ELECTRONICALLY FILED SEP 28, 2020 CLERK OF SUPREME COURT

No. 20-0343

IN THE SUPREME COURT OF IOWA

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 Pottawattamie County District Court No. LACV118305, the Honorable James S. Heckerman, presiding.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

A. CHALLENGE QUEST'S NEGLIGENCE WAS A LEGAL CAUSE OF PLAINTIFF'S INJURIES

Challenge Quest's negligence was a legal cause of Plaintiff's injuries. Plaintiff provided evidence of such to the district court that at the very least should have been found to present genuine issues of material fact. Resolving these issues on summary judgment was inappropriate.

1. Plaintiff Was Not Required to File a Rule 1.904(2) Motion in Order to Preserve Error With Respect to His Claims Against Challenge Quest

Iowa Rule of Civil Procedure 1.904(1) states in pertinent part: "The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law, and direct an appropriate judgment. A party, on appeal, ***may*** challenge the sufficiency of the evidence to sustain any finding without having objected to it by motion or otherwise. No request for findings is necessary for purposes of review." Iowa R. Civ. P. 1.904(1) (emphasis added). Iowa Rule of Civil Procedure 1.904(2) states in pertinent part: "On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions ***may*** be reconsidered, enlarged, or amended and the judgment or decree modified accordingly or a different judgment or decree substituted…" Iowa R. Civ. P. 1.904(2) (emphasis added). Nowhere does the rule indicate

that a party aggrieved by a district court's final judgment ***must*** file a Rule 1.904(2) motion before it may file an appeal.

Under Rule 1.904, the timely filing of a motion to reconsider, enlarge or amend a court order, ruling or judgment extends the deadline for filing a notice of appeal or an application for interlocutory appeal. Iowa R. Civ. P. 1.904, comment, citing Iowa R. App. P. 6.101(1)(b) and 6.104(1)(b)(2).[1] If, as Challenge Quest argues, a Rule 1.904(2) motion was a requirement of appellate procedure, the filing of such a motion would not serve to extend the appeal deadline. As Rule 1.904(2) motion does, in fact, extend the time for filing a notice of appeal, it creates an exception to the rules of appellate procedure, not a requirement, and demonstrates that the rules do not anticipate that a Rule 1.904(2) must be filed as a prerequisite for appeal.

Case law is in accord. In *Meier v. Senecaut III*, 641 N.W.2d 532, 539 (Iowa 2002), the Court noted that while a Rule 1.904(2) [then 179(b)] motion

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[1] "A notice of appeal must be filed within 30 days after the filing of the final order or judgment. However, ***if*** a motion is timely filed under Iowa R. Civ. P. 1.904(2) or Iowa R. Civ. P. 1.1007, the notice of appeal must be filed within 30 days after the filing of the ruling on such motion." Iowa R. App. P. 6.101(1)(b) (emphasis added).

"All other cases. An application for interlocutory appeal must be filed within 30 days after entry of the challenged ruling or order. However, ***if*** a motion is timely filed under Iowa R. Civ. P. 1.904(2), the application must be filed within 30 days after the filing of the ruling on such motion." Iowa R. App. P. 6.104(1)(b)(2) (emphasis added).

is necessary to preserve error when the district court fails to resolve an issue, claim or other legal theory properly submitted for adjudication, this does not mean that a motion under Rule 1.904(2) controls the preservation of error doctrine. Simply put, "the preservation of error doctrine does not require the request for a ruling to be made under rule 179(b)." *Id*.

Bill Grunder's Sons Construction, Inc. v. Ganzer, 686 N.W.2d 193 (Iowa 2004), which Challenge Quest's cites presents a different procedural issue than the one at bar and is, therefore, distinguishable. In *Bill Grunder's Sons Construction, Inc.*, the plaintiff failed to file a resistance to the defendant's motion for summary judgment and remained silent even after the district court allegedly erred by entering judgment in favor of the defendant. *Id*., at 198. The Court found that the plaintiff failed to preserve any issue for appeal. *Id.* It explained that if a nonmoving party does not contest the motion in accordance with the rules regarding summary judgment, it must at least preserve error by filing a motion following the entry of judgment allowing the district court to consider its argument. *Id*., at 197-98. Here, unlike in *Bill Grunder's Sons Construction, Inc.*, Plaintiff did file a resistance to Challenge Quest's motion for summary judgment and the district court did have the opportunity to consider his argument. Thus, the *Bill Grunder's Sons Construction, Inc.,* procedural scenario is inapplicable.

2. Whether the Zipline Was Required to Have an Emergency Brake is a Disputed Issue of Material Fact Between Plaintiff and Challenge Quest

ACCT Standards which govern the rules for safe design, construction, training and operation of zipline attractions require use of an emergency brake system on such attractions. (*ACCT Standards, 8th Ed., App. 221-227; Goodwin Depo. Ex. 23, p. 3, App. 114, 163-170; Marter Expert Report, App. 342-344*). As Challenge Quest claims that an emergency brake was not required, this material issue of fact is in dispute and should not have been subject to resolution on summary judgment. It was the absence of an emergency brake on Challenge Quest's original braking system that necessitated its replacement. Had Challenge Quest fulfilled its obligation to provide a safe and compliant zipline by including an emergency brake, an alternative system would not have been needed in the first place.

The absence of the emergency brake is just one example of Challenge Quest's negligence with respect to the entire zipline installation project which ultimately led to Plaintiff's injuries. Its wholesale disregard of industry standards, including those that it should have followed to ensure that Mt. Crescent and its employees remained in compliance with the standards and were aware of the zipline's limitations, is material to Plaintiff's claim. To the extent that Challenge Quest disagrees with these facts, disputed issues exist.

3. Whether Challenge Quest Warned Mt. Crescent Not to Use the ZipStop Braking System is a Disputed Issue of Material Fact Between Plaintiff and Challenge Quest

Challenge Quest claims it "warned Mt. Crescent about the limitations of the Zip Stop braking system and why it did not recommend its use on the Zipline." (*Challenge Quest Brief, p. 16 n.2*). However, the deposition exchange with Fleischer that Challenge Quest cites in support of this contention only indicates that the ZipStop system uses magnetic resistance to stop riders and is, according to the document being discussed in the deposition, designed to be used with a maximum impact speed of 37 miles per hour. (*Fleischer Depo., 184:24-185:22, App. 237*).

However, Fleischer did testify that Challenge Quest did not provide Mt. Crescent with a description of the zipline's braking requirements or warn Mt. Crescent that changing the braking system could result in rider injury. ("Q: Did you see any document from Challenge Quest telling you what the brake requirements were for the zip line at Mt. Crescent? A: No… Q: Did you have any document you could provide the new installer from Challenge Quest telling them what the new installer should know about the design?" A: No, I had none.…Q: Did you receive any warnings from Challenge Quest in any documents at any time before Mr. Lukken was injured about changing

the braking system and the possibility of injury?...A: Not that – no, not that I recall.") (*Fleischer Depo., 140:10-22; 145:9-16, App. 319, 321*).

The August 26, 2014 settlement letter which Challenge Quest cites states that the ZipStop braking system is generally used more for "canopy tour applications", but does not specifically warn Mt. Crescent not to exchange the original system for a ZipStop. (*Settlement Letter, App. 206-210*). The presence of a sufficient warning from Challenge Quest is in dispute.

4. Challenge Quest Incorrectly Asserts That Plaintiff Offers No Explanation For How Its Negligence Resulted in Plaintiff's Injury

Challenge Quest misquotes Plaintiff's brief by omission in order to incorrectly argue that Plaintiff provided no explanation for how Challenge Quest's negligence resulted in his injury. The complete and correct quote from Plaintiff's brief is as follows: "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 injures." (*Plaintiff's Brief, pp. 30-31*). Challenge Quest omitted the

emphasized text which does, in fact, summarize one of the ways that it was negligent. (*Challenge Quest Brief, p. 18*).

Plaintiff has provided substantial evidence which supports his negligence claim, including industry standards, an expert report and testimony from witnesses which contradict Challenge Quest's disavowal of unlawful conduct. Challenge Quest's negligence acts and omissions created an unsafe zipline attraction, which in turn proximately caused Plaintiff's injury. While Challenge Quest may dispute this evidence, its disagreement does not mean that Plaintiff has offered "no explanation".

B. CHALLENGE QUEST OWED A DUTY TO PLAINTIFF

1. Plaintiff Was Not Required to File a Rule 1.904(2) Motion in Order to Preserve Error With Respect to His Claims Against Challenge Quest

Challenge Quest presents the same argument regarding error preservation that it raised with respect to the causation issue. Plaintiff's reply is also the same. See Section A, above.

2. Challenge Quest Cannot Escape Liability By Claiming That Once the Zipline's Construction Was Complete It Owed No Further Duty to Plaintiff

Challenge Quest is under the mistaken impression that once it "turned the Zipline over to the control of Mt. Crescent" that its liability for any events that occurred thereafter was extinguished. (*Challenge Quest Brief, pp. 21-*

22). It argues that since the braking system had been changed and none of the employees allegedly trained by Challenge Quest in August 2014 were operating the Zipline on the date that Plaintiff was injured, it owed no duty to Plaintiff, the ultimate user of its product.

However, as a zipline manufacturer and installer, Challenge Quest had a responsibility to design and construct a zipline which complied with industry standards and to provide Mt. Crescent with appropriate operational instructions, limitations, warnings, training policies. It also had a responsibility to adequately address Mt. Crescent's safety concerns after the sale and to and recognize the existence of safety issues in its subsequent annual inspections of the zipline. The purpose of these responsibilities was to keep Mt. Crescent's zipline riders safe. Challenge Quest's legal duty extends to the ultimate users of the product it designed, constructed, and installed. This duty is not extinguished simply because Challenge Quest's active on-site role reached its conclusion.

Challenge Quest further claims that it "had no duties beyond the scope of its Agreement with Mt. Crescent". (*Challenge Quest Brief, p. 25*). It believes that since it constructed a zipline and provided "training" to Mt. Crescent's full-time staff in August 2014, its obligations were fulfilled and

no further duty was owed to either Mt. Crescent or zipline riders, such as Plaintiff. (*Challenge Quest Brief, pp. 21-22*). This is incorrect.

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. Additionally, Iowa has adopted the Restatement (Third) of Torts which states that when one causes physical harm to another, the question of whether a duty exists need not even be posed in most cases. Restatement (Third) of Torts §§ 6, 7, as adopted by *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009).

However, even if the Court were to look to the agreement between Challenge Quest and Mt. Crescent as the sole source of Challenge Quest's duties, the intent to offer a safe zipline experience to Mt. Crescent's customers is clearly present.

> "Section 3: MANNER OF PERFORMANCE AND WARRANTIES
> The Services performed and provided by CQ under this Agreement will be rendered in all material respects in accordance with the current professional standards adopted by the Association for Challenge Course Technology (ACCT). CQ agrees to use only industry standard hardware. Challenge Quest warrants the construct and hardware used in construction, excluding wood products, for a period of two years. Any problems will be repaired or replaced at no charge."

(*Agreement of Services, App. 486-487*).

The basic rules of contract interpretation are well settled. The primary objective is to give effect to the intention of the parties. *Pathology*

Consultants v. Gratton, 343 N.W.2d 428, 434 (Iowa 1984). Courts first look to the language of a contract and give clear and unambiguous words their plain and ordinary meaning. *Id.* Where there is ambiguity, i.e. language that is reasonably susceptible to more than one meaning, a court can consider extrinsic evidence to determine the parties' intent. *Id.* Contract obligations may arise from implications as well as express language. *Id.*

Here, there is an unambiguous contractual agreement between the parties that Challenge Quest was to construct a zipline attraction "in accordance with the current professional standards adopted by the Association for Challenge Course Technology (ACCT)". (*Agreement of Services, App. 486-487*). That duty existed for and extended to ensuring the safety of ultimate users, including Plaintiff.

Challenge Quest alleges that Plaintiff is urging the Court to find that it had a duty to train future Mt. Crescent employees on a braking system that had yet to be installed. (*Challenge Quest Brief, p. 22*). However, this is a nonsensical misrepresentation of Plaintiff's position. Challenge Quest had a duty to provide an ACCT compliant zipline and assistance with the safety issues that Mt. Crescent brought to its attention after installation so that Mt. Crescent would not have been forced to replace the original braking system in the first place, which contributed to the chain of causation resulting in

Plaintiff's injury. (See, *Fleischer Depo., 120:21-24; 128:20-129:15; 131:22-24, App. 314, 316-317.* ("Q: Did you feel that you had to change the braking system that Challenge Quest provided you for safety reasons? A: A hundred percent." … A: "We had concerns about the [braking] system from the day it was actually put in – before it was put in. We just didn't – we felt like there was too many variables in there for someone to get hurt… Q: And did they [Challenge Quest] offer to change out the brake system they had for a different one? A: No.).

Challenge Quest also had a duty to provide Mt. Crescent with the proper procedures and guidelines to train future employees in the safe operation of a zipline so that Mt. Crescent could have done so in accordance with ACCT standards, regardless of what specific braking system was being used. These were the duties that Challenge Quest owed and breached and which allowed human error to occur.

The *Thompson* case decided by the Illinois Supreme Court to which Challenge Quest cites to support its position is inapplicable. The *Thompson* plaintiff's claim was based upon the absence of a traffic median barrier which the plaintiff alleged would have prevented his injury had it been present. However, the Court found that the defendant engineering firm had not been contracted to provide a median barrier analysis or design and its work did not

even include the part of the street where the accident took place. *Thompson v. Gordon*, 948 N.E.2d 39, 42 (Ill. 2011). The contract had only been to replace the roadway, not improve it. *Id*. Thus, the engineering firm could not be held liable. *Id.,* at 46. This distinguishes the *Thompson* holding from the case at bar.

Challenge Quest cites Korby Fleischer's deposition testimony in support of its contention that it provided adequate operational guidance and training to Mt. Crescent. (*Challenge Quest Brief, p. 25 n.3*). However, although Fleischer recalled that Challenge Quest had initially given Mt. Crescent employees a test, he stated that Challenge Quest told them that "we had to come up, basically, with our own testing system, and to come up with what we – how we feel our guys should be trained pertinent to the design of that particular zipline…So we pretty much had to come up with our own testing of what we though was good enough for the - the knowledge of the trainer who would be training new people…". (*Fleischer Depo., 103:2-18*, *App. 310*).

Fleischer also testified that Mt. Crescent was not provided with any document outlining how to test practical knowledge of employees running the zipline. (*Fleischer Depo., 111:7-15*, *App. 312*). Challenge Quest's own employee, Coty Goodwin, confirmed that the contents of training manuals,

as well, are left up to its customers' discretion. (*Goodwin Depo., 35:17-36:2*, *App. 275*). At the very least, there are issues of material fact in dispute regarding whether Challenge Quest breached its duty.

C. ISSUES OF MATERIAL FACT EXIST AS TO CHALLENGE QUEST'S LIABILITY

1. Plaintiff Was Not Required to File a Rule 1.904(2) Motion in Order to Preserve Error With Respect to His Claims Against Challenge Quest

Challenge Quest presents the same argument regarding error preservation that it raised with respect to the causation issue. Plaintiff's reply is also the same. See Section A, above.

2. Challenge Quest's Arguments in Section C of Its Brief Highlight the Existence of Disputed Issues of Material Facts Unsuitable for Resolution By Summary Judgment

With respect to adequate employee training, Goodwin testified that Challenge Quest was not preparing Mt. Crescent to do its own zipline operation training and that it should use a professional training company to provide refresher training to its staff. (*Goodwin Depo., 87:12-17; 178:1-6*, *App. 282, 290*). Yet according to Fleischer, Challenge Quest told him 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 presents a disputed issue of material fact.

In addition, as previously addressed in Section A(2) and A(3) of Plaintiff's instant brief, the emergency brake issue and failure to warn issue involve disputed facts and should not have been decided on summary judgment. Also, see ***Appellant's Final Brief, Section C***, filed with this Court on September 28, 2020 and ***Plaintiff's Statement of Disputed Facts in Support of his Resistance to Challenge Quest's Motion for Summary Judgment,*** filed in the district court on September 23, 2019. Disputed issues of material fact exist which a jury should be allowed to hear and decide.

D. PLAINTIFF PROPERLY PRESERVED ERROR WITH RESPECT TO HIS GROSS NEGLIGENCE CLAIM AGAINST MT. CRESCENT

It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before they will be decided on appeal. *Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998). An issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal that the district court was aware of the issue and litigated it. *Meier*, 641 N.W.2d 532, 540 (Iowa 2002).

Here, Mt. Crescent claims that Plaintiff did not preserve error because he failed to file a Rule 1.904(2) motion to reconsider regarding the gross negligence issue. (*Mt. Crescent Brief, p. 18*). However, the district court did not overlook this issue, such that Rule 1.904(2) would be needed in order to

rectify such an oversight. The district court found it unnecessary to determine the gross negligence issue because it found that as a preliminary matter, the signed waiver barred Plaintiff's negligence claims against Mt. Crescent. (*Order on Mt. Crescent Defendants' MSJ, p. 5*, *App. 500*).

Plaintiff properly raised and argued the gross negligence issue in his resistance to Mt. Crescent's motion for summary judgment. The district court had an opportunity to resolve it, but chose not to do so based upon its finding that the waiver absolved Mt. Crescent of negligence liability. Thus, Plaintiff was not required to move pursuant to Rule 1.904(2) for the district court to reconsider before appeal. The district court erred in its finding with respect to the waiver issue, which then led to its refusal to pass on the gross negligence issue. The court did not inadvertently ignore the issue, but affirmatively decided that the issue would not be reached based upon its decision concerning the waiver. A Rule 1.904(2) motion is not proper if it is used merely to obtain reconsideration of a district court's decision. *Sierra Club Iowa Chapter v. Iowa Department of Transportation*, 832 N.W.2d 636 (Iowa 2013). Thus, such a motion was not a necessary or appropriate procedural remedy under these circumstances.

E. THE WAIVER IS CONTRARY TO THE PURPOSE OF IOWA CODE § 88A.9 AND TO PUBLIC POLICY

Mt. Crescent claims that since Iowa Code § 88A.9 does not explicitly ban the use of waivers, their use to excuse owners/operators of amusement rides for gross negligence is allowed. (*Mt. Crescent Brief, p. 26*). However, the absence of specific language to this effect does not mean that such a waiver was anticipated or would be approved of by the Iowa Legislature. Using the same logic, one could argue that gross negligence waivers are not specifically allowed by the statute's language and, therefore, should not be permitted. Neither conclusion is correct. Instead, the purpose and intent of the statute must be considered.

Legislative intent is derived "not only from the language used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." *Star Equipment, Ltd. V. State of Iowa Department of Transportation*, 843 N.W.2d 446, 455 (Iowa 2014) (quotation omitted). Waiver of gross negligence is contrary to the purpose of the statute, which is to protect the public from injury. Owners/operators are in a superior position to ensure safety during zipline rides where the unknowing public places trust in owners/operators to keep them from harm.

Freedom to contract for purposes of participating in a recreational activity must not be used as a means for owners/operators to subject the public to risk of grave bodily harm or death while circumventing any liability for gross negligence. While zipline riders should appreciate that the activity carries inherent risk, part of the risk assumed should not be the gross negligence of the owner/operator. Nor would any reasonable rider be expected to anticipate that operators could be callously indifferent or even intentionally reckless with rider safety, and escape responsibility with a waiver. Riders should not be subjected to grossly negligent acts and omissions which significantly increase the danger without a civil remedy. Such a remedy cannot be waived.

"Not the letter of the law only, its mere words, but its spirit and object, must be taken into consideration, and when a particular intent to effect a specific purpose is manifest, respect must be paid to that intent." *Redmond v. Carter*, 247 N.W.2d 268, 277 (Iowa 1976) (discussing how constitutional provisions must be construed like a statute with reference to the object to be accomplished) (quotation omitted). Amusement ride owner/operators must not be allowed to insulate themselves from gross negligence claims simply because the statute does not expressly prohibit such an activity, as the purpose of the statute itself would be defeated.

CONCLUSION

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

CERTIFICATE OF COST

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

/s/Matthew Lathrop

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This Final Reply 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 3,885 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	Dated

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on September 28, 2020, the above and foregoing Final Reply 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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