THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0102

Janet Bisceglia

v.

State of New Hampshire and
New Hampshire Department of Natural and Cultural Resources

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANTS

THE STATE OF NEW HAMPSHIRE

and

DEPARTMENT OF NATURAL AND CULTURAL RESOURCES

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(Fifteen-Minute Oral Argument Requested)

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I. Whether the trial court correctly concluded, based on uncontested evidence, that the State has permitted the general public to use the Fort Constitution Historic Site without charge for recreational purposes.

II. Whether the trial court correctly concluded, based on RSA 508:14, I's language and purpose, that recreational use immunity under RSA 508:14, I, bars the plaintiff's negligence claim.

III. Whether the trial court sustainably exercised its discretion when it declined to consider constitutional arguments raised for the first time in a motion for reconsideration.

STATEMENT OF THE FACTS AND OF THE CASE

I. Statement of the Facts.

The relevant facts are undisputed for the purposes of this appeal. On June 10, 2018, the plaintiff, Janet Bisceglia, went on an outing with her family in New Castle, New Hampshire, to tour a lighthouse located immediately adjacent to the Fort Constitution Historic Site. SA 123.[1] The federal government owns the lighthouse. SA 14, 123. The State of New Hampshire owns the Fort Constitution Historic Site, and the Division of Natural and Cultural Resources manages the property. SA 13, 123.

At one point during the outing, Ms. Bisceglia stood in a grassy area directly adjacent to the outer wall of the Fort Constitution Historic Site on property owned by the federal government. SA 123. She was injured when several bricks and a cinder block dislodged from the outer wall of the fort, striking her. SA 4.

On the day Ms. Bisceglia was injured, the Fort Constitution Historic Site was open to the general public free of charge. SA 4. Benjamin Wilson, Director of the New Hampshire Division of Historical Records, testified during a deposition that persons visit the Fort Constitution Historic Site for a variety of purposes, including historical pilgrimages, picnics, weddings, fishing, and to practice yoga. SA 66–67. Mr. Wilson testified that, with the possible exception of swimming, the Fort Constitution Historic Site is used for "pretty much anything that you would see somebody do in a general

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[1] Citations to the record are as follows:
"PB __" refers to the plaintiff's brief and page number.
"PD __" refers to the addendum attached to the plaintiff's brief and page number.
"SA __" refers to the State's appendix and page number.

park, in a day-use area." SA 67. He further testified that historic sites like the Fort Constitution Historic Site fall under the Division of Parks and Recreation. SA 59.

II. Statement of the Case.

Ms. Bisceglia filed this action on August 6, 2019, seeking to recover for her injuries. SA 3–6. She named the State of New Hampshire and Division of Natural and Cultural Resources as defendants (together "the State"), and asserted a single count of negligence. SA 3–6. The State filed a motion to dismiss on September 17, 2019, arguing that Ms. Bisceglia's negligence claim was barred by recreational use immunity under RSA 508:14, I. SA 7–11. The State attached to that motion a sworn affidavit from Mr. Wilson, which set forth that the State owned the Fort Constitution Historic Site and that it allowed members of the public to use the property for recreation without charge. SA 13–14. Ms. Bisceglia objected, primarily arguing that she was not using the Fort Constitution Historic Site for a recreational purpose at the time of her injury and that immunity under RSA 508:14, I, did not extend to historic sites. SA 15–32. The State filed a reply in which it argued that immunity under RSA 508:14, I, did not turn on how a particular person was using the property, but rather whether the property was itself opened to the public without charge for recreational purposes. SA 33–36. Following a hearing, the trial court converted the State's motion to dismiss into a motion for summary judgment and set a briefing schedule. PD 37.

The parties conducted written discovery and took depositions in relation to the immunity issue. In July and August 2020, each side

submitted supplemental summary judgment filings. *See generally* SA 37–135. In its filings, the State reiterated, among other things, that the Fort Constitution Historic Site was open to the public for recreational purposes at the time of Ms. Bisceglia's injury. *See* SA 37–47, 132–135. In support of this argument, the State relied on Mr. Wilson's affidavit and deposition testimony. *See generally* SA 37–117, 132–135. Ms. Bisceglia never disputed this evidence.

The State also reiterated that determining whether recreational use immunity applied under RSA 508:14, I, requires an objective inquiry. SA 37–47, 132–135. The State contended that under this inquiry, immunity applies to off-premises injuries such as Ms. Bisceglia's. SA 40–46. The State based this argument on the unambiguous statutory language and the central purpose recreational use immunity is designed to serve. SA 40–46. The State also relied on this Court's past recreational use immunity decisions and persuasive authority from other jurisdictions. SA 40–46.

The trial court heard oral argument on September 21, 2020. On November 13, 2020, the trial court issued a narrative order granting the State's motion for summary judgment in which it largely adopted the State's statutory construction. PD 38–43. Ms. Bisceglia moved for reconsideration on November 23, 2020, contending for the first time that the State's construction violated her rights under Part I, Articles 2, 12, and 14 of the State Constitution. SA 136–144. The State objected, arguing *inter alia* that Ms. Bisceglia should not be permitted to raise substantive constitutional arguments for the first time on reconsideration. SA 145–153.

On February 15, 2021, the trial court issued a narrative order denying Ms. Bisceglia's motion for reconsideration. PD 44–49. The trial

court agreed with the State that Ms. Bisceglia's constitutional arguments "ha[d] not been timely raised." PD 46. The trial court noted that the State had "made clear from the earliest opportunity in this case that immunity under RSA 508:14 was [its] first defense to [Ms. Bisceglia's] allegations." PD 46. The court noted that Ms. Bisceglia "had the opportunity to raise any constitutional challenges in connection with the motion to dismiss in September 2019 and again when the [trial court] invited supplemental pleadings after it converted the motion into one for summary judgment." PD 46–47. The trial court observed that Ms. Bisceglia "offer[ed] no reason why her as applied challenges to the constitutionality of the statute could not be raised in her earlier pleadings." PD 47. The trial court accordingly "decline[d] to consider" those challenges on reconsideration. PD 47.

On March 15, 2021, Ms. Bisceglia filed a timely notice of appeal.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that recreational use immunity under RSA 508:14, I, bars Ms. Bisceglia's negligence claim. A landowner is entitled to recreational use immunity when it permits the general public to use its property for recreational purposes without charge. *See* RSA 508:14, I. When these conditions are met, a landowner "shall not be liable for personal injury" unless that injury is "intentionally caused." *Id.* The uncontested evidence in this case shows that the State owns the Fort Constitution Historic Site and has permitted the general public to use the property free of charge for recreational purposes. Ms. Bisceglia's sole claim sounds in negligence. The statutory conditions are accordingly met and Ms. Bisceglia's claim is barred.

Ms. Bisceglia's argument that the State has not opened the Fort Constitution Historic Site to the public for "recreational purposes" is not persuasive. The uncontested evidence demonstrates that the members of the public use the Fort Constitution Historic Site for, among other things, fishing, picnicking, practicing yoga, and "pretty much anything that you would see somebody do in a general part, in a day-use area." SA 66–67. These activities constitute "recreation" as that term is commonly used. Ms. Bisceglia's attempt to import RSA 212:34's definition of "outdoor recreational activity" into RSA 508:14, I, is misplaced, as the State does not rely on RSA 212:34 in this case, that statute confers narrower immunity than RSA 508:14, I, and RSA 508:14, I, contains no similar statutory definition. In any event, the definition in RSA 212:34 does not help Ms. Bisceglia, as it expressly references "fishing," *see* RSA 212:34, I(c), and this Court has previously found that unenumerated activities fall within the

definition so long as they are "similar in nature to the activities enumerated." *Dolbeare v. City of Laconia*, 168 N.H. 52, 55 (2015). Ms. Bisceglia likewise provides no persuasive support for her contention that immunity under RSA 508:14, I, turns on a person's subjective use of a property or based on a property's primary function. This Court should accordingly affirm the trial court's determination that the Fort Constitution Historic Site is open to the public for "recreational purposes" within the meaning of RSA 508:14, I.

Ms. Bisceglia's argument that immunity under RSA 508:14, I, extends only to on-premises injuries is equally unavailing. Immunity applies in this case under RSA 508:14, I's express and unambiguous terms. Applying immunity to off-premises injuries also promotes the central purpose recreational use immunity is designed to serve: encouraging landowners to make more land available to the public for recreation. Ms. Bisceglia has not identified anything in the text of RSA 508:14, I, that limits immunity to on-premises injuries. Indeed, nearly all of her text-based arguments arise out of RSA 212:34, not RSA 508:14, I. Moreover, this Court has previously contemplated that immunity under RSA 508:14, I, can extend to off-premises injuries, a view endorsed by courts in other states analyzing statutes far narrower than RSA 508:14, I. The trial court therefore did not err in holding that recreational use immunity applied under the circumstances of this case, and this Court should affirm that decision.

Finally, the Court should reject Ms. Bisceglia's constitutional arguments. The trial court sustainably exercised its discretion when it declined to consider those arguments, and this Court should affirm on this basis alone. But even if this Court reaches the constitutional arguments, it

should reject them. This Court has previously held that immunity statutes like RSA 508:14, I, do not violate the right to a remedy under Part I, Article 14 or to equal protection under Part I, Articles 2 and 12 as long as they are not arbitrary. There is nothing arbitrary about applying recreational use immunity under the circumstances of this case. To the contrary, the trial court's construction ensures that RSA 508:14, I, is applied equally to members of the general public in accordance with the statutory text and in a manner that promotes the purposes recreational use immunity is designed to serve. In contrast, Ms. Bisceglia's construction tethers immunity to the happenstance of where a person is standing at the time he or she is injured. Moreover, Ms. Bisceglia bases her argument on an incorrect view of the *quid pro quo* at the heart of recreational use immunity statutes. This Court and others have rejected the notion that the *quid pro quo* should be viewed on individualized or subjective terms. Rather, the bargain is between the landowner and the general public at large. Thus, even if this Court reaches Ms. Bisceglia's constitutional arguments, they fail on the merits.

STANDARD OF REVIEW

The trial court resolved this case on summary judgment. This Court "review[s] a trial court's grant of summary judgment *de novo*." *Zannini v. Phenix Mut. Fire Ins. Co.*, 172 N.H. 730, 733 (2019). The Court "consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Id.* at 733–34. "The adverse party may not rest upon mere allegations or denials of his pleadings, but his 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." *Jeffrey v. City of Nashua*, 163 N.H. 683, 685 (2012) (cleaned up). When a review of the evidence "reveals no genuine dispute of material fact, and if the moving party is entitled to judgment as a matter of law," then this Court "will affirm the grant of summary judgment." *Zannini*, 172 N.H. at 734.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE FORT CONSTITUTION HISTORIC SITE WAS OPEN FOR "RECREATIONAL PURPOSES."

The trial court entered summary judgment for the State on the basis that recreational use immunity under RSA 508:14, I, bars Ms. Bisceglia's negligence claim. *See* PD 38–49. RSA 508:14, I, provides that a landowner, "including the state or any political subdivision, who without charge permits any person to use land for recreational purposes or as a spectator of recreational activity, shall not be liable for personal injury or property damage in the absence of intentionally caused injury or damage." Interpreting the phrase "any person," this Court has held that to be entitled to recreational use immunity "landowners must permit members of the general public to use their land for recreational purposes." *Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 271 (2005). Ms. Bisceglia does not dispute that the State permitted "members of the general public" to use the Fort Constitution Historic Site "without charge" at the time she was injured. Rather, she contends that recreational use immunity does not apply because the State did not open the Fort Constitution Historic Site for "recreational purposes." PB 22–28.

This argument runs headlong into undisputed evidence.[2] In support of its motion for summary judgment, the State relied on Mr. Wilson's

[2] Ms. Bisceglia did not submit an appendix with her brief and appears to proceed entirely on legal arguments. "It is the burden of the appealing party . . . to provide this court with a record sufficient to decide [the] issues on appeal." *Thompson v. D'Errico*, 163 N.H. 20, 22 (2011). To extent the appealing party does not do so, the Court "must assume that the evidence was sufficient to support the decision reached." *Id.* Thus, if the Court believes any issue on appeal turns on a question of fact, it must resolve that question in the State's

sworn affidavit, in which he stated that "[o]n June 10, 2018, in accordance with State practice at the site, visitors were permitted to use the Fort Constitution Historic Site for recreation, including education and leisure activity, without charge." SA 13. Mr. Wilson elaborated on this statement during his deposition, testifying that people use the Fort Constitution Historic Site to "picnic" and "do yoga" and that "[i]t's an excellent spot to fish." SA 66–67. He testified that, with the possible exception of swimming, people use the Fort Constitution Historic Site for "pretty much anything that you would see somebody do in a general park, in a day-use area." SA 67. He further testified that historic sites like the Fort Constitution Historic Site fall under the Division of Parks and Recreation. SA 59. Because Ms. Bisceglia never challenged this evidence with "contradictory affidavits," it was "taken to be admitted for the purposes of" summary judgment. RSA 491:8-a, II.

Ms. Bisceglia is thus left to argue that, this evidence notwithstanding, the Fort Constitution Historic Site is not open for "recreational purposes" as a matter of law. *See* PB 22–28. To that end, she contends that visiting a historic site is not a recreational activity. *See* PB 22–28. Without saying it outright, she also suggests that activities such as yoga, fishing, and picnicking are not "recreational," at least as that term is used within RSA 508:14, I. These arguments are without merit.

To determine what activities are "recreational" for the purposes of RSA 508:14, I, the Court must engage in statutory interpretation. The Court

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favor. *See id.* Nevertheless, the State is submitting an appendix in conjunction with this brief containing the relevant factual record. That record amply supports the trial court's decision.

"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 legislature has not defined the term "recreational" within RSA 508:14. "When a term is not defined in the statute," this Court "look[s] its common usage, using the dictionary definition as guidance." *Appeal of Town of Lincoln*, 172 N.H. 244, 248 (2019) (citation and quotation marks omitted).

"Recreational" is the adjectival form of the noun "recreation." *See Webster's Deluxe Unabridged Dictionary* 1059 (2d ed. 1979). "Recreation" means "refreshment in body or mind, as after work, by *some* form of play, amusement, or relaxation," or "*any* form of play, amusement, or relaxation used for this purpose, as games, sports, hobbies, reading, walking, etc." *Id.* (emphases added). This definition plainly encompasses activities such as picnicking, fishing, practicing yoga, and other things somebody might do in the day-use area of a general park. Indeed, as the trial court concluded, the mere act of visiting a historic site itself falls within the definition of "recreation." PD 42–43, 47–49. The general public accordingly uses the Fort Constitution Historic Site for purposes that fall within the "plain and ordinary meaning" or "common usage" of the word "recreational." *Appeal of Town of Lincoln*, 172 N.H. at 248; *Petition of Carrier*, 165 N.H. at 721. The trial court correctly concluded as much, and this Court should do the same

In her brief, Ms. Bisceglia spurns an analysis based on common usage in favor of a far more limited definition of "recreational purposes." In Ms. Bisceglia's view, immunity under RSA 508:14, I, extends only to properties open for "traditional outdoor pursuits such as hiking, biking,

horseback riding, rock climbing, snowmobiling, etc.," and certain "ancillary" activities. PB 23. She contends that the Fort Constitution Historic Site is "certainly not the image that comes to mind when one ponders the subject of 'outdoor recreation.'" PB 23. She thus argues that recreational use immunity should not apply in this case. In support of this view, Ms. Bisceglia largely relies on the definition of "outdoor recreational activity" contained in RSA 212:34, I.

Ms. Bisceglia's reliance on RSA 212:34 is misplaced for several reasons. First, and perhaps most fundamentally, the State has not invoked immunity under RSA 212:34 in this case. Second, while this Court has contemplated that RSA 508:14 and RSA 212:34 confer similar forms of recreational use immunity, *see, e.g.*, *Estate of Gordon-Couture*, 152 N.H. at 272–76, the statutes serve different purposes and this Court has never held that they are coterminous in their coverage. RSA 508:14, I, falls within RSA chapter 508, which generally governs the "limitations of actions." In contrast, RSA 212:34 falls within the chapter of the code specifically governing the "propagation of fish and game." Thus, while RSA 212:34 limits protection to landowners who allow "entry or use by others for *outdoor* recreational activity," RSA 212:34, II (emphasis added), RSA 508:14, I, extends protection to "the state or any political subdivision" and applies more generally to all "recreational purposes." Though the legislature has defined the phrase "outdoor recreational activity" for the purposes of RSA 212:34, *see* RSA 212:34, I(c), it has not defined the phrase "recreational purposes" as used within RSA 508:14, I.

Ms. Bisceglia thus asks this Court to read into RSA 508:14, I, qualifying language and a definition that the statute (a) does not contain and

(b) would be more restrictive than the language the legislature used. This Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Petition of Carrier*, 165 N.H. at 721. "The legislature is not presumed to waste words or enact redundant provisions and wherever possible, every word of a statute should be given effect." *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (citations and quotation marks omitted). The Court should decline Ms. Bisceglia's invitation to rewrite RSA 508:14.

Ms. Bisceglia's argument would still fail, however, even if this Court accepted that invitation. This is true for a simple reason: the Fort Constitution Historic Site is open for fishing, an activity *expressly* enumerated in RSA 212:34, I(c)'s definition of "outdoor recreational activity." While Ms. Bisceglia omits fishing from her list of "traditional outdoor pursuits," *see* PB 23, she does not explain why this Court should do likewise. Indeed, the body of her brief contains only one passing reference to fishing, in a parenthetical citation to Nebraska's recreational use immunity statute. *See* PB 27 (citing Neb. Rev. Stat. § 37-729). Thus, short of helping Ms. Bisceglia's case, the definition of "outdoor recreational activity" in RSA 212:34 only confirms that immunity extends to the Fort Constitution Historic Site. For this reason, too, Ms. Bisceglia's reliance on RSA 212:34 necessarily fails.

Ms. Bisceglia's argument also fails when taken on its own terms. At bottom, Ms. Bisceglia argues that immunity does not apply in this case because the Fort Constitution Historic Site is not open for activities that are sufficiently similar to those enumerated in RSA 212:34, I(c). *See generally*

PB 22–28. This Court rejected a virtually identical argument in *Dolbeare*. Relying on the doctrine of *ejusdem generis*, the plaintiff in *Dolbeare* argued that "the use of man-made attractions, such as playground equipment, does not constitute 'outdoor recreational activity' under RSA 212:34, I(c)." 168 N.H. at 55 (first internal quotation marks omitted). The Court rejected this argument, emphasizing that "the list of activities in RSA 212:34, I(c) is not exhaustive." *Id.* The Court observed that "[t]he use of playground equipment is an outdoor activity, like all of the activities enumerated in RSA 212:34, I(c)." *Id.* The Court further observed that, "[l]ike many of the activities listed in the statute, the use of playground equipment involves the use of man-made equipment." *Id.* The Court accordingly concluded that "the use of playground equipment is similar in nature to the activities enumerated in RSA 212:34, I(c)," and thus held that "the use of such equipment constitutes an 'outdoor recreational activity' under RSA 212:34." *Id.*

This reasoning applies with at least equal force in this case. As in *Dolbeare*, fishing, picnicking, and other activities that one might do in the day-use area of a public park are, by their very nature, "outdoor activities." *See* 168 N.H. at 55. The same is true of yoga, at least when, as here, it is practiced outside. And as in *Dolbeare*, fishing, yoga, picnicking, and sightseeing likewise "involve[] the use of man-made equipment." *See id.* Thus, as in *Dolbeare*, these activities are sufficiently similar to those enumerated in RSA 212:34, I(c)'s to constitute "outdoor recreational activity."

Ms. Bisceglia nonetheless suggests that recreational use immunity should not apply in this case because the Fort Constitution Historic Site

primarily functions as a "small historical site." *See, e.g.*, PB 22, 25. She premises this suggestion on the dubious notion that visiting a historic site does not fall within the plain and ordinary meaning of the word "recreation." *But see supra* pp. 17–18; *cf.* RSA 212:34, I(c) (including "sightseeing" within the definition of "[o]utdoor recreational activity").[3] But even if one were to accept the premise, Ms. Bisceglia points to nothing in the statutory language or structure that might support the type of "primary function" test she appears to envision. Such a test would undermine the purpose recreational use immunity is designed to serve: "to encourage persons to permit people to enter their lands for recreational uses." *Kenison v. Dubois*, 152 N.H. 448, 454 (2005). Under a "primary function" test, a farmer who permits the general public to use her property free of charge for picnicking or yoga would not be entitled to immunity because the property primarily functions as a farm. Similarly, the owner of a cemetery who opens her property for activities like dog walking or bird watching would not be entitled to immunity because neither activity falls within a cemetery's primary function. Ms. Bisceglia provides no principled justification for these outcomes, and this Court should not countenance them.

Ms. Bisceglia likewise suggests that recreational use immunity should not apply when the *injured party* was not using the party for a

[3] New Hampshire operates a number of historic sites, including the Fort Constitution Historic Site, Endicott Rock Historic Site, Nansen Ski Jump State Historic Site, and Bedell Bridge State Historic Site in Bedell Bridge State Park. *See Historic Sites*, New Hampshire State Parks, https://www.nhstateparks.org/visit/historic-sites (last accessed Sept. 22, 2021). The notion that visiting one of these sites is not itself "outdoor recreational activity" is unconvincing.

recreational purpose. This argument is largely subsumed within Ms. Bisceglia's more general contention that the State is not entitled to immunity in this case because she was not on state property at the time of her injury. *See* PB 17–22. The Court should reject this contention for the reasons stated below. *See infra* Section II. But even standing alone, the suggestion that recreational use immunity should turn on a plaintiff's subjective use of the property, as opposed to the objective purposes for which the property is opened to the public, is without merit. As the First Circuit has observed, recreational use immunity statutes should be "applied objectively, not subjectively." *Schneider v. U.S.A., Acadia Nat. Park*, 760 F.2d 366, 368 (1st Cir. 1985) "[T]he consequences of [a subjective] approach would be absurd" because "a greater duty [would be] owed to those for whom the [property] is not maintained than to those for whom it is." *Id.* Such an approach likewise "misconceives the statute's intendment"—"to allow a landowner not permit broad uses of his land without incurring the obligations of a common law licensor." *Id.* Ms. Bisceglia's suggestion to the contrary is misplaced.

Ms. Bisceglia's remaining arguments are also not persuasive. She fails to explain how the legislature's decision to *extend* landowner immunity in certain contexts, *see* PB 25, somehow authorizes this Court to construe RSA 508:14 (and, for that matter, RSA 212:34) more narrowly than what either statute's language or purpose might reasonably sustain. Her reliance on references to "historic" and "archeological" sites in other states' recreational use immunity statutes to contend that our legislature must have intended to exclude such sites from the protections of RSA 508:14, *see* PB 27, reflects a basic "either-or" fallacy and, in any event,

ignores the undisputed evidentiary record in this case, the plain and ordinary meaning of the word "recreation," and, at least to some extent, this Court's decisional law. Her general appeals to policy are made "in the wrong forum, as matters of public policy are reserved for the legislature." *Dolbeare*, 168 N.H. at 57. These arguments are accordingly unavailing.

In sum, the undisputed evidence in this case demonstrates that the Fort Constitution Historic Site is open to the general public without charge for recreational purposes. The trial court correctly concluded as much, and Ms. Bisceglia has provided no basis for this Court to alter that conclusion.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT RECREATIONAL USE IMMUNITY BARS MS. BISCEGLIA'S NEGLIGENCE CLAIM EVEN THOUGH SHE WAS NOT ON STATE PROPERTY AT THE TIME OF HER INJURY.

Ms. Bisceglia alternatively contends that RSA 508:14, I, does not bar her claim because she was not standing on state property at the time of her injury. To address this contention, the Court must again engage in statutory interpretation, turning first "to the language of the statute itself and, if possible, construe that language according to its plain and ordinary meaning." *Petition of Carrier*, 165 N.H. at 721. The language of RSA 508:14, I, is unambiguous and nothing therein limits recreational use immunity to on-premises injuries. The trial court correctly concluded as much when it entered summary judgment in the State's favor. This Court should affirm that decision.

RSA 508:14, I contains three statutory preconditions. First, the party invoking immunity must be "[a]n owner, occupant, or lessee of land, including the state or any political subdivision." RSA 508:14, I. Second, the party invoking immunity must "permit [the general public] to use [the] land for recreational purposes or as a spectator of recreational activity." *Id.* Third, the party invoking immunity must permit that use "without charge." *Id.* When each of these conditions is satisfied, then the party invoking immunity "*shall* not be liable for personal injury," so long as the injury was not "intentionally caused." *Id.* (citations omitted; emphasis added). "It is a general rule of statutory construction that . . . the word 'shall' makes enforcement of a provision mandatory." *In re Bazemore*, 153 N.H. 351, 354 (2006) (citations omitted).

There is no dispute that the State owns the Fort Constitution Historic Site. There is similarly no dispute that the State has permitted the general public to use the Fort Constitution Historic Site without charge. As discussed above, the scope of that permission extends to using the Fort Constitution Historic Site "for recreational purposes or as a spectator of recreational activity." RSA 508:14, I. The statutory prerequisites to recreational use immunity are thus satisfied in this case. The State therefore "shall not be liable for personal injury" so long as that injury is not "intentionally caused." *Id.* Ms. Bisceglia alleges only negligence. SA 4–5. Enforcement of RSA 508:14, I, is accordingly mandatory, and Ms. Bisceglia's claim is barred.

In resisting this conclusion, Ms. Bisceglia contends that RSA 508:14, I, "does not grant blanket immunity to landowners." PB 27. This overstates the State's position. The State does not dispute, for example, that landowners enjoy no immunity under RSA 508:14 for intentionally caused injuries. *See* RSA 508:14, I. Likewise, the State does not dispute that RSA 508:14, I, is inapplicable when the injured party has paid to access the property in question. *Cf. Soraghan v. Mt. Cranmore Ski Resort, Inc.*, 152 N.H. 399, 402–04 (2005). Nor does the State suggest that RSA 508:14, I, does not apply when a landowner opens his or her property only to invited guests, and not the general public at large. *See Estate of Gordon-Couture*, 152 N.H. at 271. Rather, the State merely argues that when, as here, the requirements of RSA 508:14, I, are met, recreational use immunity bars any personal injury claim arising out of landowner negligence. This argument is hardly novel; it is based the plain language of the statute itself.

Ms. Bisceglia's only attempt at a text-based counterargument arises out of the phrase "permits any person to use land." RSA 508:14, I. She suggests that this phrase limits immunity to injuries suffered when physically present on a landowner's land. *See* PB 20. It does no such thing. The phrase "permits any person to use land" refers to the class of persons to whom a landowner must open his or her property in order to benefit from recreational use immunity. This Court made as much clear in *Estate of Gordon-Couture*, when it construed the phrase "any person" to mean "any person as a member of the general public." 152 N.H. at 271 (emphasis and internal quotation marks omitted). In arguing otherwise, Ms. Bisceglia improperly reads the phrase "permits any person to use land" in isolation, rather than "within the context of the statute as a whole." *Petition of Carrier*, 165 N.H. at 721. The trial court correctly declined to endorse such an approach.

Ms. Bisceglia's remaining text-based arguments derive from RSA 212:34, not RSA 508:14. *See* PB 20. Ms. Bisceglia's attempts to import language from RSA 212:34 into RSA 508:14 are misplaced for the reasons stated in the previous section. More generally, however, Ms. Bisceglia's reliance on language from RSA 212:34 only undermines her position. Assuming for the sake of argument only that phrases such as "for entry upon, or use of the premises," "persons entering for such purposes," and "to the person to whom permission has been granted" limit immunity under RSA 212:34 to on-premises injuries, the most this shows is that the legislature knew how to craft such a limitation when it saw fit to do so. Yet it did not include similar language in RSA 508:14, I. This Court "will not

consider what the legislature might have said or add language that the legislature did not see fit to include." *Petition of Carrier*, 165 N.H. at 721.

Ms. Bisceglia alternatively relies on this Court's references to property users in past recreational use immunity decisions. *See* PB 19–20. Those references cannot support the weight Ms. Bisceglia places on them. Many of the references were made in relation to RSA 212:34, not RSA 508:14. *See, e.g.*, PB 19–20 (quoting and citing *Estate of Gordon-Couture*, 152 N.H. at 269). In any event, the fact that recreational use immunity will *usually* arise in the context of on-premises injuries is hardly remarkable. That no case has previously presented the precise factual scenario at issue here does not mean that immunity should not apply.

Moreover, this Court *has* suggested that immunity under RSA 508:14, I, can apply even when the injured party was not on the landowner's property at the time of the injury. In *Coan v. New Hampshire. Department of Environmental Services,* two boys tragically drowned in Silver Lake after the Department of Environmental (DES) services added 375 cubic feet per second to the flow out of Lochmere dam. 161 N.H. 1, 4 (2010). On appeal, the plaintiffs argued that DES was not entitled to recreational use immunity because RSA 508:14, I, "extends to injuries and recreational activity on the ground, but not those occurring in water." *Id.* This Court declined to resolve this question, reasoning that "[i]mmunity under RSA 508:14, I, is available whenever a landowner makes his or her land available to the general public for recreational activities, free of charge." *Id.* at 6. The Court assumed for the sake of argument that the pond was not "land" within the meaning of RSA 508:14, I, but nevertheless concluded that DES was entitled to recreational use immunity. *See id.* at 6–

7. This supports the notion that immunity under RSA 508:14, I, is not limited to on-premises injuries.

True, the Court noted in *Coan* that the decedents crossed DES property to reach the water. *See id.* at 6. But it is hard to see why that should be dispositive. As discussed above, recreational use immunity does not turn on whether a particular individual was using the subject property for recreational purposes at the time he or she was injured. Rather, the operative question is whether a landowner has "permit[ted] members of the general public to use [the] land for recreational purposes." *Estate of Gordon-Couture*, 152 N.H. at 271. In other words, "the statute is to be applied objectively, not subjectively." *Schneider*, 760 F.2d at 368. This avoids the untenable situation where "a greater duty is owed to those for whom the [property] is not maintained than to those for whom it is." *Schneider*, 760 F.2d the 368.

The arbitrariness of Ms. Bisceglia's approach is not merely an abstraction. Under that approach, a person standing one foot outside of a park's boundary line could maintain suit against the park's owner if struck by a baseball or Frisbee that originated on the property, but a person standing one foot inside the boundary line could not. Similarly, a person hooked by a fishing lure cast from a public park could maintain suit against the park's owner if hooked while in an adjacent body of water during the angler's follow through, but could not maintain suit if hooked on land seconds earlier when the angler was loading the rod. Such an approach undermines the purpose recreational use immunity is designed to served: "to encourage private landowners to make their land available for public recreational uses by limiting their liability." *Estate of Gordon-Couture*, 152

at 273. That Ms. Bisceglia did not access the Fort Constitution Historic Site on the day she was injured therefore does not matter for the purposes of the immunity analysis.

Courts in other jurisdictions have endorsed this view. For instance, in *Schwartz v. Zent*, the plaintiff sued the defendant landowners after he was struck by an errant bullet that originated on their property. 448 N.E.2d 38, 39 (Ind. Ct. App. 1983). At the time of the injury, the plaintiff was on neighboring land tending animal traps. *Id.* On appeal, the plaintiff argued that Indiana's recreational use statute applied only when the injured party "is within the landowner's property when the injury occurs." *Id.* The Indiana Court of Appeals disagreed, holding that under the plain language of the statute at issue, "the location of [the plaintiff] when he was injured is of no consequence." *Id.*

The California Third District Court reached a similar conclusion in *Wang v. Nibbelink*. *See* 208 Cal. Rptr. 3d 461 (Cal. Ct. App. 2016). In *Wang*, "[a] horse ran away from a meadow owned by the defendants" and "onto adjacent property," where it "trampled [the plaintiff] as she and her husband . . . got out of their car [for dinner]." *Id.* at 464–65. The court nonetheless held that California's recreational use immunity statute "shields landowners from liability where such recreational users of the land cause injury to persons outside the premises who are uninvolved in the recreational use of the land, even where the plaintiffs also allege that the landowners' neglect of their own property-based duties contributed to the injuries." *Id.* at 464. The court based this conclusion on the language of the statute itself. *See id.* at 474. The court further observed that "[m]aking landowners liable when a recreational user injures an uninvolved person on

adjacent property would undermine [the statutory] purpose to encourage private landowners to allow recreational use of their land." *Id.* at 475.

Notably, RSA 508:14, I, confers *broader* immunity than the statutes at issue in *Schwartz* and *Wang*. In those cases, the relevant statutes limited recreational use immunity to injuries occurring on the property itself or otherwise caused by persons using the property. *See Wang*, 208 Cal. Rptr. 3d at 469–77 (discussing Cal. Civ. Code § 846); *Schwartz*, 448 N.E.2d at 39 (discussing Ind. Code Ann. tit. 14, art. 2, ch. 6, § 3 (Burns Code Ed. 1981 Repl.)). RSA 508:14, I, does not contain similar textual limits on the scope of immunity. Thus, the reasoning in *Schwartz* and *Wang* applies with greater force in this case.

In contrast, those courts that *have* limited recreational use immunity to on-premises injuries have done so based on statutes that are narrower than the statutes at issue in *Schwartz* and *Wang*. For example, in *Landsdell v. County of Kauai*, the Hawaii Supreme Court limited immunity to on-premises injuries based on a statute under which a landowner

> owes no duty of care to keep the premises safe *for entry or use by others for recreational purposes*, or to give any warning of a dangerous condition, use, structure, or activity on such premises *to persons entering for such purposes, or to persons entering for a purpose in response to a recreational user who requires assistance*, either direct or indirect, including but not limited to rescue, medical care, or other form of assistance.

See 130 P.3d 1054, 1060 (Haw. 2006) (emphasis added) (quoting Haw. Rev. Stat. Ann. § 520-3). The Delaware Superior Court addressed a statute with similar textual limits in *Higgins v. Walls*, 901 A.2d 122 (Del. Super. Ct. 2005). While RSA 212:34 may arguably contain some of these

limitations, RSA 508:14, I, does not. Rather, RSA 508:14, I, makes clear that a landowner "shall not be liable for personal injury" when, as here, the statutory prerequisites are met.

Ms. Bisceglia nonetheless contends that applying RSA 508:14, I, to off-premises injuries violates the *quid pro quo* at the heart of recreational use immunity statutes. She is incorrect. The *quid pro quo* is not, as Ms. Bisceglia suggests, between landowners and "individuals injured after entering the landowner's property and using it for recreational purposes." PB 19. Rather, this Court made clear in *Estate of Gordon-Couture* that the relevant *quid pro quo* is between landowners and "the general public." 152 N.H. at 269 (citation and quotation marks omitted). It was largely for this reason that this Court declined to apply recreational use immunity to circumstances where a landowner opens his property only to individual invited guests, and not to the public at large. *See id.* at 269–71. Put differently, this Court in *Estate of Gordon-Couture* rejected the proposition that the relevant *quid pro quo* operates at an individual level. *See id.*

By permitting the general public to use the Fort Constitution Historic Site without charge for recreational purposes, the State has upheld its end of the bargain. This remains true even if Ms. Bisceglia was not *personally* benefitting from that bargain at the time of her injury. Again, to conclude otherwise would result in a situation where "a greater duty is owed to those for whom the [property] is not maintained than those for whom it is." *Schneider*, 760 F.2d at 368. Such a situation is not merely arbitrary, but in fact undermines the purpose that recreational use immunity is designed to serve. *See Estate of Gordon-Couture*, 152 N.H. at 273.

For all of these reasons, Ms. Bisceglia's contention that recreational use immunity under RSA 508:14, I, does not extend to off-premises injuries lacks merit. The trial court correctly rejected that contention, and this Court should do likewise.

III. THE TRIAL COURT DID NOT UNSUSTAINABLY EXERCISE ITS DISCRETION WHEN IT DECLINED TO REACH MS. BISCEGLIA'S CONSTITUTIONAL ARGUMENTS AND, REGARDLESS, THE ARGUMENTS LACK MERIT.

Ms. Bisceglia contends that applying recreational use immunity to bar her negligence claim violates her rights to a remedy under Part I, Article 14 and to equal protection under Part I, Articles 2 and 12. She raised these arguments for the first time in her motion for reconsideration, SA 142–143, and the trial court declined to reach them, PD 46–47. This Court "review[s] for an unsustainable exercise of discretion a trial court's refusal to entertain new issues on reconsideration on the basis that the issues could have been raised at an earlier time." *Loeffler v. Bernier*, 173 N.H. 180, 187 (2020). "To meet this standard," the party seeking appellate review of those issues "must show that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case." *Id.*

Ms. Bisceglia cannot meet this stringent standard. As the trial court observed, Ms. Bisceglia "had the opportunity to raise any constitutional challenges in connection with the motion to dismiss in September 2019 and again when the [trial court] invited supplemental pleadings after it converted the motion to one for summary judgment." PD 46–47. Indeed, Ms. Bisceglia was on notice when the State filed its motion to dismiss that it was invoking recreational use immunity under RSA 508:14, I, as a defense to her claims. SA 7–14. She was on notice no later than November 2019—when the State filed its reply to her objection to the motion to dismiss—that it was the State's position that immunity under RSA 508:14, I, did not depend on whether *Ms. Bisceglia* was using the Fort Constitution

Historic Site for recreational purposes at the time she was injured. SA 33–36. She was on notice no later than when the State filed its supplemental summary judgment papers in July and August 2020 that the State took the position that immunity under RSA 508:14, I, extended to off-premises injuries. SA 37–118, 132–135. The trial court heard oral argument specific to recreational use immunity in September 2020. It did not issue its summary judgment order until November 13, 2020. PD 38–43.

Ms. Bisceglia did not raise her constitutional arguments at any point during the nearly fourteen-month period. Rather, she raised those arguments for the first time ten days after the trial court entered summary judgment in the State's favor in her motion for reconsideration. SA 142–143. As the trial court noted, Ms. Bisceglia has "offer[ed] no reason why her as applied challenges to the constitutionality of the statute could not have been raised in her earlier pleadings." PD 47. It was for this reason that the trial court "decline[d] to consider them" on reconsideration. PD 47. The trial court's decision was neither untenable nor unreasonable.

This is especially true given that the constitutional arguments at least arguably fall beyond the scope of a proper motion for reconsideration. Under Superior Court Civil Rule 12(e), a party moving for reconsideration must identify "points of law or fact that the court has overlooked or misapprehended" when it issued the challenged order. A court cannot "overlook" or "misapprehend" a legal argument that was never presented in the first place. Indeed, other courts have observed that "a party may not, on a motion for reconsideration, advance a new argument that could (or should) have been presented prior to the trial court's original ruling. *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2013); *cf. Farris*

v. Daigle, 139 N.H. 453, 456 (1995) (*Thayer*, J., dissenting) ("[N]or is [a motion for reconsideration] designed to allow the parties to raise issues that *they* overlooked when presenting their original case."). Put differently, a litigant who does not "frame the issues in a case before the trial court rules" cannot use a motion for reconsideration "to switch from theory to theory like a bee in search of honey." *Cochran*, 328 F.3d at 11. For this reason, too, the trial court did not unsustainably exercise its discretion when it declined to reach Ms. Bisceglia's constitutional arguments. *Loeffler*, 173 N.H. at 187.

If this Court nonetheless reaches Ms. Bisceglia's constitutional arguments, it should reject them on the merits. The trial court's application of RSA 508:14, I, in this case does not violate Ms. Bisceglia's right to a remedy under Part I, Article 14, or to equal protection under Part I, Articles 2 and 12. The right to a remedy under Part I, Article 14 is "necessarily relative." *Sousa v. State*, 115 N.H. 340, 343 (1975). Part I, Article 14 does not confer on a plaintiff "a right to sue and hold the State liable in tort." *Id.* at 344. This Court held in *Sousa* that the phrase "conformably to the laws," as used in Part I, Article 14, means that the remedies to which persons have a right are limited to those available "under the statutory and common law application at the time the injury is sustained." *Id.* at 343. This Court further held that sovereign immunity does not violate equal protection when "all those similarly situated [i.e., all those persons injured by the state] are similarly treated." *Id.* at 344.

Under the trial court's construction, recreational use immunity under RSA 508:14, I, applies equally to all members of the general public. When, as here, the statutory prerequisites are met, a landowner is immune from

suit. Neither Part I, Article 14 nor the State Constitution's equal-protection guarantee stands as an obstacle to that result. *See id.* at 342–44; *see also Occasion v. Federal Express Corp.*, 162 N.H. 436, 448 (2011) (holding that Part I, Article 14 "only requires a remedy that conforms to the statutory and common law rights applicable at the time of injury"). Ms. Bisceglia's constitutional arguments therefore fail on the merits.

Ms. Bisceglia contends that the trial court's construction of RSA 508:14, I, nonetheless violates Part I, Article 14 because it terminates her right to recovery without conferring on her any corresponding benefit. PB 29–30. As noted above, this argument is premised on an incorrect view of Part I, Article 14. It is also premised on an incorrect view of the *quid pro quo* at the heart of recreational use immunity. The *quid pro quo* is not, as Ms. Bisceglia contends, between the landowner and any particular individual. *See Estate of Gordon-Couture*, 152 N.H. at 269–71. If that were true, then any person whose claims were barred by recreational use immunity could raise an as-applied challenge to that immunity under Part I, Article 14 if she could credibly contend that she was not engaged in recreational activity at the time of her injury. As the First Circuit observed in *Schneider*, however, recreational use immunity statutes should be "applied objectively, not subjectively." 760 F.2d at 368. To conclude otherwise "misconceives the statute's intendment." *Id.*

Moreover, this Court has made clear that a recreational use immunity statute does not violate Part I, Article 14 when it confers a substantial benefit on the *general public* and that benefit bears a fair and substantial relation to a permissible legislative purpose. *See Lorette v. Peter-Sam Inv. Props.*, 140 N.H. 208, 211–13 (1995). "[A] class need not

always receive a new benefit simply because the legislature takes an existing benefit away." *Id.* at 212. This Court has repeatedly emphasized that RSA 508:14, I, benefits the general public by "encourag[ing] private landowners to make their land available for public recreational uses by limiting their liability." *Estate of Gordon-Couture*, 152 N.H. at 273; *see also Kenison*, 152 N.H. at 454; *Soraghan*, 162 N.H. at 401–02. Immunizing landowners from suits like Ms.Bisceglia's bears a fair and substantial relation to that purpose. *Cf. Lorette*, 140 N.H. at 212–13.

Ms. Bisceglia's equal-protection argument is little more than a repackaged version of her argument under Part I, Article 14. At bottom, Ms. Bisceglia contends that applying recreational use immunity to non-premises injuries is arbitrary and unreasonable. *See* PB 31–32. She is mistaken. As discussed above, the trial court's construction finds support in RSA 508:14, I's unambiguous language. It likewise promotes the purpose that legislative immunity is designed to serve. Under that construction, recreational use immunity applies equally *whenever* a landowner has permitted the general public to use property without charge for recreational purposes. That result is neither arbitrary nor unreasonable.

Nor does the trial court's construction impermissibly "treat[] similarly situated persons differently." PB 32. Ms. Bisceglia's argument to the contrary views this case through the wrong prism. This Court has repeatedly rejected the contention that an immunity statute violates equal protection simply because it forecloses tort liability where, in the absence of the statute, liability might otherwise attach. *See, e.g.*, *Moody v. Cont'l Paving Inc.*, 148 N.H. 592, 594–95 (2002); *Lorette v. Peter-Sam Inv. Props.*, 142 N.H. 208, 210–13 (1997); *Nutbrown v. Mt. Cranmore, Inc.*,

140 N.H. 675, 681–82 (1996); *Lorette*, 140 N.H. at 211–13. The operative question, then, is not whether Ms. Bisceglia would be able to recover if the Fort Constitution Historic Site were not open to the public for recreational purposes. *See* PB 32. Such a view would render any immunity statute unconstitutional if it precluded a remedy available at common law. In any event, there was no right to tort recovery against the State at common law, as sovereign immunity was absolute. *See Sousa*, 115 N.H. at 284. RSA 508:14, I, therefore only violates equal protection if its application is wholly arbitrary. *See Lorette*, 140 N.H. at 211–13. As previously discussed, there is nothing arbitrary about applying recreational use immunity under the circumstances of this case.

In sum, the trial court sustainably exercised its discretion when it declined to reach Ms. Bisceglia's constitutional arguments because they were raised for the first time on reconsideration. This Court should affirm that decision. In any event, the constitutional arguments fail on the merits, and this Court can affirm on that alternative ground.

CONCLUSION

For the foregoing reasons, the trial court correctly concluded that recreational use immunity under RSA 508:14, I, bars Ms. Bisceglia's negligence claim. This Court should affirm the trial court's decision.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

and

NEW HAMPSHIRE DEPARTMENT OF NATURAL AND CULTURAL RESOURCES

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September 22, 2021

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CERTIFICATE OF COMPLIANCE

I, Samuel R.V. Garland, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,561 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

September 22, 2021 /s/*Samuel Garland*
Samuel R.V. Garland

CERTIFICATE OF SERVICE

I, Samuel R.V. Garland, hereby certify that a copy of the State's brief shall be served on Matthew B. Cox, Esquire, counsel for Janet Bisceglia, through the New Hampshire Supreme Court's electronic-filing system.

September 22, 2021 /s/*Samuel Garland*
Samuel R.V. Garland