

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROSHEL SMITH)	CASE NO. 2011-1708
)	
Plaintiff-Appellee)	
)	
vs.)	On appeal from the Summit County Court
)	of Appeals, Ninth Judicial District, Case
DONALD E. LANDFAIR,)	No. CA-25371
)	
Defendants-Appellant)	

MERIT BRIEF OF APPELLANT, DONALD LANDFAIR

Kenneth A. Calderone (0046860) (Counsel of record)
 John R. Chlysta (0059313)
 Hanna, Campbell & Powell, LLP
 3737 Embassy Parkway
 PO Box 5521
 Akron, OH 44334
 Ofc.: (330) 670-7300
 Fax: (330) 670-0977
 kcalderone@hcplaw.net
 jchlysta@hcplaw.net

John K. Rinehardt (0037394)
 THE JOHN K. RINEHARDT LAW FIRM
 2404 Park Avenue West
 Mansfield, OH 44906
 Phone: (419) 529-2020
 Fax: (419) 529-2717
 E-Mail: jkr@lawfirm2020.com

Attorney for Plaintiff-Appellee, Roshel Smith

Attorneys for Defendant-Appellant, Donald Landfair

Thomas M. Green (0016361)
 Green & Green, Lawyers
 800 Performance Place
 109 North Main Street
 Dayton, OH 45402

RECEIVED
 APR 09 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 APR 09 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

Ofc: 937-224-3333

Fax: 937-224-4311

tmgreen@green-law.com

Attorney for Amicus Curiae Ohio Horseman's
Council

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF THE CASE</u>	1
<u>LAW AND ARGUMENT</u>	8
<u>Proposition of Law</u>	8
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.	8
A. Standard of review	8
B. Applying Ohio’s equine-immunity statute	8
C. The court of appeals erred to the extent that it may have denied immunity to Landfair as a matter of law. At the very least, Landfair should be able to present facts and arguments to support his immunity defense at trial.	16
<u>CONCLUSION</u>	18
<u>CERTIFICATE OF SERVICE</u>	19
 APPENDIX	
Supreme Court Notice of Appeal	1-2
Trial Court Ruling, March 30, 2010	3-19
Court of Appeals Decision and Journal Entry	20-30
Court of Appeals ruling on motion for reconsideration	31-32
R.C. 2305.321	33-37

TABLE OF AUTHORITIES

Cases

Allison v. Johnson, 2001 Ohio App. LEXIS 2485 (11th Dist.) 9, 10

Lawson v. Dutch Heritage Farms, Inc. (N.D. Ohio 2007), 502 F. Supp.2d 698, 700..... 9, 10, 15, 16

Smith v. Landfair, 194 Ohio App.3d 468, 2011-Ohio-3043, ¶16. (Appx. 27)..... 1, 4, 5, 10, 15

Smith v. McBride, 130 Ohio St.3d 51, 2011-Ohio-4674..... 8

Statutes

R.C. 2305.321 1, 2, 8, 9, 10, 12

Other Authorities

Comment, *Walking Through the New Jersey Equine Activity Statute*, 12 Seton Hall J. Sport L.
65, 68 (2002)..... 9

STATEMENT OF FACTS

A. Procedural Posture

Plaintiff, Roshel Smith, who was employed at her father's horse stables, was kicked and injured when she voluntarily approached Donald Landfair's spooked horse. Smith sued Landfair in the Summit County Court of Common Pleas, alleging that Landfair negligently handled his horse.

Ohio law grants immunity from claims arising from a horse's often unpredictable conduct. Mr. Landfair thus moved for summary judgment under Ohio's equine-immunity statute, R.C. 2305.321. After briefing, the trial court entertained oral arguments and then granted summary judgment in Landfair's favor, holding that Landfair was immune under R.C. 2305.321. The court opined that imposing liability on Landfair would "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." (March 30, 2010 order, p. 8) (Appx. 10).

Plaintiff appealed to the Ninth District Court of Appeals. On June 22, 2011, that court reversed the trial court and remanded the case for further proceedings. (*Smith v. Landfair*, 194 Ohio App.3d 468, 2011-Ohio-3043; Appx. 20). The appellate court held that immunity didn't apply because Plaintiff was not an "equine activity participant" under the immunity statute. Specifically, Plaintiff wasn't a "spectator" under R.C. 2305.321(A)(3)(g,) nor was she "assisting" Mr. Landfair under R.C. 2305.321(A)(3)(e). (Appx. 27).

Landfair moved the court of appeals to reconsider its ruling because the court, in reversing summary judgment, included language in its opinion that could be construed as denying immunity as a matter of law. Since the case was only at the summary-judgment stage, the appellate court should have left open the possibility that a full factual record at trial could

still entitle Landfair to immunity. The court of appeals denied Landfair's motion for reconsideration. (Appx. 31).

This court accepted jurisdiction over one of Landfair's propositions of law, which states: "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."

B. Factual Background

Plaintiff was a horse-stable employee who was kicked and injured at the stables by a horse that was being trained and boarded there. The horse's owner, Donald Landfair, should be immune from Plaintiff's claims under Ohio's equine-immunity statute.

To understand why, the court should be familiar with Plaintiff's background with horses, Landfair's experience with horses, the horse involved, and Plaintiff's accident.

1. Plaintiff's Experience with Horses

Plaintiff is 27 years old and has worked with horses most of her life. (Plaintiff's depo. filed 10-13-09 at 4, 13). (Supp. 6, 8). Her father owned CJS Standardbred Stables. *Id.* Plaintiff was employed at CJS from 2000 to 2008. *Id.* at 7, 12. (Supp. 7, 8).

At CJS, Plaintiff worked seven days per week, four to fifteen hours per day. *Id.* at 10. (Supp. 8). Her jobs included general labor, auditing inventory, scheduling appointments, grooming horses, and managing the barn. *Id.* at 7. (Supp. 7). As barn manager, she took general care of the horses and was in charge of their feedings, record keeping, and equipment. She would lead horses to and from paddocks and stalls. *Id.* at 8. (Supp. 7). Based on her 20 years of experience working with horses, Plaintiff admitted that horses are unpredictable and inherently dangerous. *Id.* at 46-47. (Supp. 17).

2. Landfair's Experience with Horses

A young horse must be trained to do certain things *before* it can be trained to harness race. Among these things, a horse must be "broken to lead" (i.e. trained to be led and handled around barns and stables), "broken to pull" (i.e. trained to pull a cart or wagon), "broken to load" (i.e. trained to get into and out of a horse trailer), and "broken to shoes" (i.e. trained to walk or trot wearing horse shoes). Those horses slated for racing then have to be "broken to race" (i.e. trained to trot in pace around tracks with racing equipment and a jockey). (Landfair depo. filed 10-13-09 at 10-11, 16-17). (Supp. 26).

In March 2007, Defendant Landfair was 78 years old. *Id.* at 7. (Supp. 24). He had perfect vision and had no significant physical ailments or illnesses at that time. *Id.* at 39-41. (Supp. 32). Landfair has worked with and around horses since age 12. *Id.* at 23. (Supp. 25). He has been a licensed and bonded livestock dealer for nearly 40 years. *Id.* at 7. (Supp. 24). Landfair has raised and trained many horses over the decades, some for harness racing. (Plaintiff's depo. at 14, 15). (Supp. 9).

Landfair trains his horses to lead and to be transported by trailer. Based on years of experience, his standard practice is to load and unload horses numerous times until they are comfortable getting on and off trailers. (Landfair depo. at 11-12, 53-54). (Supp. 25, 35-36). He unloads his horses from trailers with one hand holding the halter and one hand holding the lead chain. *Id.* at 19. (Supp. 27).

In 2007, Landfair transported his horses by trailer to a Mr. Keim to be "broken to pull." Landfair also transported his horses to a local blacksmith for horseshoes. *Id.* at 13, 49, 53). (Supp. 25, 34, 35).

3. The Horse: Green Acre Annie

Green Acre Annie was born at Landfair's property. *Id.* at 53. (Supp. 35). When she was about six months old, Landfair started training her to lead and to load on and off trailers. *Id.* at 11. (Supp. 25). He never had any problem loading or unloading Annie. *Id.* at 16. (Supp. 26).

When she was old enough, Annie was taken to Mr. Keim to be broken to pull. *Id.* at 13. (Supp. 25). Within a few weeks, Keim successfully broke her. In fact, she was so docile that Keim's seven-year-old son hitched and drove her down the road. *Id.* In its opinion, the court of appeals noted: "It is undisputed that Annie was trained to be led." *Smith v. Landfair*, 194 Ohio App.3d 468, 2011-Ohio-3043, ¶2. (Appx. 20).

Annie was a two-year old mare when she was taken to CJS in February 2007 for training as a trotter. (Landfair depo. at 10-11). (Supp. 25). Landfair estimates that Annie was on a trailer 24 or more times and was transported by trailer about six times before being taken to CJS. *Id.* at 11, 13. (Supp. 25).

Over the next month-and-a-half, Annie was trained at CJS. Plaintiff, who was very experienced around horses in general and Annie in particular, testified that Annie exhibited no unusual, skittish, or aggressive behavior during her training. (Plaintiff's depo. at 19, 26-28). (Supp. 10, 12).

4. The Accident.

On March 28, 2007, Landfair picked up two of his horses, Green Acre Patty and Green Acre Annie, from CJS to have them shod by a Mr. Yoder. (Plaintiff's depo. at 31-32). (Supp. 13). Landfair had no problem loading Annie onto the trailer by himself; she walked right on. (Landfair depo. at 54). (Supp. 36). Landfair transported Patty and Annie to Yoder's in a step-in/step-out trailer. *Id.* at 15. (Supp. 26). Landfair unloaded Annie at Yoder's without incident

and reloaded her when she was shod, again without incident. *Id.* at 49, 54; (Supp. 34, 36); *Smith v. Landfair*, 194 Ohio App.3d 468, 2011-Ohio-3043, ¶4. (Appx. 21).

That same day, Plaintiff stopped at CJS to visit her father. (Plaintiff's depo. at 59). (Supp. 20). Plaintiff was standing by the barn door watching her father work with a horse on the track when Landfair returned from the blacksmith. *Id.* at 32. (Supp. 13). With Plaintiff standing nearby, Landfair unloaded Green Acre Patty without incident and led her into the barn. (Landfair depo. at 17). (Supp. 26). Plaintiff greeted Landfair and asked how he was doing. (Plaintiff's depo. at 32). (Supp. 13). Plaintiff saw Landfair unload Patty and then return to the trailer to unload Annie. *Id.* at 32-33. (Supp. 13).

Landfair entered the trailer, unfastened the gate, attached a lead shank, and patted Annie before beginning to lead her off. (Landfair depo. at 17, 56). (Supp. 26, 36). As he approached the trailer door, an Amish wagon with two teams of horses and clanging iron wheels passed Landfair's trailer, spooking Annie. *Id.* at 17, 19. (Supp. 26, 27). The horse bumped Landfair and knocked him to the ground. *Id.* at 19. (Supp. 19). However, Landfair maintained his hold on the horse's lead line even when he was on the ground. *Id.* at 17, 22. (Supp. 26, 28); Plaintiff's depo. at 45. (Supp. 16).

Plaintiff observed this event. She watched Landfair unload Patty, greeted him as he walked by with Patty, and watched Landfair go back to the trailer to unload Annie. (Plaintiff's depo. at 33). (Supp. 13). Plaintiff continued to stand nearby as Landfair got into the trailer, attached a line to Annie, and began to unload Annie from the trailer. *Id.* at 33-34. (Supp. 13-14).

Landfair was in Plaintiff's peripheral vision when he began unloading Annie. *Id.* at 33. (Supp. 13). Plaintiff then heard a "commotion"—"hollow sounds of something going on inside

of a trailer.” *Id.* at 36. (Supp. 14). She turned and saw Landfair “being pushed out of the trailer onto the ground.” *Id.* That is, she saw Landfair standing in front of Annie, and she saw the horse bump him out of the trailer with “[h]er head and her chest and her strength.” Plaintiff observed all of this and was able to testify about it in detail at her deposition:

A. He was standing in front of the filly and she forced him out.

Q. And what did she force him out with?

A. Her head and her chest and her strength.

Q. And while he was being pushed out of the trailer, he still had hold of the lead?

A. Yes.

Q. And when he was going out of the trailer, did he fall to the ground?

A. Yes.

Q. And when he fell to the ground, he continued to hold on to the lead?

A. Yes.

Q. While he was on the ground, did the horse haunch up on its rear legs?

A. I do not recall if she had reared but I do remember her prancing around.

Q. Do you know if in fact the horse actually stepped on him?

A. No.

Q. You recall the horse was prancing around, though?

A. Yes.

Q. When this happened, when you first turned and saw Mr. Landfair coming out of the trailer, do you recall if there was any other people in the area?

A. No.

Q. Do you recall if there were any other vehicles in the area?

- A. There was a vehicle parked on the other side of our barn which was Ralph Miller's car.
- Q. Do you recall if there were any wagons or carts or anything that was being moved in the area?
- A. Yes.
- Q. What else was being moved in the area?
- A. There was an Amish buggy coming through.
- Q. Where was the Amish buggy coming from?
- A. It was coming from the right-hand side of the coliseum.
- Q. Okay. Other than the Amish wagon and horses coming by, any other wagons, carts or other people were things moving in the area that you recall?
- A. No.
- Q. Now, while Mr. Landfair was on the ground and the horse was prancing, what did you do?
- A. I shouted, "Oh, Mr. Landfair," and ran after him and I don't remember anything after that.
- Q. When you saw Mr. Landfair being pushed out of the trailer and on the ground, how far away from him were you?
- A. I'm not entirely sure of feet, but probably a little further from this wall to that wall. This back here to that wall, it was further than that.
- Q. The length of this room, for the record, is approximately 20 feet. Does that sound about roughly the distance where you were from him when you first saw him on the ground?
- A. I can't estimate something like that.
- Q. When you saw Mr. Landfair on the ground and you yelled, "Oh, Mr. Landfair," did you move toward Mr. Landfair to help him?
- A. Yes.

Q. And when you moved toward him, were you moving toward him to help gain control of the horse?

A. No, I was moving towards him to help him.

Q. What was it you were going to do to help him?

A. I was going to try to get him out of harm's way.

Id. at 36-40. (Supp. 14-15).

Thus, Plaintiff's own testimony proves that she observed, and was a bystander to, the unloading of Green Acre Annie from her trailer at the stables where she was boarded. Plaintiff was thus an "equine activity participant" under R.C. 2305.321(A)(3). Since she was an "equine activity participant," the court of appeals erred in denying immunity to Landfair and in reversing summary judgment in his favor.

LAW AND ARGUMENT

Proposition of Law

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.

A. Standard of review

Since this case involves a summary-judgment ruling, this court's review is *de novo*. See *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, ¶12.

B. Applying Ohio's equine-immunity statute

The issue on appeal is whether Plaintiff was a "spectator" under Ohio's equine-immunity statute, R.C. 2305.321. Like most states, Ohio has an immunity statute that reflects the inherent risks that arise when large, unpredictable animals like horses are in close contact with people. Many

people enjoy horses. The equine industry is also economically important. States have thus enacted immunity statutes to support the industry and foster the enjoyment of horses. *Lawson v. Dutch Heritage Farms, Inc.*, 502 F. Supp.2d 698, 700 (N.D. Ohio 2007).

Ohio's immunity statute, R.C. 2305.321, recognizes that horses, though often friendly and docile, can easily be startled or act unpredictably, creating a risk of injury. The statute thus confers broad immunity on persons engaged in "equine activities":

...[A]n equine activity sponsor, equine activity participant, equine professional..., or other person is not liable in a tort or other civil action for harm that an equine activity participant allegedly sustains during an equine activity 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 . . . 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, . . . 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) (emphasis added). (Appx. 35).

Under the statute, an "equine" includes a horse. R.C. 2305.321(A)(1). Further, the term "equine activities" broadly covers almost every activity associated with a horse, including "trailer, loading, unloading, or transportation of an equine" and "[t]he boarding of an equine, including, but not limited to, normal daily care of an equine." R.C. 2305.321(A)(2)(a) (Supp. 33); *see Allison v. Johnson*, 2001 Ohio App. LEXIS 2485, *13 (11th Dist.) (scope of equine activities is "very broad").

Here, Plaintiff doesn't dispute (1) that Annie is an "equine" or (2) that Mr. Landfair was unloading and transporting Annie—an "equine activity." (Plaintiff's depo. at 43-44). (Supp. 16). Indeed, the trial court held that Landfair met all statutory requirements for immunity. He was

an “equine activity participant” under R.C. 2305.321 (A)(3), and he was engaged in an “equine activity” under R.C. 2305.321(A)(2)(a). (March 30, 2010 order, pp. 7-10). (Appx. 9-12).

The trial court further held that Plaintiff was subject to the immunity statute because she was an “equine activity participant” under R.C. 2305.321(A)(3)(g). *Id.* at 8-9. (Appx. 10-11). An “equine activity participant” includes one who is “a **spectator** at an equine activity.” R.C. 2305.321(A)(3)(g) (emphasis added). (Appx. 34). Relying on *Allison v. Johnson*, 2001 Ohio App. LEXIS 2485 (11th Dist.), and *Lawson v. Dutch Heritage Farms, Inc.*, 502 F. Supp.2d 698 (N.D. Ohio 2007), the trial court noted that “spectator” “has a broad meaning within the statute.” (March 30, 2010 order, pp. 9-11). (Appx. 11-13). Thus, Plaintiff, “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.” *Id.* at 11. (Appx. 13).

The court of appeals, however, disagreed with the trial court and held that Plaintiff wasn’t a “spectator” under the statute because “she saw Mr. Landfair only out of her peripheral vision. . . .” *Smith v. Landfair*, 194 Ohio App.3d 468, 2011-Ohio-3043, ¶16. (Appx. 27). Since Plaintiff, according to the appellate court, wasn’t a “spectator,” she wasn’t an “equine activity participant” subject to the immunity statute. *Id.* at ¶18. (Appx. 27-28).

Thus, the issue on appeal is the nature of Plaintiff’s actions and whether those actions made her a “spectator” under the statute. The statute doesn’t define “spectator,” but the term has been construed broadly. For instance, the court of appeals in *Allison v. Johnson*, 2001 Ohio App. LEXIS 2485, (11th Dist.), relied on broad, dictionary definitions when construing “spectator” under the statute:

Webster’s II New College Dictionary (1000) 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. at *14.

The *Allison* court rejected a plaintiff’s argument that her injury, caused when a horse kicked a board into her face, was sustained as a mere “bystander” and not a “spectator.” *Id.* The *Allison* court noted that dictionaries equate the terms “spectator” and “bystander.” Thus, the plaintiff in *Allison* was found to be a “spectator,” “to-wit: an observer, watcher, or bystander.”

Id. at 16.

The court of appeals in this case agreed with the *Allison* court that “spectator” should be given its common, ordinary meaning. 2011-Ohio-3043, ¶14. (Appx. 25). The court began by citing a definition of “spectator” as “one who attends and views a show, sports event or the like.” *Id.* The court then cited some of the dictionary definitions from *Allison*, including “one that looks on or beholds”; “one witnessing an exhibition”; and “a person who watched without participating.” *Id.*

Still, the court of appeals discussed how the statute actually broadened the dictionary definitions of “spectator” so that, under the statute, one can even be a “spectator” of a horse’s daily care:

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.

Id. at ¶15 (emphasis added). (Appx. 25).

The court of appeals correctly observed that a “spectator” under the statute isn’t limited to someone who sits in an arena and watches a formal event, like a horse show. The statute states that

an “equine activity participant” includes one who is “a spectator **at an equine activity.**” R.C. 2305.321(A)(3)(g). (Appx. 34). And “equine activity” is broadly defined to encompass nearly every conceivable activity that involves a horse, including non-formal activities like the trailering, loading, unloading, shoeing, or “normal daily care” of a horse. R.C. 2305.321(A)(2)(a). (Appx. 33). Thus, a “spectator” includes individuals who place themselves in position to watch, see, or interact with an equine activity, regardless of where that activity occurs.

But while the court of appeals correctly perceived the broad meaning of “spectator,” the court erred in applying the term. Without limiting or restricting the definition of “spectator,” the court held that Plaintiff wasn’t a “spectator” because she didn’t “watch” Landfair. Rather, she supposedly “saw Mr. Landfair only out of her peripheral vision.” *Id.* at ¶16. (Appx. 26).

This distinction—between Plaintiff seeing something directly and seeing something out of her “peripheral vision”—was misplaced both factually and logically. Plaintiff’s own testimony proved that her involvement in the incident went far beyond noticing something in her “peripheral vision.” Plaintiff was a horse-barn manager who was injured next to the very barns that she managed. While Plaintiff may not have come to the stables that day to work, she voluntarily placed herself at the stables, where she knew equine activities would be taking place. Indeed, Plaintiff admits that she was watching her father exercise a horse on the track—an equine activity in and of itself.

Further, Plaintiff admitted that she saw Landfair unload Green Acre Patty from the trailer, that she said “hi” to Landfair, and that she asked him how he was doing. (Plaintiff’s depo. at 32). (Supp. 13). She then saw Landfair return to the trailer to unload Annie. *Id.* at 33. (Supp. 13). Thus, Plaintiff obviously placed herself in a position to watch, see, and/or interact with Mr. Landfair

as he unloaded his horses. Plaintiff was no different than a fair or horse-show patron who walks or stands around the stables.

The court of appeals was concerned about creating a standard whereby “any individual who glances at a horse and is thereafter injured by it becomes a spectator.” 2011-Ohio-3043, ¶15. (Appx. 25). But Plaintiff voluntarily positioned herself at the stable doors where she could watch, observe, or interact with her father on the track or with Landfair, as he unloaded his horse into the stables. Plaintiff didn’t position herself at a remote location (e.g., a concession stand or restroom), where her primary focus was on something other than an equine activity, or where her only view of a horse would be a mere “glance.”

Further, although Plaintiff contends that Landfair was in Plaintiff’s peripheral vision when he began unloading Annie, she turned and looked directly at him once she heard a “commotion”—“hollow sounds of something going on inside of a trailer.” *Id.* at 33, 36. (Supp. 13, 14). From then on, Plaintiff was able to describe exactly what happened. She saw Landfair “being pushed out of the trailer onto the ground.” *Id.* at 36. (Supp. 14). That is, she saw Landfair standing in front of Annie, and she saw the horse force him out of the trailer with “[h]er head and her chest and her strength.” She then saw the horse “jump out of the trailer.” *Id.* at 35. (Supp. 14).

Plaintiff also observed that Landfair, while being pushed out of the trailer, still held the horse’s lead. *Id.* at 36-37. (Supp. 14). Plaintiff saw Landfair fall to the ground and continue to hold the lead. *Id.* at 37. (Supp. 14). She then saw Annie “prancing around.” *Id.* at 37. (Supp. 14). She even noticed the Amish buggy driving by at that time. *Id.* at 38. (Supp.). When Plaintiff saw Landfair on the ground, she moved toward him to help and was kicked. *Id.* at 40-41. (Supp. 15).

This was much more than a mere “glance” out of her peripheral vision. Plaintiff witnessed and involved herself in the very event that caused her injury.

Plaintiff tried to distinguish what happened in *Allison, supra*, from what happened here. Plaintiff argued that the claimant in *Allison* “intentionally sought out the defendant and admitted that she was watching him care for his horse.” (Plaintiff’s appellate brief at 22). But the definitions of “spectator” in *Allison* didn’t turn on whether the claimant “seeks out” the defendant or the event in question. The issue in *Allison* was whether the claimant was “an observer, watcher, or bystander to the normal daily care of an equine.” *Allison, supra*, at *16.

Here, it is undisputed that Plaintiff was an observer, watcher, or bystander with respect to the incident every bit as much as the plaintiff in *Allison*. The *Allison* plaintiff was in a barn when the defendant came into the barn leading a horse. 2001 Ohio App. LEXIS 2485, *2. As the defendant turned to shut a gate, the horse turned, shuffled backward, and struck the gate, causing a board to pop loose and strike the plaintiff. *Id.* The *Allison* plaintiff wasn’t a patron sitting in the stands at a horse show or other formal event. She, like Plaintiff here, was standing by a barn near the defendant, who was leading a horse as part of its routine care.

Plaintiff argued that she shouldn’t be deemed a “spectator” merely because she was present near an equine activity. But that’s exactly how courts have construed this broad statute and the term “spectator”:

Ohio’s version, on the other hand, does not restrict the definition of spectator. 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 the all-encompassing definition of “equine activity participant”

In the Ohio intermediate court decision of *Allison v. Johnson*, the court found “spectator” was to be construed broadly by referring to several dictionaries in determining that the common meaning of “spectator” was “an observer at an event,” “one who looks on or beholds, . . . are witnessing an exhibition,” and “a person who watched without participating.” Consequently, . . . 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 . . . provisions.**

Lawson v. Dutch Heritage Farms, Inc., 502 F. Supp.2d 698, 705-06 (N.D. Ohio 2007)(emphasis added).

Moreover, the facts of this case are in stark contrast to the example proffered by the court of appeals: “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.” 2011-Ohio-3043, ¶15. (Appx. 25-26). Here, Plaintiff didn’t just momentarily cross paths with Landfair’s horse due to some unrelated task or employment. Plaintiff began working in her father’s horse business in 2000. (Plaintiff’s depo. at 7). (Supp. 7). She was the groom and barn manager and was directly responsible for the horses’ day-to-day care. *Id.* at 8. (Supp. 7). Plaintiff worked around Annie and other horses daily. She voluntarily went to the stables on the day of the incident and voluntarily stood at the stable door, where she could observe her father on the track. She positioned herself at the stable area before Landfair arrived, and she remained at the stable area as Landfair unloaded his horses.

And, knowing the dangers of being around horses, Plaintiff voluntarily ran toward Annie. Plaintiff could have remained standing where she was—clear of danger. Instead, she ran toward Landfair and the horse. They didn’t come to Plaintiff. Plaintiff may have been a good Samaritan, but her laudable motive doesn’t negate Landfair’s immunity. Plaintiff was a horse person seeing a horse person at a horse stable where a horse person was unloading his horse. By placing herself in a position to watch, see, or interact with an equine activity, Plaintiff subjected herself to the immunity statute.

Whether one is a “spectator” under R.C. 2305.321 cannot be tied solely to the direction one happens to be facing at the precise moment of an incident. Such a standard is untenable at

best. Rather, Ohio courts should examine the surrounding circumstances of a particular incident to determine whether a plaintiff placed herself in position to watch, see, or interact with an equine activity. Indeed, Plaintiff's positioning in the stable area distinguishes this case from the court of appeals' mail-carrier hypothetical and highlights the difficulty in applying the appellate court's standard.

Plaintiff voluntarily went to the stables and stood outside the stable doors, where she knew equine activities would be taking place. She stood and watched her father, who was performing an equine activity with another horse on the nearby track. She voluntarily chose to remain at the stable doors, knowing that Landfair was nearby and that he also was engaged in an equine activity. That is, she knew that Landfair was unloading his horses and walking them by her as he led them into the stables. The fact that Plaintiff watched out of her "peripheral vision" as Landfair *began* unloading Annie does not remove Plaintiff from the ambit of the statute.

Nor should it. When one places oneself in position to watch, see, or interact with an equine activity, one subjects oneself to the potential danger that arises from an equine's speed, size, strength, and unpredictable nature. These are precisely the "inherent risks of an equine activity" for which the statute provides immunity. R.C. 2305.321(A)(7). (Appx. 34-35); *Lawson v. Dutch Heritage Farms, Inc.*, 502 F. Supp.2d 698, 706-07 (N.D. Ohio 2007) (emphasis added).

C. The court of appeals erred to the extent that it may have denied immunity to Landfair as a matter of law. At the very least, Landfair should be able to present facts and arguments to support his immunity defense at trial.

This appeal is from a reversal of a summary judgment granted to Defendant. Thus, the only evidence that has been considered on appeal is evidence presented under Civ. R. 56. Most of that evidence was from the parties' depositions.

Further, those limited facts were construed in Plaintiff's favor under Rule 56(C). Indeed, the court of appeals began its analysis by "[v]iewing the evidence in a light most favorable to Ms. Smith...." 2011-Ohio-3043, ¶16. (Appx. 26). The court of appeals then reversed summary judgment and denied immunity based on the summary-judgment record.

Even though the court of appeals considered a limited factual record, the court's decision could be read to preclude Defendant from raising any immunity-related facts or arguments at trial. In paragraph 18, for example, the court of appeals concluded 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.**" (Emphasis added). (Appx. 27). In the next sentence, the court stated that because Plaintiff "is not an equine activity participant, her claim is not barred by the equine immunity statute." Further, in paragraph 21, the court stated that "Mr. Landfair cannot avail himself of the protections afforded by the equine immunity statute...." (Appx. 28-29).

Landfair requested that the court of appeals reconsider its decision and clarify that Landfair could still present evidence at trial supporting an immunity defense. Unfortunately, the court refused to reconsider or clarify its decision. (Appx. 31-32).

Even if this court affirms the court of appeals' decision on the substantive merits, Defendant is concerned that the trial court, absent further guidance from this court, could construe the court of appeals' decision as foreclosing all facts or arguments relating to immunity. That is, the trial court could read the court of appeals' blanket statements—that Plaintiff "was not an equine activity participant as a matter of law"; or that Defendant "cannot avail himself of the protections afforded by the equine immunity statute"—as the law of the case that bars Defendant from presenting immunity-related facts or arguments at trial.

Defendant surmises that the court of appeals didn't intend for its ruling to be construed that way. Indeed, Plaintiff herself never advocated for such a ruling. Rather, in the trial court, Plaintiff opposed summary judgment by arguing that "there are issues of fact as to whether Ms. Smith or Defendant Landfair is a 'participant' under the equine immunity statute." (Plaintiff's brief in opp. filed 11-1-09). On appeal, Plaintiff restated her position that factual issues warranted reversal and remand. (Plaintiff's appellate brief at 26). Plaintiff herself didn't move for summary judgment on this or any other issue.

Since the court of appeals denied immunity based on a limited factual record construed in Plaintiff's favor, the case, at the very least, should have been remanded for a trial on the merits. At trial, Defendant would be permitted to present all evidence (including live testimony) that supports an immunity defense. Plaintiff's live trial testimony may differ from her deposition testimony. Or the jury, after watching Plaintiff testify live, may decide that she isn't credible and that the true facts aren't what she claims them to be. Further, the jury would apply a "preponderance of the evidence" standard to determine whether Plaintiff was a "spectator" or whether she was "assisting" someone engaged in an equine activity. Thus, despite the summary-judgment ruling, a jury could still find that Plaintiff was an "equine activity participant" and that Defendant is immune.

Thus, even if this court holds that immunity is inappropriate based on the summary-judgment record, this court should clarify that such a ruling doesn't foreclose Defendant from presenting facts and arguments at trial to prove that he is immune under R.C. 2305.321.

CONCLUSION

Ohio law confers immunity for just these types of cases—where a horse acts unpredictably and causes injury. And the statute confers immunity from the claims of those who

place themselves in position to watch, see, or interact with horse-related activities. It was no coincidence that Plaintiff was near a horse stable when she was injured. She worked there with horses daily. She went to see her father, a horse trainer, and she knew that she would be around horses and horse owners like Mr. Landfair. Plaintiff greeted Landfair, saw him leading his horse, watched as he returned to the trailer for Annie, saw him out of her peripheral vision as he began unloading Annie, and then directly watched as Annie pushed Landfair from the trailer to the ground. Plaintiff then voluntarily moved toward Landfair and the horse to assist.

Thus, the surrounding circumstances of this incident show that Plaintiff was a “spectator” to this “equine activity” under the statute’s broad wording. This court should thus reverse the court of appeals’ decision and reinstate the trial court’s summary judgment in Landfair’s favor.

Respectfully submitted,

HANNA, CAMPBELL & POWELL, LLP

By: 

Kenneth A. Calderone (0046860)

John R. Chlysta (0059313)

P.O. Box 5521

3737 Embassy Parkway

Akron, OH 44334

Ofc.: (330) 670-7324

Fax: (330) 670-7440

Kcalderone@hcplaw.net

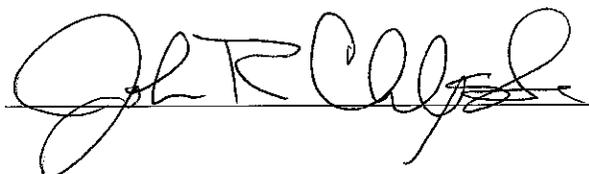
jchlysta@hcplaw.net

Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

A copy of this document was sent on April 6, 2012, by regular U.S. Mail, to John K. Rinehardt, 2404 Park Avenue West, Mansfield, Ohio 44906 and Thomas M. Green, Green & Green, Lawyers, 800 Performance Place, 109 North Main Street, Dayton, OH 45402

<<HCP #615877-v1>>



ORIGINAL

IN THE SUPREME COURT OF OHIO

ROSHEL SMITH)

Plaintiff-Appellee)

vs.)

DONALD E. LANDEFAIR,)

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 LANDEFAIR

Kenneth A. Calderone (0046860)(Counsel of
record)

John R. Chlysta (0059313)
Hanna, Campbell & Powell, LLP
3737 Embassy Parkway
PO Box 5521

Akron, OH 44334
Ofc.: (330) 670-7300
Fax: (330) 670-0977
kcalderone@hcplaw.net
ichlysta@hcplaw.net

Attorneys for Defendant-Appellant, Donald
Landfair

John K. Rinehardt (0037394)

THE JOHN K. RINEHARDT LAW FIRM
2404 Park Avenue West
Mansfield, OH 44906
Phone: (419) 529-2020
Fax: (419) 529-2717
E-Mail: jkr@lawfirm2020.com

Attorney for Plaintiff-Appellee, Roshel Smith

RECEIVED

OCT 10 2011

CLERK OF COURT
SUPREME COURT OF OHIO

FILED

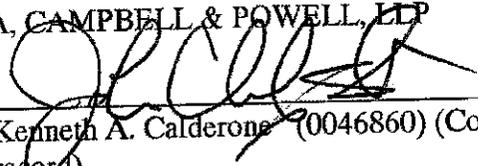
OCT 10 2011

CLERK OF COURT
SUPREME COURT OF OHIO

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.

HANNA, CAMPBELL & POWELL, LLP

By: 

Kenneth A. Calderone (0046860) (Counsel of record)

John R. Chlysta (0059313)

P.O. Box 5521

3737 Embassy Parkway

Akron, OH 44334

Ofc.: (330) 670-7324

Fax: (330) 670-7440

Kcalderone@hcplaw.net

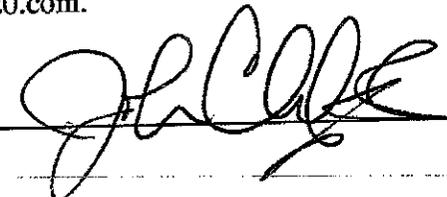
jchlysta@hcplaw.net

Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

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.

<<HCP #583445-v1>>



COPY
131127

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT
2009 MAR 30 PM 3:20

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,

E.L.L. + A

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

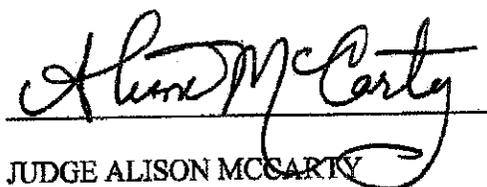
COPY.

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

COPY

STATE OF OHIO)
COUNTY OF SUMMIT)

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

ROSHEL SMITH

SUMMIT COUNTY No. 25371
CLERK OF COURTS

Appellant

v.

DONALD E. LANDFAIR, et al.

Appellees

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

20

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.

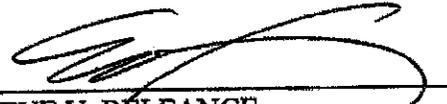
Judgment affirmed in part,
reversed in part,
and cause remanded.

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. HOFFIGAN.

2011 AUG 25 AM 11:50

ROSHEL SMITH

Appellant

v.

DONALD E. LANDFAIR, et al.

Appellees

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 25371

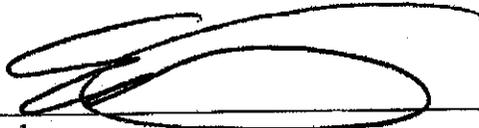
JOURNAL ENTRY

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.

2305.321 Certain equine activities no liability.

(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:

(i) An equine show, fair, competition, performance, or parade that involves an equine and an equine discipline, including, but not limited to, dressage, a hunter and jumper show, grand prix jumping, a three-day event, combined training, a rodeo, driving, pulling, cutting, reining, team penning, barrel racing, polo, steeplechasing, english or western performance riding, endurance or nonendurance trail riding, western games, hunting, packing, and recreational riding;

(ii) An equine or rider training, teaching, instructing, testing, or evaluating activity, including, but not limited to, a clinic, seminar, or symposium;

(iii) The boarding of an equine, including, but not limited to, normal daily care of an equine;

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

(v) The riding, inspecting, or evaluating of an equine owned by another person, regardless of whether the owner has received anything of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate it;

(vi) A ride, trip, hunt, branding, roundup, cattle drive, or other activity that involves an equine and that is sponsored by an equine activity sponsor, regardless of whether the activity is formal, informal, planned, or impromptu;

(vii) The placing or replacing of horseshoes on an equine, the removing of horseshoes from an equine, or the trimming of the hooves of an equine;

(viii) The provision of or assistance in the provision of veterinary treatment or maintenance care for an equine;

(ix) The conducting of procedures or assistance in the conducting of procedures necessary to breed an equine by means of artificial insemination or otherwise.

(b) "Equine activity" does not include horse or mule racing.

(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.

(4) "Equine activity sponsor" means either of the following persons:

(a) A person who, for profit or not for profit, sponsors, organizes, or provides a facility for an equine activity, including, but not limited to, a pony club, 4-H club, hunt club, riding club, or therapeutic riding program, or a class, program, or activity that is sponsored by a school, college, or university;

(b) An operator or promoter of, or an instructor at, an equine facility, such as a stable, clubhouse, pony ride, fair, training facility, show ground, or arena at which an equine activity is held.

(5) "Equine professional" means a person who engages for compensation in any of the following activities:

(a) Training, teaching, instructing, testing, or evaluating an equine or an equine activity participant;

(b) Renting to an equine activity participant an equine for the purpose of riding, driving, or being a passenger upon an equine;

(c) Renting equipment or tack to an equine activity participant for use in an equine activity;

(d) Providing daily care to an equine boarded at an equine activity;

(e) Providing or assisting in providing veterinary treatment or maintenance care to an equine;

(f) Conducting procedures or assisting in conducting procedures necessary to breed an equine by means of artificial insemination or otherwise.

(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;
- (d) A collision with another equine, another animal, a person, or an object;
- (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.

(10) "Veterinarian" means a person who is licensed to practice veterinary medicine in this state pursuant to Chapter 4741. of the Revised Code.

(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:

(a) An equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person provides to an equine activity participant faulty or defective equipment or tack and knows or should know that the equipment or tack is faulty or defective, and the fault or defect in the equipment or tack proximately causes the harm involved.

(b) An equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person provides an equine to an equine activity participant and fails to make reasonable and prudent efforts to determine the equine activity participant's ability to safely engage in the equine activity or to safely manage the equine based on the equine activity participant's representations of the participant's ability, the equine activity participant fails to safely engage in the equine activity or to safely manage the equine, and that failure proximately causes the harm involved.

(c) The harm involved is proximately caused by a dangerous latent condition of the land on which or the premises at which the harm occurs, an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person owns, leases, rents, or otherwise lawfully possesses and controls the land or premises and knows or should know of the dangerous latent condition, but does not post conspicuously prior to the time of the harm involved one or more signs that warn of the dangerous latent condition.

(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.

(C)(1) Notwithstanding the immunity conferred by division (B)(1) of this section and the grounds for its forfeiture specified in division (B)(2) of this section, subject to divisions (C)(2) (b) and (3) 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 if that equine activity participant or a parent, guardian, custodian, or other legal representative of that equine activity participant voluntarily executes, prior to the occurrence of the harm involved, a written waiver as described in division (C)(2) of this section. Subject to divisions (C)(2)(b) and (C)(3) of this section, the equine activity participant who is the subject of that waiver or the parent, guardian, custodian, or other legal representative of the equine activity participant who is the subject of that waiver 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 in whose favor the waiver was executed.

(2)(a) A valid waiver for purposes of division (C)(1) of this section shall be in writing and subscribed by the equine activity participant or the parent, guardian, custodian, or other legal representative of the equine activity participant, and shall specify at least each inherent risk of an equine activity that is listed in divisions (A)(7)(a) to (e) of this section and that will be a subject of the waiver of tort or other civil liability.

(b) A waiver in the form described in division (C)(2)(a) of this section shall remain valid until it is revoked in the manner described in division (C)(3) of this section. Unless so revoked, such a waiver that pertains to equine activities sponsored by a school, college, or university shall apply to all equine activities in which the equine activity participant who is the subject of the waiver is involved during the twelve-month period following the execution of the waiver.

(3) A valid waiver in the form described in division (C)(2)(a) of this section may be revoked in writing by the equine activity participant or the parent, guardian, custodian, or other legal representative of the equine activity participant who executed the waiver. The revocation of the waiver does not affect the availability of the immunity conferred by division (B)(1) of this section.

(D)(1) This section does not create a new cause of action or substantive legal right against an equine activity sponsor, equine activity participant, equine professional, veterinarian, farrier, or other person.

(2) This section does not affect the availability in appropriate circumstances of a civil action based on a product liability claim under sections 2307.71 to 2307.801 of the Revised Code.

Effective Date: 03-03-1997