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October 11 **2013**

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Indiana Court Clarifies Rights of Volunteer to Bring Claim Outside of Worker's Compensation & Reach of Equine Activity Statute

This week's case discussion provides a rare triple dip in so much as a single case addresses a host of topics worth discussing. Despite numerous other decisions this week from the Indiana Court of Appeals and the Seventh Circuit that may have merited a spot in our weekly post, there was never a doubt in my mind as to which case to choose. This week our discussion focuses on the Indiana Court of Appeals decision in *Einhorn v. Johnson*. The *Einhorn* decision clarified Indiana law on three important topics: (i) the application of Indiana's Worker's Compensation Act on volunteers; (ii) the applicability of the Indiana Equine Activity Statute; and (iii) the liability of owners' of "domestic animals" for negligence.

As our regular readers may recognize, I try to avoid delving into the facts of cases whenever possible. This is a case where I could probably avoid too heavy of a factual description. However, due to my familiarity with the subject matter of the case, I am going to provide a description of the events so that when I make random statements of opinion about the propensities of horses later in the post, you will

have a frame of reference. As a background, I was born and raised on a small family farm in northern Indiana on which we have housed as many as seven horses at any given time. I also have a long history of competing in 4–H and other competitions. I have competed at the Marshall County 4-H Fairgrounds on numerous occasions. Put simply, I think it is a fair statement to say that when I add an opinion in today's discussion, it will not be just pulled out of thin air.

The case stems from serious injuries suffered by Mr. Einhorn at the Marshall County 4–H Fairgrounds in July 2009. The events began when a young Miss Johnson was riding her horse in the practice arena at the fairgrounds. While Miss Johnson was riding her horse, a truck sounded a backup noise indicator that spooked her horse. Over the course of the next hour, the horse remained unruly and thrice bucked Miss Johnson off. Ultimately, Miss Johnson and those around her chose to return the horse to his stall. In the course of doing so the horse became loose.

The specific cause of the horse getting loose, though not entirely relevant to our discussion is the first instance where I'm going to call upon my decades of involvement with horses. The court describes the occurrence as resulting when "[t]he spring loaded clasp on the lead rope failed[.]" As we will discuss later, the court found that there was no claim for negligence. To the extent that I think there may have been negligence it is at this specific moment when the horse got loose. I have used hundreds of lead ropes and can tell you that there are basically three ways that a clasp "fails." The first is that the spring in the clasp becomes either pops out or somehow gets stuck. This is extremely rare. The second is that the horse pulls directly against the spring-loaded portion of the clasp with a great deal of force. That clearly is not what happened here. The third, which is not all that rare, is where the person affixing the lead line to the horse releases the clasp such that the clasp drives into the metal ring of the halter instead of closing around the ring. This is what I would guess happened. The lack of any further development on this issue seems surprising to me.

Once the horse was loose, Mr. Einhorn attempted to stop the animal. He "put his arms up and said 'Whoa' several times before" the horse trampled him. At the time of the incident, Mr. Einhorn was serving as the President of the 4-H Marshall County Horse & Pony Advisory Committee and was acting as an unpaid volunteer of the Fairgrounds. Shortly thereafter, Mr. Einhorn was told that he was eligible to receive medical benefits under Purdue's worker's compensation policy. Mr. Einhorn did not apply for the benefits, but, nevertheless, received $79,215.48 in medical benefits for his injuries. Mr. Einhorn subsequently brought suit against the Miss Johnson's parents, the fair association, and the Purdue University Board of Trustees. As to the Purdue aspect, just take my word for Purdue being involved in

Indiana 4–H and don't worry too much more about it.

Purdue filed a motion claiming that the court lacked subject matter jurisdiction – meaning it did not have the authority to hear the case against Purdue – because Mr. Einhorn's claims were subsumed by the Worker's Compensation Act. Purdue also filed a motion for summary judgment on the remaining issues. The trial court decided that it lacked subject matter jurisdiction. Meaning, Mr. Einhorn had to bring his claims through the worker's compensation process, and that provided his only remedy. Oddly, despite finding no authority over Purdue in the case, the trial court also ruled on the substance of the summary judgment motion that was filed by a defendant that the court decided could not even be in the case. The trial court further decided that the fair association and Purdue were immune under the Equine Activity Statute and that the Johnsons were not liable for negligence. The Einhorns appealed.

A. Application of the Worker's Compensation Act

The first issue for the court of appeals was whether Mr. Einhorn's claims were controlled by the Worker's Compensation Act. Ultimately, the court determined that they were not. Indiana's Worker's Compensation Act "provides for compensation of injury or death by accident arising out of and in the course of employment." The Act "defines 'employee' to mean 'every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation, or profession of the employer.'"

There was no argument that Mr. Einhorn was under contract or was an apprentice of Purdue. Thus, Purdue's only argument was that Mr. Einhorn was bound by the Worker's Compensation Act because he accepted the money from the worker's compensation policy. A previous court of appeals case decided that, "[o]nce an injured employee accepts or receives compensation under the Act, she concedes that the injury was accidental in nature and that it arose out of and in the course of employment." Thus, the employee is not able to later sue his employer for the injuries.

Despite his acceptance of the benefits, Mr. Einhorn was not bound to the Act. The unanimous court hung its hat on the fact that Mr. Einhorn was an unpaid volunteer, thus not an employee, and that merely accepting the medical payments did not magically convert him into an employee. This conclusion is probably the most important development in the entire case. Put simply, anyone who is not an employee under the Worker's Compensation Act can accept payments under a worker's compensation policy without being limited to the exclusive remedy

provisions of the Act.

B. Application of the Equine Activity Statute

The second issue for the court was the application of the Equine Activity Statute. The Statute came into being in 1998 and provides immunity to an equine activity sponsor or equine professional for injuries resulting from the inherent risks of equine activities unless the person provides faulty equipment/tack, failed to make reasonable efforts to determine the ability of the injured person to engage in the activity, knew of a defect in the land that caused the injury, or acted recklessly/intentionally in causing the injury. It is a very powerful protection. In exchange for the protection, the equine sponsor/professional has to do little more than make sure that the proper signage is properly located.

I remember when the Statute came into being. It was a monumental change in the equine industry. Despite its importance, there has only one prior case to meaningfully examine the Statute. The case was *Perry v. Whitley County 4–H Clubs, Inc.* In *Perry*, the primary issue was whether the injury resulted from an "inherent risk of equine activities." The Indiana Code, in a slightly different portion of than most of the Equine Activity Statute, provides a list of five items that inherent risks of equine activities.

> (1) The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around the equine.
>
> (2) The unpredictability of an equine's reaction to such things as sound, sudden movement, unfamiliar objects, people, or other animals.
>
> (3) Hazards such as surface and subsurface conditions.
>
> (4) Collisions with other equines or objects.
>
> (5) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within the participant's ability.

The *Perry* decision found inherent risks included a horse unexpectedly kicking a woman after the horse became agitated by another horse being too close and the woman had intervened to remove the risk of danger to the child handling the other horse.

The court of appeals, applying *Perry* decided that Mr. Einhorn's injuries fell into the category of inherent risks. The court rebuked Mr. Einhorn for mischaracterizing the evidence in his brief when he claimed that "a horse generally stops or veers when a human puts his arms in the air and says: 'Whoa.'" I agree that the court was right to chastise Mr. Einhorn – or more accurately his lawyer – for citing to the record where it did not say this. However, the statement is true when a horse is not running in a pack. This creates a procedural conundrum for me. Chiefly, if the analysis turns on what are "inherent risks" related to horses, then should not discussion of a general trait of a horse be applicable even if it were never introduced as a factual assertion? Needless to say, the court did not think so.

I think the decision leaves open a very major issue for future cases. That issue is where the line of "participant" is drawn. The Statute, on its face, only applies to "participants." The Indiana Code defines a participant in an equine activity as: "a person, whether an amateur or a professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity." Thus, the natural question follows, does a man who attempts to wrangle a loose horse "engage in an equine activity." Unsurprisingly, the Indiana Code also defines "equine activity" to include:

> (1) Equine shows, fairs, competitions, performances, or parades that involve equines and any of the equine disciplines, including dressage, hunter and jumper horse shows, grand prix jumping, three (3) day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting.
>
> (2) Equine training or teaching activities.
>
> (3) Boarding equines.
>
> (4) Riding, driving, inspecting, or evaluating an equine, whether or not monetary consideration or anything of value is exchanged.
>
> (5) Rides, trips, hunts, or other equine activities of any type (even if informal or impromptu) that are sponsored by an equine activity sponsor.
>
> (6) Placing or replacing horseshoes on an equine.

The definition specifically excludes spectators at an equine activity. It seems safe to say that as the President of the 4-H Marshall County Horse & Pony Advisory Committee, Mr. Einhorn was engaged in putting on the fair – i.e. an equine activity. However, it seems like an open question as to where that line can be drawn. What if Mr. Einhorn had been the President of the Fair Committee and not specifically the Horse & Pony portion? Would he then be engaging in equine activity?

The other blurred line for me is whether a person taking steps to wrangle a loose horse has thereby become a participant. Spectators are excluded, but does a person become a participant the second he decides to try and stop the loose horse? Does that analysis change if the spectator acts out of fear for his child being trampled? Put simply, I think this is still an open question and would be very wary of blindly citing to this case for the proposition that a person trying to wrangle a horse is necessarily a participant.

C. Negligence for a Domestic Animal

The last defendants remaining were the Johnsons. They were not protected by the Equine Activity Statute because they were neither equine professionals nor equine activity sponsors. Mr. Einhorn argued that the bucking of the horse indicated a dangerous propensity and that the Johnsons "had enough time to remove the horse from the fairgrounds before the horse ran loose from Renae."

Prior to delving into the law, I must say that I find the "had enough time to remove the horse" argument to be extremely weak. First, although the horse had been taken to his stall and got loose in the process of bringing him back out to calm him down, there seems to be very little meaningful opportunity to have removed the animal from the grounds. Second, if Marshall County's fair policies resemble that of St. Joseph County in which I was involved for sixteen years, then the Johnsons were not free to remove their animal at any time. They were subject to the policies that dictated the animal be kept at the fair unless injured or ill.

In resolving the case as to the Johnsons, the court looked to a prior Indiana decision from 1991: *Forrest v. Gilley*. The *Forrest* court summarized the law finding:

> Horses are domestic animals. The owner of a domestic animal is not liable for injuries caused by the animal unless the animal had dangerous propensities known, or which should have been known, to the owner. A dangerous propensity is "a propensity or tendency of an animal to do any act which might endanger the safety of person or property in a given situation." If an individual animal lacks dangerous

> propensities, "the rule is simply that the owner of a domestic animal is bound to know the natural propensities of the particular class of animals to which it belongs." In either event, the owner must exercise reasonable care to guard against the propensities and to prevent injuries reasonably anticipated from them. Thus, Forrest, as a horse owner, owed a duty of reasonable care to prevent any injuries Gilley might suffer as a result of the horse's dangerous propensities or, in the absence of dangerous propensities, from the horse's class propensities.

Basically, Indiana treats dogs, cats, and horses the same. The animal must have some dangerous propensity that has manifested prior to the injury to put the owner on notice of the risk of harm. The trial court found that the one-time occurrence of bucking was not sufficient. On appeal, the court determined that the undisputed evidence showed that the cause for the horse's actions were external stimuli – the truck alarm. Further, there was no evidence of prior incidence of bucking.

Interestingly, the court tossed in a footnote that stated, "We note that the Einhorns make no contention that [Mr. Einhorn]'s injuries stemmed from a failure by the Johnsons to exercise care to guard against any natural propensities of horses." This is where my previous discussion of the clasp comes into play. I think if there were room for a claim of negligence, that would have been the necessary argument. Though, without further inside knowledge, I do not care to second guess the Einhorn's highly competent and experienced legal counsel.

As I have made it a bit of a habit to speculate upon the future of the cases we discuss, I shall do so here. I have little doubt that the Einhorns will seek transfer of this case to the Indiana Supreme Court. I only see two reasons that the court would grant transfer to review the decision: (i) because the Supreme Court disagreed with the workers' compensation analysis; or (ii) because the court wants to add Supreme Court authority to the almost nonexistent line of cases interpreting the Equine Activity Statute. In either case, I do not imagine a beneficial outcome for the plaintiff. To that end, admittedly on selfish grounds, I hope that the Einhorns do not seek transfer as I think it only stands to harm future litigants. That said, if their counsel sees an angle that I do not, then I wish the Einhorns the best of luck and hope for case law that stands to benefit future cases as well.

Join us again next time for further discussion of developments in the law.

Sources

- *Einhorn v. Johnson*, ---N.E.2d---, No. 50A03-1303-CT-93, 2013 WL 5570933 (Ind. Ct. App. Oct. 10, 2013).
- Indiana Worker's Compensation Act – codified at Ind. Code art. 22-3.
- Indiana Equine Activity Statute – codified at Ind. Code ch. 34-31-5.
- Definition of Inherent Risk of Equine Activities – codified at Ind. Code § 34-6-2-69.
- Definition of Participant in Equine Activity – codified at Ind. Code § 34-6-2-95(a).
- Definition of Equine Activity – codified at Ind. Code § 34-6-2-41.
- *Perry v. Whitley County 4–H Clubs, Inc.*, 931 N.E.2d 933, 940 (Ind. Ct. App. 2010).
- *Forrest v. Gilley*, 570 N.E.2d 934, 935 (Ind. Ct. App. 1991), *trans. denied*.