

ORIGINAL

IN THE SUPREME COURT FOR THE STATE OF OHIO

Roshel Smith	:	
	:	Supreme Court Case No. 2011-1708
Plaintiff-Appellee	:	
	:	
-vs-	:	Appeal from the Ninth District
	:	Court of Appeals Case No. CA 25371
Donald Landfair	:	
	:	
Defendant-Appellant.	:	

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APPELLEE'S MEMORANDUM IN OPPOSITION TO APPELLANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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## MEMORANDUM IN OPPOSITION TO JURISDICTION

### DEFENDANT-APPELLANT HAS FAILED TO DEMONSTRATE PUBLIC OR GREAT GENERAL INTEREST

Appellant's statement of great public interest could more accurately be described as his "ode to the equine." Appellant places great emphasis on the prevalence of horses in this state. More importantly, according to Appellant, is the economic clout of the horse industry. Appellant spins a tale of opening the flood gates of litigation if certiorari is denied. However, the Appellant's grandiose rhetoric fails to match the factual record of the case at bar. Examination of the record demonstrates that the holding of the Court of Appeals is strictly limited to its facts.

Tellingly an accurate description of what actually happened in this case is glaringly omitted from Appellant's brief. Simply stated, the facts are as follows: At the time of the incident, Appellant was engaged in a solo attempt to unload a two year-old untrained horse out of his stock trailer. Appellant had stubbornly chosen not to seek any assistance in his attempt at unloading the horse. Appellant began his attempt at unloading the horse despite the fact that an Amish buckboard wagon with a team of horses could be seen in plain view approaching his trailer. Predictably, the young horse became agitated by the noise from the steel wheels of the approaching wagon, which Appellant described as "grinding like thunder." In its agitated state, the horse bolted from the trailer knocking Appellant out of the trailer and onto the ground. Because Appellant still had hold of the lunge line, the spooked horse was right above him. Lying at the feet of the spooked horse, Appellant admits he was in imminent risk of suffering severe injury or death.

It was at this moment that the then twenty-four year old Appellee, Roshel Smith, entered the picture. Ms. Smith had stopped by the fairgrounds on her way to an appointment. She was standing a considerable distance away from Appellant waiting for her father to arrive back at the

fairground's barn. Upon hearing commotion to her left, Ms. Smith turned her head and saw the Appellant lying on the ground covering his head at the feet of the spooked horse. Acting with great courage, this young lady immediately responded to the emergency situation. As Ms. Smith ran to the rescue of Appellant, it was she who was severely injured by the flying hooves of the spooked animal.

Appellant's statement of public or great general interest fails to mention that the Appellant recklessly put himself in a position of needing to be rescued. At its heart, Appellant's appeal for certiorari ignobly attempts to use the equine immunity law to convert Ms. Smith from hero to uncompensated victim.

R.C. §2305.321 provides:

“(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.”

Thus, Plaintiff-Appellee is barred from recovery only if she was a participant in an equine activity at the time of injury.

“Equine activity participant” is defined at R.C. §2305.321(A)(3) to include a person who is “controlling in any manner an equine”, “assisting a person” who is engaged in an equine activity; and “being a spectator at an equine activity.” The statute does not provide a definition of the word “spectator.”

The Court of Appeals merely determined that the legislature, in using the word “spectator,” intended that word to have its ordinary meaning. In so holding, the Court of Appeals acknowledged that the legislature envisioned that a “spectator” may be a person who is viewing any equine activity including the normal daily care of a horse. However, distinguishing

the facts of this case from those in *Allison v. Johnson* (June 2, 2001), 11<sup>th</sup> Dist. No. 2000-T-0116, the Court of Appeals held that the common and ordinary meaning of the word “spectator” should not be interpreted so that any individual who glances at a horse becomes a spectator of an equine activity. The Court of Appeals simply held that under the facts presented herein, Appellee Ms. Smith was not a “spectator” to Appellant’s putting himself in a position where he found himself at the feet of a spooked horse. The Court of Appeals correctly cites to the caveat to the *Allison* opinion that there must be some limits placed on the meaning of the word “spectator”:

“The mandate of 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 as a result of a force in motion caused by such equine.”<sup>1</sup>

Unlike the appellant in *Allison*, Appellee Ms. Smith was not watching Appellant. She was watching her father and waiting for him to come off the track. It was only when Appellant put himself in harm’s way that Ms. Smith turned to see what was happening and attempted to rescue him. The Court of Appeals concluded that, as a matter of law, Ms. Smith was not a “spectator” as the term is used in R.C. §2305.321. Clearly, the Court of Appeals’ decision herein is narrowly tailored and limited to its facts.

In his effort to obtain this Court’s review, Appellant trots out the boogeymen of “a cascade of litigation” and “a rise in insurance premiums.” Appellant’s claim that the Court of Appeals’ decision will “undermine the statute and the industry it protects” is melodramatic and preposterous. The simple truth is that the statute is, and will remain, a broad sweeping immunity to shield people involved in the equine industry. However, the breadth of the immunity is not without reasonable limits as in giving the word “spectator” its ordinary meaning.

Accordingly, there is no basis for this Court to accept jurisdiction.

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<sup>1</sup> *Allison* at \*7

## **STATEMENT OF THE CASE**

Plaintiff Roshel Smith initiated the within action by filing her Complaint setting forth a claim of negligence against Defendant Donald Landfair. In her Complaint, Ms. Smith sought recovery of damages for bodily injuries suffered when she attempted to rescue Mr. Landfair when he negligently or wantonly placed himself in a situation where he was at serious risk of suffering severe injury or death.

Defendant Landfair filed a Motion for Summary Judgment, arguing that Ms. Smith's claims were barred by the equine immunity statute, R.C. §2305.321. Ms. Smith filed her Memorandum in Opposition and supporting evidentiary materials.

The trial court granted Defendant's Motion for Summary Judgment, dismissing Plaintiff's Complaint and entering judgment in favor of Mr. Landfair.

Plaintiff-Appellant Roshel Smith appealed from the trial court's grant of summary judgment to Defendant-Appellee Landfair.

The Ninth District Court of Appeals reversed holding that, under the word's common and ordinary meaning, Ms. Smith was not a "spectator" as a matter of law. Defendant moved the court to reconsider or clarify its holding. The Court of Appeals denied Defendant's motion.

## **SUMMARY OF FACTS IN EVIDENCE**

At the time of this incident, Appellant Mr. Landfair was the owner of a two-year-old horse. In February 2007, Appellant brought his horse to Mr. Ernie Smith's CJS stable for Mr. Smith to train.<sup>2</sup> The barn housing CJS stables was located adjacent to a roadway at the Wayne County fairgrounds. The blacktopped area surrounding the CJS stables and the adjacent roadway

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<sup>2</sup> Roshel Smith depo. at p. 17

are areas open to the general public.<sup>3</sup> The roadway travels along the outside of the fairgrounds' track.<sup>4</sup> Numerous members of the public utilize the roadway for walking, jogging and bicycling, as well as vehicular traffic and horse drawn wagons.<sup>5</sup> In addition, this area is frequented by delivery drivers such as those from UPS and Fed-Ex.<sup>6</sup>

Prior to March 28, 2007, Appellant's horse was unbroken to a harness, untrained, and had little experience being transported on a trailer.<sup>7</sup> At two years old, the horse was nearly full-grown at approximately 15 hands in size or 60 inches at her withers and she weighed approximately 750-800 pounds.<sup>8</sup>

From the time that the horse was delivered to CJS stables in February 2007 through March 28, 2007, Mr. Smith had daily contact with the horse.<sup>9</sup> Mr. Smith found the horse to be skittish and to behave in a manner completely consistent with an unbroken horse of that age.<sup>10</sup>

In March 2007, Appellant and Mr. Smith discussed the prospect of having the horse shod to prepare her for the training phase. Due to the minimal training the horse had received, and her flighty nature, Mr. Smith advised Appellant that it would be unwise and against Mr. Smith's judgment to remove her from the stable.<sup>11</sup> Further, Mr. Smith specifically told Appellant that Mr. Smith's regular blacksmith who comes to the stable could easily shoe the horse right in the stable.<sup>12</sup>

However, without contacting Mr. Smith and without Mr. Smith's knowledge, on the

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<sup>3</sup> Affidavit of Ernie Smith

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Donald Landfair depo. at p. 17, Roshel Smith depo. at p. 21, Affidavit of Ernie Smith

<sup>8</sup> Affidavit of Ernie Smith

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

morning of March 28, 2007, Appellant, against all caution, loaded the horse onto his stock trailer and took her off the premises to a blacksmith.<sup>13</sup>

On Appellant's return from the blacksmith, Appellee Roshel Smith was in the area.<sup>14</sup> She and her fiancé had stopped by the stable to get some advice from Ms. Smith's father, Mr. Ernie Smith.<sup>15</sup> Ms. Smith was waiting at the barn door watching for her father to return from the track.<sup>16</sup>

As Ms. Smith waited for her father, the Appellant arrived with his stock truck and trailer. Appellant parked his trailer on the blacktop such that there was very little distance between his trailer and the roadway that passes parallel.<sup>17</sup> Thus, any vehicle or horse trailer would by necessity have to pass within a few feet of the Appellant's stock trailer containing the young horse.

When Appellant arrived at the stable, he unloaded another of his horses from the trailer.<sup>18</sup> Appellant then proceeded to attempt to unload his two year-old horse without seeking anyone to assist him.<sup>19</sup>

As Appellant prepared to unload the horse, an Amish buckboard wagon with a team of horses was approaching on the roadway.<sup>20</sup> The horse wagon was moving slowly toward where Appellant's trailer was parked.<sup>21</sup> The wagon and team of horses created considerable noise; Appellant stated that the wheels of the wagon were "grinding like thunder."<sup>22</sup> Because of where

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<sup>13</sup> Affidavit of Ernie Smith; Donald Landfair depo. at pp. 4, 32

<sup>14</sup> Roshel Smith depo. at p. 32

<sup>15</sup> *Id.* at pp. 32, 59-60

<sup>16</sup> *Id.* at p. 32

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Affidavit of Ernie Smith

<sup>21</sup> *Id.*

<sup>22</sup> Donald Landfair depo. at p. 31

Appellant had parked his stock trailer, the wagon would have to pass within not more than two or three feet of the truck and trailer.<sup>23</sup> The sight distance from where Appellant was parked was at least eight hundred feet, thus giving him a clear view to see the oncoming wagon if he had bothered to look.<sup>24</sup>

Although the wagon was in plain view, Appellant claims that he did not see or hear the wagon because, in his words, "I don't have time to stop and look around every place I'm going."<sup>25</sup>

As he attempted to lead the horse out of the trailer, the horse was spooked by the sound of the metal wheels of the Amish wagon.<sup>26</sup> The spooked horse rammed Appellant, knocking him out of the door of the trailer, off the step, and onto the ground.

With Appellant lying on the ground with his hands covering his head and the spooked horse stamping around, he was at risk of suffering severe injury or death.

Standing nearby, Appellee Roshel Smith's attention was drawn by the noise and she looked over and saw Appellant lying on the ground covering his head with the horse above him.<sup>27</sup> The horse was prancing about and thus, the position of the horse was changing second by second. Ms. Smith immediately rushed to try to rescue Appellant.<sup>28</sup> As she went to Appellant's rescue, Ms. Smith was kicked in the left side of her face knocking her to the ground and rendering her momentarily unconscious. Ms. Smith sustained severe injury to her face and jaw.

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<sup>23</sup> Affidavit of Ernie Smith

<sup>24</sup> *Id.*

<sup>25</sup> Donald Landfair depo. at p. 47

<sup>26</sup> *Id.* at p. 22

<sup>27</sup> Roshel Smith depo. at pp. 36-37

<sup>28</sup> *Id.* at pp. 39, 40

## **APPELLANT'S PROPOSITIONS OF LAW DO NOT SUPPORT JURISDICTION IN THIS COURT**

### **As To Appellant's Propositions Of Law No. 1 and No. 2: The Issue of Whether Mr. Landfair was an Equine Activity Participant or Other Person is Moot**

The Court of Appeals held that because Ms. Smith was not an equine activity participant as a matter of law, the issue of whether Mr. Landfair was "controlling" his horse under the statute was rendered moot. Appellee did not address the issue in the Court of Appeals of whether Mr. Landfair fell under the "other person" category and the Court of Appeals did not address it. In any event, Appellee does not dispute that Appellant Mr. Landfair would qualify either as an "equine activity participant" or "other person" under the statute.

However, R.C. §2305.321 and the immunity provided by it is only applicable if *both* Ms. Smith *and* Mr. Landfair were equine activity participants at the time of her injury. R.C. §2305.321 provides:

"...an equine activity participant...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."

Because Appellee Ms. Smith was not an equine activity participant, the issue of whether Appellant was an "equine activity participant" or "other person" under the statute is of no import.

### **As To Appellant's Proposition Of Law No. 3: Ms. Smith was not "Assisting" Mr. Landfair to Control his Horse**

R.C. §2305.321 defines "equine activity participant" as follows:

"(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;

- (b) Being a passenger upon an equine;
- (c) Providing medical treatment to an equine;
- (d) Conducting procedures or assisting in conducting procedures necessary to breed an equine by means of artificial insemination or otherwise;
- (e) Assisting a person who is engaged in an activity described in division (A)(3)(a), (b), (c), or (d) of this section;
- (f) Sponsoring an equine activity;
- (g) Being a spectator at an equine activity.”

The trial court held that Ms. Smith was not “assisting” Appellant in an equine activity at the time of the incident under the meaning of the statute. On appeal, Ms. Smith did not assign error to this part of the trial court’s judgment. However, Appellant raised the issue in his brief to the Court of Appeals. The Court of Appeals agreed with the trial court’s conclusion that Ms. Smith was not an equine activity participant by means of “assisting” Mr. Landfair in controlling his horse. The Court of Appeals held that although Ms. Smith was trying to help Mr. Landfair, she was not trying to assist him in gaining control of the horse. The Court of Appeals further held that Ms. Smith was injured before she could render any kind of help or assistance to Mr. Landfair.<sup>29</sup>

Appellant claims that Ms. Smith admitted that she was “assisting” him at the time of her injury. The basis of such claim is that at Ms. Smith’s deposition, in an obvious attempt to wordsmith, counsel for Appellant asked Ms. Smith if she was trying to “assist” Mr. Landfair at the time she was injured. Ms. Smith of course answered in the affirmative in that she was trying to rescue or help Mr. Landfair, who was lying on the ground covering his head, from being trampled by his out of control horse. Certainly, the general assembly did not contemplate that “assisting” is equivalent to “rescuing” in drafting R.C. §2305.32 as is disingenuously suggested by Appellant.

Ms. Smith testified that she believed Mr. Landfair’s life was in danger, and she ran over

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<sup>29</sup> Court of Appeals Decision and Journal Entry dated June 22, 2011 at ¶17

to try to get him out of harm's way. Clearly, Ms. Smith did not become Mr. Landfair's "assistant" by virtue of her attempt to rescue him.

**As To Appellant's Proposition Of Law No. 4: Ms. Smith was not a "Spectator"**

The Court of Appeals held that Ms. Smith was not a spectator under the ordinary meaning of the word. Contrary to the facts in *Allison*, Ms. Smith was not watching Mr. Landfair unload his horse. In *Allison*, the court of appeals focused on the fact that the plaintiff therein was actually watching the defendant lead his horse whereas in the case at bar, Ms. Smith was watching and waiting for her father, and noticed Mr. Landfair only out of her peripheral vision when he fell to the ground.

The Court of Appeals held that because "spectator" was not defined by the legislature, it must be given its common and ordinary meaning.<sup>30</sup> The Court of Appeals cited to The American Heritage Dictionary of the English Language (1981) 1241, which defines spectator as "[o]ne who attends and views a show, sports event or the like." The Court of Appeals further acknowledged that the *Allison* court found that common dictionary definitions included "one that looks on or beholds;\*\*\*one witnessing an exhibition[;and]\*\*\*a person who watched without participating."

The Court of Appeals found that the legislature's intent was that a spectator included not only a person who is viewing an event or exhibition, such as a horse show, but also a person who is watching any equine activity including the trailering of a horse or the normal daily care of a horse. Nonetheless, the court held that 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."<sup>31</sup> The Court of Appeals held that

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<sup>30</sup> Court of Appeals Decision and Journal Entry dated June 22, 2011 at ¶14 citing *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089 at ¶15

<sup>31</sup> *Id.* at ¶15

such application of the word would distort its common and ordinary meaning and would require that any person, even a mail carrier who happens to momentarily glance at a horse, is deemed a spectator.

Appellant Landfair contends that Ms. Smith was a spectator because when she heard the commotion she turned and witnessed Appellant lying on the ground in imminent danger of being trampled and she voluntarily ran towards him to help. This contention ignores that danger invites rescue. Appellant admits that he would have gone to the rescue of someone he saw in the same position as he was in.

Realizing that it is impossible to conceive of every scenario involving the statute, the *Allison* court extended the following caveat with respect to the immunity set forth in its 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.”<sup>32</sup>

The facts at bar are distinguishable from those in *Allison* and clearly fall within the foregoing caveat. In this case, Mr. Landfair brought his trailer and horse to Ms. Smith. In *Allison*, the plaintiff went to the defendant and the horse rather than staying in the car. Here, Roshel Smith “happened” to be there, and exercised no volition in being in proximity to Appellant’s horse unlike the plaintiff in *Allison*.

Appellant acknowledges that Ms. Smith was not present at the stable on the date of the incident for the purpose of being an equine activity participant.<sup>33</sup> However, Appellant alleges that by choosing to be in the “horse business” that she subjected herself to the immunity statute.

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<sup>32</sup> *Allison* at \*20-21 (Emphasis added).

<sup>33</sup> Trial Court Order and opinion A-1 at p. 10

The fact that Ms. Smith worked with horses and had been at the stable before is not relevant to the inquiry of whether she was a “spectator” within the confines of the statute as to this incident.

**As To Appellant’s Proposition Of Law No. 5: The Issue of whether the Rescue Doctrine is Abrogated by R.C. 2305.321 is Moot**

The trial court held that the language of the R.C. 2305.321 is broad enough to abrogate the common law rescue doctrine for those protected under it. The Court of Appeals declined to address the issue holding that because Mr. Landfair cannot avail himself of the protections afforded by the equine immunity statute, the rescue doctrine issue was not properly before it.

As the issue was not considered by the Court of Appeals, the issue is not ripe for consideration here. As Ms. Smith was not an equine activity participant, *i.e.* not a spectator, at the time of the incident, the equine immunity statute does not apply and this case should be decided under common law principles of negligence, including the rescue doctrine.

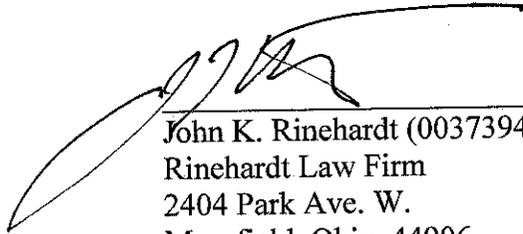
**As To Appellant’s Proposition Of Law No. 6: The Issue of whether Mr. Landfair’s Conduct was Wanton is Moot**

The Court of Appeals held that whether reasonable minds could conclude that Mr. Landfair failed to exercise any care whatsoever such that his conduct at the time of the incident was wanton was rendered moot by the fact that Ms. Smith was not an equine activity participant. Thus, the issue is not properly considered here.

**CONCLUSION**

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court deny jurisdiction as Defendant-Appellant has failed to demonstrate that this case involves a matter of public or great general interest.

Respectfully submitted,



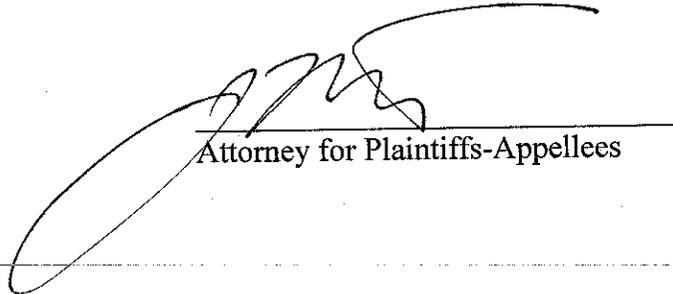
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