THE STATE OF NEW HAMPSHIRE

SUPREME COURT

SEPTEMBER TERM

2017 SESSION

Docket No. 2017-0153

Anthony W. Franciosa, III f/n/f Vaneesa S. Franciosa

v.

Jessica Grace Elliott
and
Hidden Pond Farm, Inc. a/k/a Hidden Pond Farm

RULE 7 APPEAL FROM ORDER OF THE ROCKINGHAM COUNTY SUPERIOR COURT
(Justice David A. Anderson)

BRIEF OF APPELLEES JESSICA GRACE ELLIOTT AND HIDDEN POND FARM, INC. A/K/A HIDDEN POND FARM

Gary M. Burt (N.H. Bar No. 5510)
Clara E. Conklin (N.H. Bar No. 267553)
PRIMMER PIPER EGGLESTON & CRAMER PC
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3300
gburt@primmer.com
cconklin@primmer.com

Gary M. Burt will present oral argument on behalf of the Appellees

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RELEVANT STATUTORY PROVISIONS

RSA 508:19 Liability; Equine Activities.

I. In this section:

(a) "Engages in an equine activity" means rides or drives an equine; or assists in medical treatment of an equine; or is a passenger upon an equine; or is a passenger in a vehicle drawn by an equine; or trains, whether mounted or unmounted, an equine; or who is involved in event management. The term "engages in an equine activity" does not include being a spectator at an equine activity, except in cases where the spectator is in an unauthorized area and in immediate proximity to the equine activity.

(b) "Equine" means a horse, pony, mule, donkey, or hinny.

(c) "Equine activity" means:

(1) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, 3-day events, combined training, rodeos, driving, pulling, cutting, polo, steeple chasing, hunting, english and western performance riding, endurance riding, games, and eventing.

(2) Equine training or teaching activities.

(3) Boarding equines.

(4) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine.

(5) Rides, trips, hunts, field trials, or other equine activities of any type, however informal or impromptu, that are sponsored by an equine activity sponsor.

(6) Placing or replacing shoes on an equine.

(d) "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or not for profit, which sponsors, organizes, or provides for, equine activities, including, but not limited to, pony clubs, 4-H clubs, field trial clubs, hunt clubs, riding clubs, school and college sponsored classes, programs and activities, therapeutic riding programs, stables, clubhouses, pony ride strings, fairs, and arenas at which the activity is held.

(e) "Equine professional" means a person engaged for compensation:

(1) In instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine.

(2) In renting equipment or tack to a participant.

(3) In providing daily care of horses boarded at an equine facility.

(4) In training an equine.

(f) "Inherent risks of equine activities" means those dangers and conditions which are an integral part of equine activities, including, but not limited to:

(1) The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around them.

(2) The unpredictability of an equine's reaction to such things as sounds, sudden movements, and unfamiliar objects, persons, or other animals.
(3) Certain hazards such as surface and subsurface conditions not obvious to the equine participant or not known and reasonably not known by the equine professional or sponsor.
(4) Collisions with other equines or objects that can be reasonably foreseen as a result of normal equine activities.
(5) The potential of a participant to act in a negligent manner that may contribute to injury of the participant or others, such as failing to maintain control over the animal or not acting within the participant's ability; except where said negligence can be reasonably foreseen and the equine professional or sponsor has failed to take any corrective measures.

(g) "Participant" means any person, whether amateur or professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

II. Except as provided in paragraph III of this section, an equine activity sponsor, an equine professional, or any other person engaged in an equine activity, shall not be liable for an injury or the death of a participant resulting from the inherent risks of equine activities and, except as provided in paragraph III of this section, no participant's representative shall make any claim against, maintain an action against, or recover from any other person for injury, loss, damage, or death of a participant resulting from any of the inherent risks of equine activities. Each participant in an equine activity expressly assumes the risk of and legal responsibility for any injury, loss or damage to person or property which results from participation in an equine activity. Each participant shall have the sole responsibility for knowing the range of his or her ability to manage, care for, and control a particular equine or perform a particular equine activity, and it shall be the duty of each participant to act within the limits of the participant's own ability, to maintain reasonable control of the particular equine at all times while participating in an equine activity, to heed all posted warnings, and to refrain from acting in a manner which may cause or contribute to the injury of any person.

III. Nothing in paragraph II of this section shall prevent or limit the liability of an equine activity sponsor, an equine professional, or any other person engaged in an equine activity, if the equine activity sponsor, equine professional, or person:

(a) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury.

(b) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity.

(c) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known to the equine activity sponsor, equine professional, or person and for which warning signs have not been conspicuously posted.

(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.

(e) Intentionally injures the participant.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Jessica Grace Elliott, doing business as Hidden Pond Farm ("Elliott") operates Yorkfield Farm in Kensington, New Hampshire. Appellant's App. 51-52, Depo. Page 5-6; Appellant's App. 70. Elliot provides riding lessons to students. Appellant's App. 51, Depo. Page 5. Elliott previously worked at GayLee Stables, providing riding lessons, and moved to Yorkfield Farm as her business started to grow. Appellant's App. 54, Depo. Page 16. When Elliott moved to Yorkfield Farm she entered into an agreement with the farm's owner, under which Elliott agreed to maintain the farm in exchange for the use of the farm for her business. Appellant's App. 52, Depo. Page 8; Appellant's App. 74.

In addition to operating her business, Elliott rides, breaks, and shows horses. Appellant's App. 70. Elliott has been riding horses since she was a year old, has received numerous awards as a rider, and has worked with some of the most prestigious trainers during her career. Appellant's App. 71-73. Elliott is certified by USHJA (United States Hunter Jumper Association). Appellant's App. 73. Elliott's history with horses also includes providing riding lessons at Back Bay Farm in Ipswich, Massachusetts, breaking and grooming equines at Ethal Walker School in Wellington, Florida, and for Courtney Kennedy in Middleburg, Virginia. Appellant's App. 71.

Vaneesa S. Franciosa (the "Appellant") met Elliot in 2012 when Elliot was working at GayLee Stables. Appellant's App. 35, Depo. Page 19-20; Appellant's App. 54, Depo. Page 15-16. Elliott was the Appellant's riding instructor and gave the Appellant weekly riding lessons at GayLee Stables for approximately one year before Elliott moved her business to Yorkfield Farm. Appellant's App. 54, Depo. Page 15-16. When Elliott moved her business to Yorkfield Farm several of her students, including the Appellant, left GayLee Stables to continue taking lessons with Elliott. Appellant's App. 54, Depo. Page 16. The Appellant continued taking riding lessons from Elliott up

until the time of her accident on July 20, 2014. Appellant's App. 34-35, Depo. Page 17-18; Appellant's App. 45, Depo. Page 58. At that time, the Appellant was 13 years old. Appellant's App. 35, Depo. Page 18.

The Appellant was approximately four or five when she first started riding horses at Trundle Bed Stables, where she took lessons once a week. Appellant's App. 33, Depo. Page 11. A year later the Appellant left Trundle Bed Stables and began riding horses at GayLee Stables where she took lessons every week. Appellant's App. 32, Depo. Page 11-13. In addition to lessons, the Appellant would participate in "free rides" at GayLee Stables about once or twice a month. Appellant's App. 33, Depo. Page 14. A free ride is conducted without lessons or oversight, though there is a cost associated with a free ride. Appellant's App. 36, Depo. Page 23. The participant is essentially leasing the horse and equipment, as well as incidental costs associated with the use of the riding arena or barn. The cost of a free ride is less than the cost of a lesson, as the instructor is not providing instruction nor necessarily in the barn nor onsite. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 23. Free rides are available to riders of any age at Yorkfield Farm.

At Yorkfield Farm the Appellant took weekly lessons with Elliott, including instruction on skills such as jumping, flat work, and equitation. Appellant's App. 35, Depo. Page 21; Appellant's App. 53, Depo. Page 11. In addition to these weekly lessons, the Appellant would also take one free ride a week at Yorkfield Farm. Appellant's App. 35, Depo. Page 21.

Elliott was not always on the property or watching the Appellant when the Appellant took free rides. Appellant's App. 35, Depo. Page 21. Though Elliott required minor rides to have an adult present during free rides, Elliott never represented that she would be physically present during free rides. Appellant's App. 36, Depo. Page 23; Appellant's App. 65, Depo. Page 59.

The Appellant rode several different horses throughout her time at Yorkfield Farm. Appellant's App. 36, Depo. Page 23-24. One of those horses was Wilma, a Welsh Pony Elliott purchased from New Holland Sales Stable. Appellant's App. 76. Elliott purchased Wilma in late May 2014, and Wilma arrived in New Hampshire in early June 2014. Appellant's App. 61, Depo. Page 42-43; Appellant's App. 76. Elliott considered Wilma a safe and gentle pony, and used Wilma in her lesson program as well as in a summer camp for beginner riders. Appellant's App. 60, Depo. Page 38; Appellant's App. 63, Depo. Page 50.

Elliott was never told that anyone resisted riding Wilma. Appellant's App. 63, Depo. Page 52. Prior to the accident, the Appellant rode Wilma for a week or two, and soon after became interested in having her parents lease Wilma. Appellant's App. 38, Depo. Page 30-31. Although the Appellant testified Wilma could be spooky and hard to control, the Appellant believed she could ride Wilma proficiently. Appellant's App. 38, Depo. Page 31-32. The Appellant never expressed concern about riding Wilma to Elliott. Appellant's App. 39, Depo. Page 34.

In addition to taking riding lessons and free rides at Yorkfield Farm, the Appellant participated in the IEA program with Elliott. Appellant's App. 36, Depo. Page 24. In the IEA program, participants attend a horse show and select a horse to ride in the show. Appellant's App. 36, Depo. Page 24; Appellant's App. 63, Depo. Page 53. The participants are unfamiliar with the horses they select to ride. Appellant's App. 36, Depo. Page 24. The Appellant attended approximately five (5) IEA program shows, and during all of these shows she was able to safely ride horses with which she was unfamiliar. Appellant's App. 36, Depo. Page 24-25.

On July 19, 2014, the day before her accident, the Appellant, with Elliott's permission, took Wilma on a free ride. Appellant's App. 40, Depo. Page 38-39. Elliott was not present during that free ride. Appellant's App. 40, Depo. Page 38-39. The Appellant had had no issues with Wilma

during that free ride, and on the same day the Appellant described the ride as "wonderful" on her Facebook page. Appellant's App. 40, Depo. Page 38-40.

Subsequent to the Appellant's July 19th free ride, the Appellant texted Elliott to arrange a riding lesson for the next morning. Appellant's App. 38, Depo. Page 33; Appellant's App. 48.

Appellant:	Could [I] do a lesson tomorrow some time in the morning?
Elliott:	No I will not be here
Appellant:	ok. Would [I] be able to do a free ride?
Elliott:	Yes
Appellant:	Ok. Who should [I] ride?
Elliott:	Wilma.

Appellant's App. 48. The Appellant was dropped off at Yorkfield Farm on July 20, 2014, by a family friend. Appellant's App. 39, Depo. Page 36-37. At all times, the Appellant was aware Elliott would not be present for the free ride. Appellant's App. 39, Depo. Page 36-37. A few other people were present at Yorkfield Farm on July 20, 2014, including adults and others working at the farm. Appellant's App. 41, Depo. Page 43-44; Appellant's App. 75.

The Appellant considered herself, at the time of the accident, to be well beyond the level of a beginner rider. Appellant's App. 37, Depo. Page 28-29. As an experienced rider, the Appellant understood horseback riding involved certain inherent risks, including that a horse could do something unanticipated, even during a free ride. Appellant's App. 37, Depo. Page 26-27.

About ten minutes into the Appellant's free ride on July 20, 2014, the Appellant experienced difficulty controlling Wilma. Appellant's App. 41-42, Depo. Page 45-46. Wilma started to act "jumpy" and "was hard to control a little bit." Appellant's App. 41-42, Depo. Page 45-46. Despite Wilma's behavior, the Appellant continued the ride for approximately 20 more minutes. Appellant's

App. 41-42, Depo. Page 45-46. The Appellant believed she could get Wilma to calm down, but was aware there was a risk Wilma would not calm down and she could get injured by continuing to ride. Appellant's App. 42, Depo. Page 46-48. The Appellant eventually determined Wilma had calmed down and went to dismount Wilma, at which point she fell from Wilma. Appellant's App. 42, Depo. Page 49. The Appellant is not exactly sure how she fell off of Wilma, but believes Wilma did something unexpectedly that caused her to fall. Appellant's App. 42-43, Depo. Page 49-50.

After the Appellant fell, Wilma stepped on her. Appellant's App. 43, Depo. Page 50-51. Another person immediately came over to see if the Appellant was okay, and 911 was called. Appellant's App. 43, Depo. Page 52-53.

Although Appellant's parents were unaware, prior to July 20, 2014, Elliott was not always present during the Appellant's free rides at Yorkfield Farm Elliott had an agreement with her students, including the Appellant, requiring an adult to accompany minor riders during all free rides. Appellant's App. 35, Depo. Page 21; Appellant's App. 65, Depo. Page 58-59; Appellant's App. 96. The Appellant was aware of this rule and purposely did not tell her parents, or her family friend that dropped her off, Elliot was not always present during free rides because she believed they wouldn't let her take free rides. Appellant's App. 36, Depo. Page 22; Appellant's App. 39, Depo. Page 36-37.

SUMMARY OF THE ARGUMENT

The New Hampshire legislature has adopted an equine activity statute to protect equine professionals from lawsuits arising out of accidents and injuries occurring during equine activities, unless specifically caused by conduct excluded from the scope of immunity. This statute, RSA 508:19, recognizes certain injuries that occur during equine activities are truly outside the control of the equine professional, and imposing even the threat of liability would

chill participation in the sport. The statute's immunity provision is broad and covers injuries occurring during equine activities that are within the scope of inherent risks of equine activities. The statute also carves out several exceptions to this broad immunity. These exceptions apply to acts or omission by equine professionals and an equine professional can only be held liable for an injury occurring during equine activities if its conduct falls within one of the exceptions.

The Trial Court correctly concluded, based upon the undisputed material before it, Elliott was entitled to summary judgment as the statutory immunity afforded by RSA 508:19 applied to Elliott. Elliott is entitled to immunity because falling off a horse and being stepped on, as occurred in this matter, are exactly the types of risks that are inherent to equine activities. In addition, the undisputed material facts establish Elliott made a professional, informed decision to allow the Appellant to take a free ride on Wilma and therefore no exception to the statutory immunity afforded by the equine statute applies.

The Appellant raises seven issues on appeal. Specifically the Appellant claims: 1) there are genuine disputes of material fact which preclude summary judgment; 2) the Trial Court erred in its interpretation of the Statement of Intent in Chapter 24; 3) Elliott is not immune from liability because her conduct falls into the exceptions to immunity in RSA 508:19, III (b) and/or (d); 4) the Trial Court erred when interpreting the meaning of "inherent risk" as defined in RSA 508:19, III (f);5) the Trial Court erred in its interpretation of Elliott's safety rule; 6) the Trial Court erred in ruling there was nothing in the record that established Elliott could have intervened if she were present; and 7) the Trial Court erred in ruling no reasonable jury could find Elliott was negligent. *Brief for the Plaintiff/Appellant Anthony W. Franciosa, III f/n/f of Vaneesa S. Franciosa ("Appellant's Brief")*, p. 1. These seven issues, however, can properly be reduced to two issues: did the Trial Court properly interpret RSA 508:19, and if so does the

record support the Trial Court's determination that the material facts were undisputed entitling Elliott to statutory immunity.

The plain language of the equine statute requires a court to engage in a two-step inquiry. Appellant's Addendum, 29-30. This interpretation is supported by the legislative purpose of the statute set forth in the Statement of Intent. The Statement of Intent, which is found in the session law, establishes the equine statute was intended to create a dividing line between risks assumed by a participant and specific risks within the control of equine professionals. *See* Appellant's App. 100.

The two-step inquiry requires a court to first determine whether the injury resulted from a risk inherent to equine activates and to next determine if an exception to immunity applies. The equine statute provides in section II "an equine professional . . . shall not be liable for an injury or the death of a participant resulting from the inherent risks of equine activities." RSA 508:19, II. The statute defines "inherent risks" to mean "those dangers and conditions which are an integral part of equine activities" which include the "propensity of an equine to behave in ways that may result in injury" and the "unpredictability of an equine's reaction." RSA 508:19, I (f).

The undisputed material facts before the Trial Court established the Appellant was injured when she fell from Wilma and was stepped on. Appellant's App. 49, Depo. Page 49. The Appellant believes Wilma did something unexpected to cause her to fall. Appellant's App. 42-43, Depo. Page 49-50. Unexpected or unanticipated movements of a horse fall squarely within the statutory definition of an inherent risk. RSA 508:19, I(f)(2) ("the propensity of an equine to behave in ways that may result in injury, . . . to persons on or around them."). Thus, the Appellant's accident is unquestionably within the meaning of "inherent risks" as defined in the equine statute.

RSA 508:19, III specifies those risks the legislature deemed to be within the control of an equine professional. Equine professionals can only be found liable in tort when their actions fall into one of those exceptions and if their actions proximately caused the injury. The equine statute imposes liability on an equine professional when they "[p]rovided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity" RSA 508:19, III (b), or when they commit "an act or omission that constitutes willful or wanton disregard for the safety of the participant." RSA 508:19, III , (d).

The Trial Court correctly determined the undisputed material facts establish Elliott met the obligations set forth in RSA 508:19, III (b) and (d). Both the Appellant's experience with horses and Elliott's knowledge of the Appellant's experience are undisputed. The Appellant began riding horses when she was 4 or 5 years old, taking lessons once a week at Trundle Bed Stables, GayLee Stables, and then Yorkfield Farm up until the time of the accident. Appellant's App. 33, Depo. Page 11-13; Appellant's App. 34-35, Depo. Page 17-19.

Elliott was familiar with the Appellant's riding background and had given the Appellant weekly riding lessons during the two years preceding the accident. Appellant's App. 54, Depo. Page 15-16. Elliott assessed Appellant's riding abilities during these lessons as well as during free rides and IEA competitions. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 24-25. Elliott was also familiar with Wilma's disposition and the Appellant's ability to safely ride Wilma unsupervised. Appellant's App. 40, Depo. Page 38-39; Appellant's App. 60, Depo. Page 38; Appellant's App. 63, Depo. Page 50.

Though she claims genuine disputes of material fact exist, the Appellant's Brief fails to reveal a single dispute of "material" fact regarding the cause of the accident and her injuries, the Appellant's abilities, or Elliott's knowledge of the Appellant's abilities and the disposition of

Wilma. *Appellant's Brief*, pp. 11-13. The Appellant claims Elliott failed to act reasonably or prudently because she violated her own rule regarding supervision. *Appellant's Brief*, p. 19. Elliott never maintained her rule was that she would be present during free rides. Elliott's rule was that riders under the age of 18 must have a parent or adult present during free rides. *See* Appellant's App. 65, Depo. Page 59. More importantly, there was no evidence that Elliott was even aware that the Appellant failed to abide by this rule.

Appellant cites factors, such as the safety rule, the Appellant's age, and Wilma's "newness" to the farm, she believes Elliott did not consider when assessing the Appellant's abilities. There is no evidence in the record before this Court, however, that Elliott did not consider these factors as at all times Elliott was aware of her safety rule, the Appellant's age and experience, and Wilma's "newness" to the farm. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 24; Appellant's App. 40, Depo. Page 38-39; Appellant's App. 60, Depo. Page 38; Appellant's App. 65, Depo. Page 59. In judging the Appellant's ability to engage in a free ride, Elliott took into account her safety rule and the other relevant factors when concluding the Appellant could safely participate in a free ride. That an accident subsequently happened, however, is not the determining issue. The focus is not on the result, but the decision-making process. *See* RSA 508 :19, III (b).

The Appellant further relies on Elliott's safety rule and claims Elliott's failure to supervise directly the Appellant's free ride demonstrates a willful or wanton disregard for the Appellant's safety in violation of RSA 508:19, III (d). *Appellant's Brief*, p. 19. Willful or wanton conduct involves a course of action that demonstrates actual or deliberate intention to harm or shows a conscious disregard of the safety of others. There is no evidence Elliott had knowledge of a danger presented by allowing the Plaintiff to take a free ride on Wilma. Elliott was aware of

the Appellant's abilities, Wilma's disposition, and knew minor riders at Yorkfield Farm were responsible for ensuring an adult was present during free rides. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 24; Appellant's App. 40, Depo. Page 38-39; Appellant's App. 60, Depo. Page 38; Appellant's App. 65, Depo. Page 59. In addition, Elliott knew the Appellant had taken a free ride on Wilma the day before, without incident. Appellant's App. 40, Depo. Page 38-39.

The Appellant notes it is not customary to allow students to take unsupervised free rides and that she was always supervised while riding at other stables. *Appellant's Brief*, p. 19. These facts are immaterial as they fail to address whether Elliott failed to consider whether the Appellant was qualified to ride Wilma. As Elliott was unaware the Appellant violated Elliot's requirement that an adult be present during free rides, what other stables do with regard to free rides is simply irrelevant to the inquiry. The issue is not what was allegedly the custom and practice, but whether the equine professional acted with a disregard for the Appellant's safety by allowing her to participate in a free ride when Elliott knew she would not be on site.

The Trial Court also correctly determined there was a lack of causation between Elliott's alleged actions and the Appellant's injuries. The purpose of Elliott's rule, requiring an adult to be present during free rides, was so someone would be able to render aid. Appellant's Addendum, 41. Adults were present during the Appellant's free ride and those adults provided immediate assistance when the Appellant fell. Appellant's App. 43, Depo. Page 52-53; Appellant's App. 75. In addition, there is no evidence if Elliott had been present during the free ride she could have intervened and would have been able to prevent the fall. Thus, the risk created by Elliott's failure to enforce her rule and by allowing the Appellant to take a free ride without ensuring the

Appellant had an adult present during the free ride was not the cause in fact of the Appellant's fall. Appellant's Addendum, 41-43.

ARGUMENT

I. The Trial Court properly interpreted the plain language of RSA 508:19 to require a two-step inquiry to determine whether an equine professional is entitled to immunity.

The construction of RSA 508:19 presents an issue of law that this Court must review *de novo*. *See State v. Addison,* 160 N.H. 732, 754 (2010). In matters of statutory interpretation, the Court must "begin by examining the language of the statute and ascribing the plain and ordinary meaning to the words the legislature used." *Nilsson v. Bierman*, 150 N.H. 393, 395 (2003). When the language of a statute is plain and unambiguous, the Court need not look beyond the plain language of the statute to discern the legislative intent. *See Dent v. Exeter Hosp.*, 155 N.H. 787, 795 (2007); *Lord v. Lovett*, 146 N.H. 232, 237 (2001) ("When the language of a statute is clear, it is not necessary to agonize over ambiguous and often conflicting legislative history.").

a. The Trial Court properly classified the Statement of Intent as a preamble setting forth the purpose of and policy behind the equine statute.

The Trial Court correctly concluded the Statement of Intent set forth the legislative policy behind RSA 508:19, and therefore the plain language of the equine statute must be considered in light of this policy. Appellant's Addendum, 32-35. In several cases this Court has discussed what were deemed to be "preambles," similar to the Statement of Intent, which were enacted as part of a session law but not included in the language of the statute. *See State v. Paul*, 167 N.H. 39 (2014); *State v. Kelley*, 153 N.H. 481 (2006); *Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399 (2005)*; *State v. Fleming*, 125 N.H. 238 (1984).

In each of those cases the Court treated the "preambles" as separate and distinct from the plain language of the statutes at issue. For example, in *Kelley,* 153 N.H. at 484, the preamble was

determined to be a statement of the "policy behind the ...statute", in *Soragah* 152 N.H. at 405, the preamble was said to be the "purpose of the statute" and in *Fleming*, 125 N.H. at 242, the Court stated the preamble was "the purpose and limits" of the statute at issue. The Court in those cases considered the plain language of the statute at issue in light of the statute's policy or purpose set forth in the preamble – the language found in the session law. *See Kelley,* 153 N.H. at 473; *Soraghan*, 152 N.H. at 406. In none of these cases was the preamble interpreted, as the Appellant suggests it should be, as part of the statute at issue or as overriding the plain language of the statute. *See Appellant's Brief*, pp. 15-17.

Similar to the preambles in the cases discussed above, the Statement of Intent must be read to reflect the overall purpose of the equine statute, as it was not included in the language of the statute. The Statement of Intent clearly indicates the statute was intended to create a dividing line between the risks assumed by a participant and those risks an equine professional is obligated to protect against. *See* Appellant's Addendum, 100. Consistent with this purpose, the legislature specifically set forth the risks assumed by a participant and the risks an equine professional is obligated to protect against in separate sections of the equine statute. *See* RSA 508:19, II-III. Those exceptions enumerated in RSA 508:19, III identify the specific types of conduct for which an equine professional can be held liable. These enumerated exceptions limit the type of conduct that can give rise to a cause of action against an equine professional.

The Appellant incorrectly claims the Statement of Intent is part of the plain language of the equine statute, and that a claim of ordinary negligence is extended under the equine statute. *Appellant's Brief,* p. 15. In support of this argument, the Appellant relies on paragraph III of the Statement of Intent which states:

> It is the intent of the general court that a person responsible for equines, or responsible for the safety of those engaged in equine activity, whose negligence proximately causes

injury to a person engaged in those activities, is liable for that injury in accordance with other applicable law.

Appellant's Addendum, 100. The Appellant also cites a legal research guide published by the Boston College Law Library for the proposition that the language of paragraph III in the Statement of Intent is controlling and allows a claim for ordinary negligence. *Appellant's Brief,* p. 15; Appellant's App. 151-52. The research guide however makes clear in order for the language of a session law to be controlling there must be a difference in wording between the code as enacted and the session law. Appellant's App. 151-52.

In this case, the wording of the session law and RSA 508:19 do not differ. *See* RSA 508:19; Appellant's App. 100. The session law specifically indicates RSA 508 was to be amended "by inserting after section 18 the following new section: 508:19 Liability; Equine Activities." Appellant's App. 100. The Statement of Intent is not included in section 508:19. *See* RSA 508:19; Appellant's App. 100. The legislature clearly indicated and intended for the Statement of Intent to be separate from the statute. *Id.* Thus, the statute and session law cannot be said to be in conflict and the Statement of Intent cannot be considered part of the statute.

As the Trial Court discussed, the Appellant's interpretation of the Statement of Intent runs contrary to the plain language of the statute and would swallow the protections afforded by the statute by rendering the exceptions in RSA 508:19, III meaningless. Appellant's Addendum, 14; 35. The exceptions set forth in RSA 508:19, III limit the type of negligence that can give rise to an action by identifying the specific conduct for which an equine professional may be held liable. These exceptions apply to certain specific acts or omissions.

b. The Trial Court correctly interpreted the equine statute, as requiring a two-step inquiry to determine Elliott was entitled to statutory immunity

The New Hampshire equine statute provides:

> Except as provided in paragraph III of this section, an equine activity sponsor, an equine professional, or any other person engaged in an equine activity, shall not be liable for an injury or the death of a participant resulting from the inherent risks of equine activities…

RSA 508:19, II. The Trial Court correctly concluded this language indicates a court must engage in a two-step inquiry to determine whether an equine professional is entitled to immunity. Appellant's Addendum, 29-30. This two-step inquiry requires a court to first determine whether the injury resulted from a risk inherent to equine activates and to next determine if any exception to immunity applies. An equine professional is not entitled to immunity only if an exception applies and their conduct proximately caused the injury. This two-step inquiry is expressed by the plain language of RSA 508:19, II and RSA 508:19, III. Together, RSA 508:19, II and RSA 508:19, III recognize an injury caused by risks inherent in equine activities may also be caused by actions of an equine professional.

The Appellant claims the Trial Court erred when interpreting the equine statute and the Trial Court gave too broad a meaning to the term "inherent risk" in the statute. *Appellant's Brief,* pp. 20-25. Specifically, the Appellant argues the term "inherent risk" does not provide immunity when the actions of an equine professional arguably fall within the category of negligence – i.e. when the equine professional creates risks beyond those inherent to horseback riding. *Id.* at 25. As discussed above, the Appellant's position ignores the plain language of the statute and fails to recognize the two-step inquiry a court must engage in applies even when a participant is exposed to risks beyond those inherent to equine activities. Appellant's Addendum, 29-30.

In support of her argument, the Appellant cites cases discussing ski statutes, sports injuries, and equine cases from other states. *Appellant's Brief*, pp. 22-25. Similar to the equine

statute, New Hampshire's Skiers, Ski Area and Passenger Safety Act, RSA 225-A, mandates the dismissal of any claim for injuries resulting from risks inherent to skiing. The ski immunity statute specifically defines those risks inherent to skiing as well as the responsibilities of skiers and ski areas. *See* RSA 225-A:23, RSA 225-A:24. Therefore, if an injury is caused by a risk inherent to skiing, the ski area is immune from liability, unless a ski area operator violated an enumerated statutory duty and that violation caused the injury. RSA 225-A:26; *Adie v. Temple Mountain Ski Area, Inc.,* 108 N.H. 480, 483 (1968) (noting "the rights of a downhill skier under [RSA 225-A] are not completely barred since the statute specifically confers a right of action if the operator is in violation of the statute which imposes duties…"); *See Also Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4, 7 (1st Cir. 1991) (noting by passing the ski liability act "the legislature intended to supersede and replace a skier's common law remedies for risks inherent in the sport of skiing.").

As support for the argument that Trial Court gave too broad a meaning to the term "inherent risk" in the equine statute, Appellant cites *Adie,* 108 N.H. at 484, where the Court stated a "ski area can be liable for an employee's negligence, despite the existence of statutory immunity." *Appellant's Brief,* p. 22. In *Adie,* the plaintiff was injured when she was left unattended on a ski mountain, without instruction, during a paid ski lesson. *Id.* at 481. The plaintiff filed suit against the ski area and the ski area sought immunity under the ski immunity statute. *Id.* at 482. In *Adie*, the language of the ski immunity statute did not specifically regulate or define the duties of a ski operator while giving ski lessons. *Id.* at 483. Therefore, as the ski statute did not address or define the duties of a ski area during ski lessons, the Court found the defendant was not entitled to statutory immunity. *Id.*

In this case, unlike in *Adie*, the equine statute specifically defines the obligations of a participant and an equine professional during equine activities, such as free rides. *See* RSA 508:19, II - III. Specifically, the equine statute act bars a participant from bringing suit against equine professionals if the suit arises out of a risk inherent to equine activities and states:

> Each participant in an equine activity expressly assumes the risk of and legal responsibility for any injury, loss or damage to person or property which results from participation in an equine activity. Each participant shall have the sole responsibility for knowing the range of his or her ability to manage, care for, and control a particular equine or perform a particular equine activity, and it shall be the duty of each participant to act within the limits of the participant's own ability, to maintain reasonable control of the particular equine at all times while participating in an equine activity, to heed all posted warnings, and to refrain from acting in a manner which may cause or contribute to the injury of any person.

RSA 508:19, II. The statue further provides an equine professional can be held liable for injuries resulting from a risk inherent to equine activities only if the equine professional:

> (a) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury.
> (b) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity.
> (c) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known to the equine activity sponsor, equine professional, or person and for which warning signs have not been conspicuously posted.
> (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.
> (e) Intentionally injures the participant.

RSA 508:19, III. An equine professional can be held liable only if they failed to meet one of these obligations and their actions caused the injury. *Id.*

As the Court explained in another ski liability case, the ski lability statute "does not limit the risks assumed to those enumerated therein." *Rayeski v. Gunstock Area,* 146 N.H. 495, 498, 776 A.2d 1265 (2001). The equine statute similarly does not limit the "inherent risks" but indicates that they include "those dangers and conditions which are an integral part of equine

activities, **including, but not limited to** [five enumerated risks]." RSA 508:19, I (f). Thus, while falling off a horse and being stepped on while taking a free ride is not specifically defined as an inherent risk in the equine statute, one cannot seriously suggest that the danger is not an integral part of the activity of riding a horse. *See* RSA 508:19, I (f); *Christian v. Elden*, 107 N.H. 229, 235 (1966) (noting, in a case decided before the equine statute was enacted, "everyone who mounts a horse should realize that he may fall or get thrown off.").

The Appellant cites cases addressing sports injuries and equine cases from other states. *Appellant's Brief*, pp. 22-24. The sports cases are not applicable to this matter, as they discuss the risks inherent to sports in the context of the doctrine of assumption of risk, rather than statutory immunity. *See Hacking v. Town of Belmont*, 143 N.H. 546 (1999) (discussing those risks assumed while playing basketball); *Allen v. Dover Co-Recreational Softball League*, 148 N.H. 407 (2002) (discussing risks inherent to softball); *Werne v. Executive Women's Golf Assoc.*, 158 N.H. 373 (2009); *Sanchez v. Candia Woods Golf Links*, 161 N.H. 201 (2010) (discussing risks inherent in the game of golf); *See Also Tavares v. Perl,* 2012 WL 337784 (N.Y.Sup., January 17, 2012) (discussing doctrine of assumption of risk in relation to equine activities).

The equine cases from other jurisdictions also do not support the Appellant's position as they discuss negligence of equine professionals in reference to exceptions in equine liability statutes, not in reference to the meaning of inherent risks. *See Hubner v. Spring Valley Equestrian Center,* 203 N.J. 184 (2010) (noting a plaintiff must demonstrate an injury arose not because of an inherent risk, but because the professional breached a duty owed, as defined in the exceptions); *Frank v. Mathews*, 136 S.W. 3d 196 (Mo. Court of Appeals, W.D., 2004) (discussing exception in Missouri's equine act for negligent or willful acts).

In *Frank v. Mathews*, the court specifically looked to an exception to immunity in Missouri's equine act "for **negligent** or willful act that is not covered by the statute." 136 S.W. 3d at 203 (emphasis added). Similar to New Hampshire's equine act, Missouri's equine act bars a participant from bringing suit against an equine professional if the suit arises out of a risk inherent to equine activities. Mo. Rev. Stat. § 537.325. Inherent risks are "those dangers or conditions which are an integral part of equine activities" defined to include the "propensity of any equine to behave in ways that may result in injury, harm or death to persons on or around it" and "unpredictability of any equine's reaction." *Id.* Missouri's equine act also enumerates several exceptions to the statutory immunity. Mo. Rev. Stat. § 537.325.

One of the exceptions is "for negligent or willful act that is not covered by the statute." Mo. Rev. Stat. § 537.325.4. The court in *Frank* noted this exception illustrates the state's equine act does not "protect sponsors and professionals from their own culpable acts" and the act "was not intended to relieve sponsors and professionals from any duty that common law negligence principles impose upon them." 136 S.W. 3d at 203. New Hampshire's equine statute does not contain a similar exception for negligent acts. *See* RSA 508:19, III. Thus reliance on Missouri's equine statute is simply misplaced.

Similarly in *Hubner*, the New Jersey Supreme Court noted that the New Jersey equine act "reflects that notwithstanding the many and varied inherent risks of equine activities, the [professional] owes the participants certain ordinary duties of care, **defined through the statute's expression of exceptions**." 203 N.J. at 204 (emphasis added). The court highlighted the distinction between assumed risks, those inherent to equine activities, and risks created by an act described in the exceptions. *Id.* at 206-07 (noting a plaintiff must demonstrate an injury arose not because of an inherent risk, but because the professional breached a duty owed, as defined in

the exceptions). New Hampshire's equine statute is much different, focusing on whether the risk was inherent, and if so, did the equine professional engage in certain specific conduct triggering an exception to the statute's broad grant of immunity.

The Appellant's reliance on New Hampshire equine cases that pre-dated the New Hampshire equine statute is similarly misplaced. *See Appellant's Brief* pp. 22-23. These cases not only pre-dated the equine statute, but also dealt with claims for ordinary negligence in the context of equine activities. *See Wright v. Loon Mountain Recreational Corp.,* 140 N.H. 166 (1995); *Chanaki v. Walker*, 114 N.H. 660 (1974); *Christian v. Elden*, 107 N.H. 229 (1966). Consequently, these cases cannot be read to supply the relevant definition of inherent risk. Instead, the equine statute defines this term and unlike the cases cited by the Appellant the statute contemplates certain kinds of negligence are in fact part of the risks inherent to equine activities. RSA 508:19, I(f)(5).

II. The Trial Court correctly found the Appellant's claim was barred by the equine statute as the undisputed material facts establish the Appellant was injured by an inherent risk when she fell and was stepped on, and Elliott made a professional, informed decision matching the Appellant to the horse.

In reviewing the Trial Court's grant of summary judgment, this Court must "consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Del Norte, Inc. v. Provencher*, 142 N.H. 535, 537 (1997). The Court must affirm if "the evidence reveals no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law." *McGrath v. SNH Dev.,* 158 N.H. 540, 542 (2009). The light most favorable standard only applies to factual determinations, as opposed to questions of law – such as the proper interpretation of a statute. *In re Nicholas L.*, 158 N.H. 700, 702 (2009). A trial court's application of the law to the facts is reviewed *de novo*. *Del Norte*, 142 N.H. at 537.

While this Court must consider the evidence, and all reasonable inferences in the light most favorable to the Appellant, the Court need not consider "general allegations or denials," "speculation," or "conclusory allegation[s]." *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529, 535 (2009) (quotations omitted). Similarly, the Court need not adopt a party's characterization of the evidence.

Not every claimed factual dispute will be sufficient to defeat summary judgment, as the fact must be "material" and the dispute must be "genuine." "A fact is material if it affects the outcome of the litigation under the applicable substantive law." *Bond v. Martineau*, 164 N.H. 210, 213 (2012). Thus, the substantive law identifies and determines which facts are relevant and irrelevant. *See Petition of Atkins,* 126 N.H. 577, 582 (1985) (holding in the probate context, that materiality rested upon the relationship of the facts to the controlling law).

A factual dispute is genuine only if a "reasonable jury could resolve the point in favor of the nonmoving party." *Meuser v. Fed. Express Corp.,* 564 F.3d 507, 515 (1st Cir.2009) (quoting *Suárez v. Pueblo Int'l, Inc.,* 229 F.3d 49, 53 (1st Cir. 2000)). In other words, "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way" there is a genuine dispute over an issue of fact. *Adler v. Wal-Mart Stores,* Inc., 144 F.3d 664, 670 (10th cir. 1998). When the above rules are applied to the case at hand, the Trial Court correctly weighed the evidence before it and therefore this Court must affirm the Trial Court.

The Appellant claims the Trial Court erroneously ignored certain statements and evidence and those statements and evidence create genuine issues of material fact. *Appellant's Brief,* pp. 11-13. As discussed below, none of the statements or evidence the Appellant cites in this appeal create a genuine issue of material fact related to the primary issues in this case, which

are: (1) whether the Appellant was injured by a risk inherent to equine activities; and (2) whether Elliott met the obligations enumerated in RSA 508:19, III.

a. The Trial Court correctly interpreted the meaning of inherent risk and correctly determined the Appellant was injured by a risk inherent to equine activities when she fell while dismounting and was stepped on.

The first section of the equine statute defines the terms used in the equine statute, including "equine activity," "equine professional," "inherent risks of equine activities," and "participant." RSA 509:19, I (c), (e), (f), (g). There is no dispute that at the time of the accident the Appellant was a participant, RSA 508:19, I (g), engaging in equine activity. RSA 508:19, I (a) (c). Nor is there any dispute that at the time of the accident Elliott was an equine professional. RSA 508:19, I (e).

"Inherent risks of equine activities" is defined, in relevant part, to mean "dangers and conditions which are an integral part of equine activities, including, but not limited to:

> (1) The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around them.
> (2) The unpredictability of an equine's reaction to such things as sounds, sudden movements, and unfamiliar objects, persons, or other animals.

RSA 508:19, I (f). The Appellant's accident falls within this definition. In fact, case law that predates the adoption of the statute clearly indicated that falling from a horse is a risk of the activity. *Christian v. Elden*, 107 N.H. 229, 235 (1966) ("everyone who mounts a horse should realize that he may fall or get thrown off.").

Courts from sister states have also construed the definition of "inherent risks" in similar equine statutes to provide immunity when an injury is caused by an unexpected movement or action of an equine. *See Wiederkehr v. Brent, 248 Ga.App. 645* (Ga. App. 2001)(upholding summary judgment based on the equine act after a plaintiff was seriously injured when a horse reared back and fell on him); *Kangas v. Perry,* 239 Wis.2d 392, 397 (Wis.Ct. App.2000);

Amburgey v. Sauder, 605 N.W.2d 84 (Mich. App. 1999) (stating Michigan's equine statute protects owners from risks beyond an equine's normal or anticipated behavior).

In *Kangas* the plaintiff was riding in a horse-drawn sled and was injured when the horses moved unexpectedly causing her to fall from the sled. 239 Wis.2d at 397. Wisconsin's equine statute is similar to New Hampshire's and contains an exemption from liability for injuries resulting from the "inherent risk of equine activities." *Id.* at 399. Wisconsin's equine statute similarly defines "inherent risk of equine activities" to include the "propensity of an equine to behave in a way that may result in injury or death to a person on or near it." *Id.* at 399-400. Citing this language, the court in *Kangas* determined a "horses' propensity to move without warning is an inherent risk of equine activity contemplated by the statute" and therefore the statute barred the plaintiff's claim. *Id.* at 400.

As the Appellant's testimony makes clear, she was injured when she fell from Wilma. Appellant's App. 42, Depo. Page 49. The only account of the accident comes from the Appellant:

Q: .....Tell me what happened leading up to the point that you were injured.

A: Well, we were trotting and then at the end, I decided that [Wilma] was being good so I was going to get off of her, and then somehow I fell off. I don't even know how I did that or what happened but –

Q: So you just fell off as you were dismounting?

A: Yes. I don't know how because I don't remember.

Q: Alright. So as you fell off as you were dismount – well do you think Wilma caused you to fall off?

A: I believe so.

Appellant's App. 42-42, Depo. Page 49 -50.

Thus, the record establishes the Appellant was injured when she fell to the ground while dismounting Wilma and was subsequently stepped on. The Appellant believes Wilma did something unexpected to cause her to fall. Appellant's App. 42-42, Depo. Page 49 -50. Falling off of a horse because of an unexpected movement of a horse and being stepped on are risks that are unquestionably inherent to equine activity. *See Stoffels v. Harmon Hill Farm*, 389 N.J. Super. 207, 218 (App. Div. 2006) (recognizing "a fall from a horse is an inherent risk of horseback riding"). The Appellant even admitted horseback riding involved certain inherent risks, such as a horse making an unexpected movement that might cause a rider to fall. Appellant's App. 37, Depo. Page 26.

The Appellant claims the Trial Court failed to properly weigh the evidence before it, and when properly weighed there is a genuine dispute of material fact relating to the cause of the fall. *Appellant's Brief,* pp. 11-13. The statements and evidence set forth in the Appellant's Brief, however, all address immaterial issues and fail to contradict the facts establishing the Appellant was injured when she fell from and was stepped on by a horse. Thus the Appellant has entirely failed to demonstrate the existence of any material factual dispute.

b. The Trial Court correctly concluded Elliott made reasonable and prudent efforts to assess the Appellant's ability as the undisputed material facts establish Elliott assessed the Appellant's riding ability during weekly lessons, free rides, and IEA competitions, and Elliott was aware of Wilma's prior use with riders who had less experience than the Appellant.

The equine statute imposes liability on an equine professional for injuries caused by an inherent risk of equine activities only when their conduct falls within one of the enumerated exceptions to immunity and their conduct causes the injury. In this case, the only relevant exceptions are those found in RSA 508:19, III, (b) and (d). The other three exceptions do not apply because there is no evidence or contention the tack used during the Appellant's free ride

was faulty – RSA 508:19, III (a); there is no evidence or contention the Appellant was injured because of a dangerous latent condition on the property – RSA 508:19, III (c); and there is no evidence or contention Elliott intentionally injured the Appellant. – RSA 508:19, III (e).

RSA 508:19, III (b), provides an equine professional may be held liable for injuries occurring as a result of a risk inherent to equine activities when they "[p]rovided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity." The Trial Court correctly noted this exception does not require the assessment be correct, but rather that the assessment be done with "reasonable and prudent efforts." RSA 508:19, III (b); Appellant's Addendum, 17.

The record fails to establish Elliott did not consider the Appellant's level of experience or her ability to control and safely ride Wilma. To the contrary, there is abundant evidence in the record that establishes the Appellant was an experienced rider and Elliott knew the Appellant could proficiently ride horses with which she was either familiar or unfamiliar. *See* Appellant's App. 33, Depo. Page 11; Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 23-24; Appellant's App. 40, Depo. Page 38-39; Appellant's App. 53, Depo. Page 11; Appellant's App. 63, Depo. Page 53.

Prior to allowing the Appellant to take a free ride Elliott had assessed Appellant's riding abilities during weekly riding lessons, free rides, and IEA competitions, and was aware of the Appellant's six (6) years of riding experience. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 24-25; Appellant's App. 53, Depo. Page 11. Prior to the accident Elliott had owned Wilma for approximately five (5) weeks and used Wilma during lessons and at a summer camp with less experienced riders. Appellant's App. 60, Depo. Page 38; Appellant's App. 61, Depo. Page 42-43; Appellant's App. 63, Depo. Page 50. Elliott considered Wilma a safe and gentle

pony. Appellant's App. 60, Depo. Page 38. The Appellant had ridden Wilma during supervised riding lessons with Elliott and during other free rides – including free rides during which Elliott was not present. Appellant's App. 38, Depo. Page 30-31; Appellant's App. 40, Depo. Page 38-39.

No one ever resisted riding Wilma and the Appellant never expressed any concern about riding Wilma, supervised or unsupervised. Appellant's App. 39, Depo. Page 34; Appellant's App. 63, Depo. Page 52. Elliott was aware the Appellant had taken a free ride on Wilma the day before the accident without incident. Appellant's App. 40, Depo. Page 38-39. Elliott was not present during that free ride. Appellant's App. 40, Depo. Page 38-39. Furthermore, Elliott knew other adults would be present during Appellant's free ride, and had informed the Appellant she was required to have an adult present during free rides. Appellant's App. 41, Depo. Page 43-44; Appellant's App. 65, Depo. Page 58-59. These undisputed material facts, even when taken in the light most favorable to the Appellant, demonstrate Elliott reasonably and prudently assessed the Appellant's riding abilities and Appellant's ability to safely ride Wilma during a free ride. No evidence was offered by Appellant to undermine these undisputed material facts.

The Appellant claims the Trial Court erroneously ignored certain statements and evidence and those statements and evidence create a genuine issue of material fact. *Appellant's Brief,* pp. 11-13. Specifically, the Appellant claims 1) the Trial Court did not give any weight to Appellant's testimony that Wilma could be "kind of jumpy and spooky", Wilma could be hard to control, the Appellant had only ridden Wilma a few times, and the Appellant was told by Elliott to run Wilma into the wall; 2) the Trial Court made no reference to the fact that the Appellant was always supervised while riding at GayLee Stables; and 3) the Trial Court gave no weight to Elliott's testimony relating to intervening in a ride, testimony about her safety rule, and

testimony that riding is a dangerous sport. *Id.* The Appellant also points to the fact that the Appellant was thirteen at the time of the accident, Wilma was a "new" horse, and the Appellant had only ridden Wilma a few times before the accident. *Appellant's Brief,* pp. 18-19.

No evidence was offered, however, that Elliott was unaware of these facts when, given her totally of knowledge, she concluded Appellant could safely participate in the activity. Appellant's complaint is not that Elliott failed to consider all information she had available to her, but that she weighed that evidence differently than the Appellant now would given the benefit of hindsight. But as the Trial Court noted, the focus is on the decision-making process, not the result. *See* Appellant's Addendum, 17.

Thus, while the Appellant testified Wilma could be "kind of jumpy and spooky" and hard to control, Elliott had seen the Appellant successfully complete in IEA programs riding horses with which she was unfamiliar. Appellant's App. 36, Depo. Page 24-25. Elliott had given the Appellant weekly riding lessons for approximately two years. Appellant's App. 54, Depo. Page 15-16. In addition, Elliott previously allowed the Appellant to take unsupervised free rides on Wilma, during which the Appellant was able to successfully control Wilma. Appellant's App. 38, Depo. Page 30-31; Appellant's App. 40, Depo. Page 38-40.

The Appellant also fails to set forth any evidence establishing Elliott failed to consider the Appellant's experience, age, and ability to control unfamiliar horses. There is also no evidence Elliott did not consider and weigh her safety rule or Wilma's disposition when assessing the Appellant's abilities. In fact the opposite is true. Elliott was acutely aware of all that information. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 23-24; Appellant's App. 53, Depo. Page 11. Elliott knew Wilma to be a safe pony and knew the Appellant had taken Wilma on a successful free ride the day before. Appellant's App. 40, Depo.

Page 38-39; Appellant's App. 60, Depo. Page 38. Elliott was not present during that free ride. Appellant's App. 40, Depo. Page 38-39.

The other facts the Appellant relies on – such as the fact that the Appellant was always supervised at other stables, the fact that the Appellant's father did not know the Appellant was taking free rides unsupervised, and Elliott's testimony that riding is a dangerous sport – are immaterial. These facts are immaterial because they do not address whether Elliott made a reasonable assessment of the Appellant's riding abilities prior to allowing her to take a free ride. Thus, the Appellant has failed to demonstrate the existence of any material factual disputes relating to Elliott's assessment of the Appellant's abilities.

c. The Trial Court correctly determined Elliott did not act with a willful or wanton disregard for the Appellant's safety as there is no evidence Elliott disregarded any known dangers associated with allowing the Appellant to take a free ride on Wilma.

RSA 508:19, III (d) states an equine profession is liable when they commit "an act or omission that constitutes willful or wanton disregard for the safety of the participant" causing an injury. Black's Law Dictionary defines "willful" in part as:

> Proceeding from a conscious motion of the will; voluntary, knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.

Black's Law Dictionary, Sixth Ed. (1990). This Court has stated a willful act "is a voluntary act committed with an intent to cause its results." *Ives v. Manchester Subaru, Inc.*, 126 N.H. 796, 801 (1985). A "wanton" act has been defined as "one done in reckless disregard of the rights of others, evincing a reckless indifference to the consequences to the life or limb or health or reputation or property rights of another." *Ziman v. Whitley*, 147 A. 370, 372 (1929). Black's Law Dictionary defines "wanton" in part as:

> Reckless, heedless, malicious; characterized by extreme recklessness or foolhardiness; recklessly disregardful of the rights or safety of others or of consequences.

Black's Law Dictionary, Sixth Ed. (1990).

The Appellant again claims the Trial Court erroneously ignored certain statements and evidence which create genuine issue of material fact as to whether Elliott acted willfully or wantonly. *Appellant's Brief*, pp. 11-13. These include the Appellant's testimony about Wilma being hard to control, Elliott's safety rule, the supervision provided to the Appellant at GayLee Stables, Elliott's testimony about intervening, and Elliott's testimony that riding is a dangerous sport. *Appellant's Brief*, pp. 19, 25-27. The Appellant also argues the fact that Elliott failed to enforce her own safety rule and was not present on the day of the accident establishes she acted with a willful or wanton disregard for the Appellant's safety. *Appellant's Brief*, pp. 19, 25-27.

All of these facts are immaterial to a determination of whether Elliott acted with a willful or wonton disregard for the Appellant's safety because they do not speak to whether Elliott willfully or intentionally disregarded any dangers associated with allowing the Appellant to ride Wilma unsupervised. In order to establish willful or wonton conduct there must be some evidence the conduct was done with an intent to harm or an utter indifference to a person's safety. There is simply no evidence of Elliott acting with any intent to harm or indifference to the Appellant's safety in the record.

The record before this Court clearly establishes the Appellant had ridden Wilma in the past without issue; Wilma had never in the past acted in a way that led Elliott to believe the Appellant could not ride her safely during a free ride; the Appellant knew a free ride was an unsupervised ride, without training or coaching provided, and Elliot may not be present during a free ride; the Appellant had ridden Wilma the day prior to the fall without issue; the Appellant knew Elliott would not be present during the free ride on July 20, 2014; Elliott had assessed the

Appellant's riding abilities during numerous lessons and IEA competitions; Elliott was aware of the Appellant's riding background; Elliott knew Wilma to be a safe and gentle pony; Elliott allowed riders less experienced than the Appellant to ride Wilma; no one had ever expressed concern about riding Wilma to Elliott; and the Appellant considered leasing Wilma. Appellant's App. 35, Depo. Page 21; Appellant's App. 36, Depo. Page 23-25; Appellant's App. 38, Depo. Page 30-31; Appellant's App. 39, Depo. Page 36-37; Appellant's App. 40, Depo. Page 38-39; Appellant's App. 53, Depo. Page 11; Appellant's App. 60, Depo. Page 38; Appellant's App. 63, Depo. Page 50-52.

III. The Trial Court correctly concluded Elliott's failure to enforce her safety rule was not the proximate cause of the Appellant's injuries as there were adults present during the Appellant's free ride and there was no evidence Elliott could or would have intervened if she was present.

As discussed above, the equine statute requires a court to engage in a two-step inquiry to determine whether an equine professional is entitled to immunity. This two-step inquiry requires a court to first determine whether the injury resulted from a risk inherent to equine activates and to next determine if an exception to immunity applies. The Trial Court correctly determined an equine professional is not entitled to immunity if their conduct falls within one of the five exceptions to immunity and their conduct proximately caused the injury. Appellant's Addendum, 30.

Proximate cause involves both cause-in-fact and legal cause. *Estate of Joshua T. v. State,* 150 N.H. 405, 407 (2003). The cause-in-fact element requires a plaintiff to show "the injury would not have occurred but for the negligent conduct." *Id.* Therefore, a plaintiff "must produce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed." *Id.* at 407-08 (quotation omitted). The legal cause element requires a plaintiff to establish "the negligent conduct was a substantial factor in

bringing about the harm." *Id.* at 408. The factual allegations in this matter fall far short of this standard. Proximate cause "is generally for the tier of fact to resolve" but summary judgment is appropriate when no reasonable juror could conclude a causal link exists between the defendant's conduct and the plaintiff's injury. *Id.* at 407-07; *See Also Carignan v. N.H. Int'l Speedway*, 15 N.H. 409, 414 (2004).

As discussed above, the Trial Court correctly concluded Elliott's actions did not fall within one of the exceptions to immunity. In addition, the Trial Court correctly determined there was a lack of causation between Elliott's actions and the Appellant's injuries which precluded a finding that Elliott was liable for the Appellant's injuries. Appellant's Addendum, 19-20; 40-42.

As discussed by the Trial Court, the purpose of Elliott's safety rule – which required adult supervision of minors during free rides – was so that someone would be able to render assistance if an accident occurred. Appellant's Addendum, 19; 41. At the time of the accident there were adults present at Yorkfield Farm and those adults provided immediate assistance when the Appellant fell. Appellant's App. 43, Depo. Page 52-53; Appellant's App. 75. Thus, the risk created by Elliott's failure to enforce her rule – that no one would be present to render assistance – never materialized and was not the cause in fact of the Appellant's injuries. Appellant's Addendum, 41-43.

The Appellant claims there is sufficient evidence that Elliott's actions were the proximate cause of her injuries. *Appellant's Brief,* pp. 29-31. Specifically, the Appellant argues reasonable jurors could find that by allowing a thirteen (13) year old girl to ride a horse unsupervised – in violation of a safety rule – Elliott proximately caused the Appellant's injuries. *Id.* at 30. This argument relies on the Appellant's misinterpretation of Elliott's rule, which required an adult to be present during free rides, not direct supervision by Elliott or another equine professional.

Appellant's App. 65, Depo. Page 58-59. Moreover, this argument ignores the fact that the Appellant was aware of this rule and intentionally disregarded it on the day of the accident. Appellant's App. 36, Depo. Page 22; Appellant's App. 39, Depo. Page 36-37.

The Appellant states if Elliott had "enforced her safety rule, the Appellant would not have been at the arena that day (and not injured) or she would have been there with supervision (and it is reasonable inference she might not have been injured as with such supervision, the ride would have been stopped.)" *Appellant's Brief,* p. 30. This argument is entirely based on speculation and assumptions. There is nothing in the record that establishes but for Elliott's absence the Appellant would not have been injured. Nor is there any evidence Elliott or any other adult would have seen how Wilma was acting or would have been able to stop the ride and prevent the fall. The Appellant in fact testified that Wilma had calmed down before the end of the ride, and prior to the point where she started to dismount. Appellant's App. 42, Depo. Page 49.

The Appellant claims Elliott testified had she been present she would have intervened. *Appellant's Brief,* p. 28. Elliott never testified to this and the Appellant mischaracterizes Elliott's testimony. The portion of Elliott's deposition cited by the Appellant was given in response to questions relating to her ability to correct a student improperly giving leg during a ride. Appellant's App. 59, Depo. Page 35-37. This testimony does not establish what Elliott would do to control the behavior of a horse during a ride.

Thus, unlike in *Chanaki*, 114 N.H. at 661-63, there is no evidence in this case which a reasonable jury could use to infer Elliott proximately caused the fall and Appellant's injuries. The Trial Court correctly concluded no reasonable juror could determine Elliott's actions were the proximate cause of the Appellant's injuries. Appellant's Addendum, 28; 42.

CONCLUSION

As the undisputed material facts establish, Elliott is exempt from liability based on the New Hampshire Equine Statute, this Court should affirm the Trial Court and rule the Appellees are immune from liability under New Hampshire's Equine Statute.

Respectfully submitted,

JESSICA GRACE ELLIOTT D/B/A HIDDEN POND FARM

By her attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC

Date: November 16, 2017 By: _____

Gary M. Burt (N.H. Bar No. 5510)
900 Elm Street, 19th Floor
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3300
gburt@primmer.com

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Superior Court's decision should be affirmed as the issues on appeal were correctly decided. In the event the Court decides that oral argument would be of assistance to it, Appellees designate Attorney Gary Burt to represent their interests.

Date: November 16, 2017 _____

Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION

Pursuant to Supreme Court Rule 16(10), I hereby certify that on this day two copies of this Brief have been sent via first class mail, postage prepaid, to John D. Colliander, Esq.

Date: November 16, 2017

Gary M. Burt (N.H. Bar No. 5510)