CAUSE NO. 14-11-00376-CV

IN THE COURT OF APPEALS
FOR THE 14 TH DISTRICT
HOUSTON, TEXAS

BRENDA YOUNG

APPELLANT

V.

TISA MCKIM AND JAQUELINE MCKIM

APPELLEES

APPELLANT'S MOTION FOR REHEARING

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a. This Court erred in holding *sua sponte* that appellant was an independent contractor rather than an employee.

b. This Court further erred in that whether one is an employee or an independent contractor, neither are participants under the Equine Act.

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APPELLANT'S GROUND FOR REHEARING FOUR:

This Court erred in holding that Appellant had waived a required part of Appellee's burden of proof that warning signs required by the Equine Act had been posted.

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, BRENDA YOUNG, Appellant herein, by and through her undersigned counsel and pursuant to TEX. R. APP. P. 49.1, and respectfully requests this Court to reconsider its opinion in this cause delivered on May 31, 2012. In support thereof, the Appellant would show this Court the following:

APPELLANT'S GROUND FOR REHEARING ONE:

This Court erred in holding that non-consumers of equine activities qualify as participants in equine activities as defined in 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.). 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 this Court's interpretation, years of employment and independent contractor statutes and common laws have been silently discarded by the Legislature through the Equine Act. This Court's interpretation under this section would give total immunity to the owners of horses. In fact the Court urges at page

[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.*).

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

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

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 at least the medical expenses of that worker.

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

APPELLANT'S GROUND FOR REHEARING TWO:

This Court erred in holding that a paid worker, employee or independent contractor, is a participant under the Equine Act.

a. This Court erred in holding *sua sponte* that appellant was an independent contractor rather than an employee.

b. This Court further erred in that whether one is an employee or independent contractor, neither are participants under the Equine Act.

Under the summary judgment standard there was a fact issue regarding whether Young was an employee of McKim or not. There was no such determination by the District Court, and while this Court's review is *de novo*, this Court's determination of a disputed fact issue *sua sponte* and not determined by the District Court is improper. Tex.R.Civ.P. 166a(c).

Under the right to control test, this Court held that the varying facts presented "conclusively shows that Young was an independent contractor when Jasper kicked her." Appellant Opinion at 9. The Court came to this conclusion after weighing the various evidence presented by both sides. *See id.* at 8-9. What the Court fails to address however, is that while this Court may find that the majority of the facts so far presented in a summary judgment setting sway this Court to believe that Young was an independent contractor that the very fact that the Court had to present both sides of the evidence and make a decision shows that there was a fact issue. There were, by the very argument this Court made, a

separate set of facts supporting either side. When viewed under the summary judgment standard, therefore, where every inference must be made in favor of the non-movant and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in favor or the non-movant, the non-movant has, at the very least, created a fact issue. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). *See also Nixon v. Mr. Property Mgmnt. Co.*, 690 S.W. 2d 546, 548-49(Tex. 1985)

This Court also erred in holding that it makes no difference if Young was an employee or an independent contractor for, as stated above, paid workers are not "participants" under the Equine Act. Therefore this Motion for Rehearing should be granted, and the District Court granting of the Summary Judgment should be reversed.

APPELLANT'S GROUND FOR REHEARING THREE:

This Court erred in holding that the Summary Judgment evidence does not raise a genuine issue of material fact as to the exceptions to immunity found in the Equine Act.

Issues of intent and knowledge are not susceptible to being readily controverted and, therefore, are not appropriate for summary judgment. *Frias v. Atlantic Richfield Co.,* 999 S.W.2d 97, 106(Tex.App.-Houston [14th District] 1999, *pet. denied),* and *Wohlstein v. Alliezer,* 321 S.W.3d 765, 772(Tex. App. –Houston [14th Dist.] 2010 *no pet.*). *See generally Allied Chemical Corp. v. DeHaven* , 752

S.W. 2d 155, 158(Tex.App. – Houston [14th Dist. 1988] *writ denied*) (disallowing affidavits showing that there was an intent to form a partnership),. *See also Restatement 2d of Torts § 8A(1965).*The issue of the Equine Act exceptions go to the thought process, the intent of the McKims.

The McKims failed to conclusively establish that a reasonable and prudent effort was made to determine whether Young could safely engage in the care of a previously abused and gelded horse. The language of *Loftin*[2] itself distinguishes *Loftin* from this case. *See Loftin*, 341 S.W.3d at 359. *Loftin* states: "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." *Id.* What this Court ignores is the plain language of the statute.[3] *Loftin* dealt with a very visible and common danger involved in equine activities, namely riding horses through dense foliage and a rider of average ability. *See Loftin* at 344-45. An average rider would understand the dangers associated with such an activity and would be able to see said dangers before entering into it. *See id. Loftin*, therefore, does not involve a case where the owner of the horse knew about an inherently

[2] *Loftin v. Lee*, 341 S.W.3d 352(Tex. 2011).

[3] The applicable §87.003 states: [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… 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 ("Equine Act").

undiscoverable defect with the horse, which was not disclosed to the alleged participant, where this very lack of disclosure and therefore assessment of the participant's ability to handle said danger, created the risk and resulting injury. *See id.* *Loftin*, thus, is simply not on point. *See id.* *Loftin's* limitation on the "reasonable and prudent effort" standard of the act, therefore, is entirely inapplicable to this case and because of this the Appellant did raise a genuine issue of material fact on this issue, especially when viewed in a light most favorable to the non-movant. *See id.*; *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984); Tex. Civ. Pract. & Rem. Code §87.003, before 2011amendement.

The act further provides no immunity when a defendant commits "an act or omission with willful or wanton disregard for the safety of the participant and that act or omission causes the injury." Act of Sept. 1, 2001 77th Leg., R.S., Ch. 1108, 2001 Tex. Gen. Laws 2458 ("Equine Act"). This also requires a determination of intent; and, thus is not a proper summary judgment subject.

This Court held that while "Young point[ed] to the testimony in the summary-judgment record that horses that have been malnourished in the past can experience "flashbacks" of that treatment that the record "contain[ed] no explanation as to what exactly a "flashback" is" or why "flashbacks" are dangerous. A look at the definition of the words "flashback" and "malnourished" however explains this very argument away.

Merriam Webster's dictionary describes a flashback as"… 2(b): a past incident recurring vividly in the mind." This same dictionary describes "undernourished," for which malnourished is a perfect synonym as: "1: supplied with less than the minimum amount of the foods essential for sound health and growth; 2: poorly supplied with vital elements or qualities." Thus, under the common vernacular, the horse would have a flashback to a state in which an essential element necessary for life was lacking. It is disingenuous, at this point, to argue that the combination of these two words would not trigger a state in which an animal would become dangerous as a very basic survival mechanism would have triggered.

Moreover, this Court concludes that despite there being evidence that that "freshly gelded horses' behavior is sometimes 'questionable'" that this should have been disregarded because "Jasper was well-behaved both at the SPCA and after McKim [was] adopted by him." Appellate Opinion at 11. The Court, however, ignores that this lack of knowledge about either the gelding or any sign that the horse might act erratically is the very reason that a recently gelded horse *is* dangerous. If the horse had shown signs of "questionable behavior" then it would be possible, nay necessary, to take precautions for said behavior. But, as stated above, there was *no* notice of any possibility that the horse might act erratically therefore no possible precaution could be taken by Young. It is illogical to argue

that an undisclosed and inherently undiscoverable danger was negated by the fact that there was no outward sign that the danger existed. Its undiscoverable nature is the exact reason why it is dangerous in the first place. To argue by analogy, no one would ever argue that the dangerous nature of a hidden pitfall undisclosed by a landlord is negated by the fact that the tenants did not discover the pitfall and that it appeared normal.

Based on both of the foregoing reasons, the Appellant clearly showed that, at the very least, Young created a fact issue on these issues, especially when every inference must be taken in favor of the non-movant. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984).

APPELLANT'S GROUND FOR REHEARING FOUR:

This Court erred in holding that Appellant had waived a required part of Appellee's burden of proof that warning signs required by the Equine Act had been posted.

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, appellees have 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.*[4]

Appellees, not the Appellant, had a duty to prove the application of the Equine Act. This is a fact which these Appellees 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).[5]

The Appellant once again urges, that since the movants had not established that movants were entitled to summary judgment, because the movants had not

[4] There is no such written contract in the present case.
[5] 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.

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, Appellant Brenda Young respectfully prays that her Motion for Rehearing be granted, that this Honorable Appellate Court reverse the Trial Court's ruling on Appellees 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 Appellate Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael M. Essmyer, Sr., hereby certify that a true and correct copy of the foregoing Appellant's Motion for Rehearing was served on all counsel of record via both certified mail RRR and electronically, as indicated below on the 13th day of June, 2012.

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