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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CAROLYN GREGORY, Plaintiff and Appellant, v. LORRAINE COTT et al., Defendants and Respondents.	B237645 (Los Angeles County Super. Ct. No. SC109507)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Alexander J. Petale for Plaintiff and Appellant.

Inglis, Ledbetter, Gower & Warriner, Richard S. Gower, Gregory J. Bramlage for Defendants and Respondents.

INTRODUCTION

Defendant Bernard Cott contracted with a home care agency to provide the services of an in-home caregiver to care for his wife, defendant Lorraine Cott,[1] who suffered from Alzheimer's disease. Lorraine injured the caregiver, plaintiff Carolyn Gregory, who thereupon sued Lorraine for battery and Lorraine and Bernard for negligence and premises liability. We hold that defendants are entitled to summary judgment in their favor on the ground of primary assumption of risk.

BACKGROUND[2]

In 2005, Bernard contracted with a home care agency, CarenetLA, 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. Shortly thereafter, CarenetLA assigned plaintiff to defendants' home to provide the contracted caregiver services.

Plaintiff 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. When plaintiff started working for defendants she was aware that Lorraine had Alzheimer's and knew that Alzheimer's patients could become violent. She understood that one of her duties in dealing with Alzheimer's patients was to provide "constant supervision for [the] protection [of] . . . patients, family members, [and] the caregiver." She had been injured by an Alzheimer's patient in the past. Lorraine could not carry on a coherent conversation, and Bernard informed plaintiff at the outset that Lorraine was combative and engaged in "biting, kicking, scratching, [and arm] flailing." As time went on and as Lorraine's disease progressed, she became "more combative physically." She

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[1] Because defendants share the same last name, we refer to each of them by their first name, or to both of them as defendants.

[2] We set forth undisputed facts.

required more physical restraint during bathing for her protection. On occasions, plaintiff transported Lorraine to a center at which Lorraine was aggressive with other people and at one time struck somebody. Plaintiff alleged that Lorraine "had violent tendencies." From time to time, Lorraine injured plaintiff, but plaintiff never asked her employer to reassign her because, according to plaintiff, "[plaintiff] could handle the job."[3]

In 2008, while plaintiff was washing dishes and had a knife in her hand, Lorraine made contact with plaintiff and reached for a knife that plaintiff was holding. As a result, plaintiff was cut on the wrist by the knife, suffering significant injuries. Plaintiff testified that although Lorraine's eyes were open, "she wasn't seeing me."

Plaintiff filed an action against Lorraine for battery, negligence, and premises liability and against Bernard for negligence and premises liability. Defendants moved for summary judgment, which motion the trial court granted.

DISCUSSION

A. Standard of Review

A trial court properly grants a motion for summary judgment if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party bears the burden of showing the trial court that the plaintiff has not established, and cannot reasonably expect to establish, the elements of a cause of action. We review the trial court's decision de novo. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.) Whether the assumption of risk doctrine applies in a particular case is also a question of law that we decide de novo. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa*); *Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, 227.) Cases

[3] We recognize that "[p]rimary assumption of the risk is an objective test. It does not depend on a particular plaintiff's subjective knowledge or appreciation of the potential for risk." (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 866.) The facts bear on the nature of plaintiff's activity and the parties' relationship to it.

involving a primary assumption of risk defense generally are "'amenable to resolution by summary judgment.'" (*Kahn v. Eastside Union High School Dist.* (2003) 31 Cal.4th 990, 1004, quoting from *Knight v. Jewett* (1992) 3 Cal.4th 296, 313 (*Knight*).)

B. Assumption of Risk

As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their willful or negligent conduct injures another person. (Civ. Code, § 1714; *Knight, supra,* 3 Cal.4th at p. 315.) There are, however, exceptions to this rule, based on statute or public policy. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) One exception is the doctrine of primary assumption of risk, which bars a recovery by a plaintiff "when it can be established that, because of the nature of the activity involved and the parties' relationship to the activity, the defendant owed the plaintiff no duty of care." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538, citing *Knight, supra,* 3 Cal.4th at pp. 314-315.) The relationship of the parties to each other is also a consideration. (*Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 530.) "It must then be determined, in light of the activity and these relationships, whether the defendant's conduct at issue is an 'inherent risk' of the activity such that liability does not attach as a matter of law." (*Ibid*; see *Knight, supra,* 3 Cal.4th at pp. 314-315.) If the doctrine is applicable, it bars a plaintiff's negligence and intentional tort claims. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166; *Hamilton v. Marintelli & Associates* (2003) 110 Cal.App.4th 1012, 1024.)

In the recent case of *Nalwa, supra,* 55 Cal.4th at page 1156, the court said that "the primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity' (*Beninati v. Black Rock City, LLC* [(2009)] 175 Cal.App.4th [650,] 658)." The court added that in applying the doctrine "we do not 'expand the doctrine to any activity with an inherent risk' . . . 'the primary assumption of

risk doctrine in its modern, post-*Knight* construction is considerably narrower in its application.'" (*Id.* at p 1157.) The court did not disapprove of cases in which the doctrine of primary assumption of risk had been applied in contexts other than sports and recreational activities. (See *Beninati v. Black Rock City, LLC, supra,* 175 Cal.App.4th at 650, 658 [bonfire injury]; *McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999 [spectators at skateboarding event]; *Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1260 ["another example "of primary assumption of risk . . . [is] where plaintiff is hired to undertake particular dangerous job"]; *Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 839 ["California courts have expanded the scope of the assumption of risk doctrine to encompass dangerous activities in other contexts where the activity is inherently dangerous"]; *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 333 [injury by fitness trainer]; *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [peace officer training class]; *Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 489-490 [private security guard]; *Hamilton v. Marintelli & Associates, supra,* 110 Cal.App.4th at pp. 1021-1024 [peace officer training of physical restraint methods]; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 994, fn. 22 ["The courts have applied primary assumption of risk principles to activities other than sporting or recreational endeavors, including injuries in the workplace"]; *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 72-72 [tow truck driver aiding motorist]; *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 (*Herrle*) [caretaker of Alzheimer's patient].)

We view the Supreme Court's language that the primary assumption of risk doctrine did not apply "to any activity with an inherent risk" such as "travel on the streets and highways and in many workplaces" (*Nalwa, supra,* 55 Cal.App.4th at p. 1157) as not ruling out its application to non-sports and recreational activities. As discussed *post,* the 1996 case of *Herrle, supra,* 45 Cal.App.4th 1761, which applied the primary assumption of risk doctrine to a caretaker of an Alzheimer's patient, has been referred to in many of the cases and articles cited *post.* The Supreme Court has applied the primary assumption of risk doctrine applies to activities other than sports or recreation. (*Priebe v. Nelson* (2006) 39 Cal.4th 1112 [dog kennel activities]; *Neighbarger v. Irwin Industries, Inc.,*

supra, 8 Cal.4th at pp. 544-546 [veterinary activities].) We believe that the primary assumption of risk doctrine can be applied to those whose occupation is caring for Alzheimer's patients, some of which patients can pose physical risks of injury.

C. Plaintiff's Claims Barred by Primary Assumption of Risk Doctrine

In *Herrle, supra,* 45 Cal.App.4th 1761, the plaintiff was a nurse's aide and an employee of a convalescent hospital. She was regularly exposed to patients who suffered from Alzheimer's disease and who could be combative and violent. She was injured when one of these patients struck her. (*Id.* at pp. 1763-1764.) She sued the estate of the patient. The court held that the plaintiff assumed the risk of her injuries and that the patient did not owe the plaintiff a duty of care. The court, in holding that the primary assumption of risk doctrine barred the claim, said that the "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 court added, "Here, we have precisely the situation covered under the primary assumption of the risk doctrine. The plaintiff was engaged as an aide in a convalescent hospital to assume responsibility to care for mentally incompetent patients, many of whom are occasionally violent. [The Alzheimer's patient who struck the plaintiff] was placed specifically in the hospital's care in part to protect her from injuring herself and others because of her violent tendencies. In the words of *Knight*[, *supra,* 3 Cal.4th 296, 314-315] 'the nature of the activity' was the protection of the patient from doing harm to herself or others; 'the parties' relationship to the activity' was [the] plaintiff's professional responsibility to provide this protection, the 'particular risk of harm that caused the injury' was the very risk [the] plaintiff and her employer were hired to prevent." (*Herrle, supra,* 45 Cal.App.4th at p. 1765.) The doctrine of primary assumption of risk applies where """"the defendant [is] impliedly relieved of any duty of

care by the plaintiff's acceptance of employment involving a known risk or danger. [Citations.]"'" (*Hamilton v. Martinelli & Associates, supra,* 110 Cal.App.4th at p. 1023.)

Cases in other jurisdictions have barred claims by caretakers against Alzheimer's and other patients with mental disabilities, with some variations in the theory and ground—e.g., assumption of the risk, no duty, and incapacity to form the necessary intent.[4] (*Berberian v. Lynn* (N.J. 2004) 845 A.2d 122, 129 ["mentally disabled patient, who does not have the capacity to control his or her conduct, does not owe his or her caregiver a duty of care"]; *Vinccinelli v. Musso* (La.App. 2002) 818 So.2d 163 [Alzheimer's patient owed paid companion no duty in connection with a fall occasioned by ice cream spilled by the patient]; *Creasy v. Rusk* (Ind. 2000) 730 N.E.2d 659 [mentally disabled person in a nursing home owes no duty of care to worker employed by the nursing home]; *Colman v. Notre Dame Convalescent Home* (D. Conn. 1997) 968 F.Supp. 809, 814 ["no . . . duty of care arises between an institutionalized patient and her paid caregiver"]; *Gould v. American Family Mut. Ins. Co.* (Wis. 1996) 543 N.W.2d 282, 287 ["When a mentally disabled person injures an employed caretaker, the injured party can reasonably forsee the danger and is not 'innocent' of the risk involved[.] . . . [A] person institutionalized . . . 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 caretakers who are employed for financial compensation"]; *Anicet v. Gant* (Fla.App. 1991) 580 So.2d 273, 277 ["no *duty* to refrain from violent conduct arises on the part of a person who has no capacity to control it to one who is specifically employed to do just that"]; *Mujica v. Turner* (Fla.App. 1991) 582 So.2d 24 [physical therapist could not recover for injuries caused by a nursing home patient suffering from Alzheimer's disease who injured her]; see *Yancey v. Maestri* (La.App. 1934) 155 So. 509; James, *No Help for the Helpless: How the Law Has Failed To Serve and Protect Persons Suffering from*

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[4] The primary assumption of risk doctrine in California is based on the legal conclusion that there is no duty of care owed to the plaintiff. (*Knight, supra,* 3 Cal.4th at pp. 314-315.) One authority has discussed the confusion caused by the term "assumption of risk." (4 Harper et al., Law of Torts (3d ed. 2007) §§ 21-21.8, pp. 231-320.)

Alzheimer's Disease (2012) 7 J. Health & Biomedical Law 407, 431, 434 (James); Dark, *Tort Liability and the "UnQuiet Mind": A Proposal to Incorporate Mental Disabilities Into the Standard of Care* (2004) 30 T. Marshall L.Rev. 169, 194 (Dark) ["when a caretaker sues the mentally disabled person for injuries sustained as a result of some action by the mentally disabled person, the courts are holding that there is no duty owed by the mentally disabled to the caretaker"]; Light, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law* (1999) 109 Yale L.J. 381 (Light); Rest.3d Torts, Liability for Physical and Emotional Harm, (2010) § 11, com. e, p. 140.)

We, as did the court expressly in *Dyer v. Superior Court, supra,* 56 Cal.App.4th at page 70, agree with the reasoning of the court in *Herrle, supra,* 45 Cal.App.4th 176. No court has questioned the 1996 decision in *Herrle*, and there has been no legislative action to change the law enunciated by that decision. The inherent risk of hazardous conduct by an Alzheimer's patient "render[s] the possibility of injury obvious and negate[s] the duty of care usually owed by the defendant for those particular risks of harm." (*Saville v. Sierra College, supra,* 133 Cal.App.4th at p. 867.)[5]

Based on the undisputed facts of this case, there is no meaningful distinction between undertaking to care for an Alzheimer's patient in a convalescent hospital or other care facility (*Herrle, supra,* 45 Cal.App.4th 176) and undertaking to care for such a patient in a private residence. An authority has written, "It is no surprise . . . to find that the nurse hired to care for and restrain combative Alzheimer's patients impliedly assumes the risk that one of her patients will harm her, or put otherwise, the patient is not liable for harm to the nurse even though he may be liable if he harms strangers. The outcome today is often expressed either in terms of assumption of risk or a rule that the defendant

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[5] We do not suggest that Alzheimer's disease inevitably results in violent behavior. But it has been recognized that some Alzheimer's patients "are combative and dangerous to those around them when they get confused or disoriented, and some become consistently violent." (Richards, *Public Policy Implications of Liability Regimes for Injuries Caused by Persons with Alzheimer's Disease* (2001) 35 Ga. L.Rev. 621, 639 (Richards).)

owes no duty." (Dobbs, Law of Torts (2d ed. 2011) § 237, p. 854, fn. omitted.) A contracted in-home caregiver, as plaintiff, is in the same position as a facility caregiver in undertaking the risks in caring for an Alzheimer's patient. Just as in *Herrle, supra,* 45 Cal.App.4th at page 1765, Lorraine was placed in plaintiff's care, inter alia, to protect her from injuring herself and others because of her violent proclivities. The nature of the activity undertaken by plaintiff here was the same as the activity undertaken by the plaintiff in *Herrle,* as was the risk inherent in that activity.

A note in the Yale Law Journal observed, "The *Herrle*[, *supra,* 45 Cal.App.4th 1761] court focused almost exclusively on the relationship, rather than geography. Subsequent courts could rely upon this rule to bring home care within the ambit of the no-duty exception to liability for the mentally disabled. If families hired an at-home nurse and an injury resulted from that relationship, a court could rely upon *Herrle* as precedent to relieve the defendant of liability within the care relationship, though the defendant did not reside within an institution. Such broad applicability of the court's holding and reasoning is compatible with the contemporary notion that unnecessary segregation of the mentally disabled constitutes discrimination. A mentally disabled person ought not be required to enter a mental institution in order to be relieved of liability to a paid caregiver when at-home care is more appropriate under all the circumstances." (Light, *supra,* 109 Yale L.J. at p. 406, fn. omitted.) We agree with this observation. (See Dark, *supra,* 30 T. Marshall L.Rev. at p. 185 ["deinstitutionalization . . . is largely a response to an economic consequence that the states and local governments were not willing or able to handle"].)

One authority referred to caregivers of non-institutionalized Alzheimer's patients as "informal caregivers," recognizing that "[m]ost non-institutionalized Alzheimer's patients are cared for by family members—spouses, children or siblings of the patient." (James, *supra,* 7 J. Health & Biomedical at p. 433; see also Richards, *supra,* 35 Ga. L.Rev. at p. 653.) Plaintiff here is not such an "informal caregiver." She was assigned to this home by a caregiver agency and had experience with Alzheimer's patients. She had been trained to deal with Alzheimer's patients and was aware of the physical dangers

from such patients. She was an experienced, contracted caregiver. "When the patient has been confined or *sought care* precisely because he or she can no longer care for him/herself, it seems unjust to hold the patient liable when caregivers are injured." (Richards, *supra,* 35 Ga. L.Rev. at p. 658, italics added.)

As stated in the note in the Yale Law Journal, "[T]he logic of confinement reflects an outmoded understanding of the proper place of the mentally disabled in society. In order to avoid providing the wrong incentives to confine the mentally disabled when this may not be in an individual's best interest, courts should focus upon a duty-of-care analysis that recognizes the special importance of the patient-caregiver relationship. . . . Tort law should not impose unnecessary burdens upon the mentally disabled who seek appropriate and necessary care." (Light, *supra,* 109 Yale L.J. at p. 416.) Caretakers 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.

Accordingly, we conclude that the trial court properly determined that each of plaintiff's causes of actions against Lorraine and Bernard is barred by the doctrine of primary assumption of risk. Having been a caretaker for Lorraine for several years, plaintiff could not have been under any illusions concerning Lorraine's condition or the premises. The primary assumption of risk doctrine is a defense as to Bernard, as well as to Lorraine. As noted, that doctrine applies to both negligence and intentional torts.

DISPOSTION

The judgment is affirmed. Defendants shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

MOSK, J.

I concur:

KRIEGLER, J.

ARMSTRONG, J. **CERTIFIED FOR PUBLICATION**
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I respectfully dissent.

I do not believe that the record establishes that plaintiff is a "professional caregiver" or that Mrs. Cott "was placed in plaintiff's care," two facts upon which the majority relies. Nor do I find irrelevant to the legal analysis the fact that Mrs. Cott was not institutionalized. Rather, after reviewing the case law explicating the doctrine of primary assumption of the risk and considering the policy rationale behind it, I conclude that the doctrine has no application to the facts of this case.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Cott contracted with an in-home care provider, CareNetLA, to provide care to his elderly wife. CareNetLA assigned plaintiff to the Cott home to provide the contracted services. Plaintiff was not a licensed or certified health care professional, and had no direct supervision from a registered nurse or medical professional while employed in the Cott home. Plaintiff's training in the care of those with Alzheimer's disease consisted of "watching a video and visiting a nursing home with Alzheimer's patients." Her duties included feeding, bathing and dressing Mrs. Cott, as well as general housekeeping chores such as washing the dishes and doing the laundry.

Plaintiff had been working in the Cotts' home for three years when she was injured while on duty at their residence, washing dishes at the kitchen sink. Mrs. Cott, who had been sitting at the kitchen table, rose and approached plaintiff from behind, while the water was running. "Suddenly and without warning [Mrs. Cott] pushed into Plaintiff, and at the same time . . . tried to reach into the sink with her hand and grabbed the sharp knife, which the Plaintiff was washing. [¶] Because the Defendant pushed into the Plaintiff and grabbed at the knife, the knife stabbed into the Plaintiff's left wrist, severing vital nerves and tendons, which proximately and actually caused the Plaintiff to lose the use of her left thumb and two fingers."

Plaintiff sued the Cotts for her injuries, alleging causes of action against Mrs. Cott for battery and against both defendants for negligence and premises liability. The Cotts moved for summary judgment, contending that the defense of primary assumption of the risk as explicated in *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 ("*Herrle*") barred plaintiff's claims. The court in *Herrle* had extended the so-called "firefighter's rule" – which precludes an injured firefighter from recovering tort damages from the person who negligently starts a fire in which the firefighter, in the course of combating the fire, is injured – to apply to a caregiver to an institutionalized Alzheimer's patient. The trial court ruled that the rationale of *Herrle* applied equally to the facts before it: "It's unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront." Thus, the court entered judgment for the Cotts, a judgment my colleagues affirm on this appeal.

DISCUSSION

As the majority notes, "Generally, a person is under a legal duty to use ordinary care, measured by the conduct of a hypothetical reasonable person in like or similar circumstances, to avoid injury to others. (Civ. Code, § 1714, subd. (a).) Judicially fashioned exceptions to this general duty rule must be clearly supported by public policy. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1079.)" (*Knight v. Jewett* (1992) 3 Cal.4th 296, 335-336, Kennard, J., dissenting.) Assumption of the risk is one such judicially fashioned exception to the general rule.

The doctrine of assumption of the risk has a long and tangled history. As explained by Justice Kennard in her dissent in *Knight v. Jewett*, prior to 1992, "the affirmative defense of assumption of risk [had] traditionally been defined as the voluntary acceptance of a specific, known and appreciated risk that [was] or may have been caused or contributed to by the negligence of another. (*Prescott v. Ralphs Grocery Co.* (1954) 42 Cal.2d 158, 162; see *Hayes v. Richfield Oil Corp.* (1952) 38 Cal.2d 375, 384-385.) . . . [¶] The defense of assumption of risk . . . [was] based on consent. (*Vierra v.*

Fifth Avenue Rental Service (1963) 60 Cal.2d 266, 271; see Prosser & Keeton, Torts (5th ed. 1984) § 68, p. 484.) Thus, . . . the defense [was] a specific application of the maxim that one 'who consents to an act is not wronged by it.' (Civ. Code, § 3515.) [¶] The defense . . . depend[ed] on the plaintiff's 'actual knowledge of the specific danger involved.' (*Vierra v. Fifth Avenue Rental Service, supra,* 60 Cal.2d 266, 274.)" (*Knight v. Jewett, supra,* 3 Cal.4th 296, 325-326, Kennard, J., dissenting.)

In *Li v. Yellow Cab* (1975) 13 Cal.3d 804, the Supreme Court abolished the doctrine of contributory negligence and replaced it with a system of comparative fault. The *Li* court recognized that its analysis had implications for the continued viability of the defense of assumption of the risk as summarized above. In *Knight v. Jewett, supra,* a plurality of the Supreme Court specifically addressed those implications.

In *Knight, supra,* the plaintiff was injured when the defendant knocked her over and stepped on her finger during a touch football game. The plaintiff sued for negligence, assault and battery. The Supreme Court held that, under the doctrine of primary assumption of the risk, the defendant did not owe the plaintiff a duty of care. It "conclude[d] that a participant in an active sport breaches a legal duty of care to other participants – i.e., engages in conduct that properly may subject him or her to financial liability – only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Id.* at p. 320, fn. omitted.)

"*Knight* shifted the focus of assumption of risk from a plaintiff's 'subjective knowledge and awareness' of the risk to the nature of the activity in question. (*Knight v. Jewett, supra,* 3 Cal.4th at p. 313.) 'In cases involving "primary assumption of risk" – where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury – the doctrine continues to operate as a complete bar to the plaintiff's recovery.' (*Id.* at pp. 314-315.)" (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1260.)

Injuries resulting from participation in sports and recreational activities are one category of claims subject to an assumption of the risk analysis. (For our Supreme Court's most recent explication and application of primary assumption of the risk in the recreational context, see *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148.) Another category of cases involving the doctrine concerns the so-called "occupational assumption of the risk." These cases have their genesis in the firefighter's rule.

"In 1968 California adopted the almost century-old, common law firefighter's rule. (*Giorgi v. Pacific Gas & Elec. Co.* (1968) 266 Cal.App.2d 355, 357-360; *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 367; *Walters v. Sloan* (1977) 20 Cal.3d 199, 202.) Although generally '[w]e all have the duty to use due care to avoid injuring others,' the firefighter's rule provides an exception to that general duty of care; it is 'a special rule . . . [that] limit[s] the duty of care the public owes to firefighters and police officers.' (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 536, 538 ("*Neighbarger*").) *Neighbarger* stated: 'Under the firefighter's rule, a member of the public who negligently starts a fire owes no duty of care to assure that the firefighter who is summoned to combat the fire is not injured thereby. [Citations.] Nor does a member of the public whose conduct precipitates the intervention of a police officer owe a duty of care to the officer with respect to the original negligence that caused the officer's intervention. [Citations.]' (*Id.* at p. 538, fn. omitted.)" (*City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 274.)

"'The undergirding legal principle of the [firefighter's] rule is assumption of the risk . . . .' (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1061 (hereafter *Calatayud*).) Firefighters, "'whose occupation by its very nature exposes them to particular risks of harm, "'cannot complain of negligence in the creation of the very occasion for [their] engagement."'" [Citation.]' (*Walters v. Sloan, supra*, 20 Cal.3d at p. 202.) '[T]he [firefighter's] rule is based on a principle . . . applicable to our entire system of justice – one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby.' (*Id.* at p. 204.) 'As a matter of public policy and fairness, when firefighters and police officers are injured by the very hazard they have been

employed to confront, they are generally precluded from recovering in tort damages from private persons. [Citations.] The firefighter's rule is based on the public policy that officers injured in the line of duty should be compensated through the public fisc rather than by individual tort recoveries. [Citation.]' (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 83.) 'The firefighter's rule precludes recovery for injuries suffered as a direct consequence of responding to calls in the line of duty. [Citation.]' (*Ibid.*)" (*City of Oceanside v. Superior Court*, *supra*, at pp. 274-275.)

California appellate courts have recognized the extension of the firefighter's rule to a number of situations beyond the original confines of the rule as applied to public safety employees. Thus, lifeguards owe no duty of care to their fellow lifeguards when engaged in a rescue operation (*City of Oceanside v. Superior Court, supra,* at p. 280); an owner of a disabled vehicle owes no duty to the tow truck driver to maintain his or her vehicle in running order (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 72); and a property owner owes the building contractor hired to remedy a dangerous condition of property no duty of care with respect to the condition of the property. (See *Neighbarger, supra,* 8 Cal.4th at p. 542.) Indeed, the so-called "veterinarian's rule," or the principle that a veterinarian who is injured by an animal he or she is treating may not recover for those injuries, "is just another application of the firefighter's rule in a different context." (*Farnam v. State of California* (2000) 84 Cal.App.4th 1448, 1452.)

In *Herrle, supra,* 45 Cal.App.4th 1761, a divided panel of the Fourth District Court of Appeal applied the notion of occupational assumption of the risk to a new category of worker: persons who care for Alzheimer's patients in an institutional setting. The plaintiff in *Herrle* was a certified nurse's aide, employed by a convalescent hospital, whose job duties included attending to the personal care of patients who could not care for themselves on account of Alzheimer's disease, among other conditions. The aides were trained in ways to approach, handle, and restrain the patients, who were at times violent, combative and aggressive. (*Herrle, supra,* at p. 1764.) The defendant, Ms. Marshall, was a resident at the convalescent hospital, suffering from senile dementia and Alzheimer's disease. She was occasionally combative and belligerent. The incident

resulting in plaintiff's injuries occurred when Ms. Marshall "became combative while another nurse's aide was moving her from a chair to a bed. Plaintiff, fearing Marshall would fall to the floor, entered the room to help. While holding Marshall and moving her onto the bed, Marshall struck plaintiff about the head several times causing serious jaw injuries." (*Ibid.*)

The *Herrle* court began its analysis by quoting from *Knight v. Jewett*, *supra*, 3 Cal.4th 296: "'In cases involving "primary assumption of risk" – where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury – the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving "secondary assumption of risk" – where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty – the doctrine is merged into the comparative fault scheme . . . .' (*Knight v. Jewett*, *supra*, 3 Cal.4th at pp. 314-315.)" (*Herrle*, *supra*, 45 Cal.App.4th at p. 1765.) The court continued: "Here, we have precisely the situation covered under the primary assumption of the risk doctrine. Plaintiff was engaged as an aide in a convalescent hospital to assume responsibility to care for mentally incompetent patients, many of whom are occasionally violent. Marshall was placed specifically in the hospital's care in part to protect her from injuring herself and others because of her violent tendencies. In the words of *Knight*, 'the nature of the activity' was the protection of the patient from doing harm to herself or others; 'the parties' relationship to the activity' was plaintiff's professional responsibility to provide this protection, the 'particular risk of harm that caused the injury' was the very risk plaintiff and her employer were hired to prevent." (*Ibid.*)

The opinion cited in support of its conclusion cases from Florida and Wisconsin which found no tort liability in similar factual situations. In each of these cases, a person providing care to an institutionalized patient suffering from mental illness or age-related dementia sued for injuries inflicted by the patient. Thus, in *Anicet v. Gant* (Fla.Dist.Ct. App. 1991) 580 So.2d 273 ("*Anicet*"), the defendant was committed to a state hospital

which cared for insane and violent persons. The plaintiff was employed by the institution to work with these very patients, who were confined to a special ward of the hospital. In response to plaintiff's warning that he would be put in isolation if his violent conduct continued, the defendant threw a heavy ashtray at the plaintiff's head, causing severe injury. Relying on the fact that the plaintiff's "duties specifically included the treatment and, if possible, the control of patients like [the defendant], of whose dangerous tendencies he was well aware" (*id.* at p. 274), the court held that the patient owed his care provider no duty of care. The same appellate court applied its holding in *Anicet* in a subsequent opinion, *Mujica v. Turner* (Fla.Dist.Ct.App. 1991) 582 So.2d 24, ruling that a physical therapist in charge of the Alzheimer's program at a nursing home could not recover from an Alzheimer's patient who pushed her, causing injury. The court held, "Although we agree that ordinarily a mental incompetent is responsible for his own torts, . . . this rule is inapplicable when the incompetent has been institutionalized, as here, because of her mental incompetency and injures one of her caretakers while in such institution." (*Id.*, at p. 25.) Although the *Anicet* court used language similar to that found in the cases involving the firefighter's rule, it emphasized that its ruling was not based on the doctrine of assumption of the risk. "Rather we conclude that no duty to refrain from violent conduct arises on the part of a person who has no capacity to control it to one who is specifically employed to do just that." (*Anicet, supra*, at p. 277.)

The third case upon which *Herrle, supra,* relied was *Gould v. American Family Mutual Insurance Company* (1996) 543 N.W.2d 282 ("*Gould*"). There, the head nurse of the secured dementia unit of a residential health care center was injured when the defendant, a patient diagnosed with Alzheimer's disease who was "resistant to care, and occasionally combative," knocked her to the floor. The Wisconsin Supreme 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 caretakers who are employed for financial compensation." Thus, as with the Florida cases, the *Gould* court did not hold that the doctrine of assumption of the risk bars

the claim; rather, it adopted something akin to an insanity defense to civil claims brought by employees of institutions against mentally incompetent persons resident therein.

Each of the cited cases relied substantially on the fact that the defendant was institutionalized at the time of the injury, and that the plaintiff was a professional health care provider employed to care for the defendant in an institutional setting. The opinions noted the common law rule, codified in California,[1] that mental incompetence is not a defense to tort liability, and noted that one of the rationales used to justify the rule "is that 'those interested in the estate of the insane person, as relatives or otherwise, may be under inducement to restrain him. . . .' [Citation.]" (*Gould*, *supra*, 543 N.W.2d 282, 287.) As the *Gould* court remarked, "This rationale . . . has little application to the present case. [The defendant's] relatives did everything they could to restrain him when they placed him in a secured dementia unit of a restricted health care center. When a mentally disabled person is placed in a nursing home, long-term care facility, health care center, or similar restrictive institution for the mentally disabled, those 'interested in the estate' of that person are not likely in need of such further inducement." (*Ibid.*; accord *Anicet*, *supra,* 580 So.2d 274, 276 ["It is . . . self-evident that the idea that imposing liability on an insane person will encourage those acting for him more carefully to safeguard others from his violence has no application whatever to this situation. [The defendant], his relatives and society did as much as they could do along these lines by confining him in the most restricted area of a restricted institution that could be found."].)

The *Herrle* court's adoption of the assumption of the risk analysis marks a departure from *Knight v. Jewett, supra,* 3 Cal.4th 296 and its progeny in several ways. First, *Knight* specifically stated that intentional conduct does not come within the doctrine. (3 Cal.4th at p. 320 ["a participant in an active sport breaches a legal duty of care to other participants . . . only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary

[1] "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capable of knowing that the act was wrongful." (Civ. Code, § 41.)

activity involved in the sport"].) Thus, to the extent that Ms. Marshall intentionally, rather than negligently, injured her caretaker, *Knight* does not support invocation of the doctrine. Expanding assumption of the risk to encompass intentional conduct untethers the doctrine from its origin moorings.

Secondly, the policy rational for the firefighter's rule is simply not present in *Herrle*. As noted above, "[t]he firefighter's rule is based on the public policy that officers injured in the line of duty should be compensated through the public fisc rather than by individual tort recoveries. [Citations.]" (*City of Oceanside v. Superior Court*, *supra*, at p. 275.) "[P]ublic safety employees receive special public compensation for confronting the dangers posed by the defendants' negligence. [Citation.]" (*Neighbarger, supra*, 8 Cal.4th at p. 540.) Moreover, "the policy basis for the firefighter's rule is fairness. [Citation.]" (*Id*. at p. 539.) "As a matter of fairness, police officers and firefighters may not complain of the very negligence that makes their employment necessary. [Citation.]" (*Id.* at pp. 539-540.) However, "the firefighter's rule was not intended to bar recovery for all hazards that are foreseeable in the employment context, but to eliminate the duty of care to a limited class of workers, the need for whose employment arises from certain inevitable risks that threaten the public welfare." (*Id*. at p. 542.)

The need to provide care to Alzheimer's sufferers who are unable to care for themselves can hardly be equated with the public safety imperative to extinguish fires. Moreover, the persons employed to provide that care are likely low wage workers who receive no "special public compensation" for confronting the dangers posed by negligent individuals. Nor does fairness demand that those who provide the most mundane, intimate and consistent care to incapacitated patients – orderlies and aides with the barest of medical training who bathe, dress and feed their charges and provide a clean and comfortable living space – "suffer the consequences so that those who caused them harm can avoid financial responsibility." (*Herrle*, *supra*, at p. 1778, Wallin, J., dissenting.)

Until *Herrle*, the veterinarian's rule represented the California courts' only expansion of the occupational assumption of the risk doctrine beyond the category of

public safety workers covered by the firefighter's rule.[2] (*Nelson v. Hall* (1985) 165 Cal.App.3d 709, 714-715; see also *Priebe v. Nelson* (2006) 39 Cal.4th 1112; *Cohen v. McIntyre* (1993) 16 Cal.App.4th 650.) The common scenario of these cases involves an employee of a veterinarian or kennel business who is injured while providing care to an animal whose owner delivered him to the business for treatment or care. The plaintiffs seek recovery under the strict liability "Dog Bite Statute," Civil Code section 3342. The cases applying an assumption of the risk analysis to dog bites rely on both the veterinarian's superior expertise and training, and the fact that, at the time of the injury, the veterinarian had sole custody and control of the animal which caused the harm. As the court in *Nelson v. Hall, supra,* 165 Cal.App.3d at p. 715 explained, "The veterinarian determines the method of treatment and handling of the dog. He or she is the person in possession and control of the dog and is in the best position to take necessary precautions and protective measures. . . . A dog owner who does no more than turn his or her dog over to a qualified veterinarian for medical treatment should not be held strictly liable when the dog bites a veterinarian." (Accord, *Priebe v. Nelson, supra,* 39 Cal.4th at p. 1124.)

The factors present in the dog bite cases appear to be present as well in the out-of-state cases upon which *Herrle* relied. (*Anicet, supra,* 580 So.2d 273; *Mujica v. Turner, supra,* 582 So.2d 24; *Gould, supra,* 543 N.W.2d 282.) Thus, for instance in *Mujica v. Turner,* the plaintiff was a physical therapist in charge of the daily living activity program for Alzheimer's patients at the nursing center where the defendant was one such patient (*Mujica v. Turner, supra,* 582 So.2d at p. 24), while in *Gould,* the plaintiff was the head nurse in the secured dementia unit which housed the defendant. (*Gould, supra,* 543 N.W.2d at p. 287.) Similarly, in *Herrle,* the Court of Appeal found primary assumption of the risk to be applicable due to the fact that the defendant was a resident at the

[2] While the building contractor hired to remedy a dangerous condition of property would also fall within this category, I have failed to uncover any California cases in which assumption of the risk has been invoked to deny recovery to a building contractor injured in the course of repairing defective premises.

convalescent hospital at which the plaintiff, a licensed nurse's aide, worked.[3] In each of these cases, the defendant was placed into the custody and care of medical professionals who, due to their education, training, and access to specialized facilities, equipment, and resources, were in a better position to address the inherent risks posed by the defendant's dangerous proclivities than were the defendant's family. The same cannot be said of plaintiff in this case.

Thus, even if I were to agree with the *Herrle* majority that the primary assumption of the risk doctrine provides the proper analytical framework for evaluating an Alzheimer patient's duty to his or her caregiver, I would find the case before us distinguishable on the facts. In this case, Mrs. Cott was not an Alzheimer's patient; vis-à-vis plaintiff, she was not a patient at all. Mrs. Cott was not placed in plaintiff's care, first and foremost because, having no medical or nursing license or certification, plaintiff was completely unqualified to provide medical care to Mrs. Cott. Rather, plaintiff provided housekeeping and personal care services to the Cotts, duties which required virtually no training or specialized skill or knowledge. And she provided these services in the Cotts' home, which afforded none of the protections available in an institutional setting such as the convalescent hospital in *Herrle*. For instance, one would expect a medical facility to provide staffing sufficient to provide supervision of patient activities; medical personnel with specific training in the medical conditions and behavioral attributes of the resident patients; the availability of medications, tools and restraints necessary to subdue violent or aggressive behavior; and restricted patient access to dangerous instruments such as sharp knives. One would not expect to find in an institutional setting an aide engaged in her regular duties of washing dishes, including sharp knives, while her charge roams about unsupervised.

I appreciate the dilemma facing Mr. Cott due to his wife's deteriorating physical and mental condition. Given that Mrs. Cott was unable to care for herself, and knowing that she was at times aggressive and combative, Mr. Cott chose, no doubt at great

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[3] The dissent in *Herrle* was based largely on the plaintiff's lack of special education, training or expertise.

personal sacrifice, to care for her at home. He required outside help to do so, and so contracted with an in-home care provider, who was made aware of her medical condition. However, that condition posed a risk of harm to others, most especially the person providing the in-home care. Given this increased risk of harm to Mrs. Cott's in-home caregivers, fairness demands that defendants bear responsibility for that risk, and not shift the burden of loss to the hapless worker who happened to be assigned to the home of one suffering from Alzheimer's disease, rather than, for instance, one recovering from foot surgery.

In short, I believe that the simple fact that plaintiff was paid to provide in-home care to Mrs. Cott does not bring this case within the holding of *Herrle*. Rather, the claims at issue here should be subject to the usual laws of negligence, including the comparative negligence, if any, of plaintiff.

ARMSTRONG, Acting P. J.