

**IN THE SUPREME COURT FOR THE STATE OF OHIO**

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

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**MERIT BRIEF OF PLAINTIFF-APPELLEE ROSHEL SMITH**

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**FILED**  
 MAY 09 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## STATEMENT OF THE CASE

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

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

The trial court granted Defendant's Motion for Summary Judgment, dismissing Plaintiff's Complaint and entering judgment in favor of Mr. Landfair. The trial court rejected Defendant's allegation that Plaintiff was an equine activity participant because she was "assisting" Defendant at the time of her injury, but held that Plaintiff was a "spectator" of the Defendant unloading his horse. Thus, the trial court granted judgment to Defendant pursuant to R.C. 2305.321(A)(3)(g).

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

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

Defendant filed a discretionary appeal with this Court on six propositions of law. This Court accepted jurisdiction over only one narrow proposition of law, *i.e.* whether Plaintiff was a

“spectator” within the meaning of R.C. 2305.321(A)(3)(g).

### STATEMENT OF FACTS

At the outset, Plaintiff notes that her statement of facts is limited to only those facts relevant to the single, narrow proposition of law accepted by this Court, *i.e.* whether Ms. Smith was a “spectator” under R.C. §2305.321 at the time of this incident. Defendant’s brief incorporates numerous facts (many which are disputed and must be construed in favor of Ms. Smith as the non-moving party) that are irrelevant to this appeal. Among the facts irrelevant to the narrow scope of this Court’s review are those facts related to Plaintiff’s experience as a horseperson and her employment at the facility where she was injured (although she was off-duty at the time). Defendant’s discussion of such extraneous matters has no place in the analysis of the sole question before this Court.

The facts relevant to Appellant’s proposition accepted for review are as follows:

Defendant Mr. Landfair was the owner of a two-year-old horse. In February 2007, Defendant brought his horse to Mr. Ernie Smith’s CJS stable for Mr. Smith to train. (Smith Depo. Tr. 17 [Appellant’s Suppl. 9]). The barn housing CJS stables was located adjacent to a roadway at the Wayne County fairgrounds. The blacktopped area surrounding the CJS stables and the adjacent roadway are areas open to the general public. (Affidavit of Ernie Smith ¶13 [Appellant’s Suppl. 44]). The roadway travels along the outside of the fairgrounds’ track. (Affidavit of Ernie Smith ¶12 [Appellant’s Suppl. 44]). Numerous members of the public utilize the roadway for walking, jogging and bicycling, as well as motorized vehicular traffic and horse drawn wagons (Affidavit of Ernie Smith ¶13 [Appellant’s Suppl. 44]). In addition, this area is frequented by delivery drivers such as those from UPS and Fed-Ex (Affidavit of Ernie Smith ¶13 [Appellant’s Suppl. 44]).

On the morning of March 28, 2007, Plaintiff Roshel Smith and her fiancé stopped by the stable to get some real estate advice from Ms. Smith's father, Mr. Ernie Smith. (Smith Depo. Tr. 32, 59-60 [Appellant's Suppl. 15, 20]). Ms. Smith was waiting at the barn door watching for her father to return from the track. (Smith Depo. Tr. 32 [Appellant's Suppl. 13]).

As Ms. Smith waited for her father, Defendant arrived with his stock truck and trailer. Defendant parked his trailer on the blacktop such that there was very little distance between his trailer and the roadway that passes parallel. (Affidavit of Ernie Smith ¶15 [Appellant's Suppl. 44]). Thus, any vehicle or horse trailer would by necessity have to pass within a few feet of the Defendant's stock trailer containing the young horse.

When Defendant arrived at the stable, he unloaded another of his horses from the trailer. (Landfair Depo. Tr. 54 [Appellant's Suppl. 36]).

Defendant then proceeded to attempt to unload his two year-old horse without seeking anyone to assist him. (Landfair Depo. Tr. 29 [Appellant's Suppl. 29]).

As Defendant prepared to unload the horse, an Amish buckboard wagon with a team of horses was approaching on the roadway. (Affidavit of Ernie Smith ¶16 [Appellant's Suppl. 44]). As Defendant attempted to lead the horse out of the trailer, the horse was spooked by the sound of the metal wheels of the Amish wagon. (Landfair Depo. Tr. 22 [Appellant's Suppl. 28]). The spooked horse rammed Defendant, knocking him out of the door of the trailer, off the step, and onto the ground.

Standing nearby, Plaintiff Roshel Smith's attention was drawn by the commotion and she looked over and saw Defendant lying on the ground covering his head with the horse above him. (Smith Depo. Tr. 36-37 [Appellant's Suppl. 14]). Because the spooked horse was prancing, the position of the horse was changing second by second. Ms. Smith immediately rushed to try to

rescue Defendant who was in immediate danger of serious harm. (Smith Depo. Tr. 39-40 [Appellant's Suppl. 15]). As she went to Defendant's rescue, Ms. Smith was kicked by the horse in the left side of her face knocking her to the ground and rendering her momentarily unconscious. As a result, Ms. Smith sustained severe injury to her face and jaw.

## LAW AND ARGUMENT

### I. Standard of Review

This case requires this Court to construe and apply a statute; thus this Court is confronted with a question of law, which this Court reviews *de novo*. *Columbus City School Dist. Bd. of Edn. v. Testa*, 130 Ohio St.3d 344, 2011-Ohio-5534, ¶ 12.

### II. A person is not a "Spectator at an equine activity" within the meaning of R.C. 2305.321 (A)(3)(g) unless that person has physically placed himself/herself with the purpose of perceiving that equine activity

#### A. "Spectator" is not synonymous with "bystander," "observer," "viewer," or "witness"

Defendant's proposition of law is that the words "bystander" and "observer" are synonyms of the word "spectator" in R.C. 2305.321(A)(3)(g). Defendant argues that Plaintiff was a "spectator" "by *merely being present* at the unloading of [the horse] and '*noticing*' the events that transpired." (Defendant's Merit Brief 10 (quotation marks omitted) (emphasis added).) *Amicus Curiae* The Ohio Horseman's Council, in support of Defendant, adds "viewer" and "witness" to this list of putative synonyms. The Horseman's Council argues: "The term 'spectator' should be broadly defined under R.C. § 2305.321(A)(3)(g) to include any person *viewing* an equine activity." (Horseman's Council's Brief 1 (emphasis added).) "[B]ecause [Plaintiff] *witnessed* [Defendant] unloading [the horse], she was a spectator of equine activity." (*Id.* at 5 (emphasis added).)

In construing statutes, this Court's "paramount concern is legislative intent." *State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶ 29 (quotation marks omitted).

R.C. 2305.321 does not define "spectator." "[A]ny term left undefined by statute is to be accorded its common, everyday meaning." *American Fiber Systems, Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶ 24 (quoting *State v. Dorso*, 4 Ohio St.3d 60, 62 (1983)).

The Ohio Revised Code commands that its "[w]ords and phrases shall be read *in context* and construed according to the rules of grammar and *common usage*." R.C. 1.42 (emphasis added).

This Court should reject Defendant's proposition of law for two reasons:

- Both in common, everyday usage and in the context of R.C. 2305.321, "spectator" does not mean "bystander."
- The context of R.C. 2305.321 reflects that the phrase "spectator at an equine activity" means a person who has physically placed himself/herself with the purpose of perceiving that equine activity (as opposed to a person perceiving an equine activity unwillingly or by happenstance).

**1. Both in common, everyday usage and in the context of R.C. 2305.321, "spectator" does not mean "bystander"**

A side-by-side comparison of dictionary definitions (the appendix to this brief) demonstrates that in common, everyday usage:

- "spectator" carries a strong connotation of purposeful perception – perception resulting from having physically placed oneself for the purpose of perceiving a particular event (as opposed to accidental or unwilling perception);
- "observer," "viewer," and "witness" are ambiguous with respect to such purposeful perception – in some contexts connoting such purposefulness, in other contexts not; and
- "bystander" does not connote such purposefulness.

The word "bystander" connotes mere co-location and thus is unique among Defendant's

putative synonyms in two ways.

First: the word “bystander,” unlike the other putative synonyms, does not necessarily connote perception. A “bystander” can be victimized without having perceived the cause of her injury.

Second: the word “bystander” generally connotes an *absence* of any purpose related to the event at issue. Multiple dictionaries define “bystander” as a “chance spectator” – someone who perceives not on purpose but by chance. (*See* table in the appendix of this brief.) All of the other putative synonyms carry a stronger connotation of purposefulness than does “bystander.” (More on this in Part II-A-2 below.)

Construing “spectator” in R.C. 2305.321 to mean “bystander” also leads to a contextual anomaly: R.C. 2305.321’s lengthy definition of “equine activity participant” would be rendered superfluous.

The Court must, if possible, give meaning to every word in a statute. *In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, ¶ 6; *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 33; *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 521, 1994-Ohio-496 (*per curiam*). In *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, this Court stated:

A basic rule of statutory construction requires that words in statutes should not be construed to be redundant, nor should any words be ignored. Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.

*Id.* at ¶ 26 (citations and quotation marks omitted).

If the authors of R.C. 2305.321 intended “spectator” to mean “bystander,” then the definition of “equine activity participant” is superfluous. The authors could have reached the

same result by stating that the scope of immunity included every physical injury caused by the inherent risk of equine activity (absent one of the R.C. 2305.321(B)(2) “knew or should have known” exceptions applying).

We begin with the fact that the statute’s definition of “equine activity” includes seemingly everything related to equines, down to an equine’s mere existence. R.C. 2305.321(A)(2) defines “equine activity” as including everything from jumping to hunting to mere “boarding.” Two courts have commented upon the all-encompassing definition of “equine activity.” The court in *Lawson v. Dutch Heritage Farms*, 502 F.Supp.2d 698, 705 (N.D. Ohio 2007), stated:

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 [*sic*].

In *Allison v. Johnson*, No. 2000-T-0116, 2001 Ohio App. LEXIS 2485, \*11 (11th Dist. June 1, 2001), the court stated:

Frankly, there is little of the day to day maintenance and routine of keeping a horse that could not fall under this penumbra [the definition of “equine activity”].

Defendant concedes the point:

[T]he term “equine activities” broadly covers almost every activity associated with a horse .... [¶] “[E]quine activity” is broadly defined to encompass nearly every conceivable activity that involves a horse ....

(Merit Brief of Appellant Donald Landfair 9, 12.)

The class of victims disenfranchised by R.C. 2305.321 is defined as “equine activity participants.” R.C. 2305.321(B)(1). The class “equine activity participants” includes “spectator[s] at an equine activity.” R.C. 2305.321(A)(3)(g). If “spectator” means “bystander,” then this immunity statute covers *all victims* of the inherent risk of equine activity (subject to the

R.C. 2305.321(B)(2) “knew or should have known” exceptions). If this were the intent of the authors of R.C. 2305.321, they would not have defined the class at all, because such persons are automatically in that class by virtue of having been injured as the result of the inherent risks of equine activity. Instead, the statute includes a six-paragraph, eleven-factor definition of this class of victims.

Thus, both in common, everyday usage, and in the context of R.C. 2305.321, “spectator” does not mean “bystander.”

**2. The context of R.C. 2305.321 reflects that the phrase “spectator at an equine activity” means a person who has physically placed himself/herself with the purpose of perceiving that equine activity**

“Words and phrases shall be read in context . . . .” R.C. 1.42. In construing statutes, this Court often must look to context to choose among multiple, common, everyday meanings of a single word. *See, e.g., In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-491, ¶¶ 88-89 (construing “represent” in the context of statute providing right to counsel in juvenile-delinquency proceedings); *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 12 (construing “section” in the context of the Ohio Revised Code); *Ashland Chemical Co. v. Jones*, 92 Ohio St.3d 234, 238, 2001-Ohio-184 (construing “employing” in the context of environmental regulation); *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, ¶¶ 16-18 (construing “criminally” in the context of criminal tools statute); *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 31 (construing “establish” and “occupy” in the context of sex-offender residency restriction); *State ex rel. Moss v. Ohio State Hwy. Patrol Retirement Sys.*, 97 Ohio St.3d 198, 2002-Ohio-5806, ¶ 20 (*per curiam*) (construing “qualifies” in the context of state retirement-fund system).

A side-by-side comparison of dictionary definitions (the appendix to this brief) demonstrates that the words “spectator,” “observer,” “viewer,” and “witness” have multiple,

common, everyday meanings, which apply depending upon the context in which they are used.

For example:

- **“Observer”** can mean someone who is in a particular location for the purpose of perceiving a particular event – such as a United Nations observer dispatched to a troubled country. But “observer” can also mean someone who happens to perceive something.
- **“Viewer”** can mean someone who is in a particular location for the purpose of perceiving a particular event – such as a television viewer, a jury member at a jury view, or a court-appointed inspector. But “viewer” can also mean someone who happens to see something.
- **“Witness”** can mean someone who is in a particular location for the purpose of perceiving a particular event – such as a witness to the signing of a document. But “witness” can also mean a person who happens to perceive something, such as an accident or a crime.

“Spectator,” too, depending upon the context, can mean either an intentional or an accidental perceiver – although “spectator,” more so than these other words, usually means an intentional perceiver, such as an attendee of a horse show, parade, or circus. Because “spectator” is ambiguous, this Court must construe it in the context of R.C. 2305.321.

In construing statutes, this Court does not presume that the General Assembly intended to abrogate common law, except to the extent the language of the statute clearly states such intention. *See State ex rel. Merrill*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶ 34; *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, ¶ 18. This Court elaborated upon this principle in *Bresnik v. Beulah Park L.P.*, 67 Ohio St.3d 302, 1993-Ohio-19, in holding that a statute did not abrogate the common-law property right of a property owner to exclude persons from the property:

R.C. Chapter 3769 and its accompanying regulations do not abolish the common-law right of proprietors to exclude individuals from their property. Not every statute is to be read as an abrogation of the common law. 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, and 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.* at 304 (quotations marks and emphasis omitted).

Immunity statutes abrogate the common law of torts by eliminating tort claims. *See Thrash v. Hill*, 63 Ohio St.2d 178, 182 (1980); *Wassenaar v. Ohio Dept. of Rehabilitation and Correction*, 2008-Ohio-1220, ¶ 24 (10th Dist.); *Phipps v. City of Dayton*, 57 Ohio App.3d 11, 11-12 (2nd Dist. 1998). Therefore, this Court should not presume that the General Assembly intended R.C. 2305.321 to eliminate tort claims beyond what is clear from the statutory language. In other words, read in the context of this individual-immunity statute abrogating common-law tort claims, this Court should choose the meaning of “spectator” that eliminates fewer victims’ tort claims.

Another contextual reason to give the narrower construction to “spectator” in R.C. 2305.321 is the broad scope of the defined term “equine activity” (*see* Part II-A-1 above). Defendant argues that because R.C. 2305.321 defines “equine activity” so broadly as to encompass nearly every conceivable activity that involves a horse, it necessarily follows that the R.C. 2015.321(A)(3)(g) phrase “spectator at an equine activity” must be construed so broadly as to encompass nearly everyone within viewing distance of an equine activity. (Defendant’s Merit Brief 11-12.)

The opposite is true.

Neither logic, nor semantics, nor any rule of grammar or statutory construction suggests, much less requires, that every equine activity admit of “spectating.” The fact that the statute expressly defines the phrase “equine activity” artificially broadly does not mean that courts should construe “spectator” artificially broadly. For example, one can imagine a case of statutory construction involving a statute that exhaustively defines the word “road” to include

highways, streets, alleys, paths, etc. If that statute also defined a class of persons as including a “worker in the road,” courts would give that phrase its plain and ordinary meaning – a person laboring or performing some industry related to the road, such as survey or design. Courts would not, simply because “road” is broadly defined, broadly construe “worker” as including the drivers and pedestrians transporting themselves upon the road. Similarly, the fact that R.C. 2305.321 broadly defines “equine activity” is not a reason to construe “spectator” as including every bystander or person who happens to glimpse an equine.

The decision by the statute’s authors to specifically delimit the class of disenfranchised victims, rather than disenfranchise every person injured by the inherent risks of equine activities (*see* Part II-A-1 above), militates toward the narrower construction of “spectator.” So too does the authors’ choice of the less commonly used word “spectator” over the more common<sup>1</sup> and inclusive words “observer,” “viewer,” and “witness.” If the authors were seeking the broader scope of immunity for which Defendant argues, the authors would have defined the class of victims being disenfranchised by choosing one of the more common, inclusive words. Alternatively, the statute’s authors could have done what the Iowa legislature did: artificially and broadly define a word to represent the class of disenfranchised victims. The Iowa domesticated-animal-activities immunity statute defines “spectator” as a function of mere co-location: “*Spectator* means a person who is *in the vicinity* of a domesticated animal activity, but who is not a participant.” Iowa Code § 673.1(9) (emphasis added).<sup>2</sup> In contrast, the authors of R.C. 2305.321 restrained the statute’s reach by using the less common, more restrictive word “spectator” and not imbuing it with any artificial meaning.

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<sup>1</sup> For a comparison of how often these words are used in American English, see the table in Appendix B of this brief.

<sup>2</sup> The Supreme Court of Iowa applied this definition in *Hynes v. Clay Cty. Fair Assn.*, 672 N.W.2d 764, 767 (Iowa 2003), concluding that “[Plaintiff] falls within this definition [of spectator] because . . . she was in the vicinity of that activity.”

The Horseman's Council's brief is correct in pointing out the absurdity of construing "spectator" as a function of "glances," "peripheral vision," and "seeing." (Horseman' Council Brief 6-7.) Distinguishing among these variations of visual perception for purposes of adjudicating liability is folly. Defendant's mere framing of the issue in terms of visual perception is misguided. The common, everyday meanings of "spectator" are broad enough in most contexts (including this statute) to encompass one who perceives by any of the five senses. "Observation" and "witnessing," and more so "viewing," are usually associated with the sense of sight. But one may "observe" and "witness" smells and sounds, too (and also tastes and physical impressions, although the senses of taste and touch are not likely to be implicated in the context of injuries caused by equines.) Surely the "assumption of the risk" codified in R.C. 2305.321 was not intended to depend upon victims' eyesight. A sightless person who patronizes a horse show surely must be a "spectator" within the meaning of R.C. 2305.321.

Avoiding the absurdity of liability being determined either by the sense by which the equine activity was perceived or by the characterization of such perception does not require distending the meaning of "spectator at an equine activity" to include every person in the vicinity of an equine or every person who happens to become aware of an equine in the moments before being injured by it. All that is required is to construe that phrase in context to mean a person perceiving an equine activity because that person physically placed himself/herself for the purpose of perceiving that equine activity.

**B. Construing "spectator" in R.C. 2305.321 as involving an intent to perceive avoids unreasonable results and best serves the object of the statute**

The Ohio Revised Code commands (1) that statutes be construed with the presumption that reasonable results are intended, and (2) that courts clarify ambiguities by considering the

object of the statute and the consequences of the various constructions. R.C. 1.47(C) provides: “In enacting a statute, it is presumed that ... [a] just and reasonable result is intended.” R.C. 1.49(E) provides:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; [and] (E) [t]he consequences of a particular construction.

Plaintiff concurs in the reasoning contained in the Ohio Association for Justice’s brief at part II-B. The Defendant’s proposed construction of “spectator” would be tantamount to presuming the General Assembly intended *un*reasonable results and consequences. Defendant’s proposed construction is also inconsistent with the goal of the statute, which is to codify the common-law “assumption of the risk” defense in certain equine tort disputes.

Moreover, Defendant argues that Plaintiff should be considered a “spectator” because she placed herself at a stable where she knew that various equine activities would be taking place. (Defendant’s brief at 16). Surely the General Assembly did not mean to deprive of a remedy all persons injured by equines simply because they go to a location where it is known that equine activities are taking place. If the authors of R.C. 2305.321 intended to include every person who places himself/herself in a location where it is known that equine activities are taking place, then the authors could have stated so in the statute. If that were the authors’ intent, however, then we are again left with an immunity statute that essentially includes *all victims* of the inherent risk of equine activity.

It is on this basis that Defendant attempts to distinguish Plaintiff from “the court of appeals’ mail carrier hypothetical.” (Defendant’s brief at 16). Such a distinction flies in the face of logic. Certainly, the mail carrier who delivers the mail daily to the stable *knows* that equine activities take place there. Likewise, the HVAC repairman who makes a service call to a stable knows that equine activities will be taking place, as does the FedEx driver, the jogger whose

daily run takes him or her past a horse farm and the person who delivers feed to equestrian centers. Under Defendant's proposed construction, any of these people who is injured by a horse is left without remedy simply by virtue of the fact that he or she knew that equine activities might be taking place at a given location.

A person who goes to the state fair to patronize the horse show is surely a spectator within the meaning of R.C. 2305.321. However, under Defendant's proposed definition, a person on the midway at the state fair who is injured by a horse is left without remedy if he or she knew that equine activities might be taking place at the state fair. Such unintended and unreasonable results are avoided by giving the word "spectator" its common, ordinary meaning better suited to this context: a person who has physically placed himself/herself with the purpose of perceiving that equine activity.

### **C. There is no compelling precedent under Ohio law on this issue**

There is no compelling precedent under Ohio law construing the definition of "spectator" in the context of R.C. 2305.321. In fact, only eight other appellate decisions cite R.C. 2305.321, and in only a single case did the court construe "spectator."

That case, *Allison v. Johnson*, No. 2000-T-0116, 2001 Ohio App. LEXIS 2495 (11<sup>th</sup> Dist. June 1, 2001), is clearly distinguishable from the case at bar and is not compelling precedent. In *Allison*, the victim was walking into a horse barn for the purpose of watching the horse that caused her injury. *Id.* at \*1-2. Here, in contrast, Ms. Smith was a safe distance from the horse that injured her (Smith Depo. Tr. 39-40 [Appellant's Suppl. 15]) and was not watching the horse that injured her (Smith Depo. Tr. 32-35 [Appellant's Suppl. 13-14]).

*Allison* is not compelling precedent for two reasons. First, the decision in *Allison* is based upon the incorrect premise that the meaning of "spectator" is singular and unambiguous.

As demonstrated above, “spectator,” depending upon the context, can mean either someone who physically placed himself/herself with the purpose of perceiving something or someone who simply sees something.

Second: the *Allison* opinion is self-contradictory. The opinion indicates that every “bystander” is a “spectator”: “[W]e see no distinction between the plain and ordinary meaning of spectator and bystander.” *Id.* at \*15. Then the opinion indicates that *not* every “bystander” is a “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.

*Id.* at \*20-21.

The other seven Ohio appellate cases that cite R.C. 2305.321 are not remotely relevant to the issue before this Court. (See *amicus* brief of the Ohio Association of Justice at part II-C).

**D. Other states have construed the definition of “spectator” consistent with a person who physically places himself/herself with the purpose of perceiving an activity or event**

Other states, however, have construed “spectator” in the context of statutes that prohibit being a spectator at animal fighting. As here, the legislature in these cases did not provide a definition of the word “spectator” in the statute. The reasoning employed by the courts in these cases provides guidance and support for construing spectator as a person who has physically placed himself/herself with the purpose of perceiving that equine activity.

The Supreme Court of Pennsylvania in *Commonwealth v. Craven*, 572 Pa. 431, 817 A.2d 451 (Pa. 2003) considered the definition of the word spectator under a statute that criminalizes an individual’s attendance at an animal fight “as a spectator”. The court in *Craven* reversed the trial court’s determination that the statute was unconstitutionally vague and overbroad because it

criminalized one's mere presence at an animal fight. In so holding, the court distinguished being a "spectator" from being "present" at an event or activity. The court noted that Webster's Dictionary defines "spectator" as "one that looks on or beholds; [especially] one witnessing an exhibition (as a sports event)" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2188 (1993). On the contrary, the court noted that "presence" is defined as "the state or being in one place and not elsewhere[;] the fact of being in company, attendance, or association." *Id.* at 1793. The court concluded that the two words are clearly distinct as follows:

A spectator does more than a person who is merely present at a particular place by happenstance, since a spectator, by definition, makes a conscious choice to view and witness an exhibition. *Craven* at 572 Pa. 434

Similarly, in *State v. Young*, 695 S.W.2d 882 (Mo. 1985), the Supreme Court of Missouri held that a statute that criminalized "being present at a cockfight" was unconstitutionally vague because a person could be subject to criminal liability not necessarily as a spectator or active participant, but as one who is only at a place used for such events.

In the case at bar, Plaintiff suggests that this Court adopt a standard by making a distinction between one who is a voluntary spectator versus one who is a mere passerby. A voluntary spectator is a purposeful observer, one who travels to the scene of an event expressly for the purpose of witnessing it. A mere passerby is a casual spectator, one whose attention is drawn to an exhibition while traveling in the vicinity.

In *Peck v. Dunn*, 574 P.2d 367 (Utah 1978), the Utah appellate court held that an ordinance that criminalized being a spectator at a cock fight was constitutional as follows:

[A] sensible and practical application of the ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight as opposed to some mere passerby happening to observe it. *Peck* at 370.

As in *Peck*, a sensible and practical application of R.C. 2305.321(A)(3) would require a construction of spectator as one who has physically placed himself/herself with the purpose of watching that equine activity.

**E. Plaintiff was not a “spectator”**

Plaintiff did not physically place herself with the purpose of watching Defendant’s equine activity – the equine activity that led to her injury. She placed herself with the purpose of watching – and was watching – a different equine activity. Therefore, she was not a “spectator” within the meaning of R.C. 2305.321(A)(3)(g).

Defendant argues that Plaintiff was a spectator because she was watching *another* equine activity – her father exercising *another* horse. (Defendant’s Merit Brief 12.) In other words, Defendant is advocating the following proposition of law: that R.C. 2305.321 bars the tort claim of an “equine activity participant” even if the victim was injured by a different equine activity in which the victim was *not* a participant.

The Court should reject that argument for two reasons.

First: Defendant’s argument advocates a proposition of law outside the scope of both (1) the proposition of law this Court accepted for review, and (2) any of the other propositions of law set forth in Defendant’s Memorandum in Support of Jurisdiction.

Second: Defendant’s proposition of law bears no relation to the object of R.C. 2305.321, which is to codify the common-law “assumption of the risk” defense in equine tort disputes. The logic of the statute is that a victim assumed the risk of injury by becoming an “equine activity participant.” A victim cannot be said to have assumed the risk of a different activity of which the victim was unaware. In this case, for example, Defendant’s horse was spooked by an unrelated equine activity – a horse-drawn wagon on an adjacent public road. Under Defendant’s

theory, if Defendant's spooked horse had charged directly into the wagon, the wagon passengers would have no redress, because they were "equine activity participants" – even though the passengers were injured by a different equine activity to which they were strangers.

**III. The question of whether Plaintiff was a *non-spectator* "equine activity participant" is not before this Court**

Defendant argues that regardless of whether Plaintiff was a "spectator," Plaintiff was an "equine activity participant" by being "involved herself in the very event that caused her injury." (Defendant's Merit Brief 14. *Accord id.* at 15 ("Plaintiff could have remained standing where she was – clear of danger. Instead, she ran toward [Defendant] and the horse.") In other words, Defendant argues that Plaintiff satisfies one of the *other* R.C. 2105.321(A)(3) definitions of "equine activity participant" – one who "[a]ssists a person who is engaged in an activity described in division (A)(3)(a), (b), (c), or (d) of this section," R.C. 2305.321(A)(3)(e).

This Court should decline to address this argument, because this Court expressly declined jurisdiction over this question. This Court declined jurisdiction over Defendant's Proposition of Law 3, which was: "One who comes to the aid of another who is attempting to control an equine is 'assisting' the other under R.C. 2305.321(A)(3)(e)."<sup>3</sup> This Court accepted jurisdiction over only the question of whether a person is a "spectator" within the meaning of R.C. 2305.321(A)(3)(g) if the person is a bystander or observer.

There is an irony in Defendant's ignoring the limited scope of this Court's jurisdiction and relying upon Plaintiff's role as Defendant's rescuer. In making this argument, Defendant comes close to advocating for the OAJ's proposed proposition of law. Defendant argues:

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<sup>3</sup> *Both* of the lower courts ruled in Plaintiff's favor on this issue. The court of common pleas "reject[ed] [Defendant's] allegation that [Plaintiff] was an equine activity participant because she was 'assisting' [Defendant] at the time of her injury ...." (Ct. C.P. Order (Apr. 30, 2010) 8 [Defendant's Merit Brief Appx. 10].) The court of appeals agreed. (Ct. App. Op. ¶ 17 [Defendant's Merit Brief Appx. 27].)

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.

(Defendant's Merit Brief 16.) Indeed, "spectator at an equine activity" in R.C. 3205.321 (A)(3)(g) should mean a person who has physically placed himself/herself with the purpose of watching that equine activity.

**IV. The undisputed testimony demonstrates that Ms. Smith did not physically place herself with the purpose of perceiving Defendant unloading his horse**

Defendant argues that the court of appeals decision can be construed as having determined as a matter of law that Ms. Smith was not a spectator within the meaning of R.C. 2305.321.

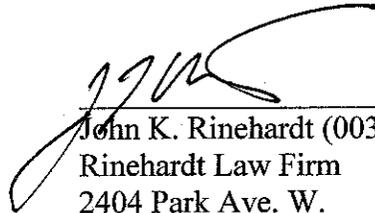
Such a construction of the court of appeals' opinion seems to be based upon the undisputed testimony contained in the record below that established that Ms. Smith was not a spectator within the definition of having intentionally placed herself in a position to observe the equine activity being engaged in by Defendant. However, the trial court was presented below only with the Defendant's motion for summary judgment. Plaintiff did not file a cross motion for summary judgment in the trial court seeking a determination as a matter of law on this issue. Thus, Plaintiff agrees that to the extent Defendant, at trial, is able to present testimony or evidence sufficient to create an issue of fact as to whether Ms. Smith was a spectator, then such issue should go to the jury.

Thus, In the event this Court affirms the court of appeals' reversal of the grant of summary judgment, Plaintiff has no objection to a declaration by this court directing that the trial court permit Defendant to present evidence to the jury on the factual issue of whether Plaintiff on the date of the incident was a spectator within the definition adopted by this court.

## CONCLUSION

This Court should affirm. In so doing, the Court should hold that the term “spectator at an equine activity” in R.C. 2305.321(A)(3)(g) means a person that has physically placed himself/herself with the purpose of watching that equine activity.

Respectfully submitted,



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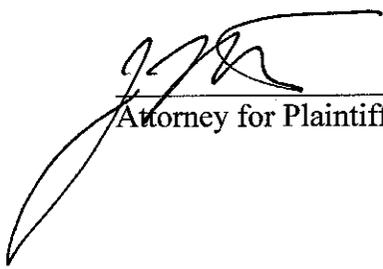
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**PROOF OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent by regular U.S. mail, postage prepaid, this 8<sup>th</sup> day of May, 2012 to the following:

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# APPENDIX A

## Dictionary Definitions

Source	"Spectator"	"Bystander"	"Observer"	"Viewer"	"Witness"
Webster's Third New International Dictionary 2188 (2002)	one that looks on or beholds; <i>esp</i> : <i>one witnessing an exhibition (as a sports event)</i> (emphasis added)	one present but not taking part : <i>a chance spectator</i> (emphasis added)	one that observes: as <b>a</b> : a keeper of or adherent to something established (as a law, custom, regulation, rite, or vow) ... <b>b</b> : one that pays attention to something; <i>esp</i> : one engaged in or trained in the methods of close and exact observation <an astronomical [observer]> <b>c</b> : one that makes a remark ... <b>e</b> : a representative sent to observe and listen but not to participate officially in a gathering ...	one that views: as <b>a</b> : a person legally appointed to inspect and report on property (as highways) <b>b</b> : an optical device of any of several forms used to assist in viewing (as photographic transparencies) <b>c</b> : a person who watches television	... one that gives evidence regarding matters of fact under inquiry; <i>specif</i> : one who testifies or is legally qualified to testify in a cause or to give evidence before a judicial tribunal or similar inquiry ... <b>3 a</b> : one who is called on to be present at a transaction so as to be able to testify to its having taken place (as one who witnesses a will, deed, or marriage) ... <b>4 a</b> : one that is cognizant of something by direct experience : one who beholds

Source	"Spectator"	"Bystander"	"Observer"	"Viewer"	"Witness"
Oxford Dictionary of English <sup>1</sup>	a person who watches <b>at a show, game, or other event</b> (emphasis added)	a person who is present at an event or incident but does not take part	a person who watches or notices something ... a person who follows events closely and comments publicly on them ... a person posted in an official capacity to an area to monitor political or military events ... a person who attends a conference, inquiry, etc., to note the proceedings without participating in them ...	1. a person who looks at or inspects something; a person watching television or a film ...	or otherwise has personal knowledge of something ... a person who sees an event, typically a crime or accident, take place ...
New Oxford American Dictionary	a person who watches <b>at a show, game, or other event</b> (emphasis added)	a person who is present at an event or incident but does not take part	a person who watches or notices something	a person who looks at or inspects something	a person who sees an event, typically a crime or accident, take place
Oxford American Dictionary of Current English	a person who looks on at a show, game, incident, etc.	a person who stands by but does not take part	<b>observer.</b> a person who observes <b>observe.</b> perceive; note	<b>viewer.</b> a person who views <b>view.</b> range of vision	a person present at some event and able to give information about it

<sup>1</sup> All three Oxford dictionaries cited in this table appear in Oxford Reference Online Premium, available to the public through the website of the Columbus Metropolitan Library, [www.ColumbusLibrary.org](http://www.ColumbusLibrary.org).

Source	"Spectator"	"Bystander"	"Observer"	"Viewer"	"Witness"
Merriam-Webster's Collegiate Dictionary (11th ed. 2004)	one who looks on or watches	one present but not taking part in a situation or event : <b>a chance spectator</b> (emphasis added)	one that observes : as <b>a</b> : a representative sent to observe but not participate officially in an activity (as a meeting or war) <b>b</b> : an expert analyst and commentator in a particular field <political [observers]>.	one that views : as <b>a</b> : a person legally appointed to inspect and report on property <b>b</b> : an optical device used in viewing <b>c</b> : a person who watches television. view. 1:to look at attentively: scrutinize, observe ... 2a: see, watch	... <b>2</b> : one that gives evidence; specif : one who testifies in a cause or before a judicial tribunal <b>3</b> : one asked to be present at a transaction so as to be able to testify to its having taken place <b>4</b> : one who has personal knowledge of something ... 6. an individual who, being present, personally sees or perceives a thing; a beholder, spectator, or eyewitness
www.diction-ary.com	a person who looks on or watches; onlooker; observer. a person who is present at and views <b>a spectacle, display, or the like</b> ; member of an audience (emphasis added)	a person present but not involved; <b>chance spectator</b> ; onlooker (emphasis added)	<b>observer</b> . someone or something that observes <b>observe</b> . 1. to see, watch, perceive, or notice ... 2. to regard with attention, especially so as to see or learn something 3. to watch, view, or note for a scientific, official, or other special purpose	<b>viewer</b> . a person or thing that views <b>view</b> . an instance of seeing or beholding; visual inspection.	

Source	"Spectator"	"Bystander"	"Observer"	"Viewer"	"Witness"
Webster's New Collegiate Dictionary (1977)	<b>spectate.</b> to be present as a spectator (as at a sports event). <b>spectator.</b> one who looks on or watches[:] onlooker	one present but not taking part in a situation or event : <b>a chance spectator</b> (emphasis added)	one that observes : as ... a representative sent to observe but not participate officially in a gathering	<b>viewer.</b> one that views <b>view.</b> the act of seeing or examining : inspection	3:one asked to be present at a transaction so as to be able to testify to its having taken place ... 4:one who has personal knowledge of something
Cambridge Dictionaries Online – American English, <a href="http://dictionary.cambri dge.org">http://dictionary.cambri dge.org</a>	a person who watches an activity, <b>esp. a public event</b> , without taking part (emphasis added)	a person who is standing near and watching something that is happening but is not involved in it	a person who watches what happens but has no active part in it	someone who watches a particular TV broadcast or series of broadcasts, esp. regularly	a person who sees an event happening, esp. a crime or an accident
Black's Law Dictionary (6th ed. 1990)	<i>No entry</i>	One who stands near; <b>a chance looker-on; hence one who has no concern with the business being transacted</b> (emphasis added). One present but not taking part, looker-on, spectator, beholder, observer.	<b>Observer. No entry</b> <b>Observe.</b> To perform that which has been prescribed by some law or usage. To adhere to or abide by.	<b>Viewers.</b> Persons appointed by a court to make an investigation of certain matters, or to examine a particular locality (as, the proposed site of a new road), and to report to the court the result of their inspection, with their opinion on the same.	In general, one who, being present, personally see or perceives a thing; a beholder, spectator, or eyewitness. One who is called to testify before a court. One who testifies to what he has seen, heard, or otherwise ob-

Source	"Spectator"	"Bystander"	"Observer"	"Viewer"	"Witness"
					<p>served. [ ] A person whose declaration under oath (or affirmation is received as evidence for any purpose ... [ ] A person attesting genuineness of signature to document by adding his signature. [ ] One who is called upon to be present at a transaction, or the making of a will. He may thereafter, if necessary, testify to the transaction.</p>

## APPENDIX B

### Word Frequencies within the Corpus of Contemporary American English

	<b>Occurrences</b>	<b>Rank</b>
spectator	4,858	5,270
bystander	1,127	12,262
observer	14,211	2,472
viewer	14,019	2,494
witness	19,714	1,980

Source: Davies, Mark, Word Frequency Data from the Corpus of Contemporary American English (COCA). Interactive word search available at <http://www.wordandphrase.info/frequencylist.asp>. According to Davies, COCA contains 425 million words and is the only large, genre-balanced, up-to-date corpus of American English. <http://www.wordfrequency.info/>