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Supreme Court of Texas.
Terri Loftin, Petitioner,
v.
Janice Lee and Bob Lee, Respondents.
No. 09-0313.
January 21, 2010.

Oral Argument

Appearances:Robert T. Cain, Jr., Zeleskey Law Firm, Lufkin, TX, for petitioner.

Douglas J. McCarver, Attorney at Law, Nacogdoches, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09-0313, Loftin vs. Lee.

MARSHALL: May it please the Court, Mr. Cain will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT T. CAIN, JR. ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT T. CAIN, JR.: This case is this Court's first opportunity to construe the Equine Liability Act.

JUSTICE NATHAN L. HECHT: The second actually.

ATTORNEY ROBERT T. CAIN, JR.: What?

CHIEF JUSTICE WALLACE B. JEFFERSON: We had a Tex Steeg case.

JUSTICE NATHAN L. HECHT: Steeg settled.

ATTORNEY ROBERT T. CAIN, JR.: Oh, okay. Steeg settled. Okay, that's right, it did. It was --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, we considered it.

JUSTICE NATHAN L. HECHT: Yeah.

JUSTICE DALE WAINWRIGHT: We didn't write on Steeg.

ATTORNEY ROBERT T. CAIN, JR.: Didn't write on it, but Steeg would have been a good one to write on and so is this one. And horses are dangerous. They're bigger, faster and stronger than people are, and when they're spooked, they're skittish. If they get startled, their instinct is to run. And if you ride horses, the question is not if you're going to get hurt, the question of when and how bad. Unfortunately that's what happened here. This horse was scared by a vine that went up its leg when it was riding. It's a normal reaction for a horse, unfortunately, Ms. Lee, the plaintiff was on it and she was hurt. Her experience as a horseback rider is limited. She was familiar with horses, she'd been a breeder, she kept horses for years, but she had an accident a few years earlier and was reluctant to start back riding. Finally, her daughter was a barrel racer and wanted her to ride with her some, so she was talking to my client's husband, Kevin Loftin, who is a farrier, and basically got an invitation, as a result, to go riding with Terri Loftin. Terri, as soon as the invitations came, went trail riding. Terri gave her her daughter's horse, which is a horse that Ms. Lee acknowledged was a calm horse, a gentle horse, one she was able to handle. Now I think that the evidence shows that the statute --

JUSTICE NATHAN L. HECHT: This was the horse, “Smash”?

ATTORNEY ROBERT T. CAIN, JR.: Smash, which --

JUSTICE NATHAN L. HECHT: Who had done some barrel racing himself.

ATTORNEY ROBERT T. CAIN, JR.: He had done barrel racing for my client's daughter, and is 11 or 12 years old, a gelding. Horses get named for their bloodlines, and I think I might have wished another name had been selected in this case. But it was a calm horse, a gentle horse, and the key fact to remember in all of this is that Ms. Lee admitted that nothing about the horse caused this accident, nothing that Terri Loftin did or did not do with respect to the horse or choosing the horse had anything to do with the accident, she could handle it. The problem came when the horse was startled by the vine, and when that happened, the horse reacted as any horse did, as Ms. Lee acknowledged was an ordinary response for a horse. It ran, and it ran so hard that Terri Loftin testified she didn't think she could have stayed on it, as experienced as she was. It's just one of those things that horses do, and it's what the Legislature described as an inherent risk of equine activity.

JUSTICE EVA GUZMAN: What about the negligence, if any, in choosing the path, if you will, or in not -- the path, exclude the mud maybe, but vines and things, should you take someone to ride through an area where you know there are obstacles that could be removed that have not been removed that would cause a horse to react that way?

ATTORNEY ROBERT T. CAIN, JR.: Well, I think that the --

JUSTICE DAVID M. MEDINA: Well, this wasn't a dude ranch, right?

ATTORNEY ROBERT T. CAIN, JR.: No, this was just on her place outside of Huntington, in deep East Texas.

JUSTICE DAVID M. MEDINA: Okay.

ATTORNEY ROBERT T. CAIN, JR.: I don't think the negligence -- well, no, I don't think that that survives it. You choose, there's nothing --

JUSTICE EVA GUZMAN: Well, simply stated, is sponsor negligence an inherent risk of the activity?

ATTORNEY ROBERT T. CAIN, JR.: Sponsor negligence really is not an issue in the Act, as I understand it. The Act exempts, provides immunity for inherent risk, which include reacting to conditions of land, reacting to unexpected things that the horse may touch. That's what happened here. You choose a -- the evidence was that this was a path that Ms. Loftin often went down. She was familiar with it, there was nothing, nothing untoward in her mind about it, nothing unusual about it. Sponsor negligence comes from, you know, the Steeg case by way of some cases out of Wyoming where the statute, the Recreational Statute just granted immunity from inherent risks without defining what those inherent risks might include. Here in one of the cases that's discussed in the brief, the Wyoming Court pointed out that other states have statutes which itemize certain lists which are found to be inherent risk, and the Court can look at those and see if that is included among those risks, and that's the distinction. So in the Steeg case, the negligence was supposed to be the failure to put on the saddle correctly, to tighten its cinch enough. And tightening the cinch improperly, putting the saddle on is not included in one of the lists in Section 87.003, so the Court of Appeals was not willing to, as the other cases do, not willing to find that this was an inherent risk, but [inaudible] not talking about sponsor negligence, and I just don't think that's justified by the statute. Either if it's an inherent risk, the Court makes that determination. I think because as Justice Boyle [Ph.] said below, “This case fits within all five of the inherent risks itemized in Section 87.003,” and I don't think it gets you to sponsor negligence. If it fits within that, then you look at 87.004 and see if anything, if any of those exceptions remove the immunity. Here the one --

JUSTICE EVA GUZMAN: Well, is there ever a scenario where you as the sponsor knew that this was not a particularly safe riding trail? And if everything that made it unsafe was somehow naturally occurring, then it fits within the exceptions regardless?

ATTORNEY ROBERT T. CAIN, JR.: I think that you can get into a situation of gross negligence and willful and wanton disregard. That is one of the exceptions in 87.004, we don't have that here. This was, you know, ordinary East Texas countryside. There's no evidence that it's anything but that.

JUSTICE DAVID M. MEDINA: And ordinary East Texas countryside sometimes includes water moccasins, other kinds of snakes, would that put some type of burden on the sponsor to warn the rider of those type of risks? And if you go up to deep East Texas, you might see an alligator.

ATTORNEY ROBERT T. CAIN, JR.: Well, you would see alligators if you got too close to the streams or the like. Well, you know, the Beaumont Case, whose

name escapes me at the moment, Patent vs. Gamble, I think it is, fire ants were on the premises, and it was found to be no duty to warn of that, that was not -- it was naturally occurring wildlife. You know, “wild animals” is how the Court described the fire ants, and I don't think that snakes or things that might across the countryside might be treated any differently.

JUSTICE DAVID M. MEDINA: Sponsor negligence would go more to improperly shoeing a horse or having the wrong bridle bit in its mouth or not properly cinching the horse before even an experienced rider got on?

ATTORNEY ROBERT T. CAIN, JR.: Well, that would not -- again, I avoid the term sponsor negligence. What the law does is it leaves intact the general principles of tort liability, but it says, “We have immunity in these circumstances.” Essentially there's an assumption of the risk, these risks, these inherent risks. If it doesn't fall within one of those inherent risks, as improperly saddling a horse or bridling a horse or shoeing a horse possibly, that would not fall within fall within one of those inherent risks, so that kind of negligence might survive depending on the circumstances. Here we have things that very plainly included, the horse was startled by the vine and it ran as a result. That's nothing unusual. You know, the real question to me is the issue of whether the exception about failure to exercise care to determine the rider's the ability to ride or to handle the horse in particular. I think that the evidence is clear that, you know, we did not ask questions per se, but I don't think that that is required under the statute. The question is to make a reasonable effort to determine the rider's ability. And here she did make the determination, she knew that she was an inexperienced rider; she gave her a gentle horse that she could handle. That's undisputed. It's also undisputed that that was not a cause of the accident. Janet Lee herself said that was not a cause of the accident, and if it's not a cause, then that section simply doesn't affect the liability one way or the other.

JUSTICE EVA GUZMAN: If you're an experienced rider when you come up or approach a certain path, would that not tell you, you know, “Maybe I better stop the horse and take another path or just turn around”? Experience would provide you that insight or foresight; wouldn't it?

ATTORNEY ROBERT T. CAIN, JR.: It could, it could.

JUSTICE EVA GUZMAN: So when we're talking about the cause of the accident, the experience in some way, the lack of experience in some way could have contributed to the fact that she didn't stop and turn around.

ATTORNEY ROBERT T. CAIN, JR.: Well, she said she wanted to turn around.

JUSTICE EVA GUZMAN: But couldn't?

ATTORNEY ROBERT T. CAIN, JR.: She said she couldn't turn around. Why she couldn't have gotten off the horse, I don't know, but, no, that would be true. Obviously things can contribute, but there's nothing to indicate in the record, no testimony in the record that this was an unusually dangerous or perilous trail for a rider of Janet Lee's ability. It's just these things happen when you ride. You ride in the woods; you can come close to vegetation.

JUSTICE PHIL JOHNSON: But we're here on summary judgment, so the burden was on you to prove that this was not some kind of an improper choice. As I

understand the Court of Appeals, they just said there's a fact question there. That's what we're here on.

ATTORNEY ROBERT T. CAIN, JR.: Well, the only evidence is -- she said the only thing that Janet Lee said was she thought, in her testimony, was that she thought that if she had gone another trail, this wouldn't have happened. She did not say that this was an unusually dangerous trail. Terri Loftin said the contrary, said that it was safe. She had been on it a week before I think, and there was nothing unusual or perilous about it. We would have -- if choice of the trail is something that survives -- is a possibly negligent act that would survive the statute, the grant of immunity in the statute, even then if that is, which I don't believe it is, but if it is, we had evidence that it was not dangerous and she had no evidence that it was. And given her admitted inexperience, her testimony about something else possibly being safer, if it was, is very weak.

JUSTICE PAUL W. GREEN: It is undisputed that it's an established trail?

ATTORNEY ROBERT T. CAIN, JR.: Yes, it's an established trail. My client has been using it. It's the neighbor's property and she's been using it for years.

JUSTICE PHIL JOHNSON: In going to the record, the Court of Appeals also said that there was evidence that there was a fact question on whether or not there had been a proper inquiry about the plaintiff's ability. And you said that your client knew that she was inexperienced, and for that reason chose the horse that she chose. If you assume that the other party is an inexperienced rider, does that have any affect here or are you just saying that you fulfilled because you assumed that she was an inexperienced rider?

ATTORNEY ROBERT T. CAIN, JR.: I'm saying that we knew she was inexperienced because of what she had told my client's husband, which was relayed to my client before she gave the invitation. Two, I'm saying that it was an appropriate horse selected for an inexperienced rider. And three, I'm saying that even if the proper effort was not taken to determine her ability, that had no cause relationship to the accident because the horse was one that the plaintiff could handle.

JUSTICE PHIL JOHNSON: And so your inquiry evidence was, we knew she was inexperienced, I mean why should we inquire further?

ATTORNEY ROBERT T. CAIN, JR.: There's no requirement that a list of questions be offered.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY ROBERT T. CAIN, JR.: And if you know someone's riding ability, however you know it, and you choose appropriately based on that, there should be no liability. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is now ready to hear argument from the Respondents.

ORAL ARGUMENT OF DOUGLAS J. MCCARVER ON BEHALF OF THE RESPONDENT

ATTORNEY DOUGLAS J. McCARVER: May it please the Court, opposing counsel --

MARSHALL: Mr. McCarver will present argument for the Respondents.

ATTORNEY DOUGLAS J. McCARVER: There's an old proverb that says you see what you want to see and you hear what you want to hear. This case is first and foremost a case about summary judgment law. Section 87.004 of the Civil Practice & Remedies Code, Section 2, we refer to it as the "Texas Equine Act," provides that a person is liable for personal injury damages if 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, number two, determine the ability of the participant to safely manage the equine.

JUSTICE DAVID M. MEDINA: So how does someone go about doing that? You own a dude ranch, come over here, and if you tell me you're a great rider, we're going to put you on Muscles, which was the name of my horse who threw me off several times, or we're going to put you on a Bambi type of horse. Is there more than a question or initial inquiry that's requested?

ATTORNEY DOUGLAS J. McCARVER: Judge, I think that it would primarily be a series of very relevant, logical questions in terms of their riding experience. How frequent, the type of events, for example, the type of terrains, the type of activities. Here we're talking about merely a common trail ride, so that sort of question would have been perhaps relevant.

JUSTICE DAVID M. MEDINA: Do you put someone on a horse and take them around and watch them to see how they ride?

ATTORNEY DOUGLAS J. McCARVER: That would be a good way to do it too. Also to have some knowledge about the horse would be very important. I think it's kind of a matching process; you've got to match the horse with the rider and the particular event that you anticipate engaging in. It's a combination of all three of those.

JUSTICE EVA GUZMAN: Do you match the trail? When you begin to ski, they put you on certain trails because --

ATTORNEY DOUGLAS J. McCARVER: Absolutely. You've got a beginner's trail, you've got an advanced rider's trail, all trails are not the same.

JUSTICE EVA GUZMAN: But just on private property, if you ride equines, horses, is it even practical to think about different trails once you ask, "Well, what's your experience?" And then you choose a trail based on experience; is that it?

ATTORNEY DOUGLAS J. McCARVER: I think that's what an ordinary reasonably prudent person, a sponsor of any kind of an equine activity, can do, should do in order to be reasonably prudent to satisfy that burden, that test.

JUSTICE DALE WAINWRIGHT: The pending opinion in the Court of Appeals says that when they were going on this trail ride in the neighbor's land, part of it was fine, and then it was Lee who took the lead position on the ride, and Lee, according to the writing, testified at her deposition that she was the one who directed her horse into the real boggy area, and then trying to get out of it, directed her horse toward a hill. So there were parts of the trail that were apparently fine, and apparently some deposition testimony that Lee went to the boggy area, not that Loftin directed her to the boggy area.

ATTORNEY DOUGLAS J. McCARVER: That's a spin; the facts and the statement on

the record are contrary to that. The facts basically say that throughout this trail ride that Mrs. Lee was totally unfamiliar with, had never been on before, was totally dependent upon Mrs. Loftin in terms of where to go. That Mrs. Loftin had been leading. What the record shows is when they got into this thick, boggy, woody area, that what happened for some reason, Ms. Loftin's, her horse just kind of stopped and said that Mrs. Lee's vehicle just kind of kept going on its own.

JUSTICE DALE WAINWRIGHT: Mrs. Lee's horse?

ATTORNEY DOUGLAS J. McCARVER: Mrs. Lee's horse kept on going on its own. It's in the record. You have to basically -- I'll be glad to find it here. It says, “Then we reached this one area and Terri moved over,” is what it says. It says, “My horse kept going.” It says, “It was really boggy, he started sinking in the mud and I could feel him getting nervous underneath me.” And Lee testified, “He bolted and then he just took off in a full run,” then she says, “I've never been on anything running ever,” ever in her life, been on a running horse. And here she is on a running horse, and she didn't get throwed off this horse, she simply fell off this horse due to the horse's acceleration. And you have to kind of keep in mind too, I think it's relevant, that this is not just an ordinary horse; this is a barrel racing horse. And it would be one thing to say that, “Well, he used to be a barrel racing horse before we bought him, and now we just use him for a pleasure horse on the farm,” but that is not the testimony. The record shows that this horse was in active competition by Ms. Loftin's daughter at that time, being ridden in active competition on the basis of once a month. Barrel racing horses, if you know anything at all about them, they're trained to do one thing and that is run just as hard and fast as they possibly can. And when they're in active competition you also know something else about them, and that is that they are in good physical condition and they are accustomed to running hard and fast right then and there. You have to kind of keep in mind also, there's an affidavit. This is a simple record. There's only two people who testified, the two people who were involved in the accident. There's an affidavit that is submitted with the response by Janice Lee to the motion for summary judgment in which she says that she was told, and she expected when she got there that morning to go on this trail ride, was that she was going to be riding Mrs. Loftin's mother's horse.

JUSTICE EVA GUZMAN: Do all horses react in the same manner when they get stuck in mud and have a vine come up on their flank though? Whether it was a barrel racing horse or not, wouldn't they have the same reaction to get out of it as fast as they could?

ATTORNEY DOUGLAS J. McCARVER: Well, I don't know.

JUSTICE EVA GUZMAN: And isn't that inherent? Isn't that inherent that that would happen?

ATTORNEY DOUGLAS J. McCARVER: No, no. I would not agree with that conclusion, Judge. I think that they would differ. I think that if it was an older more mature horse that probably just didn't like to run, didn't like to act up, was ridden regularly, I think that they would not react whenever they got into some mud or when they got into a vine on their leg. I think --

JUSTICE DAVID M. MEDINA: Do you think like a dude ranch horse --

ATTORNEY DOUGLAS J. McCARVER: Sir?

JUSTICE DAVID M. MEDINA: Like a dude ranch horse, which --

ATTORNEY DOUGLAS J. McCARVER: Right, exactly.

JUSTICE DAVID M. MEDINA: -- it won't run, it just --

ATTORNEY DOUGLAS J. McCARVER: Absolutely, a different type of horse. Like we're talking about a barrel racing horse that is in active competition.

JUSTICE PAUL W. GREEN: But isn't that really the reason for the statute though, is you really don't know how any individual horse is going to react. We can speculate about it, using a barrel racing horse or a Quarter Horse or just some brood mare, you don't know what they're going to do.

ATTORNEY DOUGLAS J. McCARVER: That's true, Judge, but I still think that the sponsor has a duty, an ordinary duty to properly match a rider and a horse, that they are not all equally matched.

JUSTICE NATHAN L. HECHT: Well, that's not what 2 says. It just says, “Make inquiry.”

ATTORNEY DOUGLAS J. McCARVER: “Make a reasonable and prudent effort to determine the ability of the participant to engage in the equine activity and determine the ability of the participant to safely manage the equine.”

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY DOUGLAS J. McCARVER: We're talking about the equine.

JUSTICE NATHAN L. HECHT: And Ms. Loftin made that effort. She knew Ms. Lee didn't ride and maybe she made a wrong decision, but she knew what the facts were. And the reply brief makes the point that this violation, the application of 2 that you're arguing couldn't have caused the injury because there's nothing that Mrs. Loftin didn't know that would have changed her mind. And what's the answer to that?

ATTORNEY DOUGLAS J. McCARVER: The answer is that Ms. Loftin knew before she put Ms. Lee on this horse that this horse did not like water and mud. The answer is that Ms. Loftin knew when she got to this particular place in the trail that right ahead of them in the trail was a low spot that tended to be wet and muddy. So she knew the horse didn't like that kind of --

JUSTICE NATHAN L. HECHT: But paragraph 2 is about not knowing. It's not about knowing. Paragraph 2 says you need to make sure you know the facts, basically, you need to make reasonable inquiry about the facts, which Ms. Loftin did. There's nothing that's argued here that would have changed her mind. She knew the trail, she knew Ms. Lee was inexperienced, and that's all there is. What else? If you had handed her a 10-page questionnaire, what would it have told her that she didn't already know?

ATTORNEY DOUGLAS J. McCARVER: Well, about, for example, that she had never been on a horse that was running before. Never ever had she been on a running horse, and here she is being put on a horse that on the weekends once a month is out there running just as hard and fast as she possibly is going. So my belief is that if that duty had been fulfilled, that another decision, a safe decision in terms of either, number one, the horse that was being ridden, or

number two, why ride a horse that you know doesn't like mud and water, have someone, you know, ride into a muddy, wet low spot and they've not been warned, not been told that the horse doesn't like that kind of condition and that kind of condition is just around the corner? That is not a good place to just kind of move over and let the other horse go on into this trap. That's like giving a child a loaded gun.

JUSTICE EVA GUZMAN: So the fact issue is whether this horse was the appropriate horse? Is that one of the issues basically in evidence?

ATTORNEY DOUGLAS J. McCARVER: It's one of our contentions, Your Honor, that this was a mismatch of horse and rider. We have a horse that is in active competition as a barrel riding horse that you're putting a novice rider on, and then you know this horse doesn't like these certain conditions and then you know you're leading this person right into those conditions, and that represents a degree of ordinary negligence beyond the scope of inherency within the Equine Act is our position. Another point that I think is really vital in this case is this business about what caused the horse to start running when it did? Was it the vine or was it the mud?

JUSTICE DAVID M. MEDINA: Does that even matter?

ATTORNEY DOUGLAS J. McCARVER: Sir?

JUSTICE DAVID M. MEDINA: Does that even matter?

ATTORNEY DOUGLAS J. McCARVER: It does, Judge, primarily because she knew that the muddy condition was ahead and that the horse did not like the mud. It was that prior knowledge that she was charged with that required her to either go select another trail where that was the not case, where the muddy, wet conditions did not exist, or simply use another horse that didn't have this aversion for those particular conditions. But throughout our briefs we have made great issues about what caused the horse to start running when the horse did. They want to talk about the vine; we want to talk about the mud. We want --

JUSTICE DAVID M. MEDINA: It seems to me the inquiry would stop on the experience of the rider versus the type of horse that she's put on. If she's put on a cutting horse, maybe when the horse sees a cow, it stops on a dime and it starts to back up. It seems to me that's where the inquiry should stop for your purposes to create the fact issue to go forward. But if there's more, I'm listening.

ATTORNEY DOUGLAS J. McCARVER: Well, it's a simple record, Judge Medina, in the sense that we only have two witnesses, their depositions are short, the pertinent excerpts from each are relatively short. We've got this one affidavit; it's really a pretty simple case in terms of the record for summary judgment purposes in this particular case. Plus the fact, you know, because it is a traditional summary judgment. Summary judgment is proper only when the movent establishes that there is no genuine issue of material fact and that the movent is entitled to judgment as a matter of law. You tell us by your opinions from this Court and other Courts that an Appellate Court in 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. Look at the differences in conclusions we have with these facts just at the Court of Appeals if no place else. But the most important thing about this being a

summary judgment evidence case is the law that you give us that says, “In reviewing a traditional summary judgment, a reviewing Court must consider all the evidence and the like most favorable to the nonmovent, indulging every reasonable inference in favor of the nonmovent and resolving any doubts against the motion.” You know, that's old and that's fine, we hear it all the time, we're all very familiar with it, but applying it on a daily basis to these very brief limited facts is a different situation. That's what Judge Wall [Ph.] in the Twelfth Court, that's what caused him to concur with the primary opinion. He said --

JUSTICE NATHAN L. HECHT: You say, you point out that you all differ about whether the cause was the vine or the mud.

ATTORNEY DOUGLAS J. McCARVER: Yes, sir.

JUSTICE NATHAN L. HECHT: Explain to me, I'm not clear what difference that makes.

ATTORNEY DOUGLAS J. McCARVER: Well, the significance is that the equine sponsor, Ms. Loftin, knew beforehand and failed to warn that this particular horse was known not to like these wet, muddy conditions and that on this particular trail that she selected, that there were some wet, muddy conditions that the horse was going to go through. This is --

JUSTICE NATHAN L. HECHT: But also vines too, I guess, right?

ATTORNEY DOUGLAS J. McCARVER: Right, that's a which goes first, the chicken or the egg? Let me just quote now what Ms. Loftin says, the Respondent in this case, she says, “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.” She said, “I think he wanted to get out of the mud.” That's the Court --

JUSTICE NATHAN L. HECHT: Right, but I take it the evidence is he's not fond of vines either, so I wasn't clear what difference it made whether it was a vine or the mud?

ATTORNEY DOUGLAS J. McCARVER: Well, the vine has some relevance in the sense that like in the Johnson vs. Smith case, we have a situation here where they selected, or the equine sponsor, Ms. Loftin, selected a too thick of a trail. She picked a bad trail. Vines on the riding trail for a novice rider are not necessarily acceptable as far as safe trail-riding conditions. We're talking about setting the standards in the State of Texas for what does constitute safe trail-riding conditions on horseback.

JUSTICE NATHAN L. HECHT: But it looks to me like from your position it doesn't matter, that both were dangerous.

ATTORNEY DOUGLAS J. McCARVER: Well, either of the theories work. I think that probably the stronger theory is the prior knowledge, the Johnson vs. Smith case where the Court basically ruled that the owner had some individual liability because he had knowledge of the increased aggression of this breeding stallion to bite, but he failed to worn.

JUSTICE DAVID M. MEDINA: Are you asking the Court to define what is a safe riding trail; is that what you're asking?

ATTORNEY DOUGLAS J. McCARVER: No, sir. I think that that, I think that that

is the burden of the movent in the motion for summary judgment. If they're going to contend that this accident arose as a result of the inherent conditions of trail riding on horseback, then they need to fulfill their burden to show what those common characteristics of a safe trail ride in the State of Texas are, and there's nothing in this record. But that's her duty, because otherwise we all have to fallback on our own personal experience in terms of what do you know about a safe trail ride. And I would suggest that that's not the best way to do it, that the burden in terms of showing what is common, what is characteristic of safe trail riding, that burden is on the plaintiff in a motion for summary judgment context. And when you look at this record, I'm telling you that there is woefully inadequate evidence of what the common characteristics of a safe trail ride are.

JUSTICE PHIL JOHNSON: Counsel, in the event that the other side might prevail here, you also have a pleading that the statute is unconstitutional.

ATTORNEY DOUGLAS J. McCARVER: Yes, sir.

JUSTICE PHIL JOHNSON: And they claim that you did not present that to the trial court, therefore you've waived it. Would you address that? Would you address number one, the waiver, and number two, your unconstitutional argument, if you care to?

ATTORNEY DOUGLAS J. McCARVER: Judge, I would just beg to differ with them. That has been a point in every brief we've ever filed. It's in the brief before the Court of Appeals --

JUSTICE PHIL JOHNSON: Yeah, but they say you didn't present it in the trial court.

ATTORNEY DOUGLAS J. McCARVER: Oh, the trial court.

JUSTICE PHIL JOHNSON: Yes. Was it in your pleadings or your response to the motion for summary judgment, or did you present that unconstitutional argument to the Trial Court?

ATTORNEY DOUGLAS J. McCARVER: No. No, we did not, Your Honor.

JUSTICE PHIL JOHNSON: Well, then what's your position on their waiver argument?

ATTORNEY DOUGLAS J. McCARVER: My position is that the Court of Appeals can still consider it. But there are some other points, Judge Johnson, and that is does the Equine Act abrogate, do away with, throw away all the Common Law causes of actions that would ordinarily otherwise exist? And our position is no, it does not. We have some seven or eight specific allegations of misconduct, of negligence in our petition, and I think only two of those fall within the Equine Act. The others all are simple Common Law causes of action, a failure to exercise ordinary care as a reasonable and prudent person would under the same or similar circumstances. They've not addressed any of those at all.

JUSTICE EVA GUZMAN: Did your client have any duty to say, “You know, I really don't know what I'm doing, I need a lot of help. I haven't ridden on these types of trails”? I mean does she have any obligation herself, instead of waiting around for someone to ask her, should she volunteer information about her experience, her abilities, her anxieties, her fears?

ATTORNEY DOUGLAS J. McCARVER: That seems reasonable and logical, but the statute places that burden on the other party as far as who has the burden to make those sorts of inquiries. But again, you know, they make an issue out of the fact that up until this particular point in the trail ride everything was going fine, that the horse was calm and quiet. And that is true, there's no dispute about it because up until that point they had not been in too thick or too dense of a trail, they had not exposed this horse to this mud, this wet situation where it was known that the horse had a problem with that and disliked it, and it was foreseeable that he was going to react in some adverse way just as the horse did. So the, we have that issue, we have, as I said, the inherency issue Judge Wortham [Ph.] talked about in his opinion, and that is basically, you know, what are the common characteristics of a safe trail ride and how do we determine that and whose burden is that? And again, our position relying on case law is that that is the responsibility of the movent in a motion for summary judgment context. So based on all of these things, we feel like that the Court of Appeals' opinion should be certainly upheld. Another point that I think need to be kind of touched on here, what do we with comparative negligence with the Equine Act? Do we just throw it out the window, proportionate responsibility? Steeg and Johnson, now Steeg in particular says that we should look at everything. Basically it says that the Appellate Court concluded that, “Sponsor negligence is not expressly listed in the inherent risk of equine activity, and therefore sponsor negligence is excepted from immunity.” They stated that, “Sponsors are not immune if they failed to fulfill a Common Law duty to protect participants, and the Courts must examine whether the injury results from innate equine behavior, the acts of participants or some other cause, such as sponsor negligence.”

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. McCarver. Are there any additional questions?

ATTORNEY DOUGLAS J. McCARVER: Thank you, Judge.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, sir. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF ROBERT T. CAIN, JR. ON BEHALF OF PETITIONER

ATTORNEY ROBERT T. CAIN, JR.: Thank you, Your Honor. I'll go back to where I started, horseback riding is dangerous.

JUSTICE NATHAN L. HECHT: Mr. Cain, let me ask you about your causation argument --

ATTORNEY ROBERT T. CAIN, JR.: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: -- that I referred to earlier. 87.004 is very oddly written. It lists exceptions, and there are six of them, and five of them might apply in this case because one just has to do with livestock shows. And of the five, all of them are exceptions for things that caused the injury. But the one that you're relying on, the inquiry -- or that the other side is relying on, the inquiry, there's no causation element stated in that. What's your take on that?

ATTORNEY ROBERT T. CAIN, JR.: Well, my take on that is twofold. One, I think in the introductory portion of Section 004, it does refer to damages caused --

JUSTICE NATHAN L. HECHT: Yeah, but it refers to the defendant's cause of the injury, and in each of the others it's the exception that's the cause. And oddly in paragraph 2, there's no cause, it doesn't refer to cause, which is very strange.

ATTORNEY ROBERT T. CAIN, JR.: Oh, it is strange, but I would think that this section was put in there for meaning for the reason that there would have to be some causal connection. They wouldn't put in there, you know, that it's an exception if the accident happens on Friday, or essentially that's got nothing to do with the causation acts. That does have to be read in there.

JUSTICE NATHAN L. HECHT: But it seems implicate in 2 is that if you had asked more questions and gotten more information and should have therefore made a different decision, then that's an exception?

ATTORNEY ROBERT T. CAIN, JR.: If we could -- yes, if we were negligent in making our decision, by not making a reasonable and prudent effort to determine her ability to handle this horse, then that would be an exception to the grant of immunity, I agree with that. But it was not a mismatch, she admits that it was not a mismatch, we knew, we could have asked more questions, but would we have learned more than what we already know? She had some experience with horses, but was a novice rider. We knew that going in, if we'd asked or handed her a 10-page questionnaire, we'd have known the same thing. It wouldn't have made any difference.

JUSTICE DAVID M. MEDINA: Don't you think it matters what type of horse you put someone on? Whether it's a cutting horse, a Quarter Horse, a stallion or a dude ranch horse, which do nothing.

ATTORNEY ROBERT T. CAIN, JR.: Obviously you have to make, a choice has to be made about what kind of horse is put on, the rider is put on, but the testimony here is that even though this horse was used by her daughter as for barrel racing, it was a calm and gentle horse. This is not, not a rowdy horse that's going to appear in barrel racing at the Grand Nationals or whatever, it's just a horse for a young high school girl. And she admitted that she was able to handle the horse, if it was -- causation is really not an issue there. Janet Lee herself said it wasn't a mismatch. Now, on the mud issue, the horse -- no horse likes mud, as my client said, and this is a subsurface or surface condition of land that is expressly included in the inherent risks. But the main thing I would like the Court to remember is that, in a straight negligence case you can always go back and look and second guess and see what might have been done differently. You can always find a choice was made, if a different choice had been made, maybe there might have been a different outcome. The Legislature decided because of the inherent danger of horseback riding to not to do that, not to go back and look for every possible action that might be considered negligence. If it comes from one of these five things in 87.003, you know, it's an inherent risk and there's not any liability unless it's shown to fit within one of the exceptions in 004.

JUSTICE DAVID M. MEDINA: But the Legislature didn't say to get on a horse is negligence per se either, as perhaps if you get on a motorcycle, that's negligence per se.

ATTORNEY ROBERT T. CAIN, JR.: Well, but it's -- no, they didn't want to say that, they didn't say that.

JUSTICE DAVID M. MEDINA: There has to be an exception so that these cases can go forward.

ATTORNEY ROBERT T. CAIN, JR.: There are exceptions, but the Legislature, unlike Michigan and New Jersey, did not put sponsor negligence as an exception in .004.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any additional questions? Thank you, Mr. Cain.

ATTORNEY ROBERT T. CAIN, JR.: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The cause is submitted, and that concludes the arguments for today. The Marshall will adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

Terri Loftin, Petitioner, v. Janice Lee and Bob Lee, Respondents.
2010 WL 412056 (Tex.) (Oral Argument)

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