IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JUDY DILLEY,

Plaintiff,

v. OPINION & ORDER

HOLIDAY ACRES PROPERTIES, INC. and STEVE KRIER, 16-cv-91-jdp

Defendants.

Plaintiff Judy Dilley was injured when she fell from a horse provided by defendant Steve Krier's business, Holiday Stables, which is located on land owned by defendant Holiday Acres Properties, Inc. Dilley asserted claims against Holiday Acres and Krier, alleging that they failed to ensure her safety.

The court granted summary judgment in favor of Holiday Acres because Wisconsin's equine immunity statute barred Dilley's claims against Holiday Acres. Dkt. 103. And because the parties' submissions for Holiday Acres' summary judgment motion showed that the equine immunity statute applied to Krier as well, the court directed Dilley to explain why the court should not grant summary judgment in favor of Krier under Federal Rule of Civil Procedure 56(f). Dilley has filed her response. Dkt. 117.

The court will grant summary judgment in favor of Krier. Krier is as an equine professional who provided a horse to Dilley, so the equine immunity analysis for Krier differs slightly from the one for Holiday Acres. But still, none of the exceptions under the statute applies here given the facts as presented, so Krier is entitled to immunity. The court will

therefore dismiss Dilley's claims against Krier. All other pending motions are denied as moot, and the case is dismissed.

UNDISPUTED FACTS

The following facts are undisputed except where noted.

Krier operates stables and gives horse-riding tours to his customers. Krier's business, called "Holiday Stables," is not a separate business entity. Dkt. 99. Dilley rented a horse from Krier.

The accident happened during a horse-riding tour. Dilley rode a horse named Blue, and Nicole Kremsreiter, a tour guide who worked for Krier, rode a horse named Roany. Kremsreiter rode ahead of Dilley, and Krier was not present during the accident. Dilley fell from Blue and was injured. According to Dilley, Blue got close to Roany, Roany kicked Blue, and Blue to reared up, throwing Dilley backward. Dkt. 1, ¶ 19 and Dkt. 65, ¶ 63. The precise cause of Dilley's fall is disputed, Dkt. 39 (Kremsreiter Dep. 40:1-18) and Dkt. 65, ¶ 63, but in considering summary judgment for Krier, the court will credit Dilley's version.

Dilley contends that Krier and Kremsreiter acted negligently in various ways, and she adduces evidence relating to four issues: (1) whether Dilley was offered a helmet; (2) whether she received instructions on how to ride a horse; (3) whether Krier properly fit the stirrups on Blue; and (4) whether Kremsreiter ignored Dilley when Dilley said she could not keep a hold on the reins. Dkt. 65, ¶ 53-55, 57-59. Some of the underlying facts are disputed, but again in this context the court will credit Dilley's version of the facts.

The court has subject matter jurisdiction on the basis of diversity under 28 U.S.C. § 1332. The parties are diverse and the amount in controversy exceeds $75,000. Dkt. 22 and Dkt. 103, at 3.

ANALYSIS

A. Wisconsin's equine immunity statute

A district court must grant summary judgment when no genuine issue of a material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The party who seeks to withstand summary judgment "must come forward with specific facts showing that there is a genuine issue for trial." *Armato v. Grounds*, 766 F.3d 713, 719 (7th Cir. 2014) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Rule 56(f) allows a district court to enter summary judgment without a formal motion from a party, on grounds not raised by a party, provided that the adverse party had a notice and reasonable opportunity to respond. *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 603 (7th Cir. 2015).

The court will grant summary judgment on all of Dilley's claims against Krier, which are negligence, negligence per se, and "Willful, Wanton & Malicious Conduct." Dkt. 21, ¶¶ 26-36. For the reasons discussed below, Wisconsin's equine immunity statute, Wis. Stat. § 895.481, precludes her claims against Krier.

Wisconsin's equine immunity statute extends immunity to equine professionals who receive compensation in exchange for arranging equine activities. The statute, in pertinent part, provides:

> Except as provided in subs. (3) and (6), a person, including an equine activity sponsor or an equine professional, is immune from

> civil liability for acts or omissions related to his or her participation in equine activities if a person participating in the equine activity is injured or killed as the result of an inherent risk of equine activities.

§ 895.481(2). Two subsections, §§ 895.481(3) and (6), provide exceptions to the general rule of immunity under the statute. One subsection concerns "products liability laws"; it is irrelevant here. § 895.481(6). The one that matters, § 895.481(3), states that a party is not immune if it "does any of the following":

> (a) Provides equipment or tack that he or she knew or should have known was faulty and the faulty equipment or tack causes the injury or death.
>
> (b) Provides an equine to a person and fails to make a reasonable effort to determine the ability of the person to engage safely in an equine activity or to safely manage the particular equine provided based on the person's representations of his or her ability.
>
> (c) Fails to conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property that he or she owns, leases, rents or is otherwise in lawful control of or possession.
>
> (d) Acts in a willful or wanton disregard for the safety of the person.
>
> (e) Intentionally causes the injury or death.

So the questions here are whether Krier is within the scope of the grant of immunity, and if so, whether any exception applies.

Krier is within the scope of the immunity statute. Krier satisfies the statutory definition of "equine professional" because he receives compensation for allowing customers to rent horses and equipment from him for horseback riding. § 895.481(1)(d). Horse riding is an equine activity. § 895.481(1)(b).

Dilley contends that the equine immunity statute should not apply for two reasons. First, Dilley contends that she was not injured because of an inherent risk of horseback riding, and thus the statute does not apply. Dilley has adduced no evidence of any willful or wanton misconduct by Krier or Kremsreiter. Dilley's allegations are that Krier and Kremsreiter conducted themselves negligently, by, among other things, improperly adjusting her stirrups.

Dilley argues that improperly fitted stirrups are not inherent risks of horseback riding, and thus the failure to properly fit stirrups is conduct not immunized by the statute. In support, she relies on cases from distant jurisdictions that have nothing to do with Wisconsin's equine immunity statute. *See* Dkt. 117, at 7-8. (citing *Kovnat v. Xanterra Parks & Resorts*, 770 F.3d 949, 960 (10th Cir. 2014) (Wyoming Recreational Safety Act*); Frank v. Mathews*, 136 S.W.3d 196, 204 (Mo. Ct. App. 2004) (Missouri's Equine Liability Act); *Corica v. Rocking Horse Ranch, Inc.*, 923 N.Y.S.2d 739, 742 (N.Y. App. Div. 2011) (common law assumption of risk)). But those cases are inapposite here because the applicable statutes are different. *Kovnat* does not apply because, under the Wyoming Recreational Safety Act, an inherent risk of sport is a question of fact. 770 F.3d 949, 958 (10th Cir. 2014). By contrast, Wisconsin's equine immunity statute expressly defines inherent risks of equine activities to include "[t]he potential for a person participating in an equine activity to act in a negligent manner." § 895.481(1)(e)(4). *Frank* does not apply here because Missouri's Equine Liability Act does not exempt equine professionals from negligence; indeed, a person's failure "to use that degree of care that an ordinarily and prudent person would use under the same or similar circumstances"—i.e., negligence—is one of the enumerated exceptions to immunity. 136 S.W.3d at 203. Wisconsin's equine statute immunizes professionals against claims of negligence, and it has no similar exception. *Kangas v. Perry*, 2000 WI App 234, ¶¶ 4, 11, 239

Wis. 2d 392, 620 N.W.2d 429 (reasoning that Wisconsin's equine immunity statute applies to negligence claims against equine professionals). *Corica* does not apply here because assumption of risk is not an issue raised by any party.

Dilley also relies on *Willeck ex rel. Willeck v. Mrotek, Inc.*, 2000 WI App 116, 235 Wis. 2d 278, 616 N.W.2d 526 for the proposition that equine immunity statute is not absolute. But *Willeck* is not helpful here because the issue there was whether the defendant assessed the customer's riding ability. *Id*. ¶ 4. Here, Krier did assess Dilley's ability to ride a horse, and gave her Blue, the most docile animal available. Besides, *Willeck* has no precedential value under Wisconsin law because it was an unpublished opinion by the Wisconsin Court of Appeals before July 1, 2009. *See* § 809.23(3). As the court explained in its previous order, Wisconsin's immunity statute forestalls negligence claims because it expressly recognizes that the potential for negligent conduct by equine professionals is an inherent risk of equine activities. Dkt. 103, at 9.

Dilley's second argument is that the exception under § 895.481(3)(b) applies to Krier. As the court explained, the exception applies when a person fails to make a reasonable effort to determine (1) whether the potential rider can safely engage in an equine activity; or (2) whether the potential rider can safely manage the particular equine provided. Dkt. 103, at 10; *see also Hellen v. Hellen*, 2013 WI App 69, ¶ 21 n.8, 348 Wis. 2d 223, 236, 831 N.W.2d 430. So the issue is whether Krier failed to make a reasonable effort to make either of the two assessments. But Dilley veers off the issue, contending that the exception should apply because:

> Krier and Kremsreiter failed to instruct Dilley on how to ride a horse;
>
> A new rider should not be allowed to ride a horse when she is scared and not confident;

> An equine professional should first confirm that she understood how to handle the horse;
>
> Krier and Kremsreiter failed to offered a helmet;
>
> Krier and Kremsreiter improperly installed stirrups on Blue; and
>
> Kremsreiter ignored Dilley's warning that she could not reach the rope on Blue while going downhill.

None of these arguments establishes that Krier failed to determine Dilley's ability to engage in safe horseback riding or her ability to manage Blue. Dilley appears to equate failure to make "a reasonable effort to determine the ability of the person," § 895.481(3)(b), with any negligent act, but her arguments have no basis in the statutory text or case law.

Fundamentally, Dilley asserts that Kreir and his employee were negligent in arranging and conducting the ride during which Dilley was injured. But Wisconsin has a particularly broad equine immunity statute, and it bars such claims.

B. Other matters

Three motions are pending before the court: (1) Holiday Acres' motion for a protective order, Dkt. 86; (2) Dilley and Holiday Acres' joint motion to amend the caption, Dkt. 99; and (3) Holiday Acres' motion for leave to file a reply to Dilley's response to the court's Rule 56(f) notice, Dkt. 119. Because the court will dismiss all of Dilley's claims, these motions are moot.

In sum, the court will dismiss all of Dilley's claims under Wisconsin's equine immunity statute. No claim remains. The court will direct the clerk of court to enter judgment in favor of defendants and close the case.

ORDER

IT IS ORDERED that:

1. Summary judgment is GRANTED in favor of defendant Steve Krier under Federal Rule of Civil Procedure 56(f).

2. Defendant Holiday Acres Properties, Inc.'s motion for a protective order, Dkt. 86, is DENIED as moot.

3. Plaintiff Judy Dilley and defendant Holiday Acres Properties, Inc.'s joint motion to amend the caption, Dkt. 99, is DENIED as moot.

4. Defendant Holiday Acres Properties, Inc.'s motion for leave to file a reply to Dilley's response to the court's Rule 56(f) notice, Dkt. 119, is DENIED as moot.

5. All of plaintiff's claims are DISMISSED with prejudice.

6. The clerk of court is directed to enter judgment in favor of defendants and close the case.

Entered July 6, 2017.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge