ORAL ARGUMENT – 02-16-05
03-1107
BASKIN FAMILY CAMPS V. STEEG

BELL: This is a case of statutory construction, and it is also one of first impression in Texas. The Equine Act presents a broad issue: What is the meaning of the phrase "inherent risk of equine activities"? In 1995 the legislature passed the liability for Equine Activities Act. The Equine Act codifies the assumption of the risk doctrine, which is inherent in riding a horse. The express purpose of the act according to is original bill sponsors and throughout the legislative history is to protect a growing industry in Texas that commercially and charitably provides horses for equine recreation.

This case arose when a rider fell from his horse after the horse broke and ran and then suddenly stopped. The rider filed suit against Baskin Family Camps for negligence. Family Camps asserted multiple defendants, including a limitation of liability found in the Equine Act. Family Camps furthermore sought summary judgment on multiple grounds, including this limitation and request the DC to construe the statute at issue and determine whether a slipping saddle is an inherent risk of riding a horse.

O'NEILL: Does it matter what causes the saddle to slip?

BELL: I'm answering yes on that based on the examples from some of our sister state's cases. If it an atypical slipping of the saddle as the Cooperman v. Davis case stated, which is a 10th circuit case ______ diversity over a Wyoming statute. In that case the court said, that saddles can slip for many reasons, including a situation where in mounting the horse, while you are trying to mount, the saddle begins to slip off and hangs underneath the belly of the horse, that's not an inherent risk in the activity. But the Cooperman court further distinguished but the fact that when you traverse the entire trail ride before the slippage occurs, and the rider himself admits that the saddle was comfortable throughout the course of the trail ride, that there was no problem until as the rider describes it, the horse spontaneously ran and then suddenly stopped. That has to be classified as an inherent risk of the activity.

GREEN: Is an inherent risk on the owner of the horse, owner of the camp doesn't apply the cinch properly?

BELL: That's difficult to answer with the term properly. Just as the Cooperman court noted, cinching a saddle is inherently an imprecise process. There is no scientific precision involved in cinching a horse.

GREEN: A good horseman knows how to cinch a horse properly.

BELL: Yes. To cinch it properly in accordance with the horse. And it's undisputed

facts in this case that the equine sponsor and the wrangler at issue cinched the horses twice, particularly this horse at issue, because what we describe as a horse acting like a horse. As Ms. Fisher determined, this horse rose, released air. And so she went back and regirted the horse and cinched it up tighter. But there was no problem with the saddle throughout the entire course of the ride. The rider himself concedes throughout the record that the saddle did not slip until this occurrence. In fact, as the Cooperman court discussed it depends on how you phrase the question. If the question is: Do saddles slip? Is saddle slipping an inherent risk? The answer to that question should be yes.

O'NEILL: Well based on what you just said, I think the answer to that question should be it depends.

BELL: But actually the next way to raise the question as the Cooperman court noted said, If you're phrasing the question, Does a saddle slip because the buckle is broken an inherent risk? And the answer to that question is no. So I agree with you, that there is sometimes additional words that need to be included in the question. But those words are not terms of negligence.

O'NEILL: What if they forget to buckle it properly? I don't mean in terms of tightness.

BELL: I think the court would be, or any court interpreting the facts in that situation, would be in the position of assessing whether this activity, whether the injury occurred because of something the horse did, something the activity performed.

O'NEILL: That's my concern. What is the state of the summary judgment record here? Do we know from the pleadings in the summary judgment record that there is - I had thought there was an allegation that there was something not hooked up right about it.

BELL: No. There is not. In fact in the amended petition that was filed and incorporated within the motion for summary judgment and responses to it, there are allegations that because the saddle slipped something must have gone wrong. It's the and/or, the but if I should say analysis. If you done it correctly, the saddle shouldn't have slipped; therefore, you must not have done it correctly. But what the CA did wrong in assessing this and leap into the factual record was they didn't begin with proper ____ of statutory construction. Because if we look to the plain meaning of the statute itself it answers these questions without us having to create a bright line.

GREEN: Does this statute protect an owner of a dude ranch that hires an incompetent horse person?

BELL: It depends on what the injury is that is resulting. If the injury results from the horse bolting and running...

GREEN: Say it results from a cinch that is not, or a saddle that's not put on properly?

BELL: It's the exact same situation that the court in Cooperman looked at. And it said that we have to go with the general rule that the saddle slips because of the inherent risk. And that you would be protected. Because cinching a saddle is imprecise. Every single time you cinch a saddle...

GREEN: What if it puts a bridle on improperly? The bit didn't go into the mouth properly.

BELL: The Cooperman court said that most important involvement short of being faulty tack, which is an exception, whether it rises to the level of being faulty or defective tack, which would give us a different result. These are what are considered according to the Cooperman court undesirable but collateral risks of horseback riding. We can't control, as the word used within the CA's and again in the rider's briefing, the issue is not whether it could be controlled or prevented. All of these can be controlled and prevented.

GREEN: So a customer can rely upon the owner of this dude ranch to properly put equipt the horse?

BELL: Yes, within the narrow exception found in 87.004, so long as it's not faulty tack or defective equipment. But those are exceptions to the rules. Those assume that we've gotten over the hurdle of inherent risk, which we believe inherent risk of an equine activity is certainly met in this case. Slipping saddles are an inherent risk of the activity. The question as the Sapone court noted which is also a 10th circuit case interpreting Wyoming state law said the question becomes whether it's an atypical situation. Whether it's an a-typical scenario. For example, mounting a horse, you haven't engaged in the activity yet, and the saddle falls and hangs under the belly of the horse. That was not an inherent risk of an equine activity.

It's also important these statutes that are relied on that actually include the phrase "could not reasonably been prevented, controlled or altered."

JEFFERSON: It sounds to me like you've conceded that it's possible that a failure to cinch the saddle properly could lead to liability. Is that not true? Because their petition says, one of the allegations of negligence were a failure to properly inspect and secure the saddle before the ride.

BELL: Yes. That's one of their negligence allegations. But I don't mean to misstate my position of the law. I think the Cooperman court is absolutely correct, that a slipping saddle is an undesirable but inherent risk of equine activity.

JEFFERSON: But if the saddle is not cinched at all, a failure to secure, you say that that would not be grounds for liability?

BELL: In the Halpern case, which is the only case that said that, has the language of being reasonably prevented, altered or controlled. It has additional requirements that we don't

possess in our statute. It includes the evaluation of could the wrangler have done something different? When you add those words to it, it certainly changes the evaluation of whether it's an inherent risk. After the Halpern case, after that ruling saying, Well perhaps there was another reason for it, the Wyoming legislature amended its statute and remove those terms because of the Halpern decision.

O'NEILL: What if this incident had happened, the horse had not bolted, they were 5 minutes in to the ride and the saddle slipped?

BELL: At that point you would probably turn to the exceptions to see if there was faulty tack involved, if it rose to the level of wilful or wonting behavior.

GREEN: Those are all fact questions aren't they?

BELL: But the exceptions of wilful and wonting, if they are pleaded and evidence presented it could potentially be issues of fact. But those aren't the facts of this case before the court. We don't have allegations of wilful and wonting. And we don't have a factual scenario of the saddle slipping earlier in the trail ride. We have exactly the fact pattern of what occurred in Cooperman.

O'NEILL: Again where do we parse it? Are you calling on judges then to decide when in the continuum it wouldn't be contributable to operator or error or whoever cinched it error. Is your answer then that if it were the first 5 minutes with no bolting or running or anything like that would have a fact issue as to whether there could be liability under the act?

BELL: No. Because I firmly believe just as the Cooperman court stated, that this is still a question of law because it goes directly to duty. While we have many statutes, such as the good Samaritan statute that this court examined in McIntyre v. Ramirez, and that I believe both parties rely on for proper canons of statutory construction, if the intent of the legislature was only to protect the rider from these extreme acts recognizing that the rider assumed that there are a myriad of risks including undesirable collateral risk, such as slipping saddles...

GREEN: The courts aren't really equipped to decide whether a slipping saddle is an inherent risk of horseback riding. Some expert testimony that the wrangler's statements and so forth, is that's what required in covering this duty issue?

BELL: No. It's not. As found in the legislative history of this act, it was intended for this statute to be read broadly to cover the sponsor. Everything was to be given an eye with protection of the sponsor. Construed broadly. And if the question of whether it's propensity of the horse to draw down in favor of the sponsor with only the exceptions those narrowly exclusive lists of exceptions in 87.004 requiring any sort of factual analysis. The automatic reaction of the court of a horse bolting as a matter of law, because it becomes a question of duty, should determine whether the event fell within the inherent risk (slipping saddle in our case) of riding the horse. Volente(?) non_______ injuror(?) is the principle that I understand the risk that I'm taking getting on this horse,

and I waive any recovery for it. That is the assumption of the risk doctrine that was codified in this statute.

If we have a negligence test, as the CA erred in this case, the CA presupposes that the sponsor would have to show absence of negligence on its part, any negligence before triggering the statute. For example, I would have to show as an equine sponsor, there was absolutely no negligence in me cinching the saddle before I could find the protections of the statute. But if I can achieve a finding of no negligence, I don't need this statute. The purpose of the statute was to fill that very gap. In fact in the letter brief filed by one of the original bill sponsors whose testimony is found throughout the record before this court, this was intended to broaden the protections and to be construed in favor of the sponsor. If the horse bolts and runs, horses do that. An animal acts like an animal. And if I have to secure a no negligence finding before getting the act's protections, I have no need of the act, because I have a no negligence finding.

WAINWRIGHT: Let me ask you some specific questions, and tell me if you believe in these examples the statute provides immunity because the activities are inherent risks. If the cinch is not buckled at all at the beginning of the ride does that protect Fisher and the camp?

BELL: No. It wouldn't under Cooperman. That is a faulty tack.

WAINWRIGHT: There's a defect in the buckle. For some reason it latches but then it doesn't hold.

BELL: That would not protect us because of the exception in 87.004.

WAINWRIGHT: Let's assume that it's cinched correctly, there is no defect in the equipment, but after some period of time is it invariably the case that the saddle is going to need to be regirded, cinched tighter?

BELL: Yes. It can depending on the length of the ride.

WAINWRIGHT: Assuming it's a ride long enough that you are going to need to recinch it. Whose obligation is it then to do that?

BELL: It depends on the various dude ranches. A lot of them require a report by the rider, I think my saddle is getting a little lose at mid point breaks. Under the facts of this case when they were checked at the mid point ride, I would say the act still covers. Protects family camps.

WAINWRIGHT: Let's assume at the mid point there is a recinching, a regirding and it's tightened but the horse is sweating so much that the saddle still slips. In that situation...

BELL: You are protected by the act. Just as the Cooperman court stated and is actually recited by the CA in this case, saddles slip for many reasons: horses sweat; saddles stretch;

the saddle pads compress; and riders could have a potential to lean from one side to the other. The record demonstrates that in the rider's own words this was a spontaneous event.

GREEN: What's the amount of damages alleged?

BELL: Actually I don't have that in front of me. I know it's a significant sum. But what is a particular significance in the line of questioning by J. Wainwright? In that series of questions there are still opportunities to sue. The legislature narrowly carved out those exceptions. But we have to first get over the hurdle of is it an inherent risk? There was no statutory construction that occurred by the CA. If we look at the plain meaning of the statute as the code construction act requires us to do so, we have to look at the meaning of these terms within the context in which they are written. And we have to do so with an eye towards the objective of the law and the legislative history, and the consequences of the particular construction.

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RESPONDENT

GREEN: Do you know how much you are suing for?

DAVIS: The amount alleged was $1.5 million.

BRISTER: $1.5 million because the saddle slips sideways. How many saddles do you think slips sideways in Texas in a year?

DAVIS: I don't have statistics on that.

BRISTER: Probably thousands. Right?

DAVIS: Could be.

BRISTER: And there's no question, the reason this was passed was so most of those people wouldn't be able to sue. That was the legislature's intent.

DAVIS: As I read the testimony before the legislature and the statements they made on the record was to take away the cause of action where the sponsor hasn't done anything wrong.

BRISTER: How have you been able to recover in Texas up to the time of the statute if the sponsor didn't do anything wrong? Under what theory?

DAVIS: Failure to warn. The statute...

BRISTER: Failing to warn would be doing something wrong. Right?

DAVIS: Under a failure to warn case - say you're riding along, lightning strikes, and the horse bolts. The sponsor obviously didn't cause the lightning or any such thing like that. But the rider would say, Hey if you had told me these risks and told me how dangerous horseback riding is, I wouldn't ever have done it.

BRISTER: So the statute was solely aimed at failure to warn?

DAVIS: Well that's the principle effect. If you look the statute actually focuses on posting a warning.

OWEN: It's not really warning is it? It just notifies them that you don't have a cause of action.

DAVIS: Right. You don't have a cause of action - it takes away that cause of action.

OWEN: It's not a warning.

DAVIS: Notice. I guess would be...

OWEN: Given the facts of this case what is your proof going to look like? How can you prove that it was a failure of someone to properly cinch as opposed to the horse losing weight during the course of the day, or the saddle pack compressing, or the sweat of the horse, or Mr. Steeg improperly shifting his weight?

DAVIS: First, the slipping saddle becomes a focus although it's not the only basis for negligence. As far as the slipping saddle goes, in the evidence before the TC in summary judgment was the affidavit of the President of American Horseman's Safety Advisory Council. She's an expert horseback rider who reviewed the deposition of the wrangler and said that the wrangler did not properly cinch the saddle. I think it was some issue of not ____ the horse after you first cinch it to let it blow correctly, and, therefore, she didn't do it right. There is also evidence that Steeg did complain that the saddle was loose while they were just walking along. So it wasn't something that was tight, tight, tight and all of a sudden it slipped. It was loose but they were walking.

JEFFERSON: Before the ride?

DAVIS: Before the accident. Before the horse ran off and fell. And that's in the CA - that is discussed in their opinion.

GREEN: Where in the statute is there a carve out for negligence?

DAVIS: It's affected by the term inherent risk. If inherent risk of equine activity is going to mean something, then you've got to separate what is inherent and what is external.

GREEN: What is inherent in your view?

DAVIS: Inherent is you're riding along and a snake comes out, and the horse bolts.

O'NEILL: Well the horse bolted here. And the horse ran and stopped suddenly and that's what caused the saddle to slip. But there is some inherent activity here that caused the injury. How do you parse through the two?

DAVIS: And that's the difficult part. The issue becomes, well what if you've got inherent risk and you've got negligent conduct? In this case we're saying and the expert is backing us up that you don't lead a horse ride from the back where people in the front can gallop out. You've got to be a the front and maintain control of the ride. When you have a situation where you've got negligence conduct and the negligence conduct leads to a horse doing what horses do and injured somebody.

BRISTER: So all the statute did was eliminate cases where no reasonable person could allege anything but an absolute act of God caused it. Everything short of that, the statute didn't do a thing about we're going to send all of those to the jury anyway. So this statute was just against God and nobody else.

DAVIS: No.

BRISTER: Name me one situation that the statute stops now other than your failure to warn thing, that wasn't protected before. What difference did the statute make?

DAVIS: Well now if you're riding along their trail and the horse loses footing and falls over...

BRISTER: Unless you throw in an allegation well you should have been in the front, you should have been in the back, you should have had the horses in a different order, you should have had the horses farther apart, you should have had them closer together, you should have had a bigger trail, a smaller trail. Lawyers are inventive people. They can always come up with something else, some circumstance that you could have done this trail ride out in nature someway where this might not have happened.

DAVIS: If the act seems limited in what provides the sponsors, we have to go back to the sponsor's testimony and what they were asking for from the legislature. And that was exactly what they asked for is the testimony appearing _________. They brought these examples of the boy being killed when the lightning struck and they asked for protection against that. That's what they got. Now they would like some more. They are in the right city, but the wrong building if they want to get more protection out of the act than ____________.

OWEN: Let's assume that experts all agree that if you ride a horse for a period of time

it's going to need to be recinched. And so at some point you know during the ride it's going to need to be recinched . Does the statute give any protection if you are a minute late for recinching? Would you agree that's inherent risk if you know that on a lengthy ride you are going to have to recinch?

DAVIS: I would say yes. It's an inherent risk of - I guess if you know you're going to be riding for a long time, it's going to be hot and the saddle is going to come loose. Okay that's part of horseback riding. I would say what's not part of horseback riding is say a wrangler who just ignores that situation...

OWEN: That's my question. You're sort of on a continuum here. Is there a standard the wrangler has to stop every 10 minutes, every 15 minutes, every 30 minutes, every hour. I mean what protection does the statute give if it's a given that if you ride for very long your horse is going to lose weight actually and there's going to be some perspiration and it's going to get slippery.

DAVIS: Well the statute certainly doesn't provide any guidance as to the specific situations. That sounds to me as if that's an area of really expertise. Only people who are very experienced in horse riding and wrangling are going to know when you need to recinch a saddle.

O'NEILL: Cooperman's analysis was that the slipping saddle is an inherent risk unless you can show that the cause of the slippage was sponsor error. Wasn't that what Cooperman held? I had thought you were going to be arguing Cooperman in support of your position.

DAVIS: Correct. If it's sponsor error, at least the slipping saddle, then it's not an inherent risk.

O'NEILL: How do you decide that on summary judgment? Is the burden then on the plaintiff to show that there was something specific that the sponsor did wrong?

DAVIS: I would say as in any negligence case summary judgment is difficult. If the issue is did the wrangler exercise reasonable care, then that's a summary judgment issue that comes up in all sorts of scenarios: medical malpractice; whatnot. The plaintiff has to have evidence the wrangler did something wrong. If you don't have evidence it's not going to survive a summary judgment motion. And in the present case we did have evidence.

WAINWRIGHT: Do you claim that there are disputed issues of material fact?

DAVIS: Yes.

WAINWRIGHT: What are they?

DAVIS: You've got people not agreeing about whether there was a recinching midway during the ride. One rider says she doesn't remember seeing them do that. The sponsor said yes I did.

WAINWRIGHT: So one doesn't remember whether it happened or not, and the other says she did.

DAVIS: There is a dispute as to whether this was a first time they ran off or the second time they ran off, and whether the ride leader actually gave them permission to do that. The rider said yes, she said it was okay for us to run away from her unsupervised.

WAINWRIGHT: Are those the only two? The CA as you recall reversed because it held that there were disputed issues of material fact. These are the two that...

DAVIS: Well whether the saddle was cinched properly. Our expert says that it was not, that they didn't follow proper procedures for cinching them.

WAINWRIGHT: The initial cinching?

DAVIS: Correct. Something about the horse not being allowed to blow or knee(?) the horse before you tighten back up. So there was a disputed issue about whether the horse was cinched properly the first time, whether it was recinched, whether Mr. Steeg complained to someone else that during the ride it was loose...

O'NEILL: But Cooperman seems to say that the act of cinching is more of an art than a science. And therefore they are going to qualify that as an inherent risk. So if it's something other than just the art of cinching, and I guess that's the basis of my question is, has there been anything alleged here other than just error in judgment as to cinching?

DAVIS: No. The slipping saddle issue is error in cinching. The other issues in the case was not taking the lead position on the ride, not controlling the riders, allowing someone who has only ridden a horse once in his life go off and gallop...

JEFFERSON: How would the case be submitted if it went back to trial? Would there be an instruction on inherent risk to the jury: Do not consider in your deliberations anything that would amount to an inherent risk with a definition? How do you let the jury know that they are not being asked to find for this exempt part of the statute. You know there is no liability unless it's an inherent risk. So how do you instruct the jury on that? You said a bolting horse for example, well that is part of horseback riding. And if the jury were to find liability because the plaintiff wasn't warned that the horse could bolt, well that wouldn't be proper under this statute. But you say well they could be found liable for some form of improper cinching or something. And so how do you instruct the jury not to consider certain aspects of the ride but do consider others?

DAVIS: You would instruct the jury that the sponsor is not liable for inherent risk of horseback riding.

JEFFERSON: What do you tell the jury about the inherent risk?

DAVIS: That becomes very difficult because the legislature didn't define it for us either. The legislature just gave us a non-exhaustive list of...

WAINWRIGHT: Or is that a legal question? Does the jury determine whether the saddle was actually loose a little bit before recinching or after recinching at the midpoint and before the accident, so the jury might determine that factual fact issue. Is it a legal question as to whether that's an inherent risk or whether the statute applies or not? The jury determines disputed facts and then the judge determines the law.

DAVIS: It could very well be handled that way.

OWEN: Is it negligence if you knew ahead of time that in the past this horse intended to follow other horses? If they trotted, the horse would trot. Would it be negligent to not warn or negligent to put someone on that horse knowing it might break into a trot?

DAVIS: I would certainly argue that case.

BRISTER: How big a fella was Mr. Steeg?

DAVIS:: He's shorter than me.

BRISTER: There is inherent risk in any sport. And we can make them safe but then we're going to have nothing but pony rides left. Right?

DAVIS: Yes.

BRISTER: Short of that, what can you do to make sure, say I don't want to get sued. It's not a matter of whether I will win at the trial or not. I can't afford $50,000 - $75,000 for the attorneys. What does an outfit do, an outfit like this and still do trail rides to make sure they won't get sued?

DAVIS: The only thing they can do on a day-to-day level would be to conduct rides as best they can. And actually have an experienced wranglers lead the ride as opposed to the person who worked in the kitchen the day before. And just do the best job they can under the statute as it presently is.

BRISTER: What kind of college degree do you need to lead a trail ride? Basically it's a world where we tell them all don't let anybody run, don't let anybody trot, don't let any horses move out of line. What you're pushing us toward is pony rides. Right?

DAVIS: No.

BRISTER: What's going to be fun in this horse ride that's going to be left?

DAVIS: Well it will be out in nature riding on their horse. I'm certainly not trying to tell the a sponsor...

BRISTER: Can you have bare back rides? Can a camp give kids the experience that the Indians had and ride bareback, no saddle at all. That would be unreasonable I assume or at least something that ought to go to a jury.

DAVIS: Well actually the statute actually has a section if you don't match the skill level of the rider of the a horse when you're not __________.

BRISTER: So the answer is kids can't do that anymore?

DAVIS: Unless it's a well skilled kid.

BRISTER: How do you get skilled in bareback riding without doing it the first time?

DAVIS: Maybe do it with your parents...

BRISTER: Doing it with somebody that you can't sue. So only people who have done it with somebody they can't sue.

DAVIS: Activities take place everyday...

BRISTER: The bottom line is you can't do bareback riding anymore?

DAVIS: You can do it if you want to. It's a risk you run and maybe that's - you know think the reward is worth it. Maybe you don't.

WAINWRIGHT: What was your client's specific evidence if any on the reason for the slippage?

DAVIS: It slid over to the side.

WAINWRIGHT: What was your client's evidence on the reason why it slid over?

DAVIS: Initially when they girded the saddle they didn't do it correctly. And there is some evidence that they also did not re-tension the cinch.

WAINWRIGHT: So it was too loose?

DAVIS: Too loose I guess to begin with, and not tightened out _____.

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REBUTTAL

BELL: The rider is falling prey to the same errors that the CA has, and that's trying to come up with disputed issues of fact that are not material to the legal question that was before the DC in interpreting this statute.

GREEN: Is there a carve out for negligence in this statute?

BELL: No. There is not. And in fact out of the 34 states the legislature looked at for example and specifically referenced, 19 of them have carved out specific negligence exceptions. They've seen fit to - in what would be our §87.004, along with wilfulness, and wonting and intentional act, they also have negligence there as an exception. This statute doesn't. And it had the opportunity to do so. In fact the house proposed doing that in a substantive bill. And in the legislative history discussion in front of the Senate, in the Senate Nat. Res. Committee, the senate removed that language because it was intended to be broader.

Mr. Steeg did not during the course of the ride state that his saddle was loose. What that was was testimony by Rebecca Freeman, another participant to the ride, who at the first part of her deposition said, Well he may have been complaining about it being loose during the ride, and then was later questioned on it. And she said that she couldn't actually recall. The rider himself states throughout his deposition that he was able to control his horse well, that the saddle was comfortable, and that it fit. Those are the facts of the rider. Taking all facts and inferences in favor of him, there was nothing wrong with this saddle other than the inherent collateral risk...

O'NEILL: We're focusing a lot on the slipping saddle, but opposing counsel has talked about there are other bases for liability here. Has there been an allegation that the rider was not appropriately matched to the animal?

BELL: No. At best there's been an insinuation of that for purposes of the exception. It was never pleaded. That's not one of the negligence allegations that was pleaded. In the response to the motion for summary judgment, it raises an issue of: he said that he hadn't ridden in 15 years. But then on page 66 of the record, the rider concedes that he was able to handle the horse. That he had no problem...

O'NEILL: Well that gets into a factual dispute. Have they pled the exception?

BELL: No. They did not plead the exception. Although it's found within their briefing it's not found...

O'NEILL: Where would you put the allegation that the ride was improperly conducted by not having someone in the front and having them in back?

BELL: I think that leads us directly to the line of questioning that J. Brister was engaging in. The only way to prevent any possible negligence allegation is to not put them on the horse. Even the example of the lightening strike, I would imagine you would see artful pleading that we should have checked the weather report better. There is always going to be these additional...

O'NEILL: So what if they had sent a bunch of people off who had never ridden before just by themselves? I think you're saying improper guidance exempts that.

BELL: That's true. And we should look again at what the intent of this statute is. It was to be read broadly in favor of the sponsor. But if we look at the definitions of that section and what is entailed in the act of what creates an equine activity, it has to do with managed trail rides. So the questions would become: Should I have had two or three hands out there? Should I have been riding at the front or in the back?

GREEN: Does an owner to the dude ranch have any duty to his customers?

BELL: Of course.

GREEN: What would that be under this act?

BELL: Under this act it would be to not behave in any manner that would fall within the categories of 87.004...

GREEN: What if you put a cook from the kitchen to fill in on a bad day to cinch up a horse?

BELL: If a cook was sent out to improperly cinch up the horse, I think some of the other exceptions would be applied. For example, just like in the case of Sapone v. ________, also a Wyoming case, where there are additional broader fact patterns that are atypical of a horse ride. We really should go back to the example of Cooperman. That court stated it is not a scientific precision and the mere fact that it was loose does not remove it from inherent risk.