

ORIGINAL

IN THE SUPREME COURT OF OHIO

Roshel Smith,

Plaintiff-Appellee,

v.

Donald E. Landfair,

Defendant-Appellant.

Case No. 2011-1708

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

BRIEF OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEE ROSHEL SMITH

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DEFENDANT/APPELLANT'S 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.

**INTEREST OF *AMICUS CURIAE*
THE OHIO ASSOCIATION FOR JUSTICE**

The Ohio Association for Justice ("OAJ") is Ohio's largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

The OAJ believes that the court of appeals reached the correct result in this case but that this Court should clarify that the term "spectator at an equine activity" in R.C. 2305.321(A)(3)(g) means a person who has physically placed himself/herself with the purpose of perceiving that equine activity.

STATEMENT OF THE CASE

The Ohio Association for Justice accepts the Statement of the Case in Appellee Roshel Smith's brief.

STATEMENT OF FACTS

The Ohio Association for Justice accepts the Statement of Facts in Appellee Roshel Smith's brief.

The Court should note that Defendant's reliance upon the fact that Plaintiff is an experienced horseman and the fact that she was employed at the facility where she was injured (albeit off duty at the time) (Defendant's Merit Brief 2, 15) is misplaced in this appeal. Those facts have no place in the analysis of the sole question before this Court: whether Plaintiff was a "spectator at an equine activity" within the meaning of R.C. 2305.321(A)(3)(g).

SUMMARY OF ARGUMENT

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). *Amicus Curiae* The Ohio Horseman's Council, in support of Defendant, adds "viewer" and "witness" to this list of putative synonyms.

R.C. 2305.321 does not define “spectator,” and so this Court must accord “spectator” its common, everyday meaning. 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.”

The word “bystander” connotes mere co-location and thus is unique among Defendant’s putative synonyms in two ways: (1) the word “bystander” does not necessarily connote perception; and (2) the word “bystander” generally connotes an *absence* of any purpose related to the event at issue.

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 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.

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.

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.

Immunity statutes abrogate the common law of torts by eliminating tort claims. 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.

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.” 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, militates toward the narrower construction of “spectator.” So too does the authors’ choice of the less commonly used word “spectator” over the more common and inclusive words “observer,” “viewer,” and “witness.”

It would be absurd to construe “spectator” as a function of “glances,” “peripheral vision,” and “seeing.” 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.

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 be-

ing 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.

Horses, like other animals, are permitted on Ohio roadways. *See* R.C. 4513.11. Defendant’s proposed construction of “spectator” would render every traveler who comes into the vicinity of a horse a “spectator at an equine activity” and give every horseman a license to be negligent no matter the circumstance.

Another unreasonable result of Defendant’s proposed construction would occur in the circumstance of horses in urban locations. Under Defendant’s proposed construction, pedestrians at a street corner who are injured by a horse are left without a remedy if they observed, viewed, or witnessed the horse, or were a bystander to the horse, even if they attempted to retreat from an approaching horse.

Defendant’s proposed construction is also inconsistent with 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 R.C. 2305.321 is that a victim, by consent or acquiescence, assumed the inherent risk of an equine activity. Defendant’s proposed construction of “spectator,” by eliminating the “intent” aspect of “spectating,” eliminates the “consent or acquiescence” requirement that is the foundation of the statute.

C. 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 watch-

ing – and was watching – a different equine activity. Therefore, she was not a “spectator” within the meaning of R.C. 2305.321(A)(3)(g).

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 im-

munity 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).

Generally speaking, immunity statutes abrogate the common law of torts. *See 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 con-

struction 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 common¹ 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).² In contrast, the authors of R.C. 2305.321 re-

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

² 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.”

strained the statute's reach by using the less common, more restrictive word "spectator" and not imbuing it with any artificial meaning.

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.

This Court’s adopting 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.

Horses, like other animals, are permitted on Ohio roadways. *See* R.C. 4513.11. Defendant’s proposed construction of “spectator” would render every traveler who comes into the vicinity of a horse a “spectator at an equine activity” and give every horseman a license to be negligent no matter the circumstance.

Another unreasonable result of Defendant’s proposed construction would occur in the circumstance of horses in urban locations – such as nightlife-oriented downtown horse-and-carriage rides. In that circumstance, some pedestrians are placed in the vicinity of a horse against their will. Under Defendant’s proposed construction, pedestrians at a street corner who are injured by a horse are left without a remedy if they observed, viewed, or witnessed the horse, or were a bystander to the horse. This would be so even if the pedestrian attempted in vain to retreat from the approaching horse.

Surely the General Assembly did not mean to deprive of a remedy all persons injured by equines who happened to perceive the equine before being injured by it. Such unintended results are avoided by giving the word “spectator” its common, everyday meaning better suited to this context: a person who has physically placed himself/herself with the purpose of perceiving that equine activity. Such a construction prudently leaves to Ohio’s trial judges (and juries ably instructed by them) the power to distinguish between, say, the unwilling pedestrian and the parade attendee.

Defendant’s proposed construction is also inconsistent with the object of R.C. 2305.321, which is to codify the common-law “assumption of the risk” defense in equine tort disputes:

[Equine immunity statutes] are acknowledged to be codifications of the affirmative defense to negligence of assumption of risk. Accordingly, the extent of risk that an “equine activity participant” assumes is a critical factor under this codified version of Ohio’s common law.

Lawson v. Dutch Heritage Farms, 502 F.Supp.2d 698, 700 (N.D. Ohio 2007) (citations and footnote omitted). The defense of assumption of risk requires consent or acquiescence in an appreciated or known risk. *Anderson v. Ceccardi*, 6 Ohio St.3d 110, 112 (1983). The logic of R.C. 2305.321 is that a victim, by consent or acquiescence, assumed the inherent risk of an equine activity. Defendant’s proposed construction of “spectator,” by eliminating the “intent” aspect of “spectating,” eliminates the “consent or acquiescence” requirement that is the foundation of the statute.

C. There is no compelling precedent regarding this question.

Only eight other appellate decisions cite R.C. 2305.321, and in only one of those cases did the court construe “spectator.” None of the decisions is a compelling precedent.

In *Allison v. Johnson*, No. 2000-T-0116, 2001 Ohio App. LEXIS 2485 (11th Dist. June 1, 2001), the plaintiff was watching the defendant lead a horse toward her when the defendant lost

control of the horse, the horse struck a gate, and a plank in the gate popped out and seriously injured the plaintiff. The court affirmed summary judgment for the defendant, ruling that the defendant was immune because the plaintiff was a “spectator at an equine activity.” *Id.* at *8-16.

Allison is not a 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 sees something accidentally or unwillingly.

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.

Allison is also factually distinguishable from this case. In *Allison*, the victim walked into a horse barn and was watching the horse that caused her injury. *Id.* at *1-2. Here, in contrast, the victim Ms. Smith was a safe distance from the horse that injured her (*see* Smith Depo. Tr. 39-40 [Appellant’s Suppl. 15]) and was not watching the horse that injured her (*see* Smith Depo. Tr. 32-35 [Appellant’s Suppl. 13-14]).

In *Lawson v. Dutch Heritage Farms*, 502 F.Supp.2d 698 (N.D. Ohio 2007), the plaintiff was seriously injured when she was thrown from a horse-drawn buggy. The magistrate judge noted *Allison*’s discussion of the word “spectator,” *id.* at 705-706, but did not reach the “specta-

tor” question because the plaintiff was already an “equine activity participant” by virtue of being a passenger in a horse-drawn buggy, *id.* at 706-707.

McGuire v. Jewett, 2005-Ohio-4214 (11th Dist.) is of no relevance here because the only issue in that case was whether there was a genuine issue of material fact regarding one of the R.C. 2305.321(B)(2)(a) “knew or should have known” exceptions to immunity.

In *Gibson v. Donahue*, 148 Ohio App.3d 139, 2002-Ohio-194, ¶ 32 (1st Dist.), the court held that R.C. 2305.321 “does not [immunize] dog owners who allow their dogs to chase horses.” *Gibson* is of no relevance here, because it is undisputed that Defendant was an “equine activity participant” with respect to the equine activity that caused Plaintiff’s injury.

Markowitz v. Bainbridge Equestrian Ctr. Inc., 2007-Ohio-1540 (11th Dist.), involved a simple application of the immunity statute to a seven-year-old thrown and trampled by a horse.

In three cases, the litigants argued, but the courts did not reach, issues arising under R.C. 2305.321: *Rutkai v. Freeland*, 2008-Ohio-6440 (9th Dist.); *McGuire v. Jewett*, 2007-Ohio-3198 (11th Dist.); *Hall v. Klien*, No. WD-99-001, 1999 Ohio App. LEXIS 4058 (6th Dist. Sept. 3, 1999).

Weiner v. American Cancer Society, Ohio Division, Inc., 2002-Ohio-2718, ¶ 67 (8th Dist.) contains only a passing mention of R.C. 2305.321 in the context of a contract dispute.

D. 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’s 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 an equine activity in which the victim was *not* an “equine activity 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 Defendant proposed in his 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 of which they were unaware.

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).”³ 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:

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.

³ *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].)

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 who has physically placed himself/herself with the purpose of watching that equine activity.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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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 a : a keeper of or adherent to something established (as a law, custom, regulation, rite, or vow) ... 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]> c : one that makes a remark ... e : a representative sent to observe and listen but not to participate officially in a gathering ... | one that views: as a : a person legally appointed to inspect and report on property (as highways) b : an optical device of any of several forms used to assist in viewing (as photographic transparencies c : 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 ... 3 a : 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) ... 4 a : one that is cognizant of something by direct experience : one who beholds |

| Source | "Spectator" | "Bystander" | "Observer" | "Viewer" | "Witness" |
|---|--|--|--|--|---|
| Oxford Dictionary of English ¹ | a person who watches at a show, game, or other event (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 at a show, game, or other event (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 | observer. a person who observes observe. perceive; note | viewer. a person who views view. range of vision | a person present at some event and able to give information about it |

¹ 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.

| 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 : a chance spectator (emphasis added) | one that observes : as a : a representative sent to observe but not participate officially in an activity (as a meeting or war) b : an expert analyst and commentator in a particular field <political [observers]>. | one that views : as a : a person legally appointed to inspect and report on property b : an optical device used in viewing c : a person who watches television. view. 1:to look at attentively: scrutinize, observe ... 2a: see, watch | ... 2 : one that gives evidence; specif : one who testifies in a cause or before a judicial tribunal 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 ... |
| www.dictionary.com | a person who looks on or watches; onlooker; observer. a person who is present at and views a spectacle, display, or the like; member of an audience (emphasis added) | a person present but not involved; chance spectator ; onlooker (emphasis added) | observer. someone or something that observes observe. 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 | viewer. a person or thing that views view. an instance of seeing or beholding; visual inspection. | 6. an individual who, being present, personally sees or perceives a thing; a beholder, spectator, or eyewitness |

| Source | "Spectator" | "Bystander" | "Observer" | "Viewer" | "Witness" |
|---|--|--|---|---|--|
| Webster's New Collegiate Dictionary (1977) | spectate. to be present as a spectator (as at a sports event). spectator. one who looks on or watches[:] onlooker | one present but not taking part in a situation or event : a chance spectator (emphasis added) | one that observes : as ... a representative sent to observe but not participate officially in a gathering | viewer. one that views view. 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, http://dictionary.cambridge.org | a person who watches an activity, esp. a public event , 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; a chance looker-on; hence one who has no concern with the business being transacted (emphasis added). One present but not taking part, looker-on, spectator, beholder, observer. | Observer. <i>No entry</i> Observe. To perform that which has been prescribed by some law or usage. To adhere to or abide by. | Viewers. 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

| | Occurrences | Rank |
|-----------|--------------------|-------------|
| 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/>