

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' BRIEF ON THE MERITS

**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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RESPONDENTS' BRIEF ON THE MERITS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Responding to the Court's request for briefs on the merits, plaintiffs/respondents Janice Lee and Bob Lee file this brief on the merits. Pursuant to T.R.A.P. Rule 55.3, the Respondents will not file with this brief, (a) the list of parties and counsel, (b) a statement of the case, or (c) a statement of jurisdiction.

The Respondents, however, are dissatisfied with the statement of facts and the statement of the issues portions of the Petitioner's brief and the Respondents are asserting independent grounds for affirmance of the Court of Appeals judgment T.R.A.P. 55.3 (b), (c) (1) and (c) (2).

ISSUES PRESENTED

- Issue One: Did a fact question exist as to whether the inherent risks of horseback riding included the risk of a riding guide's proceeding along a trail through a heavily wooded bog.
- Issue Two: Did a fact question exist as to whether the Petitioner made a reasonable and prudent effort to determine Respondent's ability to engage safely in the activity.
- Issue Three: Could reasonable and fair minded judges differ in their factual conclusions based upon the summary judgment evidence in this case.
- Issue Four: Whether the equine sponsor's personal negligence is immune from liability under the Equine Act.
- Issue Five: Whether the Equine Activity Act violates the open courts and due process of law guarantees of the Texas Constitution and is unconstitutionally vague.

STATEMENT OF FACTS

Terri Loftin's husband invited Janice Lee to their home to ride horses. Janice Lee accepted the invitation and later went to the Loftin home for that purpose. Janice Lee was provided with a horse by Terri Loftin and she and Mrs. Loftin proceeded on a trail ride through the surrounding area. During the trail ride, they came upon a heavily wooded bog. Loftin had been leading the way during the trail ride until that point. Loftin's horse then moved over, for unknown reasons, and Lee's horse continued into the boggy area. Lee's horse started sinking in the mud and then bolted into a full run. Lee fell off the horse and was 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 her husband, Cevin, (a farrier) "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). While Lee’s horse was in the boggy area, a vine apparently also caught on her horse’s leg. (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 Loftin never made any inquires to Lee about her riding experience. Even more critical, it shows that she was not warned 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

This is a traditional summary judgment case in which genuine issues of material facts as to whether inherent risks of horseback riding included the risk of the riding guide's proceeding along a trail through a heavily wooded bog, precluded summary judgment in favor of the riding guide, under the Equine Activity act. As a movant for traditional summary judgment, it was incumbent on Loftin to present evidence sufficient to conclusively establish that the injury causing risks in question were common to a trail ride activity. Loftin failed to carry that burden on this record.

Genuine issues of material facts regarding whether Loftin made a reasonable and prudent effort to determine Lee's ability to engage safely in the trail ride precluded summary judgment in favor of Loftin. It is undisputed that Loftin made no such inquires of Lee directly and to merely have knowledge that a person owns horses and wants to start riding is not enough to satisfy the requirement of making a reasonable and prudent effort to determine ability.

A summary judgment movant's evidence cannot be conclusive where three appellate court judges and one trial court judge differ in their factual and logical conclusions. Loftin, therefore, failed to conclusively establish the absence of any genuine issue of material fact and she is not entitled to judgment as a matter of law.

Allowing a novice rider on a race horse to proceed into a heavily wooded bog without forewarning, created a unique and dangerous condition over and above the common risks of trail riding and therefore Loftin's negligence is not immune from liability under the Equine Activity Act.

The Equine Activity Act should be held unconstitutional because it is arbitrary and discriminatory. It also violates the "open courts" provision of the state constitution by restricting common-law causes of action. Further, the statute is in direct conflict with the supreme court's prior abolition of the doctrine of implied assumption of risk.

ARGUMENTS AND AUTHORITIES

I. Standard of Review

It is important to note in this case that the summary judgment in question is a traditional summary judgment motion and not a no-evidence summary judgment motion.

For a party to prevail on a traditional motion for summary judgment, it must conclusively establish the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *TEX. R. CIV. P. 166a (c)*. A fact is “material” if it affects the ultimate outcome of the lawsuit under the governing law. *Pierce v. Wash. Mut. Bank*, 226 S.W. 3d 711, 714 (Tex.App.-Tyler 2007, pet. denied). A material fact issue is “genuine” if the evidence is such that a reasonable jury could find the fact in favor of the nonmoving party. *Pierce*, 226 S.W. 3d at 714; see *Wal-Mart Stores, Inc. v. Spates*, 186 S.W. 3d 566, 568 (Tex. 2006) (per curiam) (appellate court reviewing a summary judgment must consider whether reasonable and fair minded jurors could differ in their conclusions). Evidence is conclusive only if reasonable and fair minded jurors could not differ in their conclusions. See *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W. 3d 754, 755-56 (Tex. 2007) (per curiam) (citing *Spates*, 186 S.W. 3d at 568). Once the movant has established a right to summary judgment, the nonmovant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *Pierce*, 226 S.W. 3d at 714 (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W. 2d 671, 678-79 (Tex. 1979)).

It is also important to bear in mind that in summary judgment law, a reviewing court must 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 Tire & Rubber Co. v. Mayes*, 236 S.W. 3d 754 (Tex. 2007); *Yancy v. United Surgical Partners Int’l, Inc.* 236 S.W. 3d 778, 782 (Tex. 2007).

II. Loftin failed to conclusively show what risks are common to a trail ride on horseback.

The statute in question provides for a limitation on liability for the inherent risk of an equine activity. Although it includes several definitions, it does not define the term “inherent” as used in the context of the statute.

The Merrim-Webster’s Collegiate Dictionary defines inherent as “involved in constituent or essential character of something; belonging to by nature or habit”. In essence, the term inherent could be understood to mean “characteristic of” or “common to” or “normal for” something. So in the present case, the pivotal question is what are the normal or common risks of trail riding on horseback. Moreover, in a traditional summary judgment motion, it is the movant’s burden to conclusively prove the common or normal risks associated with that activity. Therefore, in the present case, to establish facts relating to inherency, it was incumbent on Loftin to further prove facts relating to whether Loftin’s alleged “risks” were common to a trail ride activity. *Phi Delta Theta Co. v. Moore*, 10 S.W. 3d 658 (Tex. 1999). Otherwise, how is a trial court judge, or a jury, or an appellate court judge, ever going to know what the common or normal risks are in any sporting or recreational activity other than from their own personal experiences that may vary greatly. The court should consider the nature of the recreational activity to determine what conduct is an accepted part of the activity, and, consequently, what risks are inherent in that activity. A defendant should not be absolved of liability for injuries that result from risks which are not particular or normal to participation in the activity. When a defendant creates a risk separate and apart from the normal nature of the activity, a defendant is subject to the ordinary rules of negligence for determining liability. The inherent risk standard turns on an analysis of the nature of the recreational activity in question and a determination of what risks are normally created by the nature of the activity. See *Phi Delta Theta*, 10 S.W. 3d at 663. Such a “determination” cannot be made without evidence and

in a summary judgment proceeding, it cannot be based on disputed material facts.

So, what facts relating to this inherency are there on this appellate record. The only summary judgment evidence in this case consists of excerpts from the depositions of Loftin and Lee and Lee's affidavit. Loftin's deposition testimony does not even touch on that subject and Lee's deposition testimony only broadly shows that she saw vines hanging from the trees and that she knew if a horse got something wrapped around their flank, they're going to jump. However, that testimony does not address whether vines or a heavily wooded bog would be common to an area designated for safe trail rides.

There is not any other evidence on the subject of the normal risks that are inherent to a trail riding activity. Although Lee made no complaints to Loftin before the accident, near the end of the deposition she does fault Loftin for the poor choice of a riding trail. At a minimum, factual disputes exist on this record.

Factual conflicts in the nonmovant's own deposition must be resolved in the nonmovant's favor where deposition is considered as summary judgment evidence. See *Randall v. Dallas Power & Light Co.*, 752 S.W. 2d 4, 5 (Tex. 1988); *Gaines v. Hamman*, 163 Tex. 618, 626, 358 S.W. 2d 557, 562 (1962); *Pierce*, 226 S.W. 3d at 716-17; *Hassell v. Mo. Pac. R.R. Co.*, 880 S.W. 2d 39, 41 n. 1 (Tex.App.-Tyler 1994, writ denied.). When the summary judgment record is viewed in this light, Janice Lee's deposition testimony, which included some conflicting inferences regarding the normalcy of alleged risks present on the selected trail, fails to conclusively establish the facts necessary to support a legal determination that the "risks" alleged by Loftin were "inherent." See *Steeg v. Baskin Family Camps, Inc.*, 124 S.W. 3d at 639-40 (Tex. App.-Austin 2003, pet. dismissed). Therefore, Loftin failed to meet her summary judgment burden, and the trial court reversibly erred by granting summary judgment.

III. Loftin failed to make a reasonable and prudent effort to determine Lee's liability to engage safely in the trail ride.

Applying the summary judgment evidence on this record to Section 87.004, essentially provides that an equine activity sponsor is liable for damages arising from personal injury if:

- 1) the person provided the equine, and
- 2) the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine event, and
- 3) determine the ability of the participant to safely manage the equine,
- 4) taking into account the participant's representations of ability.

Within the context of the facts on this record, Section 87.004 (2) has four elements that could impose liability on Loftin:

Number One, Loftin provided the horse Smash to Lee to ride on a trail ride.

Number Two, Loftin made no effort to determine (emphases added) the ability of Lee to engage safely in riding a barrel racing horse through a heavily wooded bog, knowing that the barrel racing horse particularly did not like mud and water. The word "effort" is a verb, a transitive verb, and in this context it means to assume initiative, to do something.

Number Three, there is no summary judgment evidence that Loftin determined (emphases added) the ability of Lee to safely manage riding a barrel racing horse through a heavily wooded bog.

Number Four, there is no evidence that Lee made any representations of her horse riding abilities to Loftin before the accident other than she did not have a horse to ride and wanted to start riding, again.

The obvious reason for the requirement that an equine sponsor must make a reasonable and prudent effort to determine a participant's ability is safety. To avoid unreasonable risk of harm, the sponsor must determine the participant's ability in order to match that rider with a suitable mount

and then select a trail riding path that is appropriate for that particular horse and rider.

Janice Lee testified “the biggest thing is the poor choice of riding [trail]. I look back and we shouldn’t have been riding on [that] trail.”

That testimony is germane to the issue of normalcy. She was saying that the particular trail ride path selected by Loftin was not a safe choice of a trail ride path under the circumstances. It was a ride on a barrel racing horse through a heavily wooded bog by a novice rider.

The factual circumstances on this record show that:

1. Janice Lee was only a novice rider.
2. Lee had never ridden Smash before this occasion.
3. Lee was unfamiliar with the trail riding path selected by Loftin.
4. Lee knew nothing beforehand about the heavily wooded bog along the trail selected by Loftin.
5. Loftin did not warn Lee beforehand about the heavily wooded bog along the path she selected.
6. The horse Smash particularly did not like the water or the mud.
7. Loftin knew before the accident that the horse Smash did not particularly like to get in water or muddy conditions.
8. Loftin knew before the accident that there was a heavily wooded bog along the trail she selected.
9. Loftin was leading along the trail ride until they got to the heavily wooded bog, where she allowed Smash to lead Janice Lee right into the muddy bog.
10. Loftin neglected to warn Lee that the horse Smash particularly did not like water or muddy conditions.

Is the selection of a trail ride path, under these facts, to be considered as normal, or common, or characteristic of safe trail rides in Texas. Selecting an unsafe trail cannot be the normal standard. A normal, common, characteristic of a trail ride would include the selection of a safe trail ride under

the circumstances. That was not done in this case.

IV. The evidence cannot be conclusive where reasonable and fair minded judges differ in their conclusions.

The court of appeals opinion in this case presents a sterling example of why summary judgment is not appropriate in this case. All three justices differ in their conclusions to some degree. And two of the three justices differ in their conclusions from the trial court judge.

For a party to prevail on a traditional motion for summary judgment, it must conclusively establish the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *TEX. R. CIV. P. 166a(c)*.

Evidence is conclusive only if reasonable and fair minded jurors could not differ in their conclusions. See *Goodyear Tire & Rubber Co.*, 236 S.W. 3d at 755-56. Within the context of a summary judgment proceeding and its review, the jurors are the judges. As professional jurists, judges are highly trained and experienced at careful discernment of relevant facts far more so than a lay person juror. As such, judges must also be presumed to be reasonable and fair minded in reaching their conclusions. Moreover, if the three professional jurists reviewing this case at the intermediate court level differed in their conclusions, how could it be argued that a jury of a lay persons would not differ in their conclusions in this case? Conspicuously, that argument has not been made on behalf of Petitioner Loftin.

V. An equine sponsor owes a negligence duty to a participant regarding risks that are not inherent to the equine activity.

The first of only four cases reported on the Equine Activity Act 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 regarding the Equine Activity Act 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. 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.

A more recent appellate court decision involving a different statute providing immunity also addresses the question of a negligence duty regarding risks that are not inherent to the recreational activity. In *Chrismon v. Brown*, 246 S.W. 3d 102, (Tex.App.-Houston [14th Dist.] 2007, no pet.), a volunteer assistant coach on a girls softball team brought an action against the volunteer lead coach and softball association to recover for injuries sustained when she was struck in the face by a bat that slipped from the hands of the head coach during a softball drill. The Defendants asserted immunity under the Charitable Immunity and Liability Act of 1987 and no negligence legal duty. Based primarily on briefing waiver, the court of appeals affirmed the summary judgment. In doing so, however, the court held that if the risk that resulted in the plaintiff’s injury is not inherent in the nature of the sport in which the plaintiff chose to participate, then a participant - defendant owes the plaintiff an ordinary negligence duty.

Other courts with similar cases have also held that not every injury that occurs during a sporting event or recreational activity is related to an inherent risk. See *Phi Delta Theta*, 10 S.W. 3d at 662. The applicable standard should include whether the conditions caused by the defendant’s negligence were unique and created a dangerous condition over and above the usual dangers inherent in the activity. *Kline v. OID Assocs.*, 80 Ohio App. 3d 393, 609 N.E.2d 564,565 (1992); *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269 (Tex. 2002). Given the facts of the present case, certainly it can be argued that the conditions were unique and the heavily wooded bog on a race horse that particularly did not like mud or water created a dangerous condition that was not

characteristic of a normal, safe, trail rider on horseback and therefore Loftin owed Lee an ordinary negligence duty for which responsibility should be imposed.

VI. The Equine Activity Act violates the open courts and due process of law guarantees of the Texas Constitution and is unconstitutionally vague.

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.

_____The fourth and final reason why the Equine Activity Act should be held unconstitutional is because it is in direct conflict with the Texas Supreme Court's ruling in *Farley v. MM Cattle Company*, 529 S.W. 2d 751 (Tex. 1975). In that case, the Supreme Court abolished assumption of risk as a complete defense to tort liability. In *Farley*, the Texas Supreme Court retained "voluntary assumption of risk" only in cases in which there is "express oral or written consent". But the "implied assumption of risk" affirmative defense was abolished. Therefore, the defense of express assumption of the risk is available only to one who proves that the plaintiff gave express oral or written consent before encountering the injury-causing risk. Otherwise, under *Farley*, mere participation in any risky activity, sports-related or other recreational activity, cannot be characterized as express assumption of risk.

Within the statutory language of the Equine Activity Act, the Texas Legislature has imposed the inherent-risk doctrine only in the context of liability arising from equine activities or livestock shows.

Any distinction between the inherent risk doctrine contained in the Equine Activity Act and the implied assumption of risk doctrine abolished by the Texas Supreme Court in *Farley* is conceptually vague, obscure and nebulous at best. Due to the absence of any provisions in the Equine Activity Act regarding a sponsor's negligence, the statute has the negative effect of imposing no negligence duty even as to risks of injury that are not inherent to equine activities. The result of the statute is that it circumvents the Texas Supreme Court's holding in *Farley*.

The *Farley* opinion was delivered after the Texas Legislature adopted the comparative negligence. It has been said that the defense of implied assumption of risk in whatever form has been completely absorbed into the allocation of damages through proportionate responsibility. See *Phi Delta Theta*, 10 S.W.3d at 660. But the Equine Activity Act does not include any provisions for the comparative negligence of equine sponsors in relation to risks that are inherent to the equine activity. The result is again confusion and uncertainty due to the vagueness of the statute.

Furthermore, the Equine Activity Act is poorly drafted and nonsensical in several respects. As pointed out by Chief Justice Worthen in his opinion, Subsection 2 of Section 87.004 must be modified in regard to the meaning of "the" participant and the term "that" participant was substituted. See *Lee vs. Loftin*, 277 S.W.3rd at 534. Likewise, Section 87.004 uses the terminology "caused by participant" which is totally nonsensical and it should have said "sustained by a participant" or "caused by a sponsor" whichever was the intent.

In the fourteen years since its enactment, there have only been four reported cases reaching the appellate courts of Texas on this statute. It is apparent from those decisions as well as the present case that the statute is woefully lacking in clarity and impossible to enforce on a uniform basis.

CONCLUSION

_____ Movant's summary judgment evidence is insufficient and inconclusive to provide for a determination of the risks common to a horseback trail ride. Therefore, summary judgment was not appropriate.

_____ 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.

As reflected by the difference in factual and legal conclusions by the 12th Court of Appeals, Loftin's summary judgment evidence cannot be considered as conclusive and she has therefore failed to meet her burden of proof. 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' Brief on the Merits was forwarded by certified mail, return receipt requested, to the following counsel of record for the Petitioner on this 27th day of August, 2009:

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