IN THE IOWA SUPREME COURT

SUPREME COURT NO. 20-0343

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; DOUBLE DIAMOND, INC., AN IOWA CORPORATION 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 FOR POTTAWATTAMIE COUNTY
THE HONORABLE JAMES S. HECKERMAN

APPELLEE'S BRIEF

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None.

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III. ROUTING STATEMENT

The Iowa Supreme Court should transfer this case to the Court of Appeals because it involves the application of existing legal principles and is appropriate for summary disposition. Iowa R. Civ. P. 6.1101(3).

IV. STATEMENT OF FACTS

On October 9, 2016, Plaintiff Thomas Lukken ("Lukken") went to Mt. Crescent[1] to ride on the zip line. (***Amended Petition at Law ¶¶ 28, 56, 74, A-25, 27-28***). In consideration for being granted permission to ride on the zip line, Lukken signed a Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement prior to riding on the zip line ("Waiver"). (***Release and Waiver of Liability Agreement, A-465***). The Release and Waiver of Liability provided:

> In consideration of being permitted to participate in the activities offered at Mt Crescent Ski Area I hereby agree to release, waive, discharge, and covenant not to sue Mt Crescent Ski Area, its owners, agents, employees, volunteer staff, or rescue personnel as well as any equipment manufacturers and distributors involved with the Mt Crescent Ski Area whether caused by the negligence of Mt Crescent Ski Area, its owners, agents, employees, volunteer staff, rescue personnel, equipment manufacturers, distributors or otherwise.
>
> . . .
>
> In consideration of being permitted to participate in the activities offered at Mt Crescent Ski Area, I agree that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to *any and all acts of negligence* by Mt Crescent Ski Area, its owners, agents, employees, volunteer

[1] This Brief collectively refers to Mt. Crescent Ski Area, Safehold Special Risk, Inc., Korby Fleischer, Samantha Fleischer, and Double Diamond Inc. as "Mt. Crescent."

> staff, rescue personnel, and equipment manufacturers, and distributors, including negligent rescue operations and its intended to be as broad and inclusive as permitted by Iowa law and that if any portion is held invalid, it is agreed that the balance shall continue in full legal force and effect.

(***Id.***) (Emphasis added).

On October 9, 2016, Plaintiff claims he was later injured as a result of riding on the zip line when he zip line brake was not fully reset by accident. (***Petition at Law, ¶¶ 68–74, A-16-17***). The Plaintiff subsequently filed an action against Mt. Crescent, among others, for his injuries. (***Petition at Law, A-10-21***).

Mt. Crescent filed a Motion for Summary Judgment stating that there was no genuine issue of material fact but that Lukken had signed a valid Waiver of Liability for any and all forms of negligence, and that judgment should be entered as a matter of law. Lukken did not contest the validity of the Waiver as a matter of fact, but argued that summary judgment should not be granted on the claims of gross negligence or punitive damages as a matter of law.

After hearing arguments from both sides, Iowa District Court Judge James S. Heckerman determined that there was no genuine issue of material fact regarding the validity of the Waiver, that the Waiver included a release

of liability for claims based on any and all forms of negligence, and that Mt. Crescent was entitled to Summary Judgment as a matter of Iowa law.

Lukken filed an appeal from this decision on February 25, 2020.

V. ARGUMENT

IN GRANTING SUMMARY JUDGMENT, THE IOWA DISTRICT COURT MADE A PROPER DECISION THAT THE PLAINTIFF MADE A LEGAL WAIVER OF LIABILITY UNDER IOWA LAW

A. SUMMARY JUDGMENT STANDARD ON APPEAL.

A district court's determination upon a motion for summary judgment is identical to the determination made by a district court on a motion for directed verdict. *Meyer v. Nottger*, 241 N.W.2d 911, 917 (Iowa 1976). If a directed verdict for the movant would be proper, then it is proper to grant summary judgment. *Id.*

Under Iowa Rule of Civil Procedure 1.981, summary judgment is appropriate where the moving party shows no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981; *Amish Connection Co. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 235 (Iowa 2015) (citing *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 500 (Iowa 2013) (citing Iowa R. Civ. P. 1.981(3)). The purpose of this rule "is to avoid useless trials and streamline the litigation process." *Cunningham v. Aviva Life & Annuity Co.*, 810 N.W.2d 24 (Iowa Ct. App. 2011).

In resisting a motion for summary judgment, the nonmoving party must set forth material facts that are in dispute. *See Int'l Milling Co. v. Gisch*, 129

N.W.2d 646, 651 (Iowa 1964). As such, "the nonmoving party must come forward with specific facts constituting competent evidence supporting the claim advanced." *Smith v. First Nat'l Bank Iowa*, No. 00-0534, 2001 WL 726079, at *2 (Iowa Ct. App. June 29, 2001) (citing *Winkel v. Erpelding*, 526 N.W.2d 316, 318 (Iowa 1995)). "An inference based upon speculation or conjecture does not generate a material factual dispute sufficient to preclude summary judgment." *Id*. at *6–7 (citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)).

Further, on direct attack, doubtful pleading must be resolved against the pleader. *See Eaton v. Downey*, 118 N.W.2d 583, 586 (Iowa 1962). Accordingly, the Court may draw inferences in favor of the party opposing summary judgment only if those inferences are rational, reasonable, and otherwise permissible under the governing substantive law. *See Butler*, 530 N.W.2d at 88.

Taking "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," no issue of fact must remain. Iowa R. Civ. P. 1.981. In the case at bar, Lukken did not dispute Mt. Crescent's Statement of Facts that Lukken had executed the Waiver of Liability. Lukken only contended that the Waiver could not waive liability for gross negligence or punitive damages as a matter of law.

An attempt to simply offer facts to claim that issues of fact remain is insufficient and summary judgment is appropriate when there is no *genuine* issue of *material* fact. *Parish v. ICON Health & Fitness, Inc.*, 719 N.W.2d 540, 542 (Iowa 2006). "A fact is *material* if it will affect the outcome of the suit, given the applicable law. An issue of fact is 'genuine' if the evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party." *Id*. (emphasis added)

Here, the District Court was faced with a motion for summary judgment in which the resisting party admitted that there was no issue of material fact that Lukken had executed a valid Waiver. Instead, Lukken argued that the Waiver could not release claims based on gross negligence or for punitive damages as a matter of law. When there was no genuine issue of material fact, Judge Heckerman properly granted summary judgment as a matter of law.

B. MT. CRESCENT DOES NOT MAKE A REPLY TO THE FIRST THREE APPEAL ISSUES.

Mt. Crescent does not respond to the first three appeal issues Lukken presents under Sections VII(A) thorough (C) of his Brief as they are directed to his claims against Appellee Challenge Quest, LLC.

C. THE DISTRICT COURT CORRECTLY HELD THAT THE WAIVER EXCULPATED MT. CRESCENT FROM ALL CLAIMS OF NEGLIGENCE, INCLUDING GROSS NEGLIGENCE, AS A MATTER OF LAW, SO IT WAS UNNECESSARY FOR THE DISTRICT COURT TO ADDRESS WHETHER THERE WAS A FACT ISSUE AS TO ALLEGATIONS OF GROSS NEGLIGENCE.

1. Preservation

Lukken has not preserved this issue for review. The District Court found "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 Defendants' Motion for Summary Judgment, A-500***). This error asserts that the Court erred by failing to address the gross negligence issue. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If Lukken wished to preserve this issue for appeal, he had a duty to request a ruling from the district court on the issue of gross negligence by filing a motion to reconsider, enlarge, or amend pursuant to Rule 1.904 of the Iowa Rules of Civil Procedure. He failed to do so, and through this failure also failed to preserve this issue for appeal.

2. Scope of Review

Mt. Crescent agrees that the standard of appellate review of a district court's ruling on a motion for summary judgment is for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008).

3. Argument

The Release and Waiver of Liability Agreement that Lukken signed clearly and equivocally notified Lukken that he was waiving "any and all" acts of negligence and was intended to be "as broad and inclusive as permitted by Iowa law." "A release is a contract, and its validity is governed by the usual rules relating to a contract . . . the intent of the parties must control; and, except in cases of ambiguity, this is determined by what the contract itself says." *Korsmo v. Waverly Ski Club*, 435 N.W.2d 746, 748 (Iowa Ct. App. 1988). The Iowa Supreme Court has "repeatedly held that contracts exempting a party from its own negligence are enforceable, and are not contrary to public policy." *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993). Waivers must contain "clear and unequivocal language that would notify a casual reader that by signing the document . . . [the reader] would be waiving all claims relating to future acts or omissions of negligence." *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 878–79 (Iowa 2009).

a. The Fact Issues Lukken Raises Are Not Relevant to this Appeal.

The only fact issue presented to the Iowa District Court regarding the Waiver would have been whether Lukken made a valid waiver of his legal rights to file a claim based on any form of negligence if he was injured. Pursuant to the record in this case, there is no genuine issue of material fact that Lukken executed a valid waiver of his rights, and based on that fact, the Iowa District Court made a correct determination that summary judgment was appropriate as a matter of law.

Whether Mt. Crescent was grossly negligent on the day Lukken was injured is not relevant to this appeal. Lukken spends much of his brief arguing that Mt. Crescent was grossly negligent. However, the district court properly declined to rule on this issue based on the fact that Lukken had waived his right to make a claim based on gross negligence, stating

> Regarding Plaintiff's claim of gross negligence in the operation and maintenance of the zip line, the Court finds 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. It is undisputed Plaintiff signed the Waiver and the Court finds the Waiver is enforceable.

(***Order on Defendants' Motion for Summary Judgment, A-500***).

On appeal, Lukken is in this instance asking the appellate court to make a factual finding of gross negligence. It is improper for an appellate court to

make a factual finding that had not been addressed by the district court. *Meier*, 641 N.W.2d at 537. "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.* There was no motion filed with the District Court to preserve this claim for appeal, and there is no finding for this Court to affirm or reverse regarding whether Mt. Crescent was grossly negligent.

b. The District Court Correctly Held that the Waiver in Question Applied to Gross Negligence

The Waiver clearly and unequivocally waived all of Lukken's claims based on Mt. Crescent's negligence. The Waiver states:

> I hereby agree to release, waiver, discharge, and covenant not to sue Mt Crescent Ski Area, its owners, agents, employees, volunteer state, or rescue personnel as well as any equipment manufacturers and distributors involved with the Mt Crescent Ski Area facilities **from any and all liability from any and all loss or damage** I may have and any claims or demands I may have on account of injury to my person and property or the person and property of others, including death, arising out of or related to the activities offered at Mt Crescent Ski Area whether caused by the **negligence** of Mt Crescent Ski Area, its owners, agents, employees, volunteer staff rescue personnel, equipment manufacturers, or distributors or otherwise.
>
> . . .
>
> I agree that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to **any and all acts of negligence** by Mt Crescent Ski Area, its owners, agents, employees, volunteer staff, rescue personnel, and equipment manufacturers, and distributors, including negligent rescue

> operations and **is intended to be as broad and inclusive as permitted by Iowa law**.

(***Release Agreement, A-465***) (emphasis added). The Waiver is exceedingly clear that Lukken waived "any and all" claims based in negligence. The Waiver released all claims based on any injury to Lukken as well. The Waiver is as broad and inclusive as Iowa law permits. Lukken was on notice when he signed the Waiver that any accident or misstep on behalf of Mt. Crescent could not give rise to a claim based in negligence.

Gross negligence is a type of negligence by title and definition. It involves a risk of harm and an entity's failure to adequately protect against that harm. The Iowa Supreme Court does not require a waiver to use any certain "magic words" (such as the phrase "gross negligence") in an exculpatory clause; they only require the scope of the clause to be clear. *Sweeney*, 762 N.W.2d at 879. It is not fatal that the Waiver did not explicitly use the phrase "gross negligence" when the balance of the Waiver clearly indicated the exculpation was as broad as possible.

Although Lukken cites cases from other jurisdictions in support of his position, Iowa law permits the exculpation of gross negligence. In *Smith v. All Stor Fort Knox, LLC*, the exculpatory clause released "negligence, gross negligence, willful acts of Lessor, and other acts or omissions of Lessor or its employees or agents." 924 N.W.2d 534 (Iowa Ct. App. 2018). In that case,

the Court of Appeals held that that language clearly and unequivocally barred claims of gross negligence. Thus, the Court of Appeals has held that a party can exculpate gross negligence as long as the contract is clear. Moreover, Iowa courts have already expressed a preference for the freedom to contract in situations involving recreational exculpation and found "contracts exempting a party from its own negligence . . . are not contrary to public policy." *Huber*, 501 N.W.2d 55. Here, the Waiver is clear. The parties intended the Waiver to be as broad and inclusive as permitted by Iowa law. It covered any and all acts of negligence to the greatest possible extent. The Waiver notified Lukken of the risks he was taking and he knowingly signed it.

After a thorough review of the Waiver, the Iowa District Court came to this same conclusion, writing:

> In the instant case, the Court finds the Waiver is 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. The Waiver leaves no question regarding its intention and purpose, with the title of the document as, "Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement," and language such as, "[H]ereby release, waive, discharge, and covenant not to sue Mt. Crescent Ski Arena . . . whether caused by the negligence of Mt. Crescent . . . or otherwise . . . Agreement extends to any and all acts of negligence by Mt. Crescent Ski Arena . . . and is intended to be as broad and inclusive as permitted by Iowa law." The Court finds the Waiver unambiguous in its language that it is a release of all liability for Defendant, Mt. Crescent as well as all other Defendants as its "owners, agents, employees, volunteer staff,

> rescue personnel, equipment manufacturers, distributors or otherwise."

(***Order on Defendants' Motion for Summary Judgment, A499-500***).

Thus, the Iowa District Court properly determined that the Waiver exculpates Mt. Crescent from liability for any and all forms of negligence, including gross negligence, by its terms.

c. Lukken's Punitive Damages Demand Fails if He Cannot Succeed on His Negligence Claim.

Lukken's "willful and wanton" allegations are irrelevant if he is unable to succeed on his negligence claim. Punitive damages "are not recoverable as of right and are only incidental to the main cause of action." *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979). Absent a tort to support the punitive damages claim, a party is not entitled to punitive damages. *Garber v. Hosmer*, 851 N.W.2d 547 (Iowa Ct. App. 2014). Lukken must first succeed on his negligence claim before a finding of willful and wanton conduct even becomes relevant. Neither the Iowa District Court nor this Court need to determine whether Mt. Crescent's conduct was willful and wanton because the Waiver precludes his negligence claims.

D. THE DISTRICT COURT CORRECTLY HELD THAT THE WAIVER IS NOT CONTRARY TO PUBLIC POLICY.

1. Preservation

Mt. Crescent agrees that Lukken preserved this issue for appellate review. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

2. Scope of Review

Mt. Crescent agrees that the standard of appellate review of a district court's ruling on a motion for summary judgment is for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008).

3. Argument

In this case, Lukken is asking that the waiver he knowingly and voluntarily signed be invalidated. He is asking that the Court ignore Iowa law permitting the Waiver that he signed in this case, and invalidate the Waiver based on public policy grounds.

The Iowa Supreme Court has stated that courts can only invalidate contracts based on public policy grounds "cautiously" and "only in cases free from doubt." *Rogers v. Webb*, 558 N.W.2d 155, 157 (Iowa 1997) (quoting *DeVetter v. Principal Mut. Life Ins. Co.*, 516 N.W.2d 792, 794 (Iowa 1994)). Before a court can strike down a contract based on public policy, it must "conclude that 'the preservation of the general public welfare imperatively so demands invalidation so as to outweigh the weighty societal interest in the

freedom of contract.'" *Rogers*, 558 N.W.2d at 157 (quoting *DeVetter*, 516 N.W.2d at 794). "As the freedom to contract weighs in the balance when public policy grounds are asserted against the enforcement of a contract, courts must be attentive to prudential considerations and exercise caution." *Galloway v. State*, 790 N.W.2d 252, 256 (Iowa 2010).

a. The Waiver is Not Contrary to the Requirements of Iowa Code § 88A.9.

Lukken contends that Iowa Code § 88A.9 makes waivers of liability invalid.

First, Iowa Code Chapter 88A is entitled "Safety Inspection of Amusement Rides", and nowhere in this chapter is there any prohibition of waivers of liability. In addition, Iowa Code § 88A.3 provides that the Labor Commissioner may adopt rules under this chapter, and there are no administrative rules offered by Lukken that prohibit waivers of liability.

Second, Iowa Code § 88A.9 only requires that insurance be obtained prior to issuance of a permit under the chapter, stating:

> No person shall be issued a permit under this chapter unless the person first obtains an insurance policy in the amount of not less than one million dollars for bodily injury, death, or property damage in any one occasion.

Iowa Code § 88A.9 does not deal with liability for injury or prohibit operators for requesting waivers for such injuries in consideration for access

to an amusement ride. It only requires that insurance exist in cases where there may be liability and no issue of waiver.

Allowing Mt. Crescent to require zip line riders to sign the Waiver prior to riding the zip line is not contrary to public policy based on the specific language of Iowa Code § 88A.9, Iowa Code Chapter 88A, or any of the rules enacted pursuant to the chapter by the Labor Commissioner. At the time of the District Court's decision in this case, Judge Heckerman came to this same conclusion that Iowa Code § 88A.9 does not prohibit releases, stating:

> To determine legislative intent for interpretation of a statute, we first look to the language chosen by the legislature and not what the legislature might have said or implied. *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008). "Absent a statutory definition, we consider statutory terms in the context in which they appear and give each its ordinary and common meaning." *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 235 (Iowa 2010).
>
> It is undisputed the zip line ride qualifies as an amusement ride as defined in Iowa Code § 88A.1, however, the Court finds no legal basis presented or researched for interpreting the statute to implicitly preclude amusement ride operators from entering into waivers of liability. As discussed above, Iowa courts have consistently held up the validity of broad waivers and of parties' freedom to enter into them. Giving each term its ordinary meaning, the Court finds the statute unambiguous in requiring liability insurance, but finds nothing in the language to interpret as mandating or prohibiting amusement establishments from entering into releases of liability. As such, the Court declines to impose nonexistent words and additional meaning to an unambiguous statute.

> In the absence of published case law on this matter, the Court again finds an unpublished Iowa Court of Appeals case instructive. "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." *Smith v. All Stor Fort Knox, LLC*, 924 N.W.2d 534 (Iowa Ct. App. 2018). The Court finds 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 Defendants' Motion for Summary Judgment, A-501-02***).

b. The Waiver is Not Contrary to Iowa's Public Policy.

The Waiver is not contrary to Iowa's public policy. In Iowa, the right of parties to freely enter into contracts that affect their rights is an important part of an individual citizen's rights. *See Rogers*, 558 N.W.2d at 157. Iowa courts protect that right by generally enforcing contracts as written. *See id.* They only cautiously and rarely invalidate a contract for public policy reasons. *See id.* Iowa courts have also reaffirmed the general rule that an individual is free to waive future claims based in negligence. *Huber*, 501 N.W.2d at 55. Courts have valued the freedom to contract over the public policy of protecting individuals from negligence in past cases.

Here, the Waiver was very clear that zip lining was a dangerous activity. By signing the Waiver, Lukken acknowledged this fact and made the informed decision to waive his right to bring a claim based in any type of negligence. Clearly, gross negligence is a type of negligence. Lukken simply

exercised his right to waive his legal rights after being fully apprised of the risks involved. After that, Lukken voluntarily participated in the activity.

There are many activities that are available that are not risk free, but that Iowans voluntarily seek to participate in the activities on a recreational basis with an understanding that there is a risk of injury. These activities include skydiving, scuba diving, skiing, sledding, tubing, hang gliding, wall and rock climbing, contact sports like football, basketball, softball and baseball, and the zip line activity in this case. These activities would not be offered by the sponsoring organization without a waiver. That is why the Court has recognized a public policy that permits adults to assume the risk and enter into waivers in consideration for participation. The Court should not invalidate the Waiver in this case as a matter of public policy when there is no issue that such waivers have been permitted under Iowa law, and there is no issue that Lukken freely entered into the Waiver with full knowledge of the possibility of harm.

The right of an individual to bring a gross negligence claim for recreational activities is less important than the freedom to contract. Recreational activities are not important enough that "the preservation of the general public welfare imperatively so demands invalidation" of a contract waiving negligence claims. *See DeVetter*, 516 N.W.2d at 794. It would be

easy for an individual objecting to a waiver of gross negligence to simply find another zip line or decline to ride. Iowa has already expressed a desire to value the freedom to contract over preventing an individual from waiving negligence claims. *Huber*, 501 N.W.2d at 55.

The Iowa District Court came to this conclusion in this case in determining that the Waiver was not against public policy, noting that zip lining is a voluntary recreational activity, not a matter of practical necessity to the public, writing:

> The public policy exception, if established, is a way by which the Waiver can be found invalid and unenforceable if it is determined to be against public policy to enforce it. "We have indicated that we will not 'curtail the liberty to contract by enabling parties to escape their valid contractual obligation on the ground of public policy unless the preservation of the general public welfare imperatively so demands.'" *Baker v. Stewarts, Inc.*, 433 N.W.2d 706, 707 (Iowa 1988) quoting *Tschirgi v. Merchants Nat'l*, 113 N.W.2d 226, 231 (Iowa 1962). For the exception, any professional providing a service burdened with a public interest would be prohibited from entering into waivers of liability and any agreements would be deemed unenforceable.
>
> What is determined to be contrary to public policy has not been solidified in Iowa, however in *Baker*, the Iowa Supreme Court considered, inter alia, "whether the party seeking exculpation offers a service of great importance to the public which is of practical necessity for at least some members of the public." *Id.* at 708. Additionally, in an unpublished, but instructive opinion, the Iowa Court of Appeals used this criteria to determine that snow tubing at a ski resort, as a purely recreational activity, was not a service of great importance or necessity to the public to justify applying the public policy exception. *Lathrop v. Century, Inc.*,

> No. 01-1058, 2002 Iowa App. LEXIS 1136, at *10 (Ct. App. Oct. 30, 2002).
>
> Applying these considerations to this case, the Court finds Defendant does not offer services of great importance to the public as zip lining and its other activities are of no practical necessity for any members of the public. Defendant, Mt. Crescent offer rides for amusement and entertainment of the rider and serve no public interest. Accordingly, the Court finds the public policy exception does not apply to Defendants' establishment or the zip line ride during which Plaintiff was injured. As such, Defendants' Waiver, which Plaintiff voluntarily signed, is enforceable.

(***Order on Defendants' Motion for Summary Judgment, A-499-500***).

E. THE DISTRICT COURT DID VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF AS THERE WAS NO ISSUE OF MATERIAL FACT BUT THAT LUKKEN KNOWINGLY AND VOLUNTARILY SIGNED THE WAIVER.

1. Preservation

Mt. Crescent agrees that Lukken preserved this issue for appellate review. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

2. Scope of Review

Mt. Crescent agrees that the standard of appellate review of a district court's ruling on a motion for summary judgment is for errors at law. *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008).

3. Argument

The District Court viewed the facts in the light most favorable to the Plaintiff. The only possible genuine issue of material fact involved Lukken's

knowing and voluntary signing of the Waiver. There was no issue of fact regarding Lukken's agreement to the Waiver. Once the District Court found that the properly executed and agreed Waiver was enforceable as a matter of law, and other fact issues regarding negligence were no longer material.

A fact is material when "its determination might affect the outcome of a suit." *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). Lukken's brought claims involving negligence or gross negligence against Mt. Crescent. No one disputes Lukken signed the Waiver. Lukken's signing of the Waiver is a complete defense to his negligence and/or gross negligence claims. The facts alleged by Lukken to be gross negligence or violations of industry standards do not affect the outcome of the case as the Waiver bars Lukken's claim against Mt. Crescent.

The District Court construed the material facts in the light most favorable to the Plaintiff, but there was no genuine issue of material facts regarding his voluntary acceptance and signing of terms of the written Waiver.

VI. CONCLUSION

The Iowa District Court properly determined that the Plaintiff entered into an effective Waiver of his legal rights to sue for an injury based on any and all forms of negligence, including gross negligence, and based on that granted summary judgment of Mt. Crescent. This Waiver was a knowing and

proper release of legal rights in order to participate in a voluntary recreational activity under Iowa law, and did not violate public policy.

As a result, Mt. Crescent respectfully requests that the Court affirm the decision of the Iowa District Court.

Respectfully submitted,

By: *<u>/s/ Thomas Henderson</u>*
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By: *<u>/s/ Peter J. Chalik</u>*
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VII. CERTIFICATE OF COST

I hereby certify that the cost of printing the foregoing Appellant's Brief was the sum of $0.00.

Peter J. Chalik

VIII. CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. 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 font and contains 4,963 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

Peter J. Chalik

IX. CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 28, 2020, I filed this Appellee's Brief electronically via EDMS. The undersigned further certifies that on September 28, 2020, Appellee's Brief was served upon all parties of record to the above cause via EDMS.

Peter J. Chalik