

No. 85699-1

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IN THE WASHINGTON STATE SUPREME COURT

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BARBARA STOUT, P.R. of the Estate of Larry Stout,

Petitioner,

vs.

CARL J. WARREN and JANE DOE WARREN, husband and wife

Defendants

CLARENCE JOHNSON, JR., and SALLY DOE JOHNSON, husband and wife, d/b/a "CJ"
JOHNSON BAIL BONDS,

Respondents

MIKE GOLDEN and JANE DOE GOLDEN, husband and wife, d/b/a C.C.S.R. FUGITIVE
RECOVERY

Defendants

APPEAL FROM THE COURT OF APPEALS

DIVISION II

Cause No. 38744-1-II

SUPPLEMENTAL BRIEF OF RESPONDENTS JOHNSON

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I. STATEMENT OF THE CASE

A. Procedural History

Respondents adopt the procedural history as set forth in their opening appellate brief filed in the Court of Appeals. This Court has now granted review and asked for supplemental briefing.

B. Facts

Respondents adopt the Statement of Facts as set forth in their opening appellate brief filed in the Court of Appeals.

II. ARGUMENT

The issues presented for review in the petitioner's motion for discretionary review are twofold. First, the Court of Appeals erred in holding that the plaintiff assumed the risk of being injured when he missed a court appearance and was then injured when a fugitive recovery agent attempted to arrest him. Secondly, whether fugitive recovery is an "inherently dangerous" activity and, thus, not subject to the normal rules relating to independent contractor liability. Petition for Review, at 1. For the reasons stated in Respondent's opening brief, and the further reasoning set forth below, this Court should affirm the Court of Appeals and hold that petitioner cannot recover from Respondents for his injuries because he assumed the risk and because the fugitive recovery agent causing his injuries was, at best, an independent contractor.

A. THE COURT SHOULD AFFIRM THE COURT OF APPEALS DECISION HOLDING THAT AN INDIVIDUAL WHO ABSCONDS FROM A COURT PROCEEDING AND IS SUBJECT TO AN ARREST WARRANT CANNOT RECOVER FOR HIS INJURIES WHICH OCCUR DURING THE COURSE OF AN ATTEMPT TO ARREST HIM.

Petitioner argues that the Court of Appeals decision endorses a wild west form of justice with no regard for the safety of the community. Petition for Review at 12. However, nothing in the opinion suggests that the public will go unprotected. Indeed, the decision is limited in its impact, with third parties remaining protected under decisions pertaining to third parties. See Court's Opinion, at 352-353. See also State v. Portnoy, 43 Wash. App. 455, 718 P. 2d 805 (1986) (acknowledging extraordinary powers of bail bondsmen, but not expanding those powers to acts against third parties.).

Importantly, prior to deciding whether an absconder assumes the risk of being injured when a warrant is issued for a failure to appear, it is necessary to establish the exact relationship between the parties, i.e. the surety and the defendant. The United States Supreme Court described this relationship over one hundred years ago when it stated:

When bail is given, the principal is regarded as delivered to the custody of its sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him to another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner. In 6 Modern it is said: "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge." The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot case them upon the oblige.

Taylor v. Taintor, Treasurer, 83 U.S. 366, 371-72, 21 L. Ed. 287 (1872).

Thus, there is some question as to whether the law on excessive force would even apply in this situation. However, even if it does, petitioner misstates the law on excessive force. First, RCW 10.31.050 gives an officer the authority to use all necessary force to arrest a fleeing defendant when given notice. Petitioner was given this notice by the court on his initial appearance and thereafter when he signed documents informing him that if he did not appear in court a warrant would issue. Further, RCW 10.34.020 authorizes one to retake an escaped person under the same power as that given in cases of arrest, i.e. all necessary force. Thus, the fugitive recovery agent could use all force necessary to arrest.

Graham v. Conner, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed 2d 443 (1989), relied upon by the petitioner in support of its position; involved an investigatory stop of a free citizen, as opposed to a defendant who is fleeing the court. Interestingly, consistent with the opinion by the Court of Appeals, the United States Supreme Court, *citing Connor*, stated that citizens who create exigent circumstances, have only themselves to blame for police conduct that subsequently occurs. See Kentucky v. King, 131 S. Ct. 179 L. Ed. 2d 865 (2011). The same is true in this situation.

In that regard, this Court, should consider the United States Supreme Court's decision in Scott v. Harris, 530 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). In Scott, as is the situation here, the police officer was in pursuit of a fleeing felon. The Court held that summary judgment was proper for the police officer in looking at the reasonableness of his actions where the respondent suffered serious injuries after being run off the road. In its decision, the Court stated:

“So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against

the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.”

Scott v. Harris, 530 U.S. at 384. For the same reasons, summary judgment was appropriate here.

Mr. Stout created the situation and, as in King and Harris, he has only himself to blame for the situation that subsequently evolved. This is, in essence, what the Court of Appeals held, when it found that he assumed the risk and was not a protected third person. This Court should do the same.

B. THE COURT SHOULD HOLD THAT BAIL BOND RECOVERY IS NOT AN INHERENTLY DANGEROUS ACTIVITY.

As set forth in the respondent’s brief, this occupation cannot be considered to be inherently dangerous under the prior decisions of this Court, as well as those from the appellate courts. While the Court of Appeals did not address this issue, having decided the case on other grounds, based on the same points and authorities, this Court should affirm the trial court. However, even if this court finds that the occupation is inherently dangerous, appellant has not shown that there was a contractual relationship between respondent and the codefendant, Mr. Warren.

Petitioner’s entire case against Respondent is based on the Ohio case of Hayes v. Goldstein d.b.a. ABC Bails Bonds, 120 Ohio App. 3d 116, 697 N.E. 2d 224 (1997) for the proposition that

fugitive recovery is an inherently dangerous activity. However, there is nothing cited in the opinion that even supports this statement and it is inconsistent with the law in the State of Washington.

Even the Petitioner has acknowledged that bail recovery can be performed safely, but that is not always the case. Reply brief at 6. The deposition testimony and affidavits filed in support of the motion for summary judgment, likewise, bear this out. And, ultimately, that is precisely why bail recovery cannot be said to be an inherently dangerous activity. As the courts in this state have stated repeatedly, to be considered inherently dangerous, an activity must never be able to be performed safely. Hickle v. Whitney Farms, Inc. 107 Wash. App 934, 941, 29 P. 3d 50 (2001). See also Tauscher v. Puget Sound Power and Light Co., 96 Wn. 2d 274, 635 P. 2d 426 (1981). The acknowledgement that it can be performed safely and, in fact, is performed safely undercuts the petitioner's entire argument and the Court should affirm on that basis alone.

Moreover, even if bail recovery is an inherently dangerous activity, petitioner is not within the class of persons who are protected. Long ago, in Kendall v. Johnson, 51 Wash. 477, 99 P. 310 (1990), this Court stated:

... where the work is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented; and in other like cases – a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work.

Id. at 481.

As the Court of Appeals held, Mr. Stout is not a third person, consequently he is not within the class of persons who are protected under the exception to the independent contractor rule. Indeed, Goldstein, relied upon by petitioner, involved a lawsuit against the bail bond

company for injuries received by innocent bystanders, during the course of a fugitive recovery operation. There was no suggestion that the fugitive was within the protected class. The Court of Appeals' decision maintains that distinction.

Of no less importance, is the fact that petitioner has not even established a relationship between respondents and defendant Warren. There is no testimony or document that establishes any type of employment relationship. This lack of any relationship also supports the trial court and Court of Appeals' decision. Recently, in Wash. Imaging-Servs. LLC v. Dept. of Revenue, 171 Wn. 2d 548, 562, 252 P. 3d 885 (2011) this Court again stated that an agency relationship only exists when there are facts or circumstances that establish that one person consents to acting at the instance of another and the one has direction and control over the other. Here, there is no evidence that respondents had any communication at all with defendant Warren or even knew that he was attempting to apprehend petitioner. Without this evidence, respondent cannot be held liable for petitioner's injuries.

Even the Ohio courts, in affirming Goldstein, found that summary judgment was appropriate where no evidence was presented that demonstrated an agency relationship between the bonding company and the fugitive recovery agent. See McAlpine v. A-1 Bonding Co., 199 Ohio App. LEXIS 5894 (Ohio Crt App 1999).

Thus, for all of the reason stated, this Court should affirm the Court of Appeals and hold that warrant recovery is not inherently dangerous, petitioner is not entitled to recover from respondents, and summary judgment was proper.

III. CONCLUSION

Based on the files and records herein, respondent requests that the court, affirm the Court of Appeals' decision affirming the dismissal of this lawsuit against CJ Johnson.

DATED this 9 day of August, 2011.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the supplemental brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 9th day of August, 2011.


LEE ANN MATHEWS