.* at p. 543.)

By contrast, the Court applied the same test and found that a plaintiff had assumed the risk of an occupational hazard when (1) that plaintiff sued the individuals who hired the kennel she worked for to take care of their dog, and (2) the kennel assigned the plaintiff to take care of the dog. (*Priebe*, *supra*, 39 Cal.4th at p. 1132.) *Priebe* involved a "commercial kennel worker" who sued a dog's owner when the dog bit her while taking it for a walk. (*Id.* at p. 1115.)

Initially, the Court noted it was well-settled that veterinarians assumed the risk of dog bites. (*Priebe*, *supra*, 39

Cal.4th at p. 1122.) And thus, the plaintiff attempted to distinguish the nature of her position as a kennel worker from the position of a veterinarian or a veterinary assistant based on lack of formal training. (*Id.* at p. 1127.) The plaintiff "had only been working at the kennel for approximately one month before the attack." (*Ibid.*) She had received general training and other advice from a coworker, but the plaintiff had not received any "special training on how to care for or manage a dog of [the defendant's dog's] vicious and dangerous nature." (*Ibid.*) The Court did not find the plaintiff's lack of training relevant. (*Id.* at p. 1128.)

The Court was convinced that the first and second prongs of the assumption of risk test were met because "the business of kenneling is such that the kennel operators assume the care and handling of dogs entrusted to their professional care during the absence of their owners[.]" (*Priebe*, *supra*, 39 Cal.4th at p. 1129 [internal quotation marks and emphasis omitted].) The nature of the job was to provide care for the dog, even though one could not predict whether or when the dog might bite. (*Ibid.*) And the relationship between the parties was such that the defendant paid the plaintiff's employer to provide such care in his absence. (*Ibid.*) When the owner leaves, the kennel is in charge and trusted to determine the best and safest way to provide care. (*Ibid.*) Thus, kennel workers were "in the best position, *and usually the only* position, to take the necessary safety precautions and protective measures to avoid being bitten[.]" (*Id.* at p. 1130 [original italics].) And "[i]t seems counterintuitive to hold a dog owner strictly liable

to a kennel worker for breach of the duty of care . . . [when] the dog owner has completely relinquished the care, custody, and control of his or her dog . . . and the dog owner is therefore not in a position to supervise or prevent any conduct on the part of the dog." (*Id.* at p. 1129.)

Additionally, the Court noted a third public policy reason in the context of a kennel worker taking care of a dog: allowing kennel workers to recover for injuries caused by dog bites—a risk that is part of the job—would discourage dog owners from availing themselves of kennel services for their dogs. (*Priebe*, *supra*, 39 Cal.4th at p. 1131.) The risk of liability would far outweigh the value of leaving the dog. (*Ibid.*) And so, as a policy matter, no duty existed also because the harm of kennel workers being bitten was outweighed by the value of "allowing dog owners to board their pets and have trained technicians care for the animal while the owner is out of town." (*Ibid.* [internal quotation marks omitted].) In addition, application of the assumption of risk doctrine in these circumstances would serve to protect the public from harm by dogs in the dog's owners' absence. (*Ibid.*)

B. Employment As An In-Home Caregiver For Alzheimer's Patients Inherently Involves A Risk Of Injury From Violence Or Negligence

1. The Risk Of Injury Must Be A Hazard Inherent In The Occupation Such That The Risk Is A Regular, Though Not Necessarily Universal, Part Of The Job

The policy rationales for protecting Alzheimer's patients and their families from liability to paid caregivers are myriad. By the nature of the task, caregivers for Alzheimer's patients are hired to confront the risk that the patient—true to the nature of the disease—might become violent. The first prong of the primary assumption of risk analysis is met when the caregiver is employed to confront the risk.

In *Priebe*, *supra*, 39 Cal.4th at p. 1129, the Court—quoting the Court of Appeal—recognized that the first prong was met for a kennel worker because "'the business of kenneling is such that the kennel operators assume the care and handling of dogs entrusted to their professional care[.]'" Because they are in charge when the dog owner leaves, kennel workers "'determine the best way to handle the dog while at the kennel, and what protective measures, if any, should be taken to ensure employee safety.'" (*Ibid.*) And given the fact that dog bites were a "known hazard endemic" to the job of kenneling dogs, anyone who engaged in the occupation voluntarily assumed the risk of being bitten. (*Id.* at p. 1130.)

Not every dog bites, and so universal injury or even universal conduct that could cause injury is not required for a risk to be endemic to a task. But being bitten—or having dogs attempt to bite—is common enough that it is endemic to the task of working at a kennel or as a veterinarian. It is common sense that if an individual works with dogs long enough, it is likely that some dog will try to bite him or her at some point. Given the high likelihood of a dog attempting to bite at some point, also relevant "is the common sense recognition that . . . kennel technicians . . . are in the best position, *and usually the only position*, to take the necessary safety precautions and protective measures to avoid being bitten[.]" (*Priebe*, *supra*, 39 Cal.4th at p. 1130.)

By contrast, the occupational hazard in *Neighbarger* was more attenuated when compared to what the injured party was hired to do. That case involved someone hired as a safety supervisor who was injured in a fire. (*Neighbarger*, *supra*, 8 Cal.4th at p. 542.) He was not hired to fight fires. (*Ibid.*) Rather, he was hired to face and prevent "a much broader range of risks, many of which [the Court] should be reluctant to regard as inevitably ripening into injury-causing accidents." (*Ibid.*) Finding liability would not effectively eliminate the job because fighting fires is not inherent in it. Plant safety supervisors can still do their jobs without fighting fires.

Unlike a safety supervisor position, violence from the patient is a "known hazard endemic" to caring for someone with

Alzheimer's. Alzheimer's disease is the most prevalent form of dementia. (Vaughn E. James, *No Help for the Helpless: How the Law Has Failed to Serve and Protect Persons Suffering from Alzheimer's Disease* (2012) 7 J. Health & Biomedical L. 407, 409 (James).) "The greatest risk factor for Alzheimer's disease is advancing age, but Alzheimer's is not a normal part of aging." (Alzheimer's Association, *2012 Alzheimer's Disease Facts and Figures*, Alzheimers & Dementia (2012) p. 10 (Facts and Figures).) It afflicts one in eight people who are 65 or older. (*Id.* at p. 14.)

Alzheimer's disease proceeds in stages. It progresses through the patient's brain and "robs the patient of memory and cognitive skills, and causes him or her to have severe changes in personality and behavior." (James, *supra*, 7 J. Health & Biomedical L. at p. 410.) Ultimately, the disease "erode[s] the patient's ability to think or reason," and the patient "then requires assistance for the most essential tasks of daily living." (*Id.* at pp. 413-414.)

Uncontrolled aggressive behavior is inherent in the disease. "An increasing number of individuals with Alzheimer's disease, or other dementia-related diseases, have had encounters with the legal system due to uncontrolled aggressive behaviors." (Jack Schwartz and Leslie B. Fried, *Legal Issues for Caregivers of Individuals with Alzheimer's Disease* in Caregiving for Alzheimer's Disease and Related Disorders (Springer edit., 2013) pp. 165, 174.) "Johns Hopkins University researchers found a high prevalence (60-80%) of neuropsychiatric symptoms in participants with dementia,"

including "agitation, depression, apathy, anxiety, delusions, hallucinations, and sleep impairment." (*Ibid.*) "Physically aggressive and verbally disruptive behavior also occurs and is difficult to address." (*Ibid.*)

These violent tendencies generally manifest in the later stages of Alzheimer's. "With moderately severe [Alzheimer's disease], psychotic features, irritability, agitation, combativeness, and wandering are common." (Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) p. 612.) "Because of the patient's fear, frustration, and shame regarding their circumstances, as well as other factors, patients frequently develop verbal outbursts, and threatening, or even violent behavior may occur."[3] Once the disease has progressed to its most advanced stages, the Alzheimer's patient has no more control over himself or herself than "a person suffering from an epileptic seizure or a sudden heart attack." (Okianer Christian Dark, *Tort Liability and the 'Unquiet Mind'* (2005) 30 T. Marshall L. Rev. 169, 203.) These changes "result[] in persons becoming disoriented, frustrated, and sometimes combative." (*Ibid.*) Thus, some Alzheimer's sufferers "are combative and dangerous to those around them when they get confused or disoriented, and some become consistently violent." (Edward P. Richards, *Public Policy Implications of Liability*

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[3] Fisher Center for Alzheimer's Research Foundation, *Clinical Stages of Alzheimer's Disease*, available at http://www.alzinfo.org/clinical-stages-of-alzheimers/.

Regimes for Injuries Caused by Persons With Alzheimer's Disease (2000-2001) 35 Ga. L. Rev. 621, 639 (Richards).) And a paid caregiver goes into the job knowing that he or she must confront the combativeness and danger. While not every Alzheimer's patient resorts to violence, enough do so that anyone working with them long enough can expect to confront a violent Alzheimer's patient at some point, as did Gregory on more than one occasion.

The Court of Appeal and courts in other states have recognized that dealing with violent outbursts and lack of motor control are part of the job of taking care of someone with Alzheimer's disease. In *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1763-1764 (*Herrle*), the Court of Appeal held that the primary assumption of risk doctrine barred recovery for a nurse's aide who was injured by an Alzheimer's patient's violence while the aide was working in a convalescent home. The court acknowledged that the aide's "actual knowledge of [the patient's] propensity to violence is irrelevant[.]" (*Id.* at p. 1764.)

The nature of the job was critical. The court recognized that "[v]iolence is a common trait among Alzheimer's patients" and that the aide "knew her job exposed her to patients suffering from mental illnesses which made them violent, combative and aggressive." (*Herrle*, *supra*, 45 Cal.App.4th at p. 1764.) And "[w]hen the relationship between health care providers and health care recipients is considered, the idea that a patient should be liable for 'conduct' part and parcel of the very disease which prompted the

patient (or, as here, the patient's family) to seek professional help in the first place becomes untenable." (*Id.* at p. 1770.) Thus, the aide could not recover.

Here, the Court of Appeal faithfully applied this Court's precedents to the conceded reality that dealing with violence from an Alzheimer's patient is part of the job of caring for her. First, the Court of Appeal focused on the standard set in *Knight* as applied in *Priebe* and *Neighbarger*. (Opn. 4-5.) It then analyzed *Herrle* and out-of-state case law on Alzheimer's-related injuries and concluded that "there is no meaningful distinction between undertaking to care for an Alzheimer's patient in a convalescent hospital or other health care facility (citation) and undertaking to care for such a patient in a private residence"; the nature of the employment involves confronting combative Alzheimer's patients. (Opn. 8-9.)

Courts in other "jurisdictions that apply the reasonable person standard to individuals with mental disabilities have uniformly held that Alzheimer's patients who have no capacity to control their conduct do not owe a duty to their caregivers to refrain from violent conduct[.]" (*Creasy v. Rusk* (Ind. 2000) 730 N.E.2d 659, 667, 669 (*Creasy*) [Alzheimer's patient who "regularly displayed behaviors characteristic of a person with advanced Alzheimer's disease such as aggression, belligerence, and violence" did not owe duty of care to nursing assistant he violently kicked while she put him to bed].) That is "because the factual

circumstances negate the policy rationales behind the presumption of liability." (*Id.* at p. 667.)

For instance, in *Gould v. American Family Mut. Ins. Co.* (Wis. 1996) 543 N.W.2d 282, 283 (*Gould*), an Alzheimer's patient injured a nurse by knocking her to the floor as she was attempting to remove him from another patient's room. The court recognized it would be imprudent to create a broad negligence defense for mental illness. (*Id.* at p. 286.) But it held that the Alzheimer's patient owed no duty of care to the nurse. (*Ibid.*) The nurse "was not an innocent member of the public unable to anticipate or safeguard against the harm when encountered." (*Ibid.*) Thus, the common law doctrine of protecting innocent strangers from acts by persons with mental illnesses did not apply because the nurse "was employed as a caregiver specifically for dementia patients and knowingly encountered the dangers associated with such employment." (*Ibid.*) "When a mentally disabled person injures an employed caregiver, the injured party can reasonably foresee the danger and is not 'innocent' of the risk involved." (*Id.* at p. 287.) The court held that "an individual institutionalized, as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caregivers who are employed for financial compensation." (*Id.* at p. 283.)

Other examples of states recognizing the policy interest in protecting Alzheimer's patients from tort liability for injuries to

paid caregivers are myriad.[4] The cases from these various jurisdictions utilize different legal theories based on different state laws, but the common thread among them is a recognition of the fact that violence is part of Alzheimer's and dealing with that violence is an inexorable part of working in a field that requires caring for Alzheimer's patients.

2. Whether A Person Is Trained Or Licensed Does Not Bear On The Nature Of The Task For Which He Or She Is Employed

The job description of an in-home caregiver for an Alzheimer's patient requires constant contact with someone who is prone to become violent. That is the nature of the job. The amount of training required, therefore, does not define the inherent risks of the job. Gregory argues that she did not assume the risk because she "had no certification and received only informal training." (AOB 10.) But she does not explain why this makes a difference. The amount of training does not affect the nature of the job itself—caring for an Alzheimer's patient with its inherent risks.

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4 See, e.g., *Vinccinelli v. Musso* (La.App. 2002) 818 So.2d 163, 165, 167 (*Vinccinelli*) [paid companion for Alzheimer's patient could not recover for injuries sustained when she slipped on ice cream spilled but not cleaned up by patient]; *Colman v. Notre Dame Convalescent Home, Inc.* (D. Conn. 1997) 968 F.Supp. 809, 813 (*Colman*) [caregiver entertaining patients at convalescent home with guitar could not recover for injuries when "senile dementia" patient intentionally hit her with her guitar]; *Mujica v. Turner* (Fla.App. 1991) 582 So.2d 24, 25 [physical therapist employed at nursing center could not recover against Alzheimer's patient who pushed therapist, causing injury].

In-home caregivers, like Gregory, are far from ordinary housekeepers. And Gregory's attempts to liken herself to a housekeeper now [see, e.g., AOB 12], are belied by her deposition testimony and the general job description of a paid caregiver for an Alzheimer's patient. Caregivers, like Gregory, aid the patient in bathing, they help with medications, they assist with transportation, and they have some measure of Alzheimer's-specific experience, education, and/or training. (CT 41-44.) Such activities, of course, require close contact with the patient, and they inherently raise the need for caregivers to protect themselves from a risk endemic to the disease—violence from the patient.

Gregory agrees. She readily admitted in deposition that handling violent outbursts was part of "the job" when dealing with Alzheimer's patients. (CT 56.) When asked about the "extra duties" of caring for someone with Alzheimer's, Gregory immediately stated that there was a requirement of "[c]onstant supervision for protection [of] the patient, family members, [and] *the caregiver.*" (CT 42 [emphasis added].) Indeed, Gregory even had a particular pattern for doing the dishes, "start[ing] with the knives, glassware because of [the] unpredictability of [the] Alzheimer['s] client." (CT 78.)[5] Gregory's recognition of the

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[5] To the extent Gregory concedes she was comparatively negligent here [AOB 16 (asserting that secondary assumption of risk should apply)], the Cotts agree. But that is a separate analysis, and Gregory inverts the analysis when she implies—without citation—that whether secondary assumption of risk would apply dictates whether primary assumption of risk applies. First, a court must

Continued on following page

nature of her job also is established by her lexicon. Gregory calls herself a "caregiver," not a "housekeeper." (CT 44.) Indeed, in her complaint, Gregory called herself a "caregiver" twice, and she never mentioned being a housekeeper or having housekeeping duties. (CT 35-36.) Moreover, she referred to the individuals for whom she provides care as her "patients." (CT 42, 43-44, 46.)

Moreover, California precedent does not suggest the amount of training is relevant to determining whether primary assumption of risk applies. In *Priebe*—a case Gregory does not address in her brief at all—the plaintiff kennel worker raised this very same argument. (*Priebe*, *supra*, 39 Cal.4th at p. 1127.) Priebe's training "included the basics of dog walking, including checking a boarded dog's kennel card to make sure there was no reason not to walk it, how to put a leash and collar on properly, how to greet the dog, and 'to be careful of the other dogs and be aware of the dog that you're walking.'" (*Id.* at p. 1117.) Priebe had little experience, as she had been working at the kennel "for about four

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Footnote Continued from previous page
determine whether a duty exists (primary assumption of risk) then, if a duty does exist, the court must determine whether, upon breach of that duty, the plaintiff's recovery is limited by her own negligence (secondary assumption of risk/comparative negligence). (*Knight*, *supra*, 3 Cal.4th at p. 310 ["In 'primary assumption of risk' cases, it is consistent with comparative fault principles totally to bar a plaintiff from pursuing a cause of action, because when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles"].)

weeks." (*Id.* at p. 1118.) The Court ruled that the training Priebe had received was sufficient, given the context of her employment. (*Id.* at p. 1130 [Priebe was "trained to safely care for, walk, and handle dogs" and thus was "in the only position to look out for [her] own personal safety"].)

Citing her self-serving affidavit, Gregory now claims that she only "watch[ed] a video tape and visit[ed] Alzheimer's patients in a care facility[.]" (AOB 9.) By comparison to *Priebe*, even such limited training for her limited professional role establishes that Gregory was sufficiently trained to assume the risk of the occupational hazards endemic to her career choice. In any event, at her deposition, Gregory wholeheartedly agreed that she was "trained in how to deal with a client suffering from Alzheimer's[.]" (CT 163.) And she was well aware that the "extra duties" of caring for someone with Alzheimer's involve, in her words, "[c]onstant supervision for protection, both the patient, family members, the caregiver." (CT 42.) From her training, Gregory was completely aware of the large number of Alzheimer's patients that become violent. (CT 42-43.) And Gregory had experienced violence from half of the Alzheimer's patients for whom she had cared. (CT 44.) Thus, from her training and experience in the in-home caregiving profession, even Gregory acknowledged that dealing with violence from Alzheimer's patients was part of "handl[ing] the job." (CT 56.)

3. When Intentional Conduct Is An Inherent Hazard, The Risk Is Assumed

For the same reasons, whether the injurious conduct was intentional is irrelevant. This Court plainly recognized in *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 164-165, that when intentional injurious conduct is part and parcel of the activity in which the plaintiff engaged, the plaintiff has met the first prong of assumption of risk. Gregory attempts to distinguish *Avila* only by noting that it arose in the context of sport. (AOB 3-5.) She fails to explain how that distinction makes a difference. The legal principle is the same regardless of whether a case involves sports or occupational risks: if the risk is inherent in the activity, the first prong of the assumption of risk test is met, regardless of whether the risk is intentionally injurious conduct.

With Alzheimer's, violence has to be expected, and violence from the patient is an inherent risk in any job caring for Alzheimer's patients. Given the fact that violence is intentional by definition, eliminating intentional conduct from the scope of risks assumed by Alzheimer's caregivers would eviscerate the doctrine for all violent acts. That would run contrary to the reasoning behind eliminating a duty when an employed party has assumed a risk. The person is paid to take on *all* endemic risks. And it would frustrate the Court's settled scheme for administering primary assumption of risk to exempt violence by Alzheimer's patients from the category of risks assumed by Alzheimer's caregivers. It is inherent in the job,

and thus, there is no duty by the hiring party to protect the caregiver from the violence.

In the end, the question of whether one assumes the risk of intentional conduct comes back to whether the conduct causing injury is an inherent part of the activity or occupation. As the Cotts have established above, intentional violent actions are endemic to Alzheimer's disease. And Gregory readily acknowledges that protecting oneself from such violence is one of the job duties of an Alzheimer's caregiver. As a caregiver, Gregory was in the best position to protect herself from intentional, violent conduct by Lorraine. (Cf. *Priebe*, *supra*, 39 Cal.4th at p. 1130; *Colman*, *supra*, 968 F.Supp. at p. 813 ["it was plaintiff, not [the patient] who was in the best position to protect against the risks and the dangers she faced that stemmed from the very nature of her job"].) And she was hired as a caregiver, and paid as a caregiver for the very purpose of confronting such risk.

4. The Injury Here Was Caused By The Assumed Risk

Because the focus of the first prong is on duties of the job, it also does not matter that Gregory was washing dishes when she was injured. Gregory offers no analysis to support her theory that primary assumption of risk does not apply because "she was not engaged in caring for" Lorraine at the time of her injury. (AOB 18.) Of course she was. Part of Gregory's job, generally, was "[c]onstant supervision" of the patient, as Gregory was performing

by having Lorraine in the kitchen with her. Moreover, part of the job and routine of cleaning the dishes involved protecting the patient by clearing dangerous items first due to Alzheimer's patients' "unpredictability." (CT 71.)

And the case Gregory cites undermines her claim. In *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 660, a firefighter sought compensation for injuries sustained while on an inspection. He slipped on some steps that were wet from being cleaned. (*Id.* at pp. 660-661.) The court reasoned that primary assumption of risk did not apply because the act causing injury was not an act for which he had been summoned to the scene of the injury. (*Id.* at p. 663 ["Plaintiff was not summoned to the scene to inspect the slipperiness of the stairs, he was there to inspect for fire code violations"].)

Here, as Gregory alleged, Lorraine attacked her while Gregory was engaged in caring for Lorraine. That, as explained above, is an endemic part of Alzheimer's disease and dealing with the lack of control that comes with Alzheimer's disease is a large part of the reason paid caregivers are needed. Conversely, if Gregory had slipped on the stairs coming up to the house because Bernard had sprayed water on them, it would not have been a risk inherent in caring for an Alzheimer's patient and primary assumption of risk would not apply. In sum, Gregory was injured while caring for Lorraine by the precise risk she was paid to assume.

C. The Relationship Of The Parties Is Such That The Cotts Do Not Owe A Duty Of Care To Lorraine's Caregiver, Who Was Sent By The Agency With Which The Cotts Contracted

1. A Plaintiff Cannot Recover From A Defendant Who Already Has Paid The Plaintiff To Take On The Risk Giving Rise To The Injury

In the occupational hazard context, the second prong of the primary assumption of risk test is met when the plaintiff was hired by the defendant directly or indirectly. In *Priebe*, *supra*, 39 Cal.4th at pp. 1116-1118, the dog owner had hired the kennel to care for his dog, and the kennel employed the plaintiff. The Court directly addressed the relationship between the owner and the professional. (*Id.* at pp. 1130-1131.) It relied heavily on the facts that (1) the owner had relinquished control of the dog to the kennel, and (2) there was a contractual relationship for care insofar as the dog owner had hired the kennel. (*Ibid.*) Similarly, in *Herrle*, *supra*, 45 Cal.App.4th at pp. 1770-1771, the Court of Appeal recognized that the relationship of caregiver to the person receiving care and the person paying for care warrants a limitation on the duties owed to the caregiver.

By contrast, in *Neighbarger*, the defendant was not the plaintiff's employer, and that was critical to the Court's analysis. The Court recognized that the employment relationship between firefighters and the public justified application of primary assumption of risk to firefighters. (*Neighbarger*, *supra*, 8 Cal.4th at

p. 544.) And the contractual relationship between veterinarians and dog owners also warranted application of primary assumption of risk. (*Id.* at pp. 544-545.) On the other hand, the fire in *Neighbarger* was started by third party contractors who had not "provided the services of the private safety employee" or "paid in any way to be relieved of the duty of care." (*Id.* at p. 543.) Thus, they were "more comparable to a person delivering dog food to a veterinarian's office—presumably such a person would be under a duty of care not to negligently cause the clientele to bite the veterinarian." (*Id.* at p. 545.)

Other jurisdictions have found the relationship element critical as well. For instance, in *Creasy*, *supra*, 730 N.E.2d at p. 667, the court ruled that "the relationship between [the Alzheimer's patient] and Creasy and public policy concerns dictate that [the patient] owed no duty of care to Creasy." "Creasy was not a member of the public at large, unable to anticipate or safeguard against the harm she encountered." (*Ibid.*) Rather, as a caregiver, the very reason she was employed was to support the patient, and she was in a better position than the patient to prevent her own injuries. (*Ibid.*) Thus, such caregivers are "similarly situated" with firefighters "in that they are 'specifically hired to encounter and combat particular dangers,' and by accepting such employment assume the risks associated with their respective occupations." (*Id.* at p. 668.)

The distinction makes sense. When one hires someone to confront a particular danger, the market works the danger into how much the person is paid for the task. (*Anicet v. Gant* (Fla.App. 1991) 580 So.2d 273, 276 (*Anicet*) [mental institution attendant could not recover for injuries from violent act of insane patient]; accord, *Priebe*, *supra*, 39 Cal.4th at p. 1122.) If the hiring party is susceptible to tort liability when the employed party is injured confronting the risk he or she is paid to confront, the hiring party has paid *twice* for confronting the risk. (*Anicet*, *supra*, 580 So.2d at p. 277 ["one who has 'paid' another to encounter a particular danger should not have to, so to speak, pay again for that very danger—even, as bears repeating, if he has been guilty of fault in creating it"].)

Here, the contractual relationship is undisputed. The Cotts contracted with the Agency, which sent Gregory for the specific purpose of providing a caregiver for Lorraine. In-home caregivers are paid. Bernard paid Gregory through her Agency so that he could leave Gregory alone with Lorraine, knowing that Gregory, as a trained and experienced caregiver, would take responsibility for Lorraine's as well as her own safety in light of the endemic risk of violence. Indeed, Gregory concedes in her opening brief that "responsibility for . . . Mrs. Cott was shared between the defendant Mr. Cott and the plaintiff Ms. Gregory[.]" (AOB 19.) As with any situation involving shared responsibility, when Bernard was not around, Gregory had *full* responsibility for Lorraine, and

she indisputably had full responsibility for protecting her own safety.

2. In A Caregiver Employment Relationship, Caregivers Have The Greatest Control Over The Care Recipient Regardless Of Whether Care Is In The Home Or In A Facility, And Are In The Best Position to Protect Themselves From The Inherent Risk

Gregory suggests that her responsibility for her own safety was somehow mitigated by the fact that she cared for Lorraine at home, rather than in a controlled setting like a convalescent home. (AOB 12.) She does not cite a single case failing to apply primary assumption of risk to an otherwise covered profession because care was not delivered in a clinical setting. Firefighters, of course, do not work in controlled environments. And in *Priebe*, *supra*, 39 Cal.4th at p. 1118, the kennel worker was taking the dog for a morning walk outside of the kennel when the dog bit her. So there clearly is no broad requirement of a professional setting for primary assumption of risk to apply to an occupational risk under existing California law. Moreover, while most of the out-of-state cases on this issue involve a controlled setting, that has not been the dispositive factor. Instead, the courts "have generally noted that the caregiver plaintiff is not a member of the public at large who is unable to safeguard against the risks of harm encountered." (*Vincinelli*, *supra*, 818 So.2d at p. 167.)

Gregory does not explain how being in the home changes the nature of the relationship between the parties or the nature of the job such that primary assumption of risk would not apply. She states only—without any support—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." (AOB 12.) Assuming institutionalization creates a controlled environment, it proves only that the lack of a controlled setting makes the risk even more inherent in the job the Cotts hired Gregory to do. In a convalescent home, a caregiver may come across all sorts of patients and residents, only some having Alzheimer's disease. Interactions with individual Alzheimer's patients are spread among numerous staff. Thus, interaction is rarer, and the institutional caregiver is hired to do far more than care for an Alzheimer's patient.

Here, the Court of Appeal recognized that "Lorraine was placed in plaintiff's care, inter alia, to protect her from injuring herself and others because of her violent proclivities." (Opn. 9.) Gregory did not challenge that factual statement in a petition for rehearing. And that fact, when faithfully applied to this Court's precedents as the Court of Appeal did, is dispositive. Gregory was specifically hired to care for Lorraine, who has Alzheimer's and engages in violent outbursts.

It is, by definition, part of the job of an in-home caregiver to work outside of a controlled setting. By taking on such a job, a caregiver takes on the risks inherent in the in-home setting. Indeed, Gregory readily admits that in the context of the job she accepted, the "duties and inherent risks of the location, to wit inside a single family home, owned by the defendants" were "shared between the defendant Mr. Cott and the plaintiff Ms. Gregory." (AOB 19.) Thus, the facts here provide an even stronger case for application of primary assumption of risk than the case of a worker in a convalescent home who may or may not interact with Alzheimer's patients regularly.

Given (1) Gregory's admitted responsibility for Lorraine, and (2) Lorraine's need for constant supervision not only to protect Lorraine, but also to protect herself, it is irrefutable that Gregory was in the best position to provide for her own protection. Lorraine clearly cannot be held responsible to protect Gregory. Gregory was hired, in part, *because* Lorraine does not have complete control over her emotions and her bodily movements. Bernard also cannot be expected to protect Gregory from the condition that caused Bernard to contract for Gregory's services in the first place. It is incumbent upon the caregiver to take precautions to prevent injury. And given the fact that Gregory purports to be trained in handling violence from Alzheimer's patients, she had knowledge unavailable to either of the other two parties here. Gregory—not the Cotts—had the duty to look out for Gregory's own safety.

3. Whether The Employment Is Public Or Private Is Relevant Only To Determine The Class Of Persons Who Do Not Owe A Duty To The Injured Plaintiff

With the primary assumption of risk doctrine applying to veterinarians and kennel workers, it is evident that the doctrine applies to employment outside of the public sphere. Indeed, the Court has not expressed an intent to limit the doctrine to the public employment context; rather, the discussion of public employment was relevant to the second prong—the relationship between the parties—because public employment meant the plaintiff was contracted to take on the hazard by all individuals in the community.

This Court in *Neighbarger* did "not hold that primary assumption of risk in an employment context can only be applied to public employees." (*Herrle*, *supra*, 45 Cal.App.4th at p. 1771.) Rather, "the key point [of *Neighbarger*] was not the public/private dichotomy, but whether the defendant had contracted for the plaintiff's services." (*Richards*, *supra*, 35 Ga. L. Rev. at p. 646.) That much is evident from the reasoning this Court applied in *Neighbarger*. The Court stated that "[t]he firefighter's rule should not be viewed as a separate concept, but as an example of the proper application of the doctrine of assumption of risk[.]" (*Neighbarger*, *supra*, 8 Cal.4th at p. 538.)

Evaluating the second prong in *Neighbarger*, the Court compared the relationship Neighbarger had with the third party defendant against the relationship of firefighters with the public.

(*Neighbarger*, *supra*, 8 Cal.4th at p. 543.) The Court evaluated the relationship between the firefighters and the public as a contractual one. (*Id.* at p. 542.) "When the firefighter is publicly employed, the public, having secured the services of the firefighter by taxing itself, stands in the shoes of the person who hires a contractor to cure a dangerous condition." (*Ibid.*) Thus, the public had "purchased exoneration from the duty of care" and it stood in the place of any private party who had hired someone to confront a known risk. (*Id.* at pp. 542-543.) Although not the case in *Neighbarger*, the public/firefighter contractual relationship exists here. By hiring an in-home caregiver, the Cotts paid Gregory to confront the very risk that injured her. As such, they owed her no duty of care with respect to risks arising out of Lorraine's Alzheimer's disease.

4. There Is No Issue Of Failure To Warn Because Gregory Admitted That She Was Warned Of Lorraine Cott's Violence, And Gregory Experienced It First Hand For Years Before Her Injury

This case does not present an issue of failure to warn. The Court stated in *Priebe*, *supra*, 39 Cal.4th at p. 1129, that the dog owner might have been liable if he failed to warn the kennel worker of the dog's abnormally dangerous tendencies. That issue is not presented here. Gregory readily admits that Bernard told Gregory that Lorraine had been combative and was becoming more combative. (CT 50-51.) Thus, even if Lorraine's combativeness warranted a warning, Bernard provided a warning and Gregory

could not meet her burden. Moreover, the first two counts of Gregory's three-count complaint—which are expressly dependent on theories of breach of a duty to warn [CT 35-36]—are admittedly baseless and are suitable for summary judgment for that reason as well.

D. As A Policy Matter, Applying Primary Assumption Of Risk To Caregivers Ensures The Viability Of The Profession And Allows Elderly Alzheimer's Sufferers To Live At Home; Applying Civil Code Section 41 Would Violate These Interests Without Advancing The Interests Underlying Section 41

1. In The Caregiver Context, The Policy Interest Of Protecting Unwitting Members Of The Public Does Not Apply

The fact that dealing with violence from Alzheimer's patients is part of "handl[ing] the job" also undermines Gregory's claim that Civil Code section 41, which renders mentally incompetent persons responsible for their actions, is relevant. (AOB 16-17.) Statutes intended to protect innocent and unwitting members of the public from the dangers they just happen across do not apply in the context of paid caregivers who are injured by the conduct covered under the statute. In *Priebe*, this Court expressly held that the dog bite statute did not apply to caregivers of dogs. (*Priebe*, *supra*, 39 Cal.4th at p. 1128.) And in *Creasy*, the court adopted the Restatement (Second) of Torts rule that mentally incompetent persons are liable in tort but then held the rule did not apply to injuries to caregivers. (*Creasy*, *supra*, 730 N.E.2d at pp. 666-667,

670.) In *Creasy*, *supra*, 730 N.E.2d at p. 664, the court identified five policy rationales supporting a duty of care for mentally incompetent persons toward members of the public that it ultimately ruled did not apply in the Alzheimer's caregiver context. None of them support finding a duty of care to caregivers under Civil Code section 41.

The first and second rationales are that the rule "[a]llocates losses between two innocent parties to the one who caused or occasioned the loss" and it "[p]rovides incentive to those responsible for people with disabilities and interested in their estates to prevent harm and 'restrain' those who are potentially dangerous." (*Creasy*, *supra*, 730 N.E.2d at p. 664.) The court in *Creasy* concluded that these rationales did not apply because of the nature of the relationship between the caregiver and the patient and the fact that the patient had been placed in a nursing home. (*Id.* at p. 668 [the caregiver "cannot be 'presumed *not* to have assumed risks'"] [emphasis added].) Similarly, the relationship here is that of a caregiver to a patient, and the Cotts had taken steps to protect the public by placing Lorraine in Gregory's charge. Gregory is not an "innocent party" because she is the person in the best position to protect herself from the endemic risks of caring for an Alzheimer's patient. Indeed, she is the *only* person in that position, and she concedes that providing for the safety of Lorraine, Bernard, and herself is part of her job duties.

The third rationale is that the rule "[r]emoves inducements for alleged tortfeasors to fake a mental disability in order to escape liability." (*Creasy*, *supra*, 730 N.E.2d at p. 664.) And the fourth is the desire to "avoid[] administrative problems involved in courts and juries attempting to identify and assess the significance of an actor's disability." (*Ibid.*) These rationales, of course, are irrelevant when a caregiver sues an Alzheimer's patient.

The illness already is established by the need to hire a caregiver. To find otherwise, one would have to assume that the Alzheimer's patient faked the illness and hired the caregiver for the purpose of subsequently injuring the caregiver without facing any civil liability. That is simply implausible. (See *Gould*, *supra*, 543 N.W.2d at p. 287 ["it is . . . difficult to imagine circumstances under which persons would feign the symptoms of a mental disability and subject themselves to commitment in an institution in order to avoid some future civil liability"].) And from an administrative standpoint, the court "need only conclude that [the patient] had a mental disability which served as the reason for" her caregiver being hired. (*Creasy*, *supra*, 730 N.E.2d at p. 669.) So, there is no administrative inefficiency in applying primary assumption of risk to in-home Alzheimer's caregivers.

2. The Legislature Has Stated Clear California Policy Against Unnecessary Institutionalization

The fifth rationale for holding mentally incompetent persons liable in tort identified in *Creasy* is that the rule "[f]orces persons with disabilities to pay for the damage they do if they 'are to live in the world.'" (*Creasy*, *supra*, 730 N.E.2d at p. 664.) The court noted that the final rationale "suggests that a broader policy consideration supporting the generally accepted rule was an assumption that persons with mental disabilities should be institutionalized[.]" (*Id.* at p. 664, fn. 6.) That broader policy consideration had changed in Indiana by the time *Creasy* arose [*id.* at p. 666], and to the extent it ever existed in California, it has changed here too.

California does not have a broad policy supporting institutionalizing individuals with mental disabilities. To the contrary, California policy supports persons with mental disabilities living in their homes with whatever support is necessary, available, and obtainable. The Legislature has "declare[d] that there exists a pattern of overutilization of long-term institutional care for elderly persons or adults with disabilities[.]" (Health & Saf. Code, § 1570.2.) It found that such facilities were substantially needed, but "overreliance on [them] ha[d] proven to be a costly panacea in both financial and human terms, often traumatic, and destructive of continuing family relationships and the capacity for independent living." (*Ibid.*) For those reasons, it provided for development of

less formal methods of elder care, such as adult day care centers to "[p]rovide a viable alternative to institutionalization for those elderly persons and adults with disabilities who are capable of living at home with the aid of appropriate health care or rehabilitative and social services." (Health & Saf. Code, § 1570.2, subd. (b).)[6]

Moreover, the Legislature has provided for licensed "home health agencies," which provide residential services by registered nurses and licensed vocational nurses. (Health & Saf. Code, § 1727, *et seq.*) In enacting the provision, the Legislature recognized the value of home health care in "limiting the need for unnecessary institutionalization." (Health & Saf. Code, § 1727.7, subd. (a)(1).) Indeed, the Legislature provided for unlicensed caregivers, like Gregory, to provide in-home services so long as the services do not involve "personal care services provided under a plan of treatment prescribed by a patient's physician and surgeon[.]" (Health & Saf. Code, § 1727, subd. (d).) Thus, the Legislature has

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[6] See also Welf. & Inst. Code, § 14182.17, subd. (d)(4)(H) [requiring that the state, before contracting with managed care health plans ensure that the plans "[m]onitor skilled nursing facility utilization and develop care transition plans and programs that move beneficiaries back into the community to the extent possible"]; Health & Saf. Code, § 1506, subd. (i) [requiring feasibility study to consider licensure of "foster homes that are established specifically to care for and supervise adults with developmental disabilities . . . to prevent the institutionalization of these individuals"]; Gov. Code, § 30025, subd. (i)(4) [defining "Public Safety Services" to include "[p]roviding mental health services to children and adults in order to reduce failure in school, harm to themselves and others, homelessness, and preventable incarceration or institutionalization"].

been clear that California public policy supports ensuring viable and available home health assistance from licensed and unlicensed caregivers. The fifth rationale does not apply in California. Therefore, it does not support—and none of the other rationales support—placing a duty of care on an Alzheimer's patient toward her caregiver.

Whether one works at an adult day care center or as a registered nurse in the home or as a trained, unlicensed home caregiver, the occupational hazard endemic to caring for Alzheimer's patients is the same—they are often combative and unpredictable. As the Court of Appeal recognized in *Herrle*, *supra*, 45 Cal.App.4th at pp. 1770-1771, finding a duty of care of the infirm toward their caregivers is "untenable." The caregiver is in the best position to protect herself against the very incapacity that causes her to be hired, and if the court were "to reach a contrary conclusion, nurses working in an infectious disease unit could sue a patient for giving them tuberculosis." (*Ibid.*)

As a policy matter, the Court should not discourage individuals from obtaining the care they need. It is evident from both readily available information about Alzheimer's disease and Gregory's own testimony that, in the context of in-home care for Alzheimer's patients, "'the risk cannot be eliminated without altering the fundamental nature of the activity.'" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 (*Nalwa*) [citation omitted].) Caring for Alzheimer's patients necessarily involves handling their

violent outbursts and lack of motor control; and it necessarily involves accepting the consequences of those symptoms upon accepting employment.

"The vast majority of Alzheimer's disease patients are cared for by family members, entering nursing homes, and other supervised care settings only when the disease is far advanced." (Richards, *supra*, 35 Ga. L. Rev. at p. 626.) Indeed, "[o]ver 15 million Americans provide unpaid care for a person with Alzheimer's disease or other dementias," and the 17.4 billion hours of care they provided in 2011 alone is valued at over $210 billion. (Facts and Figures, *supra*, at p. 27.)

These caregivers, like Bernard, often need help. "Most people with Alzheimer's disease and other dementias who live at home receive unpaid help from family members and friends, but some also receive paid home and community-based services, such as personal care and adult day center care." (Facts and Figures, *supra*, at p. 44.) "Direct-care workers, such as nurse aides, home health aides, and personal- and home-care aides comprise the majority of the formal health care delivery system for older adults." (*Id.* at p. 34.) And Alzheimer's patients are more than twice as likely than people of similar ages to receive paid in-home care. (*Ibid.*)

In light of the greater need, non-nursing home alternatives to care for advanced Alzheimer's sufferers are crucial. "Elderly spouse caregivers of people with dementia run a higher risk

of social isolation than adult child caregivers." (Mary Mittelman, *Psychological Interventions to Address the Emotional Needs of Caregivers of Individuals with Alzheimer's Disease* in Caregiving for Alzheimer's Disease and Related Disorders (Springer edit., 2013) pp. 17, 21.) The Legislature has "recognize[d] that factors which contribute to abuse, neglect, or abandonment of elders and dependent adults are economic instability of the family, resentment of caregiver responsibilities, stress on the caregiver, and abuse by the caregiver of drugs or alcohol." (Welf. & Inst. Code, § 15600, subd. (e).)

Among all family caregivers, there is a movement to encourage them to find respite from the psychological rigors of caring for a loved one with Alzheimer's. (Steven H. Zarit and Allison M. Reamy, *Developmentally Appropriate Long-Term Care for People with Alzheimer's* in Caregiving for Alzheimer's Disease and Related Disorders (Springer edit., 2013) pp. 51, 56.) "Respite can include having someone come into the home to stay with the person with dementia, or out-of-home programs such as adult day care and overnight respite." (*Ibid.*) And the stage at which violent behavior is most common, is also the stage that respite care is particularly needed.[7]

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[7] See Family Caregiver Alliance, *Alzheimer's Disease & Caregiving*, available at http://caregiver.org/caregiver/jsp/content_node.jsp?nodeid=567.

Gregory's construction of the assumption of risk doctrine would adversely impact all of these forms of non-institutional care because it would place potentially crushing liability on the families that contract for needed caregiving. Gregory does not deny this. Rather, she embraces it, claiming that Bernard was negligent by not institutionalizing Lorraine. (AOB 20.) That is the natural outcome of ruling that in-home caregivers do not assume the risk of violent actions from the Alzheimer's patients for whom they care. To avoid liability, all late-stage Alzheimer's sufferers would have to be institutionalized under Gregory's theory of the case. That, of course, would work a great irony by eliminating the need for in-home care workers, like Gregory, who take care of Alzheimer's patients.

In-home caregivers like Gregory are the ones with training and experience dealing with Alzheimer's patients. They are in the best position to prevent their own injury from violent patients. They have access to workers' compensation benefits, if they are injured. To impose a duty on an Alzheimer's patient or her family towards an in-home caregiver would incentivize institutionalization, thereby changing the nature of the care. Some activities and areas of employment are inherently dangerous, and "'[i]mposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.' (Citation.)" (*Nalwa*, *supra*, 55 Cal.4th at p. 1154 [ruling that the plaintiff assumed the risk of wrist injury by participating in a bumper cars game].) "The primary

assumption of risk doctrine, a rule of limited duty, developed to avoid such a chilling effect." (*Ibid.*)

IV.
CONCLUSION

For the foregoing reasons, Bernard and Lorraine Cott respectfully request that this Court affirm the judgment of the Court of Appeal.

DATED: August 21, 2013.

REED SMITH LLP

By Margaret M. Grignon
Margaret M. Grignon

Certification of Word Count Pursuant To California Rules Of Court, Rule 8.504(d)(1)

I, Margaret M. Grignon, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first-hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am one of the appellate attorneys principally responsible for the preparation of the Answer Brief on the Merits in this case.

3. The brief was produced on a computer, using the word processing program Microsoft Word 2010.

4. According to the Word Count feature of Microsoft Word 2010, the Answer Brief on the Merits contains 12,166 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the Answer Brief on the Merits complies with the requirement set forth in Rule 8.504(d)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on August 21, 2013, at Los Angeles, California.

Margaret M. Grignon

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 21, 2013, at Los Angeles, California.

Rebecca R. Rich

Rebecca R. Rich

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Gregory v. Cott, et al.
Supreme Court Case No. S209125
(Court of Appeal Case No. B2376445;
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