

Appellate Reports and cases in brief

Gregory v. Cott *applies primary assumption of the risk to in-home health-care workers*

By Jeffrey Isaac Ehrlich

Gregory v. Cott

(2014) __ Cal.4th __ (Cal. Supreme.)

Who needs to know about this case? Lawyers who litigate tort cases.

Why it's important: Applies the doctrine of primary assumption of risk to an occupational hazard; not a recreational activity; extends the "firefighter's rule" to in-home health workers

Synopsis: Cott contracted with a home healthcare agency to assist him with care for his 85-year old wife, Lorraine, who suffered from Alzheimer's disease. The agency assigned Carolyn Gregory to work in the Cott's home. While Gregory was washing a knife in the kitchen sink, Lorraine approached her, bumped into her, and reached toward the sink. Gregory dropped the knife while attempting to restrain Lorraine and suffered a serious cut that resulted in numbness in several fingers and recurring pain. She sued Cott and Lorraine for negligence and premises liability, and sued Lorraine for battery. The trial court dismissed the suit on summary judgment, relying on the doctrine of primary assumption of the risk. The Court of Appeal affirmed. The Supreme Court affirmed, as well.

California's assumption of risk doctrine has taken two different forms. Primary assumption of risk is a complete bar to recovery. It applies when, as a matter of law, the defendant owes no duty to guard against a particular risk of harm. Secondary assumption of risk applies when the defendant does owe a duty, but the plaintiff has knowingly encountered a risk of injury caused by the defendant's breach. Liability in such cases is adjudicated under the rules of comparative negligence.

While primary assumption of the risk often involves recreational activity, it also governs claims involving inherent occupational hazards. The bar against recovery in that context first developed as the "firefighter's rule," which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. The "veterinarian's rule" applies similarly to preclude veterinarians or their assistants from recovering against the owners of dogs who bite during treatment. The rule is grounded on the belief 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."

The Court of Appeal applied that rationale in *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770-1772, which applied the doctrine of primary assumption of risk to bar a claim by nurse's aide in a convalescent hospital who was struck and injured by an Alzheimer's patient. *Herrle* concluded that public policy favors exempting patients from liability to healthcare providers "for injuries inherent in the very condition for which treatment was sought."

Gregory argued that *Herrle* should not be applied to caregivers employed in private homes, which lack the specialized equipment and trained health care professionals found in institutions. Thus, she argued in-home caregivers cannot be said to be "in the best position to protect against the risks to the provider rooted in the very reason for the treatment." Gregory argued that her case should therefore be decided under the doctrine of secondary assumption of the risk. But the Court rejected this approach, because secondary assumption of the risk is predicated on the existence of a duty owed by the defendant to the plaintiff. Here, no duty was owed. Caregivers are hired to protect the patients from harming themselves or others. If a patient injures a caregiver by engaging in the combative behavior symptomatic of Alzheimer's disease, the "particular risk of harm that caused the injury" was among the very risks the caregiver was hired to prevent.

The Court did include some language in the opinion limiting its scope. It said, "We do not hold that *anyone* who helps with such patients assumes the risk of injury. The rule we adopt is limited to professional home healthcare workers who are trained and employed by an agency."

Short(er) takes

Subsequent remedial measures; Evid. Code, § 1151; proof of causation: *McIntyre v. Colonies-Pacific, LLC* (2014) __ Cal.App.4th __ (4th District, Div. 1.)

McIntyre and his daughter were beaten and terrorized in an armed robbery of McIntyre's jewelry store. McIntyre sued the shopping center where the store was located for negligence in failing to provide adequate security and introduced evidence of a pattern of armed robberies in the months before his store was

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robbed. After the robbery, the center hired unarmed security patrols, and there were no further armed robberies in the years following. The trial court granted the center's motion in limine to preclude McIntyre from introducing evidence of the post-robbery patrols. McIntyre argued that he should be allowed to introduce the evidence, not to show that the center was negligent for not having them, but to respond to its contention that hiring patrols would not have made any difference; *e.g.*, to show causation. The jury found that the center was negligent, but ruled against McIntrye on causation. McIntyre filed a new-trial motion arguing that he should have been allowed to introduce the evidence to establish causation, and to respond to the comment by counsel in opening statement. The motion was denied. Affirmed.

Evidence Code section 1151 provides: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." Section 1151 does not require the exclusion of evidence of subsequent measures when offered for another purpose besides negligence, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. The court held that these exceptions were of no assistance to McIntyre, because the evidence did not go to those issues.

The Court held that, "Whether the issue is couched in terms of the due care or causation aspect of a negligence cause of action, admission of evidence that Colonies subsequently hired a security service, which improved safety, would discourage others similarly situated from undertaking such measures, an outcome that would thwart public policy."

As far as the comment of counsel in opening statement, since the trial court instructed the jury that the comments of counsel were not evidence, there was no abuse of discretion in denying the motion.

Class actions; stipulation to temporary judge: *Luckey v. Superior Court* (2014) _ Cal.App.4th __ (2d District, Div. 3.)

Customer brought class action against retailer under the federal Fair and Accurate Credit Transaction Act (FACTA).

Before the class was certified, the plaintiff and the defendant mediated their dispute and reached a settlement. They stipulated to the appointment of a temporary judge for the purpose of ruling on the motions for preliminary and final approval of the settlement. This stipulation was presented to the Superior Court of California, County of Los Angeles, which declined to appoint the temporary judge, on the basis that counsel for plaintiff had no authority to sign the stipulation on behalf of the absent putative class members. Plaintiff filed a petition for writ of mandate, challenging this ruling. The appellate court concluded that the California Constitution, the California Rules of Court, and public-policy concerns all preclude the appointment of a temporary judge for purposes of approving the settlement of a pre-certification class action. When the class has not yet been certified, the putative class representative has no authority to consent to a temporary judge on behalf of the absent putative class members. The court therefore denied the writ petition.

Summary judgment; moving party's burden on summary judgment; factually devoid discovery responses; amended discovery responses: *Ganoe v. Metalclad Insulation Co.* (2014) __ Cal.App.4th __ (2d District, Div. 3.)

Mark Ganoe worked as a "utility man" at the Goodyear Tire plant in Los Angeles between 1968 and 1979. He was diagnosed with mesothelioma in 2010, and filed suit that year. He died while the case was pending, and his case was converted into a survival and wrongful-death action.

On October 12, 2012, Metalclad moved for summary judgment on the grounds that the plaintiffs had no evidence that Ganoe was exposed to asbestos for which Metalclad was responsible. Specifically, Metalclad argued that the plaintiffs had served factually devoid discovery responses and had failed to identify any witnesses that could show that Ganoe worked with or around any asbestos-containing products supplied, installed or removed by Metalclad.

Roughly 60 days after the motion was filed, Metalclad produced a document at its PMK's deposition showing that it had performed insulation work on steam piping at the Goodyear plant in 1974. The plaintiffs then served an amended discovery response stating that Ganoe had been exposed to asbestos in 1974 when Metalclad, an insulation contractor, performed insulation work on steam piping in 1974 at the Goodyear plant. The plaintiffs included this amended discovery response in their opposition to the summary-judgment motion. The trial court granted the motion, in part because "the document belatedly produced by Metalclad did not show that it had performed work in the vicinity of Ganoe as it did not identify "specific dates when, and locations within the plant where, the work occurred." Reversed.

It would be inequitable to allow a moving party to withhold relevant discovery and then meet its burden on summary judgment without consideration of such newly disclosed evidence or the opposing party's response to that evidence. Here, the plaintiffs' amended response to the defendant's "all-facts" interrogatories did not consist only of "boilerplate answers," "general allegations" and "laundry lists of people and/or documents." By contrast, the response contained "specific facts" showing that Metalclad had exposed Ganoe to asbestos in 1974 by removing asbestos-containing insulation in Department 132 of the Goodyear plant while he was present. Therefore, this response did not lead to an inference that

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the plaintiffs could not prove causation.

Even if Metalclad had met its burden as the moving party, summary judgment should have been denied as the plaintiffs raised triable issues of material fact. There was evidence Metalclad performed insulation work on steam piping at the Goodyear plant in 1974, that the only construction work requiring the installation of insulation at the Goodyear plant in 1974 occurred in Department 132 when a new Banbury machine and "lay-down machine" were installed, that the installation of those machines also required the removal of old insulation, and that Ganoe worked in that department, was present during the repair of the steam lines' insulation and breathed in the resulting dust. Furthermore, according to the plaintiffs' expert witness, it was more likely than not that the old insulation removed during this process contained asbestos. Viewed in its best light, this evidence supported a reasonable inference that the plaintiffs could show causation.

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