

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROSHEL SMITH

Plaintiff-Appellee

vs.

DONALD E. LANDFAIR,

Defendants-Appellant

CASE NO.

11-1708

On appeal from the Summit County Court of Appeals, Ninth Judicial District, Case No. CA-25371

NOTICE OF APPEAL OF DEFENDANT-APPELLANT, DONALD LANDFAIR

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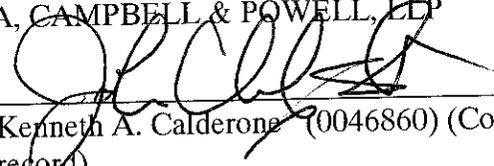
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Defendant-Appellant, Donald Landfair, gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Case No. CA-25371 on June 22, 2011. Appellant filed a motion for reconsideration on June 27, 2011. The court of appeals denied Appellant's motion for reconsideration on August 25, 2011.

This case is one of public or great general interest.

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A copy of this document was sent on October 7, 2011, by email to John K. Rinehardt, counsel for Plaintiff-Appellee, at jkr@lawfirm2020.com.

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IN THE COURT OF COMMON PLEAS
OF SUMMIT COUNTY

COUNTY OF SUMMIT
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ROSHEL SMITH,

PLAINTIFF

-vs-

DONALD E. LANDFAIR, et. al.,

DEFENDANTS

SUMMIT COUNTY
CLERK OF COURTS
CASE NO. CV-2009-03-2476

JUDGE ALISON MCCARTY

ORDER

This case comes before the Court upon Motion of Defendants, Donald E. Landfair, et. al., for Summary Judgment on the personal injury claims of the Plaintiff, Roshel Smith.

FACTS

Defendant, Donald E. Landfair ("Landfair") in engaged in harness racing in Summit County. As of March 28, 2007, Landfair owned a two-year-old, 750-800 lb., horse named Green Acre Annie ("Annie") that he boarded with CJS Standard Bred Stables at the Wayne County Fairgrounds in Wooster, Ohio ("CJS"). He also boarded another horse, Green Acre Patty ("Patty"), at CJS. As of March 2007, Landfair was 79 years old and had been involved with horses for nearly 60 years and had been a licensed livestock dealer for over 40 years.

In February 2007, Landfair hired Ernest Smith, who was the owner and operator of CJS at that time, to break and train Annie. Mr. Smith has fifteen years of experience in horse training as a stable operator. From February 2007 until March 28,

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2007, Mr. Smith had daily contact with Annie, and he found her to be skittish and to behave in a manner consistent with an unbroken and untrained horse of her age.

After approximately 30 days of training, Mr. Smith advised Landfair to have Annie shod at CJS due to avoid trailing her to an off-site blacksmith for shoeing. On March 28, 2007, Landfair loaded Annie and Patty onto his trailer and took them to be shod at an off-site blacksmith. He loaded both horses at CJS and unloaded them at the blacksmith's without incident.

Upon his return, Landfair parked his truck and stock trailer on a paved area adjacent to the road, which passed between the stables and the race track. Landfair unloaded Patty first and took her into the barn without encountering any issues. At the time that Landfair attempted to unload Annie, a buckboard wagon with metal-rimmed wooden wheels pulled by a team of horses drove down the road. Although the wagon was moving slowly and loudly, and there was nothing obstructing Landfair's view of the wagon, he did not see or hear the wagon. The sound of the wagon spooked Annie, causing her to push Landfair down to the ground. He maintained a hold on her lead while he was on the ground and she jumped out of the trailer and "pranced" about him.

Plaintiff, Roshel Smith ("Smith"), was 25 years old in March 2007. From 2001 to 2008, Smith worked at CJS caring for horses, among other related responsibilities. She worked at CJS during the time that Landfair boarded Annie and Patty there.

Smith never observed or heard that Annie was unusually skittish and had no knowledge that Annie behaved differently from other "average horses." Smith admits that horses are "unpredictable and inherently dangerous."

On March 28, 2007, at the time of the incident, Smith was at CJS. She was standing by the barn and watching her father, Mr. Smith, training a different horse on the track. On the date in question, Smith had come to CJS to ask for real estate advice from her father. While she was waiting, Smith observed Landfair park his trailer and acknowledged him. She saw him unload Patty. Upon hearing the commotion caused by the wagon spooking Annie and Landfair falling to the ground after Annie pushed him out of the trailer and onto the ground, Smith went to help Landfair because she feared Annie would step on him. As she attempted to help him, Annie kicked Smith in the left side of her face knocking her unconscious. Smith sustained multiple injuries to her face and head including multiple fractures to her mandible and jaw, broken teeth, and lacerations.

Smith claims that factual discrepancies exist as to the following facts on March 28, 2007: (1) Landfair's physical condition and ability to unload Annie from a trailer without assistance; (2) the number of times Annie had been transported by trailer prior to the date and time of the incident; (3) the state of Annie's training; (4) whether Landfair was "controlling" Annie at the time Smith went to assist him after he was knocked to the ground by Annie; (5) the nature of Smith's presence at CJS on the date of the incident; (6) Smith's level of awareness of Landfair's activities at the time of the incident; (7) the facts leading up to Landfair's fall to the ground after Annie was spooked; and (8) the position of the horse at the time Smith went to assist Landfair after he fell to the ground.

Landfair argues that he is entitled to summary judgment for the following reasons: (1) Smith's claims are barred under R.C. 2305.321, Ohio's equine-immunity statute;

and (2) Smith assumed the risk of injury. In Smith's response to Landfair's motion she offers two affidavits of Ernest Smith and P. Victor Clark.

LAW & ANALYSIS

A. *Summary Judgment Standard*

Pursuant to Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93, 1996 Ohio 107, 662 N.E.2d 264. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

B. *Immunity as to Equine Activity Risks*

The applicable sections of R.C. 2305.321 provide:

(A) As used in this section:

(1) "Equine" means a horse, pony, mule, donkey, hinny, zebra, zebra hybrid, or alpaca.

(2)(a) "Equine activity" means any of the following:

(iv) The trailering, loading, unloading, or transporting of an equine;

(3) "Equine activity participant" means a person who engages in any of the following activities, regardless of whether the person is an amateur or a professional or whether a fee is paid to participate in the particular activity:

(a) Riding, training, driving, or controlling in any manner an equine, whether the equine is mounted or unmounted;

(e) Assisting a person who is engaged in an activity described in division (A)(3)(a), (b), (c), or (d) of this section;

(g) Being a spectator at an equine activity.

(6) "Harm" means injury, death, or loss to person or property.

(7) "Inherent risk of an equine activity" means a danger or condition that is an integral part of an equine activity, including, but not limited to, any of the following:

(a) The propensity of an equine to behave in ways that may result in injury, death, or loss to persons on or around the equine;

(b) The unpredictability of an equine's reaction to sounds, sudden movement, unfamiliar objects, persons, or other animals;

(c) Hazards, including, but not limited to, surface or subsurface conditions;

(e) The potential of an equine activity participant to act in a negligent manner that may contribute to injury, death, or loss to the person of the participant or to other persons, including, but not limited to, failing to maintain control over an equine or failing to act within the ability of the participant.

(8) "Person" has the same meaning as in section 1.59 of the Revised Code and additionally includes governmental entities.

(9) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(B)(1) Except as provided in division (B)(2) of this section and subject to division (C) of this section, an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person is not liable in damages in a tort or other civil action for harm

that an equine activity participant allegedly sustains during an equine activity and that results from an inherent risk of an equine activity. Except as provided in division (B)(2) of this section and subject to division (C) of this section, an equine activity participant or the personal representative of an equine activity participant does not have a claim or cause of action upon which a recovery of damages may be based against, and may not recover damages in a tort or other civil action against, an equine activity sponsor, another equine activity participant, an equine professional, a veterinarian, a farrier, or another person for harm that the equine activity participant allegedly sustained during an equine activity and that resulted from an inherent risk of an equine activity.

(2) The immunity from tort or other civil liability conferred by division (B)(1) of this section is forfeited if any of the following circumstances applies:

* * *

(d) An act or omission of an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person constitutes a willful or wanton disregard for the safety of an equine activity participant and proximately causes the harm involved.

(e) An equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person intentionally causes the harm involved.

In Ohio, courts examine statutory language to determine legislative intent. *Allison v. Johnson*, No. 2000-T-0116, 2001 Ohio App. LEXIS 2485 (Ohio Ct. App. June 1, 2001). Furthermore, “the words and phrases contained in Ohio’s statutes are to be given their plain, common, ordinary meaning” and construed in accordance with grammar and common usage rules. *Id.* at *9.

The *Allison* court found the “single broad purpose” of R.C. 2305.321 is set forth in section (B)(1) of the statute. *Id.* at *9-*10. It further holds that the premise of the statute is clearly stated in R.C. 2305.321(A)(7). Subsections (a), (b), (c), and (e) are relevant to this case. Subsection (e) is particularly important to this case because it explicitly states that an “inherent risk of an equine activity” is the dangerous condition created by one equine activity

participant's negligence by "failing to maintain control over an equine or failing to act within the ability of the participant" may cause injury, death, or loss to "other persons."

It is undisputed that Landfair was attempting to unload Annie from his trailer at the time Smith was injured by Annie. Smith argues that Landfair is not an equine activity participant as defined by the statute because at the time of Smith's injuries Landfair had lost control of Annie at the time he fell to the ground and Annie was "prancing" about him.

Comparing these facts to the facts surrounding Appellee's "control" of a horse in *Allison*, the Court concludes otherwise. In *Allison*, the Appellee was leading a horse when he turned to close a gate. *Allison* at *2. The Appellee had turned the horse with him, but the horse began to jump and shuffle backward toward the Appellant. *Id.* The horse pulled him and he was unable to gain control of the horse. *Id.* It subsequently backed into the gate and one of the boards popped out of the brackets and hit the Appellant. *Id.* Consequently, Appellant sustained serious injury. *Id.* The *Allison* court did not hold that Appellee's inability to fully restrain the movements of the horse at the moment of Appellant's injuries in any way changed his status as an equine activity participant or negated the immunity conferred by R.C. 2305.321. In this case, Landfair was holding Annie's lead from the time he attempted to unload her until he was pushed by Annie out of the trailer and onto the ground. Smith does not dispute that Landfair had hold of Annie's lead even when he was on the ground.

The Supreme Court of Ohio has found that courts must construe statutes to avoid “unreasonable or absurd results.” *State ex. Rel. Asti v. Ohio Dept. of Youth Servs* (2005), 107 Ohio St. 3d 262, 2005 Ohio 6432, 838 N.E.2d 658, ¶28. Furthermore, “the Supreme Court [of the United States] has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application.” *Id.* at ¶30 (quoting *Consumer Electronics Assn. v. Fed. Communications Comm.* (C.A.D.C.2003), 347 F.3d 291, 298).

Using the plain and common meaning for the word “control” to determine legislative intent, the Court holds that Landfair’s acts were within the meaning of the language in R.C. 2305.321(A)(3)(a). Therefore, he is an equine activity participant under the statute. Reading the statute as Smith proposes is too narrow given the broad purpose of the statute and the unreasonable results that would occur. The Court agrees with Landfair that reading the meaning of the statute narrowly would oppose the *Allison* court’s interpretation of the statutory language and contradict the purpose of R.C. 2305.321 to grant immunity to a broad range of individuals engaged in broadly defined equine activities that are inherently dangerous.

The Court also holds that Smith is an equine activity participant as defined by the statute. While the Court rejects Landfair’s allegation that Smith was an equine activity participant because she was “assisting” Landfair at the time of her injury, the Court finds that Smith was a “spectator” under R.C. 2305.321(A)(3)(g).

The *Allison* court directly addresses the definition of “spectator” because it is undefined in the statute. *Allison* at *14. According to various common dictionaries, “spectator” means:

Webster's II New College Dictionary (1999) 1060 defines spectator as 'an observer of an event.' Similarly, Webster's Third New International Dictionary (1986) 2188 provides that a 'spectator' is 'one that looks on or beholds; *** one witnessing an exhibition.' The Random House Dictionary, Concise Edition (1983) 840, states that a 'spectator' is 'a person who watched without participating.'

Id.

Smith asserts that the facts at bar are distinguishable from those in *Allison*, and fall into the caveat created in that case to limit the *Allison* holding:

The mandate in this case should not be construed to hold that those granted immunity under this provision would be immune in all circumstances where an individual happens to see a horse and has an unfortunate physical contact with such animal or is injured as a result of a force in motion caused by such equine.

Id. at *20-*21.

The Court is not persuaded by this argument. Smith attempts to distinguish between the injured Appellant's activity of "watching" the Appellee care for his horse in *Allison* and Smith's activity of "noticing" Landfair through her peripheral vision as she watched her father on the track. Even if the Court accepts Smith's argument that the *Allison* court erred in defining "spectator," Smith still does not sufficiently clarify the difference between her act of "noticing" Landfair and the definition of "spectator." Indeed, she provides no alternative definition on which the Court should rely in determining whether Smith was a "spectator" at an equine activity at the time she was injured. Given the broad language of the statute, this Court finds that "spectator" has a broad meaning within the statute, and that under the facts, Smith was a spectator at an equine activity.

In sum, the Court finds that both Landfair and Smith were "equine activity participants" under the statute. Furthermore, the Court holds that Smith's

injuries were the result of inherent risk of an "equine activity" under R.C. 2305.321(A)(7). In *McGuire v. Jewett*, , the court determined the legislative intent for using "inherent" to describe the risks of equine activities: "By using the term 'inherent' to classify the type of risks involved in equine activities, it seems the legislature was acknowledging that equine activities involve evident risks that cannot be ignored by equine activity participants." 2005 Ohio 4214, ¶36.

Although Smith was not present at CJS for the purpose of being an equine activity participant to Landfair's equine activity of unloading Annie from his trailer, she was aware of the inherent dangers of being at a race track and barn. Furthermore, the Court has found Smith to be a "spectator" under R.C. 2305.321, which has been broadly defined by the *Allison* court. In addition, in *Lawson v. Dutch Heritage Farms, Inc.* (N.D. Ohio 2007), 502 F. Supp. 2d 698, 705, the U.S. District Court found that Ohio's equine immunity statute does not limit the definition of "spectator. Specifically, the *Lawson* court found:

If a 'person' is present at an equine activity, that person becomes a participant by merely spectating. It is difficult to conceive of an excluded 'activity' under this statute, given that the all-encompassing definition of 'equine activity participant,' which combines the functions of participants (described as riders, trainers, drivers, and passengers), veterinarians, breeders, those who assist them, sponsors and spectators.

* * *

... Ohio's statute demonstrates the intent to include active or passive 'participation' at an equine activity. The language used in Ohio's statute does not contemplate that a 'person' could be present at an equine activity in a capacity not subject to its [equine immunity statute] provisions.

Id. at 705-06. Applying this standard to the facts of the present case, Smith, by merely being present at the unloading of Annie and “noticing” the events that transpired leading up to her injury, was a spectator as contemplated by the Ohio legislature in R.C.2305.321.

C. *Wantonness Standard*

The Supreme Court of Ohio has defined wanton misconduct as a question normally decided by a jury. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 1994 Ohio 368, 639 N.E.2d 31. It has further provided:

The standard for showing wanton misconduct is, however, high. In *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 4 O.O.3d 243, 363 N.E.2d 367, syllabus, we held that wanton misconduct was the failure to exercise any care whatsoever. In *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 166, 269 N.E.2d 420, 422, we stated, ‘mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.’ Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury. *Id.* at 97, 55 O.O.2d at 166, 269 N.E.2d at 423. In *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705, we employed the recklessness standard as enunciated in 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500: ‘The actor’s conduct is in reckless disregard of the safety of others if * * * such risk is substantially greater than that which is necessary to make his conduct negligent.’

Id.

Ohio Jury Instructions defines “wanton misconduct” as follows:

Wanton misconduct must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be aware, from his knowledge of such circumstances and conditions, that his conduct will probably result in injury. Wanton misconduct implies a failure to use any care for the plaintiff and an indifference to the consequences, when the probability that harm would result from such failure is great, and such probability is known, or ought to have been known, to the defendant.

1 Ohio Jury Instructions (2008), Section 401.41.

Landfair cites to the Ninth District Court of Appeals case, *Shadoan v. Summit Cty. Children Serv. Bd.* to show that summary judgment is appropriate when an individual's actions are not meant to cause harm and did not breach a known duty "through an ulterior motive or ill will and did not have a dishonest purpose." 2003 Ohio 5775, ¶14 (quoting *Fox v. Daly*, No. 96-T-5453, 1997 Ohio App. LEXIS 4412 (Ohio Ct. App. Sept. 26, 1997)).

Smith presents facts and affidavits in an attempt to show that Landfair's conduct rose to the level of wantonness. In the affidavit of Ernest Smith, Mr. Smith alleges that he told Landfair that it would be unwise to remove Annie from the stable to be shod due to her minimal training and flighty nature. He also asserted that upon Annie's arrival at CJS in February 2007, Landfair asked him to unload Annie from the trail because she appeared anxious and was stomping her feet. He further claims that Landfair told him that Landfair had transported Annie by trailer only once prior to bringing her to CJS. Contrary to Mr. Smith's affidavit, Landfair asserts that Annie had been transported by trailer six times, and led on and off of a trailer around twenty-four times. In addition, Smith stated in her deposition that she never observed Annie behaving in an unusually aggressive way or have abnormally skittish behavior.

Smith offers the affidavit of P. Victor Clark to provide evidence that Landfair acted wantonly. Mr. Clark reviewed the depositions of Landfair, his wife Virginia Landfair, and Smith, and the affidavit of Ernest Smith. From these documents and his thirty years of experience in equine-related activities, Mr. Clark concluded that Landfair acted wantonly in handling and unloading his horse on March 28, 2007.

The Court will not consider Mr. Clark's affidavit in determining whether or not to grant summary judgment. Landfair properly cites several examples of immunity cases from the Ninth District Court of Appeals where the court ignored affidavits similar to Mr. Clark's for the purpose of summary judgment. *See, e.g., Hackathorn v. Preisse* (1995) 104 Ohio App. 3d 768, 772, 663 N.E.2d 384 ("The affiants' statements that Preisse was reckless were legal conclusions, not factual statements. Such legal conclusions should not have been included in the affidavits and, in any event, did not create any issues of fact."); *Shalkhauser v. Medina* (2002), 148 Ohio App. 3d 41, 2002 Ohio 222, 772 N.E.2d 129, at ¶41 ("Appellant's witnesses testified that Appellees . . . engaged in conduct that was wanton, reckless, extreme, and outrageous. Appellant fails to appreciate that this testimony does not create any issues of fact, but merely states Appellant's position with respect to Appellees' culpability, which is a legal conclusion."). Mr. Clark's affidavit does not create an issue of material fact, but is a legal conclusion that affirms Smith's position.

D. The Rescue Doctrine

The rescue doctrine has been part of Ohio's common law for over 100 years. *Pennsylvania Co. v. Langendorf* (1891), 48 Ohio St. 316, 28 N.E. 172; *The Pittsburg, Cincinnati, Chicago & ST. Louis Railway Co. v. Lynch* (1903), 69 Ohio St. 123, 68 N.E. 703. The court in *Reese v. Minor*, defines the rescue doctrine as:

One who is injured in an attempt to rescue a person in danger as a result of that person's own negligence may recover from that person under established principles of negligence including proximate causation. Recovery is precluded if the rescue is attempted in a rash or reckless manner.

(1981), 2 Ohio App.3d 440, 442 N.E.2d 782, at paragraph 1 of the syllabus (quoting from O.Jur 2d Negligence § 99).

In *Langdorf*, if the rescuer does not “rashly and unnecessarily” place himself in the dangerous condition, and is injured, his injury should be attributed to that person who negligently or wrongfully put the person of need of rescue in danger. 48 Ohio St. at paragraph 3 of the syllabus. The court further opined that it would be difficult to impossible to establish when one may risk their personal safety to rescue another from a perilous situation and not be charged with rashness. *Id.* at 324.

Public policy interests served by the rescue doctrine are: (1) promoting rescues, and (2) acknowledging that the “rescue response” to one in imminent danger is a “natural and probable” result of the negligence that created the danger. *Skiles v. Beckloff*, 1993 Ohio App. LEXIS 3824, at *4-*5 (Ohio Ct. App. Aug. 4, 1993). The actions of the rescuer must be to protect the person in peril. *Id.* The rescuer must have a reasonable belief that the person in need of rescue is in imminent peril. *Marks v. Wagner* (1977), 52 Ohio App. 2d 320, 6 O.O.3d 360, 370 N.E.2d 480, at paragraph 2 of the syllabus.

According to the *Marks* court, the rescue doctrine pertains to the contributory negligence of the rescuer:

Technically, the rescue doctrine is limited solely to the issue of the existence of contributory negligence on behalf of the rescuer, including the lack of imputation to the rescuer of the negligence of the person whose rescue is involved The existence of actionable negligence on the part of [party who caused the dangerous situation] is still determined by common law principles relating to the scope of the [party’s] duty, including the element of foreseeability of injury, the violation of that duty and proximate cause.

Id. at 323.

E. Does the Equine Immunity Statute abrogate the Common Law Rescue Doctrine?

Smith argues that R.C. 2305.321 does not explicitly abrogate the common law rescue doctrine. It is established that “statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment” *State ex. Rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146, at paragraph 3 of the syllabus. In addition, “in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.” *Id.* The common law is not repealed by “mere implication.” *Frantz v. Maher* (1957), 106 Ohio App. 465, 7 O.O. 2d 209, 155 N.E.2d 471, at paragraph 1 of the syllabus.

The Court finds that the language of the equine immunity statute is broad enough to abrogate the common law rescue doctrine for those protected under R.C. 2305.321. Specifically, R.C. 2305.321(B)(1) provides, “an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person is not liable in damages in a tort or other civil action for harm that an equine activity participant allegedly sustains during an equine activity and that results from an inherent risk of an equine activity.” The statute defines who is considered an “equine activity participant” in R.C. 2305.321(A)(3), what an “equine activity” means in section (A)(2), and what constitutes an “inherent risk of an equine activity” in section (A)(7). The Court has determined that both Smith and Landfair are equine activity participants as defined by the statute, and were engaged in the types of activity

explicitly described therein. The broad purpose of the equine immunity statute abrogates the common law rescue doctrine where the involved parties fall within the scope of the statute.

Furthermore, R.C. 2305.321(B)(2) provides exceptions to immunity for parties that would otherwise be protected where a party's "act or omission" constitutes a willful or wanton disregard for the safety of an equine activity participant and proximately causes the harm involved" or the party "intentionally causes the harm involved." Thus, Smith had the responsibility to show that Landfair's acts or omissions were willful or wanton or intentional in order to recover damages for her injuries. In her amended complaint and memorandum in response to the motion by Landfair for summary judgment, Smith does not provide sufficient facts that Landfair's acts in unloading Annie rose to the level of willful or wanton disregard for Smith's safety. She does not plead that Smith's acts were intentional.

Therefore, while Smith behaved nobly in attempted to "rescue" Landfair while he was on the ground with Annie "prancing" about him, R.C. 2305.321 abrogates the rescue doctrine as it applies to this case.

CONCLUSION

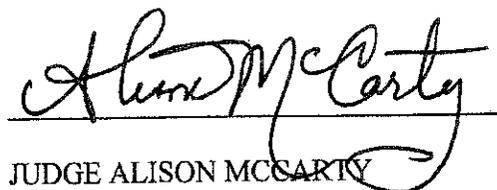
Upon due consideration of the pleadings, motion, and exhibits attached thereto, there are no genuine issues of material facts in dispute as to Plaintiff Smith's claims against Defendant Landfair. The broad sweep of the equine immunity statute, R.C. 2305.321, provides protection for Landfair against tort actions such as the one filed against him by Plaintiff Smith. Furthermore, Smith does not meet the burden of showing that Landfair's actions on the date in question rose to the level of wanton

misconduct, which would have stripped him of the protection conferred by the equine immunity statute.

As to whether R.C. 2305.321 abrogates the common law rescue doctrine, the Court finds that it does. Again, the broad language of the statute, and the provision for exceptions for wanton or intentional conduct, demonstrate that the legislature intended for the equine immunity statute to abolish the application of common law doctrines.

In conclusion, summary judgment is granted in favor of Defendant Landfair against Plaintiff Smith.

IT IS SO ORDERED.


JUDGE ALISON MCCARTY

cc: ATTORNEY JOHN K. RINEHARDT
ATTORNEY KENNETH A. CALDERONE

STATE OF OHIO
COUNTY OF SUMMIT
ROSHEL SMITH

Appellant

v.

DONALD E. LANDFAIR, et al.

Appellees

) COURT OF APPEALS
) DANIEL M. HORRIGAN THE COURT OF APPEALS
) ss: NINTH JUDICIAL DISTRICT
) 2011 JUN 22 AM 7:50

SUMMIT COUNTY No. 25371
CLERK OF COURTS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009-03-2476

DECISION AND JOURNAL ENTRY

Dated: June 22, 2011

BELFANCE, Judge.

{¶1} Plaintiff-Appellant Roshel Smith appeals from the ruling of the Summit County Court of Common Pleas which granted summary judgment in favor of Defendant-Appellee Donald Landfair on Ms. Smith's claims. For the reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} In 2007, Mr. Landfair boarded two of his horses, Green Acre Patty ("Patty") and Green Acre Annie ("Annie"), at CJS Standard Bred Stables ("CJS") at the Wayne County Fairgrounds. At the time, Mr. Landfair had been a licensed livestock dealer for forty years and had been involved with horses for over sixty years. Ms. Smith's father, Ernest Smith, owned and operated CJS and had been in the business of harness racing and horse training for fifteen years. Mr. Landfair brought Patty and Annie to CJS and Mr. Smith for breaking and training in harness racing in 2006 and 2007, respectively. The amount of training Annie had when she arrived at

Exhibit B

CJS in 2007 is disputed, including how many times Annie had been on a trailer. It is undisputed that Annie was trained to be led.

{¶3} Mr. Smith had daily contact with Annie and found her "to be skittish and to behave in a manner completely consistent with an unbroken untrained horse of that age." Ms. Smith, who was twenty-four at the time of these events and had extensive horse experience, also had involvement in Annie's care. From 2000 through August 2008, Ms. Smith worked for her father assisting in the care and management of the horses at CJS. Ms. Smith observed Annie acting "skittish" a few times, but did not think that her behavior was unusual.

{¶4} In March 2007, Annie was two years old and weighed approximately 750-800 pounds. Due to Annie's temperament and lack of training, Mr. Smith advised Mr. Landfair not to remove Annie from the property to have her shod, as Mr. Smith had a blacksmith that came to his barn. Against Mr. Smith's advice, on March 28, 2007, Mr. Landfair loaded Patty and Annie onto his trailer and transported them without incident, or assistance, to be shod by his preferred blacksmith. He also unloaded the horses at the blacksmith's place and loaded them without difficulty after the blacksmith finished.

{¶5} Upon returning to CJS, Mr. Landfair parked his truck and trailer on a paved area adjacent to a roadway that passed between the stables and the racetrack. Ms. Smith was at CJS that day, but was not working at the time. She came to the stables to seek real estate advice from her father, Mr. Smith, and was observing Mr. Smith exercise a horse on the track when Mr. Landfair returned.

{¶6} Ms. Smith noticed Mr. Landfair unload Patty without incident and said "hi" to him when he put Patty in her stall. Ms. Smith then saw Mr. Landfair return to the trailer to unload Annie. While Mr. Landfair was preparing to unload Annie, an Amish horse-drawn

wagon came down the adjacent road. Mr. Landfair, who had hearing aids, did not hear or see the wagon until he was in the process of leading Annie from the trailer. It is not disputed that the line of sight from the trailer to the wagon was not obstructed. The loud noise made by the wagon spooked Annie, causing her to push Mr. Landfair off the trailer. Mr. Landfair fell, but maintained a hold on the lead line attached to Annie. Around this time, Ms. Smith heard a commotion coming from the trailer and saw Mr. Landfair on the ground with Annie prancing around him. Ms. Smith was worried Annie would step on Mr. Landfair and injure him. Thus, she ran over towards Mr. Landfair and the prancing horse. As Ms. Smith was trying to help Mr. Landfair, Annie kicked her, causing her severe facial and head injuries.

{¶7} As a result of the injuries, Ms. Smith filed suit against Mr. Landfair and five John Doe Defendants asserting that Mr. Landfair "acted negligently by attempting to handle the untrained horse, failing to seek assistance when unloading the horse from the trailer and was otherwise negligent." Ms. Smith never amended her complaint to identify the John Doe Defendants. Mr. Landfair answered and asserted, inter alia, that he was immune pursuant to R.C. 2305.321. Mr. Landfair moved for summary judgment on the basis of immunity pursuant to R.C. 2305.321 and assumption of the risk. Ms. Smith opposed the motion and argued for the first time that questions of fact existed with respect to whether Mr. Landfair's conduct was merely negligent or whether it was wanton. Ms. Smith later moved to amend her complaint to include allegations of wantonness; however, that motion was not ruled upon. The trial court held a hearing on the summary judgment motion. The trial court found in favor of Mr. Landfair on Ms. Smith's complaint concluding that the immunity statute applied and that Ms. Smith had not demonstrated that Mr. Landfair's conduct was wanton.

{¶8} Ms. Smith has appealed to this Court, raising five assignments of error, several of which will be discussed out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN ITS APPLICATION OF R.C. [§]2305.321(A)(3)(g) OF THE EQUINE IMMUNITY STATUTE FINDING THAT APPELLANT WAS A ‘SPECTATOR’ AS A MATTER OF LAW[.]”

{¶9} Ms. Smith asserts in her third assignment of error that the trial court erred in concluding that she was a spectator under the equine immunity statute.

{¶10} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. “Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when ‘(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.’” *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶11} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Id.* at 293.

{¶12} We begin with a discussion of the equine immunity statute. The statute provides that:

“Except as provided in division (B)(2) of this section and subject to division (C) of this section, an equine activity sponsor, equine activity participant, equine

professional, veterinarian, farrier, or other person is not liable in damages in a tort or other civil action for harm that an equine activity participant allegedly sustains during an equine activity and that results from an inherent risk of an equine activity. Except as provided in division (B)(2) of this section and subject to division (C) of this section, an equine activity participant or the personal representative of an equine activity participant does not have a claim or cause of action upon which a recovery of damages may be based against, and may not recover damages in a tort or other civil action against, an equine activity sponsor, another equine activity participant, an equine professional, a veterinarian, a farrier, or another person for harm that the equine activity participant allegedly sustained during an equine activity and that resulted from an inherent risk of an equine activity." R.C. 2305.321(B)(1).

Under the statute an "[e]quine" means a horse, pony, mule, donkey, hinny, zebra, zebra hybrid, or alpaca." R.C. 2305.321(A)(1). Relevant to the facts of the instant case, an 'equine activity[.]' includes "[t]he trailering, loading, unloading, or transporting of an equine." R.C. 2305.321(A)(2)(a)(iv). Neither side appears to dispute that Mr. Landfair was engaged in an equine activity although they dispute whether Mr. Landfair was an equine activity participant. See R.C. 2305.321(A)(3) (defining equine activity participant). Notwithstanding the status of Mr. Landfair, the statute is applicable only if Ms. Smith is an equine activity participant, which is the central issue presented in this case.

{¶13} An "[e]quine activity participant" means a person who engages in any of the following activities, regardless of whether the person is an amateur or a professional or whether a fee is paid to participate in the particular activity: (a) [r]iding, training, driving, or controlling in any manner an equine, whether the equine is mounted or unmounted; * * * (e) [a]ssisting a person who is engaged in an activity described in division (A)(3)(a), (b), (c), or (d) of this section; [or] * * * (g) [b]eing a spectator at an equine activity." *Id.* In Mr. Landfair's motion for summary judgment, he maintained that Ms. Smith was an equine activity participant as she was either a spectator, R.C. 2305.321(A)(3)(g), or was assisting Mr. Landfair in controlling Annie. R.C. 2305.321(A)(3)(e). The trial court rejected the notion that Ms. Smith was "assisting" Mr.

Landfair. The trial court concluded nonetheless that Ms. Smith was an equine activity participant because she was a spectator under the statute. Ms. Smith argues that she was not a spectator within the meaning of the statute as she only noticed Mr. Landfair unloading Annie in her peripheral vision. Ms. Smith further contends that the trial court erred in its application of *Allison v. Johnson* (June 2, 2001), 11th Dist. No. 2000-T-0116, as the facts of the instant matter are distinguishable from the facts of *Allison*. We agree.

{¶14} Unfortunately the legislature has not defined "spectator" in the statute. "[W]hen words are not defined in a statute they are to be given their common and ordinary meaning absent a contrary legislative intent." *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, at ¶15. The common, ordinary meaning of spectator is "[o]ne who attends and views a show, sports event or the like." The American Heritage Dictionary of the English Language (1981) 1241. See, also, *Allison*, at *5 (examining common dictionary definitions of spectator including "one that looks on or beholds; * * * one witnessing an exhibition[; and] * * * a person who watched without participating").

{¶15} While one might ordinarily conclude that someone who is a spectator is viewing an event or exhibition, such as a horse show, the legislature has envisioned that a person can be a spectator of any equine activity including the trailering of a horse and the normal daily care of a horse. See R.C. 2305.321(A)(2)(a)(iii),(iv); R.C. 2305.321(A)(3)(g). For example, one could be a spectator while watching a farrier engaged in the process of placing shoes on a horse. Nonetheless, the word "spectator" should not be interpreted so that any individual who glances at a horse and is thereafter injured by it becomes a spectator of an equine activity and thereby an equine activity participant. Indeed, such a view would distort the common and ordinary meaning of the word and would require a conclusion that any person, even a mail carrier who happens to

momentarily glance at a horse or has some awareness in his peripheral vision that a horse is engaged in some activity, is deemed a spectator. Even the *Allison* Court, which utilized a broad definition of spectator, noted that there must be some limits placed on the meaning of the word spectator:

“The mandate in this case should not be construed to hold that those granted immunity under this provision would be immune in all circumstances where an individual happens to see a horse and has an unfortunate physical contact with such animal or is injured as a result of a force in motion caused by such equine.”
Allison, at *7.

{¶16} Viewing the evidence in a light most favorable to Ms. Smith, we cannot conclude that Ms. Smith was a spectator. Ms. Smith testified at her deposition as follows:

“Q. When Mr. Landfair arrived back at the fairgrounds, were you present?”

“[Ms. Smith:] Yes.

“Q. And what happened when he arrived back?”

“[Ms. Smith:] He unloaded Green Acre Patty and put her in the stall, and I said hi, asked him how he was doing, being nice. He went to get Annie and I was standing in the barn doorway, and I was watching my father out in the track with one of our horses, and I was waiting for him to come back, and that’s when the accident occurred.

“* * *

“Q. Did he have anybody helping him when he unloaded Green Acre Patty?”

“[Ms. Smith:] I don’t know.

“Q. Did you see anyone helping him?”

“[Ms. Smith:] It was in my peripheral vision and I was watching my dad.

“* * *

“Q. And then you said the accident happened, what is it that you observed happen?”

“[Ms. Smith:] First, I heard a commotion and I glanced over and Annie had pushed Mr. Landfair out of the trailer and Mr. Landfair was on the ground, and then Annie proceeded to jump out of the trailer, and she was starting to step on

him and he still had ahold of the line, and that's when I ran after and I don't remember very much after that."

It is clear from Ms. Smith's testimony that unlike the appellant in *Allison*, Ms. Smith was not watching the equine activity at issue, namely Mr. Landfair unloading Annie. The *Allison* Court focused on the fact that the appellant was actually watching the appellee lead the horse. *Id.* at *5 ("In particular, appellant's deposition testimony reveals that while she did not participate or help appellee lead the horse, she did admit to watching this activity take place[.]"). Ms. Smith specifically stated that she was watching and waiting for her father and that she was not watching Mr. Landfair. She said that she saw Mr. Landfair only out of her peripheral vision and that she did not even notice if anyone was helping him. Thus, we conclude as a matter of law that Ms. Smith was not a spectator.

{¶17} Further, we agree with the trial court's conclusion that Ms. Smith was not an equine activity participant by means of "assisting" Mr. Landfair in controlling Annie. See R.C. 2305.321(A)(3)(e). Ms. Smith was specifically asked in her deposition if she moved towards Mr. Landfair to "help gain control of the horse[.]" Ms. Smith responded, "[n]o, I was moving towards him to help him." This is further corroborated by her later deposition testimony when she answered affirmatively that she was trying to help Mr. Landfair. Further, from the record it appears that even if we were to consider that Ms. Smith was trying to assist Mr. Landfair in controlling Annie, Ms. Smith was injured before she was able to actually render any assistance in controlling Annie.

{¶18} Therefore we conclude that because Ms. Smith was not a spectator of an equine activity, nor was she assisting Mr. Landfair in controlling Annie, Ms. Smith was not an equine activity participant as a matter of law. We sustain Ms. Smith's third assignment of error.

Further, in light of the fact that Ms. Smith is not an equine activity participant, her claim is not barred by the equine immunity statute. See R.C. 2305.321(B)(1).

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THE DEFENDANT FAILED TO EXERCISE ANY CARE WHATSOEVER AND REASONABLE MINDS COULD CONCLUDE SUCH CONDUCT WAS WANTON[.]”

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED IN ITS APPLICATION OF R.C. [2305.321(A)(3)(a) OF THE EQUINE IMMUNITY STATUTE FINDING THAT APPELLEE WAS ‘CONTROLLING’ HIS HORSE AS A MATTER OF LAW[.]”

{¶19} Ms. Smith maintains in her second assignment of error that disputes of fact remain with respect to whether Mr. Landfair’s conduct was wanton. Ms. Smith asserts in her fourth assignment of error that the trial court erred in finding that Mr. Landfair was controlling Annie under that statute.

{¶20} In light of our resolution of Ms. Smith’s third assignment of error, we conclude that her second and fourth assignments of error are rendered moot and we decline to address them. App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN HOLDING THAT THE EQUINE IMMUNITY STATUTE EXTINGUISHED THE COMMON LAW RESCUE DOCTRINE[.]”

{¶21} Ms. Smith asserts in her first assignment that the trial court erred in concluding that R.C. 2305.321 abrogated the rescue doctrine. We note that the trial court specifically held that “the language of the equine immunity statute is broad enough to abrogate the common law rescue doctrine *for those protected under* R.C. 2305.321.” (Emphasis added.) As this Court has determined that Mr. Landfair cannot avail himself of the protections afforded by the equine

immunity statute, the question of whether a plaintiff can assert the rescue doctrine even if the defendant is immune is not properly before us. Accordingly, we decline to address Ms. Smith's first assignment of error.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR LEAVE TO AMEND HER COMPLAINT[.]"

{¶22} Ms. Smith asserts in her fifth assignment of error that the trial court erred in failing to grant her motion to allow her amend her complaint to plead wanton misconduct.

{¶23} We note that despite the trial court's failure to rule on Ms. Smith's motion, the trial court thoroughly discussed wanton misconduct in its entry. Thus, assuming without deciding that it was error for the trial court to fail to grant the motion, we conclude any error was harmless as Ms. Smith received the benefit of the trial court's consideration of her allegations concerning wanton misconduct. See Civ.R. 61. Ms. Smith's fifth assignment of error is therefore overruled.

III.

{¶24} In light of the foregoing, we sustain Ms. Smith's third assignment of error and therefore reverse the trial court's grant of summary judgment to Mr. Landfair. In addition, we overrule Ms. Smith's fifth assignment of error. Ms. Smith's remaining assignments of error are either moot or not properly before us. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.



EVE V. BELFANCE
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JOHN K. RINEHARDT, Attorney at Law, for Appellant.

KENNETH A. CALDERONE, and JOHN R. CHLYSTA, Attorneys at Law, for Appellee.

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
COURT OF APPEALS NINTH JUDICIAL DISTRICT
DANIEL M. HERRIGAN

AUG 25 AM 11:30

ROSHEL SMITH
Appellant

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 25371

v.

DONALD E. LANDFAIR, et al.
Appellees

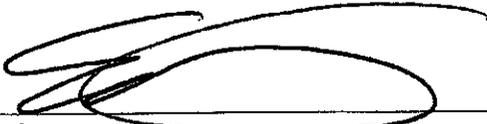
JOURNAL ENTRY

Appellee Mr. Landfair has moved this court to reconsider or clarify our decision and journal entry, which was journalized on June 22, 2011, and which reversed the trial court's summary judgment award to Mr. Landfair. Appellant has not responded to the motion.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117, 127. Mr. Landfair has argued that the decision should be reconsidered or clarified because the decision could be construed as preventing Mr. Landfair from raising statutory immunity as a defense at trial.

The court finds that the motion for reconsideration in this case neither calls attention to an obvious error nor raises an issue that we did not consider properly. Essentially, Mr. Landfair seeks advice from the Court on how our decision should be applied. Such is not a proper basis for reconsideration. Further, the Appellate Rules do not provide for a motion for clarification. This Court is neither authorized to give legal advice nor to render advisory

opinions. The request for clarification is denied. Accordingly, the motion for reconsideration or clarification is denied.



Judge

Concur:
MOORE, J.
DICKINSON, P. J.

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
COURT OF APPEALS NINTH JUDICIAL DISTRICT
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ROSHEL SMITH
Appellant

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 25371

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JOURNAL ENTRY

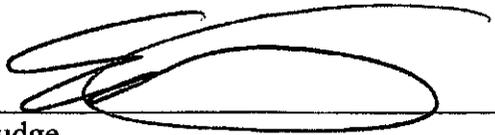
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Exhibit C

opinions. The request for clarification is denied. Accordingly, the motion for reconsideration or clarification is denied.


A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke, positioned above a horizontal line.

Judge

Concur:
MOORE, J.
DICKINSON, P. J.