

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROSHEL SMITH

Plaintiff-Appellee

vs.

DONALD E. LANDFAIR,

Defendants-Appellant

CASE NO. 2011-1708

On appeal from the Summit County Court
of Appeals, Ninth Judicial District, Case
No. CA-25371

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A. The parties agree on a number of points.

The parties' positions on appeal are more similar than one might expect. For instance, Plaintiff agrees that the court of appeals' reasoning was flawed and untenable. The court held that Plaintiff wasn't a "spectator" under the equine-immunity statute because "she only saw Mr. Landfair out of her peripheral vision...." *Smith v. Landfair*, 194 Ohio App.3d. 468, 2011-Ohio-3043, ¶16. (Appx. 27). This was factually erroneous because Plaintiff admits that she saw the incident. She watched Landfair unload his first horse and lead her into the barn. (Plaintiff's depo. at 32). (Supp. 13). She then continued to watch Landfair enter his horse trailer and, moments later, "being pushed out of the trailer onto the ground." *Id.* at 36. (Supp. 14). Plaintiff described the incident in great detail. *Id.* at 36-40. (Supp. 14-15). The fact that she may have seen a small portion of that event out of her peripheral vision doesn't negate the fact that she directly witnessed the incident.

Moreover, the court of appeals' focus on Plaintiff's peripheral vision misses the key point, which is that, at the time of the incident, Plaintiff knew she was in a position to watch, view, or interact with equine activities. Thus, even Plaintiff has noted the "absurdity" of construing "spectator" as a function of mere "'glances,' 'peripheral vision,' and 'seeing.'" (Plaintiff's brief at 13).

Plaintiff also agrees with Defendant that the statutory definition of "equine activity" is extremely broad. It is so broad "as to encompass nearly every conceivable activity that involves a horse." (Plaintiff's brief at 11). This comports with the statute's "broad purpose" of conferring immunity from the "inherent risk of an equine activity." *Allison v. Johnson*, 2001 Ohio App. LEXIS 2485, *9-10 (11th Dist.); *Lawson v. Dutch Heritage Farms, Inc.*, 502 F. Supp.2d 698, 706-07 (N.D. Ohio 2007).

Finally, Plaintiff also agrees that the court of appeals erred if it denied immunity as a matter of law. (Plaintiff's brief at 20). The appellate court should not have foreclosed Defendant from creating a factual record and arguing that immunity applies. *Id.*

Even the parties' differences, though critical, are somewhat narrow. Defendant's position is that the statutory term "spectator" includes individuals who know or should know that they are placing themselves in position to watch, see, or interact with an equine activity. Plaintiff was thus a "spectator" because she voluntarily went to the horse stables and stood outside the stable doors, where she knew equine activities would be taking place. What other type of activity should one expect to see at a horse stable? Indeed, Plaintiff stood and watched her father, who was engaged in an equine activity on the adjacent horse track. (Plaintiff's depo. at 32). (Supp. 13). Everyone else at the stables that day, like Mr. Landfair, was also engaged in training or other equine activities. *Id.* at 62. (Supp. 21). Plaintiff thus voluntarily positioned herself where she could watch, observe, or interact with her father on the track or with Mr. Landfair, as he unloaded his horses from the trailer and led them into the stables. Since she positioned herself in the midst of equine activities, Plaintiff was subject to the immunity statute.

Plaintiff, however, argues that whether she voluntarily placed herself in the midst of equine activities is irrelevant. She contends that she wasn't a "spectator" because she didn't visit the stables that day with the subjective, mental *purpose* of viewing the precise equine activity—Landfair unloading and transporting his horses—that led to her injury.

As explained below, Plaintiff's subjective "purpose" standard doesn't comport with the statute's language or the cases that interpret that language. Nor is it a practical, workable standard for determining who should or shouldn't be subject to the immunity statute.

B. Defendant's standard comports with the immunity statute's broad language and purpose.

Plaintiff's narrow reading of "spectator" is at odds with the statute itself. The equine-immunity statute is notable for its broad language. The statute confers immunity with respect to an "equine activity," which broadly includes most any horse-related activity one could think of, including the "normal daily care of an equine." R.C. 2305.321(A)(2)(a)(iii).

Those who are immune from liability are also broadly defined. They include equine-activity "sponsors," "participants," and "professionals." R.C. 2305.321(B)(1). They also include veterinarians, farriers, and those who fall under the catch-all category "other person[s]." *Id.*

Those whose claims are subject to immunity are also broadly defined and include any "spectator at an equine activity." R.C. 2305.321(A)(3)(g). This category covers a range of persons much broader than those who actually participate in an equine activity. This makes sense because horses and other equines are unpredictable and cannot always be controlled. When out of control, they can injure not only direct participants but those who are nearby.

The statute recognizes this by conferring immunity against injuries arising from the "inherent risk of an equine activity." R.C. 2305.321(A)(7). The statute defines that "inherent risk" to include "[t]he propensity of an equine to behave in ways that may result in injury . . . to persons **on or around** the equine." R.C. 2305.321(A)(7)(a) (emphasis added). The "inherent risk" also includes "[t]he unpredictability of an equine's reaction to sounds, sudden movement, unfamiliar objects, persons, or other animals," as well as "[t]he potential of an equine activity participant to act in a negligent manner . . . , including, but not limited to, failing to maintain control over an equine...." R.C. 2305.321(A)(7)(b), (e).

The term “spectator” is itself broadly defined, as shown by dictionary definitions listed in Plaintiff’s own appendix. Those definitions include:

- “One that looks on or beholds”;
- “A person who looks on at a[n] . . . incident”;
- “One who looks on or watches”;
- “A person who looks on or watches; onlooker; observer.”

Contrary to Plaintiff’s position, none of these definitions require that the person who looks on, beholds, observes, or watches an incident be present for the *purpose* of looking on, beholding, observing, or watching the incident.

Nonetheless, Plaintiff argues that “spectator” should be construed narrowly because the immunity statute abrogates the common law. (Plaintiff’s brief at 10-11). Plaintiff cites no authority for this proposition. True, the immunity statute bars potential claims in a general sense. But Plaintiff cites no case to show that those who are spectators of equine or other recreational-type activities could even recover at common law for injuries caused by risks inherent in those activities. In fact, the Supreme Court has held that such spectators are barred from recovering under the common law even if they don’t appreciate the risk of the activity at issue. *See Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, syllabus.

Further, a more fundamental precept is that a court must first and foremost look to a statute’s plain language and apply that language as written. *Beckett v. Warren*, 124 Ohio St.3d 256, 259, 2010-Ohio-4, ¶15. The plain and ordinary meaning of “spectator” includes one who, like Plaintiff, beholds, views, watches, or is an onlooker at an incident like that involving Landfair’s horse. The horse acted unpredictably, and Landfair had difficulty controlling the horse. The horse injured someone “around the equine.” R.C. 2305.321(A)(7)(a). This is precisely the type of event that the

statute was intended to govern. Construing the statute to include Plaintiff as a “spectator” fulfills the statutory purpose of conferring immunity for a broad range of equine activities involving a broad range of individuals.

Still, the statute doesn’t even *need* to be interpreted broadly to cover the incident here. Plaintiff was a horse-stable employee who voluntarily drove to a horse stable and stood outside the stable doors—in the midst of equine activities going on around her. She observed, watched, and beheld her father exercising an equine on the adjacent track. She observed, watched, and beheld Landfair unloading his horses and leading them into the stables. And at the moment of the incident itself, Plaintiff observed, watched, and beheld a horse push Landfair from the trailer and onto the ground. Plaintiff then ran directly toward Landfair, who she knew was engaged in an equine activity. Plaintiff’s conduct that day fell squarely within the ordinary meanings of “spectator.”

Plaintiff argues that the immunity statute was intended to codify the assumption-of-risk doctrine. Although Plaintiff cites no case or legislative history to support that contention, Defendant’s interpretation of the statute is consistent with assumption-of-risk principles. Assumption of the risk applies when one exposes oneself to a hazard. *See Stradtner v. Cincinnati Reds, Inc.* 39 Ohio App.2d 199, 202, 316 N.E.2d 924, 926 (1974). This doctrine is consistent with Defendant’s position that one who voluntarily places oneself in a position where there is a known or obvious risk of an equine-related injury is subject to the immunity statute. Assumption-of-the-risk applies even if the person doesn’t consent to or appreciate the inherent risks. *See Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, syllabus; *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, ¶16.

Contrary to Plaintiff’s position, it shouldn’t matter whether one’s subjective *purpose* is to perceive the particular equine activity that causes the injury. Consider, for instance, a person who

attends a baseball game but has absolutely no interest in the game and no purpose to watch, hear, or otherwise perceive any aspect of the game. The person might be attending the game to be with a friend or watch fireworks. The person might even read a book throughout the entire game. But that person, no less than the person who attends for the *purpose* of watching the game, assumes the risk of being struck by a batted or thrown ball.

Likewise, Plaintiff's subjective *purpose* for going to the stables that day may not have been to watch horses. But she voluntarily placed herself next to a horse stable where she knew or should have known that equine activities would occur. She then remained next to the stables after she *in fact* knew that her father and Mr. Landfair were engaged in equine activities. Plaintiff's subjective purpose for going to the stables doesn't negate the fact that she assumed the risk of being near equines and the inherent risks that they present.

C. Defendant's interpretation of "spectator" is consistent with the case law.

Three cases have interpreted "spectator," and each case has construed the term broadly. First, the court in *Allison v. Johnson*, 2001 Ohio App. LEXIS 2485 (11th Dist.), noted that the equine statute has "a single broad purpose" of conferring immunity for equine activities. *Id.* at *9-10. Given the broad definition of equine activities, "there is little of the day-to-day maintenance and routine of keeping a horse that could not fall under this penumbra." *Id.* at 11.

The plaintiff in *Allison* argued that "spectator" should be construed narrowly. *Id.* at *13. She, like Plaintiff here, was kicked by a horse that was being led into a barn. *Id.* at *2. The "equine activity" in *Allison* was thus the "normal daily care of an equine." R.C. 2305.321(A)(2)(a)(iii). The court found that the plaintiff was a "spectator" to that daily care under the plain meaning of that term:

Thus, upon applying the common, ordinary meaning of the term *spectator*, it is clear that appellant was an equine activity participant by virtue of being a spectator, to-wit: an observer, watcher, or bystander to the normal daily care of an equine.

Id. at *16.

Plaintiff argues that *Allison* is distinguishable because the plaintiff there “was walking into a horse barn for the purpose of watching the horse that caused her injury.” (Plaintiff’s brief at 15). That’s simply not true. In fact, the *Allison* plaintiff argued that she wasn’t a “spectator” because “she did not . . . position herself near the barn with the specific purpose of being a spectator while appellee tended to his horse. Instead, appellant was merely attempting to locate appellee.” *Id.* at *5. Indeed, the plaintiff in *Allison* was “surprised” to see her friend leading a horse just before the incident. *Id.* at *2. Thus, the plaintiff in *Allison*, like Plaintiff here, wasn’t present by a horse for the specific *purpose* of perceiving the horse or horse activities. Yet the *Allison* court still held that the plaintiff was a “spectator.”

The second case that construed “spectator” also found that its plain meaning was broad. See *Lawson v. Dutch Heritage Farms, Inc.*, 502 F. Supp.2d 698 (N.D. Ohio 2007). The *Lawson* court, in comparing Ohio’s equine statute to those in other states, noted that Ohio’s version “does not restrict the definition of spectator.” Thus, “[i]f a ‘person’ is present at an equine activity, that person becomes a participant by merely spectating.” *Id.* at 705. In contrast to other state statutes, Ohio’s statute “demonstrates the intent to include active or passive ‘participation’ at an equine activity. The language used in Ohio’s statute does not contemplate that a ‘person’ could be present at an equine activity in a capacity not subject to its . . . provisions.” *Id.* at 706.

The third court to construe “spectator” was the court of appeals in this case. Even that court refused to construe “spectator” narrowly, as one who attends a horse show or other formal event. *Smith v. Landfair*, 194 Ohio App.3d 468, 2011-Ohio-3043, ¶15. Rather, “the legislature has

envisioned that a person can be a spectator of any equine activity including the trailing of a horse and the normal daily care of a horse.” *Id.* Thus, “one could be a spectator while watching a farrier engaged in the process of placing shoes on a horse.” *Id.*

This broad reading of “spectator” is consistent with the usage of that word in *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379. This court in *Gentry* held that a four-year-old boy was a “spectator” as he watched other boys hammering nails into a chair in a back yard. *Id.* at ¶14. The law treated the boy as having assumed the risk of injury even if he couldn’t appreciate the dangers. *Id.* at ¶9. This court observed that “[t]he law simply deems certain risks as accepted by plaintiff regardless of actual knowledge or consent.” *Id.* at ¶12.

Since Plaintiff can’t rely on Ohio cases interpreting “spectator,” she relies instead on non-Ohio cases construing non-Ohio criminal statutes governing dog fights and cockfights. (Plaintiff’s brief at 16-18). Such cases are of dubious persuasive, let alone precedential, value, especially since due-process rights involved in criminal cases affect the interpretation of criminal statutes.

Moreover, the purpose of animal-fighting statutes is to discourage the fights by targeting those who attend them. No such purpose exists here. In fact, the purpose of the equine statute is to *encourage*, not discourage, the equine activities that are the subject of the statute. *See Lawson, supra*, at 700. A broad reading of “spectator” helps fulfill that purpose by conferring immunity for spectator injuries.

D. Defendant’s standard is more practical and workable.

Under Defendant’s proposed standard, one is a “spectator” if one knows or should know that one is placing oneself in a position to watch, see, or interact with an equine activity. This standard distinguishes between those persons who shouldn’t expect to encounter equines from

those, like Plaintiff, who should. Plus, the standard permits jury flexibility in cases where the facts or circumstances aren't so clear.

To illustrate, consider Plaintiff's example of a person injured by a horse at a fair. If the person were injured at the horse arena while watching a horse show, the statute would certainly apply.

On the other hand, a person standing in line at a french-fry stand on the midway—far from any horse arena or stables—wouldn't normally expect equine activities to occur there. If a horse were to break loose from the stables, race in a panic through the fairgrounds, and injure someone at the french-fry stand, that person wouldn't (and shouldn't) be subject to the immunity statute. Under Defendant's standard, that person didn't choose to be in a position to watch, see, or interact with an equine activity.

But what about someone who cuts through the horse stables on her way to the french-fry stand? Under Plaintiff's standard, that person, if kicked by a horse while walking through the stables, might recover from the horse's owner because the claimant's subjective mental *purpose* in cutting through the stables wasn't to perceive an equine activity but to reach the french-fry stand on the midway. Yet there is no doubt that such a person, while cutting through the stables, knew or should have known that horses—and their inherent risks—would be found in the stables. Why should that person be treated differently than the person who walks through the stables for the subjective purpose of looking at the horses?

Or consider a fairgoer who visits the horse arena to watch the horse shows. If injured at the horse show, that person, even under Plaintiff's standard, would be barred from recovering.

Yet consider one who enters the horse arena to visit a friend but not to watch the show. That person, no less than the person who goes to watch the show, knows that horses and their inherent

risks will be found at the arena. Yet under Plaintiff's standard, that person would lack the mental *purpose* to perceive the horse show and could sue an owner whose horse causes injury. Thus, two persons could be injured while sitting side-by-side at the same horse show, yet, under Plaintiff's standard, one could recover and one couldn't.

Indeed, the same anomaly would exist if one of those persons were watching the horse show while the other happened to be looking at a horse standing by an adjacent stable. If the person watching the show were injured by a participant horse, that person, under Plaintiff's standard, would be subject to the immunity statute. But the person watching the horse by the stable, if kicked by a horse participating in the show, could recover because, under Plaintiff's reasoning, that person had the subjective mental purpose of watching a *different* equine activity than the one that caused the injury. These arbitrary distinctions make no sense.

Plaintiff raises the spectre of a mail carrier being injured while delivering mail to horse stables. Plaintiff suggests that Defendant's standard would unfairly deny the mail carrier a remedy.

But Defendant's standard allows for flexibility if the mail carrier, for example, were to be injured while delivering mail to the business office at the stable grounds. If a horse were to break loose from the stables and charge toward the business office, the mail carrier, under Defendant's standard, wouldn't expect a horse there and could sue and recover. At the very least, Defendant's standard is flexible enough to allow the factfinder to assess whether the office was far away from the stables, whether horses were usually found near the office, or whether the mail carrier stopped to watch the horses after delivering the mail.

Defendant's standard, in other words, is flexible enough to treat the mail carrier fairly regardless of the circumstances. Thus, if the carrier, rather than leaving the mail at the office, decided to walk over to the stables to deliver a package to a stable worker in person, the carrier,

under Defendant's standard, should know that equine activities would be encountered there. But under Plaintiff's standard, the stable worker would have to be on constant guard for persons, like the carrier, who might suddenly appear at the stables for purposes other than perceiving an equine activity.

Plaintiff's standard is also problematic from an evidentiary standpoint in that it would force defendants to prove or disprove the plaintiff's subjective mental purpose for being near horses. Under Plaintiff's standard, persons injured while walking through horse stables at a fair could avoid immunity simply by claiming that they were passing through the stables to reach the french-fry stand.

Defendant's standard is more workable. There is an element of objectivity involved when persons, regardless of their subjective purpose, place themselves near equine activities. Defendant's standard also offers more certainty and predictability, not only for equine owners and activity sponsors, but for their insurance companies, which underwrite their risks and allow them to operate.

Defendant's standard is more workable, more practical, and, for close cases, more flexible than Plaintiff's standard. But this case isn't close. Plaintiff was a horse-stable employee who went to the stables to visit her father, a horse trainer. Plaintiff purposely walked over by the stables and purposefully remained there while watching her father train a horse—an equine activity under the statute. Plaintiff continued to stand there while Mr. Landfair unloaded his horses. Plaintiff knew that Landfair was there; she greeted him as he led one horse into the barn. At that point, knowing that equine activities were occurring around her, Plaintiff could have avoided the inherent risks of those activities by going elsewhere. But she remained there while Landfair unloaded his other horse. She then watched while that horse pushed Landfair from the trailer onto the ground. Even

then, Plaintiff could have stayed where she was or ran for help. Instead, she ran toward the equine activity and was injured.

CONCLUSION

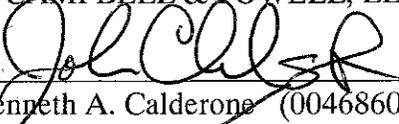
Defendant's standard for the term "spectator" is consistent with the statute's broad language and intent, as well as the Ohio cases that have construed the term. Defendant's standard is also the more workable one. It subjects to immunity those who know or should know that they are placing themselves in position to watch, see, or interact with equines. At the same time, it is flexible enough to permit recovery for chance encounters with equines.

Plaintiff was a "spectator" under this standard. She voluntarily went to and remained at a place where equine activities were prevalent. She watched those activities, including the activity that gave rise to her injury. This was precisely the type of incident to which the immunity statute was meant to apply. This court should thus reverse the court of appeals' decision and reinstate the trial court's summary judgment in Mr. Landfair's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this document was sent on May 23, 2012, by email to John K. Rinehardt, counsel for Plaintiff-Appellee, at jkr@lawfirm2020.com; to Paul Giorgianni, counsel for amicus Ohio Association for Justice, at paul@giorgianniLaw.com; and to Thomas Green, counsel for amicus Ohio Horseman's Council, at tmgreen@greenlaw.com.

A handwritten signature in black ink, appearing to read "John K. Rinehardt", is written over a horizontal line. The signature is stylized and cursive.

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