NO. _____

IN THE
SUPREME COURT
OF TEXAS

BRENDA YOUNG

PETITIONER

V.

TISA MCKIM AND JAQUELINE MCKIM

RESPONDENTS

PETITION FOR REVIEW

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No._____

BRENDA YOUNG

PETITIONER

V.

TISA MCKIM AND JAQUELINE MCKIM

RESPONDENTS.

IDENTITY OF PARTIES & COUNSEL

PARTIES TO THE TRIAL COURT'S FINAL JUDGMENT:	BRENDA YOUNG,	Plaintiff
	TISA McKIM and JAQUELINE McKIM,	Defendants
TRIAL JUDGE:	Brent Gamble	
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STATEMENT OF THE CASE

NATURE OF THE CASE: This is a personal injury case involving a violent horse kick to the head to an individual, the Petitioner Brenda Young, who was paid to take care of that particular horse, and while in the course and scope of such duties.

PROCEEDINGS IN THE TRIAL COURT: The lawsuit was filed in the 270th District Court of Harris County, Texas, the Honorable Brent Gamble presiding. Defendants/ Respondents filed both a no evidence motion for summary judgment and a traditional motion for summary judgment based on the protection of the relevant Equine Act.

THE JUDGMENT IN THE TRIAL COURT: The Honorable Brent Gamble granted solely the traditional motion for summary judgment in favor of Defendants/Respondents Tisa and Jacquline McKim.

PROCEEDING IN THE COURT OF APPEALS: Plaintiff/Petitioner Brenda Young appealed the granting of the traditional motion for summary judgment to the 14th Court of Appeals. The panel consisted of Chief Justice Adele Hedges and Justices Jeffrey V. Brown and Tracy Christopher.

a. Justice Jeffrey V. Brown authored the opinion.

b. There was no dissent.

c. The opinion of the Court of Appeals can be found at 2012 WL 1951099, attached herto as **Appendix 1**.

THE JUDGMENT OF THE COURT OF APPEALS: The 14th Court of Appeals held that the Equine Act is not limited only to consumers of equine activities but

everyone, that the evidence supported the finding that the horse caretaker, Plaintiff/Petitioner Brenda Young, was an independent contractor, that the exceptions to the Equine Act did not apply, and that the signage issue was waived by the Plaintiff/Petitioner Brenda Young as it was not an element of proof of the Equine Act, but a defense to the Equine Act which was not raised in the District Court and therefore waived. The 14th Court of Appeals therefore affirmed the District Court granting of the Motion for Summary Judgment. Plaintiff/Petitioner Brenda Young timely filed a Motion for Rehearing and on June 20, 2012 the 14th Court of Appeals denied the Motion for Rehearing.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal under Texas Government Code section 22.001(a)(2) because the Court of Appeals' opinion holds differently from a prior decision of another court of appeals on a question of law material to a decision of this case. *Dodge v. Durdin*, 87 S.W.3d 523, 529(Tex. App. – Houston [1st Dist.] 2005, *no pet.*); and *see also Johnson v. Smith*, 88 S.W.3d 729, 732(Tex. App. – Corpus Christi 2002, *no pet.*).

The Supreme Court has jurisdiction over this appeal under Texas Government Code section 22.001(a)(3) because this case involves the construction of a statute necessary to the determination of the case. Equine Act, Chapter 87 of the Texas Civil Practices and Remedies Code, then in effect. *See* Act of September 1, 2001, 77th Leg., R.S., Ch. 1108, 2001 Tex, Gen. Laws 2457-2459 (Amended 2011) (current version at Tex.Civ.Pract. & Rem. Code §§ 87.001, *et seq*.

The Supreme Court has jurisdiction over this appeal under Texas Government Code section 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected.

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Do non-consumers of equine activities qualify as participants in Equine activities as defined in the Equine Act?

A. The Court of Appeals erred in holding that non-consumers of equine activities qualify as participants and are thus governed by the Equine Act.

B. The Court of Appeals erred in holding that a paid worker, employee or independent contractor, is a participant under the Equine Act and are thus governed under the Equine Act.

ISSUE 2: Is proof of warning signs an element of proof under the Equine Act or is a lack of such required signs a defense thereto?

A. The Court of Appeals legally erred when it held that the posting of warning signs under the Equine Act was a defense and not an element of proof of the Equine Act, and therefore holding that Petitioner had waived the issue at the District Court level.

No._____

BRENDA YOUNG
PETITIONER

V.

TISA MCKIM AND JAQUELINE MCKIM
RESPONDENTS.

PETITION FOR REVIEW

TO THE HONORABLE JUSTICES OF THE TEXAS SUPREME COURT:

Petitioner **BRENDA YOUNG** submits this Petition for Review. Petitioner will be referred to as "YOUNG" and Respondents, **TISA MCKIM AND JAQUELINE MCKIM** will be referred to collectively as the "McKIMS."

STATEMENT OF FACTS

YOUNG adopts the facts contained within the opinion of Justice Brown. The Court of Appeals opinion, although correctly stating the majority of the facts underlying the actual incident, misstates some of the procedural or legal facts underlying the issues on appeal. While **YOUNG** fully relies on her previous briefs and the statements of facts contained therein, **YOUNG** would point out the following specific factual errors and/or omissions.

A. The 14th Court of Appeals Opinion incorrectly claims Young waived the issue of signage in the trial court; Young urges that such is an element of the Equine Act

that the McKims had the burden to prove, and that the McKims failed to prove this element of their case.

B. The 14th Court of Appeals *sua sponte* found that Young was an independent contractor rather than just an employee; Young urges such is a fact issue to be decided by a Jury.

C. The 14th Court of Appeals Opinion found that none of the Equine Act exceptions applied; Young urges that such also is a question of fact to be decided by a jury.

SUMMARY OF THE ARGUMENT

The 14th Court of Appeals erred in affirming the District Court's granting of McKims Traditional Motion for Summary Judgment as the applicable Equine Act does not apply to caretakers; those employed, (paid), either as an employee or independent contractor to take care of the equine animals as such would upset years of Texas employment law precedent and goes well beyond the legislative intent of the Act. Further, Young urges that as a matter of law in order for the act to apply in any event, the McKims had to first prove that the required Equine Act signage was posted; which the McKims did not do. Thus, the opinion of the 14th Court of Appeals should be reversed and the case remanded to the District Court for trial.

ARGUMENT

ISSUE 1: Do non-consumers of equine activities qualify as participants in Equine activities as defined in the Equine Act?

A. The Court of Appeals erred in holding that non-consumers of

equine activities qualify as participants and are thus governed by the Equine Act.

B. The Court of Appeals erred in holding that a paid worker, employee or independent contractor, is a participant under the Equine Act and are thus governed under the Equine Act.

"The legislature enacted the Equine Act[1] to limit the liability of equine sponsors to tourists and other consumers of equine activities." *Dodge v. Durdin*, 187 S.W.3d 523, 529 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (**Appendix 3 hereto)**. Young was not a participant in an equine activity at the time she was kicked by the horse Jasper because she was not a consumer of equine activities like a tourist engaging in a recreational equine activity. There was no equine show being performed – Young was simply doing a job for pay.

By the 14th Court of Appeal's interpretation, years of employment and independent contractor statutes and common laws have been silently discarded by the Legislature through the enactment of the Equine Act. The 14th Court of Appeal's interpretation under this section would give total immunity to the owners of horses. In fact the the 14th Court of Appeal urges at page 7 of its opinion that, "The Equine Act is a comprehensive limitation of liability for equine activities of all kinds." The thousands of people who work with and around horses would be

[1] The applicable version of the Equine Act in effect at the time is Equine Act, Chapter 8 of the Texas Civil Practice and Remedies Code, Act of September 1, 2001, 77th Leg., R.S. , Ch. 1108, 2001 Tex. Gen. Laws 2457-2459 (amended 2011) (current version at TEX. CIV. PRAC. & REM. CODE §87.001 *et seq.*). The applicable version is attached hereto as **Appendix 2**.

shocked by this outcome because they would be deprived of their rights without the specific direction or notice of the legislature.

Under the 14th Court of Appeal's interpretation, the worker who sets up the tents at equine events, connects the electrical cords, waters the animals, etc., would have no recourse if they were injured. This would include young men, old men, young women, old women, even children. They are all "participants" under the 14th Court of Appeals' current holding. They would all be deprived of their current rights; be it the Worker's Compensation Act, or under the law of Premise Liability.

On the other hand, The First Court of Appeals of Texas has noted that the Equine Act was not intended to apply under factual situations similar to the one in this case. *See Dodge v. Durdin*, 187 S.W.3d 523 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The pertinent portion of the Equine Act, see **Appendix 2** hereto states:

> Except as provided by Section 87.004, any person, including an equine activity sponsor, equine professional, livestock show participant, or livestock show sponsor, is not liable for property damage or damages arising from the personal injury or death of a participant in an equine activity or livestock show if the property damage, injury, or death results from the dangers or conditions that are an inherent risk of an equine activity or the showing of an animal on a competitive basis in a livestock show, including:
>
> (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 falling to maintain control over the equine or livestock animal or not acting within the participant's ability.

Tex. Civ. Prac. & Rem. Code § 87.003.

In *Dodge* the appellant successfully appealed a no-evidence summary judgment and traditional summary judgment granted in favor of the appellees upon which the trial court had found that the Equine Act was applicable and barred liability. *Dodge*, 187 S.W.3d at 525. The First Court of Appeals of Texas disagreed however, and held that in that factual situation the appellant was an employee rather than a participant in an equine activity, as that term is defined under the act and that the Equine Act did not apply to the appellant. *Id.*

The appellant in *Dodge* sustained an injury when an untamed horse kicked her in the abdomen as she was administering oral de-worming medication to the horse pursuant to direction from her employer and supervisor, the appellee. *Id.* Thus, in *Dodge*, just as in this case, the appellant was engaged in taking care of a

horse for the owner of the horse when the appellant was injured by the horse. *See id*.

The appellant in *Dodge* had not been warned by the appellee that the horse was not trained, or even tamed, that it previously resided only in a pasture, that it was dangerous, that she should pay close attention to it, that it needed to be handled with care, and that she should be calm around it. *Dodge*, 187 S.W.3d at 525. The appellant in *Dodge* had simply been warned that the horse "had not been handled much," which is more warning than was given Young in this case which was none. *See Id*. The decision in *Dodge* boiled down to interpreting what activities were intended by the legislature as participation in an equine activity and whether the facts of the case fit within it. *See id.* at 527.

In this case, just like in the *Dodge* case, Young had not been warned that the horse had been a rescue horse or gelded and thus more dangerous. *See id.* This is similar to the lack of warning in *Dodge* regarding the lack of training the horse had received, that it had resided in a meadow and was therefore dangerous. *See id.* at 525. Nor had, in the present case, Young been warned that the horse had been recently gelded, which also increased the dangerousness of the horse. *See Dodge*, 187 S.W.3d at 525. Moreover, the recentness of the gelding would not have been readily apparent making it an unobservable danger similar to the lack of training that the horse had in *Dodge*. *See Dodge*, 187 S.W.3d at 525. Both cases,

therefore, involve a complete failure to warn by the owner about an inherent and unobservable danger present in both horses that normally would not be present had the horses been normal everyday riding horses. *See Dodge*, 187 S.W.3d at 525. Neither the *Dodge* appellant nor the present Petitioner could tell from simple observation that the horses in question were any more dangerous than they appeared and unquestionably more dangerous than simple riding horses. *See Dodge*, 187 S.W.3d at 525.

The First Court of Appeals of Texas did not hang their hat only on the issue of inherent unobservable dangerousness of the animal and the lack of warning, however. *See Dodge*, 187 S.W.3d at 525. The court in that case delved into the murky waters of statutory construction and interpretation. *See id.* at 527. "The cardinal rule of statutory construction is to ascertain the Legislature's intent and to give effect to that intent. *Id.* When determining legislative intent, a court looks to the language of the statute, legislative history, the nature and object to be obtained, and the consequences that would follow from alternate constructions." *Id.* While the court in *Dodge* did not specifically find the definition of "participant" to be ambiguous, the court did look to the Equine Act's legislative history and the intent of its enactors. *Id.* at 528-29.

As the court aptly noted, "the preliminary portion of the definition of participant, which refers to 'a person who engages in the equine activity,' is

circumscribed by the concluding portion of the sentence, which suggests the term applies to consumers of equine activities." *Id.* at 528. Further, the legislative history only references its application to the tourism industry, and is silent about any intent to affect the employer-employee relationship (or that of an independent contractor). *Id.* "The legislative history thus suggests that the Legislature enacted the Equine Act to limit the liability of equine sponsors to tourists and other consumers of equine activities." *Id.* at 529.

Although the Equine Act does not specifically exclude employees or independent contractors from the definition of "participant" under the act, "the statutory language specifically encompasses those who pay to participate in the equine activity or who choose to participate for free." *Id.* at 530. "The purpose of the Equine Act was to limit the liability of those involved in the tourism industry, rather than to limit an employee's right's against his or her employer." *Id.*

In this case, Young's services provided to the McKims were in no way related to the tourism industry, and Young was not a consumer of equine activity provided by the McKims. Young was a paid caretaker performing a service on the horse for the benefit of her employer in a situation where the horse was dangerous and the owner had not adequately warned the handler/caregiver about an unobservable danger that was not inherent in riding horses in general. This is virtually the exact same factual situation that was before the court in *Dodge*. *See*

Id. Therefore, Young is not a participant engaging in equine activity for purposes of the Equine Act and thus should not be barred by it from recovering her damages. *See Dodge* 187 S.W.3d at 530.

It is one thing to protect Equine Events from the accidental injury to people who have paid to be present at the event, a sporting event. It is another to strip paid workers of rights that date back to the Texas Republic. If an employer has an injured worker, the employer must pay the expenses of that worker and the damages to that worker.

This Petition for Review should be granted, the Trial Court's Motion for Summary Judgment reversed, and the case remanded.

ISSUE 2: Is proof of warning signs an element of proof under the Equine Act or is a lack of such required signs a defense thereto?

A. The Court of Appeals legally erred when it held that the posting of warning signs under the Equine Act was a defense and not an element of proof of the Equine Act, and therefore holding that Petitioner had waived the issue at the District Court level.

There was no waiver because the element of whether there was a warning sign is an element that must be proven by the defendant because the defense on which the summary judgment was granted is an affirmative defense. When the party with the burden of proof seeks summary judgment, that party must prove it is entitled to judgment by establishing each element of its own claims or defenses as a matter of law or by negating an element of the respondent's claim or defense as a

matter of law. *See* TEX. R. CIV. P. 166a(c); *M.D. Andersen Hosp. & Tumor Inst. v. Willrich*, 28 S.W. 3d 22, 23(Tex. 2000); the non-movant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222(Tex. 1999); and *Wornick Co. v. Casas*, 856 S.W.2d 732, 733(Tex. 1993). In the present case, the McKims failed to prove in the first instance the application of the Equine Act. In order for the Equine Act to apply, according to the Act, relevant signs must be posted. Former section 87.005 of the Equine Act uses the words "shall," which word is mandatory. It further requires such warning be in every written contract with an equine professional. *Id.*[2]

The McKims, not the Young, had a duty to prove the application of the Equine Act. This is a fact which the McKims did not do. *See also, generally, City of Houston v. Clear Creek Basin Auth.*, 589 S.W. 2d 671, 678 (Tex. 1978)(the non-movant in a [traditional] motion for summary judgment is not required to file a response to defeat the motion for summary judgment when deficiencies in the movant's own proof or legal theories might defeat the movant's right to judgment as a matter of law).[3]

[2] There is no such written contract in the present case.
[3] C.f. *Landers v. State Farm Lloyds*, 257 S.W. 3d 740, 745(Tex.App. –Houston [1st Dist.] 2008), but the present case does not involve a TEX.R.CIV.P. 166 a(i) no evidence motion. This case involves solely the granting of a traditional Motion for Summary Judgment.

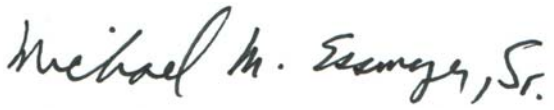
Young urges, that since the movants, the McKims, had not established that movants were entitled to summary judgment, because the movants had not proven all the elements of the movants' affirmative defense, an issue for which the movants had the burden, then the burden never shifted to the non-movant to raise a genuine issue of material fact to defeat the summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Lundstrom v. United Services Auto Ass'n- CIC*, 192 S.W.3d 78, 84 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). There was no waiver, therefore, because the movants were never entitled to summary judgment in the first place. Thus the burden, and thus an issue that could be waived, never shifted to the non-movant. *See id.* It is inherently unfair to suggest that a claimant can waive an objection to an issue that was never raised by the movants in the first place. *See id.*

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner Brenda Young respectfully prays that her Petition for Review be granted, that this Honorable Court reverse the holding of the 14th Court of Appeals and the Trial Court's ruling on Tisa McKim and Jaqueline McKim's Motion for Summary Judgment, that this Court remand the case to the District Court for trial on the merits, and for such other relief as this Court deems just.

Respectfully submitted,

ESSMYER & DANIEL, P.C.



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CERTIFICATE OF SERVICE

I, Michael M. Essmyer, Sr., hereby certify that a true and correct copy of the foregoing PETITIONER'S PETITION FOR REVIEW was served on all counsel of record by facsimile and electronically, as indicated below on the 25th day of July, 2012.

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APPENDIX

1

COURT OF APPEALS OPINION

Affirmed and Opinion filed May 31, 2012.

In The

Fourteenth Court of Appeals

NO. 14-11-00376-CV

BRENDA YOUNG, Appellant,

V.

TISA MCKIM AND JACQUELINE MCKIM, Appellees.

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2010-24816

O P I N I O N

This is an appeal from the granting of a traditional motion for summary judgment in favor of the appellees, Tisa and Jacqueline McKim. We affirm.

I

In August 2009, Tisa McKim went to the Houston SPCA with a friend who was interested in adopting a horse. One of the horses at the SPCA was named Jasper. Before the SPCA acquired Jasper, he had been extremely malnourished. He was still visibly underweight when McKim first saw him at the SPCA. After leaving the SPCA, McKim

called her daughter Jacqueline, a college student in Nebraska, to ask if she would like to adopt Jasper. Jacqueline ―who goes by "Jackie"―said she would. So McKim returned the next day and adopted Jasper.

During the adoption process, the SPCA revealed little about Jasper's past. As McKim acknowledged in her deposition, a horse rescued from mistreatment is "an unknown entity." The SPCA did inform McKim that Jasper's former owner had nearly starved him on two occasions. But the SPCA also reported that since his rescue, Jasper had behaved in a "gentlemanly" manner.

Pursuant to the SPCA's adoption policy, Jasper was gelded before he was turned over to Jackie. He then stayed at the SPCA for about a week to recover from the procedure. Once the SPCA released Jasper, McKim arranged to board him at Ravensway Stables where McKim already boarded another horse named Butch. At Ravensway, Jasper occupied a paddock by himself so that he could eat without competing with other horses for food. Jasper was still 400 to 500 pounds underweight when he arrived at Ravensway. Once he regained his weight, Jasper was placed in a paddock with other horses.

Like McKim, Brenda Young also lived near Ravensway Stables. Young and her teenage son often cared for horses kept at Ravensway, and had posted a flyer at Ravensway advertising their availability to assist owners with the care of their horses. Young began caring for Jasper in November of 2009. At that point, she had worked with about twelve or thirteen horses over the previous five years.

Young occasionally cared for both Jasper and Butch. McKim paid Young $2.50 each time she fed the horses and $3.00 each time she cleaned out the horses' stalls.[1] Because Jasper was recovering from malnourishment, McKim provided very precise

[1] While McKim agreed to use Young to take care of the horses, it was not an exclusive arrangement. Other folks also sometimes cared for the horses. McKim used a sign-up sheet to keep track of who was caring for the horses and what they had done.

instructions on what to feed him. But beyond requiring that the horses be fed twice a day, she did not specify the exact timing of the feedings. It was also understood that it was up to the person feeding the horses to decide, based on the weather, whether to put the horses out in the paddock or leave them in the barn.

The record shows that both Young and McKim believe that horses that have been mistreated can have "flashbacks" of that mistreatment. According to McKim, these flashbacks can occur without any warning. McKim also testified, without further clarification, that a recently gelded horse's behavior can be somewhat unpredictable.

In her deposition, Young testified that when she started caring for Jasper, he did not appear to have been malnourished. She also testified that aside from the incident made the basis of this case, Jasper never did anything to cause her concern. Young testified that McKim never told her that Jasper had been adopted from the SPCA, was a rescue horse, had been malnourished, or had been recently gelded. According to Young, McKim should have warned her of these facts. Had she known Jasper had been adopted from the SPCA, Young testified she would not have agreed to care for him.

McKim acknowledged in her deposition that she did not "remember having a face-to-face, one-on-one, sole-content conversation about Jasper with [Young]." She likewise did not tell Young that Jasper had been recently gelded. But McKim also testified that it was her "impression everybody knew [Jasper] came from the SPCA." McKim recalled telling "everybody [who] was around him that we didn't know anything about him and we didn't know what kind of temperament . . . he had." McKim also "figured [Young] knew what she was doing" and remembered telling Young to "be careful" and "be on your guard around Jasper for a little while."

On January 3, 2010, under instructions from McKim, Young went to Ravensway to feed Jasper and Butch. Young decided to take him out to paddock. Jasper appeared normal and Young noticed nothing unusual about his behavior. As Young led Jasper, she

encountered another boarder at the stable and stopped to talk. While they talked, Jasper grazed beside Young. Then, suddenly, Jasper turned and kicked Young, injuring her.

After Young sued the McKims for negligence, they moved for summary judgment. As their basis, the McKims relied on the version of the Equine Act, chapter 87 of the Texas Civil Practice and Remedies Code, then in effect. *See* Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2457–2459 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.001 *et seq* (West 2011)). The McKims argued that under the Equine Act, they were immune from liability because Young's alleged injuries arose from risks inherent in an equine activity. The trial court agreed and granted summary judgment in the McKims' favor. This appeal followed.

II

In a single issue Young contends the trial court erred when it granted the McKims' motion for summary judgment based on the protection from liability found in the Equine Act. Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.003)).

A

Although the McKims filed both no-evidence and traditional motions for summary judgment, the trial court specifically granted only the traditional motion. In a traditional summary-judgment motion, the movant must show there is no genuine issue of material fact. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). If there is no genuine issue of material fact, summary judgment should issue as a matter of law. *Haase v. Glazner*, 62 S.W.3d 795, 797 (Tex. 2001). Once a defendant establishes its right to summary judgment, the burden then shifts to the plaintiff to come forward with summary-judgment evidence raising a fact issue. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). On appeal, we review the entire summary-judgment record

in the light most favorable to the non-movant. *City of Keller v. Wilson*, 168 S.W.3d 802, 824–25 (Tex. 2005).

B

The Equine Act in effect at the time of the incident underlying this appeal was found where it still resides today—in chapter 87 of the Texas Civil Practice and Remedies Code. Former section 87.003 of the Equine Act provides, in pertinent part:

> Except as provided by Section 87.004, any person . . . is not liable for . . . damages [for personal injury that] results from the dangers or conditions that are an inherent risk of an equine activity . . . , including:
>
> (1) the propensity of an equine . . . 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 . . . animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal; . . . .

Loftin v. Lee, 341 S.W.3d 352, 355 (Tex. 2011) (quoting Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458 (amended 2011)). "The statutory text reflects an expansive view of 'inherent risk.'" *Loftin*, 341 S.W.3d at 356.

The Equine Act also provides exceptions to the limitation of liability found in former section 87.003. Former section 87.004 of the Equine Act provides, in pertinent part:

> A person . . . is liable for . . . damage . . . caused by a participant in an equine activity if: . . .
>
> (2) the person provided the equine . . . animal . . . and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity . . . and determine the ability of the participant to safely manage the equine animal . . . , taking into account the participant's representations of ability; . . .
>
> (4) 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. . . .

Id. (quoting Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458–59 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.004)). Section 87.004(2) applies only when the failure to make the required determination is itself the cause of the damage. *Loftin*, 341 S.W.3d at 359. Making a reasonable and prudent effort to determine the ability of a participant to safely engage in an equine activity under section 84.004(2) does not require a formal, searching inquiry by the person providing the equine animal. *Id.*

C

Within her single appellate issue, Young raises five sub-points, which we consolidate into four.

1

In her first sub-point, Young relies on the statement in *Dodge v. Durdin* that "[t]he legislative history . . . suggests that the [l]egislature enacted the Equine Act to limit the liability of equine sponsors to tourists and other consumers of equine activities." *Dodge v. Durdin*, 187 S.W.3d 523, 529 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Based on this, Young argues she was not a participant in an equine activity at the time she was kicked by Jasper because she was not a consumer of equine activities like a tourist engaging in a recreational equine activity. We disagree that only consumers of equine activities qualify as participants in equine activities as defined in the Equine Act.

Resolution of a statutory-construction issue must begin with an analysis of the statute itself. *Fitzgerald v. Advanced Spine Fixation Sys. Inc.*, 996 S.W.2d 864, 865–66 (Tex. 1999); *Cail v. Serv. Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). We must interpret the statute in a manner that gives effect to the plain meaning of the statute's words and effectuates the legislature's intent. *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). We should read every word, phrase, and expression as if it were deliberately chosen, and presume words excluded from the statute were excluded purposefully. *Ward*

Cnty. Irrigation Dist. No. 1 v. Red Bluff Water Power Control Dist., 170 S.W.3d 696, 700 (Tex. App.—El Paso 2005, no pet.). Where the language of the statute is clear and unambiguous, it should be given its common everyday meaning, without resort to rules of statutory construction or extrinsic aids. *Cail*, 660 S.W.2d at 815. Rules of construction and other extrinsic aids may not be used to create an ambiguity in a statute. *Fitzgerald*, 996 S.W.2d at 866.

The Equine Act is a comprehensive limitation of liability for equine activities of all kinds. *Loftin*, 341 S.W.3d at 355. The Equine Act applies to all "participants." *Id.* A "participant" in an equine activity is defined in the statute as "a person who engages in the activity, without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free." Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.001(9)). Under the statute, "'engages in an equine activity' means riding, handling, training, driving, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with an equine animal." Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.001(1)).

We find nothing in the language of the statute mandating that its limitation of liability applies only to consumer-oriented equine activities. For example, the statute specifically includes as a category "assisting in the medical treatment of" an equine animal. *Id.* This activity does not involve tourists or other consumers of equine activities. In addition, the Corpus Christi court of appeals has determined that an independent contractor leading a horse to a paddock was a participant in an equine activity covered by section 87.003 of the Equine Act. *See Johnson v. Smith*, 88 S.W.3d 729, 732 (Tex. App.—Corpus Christi 2002, no pet.) (holding that the plaintiff was a participant as defined in the statute but also holding that there was a fact issue on whether one of the exceptions found in

section 87.004 of the Equine Act applied). Because the coverage of the Equine Act is not limited to consumers of equine activities, we overrule Young's first sub-point on appeal.

2

In her second and third sub-points, Young contends the trial court erred in granting the McKims' motion for summary judgment because she was an employee of the McKims, not an independent contractor, and therefore she was not a participant under the Equine Act. In support of this contention, Young once again relies on the *Dodge* opinion. In that case, the First Court of Appeals held that an employee covered by the Workers' Compensation Act who was bitten by a horse was not a participant in an equine activity under the Equine Act. *Dodge*, 187 S.W.3d at 530. The court reasoned that if an employee were determined to be a participant in an equine activity, it would abrogate employer duties delineated in the Workers' Compensation Act. *Id.*

The test to determine whether a worker such as Young is an employee rather than an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the work. *Limestone Prods. Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002). An employer controls not merely the end sought to be accomplished, but also the means and the details of its accomplishment. *Id.* We measure the right to control by considering: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except about the final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job. *Id.*

While McKim provided detailed instructions on exactly what to feed Jasper and how often to feed him each day, the details of how and when Young accomplished that task were left up to her. The decision of whether to place Jasper into a paddock was also left to Young. Moreover, Young did not care for Jasper on a daily basis, but only on an as-needed basis determined by McKim's schedule. And Young was not the exclusive

person McKim paid to feed Jasper. The summary-judgment evidence shows that McKim paid at least two other people to feed Jasper. Also, the evidence establishes that Young operated a business independent of McKim. Young advertised her business at Ravensway and she provided care for other horses stabled there. Finally, the evidence establishes that McKim paid Young per feeding and stall cleaning, not based on the amount of time Young spent performing those tasks. Applying the right-of-control test, we hold that the summary-judgment evidence conclusively shows that Young was an independent contractor when Jasper kicked her. *See id.* ("Although some of these factors may not, alone, be enough to demonstrate a worker's independent-contractor status, together they provide conclusive summary-judgment evidence that Mathis was an independent contractor and not Limestone's employee when the accident occurred."). We overrule Young's second and third sub-points.[2]

3

In her fourth sub-point, Young contends the trial court erred when it granted the McKims' motion for summary judgment because there are fact issues on the applicability of two of the exceptions to immunity found in former section 87.004 of the Equine Act. We address each contention in turn.

Under former section 87.004(2) of the Equine Act, a person who provides an equine animal has no immunity under former section 87.003 unless he has made:

> a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity . . . and determine the ability of the participant to safely manage the equine . . . animal, taking into account the participant's representations of ability.

Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.004(2)). Former section

[2] In her list of the sub-points contained within her issue on appeal, Young states her second sub-issue as: "None of the cases cited by the [McKims] approved of or involved the granting of a motion for summary judgment." Young does not separately brief this sub-point; therefore, she has waived it. *See* Tex. R. App. P. 38.1(i).

87.004(2) applies only when the failure to make the required determination is itself the cause of the damage. *Loftin*, 341 S.W.3d at 359. Making a reasonable and prudent effort to determine the ability of a participant to safely engage in an equine activity under former section 84.004(2) does not require a formal, searching inquiry by the person providing the equine animal. *Id.* Young asserts that the McKims failed to conclusively establish that a reasonable and prudent effort was made to determine whether she could safely engage in the care of a previously abused or gelded horse.[3]

Here, the summary-judgment evidence establishes that Young was self-employed and operating a part-time business caring for horses stabled at Ravensway. The evidence also establishes that Young had been conducting this business since 2004 and had cared for twelve to thirteen horses on a continuing basis during that time period. In addition, Young posted advertisements at Ravensway that she was available and qualified to assist in the care of horses. Because Young had advertised her business at Ravensway, and held herself out as qualified to care for horses, we hold that former section 87.004(2) does not extinguish the McKims' immunity under former section 87.003. *See Loftin*, 341 S.W.3d at 359 (holding that when the owner of the horse already generally knows the participant's experience level in dealing with horses, former section 87.004(2) does not require a formal, searching inquiry into a participant's ability to safely manage the equine).

Next, Young raises the applicability of former section 87.004(4) of the Equine Act. Under that provision, the act provides no immunity when a defendant commits "an act or omission with wilful or wanton disregard for the safety of the participant and that act or omission cause[s] the injury." Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex.

[3] The parties disagree as to which party has the burden of proof on this issue. Young asserts the McKims were required to conclusively prove each element of their Equine Act affirmative defense, including the inapplicability of any of the exceptions found in former section 87.004. Conversely, the McKims assert former section 87.004 is an affirmative defense that places the burden on Young to produce sufficient summary-judgment evidence to raise a fact issue on each element of the defense. Because we conclude the summary-judgment evidence conclusively establishes that the exceptions found in former section 87.004 do not apply, we need not resolve this question.

Gen. Laws 2459 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.004(4)). According to Young, this exception was triggered when McKim failed to inform her that Jasper was a rescue horse that had been mistreated and that he had been gelded several months before the incident. Under the Equine Act, wilful and wanton disregard means "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." *Little v. Needham*, 236 S.W.3d 328, 334 (Tex. App.—Houston [1st Dist.] 2007, no pet.). It is synonymous with gross negligence. *Id.*

Specifically, Young points to the testimony in the summary-judgment record that horses that have been malnourished in the past can experience "flashbacks" of that treatment. We conclude this evidence is insufficient to create a fact issue on the fourth exception. The record contains no explanation as to what exactly a "flashback" is, particularly as experienced by a horse. Likewise, there is no explanation as to why the potential for such a flashback obligates McKim to reveal that Jasper had previously been malnourished to someone who holds herself out as qualified to care for horses.

Young also argues that McKim should have told her that Jasper had been freshly gelded when McKim adopted him. As Young points out, McKim testified that freshly gelded horses' behavior is sometimes "questionable." But the summary-judgment evidence shows that Jasper was well-behaved both at the SPCA and after McKim adopted by him.

We conclude the summary-judgment evidence does not create a genuine issue of material fact on the exception found in former section 87.004(4). Young has not shown how the McKims' alleged failure to disclose Jasper's previous abuse or that he had been freshly gelded could amount to wilful or wanton disregard for her safety. We overrule Young's fourth sub-point.

In her fifth sub-point, Young asserts the trial court erred when it granted summary judgment in favor of the McKims because they failed to prove as a matter of law that they posted the warning signs required by former section 87.005 of the Equine Act.[4] In response, the McKims contend Young waived this argument on appeal because she did not present it in her summary-judgment response. We agree with the McKims.

To preserve an argument against the granting of a motion for summary judgment for appellate review, the non-movant must expressly present that argument to the trial court within its written response to the motion. *Priddy v. Rawson*, 282 S.W.3d 588, 597 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Here, Young did not include in her summary-judgment response any argument that the trial court should deny the McKims' motion because they failed to post the warnings required by former section 87.005 of the Equine Act. Young failed to preserve this issue for appellate review. We overrule Young's fifth sub-point on appeal.

[4] Former section 87.005 of the Equine Act provides in pertinent part:

> (a) An equine professional shall post and maintain a sign that contains the warning contained in Subsection (c) if the professional manages or controls a stable, corral, or arena where the professional conducts an equine activity. The professional must post the sign in a clearly visible location on or near the stable, corral, or arena.
>
> (b) An equine professional shall include the warning contained in Subsection (c) in every written contract that the professional enters into with a participant for professional services, instruction, or the rental of equipment or tack or an equine animal. The warning must be included without regard to whether the contract involve equine activities on or off the location or site of the business of the equine professional. The warning must be clearly readable….

Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1108, 2001 Tex. Gen. Laws 2458 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 87.005).

* * *

Having overruled each of Young's sub-points brought within her single issue on appeal, we affirm the trial court's final judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Chief Justice Hedges and Justices Brown and Christopher.

APPENDIX

2

EQUINE ACT

V.T.C.A., Civil Practice & Remedies Code § 87.001

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§ 87.001. Definitions

In this chapter:

(1) “Engages in an equine activity” means riding, handling, training, driving, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with an equine animal. The term includes management of a show involving equine animals. The term does not include being a spectator at an equine activity unless the spectator is in an unauthorized area and in immediate proximity to the equine activity.

(2) “Equine animal” means a horse, pony, mule, donkey, or hinny.

(3) “Equine activity” means:

(A) an equine animal show, fair, competition, performance, or parade that involves any breed of equine animal and any equine discipline, including dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, driving, pulling, cutting, polo, steeplechasing, English and Western performance riding, endurance trail riding and Western games, and hunting;

(B) equine training or teaching activities;

(C) boarding equine animals;

(D) riding, inspecting, or evaluating an equine animal belonging to another, without regard to whether the owner receives monetary consideration or other thing of value for the use of the equine animal or permits a prospective purchaser of the equine animal to ride, inspect, or evaluate the equine animal;

(E) informal equine activity, including a ride, trip, or hunt that is sponsored by an equine activity sponsor;

(F) placing or replacing horseshoes on an equine animal; or

(G) without regard to whether the participants are compensated, rodeos and single event competitions, including team roping, calf roping, and single steer roping.

(4) “Equine activity sponsor” means:

(A) a person or group who sponsors, organizes, or provides the facilities for an equine activity, including equine facilities for a pony club, 4-H club, hunt club, riding club, therapeutic riding program, or high school or college class, program, or activity, without regard to whether the person operates for profit; or

(B) an operator of, instructor at, or promoter for equine facilities, including a stable, clubhouse, pony ride string, fair, or arena at which an equine activity is held.

(5) “Equine professional” means a person engaged for compensation:

(A) to instruct a participant or rent to a participant an equine animal for the purpose of riding, driving, or being a passenger on the equine animal; or

(B) to rent equipment or tack to a participant.

(6) “Livestock animal” means:

(A) an animal raised for human consumption; or

(B) an equine animal.

(7) “Livestock show” means a nonprofit event at which more than two species or breeds of livestock animals are gathered for exhibition or competition.

(8) “Livestock show sponsor” means a recognized group or association that organizes and sanctions a livestock show, including a political subdivision or nonprofit organization that is exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, as amended, by being listed as an exempt organization in Section 501(c)(3) of that code.

(9) "Participant" means:

(A) with respect to an equine activity, a person who engages in the activity, without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free; and

(B) with respect to a livestock show, a person who registers for and is allowed by a livestock show sponsor to compete in a livestock show by showing an animal on a competitive basis, or a person who assists that person.

CREDIT(S)

Added by Acts 1995, 74th Leg., ch. 549, § 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 1108, § 2, eff. Sept. 1, 2001.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Section 2 of Acts 1995, 74th Leg., ch. 549 provides:

"This Act takes effect September 1, 1995, and applies only to a cause of action accruing on or after that date. A cause of action accruing before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued for that purpose."

Acts 2001, 77th Leg., ch. 1108 rewrote subd. (6) and renumbered it as subd. (9) and added subds. (6), (7), and (8). Subdivision (6) previously read:

"Participant" means a person who engages in an equine activity, without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free.";

Section 6 of Acts 2001, 77th Leg., ch. 1108 provides:

"This Act takes effect September 1, 2001, and applies only to a cause of action that accrues on or after that date. A cause of action that accrues before September 1, 2001, is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose."

Former Sections:

Another Chapter 87, Liability for Certain Injuries to Convicted Persons, consisting of §§ 87.001 to 87.007, and added by Acts 1995, 74th Leg., ch. 604, § 1, was renumbered as Chapter 86, consisting of V.T.C.A., Civil Practice & Remedies Code §§ 86.001 to 86.007, by Acts 1997, 75th Leg., ch. 165, § 31.01(8).

LAW REVIEW COMMENTARIES

Survey of Texas animal torts. Robert Fugate, 48 S.Tex.L.Rev. 427 (2006).

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Texas Jurisprudence Pleading & Practice Forms 2d Ed § 24:29, Answer-- Affirmative Defense--Limitation on Liability of Equine Professional.

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NOTES OF DECISIONS

1. Equine activity

Breeder's act in leading a stallion back to its stall when breeder was bitten fell within definition of “equine activity,” for purposes of equine activity immunity statute, as leading of horse could fall within statutory terms of “training activity” or “boarding equine animals.” Johnson v. Smith (App. 13 Dist. 2002) 88 S.W.3d 729, rehearing overruled, on remand 2005 WL 4890709. Animals 66.7

2. Participant

Breeder, who was bitten in face by a stallion he was leading to its paddock after a breeding was a “participant” in an equine activity, for purposes of the equine activity immunity statute, even though activity in which he was engaged did not relate to a public equine operation; leading stallion to his paddock after breeding fell within the common usage of statutory terms of “handling,” “training” and “assisting in the medical treatment of an equine.” Johnson v. Smith (App. 13 Dist. 2002) 88 S.W.3d 729, rehearing overruled, on remand 2005 WL 4890709. Animals 66.7

Current through the end of the 2007 Regular Session of the 80th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 87.002

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§ 87.002. Applicability of Chapter

This chapter does not apply to an activity regulated by the Texas Racing Commission.

CREDIT(S)

Added by Acts 1995, 74th Leg., ch. 549, § 1, eff. Sept. 1, 1995.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Section 2 of Acts 1995, 74th Leg., ch. 549 provides:

"This Act takes effect September 1, 1995, and applies only to a cause of action accruing on or after that date. A cause of action accruing before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued for that purpose."

Former Sections:

Another Chapter 87, Liability for Certain Injuries to Convicted Persons, consisting of §§ 87.001 to 87.007, and added by Acts 1995, 74th Leg., ch. 604, § 1, was renumbered as Chapter 86, consisting of V.T.C.A., Civil Practice & Remedies Code §§ 86.001 to 86.007, by Acts 1997, 75th Leg., ch. 165, § 31.01(8).

LAW REVIEW COMMENTARIES

Survey of Texas animal torts. Robert Fugate, 48 S.Tex.L.Rev. 427 (2006).

Current through the end of the 2007 Regular Session of the 80th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 87.003

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§ 87.003. Limitation on Liability

Except as provided by Section 87.004, any person, including an equine activity sponsor, equine professional, livestock show participant, or livestock show sponsor, is not liable for property damage or damages arising from the personal injury or death of a participant in an equine activity or livestock show if the property damage, injury, or death results from the dangers or conditions that are an inherent risk of an equine activity or the showing of an animal on a competitive basis in a livestock show, including:

(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.

CREDIT(S)

Added by Acts 1995, 74th Leg., ch. 549, § 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 1108, § 3, eff. Sept. 1, 2001.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Section 2 of Acts 1995, 74th Leg., ch. 549 provides:

“This Act takes effect September 1, 1995, and applies only to a cause of action accruing on or after that date. A cause of action accruing before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued for that purpose.”

Acts 2001, 77th Leg., ch. 1108 rewrote the section, which previously read:

“Except as provided by Section 87.004, any person, including an equine activity sponsor or an equine professional, is not liable for property damage or damages arising from the personal injury or death of a participant if the property damage, injury, or death results from the dangers or conditions that are an inherent risk of equine activity, including:

“(1) the propensity of an equine 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 animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal;
“(3) 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 animal or not acting within the participant's ability.”

Section 6 of Acts 2001, 77th Leg., ch. 1108 provides:

"This Act takes effect September 1, 2001, and applies only to a cause of action that accrues on or after that date. A cause of action that accrues before September 1, 2001, is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose."

Former Sections:

Another Chapter 87, Liability for Certain Injuries to Convicted Persons, consisting of §§ 87.001 to 87.007, and added by Acts 1995, 74th Leg., ch. 604, § 1, was renumbered as Chapter 86, consisting of V.T.C.A., Civil Practice & Remedies Code §§ 86.001 to 86.007, by Acts 1997, 75th Leg., ch. 165, § 31.01(8).

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Texas Jurisprudence Pleading & Practice Forms 2d Ed § 40:114, Answer-- Equestrian Thrown from Horse Frightened by Vehicle--Informal Equine Activity Liability Limitations.

NOTES OF DECISIONS

1. Sponsers

Sponsors are not immune under the Liability for Equine Activity Act if they fail to fulfill a common-law duty to protect participants. Steeg v. Baskin Family Camps, Inc. (App. 3 Dist. 2003) 124 S.W.3d 633, rehearing overruled, review granted, withdrawn, review dismissed. Animals 66.7

Sponsors are not immune under the Liability for Equine Activity Act from all damages resulting from slipping saddles, just from those due to injuries resulting from inherent risks of equine activity. Steeg v. Baskin Family Camps, Inc. (App. 3 Dist. 2003) 124 S.W.3d 633, rehearing overruled, review granted, withdrawn, review dismissed. Animals 66.7

1.5. Participant

Horse stable employee was not a "participant" under the Equine Act and thus could bring negligence action against employers for injuries suffered when horse kicked her in the abdomen while she administered oral medication to horse; although Act did not specifically exclude employees from the definition of "participant," the statutory language specifically encompassed those who pay to participate in the equine activity or who choose to participate for free, which would not include employees, Act's purpose was to limit the liability of those involved in the tourism industry, rather than to limit an employee's right against his or her employer, and the Act lacked express legislative intent to abrogate employer duties as delineated in the Workers' Compensation Act. Dodge v. Durdin (App. 1 Dist. 2005) 187 S.W.3d 523. Animals 66.7

2. Summary judgment

Genuine issue of material fact as to whether patron's injury resulted from inherent risk of equine activity precluded summary judgment for retreat in patron's negligence action under the Liability for Equine Activity Act for injuries suffered during horseback ride. Steeg v. Baskin Family Camps, Inc. (App. 3 Dist. 2003) 124 S.W.3d 633, rehearing overruled, review granted, withdrawn, review dismissed. Judgment 181(33)

Current through the end of the 2007 Regular Session of the 80th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 87.004

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§ 87.004. Exceptions to Limitation on Liability

A person, including an equine activity sponsor, equine professional, livestock show participant, or livestock show sponsor, is liable for property damage or damages arising from the personal injury or death caused by a participant in an equine activity or livestock show if:

(1) 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;
(2) the person provided the equine or livestock animal and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity or livestock show and determine the ability of the participant to safely manage the equine or livestock animal, taking into account the participant's representations of ability;
(3) 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;
(4) 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;
(5) the person intentionally caused the property damage, injury, or death; or
(6) with respect to a livestock show, the injury or death occurred as a result of an activity connected with the livestock show and the person invited or otherwise allowed the injured or deceased person to participate in the activity and the injured or deceased person was not a participant as defined by Section 87.001(9)(B).

CREDIT(S)

Added by Acts 1995, 74th Leg., ch. 549, § 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 1108, § 4, eff. Sept. 1, 2001.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Section 2 of Acts 1995, 74th Leg., ch. 549 provides:

“This Act takes effect September 1, 1995, and applies only to a cause of action accruing on or after that date. A cause of action accruing before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued for that purpose.”

Acts 2001, 77th Leg., ch. 1108, in the first sentence, following “sponsor”, deleted “or an”; following “equine professional”, inserted “livestock show participant, or livestock show sponsor”; following “equine activity”, inserted “or livestock show”; in subd. (1), inserted “or livestock show”; in subd. (2), following two occurrences of “equine”, inserted “or livestock” and following “equine activity”, inserted “or livestock show”; in subd. (4), following “injury”, deleted “or”; in subd. (5), inserted “property damage” and, following “death”, deleted “or”; AND, added subd. (6).

Section 6 of Acts 2001, 77th Leg., ch. 1108 provides:

"This Act takes effect September 1, 2001, and applies only to a cause of action that accrues on or after that date. A cause of action that accrues before September 1, 2001, is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose."

Former Sections:

Another Chapter 87, Liability for Certain Injuries to Convicted Persons, consisting of §§ 87.001 to 87.007, and added by Acts 1995, 74th Leg., ch. 604, § 1, was renumbered as Chapter 86, consisting of V.T.C.A., Civil Practice & Remedies Code §§ 86.001 to 86.007, by Acts 1997, 75th Leg., ch. 165, § 31.01(8).

LAW REVIEW COMMENTARIES

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Theaters and Shows 3.60, 6(6).
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C.J.S. Animals §§ 170, 177 to 183.
C.J.S. Entertainment and Amusement; Sports §§ 19, 48, 56.
C.J.S. Motor Vehicles § 1307.

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2008 Electronic Update

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6 ALR 4th 358, Liability of Owner or Bailor of Horse for Injury by Horse to Hirer or Bailee Thereof.

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13 Am. Jur. Proof of Facts 2d 473, Knowledge of Animal's Vicious Propensities.

25 Am. Jur. Proof of Facts 2d 461, Failure to Use Due Care in Providing Horse for Hire.

TX Jur. 3d Animals § 130, Negligent Handling of Nonvicious Domestic Animal.

TX Jur. 3d Products Liability § 58, Duty to Warn.

TX Jur. 3d Summary Judgment § 58, Preserving Objections in Lower Court.

Forms

Texas Jurisprudence Pleading & Practice Forms 2d Ed § 24:15, Statutory Provisions.

Texas Jurisprudence Pleading & Practice Forms 2d Ed § 24:25, Petition-- Against Equine Professional--Minor Thrown from Horse--Failure to Make Reasonable and Prudent Effort to Determine Ability of Minor to Engage Safely in Equine Activity.

Texas Jurisprudence Pleading & Practice Forms 2d Ed § 24:26, Petition-- Particpant in Equine Activity Injured in Fall from Horse--Providing Faulty Tack--Failure to Make Reasonable and Prudent Effort to Determine Ability of Participant to Engage...

Texas Jurisprudence Pleading & Practice Forms 2d Ed § 40:114, Answer-- Equestrian Thrown from Horse Frightened by Vehicle--Informal Equine Activity Liability Limitations.

NOTES OF DECISIONS

1. In general

Presence of fire ants inside an outdoor riding pen is a natural condition and does not constitute an unreasonably dangerous condition requiring warnings under statute governing liability arising from equine activities. Gamble v. Peyton (App. 9 Dist. 2005) 182 S.W.3d 1. Animals 66.7; Public Amusement And Entertainment 135

Horse's violent reaction to being stung by fire ants inside an outdoor riding pen was an inherent risk of horseback riding, and thus landowner was not liable to rider. Gamble v. Peyton (App. 9 Dist. 2005) 182 S.W.3d 1. Animals 66.7

Horseback rider's injuries, which occurred when horse collided with a tree located on side of riding track, arose from dangers or conditions inherent to equine activity, precluding personal injury action against stable owners under statute protecting equine professionals or equine activity sponsors from liability, even though rider claimed that injuries were caused by the design of the track; rider's horse was not fully trained and was jumpy, and both the propensity of an equine to behave in ways that may result in injury, and an equine's collision with an object were statutorily defined dangers inherent to equine activity. Little v. Needham (App. 1 Dist. 2007) 236 S.W.3d 328. Animals 66.7

2. Dangerous latent condition

Horseback rider's injuries, which occurred when horse collided with a tree located on side of riding track, were not caused by a dangerous latent condition of land so as to serve as an exception to statutory immunity for injuries resulting from dangers or conditions that are an inherent risk of equine activity, absent evidence that the tree was concealed. Little v. Needham (App. 1 Dist. 2007) 236 S.W.3d 328. Animals 66.7

3. Act or omission with willful or wanton disregard

Horseback rider's injuries, which occurred when horse collided with a tree located on side of riding track, were not caused because stable owners committed an act or omission with willful or wanton disregard for rider's safety, as would serve as an exception to statutory immunity for injuries resulting from dangers or conditions that are an inherent risk of equine activity; there was no evidence that anyone had ever previously collided with or complained about the location of the tree, and there was no allegation that the track was negligently designed or maintained. Little v. Needham (App. 1 Dist. 2007) 236 S.W.3d 328. Animals 66.7

4. Review

Horseback rider failed to preserve for appellate review his argument that his injuries were caused by faulty equipment so as to serve as an exception to statutory immunity for injuries resulting from dangers or conditions that are an inherent risk of equine activity, where rider never raised such argument before the trial court. Little v. Needham (App. 1 Dist. 2007) 236 S.W.3d 328. Appeal And Error 173(13)

Current through the end of the 2007 Regular Session of the 80th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 87.005

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§ 87.005. Warning Notice

(a) An equine professional shall post and maintain a sign that contains the warning contained in Subsection (c) if the professional manages or controls a stable, corral, or arena where the professional conducts an equine activity. The professional must post the sign in a clearly visible location on or near the stable, corral, or arena.

(b) An equine professional shall include the warning contained in Subsection (c) in every written contract that the professional enters into with a participant for professional services, instruction, or the rental of equipment or tack or an equine animal. The warning must be included without regard to whether the contract involves equine activities on or off the location or site of the business of the equine professional. The warning must be clearly readable.

(c) The warning posted by an equine professional under this section must be as follows:

> UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE AND REMEDIES CODE), AN EQUINE PROFESSIONAL IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN EQUINE ACTIVITIES RESULTING FROM THE INHERENT RISKS OF EQUINE ACTIVITIES.
>
> WARNING

(d) A livestock show sponsor shall post and maintain a sign that contains the warning prescribed by Subsection (f) if the livestock show sponsor manages or controls a stable, barn, corral, or arena at which the livestock show sponsor conducts a livestock show. The livestock show sponsor must post the sign in a clearly visible location near the stable, barn, corral, or arena.

(e) A livestock show sponsor shall include the warning prescribed by Subsection (f) in every written contract that the sponsor enters into with a livestock show participant. The warning must be clearly readable.

(f) The warning posted by a livestock show sponsor under this section must be as follows:

> UNDER TEXAS LAW (CHAPTER 87, CIVIL PRACTICE AND REMEDIES CODE), A LIVESTOCK SHOW SPONSOR IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN A LIVESTOCK SHOW RESULTING FROM THE INHERENT RISKS OF LIVESTOCK SHOW ACTIVITIES.
>
> WARNING

CREDIT(S)

Added by Acts 1995, 74th Leg., ch. 549, § 1, eff. Sept. 1, 1995. Amended by Acts 2001, 77th Leg., ch. 1108, § 5, eff. Sept. 1, 2001.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Section 2 of Acts 1995, 74th Leg., ch. 549 provides:

"This Act takes effect September 1, 1995, and applies only to a cause of action accruing on or after that date. A cause of action accruing before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued for that purpose."

Acts 2001, 77th Leg., ch. 1108, in subsec. (c), inserted "posted by an equine professional under this section"; added subsecs. (d), (e), and (f).

Section 6 of Acts 2001, 77th Leg., ch. 1108 provides:

"This Act takes effect September 1, 2001, and applies only to a cause of action that accrues on or after that date. A cause of action that accrues before September 1, 2001, is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose."

Former Sections:

Another Chapter 87, Liability for Certain Injuries to Convicted Persons, consisting of §§ 87.001 to 87.007, and added by Acts 1995, 74th Leg., ch. 604, § 1, was renumbered as Chapter 86, consisting of V.T.C.A., Civil Practice & Remedies Code §§ 86.001 to 86.007, by Acts 1997, 75th Leg., ch. 165, § 31.01(8).

LAW REVIEW COMMENTARIES

Survey of Texas animal torts. Robert Fugate, 48 S.Tex.L.Rev. 427 (2006).

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Animals 112.
Theaters and Shows 6(7).
Westlaw Topic Nos. 28, 376.
C.J.S. Animals §§ 348.1 to 348.6.
C.J.S. Entertainment and Amusement; Sports §§ 55, 57 to 63, 66 to 68.
C.J.S. Motor Vehicles § 1307.

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TX Jur. 3d Animals § 130, Negligent Handling of Nonvicious Domestic Animal.

Forms

Texas Jurisprudence Pleading & Practice Forms 2d Ed § 24:15, Statutory Provisions.

Texas Jurisprudence Pleading & Practice Forms 2d Ed § 24:27, Petition-- Allegation--Equine Professional's Failure to Post and Maintain Statutory Warning at Stable.

Treatises and Practice Aids

Cochran, 27 Tex. Prac. Series § 3.18, Non-U.C.C. Warranties--Services.

Cochran, 28A Tex. Prac. Series Ch. 3 A, a Sales.

NOTES OF DECISIONS

In general 1

1. In general

Statute requiring “equine professional” to post warning regarding inherent risks of equine activities did not apply to rider's action against landowner to recover for injuries sustained in a fall from a horse stung by fire ants, where rider had bought horse from landowners, rider did not rent the horse or any tack, and rider received no riding instruction for which she paid compensation. Gamble v. Peyton (App. 9 Dist. 2005) 182 S.W.3d 1. Animals 66.7

Current through the end of the 2007 Regular Session of the 80th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 87.006

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§§ 87.006, 87.007. Renumbered as V.T.C.A., Civil Practice & Remedies Code §§ 86.006, 86.007 by Acts 1997, 75th Leg., ch. 165, § 31.01(8), eff. Sept. 1, 1997

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

These sections were part of another Chapter 87, Liability for Certain Injuries to Convicted Persons, as added by Acts 1995, 74th Leg., ch. 604, § 1.

Current through the end of the 2007 Regular Session of the 80th Legislature

End of Document

V.T.C.A., Civil Practice & Remedies Code § 87.007

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 87. Liability Arising from Equine Activities or Livestock Shows (Refs & Annos)

§§ 87.006, 87.007. Renumbered as V.T.C.A., Civil Practice & Remedies Code §§ 86.006, 86.007 by Acts 1997, 75th Leg., ch. 165, § 31.01(8), eff. Sept. 1, 1997

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

These sections were part of another Chapter 87, Liability for Certain Injuries to Convicted Persons, as added by Acts 1995, 74th Leg., ch. 604, § 1.

Current through the end of the 2007 Regular Session of the 80th Legislature

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APPENDIX

3

DODGE v. DURDIN

187 S.W.3d 523
Court of Appeals of Texas,
Houston (1st Dist.).

Deborah DODGE, Appellant,
v.
Jean DURDIN, Granger Durdin, Raymond Durdin, Magic Moments Inc., and Magic Moments Stables, Appellees.

No. 01–04–00015–CV. | Dec. 1, 2005.

Synopsis

Background: Stable employee brought negligence action against employer and individuals, claiming that she sustained an injury when an untamed horse kicked her in the abdomen as she was administering oral deworming medication to the horse. Defendants brought motion for summary judgment under the Equine Act, and the 165th District Court, Harris County, Elizabeth Ray, J., granted the motion. Employee appealed.

Holdings: The Court of Appeals, Elsa Alcala, J., held that:
[1] as a matter of first impression, employee was not a "participant" under the Equine Act such that the Act precluded liability;
[2] genuine issues of material fact regarding employment relationships between stable employee and individual defendants precluded summary judgment on grounds that they were not employee's employers;
[3] genuine issue of material fact as to whether employer breached duty of care to employee precluded summary judgment;
[4] genuine issues of material fact as to whether warning employee about horse would have prevented employee's injury and as to whether employer would have anticipated the danger of failing to warn employee precluded summary judgment on causation grounds; and
[5] genuine issue of material fact as to whether employee suffered damages due to horse's kick precluded summary judgment.

Reversed and remanded.

West Headnotes (14)

[1] Animals
Horses and Other Equines

Horse stable employee was not a "participant" under the Equine Act and thus could bring negligence action against employers for injuries suffered when horse kicked her in the abdomen while she administered oral medication to horse; although Act did not specifically exclude employees from the definition of "participant," the statutory language specifically encompassed those who pay to participate in the equine activity or who choose to participate for free, which would not include employees, Act's purpose was to limit the liability of those involved in the tourism industry, rather than to limit an employee's right against his or her employer, and the Act lacked express legislative intent to abrogate employer duties as delineated in the Workers' Compensation Act. V.T.C.A., Civil Practice & Remedies Code § 87.003; V.T.C.A., Labor Code § 406.033.

5 Cases that cite this headnote

[2] Animals
Horses and Other Equines

Purpose of the Equine Act is to protect the tourism industry, not to abrogate the regulation of employer-employee relationships in Texas. V.T.C.A., Civil Practice & Remedies Code § 87.001 et seq.

2 Cases that cite this headnote

[3] Negligence
Elements in General

To establish negligence, a plaintiff must produce evidence that establishes a duty owed, a breach of that duty, and damages proximately caused by the breach.

1 Cases that cite this headnote

[4] Labor and Employment

Delegation of Duty

Although an employer is not an insurer of the employees' safety at work, an employer owes certain nondelegable and continuous duties to employees, including the duties to warn about the hazards of employment, to supervise activities, to furnish a reasonably safe workplace, and to furnish reasonably safe instrumentalities with which to work.

[5] Judgment

Employees, Cases Involving

Genuine issues of material fact regarding employment relationships between stable employee and individual people named as defendants in employee's complaint precluded summary judgment for individuals, on grounds that they were not employee's employers, in employee's negligence action against stable company and the individuals.

[6] Judgment

Employees, Cases Involving

Genuine issue of material fact as to whether horse stable employers breached duty of care to employee to warn her about dangerous propensities of horse and to provide a reasonably safe work place precluded summary judgment for them on employee's negligence claim for injuries suffered when an untamed horse kicked her in the abdomen as she was administering oral deworming medication to the horse.

[7] Judgment

Employees, Cases Involving

Genuine issues of material fact as to whether warning stable employee about the dangerousness of horse which kicked her in the abdomen or whether taking precautions would have prevented employee's injury, and whether stable owners would have anticipated the danger of failing to warn employee or taking precautions to prevent her injury, precluded summary judgment on causation grounds for employers on employee's negligence claim.

[8] Negligence

Necessity of Causation

Negligence

Foreseeability

Proximate cause consists of cause-in-fact and foreseeability.

[9] Negligence

"But-For" Causation; Act Without Which Event Would Not Have Occurred

Negligence

Substantial Factor

The test for cause-in-fact or but for causation is whether the negligent act or omission was a substantial factor in bringing about the injury, without which the injury would not have occurred.

[10] Negligence

Foreseeability

"Foreseeability" in the negligence context means that a person of ordinary intelligence would have anticipated the danger his or her negligence created.

[11] Appeal and Error

Judgment

Employer failed to object at trial court level that employee's summary judgment affidavit was not based on personal knowledge and thus waived any objection to the affidavit on appeal. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(f); Rules App.Proc., Rule 33.1.

[12] Appeal and Error

Judgment

Although an objection to a defect in the substance of a summary judgment affidavit may be raised for the first time on appeal, lack of personal knowledge is a defect of form.

1 Cases that cite this headnote

[13] Appeal and Error
Judgment

Failure to object at the trial-court level that a summary judgment affidavit was not based on personal knowledge waives such objection on appeal.

1 Cases that cite this headnote

[14] Judgment
Employees, Cases Involving

Genuine issue of material fact as to whether horse stable employee suffered damages due to horse's kick to her midsection, which she alleged caused personal injury, physical pain, and mental anguish and which allegedly caused her to incur over $4,000 in medical bills, precluded summary judgment for employers, based on lack of damages, on employee's negligence claim.

Attorneys and Law Firms

***525** William V. Wade, William V. Wade & Associates, Houston, for appellant.

Sarah Anne Buzdar Vaughan, Gordon Law Firm, William R. Pilat, Davis Oretsky P.C., Audrey Lewis Juranek, Houston, for appellees.

Panel consists of Chief Justice RADACK and Justices ALCALA and BLAND.

Opinion

OPINION

ELSA ALCALA, Justice.

Appellant, Deborah Dodge, appeals from a no-evidence summary judgment and traditional summary judgment granted in favor of appellees, Jean Durdin, Granger Durdin, Raymond Durdin, Magic Moments Inc. and Magic Moments Stables. Dodge claims that she sustained an injury when an untamed horse kicked her in the abdomen as she was administering oral deworming medication to the horse pursuant to direction from her employer and supervisor, appellee Granger Durdin. Dodge's first, third and fourth issues on appeal assert that chapter 87 of the Civil Practice and Remedies Code, entitled "Liability Arising from Equine Activities or Livestock Shows" (the Equine Act), violates both the open courts and due course of law guarantees in the Texas Constitution and improperly allows for consideration of contributory fault in violation of section 406.033 of the Labor Code. In her third issue, Dodge asserts that the trial court erred by granting appellees' no-evidence motion for summary judgment because she raised issues of fact on all elements of her cause of action for negligence against appellees. Within her third issue on appeal, Dodge asserts that the Equine Act does not apply to her because she was an employee, rather than a participant in an equine activity, as that term is defined under the act. We sustain Dodge's third issue on appeal and therefore need not address her remaining appellate issues. We hold that the Equine Act applies to consumers and not employees and that Dodge is therefore not a "participant" under the Equine Act. We further hold that Dodge presented more than a scintilla of evidence on every element of her negligence claim and thus raised a genuine issue of material fact as to that claim. Accordingly, we reverse and remand the cause for further proceedings.

Background

Dodge asserts that appellees, her employers, never warned her of the following: that the horse was not trained, that it previously resided only in a pasture, that it was dangerous, that she should pay close attention to it, that it needed to be handled with care, and that she should be calm around it. Dodge acknowledges that Granger Durdin informed her that the horse "had not been handled much."

***526** At the time of Dodge's injury, appellees did not carry workers' compensation insurance. Dodge's suit alleged common-law negligence by asserting that appellees failed to provide her with a safe place to work, failed to address and care properly for her injuries, failed to warn her of the dangers associated with the horse that injured her, and failed to act as a reasonable and prudent person, business, or both would have acted under the same or similar circumstances. Appellees filed traditional and no-evidence motions for summary judgment, and Dodge responded to the motions. The trial court granted summary judgment for appellees without stating the grounds.

Standard of Review for Motions for Summary Judgment

We review summary judgments *de novo.* *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex.2005). Traditional summary judgment is proper only when the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX.R. CIV. P. 166 a(c). In reviewing a traditional summary judgment, we must indulge every reasonable inference in favor of the nonmovant, take all evidence favorable to the nonmovant as true, and resolve any doubts in favor of the nonmovant. *Id.* A defendant who moves for traditional summary judgment on the plaintiff's claims must conclusively disprove at least one element of each of the plaintiff's causes of action. *Little v. Tex. Dep't of Criminal Justice,* 148 S.W.3d 374, 381 (Tex.2004).

On the other hand, after adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim. TEX.R. CIV. P. 166 a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence raising a genuine issue of material fact. *Id.* We review a no-evidence summary judgment by construing the record in the light most favorable to the nonmovant and disregarding all contrary evidence and inferences. *Patriacca v. Frost,* 98 S.W.3d 303, 306 (Tex.App.-Houston [1st Dist.] 2003, no pet.). A trial court improperly renders a no-evidence summary judgment if the nonmovant presents more than a scintilla of probative evidence to raise a genuine issue of material fact. *Greathouse v. Alvin Indep. School Dist.,* 17 S.W.3d 419, 423 (Tex.App.-Houston [1st Dist.] 2000, no pet.). More than a scintilla of evidence exists when the evidence "would enable reasonable and fair-minded people to differ in their conclusions." *Forbes Inc. v. Granada Biosciences, Inc.,* 124 S.W.3d 167, 172 (Tex.2003). When, as here, a summary judgment does not specify the grounds on which it was granted, we will affirm the judgment if any one of the theories advanced in the motion is meritorious. *Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 157 (Tex.2004).

Applicability of the Equine Act

In their traditional motion for summary judgment, appellees asserted that they are not liable to Dodge under the Equine Act because (1) they are "equine activity sponsors"; (2) Dodge was engaged in "equine activities"; (3) a kick by a horse is "an inherent risk when dealing with equines, such as horses"; and (4) none of the exceptions that would allow appellees to be held liable apply to Dodge. In response, Dodge asserted that the Equine Act is inapplicable to her particular facts because (1) the Equine Act does not pertain to injuries caused to employees during the course and scope of employment, but instead to those participating in hobbies and recreational activities, (2) she does not meet the definition ***527** of "participant" in the Equine Act because she was "neither paying for an equine activity nor participating in such an activity for free, but rather she was simply being paid for her labor," (3) she was not involved in any of the seven behaviors constituting an "equine activity" as defined by the Equine Act, and (4) four of the exceptions that allow for liability under the Act apply to Dodge. Because we have concluded that Dodge is not a participant under the Equine Act, we need not address whether Dodge was involved in an equine activity or whether any exceptions to the Act apply to Dodge.

A. The Equine Act

The Equine Act established circumstances under which persons protected by the Equine Act are not liable to equine participants for damages resulting from dangers or conditions that are an inherent risk of an equine activity. *See Steeg v. Baskin Family Camps, Inc.,* 124 S.W.3d 633, 636 (Tex.App.-Austin 2003, no pet.). The Equine Act states as follows:

> Except as provided by Section 87.004, any person, including an equine activity sponsor, equine professional, livestock show participant, or livestock show sponsor, is not liable for property damage or damages arising from the personal injury or death *of a participant in an equine activity* or livestock show if the property damage, injury, or death results from the dangers or conditions that are an inherent risk of an equine activity or the showing of an animal on a competitive basis in a livestock show, including:
>
> (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. § 87.003 (Vernon 2005) (emphasis added).

[1] A participant "engages in an equine activity" by, among other things, assisting in the medical treatment of an equine animal. § 87.001(1). No court has addressed directly whether employees involved in equine activities are "participants" according to the Equine Act so as to remove any employer liability pursuant to the Labor Code. Accordingly, we determine the issue as a matter of first impression in Texas.

B. Statutory Construction

Statutory construction is a question of law. *Harris County v. Williams,* 981 S.W.2d 936, 938 (Tex.App.-Houston [1st Dist.] 1998, pet. denied). The cardinal rule of statutory construction is to ascertain the Legislature's intent and to give effect to that intent. *Id.* When determining legislative intent, a court looks to the language of the statute, legislative history, the nature and object to be obtained, and the consequences that would follow from alternate constructions. *Id.;* TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005). We presume that the Legislature intended a construction that makes the statute's result just and reasonable. *Williams,* 981 S.W.2d at 938; TEX. GOV'T CODE ANN. § 311.021(3). If ***528** the statute's language is not ambiguous, we must seek the Legislature's intent in the plain meaning of the words and terms used. *Williams,* 981 S.W.2d at 938. We consider each section and word in connection with the entire statute to ascertain its meaning and promote the statute's purpose. *Id.*

1. *The Statutory Language*

Dodge contends that she does not meet the definition of "participant" in the Equine Act because she acted as a paid employee for appellees when she sustained an injury. With respect to an equine activity, the Equine Act defines "participant" as "a person who engages in the [equine] activity, without regard to whether the person is an amateur or professional or whether the person pays for the activity or participates in the activity for free." TEX. CIV. PRAC. & REM.CODE ANN. § 87.001(9) (Vernon 2005). The statute does not state that it is inapplicable to people who are employees paid to work with equine animals. *See id.* However, the preliminary portion of the definition of participant, which refers to "a person who engages in the [equine] activity," is circumscribed by the concluding portion of the sentence, which suggests the term applies to consumers of equine activities. Specifically, the concluding portion states that a person is a "participant" regardless of "whether the person pays for the activity or participates in the activity for free." *Id.* Employees, like Dodge, who are involved in an equine activity neither pay to participate nor participate for free, as consumers do; rather, they are paid by employers for their work. Thus, although the definition of participant in the Equine Act does not expressly exclude an employee such as Dodge, the definition implies that the Equine Act does not apply to her by narrowing the class of "participants" to those who either pay to participate or who participate for free.

Only one court has discussed the definition of "participant" in the Equine Act. *See generally Johnson v. Smith,* 88 S.W.3d 729 (Tex.App.-Corpus Christi 2002, no pet.).[1] In *Johnson,* the court acknowledged that an independent contractor—not an employee—in charge of breeding and handling stallions was a participant under the Equine Act. *Id.* at 731. The appellate issue in that case was whether the Equine Act "applies to public equine operations open to the public for entertainment." *Id.* at 730. The issue before that court, therefore, is not at issue here.[2]

2. *Legislative Intent*

Although the legislative history for the Equine Act is limited, we will examine the committee reports to assist our analysis of the Equine Act. Pursuant to the Senate Committee Report, "the tourism industry in Texas has been adversely affected by the expansion of liability as well as charitable, philanthropic and educational organizations." SENATE NATURAL RES. COMM., BILL ***529** ANALYSIS, Tex. H.B. 280, 74th Leg., R.S. (1995). The Senate Report mentions only the tourism industry and is silent about any intent to affect the employer-employee relationship. The legislative history thus suggests that the Legislature enacted the Equine Act to limit the liability of equine sponsors to tourists and other consumers of equine activities.

3. *Nature and Object of the Equine Act*

[2] As set forth in the Senate Report, 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, not to abrogate the regulation of employer-employee relationships in Texas, as defined in the Labor Code.

4. *Consequences of Alternate Constructions*

If we were to conclude that the Equine Act limits liability of employers to employees, the effect of the Equine Act would be to abrogate well-settled employer duties in Texas under the Labor Code. Employers owe certain nondelegable and continuous duties to employees acting in the course and scope of their duties, including the duties to warn about the hazards of employment, to supervise activities, to furnish a reasonably safe workplace, and to furnish reasonably safe instrumentalities with which to work. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754 (Tex.1975); *Southerland v. Kroger Co.*, 961 S.W.2d 471, 472 (Tex.App.-Houston [1st Dist.] 1997, no pet.). The Legislature enacted the Workers' Compensation Act in the Labor Code in response to the needs of workers who, despite escalating industrial accidents, were increasingly being denied recovery. *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex.2000). The Act allows injured workers whose employers subscribe to workers' compensation insurance to recover without establishing the employer's fault and without regard to the employee's negligence. *Id.* In exchange, the employees received a lower but more certain recovery than would have been possible under the common law. *Id.* at 350. Since 1913, however, employers have been allowed to opt out of the workers' compensation system, resulting in employees retaining their common-law rights. *See id.* (*citing Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 511 (Tex.1995)).

To discourage employers from opting out, the Legislature included within the Act a penalty provision, found today at section 406.033 of the Labor Code, that precludes nonsubscribing employers from asserting that employees were contributorily negligent, assumed the risk, or that another employee's negligence caused the employee's injuries. *Kroger*, 23 S.W.3d at 349; TEX. LAB.CODE ANN. § 406.033 (Vernon Supp.2005). Due to the Legislature's expressed intent in enacting section 406.033 to delineate explicitly the structure of an employee's personal injury action against his or her nonsubscribing employer and the policy behind the Workers' Compensation Act to protect employees, the supreme court has held that courts should construe the Workers' Compensation Act liberally in favor of the injured worker. *Kroger*, 23 S.W.3d at 349–51. Moreover, we may not construe a statute in a manner that supplies, by implication, restrictions on an employee's rights not found in section 406.033's plain language. *Id.* at 349. Consequently, without express legislative action, we cannot conclude that by enacting the Equine Act, the Legislature intended to lessen the consequences imposed on employers who choose not to subscribe to workers' compensation insurance. ***530** Because the Equine Act does not expressly state an intent to abrogate the Workers' Compensation Act and the Legislature's policy to protect workers, the consequence of including employees among those subject to the Equine Act would be to remove well-settled employer duties under the Labor Code without express, supporting legislative intent. [3]

In summary, although the Equine Act does not specifically exclude employees acting within the course and scope of their employment from the definition of "participant" under the Act, the statutory language specifically encompasses those who pay to participate in the equine activity or who choose to participate for free. Employees neither pay to participate in the equine activity nor participate for free; rather, they are paid for their labor. The purpose of the Equine Act was to limit the liability of those involved in the tourism industry, rather than to limit an employee's right against his or her employer. Further, the Equine Act lacks express legislative intent to abrogate employer duties as delineated in the Workers' Compensation Act. For these reasons, we hold that Dodge, as an employee covered by the Workers' Compensation Act, was not a participant in an equine activity under the Equine Act.

No–Evidence Motion for Summary Judgment Concerning Negligence Claim

In her third point of error, Dodge contends that she raised issues of fact on all elements of her negligence cause of action. Dodge's response to appellee's no-evidence motion for summary judgment asserted that the undisputed evidence showed that she was injured while working in the course and scope of her employment for a stable owned and operated by appellees, that she was injured by an untrained horse that kicked her, and that she was not warned about the horse.

[3] **[4]** An employer who does not subscribe to workers' compensation insurance coverage is responsible for work-related injuries under common-law negligence principles. TEX. LAB.CODE ANN. § 406.033(d) (Vernon Supp.2005). To recover, the plaintiff must prove negligence of the employer, or of an agent or servant of the employer, acting within the general scope of the agent's or servant's

employment. *Id.* To establish negligence, a plaintiff must produce evidence that establishes a duty owed, a breach of that duty, and damages proximately caused by the breach. *Southerland*, 961 S.W.2d at 472. Although an employer is not an insurer of the employees' safety at work, an employer owes certain nondelegable and continuous duties to employees, including the duties to warn about the hazards of employment, to supervise activities, to furnish a reasonably safe workplace, and to furnish reasonably safe instrumentalities with which to work. *Id.; Farley*, 529 S.W.2d at 754.

We examine the entire summary judgment record to determine whether Dodge presented more than a scintilla of evidence as to each element of her cause of action to raise a genuine issue of material fact.

A. Duty

[5] Appellees contend that Magic Moments only and not the other appellees ***531** employed Dodge and thus that only Magic Moments owed Dodge a duty of care. To prevent summary judgment on whether all appellees owed her a duty of ordinary care, Dodge had to present more than a scintilla of evidence that appellees were Dodge's employers and that Dodge was acting within the course and scope of her employment when she was injured. Although they argued that only Magic Moments Stables and Magic Moments Inc. employed Dodge, they did not offer evidence in support of this contention in their summary judgment motion, in keeping with the assertions of no evidence as to Dodge's negligence claim. In her affidavit in response to the motion for summary judgment, Dodge states the following:

> While employed by one of [sic] more of the named Defendants, it was never explained to me who my actual employer was. I took orders from the Defendant Granger Durdin. I was hired by the Defendant Granger Durdin and the Defendant Jean Durdin. For tax purposes, I ultimately received a W–2 tax form from "Magic Moments" even though this ostensible entity has never been identified with any particularity by any of the five named Defendants in this cause in response to all of my discovery to them. Similarly, in response to my efforts at discovery, I have never been provided with a single piece of paper representing the business records of my "employer" which would identify exactly who my employer was[,] what it was, the type of business, etc.—even though I subpoenaed this information.

Construing this information in the light most favorable to Dodge, we conclude that Dodge produced some evidence that she was employed by appellees. Appellees do not distinguish their individual relationships to Dodge in their motion for summary judgment. This evidence rises to a level that would enable reasonable minds to differ as to who employed Dodge. Further, Dodge stated that she was employed by appellees and that she was applying the deworming paste to the horse pursuant to instructions from her supervisor, Granger Durdin, at the time of the injury. Thus, Dodge presented more than a scintilla of evidence that she was acting within the course and scope of her employment at the time of her injury.

B. Breach

[6] Appellees contend that no evidence exists to support a breach of any duty owed to Dodge. To prevent summary judgment, Dodge had to present more than a scintilla of evidence that appellees breached their duty of care to her. In her affidavit, Dodge repeatedly emphasized that appellees did not warn her about the horse's dangerous propensities. Further, she states that appellees did not provide her with safety instructions or instructions regarding how to administer deworming medication and that appellees did not provide other workers to assist her in handling the animals.

Construing this information in the light most favorable to Dodge, we conclude that Dodge produced more than a scintilla of evidence that appellees breached their duty of care to warn Dodge about the dangerous propensities of the horse and to provide a reasonably safe work place.

C. Proximate Cause

[7] **[8]** **[9]** **[10]** Appellees contend that Dodge did not produce evidence that appellees' breach of any duty owed to Dodge caused her injury. Proximate cause consists of cause-in-fact and foreseeability. *Farley*, 529 S.W.2d at 755. The test for cause-in-fact or "but for" causation is whether the negligent act or omission was a substantial factor in bringing about the injury, without ***532** which the injury would not have occurred. *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820 (Tex.2002). Foreseeability means that a person of ordinary intelligence would have anticipated the danger his or her negligence created. *Id.*

[11] In her affidavit, Dodge states that since her injury, she has learned that her injury could have been prevented if appellees had taken any of the following precautions: (1) provided other workers to help control the horse, (2) restrained the horse at the time of the accident, (3) hobbled the horse before applying medication, or (4) placed the horse in a narrow loading chute before applying medication. Appellees contend that this sentence is inadmissible because it is not based on personal knowledge. However, in their reply to Dodge's response to the summary judgment, appellees did not specifically object to this statement in Dodge's affidavit and merely generally objected to the affidavit as a whole based on personal knowledge.

[12] **[13]** Objections to defects in pleadings, whether of form or substance, must be specifically pointed out by exception in writing. TEX.R. CIV. P. 90, 166a(f). Appellees' general objection at the trial level to Dodge's affidavit was not sufficient to preserve error. *Id.;* TEX.R.APP. P. 33.1. Although appellees correctly assert that an objection to a defect in the substance of an affidavit may be raised for the first time on appeal, lack of personal knowledge is a defect of form. *Rizkallah v. Conner,* 952 S.W.2d 580, 585 (Tex.App.-Houston [1st Dist.] 1997, no writ). Failure to object at the trial-court level that an affidavit was not based on personal knowledge waives such objection on appeal. *Id.* By not asserting their admissibility objection in the trial court, appellees have thus waived any complaint that Dodge's statement was not based on personal knowledge.

Construing the information in Dodge's affidavit in the light most favorable to her, we conclude that Dodge presented more than a scintilla of evidence regarding cause-in-fact because reasonable minds could differ as to whether warning Dodge about the dangerousness of the horse or taking precautions would have prevented Dodge's injury. We further conclude that some evidence exists that appellees, as stable owners, would have anticipated the danger of failing to warn Dodge or taking precautions to prevent her injury.

D. Damages

[14] Appellees contend that Dodge did not present evidence to support her claims for loss of earnings and loss of wage earning capacity. We disagree. In her affidavit, Dodge testifies that the horse's kick to her midsection "knocked me backward and to the ground, causing me a great amount of personal injury, physical pain, and mental anguish." Additionally, the summary judgment record shows that Dodge incurred over $4,000 in medical bills as a result of her injury.

We conclude that some evidence exists that Dodge suffered damages resulting from appellees' negligence. Therefore, we hold that Dodge presented more than a scintilla of evidence on every element of negligence.

Conclusion

We reverse the summary judgment rendered by the trial court and remand the cause for further proceedings.

Footnotes

1 In *Johnson v. Smith,* the court held that the Equine Act applied to limit liability but that fact questions remained as to whether any exceptions applied, specifically, whether the sponsor made a reasonable and prudent effort to determine the ability of the participant to engage safely in the activity and whether the sponsor's conduct rose to the level of willful or wanton disregard of the participant's safety. 88 S.W.3d 729, 733 (Tex.App.-Corpus Christi 2002, no pet.).

2 The only other court that has interpreted the Equine Act addressed whether the injury was due to risks inherent in equine activity and whether any exception to the Equine Act applied. *Steeg v. Baskin Family Camps, Inc.,* 124 S.W.3d 633, 636, 640 (Tex.App.-Austin 2003, no pet.).

3 In *Lawrence v. CDB Services., Inc.,* the supreme court held that allowing *voluntary* pre-injury employee elections to participate in nonsubscribing employee benefit plans in lieu of exercising common-law remedies does not violate public policy. 44 S.W.3d 544, 554 (Tex.2001). Here, no evidence in the record suggests that Dodge enrolled in a voluntary occupational insurance plan in consideration for agreeing that such plan constituted the exclusive remedy for her job-related injuries.

APPENDIX

4

14TH COURT OF APPEALS JUDGMENT

May 31, 2012

JUDGMENT

The Fourteenth Court of Appeals

BRENDA YOUNG, Appellant

NO. 14-11-00376-CV V.

TISA MCKIM AND JACQUELINE MCKIM, Appellee

This cause, an appeal from the judgment in favor of appellees, Tisa McKim and Jacqueline McKim, signed April 21, 2011, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, Brenda Young, to pay all costs incurred in this appeal. We further order this decision certified below for observance.

APPENDIX

5

TRIAL COURT JUDGMENT

CAUSE NO. 2010-24816

BRENDA V. YOUNG	§	IN THE DISTRICT COURT
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
TISA MCKIM AND JAQUELINE MCKIM	§	
	§	270TH JUDICIAL DISTRICT

ORDER ON DEFENDANT TISA AND JACQUELINE MCKIM'S TRADITIONAL MOTION FOR SUMMARY JUDGMENT

On this _____ day of _____, 2011 came on to be heard the above referenced Traditional Motion for Summary Judgment. The Court, having considered the Motion, responses, all pleadings on file, and arguments of counsel, is of the opinion of that summary judgment should be GRANTED. It is therefore

ORDERED, AJUDGED, and DECREED that Plaintiff take nothing by her claims against Defendants in this lawsuit.

All costs of court are hereby taxed to Plaintiff.

This summary judgment is final as to all claims raised in this lawsuit and all parties.

Signed this 21 day of April, 2011

JUDGE PRESIDING