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ASSIGNMENTS OF ERROR

1. The trial court erred by dismissing this case on summary judgment.

Order on Summary Judgment; CP 240.

2. The trial court erred by finding that fugitive recovery is not an inherently dangerous occupation.

Finding of Fact (Order on Summary Judgment; CP 240).

The Court finds that Fugitive Recovery is not an “inherently dangerous” occupation and, as such, Defendant Clarence Johnson and Jane Doe Johnson, husband and wife D.B.A. “C.J.” Johnson Bail bonds are not responsible for the actions of independent contractors Carl Warren and Jane Doe Warren, husband and wife and/or Michael Golden and Jan[e] Doe Golden, husband and wife D.B.A. CCSR Fugitive Recovery.

CP 240 (Order Granting Defendant Johnson’s Motion for Renewed Summary Judgment and Dismissing Claim against Defendant Johnson).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. Did the trial court err by dismissing this case on summary judgment?

Assignments of Error 1-2.

- II. Did the trial court err by finding that fugitive recovery is not an inherently dangerous occupation?

Assignments of Error 1-2.

STATEMENT OF THE CASE

An automobile accident on July 16, 2002 in which Appellant Larry Stout was gravely injured underlies this appeal. At issue is the trial court's dismissal of the Plaintiff's complaint on summary judgment.

Factual background

Defendants Clarence and Sally Doe Johnson, doing business as "C.J." Johnson Bail Bonds (hereafter "Defendants Johnson") had posted a \$50,000 bail bond for Larry Stout related to felony drug charges brought against him in 2002 (Pierce County Superior Court Cause No. 02-1-00468-9). CP 29, 54. On May 23, 2002, the Court notified Defendants Johnson that Stout failed to appear in court and that the bond would be forfeited unless Stout appeared. CP 256.

Defendants Johnson retained James Michael Golden, doing business as C.C.S.R. Fugitive Recovery (hereafter "Defendant Golden"), as an independent contractor for the purpose of apprehending Stout. CP 140-42. Defendant Golden, in turn, subcontracted with Defendant Carl Warren (hereafter "Defendant Warren") to apprehend Stout. CP 160-162.

On July 16, 2002, Defendant Warren had learned Stout would be in a certain area in Tacoma within the next 30 minutes. CP 46. Defendant Warren drove to that location in his own car. CP 3. Warren positioned his partner, Jason Ferrell, "in the trees" across from his own position in a

nearby driveway, where both lay in wait for Stout to drive by on a private gravel roadway. CP 46.

As Stout was passing by in his car, he noticed another vehicle approaching him, rapidly accelerating. CP 2, 30. Fearing the approaching vehicle was going to collide with him, Stout also accelerated. CP 30. Despite Stout's efforts to avert a collision, the approaching vehicle rammed into Stout's vehicle, forcing it off the roadway, causing it to collide head-on into a tree. CP 3, 30.

As a result of the ramming collision, Stout sustained severe injuries; one of his legs was amputated; his second leg will likely be amputated as well. CP 30.

Defendant Warren told the investigating officers from the Pierce County Sheriffs Department he was employed by "CJ's Bail Bonds." CP 42. A few pages later in the incident report, in another statement written by Defendant Warren at that same time, he reported he was "with C.C.S.R. Fugitive Recovery." CP 46.

Defendants Johnson paid Defendant Golden for apprehending Stout. Defendant Golden, in turn, paid Defendant Warren a portion of that fee. CP 161 (ll. 18-25), CP 164 (l. 25) – CP 165 (ll. 1-5).

As a fugitive recovery agent, Defendant Warren had a reputation of being unorthodox and aggressive, with a fugitive recovery rate. CP 151 (l. 5), CP 152 (l. 16); CP 163 (ll. 13-14).

After the Stout accident, however, Defendants Johnson asked Defendant Golden not to subcontract with Defendant Warren any longer:

Q. What conversation did you have [with Defendant Johnson and his office manager] after the incident pertaining to Mr. Stout?

* * * *

A. They wanted to know what went on [referring to the accident] and how it went on. And they said it may go to court. And now it's going to court.

* * * *

A. They told me not to use Mr. Warren - - or they asked me not to use Mr. Warren again.

CP 147 (ll. 12-13, 20-22, 25), CP 148 (l. 1).

Defendant Golden further testified:

Q. . . . [D]id [Defendants Johnson] ever tell you, no, you can't involve [any other fugitive recovery agents]? This contract is only for you to do and nobody else? Or did they care if you got some agent to work on it?

A. That was never discussed.

Q. So there are no discussions or they didn't prohibit you - -

A. Until after the incident.

Q. Until after the incident - -

A. Correct.

Q. - - is that right?

A. Correct.

Q. And I take it that after the incident they told you no subcontracting?

A. That's incorrect.

Q. Okay. What did [they] tell you after the incident?

A. Not to use Mr. Warren.

CP 147 (ll. 23-25) – CP 148 (ll. 1-14).

Q. Now, I take it that after the Stout incident, the only thing that changed with regard to subcontracting, is that [Defendants Johnson] told you no subcontracting with Warren?

A. Correct.

CP 152 (ll. 4-7).

Q. Did [Defendants Johnson] ever tell you whether or not you could subcontract your contract to somebody else?

A. Like we covered last time, not until after this incident [with Stout] occurred.

CP 156 (l. 25) – CP 57 ll. 1-3).

Defendant Golden also testified that fugitive recovery agents sometimes apprehend fugitives on verbal notification alone, with a contract being written *after* the fugitive is apprehended.

A. A couple of times I've actually apprehended without a contract and I bring the person to their office and they will write the contract when I get there.

CP 166, ll. 9-12. This is common practice among fugitive recovery agents.

CP 168.

Louise Workman has a background in law enforcement, and was at one time a fugitive recovery agent. CP 222. C.J. Johnson Bail Bonds was an employer of hers. CP 222-223. Ms. Workman has stated:

It is not uncommon for a fugitive to flee using an automobile. Some bounty hunters will then pursue in their own vehicle, even to the point of getting into a high speed chase. I witnessed one bounty hunter in that situation collide with the fugitive's car.

All of these practices (physical altercations, use of weapons and automobile pursuits) are not unusual occurrences in bounty hunting. **They all present the very significant danger of injury to anyone who happens to be in the vicinity. These dangers are inherent in the practice.**

CP 224 (emphasis added). Defendant C.J. Johnson himself

acknowledged this inherent danger:

Bail bond recovery can be performed safely. Given the wrong circumstances, bail recovery could present some risk.

CP 125. Defendant Golden similarly acknowledged the danger inherent in

fugitive recovery:

Q. Now, is fugitive recovery, can that be dangerous?

A. It can.

CP 145.

Q. Is this a type of business where you can anticipate that somebody may pull a gun or a knife on you, or take a swing at you?

A. There's no anticipating. There's no rhyme or reason to the actions of some of these people.

Q. Right. But is that something that is always in the back of your mind as a possibility?

A. Absolutely.

Q. So I take it your personal safety is somewhat of a concern; is that right?

A. And the general public. The innocent public.

Q. Okay. I take it some of these people that you go after can be involved with alcohol or drugs - -

A. Correct.

Q. - - and you have no idea what's going to happen?

A. Correct.

Q. And you have no idea how volatile or how dangerous it can be?

A. Correct.

CP 146. Defendant Golden also explained:

- A. The main thing is we wanted to make sure everybody got home safe, you know, ourselves and the individuals that we were going after and in a sense anybody that could be in harms way. . . .
- Q. So I take it the primary concern was making sure that it was a safe recovery?
- A. For everybody concerned.
- Q. Because of the risk that something could go wrong?
- A. Absolutely.

CP 158. Finally, Defendant Golden also testified:

- Q. What scared you the most [about fugitive recovery]?
- A. The thought of somebody being injured, killed, whether it be myself, a partner, the defendant, an innocent bystander, as to defendants jumping in a car and running away from me and crashes into a little old lady. . . .

CP 167.

Procedural History

The Johnsons brought a motion for partial summary judgment with regard to the issue of agency, liability for intentional acts, and joint and several liability on October 6, 2005. CP 11-20. That motion was not heard by the court.

The Johnsons renewed their motion for partial summary judgment with regard to the issue of agency, liability for intentional acts, and joint and several liability on May 18, 2006. CP 118-129. On July 5, 2006, the Court denied the motion. CP 197-199.

Mr. Stout brought a motion for partial summary judgment with regard to liability on February 7, 2008. CP 200-220. That motion was denied on April 18, 2008. CP 233-235. Important here, the Court ruled:

Showing of facts is insufficient to grant summary judgment on issue of inherent dangerousness of bail bond recovery agents.

CP 234.

Defendants Johnson then renewed their motion for summary judgment on October 24, 2008. CP 236-237. The Court granted the motion and dismissed the matter as to Defendants Johnson on December 12, 2008. CP 238-243.

Specifically, the Court found that fugitive recovery is not an inherently dangerous occupation. CP 240. As such, the Court further found that Defendants Johnson were not vicariously liable for any of the actions of their independent contractors. CP 240.

On April 3, 2009, Defendants Golden were voluntarily dismissed from the lawsuit.¹ CP 244.

Mr. Stout timely appealed.

¹ Defendants Golden had recently filed for relief in the Bankruptcy Court. None of those documents are part of the trial court's record.

ARGUMENT

I. THE TRIAL COURT ERRED BY DISMISSING THIS COMPLAINT ON SUMMARY JUDGMENT

Standard of Review

Trial court summary judgment orders are reviewed de novo and the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corporation*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

The appellate court examines the pleadings, affidavits and depositions before the trial court and “take the position of the trial court and assume facts (and reasonable inferences) most favorable to the non moving party.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

Summary judgment is appropriate if the record before the trial court establishes “that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” CR 56(c).

If the facts are essentially undisputed, the question is whether or not the moving party is entitled to summary judgment as a matter of law. *Del Guzzi Construction Company v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). See also *Brown v. Snohomish County Physicians Corporation*, 120 Wn.2d, 747, 752, 845 P.2d 334 (1993).

In *Smith v. Safeco*, the trial court dealt with an allegation of bad faith made by plaintiff Smith against Safeco Insurance Company. The trial court, upon motion for summary judgment, found no bad faith. The Court of Appeals affirmed the trial court. *Smith v. Safeco Ins. Co.*, 112 Wn. App. 645, 50 P.3d 277 (2002).

The Washington Supreme Court held that whether or not the insurer acted in bad faith was a question of fact. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). The Supreme Court further stated that if the insured believed the insurer acted in bad faith then the insurer must come forward with evidence that the insurer acted unreasonably. *Smith*, 150 Wn. 2d 486. In addition, the Court stated that if there were any material issues of fact with respect to the reasonableness of the insurer's action, then summary judgment was not appropriate. *Id.* The Supreme Court held that the trial court and Court of Appeals had applied the wrong legal standard when granting and affirming summary judgment in favor of Safeco.

In this case, there are also issues of material fact with respect to the inherent dangerousness of fugitive recovery. Therefore, summary judgment was not appropriate.

II. The Trial Court Erred by Finding that Fugitive Recovery is not an Inherently Dangerous Occupation

A principal such as Defendant CJ Johnson Bail Bond Company can be vicariously liable for the acts of an independent contractor under the doctrine of *respondeat superior* if the underlying occupation or activity is abnormally dangerous. This doctrine is explained in the Restatement (Second) of Torts, §520 (1965) as follows:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) Inappropriateness of the activity to the place where its is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Washington courts have thus held a principal liable for the acts of its subcontractor as they relate to third parties for work that is “inherently dangerous”. *Tauscher v. Puget Sound Power and Light Company*, 96 Wn.2d 274, 635 P.2d 426 (1981). *See also Epperly v. Seattle*, 65 Wn.2d

777, 781, 399 P.3d 591 (1965); *Kendall v. Johnson*, 51 Wash. 477, 481, 99 P. 310 (1909); and *Engler v. Seattle*, 40 Wash. 72, 82 P. 136 (1905).

In *Tauscher*, the court specifically cited the Restatement (Second) of Torts at paragraphs 519; 523; 413; 414; 416; and 427. The *Tauscher* court recognized there is an exception to a principal avoiding liability for work that is inherently dangerous by simply engaging the services of a subcontractor in an effort to insulate the principal from liability. In citing the provision of the Restatement (Second) of Torts, the *Tauscher* court stated, "This exception appears to have had as its basis the principle that an owner shall not be permitted to shift from himself or herself liabilities for injuries arising out of work that is inherently dangerous by the simple expedient of entrusting that work to an independent contractor."

Tauscher, 96 Wn.2d 281.

The *Tauscher* court cited with approval Section 416 of the Restatement (Second) of Torts, which reads as follows:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

The *Tauscher* court also cited Section 427 of the Restatement (Second) of Torts, which reads as follows:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

The *Tauscher* court also quoted the proposition, "An owner who employs an independent contractor is already liable to all third persons, including employees of the independent contractor, for his or her own negligence, for negligence in the hiring of the independent contractor and for injuries resulting from any latent defects on the land." *Tauscher*, 96 Wn.2d 281-82 (citing *Welker v. Kennecott Copper Company*, 1 Ariz. App. 395, 403 P.2d 330 (1965); Restatement (Second) of Torts paragraph 343 (1965)).

The use of firearms, which permeates bounty hunting, is one example of an activity that has traditionally been considered inherently dangerous. *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 941, 29 P. 3d 50 (2001) (citing *Andrews v. Del Guzzi*, 56 Wn.2d 381, 392, 353 P.2d 422 (1960)).²

² In one case from another jurisdiction where the court analogized fugitive recovery agents to private security guards, it held there is no inherent danger related to bail recovery in the context of reviewing the denial of four fugitive recovery agents'

In one Ohio case, a bail bond company appealed the judgment entered against it for damages caused by a fugitive recovery agent (concededly its independent contractor) who broke down the door of the plaintiff's dwelling believing the fugitive he sought would be found there. *Hayes v. Goldstein*, 120 Ohio App. 3d 116, 697 N.E.2d 224 (1997). The bail bond company argued it was not vicariously liable for the actions of its independent contractor because fugitive recovery is not an inherently dangerous activity; rather, it argued it is dangerous only when improperly performed. *Hayes*, 120 Ohio App. 3d 225. The court affirmed the judgment, holding:

. . . [T]here is an indisputable danger inherent in the apprehension of one who has failed to answer to a charge leveled in a court of law or who has failed to abide by an order of a court, and that this activity presents danger ***even if undertaken with the utmost precaution.***

Hayes, 120 Ohio App. 3d 226 (emphasis added).

Secondary authorities and legal commentary are in accord. In one comprehensive law review article, one statement sums up the nature of bounty hunting: "[T]here is one extreme downside to the bounty hunting

applications for concealed weapon permits. *In re Borinsky et al.*, 830 A.2d 507, 517 (2003). However, the reviewing court noted the various trial judges' observations to the contrary. One trial judge noted "there's an obvious risk that [a fugitive recovery agent] can be injured or killed." *Id.*, at 511. The same trial judge noted "the apprehension of bail jumpers [by persons in the private sector, including fugitive recovery agents] poses an unacceptable risk to public safety." *Id.*, at 513. Another of the trial judges observed "in the course of performing their duties these [fugitive recovery agents] will be subject to a substantial threat of bodily harm[.]" *Id.*, at 513.

profession - - the danger.” John A. Chamberlin, *Bounty Hunters: Can the Criminal Justice System Live Without Them?*, 1998 U. Ill. L. Rev. 1175, 1192 (1998).

Similar observations were made in another law review article:

In arresting suspects, bounty hunters commonly use excessive and indiscriminate force, resulting in not only unnecessary deaths and injuries to suspects the law still presumes innocent, but to third parties as well. Even during arrests in public, bounty hunters regularly use methods of capture that wound bystanders or otherwise threaten their safety. Furthermore, when breaking into homes, bounty hunters often must defend themselves against startled inhabitants seeking to protect themselves from armed strangers.

Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 774-775 (1996).

Courts have found that high speed chases are inherently dangerous to society. See, e.g., *State v. S.S.*, 67 Wn. App. 800 at 818, 840 P.2d 891 (1992).

Other jurisdictions have found that recapturing fugitives presents a serious risk of violent injury to law enforcement officers and bystanders. In *People v. Lang*, 264 Cal. Rptr. 386, 782 P.2d 627 (1989), the court stated:

Escape without force, as defined by both Oregon and California law, necessarily involves some form of stealth, deceit, or breach of trust, and the potential for violence is always present when an escaped felon is recaptured.

CONCLUSION

At the time of the incident involved herein, Larry Stout had an outstanding bench warrant for his arrest due to his failure to appear for court hearings. Defendant C.J. Johnson Bail Bond Company's bail in the amount of \$50,000 was in jeopardy of being forfeited if the bail bond company could not apprehend and deliver to jail Larry Stout within a specified time.

When C.J. Johnson Bail Bond Company was unable to locate Larry Stout and convince him to turn himself in to the authorities, they turned over a contract to Mike Golden of CSSR Recovery Services to apprehend Larry Stout. Mike Golden of CSSR Recovery Services in turn solicited the help of Carl Warren to apprehend Larry Stout.

Carl Warren, and one of his assistants, laid in wait in the bushes off of 62nd Ave. S. in Spanaway waiting for Larry Stout to drive by. When this occurred Carl Warren chased Larry Stout and ran into the rear end of Larry stout's car causing Larry Stout's car to go off of the roadway and head-on into a tree causing serious injury to Larry Stout.

Although defendant C.J. Johnson Bail Bond Company believes that bail bond recovery work can be performed safely, the declarations filed in the trial court record, including that of Louise Workman, as well as the

case law cited above, clearly indicate that fugitive recovery is an activity that involves risk, and although such risks may be minimized by following certain procedures, such risk simply can never be eliminated. The uncertainty of the situation including the uncertainty of innocent third parties being present creates a high degree of risk of harm to others, not to mention the individual being apprehended. There is always the risk that the person being apprehended is the wrong person.

The trial court record and case law above further indicate that the harm that can result from a fugitive recovery gone wrong can be irreversible. People have been killed during bail bond recovery. Larry Stout has been permanently disabled.

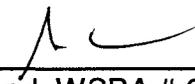
No matter how much reasonable care is used with regard to fugitive recovery it is impossible to totally eliminate the risk of harm including significant harm to person and property.

Like police work, fugitive recovery by bail bond agents is an inherently dangerous activity.

The trial court erred by concluding that there was no genuine issue as to any material fact as well as by concluding that defendant CJ Johnson Bail Bonds was entitled to judgment as a matter of law.

DATED the 14th day of December, 2009.

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA # 9559
Attorney for Appellant.

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington
I affirm the following to be true:

On this date I transmitted the original document to the Washington
State Court of Appeals, Division II by personal service, and delivered a
copy of this document via United States Postal Service to the following:

Wayne Fricke
Hester Law Group, Inc.
1008 South Yakima Ave.
Suite 302
Tacoma, WA 98405

Signed at Tacoma, Washington on this 14th day of December,
2009.



Lisa Bitz

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