THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2017 TERM

CASE NO.

2017-0153

ANTHONY W. FRANCIOSA, III F/N/F OF VANEESA S. FRANCIOSA

v.

JESSICA GRACE ELLIOTT

BRIEF FOR THE PLAINTIFF/APPELLANT

ANTHONY W. FRANCIOSA, III F/N/F OF VANEESA S. FRANCIOSA

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(Oral Argument by John D. Colliander)

(15 minutes)

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CHAPTER 24 (HB 793)

AN ACT DEFINING THE RESPONSIBILITY OF INDIVIDUALS ENGAGED IN EQUINE ACTIVITIES.

Be it Enacted by the Senate and House of Representatives in General Court convened:

24:1 Statement of Intent.

I. The general court finds that equine activities are important to the economy and culture of the state. The general court also recognizes that equines are prone to behave in ways that may result in injury, harm, or death to persons involved in equine activities, and so finds that the responsibilities of sponsors and professionals should be distinguished between those of the participants for purposes of determining liability for injuries suffered from those activities.

II. It is the intent of the general court that no person shall be liable for damages sustained by another solely as a result of risks inherent in equine activity, insofar as those risks are inherent to the equine activity and obvious to the person injured.

III. 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.

24:2 New Section; Liability; Equine Activities. Amend RSA 508 by inserting after section 18 the following new section:

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 poste warnings, and to refrain from acting in a manner which may cause or contrib ute to the injury of any person.

III. Nothing in paragraph II of this section shall prevent or limit the liabil ity of an equine activity sponsor, an equine professional, or any other perso 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 tha the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury; or

(b) Provided the equine and failed to make reasonable and prudent ef- forts 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 con- spicuously 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.

24:3 Effective Date. This act shall take effect January 1, 1999.

[Approved: April 21, 1998]
[Effective Date: January 1, 1999]

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QUESTIONS PRESENTED

I. Whether the trial court erred in granting the Defendant's motion for summary judgment in this case brought by the Plaintiff (a 13 year old minor at the time of her injury), against her equine professional who left her unsupervised, the Court basing its decision on the immunity provisions of RSA 508:19 "Liability; Equine Activities" thereby depriving the minor Plaintiff of her right to a jury trial on her negligence claim; and, conversely denying the Plaintiff's cross motion for partial summary judgment on the basis the Defendant is not immunized from her own negligence?

II. Whether the trial court erred in its application of RSA 508:19 (enacted as Chapter 24 of the Laws of 1998) by interpreting the Statement of Intent in Chapter 24 as preamble and therefore not reflective of the Legislature's intent to preserve negligence claims against "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."?

III. Alternatively, even if the Plaintiff's claim were not preserved by the Statement of Intent, whether the trial court erred in ruling that the Defendant's conduct, as a matter of law, did not fall within the exceptions to immunity in RSA 508:19 III (b) and /or (d)?

IV. Whether the trial court erred in its interpretation of the meaning of "inherent risk" in RSA 508:19 and case law (cf. Wright v. Loon Mt. Recreation Corp., 140 N.H. 166 (1995)) and gave a broad rather than strict construction of the scope of immunity in derogation of common law rights as required by the case law (cf. Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399, 401 (2005)?

V. Whether the trial court erred in its interpretation of the Defendant's safety rule and then concluding that no reasonable jury could find for the Plaintiff where the Defendant violated her own safety rule and allowed a 13 year old to ride unsupervised on the Defendant's relatively new horse when the Defendant knew she would be out of state?

VI. Whether the trial court erred in its ruling that there was nothing in the record to support that the Defendant could have intervened to control the Plaintiff's ride had she been present (contrary to the record and excerpts in the Defendant's deposition)?

VII. Whether the trial court erred in ruling that no reasonable jury could find on the facts and reasonable inferences to be made from them that the Plaintiff had met all the elements of a negligence claim—duty, breach, causation, and damages?

STATEMENT OF THE CASE

This is a personal injury case arising out of serious injuries caused when a horse trampled its minor rider. The Trial Court granted summary judgment in favor of the Defendant based on its interpretation of RSA 508:19, New Hampshire's equine liability/immunity statute. The Plaintiff appeals from that ruling.

This is a case of first impression to interpret and apply RSA 508:19.

Vaneesa Franciosa, (the "Plaintiff" for simplicity herein), was injured on July 20, 2014, and brought a negligence complaint against the Defendant, her "equine professional." (See Addendum to Brief p. 12, "Add." hereafter.) The Defendant moved for summary judgment on the basis the Defendant had statutory immunity from the complaint. The Plaintiff filed a cross motion for partial summary judgment asking the Trial Court to rule that the case was outside the scope of immunity asserting that the injury did not result from an "inherent" risk of the sport but from the acts and omissions of the equine professional and should proceed to a jury trial. (See Appendix generally as to the pleadings, "App." hereafter.)

The Defendant was deposed as was the Plaintiff, who has 15 at the time of her deposition.

On October 18, 2016, the Trial Court held a motion hearing of about 30 minutes in length with arguments of counsel only. (See Transcript, "Tr." hereinafter.) By Order dated December 21, 2016, the Trial Court granted the Defendant's Motion and denied the Plaintiff's cross motion. (Add. pp. 1-21.)

On December 28, 2016, the Plaintiff filed her Motion to Reconsider. On February 27, 2017, the Trial Court denied that motion. (Add. pp. 22-43.)

On March 16, 2017, the Plaintiff filed her Notice of Appeal raising eight issues. The seventh issue listed in the Notice of Appeal is waived and not briefed.

STATEMENT OF THE FACTS

The Plaintiff, Vaneesa Franciosa, was a minor and 13 years old at the time of her serious injury (App. p. 2.) when she was trampled by the horse, Wilma, owned by the Defendant, Jessica Elliott, the equine professional. (Add. pp. 4, 9; App. p. 53, subpage 10; App. p. 61, subpages 42-43; "subpages" will refer to the individual deposition pages as there are four to each page therein.) Through text messages the day before, the Defendant gave Vaneesa permission to ride Wilma. (App. p. 56, subpage 23.) The Defendant said she would not be there but did not say she would be out of state for other business for that day. (App. p. 54 subpage 17; App. p. 74.) There was no other person to supervise the arena, the horse, or designated to supervise Vaneesa. (Add. p. 4; App. p. 58, subpage 30.) There happened to be others present but not with any duty to supervise or watch Vaneesa or Wilma. The Defendant considers herself an expert (App. p. 53, subpage 10), considers the sport is very dangerous (App. p. 54, subpage 15; App. p. 65, subpage 59.), and was a sole proprietor and had no employees or assistant instructors only independent contractors as stable hands. (App. p. 52, subpages 6-7.)

Vaneesa was riding at the Defendant's place of business for her arena at Yorkfield Farm in Kensington, New Hampshire on the morning of July 20, 2014. (App. p. 54, subpage 17.) After a difficult ride of about 20 or 30 minutes, Vaneesa brought Wilma to the end of the ride when Wilma "unexpectedly did something" (App. p. 45, subpage 61.) and Vaneesa fell or was thrown off. Wilma then trampled her. (App. pp. 43, subpages 50-53.)

Vaneesa suffered life threatening injuries with two fractured vertebrae, a kidney injury, a liver laceration, a partial collapsed lung, multiple bruises, and copious internal bleeding. She was taken by ambulance to Exeter Hospital, then airlifted to Boston Children's Hospital where she spent 10 days. (App. pp. 3-4.) Over the last nearly three years, she has had two surgeries in an effort to reduce her back pain. She has substantial medical bills and is still undergoing pain and suffering. While fortunately she is doing quite well her future medical condition is still unresolved. (App. p. 4; App. p. 32, subpages 8-9.)

The Defendant set up her riding program so that her riders could have a lesson and pay the lesson fee or they could take a "free" ride meaning they would pay less but receive no instruction. (App. p. 42, subpages 46-47.) Vaneesa had done prior free rides. She had ridden Wilma a couple of times and on a free ride the day before. However, Wilma was a relatively new horse to the Defendant and to Vaneesa. The Defendant had purchased Wilma at an auction in Pennsylvania, and Wilma had arrived at the arena only in early June, just a few weeks earlier. (App. p. 61, subpage 43.) According to Vaneesa, Wilma could be gentle but could also be spooky and hard to control. (App. p. 38, subpage 31.) The Defendant told Vaneesa that one method to control Wilma was to "ride her into the wall." (App. p. 38, subpages 31-32.)

While Vaneesa had ridden horses for many years, she had always ridden with supervision at the several arenas where she had ridden previously. Her parents did not know she would be unsupervised at the Defendant's arena during these "free" rides. (App. p. 96; Tr. p. 33.)

The Defendant used no release forms, so no release is in issue. (Tr. p. 22.) The Defendant acknowledged she had a safety rule that minors were not to ride alone, and

she said she had posted a sign to that effect. (Tr. p. 22, App. p. 57, subpages 28-29.) When she gave Vaneesa permission to ride on July 20, 2014, she did not take any steps to enforce her safety rule or make this is a condition of permission or discuss it with Vaneesa. (App. p. 56, subpages 22-23.) The Defendant agreed it was best practice for an adult to supervise in this very dangerous sport. (App. p. 65, subpages 58-60.) She testified she left it to the rider and the riders' parents as she took the position it was not her responsibility. See conceded nothing in writing existed to support her position. (App. p. 65, subpage 61; App. p. 96.) If she had been present at the arena, the Defendant agreed she would have the opportunity to intervene to help control a situation if she saw a difficulty with a horse arise. (App. p. 59, subpages 36-37.)

SUMMARY OF ARGUMENT

This is a case of first impression for the New Hampshire Supreme Court as it has not previously interpreted RSA 508:19. Since the decision below was on summary judgment and not a trial, the Court must review the Trial Court's application of the law to the facts *de novo,* and it will also look at the record and the inferences to be made therefrom in the light most favorable to the Plaintiff.

The Legislature adopted the Equine Liability Law when it enacted Chapter 24 of the Laws of 1998. (See text in Table of Authorities.) After the introductory phrase "Be It Enacted" there is a very distinctive and very clear Statement of Intent which says that "a <u>person responsible for equines, or responsible for the safety of those engaged in equine activity, whose negligence proximately causes injury to persons engaged in those activities, is liable for that injury in accordance with other applicable law</u>." (See Table of Authorities; App. p. 100, emphasis added.) Thus, the Legislature did not intend that this law would immunize an equine professional who acts negligently as alleged in this case. It intended to immunize injuries caused <u>solely</u> by the inherent risks of the sport, not injuries caused in whole or in part by the negligence of the equine professional. In this case, the Plaintiff has alleged claims of negligence which must be decided by a jury.

Contrary to the Trial Court and its disregard for the Statement of Intent, this Court in several cases has referred to statements of intent, statements of policy, and preambles when present to aid it in interpreting statutes to discern the Legislature's intent. For example, in <u>State v. Paul</u>, 167 N.H. 39, 43 (2014), the Court stated "[i]n the session law enacting the statute, the legislature included the following preamble"

and went on to consider that session law preamble to interpret RSA 519:23-a. The Trial Court rendered the Statement of Intent in RSA 508:19 meaningless and erroneously let its view of broad immunity nullify it and the Legislature's intent.

Numerous cases state the rule that statutes in derogation of common law rights are to be strictly construed (these include ski and recreational land use cases). To affirm the Trial Court and grant immunity on the facts of this case would give very broad and essentially blanket immunity and read into the statute that failure of the professional to supervise minors is an inherent risk. The Defendant should not be given immunity for her failure to enforce her own safety rule and for setting in motion the chain of events leading to the life threatening injuries to Vaneesa. The Legislature could not have intended such an unreasonable and absurd result. The risks were enhanced by the Defendant's deliberate decisions and a failure to supervise is analogous to a failure to control and no "corrective measures" as stated in RSA 508:19 I(f)(5) could be taken due to the Defendant's absence. (Tr. p. 25.). Even if the facts were deemed to be within the scope of the statute, the Plaintiff's claims should survive for a jury trial as potential exceptions to immunity under RSA 508:19 III (b) or (d).

The meaning of "inherent" in this context and where to draw the line between immunized inherent risks of equine activities and other risks that are not immunized is the key issue. As this Court has said "being kicked by a horse is an inherent risk, but being injured in a way that would not have happened but for the tour guide's negligence is not." Wright v. Loon Mt. Recreation Corp., 140 N.H. 166, 170 (1995). To leave the Plaintiff at age 13 on a newly acquired horse with no supervision increased the risks beyond the inherent risks and immunity should not apply. Otherwise, negligent and careless equine professionals are allowed to create with

impunity dangerous situations where they fail to supervise and minors are injured. That these risks not solely caused by the horse should be immunized would be an absurd result the Legislature could not have intended.

As noted in the Argument sections which follow, at every step, the Trial Court reversed the summary judgment standard and looked at things in a light most favorable to the Defendant and this is clear error of law. The correct decision, had the inferences been applied favorably to the Plaintiff, would have been to deny summary judgment and give the Plaintiff her day in court where a jury could decide the issues.

The Legislature certainly did not intend to immunize equine professionals from their own negligence; particularly in this case where the Defendant has made such statements as "that is out of my control" and "I take no responsibility" [as to compliance with her safety rule that minors not ride unsupervised] (App. p. 65, subpages 58-61.) The Defendant's conduct was a cause of the injuries to the Plaintiff even if combined with the actions of the horse.

New Hampshire's only other recreational sport immunity statute is the ski statute, RSA 225-A. Since it has existed for decades, it has led to several Supreme Court decisions. The Supreme Court has held in the ski cases that the ski statute does not immunize the ski area for negligent instruction or other negligent operations. The same analysis and result should apply here in Plaintiff's favor—negligent supervision by the equine professional (no supervision when there should be) is not immunized.

The Plaintiff deserves her day in court, and the Legislature intended that she have her day and that the Defendant in a case such as this would not be immunized from proceeding to a jury trial. The Supreme Court must review this *de novo*, and it should reverse the Trial Court's errors.

ARGUMENT

I. Whether the Trial Court erred in granting the Defendant's motion for summary judgment in this case brought by the Plaintiff (a 13 year old minor at the time of her injury), against her equine professional who left her unsupervised, the Court basing its decision on the immunity provisions of RSA 508:19 "Liability; Equine Activities" thereby depriving the minor Plaintiff of her right to a jury trial on her negligence claim; and, conversely denying the Plaintiff's cross motion for partial summary judgment on the basis the Defendant is not immunized from her own negligence?

A. Standard of Review.

Because this appeal is from a summary judgment ruling, the Court "must review *de novo* the Trial Court's application of law to the facts and 'look at the affidavits and other evidence, and all inferences to be properly drawn therefrom, in the light most favorable to the non-moving party.'" Jesurum v. WBTSCC Limited Partnership, __N.H. __ (Slip Opinion, December 9, 2016 at page 4). (Quoting Del Norte, Inc. v. Provencher, 142 N.H. 535, 537 (1997). Accordingly, most if not all of the eight issues on appeal must be reviewed *de novo* and in the light most favorable to the Plaintiff. See also, Ianelli v. Burger King Corp., 145 N.H. 190 (2000).

This Court has stated that summary judgment is less effective in tort cases and the trial courts must be "wary" of its application so that deserving litigants are not deprived of their day in court. Ianelli, supra, at 192. In that case, this Court reversed the grant of summary judgment holding that the Trial Court erred in its opinion that the defendant as a matter of law owed no duty to the plaintiffs.

B. Two Burdens on Defendant.

The Defendant as the moving party has two burdens as it has "the burden to demonstrate that there is no genuine issue as to any material fact, and that … [it is] entitled to judgment as a matter of law." Sabinson v. Trustees of Dartmouth College, 160 NH 452, 460 (2010). See also, RSA 491:8-a. The Trial Court erred in ruling that the Defendant met each burden.

C. The Factual Burden.

As to the first burden, the facts, the trial court, when considering the motion "cannot weigh the contents of the parties' affidavits and resolve factual issues, but must determine whether a reasonable basis exists to dispute the facts claimed . . . if so, the trial court must deny the motion . . . " Id. "If the evidence . . . gives rise to two inferences, one of which supports the plaintiff's case, the court is required to assume the inference in favor of the plaintiff is true." Kukene v. Genualdo, 145 N.H. 1, 5 (2000). Here, the Trial Court erroneously resolved factual issues unfavorably to the Plaintiff and therefore erred under summary judgment law.

As to the particular facts, the Trial Court erred as follows:

(1) it gave no import to the Plaintiff's testimony that the horse, Wilma, could be "spooky" or "jumpy" (App. p. 38, subpage 31.) and further that the Defendant told the Plaintiff to handle Wilma if she were difficult and "to run her into the wall." (App. p. 38, subpage 32.)

(2) it made no reference to the Plaintiff's testimony that Wilma "unexpectedly did something" (App. 45, subpage 61) and that she believed Wilma caused her to fall off. (App. pp. 42-43, subpages 49-50.)

(3) it made no reference to the fact that at other riding stables the Plaintiff had always been supervised. (App. p. 33, subpage 13; App. p. 96.)

(4) it made no reference to the fact that the Plaintiff had only ridden Wilma a couple of times in the prior week or two and in her words it was "debatable" as to Wilma being "controllable." (App. p. 38, subpage 31.)

(5) it gave no import to Plaintiff's testimony that Wilma was "hard to control" (App. p. 42, subpage 46).

(6) it gave no import to the Defendant's testimony that she could have intervened had she been there as further discussed in Section VI of the Argument.

Instead, the Trial Court concluded:

(1) that the argument that had the Defendant been present she could have stopped the ride is not supported by the record. (Add. pp. 20, 28.)

(2) that there was no support for the argument that Wilma caused the fall, concluding that the Plaintiff simply fell off. (Add. pp. 7, 8, 27.)

(3) that the evidence through the testimony of the Plaintiff that Wilma was spooky and jumpy and difficult was disregarded as it accepted only the Defendant's testimony that Wilma was "of good quality" and "comparable to other horses" the Plaintiff had ridden. (Add. p. 28.)

(4) it disregarded the Plaintiff's testimony and the Affidavit of her father that at other stables had she been supervised (App. p. 33, subpage 13; App. p. 96.) It did acknowledge that there was a genuine dispute about whether the Defendant

had informed the Plaintiff's parents that they were responsible for supervision (Add. p. 29.) Thus on this point, the Trial Court correctly analyzed the record, but erroneously concluded this was not material (Add. p. 29.)

(5) it drew an unfavorable inference as to the Defendant's safety rule as further discussed in Section V of the Argument.

As to the Defendant's testimony, the Trial Court gave no import to:

(1) her testimony about her ability to intervene had she been there (see Section VI of the Argument);

(2) her safety rule being to protect young riders (see Section V of the Argument);

(3) her acknowledgement that riding is a very dangerous sport where supervision is needed. (App. p. 54, subpage 15; App. p. 65, subpages 58-59.)

The Trial Court improperly weighed these matters and in all cases resolved all conflicts in testimony about the ride, about Wilma, about the all risks being assumed by the Plaintiff, and made all inferences in favor of the Defendant, contrary to summary judgment law that if two inferences can be made, "the court is required to assume the inference in favor of the Plaintiff." Kukene, supra.

D. The Law Burden.

As to the second burden, the Trial Court erred on the application of the law, RSA 508:19, as the record and legal argument presented supports the Plaintiff's allegations that the risks were not inherent or if they were inherent they were within exceptions to immunity. The Trial Court erred in its interpretation of RSA 508:19 and its application of that law to the facts. See, Sections II, III, and IV of the Argument.

E. Conclusion.

It was error for the Trial Court to rule that the Defendant met either its factual burden or its law burden, thus it erred in granting summary judgment and concluding the Defendant owed no duty to the Plaintiff. The record shows that "[v]iewing the evidence in the light most favorable" to the Plaintiff, the Defendant's conduct "could have created an unreasonable risk of injury . . . that was foreseeable to the defendant. . . and then a duty existed." Ianelli, supra at 194. "The exact occurrence or precise injury need not have been foreseen." Id.

Summary judgment should have been denied to the Defendant.

The Plaintiff's cross motion for partial summary judgment should have been granted because it simply asked that the Trial Court allow the case to proceed to a jury, the relief requested in the conclusion to this brief, and as based on the various arguments herein that the risks to the Plaintiff were not "inherent" risks under RSA 508:19.

These errors are further discussed in the arguments that follow to show the Trial Court's errors with more specificity as to evidence and inferences.

II. Whether the Trial Court erred in its application of RSA 508:19 (enacted as Chapter 24 of the Laws of 1998) by interpreting the Statement of Intent in Chapter 24 as preamble and therefore not reflective of the Legislature's intent to preserve negligence claims against "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."?

A. Standard of Review.

Based on Jesurum, supra, and Kurowski v. Chester, ____ N.H. ____ (Slip Opinion, September 21, 2017) the standard of review is *de novo* because the issues involve interpretation and application of law.

B. Argument.

While the Trial Court, in its second Order, gave more analysis to the Statement of Intent in Chapter 24 of the Laws of 1998 it still reached an erroneous conclusion. (Add. pp. 35-36.) The entirety of Chapter 24 was the law passed by the Legislature. The Statement of Intent follows the lead in "Be it Enacted by the Senate and House of Representatives in General Court convened:" (emphasis added). Accordingly, contrary to the Trial Court, the Statement of Intent was enacted and is part of the law. (Table of Authorities; App. p. 100; see also App. p. 152, exhibit regarding statutory research.)

The Trial Court's analysis leads to its erroneous decision in interpreting 508:19 to give much broader, even blanket, immunity to the Defendant in complete contradiction to the Legislature's express enactment language in the Statement of Intent: Part II states ". . . no person shall be liable for damages sustained by another solely as a result of risks inherent . . ." (Emphasis added). Part III 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" (Table of Authorities; App. p. 100.) This is a clear expression of the Legislature that claims of negligent conduct by the equine professional survive.

This Court must now determine the Legislature's intent "expressed in the words of the statute considered as a whole," and "effectuate its overall purpose and avoid an absurd or unjust result" and consider the "context as a whole." Appeal of Local Gov't Ctr., 165 N.H. 790, 804 (2014). This Court must presume that the

Legislature did not enact "superfluous" words and must "give effect" to all words. Appeal of Marti, __N.H. __(Slip Opinion June 28, 2016); Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-6 (2002). These principles of statutory interpretation apply to the Statement of Intent.

The Trial Court reviewed several cases dealing with "preambles" and concluded that it would not "elevate" the Statement of Intent to the level as argued by the Plaintiff as this would "eviscerate" the statutory immunity. (Add. p. 15.) This was error because the Trial Court's decision still ends up giving no importance to the Statement of Intent and in effect re-writes the statute as if the Legislature had never expressed its intent. The Trial Court eviscerates that intent.

The cases may refer to "preamble," "statement of intent," or "statement of policy" but that distinction does not matter. The cases support the Plaintiff, that this Court should consider the Statement of Intent as it was enacted in its interpretation of 508:19 to effectuate the Legislature's purpose. See, State v. Paul, 167 N.H. 39, 43 (2014); State v. Kelley, 153 N.H. 481, 484 (2006); and State v. Fleming, 125 N.H. 238, 242 (1984). In all of these cases the preamble was considered by the Court. In Paul, the Court considered the session law preamble when interpreting RSA 519:23-a; in Fleming this Court considered the preamble to RSA 651:62; in Kelley, the Court considered the preamble to RSA 172-B; and also in Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399 (2005), the Court considered the preamble to RSA 212:34.

The Trial Court broadens and expands the statutory immunity. The statute at Part I(f) lists the principal types of inherent risks that are an "integral part of equine activities." (Table of Authorities; App. p. 101.) The list does not include

risks or riding alone without supervision while in an instructor controlled program, risks posed by being a minor, or risks posed by a new horse. Even Part I(f) (5) of the statute acknowledges there are situations where the equine professional must intervene and avoid failing to take any corrective measures. (Table of Authorities; App. p. 101.) The record is clear that the Defendant could not take any corrective measures as she was absent. (App. p. 59, subpages 36-37.) The Defendant created dangers above the usual inherent risks and enhanced the risks to a higher level by not being present to supervise and intervene "with corrective measures". The Trial Court's "absurd or unjust result" Appeal of Local Gov't Ctr., supra, at 804, is that even a failure to enforce a safety rule by the equine professional who is absent and out of state when a serious injury occurs at her riding stable, is still protected and immunized. This is not consistent with the intent of the statute generally and specifically as to Section I(f). To immunize a defendant such as this Defendant while absent and providing no supervision is exactly what the Legislature did not intend to do. It preserved such claims.

This Court should interpret RSA 508:19 giving full effect to what the Legislature expressed in the Statement of Intent in Chapter 24 of the Laws of 1998 and reverse the grant of summary judgment to the Defendant so that the Plaintiff may have her day in court in a jury trial.

III. Alternatively, even if the Plaintiff's claim was not preserved by the Statement of Intent, whether the Trial Court erred in ruling that the Defendant's conduct, as a matter of law, did not fall within the exceptions to immunity in RSA 508:19 III (b) and /or (d)?

A. Standard of Review

Based on Jesurum, supra, the standard of review on this issue is *de novo* because the issue requires a review of how the Trial Court applied the law to the facts and inferences to be made from them.

B. Argument

The Plaintiff's claim in the alternative is that even if her claim is not found to be "outside" the scope of 508:19, i.e., a claim she was injured by a risk that was not inherent to the sport, but is a claim "within" the scope of the statute, her claim still survives as an exception to immunity under Part III (b) or (d) of the statute.

Part I (f) of the statute defines "inherent" risks of the sport. Such risks are those that are "an integral part of equine activities" which include the actions of the horse. The Plaintiff's case is not about risks that are "integral" to the sport (and thus not "inherent") due to the Defendant's violation of her safety rule, lack of supervision, and use of a new horse, but even if the Court were to disagree on those points, her claim survives under the Part III exceptions.

Part III (b) is an exception to immunity where the professional provides the horse and failed to make "reasonable and prudent" efforts to determine the ability of the rider to "engage safely." These words require weighing the facts and judging the conduct of both the Plaintiff and the Defendant under all the evidence. They lead to normal jury questions and conclusions. A jury could find that the

"engage safely" test is not met as it was not reasonable to assess the Plaintiff and leave her alone simply because she was only 13, and a jury could find that it was not reasonable to use the new horse, Wilma, that the Plaintiff had ridden only once or twice, as an exception under III (b).

A reasonable jury could also find that for the Defendant to fail to enforce her own safety rule and be out of state on the day the Plaintiff was injured (App. p. 54 at subpage 17) was a "willful or wanton disregard for the safety" (emphasis added) of the Plaintiff as an exception under III (d). "Willful and wanton misconduct" means "conduct committed within an intentional or reckless disregard for the safety of others" and "willful and wanton negligence" is within the scope of gross negligence and means "a conscience, voluntary act or omission in reckless disregard of a legal duty and of the consequences of another party." Black's Law Dictionary (7th Edition 1981). A reasonable jury could find the Defendant made voluntary choices as to putting her own schedule first ahead of the Plaintiff's safety and her absence created risks that were willful or wanton in disregard to the Plaintiff's safety.

For an equine professional to be so cavalier about safety and provide no supervision and to be out of state is conduct that a jury could find to be an exception to immunity "and a breach of the standard of care appropriate under the circumstances." Morse v. Goduti, 146 N.H. 697, 699 (2001). The Trial Court should be reversed on this issue.

IV. Whether the Trial Court erred in its interpretation of the meaning of "inherent risk" in RSA 508:19 and case law (cf. Wright v. Loon Mt. Recreation Corp., 140 N.H. 166 (1995)) and gave a broad rather than strict construction of the scope of immunity in derogation of common law rights as required by the case law (cf. Soraghan v. Mt. Cranmore Ski Resort, 152 N.H. 399, 401 (2005)?

A. Standard of Review.

The Court's standard of review as to statutory interpretation is one of *de novo* review as a question of law. Kurowski, supra, at 3; Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). The Court is the "final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." Deere & Co., v. State of N.H., 168 N.H. 460, 471 (2015); Soraghan, supra, at 406. Statutory immunity presents a question of law. Camire v. Gunstock Area Comm'n. 166 N.H. 374, 377 (2014).

B. Strict Construction.

It is well settled in New Hampshire case law that statutes in derogation of common law are strictly interpreted. Thus, statutes that provide immunity and bar common law rights to recover for injuries are strictly construed. Kurowski, supra, at 3 (recreational use of land statute RSA 212:34); Dolbeare v. City of Laconia, 168 N.H. 52, 54 (2015) (recreational use of land statutes RSA 212: 34 and RSA 508:14); Antosz v. Allain, 163 N.H. 298 (2002) (the fireman's rule RSA 507:8-h); Estate of Gordon-Couture v. Brown, 152, N.H. 265, 270 (2005) (recreational use of land statutes): Soraghan, supra (ski statute RSA 225-A); Sweeney v. Ragged Mt. Ski Area, 151 N.H. 239, 241 (2004) (ski statute): Cecere v. Loon Mt. Recreation Corp., 155 N.H. 289 (2007) (ski statute).

Accordingly, RSA 508:19 must be interpreted strictly and narrowly and not liberally and expansively. "Narrow" construction or interpretation was the word used in Soraghan, supra, and Sweeney, supra. As this Court has stated, the Legislature's intent to take away rights must be clear, and the Court "will not interpret a statute to abrogate the common law unless the statute clearly expresses that intent." Sweeney, supra, at 241 (emphasis in original); Martin v. Pat's Peak, 158 N.H. 735, 739 (2009).

There is no expression in 508:19 to take away a person's rights to bring a claim of negligence when the equine professional engages in unsafe practices and creates a situation of no supervision. To the contrary, the Statement of Intent makes it clear such rights continue to exist and are not being taken away; in essence the equine professional is not immunized from her own negligence. The Trial Court erred in its interpretation by (1) not giving any import to the Statement of Intent (2) not concluding that the Defendant's conduct and the resulting injuries to the Plaintiff were outside the meaning of "inherent" and (3) not concluding, in the alternative, that the facts of this case fall within Part III of the statute such that the Defendant is not immunized. Thus, the Trial Court applied immunity too broadly and too liberally and not strictly.

The Legislature could not mean and certainly did not express any intent to give blanket immunity for irresponsible equine professionals who allow minors to be unsupervised and also in violation of the equine professional's own safety rule. To protect the Defendant who testified as to her safety rule "I take no responsibility for that. . ." (App. 65, subpages 60-61.) would be an absurd result and in direct conflict with the Legislature's intent.

C. Analogous Skiing Cases and Meaning of "inherent."

The skiing immunity statute, RSA 225-A, has existed for decades and has led to several cases before this Court. Since the skiing statute is the only other statute dealing with a sport and immunity (aside from the general recreational use of land statute), the skiing cases are useful for guidance. Negligence in instruction of skiers is not immunized under the skiing statute as that statute does not address instruction. Camire, supra, at 378, citing Adie v. Temple Mt. Ski Area, 108 N.H. 480 (1968). In Adie, the Court held that RSA 225-A cannot be assumed to cover activities not referred to therein, such as ski instruction. "If the Legislature had intended to bar skiers from actions against an operator for negligent instruction . . . some regulation of their operations in these areas would have appeared in the statute." Id., at 484. This Court has also determined that the skiing statute "does not purport to immunize a ski area operator for injuries caused by the operator's own negligent or intentional acts." Nutbrown v. Mount Cranmore, 140 N.H. 675, 680 (1996). Failing to properly mark the beginning of a trail is not an inherent risk and is not immunized. Id., 683.

The skiing cases are useful as an analogy to horse riding cases. They lead to the conclusion that the negligent acts of the operator of a ski area or the negligent acts of an equine professional are not inherent risks and therefore are not immunized by the respective statutes. The Statement of Intent further makes this clear as to horse riding under RSA 508:19.

D. Other Cases Regarding Horses and Inherent Risks.

In the record below, the Plaintiff cited a horse riding injury case, Wright v. Loon Mt. Recreation Corp., 140 N.H. 166 (1995). (App. p. 89, 143.) The Trial

Court gave it no relevance as it predated 508:19. The Plaintiff maintained then and maintains here that it is very relevant. The Trial Court relied on the other Loon Mountain case, a ski injury case Cecere v. Loon Mt. Recreation Corp., 155 N.H. 289 (2007). (Add. p. 21, 43.) In Wright, the Court found that "being kicked by a horse is an inherent risk" but "being injured in a way that would not have occurred but for the tour guide's negligence is not." Id. at 170 (paraphrasing). Thus, tour guide negligence was not a risk for which Wright gave a release. By analogy here, the Defendant's absence and allowing the Plaintiff at age 13 to ride unsupervised created risks that were not inherent risks that are immunized. As such, there is no immunity and the Plaintiff's right to a jury trial is warranted. Although Wright predates the statute, the Court's definition of "inherent" risk still applies today and to this case.

In Christian v. Elden, 107 N.H. 229, 235 (1966), there was evidence the horse from which the minor plaintiff fell was having an "off day" and was difficult to control. The instructor was present but did nothing. The minor plaintiff was entrusted to the care of the instructor. This Court upheld the verdict for the plaintiff. Together, Wright and Elden stand for the principle that the negligence of the defendants in those cases was not something that is a natural risk or inherent risk of the sport of horseback riding that would support immunity from negligence claims. The same would apply here.

E. **Sports Cases.**

In addition to the ski statute cases which provide useful analogies, there are also several sports injury cases decided by this Court under the common law that are also useful by analogy. There are four such cases that discuss "inherent" risks

of the sport: Hacking v. Town of Belmont, 143 N.H. 546 (1999) (basketball); Allen v. Dover Co-Recreational Softball League, 148 N.H. 407 (2002) (softball); Werne v. Executive Women's Golf Assoc., 158 N.H. 373 (2009) (golf); and Sanchez v. Candia Woods Golf Links, 161 N.H. 201 (2010) (golf). They stand for the proposition that while a participant assumes the risks "inherent" to the sport, he or she does not assume risks that are beyond the ordinary or increase the risks.

In Hacking, this Court affirmed the denial of the defendant's motion to dismiss as the plaintiff had alleged the basketball referees had lost control of the game and drawing all inferences in the plaintiff's favor the claim could not be dismissed as a matter of law, and the plaintiff had the right to a jury trial on the issue as alleged—that she was exposed to a risk beyond the ordinary or inherent risks. Id., 553-554.

These cases support the Plaintiff in this case—she was exposed to risks beyond the inherent risks, even more so than referees losing control of a game, the Defendant by her absence in this case had no control over Vaneesa, Wilma, or the arena.

F. Other States' Cases

Plaintiff's counsel is not aware of any other equine liability cases in other states with facts similar to this case. However, courts in a few cases provide useful guidance when faced with similar questions in general. One court asked the question: did the defendant's conduct create a "dangerous condition over and above the usual dangers that are inherent in the sport?" Tavares v. Perl, N. Y. Superior Court No. 113556/09, 2012 N.Y. Misc LEXIS 326 (January 17, 2012), quoting Owen v. R.J.S. Safety Equipment, Inc. 79 N.Y. 2d 967, 970 (1992).

Another court said this in another way, the legislature created "a dividing line" between known inherent risks versus events and conditions that are within the control of and part of the obligations of the facility operator. Hubner v. Spring Valley Equestrian Center, 203 N.J. 184, 203 (2010).

Applying those principles here, it is clear the Defendant created risks beyond those inherent in the sport and crossed the line to allow events and conditions the Defendant should have controlled. See for example, Frank v. Mathews 136 S.W. 3rd 196 (Mo. Court of Appeals, W.D., 2004) where summary judgment was reversed as the appellate court found that the plaintiff had not assumed "any enhanced exposure to those risks that may have been caused by the instructor's negligent supervision." Id., at 205.

For all the above reasons, the Trial Court erred in its application of 508:19 and the meaning of "inherent" in this case. Its decision should be reversed on this issue.

V. Whether the Trial Court erred in its interpretation of the Defendant's safety rule and then concluding that no reasonable jury could find for the Plaintiff where the Defendant violated her own safety rule and allowed a 13 year old to ride unsupervised on the Defendant's relatively new horse when the Defendant knew she would be out of state?

A. Standard of Review

The standard of review on this issue is *de novo*. Jesurum, supra.

B. Argument

It is undisputed that the Defendant, the "equine professional," as defined in 508:19, did not enforce her own safety rule which was against allowing minors to ride alone. (App. p. 65, subpages 60-61.) Yet, she allowed Vaneesa to ride without any supervision. The Defendant's failure to enforce her own safety rule

cannot logically be deemed an inherent risk of the sport. It is undisputed that the Defendant gave permission to the Plaintiff to ride on the day she was injured without any provision for supervision. (App. p. 58, subpage 30.) It is undisputed the Defendant went to Massachusetts and left no one to take her place to supervise the arena. (Add. p. 4.) It is undisputed the Plaintiff was only 13. It is undisputed the Defendant could have helped to intervene to control the situation had she been present and seen a difficulty arise. (App. p. 59, subpages 36-37.) It is undisputed the horse Wilma was a rescue horse and relatively new to the Defendant and the Plaintiff. (App. p. 38, subpage 31; App. p. 61, subpage 43.) The Plaintiff said Wilma was "hard to control", "spooky" and "jumpy" but at age 13 she liked the "challenge" as she felt this "would further her riding career." (App. p. 38, subpage 31.) Under these facts, the Defendant should have denied Vaneesa permission to ride while she was away. That would have been the prudent thing to have done.

The logical and most reasonable purpose for the safety rule is to ensure that minors are watched when they are riding and if the ride is not going well due to the rider, the horse, or other factors, then the adult can assist the minor and things can be done to prevent the situation escalating and leading to injuries; the supervision is to control the situation to prevent or reduce the occurrence of injuries. "Safety" in this context means to keep the rider safe. Despite this obvious interpretation that the rule is to protect minors and keep them reasonably safe and without injury, the Trial Court interprets the rule to give it a purpose supporting the Defendant and thus unfavorable to the Plaintiff's case. The Trial Court simply says the purpose of the rule "appears to be so that someone can render emergency assistance if an accident occurs." (emphasis added) (Add. pp. 19, 41.) Clearly, this conclusion is

not based on anything in the record and the use of the word "appears" shows it is conjecture. See for example, Fat Bullies Farm, LLC v. Lori Devenport, ___ N.H. ____ (Slip Opinion May 26, 2017), where the Court found that trial court's use of "perhaps" indicated no factual finding was made and this was error. In this case, contrary to summary judgment standards, the effect is that the Trial Court made an inference unfavorable to the Plaintiff when it should have done the opposite.

This failure by the Defendant in not enforcing her own rule set in motion the chain of events creating the risky situation beyond the inherent risks posed by a horse and a reasonable jury could conclude this was the proximate cause of the Plaintiff's injury. Under any reasonable reading of the statutory purposes, RSA 508:19 does not provide immunity under these unusual facts. Based on the Statement of Intent and the exceptions in Part III of the statute, this was conduct that (1) was not acting responsibly for Vaneesa's safety, (2) was not reasonable and prudent, and (3) was willful or wanton disregard for her safety under Part III. The Court should reverse the decision below on this issue.

VI. Whether the Trial Court erred in its ruling that there was nothing in the record to support that the Defendant could have intervened to control the Plaintiff's ride had she been present (contrary to the record and excerpts in the Defendant's deposition)?

A. Standard of Review.

The standard of review on this issue is *de novo*. Jesurum, supra.

B. Argument

The Plaintiff has claimed that the Defendant's absence from the riding arena left the Plaintiff in the risky situation that led to her injury—Wilma was hard to control, the ride was difficult, (App. p. 38, subpage 31.) and neither the

Defendant nor anyone designated by her was there to supervise or intervene and prevent the injury. (Add. p. 4; App. p. 58, subpage 30.) In her deposition, the Defendant agreed that if she were there "If I am there and I'm seeing it…If I'm there I can help control a situation. …So yes, absolutely, I would be there to help in any situation if need be and I am there….If I'm not there, I can't be helpful." (App. p. 59, subpages 36-37.)

Because the Defendant was not there, she could not take any "corrective measures" as required by RSA 508:19 I(f)(5) and thus she cannot preserve her immunity from the Plaintiff's claim. The Plaintiff testified that Wilma was hard to handle that day and that she considered her to be a "spooky" and "jumpy" horse. (App. p. 38, subpage 31.)

The reasonable conclusion and favorable inference to which the Plaintiff is entitled is that had the Defendant been at the arena or had she designated a supervisor, an intervention could have occurred to stop the ride and control Wilma. The effect of this would be for a jury to decide and it would determine if there was negligence or not.

Despite this evidence in the record, the Trial Court erroneously concluded that there was nothing in the record to support the Plaintiff's position on intervention. (Add. pp. 20, 28.) This was clear error by the Trial Court and against the standard of review at summary judgment stage. Reversal on this appeal issue is justified.

VII. Whether the Trial Court erred in ruling that no reasonable jury could find on the facts and reasonable inferences to be made from them that the Plaintiff had met all the elements of a negligence claim—duty, breach, causation, and damages?

A. Standard of Review

The standard of review on this issue is *de novo* Jesurum, supra.

B. Argument

The Order states that the Plaintiff "cannot show" that her injuries were proximately caused by the Defendant's conduct. The general rule is that proximate cause is a jury question. Carignan v. N.H. Int'l Speedway, 151 N.H. 409, 414 (2004); Cecere, supra, at 295. Due care is what reasonable prudence would require under the situation; whether the Defendant breached that duty of care is a jury question. Carignan, supra, at 414. The Plaintiff must have enough evidence for a reasonable jury to link the Defendant's conduct to the injury so that the link "probably existed." Id. The Defendant's conduct does not have to be the sole cause of the injury, rather its conduct must either cause or contribute to cause the injury. Id.

The Trial Court misapplied the application of proximate cause in general and also particularly in light of the RSA 508:19. As to the statute, the misreading results from ignoring (1) the Statement of Intent uses the term "proximate cause" and liability for negligence, and (2) there were no "corrective measures" taken, and (3) Part III of the Statute contains exceptions to immunity by referring to "reasonable and prudent" and "willful and wanton" and "disregard for safety" all of which require weighing the evidence by a jury.

Had the Defendant enforced her own safety rule, the Plaintiff would not have been at the arena that day or (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). Thus, the "but for" test could be found by a jury and there is enough evidence to "link" the Defendant as the cause. The statute does not immunize for negligence in the method, use, or lack of use, of supervision and control of riding activities by the equine professional.

Due to its erroneous conclusion that immunity applied and that the Statement of Intent had no effect, the Trial Court failed to properly apply the Wright case and failed to apply two other cases cited by the Plaintiff: Morse, supra, (reversing a trial court order of summary judgment in a personal injury case because "the evidence is not so clear that reasonable persons would necessarily arrive at the same conclusion" Id,. at 699 and "the jury may properly consider" the activity of the defendant, the foreseeability of a child being injured "in determining whether the defendant acted as a reasonably prudent person." Id., at 701) and Chanaki v. Walker, 114 N.H. 661 (1974), a horse riding case supporting a jury inference that the ride supervisor could have done more to control the situation where the Court said that the leader of the ride might have been able to intervene were permissible inferences.

Reasonable jurors could find that the Defendant's failure to be present was a cause of the Plaintiff's injury, that a 13 year old could not have assumed this risk, that the Plaintiff was in the care and control of the Defendant (or should have been), and they could conclude the Defendant should have enforced her safety rule and told the Plaintiff she could not ride that day. Or, they could reasonably infer

that had the Defendant been present she could have stopped the ride by intervening upon seeing Wilma being hard to control at that day and time. The risks of falling or being thrown while riding a horse "cannot relieve defendants from liability for falls caused by their negligence." Chanaki, supra at 235. As discussed in Section II of the Argument, the Legislature intended that those types of claims be preserved for a jury trial "in accordance with other law" (the common law of negligence).

As to the Plaintiff's age, "the fact that a dangerous condition is open to the perception of children . . . may not be enough . . . to assume that they will appreciate the full extent of the risk involved." Morse, supra, at 699-700, quoting Dunleavy v. Constant, 106 NH. 64, 67 (1964). Because some reasonable juries could find all elements of a negligence case exist in Plaintiff's favor – duty, breach, causation, and damages, the Trial Court erred in concluding otherwise.

As the Defendant admitted: (1) riding is a "very dangerous" sport, (2) had she been there and seen a problem she could have intervened "[a]bsolutely . . . I would be there to help," and (3) yet she concludes as to her safety rule "I do not take responsibility for that." (App. p. 54, subpage 15; App. p. 59, subpage 37; App. p. 65, subpage 61.) A reasonable jury could conclude it was reasonably foreseeable that a situation could arise "such as failing to maintain control over the animal" and no "corrective measures" could be taken making the risk one that was not an inherent risk and therefore not immunized. RSA 508:19 I(f)(5).

The Trial Court should be reversed on this issue.

CONCLUSION

Based on the seven arguments above, the Court should reverse the Trial Court's Orders granting summary judgment to the Defendant and allow the Plaintiff to present her case to a jury. In reversing those Orders, the Court should make it clear that the Defendant's conduct as an equine professional who left the Plaintiff, a thirteen year old, unsupervised is not immunized under RSA 508:19 based on the Statement of Intent when the Legislature enacted the statute. The Plaintiff can then proceed to trial for a jury decision on her negligence claims and have her day in court.

REQUEST FOR ORAL ARGUMENT

The Plaintiff/Appellant respectfully requests the opportunity to present oral argument to the full Supreme Court and asks for fifteen (15) minutes.

Rule 16 Certificate of Compliance

I, John D. Colliander, hereby certify pursuant to Rule 16 as follows:

1. Pursuant to Rule 16(3)(i) that copies of the two decisions below (dated December 21, 2016 and February 27, 2017) are included in this Brief.
2. Pursuant to Rule 16(7), that the original and 8 copies of the Brief with Addendum are filed with the Supreme Court.
3. Pursuant to Rule 16(10) that two copies of the Brief and Appendix have been mailed to Gary M. Burt, Esquire, counsel for the Defendant.

[Rule 17 Certificate of Compliance is with the Appendix]

Date: October 6, 2017

John D. Colliander, Esquire
NH #476

ADDENDUM TO PLAINTIFF'S BRIEF

		PAGE
1.	Trial Court Decision December 21, 2016	Add. 1
2.	Trial Court Decision February 27, 2017	Add. 22

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Anthony W Franciosa, III v Jessica Grace Elliott, et al**
Case Number: **218-2016-CV-00224**

Enclosed please find a copy of the court's order of December 19, 2016 relative to:
Cross Motions for Summary Judgment

December 21, 2016

Maureen F. O'Neil
Clerk of Court

(595)

C: John D. Colliander, ESQ; Gary Michael Burt, ESQ

Add. 1

NHJB-2503-S (07/01/2011)

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

Vaneesa S. Franciosa
by her father and next friend, Anthony W. Franciosa, III

v.

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

NO. 218-2016-CV-224

Order on Cross-Motions for Summary Judgment

Plaintiff Vaneesa S. Franciosa ("Franciosa"), a minor, filed this negligence action by her father and next friend, Anthony W. Franciosa, III, against Defendants Jessica Grace Elliott and Hidden Pond Farm, Inc. a/k/a Hidden Pond Farm (collectively, "Elliott").[1] Franciosa's claim arises out of injuries she sustained from a horseback-riding accident on July 20, 2014. Elliott moves for summary judgment, arguing that she is entitled to immunity from liability pursuant to RSA 508:19 (2010 & Supp. 2016), the equine statute, based on the undisputed facts. Franciosa objects and cross-moves for partial summary judgment on the issue of whether RSA 508:19 applies to this case. The Court held a hearing on October 18, 2016. For the reasons explained below, Elliott's motion for summary judgment is GRANTED, while Franciosa's cross-motion for partial summary judgment is DENIED.

Facts

The following are the relevant facts and are undisputed unless otherwise noted.

[1] The Court refers to Defendants collectively as "Elliott" because Jessica Grace Elliott does business as Hidden Pond Farm. On April 18, 2016, the Court granted an assented-to motion for voluntary nonsuit without prejudice against the two other named defendants, William and Phyllis Elliott.

Prior to the July 20, 2014 accident, which took place when she was thirteen years old, Franciosa had been riding horses for approximately eight years. *See* Vaneesa Franciosa Dep. 11:8–10 [hereinafter Franciosa Dep.], June 20, 2016; Anthony Franciosa Aff. ¶ 4, Aug. 16, 2016. She began riding horses at about age 5 at Trundle Bed Stables, where she took lessons from an instructor once a week. *See* Franciosa Dep. 11:10–13:3. A year later, Franciosa switched from Trundle Bed Stables to GayLee Stables ("GayLee") in Hampton Falls, where she took lessons once a week for the next six years, until 2013. *See id.* at 12:16–13:7, 17:23–20, 19:15–21.

In addition to her weekly riding lesson at Gaylee, approximately one or two times a month Franciosa would take what is colloquially referred to as a "free ride" on one of the horses. *See id.* at 13:8–21, 14:13–17. Although there is still a fee charged for a "free ride," it is much less than that of a lesson, which is conducted by an instructor. *See id.* at 23:11–16 ; *accord* Def.'s Mem. Law Supp. Mot. Summ. J. 3; Pl.'s Mem. Law Supp. Obj. to Def.'s Mot. Summ. J. & Supp. Pl.'s Cross-Mot. Partial Summ. J. 3 [hereinafter Pl.'s Mem.]. During Franciosa's free rides at GayLee, there was always an adult present keeping an eye on her. *See* Franciosa Dep. 13:14–23, 15:11–12.

Franciosa met Elliott in 2012 when Elliott became Franciosa's instructor at GayLee. *See id.* at 19:22–20:1; Elliott Dep. 15:15–16:5, June 20, 2016. Franciosa gave Elliott weekly lessons at GayLee for approximately one year until Elliott moved her business to Yorkfield Farm in Kensington, New Hampshire, in 2013. *See* Elliott Dep. at 16:8–11; Franciosa Dep. 17:23–18:5. Franciosa continued her lessons with Elliott at Yorkfield Farm up until the time of her injury on July 20, 2014. *See* Franciosa Dep. 17:23–18:5, 58:2–7.

Both parties agree that Elliott is an expert equestrian, and as such, the Court

does not recite her qualifications in full. In addition to riding horses professionally, Elliott operates a business, *see supra* note 1, through which she provides lessons to students such as Franciosa, *see* Elliott Dep. 5:5–7:6. When Elliott moved her business to Yorkfield Farm ("the farm"), she made an agreement with the owner of the property that she (Elliott) would maintain the farm, including paying the expenses and taking care of the owner's horses, in exchange for use of the property for her business. *See* Elliott Dep. at 7:23–9:1. Elliott also boards her own horses at the farm, as do other individuals, some of whom are Elliott's students and some of whom receive lessons from other instructors not affiliated with Elliott. *See id.* at 19:20–20:15

During the year she rode horses at Yorkfield Farm, Franciosa had a weekly forty-five minute lesson with Elliott, which included instruction on different types of skills, such as jumping, flat work, and equitation. *See id.* at 21:1–16; Elliott Dep. 11:20–21. Franciosa also took a free ride approximately once per week at the farm in addition to her lesson. *See* Franciosa Dep. 21:8–16. Elliott was not always present during these free rides, but other people were on the property, including independent contractors Elliott hired to clean the stables and feed the horses, as well as other riders who were receiving lessons from other instructors. *See id.* at 21:17–22:3, 39:10–15; Elliott Dep. 7:7–13, 17:6–20:22. There was no one who was specifically designated as responsible for Franciosa's supervision, however.

According to Franciosa's deposition testimony and her father's affidavit, Franciosa's parents did not become aware of this until July 20, 2014. *See* Franciosa Dep. 21:23–23:10; Anthony Franciosa Aff. ¶¶ 5–6. By contrast, Elliott's deposition testimony suggests that prior to the accident, she believed there was an understanding—based on a "verbal agreement"—between herself, Franciosa, and

Franciosa's parents that Franciosa, like other minors, was expected to be accompanied to the farm by an adult on the days she took free rides because Elliott was not always present. *See* Elliott Dep. 58:18–11. Franciosa testified that she purposely did not tell her parents that Elliott was not always present for free rides because "[she] knew that if [she] told them, they probably wouldn't have let [her] ride." Franciosa Dep. 22:1–19.

In addition to her lessons, Franciosa participated in the IEA program with Elliott, which involved "[l]essons and horse showing." Elliott Dep. 53:11–15. At these shows, of which there were at least five, Franciosa selected a horse to ride, with which she had no previous experience, and then would "walk, trot, and canter." *Id.* at 24:15–25:11. Franciosa had no difficulties controlling the horses at these shows. *Id.* at 25:4–14.

Franciosa also rode several different types of horses during her time receiving lessons from Elliott. *See* Franciosa Dep. 23:21–24:1. One of the horses Elliott owned and used in her lessons was a Welsh pony named Wilma. Elliott purchased Wilma from New Holland Sales Stable, which has "very good quality horses," in late May 2014. Elliott Dep. 39:19–20, 42:7, 43:1–4. Wilma arrived in New Hampshire in early June 2014. *See id.* at 43:1–10. Although it is unclear from the record exactly how many times Franciosa rode Wilma in the five or so weeks before the accident, she did so at least twice, including on a free ride the day before the accident, and during a lesson with Elliott. *See* Franciosa Dep. 31:23–32:1, 39:16–20. After riding Wilma for "a week or . . . [m]aybe two," Franciosa became interested in having her parents lease the horse. *Id.* at 31:5–6. Franciosa testified at her deposition that she was interested in leasing Wilma notwithstanding that

> sometimes [Wilma] would be kind of jumpy and spooky, and then a lot of the time she would be kind of out of control and, like, she wouldn't stop. So we'd have to – like, Jessica [Elliott] would tell me to run her into the wall to get her to stop.

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Id. at 31:20–32:1. At her deposition, Elliott testified that Wilma was comparable to the other horses Franciosa rode at the farm in terms of disposition. Elliott Dep. 3:3–11. Wilma was used in a six-week summer camp for beginner riders, *see id.* at 50:2–8, although it is unclear what portion of this camp, if any, occurred before July 20, 2014.

On Saturday, July 19, 2014, Franciosa took a free ride at Yorkfield Farm. *See* Franciosa Dep. 38:3–23. Elliott was not present on the premises at the time, but had given Franciosa permission to do so. *See id.* at 4:15, 3–6. Franciosa rode Wilma and did not experience any issues with the horse's temperament or otherwise. *See id.* at 39:16–20, 40:10–12. Later that afternoon, Franciosa texted Elliott to arrange a lesson for the next day, Sunday, July 20. The following is the entirety of their text message conversation on July 19:

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

Def.'s Ex. 2; *accord* Franciosa Dep. 33:6–34:5; Elliott Dep. 22:3–20.

Franciosa was dropped off at the farm by a family friend on July 20. *See* Franciosa Dep. 36:1:10. Franciosa retrieved Wilma from her stable, saddled the horse, and began riding Wilma around the arena. *See id.* at 41:8–43:6. A few other people were present at that time, including two other riders, one of whom was receiving a lesson from a different instructor. *See id.* at 43:7–23. The parties agree that none of these people had been designated by Elliott to supervise Franciosa.

Approximately ten minutes into her ride, Franciosa began experiencing difficulty with Wilma. *See id.* at 45:15–20. As Franciosa explained in her deposition, Wilma was "kind of jumpy and going like really forward, and she was hard to control a little bit." *Id.* 45:23–2. Franciosa used certain techniques "to try to slow [Wilma] down," such as sitting "back in the calf halter," but was not immediately successful. *Id.* at 46:4–10. Franciosa continued to ride Wilma, believing that the horse "would push through it like . . . before." *Id.* at 47:5–6. Franciosa also explained at her deposition that if the horse is "doing something that she's not supposed to," the rider should not end the ride because it essentially rewards the horse for bad behavior. *Id.* at 48:17–20.

After she felt Wilma had calmed down sufficiently, Franciosa decided to end the ride, which had lasted approximately thirty minutes total. *See id.* at 45:1–3, 60:18–61:9. What happened next is the subject of disagreement between the parties. *Compare* Pl.'s Mem. 3 ("Vaneesa was thrown by one of the Defendant's horses and trampled . . . ."), *with* Def.'s Mem. Law Supp. Mot. Summ. J. 4 ("Plaintiff went to dismount and fell from Wilma."). As the Court explains below, it must assess whether there is a genuine factual dispute as to how Franciosa ended up on the ground based on the summary judgment record. The only account of how that occurred comes from Franciosa's deposition testimony:

> 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.**

Franciosa Dep. 49:12–21 (bolding added). Although Franciosa testified that she

believed Wilma had caused her to fall off, *id.* at 49:22–2, she clarified that this belief was based on the fact that she had "gotten off many horses and this was the first time anything ha[d] ever happened getting off," *id.* at 50:4–6. Franciosa also testified that she believes both of her feet were out of the stirrups at the time she fell and that the horse was standing still at the time Franciosa fell off, although she could not be sure as to either point or as to what Wilma did, if anything, to cause the fall. *See id.* at 50:7–11, 61:12:17. In sum, the record establishes only that Franciosa fell to the ground while she was dismounting Wilma, not that the horse bucked Franciosa off during the ride.

After Franciosa fell to the ground, Wilma stepped on her, although Franciosa did not realize this at the time. *See id.* at 51:9–15. Another rider came over to see if Franciosa was alright, and 911 was eventually called. *See id.* at 52:10–22. Franciosa was taken by ambulance to Exeter Hospital and then later airlifted to Boston Children's Hospital because of the severity of her injuries. *See id.* at 54:6–23. The instant action seeks damages for those injuries.

Analysis

The outcome of this case depends on the statutory interpretation of RSA 508:19, which governs liability in the context of equine activities. The parties' cross-motions for summary judgment ask the Court to reach opposite conclusions about whether the statute applies here. Specifically, Elliott seeks summary judgment on the basis that the statute's immunity provision bars Franciosa's negligence claim, *see* Def.'s Mem. Law Supp. Mot. Summ. J. 5, while Franciosa argues that "this case is not within the scope" of RSA 508:19 and seeks partial summary judgment as to that issue, Pl.'s Obj. to Def.'s Mot. Summ. J. ¶ 4. Franciosa also argues, in the alternative, that the application of the immunity statute involves factual questions which must be resolved by a jury. *See* Pl.'s

Obj. to Def.'s Mot. Summ. J. ¶¶ 4, 6–7. The Court sets forth the summary judgment standard before turning to the application of RSA 508:19.

A. Summary Judgment Standard

A motion for summary judgment should be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. Where, as here, the parties have cross-moved for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law." *Conant v. O'Meara*, 167 N.H. 644, 648 (2015).

The law specifies what evidence the Court can properly consider in determining whether there is a genuine issue of material fact. The "party seeking summary judgment shall accompany h[er] motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify." RSA 491:8-a, II. A deposition satisfies the affidavit requirement of this provision. *Manchenton v. Auto Leasing Corp.*, 135 N.H. 298, 302 (1992). Here, Elliott has submitted full transcripts of her own deposition and Franciosa's deposition, as well as Elliott's answers to interrogatories propounded by Franciosa. *See* Def.'s Mot. Summ. J. Exs. A–C.

The Court must take the facts contained therein as admitted unless Franciosa, as the nonmoving party, submits with her objection "contradictory affidavits based on personal knowledge . . . or . . . an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits." RSA 491:8-a, II. Franciosa has submitted an affidavit from

her father and excerpts of Elliott's deposition transcript, which she has underlined to draw the Court's attention to specific points.[2] *See* Pl.'s Obj. to Def.'s Mot. Summ. J. Exs.1, 3.

"When a motion for summary judgment is made and supported as provided [above], the adverse party may not rest upon mere allegations or denials of h[er] pleadings, but h[er] response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV. The summary judgment statute focuses on affidavits, depositions, answers to interrogatories, and admissions on file with the Court, *see* RSA 491:8-a, III, IV, because the "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation omitted).

The only evidence submitted here that contains an account of how Wilma was acting during the ride and of how Franciosa was injured is Franciosa's own deposition. As Elliott points out, Franciosa testified that "she fell off Wilma while she was dismounting the horse," and "[t]here is no evidence the [a]ccident occurred differently than [Franciosa] described." Def's Mem. Law Supp. Obj. to Pl.'s Cross-Mot. Partial Summ. J. & Reply to Pl.'s Obj. to Def.'s Mot. Summ. J. 8.

At the summary judgment hearing, Franciosa's counsel made reference to an assertion contained in an earlier pleading filed by Elliott—her objection to Franciosa's motion to attach. This assertion is what "a witness," who is not identified, observed of Franciosa riding Wilma on July 20, 2014. Defs.' Obj. to Pl.'s Mot. Attach Notice ¶ 10.

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[2] Franciosa also submitted the session law of RSA 508:19, which the Court discusses *infra*.

Franciosa denied the accuracy of this witness's observation during her deposition, *see* Franciosa Dep. 47:13–48:3, and neither party has provided a statement from that witness to this Court, either as part of the summary judgment or otherwise. Accordingly, the Court cannot consider any assertions made in that pleading.

B. Interpretation and Application of the Equine Statute

The only cause of action remaining in this case is Franciosa's negligence claim against Elliott. *See supra* note 1. To prevail on a claim for common law negligence, "the plaintiff must demonstrate that the defendant had a duty to the plaintiff, that she breached that duty, and that the breach proximately caused injury to the plaintiff." *England v. Brianas*, 166 N.H. 369, 371 (2014). The legislature may circumscribe or bar common law rights to recovery through statutory grants of immunity, however. *See Antosz v. Allain*, 163 N.H. 298, 301 (2012). At issue here is RSA 508:19, which circumscribes tort liability in the context of equine activities.

Because the parties disagree about the proper application of RSA 508:19, resolution of this issue requires the Court to engage in statutory interpretation, the principles of which are well-settled. *See Coco v. Jaskunas*, 159 N.H. 515, 534 (2009). The Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Petition of Carrier*, 165 N.H. 719, 721 (2013). The Court "do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id.* Similarly, the Court "review[s] a particular provision, not in isolation, but together with all associated sections." *Appeal of Thermo–Fisher Scientific*, 160 N.H. 670, 672 (2010). "This enables [the Court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *K.L.N. Constr. Co., Inc. v.*

Town of Pelham, 167 N.H. 180, 184 (2014) (citations and quotations omitted).

The first paragraph of RSA 508:19 defines the terms used in the rest of the statute, including "equine activity," "equine professional," and "inherent risks of equine activities." RSA 508:19, I(c), (e), (f). Here, there is no dispute that Elliott is an "equine professional" because at all relevant times, she was "a person engaged for compensation . . . [i]n instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine." RSA 508:19, I(e)(1). Likewise, there is no dispute that Franciosa was a "participant" engaging in an "equine activity" on July 20, 2014. *See* RSA 508:19, I(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."); RSA 508:19, I(a) ("'Engages in an equine activity' means rides or drives an equine . . . ."); RSA 508:19, I(c)(4) ("'Equine activity' means . . . [r]iding, 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."). As discussed below, the parties disagree as to the scope of the "inherent risks of equine activities."

Paragraph II of the equine statute describes the immunity it 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** 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.

RSA 508:19, II (bolding added). As the foregoing language indicates, the statute provides not only immunity from liability but also immunity from suit where the participant's injuries "result[] from the inherent risks of equine activities," *unless* one of the exceptions from paragraph III applies.

Paragraph III limits the immunity provided by the equine statute by carving out five exceptions. This provision states:

> 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.

RSA 508:19, III (bolding added). If one of these five exceptions applies, the defendant is not entitled to the immunity described in paragraph II.

Franciosa focuses on the language of paragraph II, arguing that she was exposed to risks "well beyond" those inherent in equine activities, Pl.'s Cross-Mot.

Partial Summ. J. ¶ 4, and that as a result, "this case is not within the scope of [RSA] 508:19, Pl.'s Obj. to Def.'s Mot. Summ. J. ¶ 4. Central to Franciosa's argument is her contention that the statute provides immunity only when the participant was exposed to "the inherent level of risk" associated with equine activities and not when there were additional acts or omissions that arguably fall within the category of ordinary negligence. Pl.'s Mem. 5. Franciosa argues that Elliott acted negligently by allowing a thirteen-year-old to ride a horse without being there to supervise, that this exposed Franciosa to risks beyond those inherent in horseback riding, and that, accordingly, the immunity statute does not apply in the first instance. *See id.* As explained below, the Court disagrees.

Franciosa's argument relies heavily on the "Statement of Intent" which appears in the session law but not in the language of the statute itself. *Compare* Laws 1998, 24:1 (session law), *with* Laws 1998, 24:2 (enacted version equine statute), *and* RSA 508:19. As such, the statement of intent is part of the legislative history, which the Court does not examine unless the statutory language is ambiguous. *See Bank of N.Y. Mellon v. Dowgiert*, 169 N.H. ___, ___, 145 A.3d 138, 141 (2016) ("Absent an ambiguity, [the Court] will not look beyond the language of the statute to discern legislative intent."); *Nashua Coliseum, LLC v. City of Nashua*, 167 N.H. 726, 730 n.2 (2015) (designating the "Statement of Intent for House Bill 1405" as legislative history, even though the language therein was codified as the paragraph preceding the provision at issue in the case). As the Court's analysis below demonstrates, however, the language of RSA 508:19 is not ambiguous, as it is not "subject to more than one reasonable interpretation." *Attorney General v. Loreto Publ'ns, Inc.*, 169 N.H. 68, 74 (2016) (quotation omitted).

Accordingly, the Court "interpret[s] legislative intent from the statute as written

and will neither consider what the legislature might have said nor add language that the legislature did not see fit to include." *State v. Jennings*, 159 N.H. 1, 3 (2009) (quoting *State v. Lamy*, 158 NH. 511, 515 (2009)). This principle of statutory interpretation is particularly important where, as here, the legislature did not see fit to include the statement of intent *itself* in the statute. *Compare* RSA 508:19 (no statement of intent), *with* RSA 649-A:1 (entitled "Declaration of Findings and Purposes"), *and* RSA 225-A:1 (entitled "Declaration of Policy").

The statement of intent contained in the session law also contains language that the legislature did not see fit to include in the provisions of the statute. For example, although the statement of intent discusses injuries "sustained by another *solely* as a result of risks inherent in equine activity," Laws 1998, 24:1, II (emphasis added), the statute provides immunity for injuries "resulting from the inherent risks of equine activities" unless one of the five exceptions applies, RSA 508:19, II. Those specifically worded exceptions do not include an exception for ordinary negligence. *See* RSA 508:19, III. Accordingly, paragraph III of the statement of intent cannot be used to circumvent the plain language of paragraph III of the statute by imposing liability for conduct that is arguably negligent but does not fall within one of the five enumerated exceptions. Indeed, if the Court were to read the statute in the way Franciosa asks it to, *i.e.*, by elevating the importance of the session law's statement of intent above the express language of the statute, this would eviscerate the protections provided by RSA 508:19. The Court declines to do so.

Instead, the plain language of the statute makes clear that the Court must engage in a two-step inquiry. First, the Court must determine whether Franciosa's injuries "result[ed] from the inherent risks of equine activities." RSA 508:19, II. If so,

Elliott is entitled to immunity unless one of the five exceptions outline in paragraph III applies. Accordingly, the second step of the Court's inquiry is determining whether one of those exceptions applies here. The concerns identified by Franciosa—that is, the rider's age and lack of supervision—are only relevant to the extent they are reflected in the exceptions to immunity contained in paragraph III.

Because the statute defines what risks are inherent in equine activities, the Court's inquiry begins with this language:

> "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.

RSA 508:19, I(f) (bolding added). Here, Franciosa was injured when she fell off of Wilma and when Wilma subsequently stepped on Franciosa. These are precisely the kinds of risks that are inherent in equine activities, regardless of whether Franciosa simply fell or the horse made a sudden movement that caused her to fall. Indeed, these risks include being bucked off by the horse, even though that is not what happened here. *See Christian v. Elden*, 107 N.H. 229, 235 (1966) (recognizing, in a case decided decades before RSA 508:19 was enacted, "that everyone who mounts a horse should realize that he may fall or get thrown off").

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Franciosa argues, apparently in the alternative, that whether she was exposed to the inherent risks of the sport should be decided by the fact finder at trial, not by this Court on summary judgment. *Compare* Pl.'s Obj. to Def.'s Mot. Summ. J. ¶ 7 ("Reasonable triers of fact . . . could differ on . . . whether Vaneesa . . . encountered an inherent risk of the sport . . . ."), *with* Pl.'s Cross-Mot. Partial Summ. J. ¶ 7 ("[N]o reasonable trier of facts could find these risks were inherent to the sport."). This issue is a matter of statutory interpretation, however, which is a question of law for the Court to decide. *See In re Nicholas L.*, 158 N.H. 700, 702 (2009).

Because Franciosa's injuries resulted from the inherent risks of equine activities, Elliott is entitled to immunity unless one of the five exceptions applies. Franciosa argues that this case implicates exceptions (b) and/or (d) and that the Court must leave to a jury the issue of whether these exceptions apply. *See* Pl.'s Mem. 4–5.

The exception to immunity contained in subsection (b) applies if Elliott "failed to make reasonable and prudent efforts to determine the ability of [Franciosa] to engage safely in the equine activity." RSA 508:19, III(b). Importantly, this section does *not* require that such an assessment be correct, only that it be undertaken with "reasonable and prudent *efforts*." *Id.* (emphasis added). The undisputed facts show that Elliott was aware of Franciosa's several years of horseback riding experience, having been her instructor for at least two of those years, throughout which Elliott provided weekly lessons and Franciosa gained further experience through additional weekly free rides. Franciosa also successfully rode horses with which she was previously unfamiliar at shows through her participation in the IEA program with Elliott. There is no suggestion in the record that Franciosa had previously had difficulty controlling horses which had begun acting jumpy, as horses can sometimes do. Indeed, the statute recognizes that

this is an inherent risk of equine activities, and requires only that the equine professional make reasonable and prudent efforts to assess the rider's ability to engage in this activity nonetheless. Assuming that this is a question of fact as opposed to a question of law, no reasonable juror could find that Elliott failed to make reasonable and prudent efforts to assess Franciosa's ability before providing permission to ride Wilma, the horse Franciosa was thinking of leasing, especially in light of the fact that Franciosa had successfully ridden Wilma on a free ride the previous day.

Indeed, Franciosa's argument in opposing summary judgment is not that she was too inexperienced to ride Wilma outside of Elliott's presence but rather that allowing "a minor to ride unsupervised" on a horse that had recently been purchased "unreasonably increased" the risk level beyond those inherent in equine activities. Pl.'s Mem. 5. Moreover, at the summary judgment hearing, Franciosa's counsel suggested that minors cannot assume the risk of these types of activities. These arguments ignore the plain language of the statute, however. Had the legislature wanted to exclude minors categorically, it could have chosen to do so.[3] Instead, the statute identifies the relevant inquiry as the participant's experience and ability.

While Franciosa also takes issue with Elliott's failure to ensure that Franciosa was supervised, her focus on the need for adult supervision shows that this is only relevant to exception (d), if at all, and not to exception (b). Franciosa's parents do not ride horses, *see* Franciosa Dep. 67:7–8, and thus would not have been unable to provide the assistance calming Wilma down that Franciosa now claims Elliott could have provided had she been present. The argument that Franciosa's parents could have exercised better judgment than their teenage daughter and told her to end the ride

[3] The legislature's silence on age is particularly noticeable given that horseback riding participants often begin taking lessons at a young age. For example, Franciosa began riding at around age five, while Elliott, who is now slightly older than thirty, has been riding since she was a year old.

does not mean that Elliott failed to make reasonable and prudent efforts to determine the rider's ability to engage in the activity. The statute also specifies that it is the participant who bears responsibility for acting within her own limits and for "heed[ing] all posted warnings," RSA 508:19, II, such as a rule requiring adult supervision. And this rule appears to be so that someone can render emergency assistance if an accident occurs, which immediately occurred here, notwithstanding the absence of Elliott and of Franciosa's parents from the farm that day.

Indeed, the lack of causation between Elliott's acts or omissions and Franciosa's injuries is fatal to Franciosa's argument that the exceptions to immunity apply here. Exception (d) requires the "act or omission that constitutes willful or wanton disregard for the safety of the participant . . . [must] cause[] the injury." RSA 508:19, III(d). There is nothing in the record to suggest that Elliott failed to properly train Franciosa in a way that would have prevented the injuries here. Nor is there any evidence as to why Franciosa fell. And even assuming that Wilma made some unexpected movement that caused Franciosa to fall, given the unexpected nature of that movement there is nothing to suggest that Elliott could have somehow (1) prepared Franciosa to "fall" properly in order to avoid the injuries she suffered here or (2) prevented the fall from occurring had she been there. As Elliott explained at her deposition: "[W]hen you're falling off of [a] horse it's kind of like a car accident. You're not really able to control the situation unless you're very disciplined and have a lot of experience." Elliott Dep. 15:3–6. Indeed, that is why the risk of falling off of a horse is one of the inherent risks which a rider assumes under RSA 508:19.

Franciosa's causation argument hinges on her assumption that, had Elliott been present at the farm, Elliott would have seen how Wilma was acting and stopped the ride

altogether. *See* Pl.'s Mem. 6. This is not supported by the record, however. The portion of Elliott's deposition cited for this proposition was about what Elliott does "when [she] observe[s] a student improperly giving leg." Elliott Dep. 35:21–22. The only source of the suggestion that Franciosa was using a "leg aid" on July 20, 2014, is the statement of the unidentified witness referenced in Elliott's objection to the motion to attach. *See id.* at 31:21–32:17. As explained above, that statement has not been provided to the Court and is not properly part of the summary judgment record. The other portion of the transcript cited is Elliott's explanation that she "stop[s] the situation as fast as [she] can" when a horse is "acting unpredictably." *Id.* at 39:1–4. But there is no context to this question which would suggest that Elliott would classify Wilma's behavior on July 20, 2014 as "unpredictable" such that she would have intervened.

Furthermore, even if Elliott would have intervened in some way, there is no evidence as to what she would have done to try to "stop the situation," and thus there is no indication that she would have been able to prevent Franciosa's injury somehow. In other words, there is no suggestion that Elliott would have instructed Franciosa to do something different than what Franciosa did to get Wilma to calm down on July 20th. And there is also no suggestion that Wilma would have acted any differently when Franciosa attempted to dismount, assuming that Wilma was the reason Franciosa fell. This is because, as the equine statute recognizes, horses are predictably unpredictable. Put simply, Franciosa cannot show that, but for Elliott's absence, she would not have been injured that day.

Franciosa attempts to satisfy the but-for causation requirement by arguing that had Elliott refused to provide permission for Franciosa's free ride, Franciosa would not have taken Wilma for a ride on that day and, therefore, would not have been injured.

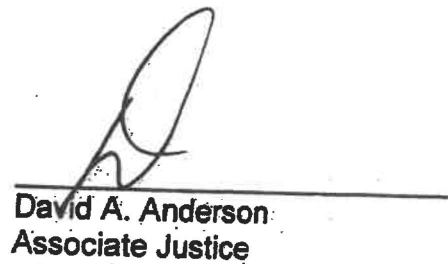
The problem is that Franciosa cannot show that Elliott's *failure to supervise* Franciosa was the proximate cause of the accident. Moreover, "an injury caused by an inherent risk cannot have been negligently caused because there is no duty to protect against such risks." *Cecere v. Loon Mountain Recreation Corp.*, 155 N.H. 289, 295 (2007). Because the foregoing would be insufficient to satisfy Franciosa's burden of establishing proximate cause for a claim of common law negligence, it is not enough to overcome the application of immunity under the exceptions listed in RSA 508:19, III, all of which require causation as well.

Conclusion

For the foregoing reasons, Elliott is entitled to immunity pursuant to RSA 508:19. Accordingly, Elliott's motion for summary judgment is GRANTED, while Franciosa's cross-motion for partial summary judgment is DENIED.

So Ordered.

December 19, 2016
Date



David A. Anderson
Associate Justice

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
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NOTICE OF DECISION

File Copy

Case Name: **Anthony W Franciosa, III v Jessica Grace Elliott, et al**
Case Number: **218-2016-CV-00224**

Enclosed please find a copy of the court's order of February 22, 2017 relative to:

Order on Plaintiff's Motion for Reconsideration of Summary Judgment Order.

February 27, 2017

Maureen F. O'Neil
Clerk of Court

(278)

C: John D. Colliander, ESQ; Gary Michael Burt, ESQ

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The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

Vaneesa S. Franciosa
by her father and next friend, Anthony W. Franciosa, III

v.

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

218-2016-CV-224

Order on Plaintiff's Motion for Reconsideration of Summary Judgment Order

Plaintiff Vaneesa S. Franciosa ("Franciosa"), a minor, filed this negligence action by her father and next friend, Anthony W. Franciosa, III, against Defendants Jessica Grace Elliott and Hidden Pond Farm, Inc. a/k/a Hidden Pond Farm (collectively, "Elliott").[1] Franciosa's claim arises out of injuries she sustained from a horseback-riding accident on July 20, 2014. On December 19, 2016, the Court issued an order granting Elliott's motion for summary judgment and denying Franciosa's cross-motion for summary judgment. *See* Order Cross-Mots. Summ. J. The Court concluded that, based on the undisputed facts in the summary judgment record, Elliott was entitled to immunity from liability pursuant to the equine statute, RSA 508:19 (2010 & Supp. 2016). Franciosa now moves for reconsideration of this order. Elliott objects. For the reasons explained below, Franciosa's motion for reconsideration is DENIED.

Analysis

Franciosa's motion for reconsideration identifies several claimed points of error. *See* Pl.'s Mot. Recons. 14. Some of these points relate to arguments Franciosa made

[1] The Court refers to Defendants collectively as "Elliott" because Jessica Grace Elliott does business as Hidden Pond Farm.

in her summary judgment pleadings but which were not substantively addressed in the Court's summary judgment order. *Accord Super. Ct. Civ. R.* 12(e) (motion for reconsideration should identify points the moving party believes the court overlooked). The Court addresses those arguments in the within order so that the parties, and any appellate court, will have the benefit of the Court's reasoning.

After carefully reviewing all of Franciosa's arguments, the Court concludes that it did not overlook or misapprehend any points of fact or law such that reconsideration of its summary judgment order is warranted. *See Super. Ct. Civ. R.* 12(e). Accordingly, unless otherwise noted below, *see infra* Part III, the Court reaffirms the analysis contained in its summary judgment order, which is incorporated by reference here. The Court groups Franciosa's arguments by subject matter and addresses them in turn.[2]

I. Appropriate Standard of Review

Franciosa first argues that the Court failed to "review the pleadings and the record in the light most favorable to [her]," and that, accordingly, the Court failed to apply the appropriate standard of review at the summary judgment stage. Pl.'s Mot. Recons. 1–2. Franciosa also renews her argument that "summary judgment is less appropriate in tort cases." *Id.* at 2; *accord* Pl.'s Mem. Law Supp. Obj. to Def.'s Mot. Summ. J. & Supp. Pl.'s Cross-Mot. Partial Summ. J. 1 [hereinafter Pl.'s Mem.] (citing *Ianelli v. Burger King Corp.*, 145 N.H. 190, 192 (2000)).

The latter argument overlooks the fact that Franciosa cross-moved for partial summary judgment in this case. By filing a cross-motion for partial summary judgment,

[2] Elliott points out that Franciosa's fourteen-page motion exceeds the ten-page limit imposed by *Superior Court Civil Rule* 12(e). *See* Def.'s Obj. to Pl.'s Mot. Recons. ¶¶ 1–2. The Court finds good cause to waive the ten-page limit in this instance and therefore considers the entirety of Franciosa's motion. *See Super. Ct. Civ. R.* 1(d) (noting court has discretion to waive application of any court rule); *cf. Super. Ct. Civ. R.* 12(e) ("To preserve issues for an appeal to the Supreme Court, an appellant must have given the court the opportunity to consider such issues.").

Franciosa took the position that summary judgment was appropriate, at least with respect to the application of RSA 508:19. *See* Order Cross-Mots. Summ. J. 7 ("Franciosa argues that this case is not within the scope of RSA 508:19 and seeks partial summary judgment as to that issue." (quotation omitted)). Furthermore, the *Ianelli* court's observation concerning the application of summary judgment in tort cases generally, which tend to be fact-dependent, *see Ianelli*, 145 N.H. at 192, does not prevent the trial court from granting summary judgment in the appropriate case—*i.e.*, where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. Indeed, "[s]ummary judgment is required" under those circumstances. *Northern N.H. Mental Health & Developmental Servs., Inc. v. Cannell*, 134 N.H. 519, 523 (1991).

Moreover, the *Ianelli* court recognized that summary judgment is sometimes appropriate in negligence actions. *See Ianelli*, 145 N.H. at 192. This may be especially true in cases involving statutory immunity, because the interpretation of a statute presents a question of law. *See In re Nicholas L.*, 158 N.H. 700, 702 (2009). Accordingly, while the Court "must be wary" in applying summary judgment, *Ianelli*, 145 N.H. at 192, the Court is also mindful of the supreme court's observation that immunity issues should be resolved pretrial, if possible, "[g]iven that the purpose of immunity is to operate as a bar to a lawsuit," *Conrad v. New Hampshire Dep't of Safety*, 167 N.H. 59, 70 (2014) (quotation omitted). This does not mean that immunity cases are always amenable to summary judgment, but to the extent Franciosa relies upon policy considerations to limit its application in tort cases, there are countervailing considerations in the immunity context because immunity "is effectively lost if a case is erroneously permitted to go to trial." *Conrad*, 167 N.H. at 70 (quotation omitted).

Turning to the appropriate standard of review, Franciosa does not take issue with the standard set forth in the Court's summary judgment order; rather, she argues that the Court misapplied this standard.

> Where, as here, the parties have cross-moved for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law."

Order Cross-Mots. Summ. J. 8 (quoting *Conant v. O'Meara*, 167 N.H. 644, 648 (2015)). The Court agrees that, pursuant to this standard, it must view the evidence in the light most favorable to Franciosa in her capacity as the nonmoving party. *See* Pl.'s Mot. Recons. 1–2. Importantly, however, this light-most-favorable standard only applies to factual determinations—that is, the Court's determination of whether there is a genuine issue of material fact after reviewing the evidence in the summary judgment record, *see Soraghan v. Mt. Cranmore Ski Resort Inc.*, 152 N.H. 399, 401 (2005), as opposed to questions of law, such as the proper interpretation of a statute, *see Nicholas L.*, 158 N.H. at 702. The interpretation of RSA 508:19, including what constitutes an "inherent risk[] of equine activities," is a question of law. *See* Order Cross-Mots. Summ. J. 15–16 (quoting RSA 508:19, II).

Additionally, as the Court explained in detail in its summary judgment order, *see id.* at 8–10, "[t]he law specifies what evidence the Court can properly consider in determining whether there is a genuine issue of material fact," *id.* at 8. Allegations made in unverified pleadings are not part of the summary judgment record. *See id.* at 8–10. Accordingly, the Court rejects Franciosa's argument that it overlooked certain assertions contained in those pleadings. *See* Pl.'s Mot. Recons. 1–2 (citing Compl.); *id.* at 10 (citing Defs.' Obj. to Pl.'s Mot. Attach Notice).

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The evidence in the summary judgment record reveals no genuine dispute as to Franciosa's experience with horses and Elliott's knowledge of and involvement in that experience. *See* Order Cross-Mots. Summ. J. 2–5, 16. Although Franciosa contends that the Court focused too much on this evidence, *see* Pl.'s Mot. Recons. 2, this evidence is directly relevant to whether "Elliott 'failed to make reasonable and prudent efforts to determine the ability of [Franciosa] to engage safely in the equine activity,'" Order Cross-Mots. Summ. J. 16 (quoting RSA 508:19, III(b)).

The Court's order explained that it was somewhat unclear why Franciosa fell off Wilma as she was dismounting—*i.e.*, whether she just fell or whether the horse did something to cause her to fall. *See* Order Cross-Mots. Summ. J. 6–7, 9, 15. The Court recounted the record evidence on this point in order to (1) clarify that there was no support for the suggestion that Franciosa was "bucked off" the horse, *see id.* at 6–7; and (2) make clear that the Court was not considering the contents of Elliott's objection to Franciosa's motion to attach, *see id.* at 9–10. The reconsideration motion's characterizations of this aspect of the Court's order, *see* Pl.'s Mot. Recons. 10–11, such as the contention that the order "creates an unfair 'Catch 22'" for Franciosa, *id.* at 10, appear to misunderstand the purpose of the Court's discussion, which was to respond to specific arguments and assertions made on Franciosa's behalf in the pleadings and at the summary judgment hearing.

While the Court must consider the evidence, and all reasonable inferences therefrom, in the light most favorable to Franciosa in her capacity as the nonmoving party, *see Concord Gen. Mut. Ins. Co. v. Green & Co. Bldg. & Dev. Corp.*, 160 N.H. 690, 692 (2010); *Conant*, 167 N.H. at 648, the Court need not consider "general allegations or denials," "speculation," or "conclusory allegation[s]" in determining

whether there is a genuine dispute of material fact precluding summary judgment, *Weaver v. Stewart*, 169 N.H. ___, ___ A.3d ___ (decided Oct. 27, 2016) (slip op. at 5–6) (quotations omitted); *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529, 535 (2009). Likewise, the Court need not adopt one party's characterization of the evidence. For example, in her pleadings, Franciosa repeatedly refers to Wilma as a "rescue horse," Pl.'s Mot. Recons. 3, and as a horse rescued from a slaughterhouse, *see* Pl.'s Mem. 6. These characterizations imply that there was something wrong with or suspect about Wilma because of where she came from, but this is not supported by the summary judgment record, nor is it an inference reasonably drawn from the evidence in the record. On the contrary, Elliott testified that she purchased Wilma from New Holland Sales Stable, which has "very good quality horses," and that Wilma's disposition "was comparable to the other horses Franciosa rode at the farm."[3] Order Cross-Mots. Summ. J. 4–5 (citing Elliott Dep. 3:3–11, 39:19–20, 42:7, 43:1–4).

Franciosa also asserts that "[i]t is undisputed [Elliott] could have intervened to control the situation had she been present" at the farm on July 20, 2014. Pl.'s Mot. Recons. 3; *see also id.* at 10 ("[Elliott] agreed she could intervene if present to control or stop a risky situation."). The Court explained in detail why this assertion "is not supported by the record." Order Cross-Mots. Summ. J. 19. Franciosa fails to point to any fact in the record that the Court overlooked or misapprehended in coming to this conclusion, *see Super. Ct. Civ. R.* 12(e), instead renewing her argument that causation is an issue for the jury. The Court explains *infra* why it rejects this argument, *see infra* Part IV, as well as the argument that reasonable jurors could infer that Elliott would have intervened early on had she been present that day, *see* Pl.'s Mot. Recons. 12.

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[3] Franciosa was not asked about how Wilma's disposition compared to other horses she had ridden, so this fact is deemed undisputed for summary judgment purposes. *See* Order Cross-Mots. Summ. J. 8.

The Court noted in its summary judgment order that there was a genuine dispute about whether Elliott had informed Franciosa's parents that she (Elliott) expected them to bear responsibility for their daughter's supervision during free rides taken at Elliott's farm. *See* Order Cross-Mots. Summ. J. 3–4. The Court also noted that the "safety rule" to which Franciosa's pleadings refer concerned adult supervision of minors, not supervision by equine professionals. *See id.* at 18. Ultimately, the dispute about whether Elliott was responsible for enforcing the adult supervision safety rule was not material—and thus did not preclude summary judgment—because Franciosa failed to put forth any evidence that the lack of adult supervision caused her injuries. *See id.* at 17–18; *cf. McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) ("In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant."). The Court reaffirms that analysis below. *See infra* Part IV.

II. Statutory Interpretation

Much of Franciosa's reconsideration motion focuses on the Court's interpretation of the equine statute. According to Franciosa, where a rider is exposed to risks beyond those inherent in equine activities, RSA 508:19 does not apply in the first instance, and an equine professional can be held liable for ordinary negligence. *See* Pl.'s Mot. Recons. 3–5, 7–9; *see also* Order Cross-Mots. Summ. J. 12–13 (noting same argument). This argument overlooks the plain language of the statute, however, which "makes clear that the Court must engage in a two-step inquiry. First, the Court must determine whether Franciosa's injuries 'result[ed] from the inherent risks of equine activities.' RSA 508:19, II. If so, Elliott is entitled to immunity unless one of the five exceptions outline[d] in paragraph III applies." Order Cross-Mots. Summ. J. 14–15.

Contrary to Franciosa's argument, this two-step inquiry applies even when the participant in the equine activity is exposed to risks beyond those inherent in equine activities, including those identified by Franciosa. *See* Pl.'s Mot. Recons. 3, 7–9 (discussing lack of supervision and failure to enforce adult supervision rule); Pl.'s Mem. 4 (distinguishing between acts of negligence and inherent risks). This is where the five exceptions listed in paragraph III come in; if the risks created by the defendant fall within one of those five exceptions, and those risks proximately caused the plaintiff's injury, the defendant is not entitled to immunity. *See* RSA 508:19, III; *see also* Order Cross-Mots. Summ. J. 15–19. Importantly, the statute contemplates that the acts or omissions listed in paragraph III may proximately cause the plaintiff's injuries even though those injuries (also) resulted from the inherent risks of equine activities. *See* RSA 508:19, II.

Franciosa relies on *Wright v. Loon Mountain Recreational Corp.*, 140 N.H. 166 (1995), for the proposition that negligence is not an inherent risk of equine activities. *See* Pl.'s Mot. Recons. 8–9. Franciosa's reliance on this case is misplaced, however, in part because *Wright* was decided prior to the enactment of RSA 508:19. As such, *Wright* cannot supply the relevant definition of inherent risks of equine activities under RSA 508:19. Instead, the equine statute defines this term, *see* RSA 508:19, I(f); and unlike *Wright*, the statute contemplates that certain kinds of negligence are part of these inherent risks, *see* RSA 508:19, I(f)(5).

Furthermore, if the ordinary negligence of an equine professional was enough to defeat the immunity provided by the equine statute, as Franciosa suggests, then there would be no need to specify the five exceptions to immunity contained in paragraph III. Franciosa's proffered interpretation would effectively render paragraph III "superfluous or redundant." *State v. Thiel*, 160 N.H. 462, 465 (2010) (quotation omitted). Indeed, the

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entire immunity statute would arguably be superfluous if it only immunized against liability for risks "unavoidably associated with equine behavior"—as opposed to immunizing against liability for the ordinary negligence of equine professionals and participants—because "[i]t would have been pointless for the Legislature to limit liability when none existed" in the first place.[4] *Loftin v. Lee*, 341 S.W.3d 352, 358 (Tex. 2011).

Franciosa's reliance on *Chanaki v. Walker*, 114 N.H. 660 (1974), is similarly misplaced. *See* Pl.'s Mot. Recons. 12. *Chanaki* predated the enactment of RSA 508:19 and dealt with a claim for ordinary negligence in the context of equine activities. *See Chanaki*, 114 N.H. at 662. RSA 508:19 provides immunity for ordinary negligence unless that conduct falls within one of the five exceptions specified in paragraph III. Another case cited by Franciosa, *Morse v. Goduti*, 146 N.H. 697 (2001), also dealt with a claim for ordinary negligence in the context of landowner liability, *see id.* at 699, and thus it is not relevant here.

Franciosa asserts that the Court's interpretation of RSA 508:19 is "unfairly liberal," "too broad[]," and contravenes the principle that immunity statutes should be strictly construed. Pl.'s Mot. Recons. 4 (citing *Soraghan*, 152 N.H. at 401; *Cecere v. Loon Mountain Recreation Corp.*, 155 N.H. 289 (2007)). Contrary to Franciosa's suggestion, however, the Court did not construe RSA 508:19 as providing "broad or blanket immunity." *Id.* Instead, the Court interpreted the statute according to its plain meaning. The statute limits tort liability for injuries resulting from equine activities to circumstances that fall within the exceptions listed in paragraph III of the statute.

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[4] Under its common law, New Hampshire rejected strict liability for "vicious" domestic animals, *see King v. Blue Mountain Forest Ass'n*, 100 N.H. 212, 216–17 (1956), and instead required causal negligence in order to impose liability in the equine context, *see Christian v. Elden*, 107 N.H. 229, 235 (1966); *Smith v. Benson's Wild Animal Farm*, 99 N.H. 243, 245 (1954); *Connell v. Putnam*, 58 N.H. 335, 335 (1878).

III. Relevance of the Statement of Intent

Franciosa argues that the Court "failed to apply the entirety of the Statute and thus misapprehended its full meaning." *Id.* at 5. Franciosa's argument centers on the import of the "Statement of Intent" enacted by the legislature. *See id.* at 5–6. As explained below, while the Court ultimately declines to reconsider its interpretation of the statute, it clarifies its analysis with respect to the statement of intent.

The Court's summary judgment order accurately noted the following:

> Franciosa's argument relies heavily on the "Statement of Intent" which **appears in the session law but not in the language of the statute itself**. *Compare* Laws 1998, 24:1 (session law), *with* Laws 1998, 24:2 (enacted version equine statute), *and* RSA 508:19.

Order Cross-Mots. Summ. J. 13 (bolding added). The Court then classified the statement of intent as "part of the legislative history, which the Court does not examine unless the statutory language is ambiguous." *Id.* (citing *Bank of N.Y. Mellon v. Dowgiert*, 169 N.H. ___, ___, 145 A.3d 138, 141 (2016); *Nashua Coliseum, LLC v. City of Nashua*, 167 N.H. 726, 730 n.2 (2015)). According to Franciosa, the Court's designation of the statement of intent as legislative history was inaccurate because the statement of intent was enacted into law by the legislature as part of the session law. Franciosa contends that the Court must consider the statement of intent as it would any other part of the statute. The Court agrees with the first point but not with the second.

The statement of intent is part of the session law, but it is *not* part of the statute itself (*i.e.*, RSA 508:19). *See* Laws 1998, ch. 24. Franciosa's argument about "the words of the session law . . . controlling over the code form," Pl.'s Mot. Recons. 6 (quotation omitted), misses the point because that principle only applies when there is some discrepancy between the language of the statute as it appears in the session law versus the version printed in the code book. Here, the legislature made a purposeful

choice to not include the statement of intent in the language of RSA 508:19. Accordingly, the question is what import the Court should give this statement of intent in interpreting RSA 508:19.

The principles of statutory interpretation focus on the language of the statute, not the language of "the law" passed by the legislature:

> The Court "first look[s] to **the language of the statute itself**, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Petition of Carrier*, 165 N.H. 719, 721 (2013). The Court "do[es] not consider words and phrases in isolation, but rather within the context of **the statute** as a whole." *Id.* Similarly, the Court "review[s] a particular provision, not in isolation, but together with all associated sections." *Appeal of Thermo-Fisher Scientific*, 160 N.H. 670, 672 (2010). "This enables [the Court] to better discern the legislature's intent and to interpret **statutory language** in light of the policy or purpose sought to be advanced by the statutory scheme." *K.L.N. Constr. Co., Inc. v. Town of Pelham*, 167 N.H. 180, 184 (2014) (citations and quotations omitted).

Order Cross-Mots. Summ. J. 10–11 (bolding added). Because of this focus on statutory language, and the supreme court's treatment of anything "beyond the language of the statute" as "legislative history," *Dowgiert*, 145 A.3d at 141, the Court classified the statement of intent as "part of the legislative history," Order Cross-Mots. Summ. J. 13.

The Court disagrees with Franciosa's arguments as to why its reliance upon *Nashua Coliseum* was misplaced.[5] *See* Pl.'s Mot. Recons. 6–7. Nonetheless, after conducting further research on the statutory interpretation issue, the Court concludes

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[5] For example, the statement of intent referenced by the *Nashua Coliseum* court was enacted into law; as the Court noted, it was codified in a different subsection of the statute at issue. *See* Order Cross-Mots. Summ. J. 13; *Nashua Coliseum*, 167 N.H. at 730 n.2. The Court also notes that it can rely upon general statements of law from New Hampshire Supreme Court precedent even where the specific issue decided in that case is not the same as that in the instant case. With respect to Franciosa's point about footnotes, *see* Pl.'s Mot. Recons. 6, the Court declines to assign authoritative value to a proposition based solely on its location within an appellate court opinion, *cf.* Powell, Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1087–88 (1982) (describing footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), as "the most celebrated footnote in constitutional law" because it "is now recognized as a primary source" of the strict-scrutiny standard of judicial review). Indeed, the use of footnotes by the New Hampshire Supreme Court appears to be much more a function of the stylistic preferences of the opinion's author than a definitive statement about the importance of the point being made. *Compare* *Appeal of Farmington Sch. Dist.*, 168 N.H. 726, 728–37 (majority opinion) (containing no footnotes), *with* *id.* (Lynn, J., dissenting) (containing eleven footnotes).

that the New Hampshire Supreme Court would most likely classify the statement of intent contained in the session law as a "preamble" to RSA 508:19, as opposed to legislative history. *See State v. Paul*, 167 N.H. 39, 43 (2014) ("In the session law enacting [RSA 519:23-a], the legislature included the following preamble . . . ." (citing Laws 2012, 243:1)); *State v. Kelley*, 153 N.H. 481, 484 (2006) (discussing "the preamble to RSA chapter 172-B" (citing Laws 1979, 378:1)); *Soraghan*, 152 N.H. at 406 ("[W]hen the legislature originally enacted RSA 212:34, it included a preamble . . . ." (citing Laws 1961, ch. 201)); *State v. Fleming*, 125 N.H. 238, 242 (1984) (discussing the "preamble" to the Restitution Act (citing Laws 1981, 329:1)).

In each of the four cases cited above, the "preamble" to the statute enacted by the legislature was part of the session law but was not included in the actual language of the statute. The supreme court did not treat the preamble as part of the statute itself. *See Paul*, 167 N.H. at 43 (referring to "both the statute and the preamble"). Instead, the supreme court treated the preamble as the legislature's statement of the "policy behind the . . . statute," *Kelley*, 153 N.H. at 484, or the "purpose of the statute," *Soraghan*, 152 N.H. at 406; *accord Fleming*, 125 N.H. at 242. The supreme court then "consider[ed]" the language of the statute at issue "in light of th[is] policy or purpose," *Kelley*, 153 N.H. at 482; *see also Soraghan*, 152 N.H. at 401, 405, instead of discerning legislative intent solely from the language of the statute itself, *see State v. Jennings*, 159 N.H. 1, 3 (2009). Importantly, the supreme court looked at whether its interpretation of the plain language of the statute effectuated or was consistent with the purpose or policy expressed in the preamble. *See Soraghan*, 152 N.H. at 406. The court did not interpret the plain language of the preamble as if it was a separate provision of the statute.

The statement of intent—*i.e.*, the preamble to RSA 508:19—provides in full:

I. The general court finds that equine activities are important to the economy and culture of the state. The general court also recognizes that equines are prone to behave in ways that may result in injury, harm, or death to persons involved in equine activities, and so finds that the responsibilities of sponsors and professionals should be distinguished between those of the participants for purposes of determining liability for injuries suffered from those activities.

II. It is the intent of the general court that no person shall be liable for damages sustained by another solely as a result of risks inherent in equine activity, insofar as those risks are inherent to the equine activity and obvious to the person injured.

III. 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.

Laws 1998, 24:1. As the Court noted in its summary judgment order, Franciosa relies on the language in paragraph III of the preamble to argue that the equine statute does not eliminate the plaintiff's ability to hold an equine professional liable in tort for ordinary negligence, even when the act or omission allegedly constituting negligence does not fall within one of the five enumerated exceptions in RSA 508:19, III. *See* Order Cross-Mots. Summ. J. 14; *see also* Pl.'s Mot. Recons. 7 (making same argument).

However, the statement of intent cannot render redundant the language of the statute itself, particularly the language in RSA 508:19, III. *See supra* pp. 8–9. The specifically worded exceptions in paragraph III of the statute do not include an exception for ordinary negligence. *See* Order Cross-Mots. Summ. J. 14 (citing RSA 508:19, III). Instead, this provision specifies the type of negligent (or reckless or intentional) conduct for which an equine professional or participant may be held liable in tort. *See* RSA 508:19, III. All five of these exceptions apply to acts or omissions that may be committed by equine professionals, whereas only two of the exceptions effectively apply to participants engaging in the equine activity. *See* RSA 508:19, III(d)–(e). As such, the statute contemplates a broader number of circumstances under which an equine

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professional may be held liable, as compared to a participant, consistent with paragraph I of the preamble. *See* Laws 1998, 24:1. Because the Court's interpretation of the equine statute is consistent with the purpose expressed in the preamble, *i.e.*, the statement of intent, the Court declines to reconsider its interpretation of RSA 508:19.

IV. Application of Immunity Exceptions

Franciosa's remaining arguments center on her assertion that the Court erred in granting summary judgment to Elliott because the application of the immunity exceptions should be resolved by a jury in this case. *See* Pl.'s Mot. Recons. 3–4, 11–12. As the Court noted in its summary judgment order, Franciosa argues that this case implicates the exceptions outlined in subparagraphs (b) and/or (d) of RSA 508:19, III. Order Cross-Mots. Summ. J. 16 (citing Pl.'s Mem. 4–5). For the reasons explained below, the Court reaffirms its conclusion that, even when viewing the evidence in the light most favorable to Franciosa, Elliott is entitled to judgment as a matter of law.

A. *Reasonable and Prudent Assessment Exception*

Under the exception to immunity listed in subparagraph (b), an equine professional may be held liable in tort if he or she "[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). After reviewing the undisputed facts, the Court concluded that "no reasonable juror could find that Elliott failed to make reasonable and prudent efforts to assess Franciosa's ability before providing permission to ride Wilma" on the day in question. Order Cross-Mots. Summ. J. 17. Those undisputed facts include Franciosa's eight years of horseback riding experience; Elliott's instruction of Franciosa for at least two of those years on a weekly basis; Franciosa's ability to successfully control and ride horses with which she was

previously unfamiliar through her participation in the IEA program with Elliott; the lack of any indication that Franciosa experienced difficulty controlling horses prior to the accident; and Franciosa's use of Wilma for a free ride, without any problems and in Elliott's absence, on the day prior to the accident . *See id.* at 16–17.

Franciosa's motion for reconsideration does not point the Court to any fact in the record which casts doubt on its conclusion that Elliott made reasonable and prudent efforts to assess Franciosa's ability to participate in the equine activity. Instead, Franciosa continues to rely upon categorical factors such as age and lack of adult supervision—as opposed to the participant's skill level and experience—in support of her argument that it is neither reasonable nor prudent to allow a minor to ride a horse without adult supervision, especially when the farm's safety rule requires adult supervision and the horse is relatively new. *See id.* at 17; Pl.'s Mot. Recons. 3–5. But the statute requires a reasonable assessment based on the (information known about the) individual abilities of the particular participant. *See* RSA 508:19, III(b). Franciosa's suggested approach omits consideration of the factors the exception is most concerned with: the participant's prior experience and skill level with respect to equine activities.

Franciosa also attempts to expand the scope of this immunity exception to a broader reasonable-and-prudent-conduct standard. *See* Pl.'s Mot. Recons. 3 (arguing that denying Franciosa permission to ride Wilma in Elliott's absence "would have been the prudent thing to [do]"); *id.* at 3–4 (arguing that Elliott's "conduct," such as the failure to enforce her own safety rule, "was not reasonable and prudent"); *id.* at 13 ("[Elliott] did not act reasonably or prudent[ly] in violating generally accepted safety standards in the horse riding field, in violating her own safety rule, and in allowing a 13[-]year[-]old to ride unsupervised."). In doing so, Franciosa effectively seeks to create a general negligence

exception to the immunity statute. As explained above, however, RSA 508:19 provides immunity for ordinary negligence unless that conduct falls within one of the specifically worded exceptions contained in paragraph III of the statute. The exception at issue here requires "reasonable and prudent efforts" to determine the participant's ability, RSA 508:19, III(b), not reasonable and prudent conduct more generally.

As part of her arguments relative to this immunity exception, Franciosa seeks to supplement the summary judgment record with a report from her expert witness, Professor Laurie Chapman-Bosco. *See* Pl.'s Mot. Recons. 13–14; *id.* Ex. 2. "Whether to receive further evidence on a motion for reconsideration rests in the sound discretion of the trial court." *Farris v. Daigle*, 139 N.H. 453, 454 (1995). Chapman-Bosco's report is not sworn to or accompanied by an affidavit, and thus does not conform to the requirements of the summary judgment statute. *See* RSA 491:8-a, IV.

Furthermore, Franciosa fails to adequately explain why she did not move to supplement the summary judgment record while the motion for summary judgment was still pending. Although Franciosa notes that she filed her objection in August 2016, the Court scheduled a hearing on this motion for October 18, and Franciosa admits that the report was available to both parties on or before October 15, 2016. *See* Pl.'s Mot. Recons. 13. The summary judgment pleadings made clear that this immunity exception was at issue, and the exception was discussed further at the October 18th hearing.[6] Yet Franciosa did not move to supplement the record with the expert report she now deems relevant to this issue until after the Court issued its summary judgment order on

[6] The Court does not agree with Franciosa's characterization of Elliott's counsel's comment about the expert report. *See* Pl.'s Mot. Recons. 13. In response to inquiry from the Court about evidence related to causation, Elliott's counsel remarked that the recently disclosed expert report did not offer an opinion on the relationship between Franciosa's injuries and her lack of supervision. In other words, counsel's comment did not relate to the issue upon which Franciosa now seeks to offer the report, nor does it explain why Franciosa did not move to supplement the record immediately after the hearing.

December 19, 2016. While Franciosa suggests she waited because "expert reports . . . end up being for the jury to weigh," *id.*, expert reports are routinely submitted at the summary judgment stage. In short, the burden was on Franciosa to provide her expert's report to the Court in a timely fashion if she deemed it relevant to the issues presented on summary judgment. *Cf.* 73 Am. Jur. 2d *Summary Judgment* § 18 (2012) ("Once the party moving for summary judgment has met the initial burden of establishing that no genuine issue of material fact exists, the burden shifts to the opposition to show, by more than mere denial and speculation, that there is a genuine issue for trial." (footnotes omitted)). Accordingly, the Court denies Franciosa's request to supplement the summary judgment record with Chapman-Bosco's report.

In the alternative, even if the Court considered the contents of Chapman-Bosco's report, it would not change the Court's conclusion that the immunity exception in subparagraph (b) does not apply here. Chapman-Bosco's report offers an opinion as to whether Elliott acted reasonably and prudently in general,[7] *see* Pl.'s Mot. Recons. Ex. 2, at 2, but the relevant inquiry under the statute is whether Elliott made "reasonable and prudent efforts to determine the ability of [Franciosa] to engage safely in the equine activity," RSA 508:19, III(b). Chapman-Bosco's report makes no mention of Franciosa's skill level and/or experience with horses, nor does it offer an opinion as to whether Elliott's efforts to assess Franciosa's ability to safely engage in a free ride in light of that skill and experience were reasonable and prudent. In sum, the report does not contain evidence relevant to the inquiry outlined in RSA 508:19, III(b), and thus it fails to create "a genuine issue for trial" concerning the application of this immunity exception. *Weaver*, 169 N.H. at ___ (slip op. at 5) (quotation omitted).

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[7] Chapman-Bosco opines: "Prudence dictates that a minor should not be allowed to ride a pony or horse not owned by that minor, in an arena, without the owner/instructor's oversight. . . . The lack of supervision as it relates to a 13-year-old rider is simply not reasonable or prudent." Pl.'s Mot. Recons. Ex. 2, at 2.

B. *Willful and Wanton Conduct Exception*

Under the exception to immunity listed in subparagraph (d), an equine professional may be held liable in tort if he or she "[c]ommits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury." RSA 508:19, III(d). In its summary judgment order, the Court concluded that a "lack of causation between Elliott's acts or omissions and Franciosa's injuries is fatal to Franciosa's argument that the exceptions to immunity apply here."[8] Order Cross-Mots. Summ. J. 18. Franciosa argues that causation is a question for the factfinder at trial, and that the evidence in the record concerning this issue is sufficient to defeat summary judgment. *See* Pl.'s Mot. Recons. 3, 11–12.

Because the Court did not expressly define causation in its summary judgment order, it takes the opportunity to do so now. Proximate cause is an element of common law negligence, *see England v. Brianas*, 166 N.H. 369, 371 (2014), and it is also a requirement of the immunity exception set forth in RSA 508:19, III(d). "The concept of proximate cause includes both the cause-in-fact and the legal cause of the injury." *Goss v. State*, 142 N.H. 915, 917 (1998) (quotation omitted). "Cause-in-fact requires the plaintiff to show that the injury would not have occurred but for the negligent conduct." *Carignan v. N.H. Int'l Speedway, Inc.*, 151 N.H. 409, 414 (2004). In the context of RSA 508:19, III(d), cause-in-fact requires Franciosa to show that her injuries would not have occurred but for the act(s) or omission(s) which, according to Franciosa, constitute Elliott's willful or wanton disregard for Franciosa's safety. The Court referred to cause-in-fact as "the but-for causation requirement" in its summary judgment order. Order Cross-Mots. Summ. J. 19. To satisfy this requirement, "[t]he plaintiff must

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[8] Accordingly, the Court did not reach the issue of whether a reasonable jury could find that Elliott's acts or omissions rise to the level of willful or wanton disregard for Franciosa's safety.

produce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the [identified act(s) or omission(s)] and the injury probably existed." *Estate of Joshua T. v. State*, 150 N.H. 405, 407–08 (2004) (quotation omitted).

Franciosa's motion for reconsideration focuses primarily on Elliott's failure to enforce her safety rule requiring minors to be supervised by adults. *See* Pl.'s Mot. Recons. 2 (describing this as "the paramount basis of the Plaintiff's claim"); *see also id.* at 3, 5, 8, 10–12. Franciosa argues that "a reasonable jury could conclude" that Elliott's failure to enforce this safety rule "was the proximate cause of [Franciosa's] injury." *Id.* at 3. This argument overlooks the fact that Elliott's safety rule pertained to *adult* supervision of minors, not supervision by equine professionals. As the Court observed in its summary judgment order, the purpose of the adult supervision rule "appears to be so that someone can render emergency assistance if an accident occurs." Order Cross-Mots. Summ. J. 18. In other words, the risk created by Elliott's failure to affirmatively arrange for adult supervision was the risk that no competent person would be present to render emergency assistance to Franciosa if an accident occurred.

This risk never materialized, however, because adults were present at the farm during Franciosa's free ride on July 20, 2014, even though they were not assigned to supervise her, *see id.* at 3, 5, and emergency assistance was immediately rendered by those adults when Franciosa fell off Wilma, *id.* at 18. Accordingly, Elliott's failure to arrange for adult supervision of Franciosa was not the cause-in-fact of Franciosa's injuries. *Cf. McLaughlin v. Sullivan*, 123 N.H. 335, 342 (1983) ("[L]iability for negligence is imposed only for injuries resulting from the particular hazard against which the duty of due care required protection to be given." (emphasis and quotation omitted)). As such, Elliott's failure to enforce this safety rule did not proximately cause Franciosa's injuries.

Beyond noting "[t]he general rule . . . that proximate cause is a jury question," Pl.'s Mot. Recons. 11, Franciosa's motion for reconsideration fails to point to any evidence in the record which supports the existence of proximate cause here. Instead, Franciosa reiterates her argument that, "had Elliott enforced her own rule, [Franciosa] would not have been at the stable that day and would not have been injured." Pl.'s Mot. Recons. 11–12. But Franciosa is conflating Elliott's act of granting Franciosa permission to ride Wilma that day with Elliott's failure to affirmatively arrange for Elliott to be supervised—by an equine professional or other adult—as a condition of that permission. This is partly why the Court noted that "Franciosa cannot show that Elliott's *failure to supervise* Franciosa," as opposed to Elliott's provision of permission, "was the proximate cause of Franciosa's injuries." Order Cross-Mots. Summ. J. 19–20.

Nor can Franciosa "show that, but for Elliott's *absence*," as opposed to Elliott's provision of permission, Franciosa "would not have been injured that day." *Id.* at 19 (emphasis added). This is because the summary judgment record is devoid of any evidence supporting Franciosa's assertion that Elliott would have intervened early on during Franciosa's ride once Elliott saw how Wilma was acting. *See id.* at 18–19. Indeed, the only evidence in the record on this point supports the opposite conclusion. *See id.* at 6 ("Franciosa also explained at her deposition that if the horse is 'doing something that she's not supposed to,' the rider should not end the ride because it essentially rewards the horse for bad behavior." (quoting Franciosa Dep. 48:17–20)).[9]

Relying on *Chanaki*, Franciosa argues that, even absent specific evidence on this point, jurors "could reasonably infer that had [Elliott] been present she could have stopped the ride by intervening upon seeing Wilma being hard to control at that day and

[9] Although Elliott was deposed, she was never asked what she would do if she had observed Wilma acting in the manner Franciosa described. *See* Order Cross-Mots. Summ. J. 19.

time." Pl.'s Mot. Recons. 12. Here, unlike *Chanaki*, there is no evidence from which a reasonable juror could infer what Franciosa suggests. *See Chanaki*, 114 N.H. at 661–63. Instead, the Court has only Franciosa's speculation about what Elliott would have done had she been present, plus further speculation that the injuries would not have occurred had Elliott taken those actions. Accordingly, although "[p]roximate cause is generally for the trier of fact to resolve," *Carignan*, 142 N.H. at 414, summary judgment is nonetheless appropriate in cases where, as here, no reasonable juror could conclude that the causal link between Franciosa's injuries and Elliott's absence probably existed. *Estate of Joshua T.*, 150 N.H. at 407–08.

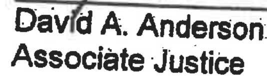
Lastly, the Court clarifies the point it was attempting to make on the final page of the summary judgment order. Absent proof that the identified conduct by Elliott proximately caused Franciosa's injuries, the Court is left only with the inherent risks of equine activities as the cause of these injuries. Because "an injury caused by an inherent risk cannot have been negligently caused," *Cecere*, 155 N.H. at 295, let alone caused by willful or wanton disregard of safety, Franciosa cannot demonstrate that this case fits within any of the exceptions to the immunity provided by RSA 508:19.

Conclusion

For the foregoing reasons, Franciosa's motion for reconsideration is DENIED.

So Ordered.

February 22, 2017
Date



David A. Anderson
Associate Justice

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