

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROSHEL SMITH, : Supreme Court Case No. 2011-1708

Plaintiff-Appellee, : Appeal from Summit County Court of Appeals, Ninth District

v. :

DONALD E. LANDBAIR, : Court of Appeals

: Case No. CA 25371

:

Defendant-Appellant.

BRIEF OF AMICUS CURIAE OHIO HORSEMAN'S COUNCIL IN SUPPORT OF APPELLANT DONALD E. LANDBAIR

Thomas M. Green, Esq. (#0016361)
 Green & Green, Lawyers
 800 Performance Place
 109 North Main Street
 Dayton, Ohio 45402
 Tel. 937.224.3333
 Fax 937.224.4311
tmgreen@green-law.com
 COUNSEL FOR AMICUS CURIAE OHIO HORSEMAN'S COUNCIL

John K. Rinehardt (#0037394)
 The John K. Rinehardt Law Firm
 2404 Park Avenue West
 Mansfield, Ohio 44906
 Tel. 419.529.2020
jkr@lawfirm2020.com
 COUNSEL FOR APPELLEE ROSHEL SMITH

Kenneth A. Calderone, Esq. (#0046860)
 Hanna, Campbell, & Powell, LLP
 P.O. Box 5521
 3737 Embassy Parkway
 Akron, OH 44334
 Tel. 330.670.7324
 Fax 330.670.7440
Kcalderone@hcplaw.net
 COUNSEL FOR APPELLANT DONALD E. LANDBAIR

FILED
 MAR 14 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 MAR 14 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

G R E E N
 G R E E N
 L A W Y E R S

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii, iii
STATEMENT OF AMICUS INTEREST	1
STATEMENT OF FACTS	2
LAW & ARGUMENT	2
A. Standard of Review	2
B. A person is a “spectator” and thus an “equine activity participant” under R.C. § 2305.321(A)(3) if the person is a bystander or observer at an equine activity	3
1. <i>Smith was a “Spectator” of an “Equine Activity” and thus an “Equine Activity Participant”</i>	<i>3</i>
i. The Court of Appeals Impermissibly Narrowed the Scope of the Statute	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Cases

Allison v. Johnson, 11th Dist. No. 2000-T-0116, 2001 Ohio App. LEXIS 2485 3, 5

Barnhart v. Peabody Coal Co. (2003), 537 U.S. 149 6

Celotex Corp. v. Catrett (1986), 477 U.S. 217 2

Dresher v. Burt (1996), 75 Ohio St.3d 280 2

Grafton v. Ohio Edison Co. (1996), 77 Ohio St. 102 2

Lawson v. Dutch Heritage Farms, Inc., 502 F. Supp. 2d 698 (N.D. Ohio 2007) 5

Moore Pers. Serv., Inc. v. Zaino, 98 Ohio St. 3d 337, 2003-Ohio-1089 3

Smith v. Landfair, 9th Dist. App. No. 25371, 2011-Ohio-3043 6

Statutes

R.C. § 2305.321 1, 5

R.C. § 2305.321(A)(3)(g) 1

R.C. § 2305.321(A)(3) 1, 4

Civ. R. 56 (C) 2

R.C. § 2305.321(A)(2)(a)(i-ix) 3, 6

R.C. § 2305.321 (A)(2) 4

R.C. § 2305.321 (A)(7) 4

R.C. § 2305.321 (B)(1) 5

Ala. Code § 6-5-337 (2011)	8
Ark. Code Ann. § 16-120-201	8
Colo. Rev. Stat. Ann. § 13-21-119 (2011)	8
DE Code Ann. § 8140 (2011)	8
Fla Stat. § 773.01 (2011)	8
Idaho Code Ann. § 6-1801 (2011)	8
745 Ill. Comp. Stat. § 47/10 (2011)	8
Iowa Code Ann. § 673.2 (2011)	8

Other Authority

Webster’s Third New International Dictionary (1986), 2188	4
Katherine C. Bloomquist, <i>Equine Activity Statutes</i> , 2005 ABA Tort Section Annual Meeting, Aug. 8, 2005	7

Ohio Horseman's Council, Inc., as amicus curiae on behalf of Defendant-Appellant Donald Landfair, urges reversal of the decision of the Summit County Court of Appeals, Ninth Appellate District, denying Landfair the benefit of immunity under R.C. § 2305.321, Ohio's Equine Activity Immunity Statute. The term "spectator" should be broadly defined under R.C. § 2305.321(A)(3)(g) to include any person viewing an equine activity. Because Plaintiff-Appellee Roshel Smith viewed Landfair untrailerling his horse, she was a "spectator" of an equine activity, and thus, an equine activity participant under R.C. 2305.321(A)(3). Accordingly, the plain language of the statute requires that this Court find that Landfair is entitled to immunity as a matter of law as to all of Smith's claims.

STATEMENT OF AMICUS INTEREST

The Ohio Horseman's Council is a non-profit corporation organized in the state of Ohio to provide a vehicle for equine owners and supporters to share ideas and suggestions for all horse related issues, through education, organized trail rides, and other social and service functions. It provides resources to promote the building and maintenance of bridle trails throughout the state of Ohio and provides financial resources and volunteer services to fellow organizations that support equine related activities. It has a vested interest in a broad interpretation of Ohio's Equine Activity Liability Act.

STATEMENT OF FACTS

Ohio Horseman's Council incorporates herein the statement of the case and facts as set forth in Donald Landfair's merits brief.

LAW & ARGUMENT

A. Standard of Review

This Court reviews a denial of summary judgment *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St. 102, 105. Summary judgment is appropriate where the pleadings and evidence show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ. R. 56 (C). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex Corp. v. Catrett* (1986), 477 U.S. 217, 322. The party opposing the motion cannot rest on its pleadings or reassert its previous allegations, but must present some type of evidence in support of its position. *Id.* at 324; *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Where reasonable minds can reach only one conclusion regarding an essential element, and that conclusion is against the nonmoving party, summary judgment shall be granted. Civ. R. 56 (C).

B. A person is a “spectator” and thus an “equine activity participant” under R.C. § 2305.321(A)(3) if the person is a bystander or observer at an equine activity.

The Ohio General Assembly enacted Rev. Code § 2305.321 to “declare that certain named equine persons as well as any ‘other person [are] 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.’” *Allison v. Johnson*, 11th Dist. No. 2000-T-0116, 2001 Ohio App. LEXIS 2485, *9-10. The legislature provided an express list of what constituted an equine activity, including the “[t]he trailering, loading, unloading, or transporting of an equine.” R.C. § 2305.321(A)(2)(a)(i-ix). It also expressly defined who qualified as an equine activity participant, including “a spectator at an equine activity.” *Id.* at (A)(3)(a-g). This case presents the issue of whether a bystander who views an equine activity is a “spectator” under the statute. If so, the “spectator” is an equine activity participant and cannot hold another liable for damages resulting from an inherent risk of equine activity.

1. *Smith was a “Spectator” of an “Equine Activity” and thus an “Equine Activity Participant”*

As the Court of Appeals correctly pointed out, the term “spectator” is not defined 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 Pers. Serv., Inc. v. Zaino*, 98 Ohio St. 3d 337, 2003-Ohio-1089, ¶ 15. The common ordinary meaning of the

term spectator is "one who looks on or beholds...one witnessing an exhibition." Webster's Third New International Dictionary (1986), 2188.

R.C. § 2305.321 (A)(2) broadly defines what constitutes an equine activity, including:

- (iii) ...normal daily care of an equine;
- (iv) The *trailer*ing, *loading*, *unloading*, or transporting of an equine[.] (emphasis added).

R.C. § 2305.321 (A)(3) provides that an "equine activity participant" is "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...(g) *being a spectator at an equine activity.*" (emphasis added).

R.C. § 2305.321 (A)(7) states that "inherent risk of 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...;
- (b) The unpredictability of an equine's reactions to sounds, sudden movement, unfamiliar objects, persons or other animals;
- (e) The potential of an equine activity participant to act in a negligent manner....

This case hinges on whether Landfair is entitled to immunity because Smith was a spectator of an equine activity, and thus, an equine activity participant. In *Allison v.*

Johnson, Allison was watching Johnson move a horse when the horse backed into a gate near Allison. *Allison* at *2. Consequently, a board attached to the gate popped out and struck Allison in the face. *Id.* Allison filed suit and Johnson defended on the grounds that he was immune from liability under Rev. Code § 2305.321. *Id.* at *3.

The issue on appeal was whether Allison qualified as a “spectator” of equine activity. *Id.* at *12. In finding that Johnson was immune from liability because Allison was a spectator, the Eleventh District explained that the law was intended to provide broad protection. *Id.* at *13. *See also Lawson v. Dutch Heritage Farms, Inc.*, 502 F. Supp. 2d 698, 706 (N.D. Ohio 2007). The court determined that Allison was a spectator because there was no question Johnson was engaged in an equine activity, and Allison’s injury occurred witnessing it. *Id.* at *14 & *16.

Here, it is undisputed Smith was experienced with horses and was familiar with Landfair’s horse, Green Acre Annie. Deposition of Roshel Smith, at pgs. 7-8; 12. She was standing at a nearby barn door when Annie “spooked” as Landfair was untrailer her. Deposition of Donald Landfair, at pgs. 17 & 19. She *saw* this happen and she ran to help him. *Id.* at pgs. 35-37; 45-46.

Pursuant to the statute, Landfair’s unloading Annie from the trailer is clearly an equine activity. Further, because Smith witnessed Landfair unloading Annie, she was a spectator of equine activity. Thus, Landfair is immune from liability. R.C. § 2305.321 (B)(1).

i. **The Court of Appeals Impermissibly Narrowed the Scope of the Statute**

In finding that Smith was not an equine activity participant, the Ninth District Court of Appeals reasoned:

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 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. *Smith v. Landfair*, 9th Dist. App. No. 25371, 2011-Ohio-3043, ¶15.

The Court of Appeals’ concern over the scope of the law is misguided. R.C. § 2305.321(A)(2)(a)(i-ix) specifically sets out what constitutes an equine activity. When a legislature defines a term with a list, the statutory canon of *expressio unius est exclusio alterius* applies and any activities not enumerated are not included. *Barnhart v. Peabody Coal Co.* (2003), 537 U.S. 149, 168. Merely glancing at a horse standing in an open field would not render a person a spectator of equine activity.¹ R.C. § 2305.321(A)(2)(a)(i-ix).

In this case, the Court of Appeals determined Smith was not a spectator because she only saw Landfair unloading Annie through her peripheral vision. Such an interpretation

¹ Smith was not unaware of the risks associated with being around horses. Smith Depo., pgs. 46-47. She had worked around horses for years, and was the barn manager at her father’s horse stables. *Id.* at pgs. 7 & 12.

improperly narrows the plain meaning of the term “spectator.” First, if a person notices an event occurring out of their peripheral vision, then one could hardly say that person is not “witnessing” the event. Smith was able to describe in detail exactly what happened when Annie spooked. The Court of Appeals’ definition will lead to a cascade of litigation with parties haggling over when a spectator actually “sees” an equine activity. Such an interpretation encourages willful blindness and will create needless arguing over the meaning of an otherwise clear word.

Although the Court of Appeals attempted to distinguish *Allison*, the courts’ determinations of who qualifies as a spectator of equine activity are directly in conflict. The only difference between the two factual scenarios is that the plaintiff in *Allison* admitted to watching the defendant move the horse, while the plaintiff in *Smith* stated she only saw the defendant moving the horse in her peripheral vision. Compare *Allison* at *16 with *Smith* at ¶16. It is hard to figure the legislature contemplated such a fine distinction, or that sound public policy would warrant such a fine distinction.

Finally, the legislature’s intent to increase the breadth of immunity is evidenced by its inclusion of spectators of equine activity as equine activity participants. Most states with similar laws exclude spectators from the list of people who qualify as equine activity participants. See Katherine C. Bloomquist, *Equine Activity Statutes*, 2005 ABA Tort Section

Annual Meeting, Aug. 8, 2005.² See also Ala. Code § 6-5-337 (2011); Ark Code Ann. § 16-120-201; Colo. Rev. Stat. Ann. § 13-21-119 (2011) (expressly excluding spectators from those engaged in equine activity except when the spectator is in an unauthorized area); DE Code Ann. § 8140 (2011); Fla Stat. § 773.01 (2011); Idaho Code Ann. § 6-1801 (2011); 745 Ill. Comp. Stat. § 47/10 (2011); *But see* Iowa Code Ann. § 673.2 (2011) (expressly including spectators). Ohio's inclusion of spectators is "significant given that generally only participants, and not spectators, may be deemed to have assumed the inherent risks of equine related activities." See Bloomquist, *supra*.

CONCLUSION

In ruling that Smith was not an equine activity participant, the Court of Appeals acted contrary to the express language of the statute and intent of the legislature. The ruling of the Court of Appeals threatens to deny thousands of Ohio horse owners, professionals, and sponsors, the protection of statutory immunity from injuries incurred by "spectators" of equine activities. This conclusion is patently at odds with the express meaning and purpose of the law and warrants reversal by this Court.

²http://bloomquistlaw.com/articles/index.php?strWebAction=article_detail&intArticleID=618.

Respectfully submitted,



THOMAS M. GREEN (#0016361)

Green & Green, Lawyers

800 Performance Place

109 North Main Street

Dayton, Ohio 45402-1290

Tel. 937.224.3333

Fax 937.224.4311

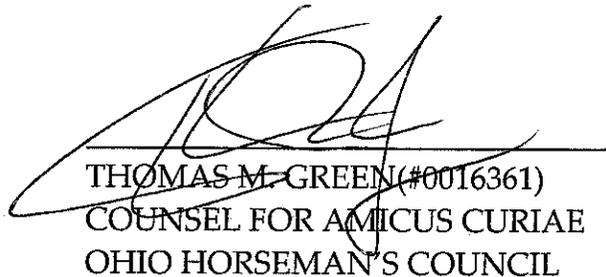
Email: tmgreen@green-law.com

Counsel for Amicus Curiae Ohio

Horseman's Council

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum was sent by ordinary U.S. mail to counsel for Appellant Kenneth A. Calderone, Esquire, Hanna Campbell & Powell, LLP, Post Office Box 5521, 3737 Embassy Parkway, Akron, Ohio 43434, and counsel for Appellee John K. Rinehardt, Esquire, The John K. Rinehardt Law Firm, 2404 Park Avenue West, Mansfield, Ohio 44906, on this 13th day of March, 2012.



THOMAS M. GREEN (#0016361)
COUNSEL FOR AMICUS CURIAE
OHIO HORSEMAN'S COUNCIL