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**FILED**

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BY ... DEPUTY

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

MAXINE HAMMOND et al,  
Plaintiff,  
-vs-  
THOMAS H. JENNER et al,  
Defendant.

NO. <sup>5772</sup> NO C ~~4772~~ D  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT

PLAINTIFF'S MOTION AND SUPPORTING DECLARATIONS  
FAIL TO SATISFY THE REQUIREMENTS OF THE APPLI-  
CABLE STATUTE WHEREIN IT STATES, "THE AFFIDAVIT  
OR AFFIDAVITS IN SUPPORT OF THE MOTION MUST  
CONTAIN FACTS SUFFICIENT TO ENTITLE PLAINTIFF  
OR DEFENDANT TO A JUDGMENT IN THE ACTION....  
AND SHALL BE SET FORTH WITH PARTICULARITY...".

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Plaintiff's Declaration merely recites the occurrence  
of an accident, which fact defendant admitted in his Answer. Said  
fact does not, however, relieve plaintiff of her burden of going  
forward with preponderating evidence of negligence. While the  
bare facts of the accident may permit an inference of negligence  
under a Res ipsa loquitur theory, defendant's Declaration which  
is attached hereto tends to rebut such an inference of negligence  
and thus creates a triable issue of fact.

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2 Plaintiff's points and authorities claim that no  
3 affirmative defense is raised and further that no legally suffi-  
4 cient claimed defense has been pleaded in this case. Such state-  
5 ments ignore the basic rights and burdens of litigation. Defendant  
6 has no burden of affirmative proof unless and until plaintiff  
7 establishes a prima facie case of legal liability.  
8

## III

9 Plaintiff's Complaint contains three causes of action,  
10 the first two being for negligence and the third being captioned  
11 Strict Liability. Though couched in terms somewhat analogous to  
12 absolute liability, the third cause of action fails to state such  
13 facts as to bring the operation of a motor vehicle within the  
14 realm of ultra-hazardous activities. To the contrary, the  
15 authorities hold that the operation of a passenger automobile is  
16 ordinarily a matter of common usage and thus is not an ultra-  
17 hazardous activity. Luthringer vs. Moore, 31 Cal 2d 489. All  
18 three causes of action would thus appear to defendant to be  
19 founded on negligence.  
20

## IV

21 As stated in Jack vs. Wood, 258 AOA 738 (cited by  
22 plaintiff) the purpose of a Summary Judgment proceeding is to  
23 permit the court to pierce the allegations of the pleadings and  
24 look to the substance of the cause of action and/or claimed  
25 defense. In that regard defendant wishes to point out that  
26 Section 12805 of the California Motor Vehicle Code provides  
27 "ground requiring refusal of license. The department shall not  
28 issue or renew a driver's license to any person... (d) who is  
29 an epileptic." "Epilepsia Added". In view of defendant's  
30 statement that he held an unrestricted California's Operator's  
31 License on the day of the accident, this section of the Motor  
32 Vehicle Code is referred to as prima facie evidence that insofar

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as the Department of Motor Vehicles was concerned, the condition that caused defendant's probationary licensing had expired prior to the accident. A question of fact is thus presented as to whether defendant rebuts the permissible inference of negligence that may be drawn against him. Such determination should be left to the triers of fact.

Respectfully submitted,  
LAFOLLETTE & JOHNSON

By: PATRICK J. HAST, Attorney for  
Defendant, THOMAS H. JENNER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MAXINE HAMMONTREE et al,  
Plaintiff,  
-vs-  
THOMAS H. JENNER et al,  
Defendant.

NO. NC C 6772 H  
DECLARATION OF DEFENDANT, THOMAS  
H. JENNER, IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT

THOMAS H. JENNER declares:

I am a named defendant in the above-captioned action and at the time of the accident giving rise thereto I was the operator of a 1959 Chevrolet that was involved in said accident.

In 1953 I experienced two nocturnal epileptic convulsions. This was reported to the California Department of Motor Vehicles, as a result of which my driving privileges were placed on probation. The terms of that probation required that I report periodically to my personal physician for a checkup regarding my condition. In 1959 this reporting requirement was reduced from every six months to once annually, because of the complete absence of any seizures or other complaints relative to an epileptic condition since 1953. During this interval I was taking Phelantin daily, on prescription of my personal physician, Dr. Benson Hyatt. I continued to take this medication as directed up to the time of the accident, April 25, 1967. As of that date I held an unrestricted California

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1 Operator's License. I had not had an epileptic seizure or other  
2 symptoms since 1951. On April 25, 1967 and prior to the accident,  
3 I had no forewarning of an attack or loss of consciousness. Until  
4 the date of this accident I had never in my life had an epileptic  
5 seizure or loss of consciousness during my waking hours.

6 I declare under penalty of perjury that the foregoing  
7 is true and correct, and if called as a witness I could competently  
8 testify to the foregoing facts.

9 Executed at Pacoima, California, this 14<sup>th</sup> day of  
10 December, 1969.

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12 *Thomas H. Jenner*  
13 THOMAS H. JENNER  
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