

No. 85699-1

OWENS, J. (dissenting) -- In tort law, the general rule is that principals are not liable for the torts of their independent contractors. Vicarious liability arises from and consists of *exceptions* to that general rule. Curiously, and perhaps tellingly, the majority inverts the rule and the exception, referring to departures from vicarious liability as “exceptions.” *See* majority at 11-15.

Vicarious liability exceptions exist to serve certain purposes identified by the common law. When extension of an exception no longer serves the underlying purpose, I believe that vicarious liability should no longer be available. This case involves the “peculiar risk” exception, which allows vicarious liability where the principal hires an independent contractor to carry on an activity that poses a peculiar

risk of physical harm. The majority holds that viewing the facts in the light most

favorable to the nonmoving party, the facts of this case fall within the peculiar risk exception. Because the purpose of the peculiar risk exception is not served by applying vicarious liability in these circumstances, I respectfully dissent.

At the outset, I note that I agree with the majority's determination that fugitive defendant apprehension is an activity that poses a peculiar risk of physical harm. *See* majority at 6; Restatement (Second) of Torts §§ 416, 427 (1965). Because there is a peculiar risk, the majority concludes that peculiar risk liability applies without critically examining the limits of the peculiar risk exception. The limits of the exception are properly determined by looking to the exception's purpose; where vicarious liability fails to serve the purpose of the exception, the exception should no longer apply. The peculiar risk exception exists because certain activities pose a risk that people are not commonly subjected to and thus do not anticipate the need for taking precautions. *See* Restatement (Second) of Torts § 416 cmt. d. For example, a company that digs a trench immediately next to a public road creates a peculiar risk of physical harm to the public because the public does not expect the associated risk and does not take precautions against it. *See id.* Performing an activity involving a peculiar risk of physical harm causes the principal to become vicariously liable for its independent contractors when it would otherwise not be. *See id.* § 416 cmt. c.

When an individual with knowledge of the existence of the peculiar risk of

physical harm that is inherent to a particular activity chooses to voluntarily participate in the activity anyway, the risk is no longer “peculiar” as to that individual. As a result, the underpinning of the peculiar risk exception falls away because the individual can anticipate the need to take precautions. Peculiar risk vicarious liability should no longer apply because a critical basis for departure from the general rule of nonliability for the acts of independent contractors is absent. Moreover, the individual who voluntarily participates in the activity, with knowledge of its peculiar risk, is no longer a typical member of the general public who cannot anticipate the peculiar risk.

With regard to the peculiar risk of harm in fugitive defendant apprehension, a fugitive defendant is the opposite of an uninvolved member of the public. The fugitive defendant is actually one source of the “peculiar risk,” and his or her failure to appear is invariably a cause in fact of the harm (i.e., but for the fugitive defendant’s failure to appear or subsequently surrender, the bail bond recovery agent would not have been engaged in the course of action leading to the harm). Moreover, the fugitive defendant will almost always have cause to know of the risk inherent in failing to appear for a court hearing.

In the present case, the record clearly establishes that Larry Stout was very aware of the peculiar risk of harm inherent in fugitive defendant apprehension. Several months before the incident, Stout had been apprehended by two bail bond

recovery agents who broke his door down and entered with guns drawn. One of those agents was Carl Warren. In the period of time leading up to the collision in this case, Stout was aware that Warren was again pursuing him and that Warren had kicked in the doors of the homes of persons with whom Stout had been staying. Stout was therefore necessarily aware of the peculiar risk of physical harm inherent to the activity of fugitive defendant apprehension. Nonetheless, Stout refused to turn himself in, in spite of his statement to Clarence Johnson, the owner of CJ Johnson Bail Bonds, that he would do so. Stout was aware of the peculiar risk of being involved in the activity of fugitive defendant apprehension and voluntarily chose to participate in that activity. The majority's conclusion that Stout was "not connected with the business of bail bondsmanship or fugitive recovery," majority at 17, is puzzling given that he is the customer of bail bondsmanship and that his decision not to appear in court created the need for fugitive recovery. Because he created the circumstances that necessitated fugitive recovery, Stout was actually a source of the peculiar risk. The entire rationale for peculiar risk liability simply does not apply to his situation given that he was both aware of and a cause of the peculiar risks of the activity he chose to engage in. Therefore, limiting the peculiar risk exception under these circumstances is appropriate.

It is well established that principals are not vicariously liable for the torts of

their independent contractors except under certain limited exceptions. The purpose of the peculiar risk exception• the need to protect members of the public from unanticipated dangers• simply is not served by applying vicarious liability when the injured party had knowledge of the existence of the peculiar risk and nonetheless chose to participate in the activity. Because the purpose of the peculiar risk exception to that general rule is not served, vicarious liability should not apply in this situation.

I respectfully dissent.

AUTHOR:

Justice Susan Owens

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WE CONCUR:

Justice James M. Johnson

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Justice Charles W. Johnson

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