IN THE SUPREME COURT OF IOWA

Supreme Court No. 20-0343
Pottawattamie County No. LACV118305

THOMAS LUKKEN,

PLAINTIFF-APPELLANT,

v.

KORBY L. FLEISCHER, individually and d/b/a MT. CRESENT SKI AREA; SAMANTHA FLEISCHER, individually and d/b/a/ MT. CRESCENT SKI AREA; DOUBLE DIAMOND, INC., an Iowa corporation d/b/a MT. CRESENT SKI AREA; CHALLENGE QUEST, LLC, an Oklahoma Corporation; KIRK GREGORY ENGINEERING, P.C., a Texas Corporation; and KG STRUCTURAL SOLUTIONS, LLC, a Texas Corporation

DEFENDANTS-APPELLEES.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POTTAWATTAMIE COUNTY
THE HONORABLE JAMES S. HECKERMAN

APPELLANT'S FINAL BRIEF

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IV.
ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction of this matter as it presents a substantial issue of first impression with respect to: (1) whether the Iowa Safety Inspection of Amusement Rides Act's requirement that amusement ride operators carry liability insurance for bodily injury in the amount of $1,000,000 make a waiver of such operators' liability for negligence invalid as against public policy, and (2) whether willful or wanton disregard for the safety of others may be released by a form waiver. These questions present fundamental and urgent issues of broad public importance and their answers will have substantial implications, as enunciating and changing legal principles are at issue. *See*, Iowa R. App. P. 6.1101(2)(c), (d) and (f).

V.
STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

On September 21, 2018, Plaintiff Thomas Lukken ("Plaintiff") filed a Petition at Law in the district court for Pottawattamie County alleging Defendants owed a duty to Plaintiff which they breached, proximately causing

Plaintiff's injuries and damages. (*Petition, App. 10*). Plaintiff also pled strict liability and requested punitive damages. *Id.* On June 3, 2019, Plaintiff filed an Amended Petition at Law. (*Amended Petition, App. 22*).

On July 30, 2019, Defendant Challenge Quest, LLC ("Challenge Quest") filed a motion for summary judgment on the entirety of Plaintiff's claim against it. (*Challenge Quest MSJ, App. 34*). Plaintiff resisted Challenge Quest's motion, arguing that it owed a legal duty to Plaintiff, that its negligence was a legal cause of Plaintiff's injuries and that its summary judgment motion was premature. (*Plaintiff's Resistance to Challenge Quest MSJ, App. 71-96*).

Plaintiff alleged that at the very least genuine issues of material fact existed as to whether Challenge Quest owed a duty to Plaintiff and whether its failure to meet industry standards was a foreseeable and proximate cause of Plaintiff's injuries.

On December 16, 2019, Defendants Korby Fleischer, Samantha Fleischer and Double Diamond, Inc., d/b/a Mt. Crescent Ski Area, (collectively "Mt. Crescent") filed a motion for summary judgment on the entirety of Plaintiff's claim against them, claiming that Plaintiff's claim was barred because he signed a waiver purporting to release Mt. Crescent from any liability associated with Plaintiff's ride on its zipline. (*Mt. Crescent*

Defendants' MSJ, App. 423; Release Agreement, App. 465). Plaintiff resisted Mt. Crescent's motion, arguing that Mt. Crescent cannot be released from willful and wanton disregard for the rights and safety of Plaintiff and that such a waiver is contrary to the applicable provisions of Iowa Code Chapter 88A and public policy, rendering it void and unenforceable. (*Plaintiff's Resistance to Mt. Crescent Defendants' MSJ, App. 440-464).*

Plaintiff alleged that at the very least genuine issues of material fact existed as to whether Mt. Crescent's conduct constituted gross negligence and/or willful and wanton disregard for safety which would preclude it from waiving its liability in this case, as well as whether the waiver Plaintiff signed is invalid and unenforceable as contrary to the Iowa Amusement Park and Ride Safety Inspection and Regulation Act and public policy.

B. DISPOSITION OF THE CASE IN THE DISTRICT COURT

On December 10, 2019, the Iowa District Court for Pottawattamie County, the Honorable James S. Heckerman presiding, granted Challenge Quest's Motion for Summary Judgment. (*Order on Challenge Quest's MSJ, App. 414*). On January 9, 2020, Plaintiff filed a Notice of Appeal. (*Notice of Appeal, App. 436*).

On February 14, 2020, the District Court granted Mt. Crescent's Motion for Summary Judgment. (*Order on Mt. Crescent Defendants' MSJ,*

App. 496). On February 21, 2020, Plaintiff filed a Notice of Appeal. (*Notice of Appeal, App. 505*).

VI.
STATEMENT OF FACTS

This is a case involving multiple failures by Defendants in the design, construction and operation of a zipline challenge course. As a result of the alleged failures, Plaintiff, who was a paid guest at Mt. Crescent Ski Area, which is owned and operated by Double Diamond, Inc. ("Double Diamond"), descended on a zipline, traveling in excess of 40 miles per hour, and due to a confluence of systemic human, design and mechanical errors, he collided with a wooden pole at the base of the zipline and suffered a C7 fracture of his neck, resulting in surgical fusion. (*Amended Petition, App. 22-33*).

On or about April 15, 2014, Challenge Quest entered into an Agreement for Services ("Agreement") with Mt. Crescent. (*Agreement of Services, App. 486-493)*. Pursuant to the Agreement, Challenge Quest promised to construct "two side by side zip lines with Zip Stop braking system with 4 pole tower at top and bottom per drawings supplied by engineer" and provide "4-day, site-specific high technical training for full time staff." The zipline construction was completed by Challenge Quest in August 2014. (*Fleischer Affidavit, ¶ 6,*

App. 483-485).[1] Challenge Quest also covenanted that its services would be rendered in accordance with the current professional standards adopted by the Association for Challenge Court Technology ("ACCT"). (*Agreement for Services, App. 486).* The ACCT Standards set out safety standards for zipline courses like the one located at Mt. Crescent Ski Area. (*Fleischer Depo., 31:21-33:19, App. 294-295; Goodwin Depo., 53:17-24; App. 278*).

Despite the fact that the terms of the Agreement specified that an ACCT-compliant Zip Stop braking system would be used, Challenge Quest failed to install this system on the Mt. Crescent zipline, *(Agreement of Services, App. 486-493; Fleischer Depo., 82:13-15; App. 307*). Instead, Challenge Quest elected to use a different braking system, one that utilized a capture arm with a brake block. *(Fleischer Affidavit, ¶ 5, App. 484; Sketch of Original Braking System, App 262; Goodwin Depo., 154:5-160:20, App. 287-288; Fleischer Depo., 83:16-86:11, App. 307-308*). This manual-resistance design required Mt. Crescent employees to grip the rope attached to the brake

[1] The structure includes a 24-foot-tall launch tower at the peak of Mt. Crescent where riders begin their descent. Tandem 5/8" cables are stretched to a 40-foot-tall tower at the base of Mt. Crescent, with riders landing at a platform 33 feet above the ground. (*Engineering Drawing of Zipline Towers 1/28/14, App. 212; Engineering Drawing of Zipline Elevation 5/22/13, App. 215*). The riders, suspended in harnesses, descend on trolleys attached to the 5/8" cable. (*Fleischer Depo., 40:9-44:1; 83:16-86:18, App. 296-297; 307-308*).

block in order to arrest the zipline riders' descents. *Id.* When a rider's trolley engaged the brake block, the Mt. Crescent employee would apply resistance to the vertical braking rope as the rope pulled through the employee's grip. *Id*. Heavier riders required more grip friction. *Id.* Riders who were pushed by "tail winds" would similarly require more grip friction. *Id.* Riders had no way to control the speed of their descent and were entirely dependent upon the zipline's braking system and its correct usage to slow down and stop. (*Fleischer Depo., 40:9-44:1; 83:16-86:18, App. 296-297; 307-308*).

The braking system design used by Challenge Quest in place of the promised Zip Stop braking system was substandard and unsafe. It lacked an ACCT-mandated back-up brake, which would have served as a secondary or emergency brake in the event that the primary brake failed. Challenge Quest never advised Mt. Crescent of this fact and in fact, Challenge Quest witness, Coty Goodwin believed that the secondary brake was not even required. This was not accurate, contrary to industry standards and was criticized by Plaintiff's expert, Erik Marter in his report. (*Marter Report, App. 334-349*).

Soon after its construction, Mt. Crescent realized the original braking system installed by Challenge Quest was flawed and would need to be replaced. (*Fleischer Depo., 119:1-120:24, App. 314*). Multiple incidents occurred where riders came down the zipline so fast that employees could not

apply enough "grip friction" to safely slow the riders. As a result, the riders arrived at the zipline landing area at a speed in excess of 6 miles per hour – the threshold set by ACCT Standards – and/or collided with the employees in the landing area. There were several occasions upon which an employee was "bumped and fell off the platform". There was also an incident in which a rider came down the zipline too fast and the employee at the landing area could not arrest the rider, which caused the rider to collide with the platform in the landing area, injuring her ankle. *(Fleischer Depo., 83:16-89:11; App. 307-309*).

Mt. Crescent contacted Challenge Quest regarding the safety defects they were experiencing with the braking system. (*Fleischer Depo., 127:18-132:8; App. 316-317*). In a letter dated August 26, 2014, Challenge Quest merely rationalized the chosen system. (*Settlement Letter, App. 206-207*) ("…we chose the system we did, with the approval of the client, to provide the maximum simplicity, reliability, lost (sic) cost maintenance and flexibility.") Challenge Quest's response failed to address Mt. Crescent's safety concerns, which left Mt. Crescent with no choice but to replace the braking system through a third party.

Additionally, at no point prior to the incident at issue did Challenge Quest provide Mt. Crescent with any safety rules, policies, or procedures

regarding the structure of the zipline, the operation of the zipline, the operational limits of the zipline, training requirements for zipline operators, or braking (specifically emergency brake) requirements. (*Fleischer Depo., 30:6-14; 44:25-45:25; 46:25-47:8; 54:10-55:11; 58:13-19; 74:18-79:2; 110:23-111:15; 133:7-136:25; 140:10-141:2; 144:9-16; 145:5-146:19; 202:17-23, App. 294, 297-298, 300, 301, 305-306, 312, 317-318, 319-320; 321, 332; Zip Line Manual 2012, App. 238-249*).

Challenge Quest provided no warnings of any type to Mt. Crescent detailing the risks of modification of Challenge Quest's design. Nor did it provide Mt. Crescent any procedures required for modification of Challenge Quest's design. (*Fleischer Depo., 38:12-39:11; 72:3-73:19; 145:9-16, App. 296, 304-305, 321*). Mt. Crescent did not have the expertise to design a safety program for the operation of this zipline and relied upon Challenge Quest, the designer and builder of this zipline attraction, to detail what Mt. Crescent should know to operate the zipline safely. (*Fleischer Depo., 28:6-29:16; 74:18-79:2, App. 294-294, 305-306*).

After the new braking system was put into place, Plaintiff was injured when a Mt. Crescent employee failed to deploy the brakes correctly, resulting in Plaintiff arriving far too fast to stop at the base, and colliding at-speed with the base-tower structure. (*Fleischer Depo., 66:16-68:2; 188:11-190:5;*

203:7-19, App. 303, 328-329). Critical to this Court's understanding is the fact that the braking system as installed *did not fail*. The failure was a system failure involving a combination of human error, an unsafe design and construction, inadequate training, failure of documentation, and a non-existent operations system which put riders at risk at every stage of the zipline experience. (*Fleischer Depo., 83:16-84:19, App. 307; Goodwin Depo., 154:4-159:20, App. 287-288*). These failures constitute not only gross negligence on the part of Defendants, but a willful and wanton disregard for the safety of Plaintiff, Mt. Crescent Ski Area patrons, customers, and the general public. (*Amended Petition, App. 22*).

There are genuine issues of material fact as to Defendants' liability in this case with respect to the chain of events leading up to Plaintiff's injury. Challenge Quest designed and constructed a defective zipline which had no emergency brake as required by industry standards and failed to provide Mt. Crescent with the information, knowledge, training, and safety procedures required to operate the zipline safely and in accordance with industry standards. A Mt. Crescent employee failed to deploy the brake and Mt. Crescent itself failed not only to appropriately train and oversee its zipline employees, but also failed to document safety issues and put into place the

policies, procedures, safety manuals, checklists which would have prevented Plaintiff's injuries.

VII.
ARGUMENT

A. THE DISTRICT COURT ERRED IN FINDING THAT THE INSTALLATION OF A NEW ZIPLINE BRAKING SYSTEM WAS A SUPERSEDING CAUSE OF PLAINTIFF'S INJURIES WHICH WOULD RELIEVE CHALLENGE QUEST FROM LIABILITY

1. Preservation of Error

On January 9, 2020, Plaintiff filed a timely Notice of Appeal from the District Court's December 10, 2019 ruling granting Challenge Quest's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 436; Order on Challenge Quest's MSJ, App. 414*). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District Court. (*See generally, Plaintiff's Brief and Memorandum of Authorities in Support of his Resistance to Challenge Quest's MSJ, App. 77-92; Order on Challenge Quest's MSJ, App. 414*).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not,

whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id*. (quotation omitted).

3. Argument

The District Court erred in finding that the installation of a new zipline braking system was a superseding event which interrupted the chain of causality and liability associated with Challenge Quest's negligence. While it is undisputed that the braking system was replaced, ***this was not the proximate cause of Plaintiff's injury***. A series of events, which started with Challenge Quest (unsafe design, unsafe construction, inadequate training, inadequate design of safety policies and procedures and negligent approval of the final build) and continued with Mt. Crescent (inadequate and non-ACCT-compliant training, inadequate supervision, inadequate design of safety policies and procedures, inadequate enforcement of procedures, and inadequate documentation) setting in motion the chain of events that led to Plaintiff' injury.

Mt. Crescent was forced to replace Challenge Quest's original braking system because of its substandard and dangerous construction and design. Due to the safety issues that immediately surfaced once the zipline operation

began and furthered by Challenge Quest's unwillingness to assist in correcting these issues even when Mt. Crescent requested its assistance, Mt. Crescent had to replace the substandard brake system.

Regardless of the braking system issue, it has been established that Plaintiff's injury occurred due to human error, not a mechanical issue with the braking system. This error transpired due to Challenge Quest's failure to provide Mt. Crescent with the required information, operational instructions, warnings and basic employee training, and Mt. Crescent's failure to have any safety inspection, training, supervision, policies or documentation. These, combined with the lack of an emergency brake on either the original or the replacement braking systems were the cause of Plaintiff's injury. Aside from Mt. Crescent's own liability, the chain of events that resulted in Plaintiff's injuries originated with and was perpetuated by Challenge Quest. The installation of a new braking system was necessitated by Challenge Quest's negligence and, therefore, does not excuse it from its unlawful acts and omissions which go beyond the defective braking system itself and include Challenge Quest's other failures regarding training, providing safety policies, practices, procedures, operational instructions and warnings.

Contrary to the district court's finding, the chain of causal events between Challenge Quest's negligence and Plaintiff's injury was not broken.

(*Order on Challenge Quest MSJ, p. 6, App. 419*). The installation of the new braking system was not a superseding or intervening cause. See generally, *Rieger v. Jacque*, 584 N.W.2d 247, 251 (Iowa 1998). The district court focused on the fact that a new braking system was installed by a third party, but in doing so, it failed to recognize that no such intervention would have even been necessary had Challenge Quest provided Mt. Crescent with a safe, ACCT-compliant product in the first place, as per the terms of the Agreement. (*Order on Challenge Quest MSJ, pp. 7-8, App. 420-421*). The district court did not consider Challenge Quest's failure to provide Mt. Crescent with the aforementioned training, policies, instructions and limitations, which are also elements of Plaintiff's negligence claim and serve as independent proximate causes for Plaintiff's injury.

Under Iowa law, causation has two components: (1) the defendant's conduct must have in fact caused the plaintiff's damages (generally a factual inquiry), and (2) the policy of the law must require the defendant to be legally responsible for the injury (generally a legal question). *Union County v. Piper Jaffray & Co.*, 741 F. Supp. 2d 1064, 1091 (S.D. Iowa 2010) (quotations omitted).

In the present case, Challenge Quest's failure to provide Mt. Crescent with an appropriate and safe system, along with its failure to provide Mt.

Crescent with the required information, operational instructions, warnings and basic employee training – which according to industry standards, should have included proper procedures for Mt. Crescent to train its subsequent employees - caused Plaintiff's injuries. The risk of these failures certainly includes catastrophic injury to a zipline rider – like the Plaintiff. See *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), citing Restatement (Third) of Torts, § 29, at 575 ("An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.").

Specifically, manufacturers must anticipate the nature of the environment in which their products are to be used and the risk attending a product's use in that setting. *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 192 (Iowa 1982) (citation omitted). If misuse of a product occurs, the factfinder must determine whether the misuse was reasonably foreseeable by the manufacturer. *Id*. It was foreseeable to Challenge Quest that if it failed in these aforementioned duties, that zipline-rider injury would occur. The need to replace the unsafe Challenge Quest braking system does not supersede Challenge Quest's responsibility.

This Court recently noted that under the Restatement (Third) of Torts, the law on intervening and superseding forces has been significantly simplified. *State v. Shears*, 920 N.W.2d 527, 543 (Iowa 2018) (rejecting

"superseding cause" and finding that under the Restatement's causation standard, the property damage caused was foreseeable and within the scope of liability). The Restatement (Third) states that "[w]hen a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Id.*, citing Restatement (Third) of Torts § 34, at 569. The foreseeability of an intervening act will determine whether an actor's liability extends to any harm that occurs. *Id*., citing § 34 reporters' note cmt. e, at 588.

The *Shears* Court also noted the Restatement (Third)'s "declining importance" of the law on intervening forces and superseding causes because "modern tort law has recognized 'that there are always multiple causes of an outcome and that the existence of intervening causes does not ordinarily elide a prior actor's liability." *Id*., citing Restatement (Third) of Torts § 34 cmt. a, at 569.

In *Deromedi v. Litton Industrial Products, Inc*., 636 F. Supp. 392, 393 (W.D. Mich. 1986), a federal district court applied a similar rationale. In *Deromedi*, an employer replaced a circuit board for a computer operated grinder which subsequently malfunctioned causing bodily injury. The plaintiff sought to hold the grinder manufacturer liable for negligence, while the manufacturer maintained that the employer's failure to provide a safe

workplace was a superseding intervening cause. *Id.* The court granted plaintiff's partial summary judgment as to this affirmative defense, reasoning that the employer's unsafe use of the incorrect replacement part was foreseeable and, therefore, any negligence by the employer or the employee was not a superseding intervening cause of the accident. *Id.*, at 395.

The *Deromedi* Court explained that a superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. *Id*. An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed. *Id*. Therefore, an intervening act is considered a superseding cause of injury only where it is unforeseeable. See, *Id*. It concluded that the use of the incorrect circuit board was a foreseeable consequence of the manufacturer's negligence and that the conduct of the plaintiff and his employer was not, as a matter of law, a superseding cause sufficient to relieve the manufacturer from liability. *Id.*

Questions of intervening forces and superseding causes often involve factual analysis and are not suitable for summary judgment resolution. For example, in *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 15 (Iowa 1977), the Iowa Supreme Court rejected a vehicle manufacturer's argument that the

injured driver's failure to properly inspect the vehicle was a superseding cause. "In order for an intervening act or force to relieve an individual from liability, it must not have been a normal consequence of his acts or have been reasonably foreseeable." *Id.* (citations omitted). The Court explained:

> "In applying this doctrine to cases where there is an intervening agency, it is generally held that the intervening act of an independent voluntary agency does not arrest causation, nor relieve the person doing the first wrong from the consequences thereof, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer."

Id. (quotation omitted). The Court emphasized that when facts are in dispute or room exists for reasonable differences of opinion as to whether the conduct is intervening, the question is for the jury. *Id.* (citations omitted). It found that since reasonable minds could differ on the question of foreseeability, the trial court properly submitted the causation issue to the jury. *Id*. See also, i.e. *Bellman v. City of Cedar Falls*, 617 N.W.2d 11, 18 (Iowa 2000) (finding it foreseeable that group of school children would be curious and interested in an unattended golf cart and that the jury could conclude that the decedent child's conduct fell within the original risk created by defendant's actions, which were not superseded by the alleged inattention of those supervising the children at the time the injury occurred); *Tenney v. Atlantic Associates*, 594 N.W.2d 11, 21 (Iowa 1999) (reversing summary judgment for defendant landlord where defendant, who was negligent in safekeeping master

apartment keys, alleged that intruder's actions were a superseding cause of plaintiff's injuries, finding that it was foreseeable that such harm could occur and thus was within the scope of the original risk).

It is well settled that a manufacturer, regardless of privity of contract, is liable to an ultimate user of its product for injuries arising from its negligence in the manufacture of the product. See, i.e. *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969) (holding Texas jurisdictional long-arm statute applicable where an Oregon amusement ride manufacturer sought dismissal after plaintiff was injured on a ride it had sold into interstate commerce and was owned and operated by a third party). Corporate defendants cannot escape jurisdiction, hence liability, by selling a product to an independent intermediary. See, i.e. *Cole v. Caterpillar Machinery Corp.*, 562 F. Supp. 179, 181 (M.D. La. 1983) (defendant tractor manufacturer subject to court's jurisdiction in plaintiff's wrongful death action even though it had merged with a foreign company).

In *United States Fidelity & Guaranty Co. v. Brian*, 337 F.2d 881, 883 (5th Cir. 1964), the Fifth Circuit found that the special verdicts of negligence as to an operator of an amusement ride which caused injury and freedom from negligence as to the ride's manufacturer-designer were either inconsistent or unsupported by the evidence and remanded the case for a new trial. It stated

that the same circumstances that require greater care on the part of an amusement park operator apply as well to the manufacturer-designer of such rides as the foreseeable dangers are the same – "both are creating risks to thousands of passengers for monetary gain". *Id.*

> "If the fault for the accident in the case before us arises from the design of the [amusement ride], such fault must surely fall upon the manufacturer-designer as well as on the operator. It is the latter who is the expert in matters of design; it is he who has initiated the faulty design. Nor can the manufacturer be held less responsible for recognizing a defect in the design….since he designed and built the ride in this manner…the manufacturer was in at least as good a position to foresee injury as was the operator…***if the injury to [the plaintiff] was reasonably foreseeable, it was foreseeable to both***."

Id. (emphasis added).

In the present case, there is evidence of Challenge Quest's negligence on a number of levels that at the very least represents factual disputes that must be determined by a jury. It may not escape liability for its own negligence simply because it was not the owner/operator of the zipline at the time of Plaintiff's injury. Granting summary judgment was inappropriate.

B. THE DISTRICT COURT ERRED IN FINDING THAT CHALLENGE QUEST OWED NO DUTY TO PLAINTIFF

1. Preservation of Error

On January 9, 2020, Plaintiff filed a timely Notice of Appeal from the district court's December 10, 2019 ruling granting Challenge Quest's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 436; Order on*

Challenge Quest's MSJ; App. 414). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District Court. (*See generally Plaintiff's Brief and Memorandum of Authorities in Support of his Resistance to Challenge Quest's MSJ, App. 77-92; Order on Challenge Quest's MSJ, App. 414*).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id*. (quotation omitted).

3. Argument

The district court incorrectly found that "[Defendant] had no duty to Plaintiff after it completed its work and transferred control on (sic) the zipline to Mt. Crescent" and that once construction was complete, it "had no further involvement or responsibility for the zipline." (*Order on Challenge Quest's MSJ, p. 5, App. 418*). At the onset, Challenge Quest was responsible for

designing and constructing a zipline which complied with industry standards, which it did not do. In addition, Challenge Quest was responsible for: (1) providing Mt. Crescent with the necessary operational instructions, operational limitations/warnings and initial training to operate the zipline safely; (2) adequately addressing Mt. Crescent's safety concerns in the parties' subsequent correspondence; (3) ensuring that Mt. Crescent had safety policies, procedures and guidelines in place and a definitive method for training future Mt. Crescent employees to follow such policies, procedures and guidelines; and (4) recognizing safety issues in its subsequent annual inspections of Mt. Crescent's zipline instead of allowing it to pass inspection and leave such issues unaddressed. Evidence in the record shows that Challenge Quest failed in these responsibilities. Its conduct created a risk of physical harm to zipline end users, such as Plaintiff. Under Iowa law, Challenge Quest owed Plaintiff a duty to exercise reasonable care in its design, construction, training and inspection of the zipline.

A claim of negligence involves four elements: (1) existence of a duty, (2) breach of that duty, (3) causation, and (4) damages. *Brosnan v. Woodman*, 939 N.W.2d 123, *5 (Iowa Ct. App. 2019) (unreported). With this Court's adoption of the Restatement (Third) of Torts, the question of whether a duty exists when one causes physical harm to another need not even be posed in

most cases. See generally, *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). In *Thompson*, this Court reasoned:

> "'An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.' Thus, in most cases involving physical harm, courts 'need not concern themselves with the existence or content of this ordinary duty', but instead may proceed directly to the elements of liability set forth in section 6 [i.e. breach, factual causation, scope of liability]. The general duty of reasonable care will apply in most cases, and thus courts 'can rely directly on section 6 and need not refer to duty on a case-by-case basis.'"

Id., quoting Restatement (Third) of Torts §§ 6, 7.

The *Thompson* Court also held that district courts should not be making fact-specific duty holdings. Rather, [t]he assessment of the foreseeability of a risk is allocated to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care. *Id*., at 835. "If multiple acts occur, each of which…would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of harm." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 27.

Ziplines are inherently dangerous. Once a rider is attached to the zipline, he or she is entirely without control over the zipline's movement and simply passively experiences the ride. Once released from the upper tower, the rider cannot steer, control speed, slow down, brake or stop. Injuries resulting in the failure of the safe operation of a zipline, whether it be

mechanical, equipment or human failures, could range from no injuries to catastrophic injuries or even death. (*Fleischer Depo, 24:1-25:17, App. 292-293*).

Challenge Quest clearly owed a duty to Plaintiff. Because the potential for harm was so great, the level of care required for Challenge Quest to meet those dangers, and thus its duty, was also great. Plaintiff was a rider on a zipline designed and constructed by Challenge Quest. It had a duty to ensure that Mt. Crescent, at the very least, had the information and training on how to safely operate a zipline challenge course, which it failed to do. Further, Challenge Quest undertook the responsibility of training Mt. Crescent employees to safely and effectively operate the zipline. Because their training was inadequate and their guidance nonexistent, Plaintiff was injured.

C. THE DISTRICT COURT ERRED IN FINDING NO ISSUES OF MATERIAL FACT AS TO PLAINTIFF'S NEGLIGENCE CLAIM AGAINST CHALLENGE QUEST

1. Preservation of Error

On January 9, 2020, Plaintiff filed a timely Notice of Appeal from the district court's December 10, 2019 ruling granting Challenge Quest's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 436; Order on Challenge Quest's MSJ, App. 414*). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District

Court. (*See generally, Plaintiff's Brief and Memorandum of Authorities in Support of his Resistance to Challenge Quest's MSJ, App. 77-92; Order on Challenge Quest's MSJ, App. 414*).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id*. (quotation omitted).

3. Argument

a. Challenge Quest's Defective Design and Construction of the Zipline Violated Industry Standards

Pursuant to the Agreement between Challenge Quest and Mt. Crescent, the zipline was required to be constructed pursuant to Association of Challenge Course Technology ("ATTC") Standards.[2] (*Agreement for*

[2] ACCT Standards, 8th Edition contains the standards for safe design, construction, training and operation of zipline attractions. (*Fleischer Depo., 31:8-33:19, App. 294-295*).

Services, App. 486). However, Challenge Quest's original braking system for the Mt. Crescent zipline did not comply with ACCT standards and lacked an emergency brake, rendering it defective and unsafe. (*Fleischer Depo., 83:16-89:11; 119:2-121:24, App. 307-309, 314-315*). The report of Plaintiff's expert Erik Marter, citing multiple ACCT standards, makes clear the number of design, construction, and documentation failures with the zipline, that created and perpetuated a completely unsafe experience for riders. (*Marter Expert Report, App. 334-349*). Soon after its construction, Mt. Crescent realized the original braking system was flawed and unsafe and would need to be replaced. (*Fleischer Depo., 119:-120:24, App. 314*).

Significantly, Challenge Quest's original braking system ***did not*** contain an emergency brake. (*Goodwin Depo., 154:5-160:20, App. 287-288; Sketch of Original Braking System, App. 262*). This created a zipline operation in which no Mt. Crescent employees – even those whom Challenge Quest supposedly trained – was aware of what an emergency brake was, what one looked like, how to inspect one, or even that one was necessary until after Plaintiff was injured.

Emergency brakes are required by ACCT standards:

> "H.1.3. Emergency Brake Requirements: An emergency brake shall require no action by the participant and shall either be completely separate from the primary brake or an integrated back up feature of the

> primary brake. An emergency brake shall be required if, upon failure of the primary brake, both of the following occur:
>
> -The participant arrives at the zip line landing area at a speed in excess of 6 mph (10kph)
>
> -The participant experiences unintended and/or harmful contact with terrain, object or people in the zip line landing area."

(*ACCT Standards, 8th Ed., App. 223; Marter Expert Report, App. 334-349*).

Clearly, the braking system constructed by Challenge Quest required an emergency brake under industry standards - and under the Agreement with Mt. Crescent. Yet, Defendant failed provide the required emergency brake and failed to inform Mt. Crescent that one was necessary. (*Fleischer Depo., 136:10-137:14; 141:3-21; 197:23-198:2, App. 318-319, 320, 331*)**.** This was a critical safety feature mandated by ACCT standards that Challenge Quest simply excluded.

The District Court found that Challenge Quest owed no duty of care to prevent Mt. Crescent from changing the braking system and that as such, Plaintiff's claim fails as a matter of law. (*Order on Challenge Quest's MSJ, pp. 5-6, App. 418-419*). However, it was foreseeable that Mt. Crescent would be required to change the braking system and that Mt. Crescent management - who are not zipline experts or qualified to build or operate a zipline challenge course - would fail to ensure that the safety rules provided by the ACCT regarding emergency brakes would be followed. (*Fleischer Depo., 74:18-*

76:24, App. 305). Therefore, it was foreseeable that Plaintiff would be injured regardless of what particular braking system was in place. The absence of Challenge Quest's actual knowledge or involvement in this process is irrelevant. The district court's finding to the contrary is in error. (*Order on Challenge Quest's MSJ, p. 6., App. 419*)

b. Challenge Quest Failed to Provide Mt. Crescent with Zipline Safety Policies, Procedures, Guidelines, Operational Instructions, Warnings or Limits in Violation of Industry Standards

Challenge Quest was required by ACCT standards to provide Mt. Crescent with specifications, warnings, operational limitations and requirements, and procedures developed by qualified experts. (*Marter Expert Report, App. 334-349; ACCT Standard B.1 Training Delivery Requisites, App. 353-354*). However, during the construction of the zipline, and thereafter, prior to the incident at issue, Challenge Quest failed to provide Mt. Crescent with any documents outlining ACCT standards or any policies, procedures or guidelines to ensure that Mt. Crescent would maintain a safe zipline operation. (*Fleischer Depo., 62:3-64:2, App. 302; ACCT Standard, A.4, Documentation upon Commissioning, App. 352; Zip Line Training Manual, App. 228-237; Zip Line Operating Procedure, App. 256-258*).

This is the most critical element of Challenge Quest's negligence. Unless a strict culture of safety was built and solidified in the form of detailed

policies and procedures for inspections, maintenance, supervision, operations, and documentation, Mt. Crescent, led by unqualified workers would neither perform adequate safety inspections, nor would Mt. Crescent staff have the training and knowledge to see dangerous situations before riders were hurt. Strict safety procedures, including redundancy and checklists that ensured the manually deployed brake (whether the original design or the subsequent Zip Stop design) was properly deployed and cross-checked before riders were released was not part of any policy manual at the time, and the procedures were obviously not followed. Challenge Quest, which held itself out as an expert in this field, was required to put into place a program that worked exactly the same way every time in order to avoid errors that could cause rider injury. Yet Challenge Quest simply built the zipline and then failed to do anything to make sure it was operated safely.

Significantly, Challenge Quest did not inform Mt. Crescent that the zipline was required to have an emergency brake. In fact, Mt. Crescent did not even know that an emergency brake was required until after Plaintiff was injured. (*Fleischer Depo., 136:10-137:14; 141-3:21; 197:23-198:2, App. 318-319, 320, 331*). Further, Challenge Quest knew that Mt. Crescent would be forced to change the zipline's braking system because the original system installed by Challenge Quest was unsafe.

In addition, Challenge Quest failed to provide Mt. Crescent with any guidance on the safe operation of a zipline. (*Fleischer Depo., 62:3-64:2, App. 302; ACCT Standard, A.4, Documentation upon Commissioning, App. 352; Zip Line Training Manual, App. 228-237; Zip Line Operating Procedure, App.256-258).* The only document Challenge Quest provided Mt. Crescent was a "Zip Line Manual 2012". (*Fleischer Depo., 46:25-47:8; 58:13-19, App. 298, 301; Zip Line Manual 2012, App. 238-249*). This document is not a safety manual, but rather is merely an ***outline*** for what Mt. Crescent needed to do in order to draft a manual.[3] (*Zip Line Training Manual, App. 228-237; Zip Line Manual 2012, App. 228-237; Zip Line Operating Procedure, App. 256-258; Fleischer Depo., 62:3-64:2, App 302*). Complicated and dangerous processes where someone could be injured or killed are typically drilled over and over in training. They ordinarily include checklists and involve more than one person confirming the task has been accomplished. There is generally a scripted checklist, such as those followed by pilots, surgeons and other amusement park ride operators. When accidents or near-misses occur the

[3] In the Iowa Rule of Civil Procedure Rule 1.707(5) deposition of Challenge Quest, witness Coty Goodwin could not produce any documentation which Challenge Quest describes as an operations manual which was provided to Mt. Crescent. Challenge Quest has no documentation of its own in this case, but instead has relied solely upon what has been produced by Mt. Crescent.

event is documented; the root cause is determined and corrective action is taken.

Mt. Crescent's owner, Defendant Korby Fleischer, testified that he is not a zipline expert and that he is not qualified to construct a zipline or administer safety training. (*Fleischer Depo., 74:18-76:24, App. 305*). He trusted Challenge Quest as experts and as professionals to design and build the zipline and train his staff. Following the commissioning of the zipline, Fleischer had to request from Challenge Quest something to help him write his safety policies and procedures. Challenge Quest provided him with nothing except the outline in the Zipline Manual 2012. (*Zip Line Manual 2012, App. 238-249*).

Challenge Quest did not provide a "critical components" list, which is required by ACCT standards. Mt. Crescent was not given any documents outlining ACCT standards and it was not given ***any*** document which warned about what could happen if safety rules and ACCT standards were not followed. Challenge Quest did not provide a certification that the zipline met ACCT standards. It also failed to provide Mt. Crescent with any document listing maintenance criteria, inspection criteria and equipment replacement criteria for the zipline. No checklists, no written procedures, no redundancy, nothing was given to Mt. Crescent. It was not told what it should be looking

for when inspecting the zipline or how its employees should double check one another's work.

Because Challenge Quest failed to give Fleischer any guidance on how to safely operate the zipline that it had constructed, Fleischer made it up as he went along. Challenge Quest should have known that Fleischer was unqualified to run a zipline challenge course and that no one was in his employ was qualified under ACCT standards to operate this extremely dangerous mechanism. With greater risk comes the requirement of greater care to protect others from foreseeable harm. Instead of ensuring that safety rules were in place or that ACCT standards were being complied with, Challenge Quest certified the operation as "safe" and walked away, allowing unqualified people to operate a zipline that failed to meet industry safety standards. Immediately, as Fleischer testified, the incidents of rider injury and employee safety breaches began to pile up.[4]

Challenge Quest performed an Acceptance Inspection of the zipline on August 4, 2014. (*Acceptance Inspection Report 8/4/14, App. 259-261)*)[5]. It

[4] Prior incidents of injury, employee falls from height and near misses occurred before Plaintiff's injury were not documented by Double Diamond. (*Fleischer Depo., 119:7-123:3, App. 314-315).* Nor was Plaintiff's catastrophic incident documented. *Id., at 68:13-70:22, App. 303-304*).

[5] The Acceptance Inspection Report provides that the course inspected was "Chickasaw Retreat Center". At his deposition, Challenge Quest employee,

determined that Mt. Crescent passed the inspection even though the zipline had no emergency brake and despite the absence of safety and training policies and procedures and manuals associated therewith. The Acceptance Inspection was performed by Coty Goodwin from Challenge Quest, the same individual who built the Mt. Crescent zipline.

Challenge Quest similarly failed to provide Mt. Crescent with zipline operational instructions and limitations or associated warnings. For example, when Mt. Crescent expressed concerns with the safety of the original design, nothing in Challenge Quest's August 26, 2014 response letter addressed those concerns or advised how to address them. (*Settlement Letter, App. 206-210*).

Significantly, Challenge Quest's relationship with Mt. Crescent did not end once the zipline was constructed and installed. Challenge Quest performed yearly inspections of the zipline. However, in none of the inspections before Plaintiff was injured did it ever ensure that Mt. Crescent had safety policies, procedures and guidelines in place or ensure that an emergency brake was installed. An attempted inspection of training documents (there were none) would have demonstrated to Goodwin that Mt.

Coty Goodwin, explained that he used a form when drafting the report and failed to switch out the course name. This is further evidence of Challenge Quest's lack of attention to detail. (*Id.; Goodwin Depo., 132:2-133:8, App. 285-286*).

Crescent's employees were not being trained pursuant to ACCT standards. Instead, Challenge Quest passed Mt. Crescent's zipline in both of its inspections before the incident at issue occurred.

c. Challenge Quest's Failure to Properly Train Mt. Crescent Employees Was a Violation of Industry Standards

The district court focused on the fact that none of the Mt. Crescent employees trained by Challenge Quest on the use of the original braking system were operating the zipline at the time Plaintiff was injured. (*Order on Challenge Quest MSJ, p. 5, App. 418*). However, this conclusion misses the point. Challenge Quest did nothing to ensure that ongoing and future training would be delivered by a qualified person pursuant to ACCT standards. ACCT compliant training ensures all employees receive the necessary skills, knowledge and abilities to predictably and safely operate a zip line. ACCT Standard B.1.3 states: Trainer Qualifications: Training shall be delivered by a qualified person." The ACCT defines a "qualified person" as:

> "An individual who, by possession of a recognized degree, certificate, or professional standing; or who, by possession of extensive knowledge, training, and/or experience in the subject field; has successfully demonstrated ability in design, analysis, evaluation, installation, inspection, specification, testing or training in the subject work, project, or product to the extent established by this standard."

(*ACCT Definitions, 9th Ed., p. 4, App. 253*).

Challenge Quest was required to train Mt. Crescent staff pursuant to ACCT standards. (*Marter Expert Report, App. 334; ACCT Standard B.1 Training Delivery Requisites, App. 353*). However, according to Mt. Crescent, Challenge Quest informed Fleischer that ***any*** Mt. Crescent employee was "qualified" to train other Mt. Crescent employees once the "trainer" had "enough hours working on the zipline". (*Fleischer Depo., 112:24-117:12, App. 312-314*). This is not what the standard requires and was the only guidance Challenge Quest gave Fleischer to help determine whether he had a "qualified person" administering training to the Mt. Crescent zip line operators.

The district court also found that since the zipline's braking system had been "unilaterally modified" by Mt. Crescent, Challenge Quest could not have trained Mt. Crescent employees on the new braking system's operation and, therefore, was not liable. (*Order on Challenge Quest MSJ, p. 5, App. 418*). However, the fact that the original braking system had been replaced is of no consequence here because it was not a braking mechanism failure that caused Plaintiff's injuries, but a human error instead. The Mt. Crescent employee responsible for applying the brakes simply did not do so. Rider injury from such a mistake would be the same no matter what braking system was in place. If any brake was not deployed, a rider would be injured. Challenge Quest

should have provided Mt. Crescent with the information, policies, procedures and industry standards that would have required and outlined how Mt. Crescent was to train subsequent employees. The fact that the particular braking system in place at the time of Plaintiff's injury was not the original braking system installed by Challenge Quest does not excuse its negligence in this regard.

D. THE DISTRICT COURT ERRED IN FAILING TO ADDRESS THE GROSS NEGLIGENCE ISSUE PRESENTED IN MT. CRESCENT'S MOTION FOR SUMMARY JUDGMENT

1. Preservation of Error

On February 21, 2020, Plaintiff filed a timely Notice of Appeal from the district court's February 14, 2020 ruling granting the Mt. Crescent's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 505; Order on Mt. Crescent Defendants' MSJ, 2/14/2020, App. 496-504*). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District Court. *(See generally Plaintiff's Brief and Memorandum in Resistance to the Mt. Crescent Defendants' MSJ, App. 442-457; Order on Mt. Crescent Defendants' MSJ, App. 496-504*).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732,

735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id*. (quotation omitted).

3. Argument

In ruling on Mt. Crescent's motion for summary judgment, the district court found that the waiver Plaintiff signed before riding the zipline was "broad in its inclusiveness and contained clear and unequivocal language sufficient to notify Plaintiff that by signing the document, he would be waiving all future claims for negligence against Defendants." (*Order on Mt. Crescent Defendants' MSJ, p. 4, App. 499)*. However, even if the waiver language at issue in this case could be considered "clear and unequivocal", it does not excuse or relieve Mt. Crescent from liability for ***grossly*** negligent acts. Mt. Crescent's negligence goes beyond ordinary negligence and constitutes willful and wanton disregard for the safety of Plaintiff and as such, may not be waived.

However, the district court declined to address the gross negligence issue. Instead, it stated that "the Waiver expressly absolves Defendants' of

'any and all negligence' to be found and, therefore, finds it unnecessary to determine whether Defendants' operation and maintenance constituted gross negligence or caused Plaintiff's injuries." (*Order on Mt. Crescent Defendants' MSJ, p. 5, App. 500*. This constitutes error warranting reversal.

"Gross negligence" implies conduct which is more culpable than ordinary inadvertence or inattention. *Thompson v. Bohlken*, 312 N.W.2d 501, 504 (Iowa 1981). It involves a wanton neglect for the safety of another. *Id*., citing Iowa Code § 85.20. Similar to willful or reckless conduct, "wanton" conduct lies somewhere between the mere unreasonable risk of harm in ordinary negligence and the intent to harm. *Id*. (citation omitted); *Nelson v. Winnebago Industries*, 619 N.W.2d 385, 390 (Iowa 2000) ("Wantonness is said to be less blameworthy than an intentional wrong only in that instead of affirmatively wishing to injure another, the actor is merely willing to do so.")

> "The usual meaning assigned to "willful", "wanton" or "reckless", according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it and so great as to make it highly ***probable*** that harm would follow."

Thompson, 312 N.W.2d 501, 504 (Iowa 1981) (quotation omitted) (emphasis original).

The Iowa Supreme Court has identified gross negligence elements as follows: (1) knowledge of the peril to be apprehended; (2) knowledge that

injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. *Thompson*, 312 N.W.2d 501, 505 (Iowa 1981) (citation omitted). Willful and wanton conduct is shown where an "actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004) (quotation omitted) (overruled on other grounds by *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699, 708 (Iowa 2016). Mt. Crescent's acts and omissions at issue, as discussed below, represent gross negligent under Iowa law.

a. Mt. Crescent Disregarded Industry Safety Standards and Requirements

The Association for Challenge Course Technology ("ACCT") provides standards and requirements for the safe operation of zipline rides, like the one located at Mt. Crescent Ski Area. (*ACCT Standards 8th Ed., App. 221; Fleischer Depo., 31:21-33:19, App. 294; Goodwin Depo., 53:17-24, App. 278*). Any owner or operator of a zipline amusement ride must have an understanding of the Standards. In his deposition, Mt. Crescent Ski Area owner Korby Fleischer admitted that the easiest way to determine if Mt. Crescent acted in accordance with accepted practices is to compare its actions

to the ACCT Standards, which he further admitted must be followed. (*Fleischer Depo., 29:17-30:5; 34:14-19, App. 294, 295*). He conceded that failure to comply with the Standards, especially the failure to have an emergency brake to protect against human error, ensures that disaster will occur. (*Fleischer Depo., 33:14-19, App. 295*). Although Mt. Crescent claims that it was aware of the importance of the ACCT Standards, in reality, it had absolutely no understanding of the Standards and furthermore, took no time or interest doing so or in ensuring compliance. (*Fleischer Depo., 31:21-33:19; 119:7-123:3; 136:10-137:14; 141:3-21; 177:20-180:2; App. 294, 295, 314-315, 318-319, 320, 326; Zip Line Manual 2012, App. 238-249*). As admitted by Fleischer, prior to Plaintiff's injury, he had merely "glanced through" the Standards. (*Fleischer Depo., 165:10-166:8, App. 323*). Mt. Crescent by its own admission entirely failed to ensure that it was in compliance with ACCT Standards. (*Fleischer Depo., 136:10-137:14; 141:3-21: 197:23-198:2, App. 318-319, 320, 331).*

b. The Mt. Crescent Ski Area Zipline Did Not Have an Emergency Brake on Either Brake System in Violation of Industry Standards

On multiple occasions, riders arrived at the zipline landing platform well in excess of six miles per hour (the ACCT threshold for safety) and collided with employees in the landing area, sometimes knocking employees

off of the 33-foot-tall landing platform. (*Fleischer Depo., 84:23-85:14, 172:13-22, App. 307-308, 324*). In violation of ACCT documentation standards, Mt. Crescent failed to document these incidents of serious safety breaches, including Plaintiff's catastrophic injury and other injuries which occurred in connection with the zipline. (*Fleischer Depo., 68:13-70:22; 83:16-89:11; 119:7-123:3, App. 303-304, 307-309, 314-315; Zip Line Manual 2012, App. 238-249*).

Never, before Plaintiff's injury, did the Mt. Crescent zipline have an emergency brake. Fleischer openly admitted that he knew about the importance of compliance with the ACCT Standards, but then testified that the did not know that an emergency brake was required by those standards. (*Fleischer Depo., 136:10-137:14; 141:3-21; 197:23-198:2, App. 318-319, 320, 331*). Thus, the ACCT Standards regarding emergency brakes were not met. *Id.* And, Mt. Crescent still did not bother to install an emergency braking system on their zipline until approximately one year after Plaintiff's injury. (*Fleischer Depo., 141:6-10, App. 320*). The evidence demonstrates that Mt. Crescent has shown willful and wanton disregard for the safety of Plaintiff, its other patrons, customers and the general public to whom it holds itself out as a safe amusement ride provider.

c. Mt. Crescent's Failure to Properly Train Its Employees Was a Violation of Industry Standards

Mt. Crescent completely failed to ensure that their employees were adequately trained to operate the zipline and ensure the safety of its riders. This, too, represents more than just ordinary negligence, but a flouting of the ACCT Standard regarding trainer qualifications, as previously discussed.

ACCT Standard B.1.3 states: "Trainer Qualifications: Training shall be delivered by a qualified person." A "qualified person" is defined as:

> "An individual who, by possession of a recognized degree, certificate, or professional standing; or who, by possession of extensive knowledge training, and/or experience in the subject field; has successfully demonstrated ability in design, analysis, evaluation, installation, inspection, specification, testing or training in the subject work, project, or product to the extent established by this standard."

(*ACCT Definitions 9th Ed., p. 4, App. 253).*

Once the zipline was installed, Mt. Crescent staff was allegedly then trained on the operation of the zipline by the design and construction company, Challenge Quest. Then, on the advice of Challenge Quest, Mt. Crescent entrusted one of its own unqualified employees, Chris Andrews, to thereafter administer training to other Mt. Crescent employees who were to operate the zipline. Fleischer admitted that Mt Crescent has no documentation regarding training, no proof of the contents of the training and no training syllabus for the years prior to Plaintiff's injury. (*Fleischer Depo., 101:21-*

109:9, App. 310-312). Fleischer further admitted that Mt. Crescent has no documentation regarding the knowledge, training or experience of Andrews himself, save "time cards" indicating how many hours he worked. (*Fleischer Depo., 114:20-115:24, App. 313*). Neither the training nor Andrews non-existent qualifications met ACCT Standards. (*Marter Expert Report, App. 334-349; ACCT Standard, B.1 Training Delivery Requisites, App. 353-354; Fleischer Depo., 29:17-30:5; 36:23-38:9; 48:6-49:5; 59:10-62:2; 76:13-77:18; 101:10-109:9; 110:10-111:15; 112:24-116:1; 117:13-119:19, App. 294, 295-296, 298-299, 301-302, 305-306, 310-312, 313, 314*).

The ACCT Standards also require annual skill refreshers for all zipline staff, as well as eight hours of continuing education per year. (*Annual Inspection Report, 8/25/15, App. 409-411*). Fleischer admits he was given an inspection report from Challenge Quest in 2015 which provided this ACCT Standard section, but further admits he did not know about or adhere to this requirement. (*Annual Inspection Report, 8/25/15, App. 409-411; Fleischer Depo., 177:20-180:2, App. 326*).

Mt. Crescent's so-called training of its employees was completely inadequate and constituted an on-going willful and wanton disregard for Plaintiff's safety, the safety of other riders and the general public. Andrews was simply not qualified to train other employees. If the employee working

on the day Plaintiff was injured had been adequately trained by a qualified person following ACCT standards, and had a procedure been in place to ensure that the brake was appropriately deployed, Plaintiff's traumatic injury would not have occurred. (*Fleischer Depo., 182:11-19, App. 327*). Mt. Crescent's admitted knowledge that adequate, industry-standard training was necessary and important, combined with its failure to develop and employ such training represents willful and wanton conduct constituting gross negligence. (*See Fleischer Depo., 31:21-33:19; 101:21-109:9; 114:20-115:24; 136:10-137:14; 141:3-21; 177:1-180:2; 197:23-198:2, App. 294-295, 310-312, 313, 318-319, 320, 326, 331; Annual Inspection Report, 8/25/15, App. 409-411*).

d. Mt. Crescent Failed to Have Safety Policies, Procedures, Manuals, Checklists or other Safety Documentation in Place in Violation of Industry Standards

Mt. Crescent failed to have any safety policies, procedures, manuals, checklists or other documentation in place to ensure the safe operation of its zipline or the safety of its patrons, customers, employees and the general public. Nor did it hold safety meetings for its employees who were in charge of operating the zipline. (*Fleischer Depo., 24:11-13, App. 292*). Evidence shows that safety simply was not a priority. Mt. Crescent's failure to have

any basic safety protocol or standards in place constitutes a willful and wanton disregard for safety.

For example, strict safety procedures, including a procedure to ensure that the brake is properly deployed and cross-checked before riders are released down a zipline at speeds in excess of 40 miles per hour was not part of any policy manual at the time Plaintiff was injured. (*Fleischer Depo., 182:11-19, App. 327*). Any procedures that might have been in place were obviously not followed. The only document provided during discovery by Mt. Crescent regarding its safety procedures was the aforementioned "Zip Line Manual 2012", a mere outline for what Mt. Crescent needed to do in order to draft an actual policy manual. (*Zip Line Manual 2012, App. 238-249; Fleischer Depo., 62:3-64:2, App. 302*).

Mt. Crescent admittedly failed to document numerous incidents involving the zipline, including prior incidents of injury, employee falls from-height and near-misses which occurred before Plaintiff's injury. (*Fleischer Depo., 68:13-70:22; 119:7-123:3, App. 303-304, 314-315; Zip Line Manual 2012, App. 238-249*). Nor is there documentation of Plaintiff's incident and catastrophic injury. (*Fleischer Depo., 68:13-70:22, App. 303-304).* These, too, are violations of ACCT Standards.

In his deposition, Fleischer was asked what – if anything – was changed about the zipline's operation to ensure that no further injuries occurred. He answered, "Well, it's human error. I mean, what's changed at Mt. Crescent? I'd say nothing's really changed at Mt. Crescent…You know, people are going to forget to do something…". (*Fleischer Depo., 67:9-68:2, App. 303*). This astonishing answer demonstrates a willful failure to acknowledge the importance of training, testing and supervising zipline employees.

In sum, Mt. Crescent had actual knowledge of the importance of the ACCT Standards, yet completely disregarded the requirements. It knew that failure to follow industry standards would likely result in severe injury or death. (*Fleischer Depo., 31:21-33:19; 136:10-137:14; 141:3-21; 177:20-180:2; 197:23-198:2, App. 294-295, 318-319, 320, 326, 331*). Yet, it did nothing to implement or enforce the safety standards that would have prevented Plaintiff's injury. This constitutes gross negligence.

Clearly, Mt. Crescent was not motivated to make their inherently dangerous operations safe because it believed it would be shielded from liability by a standard form waiver of liability which it required its riders to sign. Preservation of the general public welfare imperatively demands that such waivers be held unenforceable. It is only a matter of time before Iowa

courts will have other cases before it where a Mt. Crescent Ski Area zipline rider is severely injured, paralyzed or dead. The utter lack of attention, care and common sense by Mt. Crescent and its employees and management, when it was fully aware of the life-threatening injuries that could result from such a lack of care, is the very definition of willful and wanton and should not be subject to waiver.

Although not specifically addressed in Iowa, a vast majority of courts have held that a waiver is void and unenforceable to the extent that it seeks to release gross negligence or willful and wanton disregard. See, i.e. *Moore v. Waller*, 930 A.2d 176, 181 (D.C. 2007) ("[W]e recognize that courts have not generally enforced exculpatory clauses to the extent that they limited a party's liability for gross negligence, recklessness or intentional torts."); *Wolf v. Ford*, 644 A.2d 522, 525 (Md. 1994) ("[A] party will not be permitted to excuse its liability for…the more extreme forms of negligence, i.e. recklessness, wanton, or gross."); *Seigneur v. National Fitness Institute, Inc.*, 752 A.2d 631, 638 (Md. Ct. Spec. App. 2000) (exculpatory clause will not be enforced "when the party protected by the clause…engages in acts of reckless, wanton, or gross negligence")'; *Anderson v. McOskar Enterprises*, Inc., 712 N.W.2d 796 (Minn. Ct. App. 2006) ("A better interpretation of the law is that any term in a contract which attempts to exempt a party from liability for gross

negligence or wanton conduct is unenforceable.") (citing *Wolfgang v. Mid-American Motorsports, Inc.*, 898 F. Supp. 783, 788 (D. Kan. 1995)); *New Light Co. v. Wells Fargo Alarm Services*, 525 N.W.2d 25, 30 (Neb. 1994) (a party cannot insulate itself from damages caused by grossly negligent conduct); *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (while exculpatory agreements are generally enforceable, "[i]n no event will an exculpatory agreement be permitted to shield against a claim of willful and wanton negligence."); *Brady v. Glosson*, 74 S.E.2d 253 (Ga. 1953) (an exculpatory provision may not be enforced to relieve liability for willful or wanton conduct).

The rationale for the above holdings is simple – exculpatory contracts are not a license to utterly disregard the health, safety, welfare and lives of the general public. Additionally, the purpose of punitive damages, which Plaintiff has pled in this case, revolves around deterrence. "Punitive damages serve a vital function in our tort system…They are not compensatory; they are for punishment and deterrence". *Ryan v. Arneson*, 422 N.W.2d, 491, 496 (Iowa 1988) (citations omitted); see also, Iowa Code § 668A.1.

Mt. Crescent argued in its motion for summary judgment that contracts exempting parties from their own negligence are enforceable and not contrary to public policy, citing *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993); *Grabill*

v. Adams County Fair & Racing Association, 666 N.W.2d 592 (Iowa 2003); and *Korsmo v. Waverly Ski Club*, 435 N.W.2d 746 (Iowa Ct. App. 1988). However, these cases upon which it relied did not include allegations of gross negligence or willful and wanton disregard for the safety of the plaintiff with respect to the released parties as has been alleged in the present case. Because of this important difference, these cases are distinguishable from the one at bar and do not excuse Mt. Crescent from liability.

E. THE DISTRICT COURT ERRED IN FINDING THAT THE WAIVER IS NOT CONTRARY TO STATUTORY PURPOSE AND PUBLIC POLICY

1. Preservation of Error

On February 21, 2020, Plaintiff filed a timely Notice of Appeal from the district court's February 14, 2020 ruling granting Mt. Crescent's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 505; Order on Mt. Crescent Defendants' MSJ, App. 496-504*). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District Court. *(See Plaintiff's Brief and Memorandum in Resistance to the Mt. Crescent Defendants' MSJ, App. 442-457; Order on Mt. Crescent Defendants' MSJ, App. 496-504*).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id*. (quotation omitted).

3. Argument

a. The Waiver is Contrary to the Purpose of Iowa Code Section 88A.9

The waiver Plaintiff signed before riding the Mt. Crescent zipline is contrary to the purpose of the applicable provisions of the Iowa Amusement Park and Ride Safety Inspection and Regulation Act (Iowa Code Chapter 88A) and is, therefore void and unenforceable. It was error for the district court to find otherwise.

Iowa Code Chapter 88A exists because amusement rides and devices are inherently dangerous. The act provides for several safety considerations in order to provide "protection of the public", including but not limited to the requirement of a permit, safety inspections, the adoption of rules for the safe

installation, repair, maintenance, use, operation, and inspection of amusement devices and rides, rider safety reports, and notice to riders of rider safety responsibilities and the location of stations to report injuries. Iowa Code §§ 88A.3, 88A.10, 88A.15, 88A.16. A violation of the Act may result in a serious misdemeanor criminal charge. Iowa Code § 88A.10(1) and (2). The inspection commission has the power to seek an injunction where owners or operators continue to operate an amusement device or ride after receiving notice of a defect. Iowa Code § 88A.14.

Evidence in the record reflects that Mt. Crescent violated the "Rider Safety Reports", "Notice to Riders" and "Location of Stations" requirements (*Fleischer Depo., 68:13-70:22; 83:16-89:11; 119:7-123:3; 172:13-22, App. 303-304, 307-309, 314-315, 324*) (Fleischer concedes that no documentation of injuries was made, thus, Mt. Crescent could not have complied with "Notice" and "Location" requirements, either.)

Most significantly, Section 88A.9 of the Act provides that Iowa carnivals must carry liability insurance in the amount of $1,000,000 for bodily injury, death, or property damage in any one occurrence. Iowa Code § 88A.9. The Act defines a "carnival" as an "enterprise offering *amusement or entertainment* to the public in, upon, or by means of *amusement devices or*

rides or concession booths". Iowa Code § 88A.1 (emphasis added). See, *Lathrop v. Century, Inc*., 2002 Iowa App. Lexis 1136.

The Act further defines an "amusement ride" as "any mechanized device or combination of devices which carries passengers along, around, or over a fixed or restricted course for the purpose of giving its passengers amusement, pleasure, thrills or excitement". Iowa Code § 88A.1.

Clearly, Mt. Crescent offers "amusement and entertainment" by way of an "amusement ride", as acknowledged in the district court's order. (*Order on Mt. Crescent Defendants' MSJ, p. 6, App. 501*) ("It is undisputed the zip line ride qualifies as an amusement ride as defined in Iowa Code § 88A.1…"). Therefore, because it meets the statutory definition of an "amusement ride", it must comply with the Act.

Yet the district court concluded that there was no basis in the statute for precluding amusement ride operators from entering into waivers of liability. (*Order on Mt. Crescent Defendants' MSJ, pp. 6-7, App. 501-502).* It held that such operators "are permitted to enter into waivers of liability, including gross negligence, and Iowa Code § 88A.9 does not prohibit them from doing so." *Order on Mt. Crescent Defendants' MSJ, p. 7, App. 502).* This is an incorrect conclusion and certainly against the expressed public policy of the Act. If Mt. Crescent is permitted to waive its statutory duties under the Act, it may then

circumvent the Act's requirements without any consequences under the civil law when their unlawful acts and omissions injure or kill zipline riders. This cannot be allowed.

The Iowa Supreme Court has stated that "[t]he object of statutory interpretation is to discover the true intention of the legislature considering the clearly stated objects and purposes involved." *H & Z Vending v. Iowa Department of Inspections & Appeals*, 511 N.W.2d 397 (Iowa 1994). In enacting Iowa Code Chapter 88A, the Iowa legislature intended to protect the safety of the public wishing to partake in amusement rides. Individuals partake in amusement rides, such as the Mt. Crescent zipline, trusting that the owners and operators will not endanger them. The Iowa legislature enacted Section 88A specifically to provide for the safety of the unknowing public and to require the owners and operators of the rides to provide liability insurance in case of rider injury.

When Mt. Crescent chose to venture out of snow skiing and sledding operations and turned to entertainment via a zipline "amusement ride", the venue was no longer simply a ski resort, but became a "carnival" as defined by the Act. Because the Mt. Crescent Ski Area zipline is a mechanical construction that carries passengers along and over a fixed course for the purpose of giving such passengers amusement, pleasure, thrills or excitement,

it falls squarely within Iowa Code § 88A.1 and is obligated to comply with its provisions. Indeed, the Mt. Crescent Defendants carried insurance in order to comply with this specific statutory requirement. (*Nova Casualty Company, Commercial General Liability Declarations Page, App. 466-471*). There would be no reason to carry insurance if the Mt. Crescent zipline was exempt from coverage as a result of forcing riders to forfeit their rights to a legal remedy should they become injured due to Mt. Crescent's gross negligence.

Furthermore, it would be incongruous to statutorily require liability insurance coverage for bodily injuries on one hand and to allow owners and operators to escape their duty by simply requiring riders to sign a blanket exculpatory agreement on the other hand. Mt. Crescent cannot avoid a statutory obligation or the public policy considerations behind such obligation by this means.

The district court dismissed Plaintiff's argument regarding this issue by relying on one quote from one unreported Iowa Court of Appeals case which had nothing to do with Iowa Code Chapter 88A.: "Even construing the facts in the light most favorable to Smith [plaintiff], the release provision is clear, unambiguous, and unequivocal in its release of liability and bar of claims of negligence and gross negligence." (*Order on Mt. Crescent Defendants' MSJ, p. 7, App. 502*, citing *Smith v. All Stor Fort Knox, LLC*, 924 N.W.2d 534 (Iowa

Ct. App. 2018) (unreported)). The district court used this single sentence to impermissibly conclude that Iowa Code § 88A.9 does not prohibit amusement operators from entering into waivers of liability for gross negligence. *Id*., at 6.

Aside from being non-binding on the appellate court and absent any issue under Iowa Code Chapter 88A, the *Smith* decision is also distinguishable, primarily because the *Smith* waiver expressly released that defendant for liability for "gross negligence" and "willful acts". *Id*., at *3. The waiver in the present case, however, only purports to release Mt. Crescent from simple "negligence". (*Release Agreement, App. 465*). The terms "gross negligence" or "willful acts" is not used, thus, was not contemplated by the parties as within the scope of the waiver. *Id*. The release provision in *Smith* was part of a contract between the plaintiff and the defendant for the rental of a storage unit. *Smith*, 924 N.W.2d 534, *1 (Iowa Ct. App. 2018) (unreported). The plaintiff was injured when an alleged defective chair in the defendant's office which plaintiff sat in caused him to fall to the floor. *Id*. Unlike the present case, the waiver of liability included in the *Smith* rental contract was not associated with an activity covered by Iowa Code Chapter 88A. This difference is significant from a public policy perspective, in that lessees of storage units are much less likely to suffer a personal injury than riders of

amusement mechanisms. A waiver in the former situation does not implicate a specific state statute or the public policy concern of protecting the public from personal injury. *Id*., at *6.

The *Smith* Court was concerned with the issue of whether the plaintiff was bound by a document he signed which waived claims based upon gross negligence, despite not reading all of the terms and not being expressly accepting or even aware of all of the terms. *Id*., at *4. This is decidedly different than the issue presented by the case at bar, namely whether a waiver that does not expressly release a defendant from liability for its "gross negligence" or "willful acts" will indeed release a defendant from such conduct and whether such a waiver is contrary to Iowa Code Chapter 88A.

The District Court found that there was nothing in the express language of Iowa Code Chapter 88A "to interpret as mandating or prohibiting amusement establishments from entering into releases of liability", therefore, "amusement operators are permitted to enter into waivers of liability, including liability for gross negligence, and Iowa Code § 88A.9 does not prohibit them from doing so." (*Order on Mt. Crescent Defendants' MSJ, p. 7, App. 502*). This is a leap of statutory interpretation that is contrary to the very purpose of the Act, which is to protect amusement ride users. If owners and

operators are allowed to escape their acts and omissions constituting gross negligence, the Act is rendered meaningless.

b. The Waiver is Contrary Public Policy

Waivers of liability may be found invalid and unenforceable if determined to be contrary to public policy. It has long been held that courts ought not enforce contracts which tends to be injurious to the public or contrary to the public good. See, i.e. *In re Estate of Barnes*, 256 Iowa 1043, 1051-52, 128 N.W.2d 188, 192 (1964). A contract may be invalidated if it would violate "any established interest of society". *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 335 (Iowa 1980). See also, Restatement (Second) of Contracts § 195 ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.")

Here, the district court held that since Mt. Crescent offers recreational services which are not of "great importance to the public" and "are of no practical necessity for any members of the public", that the public policy exception should not apply. (*Order on Mt. Crescent Defendants' MSJ, p. 6, App. 502*). It cited *Lathrop v. Century, Inc.*, 2002 Iowa App. Lexis 1136 as illustrative of this principle.

In *Lathrop*, the plaintiffs were injured while snow tubing at the same facility at issue in the present case, Mt. Crescent Ski Area. The Court's decision that the public policy exception to the waiver of liability which the plaintiffs had signed would not apply was based on its additional finding that the snow tubing activity was not an amusement "device" or "ride" as contemplated by Iowa Code Chapter 88A and that, therefore, it would not decide whether Chapter 88A implicitly precluded the use of liability waivers by such facilities. This distinguishes *Lathrop* with respect to the public policy exception issue. *Id*., at **8-9. Additionally, there was no evidence that the *Lathrop* plaintiffs had alleged acts of gross negligence, willful or wanton conduct by the defendant that went beyond ordinary negligence.

Moreover, the district court mistakenly focused only on the ***type*** of activity involved – zipline riding – in determining that there was no important public interest at stake. It did not focus, as it should have, on the ***result*** of a zipline owner or operator's negligence, i.e. serious injury or death to participants who have placed their trust in such owners and operators to conduct zipline activities with the upmost attention to safety and within the confines of industry standards and Iowa law. Iowa clearly places great importance upon keeping amusement ride users safe, as evidenced by the

Legislature's creation of Chapter 88A. This should have been the focus of the District Court's analysis. To the extent that it was not, the District Court erred.

When courts balance a party's right to contract against the protection of the public, there is a compelling reason to prevent a party from insulating itself by contractual agreement from damages caused by its own gross negligence, willful and wanton misconduct or the violation of statute meant to protect the public from harm. Such agreements are verifiably injurious to the public as they allow conduct contrary to societal good to go unchecked. "The limitation on the freedom to contract is imposed by law because of the potential risks to human life and property and is, therefore, independent of the agreement of the parties." *New Light Co*., 525 N.W.2d 25, 30 (Neb. 1994).

F. THE DISTRICT COURT FAILED TO VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO PLAINTIFF

1. Preservation of Error

On January 9, 2020, Plaintiff filed a timely Notice of Appeal from the District Court's December 10, 2019 ruling granting Challenge Quest's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 436; Order on Challenge Quest's MSJ, App. 414*). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District Court. (*See generally Plaintiff's Brief and Memorandum of*

Authorities in Support of his Resistance to Challenge Quest's MSJ, App. 77-92; Order on Challenge Quest's MSJ, App. 414)

On February 21, 2020, Plaintiff filed a timely Notice of Appeal from the district court's February 14, 2020 ruling granting the Mt. Crescent's Motion for Summary Judgment in this matter. (*Notice of Appeal, App. 505; Order on Mt. Crescent Defendants' MSJ, App. 496*). Plaintiff-Appellant raises the same issues and arguments on this Appeal as were presented to and decided by the District Court. *(See generally Plaintiff's Brief and Memorandum in Resistance to Mt. Crescent Defendants' MSJ, App. 442-457; Order on Mt. Crescent Defendants' MSJ, App. 496*).

2. Scope of Review

A district court's ruling on a motion for summary judgment is reviewed for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008). The Iowa Supreme Court examines the record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Roll v. Newhall*, 888 N.W.2d 422, 425 (Iowa 2016). "We view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id*. (quotation omitted).

3. Argument

With respect to a motion for summary judgment, the moving party must show that there is no genuine issue as to any material fact concerning the matters addressed in its motion. Iowa R. Civ. Pro. 1.981(3); *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). The burden of proof is on the moving party. *Evans v. McComas-Lacina Construction Co.*, 641 N.W.2d 841, 843-44 (Iowa 2002). The evidence must be viewed in the light most favorable to the nonmoving party. *Hollingsworth*, 553 N.W.2d 591, 594 (Iowa 1996). Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717-18 (Iowa 2001); *Scheckel v. Jackson County*, 467 N.W.2d 286, 289 (Iowa Ct. App. 1991). An inference is "legitimate" if it is rational, reasonable, and otherwise permissible under the governing substantive law. *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994); *Phillips*, 625 N.W.2d 714, 718 (Iowa 2001).

If two legitimate, conflicting inferences are present, the court should rule in favor of the non-moving party. *Eggiman v. Self-Insured Services Co.*, 718 N.W.2d 754, 763 (Iowa 2006); *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010) (if reasonable minds can differ on how a material fact issue should be resolved, summary judgment should not be granted). The summary

judgment procedure does not contemplate that a district court may try issues of fact, but must determine only whether there are issues to be tried. *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006).

In making such a determination, district courts must not weigh the admissible evidence tending to prove a fact against the admissible evidence opposing it in deciding whether genuine issues of fact exist for trial. *Taft v. Iowa District Court ex rel. Linn County*, 828 N.W.2d 309, 315 (Iowa 2013). Similarly, inferences raised from admissible evidence tending to prove or disprove a fact are not weighed against each other, but instead are weighed against "the abstract standard of reasonableness, casting aside those which do not meet the test and concentrating on those which do." *Id*., quoting *Butler*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994).

Moreover, summary judgment does not result merely because the parties do not dispute the underlying facts. *Butler*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994). A jury issue may be presented in a case even based upon undisputed facts, if reasonable minds could draw different inferences or conclusions from the uncontested evidence. *Id*., citing *Lenstra v. Menard, Inc*., 511 N.W.2d 410, 412 (Iowa Ct. App. 1993). Even when a motion for summary judgment is properly supported by admissible evidence, it should not be granted if the resisting party responds with specific facts that show a

genuine issue for trial. *Employers Mutual Casualty Co. v. Van Haaften*, 815 N.W.2d 17, 29 (Iowa 2012) (citations omitted).

Iowa courts are slow to grant summary judgment in negligence actions. *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990). Because resolution of issues of negligence and proximate cause turns on the reasonableness of the acts and conduct of the parties under all the facts and circumstances, negligence actions are ordinarily not susceptible to summary judgment adjudication. *Id*. The issues before the district court in this case were not whether or not Defendants were, in fact, negligent, but whether evidence was presented upon which liability and causation ***could have*** been found. See, i.e. *Cox v. Jones*, 470 N.W.2d 23, 26 (Iowa 1991), citing *Oswald*, 453 N.W.2d 634, 635 (Iowa 1990) (quotation omitted) (emphasis added). At this stage in a case, courts must determine whether any evidence in the record enables a plaintiff to establish the applicable standard of care and defendant's breach of those standards. *Id*. As Plaintiff in the present case came forth with such evidence, as discussed herein, Defendants' motions for summary judgment should have been denied.

VIII.
CONCLUSION

It is well-settled that questions of causation, including superseding causes, are ordinarily for the jury and should only be decided by the court as a matter of law in exceptional cases. *Thompson*, 774 N.W.2d 829, 832 (Iowa 2009); *Iowa Electric Light & Power Co. v. General Electric Co.*, 352 N.W.2d 231, 235 (Iowa 1984). Here, Defendants had a duty to provide Plaintiff with a safe zipline experience and they breached those duties to Plaintiff's detriment. At the very least, there are genuine issues of material fact as to the factors which caused Plaintiff's injuries. These questions are for the jury.

For all of these reasons, Plaintiff urges this Court to find that the district court erred in granting Defendants' Motions for Summary Judgment.

IX.
REQUEST FOR ORAL ARGUMENT

Plaintiff hereby requests oral argument.

X.
CERTIFICATE OF COST

I hereby certify that the cost of printing the foregoing Brief of Plaintiff-Appellant was $0.00.

XI.
CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point and contains 13,659 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/Matthew Lathrop — 9/28/2020
Signature — Date

XII.
CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 28, 2020, the above and foregoing Final Brief was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, serving being made by EDMS upon the following, and by depositing a copy in the U.S. Mail, postage prepaid to those non-filing users:

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