

**No. 09-0313**

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In the Supreme Court of Texas  
Austin, Texas

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**Terri Loftin,**

*Petitioner*

*v.*

**Janice Lee and Bob Lee,**

*Respondents*

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**Petitioner's Reply Brief on the Merits**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

**1. The Lees’s brief still ignores most of Loftin’s issues.**

The Lees appeared uninterested in addressing any of the issues that Loftin raised in her petition for review; that same attitude carries forward to their brief on the merits. Of the four issues brought forward by Loftin, the Lees have responded only to one.

Loftin argued that even if she did not make “reasonable inquiry” into Janice Lee’s riding ability, she nonetheless did not lose her immunity under the Equine Activity Act, as the undisputed evidence conclusively established that Janice Lee’s injury had nothing to do with her riding ability or the suitability of the horse assigned to her. The Lees do not respond to this argument.

Neither did the Lees dispute Loftin’s argument that they had the burden to come forward with evidence that Loftin’s failure to inquire caused Lee’s injuries.

The Lees do not dispute that Loftin established that the vine was an inherent risk in a trail ride. They do not contend that they have ever claimed that the vine was not an inherent risk.

**2. Section 87.004(4) does not require that a list of questions be submitted to the rider.**

The only one of Loftin’s issues that the Lees even allude to is the first one, concerning the construction of Section 87.004(2) of the Equine Activity Act. That Act generally grants immunity to “participants” 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 provider fails to make a

“reasonable and prudent effort” to determine the rider’s ability to “engage safely in the equine activity.” *Id.*, § 87.004(2)

In her first issue, Loftin argues that if a provider already knows about a rider’s ability to handle a horse, she does not need to propound a set of questions directly to the rider to preserve her immunity under the Act.

The Lees simply deny, without argument, that Loftin’s prior knowledge of Janice Lee’s riding experience could amount to the “reasonable inquiry” needed to preserve Loftin’s immunity under the Act and assert, without evidence (and contrary to Janice Lee’s testimony at C.R. 37, 38, 41), that the horse was not an appropriate one for Lee to ride. The closest thing to evidence that they cite is the fact that the horse did not like mud; but there is no evidence that this horse was more averse to muddy ground than any other. As Loftin said, “No horse or person wants to stand in the mud.” C.R. 94.

The Lees do not deny that Loftin did, in fact, know enough about Janice Lee’s ability to “engage safely in the equine activity.” Although they deny that the horse Loftin selected was safe, they cite no evidence to that effect. They do not attempt to explain away Janice Lee’s admissions that the horse Loftin selected was “calm” and “gentle” (C.R. 74), and one that Lee “knew how to ride.” C.R. 116. They do not explain what questions Loftin might have asked that would have told her something she did not already know about Lee’s ability to “engage safely in the equine activity” or what questions would have persuaded her to select a different horse for Lee.

### **3. Simple “sponsor negligence” does not survive the Equine Activity Act.**

The Lees argue that Loftin was negligent in her choice of a riding trail. Lee. Br. at

8. “Sponsor negligence,” they say, is not an inherent risk of trail riding and so the Equine Activity Act does not afford immunity for it.

**A. The Lees cite one case that relies on inapt out-of-state authority.**

The Lees’ arguments stem in part from their misreading of *Steeg v. Baskin Family Camps, Inc.*, 124 S.W.3d 633 (Tex. App.—Austin 2003, no pet.). In that case, the plaintiff was injured when his saddle slipped, and there was some evidence supporting the claim the horse may have been improperly saddled. *See id.* at 638-39. Section 87.003 of the Equine Activity Act does not list negligent saddling as an inherent risk of an equine activity; following decisions in other states, the Austin court of appeals declined to hold that it was such a risk as a matter of law. *See id.*, citing *Sapone v. Grand Targhee, Inc.*, 308 F.3d 1096, 1103-05 (10th Cir. 2002), and *Halpern v. Wheeldon*, 890 P.2d 562, 566 (Wyo. 1995). *Compare Little v. Needham*, 236 S.W.3d 328, 332-33 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (distinguishing *Steeg*).

But *Sapone* and *Halpern* are of dubious relevance. Both cases involved a Wyoming statute that provided immunity for “inherent risk[s]” of recreational activities, but which, unlike the Texas Equine Act, failed to define or specify any of those inherent risks. *Compare* WYO.STAT.ANN. § 1-1-122(a)(i) *with* TEX.CIV.PRAC. & REM.CODE ANN. § 87.003(Vernon 2005).

In *Halpern*, the court distinguished the Wyoming statute from statutes such as the Texas Equine Activity Act, observing:

Wyoming’s Recreation Safety Act is more concise than similar statutes in other states are. Many of our sister states’ inherent risk statutes provide nonexclusive lists of risks which the Legislatures have determined are inherent

to certain activities. . . . When a court is presented with a case under that type of statute, it may compare the facts of the case to the list of legislatively defined inherent risks and decide, as a matter of law, whether the plaintiff's injury resulted from an inherent risk. . . . The Wyoming Legislature did not provide the courts with that type of guidance. [*Halpern*, 890 P.2d at 566 (citations omitted).]

Absent that guidance, the Wyoming court was unwilling to conclude that the plaintiff's injuries were caused by an "inherent risk" of horseback riding. In *Sapone v. Grand Targhee, Inc.*, the Tenth Circuit simply followed Wyoming law as interpreted in *Halpern*. 308 F.3d at 1100-01.

The Texas Legislature has provided the guidance that Wyoming's did not. Because the Legislature has defined certain specific risks as being inherent in "equine activity," it is perfectly appropriate for the courts to decide as a matter of law that Janice Lee's injuries were caused by certain of those risks itemized in Section 87.003. Thus this case is distinguishable from *Steeg*, *Halpern*, and *Sapone*, as were *Little v. Needham*, 236 S.W.3d at 332-33, and *Gamble v. Peyton*, 182 S.W.3d 1, 3 (Tex. App.—Beaumont 2005, no pet.).

Interestingly, the *Steeg* court did not discuss Section 87.004(1), which denies immunity if:

the injury or death was caused by faulty equipment or tack used in the equine activity or livestock show, the person provided the equipment or tack, and the person knew or should have known that the equipment or tack was faulty. . . . [TEX. CIV. PRAC. & REM. CODE ANN. § 87.004(1) (Vernon 2005).]

It seems reasonable that an improperly cinched girth could be considered "faulty." If so, the *Steeg* plaintiff's claim would not have been barred. There was no need to import the idea of "sponsor negligence" into the Act.

**B. The Act exempts claims for gross negligence, but not simple negligence.**

If the Legislature had wanted to allow claims for “sponsor negligence,” it could have included a provision like one in the New Jersey statute, which removes immunity if the injury is caused by “an act or omission on the part of the operator that constitutes negligent disregard for the participant's safety. . . .” *Hubner v. Spring Valley Equestrian Ctr.*, 408 N.J. Super. 626, 975 A.2d 992, 996 (2009), quoting N.J. STAT. ANN. § 5:15-9(d).

Instead, the Texas Act removes immunity if “the person committed an act or omission with wilful or wanton disregard for the safety of the participant and that act or omission caused the injury. . . .” TEX. CIV. PRAC. & REM. CODE ANN. § 87.004(4) (Vernon 2005). This language is equivalent to gross negligence. *See, e.g., Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 916-20 (Tex.1981) (equating willful negligence, conscious indifference to the welfare of others, and reckless disregard for the rights of others with gross negligence); *Chrismon v. Brown*, 246 S.W.3d 102, 107 (Tex. App.—Houston [14 Dist.] 2007, no pet.) (equating wilfully negligence, or conscious indifference or reckless disregard for the safety of others with gross negligence); *Morrone v. Prestonwood Christian Acad.*, 215 S.W.3d 575, 582 (Tex. App.—Eastland 2007, pet. denied) (equating willful misconduct and reckless disregard with gross negligence); *Dunlap v. Young*, 187 S.W.3d 828, 835-36 (Tex. App.—Texarkana 2006, no pet.) (equating willful negligence and reckless disregard with gross negligence); *Hernandez v. Lukefahr*, 879 S.W.2d 137, 141-42 (Tex. App.—Houston [14th Dist.] 1994, no writ) (equating willful negligence and conscious indifference with gross negligence); *Wheeler v. Yettie Kersting Mem. Hosp.*, 866 S.W.2d 32, 50 & n. 25 (Tex. App.—Houston [1st Dist.] 1993, no writ) (equating willful negligence and reckless disregard with

gross negligence).

If, as the Lees claim, the Act implicitly allows a claim for simple “sponsor negligence,” there was little point in explicitly exempting gross negligence from the general immunity afforded by the Act.

Nowhere do the Lees plead, argue, or imply that Loftin was grossly negligent, and rightly so. Loftin is immune from their claim of “sponsor negligence.”

**4. The Act itself provides that the risks in this case were inherent to equine activities.**

The Lees argue at length that Loftin did not conclusively prove what risks are inherent in a trail ride. Lees’ Br. at 5-6. They are wrong.

In Section 87.003 of the Texas Equine Activity Act, the Legislature provided a non-exclusive list of five risks that are inherent to equine activities:

- (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. [TEX. CIV. PRAC. & REM. CODE ANN. § 87.003S (Vernon 2005).]

As explained above, this is guidance that some state legislatures (such as Wyoming’s) have not provided their courts. With that sort of guidance, a court “may compare the facts

of the case to the list of legislatively defined inherent risks and decide, as a matter of law, whether the plaintiff's injury resulted from an inherent risk." *Halpern v. Wheeldon*, 890 P.2d 562, 566 (Wyo. 1995).

Similarly, the Legislature could not supply such a list if this Court were to adopt a common-law rule such as the one Justice Enoch wanted to consider when he dissented from the Court's denial of the petition for review in *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658 (Tex. 1999). Without legislative guidance, applying such a rule would necessarily require "an analysis of the nature of the sport in question and a determination of what risks are normally created by the nature of the sport." *Id.* at 663.

With the Equine Activity Act, the Legislature has performed that analysis and made that determination; the courts do not have to do so. Two of the justices below held that this case falls within the list of inherent risks; Justice Hoyle found that it fell "within all five of the listed inherent risks of equine activity." 277 S.W.3d at 534.

**5. "Muddy conditions" on the trail do not fall within an exception to immunity.**

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. & 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.

**6. The Lees waived their constitutional arguments by not presenting them to the trial court.**

On appeal, the Lees argued for the first time that the Equine Act violates the Open Courts provision of the Texas Constitution and their rights to substantive due process. Lee Br. at 11, citing TEX. CONST. art. I, § 13.

But these arguments were not raised in the trial court, either in the Lees’ petition (C.R. 100) or in their response to the motion for the summary judgment. C.R. 55. They are therefore waived. *See Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 222 (Tex. 2002) (claim of Open Courts violation was waived when not set out in response to motion for summary judgment).

The only exception to this rule of error preservation in civil cases is when the matter amounts to “fundamental error.” The Lees rightly do not argue that their constitutional complaints rise to this level.

Because of strong policy concerns favoring preservation of error during trial or during appeal, the fundamental error doctrine is a “discredited doctrine” that is used only in rare circumstances. *See In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003), quoting *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam). The doctrine has been employed to review issues of jurisdiction and certain types of errors in juvenile delinquency cases because of their “quasi-criminal” nature. *In re B.L.D.*, 113 S.W.3d at 350.

Fundamental error is limited to “those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.” *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex.1993), quoting *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex.1982) (per curiam).

Few issues “directly and adversely affect[.]” the public interest to a degree sufficient to invoke fundamental error. Most commonly these issues involve the state’s interest in the rights and welfare of children. *See In re J.F.C.*, 96 S.W.3d 256, 293 (Tex. 2002) (Hankinson, J., dissenting). It is not enough to claim a violation of the constitution. *See Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 630 (Tex. App.—Dallas 2004, pet. denied); *Elbar, Inc. v. Claussen*, 774 S.W.2d 45, 53 (Tex. App.—Dallas 1989, writ dismissed).

No constitutional claim that the Lees present in their brief rises to the level of fundamental error.

## CONCLUSION

This case gives the Court the opportunity to resolve important issues about the construction of the Equine Activity Act. Is it necessary to ask express questions of a rider

to preserve immunity, when the equine provider is already familiar with the rider's skill and experience? When the alleged failure to inquire did not cause the accident, does it still void the immunity granted elsewhere in the statute? Who has the burden to plead and prove causation? Is a horse's brushing against vegetation an "inherent risk" of a trail ride?

The justices below disagreed on the answers to these questions. This Court's answers will determine whether horse owners will actually receive the protections that the Legislature intended when it wrote the Act into law.

### **PRAYER**

For the reasons stated, and for the reasons stated in her brief on the merits, 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,

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**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:

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*Attorney for Respondents Janice Lee and Bob Lee*

on September 14, 2009.

/s - Original signed by Robert T. Cain, Jr.  
Robert T. Cain, Jr.