

No. 09-0313

IN THE SUPREME COURT OF TEXAS

TERRI LOFTIN,

Petitioner,

vs.

JANICE LEE and BOB LEE,

Respondents.

**On Petition for Review
From the Twelfth District Court of Appeals at Tyler, Texas
Appeal No. 12-07-00143-CV
Trial Court Cause No. CV39,857-06-08
159th Judicial District Court, Angelina County, Texas**

RESPONDENTS' RESPONSE TO PETITION FOR REVIEW

**DOUGLAS J. McCARVER
State Bar No. 13378500
3548 N. E. Stallings Drive
Nacogdoches, Texas 75965
(936) 560-4555
(936) 552-8990 - Fax**

**ATTORNEY FOR RESPONDENTS,
JANICE LEE AND
BOB LEE**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Janice Lee and Bob Lee, Plaintiffs/Appellants/Respondents, respectfully responds to the Petition for Review filed by Terri Loftin, Defendant/Appellee/Petitioner, regarding the issues presented of (1) whether the defendant's summary judgment evidence fulfills the burden of proof imposed by Tex. R. Civ. P. 166a©, to conclusively disprove at least one element of each of the plaintiffs' causes of action, (2) whether an equine sponsor's personal negligence is immune from liability under the Equine Act, (3) whether material fact issues exist regarding what caused the horse to run when it did, and (4) whether the Equine Act violated the open courts and due process of law guarantees of the Texas Constitution and is unconstitutionally vague, and in response thereto, Respondents respectfully show the Court the following:

STATEMENT OF THE CASE

Nature of the Case	This is a personal injury lawsuit arising out of a horseback-riding accident. It was brought by Janice Lee and her husband, Bob Lee, against Terri Loftin. C.R. 100.
Course of Proceedings	Loftin moved for summary judgment on the grounds that the plaintiffs' claim was barred by the Texas Equine Activity Act, Chapter 87 of the Texas Civil Practice & Remedies Code. <i>See</i> TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001 - .005 (Vernon 2005). C.R. 22.
Trial Court Disposition	The 159 th District Court of Angelina County, the Hon. Paul E. White, presiding, granted Loftin's motion for summary judgment and entered judgment that the Lees take nothing. C.R. 130. The Lees have appealed. C.R. 131.
Court of Appeals	The Twelfth Court of Appeals at Tyler. The panel consisted of Chief Justice James Worthen, Justice Brian Hoyle, and Justice Sam Griffith.
Court of Appeals' Disposition	The Court of Appeals reversed and remanded. There were three separate opinions: Chief Justice T. Worthen announced the judgment of the court and found two grounds for reversal; Justice Hoyle concurred on one grounds of reversal found by Chief Justice and disagreed with the other; and Justice Griffith dissented. The opinions are reported at 277 S.W.3d 519.

ISSUES PRESENTED

- Issue One: Whether the defendant's summary judgment evidence fulfills the burden of proof imposed by Tex. R. Civ. P. 166a©, to conclusively disprove at least one element of each of the plaintiffs' causes of action.
- Issue Two: Whether an equine sponsor's personal negligence is immune from liability under the Equine Act.
- Issue Three: Material fact issues exist regarding whether the vine or the muddy conditions caused the horse to suddenly start running and material fact issues remain undisproved on all of the Plaintiffs' common law claims for Loftin's negligence.
- Issue Four: Whether the Equine Act violates the open courts and due process of law guarantees of the Texas Constitution and is unconstitutionally vague.

STATEMENT OF FACTS

Terri Loftin, Appellee, invited Janice Lee, Appellant, to her home to ride horses together. Janice Lee accepted the invitation and later went to the Loftin home for that purpose. Janice Lee was provided with a horse owned by Loftin and the two mounted riders proceeded on a trail ride through the surrounding area. During the trail ride, they came upon a boggy area and the horse ridden by Janice Lee suddenly bolted away from that area, causing her to fall off the horse and be severely injured.

Janice Lee testified in her deposition that she and her husband have lived at their Chireno, Texas residence for eight years (CR 71, line 7). She stated that although they owned horses, she did not ride them very often (CR 72, line 9). In the eight years they had lived there, she had not ridden a horse more than three or four times (CR 73, lines 3-5). The area along the trail ride where the accident occurred she described as “pretty overgrown”, with “a lot of bushes”, “trees close together” and “trees that were brushing the sides of my legs on both sides.” (CR 72, lines 21-24). She testified that “then we reached this one area and Terri moved over... my horse kept going.” (CR 75, lines 5-7). “It was really boggy. He started sinking in the mud and I could feel him getting nervous underneath me...” (CR 75, lines 8-9). Mrs. Lee testified “he bolted and then he just took off in a full run. I’ve actually never been on anything running, ever.” (CR 76, line 25; CR 77, lines 1-2).

Terri Loftin testified in her depositions that Cevin, her husband, “went out to do their (Lee’s) horses and they had conversations in the past about her (Janice Lee) wanting to start riding and had wanted to ride.” (CR 83, lines 13-15). She further stated “she (Janice Lee) didn’t really have anything to ride.” (CR 83, line 16). Mrs. Loftin testified that her husband had invited Janice Lee to come over to their farm and trail ride (CR 83, lines 23-25). Mrs. Loftin put Janice Lee on her daughter’s horse named “Smash” (CR 84, lines 11-12) that they had purchased seven or eight months earlier (CR 85, line 4) who was a barrel (racing) horse.” (CR 86, line 1). Mrs. Loftin’s daughter rode

Smash in barrel racing competition “about once a month.” (CR 87, lines 18-22). At some point along the trail ride, they encountered a boggy, wet area where the accident occurred (CR 91, lines 2-6). She described that area as a “low spot”, “you can’t tell it’s wet. It’s just kind of mushy.” (CR 91, lines 21-22). Mrs. Loftin also said “there was a lot of trees” on one side of that area. (CR 92, line 11). Terri Loftin admitted that from prior riding experiences, she knew that particular low area held water and tended to be soft and boggy (CR 93, lines 18-25; CR 94, line 1). She testified “he (Smash) was trying to get out of the mud, just picking his feet up. He don’t particularly like the water or the mud.” (CR 94, line 4-5). She said “I think he wanted to get out of the mud.” (CR 94, lines 11-12). As Janice Lee rode into the boggy area, a vine went up her horse’s leg and he lunged forward. (CR 95, line 23-25). At no time before the accident had Mrs. Loftin or her husband made any attempt to make sure that the trail was clear for riding purposes (CR 96, lines 13-16). She said “I hadn’t been there the week before.” (CR 95, line 14). She described the horse’s movement as “a significant lunge.” (CR 97, lines 20-21).

Janice Lee’s sworn affidavit (CR 64) attached to her response shows that she was expecting to ride Terri Loftin’s mother’s horse that day and not the daughter’s barrel racing horse. It also shows that Terri Loftin never made any inquires to her about her riding experience. Even more critical, it shows that no warnings were ever provided to her about the wet, boggy area along the trail ride or the fact that the horse named Smash was known to dislike mud and water.

SUMMARY OF THE ARGUMENTS

Issue One - Whether the defendant's summary judgment evidence fulfills the burden of proof imposed by *Tex. R. Civ. P. 166a*©, to conclusively disprove at least one element of each of the plaintiffs' causes of action.

The summary judgment movant failed to conclusively prove that she made a reasonable and prudent effort to determine the ability of Janice Lee to engage safely in the equine activity and to determine the ability of Janice Lee to safely manage the barrel racing horse named "Smash". Janice Lee denies that Terri Loftin made any inquiry to her of her riding ability and a genuine issue of material fact exists on that point that negates summary judgment. To merely "glean" a person's ability to safely engage in an equine activity is not enough to conclusively prove there are no material fact issues as required by Texas summary judgment standards.

Issue two - Whether an equine sponsor's personal negligence is immune from liability under the Equine Act.

The Plaintiff asserted claims that Loftin, as the equine sponsor, is liable for her own personal negligence. Sponsor negligence is not expressly listed in the statute as an inherent risk of equine activity that is protected by immunity. Jurists cannot read something into the statute that is not there.

Issue Three - Material fact issues exist regarding whether the vine or the muddy conditions caused the horse to suddenly start running and material fact issues remain undisproved on all of the Plaintiffs' common law claims for Loftin's negligence.

The significance of whether the vine or the muddy ground conditions caused the horse to bolt is that Loftin knew beforehand that the muddy condition existed and that this particular horse did not like muddy ground conditions but she failed to give Janice Lee any forewarning of either known fact. Other fact issues unresolved are whether Loftin was careless in her selection of a dense, overgrown area for trail riding and whether she was careless in allowing Janice Lee to take the lead as they approached the dense area. These facts are entirely too intense and conflicting to support a

summary judgment.

Issue Four - Whether the Equine Act violates the open courts and due process of law guarantees of the Texas Constitution and is unconstitutionally vague.

The five enumerated equine activities covered in the statute are non-exclusive. Other equine activities that may or may not be covered by the Act would have to be based on or subject to individual judgment or discretion. That would be an arbitrary determination and a violation of the due process of law guarantee of the state constitution.

The open courts provision of the Texas Constitution prevents the legislature from unreasonably or arbitrarily restricting common law causes of action. For those listed equine activities covered by the Act, a tort victim's common law remedies would be foreclosed by the immunity. That would constitute a violation of the open courts constitutional guarantee.

The Equine Act is unconstitutionally vague because it is humanly impossible to describe in written words the endless type and sorts of equine activities by which persons may be injured. Likewise, it is not possible to draft a clear and just standard by which immunity will or will not apply with such a variety of scenarios.

ARGUMENTS

A. Standard of Review

Summary judgments are to be reviewed de novo. Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661, 48 Tex. Sup. Ct. J. 671 (Tex. 2005). Therefore, the usual appellate issues regarding abuse of discretion and reversible error are not applicable.

Traditional summary judgment is proper only when the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). In reviewing a traditional summary judgment, the courts must indulge every reasonable inference in favor of the nonmovant, take all evidence favorable to the nonmovant as true, and resolve any doubts in favor of the nonmovant. Valence, Id. A defendant who moves for traditional summary judgment on the plaintiff's claims must conclusively disprove at least one element of each of the plaintiff's causes of action. Little v. Tex. Dep't of Criminal Justice, 148 S.W.3d 374, 381, 48 Tex. Sup. Ct. J. 56 (Tex. 1999).

A summary judgment movant must prove there is no genuine issue of material fact to prevail on his motion. SAS Institute, Inc. v. Breitenfeld, 167 S.W.3d 840 (Tex. 2005).

On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See Nixon v. Mr. Prop. Mgmt. Co., 690 S.W. 2d 546 (Tex. 1985).

B. Case Law

The Equine Act is primarily composed of two distinct sections, one being Section 87.003, Civ. Prac. & Rem. Code. entitled Limitations on Liability and the other being Section 87.004 entitled Exceptions to Limitations on Liability. Since these provisions became effective, there are only four cases that have reached the appellate courts and provide guidance on the application of the new law.

The first of these cases is Johnson V. Smith, 88 S.W.3d 729 (Tex. App.-Corpus Christi 2002, no pet.). In that case, a plaintiff horse breeder filed suit against defendant horse owner on claims of negligence after a horse bit the breeder. The trial court granted summary judgment in favor of the owner on grounds that the breeder's claims were barred by Chapter 87, Civ. Prac. & Rem. Code. The appellate court first had to determine whether the injury resulted from "an inherent risk of equine activity" as envisioned by the statute and, if so, whether an exception to immunity applied under Section 87.004, Civ. Prac. & Rem. Code. Upon review, the court concluded that the horse bite did fall within the scope of Section 87.003, but that there was sufficient evidence to raise a fact issue regarding whether Smith made "a reasonable and prudent effort to determine the ability of the participant to engage safely" in the activity at issue in that case. That court also found that there was a fact issue regarding the level of Smith's potential culpability for failing to properly warn Johnson of the increased aggression of the horse when it was known by the owner. Summary judgment was therefore reversed and remanded.

The next case to reach the appellate courts was Steeg v. Baskin Family Camps, Inc., 124 S.W. 3d 633 (Tex. App.-Austin 2003, pet. dismiss'd). In that case, the rider, who was at the facility during a corporate retreat, participated in a trail ride guided by a facility employee. During the ride, the rider's saddle slipped 90 degrees to the side, causing him to fall and sustain injury. The trial court found that the facility was immune from liability under Section 87.003, Civ. Prac. & Rem. Code, and granted summary judgment. The Austin Court of Appeals found that there was evidence that the facility's negligent acts or omissions also contributed to the fall, which placed the facility outside of immunity. Genuine issues of material fact existed, which made the grant of summary judgment improper. Steeg contended that appellee's actions either did not fall within the scope of the limitation of liability or fell within an exception to the limitations. He also contended that the

Equine Act violated the open courts' guarantee of the State constitution, but the case was decided without reaching that point. The appellate court concluded that sponsor negligence is not expressly listed as an inherent risk of equine activity and therefore sponsor negligence is excepted from immunity. They stated further that sponsors are not immune if they fail to fulfill a common law duty to protect participants and that the courts must examine whether the injury results from innate equine behavior, the actions of participants, or some other cause, such as sponsor negligence. An expert opined in that case that Defendant was negligent by allowing the plaintiff to lead the trail ride without sufficient training. Commentary in the opinion also stated that "taking a too-difficult path" was a non-inherent risk factor. Summary judgment was reversed and the cause was remanded for further proceedings.

The next case reported was Dodge v. Durdin et al, 187 S.W. 3d 523 (Tex. App.-Houston [First Dist.] 2005, no pet). This was a claim by an employee against her non-subscribing employer for injuries resulting from being kicked by a horse in the abdomen as she was administering oral deworming medication to the horse. This was another summary judgment case, but the primary issue was whether the Equine Act applied to employees. On appeal, the court held that the Equine Act applies to consumers and not employees and that Dodge was therefore not a "participant" under the Equine Act. That court also found that Dodge presented more than a scintilla of evidence on every element of her negligence claim and thus raised a genuine issue of material fact as to that claim. Reversed and remanded for further proceedings. The Equine Act was also challenged in that case as being in violation of both the open courts and due course of law guarantees in the Texas Constitution, but, again, those points of appeal were not reached by the reviewing court in reversing the summary judgment.

The last reported case on the Equine Act was Gamble v. Peyton, 182 S.W.3d 1 (Tex. App-

Beaumont 2005, no pet.). In that case a horseback rider sued the landowners for injuries sustained when she fell from a horse stung by fire ants on their property. The rider had bought the horse from the landowner, did not rent the horse or any tack, and the landowner had given the rider a verbal warning of the presence of fire ants on the property. The reviewing court found that fire ants were normally present in nature and that the horse's unexpected reaction to fire ants on his back legs was an inherent risk of equine activity within the scope of the Equine Act. That court also found that because the landowner did provide a verbal warning, that the exception of liability for a dangerous latent condition of land did not apply and summary judgment was affirmed.

C. The Plaintiffs' Claims

The Plaintiffs' First Amended Original Petition (CR 100-103) alleges that the Defendant failed to use ordinary care in eight particulars:

1. In failing to make a reasonable and prudent effort to determine the ability of Janice Lee to engage safely in the equine activity and determine the ability of Janice Lee to safely manage the equine.
2. In failing to warn Janice Lee of a dangerous latent condition of land for which warning signs, written notices, or verbal warnings were not conspicuously posted or provided to Janice Lee, and the land was under the control of Terri Loftin at the time of the injury and Terri Loftin knew of the dangerous latent condition.
3. In failing to select a safe trail for horseback riding.
4. In selecting a trail for horseback riding that had a known boggy, wet, low area and then putting Janice Lee on a horse that was known to dislike the mud or water.
5. In selecting a trail for horseback riding that was too thick and overgrown for safe trail riding with guests who were unfamiliar with the area and the horse being ridden.

6. In failing to investigate the riding trails to determine if there were any areas along the trail that would pose a hazard or risk of harm to riding guests.
7. In failing to lead the way along the trail ride for the safety and proper supervision of riding guests unfamiliar with the trail route and potential hazards.
8. In allowing the Plaintiff to lead the way along the trail and into a hazardous area of water, mud and overgrowth.

As in a common auto collision case, the plaintiff's claims are a mixture of both statutory claims and common law claims. Only the first two of these particulars are statutory claims as exceptions to immunity under the Equine Act and the remaining six are common law claims in tort. The Equine Act does not expressly abrogate common law claims and therefore they remain as viable claims independent of the Equine Act.

D. Issue One - Defendants Burden of Proof

_____ One of the issues in this case is whether the summary judgment movant met the burden of proof imposed by Rule 166a(c). Respondents submit that Petitioner did not meet that burden.

Rule 166a provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine fact issue. *See Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972). The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *See Tex. R. Civ. P. 166a*©; *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Nixon v. Mr. Property Mgt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985); *Calvillo v. Gonzalez*, 922 S.W.2d 928, 929 (Tex. 1966). The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *See Oram v. General Am. Oil Co.*, 513 S.W.2d 533, 534 (Tex. 1974); *Swilley*, 488 S.W.2d at 67-68. The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment

motion when the movant's summary judgment proof is legally insufficient. See City of Houston v. Clear Creek Basin Auth. 589 S.W.2d 671, 678 (Tex. 1979). The movant must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. See Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996); Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195, 197 (Tex. 1995); City of Houston, 589 S.W.2d at 678.

But the fact that some evidence favors immunity cannot be grounds for summary judgment when other evidence weighs against immunity Steeg v. Baskin Family Camps, Inc., 124 S.W. 3d 633 (Tex. App.-Austin 2003, pet. dismiss'd)

Summary judgment is usually not appropriate when the issues are inherently those for a factfinder, as in cases involving intent, reliance, reasonable care, uncertainty and the like. See Wofford v. Blomquist, 865 S.W.2d 612, 614 [**19] (Tex. App.--Corpus Christi 1993, writ denied); Hilton v. Texas Inv. Bank, N.A., 650 S.W.2d 545, 547 (Tex. App.--Houston [14th Dist.] 1983, no pet.).

An exception to limitation on liability exists under Section 87.004 (2) of the Civil Practice and Remedies Code when:

_____ "The person provided the equine or livestock animal and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity or livestock show and determine the ability of the participant to safely manage the equine or livestock animal, taking into account the participants representations of ability."

The Texas Equine Act therefore requires an equine sponsor to make a "reasonable and prudent effort" to determine the ability of the participant to ride a horse in an equine activity and in this case, that did not occur. To simply know indirectly that someone owns horses and wants to start

riding again is not enough to fulfill this burden of proof. Janice Lee expressly denied that Terri Loftin made any inquiry of that nature to her. At the very least, a disputed fact issue of that material point existed on this record and summary judgment should not have been granted.

But the statute includes a second requirement that the sponsor also determine the ability of the participant to safely manage the particular animal. In this case, the horse named Smash was a barrel racing horse still being used in competition and certainly not the type of horse that any reasonable equine owner would allow a novice rider to use for the first time on a trail ride. The sponsor has a duty to properly match the horse to the rider for the particular activity and the disaster that resulted as was readily foreseeable.

E. Issue Two - Sponsor's negligence

The Equine Act is primarily composed of C.P.R.C. section 87.003 entitled Limitation on Liability and section 87.004 entitled Exceptions to Limitation on Liability. Together they create five behaviors constituting an "equine activity" as defined by the Act, and six exceptions that allow for liability under the Act. Aside from that obstacle course of arbitrary determinations, the listed factors have been interpreted to be "non-exclusive" Gamble v. Peyton, 182 S.W.3d 1 (Tex. App.-Beaumont 2005, no. pet.). In fact, the preface to the enumerated behaviors listed in Sec. 87.003 uses the term "including" immediately above the five described equine activities. If the listed behaviors and exceptions are not exclusive, then other factors should be considered when they are relevant.

Furthermore, sponsor negligence is not expressly listed as an inherent risk of equine activity nor is it mentioned as an exception to immunity. The logical conclusion then is that the absence of negligence from the list in C.P.R.C. sec. 37.001, means that sponsor negligence is not excepted from immunity. Steeg v. Baskin Family Camps, Inc. Id.

Because the Act does not confer immunity for injuries resulting from a fall or other occurrence caused by something other than an inherent risk, courts must consider the full array of underlying causes for the horse running and the person falling that are evident in the record. Courts must examine whether the injury results from innate equine behavior, the actions of participants, or some other cause, such as sponsor negligence. Given the wide array of possible causes of injuries, determining whether injuries result from an inherent risk of equine behavior or from some other cause requires a fact-intensive inquiry into the circumstances leading to the injury. *See Sapone*, 308 F.3d at 1103-05.

F. Issue Three - Multiple Disputed Fact Issues

_____ In this case, Terri Loftin knew that the horse Smash did not like wet, muddy areas and she knew there was a wet, muddy area along the trailway she had selected. Yet, she failed to warn or inform Janice Lee of either condition. The Petitioner wants to emphasize a point about the vine being the cause of the horse running away but no mention is made of the muddy spot in the trail being the cause. A legitimate fact issue remains undisproved as to whether the muddy conditions caused the horse to bolt suddenly or whether it was the vine. The fact intensive analysis of each parties deposition testimony fails to conclusively show that there are no genuine issues of material facts in dispute. The movant has failed to carry the heavy burden of proof imposed in summary judgment cases.

The Defendant's Motion for Summary Judgment addresses only the two Equine Act claims and not the remaining six common law claims. It is the movant's burden to conclusively prove as a matter of law that the six common law claims are not viable claims. Those six common law claims include numerous fact issues that were not disproved by the Petitioner's summary judgment

evidence. Those issues include whether Loftin failed to select a safe trail for horseback- riding and whether she was negligent in allowing Janice Lee to lead the way into the thick, overgrown area where the muddy conditions existed. The summary judgment movant has failed to disprove all of the plaintiffs' causes of action.

G. Issue Four -The Constitutional Challenges

_____The Equine Act is a relatively new statute with only four appellate cases reported to provide precedence and understanding of how and when it is to be applied. All four reported appellate rulings on the statute were in a summary judgment procedural context where judgment was granted for the equine sponsor. Three of those cases reversed the trial court grant of summary judgment and constitutional challenges were raised in two of those cases but those issues were not reached by the deciding courts.

The Equine Act was enacted because of adverse effects on the tourism industry resulting from the expansion of liability for equine activities. The statute as a whole suggests that the nature and object to be obtained by the Equine Act is to protect the tourism industry. See Dodge v. Durdin et al, 187 S.W. 3d 523 (Tex. App.-Houston [First Dist.] 2005, no pet). The objective of the Equine Act was not, however, to abrogate the common law duty of an equine sponsor to protect participants.

First, Janice Lee urges a violation of substantive due process. In making a substantive due process determination, the courts must first look at whether the statute has a reasonable relation to a proper legislative purpose, and whether it is arbitrary or discriminatory. Garza-Vale v. Kwieccien, 796 S.W.2d 500, 505 (Tex. App.-San Antonio 1990, writ denied). Since the legislative purpose of the statute was to protect the tourism industry of Texas, the statute when applied to equine participants not involved with the tourism industry, it becomes arbitrary and discriminatory against

those not involved in that industry. Furthermore, the covered activities listed are non-exclusive and other covered equine activities would be determined on an arbitrary basis.

Second, Janice Lee urges a violation of the open courts provision of the Texas Constitution. Tex. Const. art. I, § 13, commonly referred to as the "open courts provision," prevents the legislature from unreasonably or arbitrarily restricting common-law causes of action. This state constitutional guarantee is a facet of the broader due process protection provided by Tex. Const. art. I, § 19. See Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983). In Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988), the supreme court reaffirmed the requirement that a litigant seeking relief under the open courts provision must first demonstrate that she has a cognizable common-law cause of action. Since the purpose of the Equine Act legislation was to protect the tourism industry from liability from equine activities, it is evident that before and without the statutory enactment, a common law cause of action did exist for a breach of duty by equine sponsors to protect participants in Texas, as in other jurisdictions. See Sapone v. Grand Targhee, Inc., 308 F.3d 1096 (10th Cir. 2002).

_____ It should also be noted, that the Equine Act does not expressly abrogate the common law cause of action that previously existed, and still exists. By contrast, other statutes, such as the Texas Smoke Detector Statute, Tex. Prop. Code sec. 92.252(a), clearly states that the statute is "in lieu of common law" remedies, when the legislative intention is to nullify or abrogate the prior common law.

_____ Third, Janice Lee argues that the Equine Act is unconstitutionally vague. A statute is unconstitutionally vague if the persons regulated by it are exposed to risk or detriment without fair warning of the nature of the prescribed conduct. A due process violation occurs when conduct is stated in such vague terms that people of common intelligence must guess at what is required.

Raitano v. Tex. Dep't of Pub. Safety, 860 S.W.2d 549, 551 (Tex. App.-Houston [1st Dist.] 1993, writ denied). The vagueness and confusion of the enacted Equine Act may be caused more from what it does not state rather than what it does state. If lawyers and judges cannot understand it as written, then the equestrians and tourist industry would likely find it confusing and uncertain in its application.

_____ The Equine Act is unconstitutionally vague because it is humanly impossible to describe in written words the endless type and sorts of equine activities by which persons may be injured. Likewise, it is not possible to draft a clear and just standard by which immunity will or will not apply with such a variety of scenarios.

CONCLUSION

_____ To merely “glean” from vague, second-hand information a person’s ability to ride a trained barrel racing horse on a trail ride does not satisfy Texas law that requires a reasonable and prudent effort to determine the rider’s ability to safely engage in equine activity. Clearly, it is a material issue in this case and the summary judgment evidence of Petitioner fails to conclusively prove there are no genuine issues of fact on that point. The record in this case shows that Janice Lee was a novice rider at best and that she was mismatched on a barrel racing horse named Smash and then allowed to take the lead on an unfamiliar trail into a muddy area on a horse that was known to dislike muddy areas. While equine participants may assume some risks with horses, they do not assume the risk of sponsor negligence and sponsor negligence is not immune from liability under the Equine Act. There may be both statutory claims and common law claims pursued jointly and there remains genuine issues of material facts that preclude summary judgment on Respondents’ common law claims in particular. Petitioner’s appeal on these issues should be denied and the holding of the 12th Court of Appeals should be affirmed and Terri Loftin’s Petition for Review should be denied in its entirety.

Respondents, Janice Lee and Bob Lee, respectfully request that the Court deny this Petition for Review and thereby affirm the Court of Appeals’ prior findings and holdings in this cause.

_____ Respectfully submitted,

Douglas J. McCarver
3548 N. E. Stallings Drive
Nacogdoches, Texas 75965
(936) 560-4555
(936) 552-8990 - Fax

ATTORNEY FOR RESPONDENTS,
JANICE LEE AND BOB LEE

CERTIFICATE OF SERVICE

_____ The undersigned counsel of record for Respondents, Janice Lee and Bob Lee, hereby certifies that a true and correct copy of this Respondents' Response to Petition for Review was forwarded by certified mail, return receipt requested, to the following counsel of record for the Petitioner on this 18th day of May, 2009:

_____ Robert T. Cain, Jr.
ZELESKEY LAW FIRM PLLC
P. O. Drawer 1728
Lufkin, Texas 75902-1728
