

Received
Washington State Supreme Court

No. 89806-5

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Ronald R. Carpenter
Clerk

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.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR WHATCOM COUNTY

Cause No. 12-2-00188-6

BRIEF OF RESPONDENTS'

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ORIGINAL

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I. INTRODUCTION

This case stems from a routine apprehension of a criminal fugitive that went awry when the Appellant, Ronald Applegate, attacked the state licensed fugitive recovery agents.

On October 17, 2011, the state licensed fugitive recovery agents retained by the bail bond company, Lucky Bail Bonds, Inc., followed an informant's tip that the fugitive was staying in a trailer at her parents' property in Whatcom County, Washington. Her mother was the indemnitor on the bail bond.

Upon arrival, the Agents entered the property to look for the fugitive in trailers parked on the property. The Agents were met by a belligerent and hostile man, Ronald Applegate, later discovered to be the fugitive's father.

Agent Wirts attempted to inform the man of the purpose of their presence and calm him down. Mr. Applegate, from atop a porch, kicked Agent Wirts and then reached into his pocket as if to go for a weapon. To defend himself, after being knocked back, Agent Wirts

attempted to take a hold of Mr. Applegate and stop him from going for a weapon. Agent Luna assisted in controlling Mr. Applegate.

The physical altercation resulted in the Agents and Applegate falling through the threshold of the home. During the physical altercation, fugitive Elizabeth Applegate was discovered and apprehended. Mr. Applegate was released and the Agents left immediately upon her apprehension.

At trial, Mr. Applegate claimed harm from the Agents' actions and requested damages on several theories of tort liability. A jury found against Mr. Applegate on all claims. Now, Mr. Applegate claims that the trial court improperly instructed the jury regarding fugitive recovery agents rights to enter property.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The Trial Court's Instruction No. 39 properly advised the jury of the law in Washington, that the privilege to take into custody a person for whose appearance in court security has been given by the actor carries with it the privilege to enter land in possession of a third party to exercise the privilege to take into custody if the person sought is on the land or the actor reasonably believe him to be there.

Assignment of Error 2: The Trial Court's Instruction No. 41 properly advised the jury of the law in Washington, that the privilege to take into custody a person for whose appearance in court security has been given by the actor carries with it the privilege to use reasonable force to enter a dwelling if the person sought is in the dwelling or the actor reasonably believes him to be there.

Assignment of Error 3: The Trial Court's Instruction No. 17 properly advised the jury of the law in Washington, that a person can not trespass land when there exists a privilege to be there.

III. STATEMENT OF CASE

A. Lucky Bail Bonds, Inc. and Applegate Bond.

In August, 2011, Lucky Bail Bonds, Inc. posted two bail bonds on behalf of Elizabeth Applegate, securing her release on a matter from Ferndale Municipal Court and a matter in Whatcom County District Court. The aggregate of the bonds valued \$4,000. RP Vol. 2 25:11-26:2. Lucky Bail Bonds, Inc.'s premium (fee) for the bonds was \$400. RP Vol. 2 135:5-13.

Ms. Dorothy Applegate, Elizabeth's mother, filled out an Indemnitor's Application, agreeing to be financially responsible for the bonds. RP Vol. 2 130:17-131:11, 143:9-14. Department of Licensing also advised the public that indemnitors' homes and property may be searched by bail enforcement agents if a defendant fails to appear in court. RP Vol. 3 344:6-14. On Dorothy Applegate's Indemnitor Application, she listed her then-current address as 2477 Loomis Trail Road, Custer, Washington, and Ronald Applegate as her husband. RP Vol. 2 14:20-15:19.

On September 19, 2011, Lucky Bail Bonds, Inc. was notified by Whatcom County District Court that Elizabeth Applegate failed to

appear from a mandatory court appearance on September 15, 2011.

RP Vol. 2 138:2-23.

On September 29, 2011, Lucky Bail Bonds, Inc. was notified by Ferndale Municipal Court that Elizabeth Applegate failed to appear at pretrial conference scheduled for September 23, 2011. RP Vol. 2 138:24-139:1.

In the event a defendant fails to appear at a mandatory court appearance, the bail bond may be forfeited by Order of the Court. In the event a bond of forfeited, the bonding company has a limited period of time, usually sixty (60) days, to return the fugitive to the custody of the Court before the bonding company must pay the value of the bond. RP Vol. 2 136:14-21.

After receiving notice of Elizabeth Applegate's failure to appear in both court matters, Eric Arps, owner and president of Lucky Bail Bonds, Inc., contacted the indemnitor of the bonds, Dorothy Applegate. Mr. Arps explained to Mrs. Applegate her financial obligations for the bonds and sought information and assistance from her to locate Elizabeth Applegate. RP Vol. 2 135:21-137:21.

After failed attempts to locate Elizabeth Applegate, Mr. Arps decided to retain fugitive recovery agents to locate and apprehend

Elizabeth Applegate and return her to the custody of the courts before payment on the bonds were due. RP Vol. 2 139:5-140:3.

On October 11, 2011, Lucky Bail Bonds entered into a Bail Bond Recovery Contract for the apprehension and surrender of Elizabeth Applegate with three licensed fugitive recovery agents, Cesar Luna, John Wirts, and Greg Peterson. RP Vol. 2 14:3-19. Each of these agents were independent contractors, and not employees of Lucky Bail Bonds, Inc. RP Vol. 2 109:25-110:3, 134:10-13.

B. October 17, 2011.

During the evening on October 17, 2011, Agent Luna received information from a confidential informant that Elizabeth Applegate was staying in a trailer located at 2477 Loomis Trail Road, Custer, Washington. RP Vol. 3, 347:19-20, 372:5-373:3, 385:23-386:4. Agent Luna contacted Agent Wirts and Agent Peterson to meet at an intersection near 2477 Loomis Trail Road in order to investigate and potentially apprehend Ms. Applegate. RP Vol. 3 373:3-18.

Upon arrival at approximately 10:30 p.m., the Agents, arriving separately, parked their cars several houses west of the intersection,

and met to discuss plans on approaching the property.¹ RP Vol. 1 9:4-11:10; Vol. 2 9:24-10:18; Vol. 3 373:6-74:5. They observed several trailers located one side of the property, with a driveway separating the house from the trailers. It was decided that the Agents would first approach the trailer in the back of the property and knock on the trailer door to determine if Elizabeth Applegate was inside. The Agents would then work towards the trailer at the front of the property. If she was not located in any of the trailers, the Agents would approach the house and knock on the front door. RP Vol. 3 373:6-375:24.

The Agents were wearing shirts or sweatshirts with the words “BAIL ENFORCEMENT,” “AGENT BAIL ENFORCEMENT,” or written in large brightly colored letters across the front and the back of the vest. They also had fugitive recovery agent badges displayed in front in plain sight. RP Vol. 1 42:3-44:7; Vol. 2 19:23-21:11, 27:5-28:5, 49:20-50:2; Vol. 3 374:6-19.

Agents Luna, Peterson, and Wirts entered the Applegate property in single file, in that order, and walked between the house on

¹ Agent Wirts' adult son, Riley Wirts, arrived with Agent Wirts, as the two had been having a late dinner together when Agent Luna called regarding the informant's tip. Riley was instructed to stay back away from the property. He followed those instructions except for one moment when he stepped just onto the Applegate property just after his father was attacked by Ron Applegate, to ask Agent Peterson if everything was ok, after which Riley immediately retreated from the property. RP Vol. 3 358:1-364:15.

the property and a van parked next to the trailers. Agents Luna and Peterson walked past the front porch on the house, with Mr. Applegate on the porch. RP Vol. 2 89:16-91:25.

Mr. Applegate immediately engaged verbally and aggressively with the Agents. RP Vol. 3 282:21-23, 363:6-17, 374:23-76:16.

Agent Wirts approached the house to attempt to calm Mr. Applegate down and to inform him of the Agents' purpose and intentions at the property. RP Vol. 1 17:1-6, 19:4-14, 40:17-42:2. As Agent Wirts approached the steps of the porch, he identified himself as "John" and clearly stated that he was a bail enforcement agent looking for Liz Applegate. RP Vol. 1 41:24-42:2.

Mr. Applegate yelled at Agent Wirts, swearing at him and demanding that the Agents leave the property. Agent Wirts tried to explain that they were fugitive recovery agents looking to apprehend Liz Applegate. In the exchange with Agent Wirts, Mr. Applegate lied to Agent Wirts, stating that he did not know Liz Applegate and continued his verbal assault, unrelenting verbal profanities and orders to get off the property, failing to actually hear and understand the situation. RP Vol. 2 110:8-16; Vol. 3 206:8-208:1, 286:6-287:8.

Mr. Applegate then told Agent Wirts that Elizabeth was living in a blueberry field. RP Vol. 3 208:6-22.

In trying to calm Mr. Applegate down and get accurate information about Elizabeth Applegate, Agent Wirts approached the first step of the porch. RP Vol. 117:1-6, 19:4-14, 40:15-41:4. As Agent Wirts stood at the bottom of the porch, Mr. Applegate kicked Agent Wirts in his left shoulder, causing him to momentarily lose balance backwards. RP Vol. 1 19:19-24; Vol. 2 114:6-11, 118:4-18; Vol. 3 282, 360:16-362:6. As Agent Wirts caught his balance, Mr. Applegate reached into his right pocket as if reaching for a weapon. RP Vol. 1 24:1-11, 38:25-39:21.

Concerned that Mr. Applegate was reaching for a weapon and that Mr. Applegate may assault him again, Agent Wirts decided to step on the porch and obtain control of Mr. Applegate. RP Vol. 1 24:7-15, 38:25-39:21. The porch was covered with what appeared to be pumpkin innards and was extremely slippery. RP Vol. 1 26:14-19. As Agent Wirts reached the top of the porch, he grabbed at Mr. Applegate for his safety. Upon contact with Mr. Applegate, they began sliding around on the debris on the front porch. RP Vol. 1 24:12-19, 26:14-19.

As Agent Wirts grabbed for Mr. Applegate, Agent Luna arrived to the porch to assist him in getting Mr. Applegate under control. RP Vol. 3 376:14-25. At no point did the Agents punch, kick, or knee Mr. Applegate. Rather, they merely attempted to restrain him. RP Vol. 3 362:13-63:1.

Prior to Applegate's attack, Agent Luna had reached the rear of the property and began to knock on the trailers, searching for Elizabeth Applegate. During the approximate two to three minutes it took for Agent Luna to investigate the trailers, he heard Mr. Applegate yelling profanities at Agent Wirts. RP Vol. 3 374:22-376:12.

After he knocked on the doors of the trailers, Agent Luna started towards the house where the yelling was coming from. He saw that Agent Wirts and Mr. Applegate were in a struggle. Agent Luna ran up to the porch and began helping Agent Wirts gain control of Mr. Applegate. RP Vol. 3 376:2-19.

Prior to Applegate's attack, Agent Peterson walked towards the trailers with Agent Luna, hearing Mr. Applegate's yelling increase. Mr. Applegate was being very hostile. Agent Peterson looked toward the porch of the house and observed Mr. Applegate kick Agent Wirts. RP Vol. 2 113:15-114:7, 118:4-18.

Mr. Applegate continued to verbally assault and threaten the agents while he physically struggled with Agents Wirts and Luna. The Agents believed that Mr. Applegate continued to present a threat to them, as Mr. Applegate refused to calm down and act rationally. In addition, the Agents were concerned that Mr. Applegate was attempting to get inside the house to grab a weapon. RP Vol. 3 377:1-378:2. As the Agents were attempting to gain control of Mr. Applegate, the front door the residence opened up with a man standing there, later identified as Elizabeth Applegate's boyfriend, Garrett. RP Vol. 2 102:15-21; Vol. 3 378:3-12.

After the door was opened, Mr. Applegate, Agent Cesar, and Agent Wirts fell into through the threshold of the house. RP Vol. 2 102:15-21. Mr. Applegate tried to get free and run into the house. As he did, he lost his balance, which allowed Agent Luna to get better control of him just inside the doorway. RP Vol. 3 378:6-12, 392:1-19. Agent Luna then had Mr. Applegate's right arm behind his back and Agent Luna's arm was across Mr. Applegate's chest, to not obstruct his breathing. Mr. Applegate was on a bended knee, and continued to yell profanities at the Agents. RP Vol. 3 379:5-381:4.

During the time that Agent Wirts and Luna were attempting to get control of Mr. Applegate, Agent Peterson called law enforcement. RP Vol. 2 99:14-103:3.

Upon reaching the threshold, Agent Wirts was able to see in the house and observed Elizabeth Applegate standing behind Garrett. RP Vol. 1 32:5-22; Vol. 2 7:18-23. Elizabeth Applegate retreated to the back of the house, out of sight. RP Vol. 1 32:5-22; Vol. 2 7:18-23. Garrett brought Elizabeth Applegate back to the front of the house, where she was taken into custody by Agent Wirts. RP Vol. 3 380:10-15. After Agent Wirts' escorted Elizabeth out of the house, Agent Luna let Mr. Applegate go and backed out of the house. RP Vol. 3 380:15-18.

After Elizabeth was taken to the agents' car, Garrett was shown the fugitive recovery contract as requested and brought Elizabeth some clothes. RP Vol. 2 70:3-71:12. Garrett confirmed that he and Elizabeth Applegate were staying in the trailers on her parents' property that night. RP Vol. 2 73:14-74:5.

During the entire interaction with the Agents, Mr. Applegate was aware that his daughter was inside his residence. Further, he was aware that she had warrants out for her arrest. RP Vol. 3 291:3-9.

Nonetheless, he chose to lie to the Agents about her whereabouts and attack Agent Wirts. While the Agents were speaking to Sheriff's Deputies, Mr. Applegate got into his truck and drove away, avoiding the Sheriff's Deputies. RP Vol. 2 9:1-23.

C. Petitioner's Lawsuit and Trial.

Ronald Applegate filed a lawsuit against Lucky Bail Bonds, Inc., the three fugitive recovery agents, John Wirts, Mr. Wirts' company Quest Recovery, Greg Peterson, Cesar Luna, and Mr. Wirts' son, Riley Wirts. At trial, seven (7) causes of action were asserted against the Defendants by Mr. Applegate, including trespass, assault, battery, false imprisonment, negligence, intentional infliction of emotional distress, and the tort of outrage. CP 68-121.

After reviewing the evidence and the Court's instructions on the law, the jury found in favor of all defendants on all claims. CP 124-125. Currently, Appellant takes issue with three of the Court's instructions: Instruction No. 17, Instruction No. 39, and Instruction No. 41. CP 87, 111, 113, respectively.

Instruction No. 17 states, in portion relative to Appellant's objection:

Plaintiff claims that Defendants John Wirts, Cesar Luna, Greg Peterson, and Riley

Wirts each trespassed on his property. To establish this claim, with regard to each defendant, Plaintiff must prove the following:

3. That Plaintiff did not give the Defendant permission to enter Plaintiff's Property and Defendant did not have a privilege to be on Plaintiff's property; . . .

Instruction No. 39 states:

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 the actor.

Instruction No. 41 states:

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.

The basis of each of the instructions, and the basis of the

objections to the instructions, is the premise that if a party that has a privilege to take a person into custody, there is also a privilege to enter land or dwelling of a third party where the person is or is reasonably believed to be.

IV. ARGUMENT

A. Standard of Review.

Jury instructions are reviewed de novo for errors of law.

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289, 294 (2012); *citing Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Anfinson*, 174 Wn.2d at 860, *citing Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). If any of these elements are absent, the instruction is erroneous. *Anfinson*, 174 Wn.2d at 860, *citing Joyce*, 155 Wn.2d at 323-25.

An erroneous instruction is reversible error only if it prejudices a party. *Anfinson*, 174 Wn.2d at 860, *citing Joyce*, 155 Wn.2d at 323-25. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction

is merely misleading. *Anfinson*, 174 Wn.2d at 860, citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

Appellant argues that Instructions No. 39, 41, and 17 each contain clear misstatements of law. To the contrary, each instruction accurately states the law regarding a bail bondsman and fugitive recovery agent access to property and dwellings in the State of Washington. These instructions, from the *Restatement (Second) of Torts* (adopted in Washington as law pertaining to trespass), also reflect the centuries of common law pertaining to bail bondsmen/fugitive recovery agents and Washington State statutory support and authority for bondsman/fugitive recovery agents.

B. Common Law Authority for Fugitive Apprehension

A bail bond company, as dictated by two centuries of rulings by the United States Supreme Court and United States Appellate Courts, has broad powers to apprehend a fugitive. A bonding company has the power to apprehend a fugitive anytime and anywhere, unless otherwise limited by state legislation. Once a bail bond company has posted a bond on behalf of a criminal defendant pursuant to a bail bond contract, the bail bond company has custody of the criminal defendant.

Nicolls v. Ingersoll, 7 Johns 145 (N.Y. 1810) is an early landmark decision granting such powers to a bondsman. Therein, the Court of Appeals of New York stated that “as between the bail and his principal, the controlling power of the former over the latter *may be exercised at all times and in all places.*” *Id.* at 155-56 (emphasis added). Another such decision is *Read v. Case*, 4 Conn. 166, 170 (1822), wherein the Supreme Court of Connecticut declared that “the law supposes the principal to be always the custody of his bail, and if he is not in fact, the bail may take him, when and where he pleases.” Similarly, in *Commonwealth v. Brickett*, 8 Pick. 138, 25 Mass. 138, 140 (1829), the Supreme High Court of Judicature of Massachusetts stated that “the bail has custody of the principal and may take him at any time, and in any place.”

The United States Supreme Court affirmed these common law rules regarding the authority of bondsman, finding that when bail is given, the criminal defendant out on bail is regarded as *delivered to the custody of the sureties, the dominion being a continuance of the original imprisonment.* *Taylor v. Taintor*, 83 U.S. 366, 371, 16 Wall. 366, 21 L.Ed. 287 (1872). Whenever the surety chooses, they may seize him and return him to public custody. The surety may pursue

and arrest the defendant at any time and any place in order to surrender him, including breaking and entering into a residence for that purpose. *Taylor* at 371; *See also In re Von Der Ahe*, 85 F. 959, 7 Pa. D. 131 (1898).

The bail bondsman has the defendant on a string and may pull the string whenever they please, and render him in their discharge. *Taylor* at 372. The arrest by the surety, or bail bondsman, is based upon the relationship which the parties have established between themselves. Consequently, the arrest is not confined to any local or jurisdiction. *Von Der Ahe* at 960. By entering into the bond contract, ***the parties to the contract are, under common law, implicitly agreeing that the surety, or the surety's agents, may enter their homes and use reasonable force to apprehend the fugitive. Id.*** (Emphasis added).

This common law rule, established from the early 1800's, has been consistently applied over the course of two centuries. In *Ex Parte Salinger*, 288 F. 752 (1923), the Court stated that "Forfeiture of the bond so given authorizes the surety to arrest the fugitive summarily, and even by breaking and entering, anywhere in the United States," citing *Reese v. United States*, 9 Wall. 13, 19 L.Ed. 541(1869);

and *Taylor v. Taintor*, 83 U.S. 366, 371, 16 Wall. 366, 21 L.Ed. 287 (1872).

In *Fitzpatrick v. Williams*, 46 F.2d 40, 41 (1931), the Court stated that the original imprisonment of the defendant continued to the surety, and that the surety has the right to seize him *wherever they can find him*, citing *Taylor v. Taintor*, 83 U.S. 366, 371, 16 Wall. 366, 21 L.Ed. 287 (1872); and *In re Von Der Ahe*, 85 F. 959, 7 Pa. D. 131 (1898). The *Fitzpatrick* Court specifically stated that the right of the surety is not one of criminal procedure, but arises from the private undertaking *implied* in the furnishing of the bond.² *Id.* at 40-41.

In *Maynard v. Kear*, 474 F.Supp 794, 801 (N.D. Ohio 1979), the well established common law rule regarding authority of a bail bondsmen to seize a fugitive was similarly applied. The Court stated that “[i]n order to secure the principal’s appearance at future court proceedings, the bondsman has the right pursuant to the bail contract or common law to arrest the principle *at any time and at any place* to redeliver the principal into the hands of the public jailor[,]” (emphasis

² Much of Petitioner’s argument rests upon the assertion that the language bond contract dictates a bondsman’s authority to apprehend fugitives. This is misunderstanding of the law. The bondsman’s authority is a *common law right* which exists because of the *existence* of the bond contract.

added) citing *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952); and *United States v. Field*, 193 F.2d (2nd Cir. 1951), *cert. denied*, 342 U.S. 894, 72 S.Ct. 202, 96 L.Ed. 670 (1951). The Court also stated that the bondsmen's broad authority pursuant to the bond contract and common law remains intact *unless contrary to state statutes*. *Id.* at 802.³

This common law rule and its applicability has been confirmed in the Ninth Circuit. In *Outzts v. Maryland National Insurance*, 505 F.2d 547 (1974), the Court found that the common law right of the bondsman to apprehend a fugitive arises out of the contract between the parties. The right is transitory and *may be exercised wherever the fugitive may be found*. *Id.* at 551.

Fugitive recovery agents and/or bail bondsmen have the common law privilege to arrest/apprehend fugitives bonded out by bail bond companies.

Appellant confuses the source of this privilege to arrest fugitives. Appellant argues that this right is strictly a creature of the

³ Contrary to Petitioner's assertions, common law permits bondsmen to go anywhere at anytime to apprehend a fugitive, unless contrary to state statutes. The Petitioner cites cases from other states wherein a bondsman's access to a third party house has been limited. Washington is not such a state.

contract, and thus its limits and rights are dictated by the specific language in the contract. However, the specific language of the bond contract is not controlling of the privilege. Rather, the *existence* of the bond contract gives rise to the common law privilege for a bondsman to apprehend or arrest a fugitive whom they have bonded out.

C. Statutory Authority For Fugitive Apprehension.

The Washington State Legislature specifically recognizes a bail bondsman's right to apprehend/arrest a criminal defendant they have out on bail. RCW 10.19.160 (Granting authority for surety company to apprehend and return a criminal defendant to custody).

Persons that perform acts of fugitive recovery (the apprehension of persons out on bail) must be individually licensed by the State of Washington. RCW 18.185.280 (Setting out requirements that person performing as fugitive recovery agent must be licensed by Department of Licensing); RCW 18.185.250 and .260 (Setting requirements for fugitive recovery agent to obtain license).

For each criminal defendant to be apprehended, a fugitive recovery agent must have an individual separate contract with the bail bond agent or company. RCW 18.185.270 (Stating that fugitive recovery agents must have individual contract with a bail bond agent

for each fugitive apprehended).

Importantly, the state legislature specifically contemplates and authorizes fugitive recovery agents to enter the property and buildings belonging to third parties without consent. RCW 18.185.090 states, in relevant part:

(4) A bail bond recovery agent shall notify the director within ten business days following a forced entry for the purpose of apprehending a fugitive criminal defendant, whether planned or unplanned. The notification under this subsection must include information required by rule of the director.

RCW 18.185.300 states as follows:

(1) Before a bail bond recovery agent may apprehend a person subject to a bail bond in a planned forced entry, the bail bond recovery agent must:

(a) Have reasonable cause to believe that the defendant is inside the dwelling, building, or other structure where the planned forced entry is expected to occur; and

(b) Notify an appropriate law enforcement agency in the local jurisdiction in which the apprehension is expected to occur. Notification must include, at a minimum: The name of the defendant; the address, or the approximate location if the address is undeterminable, of the dwelling, building, or other structure where the planned forced entry is expected to occur; the name of the bail bond recovery agent; the name of the contracting bail bond agent; and the

alleged offense or conduct the defendant committed that resulted in the issuance of a bail bond.

(2) During the actual planned forced entry, a bail bond recovery agent:

(a) Shall wear a shirt, vest, or other garment with the words "BAIL BOND RECOVERY AGENT," "BAIL ENFORCEMENT," or "BAIL ENFORCEMENT AGENT" displayed in at least two-inch-high reflective print letters across the front and back of the garment and in a contrasting color to that of the garment; and

(b) May display a badge approved by the department with the words "BAIL BOND RECOVERY AGENT," "BAIL ENFORCEMENT," or "BAIL ENFORCEMENT AGENT" prominently displayed.

(3) Any law enforcement officer who assists in or is in attendance during a planned forced entry is immune from civil action for damages arising out of actions taken by the bail bond recovery agent or agents conducting the forced entry.

RCW 18.185.010(12) defines a planned force entry as:

"Planned forced entry" means a premeditated forcible entry into a dwelling, building, or other structure without the occupant's knowledge or consent for the purpose of apprehending a fugitive criminal defendant subject to a bail bond. "Planned forced entry" does not include situations where, during an imminent or actual chase or pursuit of a fleeing fugitive criminal defendant, or during a casual or unintended encounter with the fugitive, the bail bond recovery agent forcibly enters into a dwelling, building, or other structure without advanced planning.

These statutes clearly authorize fugitive recovery agents to

enter property, dwelling, and buildings owned by third parties without consent of the third parties, as long as there is reasonable cause to belief that the defendant/fugitive is present. Moreover, the Washington State Legislature has *expressly* left intact all common law rights recognized by the Courts in and as a result of *Taylor v. Taintor*:

The legislature does not intend, and nothing in this chapter shall be construed to restrict or limit in any way the powers of bail bond agents as recognized in and derived from the United States supreme court case of *Taylor v. Taintor*, 16 Wall. 366 (1872).

RCW 18.185.260(4).

D. Fugitive Recovery Agents Entry Onto Land.

The common law and statutory based privilege for fugitive recovery agents to arrest criminal defendants is clear. As such, the law regarding the authority of fugitive recovery agents to enter property and even dwellings is also clear. *It is lawful for fugitive recovery agents to enter property and dwellings to apprehend a fugitive when the fugitive is on the property or in the dwelling, or the when the fugitive recovery agent reasonably believes the fugitive to be present.*

The authority to arrest a fugitive is not a cart blanche right for a bondsman to enter just anyone's property or dwelling at any time without guidelines. Rather, state laws pertaining to trespass govern

such access.

In *Brutsche v. City of Kent*, 164 Wn.2d 664, 673-74, 193 P.3d 110 (2008), the Washington State 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. There is no cogent argument to not apply this same law and standard to fugitive recovery agents' access to private property – especially since the State Legislature has so clearly authorized a fugitive recovery agent to enter property of a third party.

In addition, *Restatement (Second) of Torts* has been continually and consistently adapted by Washington Courts regarding the law of trespass. See *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 681-84, 709 P.2d 782 (1985) (applying [14] *Restatement (Second) of Torts* § 158). 7; *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* specifically provides for the lawful access and entrance onto property and into dwellings to effectuate an arrest where there exists a privilege to arrest. Specifically, the *Restatement (Second) of Torts* states as follows:

The privilege to make an arrest for a criminal offense carries with it the privilege to enter land in the possession of another for the purpose of making such an arrest, if the person sought to be arrested is on the land or if the actor reasonably believes him to be there.

Restatement (Second) of Torts § 204. Entry To Arrest for Criminal Offense. Common law is clear: bondsmen have the privilege to arrest a fugitive.

The comments of this section go on to state that when determining whether the actor has reasonable cause to believe that the person he is seeking is present, the fact that the possessor of the land informs him that the person is not present is *not* conclusive. *Id.*,

Comment E.

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.*⁴

(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.

⁴ Noteworthy is that the reasonable belief standard is precisely the same standard as stated by the Washington State Legislature in enacting the forcible entry statute authorizing entry into third part building and dwellings. RCW 18.185.010(12).

(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 or fair 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.

Appellant presents five cases as support for his contention that fugitive recovery agents in Washington have no authority to entry property of a third party without specific consent of the property owner. However, four of the five cases are from different jurisdictions and are each quickly distinguished from the case at hand and the Washington case supports Respondents' position in the instant matter.

In *Mishler v. State*, 660 N.E.2d 343 (1996), the Court's ruling was that *under the circumstances of that particular case*, the bondsmen had no authority to enter a third party's home. The court specifically distinguished *Livingston v. Browder*, 51 Ala. App. 366, 285 S.2d 923, wherein agents were permitted to enter the property of a third party with a reasonable belief that the fugitive was present, stating:

It is apparent that Schmucker and Mishler only speculated that Leufling might have been inside. Such conjecture regarding Leufling's whereabouts renders *Livingston* inapplicable and the bondsmen were not justified in entering the home under the circumstances.

Id. at 347.

The Court's ruling clearly indicated that had the Agents had reasonable cause to believe that the fugitive was present in the third party home, they would have been justified in forcibly entering the home. The *Mishler* court merely ruled that bail agents do not have carte blanche to forcibly enter any home or building the desire without reasonable justification to believe that the fugitive was present inside. This is similar to the law in Washington – which the jury was properly instructed by the trial court in the instant case.

The instant case is factually distinguishable from *Mishler*. First, the Applegates were, in fact, party to the bond contract as Dorothy Applegate signed as an indemnitor. Second, and significantly, the Agents were operating on a credible tip that Elizabeth was staying in the trailers on her parents' property that night. Not only was the tip credible, but it turned out to be accurate.

In *State v. Tapia*, 468 N.W.2d 342 (1991), the court addressed the question of whether a bail agent may forcibly enter the property of a third party in search of a fugitive when the agent was advised that the fugitive was present. Important to the Court's analysis was that state statutes distinguished between an arrest for a felony charge and an arrest for misdemeanor charges, the former permitting forcible entry into a third party home and the latter not. *Id.* at 344.

Tapia is inapplicable in assessing the law in Washington. Washington statutes specifically grant authority to arrest and specifically authorize bail agents entry onto property of a third party without consent when reasonable cause exists to believe the fugitive is present. There is no distinguishing between

misdemeanors and felonies. (Also, it should not be lost that the Applegates were not random third parties, but were in fact party to the bond contract via Dorothy's signing as an indemnitor.)

In *State v. Lopez*, 734 P.2d 778 (1986), Texas bail agents came to New Mexico to apprehend a fugitive hiding out at his parent's house. The bail agents attempted to gain entry into the home at gun point, pointing a rifle at the father and threatening to shoot him. The bail agents, not entering the house, then pointed guns at several police officers that had arrived. The defendant was convicted of aggravated assault on a peace officer, attempted aggravated burglary, and aggravated assault.

A complicating factor in *Lopez*, and a reason that the Court affirmed the conviction, was New Mexico's adoption of the Uniform Criminal Extradition Act, which specifically limited and effected the bondmen's rights and privileges. More specifically, the Court found that the bondsmen could not force entry into a third party home for the purposes of assaulting a third party inside – which is what they did when they kicked in the door and pointed a gun at the father without provocation. *Id.* at 543-44.

Lopez is not analogous to the instant matter. First, there are

no issues herein an extradition act. Second, Lucky Bail Bonds, Inc. and the Agents are not arguing that they have authority to enter property for the purposes of assaulting someone. They are not arguing, and did not argue at trial, that their actions as fugitive recovery agents are immune from criminal laws. Rather, they argued that they had a right to be *present* on the property pursuant to their fugitive recovery activities.

In *State v. Mathis*, 349 N.C. 503, 509 S.E.2d 155 (1998), the court was asked to address two specific questions: (1) whether a bail bondsman may forcibly enter his principal's residence to search for and seize him; and (2) whether, in the process of gaining entry, a bail bondsman may overcome the resistance of a third party. The Court found that bail bondsmen have both such powers under the common law. *Id.* at 507-08.

In dicta, the Court did state that the law in North Carolina did not permit bondsmen to enter homes of third parties without consent. However, the law in Washington is clearly different. Washington statutes *clearly* permit forcible entry into a third party home without consent upon reasonable cause to believe the fugitive is present. North Carolina does not. This case is simply

inapplicable.

In addition, the Court in *Mathis* stated that a fugitive residing in the home of another did permit agents to enter that home without consent of the home owner. Such is analogous to the instant matter, as the Agents entered the Applegate property while Elizabeth Applegate was staying on the property.

In *State v. Portnoy*, 43 Wn. App. 455, 718 P.2d 805 (1986), the defendant was convicted of second degree assault for actions during the attempted apprehension of a fugitive. The defendant and his partner, both bail agents, were refused entry to the fugitive's parents' home, where they believed (correctly) the fugitive to be. After refusal, they entered through a back door to the home. The defendant exchanged punches with the mother, who then ran across the street for help. The neighbor came to the parents home and began wrestling with the defendant, who ordered his partner to shoot the neighbor. The neighbor let go, but the defendant ordered the gun to remain pointed at the neighbor. After it was realized that the defendant was a bondsman, the situation resolved. *Id.* at 458-59

The trial court correctly dismissed the charge of criminal

trespass because of the bondsman's rights to get into the house to try to apprehend the fugitive. *Id.* at 459. The bondsman was convicted of second degree assault for ordering his partner to hold the neighbors at gun point.

The defendant appealed his conviction on numerous grounds, but only one relevant to his role as a bail bondsman. The defendant argued that he should have been afforded a jury instruction on self-defense that suggested a bail bondsman had a broader justification for the use of force than private citizens. *Id.* at 466. The appellate court denied the appeal on this ground. *Id.*

Portnoy has no relevance regarding the jury instructions provided in this case, other than to confirm that a bondsman does not commit trespass when entering property where a fugitive is present or resides.

Appellant would have the Court believe that the trial court's instructions to the jury leave the citizens of Washington unprotected from rouge fugitive recovery agents. This is simply not true. The instructions provided by the trial court are accurate statements of the law while not shielding any fugitive recovery agents from criminal liability. Contrary to Appellant's assertions,

the instructions provided by the trial court do not leave innocent citizens unprotected from rouge or unlawful fugitive recovery agents. An agent must have reasonable cause to believe a fugitive is present before entering property. An Agent can only respond with force reasonable to that used against him, as the Court instructed the jury.⁵

If the Agents exceed their privilege to be on the property, for instance by committing a crime against another, they are then on the property unlawfully. *See Brutsche v. City of Kent*, 164 Wn.2d 664, 673-74, 193 P.3d 110 (2008). If an Agent were to exceed permissible use of force, then he would have exceeded his privilege to be on the property, again exposing him to criminal and civil penalties.

For instance, if the jury were to have believed Mr. Applegate's story – that the agents stormed onto the property without identifying themselves, attacked him for no reason, beat him up for no reason, and forced their way onto his property or into his house without cause to believe Elizabeth was there – then the jury would have found in his favor, and the jury instructions would have instructed them to do so. Rather, the jury simply did not believe Mr. Applegate but believed the

⁵ Jury Instruction No. 38. CP 110. Appellant did not object to this instruction, and has made no issue of it herein.

recovery agents and, therefore, found in favor of the bail bond company and fugitive recovery agents.

A fugitive recovery agent's privilege to arrest exists in both common law and in Washington State statutes. In Washington, a fugitive recovery agent has specific and clear authority to enter property owned by a third party, without consent of the owner, upon a reasonable belief that the fugitive is on the land. This is confirmed in both state statutes and the Court's adoption of the *Restatement (Second) of Torts* pertaining to trespass. The Court's instructions to the jury properly and accurately advised the jury of the law.

V. CONCLUSION

The issue in this appeal is whether the trial court properly instructed the jury regarding a bail bondsmen or fugitive recovery agents rights to enter property of a third party. The trial court's instructions to the jury were an accurate statement of the law in Washington.

Common law, state statutes, and the *Restatement (Second) of Torts* (adapted in Washington as the law pertaining to trespass) each individually, and certainly in the aggregate, permit a bail agent entry

onto land and into a building or dwelling without consent when there is reasonable cause to believe that the fugitive is present.

Accordingly, the Appellant's requested relief must be denied.

DATED: December 7, 2015


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CERTIFICATE OF SERVICE

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

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