**SUPREME COURT – STATE OF NEW YORK**
**TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

***Hon. Carmen Victoria St. George***
**Justice of the Supreme Court**

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**FRANCINE HARRISON,**

**Plaintiff,**

**-against-**

**MINIERI'S PARKVIEW RIDING CENTER, INC. d/b/a PARKVIEW RIDING CENTER,**

**Defendant.**

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**Index No.**
**610322/2018**

**Motion Seq:**
**005 MD**

**Decision/Order**

The following electronically-filed papers were read upon this motion:

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| Notice of Motion/Order to Show Cause..... | 65-74 |
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Defendant Minieri's Parkview Riding Center (the Riding Center) moves this Court for summary judgment dismissal of the complaint "on the basis that plaintiff has failed to establish a prima facie case of negligence on defendant's behalf, and that there are no issues of fact to be determined at trial." Plaintiff opposes the requested relief.

On November 26, 2017, the plaintiff fell off a horse[1] at the Riding Center and was dragged with her foot caught in the stirrup, causing her various injuries including a broken femur. Specifically, plaintiff generally claims that the horse was "rooting" (thrusting/pulling his head down), and that she had received no instructions on how to respond to this dangerous behavior until the accident occurred.

Defendant claims that it is entitled to summary judgment dismissal because there is insufficient admissible evidence to establish an issue of fact concerning any negligence on defendant's behalf; that plaintiff's execution of the riding instruction agreement and liability release is valid; that the action must be dismissed based on the doctrine of primary/express assumption of risk and also based upon the

[1] The horse's name is Herman.

doctrine of implied assumption of risk, and finally, because plaintiff has failed to establish proximate cause.

"As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***George Larkin Trucking Co. v. Lisbon Tire Mart, Inc.***, 185 AD2d 614, 615 [4th Dept 1992]; see also ***Velasquez v. Gomez***, 44 AD3d 649, 650-651 [2d Dept 2007]).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]). The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***)

In support of its motion, the Riding Center submits, *inter alia*, the pleadings, the deposition transcripts of the plaintiff, the instructor/trainer, and the co-owner/operator of the Riding Center where plaintiff's accident occurred, plus what defendant refers to as a "sign in sheet waiver form."

It is evident that there are material questions of fact raised by the contradictory testimony of the plaintiff and her instructor/trainer concerning how and why the accident occurred. The core question as to how and why the incident occurred turns on the credibility of the witnesses to it: plaintiff and the instructor/trainer (Alexander Dassler).

Mr. Dassler acknowledged that rooting is unsafe behavior and that if he saw that a horse was rooting (pulling sharply and abruptly on the reins to lower its head all the way to the ground[2]), he would change the horse for the lesson; however, Mr. Dassler testified that he has never seen a horse engage in rooting behavior at the Riding Center, nor was Herman rooting at the time of the incident, or pulling his head down in any way, or attempting to come to the center of the ring. Mr. Dassler specifically testified that his "concept of having an issue with riding a horse that I would change a horse because of, is if somebody had major issues such as bucking, rearing, rooting, issues that were unsafe."

Further, Mr. Dassler testified that "[t]he reason that this incident happened was because the rider that particular day [plaintiff] failed to listen to instruction and acted out in an aggressive manner towards the horse which caused the horse to canter while she was unprepared and not listening which that is what caused her to fall off was the fact that she did it without following instruction and without being prepared because she changed what she was doing as per how she was instructed prior." Specifically according to Mr. Dassler, "[t]he rider did not use the crop as it was instructed to use or intended to use, she used it at a much higher severity and against instruction, which is why she fell off, because she was unprepared for the result of using the crop in that manner. The issue was not the horse, the issue was the

[2] Dassler transcript, p. 51: lines 23-25.

rider." He testified that plaintiff did not follow instructions, and insisted that she was going to "do it her way." He further stated that plaintiff was not balanced in the saddle when the horse stepped off into the canter, "because she twisted her body to hit the horse on the hind end. If she had taken instruction correctly and tapped the horse on the shoulder, her center of gravity and her balance would have been centered at her core, which is how you ride."

In direct contravention to Mr. Dassler's testimony, the plaintiff testified that Herman the horse exhibited some rooting behavior at a riding lesson the week prior to the subject incident, while Mr. Dassler was administering instruction during that prior lesson. Plaintiff further testified that on the occasion of the riding lesson the week prior to the accident, Mr. Dassler did not stop the lesson, change horses, or give any guidance to the plaintiff on how to deal with the rooting behavior. Plaintiff had never before been on a horse that rooted. Instead, Mr. Dassler put the plaintiff on the same horse one week later, thereby causing her to fall off Herman when he again exhibited rooting behavior. Plaintiff further denied that she failed to heed any instructions, or that she insisted on doing it "her way." She stated that she was told what to do to stop the rooting only moments before the incident occurred, but was unable to implement those instructions in time.

Plaintiff further testified that on the day of the subject incident, she mounted an English style saddle on Herman, as she had the week before, but that she was wearing a Western style boot that slipped all the way through the stirrup, thereby causing her to be dragged. The plaintiff testified that maybe if she was wearing English style boots her right foot would not have slipped forward and through the stirrup. According to plaintiff, Mr. Dassler never told her to wear a different type of boot for English style riding. On the other hand, Mr. Dassler testified that the reason that her foot went completely forward into the stirrup was "because she had her foot very deep in the stirrup instead of on the ball of the foot, her foot, and that her toe went down, which is basic instruction, we constantly tell riders, which is one of the most basic things, if you keep your heels down toes up. . .your foot cannot go into the stirrup because the stirrup is on the ball of the foot." He further testified that he gave the plaintiff those instructions before, during, and in every lesson.

In addition to this testimony that differs in material respects, the co-owner/operator of the Riding Center, Michelle Cordingley, did not witness the subject incident, and she is not a riding instructor. She testified as to the general operation of the Riding Center and described the duties of the riding instructors as being "to meet and greet their clients, discuss the horse that we want for that lesson for that client, give an amazing riding lesson and keep the clients happy." She did not have any written lesson books for the horse or the plaintiff in this action, and she was doubtful that the instructors maintain any notes related to their customers' progress. According to her, Mr. Dassler works for them part-time and has done so for several years prior, including at Ms. Cordingley's sister's riding facility that closed. When her sister's facility closed, Mr. Dassler came to the subject Riding Center. His full-time job is in a warehouse for a drink distributor, and he is paid in cash by the Riding Center. Although Ms. Cordingley testified that Herman the horse does not have any bad habits that she is aware of, she testified that she does not stand at the ring and watch lessons, and she has never ridden Herman. According to her testimony, her instructors "very rarely" ride the horses themselves. Ms. Cordingley also denied that she has seen any of her lesson horses engage in rooting behavior.

After the subject incident, Ms. Cordingley filled out an accident report while speaking with Mr. Dassler, but she did not speak with the plaintiff about the occurrence. Portions of the accident report were read into the record at deposition: "Before she fell she was not listening to trainer and insisting on trying it her way is what she said;" "She was told to hold the crop, not to use it at all, several times and to shorten her reins several times. She did not listen;" "several times told not to tap the horse with the crop but did it anyway." These latter sentences concerning use of the crop seem to contradict Mr. Dassler's testimony that he told the plaintiff to tap Herman on the shoulder with the crop.

The magnitude of the contradictory testimony presented with respect to material issues of fact precludes finding that the defendant has established its *prima facie* entitlement to summary judgment as a matter of law as to its alleged negligence. Likewise, the existing questions of fact as to defendant's negligence necessarily preclude a determination by this Court that the defendant did not proximately cause plaintiff to fall from the horse.

Defendant further asserts that it is entitled to summary judgment dismissal of the complaint because the plaintiff assumed the risks of horseback riding, which include the risk of falling from a horse, being thrown from a horse, or a horse acting in an unintended manner (*see* ***Eslin v. County of Suffolk***, 18 AD3d 698 [2d Dept 2005]).

CPLR § 1411, adopted in 1975, provides in pertinent part that, "[i]n any action to recover damages for personal injury. . . the culpable conduct attributable to the claimant. . . including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant. . . bears to the culpable conduct which caused the damages."

Despite enactment of CPLR § 1411, courts "have held that a limited vestige of the assumption of the risk doctrine—referred to as 'primary' assumption of the risk—survived the enactment of CPLR 1411 as a defense to tort recovery in cases involving certain types of athletic or recreational activities" (***Custodi v. Town of Amherst***, 20 NY3d 83, 87 [2012]). "Since the adoption of CPLR 1411, we have generally restricted the concept of assumption of the risk to particular athletic and recreative activities in recognition that such pursuits have 'enormous social value' even while they may 'involve significantly heightened risks'" (***Id***. at 88, *citing* ***Trupia v. Lake George Central School District***, 14 NY3d 392, 395 [2010]). "Hence, the continued application of the doctrine 'facilitate[s] free and vigorous participation in athletic activities' (***Benitez***, 73 NY2d at 657)[3], and fosters these socially beneficial activities by shielding coparticipants, activity sponsors or venue owners from 'potentially crushing liability' (***Bukowski***, 19 NY3d at 358)[4]" (***Custodi***, ***supra***. at 88). Consistent with this justification each of our cases applying the doctrine involved a sporting event or recreative activity that was sponsored or otherwise supported by the defendant, or occurred in a designated athletic or recreational venue" (***Id***. at 88).

With regard to primary assumption of the risk, "[r]isks in this category are incidental to a relationship of free association between the defendant and the plaintiff in the sense that either party is perfectly free to engage in the activity or not as he wishes. Defendant's duty under such circumstances

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[3] ***Benitez v. New York City Board of Education***, 73 NY2d 650 (1989).
[4] ***Bukowski v. Clarkson University***, 19 NY3d 353 (2012).

is a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (***Turcotte v. Fell***, 68 NY2d 432, 438-439 [1986]). "[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (***Morgan v. State***, 90 NY2d 471, 484 [1997]). "Relatedly, risks which are commonly encountered or 'inherent' in a sport, such as being struck by a ball or bat in baseball, are 'risks [for] which various participants are legally deemed to have accepted personal responsibility'" (***Bukowski v. Clarkson University***, 19, NY3d 353, 356 [2012], *quoting* ***Morgan***, ***supra*** at 484).

On the other hand, an "important counterweight to an undue interposition of the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of reckless or intentional conduct [citation omitted] or concealed or unreasonably increased risks" (***Morgan***, ***supra*** at 485; *see also* ***Benitez***, ***supra*** at 658). "[T]he applicable standard should include whether the conditions caused by the defendant['s] negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport'" (***Morgan***, ***supra*** at 485, *citing* ***Owen v. R.J.S. Safety Equipment, Inc.***, 79 NY2d 967, 970 [1992]). "Participants will not be deemed to have assumed unreasonably increased risks" (***Corica v. Rocking Horse Ranch, Inc.***, 84 AD3d 1566, 1567 [3d Dept 2011]; ***Irish v. Deep Hollow, Ltd.***, 251 AD2d 293 [2d Dept 1998]).

A key criteria for the application of the primary assumption of risk doctrine is the plaintiff's awareness of the risk of harm, and that awareness is to be assessed against his skill, background and experience with the activity (***Maddox v. City of New York***, 66 NY2d 270, 278 [1985]; *see also* ***Morgan***, ***supra*** at 486).

Here, it is apparently undisputed that on the date of her fall from Herman, it was only her second time riding that horse, with an English style saddle/stirrups. According to plaintiff, the defendant assigned Herman to her; plaintiff did not request to ride Herman. Moreover, Mr. Dassler characterized the plaintiff alternately as a "beginner or advanced beginner" and as an "intermediate" rider, but Ms. Cordingley testified that Herman was a horse appropriate for beginners, and her knowledge of the plaintiff's riding abilities led her to classify the plaintiff as "still beginnering," but not a "novice rider."

Most salient is the divergent testimony about whether Herman displayed rooting behavior prior to the date of plaintiff's fall. Mr. Dassler acknowledged that rooting is unsafe behavior and that he would change the horse if he observed that behavior, but he also stated that he never saw any horses at the Riding Center engage in rooting, including Herman. In contrast, as noted, the plaintiff testified that Herman engaged in rooting behavior the week prior to the subject incident, and she was not provided any instruction by Mr. Dassler as to how to deal with that behavior. So, apart from the inherent risks involved in horseback riding, it is conceded by defendant in this case that rooting behavior is dangerous enough to justify changing a rider's horse; therefore, if that behavior manifested itself in the same horse, with the same rider, prior to an incident causing injury to that rider, it would not necessarily constitute a horse acting suddenly in an unintended manner; however, this is a determination that only the trier of fact can make. Accordingly, there exists a triable question of fact as to whether the defendant exposed the plaintiff to an unreasonably increased risk that she was riding a horse that was prone to rooting behavior, which is a risk that plaintiff cannot be deemed to have assumed.

Defendant's sign-in sheet/waiver form annexed to its motion papers is insufficient, as written, to release it from liability. Exhibit H consists of one sheet of paper that is a pre-printed form, at the top of which appears the following language:

> Upon my acceptance of horse and equipment, I acknowledge that 1 assume full responsibility for my safety. I further understand that I ride at my own risk, I agree to hold that above entity, its officers, employees etc. harmless from every and all claim which may arise from injury, which might occur from said horse and/or equipment, in favor of myself, my heirs, representatives, or dependents. I understand that the stable does not represent or warrant the quality or character of the horse furnished.

Underneath that paragraph appear lines for the names and addresses of the riders. Approximately twenty-eight (28) different names appear on the signature/address lines, including one entry for the plaintiff ("Fran Harrison"). The date appearing on the top of the form is written as "Sunday November 26, 2017." The plaintiff does not deny that she "signed in" on the day of her lesson, on that sheet, and then she put her helmet on and went outside the office to the stable. There is no evidence that the plaintiff signed any other type of purported waiver or release, aside from the sign-in sheet.

The defendant maintains that the purported waiver/release set forth in its sign-in sheet is enforceable and not void under New York General Obligations Law § 5-326 because that law "relates solely to and voids releases by recreational facilities and is not applicable to cases, where as in here, the purpose of plaintiff's horseback riding was instructional."[5] Defendant further contends that the purported waiver/release "specifically references a release of liability from any claimed ordinary negligence on behalf of the defendant. . .," and that there is no evidence of gross negligence on behalf of defendant.

Defendant's argument is misplaced and mistaken. Even accepting that under the circumstances present in this case GOL § 5-326 does not apply because plaintiff was at the Riding Center for instructional purposes rather than recreational purposes, the purported waiver/release at issue is wholly insufficient to absolve the defendant from any liability for its own negligence (*see* ***DeMatteo v. Yoga Moments Studio***, 2007 NY Slip Op 31498 [U] [Sup Ct Suffolk County 2007]).

"As the cases make clear, the law's reluctance to enforce exculpatory provisions of this nature has resulted in the development of an exacting standard by which courts measure their validity. So, it has been repeatedly emphasized that unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts" (***Gross v. Sweet***, 49 NY2d 102, 107 [1979]). The language "must appear plainly and

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[5] General Obligations Law (GOL) § 5-326 provides as follows: Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

precisely" that the limitation of liability extends to the party seeking to shed its ordinary responsibility (***Id.***). "Not only does this stringent standard require that the drafter of such an agreement make its terms unambiguous, but it mandates that the terms be understandable as well. Thus, a provision that would exempt its drafter from any liability occasioned by his fault should not compel resort to a magnifying glass and lexicon" (***Id.***).

While the word "negligence" does not have to be written for courts to give effect to such exculpatory language, "words conveying a similar import must appear" (***Gross***, ***supra*** at 108), but general language releasing a party from any and all responsibility or liability of any kind, or waiving claims for any loss to personal property or for any personal injury does not bar claims based on the negligence of the party sought to be released (***Id.*** at 108-109).

The waiver contained in the sign-in sheet in this case purports to release the defendant, its "officers, employees, *etc.*" from "*every and all claim* (sic) which may arise from injury, which might occur from said horse and/or equipment. . ." (emphasis added). This is exactly the type of language that does not clearly convey that there is a release of liability regardless of who is at fault, and even if the injury/claim is caused by the fault of the party seeking to insulate itself. The language in defendant's purported waiver/release is analogous to the language of the purported release in ***Gross*** that did not bar that plaintiff from suing in negligence. The language employed in ***Gross*** reads that "I, the undersigned, hereby, and by these covenants, do waive any and all claims that I, my heirs, and/or assignees may have against Nathaniel Sweet, the Stormville Parachute Center, the Jumpmaster and the Pilot who shall operate the aircraft when used for the purpose of parachute jumping for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft. I also assume full responsibility for any damage that I may do or cause while participating in this sport" (***Id.*** at 109).

As the Court found in ***Gross***, the language in the case at bar can be interpreted to have alerted the plaintiff to the dangers inherent in horseback riding, but it does not serve to make the plaintiff aware of, much less accept, any enhanced risk of injury that is caused by the carelessness/negligence of the very party upon whom she depended for her safety during the lesson. There is simply no language that demonstrates any intention on the part of the defendant to exempt itself from liability for injury resulting from its failure to use reasonable care in its administration of the lesson.

As noted by this Court, there is a question of fact as to whether the defendant/its employee (Mr. Dassler) was negligent, and whether the defendant exposed the plaintiff to an unreasonably increased risk that she was riding a horse that was prone to unsafe rooting behavior. Agreements to release a party from "any and all responsibility or liability of any nature whatsoever" will not bar claims sounding in ordinary negligence (***Gross***, ***supra*** at 108-109; ***Glenn v. Annunziata***, 72AD3d 886, 888 [2d Dept 2010]; ***Delaney v. City of Mount Vernon***, 28 AD3d 416, 417 [2d Dept 2006]; ***Trummer v. Niewisch***, 17 AD3d 349, 350 [2d Dept 2005]; ***Barone v. St. Joseph's Villa***, 255 AD2d 973, 974 [2d Dept 1998]; ***Abramowitz v. New York University Dental Center***, 110 AD2d 343, 347 [2d Dept 1985]); thus, while the sign-in sheet waiver is enforceable to the extent that it insulates the defendant from liability for injuries resulting from plaintiff's fall from the horse caused by reasons *other than* the defendant's negligence, the defendant in this case has failed to establish *prima facie* that it was not negligent.

Accordingly, the sign-in sheet waiver proffered by defendant does not advance its argument that summary judgment should be granted on that basis.

The defendant Riding Center has failed to establish its *prima facie* entitlement to summary judgment as a matter of law on any of the bases set forth in its motion; therefore the motion is denied. Accordingly, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact in these respects (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

Although this Court need not consider the plaintiff's papers, it is compelled to note that as part of plaintiff's Exhibit G consisting of pages from defendant's website, there is a lengthy one-page form entitled "Release of Liability, Assumption of Risk, Waiver of Claims & Indemnification Agreement." The Court further notes that this blank form from the defendant's website includes certain specific language referring to a release of "all claims that arise or may arise from any negligent acts or conduct of the Host, its owners, affiliates, operators, employees, agents, and/or officers. . ." While there is no need for this Court to make any determination with respect to the enforceability of this extensive Agreement, it is undisputed that there is no evidence whatsoever that the plaintiff in this action was presented with this Agreement, let alone signed it.

Motion Sequence 005 is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 10, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [ X ]