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DIVISION II

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Court of Appeals No. 38744-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

LARRY STOUT,
Petitioner,

v.

CARL J. WARREN AND JANE DOE WARREN, *et al.*,
Respondent.

PETITION FOR REVIEW

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IDENTITY OF PETITIONER AND PERSONS FILING THIS PETITION

Petitioner, Larry Stout, submits this Petition for Review by and through his attorney of record, Robert Helland of The Law Office of Robert Helland.

COURT OF APPEALS DECISION (PUBLISHED)

Larry Stout seeks review of the published decision of the Court of Appeals, Division II, *Stout v. Johnson*, --- Wn. App. ---, 244 P.3d 1039.

A true and correct copy of the published decision at issue is provided at the Appendix at pages A through E.

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by failing to reach the legal merits of the case but rather improperly holding that a criminal “participating” in the bail bond recovery assumes all risks arising from bail bond recovery and is not a member of the protected class of people?
2. Did the Court of Appeals err by not reaching the legal merits of the appeal as to whether bail bond recovery is “inherently dangerous” and whether summary judgment was appropriate?

STATEMENT OF THE CASE

An automobile accident on July 16, 2002 in which Appellant Larry Stout was gravely injured underlies this petition. 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") 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 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 the back of 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. 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 high 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. 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 which was not heard by the court. CP 11-20. 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 May 18, 2006 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 due to bankruptcy filing. CP 244. Larry Stout now seeks discretionary review by the Supreme Court.

ARGUMENT

The Court of Appeals erred by affirming the trial court’s disposition of this case. The analysis of the trial court decision by Division II fails to reach the legal merits of the case but rather improperly holds that a criminal assumes all risks arising from bail recovery. Stout’s petition for review should be granted.

A. RAP 14(b) Factors.

The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Three factors are considered when determining whether an issue is one of “substantial public interest”: “(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.” *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 712, 911 P.2d 389 (1996) (quoting *Hart v. Dep’t of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)).

This case presents a question of significant public nature to the Court. In particular, it controls the amount of personal protection a criminal is afforded in a non-police apprehension and drastically limits the recovery of persons engaged or in the vicinity of an “inherently dangerous activity.” It is important to note that bail bond recovery places not only the fugitive and bail bond agent in peril, but also the general public.

Furthermore, since there is no law on point to guide a public official in deciding these matters a decision from this Court is necessary. Lastly, the bail recovery industry is now regulated. RCW 18.185.¹ That regulation notwithstanding, it is likely that fugitive apprehension that falls outside of this regulation will continue to occur and individuals involved in “inherently dangerous activities” will continue to be injured by actions outside of the realm

¹ This regulatory scheme was enacted in 2004, after the accident at issue here. Law of 2004 c 186.

of foreseeability. Consideration by the Supreme Court is warranted. RAP 13.4(b).

B. The Court of Appeals erred in concluding that a criminal who obtains a bail bond assumes the risk of any harm arising from later attempted apprehension by a bail recovery agent.

The Court of Appeals erred by improperly holding that a criminal defendant assumes all risks associated with bail recovery and therefore is not in the class of people protected under the “inherently dangerous” exception to contractor liability. The issue of whether a criminal defendant assumes the risk of excessive force and ultimately injury or death during bail recovery is an issue of first impression for this Court. Furthermore, it is an issue of first impression for this Court as to whether an agent-principal relationship exists between a bail recovery agent and a fugitive as to create the issue of protected versus unprotected classes of people.

The bail bond agent and fugitive relationship is analogous to that of a police officer and fugitive.

Although a fugitive may interact with law enforcement by violating a criminal statute, the fugitive has not knowingly accepted all risks associated with apprehension. Rather, the United States Constitution, Washington State Constitution and United States Supreme Court have limited force that an officer may use in the recovery of an alleged fugitive. The Court applies an “objective reasonableness” standard in determining excessive force by an

officer during an arrest. *Graham v. Connor*, 490 U.S. 386, 395-97.

“Objective reasonableness” is evaluated from the point of view of reasonable officers on the scene, in light of the facts and circumstances confronting them, allowing for the necessity of split-second decisions, and without regard to the officers’ underlying intent or motivation. *Graham*, at 395-97. The conclusion that conduct was reasonable depends on: (1) the severity of the underlying offense; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest. *Graham*, at 396.

If the above test is applied by analogy to the facts in this proceeding, it is clear the Stout would have a claim for excessive use of force because Stout was only sought by Defendant Johnson for monetary purposes, posed no danger to the bail bond agent or others in the area, was not armed, and was not trying to resist arrest as Stout was unaware that the vehicle accelerating towards him was a bail bond recovery agent.

The decision by the Court of Appeals removes all forms of protections from a criminal fugitive in a non-police encounter and encourages a vigilante form of justice. At the time of the accident the bail bond recovery industry was not regulated and therefore a common law method of recovery was the only form of regulation to protect the citizens of the state, including Stout. This is precisely why the industry is now regulated. See RCW Chapter 18.185.

By holding that due to his criminal actions no common law means for recovery exists for Stout and all risks of injury and damage from the bail recovery industry were foreseeable, the Court of Appeals is endorsing a “wild-west” form of justice with no regards for the safety of the residents of the state. Although the issue of regulation may deem future circumstances such as these moot through new regulations on bail recovery, it is not moot for Stout.

The bail recovery agent and fugitive relationship is not analogous to the employer and employee relationship.

The Court of Appeals decision in this matter rests on the basis that Stout is not in the “protected class of people” as he was not an innocent third party but rather knowingly entered into a relationship with the bail recovery agents, and thus sat in the same position as a contractor obtained by the principal. *Stout*, --- Wn. App. at 9. However, there is no known case law that supports extending the protections and liabilities associated with an agent and principal relationship to third parties who may come into contact with an agent in the ordinary course of business. The Court of Appeals overly broadens how a principal and agent relationship may be created. Moreover the Court of Appeals ignored the potential of irreparable harm to innocent bystanders.

“Inherently dangerous activity” does not bar a participant from recovery for all risks arising from the activity.

Even if Division II had concluded that Stout “participated” in the bail bond industry and therefore assumed the risk of an “inherently dangerous

activity,” it improperly held that Stout need not know “all of the causes of the risk inseparable from the activity.” *Stout*, --- Wn. App. at 17. The Court of Appeals confused lack of knowledge of foreseeable risks of an activity which may not have been fully understood by a party at the time of the injury with extraordinary or unusual risks that cannot be reasonably foreseen.

In *Cross v. Spokane*, 158 Wash. 428 an employee of a railroad company was run over by a train speeding on the tracks that he was working on. Although the employee worked in an inherently dangerous workplace, he was not foreclosed from recovery for damages since the risk faced was extraordinary or unusual, as the accident would not have occurred had the train not been speeding or sounded a horn. Similarly, the accident in the present case could have been avoided had Defendant Johnson identified himself and not rammed Stout’s vehicle from behind. There is nothing in the record to suggest that the only possible means of apprehension of Stout was by unexpectedly ramming his car from behind. The Court of Appeals interprets *Epperly v. City of Seattle*, 65 Wn.2d 777, 784, 399 P.2d 591 (1965) as barring any recovery for any risk in an activity no matter how unforeseeable or disconnected from the “inherently dangerous” portion of the activity. See *Stout*, ---Wn. App. at 17.

The Court of Appeals indicated that since Stout was a fugitive he assumed the risk of unknowingly having his vehicle rammed from behind by a bail bond

recovery agent. See *Stout*, Wn. App. at 17. Such analysis results in an assumption of risk for any harm, however grave, resulting from bail recovery to the fugitive, or a person in the vicinity of the activity who recognizes it as a bail recovery effort no matter how unforeseeable or unreasonable such risks are.

C. The Court of Appeals failed to reach the legal issue of whether bail bond recovery is an inherently dangerous activity as to make Johnson liable for the actions of its independent contractors.

Summary judgment was not appropriate.

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).

Bail bond recovery is an “inherently dangerous activity.”

In this case, there are also issues of material fact with respect to the inherent dangerousness of fugitive recovery as it existed at the time of the accident. A principal such as Defendant CJ Johnson Bail Bond Company should 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.

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

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’ 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.

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 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.

re, summary judgment was not appropriate.

CONCLUSION

The opinion issued by Division Two in this case is a matter of first impression for the Court and is of substantial public interest. Therefore, this Petition for Review should be granted.

DATED the 10th day of February, 2011.

RESPECTFULLY SUBMITTED,



Robert Holland, WSBA #9559
Attorney for Appellant Larry Stout

Declaration of Transmittal

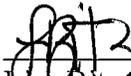
Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Supreme Court by legal messenger, and delivered a copy of this document via ABC Legal Messengers to the following:

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

Signed at Tacoma, Washington on this 10th day of February, 20

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4 of 100 DOCUMENTS

LARRY STOUT, *Appellant*, v. CLARENCE JOHNSON, JR. ET AL., *Respondents*.

No. 38744-1-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

244 P.3d 1039; 2011 Wash. App. LEXIS 84

September 10, 2010, Oral Argument

January 11, 2011, Filed

PRIOR HISTORY: [*1]

Appeal from Pierce County Superior Court. Docket No: 04-2-09770-9. Judgment or order under review. Date filed: 12/12/2008. Judge signing: Honorable Thomas J Felnagle.

COUNSEL: *Robert Helland* and *Barbara H. McInville*, for appellant.

Wayne C. Fricke, for respondents.

JUDGES: AUTHOR: J. Robin Hunt, P.J. We concur: Christine Quinn-Brintnall, J., Marywave Van Deren, J.

OPINION BY: J. Robin Hunt

OPINION

¶1 HUNT, J. -- Larry Stout appeals the trial court's grant of summary judgment dismissal of Clarence and Sally Doe Johnson, doing business as "CJ" Johnson Bail Bonds (Johnson), from Stout's lawsuit against them. Stout had sued Johnson for damages based on injuries he suffered when Johnson's independent contractor's subcontractor apprehended Stout after Stout failed to appear in court on a criminal case for which Johnson had posted Stout's bail. Stout argues that summary judgment was inappropriate because bail bond recovery is an "inherently dangerous occupation" and, therefore, Johnson should be liable for the actions of its independent contractors. Br. of Appellant at 10. We hold that Stout is not entitled to bring an action for damages under [*2] the "inherently dangerous activity" exception to the general rule absolving principals from liability for their independent contractors' actions because this exception is

intended to protect innocent third parties and not Stout, who triggered and knowingly participated in the bail bond recovery, with awareness of at least some associated risk. We affirm.

FACTS**I. BACKGROUND**

¶2 The basic facts are not in dispute. On or about May 1, 2002, Johnson, doing business as "CJ" Johnson Bail Bonds, contracted with Larry Stout to post a \$ 50,000 bail bond for Stout in a Pierce County felony drug charge case. On May 23, the State notified Johnson that Stout had missed a court appearance and, consequently, Johnson would forfeit the entire \$ 50,000 bond unless Stout appeared.

¶3 Johnson retained independent contractor James Michael Golden, doing business as CCSR Fugitive Recovery, to apprehend Stout. Golden subcontracted with Carl Warren to retrieve Stout. On July 16, Warren learned that Stout would be in a certain Tacoma area within the next 30 minutes, drove with his partner Jason Ferrell to that location, positioned himself in a driveway, positioned Ferrell "in the trees" across from him, and waited with [*3] Ferrell for Stout to drive by on a private gravel roadway. Clerk's Papers (CP) at 46.

¶4 There are two different accounts about what occurred next. On summary judgment, however, we take the facts in the light most favorable to the nonmoving party,¹ here, Stout: As Stout travelled down the private gravel roadway, Golden pulled his vehicle out and hit Stout's vehicle from behind. Stout collided with a nearby tree and sustained severe injuries, resulting in amputation of his leg.²

1 *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001)).

2 According to Warren, as Stout passed by in his car, Ferrell identified himself and stepped into the road, at which point Stout

swerved to hit [Ferrell]. [Stout] had approximately 100 [feet] to stop, but accelerated toward [Ferrell] forcing [Ferrell] to jump into the woods to keep from being hit. I [Warren] immediately pulled out and attempted to stop [Stout]. He accelerated to approx[imately] 55 [miles per hour] on the dirt road. [Stout] was reaching for something which I [Warren] assumed to be a gun. I hit [Stout's] vehicle from behind[,] [Stout] lost [*4] control and hit a cottonwood tree.

CP at 46.

II. PROCEDURE

∂5 In 2004, Stout sued Johnson, et al., claiming that Johnson was liable for Warren's allegedly tortious actions, which had caused his (Stout's) injuries. ³ Johnson moved for partial summary judgment on the issue of "agencies, ... liability for intentional acts and joint and several liability." CP at 118. Johnson argued that the trial court should dismiss it (Johnson) from Stout's lawsuit because "[n]o evidence [shows] that [Warren] was an employee or agent of [Johnson] at the time of the collision"; instead, Warren was an independent contractor, for whose actions Johnson was not liable. CP at 120. The trial court initially denied Johnson's motion for summary judgment.

3 Stout alleged that (1) Warren "was either acting as an independent contractor or was acting as an employee or agent of [Johnson] or [Golden]," CP at 3; [*5] and (2) Johnson was, therefore, liable for Warren's negligence, assault and battery, and intentional infliction of emotional distress. Stout's amended complaint also included Golden and Warren as defendants but Stout ultimately dismissed Golden from the lawsuit. This appeal, however, concerns only defendant Johnson.

∂6 Stout filed a cross motion for partial summary judgment, arguing that "[b]ounty hunting ⁴ is inherently

dangerous and [Johnson is] therefore vicariously liable under the doctrine of respondeat superior for the tortious acts of the bounty hunters they retain, despite the fact they call them 'independent contractors.' " CP at 208. ⁵ But Stout failed to identify any Washington case law holding that bail bond recovery is an "inherently dangerous" activity. CP at 209. And the superior court denied Stout's motion for summary judgment, noting, "[Stout's] showing of facts is insufficient to grant summary judgment on [the] issue of inherent[] dangerousness of bail bond recovery agents." CP at 234.

4 For purposes of this opinion, we use the statutory term "bail bond recovery." See, e.g., *RCW 18.185.010(10)*.

5 See, e.g., *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 287, 635 P.2d 426 (1981) [*6] ("[I]n inherently dangerous situations, an owner cannot delegate his or her duty of care toward 'others' to an independent contractor and escape liability.").

∂7 The trial court granted Johnson's renewed motion for summary judgment, thereby dismissing Johnson from the lawsuit. In so doing, the trial court noted:

The [Superior] Court finds that ... Fugitive Recovery is not an "inherently dangerous" occupation, and, as such, [Johnson is] not responsible for the actions of independent contractors [Warren] and [Golden]. [T]he case against [Johnson] is hereby dismissed.

CP at 240.

∂8 Stout appeals the superior court's grant of Johnson's motion for summary judgment.

ANALYSIS

∂9 Stout challenges the superior court's granting Johnson's summary judgment motion and its legal determination that bail bond recovery is not an "inherently dangerous activity." Br. of Appellant at 16. In response, Johnson argues that, not only was the superior court's legal conclusion correct, but also Stout "should not be able to even claim this exception" because he participated in the activity. Br. of Resp't at 19. Stout did not address this argument in his reply brief.

∂10 Stout argues that bail bond recovery is an "inherently [*7] dangerous" activity for purposes of imposing liability on Johnson for his independent contractor's actions. Br. of Appellant at 10. Disagreeing, we hold that even assuming without deciding that bail bond recovery

is an "inherently dangerous activity," Stout triggered, knowingly participated in, and was aware of at least some risk associated with the allegedly "inherently dangerous activity." Thus, Stout was not entitled to damages from Johnson under this exception to the general rule absolving owners of liability for the actions of their independent contractors. Accordingly, we affirm the trial court's grant of summary judgment to Johnson.

I. STANDARD OF REVIEW

[1, 2] ∂ 11 A trial court will grant a motion for summary judgment if the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *CR 56(c)*. We review the superior court's legal decision de novo, taking the facts in the light most favorable to Stout, the nonmoving party on summary judgment below. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)).

II. PARTICIPANT [*8] CANNOT INVOKE "INHERENTLY DANGEROUS ACTIVITY" EXCEPTION

A. "Inherently Dangerous Activity" Exception

[3, 4] ∂ 12 "Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). But in general, an employer who hires an independent contractor is not vicariously liable for the actions of its independent contractor. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976)); see also *RESTATEMENT (SECOND) OF TORTS* β 409 (1965) ("[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.").

∂ 13 There is, however, an exception to this general principle: "[I]n inherently dangerous situations, an owner [i.e., employer of an independent contractor] cannot delegate his or her duty of care toward 'others' to an independent contractor and escape liability." *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 287, 635 P.2d 426 (1981).⁶ For purposes [*9] of this opinion, we assume, without addressing or deciding, that bail bond recovery is an inherently dangerous activity for purposes of the exception to the general rule that the employer of an independent contractor may not be held liable for its independent contractor's actions, including the actions of the independent contractor's employees.

6 We note that *Tauscher* provides an additional rationale for denying independent contractor's employees recovery from the one who hired the independent contractor: Usually such employees can obtain worker's compensation for work-related injuries. See *Tauscher*, 96 Wn.2d at 282. This secondary *Tauscher* rationale does not apply to Stout (Stout was not an employee of Johnson); and it does not alter our holding here, which finds support in the assumption of risk rationale of *Epperly v. City of Seattle*, 65 Wn.2d 777, 784, 399 P.2d 591 (1965). *Epperly* denied imposition of liability on the independent contractor even though the court made no mention of the availability of workers' compensation.

B. Employees of Independent Contractors and Innocent Third Parties

[5-7] ∂ 14 Although Stout is not an employee of Johnson (the independent contractor here), [*10] the different applications of the "inherently dangerous activity" exception to independent contractors' employees and innocent third parties illustrate why Stout has no cause of action under this exception. Our Supreme Court has circumscribed "the class of persons" entitled to the "inherently dangerous activity" exception to pursue a tort claim against the employer that hires an independent contractor who engages in such activities. *Epperly v. City of Seattle*, 65 Wn.2d 777, 784, 399 P.2d 591 (1965). *Epperly*, an employee of an independent contractor hired by the City of Seattle, died while working on a river dam. *Epperly*, 65 Wn.2d at 778. *Epperly's* widow sued Seattle based on negligence, arguing that Seattle was liable under the "inherently dangerous activity" exception. Rejecting the widow's argument, the court concluded that "the [inherently dangerous activity] rule is designed to protect third persons," *Epperly*, 65 Wn.2d at 781 (quoting *Corban v. Skelly Oil Co.*, 256 F.2d 775, 780 (5th Cir. 1958)), not those who have "reason to know that there is an unavoidable risk to which those taking part in the activity or coming within its reach will subject themselves." *Epperly*, 65 Wn.2d at 782-83.

∂ 15 As [*11] an employee of the independent contractor, *Epperly* was "engaged upon the project out of which the hazard arose" and, therefore, "was not within the class of persons protected"; consequently, he had no "right to recovery" under the "ultrahazardous activity" ⁷ exception to the rule barring recovery from the entity that hired the independent contractor, namely Seattle. *Epperly*, 65 Wn.2d at 784, 782-83. Since *Epperly*, Washington courts have continued to limit the class of persons having a right of recovery under the "inherently dangerous activity" exception; these cases, however, have focused primarily on employees of independent contrac-

tors, like Epperly. *See, e.g., Tauscher, 96 Wn.2d at 279; Rogers v. Irving, 85 Wn. App. 455, 465, 933 P.2d 1060 (1997)* ("Special rules pertaining to inherently dangerous activities are designed to protect third persons who might be harmed by such activities, not those who knowingly take part in them.")

7 The *Epperly* court uses the phrases "ultrahazardous activity" and "inherently dangerous activity" interchangeably. Similarly, for purposes of this opinion, we use these phrases interchangeably, depending on the language used in the source that we are citing.

∂16 Our [*12] Supreme Court based its *Epperly* holding on an assumption-of-risk rationale, which it used to distinguish between two classes of persons to whom the party hiring the independent contractor owed different duties of care when undertaking highly dangerous activities--innocent third parties and the independent contractor's employees. With respect to an independent contractor's employees, the court cited *Restatement of Torts* β 523 (1938), which stated that a person who carries on an "ultrahazardous activity" is not strictly liable for harms suffered by another person who (1) "has reason to know of the risk which makes the activity ultrahazardous" and (2) "takes part in" the activity or brings himself into the area of danger. *Epperly, 65 Wn.2d at 782* (quoting *RESTATEMENT OF TORTS* β 523 (1938) ⁸). Independent contractors and their employees, such as Epperly, "know that there is an unavoidable risk to which those taking part in the activity or coming within its reach will subject themselves." *Epperly, 65 Wn.2d at 782-83*. For these reasons, the Supreme Court rejected Epperly's argument that employees of independent contractors could recover against an "owner," such as Seattle, [*13] under the "inherently dangerous activity" exception. *See Epperly, 65 Wn.2d at 783*.

8 *Restatement (Second) of Torts* β 523 (1977) subsumes the assumption of risk concept contained in *Restatement of Torts* β 523 (1938).

∂17 Consistent with its assumption-of-risk rationale, the *Epperly* court distinguished the other class of persons exposed to inherently dangerous activities--innocent third parties. The court explained that, unlike independent contractor employees, innocent bystanders do not undertake the risks that accompany inherently dangerous activities; and, therefore, an employer of an independent contractor hired to undertake ultrahazardous activities is strictly liable for innocent third parties' injuries caused by the independent contractor or its employees. *See Epperly, 65 Wn.2d at 783-84; see also Rogers, 85 Wn. App. at 465* ("Special rules pertaining to inherently dangerous activities are designed to protect third persons who might

be harmed by such activities, not those who knowingly take part in them.").

C. Other Participants in "Inherently Dangerous Activity"

∂18 Until now, Washington courts have not addressed whether classes of persons other than employees of independent contractors [*14] similarly are entitled to use the "inherently dangerous activity" exception to seek recovery from the party hiring the independent contractor. Addressing this issue of first impression, we agree with Johnson ⁹ and hold that, as a person who triggered and knowingly participated in the bail bond recovery while aware of some attendant risk, Stout does not have a cause of action against Johnson under this exception.

9 Br. of Resp't at 19 (citing *Rogers, 85 Wn. App. at 465*).

∂19 Bail bond recovery is an activity that involves two participants: the fugitive and the bail bond recovery agent. But for the fugitive, there would be no bail bond recovery. *See RCW 18.185.010(10)* (defining "bail bond recovery agent" as "a person who is under contract with a bail bond agent to receive compensation, reward, or any other form of lawful consideration for locating, apprehending, and surrendering a *fugitive* criminal defendant for whom a bail bond has been posted." (emphasis added)). Like the employees of the independent contractors in *Epperly* and *Tauscher*, Stout not only knowingly participated in this bail bond recovery activity, which resulted in his injuries, but also precipitated this activity by his own actions [*15] and failures to act. And even after triggering the bail bond recovery activity, Stout continued to participate, even though he could have stopped it simply by turning himself in, as he had originally promised when Johnson posted his bond.

∂20 For example, Stout acknowledged that (1) he "had multiple telephone messages from [Warren] indicating that [Warren] was trying to pick [him] up for a failure to appear through C.J. Johnson's bail bond company"; (2) he (Stout) "had been in seven different houses trying to avoid apprehension," all of which Warren "was able to find"; and (3) he (Stout) eventually "grew tired of running" and "was tired of Carl Warren chasing [him]," so he (Stout) advised Johnson that he was willing to turn himself in. CP at 31. But when Johnson took steps to facilitate Stout's appearance in court, Stout reneged on his promise and he failed to appear. About a month later, Warren tracked down, pursued, and caught Stout, during which apprehension Stout suffered injuries. Thus, the record shows that Stout was a participant in, even a precipitator of, the bail bond recovery activity during which he was injured.

∂21 Furthermore, we cannot say that Stout was unaware that his flight [*16] from Warren would create the possibility of harm to himself. Based on previous experience, for example, Stout was familiar with independent-contractor, bail-bond-recovery employee Warren and his bail bond recovery activity: Warren had previously apprehended Stout on a different bail bond recovery mission three months before the July-2002 incident at issue here. And the record includes evidence that a repeat fugitive like Stout would know that a bail bond recovery agent, like Warren, might use a vehicle for recovery purposes. For example, Stout's submission of a national bail bond agency manager's declaration states:

[W]ith the "independent contractor" recovery agents it is common knowledge that they will be involved in vehicle pursuits in order to obtain the fugitive. ... It is not uncommon for "independent contractor" bail recovery agents to chase a defendant by automobile and to attempt to do whatever it takes to get the defendant to stop.

CP at 25-26.

∂22 Stout's protracted flight from Golden and Johnson, Stout's experience with prior bail bond recovery efforts to apprehend him, and the general custom of bail bond activity all give rise to a reasonable inference that Stout had general [*17] knowledge of the risk accompanying bail bond recovery. Moreover, our holding is not foreclosed even if Stout may not have anticipated that Warren would ram his (Stout's) car off the road on July 16. As the *Epperly* court explained:

[I]t is not necessary that the person who knows of the activity and its risks should know *all of the causes* of the risks inseparable from the activity. It is enough that he has reason to know that there is an unavoidable risk to which those taking part in the activity or coming within its reach will subject themselves.

Epperly, 65 Wn.2d at 782-83 (emphasis added). Thus, Stout need not have been prescient to fall outside the "inherently dangerous activity" exception; it is sufficient that he knew that there was a risk of at least some peril when he absconded.

∂23 In contrast, Stout had to have known that there would have been little or no risk of peril in turning himself in to Johnson, as Stout originally promised, or in cooperating later by peacefully surrendering to Warren. But Stout chose the risk of peril over safety. Accordingly, under *Epperly*'s "assumption of risk" rationale, Stout does not fall within the class of innocent, nonparticipant bystanders whom the [*18] "inherently dangerous activity" exception was designed to protect.

∂24 Even viewing the facts in the light most favorable to Stout, Stout triggered and participated in the bail bond recovery, with some awareness of the attendant risks. Accordingly, as a matter of law, we hold that he cannot recover damages from Johnson under the "inherently dangerous activity" exception to the general rule precluding owner liability for the actions of its independent contractors.¹⁰

10 This appeal does not present nor do we address (1) whether Warren acted reasonably and whether Stout could pursue a negligence claim against Warren or Golden; or (2) whether Johnson could be liable to an innocent third party under the "inherently dangerous activity" exception if, for example, Warren's chase had caused Stout's car to injure an innocent bystander.

∂25 Accordingly, we affirm the superior court's grant of summary judgment dismissing Johnson from Stout's lawsuit for damages.

QUINN-BRINTNALL and VAN DEREN, JJ., concur.

Michael J. Killeen, *Employment in Washington: A Guide to Employment Laws, Regulations and Practices* (4th ed.)

Littler Mendelson, PC, *The Washington Employer*, 2010-11 ed.