IN THE SUPREME COURT OF TEXAS

No. 19-0167

CONWAY WAAK, JR. AND MARLENE WAAK D/B/A CARMINE CHAROLAIS RANCH, AND CARMINE CHAROLAIS RANCH, PETITIONERS

v.

RAUL AMPARO ZUNIGA RODRIGUEZ AND ANA MARIA ORTIZ MARTINEZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES AND HEIRS OF THE ESTATE OF RAUL AMPARO ZUNIGA ORTIZ, JR.; AND JUANA GUADALUPE MARTINEZ, AS NEXT FRIEND OF SEBASTIAN ZUNIGA AND WENDY ZUNIGA, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued January 30, 2020

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BUSBY joined.

JUSTICE BLACKLOCK filed a dissenting opinion, in which JUSTICE BOYD joined.

JUSTICE BLAND did not participate in the decision.

The Texas Farm Animal Activity Act[1] limits liability for injury to "a participant in a farm animal activity or livestock show" that results from an "inherent risk" of such activities,[2] "whether

[1] TEX. CIV. PRAC. & REM. CODE §§ 87.001–87.005.

[2] § 87.003.

the person is an amateur or professional or . . . pays . . . or participates . . . for free".[3] A divided court of appeals held that the Act does not apply to ranchers and ranch hands.[4] We agree and affirm the court's judgment.

I

For many years, petitioners Conway and Marlene Waak have bred Charolais cattle[5] on their 760-acre Carmine Charolais Ranch in Fayette County west of Brenham. In 2005, they hired Raul Zuniga part-time to work the cattle, landscape, and cut hay. Three years later, Zuniga began working for the Waaks full-time, living on the ranch in a mobile home he was buying from them.

At first, Conway trained Zuniga how to work and cut cattle, observing to see that he did the work properly. Zuniga had no set work schedule; instead, the Waaks gave him various tasks to perform each day. He often worked cattle alone while Conway worked at his oilfield consulting business.

When cattle had to be moved from place to place on the ranch, they were herded into a pen, moved through a chute onto a trailer, hauled to the new location, and unloaded. Conway showed Zuniga what equipment and strategies to use to move the cattle and how to "punch them up"—prod them to move through the chute leading them onto the trailer.

In October 2013, Conway asked Zuniga, 33, to move 20 head of cattle from one end of the ranch to the other, something Zuniga had done many times. The Waaks then left the ranch to run

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[3] § 87.001(9).

[4] 562 S.W.3d 570 (Tex. App.—Houston [1st Dist.] 2018) (2–1).

[5] *See* Am. Int'l Charolais Ass'n, *The Charolais Heritage . . . A Brief History*, https://charolaisusa.com/history.php (last visited June 8, 2020).

errands in Brenham. After moving most of the cattle, Zuniga called the Waaks to confirm that he should move the last three remaining in the pen in the barn: a 2,000 pound bull, a cow, and the cow's calf. They replied that he should. When the Waaks returned home, they found Zuniga lying dead behind the barn. The bull and the two cows were still in the pen. The medical examiner determined that Zuniga's cause of death was "blunt force and crush injuries" that were "severe enough to have come from extensive force like that of a large animal trampling the body".

Respondents, Zuniga's parents and surviving children, sued the Waaks, nonsubscribers under the Texas Workers' Compensation Act, on wrongful death and survival claims.[6] Plaintiffs allege that the bull killed Zuniga and that the Waaks were negligent in several respects, including failing to provide a safe workplace, failing to train Zuniga and warn him of the dangers of working cattle, and failing to supervise him. The trial court granted summary judgment for the Waaks after concluding that the Farm Animal Activity Act (the *Farm Animal Act* or the *Act*) barred the plaintiffs' claims. The court of appeals reversed, holding that Zuniga "was not a participant in a farm animal activity" for whose injuries and death the Act limits liability.[7]

We granted the Waaks' petition for review.

II

[6] *See* TEX. CIV. PRAC. & REM. CODE § 71.002(a) (authorizing "[a]n action for actual damages arising from an injury that causes an individual's death"), § 71.021(a)–(b) (authorizing "[a] cause of action for personal injury to the health, reputation, or person of an injured person" by the decedent's "heirs, legal representatives, and estate").

[7] 562 S.W.3d at 583.

The Waaks argue that the Farm Animal Act applies by its plain terms to ranching—working farm animals for a living or for profit.

A

The Farm Animal Act is a somewhat expanded revision of the Equine Activity Act (the *Equine Act*) passed in 1995.[8] To interpret the Farm Animal Act, we must first examine its history.[9]

The Equine Act was a product of a national movement spurred by the horse industry to protect itself from liability for injuries due to the inherent risks of being around the animals that reasonable people should expect.[10] Those common expectations had always completely protected horse owners from negligence liability through the absolute common law defenses of contributory negligence and *volenti non fit injuria*—voluntary assumption of the risk. Those defenses precluded a person from recovering damages for injuries sustained in voluntarily exposing himself to the known risks of being around a horse. But as those absolute defenses were gradually replaced in state after state by comparative negligence, which reduces liability only based on a plaintiff's share in the responsibility for injury,[11] the horse industry's liability, together with the costs of litigation,

[8] Equine Activity Act, 74th Leg., R.S., ch. 549, 1995 Tex. Gen. Laws 3318 (codified at TEX. CIV. PRAC. & REM. CODE ch. 87).

[9] *See Pruski v. Garcia*, 549 S.W.3d 322, 328 n.2 (Tex. 2020) ("This is the history of the legislation, not legislative history." (quoting *Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 445 n.31 (Tex. 2011) (Willett, J., concurring in part))).

[10] *See* Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157, 157 (1995) ("[Equine Acts] have arisen in the wake of state legislatures' recognition of the inherent risks associated with equine activities . . . . [Their] purpose . . . is to encourage equine activities by limiting the civil liability of those involved in such activities, in light of the reality that rising insurance costs and increased litigation would put many equine professionals and equine facilities out of business.").

[11] *See, e.g.*, *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975).

naturally increased. The industry's proposed fix was a uniform act to be adopted state by state limiting liability for certain horse-related activities. In the five years before Texas enacted its version of the statute, more than 25 states had already beaten us to the punch.[12]

The Equine Act provided that "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 . . . [that] results from the dangers or conditions that are an inherent risk of equine activity".[13] Included among the statute's list of inherent risks was "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", as well as "the unpredictability of an equine animal's reaction to sound, a sudden movement, or an unfamiliar object, person, or other animal".[14]

An "equine activity sponsor" shielded from liability was defined in general terms as "a person or group who sponsors, organizes, or provides the facilities for an equine activity . . . without regard to whether the person operates for profit", with a list of inclusive examples: "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".[15] The definition also included "an operator of, instructor at, or promoter for . . . facilities . . . at which an equine activity is held" but again added an inclusive list of examples of the facilities intended: "a stable, clubhouse, pony ride

[12] *See* Carmel, *supra* note 10, at 157 n.2 (listing state statutes).

[13] Equine Act, sec. 87.003, 1995 Tex. Gen. Laws at 3319.

[14] Sec. 87.003(1)–(2), 1995 Tex. Gen. Laws at 3319.

[15] Sec. 87.001(4)(A), 1995 Tex. Gen. Laws at 3318.

string, fair, or arena".[16] A "participant", whose recovery was limited by the Act, was defined as "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."[17]

"Equine activity" was defined as including:

- "an equine animal show, fair, competition, performance, or parade" involving "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";[18]
- "rodeos and single event competitions, including team roping, calf roping, and single steer roping";[19]
- "riding, inspecting, or evaluating an equine animal belonging to another";[20]
- "training or teaching" and "boarding";[21] and
- "a ride, trip, or hunt that is sponsored by an equine activity sponsor".[22]

The Act defined "engag[ing] in an equine activity" as "riding, handling, training, driving, assisting in the medical treatment of, being a passenger on, or assisting a participant or sponsor with an equine animal."[23] The definition specifically included "management of a show" but

[16] Sec. 87.001(4)(B), 1995 Tex. Gen. Laws at 3319.

[17] Sec. 87.001(6), 1995 Tex. Gen. Laws at 3319.

[18] Sec. 87.001(3)(A), 1995 Tex. Gen. Laws at 3318.

[19] Sec. 87.001(3)(G), 1995 Tex. Gen. Laws at 3318.

[20] Sec. 87.001(3)(D), 1995 Tex. Gen. Laws at 3318.

[21] Sec. 87.001(3)(B)–(C), 1995 Tex. Gen. Laws at 3318.

[22] Sec. 87.001(3)(E), 1995 Tex. Gen. Laws at 3318.

[23] Sec. 87.001(1), 1995 Tex. Gen. Laws at 3318.

excluded "being a spectator at an equine activity unless . . . in an unauthorized area and in immediate proximity to the equine activity."[24]

Notably, as these lengthy excerpts repeatedly demonstrate, the Equine Act described its coverage not in general terms or concepts but with detailed and specific examples. An equine activity might simply have been defined as any activity involving an equine. Instead, the statute defined the two words with a 158-word sentence containing some 40 examples.[25] An equine activity is not just a "show, fair, competition, performance, or parade," but one that involves "any equine discipline," which is described with 13 examples.[26] The definition includes "single event competitions," but rather than stop there, it adds, "including team roping, calf roping, and single steer roping."[27] An equine activity sponsor provides facilities not just for a club, but for "a pony club, 4-H club, hunt club, [or] riding club".[28]

The Equine Act's prolixity made obvious that it was entirely concerned with equine activities unrelated to ranching—that is, breeding, feeding, and working equine animals as a vocation. In all its scores of examples, there was no hint of any application to ranchers' and ranch hands' involvement with horses. The omission must be meaningful.

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[24] *Id.*

[25] Sec. 87.001(3), 1995 Tex. Gen. Laws at 3318.

[26] Sec. 87.001(3)(A), 1995 Tex. Gen. Laws at 3318.

[27] Sec. 87.001(3)(G), 1995 Tex. Gen. Laws at 3318.

[28] Sec. 87.001(4)(A), 1995 Tex. Gen. Laws at 3318.

In the relatively few instances when the Equine Act did speak in general terms, those terms must be read in connection with the statute's examples. The statute limited the liability of "any person, including an equine activity sponsor or an equine professional".[29] Ordinarily, "including" is a term of enlargement.[30] But "any person", in the abstract, cannot be enlarged upon. Removed from its context, it is universal. To read the phrase as such would make the two examples that follow surplusage, violating the cardinal rule of statutory interpretation that every word of text be given meaning.[31] It is like saying, "any person, including John and Mary." If by "any person" it is meant any person in the world, then it says nothing to specify that John and Mary are included. But the addition has meaning if John and Mary are examples of the persons intended.

The Equine Act defined an "equine activity sponsor" shielded from liability as "a person . . . who . . . provides the facilities for an equine activity".[32] That describes a rancher with a stable, which is unquestionably a facility for an equine activity. But the examples of facilities that follow the next word, "including"—facilities for various school clubs and programs—show that the statute intended that "sponsor" be someone who provided a facility like those listed, not everyone who provided a facility where an equine could possibly be placed. The Equine Act defined "participant" as "a person who engages in an equine activity," but the statute then immediately added, "without regard to whether the person is an amateur or professional or whether

[29] Sec. 87.003, 1995 Tex. Gen. Laws at 3319.

[30] TEX. GOV'T CODE § 311.005(13).

[31] *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

[32] Sec. 87.001(4)(A), 1995 Tex. Gen. Laws at 3318.

the person pays for the activity or participates in the activity for free."[33] If the statute meant any person at all, then the four examples listed would be surplusage. They have meaning only if they typify the persons intended as participants.

Not only do the many examples in the Equine Act omit any mention of ranchers and ranch hands, every textual indication shows that they are not covered. The court of appeals came to that conclusion 10 years after the Equine Act was passed in *Dodge v. Durdin*.[34] Today, every state but two—California and Maryland—has a statute limiting liability for equine activities. We are unaware of any that applies to ranching or limits a ranch employee's recovery for on-the-job injuries caused by horses. Nor are we aware of any reported decision applying an equine statute to ranching. In the 40-year history of equine activity statutes, the *Dodge* court—the only one to consider the issue of which we have been made aware—held that the Texas Equine Act does not apply to ranching.

[33] Sec. 87.001(6), 1995 Tex. Gen. Laws at 3319.

[34] 187 S.W.3d 523, 530 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The court relied in part on the Equine Act's legislative history—statements made by participants in the legislative process who cannot speak for the legislative body—and specifically, a bill analysis prepared by legislative staff. *Id.* at 528–529. While this reliance was misplaced, the court's interpretation of the statute was otherwise sound.

B

In 2011, the Legislature broadened the Equine Act in three ways.[35] The renamed Farm Animal Act included other farm animals besides equines: bovines, sheep, goats, pigs, hogs, ratites, ostriches, rheas, emus, chicken, and other fowl.[36] It was somewhat expanded to cover veterinarians[37] and livestock shows.[38] And the words "handling, loading, or unloading" were added to the definition of farm animal activity.[39]

In other respects, the Farm Animal Act did not depart from the Equine Act. The former, like the latter, limits the liability of "any person, including a farm animal activity sponsor [or] farm animal professional," but then continues with additional examples of a person whose liability is limited: "livestock producer, livestock show participant, or livestock show sponsor".[40] As in the Equine Act, the categories following "including" cannot be read as exclusive, but neither can they be read as meaningless. In both statutes, the examples show the types of persons meant by "any". Farm animal sponsors, which the Farm Animal Act defines essentially the same way the Equine Act did, are largely event organizers and facilities providers,[41] and professionals are trainers and

[35] Farm Animal Activity Act, 82nd Leg., R.S., ch. 896, 2011 Tex. Gen. Laws 896 (amending TEX. CIV. PRAC. & REM. CODE ch. 87).

[36] TEX. CIV. PRAC. & REM. CODE § 87.001(2-a).

[37] § 87.001(5)(C)–(D).

[38] §§ 87.001(6)-(8), (9)(B); 87.004(6).

[39] § 87.001(3)(D).

[40] § 87.003.

[41] *See* § 87.001(4).

equipment renters.[42] The livestock examples relate to "shows".[43] The examples confine the statute's protections to the context of shows, rides, exhibitions, competitions, and the like. The categories listed as examples do not suggest that ranchers should also be included.

The Farm Animal Act limits liability to or for a "participant", defined in part as "a person who engages in [a farm animal] 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".[44] Again, to give any meaning to the listing of four examples—amateur, professional, paying, and for free—they must be read as typical of participants. They describe the kind of people the Act treats as participants. Ranch hands might be said to be experienced or inexperienced, but would not be said to be professional or amateur. On the other hand, horse riders in a show or rodeo, or even on a trail ride or hunt, might certainly be said to be amateur or professional. Ranch hands do not pay to work. It makes no sense to speak of a ranch hand "without regard to whether . . . the person pays for the activity". And ranch hands, though often underpaid, do not ordinarily work for free. The four examples make clear that referring to a ranch hand as a "participant in a farm animal activity" is inconsistent with the Act's history and context. This is even clearer from the second part of the definition of "participant", which relates only to livestock shows.[45]

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[42] *See* § 87.001(5).

[43] *See* § 87.001(7)–(8).

[44] § 87.001(9)(A).

[45] *See* § 87.001(9)(B).

The Equine Act included "handling" in the long list of examples defining engaging in equine activities.[46] The Farm Animal Act added "loading [and] unloading" to the list in the corresponding definition of engaging in farm animal activities[47] and added "handling, loading, or unloading" to the list of examples that define farm animal activity.[48] But those words obviously have meaning outside the ranching context, and nothing in any of the Legislature's changes in the Equine Act suggests that by adding those three words it intended to broaden the Farm Animal Act to cover ranching for the first time.

Ranch hands do not work as amateurs or professionals, they certainly do not pay to do their work, and they ordinarily do not work for free. Ranch hands have none of the characteristics the Farm Animal Act lists for "participants". Ranchers, as such, are not farm animal activity organizers, facilities providers, trainers, equipment renters, and showmen. They have none of the qualities the Act lists for those it protects. Thus, we conclude that the Farm Animal Act does not cover ranchers and ranch hands and that it did not shield the Waaks from liability for their negligence, if any, resulting in Zuniga's death.

C

The DISSENT'S contrary conclusion requires a reading of the Farm Animal Act that has significant constitutional impediments and cannot reasonably be ascribed to the Legislature. This necessitates an explanation of Texas' workers' compensation system.

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[46] Equine Act, sec. 87.001(1), 1995 Tex. Gen. Laws at 3318.

[47] TEX. CIV. PRAC. & REM. CODE § 87.001(1).

[48] § 87.001(3)(D).

The workers' compensation system throughout the country strikes a balance between employers' and employees' respective interests in compensating workplace injuries. The employee cannot sue the employer on common law claims, thereby relieving the employer of defending and paying them, but in return, the employer must pay the employee standardized insurance benefits regardless of fault.[49] Each pays or receives something, though perhaps more or less than under the common law.

In Texas, an employer can opt out of the system. The Texas Workers' Compensation Act (*WCA*)[50] "discourages employers from opting out of workers' compensation insurance by prohibiting a nonsubscriber from asserting that its employee was contributorily negligent, assumed the risk, or that a fellow employee's negligence caused the employee's injuries."[51] Thus, the employee of a nonsubscribing employer, though not receiving compensation benefits, has a remedy against the employer in the form of a negligence action. Though the WCA limits the nonsubscribing employer's defenses, it does not prevent an employer from asserting the liability shield of the Farm Animal Act. A ranch hand accidentally injured on the job by falling, by something falling on him, by equipment, by twisting his back or pulling a muscle—by almost anything—can sue his nonsubscriber employer and recover damages as long as he was not intoxicated.[52] But he could not do so if the employer were protected by the Farm Animal Act. If

[49] *See Kroger Co. v. Keng*, 23 S.W.3d 347, 349–350 (Tex. 2000) (providing background on the WCA).

[50] TEX. LAB. CODE ch. 406.

[51] *Kroger Co.*, 23 S.W.3d at 350 (citing TEX. LAB. CODE § 406.033(a)).

[52] *See* TEX. LAB. CODE § 406.033(c)(2).

the Act covered ranch hands, then it would operate to deny those employed by nonsubscribers of any remedy whatsoever for their injuries. They would not be entitled to compensation benefits, and they would have no common law cause of action. That is certainly a policy choice the Legislature *could* make. It could single out ranch hands and deny them, alone of all employees in the state, any right of recovery whatsoever for certain accidental injuries, commonplace in their jobs, while working for nonsubscribing employers. Apart from the constitutional implications of such a decision—such as violations of due process and equal protections guarantees, as well as open courts—nothing in the history of the Texas Equine Act or of similar statutes in almost all other states or in the caselaw interpreting them suggests any intent to deny recovery of damages for injuries from horse activities altogether in a group of cases. Rather, the history of these statutes shows a universal legislative intent, for claims of injury from horses, to return to something like the common law, with its absolute defenses of contributory negligence and assumption of the risk.

It is certainly not our place to make policy decisions that are for the Legislature to make. But it is exclusively our place to determine what policy decisions they have made. The Farm Animal Act can reasonably be interpreted to fulfill its historical and stated intent fully and completely without adding legal injury to physical injury for one small class of ranch hands.

We have confronted a similar situation before. In 1985, the Legislature amended the Motor Vehicle Code to require the use of seat belts and impose criminal penalties for nonuse, while adding that "[u]se or nonuse of a safety belt is not admissible evidence in a civil trial."[53] When

[53] *See Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 134 (Tex. 1994) (quoting former TEX. REV. CIV. STAT. ANN. art. 6701(d), § 107C(j)).

Marilyn Glyn-Jones sued on a products liability claim, alleging that her seat belt was defective, defendant Firestone moved for summary judgment, arguing that Glyn-Jones could not prove her case because she could not offer evidence that she had been using her seat belt. The trial court granted the motion. The court of appeals reversed, holding that the statutory provision violated the Open Courts provision of the Texas Constitution. We affirmed without reaching the constitutional issue, holding instead that the statute could not reasonably be interpreted to apply in products liability cases.[54] "[T]hat the Legislature would absolve seat belt manufacturers from products liability claims in a subsection of a traffic statute [was] simply too much to believe."[55]

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The court of appeals correctly concluded that the Farm Animal Act does not apply to ranchers and ranch hands acting as such. Accordingly, the court's judgment is

Affirmed.

Nathan L. Hecht
Chief Justice

Opinion delivered: June 12, 2020

[54] *Id.* at 134–135.

[55] *Id.* at 135 (Hecht, J., concurring).