

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-000047-MR

BOBBI TABOR

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE PAUL WINCHESTER, JUDGE  
ACTION NO. 12-CI-00141

JOE DAUGHERTY;  
KIM ADLETA; AND  
DAUGHERTY STABLES

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellant, Bobbi Tabor, appeals the McCreary Circuit Court's December 10, 2015, order granting summary judgment in favor of Appellees, Joe Daugherty, Kim Adleta, and Daugherty Stables. As a review of the record has revealed multiple disputes of material fact, we vacate the order and remand to McCreary Circuit Court for a jury trial.

## I. BACKGROUND

Joe Daugherty (“Joe”) owns a horse stable outside of Whitley City, Kentucky, where he does business under the name of Daugherty Stables. While the majority of Joe’s business is done as a farrier, in 2006 he and Kim Adleta (“Kim”), a full-time school teacher, began purchasing and selling horses together as partners. The business relationship between the two is fairly simple. Kim and Joe both purchase horses and house them at Daugherty Stables. Each have a 50% ownership interest in every horse, regardless of who purchased it. Other than purchasing horses, Kim’s primary duties in the partnership are to advertise the horses on various horse trading websites, video and photograph the horses, and communicate with potential customers about the horses for sale. Joe maintains and cares for the horses in his stables and shows the horses to prospective buyers when they visit the stables.

On May 30, 2011, Bobbi Tabor (“Bobbi”) contacted Kim through the horse trading website Horsetopia expressing interest in some of the horses at Daugherty Stables. Before Bobbi visited the stables on June 3, 2011, Bobbi and Kim communicated several times via email and telephone. The email correspondence between the two, which is of record, indicates that Bobbi was looking for four horses, preferably geldings. The horses were going to be purchased by Bobbi’s then-boyfriend, Mario, and were going to be ridden by Bobbi, Mario, and Mario’s two teenaged daughters. Additionally, Bobbi stated in an email that:

I use [sic] to own a spotted mare that I was telling you about. She was awesome on the trails, it was just the field that I had problems with. She was part Standardbred so I think that was the problem. But I loved her speed. She was 18 mph easy before she crossed over to a pace. I am older now and not as eager to go that fast but I do like to know I can go if I want to. So like I said, two of the horses can be advanced. The other [sic] need to be beginners.

...

I am sort of picky about my tack. Can't wait to horse talk with you. Funny thing is if people don't own a gaited horse, I tend to tune them out!

It was Kim's impression, based on the above-quoted email, that Bobbi was wanting the advanced horses for Mario and herself and the beginner horses for the two daughters. Bobbi, however, testified in depositions that the advanced horses were meant to be for Mario and his eldest daughter, while she was looking for a gentle horse to begin riding on again.

Bobbi and Mario arrived at Daugherty Stables on June 3, 2011. Kim was unable to be at the stables on that date, but had spoken with Joe about what horses Bobbi was interested in so that he could show them to her when she arrived. The group started at the main stables, which had the required Kentucky Equine Liability sign posted. Apparently at this time Bobbi informed Joe that she "really hadn't ridden a horse for a while" and "wasn't that good," but "knew the lingo and understood horse training." Bobbi further informed Joe that she was "old and fragile,"<sup>1</sup> a grandmother, and had recently had a hysterectomy, at which point Joe

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<sup>1</sup> Bobbi was 46 years old at the time of the accident.

told Bobbi that he would not put her on anything that would hurt her. Bobbi rode 3-4 horses at the main stables, then asked where Flash, the horse that is the subject of this litigation, was. Bobbi had seen Flash, a Tennessee Walking Horse, on Horsetopia, where he rated 3 on a 1-10 scale for temperament, and was described as follows:

[W]onderful temperament, an amazing ride, and drop dead gorgeous!! Flash is super sweet and gentle – easy to handle...very well mannered.

He is awesome on the trails. If you love to ride, you will love Flash. He never gets tired and loves to go. Stands like a statue to get on and off ... when you ask him to go, he is ready. Super smooth ride and he will go all day long. Not a spook in him, he is great on the trails.

Bobbi, Mario, Joe, and two Daugherty Stables employees travelled approximately eight miles down the road to a smaller set of stables where Flash was housed.

Pursuant to protocol, after bringing Flash out and putting a saddle and bridle on him, one of the employees rode Flash for about 10-15 minutes. This was done to “blow the steam” off of Flash, as he had been standing in his stall all day, and to demonstrate to Bobbi and Mario that Flash was broken. Next, Mario mounted Flash. Mario rode Flash for about 100-200 feet, but, being unexperienced with gaited horses, did not put Flash through any gaits. When Mario dismounted he expressed that the horse felt rough to him and asked Bobbi to ride Flash next to see what she thought of him. It is at this point where the accounts of the day’s events diverge.

Bobbi's version of the facts is summarized as follows: Before getting on Flash, Bobbi asked Joe if he was sure that Flash was for a beginner rider. Joe again assured Bobbi that he would not put her on anything that would hurt her. Bobbi mounted Flash and told him to move forward. At Bobbi's command, Flash immediately went into a fast step, causing Bobbi to lose control of him within five seconds. Bobbi maintains that no one at Daugherty Stables gave her any instruction on how to properly operate the reins; however, she had learned tactics from videos on how to handle runaway horses. Drawing from her pre-acquired knowledge, Bobbi began pulling back on the reins and telling Flash "easy, easy," but Flash did not slow his pace. After travelling about 200 feet down the trail, Bobbi decided to try to turn Flash around and jump off of him as he slowed down. However, while Bobbi did get Flash to turn, the turning only caused his speed to increase. Flash began galloping back towards Mario, Joe, and the two employees. Bobbi continued to pull Flash's reins up and attempted to pull him in a circle, but Flash was too strong for her. As Flash continued to gallop closer to Mario, Joe, and the employees, Bobbi began mouthing to the group that Flash would not stop. In response, Joe and his employees jumped out in front of Flash and began waving their hands at him. The sudden movement caused Flash to immediately turn and head back towards, then into, the woods. With trees hitting her on both sides of her head, Bobbi kicked her feet out of the stirrups in another attempt to jump off. Before she could jump, however, Flash began heading straight towards a large tree. Flash veered to the right at the last moment to avoid hitting the tree, but this

motion pitched Bobbi straight forward into the tree. Bobbi bounced off the tree, hit several surrounding trees, and then landed on the ground. She was knocked out for a few moments, and regained consciousness as Mario and Joe lifted her – against her wishes – and carried her back to her vehicle where she waited for an ambulance.

Joe's version of the incident paints a very different picture. Joe claims that Bobbi got on Flash perfectly and proceeded to ride Flash perfectly during the 200-foot trip down the trail. As Bobbi turned around to head back, however, Joe noticed that she had loosened her grip on the reins, which will typically cause a gaited horse to speed up. As Flash galloped back towards Joe and the group, Joe saw Bobbi mouth, "He won't stop." Joe told Bobbi to pull back on the reins and say "whoa." He then began walking down the road towards Flash, but at no point tried to flag Flash down or corral him in a certain direction. Bobbi complied with Joe's advice, which caused Flash to slow down. However, as Flash slowed, Bobbi let go of the reins and grabbed hold of the horn on the saddle with both hands. This caused Flash to take off towards the woods with Bobbi on his back. Joe saw Bobbi fall from the horse, at which point he, Mario, and his employees ran over to the wooded area. After checking that she was okay, Mario suggested that they carry Bobbi back to the car so that she could wait for the ambulance. Mario and Joe carried Bobbi and waited with her while the two workers went to retrieve Flash.

As a result of her fall, Bobbi suffered two broken vertebrae, broken ribs, a fractured hip, and an injured shoulder. She has undergone surgery, ongoing medical treatment, and physical therapy. Bobbi filed the present action against Joe, Kim, and Daugherty Stables on May 31, 2012, seeking to recover damages for her injuries. At this point Flash had already been sold – at a 50% reduced price – to a buyer in Canada. Bobbi alleged that defendants had failed to abide by the warning requirements of the Farm Animals Activity Act,<sup>2</sup> and that, to the extent that they did comply with the requirements, they were liable to her for her injuries as their conduct fell within one of the enumerated exceptions to the protection given by the Act.

Following initial discovery and depositions of the parties to the action, Joe and Daugherty Stables moved for summary judgment on October 11, 2013. Joe argued that because Bobbi was a participant in a farm animal activity and he and Kim are farm animal professionals as defined in the Act, he only had a duty to warn Bobbi about the inherent dangers associated with horseback riding, a duty that it was undisputed he had fulfilled by posting the warning sign required by the Act at his stables. The motion further contended that none of the exceptions to the Act were applicable to the situation, as Bobbi had represented herself as an experienced horse rider and there was no prior indication that Flash was not suitable to be ridden. Kim filed her own motion for summary judgment on November 8, 2013, by which she incorporated and joined with Joe and Daugherty

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<sup>2</sup> KRS (Kentucky Revised Statutes) 247.401-4029.

Stables' previous motion for summary judgment. Bobbi filed a combined response to both motions on February 10, 2014. Her response cited the need for continued discovery and the multiple issues of fact that had not yet been resolved.

Additionally, a substantial amount of Bobbi's response dealt with Kim and Joe's lack of credibility, as Bobbi believed was evidenced by their failure to keep business records, failure to pay taxes on their business, and the fact that they could not recall to whom Flash had been sold following Bobbi's accident. Kim's motion for summary judgment was overruled by order dated February 18, 2014, but it does not appear that Joe and Daugherty Stables' motion was ever ruled on.

On June 22, 2015, Humana Health Plan of Ohio, Inc. ("Humana") moved to intervene in the action, stating that it had a subrogated interest as it had paid on Bobbi's medical claims. Before that motion was ruled on, the court issued an order setting a trial date for December 15-18, 2015. Humana was then permitted to intervene by agreed order entered on August 10, 2015. On October 30, 2015, Kim filed a renewed motion for summary judgment. That same day, Joe and Daugherty Stables filed an amended motion for summary judgment. Bobbi responded to both motions on November 10, 2015. On November 30, 2015, the Estate of Andrew J. Fry, V (the "Estate") moved to intervene in the action.<sup>3</sup> This

<sup>3</sup> The Estate stated that the decedent had made an \$84,000 loan to Bobbi in September of 2014 to enable her to purchase certain real property. The loan was made on the condition that Bobbi refrain from contacting the decedent or any of his family members and discussing or making accusations about the decedent and his previous relationship with Bobbi. The entire balance of the loan was to become due and owing when Bobbi received any sort of payment out of this lawsuit. Upon the decedent's death, the Estate had discovered that Bobbi had breached the loan agreement by discussing her and the decedent's sexual relationship with the decedent's parents and by failing to make her installment payments on the loan. Further, the Estate had discovered that the real property in question had never existed. Thus, the Estate was concerned that Bobbi

motion was never ruled on, as on December 10, 2015, the court issued an order granting Kim's Renewed Motion for Summary Judgment and Joe and Daugherty Stables' Amended Motion for Summary Judgment. The order simply stated:

Having considered the arguments of the parties, the briefs of the parties, the entire record, and being otherwise sufficiently advised, the Court concludes that there are no genuine issues of material fact, and the Defendants, Joe Daugherty, Daugherty Stables, and Kim Adleta, are entitled to judgment as a matter of law.

This appeal followed.

## II. STANDARD OF REVIEW

When hearing a motion for summary judgment, a trial court “must view the record in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate only “if it appears impossible in a practical sense for the respondent to prevail at trial.” *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007). On appeal, “the standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Cantiff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014). “Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense

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would not fulfill her obligations to the Estate under the terms of the loan unless it was permitted to intervene in this action.

that we owe no deference to the conclusions of the trial court.” *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

### III. ANALYSIS

The Farm Animals Activity Act (“the Act”), in relevant part, provides:

The inherent risks of farm animal activities are deemed to be beyond the reasonable control of farm animal activity sponsors, farm animal professionals, or other persons. Therefore, farm animal activity sponsors, farm animal professionals, or other persons are deemed to have the duty to reasonably warn participants in farm animal activities of the inherent risks of the farm animal activities but not the duty to reduce or eliminate the inherent risks of farm animal activities. Except as provided [below], no participant or representative of a participant who has been reasonably warned of the inherent risks of farm animal activities shall make any claim against, maintain any action against, or recover from a farm animal activity sponsor, a farm animal professional, or any other person for injury, loss, damage, or death of the participant resulting from any inherent risks of farm animal activities.

KRS 247.402(1). Inherent risks of farm animal activities are defined as:

[D]angers or conditions which are an integral part of farm animal activities, including, but not limited to;

(a) the propensity of a farm animal to behave in ways that may result in injury, harm, or death to persons around them;

(b) The unpredictability of the reaction of a farm animal to sounds, sudden movement, and unfamiliar objects, persons, or other animals;

(c) Certain hazards such as surface and subsurface conditions;

(d) Collisions with other farm animals or objects; and

(e) 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 a farm animal or not acting within his or her ability.

KRS 247.4015(9). It is undisputed that Bobbi was a farm animal participant and that Kim and Joe are farm animal professionals as defined in the Act.

Additionally, Bobbi no longer argues that Appellees failed to warn her of the inherent dangers of farm animal activities. On appeal, Bobbi argues that, when the facts are viewed in a light most favorable to her, a reasonable person could find that Appellees' conduct falls into multiple exceptions to the Act's liability protections. The relevant exceptions, found in KRS 247.402(2), deny the Act's liability immunity if the farm animal professional:

(b) Provided the farm animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the farm animal activity and to safely manage the particular farm animal based on the participant's representations of the participant's ability;

...

(d) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury; or

(e) Negligently or wrongfully injures the participant.

*Id.* Bobbi further contends that Appellees' act of selling Flash and being unable or unwilling to disclose his buyer's information constitutes spoliation of evidence, which the trial court should have taken into account during its summary judgment decision.

The majority of Appellees' arguments regarding KRS 247.402(b) focus on the representations Bobbi made to Kim in their email correspondence, *supra* p. 3, where she held herself out as being experienced with horses. Bobbi admits that she made these statements – although she later testified that she was exaggerating her abilities – but argues that Joe cannot rely on them because he was not included on the emails in which she made the statements. Regarding Appellees' initial duty to ascertain whether Bobbi had the ability to safely ride horses, we do not find this argument to be meritorious. The evidence of record, when viewed in a light most favorable to Bobbi, indicates that the structure of Kim and Joe's partnership is one where Kim communicates with potential purchasers and helps them select the appropriate horse and Joe then shows that customer the horse when he or she visits the stables. Bobbi was aware that she was communicating with Kim for this purpose, and chose to represent herself as an experienced rider. In her deposition, Bobbi testified that Joe had the horses that she and Kim had discussed in their correspondence ready and saddled to be ridden when she arrived at Daugherty Stables, despite the fact that Kim was not present that day. This fact, in combination with Joe's testimony that he was aware of Bobbi's prior experience with horses, indicates that Joe was aware of the conversations between Bobbi and Kim. There was no need for Joe to individually interrogate Bobbi on her riding abilities.

To be exempt from liability, however, Appellees were also required to make a reasonable and prudent inquiry into Bobbi's ability to manage *the*

*particular animal* on which she was riding. While Bobbi initially represented that she was an experienced rider and Joe observed her riding three horses without incident, the facts indicate that Bobbi verbally expressed trepidation at riding Flash, asking Joe if he was sure that Flash was meant for a beginning rider. Bobbi testified that she did not have control of Flash from the second she mounted him. Further, it is undisputed that Mario said that Flash was “riding rough.” While there is no evidence of record indicating that Flash had temperament issues or that Flash had received previous complaints, Bobbi and Mario’s statements at the stables were sufficient to present a jury question as to whether Joe was put on notice that Bobbi did not possess sufficient ability to ride Flash.

Additionally, there are genuine issues of material fact concerning whether Appellees willfully and wantonly disregarded Bobbi’s safety. The facts surrounding the actual accident are clearly disputed by the parties. Bobbi has testified that Joe and the employees stood in front of Flash and waived their arms at him in an attempt to slow him down. Joe has testified that no such actions occurred. If Bobbi’s version of the facts are taken as true, then a reasonable jury could find that Joe and his employees did willfully and wantonly disregard Bobbi’s safety. It is fairly common knowledge that horses are generally alarmed by quick movements, like the waving of arms. This is something that Joe and his employees, as farm animal professionals, should have been aware of. It is true that one of the “inherent risks of farm animal activities” the Act protects against is “the unpredictability of the reaction of a farm animal to . . . sudden movements.” KRS

247.4015(9)(b). But while the Act relieves Joe and his employees of the duty to eliminate such inherent risks, it does not entitle them to *create* those risks.

Based on the above analysis, a reasonable jury could also find that Appellees negligently injured Bobbi. When considering the facts in a light most favorable to Bobbi, a jury could find that the duty to ascertain Bobbi's abilities to manage Flash was breached, and that the breach caused her injuries. A jury could find that Appellees' actions in attempting to stop Flash once Bobbi asked for help were negligent. Further, all parties acknowledge the fact that Mario and Joe came to Bobbi's aid after she fell from Flash and moved her down the trail to her car. It is a question for the jury whether these acts constitute negligence, not one to be decided on summary judgment.

Bobbi's final argument is that summary judgment for Appellees should be reversed because Appellees improperly destroyed and/or withheld evidence from her. It is Bobbi's belief that, if all the facts that were destroyed or purposefully hidden were taken in a light most favorable to her, it would be impossible to grant summary judgment for Appellees. Admittedly, the circumstances surrounding Flash's sale and current location may seem somewhat suspect. Flash was sold very shortly after Bobbi's injury at a drastically discounted rate. Neither Kim nor Joe were able to produce a name of the buyer until Bobbie moved the court to compel Kim to produce her bank records and PayPal information. Further, Flash has again been sold. While Appellees contend that this is just the nature of their business – they have a quick turnover, frequently

lower prices, and rarely keep any sort of business record – Bobbi believes that these actions were purposefully taken to prevent her from examining Flash.

However, Flash’s disappearance, while perhaps irritating, has caused no real prejudice to Bobbi. Flash’s initial buyer, Alberta McKibben, has been deposed and informed Bobbi of Flash’s current location and the names of his buyers. Bobbi is now able to have Flash examined if she chooses to do so on remand.

The likelihood that such an examination will evidence Flash’s temperament on June 3, 2011, however, is slim. While this delay could partly be the fault of Appellees, over a year had passed before Bobbi sought to examine Flash. A horse’s temperament can greatly change over the course of a year. Moreover, the more relevant question appears to be whether the Appellees knew Flash had a “hot” temperament, and therefore, misrepresented him in their advertisements and communications.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

LAMBERT, D., JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Robert R. Waters  
D. Matthew Kannady  
Louisville, Kentucky

BRIEF FOR APPELLEES JOE  
DAUGHERTY AND DAUGHERTY  
STABLES:

Rodney E. Buttermore, Jr.  
Harlan, Kentucky

BRIEF FOR APPELLEE KIM  
ADLETA:

Andre Fereole Regard  
Lexington Kentucky