

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. 24-0025

ELLEN HUBBELL, Individually and as Personal Representative of the Estate of
Jesse Hubbell,

Plaintiffs/Appellants,

v.

GULL SCUBA CENTER, LLC d/b/a GULL
DIVE CENTER,

Defendant/Appellee.

APPELLANTS' PRINCIPAL BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-2020-810
Honorable Jason Marks

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I. STATEMENT OF ISSUES

- A. Did the District Court err in concluding PADI Retailer Association (“PRA”) Membership Standards control as the sole and conclusive standard of care for Gull’s negligence and therefore its *de facto* legal duty?
- B. Did the District Court err in concluding as a matter of law that Gull’s negligent provision of scuba diving equipment to a clearly inexperienced diver did not cause his tragic death?

II. STATEMENT OF THE CASE

This is a tragic wrongful death case. The District Court erred by granting summary judgment in favor of Gull on the negligence claims.

Jesse Hubbell drowned at Canyon Ferry Reservoir while scuba diving on June 17, 2019, during the filming of a political campaign advertisement for John Mues, who was running for U.S. Senate. (Doc. 1). Hubbell was working with Mues, and agreed to produce a film of him while scuba diving and serve as a second diver in the water to promote Mues’ background as an officer in the U.S. Navy. *Id.*, ¶¶ 19-20.

Three days before the drowning, Hubbell and Mues travelled to Missoula and paid money to Gull, a commercial dive shop, for the provision of scuba diving tanks and equipment (hereinafter collectively “the equipment”). (Doc. 70). Gull undisputedly provided the equipment despite Hubbell providing no proof that he

held the requisite scuba certification from PADI ("Professional Association of Diving Instructors"), NAUI ("National Association of Underwater Instructors"), or any other scuba diving certification agency. This is a quite reasonable condition precedent to renting the equipment given that mistakes and accidents in scuba diving can often lead to fatal consequences. *Id.* Gull did nothing to verify Hubbell was sufficiently familiar with or knew how to properly use the equipment.

Hubbell obtained a PADI Junior Open Water Certification in 1993 when he was just fourteen (14) years old. He had never scuba dived again until the day he drowned twenty-six (26) years later. *Id.* He had no more recent training, instruction, or diving experience until the day of his premature death. The features of scuba equipment changed significantly over time.

Chris Hanson was Gull's employee. Hanson provided the equipment to Mues and Hubbell in the course and scope of his employment with Gull. Hanson admits Hubbell provided absolutely no proof whatsoever that he was certified or sufficiently experienced to rent or properly use the equipment. *Id.*, pp. 4-5. Mues provided proper certification to rent the equipment, and he signed Gull's rental agreement. Importantly, however, Hanson acknowledges he really provided the equipment to both Mues and Hubbell, with actual knowledge that both men were going to use it to scuba dive at Canyon Ferry Reservoir. *Id.*, p. 5. Hubbell also paid for the equipment. *Id.* Hanson provided the equipment without having Hubbell first

demonstrate his knowledge or proficiency in assembling or using it, and without any verification of his abilities, level of knowledge of scuba diving, or proof of current experience. (Doc. 100). As evidenced by the fatality impetus for this lawsuit, Hubbell obviously lacked the necessary experience and training to properly use the equipment. The accident and equipment report, along with images showing the improper assembly of the equipment, are very telling. *Id.*, p. 12, ¶ 3.12. Gull failed to warn Hubbell of the dangers associated with misusing the equipment.

On July 23, 2020, Hubbell's wife filed a Complaint both individually and as the personal representative of Hubbell's estate. (Doc. 1). Hubbell settled with the other Defendants, leaving Gull as the only remaining Defendant for trial.

Gull, defending claims for Negligence (Survival), Negligence (Wrongful Death), and Negligent and Intentional Infliction of Emotion/Distress, filed a Motion for Summary Judgment on June 30, 2022. The motion was erroneously granted by the District Court on December 12, 2023. (*See* Appendix A). This error is reversible.

III. STATEMENT OF THE FACTS

A. Standard of Care

Hubbell's liability expert is Thomas A. Maddox. Maddox's testimony was admitted into the summary judgment record pursuant to affidavit. (Doc. 100). Maddox properly relies on his own "extensive knowledge, training, experience, and expertise that [he has] gained over more than 47 years in the diving industry and as

a dive store owner, PADI Retail Association Member, PADI, NAUI and YMCA SCUBA instructor, diving equipment expert, US Coast Guard certified vessel owner and US Coast Guard licensed Captain, dive operator and tour operator.” *Id.*, p. 4.

Maddox’s qualifications were not at issue in the District Court. Maddox properly testified as to disputed issues of fact. Gull does not contend Maddox stated improper legal conclusions or applied the law to the facts. His testimony properly embraces ultimate negligence issues of breach and causation.

In summary judgment briefing, Hubbell correctly argued that determination of the appropriate legal standard and whether it was breached is for the jury, and evidence of what should be considered by the jury in determining compliance with the legal standard can include PADI standards, SCUBA diving industry standards, global standards, and other expert testimony. *Id.*, p. 5. But the District Court rejected this argument, erroneously concluding the PRA Membership Standards control as the sole and conclusive standard of care applicable to Gull. (Appendix A). The District Court reasoned that because PRA Membership Standards are internationally recognized, and because Gull is a member of the organization and thus subject to these standards, they somehow fully define the scope of Gull’s legal duty. (Appendix A). With due respect to the Honorable District Court, this reasoning is flawed.

PRA Membership Standards require that anyone seeking to rent or obtain scuba equipment from a PRA member first present proof that he or she holds the

necessary scuba diving certification from PADI (NAUI or another appropriate certifying agency). (Doc. 99). PRA Membership Standards require Gull to “[a]gree to sell, rent or provide compressed air for scuba purposes only to certified divers and student divers in training under a professional scuba instructor, unless prohibited by local law.” *Id.* PRA Membership Standards also mandate that Gull “[r]equire proof of recreational scuba certification by all divers participating in noninstructional recreational scuba dives.” (*Id.*, ¶ 17). It is entirely undisputed that Hubbell provided no proof of any kind on June 14, 2019, the date on which Gull, “agreed to sell, rent or provide” the equipment, that he held any certification from PADI, NAUI or from any other recognized scuba certifying organization. *Id.* As a result, it was unknown to Gull that he was an inexperienced scuba diver and unfamiliar with the modern equipment rented by Gull.

Maddox and Gull’s expert, Peter Pehl, professionally disagree on the appropriate standards applicable in this case and whether they were breached.

Maddox opines:

- Although “recommended” by PADI, attending such a review course was required in June 2019 under *the global standard of care applicable to retail scuba dive shops* and, in this case, Gull Dive should never have rented/provided scuba equipment to Jesse Hubbell until he had attended and completed such a course. This is not a “gray” area in the retail scuba industry. (emphasis supplied) (Doc. 100, p. 11, ¶ 1.4).
- It is noteworthy that it doesn’t matter whether Gull Dive “rented” the scuba equipment to Jesse Hubbell or just “provided” it to him since, under the circumstances, both would have violated *global*

- standards of care as well as PADI's own Retailer Association standards (under paragraph 16).* (emphasis supplied) (Doc. 100, p. 12, ¶ 1.6).
- I will examine...*the accepted standards and protocols* that Gull Dive was bound to, concerning renting, and making SCUBA equipment available to non-certified and inexperienced divers. (emphasis supplied) (Doc. 100, p. 12, ¶ 1.7).
 - In preparing this report, I have relied on my extensive knowledge, training, experience, and expertise that I have gained over more than 47 years in the diving industry... (Doc. 100, p. 12, ¶ 1.8).
 - ...indicating that it is an industry standard to seek out additional information before renting life support equipment. (Doc. 100, p. 20, ¶ 3.4).
 - *Gull Dive also failed to meet the worldwide SCUBA diving industry standards* of discerning the diver's level of experience, knowledge, and capabilities before renting equipment to them. Jesse Hubbell should not have been rented the equipment by Gull Dive Center since he was inexperienced, had not completed any review course, did not hold the appropriate certification, and was incapable of assembling and using the equipment properly and safely. The rental of the equipment to Jesse Hubbell led directly to his death. (emphasis supplied) (Doc. 100, p. 24; Doc. 99, pp. 10-11).

Maddox further opines:

- Mr. Hubbell did not present a diver certification card at the time of renting equipment at Gull Dive Center, a PADI Retail Member facility, as specifically required by PADI Retailer Association Standards...both would have violated global standards of care *as well as PADI's own Retailer Association standards*. (emphasis supplied) (Doc. 100, p. 12, ¶ 1.6).
- [Gull's employee] Mr. Hanson *circumvented the PADI Retail Member Association* and industry standard of care by stating that he was renting only Mr. Mues the equipment, since he had a certification card, and what he did with the other set was his responsibility. (emphasis supplied) (Doc. 100, p. 21, ¶ 3.7).
- *Gull Dive Center failed to meet the standards of the PADI Retail Association*, which they were an active member of, which requires all members to rent SCUBA equipment only to certified divers or to

students under the supervision of an instructor. (emphasis supplied)
(Doc. 100, p. 24; Doc. 99, p. 5).

The District Court notably found a genuine dispute of material fact concerning “whether Gull breached PRA Membership Standards when it rented equipment to Mr. Mues for both himself and Mr. Hubbell without verifying Mr. Hubbell’s certification.” (Appendix A). The District Court held “the written PADI standards lack specificity with regard to renting multiple sets of diving equipment to a single certified individual for a commercial dive and there is a dispute about interpretation.” *Id.*, p. 14. Based upon the improper determination that PRA Membership Standards constitute the sole legal standard applicable to this matter, the Court proceeded to conclude erroneously that the only material fact in dispute related to whether the renting of equipment to one person for use by two people was proper, and granted summary judgment to Gull by determining that any such breach would not be causally related to the tragic death of Hubbell, depriving Hubbell of the right to a jury trial.

B. Causation

As referenced above, the District Court erroneously concluded that “the rental of the equipment - regardless of whom it was rented to or whether a person could rent more than one set of equipment under PRA Membership Standards - did not cause Mr. Hubbell’s death.” (Appendix A, pp. 13-14).

The District Court's erroneous conclusion is predicated on its misplaced reliance on PRA Membership Standards as the exclusive factor in evaluating Hubbell's negligence claims. The District Court then found that Hubbell was eligible to rent the equipment under PRA Membership Standards using his PADI Junior Open Water Certification and, therefore, that Hanson would have provided the equipment even if he verified Hubbell's certification in accordance with the standards. *Id.*, p. 13. In reaching this conclusion, the Court treated the PRA Membership Standards as mere formalities and failed to recognize the unreasonable dangers presented by its narrow interpretation of the legal principles of negligence and causation applicable to this matter, leading to the improper entry of Summary Judgment in favor of Gull.

Hubbell validly disputes whether the Junior Open Water certification automatically converts into an "Open Water Diver" certification when an individual turns 15 years old, and whether a person who obtains a junior diver card can properly and safely rent or use equipment after they turn 15 years old. *Id.*, p. 13. Hubbell's dispute is genuine and based on admissible expert testimony from Maddox.

Maddox opines that the Junior Open Water Course which Hubbell attended when he was only fourteen (14) years old requires "that all Junior divers must dive with a certified diver over the age of 18 or an instructor, and they may not rent equipment or dive on their own. While the Junior diver certification may be

converted to a PADI Open Water Certification at the age of 15, it is not automatic. The diver must apply to PADI to convert the certification and be issued a new card. This was never done.” (Doc. 100).

The District Court erroneously held that reasonable minds could only reach one conclusion: Gull did not cause Hubbell’s death because he was eligible to rent the equipment under PRA Membership Standards and, therefore, Gull would have provided the equipment to him on June 14, 2019, with or without verification of a valid scuba certification. (Appendix A). This is an unreasonable leap of logic, especially considering the evidence, including Hubbell’s obvious inexperience with scuba diving and unfamiliarity with modern equipment.

Hanson openly admits that had he been aware of Hubbell’s lack of experience, he would have suggested a refresher course. *Id.* This admission contains an implicit recognition of the unreasonable danger that can result from a failure to inquire about and verify the current status of the scuba certification held by the proposed user of the scuba equipment, and leads to the reasonable inference that Hanson would have denied Hubbell the equipment unless and until he first completed a refresher course. This is also consistent with the industry standards referenced by Maddox in his opinion, and warrants a conclusion by the jury that Hanson and Gull failed to exercise reasonable care in renting the diving equipment under the existing circumstances. A jury could find that commercial dive shops should err on the side

of caution and require updated training and instruction if there is any question about a person's scuba diving qualifications and familiarity with diving equipment even if they hold a Junior Certification. Similarly, Hanson's testimony leads to a reasonable inference that Hubbell would have refrained from using the equipment to scuba dive at Canyon Ferry Reservoir had Hanson suggested a refresher course or otherwise properly warned Hubbell about the dangers of scuba diving without sufficient familiarity with the equipment being rented and current diving knowledge, training, and experience.

The District Court failed to draw all reasonable inferences in favor of Hubbell as the non-moving party. The summary judgment record shows a reasonable factfinder could return a verdict for Hubbell on negligence, so there is a genuine dispute that should have precluded summary judgment. *See Estate of Irvine v. Oaas*, ¶ 12, 2013 MT 271, 372 Mont. 49, 309 P.3d 986.

The District Court's summary judgment ruling disregards Maddox's expert testimony regarding causation as well. According to Maddox, reasonable care required determining whether Hubbell had sufficient instruction and training to ensure he was familiar with the set up and use of the equipment, and that he was able to use the equipment safely. (Doc. 99). To a reasonable degree of professional certainty, Maddox opines "[t]he rental of the equipment to Jesse Hubbell led directly to his death." *Id.*, p. 10. "Jesse Hubbell should not have been rented the equipment

by Gull Dive Center since he was inexperienced, had not completed any review course, did not hold the appropriate certification, and was incapable of assembling and using the equipment properly and safely.” *Id.*

IV. STANDARDS OF REVIEW

This Court reviews a District Court’s grant or denial of summary judgment *de novo* and applies the same criteria considered by the District Court based on M.R.Civ.P. 56. *Crisafulli v. Bass*, 2001 MT 316, ¶ 12, 308 Mont. 40, 38 P.3d 842. “Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* (citing *Motarie v. Northern Montana Joint Refuse Disposal Dist.*, 274 Mont. 239, 242, 907 P.2d 154, 156 (1995)). When considering a motion for summary judgment, “the evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences from that evidence will be drawn in favor of the party opposing summary judgment.” *Id.* (citations omitted).

“Ordinarily, issues of negligence are not susceptible to summary judgment and are better determined at trial. Liability should not be adjudicated upon a motion for summary judgment where factual issues concerning negligence and causation are presented.” *Brohman v. State*, 230 Mont. 198, 201, 749 P.2d 67, 69 (1988) (citing *Brown v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 197 Mont. 1, 640 P.2d 453, 458 (1982)). “It is true that because of the peculiarly exclusive nature of the concept

of negligence, it is the rare personal injury case which may be properly disposed of by summary judgment.” *Brohman*, 230 Mont. at 203, 749 P.2d at 70 (1988). This principle is especially important where the loss involves a tragic death.

“No civil case shall be reversed by reason of error which would have no significant impact upon the result.” *Rocky Mt. Enters. v. Pierce Flooring*, 286 Mont. 282, 294, 951 P.2d 1326, 1333 (1997). Reversible error occurs when “a substantial right of the party is affected.” *In re Estate of Edwards*, 2017 MT 93, ¶ 50, 387 Mont. 274, 393 P.3d 639 (quoting *Reese v. Stanton*, 2015 MT 293, ¶ 25, 381 Mont. 241, 358 P.3d 208 (citing M. R. Evid. 103)).

V. SUMMARY OF ARGUMENT

The District Court should not have taken Hubbell’s negligence claims from the jury. Negligence under the law is defined as the failure to exercise reasonable care; that is, the failure to do what a person of ordinary prudence would have done under the same or similar circumstances. The District Court should have been looking only to determine whether there was evidence from which a jury could find that Gull failed to exercise reasonable care; that is, evidence that would warrant the jury in concluding that Gull should have recognized the existence of an unreasonable risk of harm and did nothing to either warn Hubbell of that risk or reduce or eliminate that risk (e.g., failed to verify Hubbell’s diving certification, training, knowledge, and experience, etc., and failed to warn of the danger presented by the lack of a

current and valid diving certification as well as the lack of training, knowledge and experience, and/or to require that Hubbell take a refresher course that would reduce or eliminate the risk). Gull made no inquiry to determine whether Hubbell possessed a current and adequate diving certification, training, knowledge, experience, or familiarity with the equipment being rented, and Hubbell provided no proof in those regards.

The existence of a duty is a question of law determined by the Court. *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 33, 375 Mont. 38, 324 P.3d 1167. Gull does not challenge the existence of a duty. Because a duty was clearly established in the District Court, “the breach of that duty is a question of fact to be resolved by a jury.” *Id.*

In an ordinary negligence case such as this, the jury determines whether Gull breached its duty by applying the applicable legal standard to the facts of the matter. *Hanson v. Edwards*, 2000 MT 221, ¶ 31, 301 Mont. 185, 7 P.3d 419. The legal standard for ordinary negligence is “reasonable care” – how “an ordinarily prudent person would act under the circumstances.” *Id.*; see also *Okland v. Wolf*, 258 Mont. 35, 40, 850 P.2d 302, 306 (1993).

Gull can suggest that PADI standards provide some evidence that they acted with reasonable care and have not violated their legal duty. However,

notwithstanding the District Court's erroneous summary judgment ruling, PADI or PRA Membership Standards are not dispositive. (emphasis supplied).

Just because Gull's conduct meets a particular industry standard does not automatically mean it cannot be held liable for its conduct. Similarly, Gull's failure to comply with a particular standard would not automatically mean it can be held liable for injuries or damages resulting from its conduct. Stated differently, while particular industry standards can provide some evidence of reasonable care, compliance with particular standards does not require a determination of reasonable care. Reasonable care is determined by the jury based upon all of the evidence.

In this case, expert witnesses can also provide some evidence of reasonable care, as can standards established by most of the industry or profession, locally, regionally, and nationally. Experts, such as Maddox and Pehl, often take opposite points of view and attempt to sway the judge or jury as to what actually constitutes the legal standard. Maddox's and Pehl's sharply contested professional views and expert testimony created material questions of fact on summary judgment. *See Schuff v. Jackson*, ¶ 23, 2008 MT 81, 342 Mont. 156, 179 P.3d 1169.

Genuine issues of material fact exist regarding the standard of care, breach, and causation. First, the District Court erred in concluding PRA Membership Standards control as the sole and conclusive standard of care applicable to Gull's conduct. (Appendix A, p. 10). While compliance or non-compliance with PRA

Membership Standards may provide some evidence of negligence or the absence thereof, these standards are not dispositive. Maddox and Pehl disagree on the applicable standard, thus creating genuine disputes of material fact.

Second, the District Court erred in concluding the rental of equipment “did not cause Mr. Hubbell’s death” as a matter of law. *Id.*, pp. 13-14. Reasonable minds could most certainly conclude that Gull’s action of renting scuba equipment to Hubbell, a clearly inexperienced diver who provided no proof of a valid current certification or evidence of familiarity with the rented equipment, caused his death. If PRA Membership Standards do not conclusively determine the legal standard of reasonable care, a genuine issue of material fact exists as to whether Gull negligently rented Mr. Hubbell the equipment, thus causing his death. Alternatively, if PRA Membership Standards were to conclusively determine the legal standard, a genuine issue of material fact still exists regarding the reasonable and proper application of these standards to determine whether Hubbell was eligible to safely rent or obtain scuba equipment, and whether Gull’s actions caused his death. The District Court improperly relied on comparative negligence principles and the settled-party defense in deciding causation against Hubbell as a matter of law. These too are questions of fact for the jury to decide. The District Court’s summary judgment ruling was reversible error.

VI. ARGUMENT

A. The District Court erred in concluding PRA Membership Standards control as the sole and conclusive standard of care for Gull's negligence and therefore its *de facto* legal duty.

i. Compliance or non-compliance with PRA Membership Standards is not dispositive of negligence.

While Montana courts have not examined PRA Membership Standards specifically, the Court has developed a test for the admissibility of codes or standards in a negligence case:

- 1) a code or standard sought to be admitted for the purpose of "conclusively determining the standard of care imposed upon the defendant" must have been adopted by a governmental agency so as to have the force of law;
- 2) where a code or standard does not have the force of law, it may nevertheless be admitted as substantive evidence of negligence if it is coupled with a showing of general acceptance in the industry concerned.

Lynch v. Reed, 284 Mont. 321, 328, 944 P.2d 218, 223 (1997) (citing *Runkle v. Burlington Northern*, 188 Mont. 286, 304, 613 P.2d 982, 993 (1980)).

PRA Membership Standards have not been adopted by a governmental agency, so they do not have the force of law. The District Court's adoption of PRA Membership Standards to conclusively determine the legal standard imposed upon Gull conflicts with controlling Montana law.

The standards may be admitted as some evidence of negligence, or the absence thereof, upon a showing of general acceptance in the commercial dive shop

industry, but they are not the sole and the conclusive determinants of what constitutes reasonable care. The facts the District Court relied on – that PRA Membership Standards are internationally recognized¹ and that Gull is a member of the organization and thus subject to its standards – do not entitle Gull to summary judgment.

The District Court improperly treated PRA Membership Standards as having the force of law, which they do not. Evidence of standards or customs is admissible only to show the customary practices of an industry as a whole, not one particular member of that industry. *Ganz v. United States Cycling Federation*, 273 Mont. 360, 903 P.2d 212 (1995). Customary methods of conduct are not controlling on the question of negligence but are merely one of the factors to be considered in determining whether or not ordinary care has been exercised. *Rocky Mountain Elk Foundation v. Schafer & Assoc.*, 2005 Mont. Dist. LEXIS 1454, **22-23 (Mont. 4th Jud. Dist. Ct. 2005) (citing *Ganz*); *see also Collins v. Itoh*, 160 Mont. 461, 469, 503 P.2d 36 (1972) (held: custom and practice cannot establish a reasonable basis to infer that a doctor who does not follow that particular practice was negligent).

In *McCollum v. D & M Lumber Co.*, 156 Mont. 335, 337-338, 479 P.2d 458 (1971), the Court explained:

¹ The SSI ("Scuba School International"), SDI ("Scuba Diving International"), and ISO ("International Standards Organization") are also internationally recognized scuba dive standards. (Doc. 98).

As to defendant's argument that the custom and usage of the industry dictates a different standard of care, we cannot say as a matter of law that the plaintiff was negligent. It is obvious from the record that the trial court was aware of the evidence introduced relating to the alleged custom and usage. Customary methods of conduct are not controlling on the question of negligence but are merely one of the factors to be considered in determining whether or not ordinary care has been exercised. We cannot say the alleged custom relied upon here would have substantial weight, in view of the fact that there were other nonlogging vehicles using the road.

Courts in other jurisdictions also apply the same test, and those cases are highly persuasive here. *See Doe v. American Nat'l Red Cross*, 848 F. Supp. 1228, 1233 (S.D. W. Va. 1994) (opposing defendant's assertion "that compliance with industry standards conclusively establishes absence of negligence. Customary practice does not prescribe the duty of care.") (citing *Texas & Pacific Ry. v. Behymer*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."))).

In *Doe*, the court held the defendant blood bank "had the duty to exercise the degree of care commonly practiced by the ordinarily skillful, careful, and prudent blood bank or equivalent personnel in the same or similar circumstances. Under this standard, [defendant] may be held liable if plaintiffs prove its practices fell below the standards promulgated and practiced by the blood-banking industry, or that the industry standards were themselves unacceptably deficient given the reliable data and knowledge available to the industry" *Id.*; see also *Advincula v. United Blood*

Servs., 176 Ill. 2d 1, 39, 678 N.E.2d 1009 (1996) (holding that “conformance with professional standards of care, proven by expert testimony or other evidence of professional standards, is indicative but not conclusive of due care. Such evidence may be overcome by a sufficient showing of contrary expert opinion testimony (or its equivalent) that the prevailing professional custom or usage itself constitutes negligence.”).

In the Ninth Circuit, “[i]t is well settled that proof of adherence to an industry practice or custom is not dispositive on the issue of negligence ... Instead, evidence of custom, usage, or industry practice is relevant in determining whether a particular defendant has met the appropriate standard of care.” *Doe v. Cutter Biological Inc.*, 971 F.2d 375, 383 (9th Cir. 1992). “[T]he critical inquiry is whether the defendant acted reasonably.” *Id.* (citing *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 610 (9th Cir. 1990)); see also *O'Connor v. Boeing N. Am.*, 2005 U.S. Dist. LEXIS 46226, 99 (C.D. Ca. August 18, 2005) (“Contrary to Defendant’s position, the standard of care is not synonymous with the actual practices or custom of a particular industry. A party’s actions can fall well below the standard of care expected of a particular industry while still being practiced by all or most of the parties in that industry.”). Similarly here, PRA Membership Standards are not dispositive. The District Court clearly erred in finding they are.

The Supreme Court of Colorado elaborated on the improper nature of allowing a professional standard to control as the standard of care for a negligence claim:

If the standard adopted by a practicing profession were to be deemed conclusive proof of due care, the profession itself would be permitted to set the measure of its own legal liability, even though that measure might be far below a level of care readily attainable through the adoption of practices and procedures substantially more effective in protecting others against harm than the self-decreed standard of the profession.

United Blood Services v. Quintana, 827 P.2d 509, 520, 1992 Colo. LEXIS 272 (1992).

PADI is a for-profit private corporation², and allowing PRA Membership Standards to act as the sole and conclusive standard of care allows the commercial dive shop industry to unilaterally set the measure of their own legal liability. This is not allowed, but it is exactly what the District Court allowed Gull to do in granting summary judgment for it. Regardless, Maddox opines Gull breached PRA Membership Standards.

The “traditional, centuries-old, universally recognized, common law rule is that we all share the duty to exercise the level of care that a reasonable and prudent person would under the same circumstances.” *Bassett v. Lamantia*, 2018 MT 119, ¶

² *Nova Designs, Inc. v. Scuba Retailers Ass’n*, 202 F.3d 1088, 1090 (9th Cir. 2000).

23, 391 Mont. 309, 417 P.3d 299 (citing *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 16, 342 Mont. 335, 181 P.3d 60); (citing M.C.A. §§ 27-1-701, 702). Gull's legal duty is not defined by PRA Membership Standards. The scope of such duty must be determined by expert testimony. It is the jury's function to weigh that testimony and determine credibility.

ii. *The standard of care applicable to Hubbell's negligence claims is a genuine issue of material fact which must be established by expert opinion.*

"Under Montana law, expert testimony is required to establish the standard of care 'unless the conduct complained of is readily ascertainable by a lay[person].'" *Brookins v. Mote*, 2012 MT 283, ¶ 63, 367 Mont. 193, 292 P.3d 347 (quoting *Deaconess Hosp. v. Gratton*, 169 Mont. 185, 189, 545 P.2d 670, 672 (1976)).

It was improper for the District Court to determine the standard of care applicable to Gull's conduct as a matter of law because the applicable standard is not readily ascertainable by a layperson. *See e.g., Ito v. Macro Energy, Inc.*, 4 NMI 46, 59 (1993) (trial court heard expert testimony by the plaintiff's and defendant's scuba experts to determine the appropriate standard of care a scuba diving course operator and its employees owed to customers). Just as in *Ito*, the standard of care applicable to Gull must be established through expert testimony.

M. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education may testify thereto in the form of an opinion or otherwise.” Maddox has long-standing and extensive knowledge and experience in the diving industry. (Doc. 99). Maddox has worked in the industry for nearly five (5) decades. *Id.* He is a certified diving instructor, a retail store owner and operator dating back to the mid-1970s, a dive school owner and instructor, a U.S. Coast Guard Licensed Captain, and a dive vessel owner. *Id.* Maddox is clearly qualified to opine on the standard of care applicable to Gull, including those beyond just PRA Membership Standards, in the form of an opinion or otherwise.

The District Court properly admitted Maddox as an expert, and any challenge to his qualifications as an expert goes to the weight of the evidence rather than admissibility, and is thus a question for the jury. *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶ 51, 388 Mont. 347, 400 P.3d 735 (citing *Wacker v. Park Rural Elec. Coop.*, 239 Mont. 500, 501-02, 783 P.2d 360, 361 (1989)). Montana’s expert testimony standard “recognizes that admissible expert evidence should come in, even if that evidence may be characterized as ‘shaky.’” *Id.* (citing *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 23, 380 Mont. 204, 354 P.3d 604). The expert’s qualifications and testimony are then “open for attack through the traditional and appropriate methods: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.” *Id.*

Maddox bases his expert testimony on extensive knowledge, skill, experience, training, and education in the field of scuba diving. (Doc. 99). Maddox's expert testimony is far from shaky, and even if it could be characterized as such, it still comes in to establish the standard of care.

Because the parties' experts disagree on the applicable standard of care, a genuine issue of material fact exists, and it was clear error for the District Court to decide the question on summary judgment.³

B. The District Court erred in concluding as a matter of law that Gull's negligent provision of scuba diving equipment to a clearly inexperienced diver did not cause his tragic death.

Just as PRA Membership Standards cannot conclusively establish the standard of care, evidence of compliance or non-compliance with these standards cannot conclusively resolve the question of causation as a matter of law.

The District Court's exclusive reliance on PRA Membership Standards to dispose of Hubbell's negligence claims was reversible error. Causation in this case is a question of fact for the jury. It may not be determined as a matter of law because reasonable minds can reach more than one reasonable conclusion regarding causation, especially considering Maddox's admissible expert testimony. *Brohman*, 230 Mont. at 202-203, 749 P.2d at 70; *see also Riley v. Am. Honda Motor Co.*, 259

³ Under its formulation of duty and breach, the District Court acknowledged "there exists a material dispute as to whether Gull breached PRA Membership Standards when it rented equipment to Mr. Mues for both himself and Mr. Hubbell without verifying Mr. Hubbell's certification." (Appendix A).

Mont. 128, 132, 856 P.2d 196, 198 (1993). Reasonable minds could certainly conclude Gull's provision of equipment to Hubbell was a substantial factor in causing his tragic death, regardless of whether PRA Membership Standards solely and conclusively establish the standard of care. Maddox opines Gull breached those standards as well.

Had Gull done anything to verify Hubbell's scuba diving experience or certification, Gull would have learned he last scuba dived twenty-six (26) years earlier when he was just fourteen (14) years old. Gull subsequently would have refrained from providing equipment to Hubbell due to his severe lack of experience, confidence, and knowledge related to scuba diving and the equipment that was being rented to him unless he first took a refresher course. (Doc. 99). This is a reasonable inference which must be drawn in Hubbell's favor on summary judgment.

Maddox's testimony also supports this foreseeable scenario, opining "[t]he rental of the equipment to Jesse Hubbell led directly to his death." *Id.* "Jesse Hubbell should not have been rented the equipment by Gull Dive Center since he was inexperienced, had not completed any review course, did not hold the appropriate certification, and was incapable of assembling and using the equipment properly and safely." *Id.*

Second, even assuming, *arguendo*, that PRA Membership Standards are the sole and conclusive standard of care, reasonable minds could still easily conclude

Hubbell was not qualified to rent equipment, and in turn that Gull's provision of equipment violated PRA Membership Standards, causing Hubbell's tragic death. The Junior Open Water certification Hubbell received at age fourteen (14) did not automatically upgrade into a PADI Open Water Certification and it did not allow Hubbell to safely rent scuba equipment; Gull's provision of equipment to Hubbell violated PRA Membership Standards. (Doc. 100, p. 11, ¶¶ 1.4-1.6). Had Gull adhered to PRA Membership Standards by refusing to provide Hubbell with equipment unless he first took a refresher course, he would not have died scuba diving.

Estate of Willson v. Addison, is a medical malpractice case that dealt with similar issues of causation on summary judgment. 2011 MT 179, 361 Mont. 269, 258 P.3d 410. The District Court granted summary judgment in favor of defendants because they provided expert testimony on the issue of causation, and plaintiff's experts failed to opine on the issue of causation to create a genuine issue of material fact, namely that the medications administered to the patient shortened her life. *Id.*, ¶¶ 19-20. The Court affirmed, holding that plaintiff failed to come forth with expert testimony on the element of causation to create an issue of fact, failed to refute defendant's expert testimony, and failed to provide testimony that would establish the element of causation. *Id.*, ¶¶ 20-21. Here, unlike *Estate of Wilson*, Hubbell sufficiently refutes Gull's expert testimony with her own.

The Court “has separated the element of causation into two separate components, causation in fact, and proximate or legal causation, both of which must be proven to prevail in an action for negligence.” *United States Fid. & Guar. Co. v. Camp*, 253 Mont. 64, 68, 831 P.2d 586, 588 (1992) (citing *Young v. Flathead County*, 232 Mont. 274, 757 P. 2d 772 (1988)). Causation in fact is normally established using the “but for” test, but in cases “where there are allegations that the acts of more than one person combined to produce a result...we recommend continued use of the substantial factor test.” *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139-40 (1996). Where there is more than one cause of damages in a negligence case, the court must determine whether the alleged act was a substantial factor in causing the damage. *Id.* Once causation in fact is established, proximate cause is analyzed in terms of foreseeability where a “defendant is liable for his wrongful conduct if it is reasonably foreseeable that plaintiff's injury may be the natural and probable consequence of that conduct.” *United States Fid. & Guar. Co.*, 253 Mont. at 69, 757 P.2d at 589 (citing *Thayer v. Hicks*, 243 Mont. 138, 155, 793 P. 2d 784, 795 (1990)).

Hubbell establishes genuine issues of material fact relative to causation. Hubbell shows Gull's provision of scuba equipment was a substantial factor in causing his tragic death, thus establishing causation in fact. Hubbell also shows if

Gull could reasonably foresee Hubbell's death, it would be the natural and probable consequence of providing him scuba equipment, thus establishing proximate cause.

The District Court erroneously concluded "Mr. Hubbell's death was the result of his own actions and perhaps the negligence of others - not Gull's action of renting scuba equipment." (Appendix A). Hubbell credibly disputes this conclusion as it relies on comparative fault principles and the settled-party defense to improperly decide causation as a matter of law.

In Montana, "[c]omparative negligence is a question of fact for the jury to decide." *Faulconbridge v. State*, 2006 MT 198, ¶ 99, 333 Mont. 186, 142 P.3d 777 (citing *Contreras v. Fitzgerald*, 2002 MT 208, ¶ 25, 311 Mont. 257, P25, 54 P.3d 983); *see also OKLAND v. WOLF*, 258 Mont. 25, 850 P.2d 302, 307 (1993) (holding "where there was evidence of negligence on the part of both parties, it was for the fact finder to determine the comparative degree of negligence. The District Court did not err by submitting the issue of comparative negligence to the jury."). The District Court cannot properly rely on the undetermined comparative negligence of other parties, including the settled parties and Hubbell himself, in deciding causation as a matter of law. These are questions of fact for the jury.

Similarly, the settled-party defense provides that, "[i]n an action based on negligence...a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a person with whom the claimant has settled or

whom the claimant has released from liability.” M.C.A. § 27-1-703(6)(a). As discussed above, comparative negligence on the part of settled parties is a question of fact to be properly determined by the jury. That is not a conclusion the District Court could properly reach as a matter of law on summary judgment.

VII. CONCLUSION

Genuine issues of material fact exist as to duty, breach, and causation, all which effectively preclude summary judgment for Gull. It was clear reversible error for the District Court to take Hubbell’s negligence claims away from the jury.

The District Court’s error had a significant impact on the result of this case, wrongfully depriving Hubbell of a jury trial. It is the jury’s job to weigh competing expert testimony and decide credibility issues. It is also the jury’s job to allocate fault amongst the parties, including Hubbell, Gull, and the settled parties. Gull’s provision of equipment to Hubbell is the first link in the chain of events that led to Hubbell’s death. Had Gull not negligently provided the equipment, neither Hubbell nor the settled parties would have even been in a position to cause or contribute to the drowning in the first place. It was a domino effect, and Gull’s provision of equipment was the first domino to topple over.

The District Court’s erroneous grant of summary judgment for Gull must be reversed with instructions to schedule this case for a jury trial. Gull wants to blame

Hubbell for his own horrific death. The jury should decide whether victim blaming is a valid defense.

DATED this 15th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rule of Appellate Procedure 11(4)(e), I certify that this Principal Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and, the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding Table of Contents, Certificate of Service and Certificate of Compliance.

DATED this 15th day of May, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court, and that true and accurate copies of the foregoing upon each attorney of record, as follows:

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