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

GERARD GIRASOLE,

Plaintiff and Appellant,

v.

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

Defendant and Appellee.

APPELLANT'S REPLY BRIEF

On appeal from the Fourth Judicial District Court Missoula County,
District Court No. DV-32-2022-1300
Hon. Leslie Halligan, Presiding

Appearances:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

The Plaintiff-Appellant, Dr. Gerard Girasole (hereinafter "Girasole") provides this reply to the Response Brief of Paws Up Ranch, LLC d/b/a The Resort at Paws Up (hereinafter "Paws Up"):

I. DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

As concluded by this Court, "'persons responsible for equines,' § 27-1-725, MCA (1995)…operate pursuant to a general negligence standard." *Oberson v. USDA*, 2007 MT 293, ¶ 20, 339 Mont. 519, 171 P.3d 715. Thus, an equine activity sponsor or equine professional who is negligent and causes foreseeable injury to a participant bears responsibility for that injury. Mont. Code Ann. § 27-1-725.

To apply and restrict liability, Montana's Equine Activities Act requires that the inherent risk must be the ***sole cau*se** of injury:

> It 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. It 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.

Mont. Code Ann. § 27-1-725 (emphasis added).

When the inherent risk is combined with specific facts not typical of the activity, the risk may or may not be inherent, and this should be resolved by the jury. *See Cooperman v. David*, 214 F.3d 1162, 1167 (10th Cir. 2000) ("While at some

level all sports have inherent risks, as we add in the facts of a specific risk encountered the risk may or may not be inherent"); *see Halpern v. Wheeldon*, 890 P.2d 562, 566 (Wyo. 1995) (concluding that when genuine issues of material fact exist, it is proper to present the issue to the jury of whether a risk is inherent to a particular activity).

This case is distinguishable from the two other cases previously considered by this Court in interpreting Montana's statutory scheme specific to equine activities. *See McDermott v. Carie*, 2005 MT 293, 329 Mont. 295, 124 P.3d 168 (affirming a jury verdict in favor of the defendant while considering the issue of the admissibility of a redacted liability waiver)[1]; *Fishman v. GRBR, Inc.*, 2017 MT 245, 389 Mont. 41, 403 P.3d 660 (affirming summary judgment to defendant when plaintiff admitted the application of the statutory exceptions and his only claim was that a cinch loosened during a ride, causing injury).

Unlike *Fishman*, the facts here involve specific allegations against the equine activity sponsor supported by an expert witness opining that Paws Up violated the standard of care on multiple fronts. Girasole has not merely alleged that his saddle was not cinched tightly enough. Rather, Girasole met his burden in setting forth specific, material facts that his injury was not caused by an inherent risk.

[1] Girasole had a pending motion in limine before the district court to exclude Paws Up's Assumption of Risk and Indemnification Agreement on the grounds that it was a contract of adhesion and is illegal under Montana law. (Doc. 24, Pl.'s Mot. in Limine and Br. in Supp.).

While it is true that Girasole was injured while riding a horse that stumbled, that alone is insufficient to determine that his injury was caused solely by an inherent risk. Greater specificity and consideration is required. Girasole presented evidence (much of it disputed) that included: (1) the guide did not check the girth on Girasole's horse, contributing to an unbalanced ride; (2) as a novice rider, Girasole was unaccustomed to narrow single-track wilderness trails and needed a guide in front leading the way; (3) Girasole was not guided or led by the equine activity sponsor in contravention of Paws Up's policies; (4) the guide violated the Paws Up Wrangler Manual by not stopping the ride and helping Girasole when he told his guide something was wrong with his horse; (5) the horse's unusual behavior of turning her head around, not wanting to go forward and trying to turn back to the barn were beyond Girasole's ability to independently ride the horse; (6) the guide failed to recognize Girasole's wants and abilities; and (7) the guide was more concerned on working with her "problem horse" than leading the guests. Appellant Exh. 9, Expert Report of Linda Rubio, pp. 7-17. These facts are more than sufficient to defeat summary judgment. *See Sapone v. Grand Targhee, Inc.*, 308 F.3d 1096, 1103–05 (10th Cir. 2002) (noting, in part, defendant's concession that providing children horseback riding instructions before embarking on a trail ride was not only a duty but a matter of "common sense").

Here, Paws Up's equestrian manager similarly conceded that it was also "obvious" that Paws Up has an obligation to pay attention to the needs of its guests. Appellant Exh. 6, Jackie Kecskes Depo., 84:2-19; 85:11-21. As concluded in *Sapone*, the equine activity sponsor's failure to fulfill certain obligations "may constitute violations of a duty separate and distinct from those embedded in the inherent risks of horseback riding." 308 F.3d at 1104-1105 (citing *Carden v. Kelly,* 175 F.Supp.2d 1318 (D.Wyo. 2001) and *Madsen v. Wyoming River Trips, Inc.,* 31 F.Supp.2d 1321, 1328-1329 (D.Wyo. 1999) (stating that "getting bucked off of a horse, in certain situations, may be an inherent risk to horseback riding" and further noting that "[i]f the duty question is framed incorrectly, the legislature's intent to allow a cause of action for negligence will be lost")).

This Court should similarly conclude that the question, when framed with the requisite specificity, might lead a reasonable jury to conclude that Girasole's injuries were the result of negligence that is not characteristic of the risks of horseback riding. *See Sarpone*, 308 F.3d at 1105. It is easily foreseeable that a horse could stumble on a newly cut trail, with a novice, unbalanced rider, being led by another guest (not the guide) while the guest complains to the guide about not knowing where to go and his horse being uncooperative.

Since reasonable minds could differ, foreseeability determination should **not** be made as a matter of law. *See Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 42, 342

Mont. 335, 181 P.3d 601 ("the issue of whether an intervening cause was foreseeable or not is a question of fact that is normally properly left to the fact-finder for resolution"); *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 39, 296 Mont. 25, 987 P.2d 351 (question of foreseeability may be determined only when "reasonable minds could reach but one conclusion"). Girasole should be entitled to present the facts to the jury since reasonable minds could reach different conclusions.

It is further undisputed that Girasole was a beginning horseback rider:

> Q. What did you understand his riding level to be?
> A. Basic, beginner. That's what he told me. He said he had, you know, ridden at different ranches and done different trail rides and things like that but nothing extensive.

Appellee Appendix, p. 28, Anna Oglesby Depo., 42:14-17. As a beginner, Paws Up's own written procedures required the ride to be adjusted to the lowest rider's ability: "[w]e gear our rides to the lowest riding ability so typically these rides are a walk only, nose to tail ride." Appellant Exh. 9, Linda Rubio Expert Report, p. 12. Paws Up did not follow this procedure; instead, the guide pointed Girasole and his wife, Elise, in the general direction on a newly cut trail. Appellant Exh. 7, p. 46, Excerpts of Pl.'s Responses to Def.'s First Combined Disc. Requests.[2]

[2] The original pagination to Exh. 7 of Appellant's Index -- Plaintiff's Responses to Defendant's First Discovery.230630 -- was inadvertently removed when added to the Appellant's Appendix and has resulted in imprecise citation in the Appellant's Opening Brief to the answers to Interrogatory No. 8, which are found in the Appellant's Appendix at Appx., 45-50 of 87.

The guide, Anna Oglesby, testified that the trail was newly cut and she had been on it once:

> Q. Do you recall telling them it was a newly cut trail?
> A. I'm sure I did. I don't recall it specifically, though.
> Q. Why are you sure of that as we sit here today?
> A. I mean, it was, that's true, and I likely just did say that, making conversation, you know, you just find things to talk about. If she did ask me specifically, Where is the trail, I would be like, Oh, it's right there, maybe it's because it's a newly cut trail. I'm not a hundred percent sure on that, though.
> Q. How many times had you used the trail prior to August 21st of 2022?
> A. I think I had been on it one time.

Appellant Exh. 11, Appellant Supplemental Appendix, Anna Oglesby Depo., 63:25-64:16.

It is further undisputed that Paws Up's two-hour trail rides are supposed to start as nose-to-tail rides:

> Q. So two-hour trail rides, do they always start as a nose-to-tail ride?
> A. That's correct.

Appellant Exh. 6, Jackie Kecskes Depo., 60:21-23. In spite of this policy, the Girasole two-hour trail ride started with a guest leading the way while the guide rode

off to the side and worked with her problem horse. Appellant Exh. 7, p. 46, Excerpts of Plaintiff's Responses to Defendant's First Combined Discovery Requests.

Girasole's discovery responses, which he was questioned about extensively during his deposition, described the moments in detail:

> The guide pointed Plaintiff and Elise in the general direction, but there was no observable trail. Problems started immediately. Plaintiff's horse started trying to turn back to the barn, flipping its head backwards repeatedly. Plaintiff shouted to the guide, "what's the deal here? This horse doesn't want to go."
>
> The guide responded that the horse "probably doesn't know the trail." The guide also told the group that she had never been on the trail, and it was "newly cut." Plaintiff and Elise could not see any identifiable trail to follow.
>
> Plaintiff's horse continued turning its head back in the direction of the corral and being generally uncooperative. Plaintiff continued making the guide aware of his horse's agitation.
>
> The guide, still riding her problem horse off to the side, never came over to inspect Plaintiff's horse or offer any instruction other than telling Plaintiff to follow Elise's horse, which was now in the lead.
>
> At no point in the ride did the guide lead the group, instead having Plaintiff and Elise alternate the lead position while she rode off to the side.
>
> Compounding what was already becoming an increasingly frightening ride to Plaintiff and Elise was the fact that the "newly cut" trail was not noticeable. Elise had to ask repeatedly "where do I go?"
>
> Meanwhile, Plaintiff continued expressing his concern to the guide, saying "excuse me, what do you think is wrong with my horse?" Plaintiff's horse was not paying attention to the trail, and

> was continuing to turn its head back to the barn, as well as stopping, which required Plaintiff to prod the horse forward.
>
> The guide remained oblivious to Plaintiff's and Elise's concerns and questions, pushing the group forward on no apparent trail through forest and shrubbery, with the guests in the lead.

Appellant Exh. 7, pp. 46-47, Excerpts of Plaintiff's Responses to Defendant's First Combined Discovery Requests. Not long after, Girasole's horse stumbled, went down to its knees, and when it regained its footing and moved upward, fractured Girasole's pelvis. *Id.* at p. 48.

Girasole's life-changing injury could have been prevented had the guide been following Paws Up's policies and actually leading the group in which the stumble was preceded by Girasole complaining about his horse acting strangely while Girasole did not know where to go. There was an alternative, safer method, which was precisely what Girasole's expert witness opined -- Girasole (a novice rider) was "unaccustomed to the narrow single-track wilderness trails," and he "needed to be led by a Trail Guide that knew where they were going…[and] that was in front of the ride and leading the ride." Appellant Exh. 9, Linda Rubio Expert Report, p. 13.

Paws Up also claims that "the undisputed facts show that Oglesby selected a horse routinely ridden by children," and that Girasole's expert testified that Reba neither had a neurological problem nor was barn sour. Appellee's Answer Brief, pp. 22-23. This argument completely ignores Linda Rubio's opinions that Reba's unusual conduct on the Girasole ride should have alerted the guide to a problem:

> Reba was not a horse that looked back, trying to turn back to the barn. Reba's behavior on August 21,2021 was out of the ordinary.
>
> …
> Reba's unusual behavior of turning her head around, not wanting to go forward and trying to turn back to the barn were way beyond Dr. Gerard's ability's to handle as a novice/beginner rider.

Appellant Exh. 9, Linda Rubio Expert Report, p. 16. Accordingly, Reba's unusual behaviors on the Girasole ride should have put the guide on notice of issues, which was precisely what Girasole was yelling to the guide. Instead, the guide ignored his concerns and did nothing. Appellant Exh. 7, pp. 46-47, Excerpts of Plaintiff's Responses to Defendant's First Combined Discovery Requests.

Girasole's expert witness also rebutted Paws Up's contention that a tripping horse is an inherent risk of the sport:

> Q. Would you agree with me that horses, like human beings, are susceptible to tripping?
> A. You know, that's another thing. How many times did you trip yesterday? How many times did you trip this year? Tripping isn't something I do every day. And I'm concerned if I trip. And if I'm riding a horse and it trips, I'm concerned, because horses are very sure-footed. And you know what, they don't want to trip, which is why they come up so fast after they do trip.
> But there are things that can contribute to a horse tripping. If I were riding a horse and it tripped and I was walking slowly and I was on even ground, I would be concerned.

Appellant Exh. 9, Linda Rubio Depo., 42:4-20.

Additionally, a disputed fact exists as to whether Girasole's guide was working with a "problem horse" on the day of the ride in question. Girasole testified as follows:

> 5 Q. Okay. The next paragraph: The guide then mounted
> 6 her horse and plaintiff asked, Is that your horse. The guide
> 7 said, No, **offering that it was a problem horse that she was**
> **8 trying to get back into circulation and that she intended to**
> **9 train the horse during the guided trail ride**.
> 10 Did I read that right?
> 11 A. 100 percent.
> 12 Q. Okay. Were you concerned for your safety at that
> 13 point when you heard the words "problem horse"?
> 14 A. I wasn't concerned about her -- a problem horse. I
> 15 wasn't on that horse. My concern was that she was -- she was
> 16 training a horse during my time riding and why was she
> 17 training a horse…

Appellant Exh. 12, Appellant's Supplemental Appendix, Gerard Girasole Depo., 13:5-17 (emphasis added). As Girasole testified, his concern was that the guide was not paying attention to him, the guest. Even Paws Up's expert concedes that working with a "problem horse" during a guided ride would be unprofessional: "it would be unprofessional for Paws-Up to utilize problem horses in any phase of the equestrian activities." Appellant Exh. 13, Appellant's Supplemental Appendix, Wayne Hipsley Expert Report Excerpt. Moreover, Anna Oglesby's reference to "problem horses" in her resume reflects this was terminology that she used and further supports Girasole's version of events. *See* Appellant Exh. 9, Expert Report of Linda Rubio,

p. 26 (Oglesby's resume providing "patient working with problem horses…"). This disputed fact is reflected from Rubio's deposition testimony:

> A. Well, it's what Anna said. Anna said, I'm riding a problem horse. I'm going to be training him while you and your wife are riding.
> Q. Is that what Anna testified to in her deposition?
> A. No.
> Q. That's what Gerard says Anna said, correct?
> A. Yes. But how would Gerard know the term "problem horse"? To me, that was a real -- How would he know the word "problem horse"?
> Q. Do you know anything about the horse Anna was riding that day?
> A. The horse's name is Boots. He's a leased horse. I looked at the daily sheets, whatever they call them, for the season. I saw that in May, he had been ridden by wranglers, and then he was put in distribution or whatever. People were always riding him. He was never written down as a teen, tween, kid horse.
> And then later in the season, a little bit before this incident, he -- I know there's another wrangler -- I believe her name is Hannah.
>
> Hannah had ridden him, and so somehow he had been put back under the guidance of the wranglers to be worked with.

Appellant Exh. 14, Appellant's Supplemental Appendix, Linda Rubio Depo., 56:3-57:3.

It is undisputed that Girasole and his wife requested and anticipated an easy, safe ride, especially since Elise Girasole had recently had a lumbar fusion. Appellant

Exh. 3, Elise Girasole Depo., 16:2-25. Indeed, the unique nature of the opportunity for the consumer may impact an assessment of what risks are properly deemed atypical. *See Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1291 (10th Cir. 2018) (noting that the choices of the consumer are a consideration in determining what risk is inherent to the nature of the plaintiff's activity).

Paws Up's arguments in regards to the exceptions under Mont. Code Ann. § 27-1-727 ignores this Court's precedent that the equine liability statute has a general negligence standard. *See Oberson*, ¶ 26. Paws Up contends that Girasole "failed to show that an exception under § 27-1-727(3)(a) applied." Appellee's Answer Br., p. 19. Girasole's primary argument is that the exceptions are inapplicable because Girasole's injury was not the sole result of an inherent risk of horseback riding and the jury should make that determination after hearing all of the evidence. Even assuming that Girasole has the burden of proving the exceptions under Mont. Code Ann. § 27-1-727, summary judgment is still inappropriate. Girasole's disputed facts would be applicable under the exceptions, which is demonstrated by the fact that Paws Up's argument reiterates the exact same facts utilized by Girasole in claiming that there are disputed issues of material fact that the injury was not caused by inherent risks of horseback riding.

Paws Up also suggests that Girasole has waived any argument about the inapplicability of the § 27-1-727(3)(a) exceptions. Appellee's Answer Br., p. 21. This argument is without merit as the disputed facts for consideration do not change. Girasole has maintained that the facts and his injuries need not be considered in the context of the exceptions because his injuries were not caused by the risks inherent in horseback riding. But he has still presented a multitude of disputed facts which would create disputed issues under Mont. Code Ann. § 27-1-727(3)(a)(ii), (iv). However, by this Court's precedent and the language of the statute, if the risks posed by the precise facts are not inherent to the sport of horseback riding, then the law requires a traditional negligence standard be applied. Paws Up can then argue to the jury that the exceptions are applicable as an affirmative defense.

A stumbling horse should be viewed in the context of the allegations of negligence, including the failure to properly inspect the equipment before starting the ride, and then taking off on a newly cut trail in which the guests are left to wander off through the woods on their own without any assistance from the guide working with a problem horse.

In *Kovnat v. Xanterra Parks & Resorts*, the Tenth Circuit concluded that failure to address uneven stirrups created genuine issues of material fact:

> We in turn conclude that a jury could reasonably find that the risks posed by this set of facts are not inherent to the sport of horseback riding. As Kovnat has consistently argued throughout these proceedings, and as at least one of Xanterra's

> own wranglers conceded during discovery, uneven stirrups are visually noticeable and necessarily warrant corrective action.
> …
> We conclude that, under either of these factual scenarios, Kovnat would have been exposed to an atypical risk, rather than a risk inherent in the sport of horseback riding. In turn, Xanterra would not be immune from liability under the WRSA. More specifically, Kovnat would not have assumed such an atypical risk, and Xanterra in turn would have had a duty to eliminate any such atypical risks. Consequently, we conclude the district court erred in granting summary judgment in favor of Xanterra on Kovnat's negligence claim, to the extent it was based on her allegation that she was permitted to ride with uneven stirrups.

770 F.3d 949, 960 (10th Cir. 2014). A similar conclusion should be reached here.

Girasole made his guide aware of problems that he was encountering, and contrary to Paws Up's own written procedures, the guide did not stop the ride to assist him or offer any sort of assistance:

> 6 [S]he could also have come over and done what
> 7 she's supposed to do and take care of me and be my guide and
> 8 not just ride her horse to the side and be so ambivalent that
> 9 she didn't even pay attention to me and she just kept telling
> 10 Elise to keep going. And my wife was screaming, Where do we
> 11 go; where do we go. There was no trail, so -- and then
> 12 within a matter of time -- you don't know what I went
> 13 through. In a matter of time, this horse went down, and it
> 14 was like a freaking nightmare.
> 15 So you keep saying could I have gotten off the
> 16 horse. Yeah, you could get off the horse. But the point of
> 17 the matter is nothing was done at that time. Your guide did
> 18 not assess me, did not come over to my horse, did not even
> 19 care.

Appellant Exh. 8, Gerard Girasole Depo., 20:2-19.

Paws Up ends its arguments with several passing blows, one of which is that "certain risks are inherent to horseback riding and cannot be eliminated." Appellee's Answer Br., p. 29. That argument ignores the disputed facts in this case. Girasole's expert witness (regardless of whether she provided a rebuttal report) provided numerous examples of conduct that was below the standard of care, including violations of Paws Up's own internal policies.

Paws Up's other final, unsubstantiated statement is that "[t]o 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." Appellee's Answer Br., p. 29. This over-the-top statement ignores this Court's own statement that "persons responsible for equines, § 27-1-725, MCA (1995)…operate pursuant to a general negligence standard," (*Oberson*, ¶ 20), as well as the language of the Equine Activities Act which requires that an injury result solely from an inherent risk. Moreover, it ignores Paws Up's concessions that it has a responsibility to provide its guests with a safe horseback riding experience. Adopting Paws Up's version of the law would ensure that Montana's equine activity sponsors have no incentive to minimize the risks of horseback riding. All that an equine activity sponsor would have to do is what they did here – charge consumers such as Girasole for a "guided two-hour horseback ride" while the guide completely

ignores any concerns and complaints of its guest who leads himself through the woods of Montana on an uncooperative horse.

CONCLUSION AND RELIEF SOUGHT

Nowhere in Montana's Equine Liability Act does it eliminate liability for the negligence of an equine professional. Instead, the Act recognizes that despite best efforts, there are inherent risks that can *solely* be the cause of injury to a rider, and when that occurs, liability is precluded. However, that does not mean equine professionals are blanketed with absolute immunity for all *inherent risks*. Under the Act, if an equine professional's negligence needlessly increases the likelihood of an inherent risk causing an injury—the injury was caused by a combination of negligence and inherent risk—clearly they should be held accountable.

Here, Girasole has provided sufficient evidence to explain how Paws Up's negligent conduct contributed to his horse stumbling. Girasole should be able to present his explanation to a jury that the guide's negligent acts were not inherent to horseback riding and his injuries were not solely caused by an inherent risk. This Court should reverse the district court's grant of summary judgment and remand the case to the district court with instructions to schedule the matter for trial so that a jury can determine the disputed issues of material fact.

DATED this 26th day of February 2025.

HEENAN & COOK, PLLC

By /s/ *Philip McGrady*
Philip McGrady
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to L. R. 7.1(d)(2)(E), I certify that this **Appellant's Reply Brief** is printed with proportionately spaced Times New Roman text typeface 14 point; is double spaced; and the word count, calculated by Microsoft Word for Microsoft Office, is less than 5,000 words, excluding the Caption and Certificate of Compliance.

DATED this 26th day of February 2025.

HEENAN & COOK

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February 2025, a true and correct copy of the foregoing document was served upon the following:

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I, Philip McGrady, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-26-2025:

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