No. 09-0313

In the Supreme Court of Texas
Austin, Texas

Terri Loftin,

Petitioner

v.

Janice Lee and Bob Lee,

Respondents

Petitioner's Brief on the Merits

ROBERT T. CAIN, JR.
STATE BAR NO. 03607200
ZELESKEY LAW FIRM PLLC
P. O. DRAWER 1728
LUFKIN, TEXAS 75902-1728
TELEPHONE: (936)632-3381
FACSIMILE: (936)632-6545

Attorney for Petitioner

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Petitioner	**Counsel**
Terri Loftin Insurance Company	Robert T. Cain, Jr. (on appeal) Joseph M. McElroy (at trial) ZELESKEY LAW FIRM PLLC P. O. Drawer 1728 Lufkin, Texas 75901-1728

Respondent	**Counsel**
Janice Lee and Bob Lee	Douglas J. McCarver (at trial and on appeal) 3548 N.E. Stallings Drive Nacogdoches, Texas 75965

____

Robert T. Cain, Jr.

TABLE OF CONTENTS

LIST OF PARTIES i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES v

STATEMENT OF THE CASE viii

STATEMENT OF JURISDICTION ix

ISSUES PRESENTED ix

1. Reasonable inquiry ix

2. Causation ix

3. Burden ix

4. Inherent risk x

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT AND AUTHORITIES 4

I. Standard of review 4

II. Loftin established her immunity under the Texas Equine Activity Act 4

III. After Loftin established her immunity under the Equine Activity Act, Lee was required to plead and offer proof of an exception to that immunity 6

IV. Loftin made a reasonable and prudent inquiry into Lee's ability to ride and her ability to handle this particular horse 8

A. The record shows that Loftin was aware of Lee's riding experience . . . 9

B. Direct inquiry is not necessary to secure the statute's protection . . . 11

V. Even if Loftin had not made reasonable inquiry about Lee's riding skill, that failure was not a cause of the accident and so it does not eliminate the immunity afforded by the Equine Activity Act. . . . 13

A. Lee admitted that any failure by Loftin to ask about her riding skill had nothing to do with her accident . . . 13

B. Since failure to inquire did not cause the accident, failure to inquire did not eliminate the immunity granted by the Equine Activity Act . . . 15

VI. The vine that startled Lee's horse was an inherent risk of a trail ride, and the Lees have never contended otherwise . . . 17

A. The statute expressly states that conditions of land are an "inherent risk." . . . 18

B. The Lees have never contended that the vine was not a risk inherent in a trail ride . . . 18

C. The record shows that the vine was a risk inherent in a trail ride . . . 19

VII. The muddy patch was also an inherent risk . . . 20

CONCLUSION . . . 21

PRAYER . . . 22

SIGNATURE 22

CERTIFICATE OF SERVICE 23

APPENDIX

INDEX OF AUTHORITIES

CASES:

Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829 (Tex.1994) 6

Anderson v. Anderson County, 6 S.W.3d 612
(Tex. App.—Tyler 1999, pet. denied) 19

Anthony Equip. Corp. v. Irwin Steel Erectors, Inc., 115 S.W.3d 191
(Tex. App.—Dallas 2003, pet. dism'd) 20

City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005) 4

Ellis v. Woods, 453 S.W.2d 509
(Tex. Civ. App.—El Paso 1970, no writ) 7

Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754 (Tex. 2007) 4

Johnson v. Smith, 88 S.W.3d 729 (Tex. App.—Corpus Christi 2002, no pet.) 4, 7

McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337 (Tex. 1993) 19

Nicholson v. Mem. Hosp. Sys., 722 S.W.2d 746
(Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) 7

Pinto v. Revere-Saugus Riding Acad., Inc., No. 05-3940-E, 2007 WL 3244631,
(Mass. Super. Ct. Oct. 18, 2007), *rev'd on other grounds,*
74 Mass. App. Ct. 389, 907 N.E.2d 259 (2009) 3, 10, 13

Pinto v. Revere-Saugus Riding Acad., Inc.,
74 Mass. App. Ct. 389, 907 N.E.2d 259 (2009) 13

Resolution Trust Corp. v. Ammons, 836 S.W.2d 705
(Tex. App.—Houston [1st Dist.] 1992, no writ) 6

Rogers v. Fort Worth Poultry & Egg Co., 185 S.W.2d 165
(Tex. Civ. App.—Fort Worth 1944, no writ) 18

Royal Typewriter Co. v. Vestal, 572 S.W.2d 377
(Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) 7

Ryland Group, Inc. v. Hood, 924 S.W.2d 120 (Tex. 1996) 6

Stoffels v. Harmony Hill Farm, 389 N.J. Super. 207,
912 A.2d 184 (2006) 3, 12, 13

Sudan v. Sudan, 199 S.W.3d 291 (Tex. 2006) 4

Sustala v. North Side Ready-Mix Concrete Co., 317 S.W.2d 64
(Tex. Civ. App.—Houston [1st Dist.] 1958, no writ) 7

Tello v. Bank One, N.A., 218 S.W.3d 109
(Tex. App.—Houston [14th Dist.] 2007, no pet.) 19

Walling v. Metcalfe, 863 S.W.2d 56 (Tex.1993) 18

Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876 (1962) 7

Wright v. Gifford-Hill & Co., 736 S.W.2d 828 (Tex. App.—Waco 1987, writ ref'd n.r.e.)7

Wal-Mart Stores, Inc. v. Spates, 186 S.W.3d 566 (Tex. 2006) 4

RULES AND STATUTES:

MASS. GEN. LAWS

ch. 128, § 2D 10, 11

N.J. STAT. ANN.

§§ 5:15-1 – 5:15-12 . . . . 10, 11

TEX. CIV. PRAC & REM. CODE ANN. (Vernon 2005)

§ 87.001(3)(D) & (E) 5, 16

§ 87.001(9)(A) 15, 16

§ 87.001(4) 5

§ 87.003 . . . . 3, 5, 6, 7,15,18, 20

§ 87.003(3) 18

§ 87.004 . . . . 6, 7, 8, 15, 16

§ 87.004(2) 6, 7, 8, 11, 12, 15, 17

§ 87.004(3) 3, 10, 12, 20

§ 87.004(4) 7

§§ 87.001 - .005 . . . . vii, 2

TEX. GOV'T CODE ANN. (Vernon 2004)
§ 22.001(a)(1), (3), & (6) vii

TEX. R. EVID. 701 20

<u>OTHER AUTHORITIES</u>:

House Civ. Pract. Comm., Bill Analysis, Tex. H.B. 280,
74th Leg., R.S. (1995) 4

2 ROY MCDONALD & ELAINE CARLSON,
TEXAS CIVIL PRACTICE § 10.5 n. 9 (2002) 7

House Research Org., Bill Analysis, Tex. H.B. 280,
74th Leg., R.S. (1995) 17

Senate Comm. on Nat. Res., Bill Analysis, Tex. H.B. 280,
74th Leg., R.S. (1995) 4, 16, 21

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. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001 - .005 (Vernon 2005). C.R. 22.
Trial Court Disposition	The 159th 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 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 Worthen announced the judgment of the court and found two grounds for reversal; Justice Hoyle concurred on one grounds of reversal found by the Chief Justice and disagreed with the other; and Justice Griffith dissented. The opinions are reported at 277 S.W.3d 519. A copy of the reported opinion is attached under Tab 1 of the Appendix.
Appendix	Tab 1 Opinion of the Court of Appeals. Tab 2 Trial Court's judgment. C.R. 130. Tab 3 The Equine Activity Act, Chapter 87, Texas Civil Practice & Remedies Code.
References	Unless the context indicates otherwise, • references to "Lee" will mean Janice Lee, one of the plaintiffs/respondents; • references to "Loftin" will mean Terri Loftin, the defendant/petitioner; and • references to section numbers will refer to sections of the Texas Civil Practice & Remedies Code.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Section 22.001(a)(1) , (3), & (6) of the Government Code. All three justices of the court of appeals disagreed on at least one material question of law, and the case involves the construction of a statute that this Court has never construed.

ISSUES PRESENTED

1. *Reasonable inquiry*. The Equine Activity Act[1] generally grants immunity to "equine activity sponsors" for injuries resulting from "dangers or conditions that are an inherent risk of an equine activity . . . ." One exception to this grant of immunity is if the sponsor fails to make a "reasonable and prudent effort" to determine the rider's ability to "engage safely in the equine activity . . . .and determine the ability of the participant to safely manage the equine . . . ." If a sponsor already knows about a rider's ability to handle a horse, does she nonetheless need to propound questions directly to the rider to preserve her immunity under the Act?

2. *Causation*. If the horse owner does not make reasonable inquiry into a rider's skill, but the rider is injured for reasons that have nothing to do with the rider's ability or the suitability of the horse assigned to her, does the horse owner lose her immunity under the Equine Activity Act?

3. *Burden*. In responding to a motion for summary judgment, is it incumbent on the injured rider to present evidence that the owner's failure to inquire about the rider's experience caused the injury, or is it the burden of the horse owner to establish that there was

---

[1] TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001 - .005 (Vernon 2005).

no causation?

4. *Inherent risk.* (a) The evidence shows that Lee's accident occurred because the horse she was riding bolted when it was startled by a vine hanging down from a tree. Chief Justice Worthen held that Loftin was required to establish that this vine was a danger or condition that is an inherent risk of a trail ride. Loftin did so.

(b) The Lees have never contended that the vine was not a risk inherent in a trail ride. Is it appropriate to reverse a summary judgment on a grounds that was not alleged by the respondents in their pleadings, their response to summary judgment, or in their brief?

STATEMENT OF FACTS

Plaintiff Janice Lee has had long experience with horses. At the time of her deposition, she owned twelve of the animals, and she had owned horses ever since 1983 or 1984. C.R. 35. She likes horses (C.R. 36) and is in the business of breeding and selling them (C.R. 39), owning a business incorporated for that purpose. C.R. 39. She feeds them and takes care of them. C.R. 35. Her horses are brood mares, not riding horses, so she did not often ride them (C.R. 118), although she keeps saddles and tack and had been riding horses "quite some time" before this accident. C.R. 36-37. Her daughter is a barrel racer (C.R. 34), and she had urged Lee to ride more often. C.R. 83. Lee's hesitation apparently stemmed from a fall she had sustained seven or eight years earlier while riding her own mare. C.R. 118.

Lee had told Loftin's husband that she wanted to resume horseback riding, so the Loftins invited her to come ride with them. C.R. 83. She accepted this invitation, came to the Loftins' place, and went riding one day with Terri Loftin. C.R. 39-40, 83.

Although she wanted more experience as a horsewoman, Lee did not consider herself an inexperienced rider. C.R. 37. She knew how to ride the horse she rode that day, which was gentle and did not appear dangerous. C.R. 37, 38, 41. It was a gelding, eleven or twelve years old. C.R. 84.

The trail was clear for riding. C.R. 96. Lee and Loftin rode together for a while. Loftin led at first, but eventually "Terri moved over, and I don't remember if she got off her horse. . . . I just know she moved over and I kept going, my horse just kept going." C.R. 42.

With Lee in the lead, the pair came to a muddy stretch of ground. Although Lee could see that it was muddy (C.R. 42, 43), she never expressed any concern to Loftin or felt the need to turn back. C.R. 45. Loftin saw the mud, too, and did not think that it was anything that they needed to avoid. C.R. 91.

The horse was uncomfortable in the soft ground. As Loftin said, "No horse or person wants to stand in the mud." C.R. 94. Although Lee says she felt uncomfortable on the horse at this point (C.R. 42), they successfully negotiated the transit. Just after they left the muddy patch, a vine went up the horse's leg; they took another step, it went up his stifle,[2] and he lunged forward. C.R. 95. Lee saw vines hanging from trees in that area. C.R. 44. She naturally did not see one touch the horse behind her, but she did not dispute this is what occurred. C.R. 44. When the horse bolted, she fell off backwards and injured herself. C.R. 42.

Lee acknowledged that she knew a horse will jump if something is wrapped around its flank, as appears to have happened. C.R. 44. This was normal conduct for a horse, she admitted, a risk inherent in riding. C.R. 44, 45.

SUMMARY OF THE ARGUMENT

This case involves the interpretation of a statute that this Court has never construed, the Equine Activity Act, found in chapter 87 of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 87.001 - .005 (Vernon 2005).

---

[2] The "stifle" is the joint next above the hock in a horse's hind leg, corresponding to the human knee. The location of the joint may be seen in an illustration found at <http://www.merriam-webster.com/art/dict/horse.htm> (last accessed July 29, 2009).

The statute gives broad immunity to "equine activity sponsors" for injuries resulting from "dangers or conditions that are an inherent risk of an equine activity . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 87.003 (Vernon 2005).

One exception to this grant of immunity is if the sponsor failed to "make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity . . . and determine the ability of the participant to safely manage the equine . . . ." *Id.*, § 87.004(3).

Does this require that the sponsor propound questions directly to the rider? Two justices of the court of appeals appear to think so. 277 S.W.3d at 532, 534-35 (App., Tab 1). Other courts construing similar statutes disagree. *See Pinto v. Revere-Saugus Riding Acad., Inc.*, No. 05-3940-E, 2007 WL 3244631, *3 (Mass. Super. Ct. Oct. 18, 2007), *rev'd on other grounds*, 74 Mass. App. Ct. 389, 907 N.E.2d 259 (2009); *Stoffels v. Harmony Hill Farm*, 389 N.J. Super. 207, 912 A.2d 184 (2006).

And does the alleged failure to "make a reasonable and prudent effort" result in liability even when all the evidence shows that any such failure did not cause the accident? Lee admitted that the horse she rode was calm and gentle, she knew how to ride it, and that nothing the defendant "did or didn't do . . . as far as checking into [her] ability to ride that horse" had anything to do with the accident. C.R. 116-17.

Who has the burden to come forward with evidence on these issues? The chief justice of the court of appeals perceived a split in authority between two other courts on this question. 277 S.W.3d at 531 n. 8 (App., Tab 1), comparing *Little v. Needham*, 236 S.W.3d

328, 333-34 (Tex. App.—Houston [1st Dist.] 2007, no pet.), which placed that burden on the nonmovant, with *Johnson v. Smith*, 88 S.W.3d 729, 730-33 (Tex. App.—Corpus Christi 2002, no pet.), which, Chief Justice Worthen said, "implicitly plac[ed] that burden on the movant." 277 S.W.3d at 531 n. 8 (App., Tab 1).

Only this Court can resolve these questions.

ARGUMENT AND AUTHORITIES

I. Standard of review.

An appellate court reviewing a summary judgment considers whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755-56 (Tex. 2007); *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006); *City of Keller v. Wilson*, 168 S.W.3d 802, 822-24 (Tex. 2005). The court should consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion. *See Goodyear*, 236 S.W.3d at 756; *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006).

II. Loftin established her immunity under the Texas Equine Activity Act.

In 1995, the Texas Legislature enacted the Texas Equine Activity Act, with the purpose of "limiting the personal liability resulting from dangers that are inherent risk of equine activities." House Civ. Pract. Comm., Bill Analysis, Tex. H.B. 280, 74th Leg., R.S. (1995). The Legislature saw the need for this limitation of liability because of "an expansion in tort liability, changes in insurance costs, and the nature of equine activities." Senate

Comm. on Nat. Res., Bill Analysis, Tex. H.B. 280, 74th Leg., R.S. (1995).

Loftin moved for summary judgment on the basis of that Act, which generally grants immunity to "any person, including an equine activity sponsor" such as Terri Loftin for injuries resulting from "dangers or conditions that are an inherent risk of an equine activity . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 87.003 (Vernon 2005).

Without any doubt, Lee and Loftin's trail ride was an "equine activity." *See* § 87.001(3)(D) & (E). Similarly, there is no question but that Loftin was an "equine activity sponsor." *See* § 87.001(4). To establish her immunity, Loftin was only required to show that Lee's injury resulted from an "inherent risk of an equine activity."

Section 87.003 goes on to set forth a non-exclusive list of matters that are "inherent risk[s] of equine activity:"

> (1) the propensity of an equine or livestock animal to behave in ways that may result in personal injury or death to a person on or around it;
>
> (2) the unpredictability of an equine or livestock animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal;
>
> (3) with respect to equine activities, certain land conditions and hazards, including surface and subsurface conditions;
>
> (4) a collision with another animal or an object; or
>
> (5) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or another, including failing to maintain control over the equine or livestock animal or not acting within the participant's ability. [*Id.*]

As Justice Hoyle observed in his concurring opinion:

Because section 87.003 controls here and contains a nonexclusive list of

> inherent risks, we may compare the facts of this case to the listed risks to decide whether, as a matter of law, the Lees' injuries resulted from an inherent risk. *See Little v. Needham*, 236 S.W.3d 328, 332 (Tex. App.—Houston [1st Dist.] 2007, no pet.). [277 S.W.3d at 534 (App., Tab 1).]

As explained above, the horse Lee was riding was startled when a vine went up its leg, which caused it to lunge forward and throw Lee from the saddle. *See* p. 2, *supra*. As two of the justices below found, Lee's injury was caused by all five of the listed inherent risks. (Chief Justice Worthen's contrary opinion is discussed at pp. 17-20, *infra*.) Therefore, Loftin showed that she was entitled to summary judgment by establishing her immunity under the Act.

III. After Loftin established her immunity under the Equine Activity Act, Lee was required to plead and offer proof of an exception to that immunity.

Section 87.004 lists six exceptions to the general immunity granted by Section 87.003. Whether one of these exceptions, Section 87.004(2), applies is the principal issue in this case.

These exceptions are what have been called "counter-affirmative defenses" or "defenses to the defense." That is, they are pleas in avoidance like a traditional affirmative defense, and the burden was on the Lees to present evidence as to each element of those matters in avoidance. *See Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (defendant conclusively proved that suit was filed after the ten-year statute of repose had expired; burden on plaintiffs to "to raise a fact issue on their affirmative defenses — fraudulent concealment and willful misconduct . . . ."); *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex.1994) (same); *Resolution Trust Corp. v. Ammons*, 836 S.W.2d 705, 710 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holder-in-due-course status as counter-

affirmative defense).[3]

The only opinion to mention this issue was Chief Justice Worthen's. He declined to address the question, but perceived an apparent split between the Thirteenth and First Courts of Appeals. 277 S.W.3d at 531 n. 8 (App., Tab 1).

The Chief Justice found that the burden was implicitly placed on the movant in *Johnson v. Smith*, 88 S.W.3d 729, 732-33 (Tex. App.—Corpus Christi 2002, no pet.). In that case, the court found the defendant had established the plaintiff's injury was an inherent risk of an equine activity, and so the defendant was immune under Section 87.003, but the court also found plaintiff had raised a fact issue as to two exceptions under Sections 87.004(2) and (4).

But it is not enough merely to plead or assert an exception under Section 87.004. To avoid summary judgment, "[a] genuine issue on each element of that affirmative defense must be raised by competent summary judgment evidence." *Nicholson v. Mem. Hosp. Sys.*, 722 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (ostensible agency as counter to independent-contractor defense).

Thus in *Little v. Needham*, the plaintiff failed to come forward with evidence of an

---

[3] Other cases discussing the plaintiff's burden to come forward with pleadings and evidence to negate a plea of limitations are *Wise v. Anderson*, 163 Tex. 608, 359 S.W.2d 876, 880 (1962), *Wright v. Gifford-Hill & Co.,* 736 S.W.2d 828, 834 (Tex. App.—Waco 1987, writ ref'd n.r.e.) and *Royal Typewriter Co. v. Vestal*, 572 S.W.2d 377, 378 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). Other examples of "counter-affirmative defenses" by plaintiffs include defenses to a release (*see Ellis v. Woods*, 453 S.W.2d 509, 510 (Tex. Civ. App.—El Paso 1970, no writ)) and defenses to a pleas of payment (see *Sustala v. North Side Ready-Mix Concrete Co.*, 317 S.W.2d 64, 67 (Tex. Civ. App.—Houston [1st Dist.] 1958, no writ). Other examples are collected at 2 ROY MCDONALD & ELAINE CARLSON, TEXAS CIVIL PRACTICE § 10.5 n. 9 (2002).

exception under Section 87.004, so the appellate court affirmed the summary judgment. *Little v. Needham*, 236 S.W.3d 328, 333-34 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Like the plaintiff in *Little*, the Lees have failed to meet their burden.

IV. Loftin made a reasonable and prudent inquiry into Lee's ability to ride and her ability to handle this particular horse.

Section 87.004 lists six exceptions to this grant of immunity. At issue is Section 87.004(2), which allows for liability if:

> 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 participant's representations of ability. [TEX. CIV. PRAC. & REM. CODE ANN. § 87.004(2) (Vernon 2005) (emphasis supplied).]

In an affidavit, Lee said, "At no time prior to my riding accident did Terry Loftin ask me any questions regarding my horse riding experience." C.R. 64.

Both Chief Justice Worthen and Justice Hoyle concluded that this statement created a fact issue precluding summary judgment. 277 S.W.3d at 532, 534-35 (App., Tab 1).

We would respectfully show that this statement did not create a fact issue. As phrased in Section 87.004(2), the legal issue is whether Loftin made a "reasonable and prudent effort" to determine Lee's ability to handle the horse she rode. (There is no claim that Lee lacked the ability to "engage in the equine activity" at all — i.e., that she was completely lacking in the ability to handle any horse.) There are more ways to make that "reasonable and prudent effort" than to submit a series of questions directly to the rider.

A. The record shows that Loftin was aware of Lee's riding experience.

Loftin testified:

> Cevin [Loftin, Terri's husband] went out to do [the Lees'] horses and they had had conversations in the past about [Janice Lee] wanting to *start riding* and had *wanted to ride.* She said her daughter had been *wanting her to ride* but she *didn't really have anything to ride*, so Cevin invited her out. [C.R. 83 (emphasis added).]

Thus, Loftin knew that Lee was not an experienced rider. She did not inquire about Lee's riding ability by propounding a series of questions directly to her, but by getting the necessary information through Cevin Loftin, her husband.

This information allowed Loftin to select an appropriate horse for Lee, one that Lee admitted was "calm" and "gentle" (C.R. 74), and one that Lee "knew how to ride." C.R. 116.

Lee does not dispute any of Terri Loftin's account. If she did, she could have presented an affidavit from herself or her husband denying that they had discussed her riding ability with Cevin Loftin: instead, Lee merely states that Terri Loftin did not ask her any questions (C.R. 64), and acknowledges that she expected Loftin's invitation to ride, having expressed a desire to go riding one day. C.R. 40.

Based on the summary-judgment evidence, reasonable jurors could only conclude that Loftin had learned enough about Lee's riding ability to allow her to select an appropriate horse for Lee to ride.

B. Direct inquiry is not necessary to secure the statute's protection.

Would it have made sense for Loftin to ask Lee questions so that Lee could tell her what she already knew? Other courts in states with equine activity acts would say not.

In a Massachusetts case similar to this one, construing a virtually identical statute,[4] the court held that "it was not necessary for Riding Academy to directly question [the rider] about her riding experience because Riding Academy could glean [the rider's] abilities implicitly from her words and actions." *Pinto v. Revere-Saugus Riding Acad., Inc.*, No. 05-3940-E, 2007 WL 3244631, *3 (Mass. Super. Ct. Oct. 18, 2007), *rev'd on other grounds*, 74 Mass. App. Ct. 389, 907 N.E.2d 259 (2009).

The court related some of the rider's "words and actions:"

> Pinto used several horseback riding terms during her interactions with Riding Academy's staff. She asked to purchase a particular kind of horse, a "western pleasure horse." Pinto was shown horses that met this criterion. However, because she was looking for a horse of a particular size, "15 hands," she rejected a first horse for being too small. After expressing an interest in Twilight, Pinto requested to use "western tack" to ride him. In addition, Pinto's deposition testimony indicates that, once mounted on Twilight, she knew how to direct the horse's movements, squeezing him with her heels to make him proceed forward. [*Id.* at *3, n. 10.]

On appeal, the appeals court did not disturb the trial court's holding that the defendant stable had made reasonable inquiry into the plaintiff's riding ability. Instead, the appeals court found that there was a fact issue regarding the second part of the exception, which

---

[4] *See* MASS. GEN. LAWS ch. 128, § 2D, especially Section 2D(c), which reads substantially the same as Section 87.004(3) of the Texas Equine Activity Act:

> Nothing in subsection (b) shall prevent or limit the liability of an equine activity sponsor . . . if the equine activity sponsor . . . :
>
>> (1) . . . .(ii) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, and determine the ability of the participant to safely manage the particular equine based on the participant's representations of his ability . . . . [MASS. GEN. LAWS ch. 128, § 2D(c).]

required the stable to make a reasonable effort to "determine the ability of the participant to safely manage the particular equine based on the participant's representations of his ability." MASS. GEN. LAWS ch. 128, § 2D(c)(1)(ii); *compare to* Section 87.004(2) of the Texas Act.

The court wrote:

> The plaintiff's deposition testimony indicated that before she mounted Twilight, he was "prancing" and "tossing his head," showing "too much energy," and it appeared that the farrier also was having a difficult time controlling the horse. The stable manager, who was present while the farrier was riding, asked the plaintiff whether she wanted to mount. This was so despite the representations of the plaintiff that she was a beginner and wanted a safe horse. Although there was evidence that there had been no previous complaints about the horse, the skittish conduct of the horse known to the stable manager was sufficient to present a jury question whether the horse's behavior during the farrier's ride put the stable manager, or a reasonable professional in her place, on notice that at that time the plaintiff, a beginner, did not have sufficient ability to ride Twilight. [907 N.E.2d at 264.]

Thus, even assuming that the defendant had made reasonable inquiry into the rider's ability to ride generally, there was not a reasonable effort to determine her ability to ride *that particular horse*, given its behavior immediately before the plaintiff got into the saddle.

Like the Massachusetts defendant, Loftin had learned about Lee's level of experience other than through direct questioning. Cevin Loftin. *See* p. 9, *supra.* Unlike the Massachusetts defendant, Loftin did not overestimate Lee's ability to ride. As Lee testified:

Q You didn't need any training about how to handle a horse?

A Not as far as just getting on and riding, no.

* * *

Q As far as your ability to ride that horse, you knew how to ride a horse with those kind of propensities to it, right?

A Yes.

Q I mean there's nothing that my client, Terri, did or didn't do with regard to this horse as far as checking into your ability to ride that horse? You had the ability to do it, right?

A Yes. [C.R. 116-17.]

Terri Loftin may not have directed questions to Lee, but she certainly learned, or "gleaned," the facts she needed to know about Lee's riding ability in order to select an appropriate horse for her to ride. She made the "reasonable and prudent effort" required by Section 87.004(2).

A similar New Jersey statute[5] was at issue in *Stoffels v. Harmony Hill Farm*, 389 N.J. Super. 207, 912 A.2d 184 (2006). In that case, the defendant bought some new horses and announced at a horsemen's association meeting that she had horses that "needed exercising" and that members should call her if they were interested in riding. She also sent a follow-up email to the same effect. The plaintiff obtained a copy of this email from her daughter and replied that she would be interested, detailing her riding experience.

Like Lee, the *Stoffels* plaintiff stated that "she and defendant did not discuss her riding experience . . . ." 912 A.2d 188. The appellate court held that this was not necessary to preserve the defendant's immunity, in light of the plaintiff's email and the fact that the

---

[5] N.J. STAT. ANN. §§ 5:15-1 – 5:15-12. Section 5:15-9(b) is similar to Section 87.004(3) of the Texas act:

> Notwithstanding any provisions of sections 3 and 4 of this act to the contrary, the following actions or lack thereof on the part of operators shall be exceptions to the limitation on liability for operators:
> . . . .
>
> > b. Failure to make reasonable and prudent efforts to determine the participant's ability to safely manage the particular equine animal, based on the participant's representation of his ability . . . .

plaintiff learned of the "riding opportunity presented by defendant at a regular meeting of horsemen." 912 A.2d at 190.

And "[g]iven the extensive representations of [plaintiff's] equestrian accomplishments, it would be curious for defendant to commence a cross-examination of plaintiff's representations." *Id.*

Accordingly, the court held that New Jersey equivalent of Section 87.004(2) did not provide an exception to the defendant's immunity from suit. *See id.*[6]

These two cases are from other jurisdictions, but the courts in each were construing statutes very similar to the Texas Equine Activity Act. Both cases demonstrate that it is not essential for an equine activity sponsor, such as Loftin, to propound questions directly to a rider such as Lee. The sponsor can "glean" this information otherwise, as Loftin certainly did. *See Pinto v. Revere-Saugus Riding Acad., Inc.*, 2007 WL 3244631 at *3.

V. Even if Loftin had not made reasonable inquiry about Lee's riding skill, that failure was not a cause of the accident, and so it does not eliminate the immunity afforded by the Equine Activity Act.

A. Lee admitted that any failure by Loftin to ask about her riding skill had nothing to do with her accident.

In her deposition, Lee testified:

Q [T]his horse that you were riding at the time of the accident was a gentle horse. You've admitted that, haven't you?

A Yes.

---

[6] The plaintiff did create a fact issue about another exception from immunity found elsewhere in the New Jersey statute, in a section without a parallel in the Texas act. *See* 912 A.2d at 191, discussing Section 5:15-9(d). Truly, this was an exception that swallowed the rule. *See* N.J. STAT. ANN. §§ 5:15-9(d).

* * *

Q And that horse didn't appear to be dangerous to you one bit, did it?

A No.

Q As far as your ability to ride that horse, you knew how to ride a horse with those kind of propensities to it, right?

A Yes.

Q I mean there's nothing that my client, Terri, did or didn't to with regard to this horse as far as checking into your ability to ride that horse? You had the ability to do it, right?

A Yes. [C.R. 116-17.]

Elsewhere she testified:

Q Up until the time that the accident occurred, was there anything about the horse that you felt was dangerous?

A No, sir.

Q Did it appear to be a calm horse?

A Right.

Q A gentle horse?

A Yes. [C.R. 74.]

Thus, it cannot be claimed that there was a mismatch between Lee and the horse she rode. Even if there could be doubt that Loftin made inquiry into Lee's general ability to ride, no reasonable juror could believe that any such failure caused the accident. Certainly the Lees have made no effort to prove a causal connection.

B. Since failure to inquire did not cause the accident, failure to inquire did not eliminate the immunity granted by the Equine Activity Act.

Since Loftin's alleged failure to investigate Lee's ability to ride did not contribute to the injury, it stands to reason that the failure would not deprive Loftin of the protection afforded by the Equine Activity Act.

Section 87.003 of the Equine Activity Act grants broad immunity to "equine activity sponsors" for damages resulting from "the dangers or conditions that are an inherent risks of an equine activity . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 87.003 (Vernon 2005).

Section 87.004 provides exceptions to this grant of immunity, providing in relevant part:

> A person, including an equine activity sponsor . . . is liable for property damage or damages arising from the personal injury or death caused by a participant in an equine activity . . . if: . . .
>
> (2) the person provided the equine . . . 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 . . . and determine the ability of the participant to safely manage the equine . . . , taking into account the participant's representations of ability. . . .[TEX. CIV. PRAC. & REM. CODE ANN. § 87.004(2) (Vernon 2005).]

Although Section 87.004(2) includes no causation language, the main part of Section 87.004 removes the immunity granted by Section 87.003 only for personal injury or death "caused by a participant in an equine activity." The definition of "participant" in Section 87.001(9)(A) is broad enough to include Terri Loftin:

"Participant" means:

> (A) with respect to an equine activity, a person who engages in the activity, without regard to whether the person is an amateur or

> professional or whether the person pays for the activity or participates in the activity for free . . . . [TEX. CIV. PRAC. & REM. CODE ANN. § 87.001(9)(A) (Vernon 2005).]

A trail ride is certainly an equine activity, and Terri Loftin was certainly a participant. *See id.*, § 87.001(3)(E). The court of appeals agreed, Chief Justice Worthen stating, "It is undisputed that Loftin and Janice Lee were participants engaged in equine activity at the time of Lee's injury." 277 S.W.3d at 527 (App., Tab 1). Indeed, if Loftin were not a "participant," then there would be one "participant" in the event, Janice Lee. Only damages "caused by a participant" can be the basis for an exception to immunity under Section 87.004, so such a construction would yield nonsensical results: If damages are not recoverable unless they are caused by a "participant," if Lee were the only "participant" she could only recover if she had caused her own damages. This would be contrary to common sense and the plain intention of the Legislature.

It is easy enough to determine the Legislature's intent. The Senate committee's report on the legislation summarizes Section 87.004 as follows:

> Sec. 87.004. EXCEPTIONS TO LIMITATION OF LIABILITY. Provides that a person is liable for property damages, injury, or death resulting *from that person's negligence* under specific conditions. [Senate Comm. on Nat. Res., Bill Analysis, Tex. H.B. 280, 74th Leg., R.S. (1995) (emphasis added).]

Similarly, the House Research Organization[7] interpreted the bill's language as establishing:

> exceptions to liability limitations *if the injury was caused by* faulty equipment

---

[7] What is now Section 87.004 was part of the introduced version of the bill. As the House Research Organization report observes, this provision was stripped from the bill in the House Committee on Civil Practices. It was restored by the Senate and is part of the enacted statute.

> or tack, failure of an equine professional to determine the ability of the participant to engage in the activity safely, a dangerous latent condition on the land, an act or omission of wanton for willful disregard for safety, or intentional actions. [House Research Org., Bill Analysis, Tex. H.B. 280, 74th Leg., R.S. (1995) (emphasis added).]

It follows that since Loftin's alleged failure to inquire into Lee's riding ability did not cause the accident, Section 87.004(2) does not abrogate Loftin's immunity under Section 87.003.

VI. The vine that startled Lee's horse was a an inherent risk of a trail ride, and the Lees have never contended otherwise.

It is undisputed that Lee was injured after her horse was startled when it brushed up against a vine growing on a tree. It is also undisputed that this is a normal reaction for a horse. Chief Justice Worthen acknowledged as much in his opinion (277 S.W.3d at 528 [App., Tab 1]), but he questioned whether the statute provided immunity at all. Section 87.003 does not provide immunity unless the injury "results from the dangers or conditions that are an inherent risk of an equine activity." Chief Justice Worthen added, "to establish facts relating to inherency, it was incumbent on Loftin to further prove facts relating to whether exposure to Loftin's alleged 'risks' was common to a *trail ride* activity." 277 S.W.3d at 528 (App., Tab 1) (emphasis in original).

Neither Justice Hoyle nor Justice Griffith agreed with the Chief Justice on this point: Justice Hoyle found that this case "falls within all five of the listed inherent risks of equine activity." 277 S.W.3d at 534 (App., Tab 1). Justice Griffith also found this to be an inherent risk, noting, "Had Lee wanted to ride in a riding corral, they could have done so. However, she chose to embark on a trail ride with Loftin." 277 S.W.3d at 540 (App., Tab 1).

A. The statute expressly states that conditions of land are an "inherent risk."

Section 87.003 provides immunity from personal injury claims that are "an inherent risk of an equine activity." TEX. CIV. PRAC. & REM. CODE ANN. § 87.003 (Vernon 2005). That same section provides a non-exclusive list of inherent risks, "including: . . . (3) with respect to equine activities, certain land conditions and hazards, including surface and subsurface conditions . . . ." *Id.*, § 87.003(3).

Plants, such as vines and other vegetation, are considered part of the land. *See Rogers v. Fort Worth Poultry & Egg Co.*, 185 S.W.2d 165, 167 (Tex. Civ. App.—Fort Worth 1944, no writ).[8] It follows that the presence of a vine is a "condition" of the land. That alone is sufficient to bring this case squarely within Section 87.003(3).

B. The Lees have never contended that the vine was not a risk inherent in a trail ride.

Nowhere in their pleadings, their response to the motion for summary judgment, or in their brief to the court of appeals have the Lees argued that the vine that startled Janice Lee's horse was not a risk inherent in a trail ride. *See* C.R. 100-03 (Pl. 1st Am. Pet.); C.R. 55-99 (Pl. Resp. to Def.'s Mot. for Summ. J.). Indeed, Janice Lee acknowledged that this was "one of the dangers that happens when you ride a horse." C.R. 76.

It is elementary that it is improper to reverse on unpreserved and unassigned error. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex.1993) ("We have held repeatedly that the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of

[8] "It is obvious that all appurtenances to land placed there by nature constitute a part of the land; likewise all growing crops and grass, while unsevered, is a part of the real estate." 185 S.W.2d at 167.

error."); *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 118 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (stating that issues not raised to trial court during summary judgment proceedings cannot be raised for the first time on appeal), citing *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993).

C. The record shows that the vine was a risk inherent in a trail ride.

More significantly, the record establishes that the hazards on this trail ride were inherent risks of the activity, beyond simply being a condition of the land. Vines are commonplace in the East Texas woods. As Chief Justice Worthen noted in an earlier opinion, "heavy vegetation . . . , while possibly uncommon within a city's limits, is neither uncommon nor unexpected in the springtime in rural East Texas." *Anderson v. Anderson County*, 6 S.W.3d 612, 617 (Tex. App.—Tyler 1999, pet. denied).

If Lee and Loftin were to "trail ride," they would ride by trees, and it was inevitable that they would also ride by vines. Janice Lee acknowledged that this was "one of the dangers that happens when you ride a horse." C.R. 76.

More significantly, when asked about the condition of the trail, Loftin confirmed: "I had been riding it. It was clear for riding purposes." C.R. 96. Thus Loftin testified that the conditions of the trail, including the presence of vines, was normal for a trail ride.

Janice Lee's statements cited at 277 S.W.3d 228-29 (App., Tab 1) do not go to this issue. Essentially, she states that if they had been riding on a different trail, her horse would not have brushed up against the vine and the accident would not have happened. While that is doubtless true, none of Lee's testimony implies that vines are not commonly encountered

in trail rides. Moreover, given her professed lack of riding experience, Janice Lee could hardly express an opinion about what is and is not common on trail rides. Any inferences or opinions that Lee would express on the subject would be based on perceptions and knowledge that she simply does not have. *See Anthony Equip. Corp. v. Irwin Steel Erectors, Inc.*, 115 S.W.3d 191, 207 (Tex. App.—Dallas 2003, pet. dism'd); TEX. R. EVID. 701.

There can be no doubt that the vine was an "inherent risk" of a trail ride, and that Terri Loftin is shielded from liability by Section 87.003.

VII. The muddy patch was also an inherent risk.

In their response to the petition for review, the Lees reasserted their claim that "muddy conditions" on the trail caused the horse to bolt. *See* Lee Resp. at 12. No judge on the court of appeals considered that as a grounds for liability that would survive the Equine Activity Act.

Section 87.004(3) provides an exception to immunity if:

> the injury or death was caused by a dangerous latent condition of land for which warning signs, written notices, or verbal warnings were not conspicuously posted or provided to the participant, and the land was owned, leased, or otherwise under the control of the person at the time of the injury or death and the person knew of the dangerous latent condition. [TEX. CIV. PRAC. & REM. CODE ANN. § 87.004(3) (Vernon 2005).]

The Lees argue this exception applies because the ground was muddy where the accident occurred. The horse Janice Lee was riding did not like the mud, and this, they say, caused him to bolt and Mrs. Lee to fall off. This argument fails on at least two counts.

First, the muddy condition of the trail was not "latent." There is no evidence that the muddy patch was latent or concealed. *See Little v. Needham*, 236 S.W.3d at 333-34. To the

contrary: Lee repeatedly admitted she saw the mud before she rode into it. C.R. 42, 43, 45. She also saw vines hanging from trees, and it was one of these, not the mud, that spooked Lee's horse and caused it to bolt. C.R. 44, 95.

Second, there is no showing the land where the accident occurred was "owned, leased, or otherwise under the control" of Loftin. Indeed, the evidence shows the land was owned by a neighbor, Dewayne Weldon, who cleared and maintained the trails and allowed the Loftins to ride their horses across it. C.R. 88-89.

CONCLUSION

Terri Loftin knew that Janice Lee was a relatively inexperienced horseback rider. She knew that Lee wanted to come ride with her for the very purpose of getting the riding experience she wanted. With this knowledge, she selected an appropriate horse for Lee to ride, one that Lee acknowledged was "calm" and "gentle" (C.R. 74), and one that Lee "knew how to ride." C.R. 116. Lee can point to nothing that Loftin could or should have done differently in selecting the horse if she had asked Lee a series of questions that would have told Loftin what she already knew. Indeed, she admits that Loftin's selection of the horse had nothing to with her accident.

Rather, the accident was an unfortunate example of the inherent risks of horseback riding, and this suit is an example of the sort of litigation that the Legislature intended to eliminate when it enacted the Equine Activity Act to protect a Texas institution from "an expansion in tort liability, changes in insurance costs, and the nature of equine activities" that threatened to destroy it. Senate Comm. on Nat. Res., Bill Analysis, Tex. H.B. 280, 74th Leg.,

R.S. (1995).

This Court should grant this petition for review to resolve unanswered questions about the meaning of the Equine Activity Act and to clarify and strengthen the protections intended by the Legislature.

PRAYER

For the reasons stated, Terri Loftin, petitioner, prays that the Court grant her petition for review, reverse the judgment of the court of appeals, and affirm the judgment of the district court. Petitioner also prays that she be granted such other and further relief as may be just.

Respectfully submitted,

ZELESKEY LAW FIRM PLLC
P. O. Drawer 1728
Lufkin, Texas 75902-1728
Phone: 936/632-3381
Fax: 936/632-6545

By:__________________________________
Robert T. Cain, Jr.
State Bar No. 03607200
Attorneys for Petitioner Terri Loftin

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument was served or delivered by depositing the same, enclosed in a postpaid, properly addressed wrapper, certified mail, return receipt requested, in an official depository under the care and custody of the United States Postal Service, to:

Mr. Douglas J. McCarver
Attorney at Law
3548 NE Stallings Drive
Nacogdoches, Texas 75965-8732

Attorney for Respondents Janice Lee and Bob Lee

on July 31, 2009.

____
Robert T. Cain, Jr.