

No. 94075-4

SUPREME COURT
STATE OF WASHINGTON

RON APPLGATE,
Appellant,

vs.

LUCKY BAIL BONDS, Inc., Defendant/Respondent,
AND
GREG D. PETERSON, Defendant/Respondent,
AND
CESAR LUNA, Defendant/Respondent,
AND
RILEY WIRTS, Defendant/Respondent,
AND
JOHN WIRTS, Defendant/Respondent,
AND
QUEST RECOVERY, Defendant/Respondent.

PETITION FOR REVIEW OF COURT OF APPEALS DECISION

Court of Appeals Div. I Case No. 74739-8-1

ANSWER OF RESPONDENTS'

Spencer D. Freeman
WSBA #25069

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I. NATURE OF THE CASE AND DECISION

This case involves Washington State licensed fugitive recovery agents attempting to locate and apprehend fugitive Elizabeth Applegate when they were attacked and assaulted by her father, Ronald Applegate, who was hiding her inside his residence. Mr. Applegate claimed at trial that the agents trespassed on his land and assaulted him. The jury disagreed.

Mr. Applegate appealed, arguing that jury instructions based upon the *Restatement (Second) of Torts* §§ 205 and 206 incorrectly stated the scope of a bail bondman's privilege of entry onto land and dwellings. The Court of Appeals Division I disagreed.

A. Factual Background.

Lucky Bail Bonds, Inc. posted bail bonds on two cases for Elizabeth Applegate, one in Whatcom County District Court and one in Ferndale Municipal Court. After receiving notice that she failed to appear at mandatory court hearings in each court, Lucky Bail Bonds, Inc., made attempts to contact Elizabeth through her mother, who had signed the bail bond as an indemnitor. Unsuccessful, and with payment of the value of the bonds looming, Lucky Bail Bonds, Inc. retained three fugitive recovery agents to locate and apprehend Elizabeth Applegate.

Late in the evening on October 17, 2011, just days after being retained to locate and apprehend Elizabeth, the fugitive recovery agents received an informant's tip that Elizabeth was staying in a trailer on her

parents' property. The Agents met down the road from the Applegate property between 10:30 and 11:00 pm. Each Agent was wearing clothing that included clear, large, and bright lettering identifying each as a bail recovery or enforcement agent. Each Agent was also wearing a State approved fugitive recovery agent badge.

As two Agents entered the property to check out the three trailers located parallel to the house, an Agent remained at the front of the property to observe in case the fugitive fled. Mr. Applegate was on the small front porch of the house as the Agents walked to the rear portion of the property to check the trailers for the fugitive. Mr. Applegate became immediately aggressive, defiant, hostile, and profane with the Agents.

Mr. Applegate's profane hostility continued as he demanded the Agents leave while he lied about knowing "Liz Applegate." He then informed the Agents that his daughter Elizabeth was not present, also a lie. While the Agents checked the trailers, Agent Wirts approached and stood by the front porch in order to attempt to explain their presence and ask about Elizabeth. Mr. Applegate refused to calm down and continued his tirade yelling profanities at the Agents.

Unprovoked, Mr. Applegate shined a light in Agents Wirts' eyes, kicked him in the chest, and then reached into his pocket as if he were reaching for a weapon. Applegate admitted at trial that he kicked Agent Wirts. After being knocked back, Agent Wirts immediately determined that for his safety and the safety of the other Agents, he needed to obtain

physical control of Mr. Applegate and stepped on the porch to grab Mr. Applegate.

Agent Luna observed the physical struggle on the small porch between Agent Wirts and Mr. Applegate. Agent Luna approached to assist Wirts in gaining control of the aggressive and threatening Applegate. Agent Peterson observed Mr. Applegate kick Agent Wirts and called the Whatcom County Sheriff's Department as Agents Wirts and Luna struggled with Mr. Applegate.

During the struggle on the porch, the front door to the house was opened by an occupant in the house. The three struggling men then fell inside the threshold as Mr. Applegate attempted to break free and get inside the house. The Agents were concerned that Mr. Applegate was attempting to reach a weapon.

As the parties fell through the threshold, Agents Wirts observed Elizabeth Applegate immediately inside the house. Mr. Applegate's wife got Mr. Applegate to calm down, at which time he was released by the Agents while Elizabeth Applegate was taken into custody. The Whatcom County Sheriff's Department arrived shortly after the fugitive was taken into custody, at which time Mr. Applegate fled the scene in his truck.

Mr. Applegate sued Lucky Bail Bond, Inc., and each of the fugitive recovery agents, alleging a litany of civil claims based in his belief that the agents trespassed on his land, assaulted him, and forcibly entered his home.

B. Trial and Decision Appealed.

On December 4, 2013, Mr. Applegate's numerous claims, including trespass, assault, battery, among a litany of other civil claims, were tried before a jury in Whatcom County Superior Court. On December 17, 2013, the jury returned a verdict in favor of the Defendants for each of Mr. Applegate's claims.

The Court instructed the jury regarding the ability of fugitive recovery agents to enter property of a third party. Included in these instructions, Instruction No. 39, attached hereto as Appendix 1, was the following:

The following privilege carries with it the privilege to enter land in the possession of another for the purpose of exercising the particular privilege, if the person sought is on the land or the actor reasonably believes him to be there:

The privilege to take into custody a person for whose appearance in court security has been given by the actor.

The language of this instruction was taken directly from the *Restatement (Second) of Torts §205. Entry To Recapture Or To Prevent Crime And In Related Situations.*

The Washington State Supreme Court adopted the *Restatement (Second) of Torts* pertaining to trespass as an accurate statement of the law of trespass in Washington. *Brutsche v. City of Kent*, 164 Wn.2d 664, 673-74, 193 P.3d 110 (2008). *See also Olympic Pipe Line Co. v. Thoeny*, 124

Wash. App. 381, 393-94, 101 P.3d 430, 437 (2004); and *Peters v. Vinatieri*, 102 Wash. App. 641, 655, 9 P.3d 909, 916-17 (2000).

Petitioner does *not* appeal the Court's decision to provide the jury this instruction. Additionally, the Court accurately instructed the jury pertaining to assault, battery, false imprisonment, and the use of force in self defense in Washington, attached hereto as Appendix 2, 3, 4, and 5 respectively.

Petitioner appeals the Court's Instruction No. 41, attached hereto as Appendix 5, wherein the Court instructed the jury regarding the privilege to use force to enter a dwelling. Instruction No. 41 states:

The privilege to enter land carry [sic] with it the privilege to use force to enter a dwelling if the person sought to be taking into custody is in the dwelling. Such force may be used only after explanation and demand for admittance, unless the actor reasonably believed such demand to be impractical or useless.

Although the person sought is not in the dwelling, the actor is privileged to use force if he reasonably believes him to be there, and enters in exercise of a privilege to take into custody a person for whose appearance in court security has been given by the actor.

The language of this instruction is taken directly from *Restatement (Second) of Torts §206. Forcible Entry of Dwelling To Arrest, Recapture, Prevent Crime, and Related Situations.*

Petitioner also appeals the Court's granting of Instruction No. 17, wherein the Court instructed that in order to establish a claim of trespass,

it had to be established that the defendants did not have a privilege to enter the land.

II. ISSUES PRESENTED

1. Did the trial court properly instruct the jury regarding the privilege of a fugitive recovery agent to enter third party land in the State of Washington?

2. Did the trial court properly instruct the jury regarding permissible use of force in the State of Washington?

III. GROUNDS FOR REVIEW

Rules of Appellate Procedure provides for discretionary review of appellate court decisions by the Supreme Court in limited cases.

Specifically, those cases are: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)

Petitioner cites two as grounds for review, RAP 13.4(b)(3) and (4), significant constitutional issues and public interest issues, respectively. However, Petitioner fails to present any argument relating to constitutional issues and fails to establish that the public interest in this case rises to the level of review.

A. RAP 13.4(b)(3).

RAP 13.4(b)(3) provides that review may be granted “[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved.”

Despite the clear language of the rule, requiring a significant question of constitutional law, Petitioner fails to cite any constitutional law at issue in this case or any argument whatsoever that the case involves a constitutional issue.

Petitioner has failed to present any questions of constitutional law to warrant review of the Supreme Court pursuant to RAP 4.2(3).

B. RAP 13.4(b)(4).

RAP 13.4(b)(4) provides for review “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”

Petitioner has not successfully presented evidence or argument of a “substantial public interest.” Petitioner must establish that the application of the *Restatement (Second) of Torts* §§ 205 and 206 creates an issue of substantial public interest. It does not.

In sole support of its “public interest” argument, Petitioner states that citizens around the State have been severely injured based upon confusion surrounding powers and abilities of fugitive recovery agents. However, there is simply no support of this assertion of fact that citizens

“around the State have been injured based on confusion” and there should be little confusion regarding the powers of fugitive recovery agents.

The State Supreme Court has, on several occasions, determined that the *Restatement (Second) of Torts* applies to the law of trespass in Washington. See *Brutsche v. City of Kent*, 164 Wn.2d 664, 673-74, 193 P.3d 110 (2008) (Supreme Court specifically adapted *Restatement (Second) of Torts* § 214 as an accurate statement of the law of trespass claims involving execution of search warrants on private property); *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 681-84, 709 P.2d 782 (1985) (applying Restatement (Second) of Torts § 158 regarding the law of trespass).

In addition, the appellate courts have similarly applied the *Restatement (Second) of Torts* regarding the law of trespass in Washington. See *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 123, 977 P.2d 1265 (1999) (quoting § 214(1) cmt. a). Liability for damage may arise under section 214(1), which provides that “[a]n actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct.”); *Olympic Pipe Line Co. v. Thoeny*, 124 Wash. App. 381, 393-94, 101 P.3d 430, 437 (2004) (referencing *Restatement (Second) of Torts* regarding law of trespass); and *Peters v. Vinatieri*, 102 Wash. App. 641, 655, 9 P.3d 909, 916-17 (2000) (applying

Restatement (Second) of Torts to trespass claim regarding government agents access to land to inspect septic system.)

The *Restatement (Second) of Torts* sections applied in this case, §§ 205 and 206, read as follows:

The following privileges carry with them the privilege to enter land in the possession of another for the purpose of exercising the particular privilege, if the person sought is on the land or the actor reasonably believes him to be there: the privilege

(a) to recapture a person previously arrested in criminal or civil proceedings or a convicted prisoner, or

(b) to take into custody under a warrant, valid or fair on its face, one who has been adjudged a lunatic, or

(c) to recapture a person who having been adjudged a lunatic has been taken into custody, or

(d) to take into custody a person for whose appearance in court security has been given by the actor, or

(e) to prevent one from committing a serious crime or to detain a dangerous lunatic.

Restatement (Second) of Torts §205. Entry To Recapture Or To Prevent Crime And In Related Situations.

(1) The privileges to enter land stated in §§ 204 and 205 carry with them the privilege to use force to enter a dwelling if the person sought to be taken into custody is in the dwelling. Such force may be used only after explanation and demand for admittance, unless the actor reasonably believes such demand to be impractical or useless.

(2) Although the person sought is not in the dwelling, the actor is privileged to use force as stated in subsection (1) if he reasonably believes him to be there, and enters in the exercise of a privilege

(a) to make a criminal arrest under a warrant valid or fair on its face, or

(b) to make a criminal arrest under an order of a

court acting within its jurisdiction, or
(c) to effect a recapture on fresh pursuit of one who has been lawfully arrested on civil or criminal proceedings or who is a convicted prisoner, or
(d) to take into custody under a warrant valid on its face, or to recapture on fresh pursuit, one who has been adjudged a lunatic, or
(e) to take into custody a person for whose appearance in court security has been given by the actor, or
(f) to prevent one from committing a serious crime or to control a dangerous lunatic.

Restatement (Second) of Torts §206. Forcible Entry of Dwelling To Arrest, Recapture, Prevent Crime, and Related Situations.

Not only is it clear that the *Restatement (Second) of Torts* is the applicable law of trespass in Washington, but the standards therein are consistent that the requirements dictated by the Washington State Legislature regarding actions of fugitive recovery agents. In RCW 18.185.101(12), the Legislature authorizes fugitive recovery agents to forcibly enter third party buildings and dwellings upon reasonable cause to believe that the fugitive is in the building. (Petitioner states that there is no Washington statute that would permit forcible entry onto a third party's property. Petitioner ignores RCW 18.185.101(12).)

Petitioner did not appeal another instruction presented to the jury, Instruction No. 39, which was also based upon *Restatement (Second) of Torts*. Petitioner fails to present any argument as to why one section of the *Restatement (Second) of Torts* pertaining to trespass and privilege to enter land is applicable in Washington, but other sections are not.

Petitioner further fails to assert why the trial court's instructions pertaining to assault, battery, false imprisonment and self defense, in conjunction with *Restatement (Second) of Torts* pertaining to privilege to enter land, fails to adequately protect the citizens of Washington.

Petitioner argues that this issue is one of first impression in Washington and that some jurisdictions in the nation do not authorize fugitive recovery agents the same authority as permitted by the Court of Appeals decision. A matter of first impression is not one of the factors relevant to determination of review by the Supreme Court. RAP 13.4(b). While this may be the first appeal from a trial court decision on this specific issue, that does not render the law in Washington pertaining to trespass to be unsettled or to be unclear, as outlined above.

Regarding the law from other jurisdictions, these were all specifically distinguished in the Court of Appeals decision. Moreover, law in other jurisdictions is not one of the factors in determining Supreme Court review. RAP 13.4(b).

Rather, cases such as this one are limited to a small subsection of the public involved with criminal bail bonds and with persons that are fugitives of the courts. Fugitive Recovery Agents have acted in the State of Washington for many decades, and have been separately licensed and governed by the State of Washington since 2006. Nonetheless, the Appellate incident is the first wherein someone has expressed "confusion"

as to the powers of fugitive recovery agents, and this confusion allegedly leading to the injury of another.

There simply is no confusion regarding when a fugitive recovery agent may enter property of a third party, nor is there any conceivable interpretation of the trial court's instructions to the jury that fugitive recovery agents can use physical force against another person in contradiction of the long standing laws pertaining to assault, battery, false imprisonment, and self defense.

Accordingly, there is no public issue presented in this case which warrants Supreme Court review of the trial court's granting of Instruction No. 17 and No. 41.

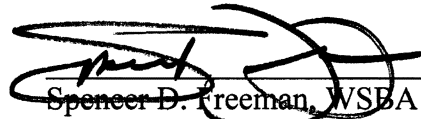
IV. CONCLUSION

The Washington State Supreme Court's adoption of the *Restatement (Second) of Torts* as accurate statement of the law pertaining to trespass in Washington makes it clear that the fugitive recovery agents were lawfully on the Applegate property. Mr. Applegate does *not* appeal this particular instruction to the jury. Mr. Applegate then admittedly kicked Agent Wirts. The jury determined that the fugitive recovery agents acted in defense to his attack.

Petitioner's objection to jury instructions No. 17 and 41 do not warrant review by the Supreme Court. Accordingly, it is respectfully requested that the Court deny the petition for review.

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DATED this 13th day of February, 2017.



Spencer D. Freeman, WSBA #25069
Attorney for Respondents

Instruction No. 39

The following privilege ~~carries~~^{carries} with it the privilege to enter land in the possession of another for the purpose of exercising the particular privilege, if the person sought is on the land or the actor reasonably believes him to be there:

the privilege the privilege to take into custody a person for whose appearance in court security has been given by the actor.

INSTRUCTION NO. 9

Ronald Applegate claims that Cesar Luna assaulted him. To establish this claim, Ronald Applegate must prove all of the following:

1. That Cesar Luna acted, intending to cause harmful or offensive contact;
2. That Ronald Applegate reasonably believed that he was about to be touched in a harmful or an offensive manner;

or

1. That Cesar Luna threatened to touch Ronald in a harmful or an offensive manner;
2. That it reasonably appeared to Ronald Applegate that Cesar Luna was about to carry out the threat;
3. That Ronald Applegate did not consent to Cesar Luna's conduct;
4. That Ronald Applegate was harmed; and
5. That Cesar Luna's conduct was a substantial factor in causing Ronald Applegate's harm.

A touching is offensive if it offends a reasonable sense of personal dignity.

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for assault as to Cesar Luna.

INSTRUCTION NO. 10

Ronald Applegate claims that Greg Peterson assaulted him. To establish this claim, Ronald Applegate must prove all of the following:

1. That Greg Peterson acted, intending to cause harmful or offensive contact;
2. That Ronald Applegate reasonably believed that he was about to be touched in a harmful or an offensive manner;

or

1. That Greg Peterson threatened to touch Ronald Applegate in a harmful or an offensive manner;
2. That it reasonably appeared to Ronald Applegate that Greg Peterson was about to carry out the threat;
3. That Ronald Applegate did not consent to Greg Peterson's conduct;
4. That Ronald Applegate was harmed; and
5. That Greg Peterson's conduct was a substantial factor in causing Ronald Applegate's harm.

A touching is offensive if it offends a reasonable sense of personal dignity.

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for assault as to Greg Peterson.

INSTRUCTION NO. 11

Ronald Applegate claims that John Wirts assaulted him. To establish this claim, Ronald Applegate must prove all of the following:

1. That John Wirts acted, intending to cause harmful or offensive contact;
2. That Ronald Applegate reasonably believed that he was about to be touched in a harmful or an offensive manner;

or

1. That John Wirts threatened to touch Ronald in a harmful or an offensive manner;
2. That it reasonably appeared to Ronald Applegate that John Wirts was about to carry out the threat;
3. That Ronald Applegate did not consent to John Wirts' conduct;
4. That Ronald Applegate was harmed; and
5. That John Wirts' conduct was a substantial factor in causing Ronald Applegate's harm.

A touching is offensive if it offends a reasonable sense of personal dignity.

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for assault as to John Wirts.

INSTRUCTION NO. 12

Ronald Applegate claims that Cesar Luna committed a battery. To establish this claim, Ronald Applegate must prove all of the following:

1. That Cesar Luna touched Ronald Applegate or caused Ronald Applegate to be touched with the intent to harm or offend him;
2. That Ronald Applegate did not consent to the touching; and
3. That Ronald Applegate was harmed or offended by Cesar Luna's conduct;

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for battery as to Cesar Luna.

INSTRUCTION NO. 13

Ronald Applegate claims that John Wirts committed a battery. To establish this claim, Ronald Applegate must prove all of the following:

1. That John Wirts touched Ronald Applegate or caused Ronald Applegate to be touched with the intent to harm or offend him;
2. That Ronald Applegate did not consent to the touching; and
3. That Ronald Applegate was harmed or offended by John Wirts' conduct;

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for battery as to John Wirts.

INSTRUCTION NO. 14

Ronald Applegate claims that he was wrongfully restrained and confined by Cesar Luna. To establish this claim, Ronald Applegate must prove all of the following:

1. That Cesar Luna intentionally deprived Ronald Applegate of his freedom of movement by use of physical barriers, force, or threats of force (express or implied); and
2. That the restraint or confinement compelled Ronald Applegate to stay or go somewhere for some appreciable time, however short;
3. That Ronald Applegate did not knowingly or voluntarily consent;
4. That Ronald Applegate was actually harmed; and
5. That Cesar Luna's conduct was a substantial factor in causing Ronald Applegate's harm.

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for false imprisonment as to Cesar Luna.

INSTRUCTION NO. 15

Ronald Applegate claims that he was wrongfully restrained and confined by Greg Peterson. To establish this claim, Ronald Applegate must prove all of the following:

1. That Greg Peterson intentionally deprived Ronald Applegate of his freedom of movement by threats of force (express or implied); and
2. That the restraint or confinement compelled Ronald Applegate to stay or go somewhere for some appreciable time, however short;
3. That Ronald Applegate did not knowingly or voluntarily consent;
4. That Ronald Applegate was actually harmed; and
5. That Greg Peterson's conduct was a substantial factor in causing Ronald Applegate's harm.

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for false imprisonment as to Greg Peterson.

INSTRUCTION NO. 16

Ronald Applegate claims that he was wrongfully restrained and confined by John Wirts. To establish this claim, Ronald Applegate must prove all of the following:

1. That John Wirts intentionally deprived Ronald Applegate of his freedom of movement by use of physical barriers, force, or threats of force (express or implied); and
2. That the restraint or confinement compelled Ronald Applegate to stay or go somewhere for some appreciable time, however short;
3. That Ronald Applegate did not knowingly or voluntarily consent;
4. That Ronald Applegate was actually harmed; and
5. That John Wirt's conduct was a substantial factor in causing Ronald Applegate's harm.

If you find from our consideration of all of the evidence that these propositions have been proven, your verdict should be for the Plaintiff for false imprisonment as to John Wirts.

A person is not responsible for harm for assault and battery if he was acting in self-defense, defense of another, or defense of his property. To succeed, on a claim of self defense a party must show:

1. They reasonably believed that the person was going to harm him, a third person or property; and
2. They only used the amount of force that was reasonably necessary to protect himself, a third person, or his property; and
3. That they were in a place where they were legally permitted to be; and
4. They were defending themselves, another person or their property against an unlawful use of force.

The right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge.

No person shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property.

There is no duty to retreat if you are in a place you are lawfully permitted to be.

Instruction No. 41

The privilege to enter land carry with it the privilege to use force to enter a dwelling if the person sought to be taken into custody is in the dwelling. Such force may be used only after explanation and demand for admittance, unless the actor reasonably believes such demand to be impractical or useless.

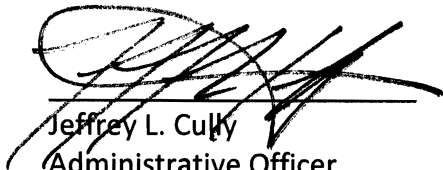
Although the person sought is not in the dwelling, the actor is privileged to use force if he reasonably believes him to be there, and enters in the exercise of a privilege to take into custody a person for whose appearance in court security has been given by the actor.

CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury under the laws of the State of Washington that I personally caused ***ANSWER OF RESPONDENTS'*** to be delivered to the following individuals via email and United States Postal Service:

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DATED: February 13, 2017


Jeffrey L. Cully
Administrative Officer
Freeman Law Firm, Inc.