IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0537

GERARD GIRASOLE,
Appellant,

vs.

PAWS UP RANCH, LLC, d/b/a THE RESORT AT PAWS UP,
Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the District Court of the Fourth Judicial District
of the State of Montana, In and For the County of Missoula,
Before the Honorable Leslie Halligan

Appearances:

W. Bridger Christian
CHRISTIAN, SAMSON & BASKETT, PLLC
310 West Spruce St.
Missoula, Montana 59802
Tel: (406) 721-7772
Fax: (406) 721-7776
Email: bridger@CSBlawoffice.com
Attorney for Appellee

Joseph Cook
Philip McGrady
HEENAN & COOK, PLLC
1631 Zimmerman Trail, Ste. 1
Billings, MT 59102
Tel: (406) 839-9091
Fax: (406) 839-9092
Email: joe@lawmontana.com
philip@lawmontana.com
Attorneys for Appellant

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I. STATEMENT OF THE ISSUE

Whether summary judgment is appropriate when the undisputed facts show that Appellant Gerard Girasole's ("Girasole") injuries arose from risks inherent to horseback riding, exempting Appellee Paws Up Ranch, LLC d/b/a The Resort at Paws Up ("PUR") from liability under the Equine Activities Act.

II. STATEMENT OF THE CASE

Girasole has appealed from an Order entered by the Missoula County District Court ("the District Court") granting summary judgment in favor of PUR on the issue of liability. The District Court determined that, under what is commonly referred to as the "Equine Activities Act," Mont. Code Ann. §§ 27-1-725 *et seq.*, a stumbling horse and a tilting saddle constitute inherent risks in equine activities, thus barring a finding of liability absent the application of one of the five exceptions enumerated under Mont. Code Ann. § 27-1-727(3)(a). The District Court determined that Girasole failed to establish either the applicability of any statutory exceptions or that his injury was foreseeable. Because the undisputed facts showed that PUR was not liable pursuant to the Equine Activities Act, the District Court held that Girasole could not prevail on any of his claims, granted summary judgment, and dismissed the case. Girasole now appeals to this Court.

III. STATEMENT OF THE FACTS

The following facts are undisputed. PUR operates a luxury guest resort in Missoula County, Montana. Complaint and Demand for Jury Trial (Dkt. 1) at ¶ 6. PUR offers several recreational activities to guests, including guided horseback rides. *Id.* On or about August 20, 2022, Girasole and his wife Elise (collectively, "Girasoles") travelled to Montana to vacation at PUR. *Id.* at ¶ 5.

Upon arrival at the resort, the Girasoles signed a Guest Assumption of Risk and Identification Agreement ("the Agreement"). Appellee's Appendix, Exhibit A, Assumption of Risk Waiver at Appendix, p. 2. The Agreement advised the Girasoles of various inherent risks associated with horseback riding and other recreational activities available at PUR. *Id.* The Agreement notified the Girasoles that the offered activities, including horseback riding, came with inherent risks of "BODILY INJURY, SERIOUS BODILY INJURY, ILLNESS[,] PARALYSIS[,] TRAUMA[,] AND EVEN DEATH," and it further advised the Girasoles that the known risks of injury include things like "sprains, twists, cuts, bruises, breaks, burns … and other trauma of any and all body parts." *Id.* The Agreement specifically informed the Girasoles that the inherent risks of horseback riding include, without limitation:

- "the propensity of an equine to behave in ways that may result in injury or harm to or the death of persons on or around the equine";
- "the unpredictability of an equine's reaction to such things as medication[,] sounds[,] sudden movement[,] and unfamiliar objects, persons, or other animals";

- "hazards, such as surface and subsurface ground conditions";
- "collisions with other equines or objects";
- "the potential of another participant to not maintain control over the equine or to not act with the person's ability";
- "unpredictability of animals such as snakes, bears, moose, mountain lions, horses, etc.";
- "collisions with . . . people, trees, and other objects"; and
- "slips-and-falls[.]"

Id. The Agreement further advised the Girasoles that the list of enumerated inherent risks within the body of the Agreement "is not complete," and that "there are other risks, hazards and dangers which … may be inherent in a given activity." *Id.* The Agreement also cautioned the Girasoles that PUR "cannot eliminate" the inherent risks associated with the offered recreational activities, including horseback riding. *Id.*

The Girasoles signed the Agreement on August 20, 2022, acknowledging that they "underst[ood] they [were] responsible for participating in these activities," and "underst[ood] neither [PUR] nor its members', managers', officers', agents', affiliates', or other representatives' presence is no assurance of safety or the lessening of any of these risks." Ex. A at App. pp. 2, 5. By signing, the Girasoles expressly acknowledged that they "recognize," "understand," and have "full

appreciation of the risks involved," and agreed to "assume all risk from [their] participation in . . . any and all activities[.]" *Id.* at App. p. 2.

The Girasoles travelled to PUR in part because of the outdoor activity offerings. Appellee Ex. B, Deposition of Elise Girasole, at App. p. 8, 12:3-7. For their horseback riding experience, Elise requested a "mellow" trail and horse due to a prior back injury. *Id.* at App. pp. 11-12, 56:24-57:9. Elise, a self-described intermediate rider, has been riding since she was eight years old. *Id.* at App. p. 9, 18:19-20. Girasole characterizes himself as a "novice" and estimates he has been on approximately ten rides over the course of his lifetime. Appellee Ex. C, Deposition Gerard Girasole, at App. pp. 20-21, 58:17-20; 59:13.

On August 21, 2022, the Girasoles arrived at PUR's "Wilderness Outpost" to begin their scheduled horseback ride. Appellee Ex. D, Plaintiff's Responses to Defendant's First Combined Discovery Requests, at App. p. 23. Anna Oglesby, a wrangler at PUR and their guide for the tour, greeted them. *Id.* Oglesby selected a horse named Reba for Girasole and Blaze for Elise. Appellee Ex. E, Deposition of Anna Oglesby, at App. p. 30, 44:8-16. Oglesby described Reba as a phenomenal horse that had no prior issues. *Id*. at App. p. 32, 46:1-9.

After identifying horses for the Girasoles to ride, Oglesby went to retrieve the horses. *Id.* at App. p. 33, 48:19-21. Reba and Blaze were already saddled when Oglesby retrieved them. *Id.* at App. p. 36, 51:20-21. Oglesby returned to the

Girasoles. *Id.* at App. pp. 33-34, 48:24-49:7. While Girasole disputes the extent of Oglesby's pre-ride preparation, at a minimum, Oglesby provided the Girasoles with riding helmets, advised the Girasoles as to how to mount their horses using a mounting block, provided basic riding instructions, and checked with the riders as to their saddle and stirrup fit. *Id.* at App. p. 34, 50:17-21; Ex. D at App. p. 24; Ex. B at App. p. 13, 65:24-25.[1]

The Girasoles and Oglesby left the barn shortly thereafter. Ex. E at App. p. 37, 56:21. After riding for approximately 15 minutes, Reba suddenly and unexpectedly stumbled, going down on her front knees. *Id.* at App. p. 40, 67:24-68:3. When Reba regained her footing, Girasole's pelvis impacted the saddle, resulting in his injuries. Ex. D at App. p. 26. Girasole described Reba's stumble and subsequent rise as "unexpected." *See* Ex. C at App. p. 19, 37:12-18. Elise did not see Reba's stumble. Ex. B at App. p. 15, 70:23-25. At no time during the ride did Girasole ask to turn around and return to the barn. Ex. C at App. p. 17, 19:11-13. Neither did Girasole ask to dismount Reba. *Id.* at App. p. 18, 20:2-19.

Girasole's expert witness, Linda Rubio, has never seen Reba in person. Appellee Ex. F, Deposition of Linda Rubio, at App. p. 48, 33:11-13. She never

[1] Notably, Anna disputes the Girasole's interpretation of the events in the corral. Ex. E at App. pp. 33-34, 48:24-25 – 49:1-18. Indeed, Anna gave a detailed riding demonstration in accordance with PUR policy that included tightening the horses' cinches. *Id.* However, although this fact is disputed, it is ultimately immaterial as to whether summary judgment was appropriately granted by the District Court.

inspected or rode Reba. *Id.* at App. p. 48, 33:14-17. She has never been to the PUR premises, including the trail where the injury occurred. *Id.* at App. p. 48, 33:18-24. Rubio never inspected the equipment or tack used on Reba. *Id.* at App. p. 52, 47:3-7. She did not know if the equipment fit well or the reason it purportedly slipped. *Id.* at App. p. 52, 47:8-23. Rubio opined that tightening a cinch was not an exact measurement but "more like a muscle memory science." *Id.* at App. p. 43, 16:24-25. Further, Rubio admitted that a cinch can loosen—and ultimately cause the saddle to shift—for a variety of reasons, such as when a horse is simply "walking" or "breathing" or even when a rider places too much weight in one of the stirrups. *Id.* at App. pp. 44-45,18:2-4; 19:8—20:3. She additionally noted that, if a rider puts "too much weight" in one stirrup, that can "very, very, very easily off-center [the saddle]." *Id*. at App. pp. 45-46, 19:24—20:3. Rubio further acknowledged how "a saddle can more easily slip" when, for example, a horse doesn't have high withers. *Id*. at App. p. 47, 23:17-23.

Rubio further testified that a horse could trip for a number of reasons:

> There's a reason that they trip. They trip over something. They trip because their hooves are too long and they need to be shoed. They trip because they have a neurological problem. They trip because they're distracted.

Id., at App. p. 51, 45:13-20. Rubio stated that horses are "fright-and-flight animals," creating an inherent risk for things to "go sideways." *Id.* at App. p. 53, 48:14-49:1-2. Because of this "unpredictability," as a guide, Rubio would never guarantee a

client they would not fall off a horse. *Id.* at App. p. 54, 51:16-21. PUR's expert witness, Wayne Hipsley, agrees that all horses can behave unpredictably at times. *See* Appellee's Ex. G, Wayne Hipsley Expert Report, at App. p. 59, p. 14.

Unlike Rubio, Hipsley traveled to PUR to conduct a personal inspection in connection with the preparation of his expert report. *See* Ex. G at App. p. 56, p. 3. Hipsley's report is uncontroverted – Girasole filed no rebuttal report, nor did he depose Hipsley.

Hipsley examined Reba. Ex. G at App. p. 57, p. 6. His investigation determined that Reba had otherwise been ridden for three seasons at PUR without incident. *Id.* at App. p. 62, p. 44. He found nothing that would impact her gait. *Id.* at App. p. 57, p. 6. He observed Reba walking and trotting and determined that her movements were consistent with a horse properly trained for a beginner ride. *Id.* at App. p. 58, p. 7. During Hipsley's observation of Reba, she did not display any "mannerisms associated with head tossing, bit resistance, and/or inability to be controlled and guided." *Id.* at App. p. 58, p. 7.

Further, Reba rode the same trail as the Girasoles without incident. *Id.* Hipsley classified this trail as a "beginner trail," stating that the trail mirrored traditional riding trails found throughout the world. *Id.* at App. p. 60, p. 16.

Hipsley additionally examined the tack used on Reba. *Id.* at App. p. 61, p. 40. In his opinion, PUR utilized a "very good system" for maintaining accuracy on

fitting horses with tack. *Id.* He further determined the tack was not defective, nor did it become ineffective during the ride. *Id.*

IV. STANDARD OF REVIEW

A district court's grant summary judgment is reviewed de novo. *Boulder Hydro Ltd. P'ship v. Northwestern Corp.*, 2018 MT 248, ¶ 8, 393 Mont. 85, 428 P.3d 250. "A moving party is entitled to summary judgment when the party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law." *Id.* If this burden is met, "the burden then shifts to the party opposing summary judgment to present substantial evidence essential to one or more elements of its case to raise a genuine issue of material fact, or to show why the undisputed facts do not entitle the moving party to judgment." *Not Afraid v. State*, 2015 MT 330, ¶ 10, 381 Mont. 454, 362 P.3d 71 (citations omitted). The nonmoving party cannot satisfy its burden with "mere denial, speculation, or conclusory assertions." *Id.* (citations omitted). In the absence of disputed material facts, the primary purpose of summary judgment is to encourage judicial economy through the elimination of claims "not deserving resolution by trial." *Gwynn v. Cummins*, 2006 MT 239, ¶ 12, 333 Mont. 522, 144 P.3d 82.

V. SUMMARY OF ARGUMENT

The judgment of the lower court should be affirmed. The District Court properly determined, without weighing evidence, that the undisputed facts establish

Reba's stumble was an inherent risk under the Equine Activities Act. Even assuming Girasole properly raised the issue of Reba's slipping saddle (which he did not clearly do in the proceedings below), the District Court correctly determined this too was an inherent risk under the Equine Activities Act. Moreover, Girasole's argument that the District Court's interpretation would immunize providers from their own negligence ignores the statute's clear framework for when negligent conduct falls outside the inherent risk exemption. Critically, Girasole failed entirely to establish that any of these statutory exceptions applied.

VI. ARGUMENT

A. The plain language of the Equine Activities Act expressly exempts equine professionals and sponsors from liability for injuries resulting from the inherent risks of horseback riding, absent a showing of a statutory exception.

Section 27-1-727, Mont. Code Ann. states:

> Equine activity liability limitations. (1) Except as provided in subsections (2) and (3), an equine activity sponsor or an equine professional is not liable for an injury to or the death of a participant engaged in equine activity resulting from risks inherent in equine activities.
>
> (2) An equine participant shall act in a safe and responsible manner at all times to avoid injury to the participant and others and to be aware of risks inherent in equine activities.
>
> (3) Subsection (1) does not apply:
>
> (a) if the equine activity sponsor or the equine professional:

> (i) provided the equipment or tack and the equipment or tack caused the injury because the equine activity sponsor or equine professional failed to reasonably and prudently inspect or maintain the equipment;
>
> (ii) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity and the participant's ability to safely manage the particular equine based on the participant's representations as to the participant's ability;
>
> (iii) owned, leased, rented, or otherwise was in lawful possession and control of the land or facilities upon which the participant sustained injuries caused by a dangerous latent condition that was known or should have been known to the equine activity sponsor or the equine professional;
>
> (iv) committed an act or omission that constituted willful or wanton disregard for the safety of the participant and the act or omission caused the injury; or
>
> (v) intentionally injured the participant; or

(b) in a products liability action.

When interpreting a statute, this Court's analysis always begins with the "plain meaning" of the words used in the statute. *Gulbrandson v. Carey*, 272 Mont. 494, 500, 901 P.2d 573, 577 (1995) (citations omitted). "If the legislature's intent can be determined by the plain language of the words used, [this Court] may not go further and apply other means of interpretation." *Id.*, 272 Mont. at 500, 901 P.2d at 577 (citations omitted).

In the present case, the plain language of the Equine Activities Act expressly states that its purpose is "to assist courts and juries in defining the circumstances

under which persons responsible for equines may be found liable for damages to persons harmed in the course of equine activities." Mont. Code Ann. § 27-1-725. To assist courts and juries in applying the Equine Activities Act, the legislature has defined certain terms.

First, "equine activity," in relevant part, means "rides, trips, hunts, pack trips, or other equine activities of any type, however informal, that are sponsored by an equine activity sponsor." § 27-1-726(3)(e). An "equine activity sponsor" means an "individual, group, club, partnership, corporation, or other entity, whether operating for profit or nonprofit, that sponsors, organizes, or provides the facilities for an equine activity." § 27-1-726(4). To engage in an equine activity means to "ride, train, drive, or be a passenger upon an equine…" § 27-1-726(1). Often, these equine activities are directed by an equine professional, a person engaged for compensation that instructs or rents to "a participant an equine for the purpose of riding, driving, or being a passenger upon the equine." § 27-1-726(5). A participant means a person, "whether amateur or professional, who directly engages in an equine activity . . ." § 27-1-726(6). Equine activities bring certain inherent risks, or dangers or conditions that are an integral part of equine activities, including but not limited to:

(a) the propensity of an equine to behave in ways that may result in injury or harm to or the death of persons on or around the equine;

(b) the unpredictability of an equine's reaction to such things as medication; sounds; sudden movement; and unfamiliar objects, persons, or other animals;

(c) hazards, such as surface and subsurface ground conditions;

(d) collisions with other equines or objects; or

(e) the potential of another participant to not maintain control over the equine or to not act within the person's ability.

§ 27-1-726(7). In sum, Girasole engaged in the equine activity of riding as provided by the equine activity sponsor, PUR. Oglesby, the equine professional, directed Girasole, the participant, leaving the question of whether Girasole's injuries resulted from an inherent risk of equine activity.

The resolution of this question strikes at the heart of Montana's statutory framework for equine liability. The Montana legislature had made clear that "[i]t is the policy of the state of Montana that a person is not liable for damages sustained by another solely as a result of risks inherent in equine activities if those risks are or should be reasonably obvious, expected, or necessary to persons engaged in equine activities." Mont. Code Ann. § 27-1-725. Alternatively, "[i]t is the policy of the state of Montana that an equine activity sponsor or equine professional who is negligent and causes foreseeable injury to a participant bears responsibility for that injury in accordance with other applicable law." *Id.* The practical effect of this statute is to "pronounce that equine activity sponsors do not have a duty to protect participants from unavoidable risks, or the inherent risks of equine activities of which the

participant is or should be aware." *McDermott v. Carie*, 2005 MT 293, ¶ 18, 329 Mont. 295, 124 P.3d 168.

A stumble is one such unavoidable risk. As stated above, the legislature defined inherent risk, in part, as "the propensity of an equine to behave in ways that may result in injury or harm." Mont. Code Ann. § 27-1-726(7); *see also, e.g.*, *Harrold v. Rolling J Ranch*, 19 Cal.App.4th 578 (2nd Dist. Cal. App. 1993) ("There is no doubt horseback riding, even the rather tame sport of riding on the back of walking horses in an afternoon trail ride, carries some inherent risk of injury. A horse can stumble or rear or suddenly break into a gallop, any of which may throw the rider."). Similarly, despite Girasole's apparent arguments to the contrary, a saddle slipping is another inherent risk. *Fishman v. GRBR, Inc.*, 2017 MT 245, ¶ 16, 389 Mont. 41, 403 P.3d 660.

In *Fishman*, the plaintiff booked a trail ride. *Id.* ¶ 3. Fishman had "a low level of riding experience." *Id.* ¶ 6. Upon arrival at the corral, Fishman was instructed to mount the horse. *Id.* The wrangler observed that the saddle was shifting under Fishman's uneven weight distribution and instructed Fishman to shift his weight to keep the saddle centered. *Id*. He did so and the parties left the corral. *Id.* During the ride, the saddle again began to shift. *Id.* ¶ 7. This time, Fishman fell off his horse, injuring himself. *Id.* ¶ 8.

As in the instant matter, Fishman argued that the wrangler never physically touched or inspected his saddle, even after the wrangler was aware it was off center. *Id.* ¶ 8. He subsequently filed an action asserting negligence, while the defendant moved for summary judgment stating the accident was caused by an inherent risk. *Id.* The district court granted the defendant's motion for summary judgment. *Id.*

This Court affirmed the lower court's grant of summary judgment, stating "the fact that the cinch nonetheless loosened during the ride underscores that this occurrence is an inherent danger or condition of equine activity." *Id.* ¶ 15. Notably, the *Fishman* Court stated that, despite a dispute as to the "differing accounts of the communications" that occurred between the parties before the ride, they were not material as to whether the accident was caused by an inherent risk. *Id.* ¶ 16.

As the District Court noted, the *Fishman* decision comports with other holdings from jurisdictions outside of Montana. In *Cooperman v. David*, the plaintiff brought a negligence action as result of the injuries resulting from a slipping saddle. *Cooperman v. David*, 214 F.3d 1162 (10th Cir. 2000). Affirming the Wyoming district court, the Tenth Circuit stated that:

> it is inherent that a saddle will slip. . . This imprecision in the cinching of the saddle is "characteristic" or "typical" of and therefore "inherent in" the sport of horseback riding. It is an undesirable risk which is simply a collateral part of the sport. When the cinching of a saddle can be too tight or too loose, and the cinching is not done with scientific precision, it is inherent in the sport that the provider at times will cinch too loosely or too tightly. Thus, the testimony of WRT's employee that a saddle hanging underneath a horse would be evidence that the saddle

> was not cinched tightly enough does not take us outside the realm of inherent risk. It does not explain why the saddle was not cinched tightly enough.
>
> . . .
>
> The Wyoming Legislature expressly stated in the Safety Act that a recreational provider has no duty to "eliminate, alter or control the inherent risks within the particular sport or recreational opportunity." Wyo. Stat. Ann. § 1-1-123(b). Thus, stating only that the cinch was not tight enough does not show that the risk was no longer inherent to the sport. The Coopermans have the burden of presenting some evidence on summary judgment that would raise a question of fact that the loosely cinched saddle was caused, not by an inherent risk, but rather by a risk that was atypical, uncharacteristic, not intrinsic to, and thus not inherent in, the recreational activity of horseback riding.

Id. at 1168-69. The *Cooperman* court additionally stated:

> we must evaluate the risk at the greatest level of specificity permitted by the factual record . . . . For example, if the only fact presented to the court is that the horse bucked while the rider was properly sitting on the horse, we would frame the duty question as whether a bucking horse is an inherent risk of horseback riding. However, if the facts established that the owner of the horse lit firecrackers next to the horse and the horse bucked, we would ask whether a horse bucking when firecrackers are lit next to the horse is an inherent risk of horseback riding.

Id. at 1167.

Applying this reasoning, the District Court correctly held that, even viewing the facts in the light most favorable to Girasole, both the shifting saddle and Reba's unanticipated stumble were inherent risks of horseback riding, and nothing in the facts took these incidents outside the realm of inherent risk.

Girasole attempts to distinguish the above cited cases, protesting that the District Court "twisted the rationale of these cases to support its conclusion." Appellant's Opening Brief, p. 23. First, he argues that *Fishman* is distinguishable because there was no expert testimony provided in that case. However, Rubio's expert testimony on behalf of Girasole supports PUR's argument that stumbling and saddle shifting are inherent risks of horseback riding. Rubio opined that a horse could stumble for any number of reasons and horses are unpredictable in nature. Ex. F at App. p. 51, 45:13-20; App. pp. 53-54, 48:14-49:1-2. Rubio further stated that cinch tightening was more akin to muscle memory than any exact science. *Id.* at App. p. 43, 16:24-25. These statements only underscore the inherent risks of stumbling and saddle shifting.

Girasole next argues that *Fishman* is distinguishable because the only allegation in *Fishman* was that the cinch loosened during the course of the ride and there were no disputed issues of material fact as to the cause of the cinch loosening. However, like Girasole, the plaintiff in *Fishman* focused on the guide's "personal actions or inaction" and differing accounts of communication between the parties. 2017 MT 245, ¶¶ 15-16. The *Fishman* Court ultimately found that these issues were immaterial as to whether the accident was caused by an inherent risk. *Id.*

Next, Girasole argues that *Cooperman* viewed in its totality supports his argument, as the inherent risk at issue must be viewed with the greatest level of

specificity by the factual record. The District Court did so, finding that at this level of specificity, Girasole still failed to carry his burden. Relying on his expert's testimony, Girasole argues that the facts show that PUR's purported negligence contributed to the unbalanced ride and ultimately the stumble. However, Girasole's own expert testified that she did not know why the saddle slipped, stating "[t]here was a reason it slipped, but I don't know why." Ex. F at App. p. 52, 47:18-19. As in *Cooperman*, Girasole had the burden of presenting some evidence on summary judgment that would raise a question of fact that the loosely cinched saddle was caused, not by an inherent risk, but rather by a risk that was atypical, uncharacteristic, not intrinsic to, and thus not inherent in, the recreational activity of horseback riding. Girasole provided no such evidence.

Further, Girasole claims that the District Court "erroneously distinguished Girasole's facts from those in *Carden v. Kelly*, 175 F.Supp.2d 1318 (D. Wyo. 2001)." Appellant's Opening Brief, p. 26. Girasole further argues that, in doing so, the District Court improperly weighed evidence. *Id.* In actuality, the District Court merely noted that *Carden* provided a "useful comparison," and explained the facts in *Carden.* Order Granting Plaintiff's Motion for Summary Judgement (Liability) (Dkt. 53), p. 16. The District Court concluded that the undisputed facts as stated by the parties could not make Girasole's injury from an inherent risk foreseeable.

Girasole finally invites the Court to conclude that an inherent risk of stumbling combined with the inherent risk of saddle shifting totals negligence on the part of PUR, making much ado that PUR conceded it has an obligation to provide a safe experience for its guests. Appellant's Opening Brief at p. 19.

However, providing a safe experience does not equate to eliminating all risks of injury for the guests. Girasole argues that Reba's stumble could have been "avoided by better planning, rider education, and an attentive guide," and Rubio argues that PUR's conduct was below "the standard of care." Appellant's Opening Brief at pp. 22, 25. Notwithstanding that the former argument is devoid of citation to the record and the type of conclusory statement that fails to meet the nonmovant's burden of demonstrating a difference in material fact, these arguments ignore this Court's prior pronouncement in *McDermott*:

> If the injury is due to an inherent risk of equine activities and the participant expected that risk, then the equine activity sponsor cannot have been negligent—the injury was due to an unavoidable risk of which the participant was aware, so the sponsor could not have breached any duties to warn of or eliminate the risk. Thus, so long as the participant expects a risk inherent in equine activities, pursuant to the statute, the equine activity sponsor may not be held liable for injury suffered as a result of that risk.

2005 MT 293, ¶ 18. In other words, an inherent risk is a risk that the equine sponsor or professional cannot abate, no matter what efforts they make. Mere complaints about Girasole's discomfort or uncertainty do not and cannot convert an inherent risk into a foreseeable injury. Simply put, because the sponsor cannot eliminate the

risk of a horse stumbling or a saddle slipping, they have no duty to eliminate the risk of a horse stumbling or a saddle slipping. Just as two wrongs do not make a right, two inherent risks do not make the injury avoidable.

B. Girasole failed to show that an exception under § 27-1-727(3)(a) applied.

Girasole argues that the District Court ignored "the totality of the circumstances," and that its interpretation of the Equine Activities Act would effectively immunize providers of horseback riding activities from their own negligence. Appellant's Opening Brief at p. 15. Girasole argues that this interpretation would have "constitutional implications," citing *Brewer v. Ski-Lift, Inc.*, 762 P.2d 226, 230 (Mont. 1988) and *Oberson v. USDA*, 2007 MT 293, 339 Mont. 519, 171 P.3d 715. While Girasole does not indicate what these constitutional implications are, presumably they are what the *Brewer* and *Oberson* Courts deemed as improperly "immunizing [ski] area operators from the inherent risks of the sport over which the operator has no control."

First, PUR is unaware of any relevant authority imposing such a "totality of the circumstances" test on the District Court in this instance, nor does Girasole cite one. Second, unlike the snowmobile liability and skier responsibility statutes found unconstitutional in *Brewer and Oberson*, the Equine Activities Act provide specific exceptions to an equine activity sponsor or professional's immunity. Should an individual be injured due to an inherent risk of equine activities, the equine activity

sponsor or professional may be held liable if plaintiff shows that the equine activity sponsor or professional:

> (i) provided the equipment or tack and the equipment or tack caused the injury because the equine activity sponsor or equine professional failed to reasonably and prudently inspect or maintain the equipment;
>
> (ii) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity and the participant's ability to safely manage the particular equine based on the participant's representations as to the participant's ability;
>
> (iii) owned, leased, rented, or otherwise was in lawful possession and control of the land or facilities upon which the participant sustained injuries caused by a dangerous latent condition that was known or should have been known to the equine activity sponsor or the equine professional;
>
> (iv) committed an act or omission that constituted willful or wanton disregard for the safety of the participant and the act or omission caused the injury; or
>
> (v) intentionally injured the participant . . .

Mont. Code Ann. § 27-1-727(3)(a).[2]

In contrast, Girasole's argument – that when an inherent risk is combined with alleged negligence, traditional negligence law must be applied – would render these exceptions superfluous. As here, a plaintiff could allege any number of disconnected events to give the illusion that negligence gave rise to injury resulting from an

[2] Although Girasole alleged the applicability of the other exceptions in his Complaint, he did not allege that he was intentionally injured and the fifth exception is therefore inapplicable.

inherent risk. Requiring the district courts to apply a traditional negligence analysis to an injury resulting from an inherent risk any time, for example, a plaintiff alleged that a guide was inattentive would render the Equine Liability Act toothless.

Relying almost entirely on his traditional negligence argument, Girasole gives the above exceptions short shrift. However, as stated above, these exceptions are intended by the legislature as an avenue for plaintiffs to show that an equine professional or sponsor should be held liable in the event of injury resulting from risks inherent in equine activities. § 27-1-727(1); § 27-1-727(3). Notably, Girasole has failed to demonstrate – or even argue – the applicability of any exceptions, apart from a passing mention that "[e]ven assuming that Girasole has the burden of proving the exceptions under Mont. Code Ann. § 27-1-727, summary judgment is still inappropriate." Appellant's Opening Brief, p. 29. Indeed, the only exception mentioned by Girasole in his Appellant's Opening Brief is a bare statement that PUR committed an act or omission that constituted willful or wanton disregard for Girasole, pursuant to § 27-1-727(3)(a)(iv). Notwithstanding the fact that if a party fails to raise an issue or argue it in their Appellant's Opening Brief, the issue is deemed waived, *see Schaubel v. Iversen*, 257 Mont. 164, 166, 848 P.2d 489, 490 (1993), PUR will address the inapplicability of the § 27-1-727(3)(a) exceptions.

Under the first exception, an equine sponsor or professional is liable if they provided the equipment or tack and that equipment or tack caused injury because of

the sponsor or professional's failure to reasonably and prudently inspect or maintain the equipment. § 27-1-727(3)(a)(i). *Fishman* is instructive on the first exception. The trial court in *Fishman* granted summary judgment in favor of the equine activity sponsor on a claim under § 27-1-727(3)(a)(i) because "[the plaintiff] ha[d] not alleged or shown that any piece of tack or equipment broke, was otherwise defective or did not work or perform as expected." *Fishman*, ¶ 9. This Court affirmed the trial court's ruling and, in doing so, expressly noted how "[the plaintiff] did not allege that the equipment or tack failed, was improperly maintained, or was otherwise defective." *Id.* at ¶ 15. Moreover, evidence demonstrating the defendant knew the cinch was loose and the saddle was slipping was not material as to whether the equipment was reasonably and prudently inspected. *Id.*

Here, there are no facts demonstrating that any tack or equipment used by Girasole failed, broke, or was otherwise defective. In fact, the evidence in the record demonstrates that the tack and equipment used by Girasole was not defective. Ex. G at App. p. 61, p. 40. Even if Girasole's theory that he had an unbalanced ride as a result of a loose cinch is taken at face value, the unbalanced ride did not result from defective equipment, but rather the inherent risk of a cinch loosening during a ride.

Under the second exception, the equine activity sponsor who provided the equine is required to "make reasonable and prudent efforts to determine the ability of the participant to safely engage in the equine activity . . . based on the participant's

representations as to the participant's ability." § 27-1-727(3)(a)(ii). Here, Oglesby clearly undertook efforts to match a suitable trail and horses to the Girasoles.

Indeed, Oglesby and the Girasoles discussed suitable trails for the ride. Ex. B at App. p. 10, 54:2-6; Ex. E at App. pp. 28-29, 42:24-25 – 43:1-14. Anna selected a trail that lay close to the barn in case Elise's back began to hurt. *Id*. The trail was one of the most frequented on PUR land. Appellee's Ex. H, Deposition of Steve Hurst, at App. p. 64, 24:18-22. Hipsley, based on his experience as a rider and guide, described the trail as "beginner" level. Ex. G. at App. p. 60, p. 16. When Elise Girasole viewed pictures showing a clear trail at the scene of the incident, she had no reason to dispute their authenticity. Ex. B at App. pp. 14-15, 69:21-5 – 70:1-4.

Additionally, Oglesby understood Girasole's riding ability to be at a beginner level. Ex. E at App. p. 28, 42:16-20. Oglesby assessed which horses would be appropriate given the Girasoles' level of experience. *Id.*, at App. p. 30, 44:2-16. Based on Elise's prior injury, Oglesby selected Blaze for her to ride. *Id.* Similarly, based on Girasole's inexperience, she selected Reba, "a good, easy steady-going horse" routinely used by children as young as six. *Id.* at App. p. 32, 46:1-9.

Girasole states that "the actions of [his] horse were beyond his ability to control . . ." Appellant's Opening Brief, p. 17. However, the undisputed facts show that Oglesby selected a horse routinely ridden by children, Girasole had some familiarity with horseback rides as he had ridden approximately ten times before,

and that Girasole could have stopped the ride at any time but chose to continue. Further, Girasole's own expert testified that, in her opinion, Reba neither had a neurological problem nor was barn sour (a tendency to return to the barn despite the rider's efforts). Ex. F at App. p. 49, 35:19-22; App. p. 50, 42:14-20. If a horse routinely ridden by six-year-olds was beyond his ability to control, it is unclear what, if any horse, could have satisfied his needs. Accordingly, Oglesby's efforts to match the trail and horse to Girasole's ability was more than reasonably prudent and the second exception does not apply.

Girasole faces the same deficiency under the third exception, which states that an equine activity sponsor may be held liable if it "owned, leased, rented, or otherwise was in lawful possession and control of the land or facilities upon which the participant sustained injuries caused by a dangerous latent condition that was known or should have been known to the equine activity sponsor or the equine professional." § 27-1-727(3)(a)(iii). A latent condition is dangerous condition of the land that is concealed. *See Little v. Needham,* 236 S.W.3d 328, 333-34 (Tex. 1st Dist. Ct. of App. 2007) (finding that a tree lying close to a trail that a rider collided with was not a latent condition as it was noticeable). Here, nothing in the record suggests that Reba stumbled as the result of some dangerous concealed condition, such as a hole or depression. Instead, Girasole argues broadly that the "newly cut trail" contributed to Reba's stumbling. Of course, Girasole could have argued the same if

the trail had been overgrown or no trail had existed at all. Without some sort of fact in the record connecting the trail with the stumble, arguing the trail was newly cut is simply noise obfuscating the true issue of whether a stumble is an inherent risk.

As stated above, nothing in the record connects Reba's stumble to the trail conditions. As Girasole's own expert stated, a horse can trip for a number of reasons. Ex. F at App. p. 51, 45:13-20. While Girasole speculates as to the cause of Reba's trip, ultimately such speculation is conclusory, unsupported by the record, and for naught. Girasole's injury was due to an unavoidable risk of which he was aware, so PUR or Oglesby could not have breached any duties to warn of or eliminate the risk.

Pursuant to the fourth exception, the equine sponsor or professional "committed an act or omission that constituted willful or wanton disregard for the safety of the participant and the act or omission caused the injury." § 27-1-727(3)(iv). Girasole states that a "'willful and wanton standard' is at play" because counsel stated at oral argument that, by not paying attention to her guests, Oglesby acted willfully and wantonly. Appellant's Opening Brief at p. 30. This argument was not part of Girasole's summary judgment briefing and was only briefly raised at oral argument after prompting by the District Court judge.

Girasole misstates the "willfully and wantonly" standard. As defined by Mont. Code Ann. § 1-1-204, the term willfully, "when applied to the intent with which an act is done or omitted, means a purpose or willingness to commit the act or make the

omission referred to." Wanton does not have a statutory definition, "but in previous cases we have held it to be synonymous with 'reckless.'. . . [W]e define[] willful, wanton, or reckless conduct as an act for which 'it is apparent, or reasonably should have been apparent, to the defendant that the result was likely to prove disastrous to the plaintiff, and [the defendant] acted with such indifference toward, or utter disregard of, such a consequence that it can be said he was willing to perpetuate it." *Jobe v. City of Polson*, 2004 MT 183, ¶ 18, 322 Mont. 157, 94 P.3d 743 (citations omitted).

Other jurisdictions have applied this standard in the context of equine liability. In *Holcomb v. Long*, an inexperienced rider sued an equine activity sponsor after he fell from a saddle, alleging that the injuries resulted from the failure of the guide to retighten his saddle. *Holcomb v. Long*, *765* S.E.2d 687, 688-89 (Ga. Ct. of App. 2014). There, the trial court granted summary judgment in favor of the defendant. *Id.*, at 689. The Georgia court of appeals upheld the lower court, in part, because the plaintiff failed to act in a willful and wanton manner. *Id.* at 692. Finding that, although the plaintiff's expert testified that defendant should have retightened the saddle and the defendant admitted to noticing the saddle beginning to loosen, "such evidence – at most – would establish [the defendant's] negligence or perhaps gross negligence" and not willful or wanton conduct. *Id.* Accordingly, the *Holcomb* court held that plaintiff failed to meet its burden in showing willful or wanton disregard

for his safety. *Id.*; *see also Dennis v. Nickajack Farms, LTD*, 2014 Ohio App. LEXIS 5305, at *12 (Ohio 11th. Dist. Ct. of App. 2014) (finding, in part, that defendant's failure to ascertain plaintiff's riding ability and failure to intervene when defendant saw plaintiff off balance on the saddle did not rise to willful or wanton misconduct).

No facts in the record show that Oglesby acted in a manner that indicated she intended for Girasole to sustain injury from Reba's stumble, i.e., willingly. Nor do any facts, even those viewed in a light most favorable to Girasole, show that Oglesby acted in a way for which the result was likely to prove disastrous to the plaintiff and that she acted with such indifference toward, or utter disregard of the result that it was akin to her being willing to perpetuate it.

Here, Girasole suggests that simple inattentiveness somehow rises to meet the willful and wanton standard. Appellant's Opening Brief at p. 30. In support of this, he alleges a slew of disparate facts and invites the court to infer a connection among them, none of which rise to the level of willful and wanton disregard for safety. Girasole argues that Reba's stumble was avoidable "if PUR had actually guided the trail-ride through a newly cut, ill-defined trail; made sure that its paying guests were aware of where to go on the trail-ride; used a guide focused on its guests instead of training a problem horse; and listened to and responded to Girasole when he complained that he did not know where he was going." Appellant's Opening Brief at p. 19. While PUR disputes this version of events, it is ultimately of no

consequence. The allegations stated by Girasole simply do not suggest that Oglesby was acting in such a manner that it was akin to her being willing to perpetuate Girasole's injury.

Finally, Girasole argues that the statute provides that an equine participant shall act in a safe and responsible manner at all times to avoid injury to the participant and others and to be aware of risks inherent in equine activities, and that there is zero evidence that Girasole acted unsafely or irresponsibly. § 27-1-727(2). As this Court has previously stated,

> Exactly how the Legislature envisioned subsection (2) as an exception to the general limitation on the liability of equine activity sponsors is unclear. In light of the Legislature's express policy statement, we surmise that the intended effect of this provision is to retain liability for equine activity sponsors when a participant acts in a safe and responsible manner but remains totally ignorant of the risks inherent in equine activities.

McDermott, 2005 MT 293, ¶ 17. The intent of PUR's waiver is to provide notice of the inherent risks of horseback riding. PUR has never argued that the waiver would immunize it from suit. Rather, PUR maintains that Girasole's injury from Reba's stumble resulted from an inherent and unavoidable risk of horseback riding. Girasole cannot argue that he was ignorant of the inherent risks, as he was explicitly placed on notice when he was presented with and signed the waiver. His appeal to § 27-1-727(2) only strengthens PUR's position.

VII. CONCLUSION

Montana's outdoor traditions have long drawn visitors from across the globe seeking authentic Western experiences, including horseback riding. The legislature, in enacting the Equine Activities Act, struck a careful balance between preserving these opportunities and protecting public safety. The Act recognizes an essential truth: that despite best practices and precautions, certain risks are inherent to horseback riding and cannot be eliminated.

To accept Girasole's position would effectively nullify the Act's careful framework, forcing equine activity sponsors to become *de facto* insurers against any injury involving an inherent risk. Such a result would make it practically impossible for Montana's ranches, outfitters, and guides to continue offering these cherished experiences to visitors and residents alike. The District Court's well-reasoned application of the Act should be affirmed, preserving both the letter of the law and the spirit of Montana's outdoor heritage.

DATED this 12th day of February, 2025.

CHRISTIAN, SAMSON & BASKETT, PLLC

/s/ W. Bridger Christian
W. Bridger Christian
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, we the undersigned hereby certify that the foregoing Appellee's Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word is 7,478 words, excluding the caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 12th day of February, 2025.

CHRISTIAN, SAMSON & BASKETT, PLLC

/s/ W. Bridger Christian
W. Bridger Christian
Attorney for Appellee

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, in accordance with Rule 10(2) of the Montana Rules of Appellate Procedure, this 12th day of February, 2025, I served a true and correct copy of the foregoing document on the following parties via U.S. mail and e-filing:

Joseph Cook
Philip McGrady
HEENAN & COOK, PLLC
1631 Zimmerman Trail, Ste. 1
Billings, MT 59102
joe@lawmontana.com
philip@lawmontana.com

DATED this 12th day of February, 2025

CHRISTIAN, SAMSON & BASKETT, PLLC

/s/ W. Bridger Christian
W. Bridger Christian
Attorney for Appellee

CERTIFICATE OF SERVICE

I, William Bridger Christian, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-12-2025:

Philip McGrady (Attorney)
1631 Zimmerman Trail
Suite 1
Billings MT 59102
Representing: Gerard Girasole
Service Method: eService

Joseph Patrick Cook (Attorney)
1631 Zimmerman Trail, Ste. 1
Billings MT 59102
Representing: Gerard Girasole
Service Method: eService

Electronically Signed By: William Bridger Christian
Dated: 02-12-2025