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Lisa Penunuri and Barry Siegwart v. Sundance Partners, LTD; Sundance Holdings, LLC; Sundance Development Corp.; Robert Redford; Robert Redford 1970 Trust; Rocky Mountain Outfitters, L.C.; and Does I-X : Brief of Appellee

Utah Court of Appeals

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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LISA PENUNURI and BARRY  
SIEGWART,

Plaintiffs/Appellants,

vs.

SUNDANCE PARTNERS, LTD;  
SUNDANCE HOLDINGS, LLC;  
SUNDANCE DEVELOPMENT  
CORP.; ROBERT REDFORD;  
ROBERT REDFORD 1970  
TRUST; ROCKY MOUNTAIN  
OUTFITTERS, L.C.; and DOES  
I-X,

Defendants/Appellees.

**APPELLEES' BRIEF**

**Supreme Court Case No.  
20110565**

**Court of Appeals Case No.  
20100331**

**District Court Case No.  
08040019**

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**ON CERTIORARI FROM THE UTAH COURT OF APPEALS**

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**Oral Argument and Published Decision Requested**

**FILED  
UTAH APPELLATE COURTS**

**MAR 23 2012**

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I-X, )

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## **JURISDICTION**

The Utah Court of Appeals issued its decision on June 9, 2011. Pursuant to Utah Code section 78A-3-102(3)(a), and in accordance with Rules 45 and 46 of the Utah Rules of Appellate Procedure, this Court has jurisdiction to review the decision rendered by the Court of Appeals. The decision of the Utah Court of Appeals is reported at *Penunuri v. Sundance Partners, Ltd.*, 2011 UT App 183, 257 P.3d 1049, a copy of which is attached as Addendum A.

## **STATEMENT OF THE ISSUE ON APPEAL**

Pursuant to Rule 45 of the Utah Rules of Appellate Procedure, this Court granted Appellants' Petition for Writ of Certiorari as to the following issue:

Whether the court of appeals erred in construing the Limitations on Liability for Equine and Livestock Activities Act, Utah Code Ann. § 78B-4-201, et seq., to permit releases of liability for ordinary negligence.

## **STANDARD OF REVIEW**

On certiorari, this Court reviews the decision of the Court of Appeals and not that of the district court. *See State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699. The Court reviews the Court of Appeals' decision for correctness, "giving no deference to its conclusions of law." *State v. Harker*, 2010 UT 56, ¶ 8, 240 P.3d 780. Because the issue before the Court is one of statutory interpretation, the Court conducts its own review for correctness. *See State v. Anderson*, 2009 UT 13, ¶ 6, 203 P.3d 990.

## **STATUTORY PROVISIONS**

Limitations on Liability for Equine and Livestock Activities (“Equine Act”), Utah Code Ann. §§78B-4-201 to 78B-4-203 (formerly §§ 78-27b-101 to 78-27b-103):

1. Utah Code Ann. § 78B-4-201. Definitions;
2. Utah Code Ann. § 78B-4-202. Equine and livestock activity liability limitations;
3. Utah Code Ann. § 78B-4-203. Signs to be posted listing inherent risks and liability limitations.<sup>1</sup>

## **STATEMENT OF THE CASE**

### **A. Nature of the Case.**

On August 1, 2007, Plaintiff Lisa Penunuri (hereinafter “Penunuri”) and two friends took part in a horseback ride operated by Defendant Rocky Mountain Outfitters. The ride covered areas in and around the Sundance Resort. Prior to embarking on the ride, Penunuri was presented with a Horseback Riding Release (hereinafter “Release”). The Release explains that horseback riding involves “significant risk of serious personal injury” and goes on to describe some of those risks. The Release also explains there are certain “inherent risks” associated with horseback ridings for which the Defendants (collectively “Sundance”) cannot be

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<sup>1</sup> A copy of the Equine Act, Utah Code Ann. §§78B-4-201 to 78B-4-203, is attached hereto as Addendum B.

held liable. Penunuri signed the Release and indicated that she had read, understood and voluntarily agreed to the same.

During the ride, Penunuri fell from her horse and was injured. She alleges that she fell when her horse accelerated unexpectedly to catch up with the horse in front of her.

Penunuri, along with her husband, Barry Siegwart, filed suit against Sundance for personal injuries. In a motion for partial summary judgment, Penunuri sought to have the trial court declare the Release void under the Equine Act and the purported public policy underlying the same. The trial court denied Penunuri's motion and dismissed her ordinary negligence-based claims as a matter of law.

#### **B. Course of Proceedings.**

Penunuri and her husband filed this lawsuit against Sundance on January 3, 2008. (R. 14.) Sundance filed its Answer on March 5, 2008. (R. 31.) On September 22, 2009, Penunuri moved for partial summary judgment and for declaratory relief. (R. 132, R. 143.) After briefing on the motion was complete, the trial court heard oral argument on January 19, 2010. (R. 243.) The trial court denied Penunuri's motion. (R. 247.) Finding the Release valid and enforceable, the trial court dismissed Penunuri's ordinary negligence-based claims with prejudice and on the merits, leaving only her claim for gross negligence. (R. 247.)

### **C. Disposition of the Lower Courts.**

On March 30, 2010, the trial court entered an order denying Penunuri's Motion for Partial Summary Judgment and dismissed ordinary negligence-based claims against Sundance as a matter of law. (R. 247.)

On June 9, 2011, a unanimous panel of the Utah Court of Appeals affirmed the trial court's ruling. *See Penunuri*, 2011 UT App 183, 257 P.3d 1049.

On July 5, 2011, Penunuri filed a Petition for Writ of Certiorari. On October 20, 2011, this Court granted her Petition. *See Penunuri v. Sundance*, 263 P.3d 390 (Utah 2011).

### **STATEMENT OF FACTS**

1. On August 1, 2007, Penunuri and two friends went to Sundance for a guided horseback ride. (R. 250.)
2. Prior to the ride, Penunuri signed a Release, which reads, in relevant part:

### **SUNDANCE HORSEBACK RIDING RELEASE**

\* \* \*

### **RELEASE & INDEMNITY AGREEMENT – READ CAREFULLY BEFORE SIGNING**

**I, the undersigned, and if I am a person under 18 years of age, my parents and I (hereafter “Rider”) understand that horseback riding, sleigh riding or horse drawn wagons (collectively “Horseback Riding”) involve SIGNIFICANT RISK OF SERIOUS PERSONAL INJURY, PROPERTY DAMAGE OR EVEN DEATH. The risks**

include NATURAL, MAN-MADE, ENVIRONMENTAL CONDITIONS AND INHERENT RISKS, **including changing weather, mud, rocks, variations in steepness, terrain, natural and man-made obstacles, equipment failure and the negligence of others.** “Inherent risk” with regard to equine or livestock activities means those dangers or conditions which are an integral part of equine or livestock activities, which may include: (a) the propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them; (b) the unpredictability of the animal’s reaction to outside stimulation such as sounds, sudden movement, and unfamiliar objects, persons, or other animals; (c) collisions with other animals or objects; or (d) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability. **Sundance** shall have no liability for inherent risks.

In consideration of participation in the **Horseback Riding** and use of SUNDANCE’s facilities, I agree to the following:

**1. I expressly agree to assume all risks of personal injury, falls, accidents, and/or property damage, including those resulting from any negligence of Sundance Partners Ltd., Sundance Holding LLC, Sundance Development Corporation, Sundance Institute, Inc., Robert Redford, Redford 1970 Trust, Rocky Mountain Outfitters, L.C., their agents, employees, property owners, and affiliated companies (herein collectively “SUNDANCE”).**

**2. Release & Indemnity.** To the fullest extent allowed by law, I agree to forever release SUNDANCE from any and all claims for injuries, losses, and damages resulting in any way from “Horseback Riding” use of Sundance facilities, SUNDANCE’S negligence. My release includes all claims regarding the design, maintenance, manufacture, instructions, or conditions of the Horseback Riding area, course, structures or equipment utilized in the Horseback Riding, express or implied warranties, product liability and the negligence of SUNDANCE. To the fullest extent allowed by law, I agree to

indemnify and hold SUNDANCE harmless from all claims, damages or injuries in any way related to my participation in Horseback Riding or use of any facilities at SUNDANCE, including breach of this Release, and will reimburse SUNDANCE's attorneys' fees and costs, even if SUNDANCE was negligent.

\* \* \*

7. I HAVE READ, UNDERSTOOD AND VOLUNTARILY  
SIGNED THIS RELEASE OF LIABILITY.

Signature of Rider: /s/ Lisa Penunuri Date 8/1/07

(R. 250.) (emphasis original).

3. Penunuri was forty-eight years old when she executed the Release.  
(R. 249.)

4. Penunuri signed the Release prior to the horseback ride and testified that she did so voluntarily. (R. 182, L. Penunuri Dep., p. 129.)<sup>2</sup>

5. Penunuri testified that at no time did she ask for any clarification regarding any of the language in the Release. (R. 182, L. Penunuri Dep., p. 130.)

6. According to Penunuri, during the ride, the horse in front of hers would occasionally stop to graze, causing some separation between her and the rest

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<sup>2</sup> This was not Penunuri's first experience signing a release. During her deposition, she testified, "[a]ll these releases, they all say the standard thing. Like I've been -- what is it -- when we went rock climbing at the rock climbing gym, they have you sign something similar, and you know, they all say you can die, so it's pretty standard." (R. 182, L. Penunuri Dep., p. 123.) In addition, Penunuri testified that shortly before the accident, she took two horseback riding lessons at an arena near her home in Phoenix, Arizona where she also executed a release. (R. 182, L. Penunuri Dep., pp. 64-65, 129.)

of the group. (R. 182, L. Penunuri Dep., p. 112.) With respect to her fall, Penunuri testified:

. . . my horse was stopped behind [Haley's horse], and my horse started going, and it was - - it was a rougher ride than I remember having had before, other than, you know, with other grazing episodes my horse would, you know, kind of giddyup a little faster than it had been going, because Haley's horse would start up and then mine would start up, too, and then would slow down. And this particular incident, it seemed even rougher than, you know, the giddyup that I had gotten in other stops. And then I don't remember anything until I was on the ground.

(R. 182, L. Penunuri Dep., pp. 114-15.)

## **SUMMARY OF ARGUMENT**

Penunuri asserts that the Release she signed prior to embarking on the trail ride at Sundance is invalid and unenforceable. Relying on the Equine Act, Utah Code Ann. §§ 78B-4-201 to -203, Penunuri argues that the Release violates the plain language and public policy of the Act.

As a general rule, Utah recognizes and upholds the rights of individuals to limit their ability to recover in tort for damages caused by the ordinary negligence of others. Despite Penunuri's assertion to the contrary, nothing in the plain language of the Equine Act prohibits the use of a release between equine activity sponsors and participants, or reveals a public policy against the same. In fact, the plain language of the Equine Act expressly contemplates and authorizes the use of releases by equine sponsors.

Patterning her arguments and analysis against the enforcement of the Release she signed after those set forth in the case *Rothstein v. Snowbird Corp.*, 2007 UT 96, 175 P.3d 560, where a ski release was declared void against the public policy of the Inherent Risks of Skiing Act ("Skiing Act"), Utah Code Ann. §§ 78B-4-401 to -404 (formerly 78-27-51 to -54), Penunuri attempts to paint the Equine Act and the Skiing Act as being one and the same. While Sundance does not dispute there being some similarities between the Equine Act and the Skiing Act, there are key distinctions between them, both in form and in substance.

In order for the Release to be void based on public policy, Penunuri must make a showing free from doubt that the Release is against public policy. Because Penunuri has failed to make such a showing, the decision of the Court of Appeals should be affirmed.

## **ARGUMENT**

### **I. THE PLAIN LANGUAGE OF THE EQUINE ACT DOES NOT INVALIDATE THE RELEASE SIGNED BY PENUNURI.**

When construing a statute, this Court “looks first to the plain meaning of the words used and their statutory context.” *Kimball Condos. Owners Ass’n v. County Bd. of Equalization*, 943 P.2d 642, 648 (Utah 1997). It is a fundamental rule of statutory construction that statutes are to be construed according to their plain language. *See O’Keefe v. Retirement Bd.*, 956 P.2d 279, 281 (Utah 1998). *See also State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795 (“Our primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purposes the statute was meant to achieve.”) Moreover, the “terms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion.” *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994).

Penunuri argues that *section 202* of the Equine Act “provides that the sponsor [of an equine activity] is not to be held liable for inherent risks associated with equine activity [sic] yet *must* be held liable for its acts or omissions of

negligence.” (Appellants’ Brf., p. 12) (emphasis added). She contends that because the protections of *section 202* apply only to “inherent risks” and expressly provides no protection against ordinary negligence, *section 202* prohibits by implication an equine sponsor from utilizing a release to protect against claims of ordinary negligence.

*Section 202* of the Equine Act states, in relevant part:

(1) It shall be presumed that participants in equine or livestock activities are aware of and understand that there are inherent risks associated with these activities.

(2) An equine activity sponsor<sup>3</sup>, equine professional, livestock activity sponsor, or livestock professional is not liable for an injury to or the death of a participant due to the inherent risks associated with these activities, *unless* the sponsor or professional:

- (a) (i) provided the equipment or tack;
  - (ii) the equipment or tack caused the injury; and
  - (iii) the equipment failure was due to the sponsor’s or professional’s negligence;
- (b) failed to make reasonable efforts to determine whether the equine or livestock could behave in a manner consistent with the activity with the participant;
- (c) owns, leases, rents, or is in legal possession and control of land or facilities upon which the participant sustained injuries

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<sup>3</sup> The term “Equine activity sponsor” is defined to mean “an individual, group, governmental entity, club, partnership, or corporation, whether operating for profit or as a nonprofit entity, which sponsors, organizes, or provides facilities for an equine activity . . . .” Utah Code Ann. § 78B-4-201(3). The term “Equine activity” is defined to include, among other things, “(f) other equine activities of any type including rides, trips, hunts, or informal or spontaneous activities sponsored by an equine activity sponsor.” Utah Code Ann. § 78B-4-201(2).

because of a dangerous condition which was known to or should have been known to the sponsor or professional and for which signs have not been conspicuously posted;

(d) (i) commits an act or omission that constitutes negligence, gross negligence, or willful or wanton disregard for the safety of the participant; and

(ii) that act or omission causes the injury; or

(e) intentionally injures or causes the injury to the participant.

Utah Code Ann. § 78B-4-202(2) (emphasis added).

Using clear and unambiguous language, the Act provides that an equine activity sponsor cannot be liable for the “inherent risks” associated with equine activities, “unless” the sponsor (a) negligently provided faulty equipment or tack that causes injury; (b) failed to make reasonable efforts regarding equine selection; (c) failed to post signs for known dangerous conditions; (d) committed an act or omission constituting negligence, gross negligence, or willful or wanton disregard for the safety of the participant, or (e) intentionally caused injury to the participant. *See* Utah Code Ann. § 78B-4-202(2). While arguably expressed as exceptions to the rule protecting equine sponsors from liability for “inherent risks,” none of these circumstances actually involve “inherent risks.” The Act defines “inherent risk” as follows:

[W]ith regard to equine or livestock activities [inherent risk] means those dangers or conditions which are an integral part of equine or livestock activities, which may include:

- (a) the propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them;
- (b) the unpredictability of the animal's reaction to outside stimulation such as sounds, sudden movement, and unfamiliar objections, persons, or other animals;
- (c) collisions with other animals or objections; or
- (d) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

Utah Code Ann. § 78B-4-201(5).

Both Sundance and Penunuri agree the Equine Act provides no protection to equine activity sponsors for claims of ordinary negligence. The plain language of the Act limits its protection only to “inherent risks” and expressly eliminates claims of ordinary negligence from its purview. Where the parties disagree is over what happens when ordinary negligence is alleged or established.

Penunuri argues that when ordinary negligence is established, *section 202* of the Equine Act mandates liability. *See Penunuri*, 2011 UT App 183, ¶ 12. According to Penunuri, the Act automatically voids any contractual defenses an equine sponsor may have under a release. The problem with this argument is that the text of *section 202* says nothing that would require the invalidation of an otherwise valid and enforceable release. As the Court of Appeals recognized, “[t]he principle obstacle to reading *section 202* to invalidate pre-injury releases is that it does not mention releases.” *Id.* at ¶ 12.

This Court has often instructed that it is improper to infer substantive terms into the text of a statute. *See, e.g., Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994) (“A cardinal rule of statutory construction is that courts are not to infer substantive terms into the text [of a statute] that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.”) In this case, the Court of Appeals determined that “[r]eading [section 202] to abrogate common law defenses, invalidate pre-injury releases, and mandate liability stretches the statutory language past its plain meaning.” *Penunuri*, 2011 UT App 183, ¶ 13.

**A. Had the Legislature intended to abolish the use of releases under the Equine Act, it would not have used language which expressly contemplates and authorizes their use.**

As set forth above, when construing a statute, the primary goal is to evince “the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.” *Hall v. Dep’t of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958 (brackets original). In so doing, Utah courts seek “to render all parts thereof relevant and meaningful, and accordingly avoid interpretations that will render portions of a statute superfluous or inoperative.” *Id.* (internal quotations and citations omitted). “[O]ur interpretation of a statute requires that each part or section be ‘construed in connection with every other part or section so as to produce a harmonious whole.’” *Anderson v. Bell*, 2010 UT 47, ¶ 9, 234 P.3d 1147

(quoting *Sill v. Hart*, 2007 UT 45, ¶ 7, 162 P.3d 1099) (additional citations omitted)).

Under *section 203* of the Equine Act, equine activity sponsors are to provide participants notice of the inherent risks associated with equine activities and states that this notice can be provided in a “document or release.” *Section 203* states, in relevant part:

(1) An equine or livestock activity sponsor shall provide notice to participants of the equine or livestock activity that there are inherent risks of participating and that the sponsor is not liable for certain of those risks.

(2) Notice shall be provided by:

(a) posting a sign in a prominent location within the area being used for the activity; or

(b) providing a *document or release* for the participant, or the participant’s legal guardian if the participant is a minor, to sign.

(3) The notice provided by the sign or document shall be sufficient if it includes the definition of inherent risk in Section 78B-4-201 and states that the sponsor is not liable for those inherent risks.

Utah Code Ann. § 78B-4-203 (emphasis added).<sup>4</sup>

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<sup>4</sup> Penunuri argues that “[t]he common-sense interpretation of the Notice Section 203 is that in order for an operator to take advantage of immunity for inherent dangers of the Limitations on Liability section 202, the operator must provide notice to or warn the participant of the possibility of inherent risks or dangers.” (Appellants’ Brf., p. 14.) While perhaps beyond the scope of this appeal - as there is no dispute Sundance fully satisfied the notice requirements of *section 203* - nothing in the plain language of the Equine Act states that the protections against liability for “inherent risks” are contingent upon compliance with *section 203*.

The Equine Act does not define the terms “document” or “release.” However, it is evident the term “release” refers to something more than a “document” which notifies the participant of the inherent risks associated with equine activities. As explained by the Court of Appeals, it would be inconsistent with established principles of statutory interpretation to read the terms “document” and “release” in *section 203* as conveying the same meaning:

We do not read the word ‘release’ in this section [*section 203*] to refer merely to a document notifying the participant that the sponsor is insulated against claims arising from certain inherent risks of participating in the activity. Because the statutory term ‘document’ already conveys this meaning, such a reading would impermissibly render ‘release’ redundant. *See State v. Maestas, 2002 UT 123, ¶ 53, 63 P.3d 621.*

*Penunuri, 2011 UT App 183, ¶ 14. See also State v. Morrison, 2001 UT 73, ¶ 11, 31 P.3d 547 (“[A]ny interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.”)*

The ordinary and accepted meaning of the term “release” is “to give up in favor of another.” *Merriam-Webster’s Collegiate Dictionary* 987 (10<sup>th</sup> ed. 1999). Black’s Law Dictionary defines “release” as “the act of giving up a right or claim to the person against whom it could have been enforced.” *Black’s Law Dictionary* 1202 (7<sup>th</sup> ed. 1999). In this case, the Court of Appeals noted, “[t]he main purpose of a release typically is the voluntary relinquishment of a claim or right by one who, absent the release, could have enforced such a claim or right.” *Penunuri,*

2011 UT App 183, ¶ 14 (quoting 66 Am. Jur. 2d *Releases* § 1 (2010)). In this case, Penunuri could not “release” that which she did not have - a right to recover for injury caused by an “inherent risk.”

It is a fundamental principle of statutory interpretation that courts “presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.” *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d 726. “Further, ‘unambiguous language . . . may not be interpreted to contradict its plain meaning.’” *Lorenzo v. Workforce Appeals Bd.*, 2002 UT App 371, ¶ 11, 58 P.3d 873 (quoting *Zoll & Branch, P.C. v. Asay*, 932 P.2d 592, 594 (Utah 1997)). “A corollary of this rule is that ‘a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purposes of the statute.’” *State v. Pixton*, 2004 UT App 275, ¶ 7, 98 P.3d 443 (quoting *O’Keefe*, 956 P.2d at 281).

The Legislature’s use of the term “release” in *section 203* indicates that it did not intent to prohibit the use of releases between equine activity sponsors and participants. If Penunuri were correct in arguing that the Legislature truly intended to void the use of releases, then certainly it would not have used language which expressly recognizes and authorizes their use.

As the Court of Appeals observed, the Legislature’s use of the term “release” in *section 203* “presupposes the continued use of releases between equine activities sponsors and participants.” *Penunuri*, 2011 UT App 183, ¶ 14. Realizing, perhaps, the prevalent use of releases in recreational activities, the Legislature chose to allow equine sponsors to incorporate the notice requirement of *section 203* into their releases, which is exactly what Sundance did in this case.<sup>5</sup> There is simply nothing in the plain language of the Equine Act that prevents or restricts an equine activity sponsor, such as Sundance, from utilizing a release to protect itself contractually against claims of ordinary negligence.

## **II. PENUNURI IDENTIFIES NO PUBLIC POLICY UNDERLYING THE EQUINE ACT THAT WOULD INVALIDATE THE USE OF A RELEASE.**

Penunuri next argues that the Release she signed is void because it violates the public policy of the Equine Act. Relying on this Court’s decision in *Rothstein v. Snowbird Corp.*, 2007 UT 96, 175 P.3d 560, and its invalidation of a release under the Skiing Act, Penunuri asserts that the public policy of the Equine Act similarly requires the Release she signed be declared void. In support of her argument, Penunuri cites to legislative history and congressional floor debates, and claims that the Equine Act was intended to “parallel” the Skiing Act. (Appellants’

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<sup>5</sup> Sundance also posted a sign at its stable notifying participants of the “inherent risks.” See Utah Code Ann. § 78B-4-203(2)(a).

Brf., p. 24.) While Sundance fully responds to Penunuri's arguments below, there are two preliminary points that must be considered.

First, the legislative history of the Equine Act was never argued or presented to the trial court. It is well-settled that this Court will not address arguments raised for the first time on appeal. *See Smith v. Four Corners Mental Health Ctr.*, 2003 UT 23, ¶ 19, 70 P.3d 904 (refusing to address new arguments raised for the first time on appeal). *See also Ong Int'l v. 11<sup>th</sup> Ave. Corp.*, 850 P.2d 447, 455 n.31 (Utah 1993) ("Our concern is whether an argument was addressed in the first instance to the trial court. Failure to raise the point [below] precludes its consideration here.") (internal citations and quotations omitted; brackets original).

Second, Penunuri's use of legislative history is improper where there has been no assertion that the plain language of the Equine Act is ambiguous. As previously noted, when interpreting a statute, courts look to the statute's plain language. *See Dale T. Smith & Sons v. Utah Labor Comm'n*, 2009 UT 19, 208 P.3d 533, 534 ("When determining the meaning of a statute we first look to the words used by the Legislature, the statute's plain language.") It is only when the plain language of the statute is ambiguous that courts look to other sources. *See Baby E.Z. v. T.I.Z.*, 2011 UT 38, ¶ 15, 266 P.3d 702 ("Unless we find ambiguity in a statute, we do not look to legislative history or public policy to try to glean the statute's intent.") *See Peterson & Simpson v. IHC Health Servs.*, 2009 UT 54, ¶ 9,

217 P.3d 716 (“We consult other sources only if the plain language of the statute is ambiguous.”)

Here, Penunuri has identified no ambiguity in the text of the Equine Act and agrees that its language is clear and unambiguous. Despite this, Penunuri attempts to use the legislative history to justify an interpretation of the Act which, as previously discussed, is unsupported by and directly contrary to its plain language. Penunuri’s approach is exactly why this Court has instructed that caution be taken when considering public policy as a justification of judicial decisions. “Public policy is a vague and elastic term in need of limitation . . . .” *Hodges v. Gibson Prod. Co.*, 811 P.2d 151, 165 (Utah 1991). When attempting to extract public policy from statutory language, this Court has admonished:

[I]n most instances, our proper role when confronted with a statute should be restricted to interpreting the meaning and application as revealed through its text. *To pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle is to invite judicial mischief. Like its cousin legislative history, public policy is a protean substance that is too often easily shaped to satisfy the preferences of a judge rather than the will of the people or the intentions of the Legislature.* We aptly noted the risks of relying on public policy rationales when we stated that ‘the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as a basis for judicial determinations, if at all, only with the utmost circumspection.’

*Rothstein*, 2007 UT 96, ¶ 10 (additional citations omitted) (emphasis added).

**A. The Court's decision in *Rothstein* and its analysis of the Skiing Act does not reveal a public policy prohibiting the use of releases under the Equine Act.**

While Sundance does not dispute there being some similarities between the Skiing Act and the Equine Act, Penunuri's reliance on *Rothstein* and the Court's interpretation and application of the Skiing Act is misplaced.

In *Rothstein*, the plaintiff sustained injuries when he collided with a retaining wall while skiing at Snowbird Ski Resort. 2007 UT 96, ¶ 1. Snowbird denied liability and claimed the skier had waived his ability to sue the resort for negligence when he purchased two ski passes that released the resort from liability for its ordinary negligence. In a subsequent lawsuit, the district court found the releases valid and dismissed the skier's claim for ordinary negligence against the resort.

This Court reversed the district court's ruling, finding that the release violated public policy as declared in the Skiing Act. In its decision, the Court began by noting the general acceptance of releases and the general wariness of courts in relying on public policy rationales as a basis for judicial determinations. *Id.* at ¶¶ 9-10. The Court observed that "no statute or other legislative pronouncement of public policy answers squarely the question of whether a preinjury release of a ski resort operator's negligence executed by a recreational skier is enforceable." *Id.* at ¶ 11. However, the Court felt confident it could

properly define the public policy underlying the Skiing Act based on the Legislature's decision to enunciate that public policy and incorporate it directly into the text of the Act. In the introductory section of the Skiing Act, the Legislature articulated the following public policy:

The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state. It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

*Rothstein*, 2007 UT 96, ¶ 12 (quoting Utah Code Ann. § 78-27-51). Based on this express statement of public policy, the Court was persuaded that the Legislature found it “necessary to immunize ski area operators from liability for injuries caused by inherent risks because they were otherwise being denied insurance coverage or finding coverage too expensive to purchase.” *Rothstein*, 2007 UT 96, ¶ 13. The Court went on to note that, in the absence of a “perceived insurance crisis,” there was no evidence the Legislature would have “interceded” on behalf of the ski resorts in passing this legislation. *See id.* at ¶ 15.

Demonstrating the importance of the express statement of public policy contained in the Skiing Act, Utah Code Ann. § 78-27-51, this Court rejected case law cited by Snowbird from other jurisdictions that have, through statute, insulated providers of recreational activities from liability for inherent risks *and* have upheld the use of releases, finding that none “contain[ed] the kind of resounding public policy pronouncement present in Utah’s [Skiing] Act.” *Rothstein*, 2007 UT 96, ¶ 18.<sup>6</sup>

Unlike the Skiing Act, the Equine Act contains no legislative findings or express statement of public policy, which was what this Court found so significant to its analysis in *Rothstein* and which ultimately formed the basis for its decision. *See id.* at ¶ 13. Indeed, it was the “resounding public policy pronouncement” by the Legislature that has subsequently come to define the holding of *Rothstein*. *Id.* at ¶ 18. *See Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶15, 179 P.3d 760 (“In *Rothstein*, we relied on the legislature’s statement of public policy in Utah’s Inherent Risks of Skiing Act to conclude that a ski resort cannot enforce a preinjury release against a skier whose injuries may have resulted from the negligence of the ski resort.”) The Court of Appeals found this fact alone sufficiently distinguished *Rothstein* from this case. *See Penunuri*, 2011 UT App

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<sup>6</sup> *Rothstein* was decided by a divided court (three to two), with the dissent expressing that “the majority’s interpretation improperly expands the plain language of the [Skiing] Act and infuses it with ‘intention not expressed’ by the Legislature.” 2007 UT 96, ¶ 26.

183, ¶ 19 (stating “[t]he Equine Act has no equivalent statement of public policy. In fact, it has no statement of public policy at all.”) Further, the Court of Appeals rejected Penunuri’s assertion that public policy could be determined from the language of the Equine Act, stating “*Rothstein* itself warns that ‘[t]o pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle is to invite judicial mischief.’ Consequently, we decline to do so.” *Penunuri*, 2011 UT App 183, ¶ 19 (quoting *Rothstein*, 2007 UT 96, ¶ 10).

In addition to lacking a statement of public policy, there are other important distinctions between the Equine Act and the Skiing Act. This includes the fact that the public policy and the legislative findings expressed in the Skiing Act do not carry over to equine activities.<sup>7</sup> Penunuri has presented no evidence in this case showing that horseback riding “significantly contribut[es] to the economy of this state” the same way skiing does. See Utah Code Ann. § 78-27-51. For a state that has hosted the Winter Olympics and that boasts on its license plates having the “Greatest Snow on Earth,” there can be no dispute - horseback riding occupies no

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<sup>7</sup> In fact, the public policy and legislative findings underlying the Skiing Act do not even carry over to all types of skiing activities. See *Berry v. Greater Park City Co.*, 2007 UT 87, ¶17; 171 P.3d 442 (upholding the enforcement of a release for a ski race and stating, “while the reach of the [Skiing] Act may extend to ski-related activities that fall outside the public policy consideration underlying the adoption of the [Skiing] Act, those activities, like skicross racing, are nevertheless subject to a separate analysis for the purpose of evaluating the enforceability of preinjury releases.”)

space in the same realm of importance as skiing in Utah. Furthermore, unlike the Skiing Act, there is no evidence the Equine Act was born out of a “perceived insurance crisis” that prompted the Legislature to urgently “intercede” on behalf of equine sponsors. *See Rothstein*, 2007 UT 96, ¶ 15. Moreover, and perhaps most importantly, unlike the Equine Act, the Skiing Act contains no language expressly recognizing and authorizing the use of releases. As set forth above, the Legislature’s use of the term “release” in *section 203* of the Equine Act is significant, and demonstrates that it did not intend to prohibit equine activity sponsors from utilizing releases.

**B. The Legislative History of the Equine Act reveals no public policy or intent to prohibit the use of releases.**

Setting aside her failure to raise the argument before the trial court, Penunuri’s analysis of the Equine Act’s legislative history fails to uncover any public policy or legislative intent that would prohibit the use of releases between equine activity sponsors and participants. Penunuri places great emphasis on comments by some members of the Legislature discussing the similarities between the proposed Equine Act and the Skiing Act. However, rather than supporting Penunuri’s position, the legislative history and floor debates actually undercut it.

First, nowhere in the legislative history of the Equine Act is there any discussion signifying an intent by the Legislature to effect a change in existing law regarding the use of releases for non-inherent risks. The use of releases by

sponsors of recreational activities is commonplace in today's society and, in recent years, has been recognized and upheld on multiple occasions. *See e.g., Pearce*, 2008 UT 13, ¶ 15 (finding no public policy that would render unenforceable a release between a public bobsled ride operator and an adult bobsled rider); *Berry*, 2007 UT 87, ¶ 15 (“[Utah’s] public policy does not foreclose the opportunity of parties to bargain for the waiver of tort claims based on ordinary negligence.”). If it was the intention of the Legislature to effect a dramatic change to this established practice, then one would expect there would be at least some discussion or mention of it during the legislative debates. Instead, there is none. *See Penunuri*, 2011 UT App 183, ¶ 12, n.2 (noting that, like the text of the Equine Act, the legislative history cited by *Penunuri* does not even mention releases).

Under what is known as the “barking dog” canon of statutory construction, courts refuse statutory interpretations that result in marked changes to existing law where there is no recognition or discussion in the legislative history of the statute having such an effect. *See Chisom v. Roemer*, 501 U.S. 380, 396, n. 23, 111 S. Ct. 2354, 115 L. Ed 2d 348 (1991) (“[I]f Congress had such an intent, [it] would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment . . . . Congress’ silence in this regard can be likened to the dog that did not bark.”); *Church of Scientology v. IRS*, 484 U.S. 9, 108 S. Ct.

271, 276, 98 L. Ed 2d 228 (1987) (Rehnquist, C.J.) (“All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’ that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.”) In this case, the legislative floor debates contain no reference to word “release” or to any intent by the Legislature to override the ability of parties to reallocate liability for non-inherent risks through contract.

Second, consistent with the Act’s plain language, the floor debates reveal that the purpose and intent of the Act was to limit the liability of equine sponsors for the inherent risks associated with equine activities. At the same time, the Legislature wanted to make it clear that the Equine Act would not alter the status quo with respect to liability for non-inherent risks. As set forth in the floor debates, the Act was intended to benefit equine sponsors by clarifying the law and declaring definitively that they would have no liability for inherent risks. This is significant because Penunuri’s interpretation and application of the Act turn the intent of the Legislature on its head.

Under the common law, equine sponsors were protected against liability from inherent risks under the doctrine of primary assumption of risk.<sup>8</sup> “Primary assumption of the risk is the judicially created affirmative defense whereby a defendant owes no duty to protect a plaintiff against certain risks that are so inherent in an activity that they cannot be eliminated.” *Bundschu v. Naffah*, 768 N.E.2d 1215, 1221 (Ohio Ct. App. 2002). Primary assumption of risk “is an alternative expression for the proposition that defendant was not negligent, that is, there was no duty owed or there was no breach of an existing duty.” *Ghionis v. Deer Valley Resort Co., Ltd.*, 839 F. Supp. 789, 796 (D. Utah 1993) (applying Utah law); *Lawson*, 901 P.2d at 1016.

In *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), the court construed the Skiing Act and analyzed its correlation with the doctrine of primary

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<sup>8</sup> Like many jurisdictions, Utah courts have recognized two types of assumption of risk, primary and secondary. “Primary” assumption of risk applies when a risk is “so inherent in an activity” that a duty cannot be imposed on the defendant to protect the plaintiff against it. *Lawson v. Salt Lake Trappers*, 901 P.2d 1013, 1016 (Utah 1995). On the other hand, the more common “secondary” assumption of risk is an affirmative defense to an established breach of a duty and is considered a form of contributory negligence. *Id.* at 1016 (quoting *Jacobsen Constr. v. Structo-Lite Eng’g*, 619 P.2d 306, 310 (Utah 1980) (discussing secondary assumption of risk)). Due to confusion caused by the indiscriminate use of the phrase, “assumption of risk” terminology has been disapproved. However, the concept and principle behind the primary assumption of risk doctrine remains viable. See *Fordham v. Oldroyd*, 2007 UT 74, ¶ 13, 171 P.3d 411 (stating “we do not violate principles of comparative negligence when we evaluate the presence or absence of duty under what had previously been denominated as primary assumption of the risk.”)

assumption of risk. As set forth above, the Skiing Act and the Equine Act contain important distinctions. However, the *Clover* court's analysis concerning the inherent risks of skiing and the doctrine of primary assumption of risk is helpful. The court observed that when the Skiing Act was passed, "the majority of jurisdictions employed the doctrine of primary assumption of risk in limiting ski resorts' liability for injuries their patrons received while skiing." *Id.* at 1045. The court explained:

Terms utilized in the [Skiing Act] such as 'inherent risk of skiing' and 'assumes the risk' are the same terms relied upon in such [primary assumption of risk] cases. This language suggests that the statute is meant to achieve the same result achieved under the doctrine of primary assumption of risk. In fact, commentators suggest that the statute was passed in reaction to a perceived erosion in the protection ski area operators traditionally enjoyed under the common law doctrine of primary assumption of risk.

*Id.* at 1045-46.

In this case, the Equine Act codifies the common law doctrine of primary assumption of risk by announcing that no equine activity sponsor can be liable for the "inherent risks" associated with equine activities. However, just as claims for ordinary negligence would not be barred under the common law, such claims are not barred under the Equine Act. To make this clear, the Legislature exempted negligence and other forms of culpable conduct from the protection afforded under the Act.

If, prior to the Equine Act, equine sponsors were protected under the common law against liability for inherent risks *and* had the ability to utilize releases as a contractual protection against non-inherent risks, then it would make no sense for the Act to be applied in a way that provides equine sponsors with less protection than they had before the Act came into existence. *See O'Keefe*, 956 P.2d at 281 (explaining that statutes must not be interpreted to result in an application that is "in blatant contradiction of the express purpose of the statute"); *B.L. Key v. Utah State Tax Comm'n*, 934 P.2d 1164, 1168 (Utah Ct. App. 1997) (rejecting petitioner's statutory interpretation on the basis that it contradicts the purpose of the statute as expressed by the legislative history). Put another way, the Equine Act should not be construed so as to contradict the stated intent of the Legislature by placing equine sponsors in worse position than they were in before the Act was passed into law.<sup>9</sup>

The legislative history of the Equine Act uncovers no public policy or intent that would prohibit equine sponsors from having the continued ability to protect themselves contractually against non-inherent risks.<sup>10</sup> As a practical matter, the

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<sup>9</sup> The fact that, under Penunuri's argument, equine sponsors would be placed in worse position than they were in before the Act was passed also undercuts her claim that equine sponsors must not be allowed to utilize releases based on a "bargain" that was struck to give them protection against "inherent risks," as that protection already existed under the common law. (Appellants' Brf., p. 24.)

<sup>10</sup> If accepted, Penunuri's interpretation and application of the Equine Act would call into question the validity of any release used in a host of other recreational

contractual protections offered by a release are necessary based on the ease in which an injured participant may circumvent the protections equine sponsors are meant to enjoy against inherent risks. This case provides an excellent example.

Penunuri has alleged that on the day of the accident the horse in front of hers repeatedly stopped to graze, causing some separation between her and the rest of the group. (R. 182, L. Penunuri Dep., p. 112.) Penunuri asserts that “[w]hen [her] horse rounded the bend it suddenly (and unexpectedly to Ms. Penunuri) accelerated to catch up with the heard. The unexpected acceleration caused Ms. Penunuri to fall to the ground.” (Appellants’ Brf., p. 3) (brackets added; parenthesis original).

During her deposition, Penunuri testified:

... my horse was stopped behind [Haley’s], and my horse started going, and it was - - it was a rougher ride than I remember having had before, other than, you know, with other grazing episodes my horse would, you know, kind of giddyup a little faster than it had been going, because Haley’s horse would start up and then mine would start up, too, and then would slow down. *And this particular incident, it seemed even rougher than, you know, the giddyup that I had gotten in other stops. And then I don’t remember anything until I was on the ground.*

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activities. For instance, the Inherent Risks of Certain Recreational Activities Act provides protection against injuries and damages caused by the inherent risks associated with such activities as “a rodeo, an equestrian activity, skateboarding, skydiving, para gliding, hang gliding, roller skating, ice skating, fishing, hiking, walking, running, jogging, bike riding, or in-line skating . . . .” Utah Code Ann. § 78B-4-509(1)(d). Like the Equine Act, the Recreational Activities Act specifically excludes liability for non-inherent risks from the scope of its protection. *See id.* at (3)(b). According to Penunuri, this would mean that any release for ordinary negligence would necessarily be invalid and unenforceable.

(R. 182, L. Penunuri Dep., pp. 114-15) (emphasis added).

Under the Equine Act, “inherent risk” is defined as “those dangers or conditions which are an integral part of equine . . . activities, which may include: a. the propensity of [an] animal to behave in ways that may result in injury . . . [and] b. the unpredictability of [an] animal’s reaction to outside stimulation such as . . . persons, or other animals.” Utah Code Ann. § 78B-4-201(5). Theoretically, Penunuri’s claim should be barred because the sudden and unexpected acceleration of her horse, or as she describes it “rougher . . . giddyup,” fits exactly within the Equine Act’s definition of “inherent risk.” To avoid having her claim barred by the Act, however, Penunuri has alleged that her horse’s sudden and unexpected acceleration was not the result of an “inherent risk,” but was instead the result of negligence on the part of the guide for allegedly allowing gaps to form between the riders. (Appellants’ Brf., p. 4.)

It is difficult to imagine a scenario in which a participant injured during an equine activity could not easily articulate a theory of negligence to evade the protections equine activity sponsors are meant to enjoy against liability from inherent risks. If a participant is injured from being bitten or kicked by another horse on a group trail ride, one could argue that the equine sponsor was negligent for allowing the horses to get too close to one another. If a participant falls because their horse was spooked by a hiker or wild animal, one could argue that

the equine sponsor was negligent for taking the participant on a trail open to hikers or in an area inhabited by other animals.

Realizing the ease with which an injury caused by an “inherent risk” may be transformed into a claim of negligence is likely what caused the Court of Appeals in this case to remark in a footnote, “one might question whether the negligence exception to the Equine Act’s coverage circumscribes its protections to the point of rendering them illusory.” *Penunuri*, 2011 UT App 183, ¶ 13, n. 3. For this reason, equine sponsors must have the ability to continue using releases and be able to rely on them as a contractual defense to claims of ordinary negligence.

**C. The public policy most applicable in this case is the policy supporting freedom of contract.**

Utah appellate courts have long recognized that “people are generally free to bind themselves pursuant to any contract, barring such things as illegality of subject matter or legal incapacity.” *Phone Directories Co. v. Henderson*, 2000 UT 64, ¶ 15, 8 P.3d 256. *See also Frailey v. McGarry*, 211 P.2d 840, 847 (Utah 1949) (stating that “the law favors the right of men of full age and competent understanding to contract freely”); *Nielsen v. O’Reilly*, 848 P.2d 664, 668 (Utah 1992) (recognizing the legislatively expressed policy that freedom of contract be maintained and that written contracts be the primary means by which this freedom is exercised) (internal quotations omitted).

Nullifying a contract on public policy grounds is a rarity under Utah law. Indeed, there are only a few instances in which the Legislature has found public policy sufficient to statutorily void otherwise valid and enforceable contracts. For instance, under Utah's Product Liability Act, the Legislature has declared that "[a]ny clause in a sales contract . . . that requires a purchaser or end user of a product to indemnify, hold harmless, or defend a manufacturer of a product is contrary to public policy and void and unenforceable . . . ." *See* Utah Code Ann. § 78B-6-707. The Legislature has also declared void certain indemnification agreements in the construction industry as contrary to public policy. *See* Utah Code Ann. § 13-8-1. These examples suggest that when the Legislature enacts legislation intended to void particular types of contracts on grounds of public policy, it does so expressly.

In this case, Penunuri was forty-eight years old when she signed the Release. (R. 249.) She testified that she signed the Release voluntarily and at no time did she ask for any clarification regarding any of the language in the Release. (R. 182, L. Penunuri Dep., pp. 129-30.) During her deposition, Penunuri testified that this was not her first experience signing a release and described signing similar releases at a rock climbing gym and for horseback riding lessons she took at an arena near her home in Phoenix, Arizona shortly before the accident. (R. 182, L. Penunuri Dep., pp. 64-65, 129.) As a matter of contract law, invalidating the Release

Penunuri signed would result in unpredictability for businesses like Sundance that rely on the use of releases. As one court observed:

If a prospective participant wishes to place himself in the competition sufficiently to voluntarily agree that he will not hold the organizer or sponsor of the event liable for his injuries, the courts should enforce such agreements. If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest.

*Gore v. Tri-County Raceway, Inc.*, 407 F.Supp. 489 (D. Ala. 1974). See also G. Johnson, *Enforceability of Exculpatory Clauses in Hazardous Recreational Activities*, 11 *Utah Bar J.* 8, 11 (1998) ("If Utah's hazardous recreational industries are to remain viable, Utah's framework for analyzing and enforcing exculpatory clauses should be consistently followed . . . . If the language of the exculpatory clause is: (1) written clearly and is understandable by the average lay person, (2) if the wording of the exculpatory clause is displayed prominently and in an adequate type size, and (3) if the intent to relieve the provider of the activity from liability for alleged negligence is clearly and unequivocally expressed in the contractual provision, our courts should enforce that provision. The timorous may stay at home.").

"For a contract to be void on the basis of public policy, there must be a showing free from doubt that the contract is against public policy." *Ockey v.*

*Lehmer*, 2008 UT 37, ¶21, 189 P.3d 51. Here, Penunuri has made no such showing, much less one free from doubt.

**III. AMICUS CURIAE RAISE ISSUES THAT EXTEND BEYOND THE QUESTION FOR WHICH CERTIORARI WAS GRANTED AND ASSERTS NEW ARGUMENTS INCLUDING SOME WHICH CONFLICT WITH THOSE MADE BY PENUNURI.**

This Court granted Penunuri's Petition for Certiorari on the following issue:

Whether the court of appeals erred in construing the Limitations on Liability for Equine and Livestock Activities Act, Utah Code Ann. § 78B-4-201, et seq., to permit releases of liability for ordinary negligence.

The Court's certiorari order is clear and concise. While Penunuri and Sundance have limited their briefs to an analysis and discussion of the issue on review, the brief of amicus does not. Rather, amicus attempts to raise several new issues and arguments, including some that are directly contrary to those made by Penunuri.

It is well-established that an amicus brief cannot extend or enlarge the issues on appeal. *See Madsen v. Borthick*, 658 P.2d 627, 629, n. 3 (Utah 1983) ("Consistent with the well-settled rule that an amicus brief cannot extend or enlarge the issues on appeal, . . . we have only considered those portions of the amicus brief that bear on the issues pursued by the parties on this appeal."); *In re Woodward*, 384 P.2d 110, 111 (Utah 1963) ("Amicus curiae supports appellant's attack, but seeks to have the court canvass the constitutionality of a number of other sections, on the same and different constitutional grounds. We review only

those points raised by the litigants on appeal and not those urged by strangers thereto . . . .”) *See also Pratt v. Coast Trucking, Inc.*, 228 Cal. App. 2d 139, 39 Cal. Rptr. 332, 334 (Cal. App. 1964) (“an amicus curiae must accept the case as it finds it and that a ‘friend of the court’ cannot launch out upon a juridical expedition of its own unrelated to the actual appellate record.”)

In her arguments to this Court and the Court of Appeals, Penunuri attacks the validity of the Release she signed based on the language of the Equine Act and what she considers to be the public policy underlying the Act based on its legislative history. Amicus, however, all but ignores the Equine Act and instead mounts an attack against all recreational releases, not just those relating to equine activities. Amicus asserts that the Court of Appeals erred in this case by “fail[ing] to engage in a thorough public policy analysis due to the lack of an express legislative statement” and argues that Utah’s Constitution and common law contain public policy that weigh against the enforcement of recreational releases. (*See* Amicus Brf. at p. 5.) Specifically, amicus argues that recreational releases violate the public policy of the petition clause and open courts clause of the Utah Constitution. (*See id.* at pp. 6-13.) Amicus also argues that recreational releases are contrary to the general public policy of tort law and that allowing “for-profit business” to immunize themselves against negligence “promotes no societal benefits.” (*See id.* at pp. 13-18.) Not only do these arguments go beyond the issue

for which certiorari was granted, they go far beyond the issues raised by Penunuri or otherwise preserved for appeal.<sup>11</sup>

Amicus further argues that the Release signed by Penunuri is overly broad and “offends notions of public good.” (*See id.* at p. 19.) Focusing on the language of the Release, amicus claims that it is too broad to be enforceable. (*See id.*) Again, this argument goes beyond the issue presented for review and was never raised or preserved below.

The last argument raised by amicus asserts that the Release signed by Penunuri is contrary to the public interest. Amicus’ argument is curious in that it acknowledges but ignores this Court’s holding in *Pearce*, 2008 UT 13, ¶ 14, which found that “recreational activities do not constitute a public interest and that, therefore, preinjury releases for recreational activities cannot be invalidated under the public interest exception.” (*See* Amicus Brf., p. 20.) Relying on the public interest factors articulated in the case *Tunkl v. Regents of the Univ. of Cal.*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441, 445-46 (Cal. 1963), and two cases from outside jurisdictions applying the same, *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003) and *Reardon v. Windswept Farm, LLC*, 905 A.2d 1156, 1162

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<sup>11</sup> Amicus also makes no effort to reconcile its assault on recreational releases with the recent decisions by this Court upholding their use in *Berry*, 2007 UT 78 and *Pearce*, 2008 UT 13, except to say that horseback riding “involves a much milder activity” than ski racing and bobsledding. (*See* Amicus Brf. at p. 23.)

(Conn. 2006), amicus argues that the Release signed by Penunuri is void because it violates the public interest.

In addition to again being beyond the issue for which certiorari was granted, amicus' argument concerning the public interest directly contradicts the position taken by Penunuri in this case. In her briefing to the Court of Appeals, Penunuri stated, "[i]n this instance Ms. Penunuri agrees with Sundance that horseback riding, just like skiing, is a recreational activity and is non-essential and therefore it certainly does not violate the *Public Interest Exception*." (Appellants' Court of Appeals Reply Brf., p. 5.) (emphasis original). She further stated, "[t]herefore Ms. Penunuri has made no claim that the release violated the public interest exception and has also made no claim that the release was ambiguous." (*See id.* at p. 6.) *See also Penunuri*, 2011 UT App 183, ¶ 15, n. 4 (noting "Penunuri does not argue that the Release violates public policy under the so-called *Tunkl* standard.")

As demonstrated above, the brief filed by amicus goes beyond the issue for which certiorari was granted and the arguments raised by Penunuri in this case. Because it is well-established that amicus, a stranger to the case, cannot extend or enlarge the issues on appeal, Sundance has not addressed these new issues and arguments. *Madsen*, 658 P.2d at 629, n. 3. However, should the Court desire for Sundance to respond to the issues and argument raised by amicus, Sundance

respectfully requests that the Court so indicate and grant it leave to submit additional briefing.

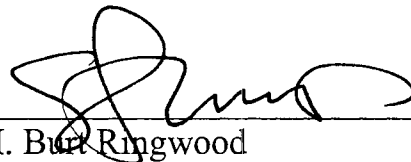
### CONCLUSION

Based on the foregoing, Sundance requests that the Court affirm the judgment of the Court of Appeals, which affirmed the trial court's decision finding the Release signed by Penunuri valid and enforceable against her ordinary negligence-based claims.

DATED this 23<sup>rd</sup> day of March, 2012.

STRONG & HANNI

By



H. Burr Ringwood

A. Joseph Sano

Attorneys for Defendants/Appellees

### **CERTIFICATE OF COMPLIANCE**

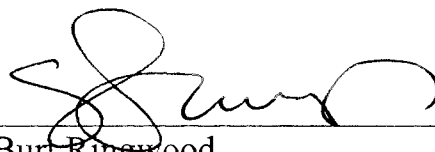
1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it does not exceed 50 pages, exclusive of exempted content, and because it contains 11,336 words.

2. This brief also complies with the typeface and typestyle requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using Ms Word 2007, in a 14 point Times New Roman font.

DATED this 23<sup>rd</sup> day of March, 2012.

STRONG & HANNI

By



H. Burt Ringwood

A. Joseph Sano

Attorneys for Defendants/Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of March, 2012, a true and correct copy of the foregoing **Appellees' Brief** was served by the method indicated below, to the following:

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# ADDENDUM A

## Penunuri v. Sundance Partners, Ltd.

Case No. 20100331-CA

## COURT OF APPEALS OF UTAH

2011 UT App 183; 684 Utah Adv. Rep. 30; 2011 Utah App. LEXIS 189

June 9, 2011, Filed

**NOTICE:**

THIS OPINION IS SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTER.

**PRIOR HISTORY:** [\*\*1]

Fourth District, Provo Department, 080400019. The Honorable Claudia Laycock.

**COUNSEL:** Robert D. Strieper, Salt Lake City, for Appellants.

H. Burt Ringwood and A. Joseph Sano, Salt Lake City, for Appellees.

**JUDGES:** J. Frederic Voros Jr., Judge. WE CONCUR: James Z. Davis, Presiding Judge, Michele M. Christiansen, Judge.

**OPINION BY:** J. Frederic Voros Jr.

**OPINION**

VOROS, Judge:

[\*P1] Lisa Penunuri appeals the trial court's order denying her Motion for Partial Summary Judgment against Sundance Partners, LTD, and other named appellees (collectively, Sundance) and dismissing as a matter of law her claims based on ordinary negligence. We affirm.

**BACKGROUND**

[\*P2] On August 1, 2007, Penunuri and two friends participated in a guided horseback ride operated by Sundance. The party consisted of five riders and one guide. The riders were arrayed in single file with the guide in front and Penunuri in the rear. The rider directly in front of Penunuri was an eight-year-old girl. The girl had problems controlling her horse; as a result, gaps

formed in the train of riders. To keep the train together, the guide informed the riders that she would hold the reins of the eight-year-old's horse. However, before the guide could do so, Penunuri's horse suddenly accelerated [\*\*2] to catch up with the other horses. The unexpected acceleration allegedly caused Penunuri to fall off her horse and suffer serious injuries. Sundance's instructional manual for horseback riding guides cautioned that horses that lag behind tend to accelerate quickly to catch up with the group.

[\*P3] Before participating in the ride, Penunuri signed a Release & Indemnity Agreement (the Release), which purported to release Sundance from any claims arising from its ordinary negligence:

I expressly agree to assume all risks of personal injury, falls, accidents, and/or property damage, including those resulting from any negligence of Sundance . . . .

[\*P4] Penunuri filed suit against Sundance alleging negligence, gross negligence, and vicarious liability. She then filed a Motion and Memorandum for Partial Summary Judgment and Declaratory Relief, arguing that the Release is unenforceable under the Limitations on Liability for Equine and Livestock Activities Act (the Equine Act), *see Utah Code Ann. §§ 78B-4-201 to -203* (2008). The trial court ruled that the Equine Act did not prevent a party from contracting away its liability for ordinary negligence and thus ruled the Release enforceable. It accordingly [\*\*3] dismissed all of Penunuri's claims based on ordinary negligence. Penunuri appeals.

**ISSUES AND STANDARDS OF REVIEW**

[\*P5] Penunuri contends that the trial court erred by denying her motion for partial summary judgment and by ruling that the Release was enforceable. More specifically, she argues that the plain language of the Equine Act prevents an equine sponsor from limiting its liability

for ordinary negligence with a pre-injury release. In addition, she argues that public policy as expressed in the Equine Act prohibits such releases.

[\*P6] Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Utah R. Civ. P. 56(c)*. We "review[] a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and view[] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 10, 235 P.3d 730. In addition, "[w]e review questions of statutory interpretation for correctness giving no deference to the trial court's interpretation." *In re S.C.*, 1999 UT App 251, ¶ 8, 987 P.2d 611 [\*\*4] (internal quotation marks omitted).

#### ANALYSIS

[\*P7] "In general, the common law disfavors agreements that indemnify parties against their own negligence because one might be careless of another's life and limb, if there is no penalty for carelessness." *Hawkins v. Peart*, 2001 UT 94, ¶ 14, 37 P.3d 1062 (internal quotation marks omitted). Nevertheless, generally, "those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence in performance of [a] contractual duty; but such an exemption is always invalid if it applies to harm wilfully inflicted or caused by gross or wanton negligence." *Id.* ¶ 9 (quoting 6A Arthur Linton Corbin, *Corbin on Contracts*, § 1472, at 596-97 (1962)). Thus, in Utah, as in a majority of states, generally "people may contract away their rights to recover in tort for damages caused by the ordinary negligence of others." *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 14, 179 P.3d 760; see also *Rothstein v. Snowbird Corp.*, 2007 UT 96, ¶ 6, 175 P.3d 560 ("We have joined the majority of jurisdictions in permitting people to surrender their rights to recover in tort for the negligence of others.").

[\*P8] Penunuri first contends [\*\*5] that the plain language of the Equine Act renders the Release unenforceable. She also contends that the Release offends public policy established by the Equine Act. We consider each contention in turn.

A. The Language of the Equine Act Does Not Invalidate the Release.

[\*P9] "To interpret a statute, we always look first to the statute's plain language in an effort to give effect to the legislature's intent, to the degree it can be so discerned." *In re Olympus Constr., LC*, 2009 UT 29, ¶ 10, 215 P.3d 129. To determine the meaning of the plain language, we examine the statute "in harmony with other statutes in the same chapter and related chapters." *LPI*

*Servs. v. McGee*, 2009 UT 41, ¶ 11, 215 P.3d 135 (internal quotation marks omitted). Moreover, "effect must be given, if possible, to every word, clause and sentence of a statute . . . . No clause[,] sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute." *State v. Maestas*, 2002 UT 123, ¶ 53, 63 P.3d 621 (omission and alteration in original) (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:06 [\*\*6] (4th ed. 1984)).

[\*P10] Penunuri contends that the Release violates the express terms of the Equine Act. Section 202 of the Equine Act shields an equine sponsor from liability for the inherent risks associated with equine activities, unless the sponsor engages in negligence, gross negligence, willful or wanton disregard for the safety of the participant, or intentionally injurious conduct:

An equine activity sponsor, equine professional, livestock activity sponsor, or livestock professional is not liable for an injury to or the death of a participant due to the inherent risks associated with these activities, *unless* the sponsor or professional:

(a)(i) provided the equipment or tack;

(ii) the equipment or tack caused the injury; and

(iii) the equipment failure was due to the sponsor's or professional's negligence;

(b) failed to make reasonable efforts to determine whether the equine or livestock could behave in a manner consistent with the activity with the participant;

(c) owns, leases, rents, or is in legal possession and control of land or facilities upon which the participant sustained injuries because of a dangerous condition which was known to or should have been known to the sponsor or professional [\*\*7] and for which warning signs

have not been conspicuously posted;

(d)(i) commits an act or omission that constitutes negligence, gross negligence, or willful or wanton disregard for the safety of the participant; and

(ii) that act or omission causes the injury; or

(e) intentionally injures or causes the injury to the participant.

*Utah Code Ann. § 78B-4-202(2)* (2008) (emphasis added).<sup>1</sup>

1 This section was renumbered and amended after the instant case arose, but the relevant portions have not changed. See *Utah Code Ann. § 78B-4-202* amend. notes (2008). We cite to the current version of the statute for the reader's convenience.

[\*P11] Penunuri argues that the "plain language provides that [Sundance] is not to be held liable for inherent risks associated with equine activity yet *must* be held liable for its acts or omissions of negligence." (Emphasis added.) She further argues that enforcing the Release "would make everything after 'unless' in [section 202(2)] superfluous." Sundance responds that while the Act is designed to ensure that equine activity sponsors would not be liable for specified inherent risks, "nothing in the Act suggests that the Legislature intended to change or alter the liability of [\*8] equine sponsors for noninherent risks or the contractual protections that might be afforded to them through a release." As noted above, Utah case law recognizes that pre-injury releases releasing a party from liability for its own negligence are generally enforceable. Thus, in effect, Penunuri asks us to read *section 202* to overrule that case law insofar as equine and livestock activities are concerned.

[\*P12] The principal obstacle to reading *section 202* to invalidate pre-injury releases is that it does not mention releases.<sup>2</sup> Accordingly, if *section 202* invalidates pre-injury releases, it does so by implication only. As it applies to this case, *section 202* is clear that an equine activity sponsor is protected from liability for the injury or death of a participant due to the inherent risks of equine activity *unless* the sponsor is negligent, grossly negligent, or worse. But what then? According to Penunuri,

once negligence is established, the Equine Act mandates liability, subject only to statutory defenses. According to Sundance, once negligence is established, the Equine Act ceases to apply, and the case becomes a garden variety negligence case controlled by the rules governing such cases, [\*9] including common law defenses.

2 The same is true of the legislative history to which Penunuri directs our attention.

[\*P13] Reading this language to abrogate common law defenses, invalidate pre-injury releases, and mandate liability stretches the statutory language past its plain meaning. We agree with Sundance and the trial court that *section 202* protects a sponsor from liability arising from the inherent risks of equine activities unless the sponsor is negligent, in which case it offers no protection. However, the sponsor remains free to assert all other applicable defenses, including, if appropriate, release. The "unless" clause thus defines the limit of the Act's benefits to sponsors; it does not impose new burdens upon them. The Equine Act therefore leaves undisturbed case law permitting sponsors to contractually limit their liability for acts of ordinary negligence. See generally *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 904 (Utah Ct. App. 1995) ("Generally, parties ... may properly bargain against liability from harm caused by their ordinary negligence."). This reading does not render the language following "unless" superfluous, as Penunuri argues. That language is still given its [\*10] desired effect, which is to circumscribe the protections offered by the Equine Act.<sup>3</sup>

3 Because our supreme court has declined—albeit in a noncommercial setting—to "extend strict liability to owners and keepers of horses," see *Pullan v. Steinmetz*, 2000 UT 103, ¶ 7, 16 P.3d 1245, one might question whether the negligence exception to the Equine Act's coverage circumscribes its protections to the point of rendering them illusory.

[\*P14] Thus construed, *section 202* is in harmony with *section 203* of the Equine Act. See *LPI Servs. v. McGee*, 2009 UT 41, ¶ 11, 215 P.3d 135 (stating that statutes are to be read in harmony with other statutes in the same chapter). *Section 203* requires equine or livestock activity sponsors to provide notice to participants that the sponsor is not liable for certain inherent risks of the equine activity. See *Utah Code Ann. § 78B-4-203(1)* (2008). This notice may be provided by posting a sign in a prominent location or by "providing a document or release for the participant . . . to sign." *Id.* § 78B-4-203(2)(b) (emphasis added). We do not read the word "release" in this section to refer merely to a docu-

ment notifying the participant that the sponsor is insulated against [\*\*11] claims arising from certain inherent risks of participating in the activity. Because the statutory term "document" already conveys this meaning, such a reading would impermissibly render "release" redundant. *See State v. Maestas*, 2002 UT 123, ¶ 53, 63 P.3d 621. Furthermore, a release does more than provide notice. "The main purpose of a release typically is the voluntary relinquishment of a claim or right by one who, absent the release, could have enforced such a claim or right." 66 Am. Jur. 2d *Releases* § 1 (2010). We therefore conclude that section 203 presupposes the continued use of releases between equine activity sponsors and participants. Given the other provisions of the statute, a release in this context can have only one purpose, which is to release in advance a sponsor from liability for that sponsor's ordinary negligence. Accordingly, we conclude that the plain language of the Equine Act does not invalidate the Release.

#### B. Public Policy as Expressed in the Equine Act Does Not Invalidate the Release.

[\*P15] Penunuri next contends that the Release violates public policy as expressed in the Equine Act.<sup>4</sup> It is well settled that "preinjury releases must be compatible with public policy." [\*\*12] *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 15, 179 P.3d 760. However, we proceed with great caution when considering whether to invoke public policy as a basis for judicial determinations:

[P]ublic policy is a protean substance that is too often easily shaped to satisfy the preferences of a judge rather than the will of the people or the intentions of the Legislature . . . . [T]he theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as a basis for judicial determinations, if at all, only with the utmost circumspection.

*Rothstein v. Snowbird Corp.*, 2007 UT 96, ¶ 10, 175 P.3d 560 (internal quotation marks omitted); *see also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 672 (Tex. 2008) ("[P]ublic policy ... is a very unruly horse, and when once you get astride it you never know where it will carry you." (quoting *Richardson v. Mellish*, (1824) 2 Bing. 229, 252, 130 Eng. Rep. 294, 303)). "For a contract to be void on the basis of public policy, there must be a showing free from doubt that a contract is against public policy." *Ockey v. Lehmer*, 2008 UT 37, ¶

21, 189 P.3d 51 [\*\*13] (internal quotation marks omitted).

4 Penunuri does not argue that the Release violates public policy under the so-called *Tunkl* standard. *See generally Hawkins v. Peart*, 2001 UT 94, ¶ 9 n.3, 37 P.3d 1062 (discussing the public policy standard set forth in *Tunkl v. Regents of the University of California*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441, 445-46 (Cal. 1963)).

[\*P16] Generally, "our public policy does not foreclose the opportunity of parties to bargain for the waiver of tort claims based on ordinary negligence." *Berry v. Greater Park City Co.*, 2007 UT 87, ¶ 15, 171 P.3d 442. However, Penunuri argues that the Equine Act establishes a public policy prohibiting an equine sponsor from limiting its liability for negligence via a pre-injury release. She analogizes to the Utah Supreme Court's invalidation of a pre-injury release based on public policy grounds under Utah's Inherent Risks of Skiing Act (the Skiing Act). *See generally Rothstein*, 2007 UT 96, 175 P.3d 560; Utah Code Ann. §§ 78-27-51 to -54 (2002 & Supp. 2007).

[\*P17] In *Rothstein v. Snowbird Corp.*, 2007 UT 96, 175 P.3d 560, a skier collided with a retaining wall and was injured. *See id.* ¶ 1. He sued the ski resort, alleging negligence. *See id.* The trial court granted the ski resort's [\*\*14] motion for summary judgment based on two release and indemnity agreements signed by the skier. *See id.* ¶ 5. The agreements provided that the skier waived all claims, "including those caused by [the resort's] negligence." *Id.* ¶ 4. The supreme court reversed in a 3-2 decision, holding that the releases violated public policy as declared in the Skiing Act. *See id.* ¶ 1.

[\*P18] The first section of the Skiing Act contains an extensive statement of its public policy underpinnings:

"The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state. It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to es-

tablish as a matter of law that certain risks are inherent in that sport, and to provide that, as [\*\*15] a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks."

*Id.* ¶ 12 (quoting Utah Code Ann. § 78-27-51 (2002 & Supp. 2007)). Based on that public policy statement, the *Rothstein* court observed that the Legislature found it "necessary to immunize ski area operators from liability for injuries caused by inherent risks because they were otherwise being denied insurance coverage or finding coverage too expensive to purchase." *Id.* ¶ 14. The court thus reasoned that "[t]he central purpose of the [Skiing] Act ... was to permit ski area operators to purchase insurance at affordable rates." *Id.* ¶ 15. A public policy "bargain [was] struck by the [Skiing] Act," the court held, which provided that "ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for noninherent risks by purchasing insurance." *Id.* ¶ 16. Because the purpose of the Skiing Act was to provide ski resorts with the ability to purchase affordable liability insurance, the court held that the Legislature had determined that ski resorts could not "use pre-injury releases [\*\*16] to significantly pare back or even eliminate their need to purchase the very liability insurance the [Skiing] Act was designed to make affordable." *Id.* Accordingly, the court held that the releases offended public policy. *See id.*

[\*P19] Penunuri argues that the Equine Act "was intended to mirror" the Skiing Act and that the two acts are "nearly identical." She argues, therefore, that the Equine Act struck the same bargain as the Skiing Act and thus prohibits pre-injury releases for negligence. Penunuri points out that both statutes "limit participants from recovering from inherent risks of the sport. Both define the inherent risks as those that are integral to the sport. Both acts require that the operator or sponsor post a sign listing the inherent risks. Both acts permit a participant to recover from acts of the sponsor or operator's negligence." Notwithstanding those similarities, however, only the Skiing Act includes a declaration of public policy. That public policy declaration was the centerpiece of *Rothstein*. From it, the supreme court gleaned "[t]he central purpose of the [Skiing] Act," *id.* ¶ 15, and extrapolated "the bargain struck by the [Skiing] Act," *id.* ¶ 16, which supported its [\*\*17] ultimate holding that

Snowbird's releases were invalid. *See id.* "Few legislative expressions of public policy speak more clearly to an issue," the court noted, "than the public policy rationale for Utah's ... Skiing Act speaks to preinjury releases for negligence." *Id.* ¶ 11. The Equine Act has no equivalent statement of public policy. In fact, it has no statement of public policy at all. We are instead left with only the text of the Equine Act from which to deduce a public policy. *Rothstein* itself warns that "[t]o pluck a principle of public policy from the text of a statute and to ground a decision of this court on that principle is to invite judicial mischief." *Id.* ¶ 10. Consequently, we decline to do so.<sup>5</sup>

5 In *Street v. Darwin Ranch, Inc.*, 75 F. Supp. 2d 1296 (D.C. Wyo. 1999), a rider suing a dude ranch for a fall from a horse on a trail ride sought to invalidate a pre-injury release based on the Wyoming Recreation Safety Act. *See id.* at 1297. Similar to the Equine Act, the Wyoming Recreation Safety Act shields providers of recreational activities from claims based on the inherent risks of those activities. *See id.* (citing Wyo. Stat. Ann. § 1-1-123 (1999)). The court concluded, "The [\*\*18] Release is, at the very least, consistent with the public policy expressed by the Act, if not in furtherance of it." *Id.* at 1300-01.

## CONCLUSION

[\*P20] The plain language of the Equine Act provides statutory protection to equine sponsors for inherent risks of equine activities. The portion of the Equine Act excluding negligent, gross negligent, and intentional acts from its protection does not invalidate pre-injury releases of ordinary negligence. In addition, while the Equine Act and the Skiing Act share a number of similarities, only the latter features a declaration of public policy. Accordingly, while the supreme court in *Rothstein* had a basis in the Skiing Act to invalidate pre-injury releases, we see no equivalent basis in the Equine Act for doing the same.

[\*P21] Affirmed.

J. Frederic Voros Jr., Judge

[\*P22] WE CONCUR:

James Z. Davis,  
Presiding Judge

Michele M. Christiansen, Judge

# ADDENDUM B

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TITLE 78B. JUDICIAL CODE

CHAPTER 4. LIMITATIONS ON LIABILITY

PART 2. LIMITATIONS ON LIABILITY FOR EQUINE AND LIVESTOCK ACTIVITIES

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 78B-4-201 (2011)*

§ 78B-4-201. Definitions

As used in this part:

(1) "Equine" means any member of the equidae family.

(2) "Equine activity" means:

(a) equine shows, fairs, competitions, performances, racing, sales, or parades that involve any breeds of equines and any equine disciplines, including dressage, hunter and jumper horse shows, grand prix jumping, multiple-day events, combined training, rodeos, driving, pulling, cutting, polo, steeple chasing, hunting, endurance trail riding, and western games;

(b) boarding or training equines;

(c) teaching persons equestrian skills;

(d) riding, inspecting, or evaluating an equine owned by another person regardless of whether the owner receives monetary or other valuable consideration;

(e) riding, inspecting, or evaluating an equine by a prospective purchaser; or

(f) other equine activities of any type including rides, trips, hunts, or informal or spontaneous activities sponsored by an equine activity sponsor.

(3) "Equine activity sponsor" means an individual, group, governmental entity, club, partnership, or corporation, whether operating for profit or as a nonprofit entity, which sponsors, organizes, or provides facilities for an equine activity, including:

(a) pony clubs, hunt clubs, riding clubs, 4-H programs, therapeutic riding programs, and public and private schools and postsecondary educational institutions that sponsor equine activities; and

(b) operators, instructors, and promoters of equine facilities, stables, clubhouses, ponyride strings, fairs, and arenas.

(4) "Equine professional" means a person compensated for an equine activity by:

(a) instructing a participant;

(b) renting to a participant an equine to ride, drive, or be a passenger upon the equine; or

- (c) renting equine equipment or tack to a participant.
- (5) "Inherent risk" with regard to equine or livestock activities means those dangers or conditions which are an integral part of equine or livestock activities, which may include:
  - (a) the propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them;
  - (b) the unpredictability of the animal's reaction to outside stimulation such as sounds, sudden movement, and unfamiliar objects, persons, or other animals;
  - (c) collisions with other animals or objects; or
  - (d) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.
- (6) "Livestock" means all domesticated animals used in the production of food, fiber, or livestock activities.
- (7) "Livestock activity" means:
  - (a) livestock shows, fairs, competitions, performances, packing events, or parades or rodeos that involve any or all breeds of livestock;
  - (b) using livestock to pull carts or to carry packs or other items;
  - (c) using livestock to pull travois-type carriers during rescue or emergency situations;
  - (d) livestock training or teaching activities or both;
  - (e) taking livestock on public relations trips or visits to schools or nursing homes;
  - (f) boarding livestock;
  - (g) riding, inspecting, or evaluating any livestock belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the livestock or is permitting a prospective purchaser of the livestock to ride, inspect, or evaluate the livestock;
  - (h) using livestock in wool production;
  - (i) rides, trips, or other livestock activities of any type however informal or impromptu that are sponsored by a livestock activity sponsor; and
  - (j) trimming the feet of any livestock.
- (8) "Livestock activity sponsor" means an individual, group, governmental entity, club, partnership, or corporation, whether operating for profit or as a nonprofit entity, which sponsors, organizes, or provides facilities for a livestock activity, including:
  - (a) livestock clubs, 4-H programs, therapeutic riding programs, and public and private schools and postsecondary educational institutions that sponsor livestock activities; and
  - (b) operators, instructors, and promoters of livestock facilities, stables, clubhouses, fairs, and arenas.
- (9) "Livestock professional" means a person compensated for a livestock activity by:
  - (a) instructing a participant;
  - (b) renting to a participant any livestock for the purpose of riding, driving, or being a passenger upon the livestock; or
  - (c) renting livestock equipment or tack to a participant.
- (10) "Participant" means any person, whether amateur or professional, who directly engages in an equine activity or livestock activity, regardless of whether a fee has been paid to participate.
- (11) (a) "Person engaged in an equine or livestock activity" means a person who rides, trains, leads, drives, or works with an equine or livestock, respectively.

(b) Subsection (11)(a) does not include a spectator at an equine or livestock activity or a participant at an equine or livestock activity who does not ride, train, lead, or drive an equine or any livestock.

**HISTORY:** C. 1953, 78-27b-101, enacted by L. 1992, ch. 126, § 1; 1999, ch. 257, § 1; 2003, ch. 175, § 1; renumbered by L. 2008, ch. 3, § 741.

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TITLE 78B. JUDICIAL CODE

CHAPTER 4. LIMITATIONS ON LIABILITY

PART 2. LIMITATIONS ON LIABILITY FOR EQUINE AND LIVESTOCK ACTIVITIES

**Go to the Utah Code Archive Directory**

*Utah Code Ann. § 78B-4-202 (2011)*

§ 78B-4-202. Equine and livestock activity liability limitations

(1) It shall be presumed that participants in equine or livestock activities are aware of and understand that there are inherent risks associated with these activities.

(2) An equine activity sponsor, equine professional, livestock activity sponsor, or livestock professional is not liable for an injury to or the death of a participant due to the inherent risks associated with these activities, unless the sponsor or professional:

(a) (i) provided the equipment or tack;

(ii) the equipment or tack caused the injury; and

(iii) the equipment failure was due to the sponsor's or professional's negligence;

(b) failed to make reasonable efforts to determine whether the equine or livestock could behave in a manner consistent with the activity with the participant;

(c) owns, leases, rents, or is in legal possession and control of land or facilities upon which the participant sustained injuries because of a dangerous condition which was known to or should have been known to the sponsor or professional and for which warning signs have not been conspicuously posted;

(d) (i) commits an act or omission that constitutes negligence, gross negligence, or willful or wanton disregard for the safety of the participant; and

(ii) that act or omission causes the injury; or

(e) intentionally injures or causes the injury to the participant.

(3) This chapter does not prevent or limit the liability of an equine activity sponsor, an equine professional, a livestock activity sponsor, or a livestock professional who is:

(a) a veterinarian licensed under Title 58, Chapter 28, Veterinary Practice Act, in an action to recover for damages incurred in the course of providing professional treatment of an equine;

(b) liable under Title 4, Chapter 25, Estrays and Trespassing Animals; or

(c) liable under Title 78B, Chapter 7, Utah Product Liability Act.

**HISTORY:** C. 1953, 78-27b-102, enacted by L. 1992, ch. 126, § 2; 2003, ch. 175, § 2; renumbered by L. 2008, ch. 3, § 742.

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*Utah Code Ann. § 78B-4-203 (2011)*

§ 78B-4-203. Signs to be posted listing inherent risks and liability limitations

(1) An equine or livestock activity sponsor shall provide notice to participants of the equine or livestock activity that there are inherent risks of participating and that the sponsor is not liable for certain of those risks.

(2) Notice shall be provided by:

(a) posting a sign in a prominent location within the area being used for the activity; or

(b) providing a document or release for the participant, or the participant's legal guardian if the participant is a minor, to sign.

(3) The notice provided by the sign or document shall be sufficient if it includes the definition of inherent risk in *Section 78B-4-201* and states that the sponsor is not liable for those inherent risks.

(4) Notwithstanding Subsection (1), signs are not required to be posted for parades and activities that fall within *Subsections 78B-4-201(2)(f) and (7)(c), (e), (g), (h), and (j)*.

**HISTORY:** C. 1953, 78-27b-103, enacted by L. 2003, ch. 175, § 3; renumbered by L. 2008, ch. 3, § 743.