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. CRESCENT SKI AREA; SAMANTHA FLEISCHER, individually and d/b/a MT. CRESCENT 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

APPELLEE'S FINAL BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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I.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court erred in finding there is no genuine issue of material fact and granting Defendant/Appellee Challenge Quest, LLC's ("Challenge Quest") Motion for Summary Judgment because (1) Challenge Quest owed no duty of care to prevent Third-Party Defendant/Appellee Double Diamond, Inc. d/b/a Mt. Crescent Ski Area ("Mt. Crescent") from changing the braking system on a zipline, which Plaintiff/Appellant Thomas Lukken ("Plaintiff") points to as the alleged cause of his injuries, and (2) Plaintiff cannot establish any act or omission by Challenge Quest was a legal cause of his injuries.

II.
ROUTING STATEMENT

Challenge Quest takes no position with respect to Plaintiff's asserted grounds for retention of jurisdiction as said grounds pertain exclusively to Plaintiff's appeal from the district court's order granting Mt. Crescent's Motion for Summary Judgment. With respect to the issues presented by Plaintiff's appeal of the district court's order granting Challenge Quest's Motion for Summary Judgment, Challenge Quest states this case presents application of existing legal principles.

III.
STATEMENT OF THE CASE

Challenge Quest is satisfied with Plaintiff's Statement of the Case.

IV.
STATEMENT OF FACTS

A. CHALLENGE QUEST ENTERS INTO SERVICES AGREEMENT WITH MT. CRESCENT

On or about April 15, 2014, Challenge Quest entered into an Agreement for Services (the "Agreement") for Challenge Quest to provide construction of a zipline challenge course on property owned, managed, or operated by Mt. Crescent. App. 486-493.

Challenge Quest constructed the zipline on the property (hereinafter, the "Zipline") and installed a braking system (the "Original Braking System") that utilized a capture arm with the brake block. App. 484.

Challenge Quest completed its scope of work for construction of the Zipline and training of Mt. Crescent's full-time staff in August 2014, at which time Challenge Quest turned the Zipline over to the control of Mt. Crescent. App. 484; 408. Challenge Quest had no involvement with or control over the Zipline after August 2014. App. 384. None of the employees trained by Challenge Quest on use of the Original Braking System in August 2014 were operating the Zipline on October 9, 2016. App. 484.

B. DOUBLE DIAMOND REPLACES THE ORIGINAL BRAKING SYSTEM

In or around July 2016, Mt. Crescent retained Sky Line, a Canadian company, to install a new braking system on the Zipline. App. 484. This changed the braking system from the Original Braking System to an automated braking system called zipSTOP® manufactured by TruBlue, LLC d/b/a Head Rush Technologies, LLC. App. 484.

C. PLAINTIFF'S ALLEGATIONS AGAINST CHALLENGE QUEST

Plaintiff filed his initial Petition on September 21, 2018, alleging negligence against several defendants, including Challenge Quest, stemming from an alleged accident involving the Zipline on October 9, 2016 (hereinafter, the "Incident"). *See generally* App. 10-21. Plaintiff subsequently filed an Amended Petition on June 3, 2019. App. 22.

Plaintiff alleges "the [Z]ipline braking system failed" resulting in his collision with a wooden pole near the landing area of the [Z]ipline. App. 28. Plaintiff alleges he "suffered a fractured neck . . . and other injuries" as a result of Defendants' negligence. App. 30. Plaintiff specifically alleges that an employee at the landing area "exclaimed that he had forgotten to set the brake." App. 28.

Plaintiff alleged Challenge Quest owed a duty of care to Zipline participants, including Plaintiff, "in the safe design and implementation of the zipline challenge course." App. 26. Plaintiff also asserted "Defendant's conduct resulted in the design, construction, and/or operation of an ultrahazardous activity and should result in application of strict liability against the[] Defendants." App. 32. Plaintiff further alleged Challenge Quest was negligent in "[c]hoosing equipment, designs, and materials that were not the safest" and "[c]hoosing equipment, designs, and materials that were not adequate to protect the health and safety of participants . . . ." App. 30. Specifically, Plaintiff alleged the Zipline "operated by the Mt. Crescent Defendants" and "designed by Challenge Quest . . . used a participant-passive braking system, which is managed by the operator, as its primary brake system." App. 26.

D. DISTRICT COURT GRANTS CHALLENGE QUEST'S MOTION FOR SUMMARY JUDGMENT

On July 30, 2019, Challenge Quest filed a Motion for Summary Judgment with respect to Plaintiff's claims against it. App. 34-57. On December 10, 2019, the district court granted Challenge Quest's Motion for Summary Judgment, finding Plaintiff failed to establish Challenge Quest owed a legal duty to Plaintiff and, furthermore, that Plaintiff failed to establish that Challenge Quest was a legal cause of his alleged injuries. App. 414-422.

V.
INTRODUCTION

This case is exceptionally simple. There are three fundamental—and undisputed—facts the Court sound consider in reviewing this appeal:

(1) In 2014, Challenge Quest contracted with the Zipline operator, Mt. Crescent, to construct the Zipline and provide "4 day site specific . . . training" for Mt. Crescent's then-full time staff. Challenge Quest completed these contractual obligations in August 2014, at which time it handed over the Zipline to Mt. Crescent.

(2) In 2016, without Challenge Quest's knowledge or involvement, Mt. Crescent unilaterally replaced the braking system Plaintiff alleges "failed."

(3) The Incident was caused by admitted "***human error***"—the failure of Mt. Crescent's employee to reset the brake block on an entirely ***new*** braking system installed by Mt. Crescent.

As attempted with the district court, Plaintiff seeks to muddle the record by pointing to several perceived "failures" of Challenge Quest with respect to the Zipline. The Court should see this for what it is: white noise. Plaintiff has once again failed to offer any cogent theory or explanation of how these failures led to the admitted "human error" that resulted in the Incident. Furthermore, Plaintiff's arguments would impose a duty upon Challenge Quest—or any contractor in the State of Iowa—unheard of in Iowa law (or elsewhere), contrary to public policy and common sense.

For the reasons discussed below, Challenge Quest respectfully submits the Court should affirm the district court's judgment granting Challenge Quest's Motion for Summary Judgment. App. 414-422.

VI. ARGUMENT

A. THE DISTRICT COURT CORRECTLY FOUND THAT CHALLENGE QUEST WAS NOT A LEGAL CAUSE OF THE PLAINTIFF'S INJURIES

1. Preservation of Error

Challenge Quest agrees with Plaintiff's statements on error preservation; however, to the extent Plaintiff criticizes any failure on the part of the district court to address any arguments, Plaintiff failed to preserve this issue for appeal by filing motion to enlarge or amend the judgment pursuant to Iowa Rule of Civil Procedure 1.904(2). *See Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004) (stating a nonmovant must file a motion under Iowa Rule of Civil Procedure 1.904 after the grant of summary judgment to preserve its unaddressed arguments for appeal).

2. Scope of Review

Challenge Quest agrees with Plaintiff's statements on scope of review and standard of review.

3. Argument

Plaintiff argues "[w]hile it is undisputed that the braking system was replaced, that is not the proximate cause of Plaintiff's injury[,]" and that Mt. Crescent was forced to replace Challenge Quest's original braking system because of its substandard and dangerous construction and design." (Plaintiff's Final Br. at 28). Plaintiff's theory does not withstand scrutiny.

It is important to understand at the outset the ultimate cause of the Incident in this case. Plaintiff's alleged injuries were caused by the failure of a Mt. Crescent employee "to deploy the arresting brake (Zip Stop) correctly, resulting in . . . [Plaintiff] colliding at-speed with the base-tower structure." App. 79. Specifically, Mt. Crescent's owner, Korby Fleischer, testified a Mt. Crescent employee, "forgot to put . . . the brake back out . . . until he realized he made a mistake . . . and [Plaintiff] had an impact with the structure . . . ." App. 303 (Fleischer Dep. 66:20-67:8). Mr. Fleischer attributed this entirely to "human error" caused by the employee "forget[ting] to do something" he was trained to do—resetting the brake block on the Zipline before a new rider descended:

> Q. Do you feel like that was an aspect of the operation of the braking system that Mt. Crescent employees understood they needed to perform?
>
> A. Oh, yes. ***They knew to put that out***. Like I said before, it was a mistake by the person that was working that day. He just -- it

> was the end of the day. It was the last two people going down the zip line and he was out there all day. ***He just -- he missed -- he missed it.***

App. 303; 304; 318; 319 (Fleischer Dep. 67:9-68:2, 72:5-23, 133:12-21, 189:10-191:3). (emphasis added).

Plaintiff acknowledges "[r]egardless of the braking system at issue, it has been established that Plaintiff's injury occurred ***due to human error***, not a mechanical issue with the braking system." (Plaintiff's Final Br. at 29) (emphasis added).

Plaintiff devotes much of his brief to an attempt to paint Challenge Quest as an incompetent contractor and asserts that because the Original Braking System did not have an "emergency brake" it was therefore foreseeable "Mt. Crescent [would be] forced to replace Challenge Quest's original braking system[.]" (Plaintiff's Final Br. at 28). The district court properly saw through these arguments in granting Challenge Quest's Motion for Summary Judgment.

Whether the Original Braking System employed by Challenge Quest had an "emergency brake" or whether an "emergency brake" was required by ACCT standards is simply not a material fact.[1] The undisputed facts show

[1] As Challenge Quest noted in its briefing before the district court, Section H.1.3 of the ACCT standards provides in relevant part: "An emergency brake shall be required if, upon failure of the primary brake, both

that Challenge Quest completed construction of the Zipline and training of Mt. Crescent employees in August 2014. App. 484. Challenge Quest installed the Original Braking System, which utilized a capture arm with a brake block, which was the braking system in place at the time Challenge Quest completed construction of the Zipline in August 2014. App. 484. Challenge Quest thereafter turned over the Zipline to Mt. Crescent and had no further involvement or responsibility for the Zipline. App. 484; 46.

In July 2016—nearly two years after Challenge Quest turned the Zipline over—Mt. Crescent retained Sky Line, a Canadian company, to install a new braking system on the Zipline. App. 484. This changed the braking system from the Original Braking System to an automated braking system called Zip Stop. App. 484.[2] Under the Zip Stop system, the brake block

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of the following occur: [1] The participant arrives at the zip line landing area at a speed in excess of 6 mph (10 kph) [and] [2] The participant experienced unintended and/or harmful contact . . . in the zip line landing area." App. 83. From this, Plaintiff made the unsupported leap that "***[c]learly***, the braking system constructed by Challenge Quest required an emergency brake." (*Id*.) (emphasis added). Mr. Goodwin testified an "emergency brake" as defined under ACCT standards was not required under the Original Braking System employed by Challenge Quest. App. 280-281; 289 (Goodwin Dep. 66:25-67:8, 78:23-79:16, 173:21-174:8).

[2] Plaintiff notably neglects to mention that Challenge Quest in fact warned Mt. Crescent about the limitations of the Zip Stop braking system and why it did not recommend its use on the Zipline. App. 327-328 (Fleischer Dep. 184:24-185:22); 280 (Goodwin Dep. 65:22-66:11); 206-21. Mt. Crescent elected to hire Sky Line to install the Zip Stop system anyway. App. 484.

"automatically deploys itself back to reset for braking[]" after each rider. App. 328. Mt. Crescent never informed Challenge Quest that it planned to change the Original Braking System to the automated Zip Stop braking system. App. 330 (Fleischer Dep. 196:13-18). Sky Line conducted its own acceptance inspection of the Zipline after it installed the new Zip Stop braking system, and Mt. Crescent "relied on Skyline's expertise in conducting the inspection of the [Zipline] after the [Z]ipStop system was installed." App. 330-331 (Fleischer Dep. 196:19-197:6). Mt. Crescent expected Sky Line to "know what ACCT standards required with respect to an emergency brake on their system[.]" App. 331 (Fleischer Dep. 198:11-17).

Even assuming *arguendo* the Original Braking System employed by Challenge Quest was "substandard" and pushed Mt. Crescent to install the Zip Stop system, there is simply no logical correlation between this and "human error" that Plaintiff admits was the cause of the accident, and Plaintiff offers none. A simple analogy demonstrates the flaw in Plaintiff's causation theory. Suppose Manufacturer A sells a defective and dangerous product (e.g., a saw) to a consumer. Recognizing the defective and dangerous nature of Manufacturer A's product, the consumer then goes out and purchases Manufacturer B's similar product, which is also defective and dangerous. The consumer is then injured while using Manufacturer B's product. Adopting

Plaintiff's argument, Manufacturer A would be liable to the consumer even though the consumer never used, and was not injured by, Manufacturer A's product. Such a liability regime is unheard of in Iowa, or elsewhere, and Plaintiff offers no authority to support its adoption by this Court.

Plaintiff further argues "[t]he district court did not consider Challenge Quest's failure to provide Mt. Crescent with . . . training, policies, instructions and limitations, which are also elements of Plaintiff's negligence claim[.]" (Plaintiff's Final Br. at 30). Plaintiff is mistaken.

In granting Challenge Quest's Motion for Summary Judgment, the district court specifically found:

> While Plaintiff alleges "Challenge Quest and/or the Mt. Crescent Defendants provided training to the Mt. Crescent employees operating the zipline attraction on October 9, 2016" the undisputed facts show "none of the employees trained by Challenge Quest on the use of the [o]riginal [b]raking [s]ystem were operating the [z]ipline on October 9, 2016." App. 27; 484. Nor could Challenge Quest have provided any training to Mt. Crescent employees on the operation of a braking system which had yet to be unilaterally modified by Mt. Crescent without Challenge Quest's knowledge or involvement.

App. 418.

Similar to Plaintiff's "kitchen sink" approach in the district court, Plaintiff argues on appeal that "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 . . . caused Plaintiff's injuries." (Plaintiff's Final Br. at 31). Once again, Plaintiff has simply offered up this conclusion without any explanation or theory how these alleged deficiencies resulted in Plaintiff's injuries.

B. THE DISTRICT COURT CORRECTLY FOUND THAT CHALLENGE QUEST DID NOT OWE A DUTY TO PLAINTIFF

1. Preservation of Error

Challenge Quest agrees with Plaintiff's statements on error preservation; however, to the extent Plaintiff criticizes any failure on the part of the district court to address any arguments, Plaintiff failed to preserve this issue for appeal by filing a motion to enlarge or amend the judgment pursuant to Iowa Rule of Civil Procedure 1.904(2). *See Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004) (stating a nonmovant must file a motion under Iowa Rule of Civil Procedure 1.904 after the grant of summary judgment to preserve its unaddressed arguments for appeal).

2. Scope of Review

Challenge Quest agrees with Plaintiff's statements on scope of review and standard of review.

3. Argument

"The essential elements of a tort claim for negligence generally include: (1) the existence of a duty on the part of the defendant to protect plaintiff from

injury; (2) a failure to perform that duty; (3) a reasonably close causal connection, i.e., legal cause or proximate cause; and (4) damages." *Bockelman v. State, Dep't of Transp*., 366 N.W.2d 550, 552 (Iowa 1985); *accord Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) ("An actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages.") (quoting *Stotts v. Eveleth*, 688 N.W.2d 803, 807 (Iowa 2004).

Under the Restatement (Third), in order to prove a defendant was negligent, a plaintiff must show, among other things, "the existence of a duty to conform to a standard of conduct to protect others." *Thompson*, 774 N.W.2d at 834 (quoting *Stotts v. Eveleth*, 688 N.W.2d 803, 807 (Iowa 2004)); *accord Hill v. Damm*, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011); Restatement (Third) of Torts § 6 cmt. b (Am. Law Inst. 2010). "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts § 7(a) (Am. Law Inst. 2010). However, "whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm." *Thompson*, 774 N.W.2d at 834 (quoting *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256,

258 (Iowa 1999)). Existence of a duty "is a question of law for the court to determine." Restatement (Third) of Torts § 6 cmt. b (Am. Law Inst. 2010); *accord Estate of Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 586 (Iowa 2017) (quoting *Thompson*, 774 N.W.2d at 834).

The threshold question in any tort case is whether the defendant owed the plaintiff a duty of care. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). "Whether such a duty arises out of the parties' relationship is always a matter of law for the court." *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

a. Plaintiff Misapprehends Challenge Quest's Duty

Plaintiff argues "Challenge Quest was responsible for designing and constructing a zipline which complied with industry standards, which it did not do." (Plaintiff's Final Br. at 37-38). Plaintiff further argues Challenge Quest failed in its responsibility to "(1) provid[e] Mt. Crescent with the necessary operational instructions, operational limitations/warnings and initial training to operate the zipline safely; (2) adequately address[] Mt. Crescent's safety concerns . . . ; (3) ensur[e] that Mt. Crescent had safety policies, procedures and guidelines in place and a definitive method of training future Mt. Crescent employees . . . and (4) recogniz[e] safety issues in its subsequent annual inspections of Mt. Crescent's zipline[.]" (Plaintiff's

Final Br. at 38). The undisputed evidence shows that Challenge Quest met any duty it owed to Plaintiff.

The Agreement provides Challenge Quest would "perform challenge course construction services" for a zipline challenge course on property owned, managed, or operated by Mt. Crescent. App. 486. Pursuant to the Agreement, Challenge Quest also agreed to provide "***4 day site specific high technical training for full time staff***[.]" App. 486; 492. The undisputed evidence shows that Challenge Quest provided this four-day training to Mt. Crescent's existing staff in August 2014, and Plaintiff does not dispute that fact. Challenge Quest completed its scope of work for construction of the Zipline and training of Mt. Crescent's full-time staff in August 2014, at which time Challenge Quest turned the Zipline over to the control of Mt. Crescent. App. 484.

More fundamentally, and as the district court recognized, ***none of the employees*** trained by Challenge Quest in August 2014 were operating the Zipline on the date of the Incident. App. 418. Nor could Challenge Quest have provided training to any Mt. Crescent employees on the operation of a ***completely different braking system*** that had yet to be installed by Mt. Crescent. App. 418. In other words, Plaintiff's argument would impose

a duty on Challenge Quest to provide training to a ***future employee*** on a braking system that ***had yet to be installed***. That is preposterous on its face.

Plaintiff further asserts "Challenge Quest . . . was required to put in place a program that worked exactly the same way every time in order to avoid errors that could cause rider injury[.]" (Plaintiff's Final Br. at 45). Plaintiff is mistaken.

"Generally, a person does not have a duty to aid or protect another, or to control the conduct of a third person to prevent that person from causing physical harm to another." *Pierce v. Staley*, 587 N.W.2d 484, 487 (Iowa 1998).

Thompson v. Gordon, 241 Ill. 2d 428, 432, 948 N.E.2d 39, 42 (2011), is particularly instructive here. In *Thompson*, engineering firms entered in a contract with a property developer (WDC) whereby firms agreed to provide engineering services in connection with the development of a shopping mall. As part of the development, WDC was required to improve an avenue to handle traffic the mall would generate. Accordingly, WDC's contract with the engineering firm required the firm to design two ramps as well as a replacement bridge deck surface. The Illinois Department of Transportation approved the plans and issued a permit for work to commence. Approximately seven years after the roadwork was completed, the plaintiff

was injured when a vehicle traveling eastbound lost control and swerved, hit the median and crossed into the opposite lane, where it collided with the plaintiff's vehicle, causing serious injuries.

Plaintiff filed a lawsuit against the engineering firms, alleging "that defendants should have designed and constructed a 'Jersey barrier,' on the road, including the bridge deck and the areas encompassing the interchange and weave lanes." *Id*. at 42. Defendants filed a motion for summary judgment, arguing "that they owed no duty to plaintiff because the work that they contracted to perform for WDC did not require median barrier analysis or design, and the design work performed by defendants did not encompass the area of the accident." *Id*. at 43. The trial court granted defendants' motion, finding their "duty to plaintiff was circumscribed by the terms of the contract that they entered into with WDC and the scope of their work was determined by their contractual undertaking." *Id*. at 43. In affirming the trial court, the Supreme Court of Illinois held:

> [T]he scope of defendants' duty is defined by the contract between defendants and WDC. The plain language of that contract required defendants to replace the bridge deck, and in doing so, required defendants to use the degree of skill and diligence normally employed by professional engineers performing the same or similar services. The use of the phrase "same or similar services" limits the scope of defendants' standard of care to replacing the bridge deck . . . .

> Because defendants owed no duty to plaintiff to consider and design an improved median barrier, the trial court properly granted summary judgment in favor of defendants.

Thompson, 241 Ill. 2d at 450, 948 N.E.2d at 51–52; *see also Roberts v. Alexandria Transportation, Inc*., No. 19-2395, 2020 WL 4495281, at *4 (7th Cir. Aug. 5, 2020) ("Where a negligence action derives from a contractual obligation, '[t]he question of whether a duty exists . . . is determined by the terms of the contract, and the duty, if any, will not extend beyond that described in the contract.'"); *McGee By & Through McGee v. Chalfant*, 248 Kan. 434, 437, 806 P.2d 980, 983 (1991); (citing Restatement (Second) of Torts § 324A (1964) and noting "[t]he extent of the undertaking should define the scope of the duty.").

It was Mt. Crescent's, not Challenge Quest's duty to ensure the safe operation of the Zipline. As recognized in *Thompson*, Challenge Quest had no duties beyond the scope of its Agreement with Mt. Crescent, which it fulfilled. Reduced to its essence, Plaintiff's argument is that Challenge Quest was under a duty to continually monitor Mt. Crescent's compliance with safety protocols and provide ongoing training for Mt. Crescent's employees in perpetuity (and without compensation). That is simply not the law or feasible as a policy decision.

Plaintiff also argues that Challenge Quest "failed to provide Mt. Crescent with ***any guidance*** on the safe operation of a zipline[,]" and failed its purported duty "of ensuring that safety rules were in place or that ACCT standards were being complied with" by Mt. Crescent. (Plaintiff's Final Br. at 46, 48) (emphasis added). Plaintiff's contention is not only a misrepresentation of the record,[3] but fails for a more fundamental reason. Plaintiff can point to no evidence to show that what Mt. Crescent did provide was "inadequate" or what Challenge Quest (or Mt. Crescent, for that matter) could have done to prevent the Incident that Plaintiff concedes was attributable to "human error." (Plaintiff's Final Br. at 29). In short, Plaintiff argues that because an accident occurred, there ***must have been*** some deficiency in the training that Challenge Quest provided its employees. As the district court recognized in granting Challenge Quest's Motion for Summary Judgment, that is insufficient for Plaintiff to meet its burden to put forth "specific facts" demonstrating the genuine issue of material fact.

[3] Challenge Quest has produced the written tests provided to Mt. Crescent's staff and the verification of training. App. 390-406; 407-408; *see also* 275; 276-277; 279; 283-284; 289 (Goodwin Dep. 35:8-36:2, 48:23-49:7, 60:5-18, 89:24-93:9, 174:22-175:3); *see also* 310; 321; 323; 327 (Fleischer Dep. 101:19-102:19, 146:5-15, 166:22-25, 181:3-9). The record also reflects Challenge Quest recommended the creation of a policy and procedure manual by Mt. Crescent. App. 228-237; 302; 302-303 (Fleischer Dep. 62:18-63:15, 64:17-65:15).

Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 245 (Iowa 2006); *Hoefer v. Wis. Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 338 (Iowa 1991) ("[T]here is no genuine issue of fact if there is no evidence.").

C. THE DISTRICT PROPERLY FOUND THERE WERE NO ISSUES OF MATERIAL FACT AS TO CHALLENGE QUEST'S LIABILITY

1. Preservation of Error

Challenge Quest agrees with Plaintiff's statements on error preservation; however, to the extent Plaintiff criticizes any failure on the part of the district court to address any arguments, Plaintiff failed to preserve this issue for appeal by filing a motion to enlarge or amend the judgment pursuant to Iowa Rule of Civil Procedure 1.904(2). *See Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004) (stating a nonmovant must file a motion under Iowa Rule of Civil Procedure 1.904 after the grant of summary judgment to preserve its unaddressed arguments for appeal).

2. Scope of Review

Challenge Quest agrees with Plaintiff's statements on scope of review and standard of review.

3. Argument

Adopting a similar approach to its arguments before the district court, Plaintiff has thrown out a number of alleged issues relating to the Zipline and the work performed by Challenge Quest that Plaintiff asserts is "evidence of

Challenge Quest's negligence on a number of levels[.]" (Plaintiff's Final Br. at 36). Unfortunately for Plaintiff, negligence does not exist in a vacuum—"[c]ausation in a negligence action must be analyzed in the context of the relationship between those theories of negligence supported by the evidence and the theory of damages sought by the plaintiff." *Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007).

First, Plaintiff argues "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." (Plaintiff's Final Br. at 42). Once again, after Challenge Quest completed construction of the Zipline in 2014, after which Mt. Crescent hired Sky Line to install a new automated braking system (Zip Stop). App. 484. Mt. Crescent "relied on Skyline's expertise in conducting the inspection of the [Zipline] after the [Z]ipStop system was installed[,]" and expected Sky Line to "know what ACCT standards required with respect to an emergency brake on their system[.]" App. 330-331 (Fleischer Dep. 196:19-197:6, 198:11-17). Simply put, the Original Braking System did not fail, ***because it did not exist*** at the time of the Incident. Plaintiff further offers no explanation why or how, if the entirely new braking system installed by Sky Line required an "emergency brake" under ACCT standards, this responsibility falls on Challenge Quest.

Plaintiff further asserts "Challenge Quest did not provide a 'critical components' list, which is required by ACCT standards[,]"and "failed to provide Mt. Crescent with any document listing maintenance criteria, inspection criteria and equipment replacement criteria." (Plaintiff's Final Br. at 47).

Plaintiff fails to mention that Mt. Crescent in fact had a copy of the ACCT standards in place at the time of the Incident and could have consulted those ACCT guidelines regardless of their origin. App. 322-323 (Fleischer Dep. 164:15-165:15). In any event, Plaintiff offers no articulable theory, much less any evidence, as to how or why had Challenge Quest provided such documents this would have prevented Plaintiff's injury. Plaintiff was not injured because the tower collapsed or the line broke due to poor construction or maintenance. The Incident indisputably occurred because a Mt. Crescent employee simply "forgot" to "unclip the brake and let it go back out[,]" a failure that was attributable to "human error." App. 303; 329 (Fleischer Dep. 67:9-68:2, 189:10-190:18).

Plaintiff further points to the fact that "Challenge Quest performed an Acceptance Inspection of the zipline" in August 2014 and "determined that Mt. Crescent passed the inspection even though the zipline had no emergency brake[.]" (Plaintiff's Final Br. at 48-49). Again, this inspection occurred

before the removal and replacement of the Original Braking System by Mt. Crescent.

Plaintiff finally argues "Challenge Quest did nothing to ensure that ongoing and future training would be delivered by a qualified person pursuant to ACCT standards." (Plaintiff's Final Br. at 50). This, too, misstates the record. Challenge Quest was not hired and did not agree to prepare Mt. Crescent to do training themselves and specifically informed Mt. Crescent of the need to provide "***annual . . . [r]efresher training***" for staff. App. 282; 290 (Goodwin Dep. 87:12-17, 177-20-178:14). Given Plaintiff's fixation with documentation—it is notable that the Annual Inspection Report provided by Challenge Quest over a year before the Incident clearly provides:

> ***The ACCT standards require annual skill refreshers for zip line staff*** as well as 8 hours of continuing education a year. Refresher training evaluates all necessary skills for operating the zip lines[,] including zip line procedures, brake blocking, retrievals, trolley transfers, and taking the written test again.

App. 325-326; 411 (Fleischer Dep. 175:19-176:7; 177:14-19). Mt. Crescent knew this and could have hired Challenge Quest to provide annual training for its new staff. That Mt. Crescent elected not to do so does not land at Challenge Quest's feet. Accordingly, the district court did not err in granting Challenge Quest's Motion for Summary Judgment.

VII.
CONCLUSION

For the reasons stated herein, Challenge Quest respectfully requests the Court affirm the district court's judgment granting Challenge Quest's Motion for Summary Judgment.

VIII.
REQUEST FOR ORAL ARGUMENT

Challenge Quest requests oral argument.

IX.
CERTIFICATE OF COST

The cost of printing the foregoing Final Brief of Appellee was $0.00.

X.
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 proportionally spaced using Times New Roman 14-point and contains 4789 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

XI.
CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 28, 2020, the above and foregoing Appellant's Final Brief was electronically filed with the Clerk of the Court for the Supreme Court of Iowa, using the EDMS system, service

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