IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 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.

DEFENDANT-APPELLEE'S ANSWER BRIEF

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

APPEARANCES:

Susan Moriarity Miltko
Williams Law Firm, P.C.
235 E. Pine Street
P.O. Box 9440
Missoula, Montana 59807-9440
(406) 721-4350
susan@wmslaw.com
Attorneys for Defendant/Appellee

Molly K. Howard / J.R. Casillas
DATSOPOULOS, MacDONALD & LIND, P.C.
201 West Main Street, Suite 201
Missoula, Montana 59802
(406) 728-0810
mhoward@dmllaw.com
jrcasiallas@dmllaw.com
Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. STATEMENT OF ISSUES 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF THE FACTS 3

A. Because he was PADI certified, Mr. Hubbell volunteered to accompany Mr. Mues on the commercial scuba dive to film a campaign advertisement. 3

B. In accordance with PADI Requirements, Gull rented the scuba equipment to John Mues, a certified advanced diver. 7

C. Jesse Hubbell was independently qualified to rent scuba diving gear from Gull. 9

D. Procedural developments in litigation. 10

IV. STANDARDS OF REVIEW 14

A. Summary judgment. 14

B. Exclusion of expert opinions. 15

V. SUMMARY OF ARGUMENT 16

VI. ARGUMENT 18

A. The District Court did not abuse its discretion when it rejected the "amorphous" opinions of Hubbell's new expert, Thomas Maddox, because they are based on an unreliable field that contradicts the PRA Requirements, and because Maddox's opinions were substantively different than those of Hubbell's prior expert, Bret Gilliam. 18

1. Maddox's opinions about what is required to rent compressed air are based on an unreliable field of expertise that contradicts the PRA Requirements controlling Gull's operations. 18

2. The District Court acted within its discretion by rejecting Maddox's opinions that were substantively different from those of the prior expert, Gilliam. 26

B. The District Court did not err when it determined that Gull's rental of equipment was not the cause of Mr. Hubbell's death because he had a PADI certification that was "good for life" and he was diving with another certified diver, who rented the equipment. 31

1. The accident was not caused by the rental of the equipment because Mr. Hubbell had the necessary PADI certification to rent equipment. 31

2. Gull did not cause the accident because it rented scuba diving gear to Mues, a certified Advanced Diver, who was diving with Mr. Hubbell. 35

C. Hubbell's claims against Gull are barred by Montana's Recreation Responsibility Act because his accidental drowning death was a risk that was characteristic and intrinsic to scuba diving. 37

VII. CONCLUSION 42

CERTIFICATE OF COMPLIANCE 43

APPENDIX INDEX 43

TABLE OF AUTHORITIES

Cases

Akhtar v. Van de Wetering,
197 Mont. 205, 642 P.2d 149 (1982) 22

Avivi v. Centro Medico Urgente Med. Ctr.,
159 Cal.App.4th 463, 71 Cal.Rptr.3d 707 (2008) 15

Cooperman v. David,
214 F.3d 1162 (10th Cir. 2000) 41

Cottrell v. Burlington N. R.R. Co.,
261 Mont. 296, 863 P.2d 381 (1993) 24

Ferrari v. Grand Canyon Dories,
32 Cal. App. 4th 248 (1995) 41

Grdinich v. Bradlees,
187 F.R.D. 77 (S.D.N.Y.1999) 24

Halliday v. Cruise Ship Excursions, Inc.,
2016 WL 6635157 (V.I. Super. Nov. 4, 2016) 25

Hambrook v. Smith,
2016 WL 4408991 (D. Haw. Aug. 17, 2016) 21

Hewitt v. Miller,
521P.2d 244 (Wash. Ct. App. 1974) 41

Johnson Farms, Inc. v. Halland,
2012 MT 215, 366 Mont. 299, 291 P.3d 1096 ..... 15, 27

Lynch v. Reed,
284 Mont. 321, 944 P.2d 218 (1997) 21

Martin v. SAIF Corp.,
2007 MT 234, 339 Mont. 167, 167 P.3d 916 14

McClue v. Safeco Ins. Co. of Ill.,
2015 MT 222, 380 Mont. 204, 354 P.3d 604 ..... 15, 23, 26, 34

Missoula Rural Fire Dist. v. Missoula Cnty.,
222 Mont. 178, 720 P.2d 1170 (1986) 38

Murray v. Marina Dist. Dev. Co.,
311 F. App'x 521 (3d Cir. 2008) 24

Nalwa v. Cedar Fair, L.P.,
55 Cal.4th 1148 (Cal. 2012) 41

Nasca v. Hull,
2004 MT 306 Mont. 484 P.3d 997 38

Ollier v. Sweetwater Union High Sch. Dist.,
768 F.3d 84 (9th Cir. 2014) 24

Payne v. Knutson,
2004 MT 271, 323 Mont. 165, 99 P.3d 200 15

Poole ex rel. Meyer v. Poole,
2000 MT 117, 299 Mont. 435 P.3d 936 40

Runkle v. Burlington N.,
188 Mont. 286, 613 P.2d 982 (1980) 21

Ryffel Family P'ship, Ltd. v. Alpine Country Constr., Inc.,
2016 MT 350, 386 Mont. 165, 386 P.3d 971 22

Scrofani v. Stihl Inc.,
44 Fed.Appx. 559 (3d Cir.2002) 25

Speer v. Dep't of Corrections,
2020 MT 45, 399 Mont. 67, 458 P.3d 1016 ..... passim

State Highway Comm'n v. Biastoch Meats, Inc.,
145 Mont. 261, 400 P.2d 274 (1965) 24

State v. Smith,
141 Mont. 302, 377 P.2d 352 (1962) 24

Wood v. Old Trapper Taxi,
286 Mont. 18, 952 P.2d 1375 (1997) 18, 35

Young v. Era Advantage Realty, 2022 MT 138, 409 Mont. 234, 513 P.3d 505 17, 35, 37

Statutes

Mont. Code Ann. § 27-1-753 ..... 42, 43

Rules

Mont. R. Civ. P. 56 14

I. STATEMENT OF ISSUES

This case arises out of the accidental drowning death of Jesse Hubbell in a commercial scuba diving accident that occurred when he and the other diver were certified to dive and rent equipment. The issue for the Court is whether a scuba shop, that is a member of and subject to PADI[1] membership standards, can be held liable for renting air cylinders to divers who carry life-long diving certifications. The District Court correctly granted summary judgment for Gull, holding "Gull's rental of scuba equipment certainly was not the cause of Mr. Hubbell's unfortunate death[,]" because he "was a certified diver" and his death "was the result of his own actions and perhaps the negligence of others—not Gull's action of renting scuba equipment." (Dkt. 105.)

This appeal raises three issues.

1. Whether the District Court abused its discretion when it rejected the unsupported opinions of Hubbell's new expert, Thomas Maddox, where his opinions were based on an unreliable, "amorphous" expert field contradicting the controlling PADI Requirements, and Maddox's new opinions were prohibited because they differed from those of Hubbell's prior expert, who was excluded by the District Court?

[1] Professional Association of Diving Professionals.

2. Whether the District Court erred when it determined Gull's rental of compressed air was not the cause of Mr. Hubbell's death because he was qualified under the PADI standards to rent as he had a certification that was "good for life"?

3. Whether Hubbell's claims against Gull are barred by Montana's Recreation Responsibility Act where his accidental drowning death arose out of a risk that was characteristic and intrinsic to scuba diving?

II. STATEMENT OF THE CASE

Along with suing those responsible for managing this commercial dive, Personal Representative Ellen Hubbell ("Hubbell") filed a negligence action against Gull for renting the scuba equipment used for this commercial dive. Hubbell alleges Gull should not have rented the equipment because it allegedly did not verify Mr. Hubbell was certified. Although it is undisputed Mr. Hubbell was PADI certified "for life," Hubbell alleges Gull should have verified his experience and required he attend a refresher course before renting the equipment. But this the PADI rules do not require.

Addressing the opinions of Hubbell's expert, Maddox, the District Court acted within its discretion in rejecting them because they are "amorphous" and directly contradict the PADI PRA Membership Standards which undisputedly applied. Maddox's opinions, which contradict the PADI requirements, are based on an unreliable field, without any supporting authority or verifiable industry

standards. Maddox's opinions also impermissibly and substantively differed from the opinions of Hubbell's prior expert, who was excluded within the sound discretion of the District Court. Based on these issues, the District Court acted within its discretion in rejecting Maddox's opinions that are contrary to the written requirements controlling Gull's operations. Accordingly, the District Court did not err when it determined as a matter of law that Gull's rental of scuba equipment was not the cause of Mr. Hubbell's death because he was PADI certified "for life" and eligible to rent scuba equipment.

The District Court did not reach the issue of whether Hubbell's claims against Gull are barred by Montana's Recreation Responsibility Act. If this Court disagrees with the District Court's Order Granting Gull's Motion for Summary Judgment, the Court should find Hubbell's claims are barred by the MRRA.

III. STATEMENT OF THE FACTS

A. Because he was PADI certified, Mr. Hubbell volunteered to accompany Mr. Mues on the commercial scuba dive to film a campaign advertisement.

The accident occurred during an attempt to film a campaign advertisement for John Mues, who was running for U.S. Senate. (Dkt. 1, Complaint, ¶10.) At that time, Mr. Hubbell was working with Mues and the companies he had hired, Defendants Putnam Partners and SOS Commercial Productions. (*Id.*, ¶¶19-22.) It was decided to film Mues while scuba diving to promote his experience as a Naval

Officer. (*Id.*, ¶ 19.) It is undisputed Gull was not involved in the planning or execution of the commercial dive; its involvement was limited to renting the equipment. (Dkt. 1, Compl., ¶¶18-19, 22, 35.)

Mr. Hubbell volunteered to accompany Mues on the dive and never expressed doubt about whether he was certified to dive. (Depo. Mues, 79:16-80:5; 89:13-21; 111:21-112:9, Exh. A to Dkt. 70.) Rather, he confirmed his "open water certification is good for life." (*Id.* at 112:10-20; 127.) It is also undisputed that, for his Junior Open Water Certification, Hubbell received the same training he would have received for an adult open water certification. (Depo. C. Hanson, 78:1-25 (Depo. Exh. 42); 76:23-77:1; Exh. B to Dkt. 63.) Indeed, "A PADI Junior Open Water Scuba training is the same as PADI Open Water Scuba training in all respects, including classroom, confined water, and open water lessons and evaluation." (Report of Pehl, at 2, Exh. J to Dkt. 63.)

When Hubbell was certified, it is undisputed the 1988 Open Water Diver Course Instructor Guide from PADI was applicable ("PADI Guide"). (Appendix 1 at p.1-6.)[2] Pertinent here, the Guide states "A Junior Open Water Diver is required to meet all requirements for Open Water Diver certification other than age." (*Id.*) The Guide also states, when a diver is still a junior, "A Junior Open Water Diver is

[2] Excerpts of the PADI Guide are included for the Court's convenience at Appendix 1. The foundation for the PADI guide was established in the Deposition of Gilliam at 80:7-25, Exh. H to Dkt. 63, Depo. Exh. 191.

qualified to dive only when accompanied by another certified diver who is of legal age." (Appx. 1 at 1-6.) Finally, the Guide states "PADI Junior Open Water Divers may upgrade their certification level to PADI Open Water Diver when they reach age 15 **with no additional requirements**." (*Id.*) (emphasis added). While a review course for a junior diver after more than one year from certification is "recommended," it is "not required[.]" (*Id.*) The Guide is clear:

Junior Open Water Diver Certification Procedures

Certification is open to students under the age of 15 through the PADI Junior Open Water Diver Certification.

A Junior Open Water Diver is required to meet all requirements for Open Water Diver certification other than age. The Junior Open Water Diver is reqired to be 12 years old *prior to the start date of the course.* Certification is determined by competency and is based on the student's ability to understand the concepts involved in diving. To demonstrate that they understand, students must pass the standard PADI Quizzes and Final Exam. These exams must be administered in written form (no oral exams allowed), and students' quiz and exam answer sheets are to be maintained as part of their student records.

A Junior Open Water Diver is qualified to dive only when accompanied by another certified diver who is of legal age. *Legal age* is defined as an individual who is at least 18 years of age — unless a law in the area defines an older age; in this case, the law becomes the guideline. PADI recommends the student be accompanied during training by a legal-aged family member who is also taking the course.

PADI Junior Open Water Divers may upgrade their certification level to PADI Open Water Diver when they reach age 15 with no additional requirements. (See the Replacement Card Procedures and Upgrade Procedures in the Standards and Procedures section.) If more than one year has transpired since a student was certified as a Junior Open Water Diver, and the diver is requesting an upgrade, it is recommended, though not required, that the diver complete a Scuba Review course.

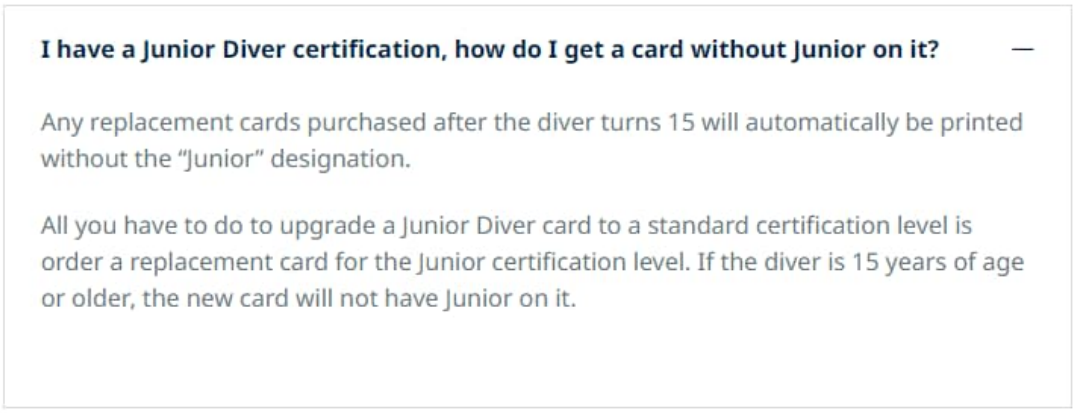
(*Id.*) (highlighting added).

The PADI website is also consistent with the Guide. At the relevant time the website stated, "Junior Open Water Divers automatically become Open Water

Divers at age 15." (Depo. Gilliam at 80:7-25, Exh. K to Dkt. 63, Depo. Exh. 193.) It also stated, "Any replacement certification card or E-card … purchased the day after the diver's 15th birthday will automatically show an Open Water Diver (not Jr. Open Water Diver) certification.":

> Junior Open Water Divers automatically become Open Water Divers at age 15. Any replacement certification card or eCard (https://www.padi.com/certification-cards-padi-ecards) purchased the day after the diver's 15th birthday will automatically show an Open Water Diver (not Jr. Open Water Diver) certification.

(*Id.*) PADI's recently updated website still provides a "Junior" Open Water certification automatically loses the "Junior" designation when a diver turns 15 and orders a replacement card:



https://www.padi.com/certification-cards (accessed July 8, 2024).

Further, Hubbell was aware that her husband was certified. After the accident, she recorded conversations and confirmed she knew he had a license which did not expire. (Depo. E. Hubbell, 155-160; 163-164, Exh. D to Dkt. 63.)

B. In accordance with PADI Requirements, Gull rented the scuba equipment to John Mues, a certified advanced diver.

Hubbell's claims are premised upon the allegation Gull "was a member of the PADI Retailer Association ('PRA') and was required to comply with its Membership Standards." (Dkt. 1, Complt., ¶¶33-34, 67.) Paragraph 16 of the PRA controls the rental of compressed air.[3] It states a PADI Dive Center "must":

> Agree 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…

(Appendix 2 at ¶16.)[4]

Before going to Gull, Mues called the shop to discuss what they wanted. Gull employee Chris Hanson asserted Mues and Mr. Hubbell had to be certified, and there was no concern, because both were certified, and certifications could be verified online. (Depo. Hanson at 60:4-10, Exh. H to Dkt. 70; Depo. Mues at 122:12-16, Exh. A to Dkt. 70.) On June 14, 2019, Mr. Hubbell and Mues traveled to Gull. In accordance with PRA Requirements, Hanson asked for Mues'

[3] The compressed air cylinder is the *only* item for which the verification of a diver's certification is necessary. There are no written standards providing that a dive shop must verify a diver's license to rent regulators or other scuba equipment.
[4] Excerpts from the PRA Standards are included for the Court's convenience at Appendix 2. Authenticity and foundation were established in the Deposition of Gilliam at 62-64, Depo. Exh. 188, Exh. E to Dkt. 63. (Gilliam's full Depo. attached as Exh. I, Dkt. 69.)

certification and Mues provided an Advanced Diver certification from the National Association of Underwater Instructors ("NAUI"). (Depo. Mues at 149:7-18.)

Mues executed the PADI authorized form, which states: "Liability Release and Assumption of the Risk [/] Equipment Rental Agreement." (Depo. Exh. 214, Exh. F to Dkt. 63.) On Page 1, Mues is listed with his Certification Level: Advanced. (*Id.*) On Page 2, Mues is listed as the (Rentor) "for the rental of scuba and/or skin diving equipment[.]" *Id.*

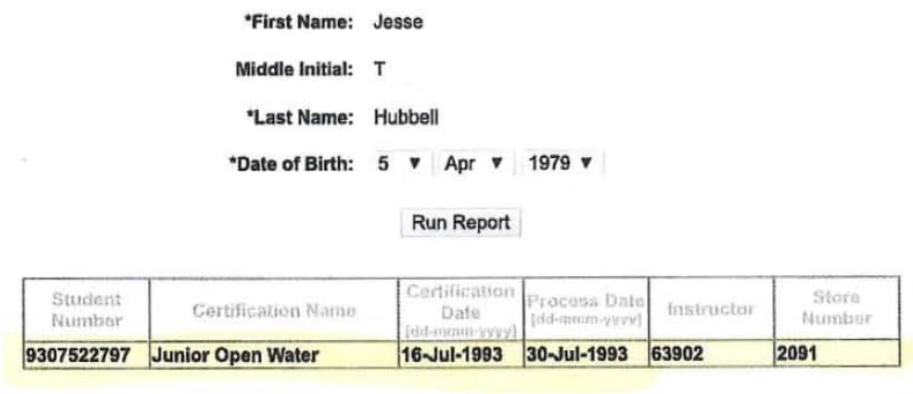

and JOHN MUES (Rentor), for the rental of scuba and/or skin diving equipment.

It is undisputed Gull rented the equipment to Mues, and he was certified to do so. (Or. Granting MSJ at 11:1-2.)

Notably, Hanson had previously confirmed with PADI that it was acceptable for one diver to rent gear for more than one person. (Depo. Hanson at 80:15-82:9.) Hubbell's expert has not opined it is always improper to rent two sets of gear to one certified diver. (Rpt. of Maddox, Exh. A to Dkt. 98.) It is also undisputed Hanson told Mues and Mr. Hubbell they should conduct a weight check in shallow water before proceeding to deeper water, although they did not do this. (Depo. Mues. at 154:4-14; Depo. Hanson at 27-29.)

C. Jesse Hubbell was independently qualified to rent scuba diving gear from Gull.

While Mr. Hubbell did not have his certification card on his person, it is undisputed he informed Hanson he was PADI certified, and all knew his certification could be verified online. (Depo. Hanson at 19; Depo. Mues at 149:19-22.) Hubbell's expert, Maddox, misrepresents Hanson's testimony by claiming (without factual knowledge) that Hanson did not verify Mr. Hubbell's certification online. (Rpt. of Maddox at p. 16.) Rather, Hanson simply could not recall whether he did this, though this was his practice; and it is undisputed the certification was verifiable online:



*First Name: Jesse

Middle Initial: T

*Last Name: Hubbell

*Date of Birth: 5 Apr 1979

Run Report

Student Number	Certification Name	Certification Date [dd-mmm-yyyy]	Process Date [dd-mmm-yyyy]	Instructor	Store Number
9307522797	Junior Open Water	16-Jul-1993	30-Jul-1993	63902	2091

(Depo. C. Hanson at 29; 78-79; 94, Depo. Exh. 42, Exh. B to Dkt. 63.)

As the District Court noted, a Junior Open Water certification automatically converts to an Open Water Diver certification when the diver turns 15 years old. (Order Granting MSJ at 13.) It is undisputed Mr. Hubbell had a PADI certification, and if he had simply ordered a replacement card, it would state he had an Open

Water Diver certification, with no restrictions, as "[a]ny replacement certification card or E-card … purchased the day after the diver's 15th birthday will automatically show an Open Water Diver (not Jr. Open Water) certification." (Depo. Gilliam at 80:7-25, Exh. K to Dkt. 63, Depo. Exh. 193.) As such, even if Hanson did not verify Mr. Hubbell's certification online, it was not the proximate cause of Mr. Hubbell's drowning, because he was undisputedly certified and fully eligible for the Open Water Diver certification "with no additional requirements," such as a refresher dive. (Or. Granting MSJ at 13-14; Appx. 1 at 1-6.)

D. Procedural developments in litigation.

Hubbell filed suit against Gull on July 23, 2020.[5] On August 9, 2021, Hubbell disclosed Bret Gilliam as a liability expert. (Rpt. of Gilliam, Exh. C to Dkt. 63.) On March 31, 2022, Gilliam was deposed. In his deposition, Gilliam agreed with many of the PADI standards outlined above. He agreed the PADI standards provide "a junior open water diver is qualified to dive only when accompanied by another certified diver who is of legal age." (Depo. Gilliam at 84:5-11, Exh. I to Dkt. 69.) Gilliam also agreed Mues was of legal age, and a certified advance open water diver through NAUI. (*Id.* at 84:12-85:2.) Thus, even

[5] Hubbell also sued those responsible for managing this commercial dive (John Mues, Putnam Partners, and SOS Commercial Productions) and has settled with them. Complt., ¶¶ 18-19, 22.

assuming *arguendo* Mr. Hubbell had to be accompanied by a certified diver to dive and rent equipment, it is undisputed he was.

Despite the clear PADI standards outlined above, Mr. Gilliam refused to acknowledge what is stated, including on the PADI Guide and website:

Q So, the second sentence says that a scuba review course is recommended but not required, correct?
A Correct.
Q The first sentence -- I'm going to ask you if I'm reading it correctly. It says PADI junior

open water divers may upgrade their certification level to PADI open water level when they reach age 15 with no additional requirements. Did I read that sentence correctly, Mr. Gilliam?
A It is not within the context of this paragraph.
Q That is not what I asked. Did I read that sentence correctly, Mr. Gilliam?
A No.
Q Would you read the first sentence out loud?
A No.
Q Why not?
A You already read it.
Q And I read it correctly, correct, Mr. Gilliam?
A No, you read it out of context.
Q So, I'm going to ask you, Mr. Gilliam, to read the first sentence of that paragraph out loud?
A I will read the paragraph out loud to put it in context.
Q That's not my question. This manual says that a junior open water diver may upgrade their certification level to PADI open water diver when they reach age 15 with no additional requirements. Did I read that correctly?

A No.
Q Mr. Gilliam, you understand that you are under oath?
A Yeah. Are you under oath?

(*Id.* at 89:25–90:16.) As discussed by the District Court, it was clear "from the outset of his testimony, Mr. Gilliam intended to unnecessarily draw out his answers and meet simple questions with evasiveness." (Dkt. 88 at 5.)

In a fit of rage, apparently from his refusal to answer questions, Gilliam resorted to extremely offensive pejorative attacks on defense counsel:

Q And then the next sentence says, either credential attests to your completion of training and your ability to meet the standard requirements established by PADI. Did I read that sentence correctly?
A You read it correctly, but it is not in the full context of the standard. So, no, your statement is incorrect.
Q It wasn't my statement. It's the PADI statement from the open water diver manual, correct?
A You read one sentence and the context has got to be explained. For instance, the PADI junior open water divers are not qualified --
Q Mr. Gilliam, this is not --
A Are you going to stop interrupting me? Shut up, bitch. Oh, be quiet, babble on all you want. Let me answer the God damn question.
Q Let's be very clear, did I understand you, Mr. Gilliam, just now that you said shut up, bitch?
A No, I said what a nice day.

(*Id.* at 89:25–90:19) (emphasis added).

On June 30, 2022, Gull moved to exclude Gilliam because his opinions were unreliable and based on his personal, subjective beliefs rather than any authority, and for bad faith conduct during his deposition. (Dkt. 59.) On November 18, 2022, the District Court granted Gull's motion to exclude Gilliam, finding Gilliam engaged in bad faith conduct, but not reaching the substance of his opinions. (Dkt. 88.) The District Court found Gilliam's behavior and language "appalling" and completely unwarranted. The Court also issued sanctions. (*Id.*)

Before ruling on Gull's motion to exclude Gilliam, Hubbell filed a motion to amend the scheduling order to disclose a new liability expert because of health complications Gilliam developed. (*See* Dkt. 93 at 3.) Gull objected, because once Hubbell's liability expert was excluded, they should be precluded from naming a new expert. (*Id.* at 11.) On March 9, 2023, the Court granted Hubbell's motion, allowing the disclosure of Tom Maddox as a new expert. (*Id.*) However, the Court made clear in its order that "the Plaintiff may not raise any new theories of any claim, and any opinion or testimony from Mr. Maddox that substantively differs from Mr. Gilliam's report will not be considered." (*Id.* at p. 15.)

Based upon the new report of Maddox, the parties filed supplemental briefing in relation to Gull's Motion for Summary Judgment. (*See* Dkt. 105 at 1-2.) A hearing on Gull's motion occurred on September 13, 2023. (Sept. 13, 2023, Hearing Transcript, filed with this Court on March 14, 2024.) On December 12,

2023, the District Court granted Gull's motion. (Dkt. 105.) In so doing, the Court acted within its discretion when it rejected Maddox's opinions that contradicted the PADI standards providing an individual with a PADI Junior Open Water Diver certification automatically qualifies to be a full Open Water Diver at age 15 and is therefore qualified to rent scuba equipment. Because there is no genuine dispute that Mr. Hubbell was certified and able to rent scuba equipment, the Court correctly determined, as a matter of law, Gull was not the cause of Hubbell's drowning. (*Id.* at 11.)

IV. STANDARDS OF REVIEW

A. Summary judgment.

This Court reviews a District Court's grant or denial of summary judgment *de novo*. *Martin v. SAIF Corp.*, 2007 MT 234, ¶ 9, 339 Mont. 167, 167 P.3d 916. Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). To preclude summary judgment, the "opposing party must, in proper form and by more than mere denial, speculation, or pleading allegations 'set out specific facts' showing the existence of a material fact." *Speer v. Dep't of Corrections*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016. While the interpretation of a material fact may be in dispute, "disagreement over the correct interpretation of, or conclusion from, facts not otherwise subject to genuine

material dispute generally does not create a *genuine issue* of material fact precluding summary judgment." *Id.*, ¶ 24 (emphasis added). And the Court "has no duty to anticipate or speculate regarding contrary material facts." *Id.*, ¶ 17.

"[W]here the conclusion of the district court is correct, it is immaterial, for the purpose of affirmance on appeal, what reasons the district court gives for its conclusion." *Johnson Farms, Inc. v. Halland*, 2012 MT 215, ¶ 11, 366 Mont. 299, 291 P.3d 1096 (citation omitted). In other words, if this Court "reach[es] the same conclusion as the district court, but on different grounds, [it] may affirm the district court's judgment." *Id.* (citation omitted).

B. Exclusion of expert opinions.

When reviewing a District Court's evidentiary ruling, this Court employs an abuse of discretion standard. *Payne v. Knutson*, 2004 MT 271, ¶ 20, 323 Mont. 165, 99 P.3d 200. This Court recognizes exclusion of expert testimony is "within the discretion of trial courts," like other evidentiary rulings, and is thus reviewed "for an abuse of discretion" as well. *McClue*, ¶¶ 13-14. Moreover, "[w]hile an order granting summary judgment is reviewed de novo, 'any determination underlying the order granting summary judgment is reviewed under the standard appropriate to that determination.'" *McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶ 13, 380 Mont. 204, 354 P.3d 604 (quoting *Avivi v. Centro Medico Urgente Med. Ctr.*, 159 Cal.App.4th 463, 467 (2008)).

V. SUMMARY OF ARGUMENT

The District Court did not abuse its discretion when it rejected the amorphous, personal opinions of Hubbell's expert Maddox because they are unsupported and directly contradict the requirements of the PADI PRA Membership Standards. The unsubstantiated field of "industry standards worldwide" Maddox purports to discuss is unreliable. Maddox fails to cite any authority, besides the PRA Standards, to support his opinions. Rather, he impermissibly intertwines wholly unsubstantiated standards to make the PRA Standards say what its drafters omitted. As such, the District Court acted within its discretion when it disregarded Maddox's opinions that contradicted the PADI requirements controlling Gull's operations.

There is no genuine dispute that Mr. Hubbell's Junior Open Water Diver certification automatically became an "Open Water Diver" certificate when he turned 15. Indeed, before volunteering to accompany Mr. Mues, Mr. Hubbell personally confirmed his "open water certification [wa]s good for life." It is also undisputed that, for his Junior Open Water Certification, he received the same training as required for an adult open water certification. (Depo. C. Hanson, 78:1-25 (Depo. Exh. 42); 76:23-77:1; Exh. B to Dkt. 63.) Because he was certified, there is no genuine dispute that he was qualified to rent air cylinders and equipment under the PADI "Requirements" controlling Gull's operations.

Alternatively, because John Mues accompanied him, Mr. Hubbell was qualified even if his "Junior" certification did not automatically transition when he turned 15. There is no genuine dispute Gull rented the scuba equipment to Mues, and that a Junior diver could rent equipment and dive with Mues, who was certified and diving with Mr. Hubbell.

Either way, Gull's actions were not the cause of Mr. Hubbell's drowning. As Hubbell alleges, the cause of the accident was assembling his gear incorrectly which rendered it inoperable. (Dkt. 1, Compl., ¶¶ 58-59.) Notably, Hubbell does not allege Gull provided Mr. Hubbell with misassembled or faulty gear, or that Gull had the duty to assemble the equipment. Because Mr. Hubbell and Mues were both certified to rent the scuba equipment, they could have rented it from any able provider. The assembly of the equipment before the dive would be the same regardless of where it was rented. Accordingly, as a matter of law, the rental of equipment was not a cause of the accident. Just as if a gas station clerk sells beer to a sober adult of legal age, the gas station could not be responsible for damage caused by this purchaser for allegedly failing to verify they were of legal age.

Because reasonable minds could only reach the conclusion that Gull did not cause this accident, the District Court properly granted summary judgment to Gull. *See Young v. Era Advantage Realty*, 2022 MT 138, ¶ 24, 409 Mont. 234, 513 P.3d 505 (where reasonable minds cannot not differ, Court may rule on causation as a

matter of law) (quoting *Wood v. Old Trapper Taxi*, 286 Mont. 18 at 30, 952 P.2d 1375 at 1383 (1997)).

Hubbell's claims against Gull should also be dismissed as barred by Montana's Recreation Responsibility Act because Mr. Hubbell's accidental drowning death was a risk characteristic and intrinsic to scuba diving.

VI. ARGUMENT

A. The District Court did not abuse its discretion when it rejected the "amorphous" opinions of Hubbell's new expert, Thomas Maddox, because they are based on an unreliable field that contradicts the PRA Requirements, and because Maddox's opinions were substantively different than those of Hubbell's prior expert, Bret Gilliam.

1. Maddox's opinions about what is required to rent compressed air are based on an unreliable field of expertise that contradicts the PRA Requirements controlling Gull's operations.

Hubbell's expert, Maddox, agrees Gull "was a member of the PADI Retailers Association and was subject to their policies and membership standards." (Maddox Rpt. at p. 11.) The District Court noted the parties "agree that Gull is a member of and subject to the PRA Membership Standards." (Or. Granting MSJ at 10.) In the United States, there are four major certification agencies (PADI, NAUI, SSI (Scuba Schools International), and SDI (Scuba Diving International)). It is undisputed that only PADI has standards concerning diving certifications necessary for renting equipment. (Apr. 10, 2023, Rpt. of Pehl, p. 4, Exh. B to Dkt. 98.) Hubbell has stilled failed to identify any other written standard or authority besides

the PRA requirements that address a PADI member's rental of compressed air cylinders. Neither has Hubbell identified any legal or persuasive authority providing anything beyond being PADI certified is necessary to rent scuba equipment. Nor has Maddox identified any scuba dive shop materials, rules, or anything of substance beyond his beliefs that would require a dive shop to do anything beyond verifying a diver's certification before renting equipment.

The *only* authority is from the PRA Membership Standards, which states:

Requirements*

To qualify for and maintain annual membership as a PADI Dive Center, the business must:

16. Agree 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. If the business offers enriched air

(Appx. 2, ¶16.) The PRA "Requirements" mandated that Gull "must . . . rent or provide compressed air for scuba purposes only to certified divers…." *Id.* The rental of compressed air for scuba purposes is not "prohibited by local law[,]" so the plain meaning of this requirement is Gull had to agree to rent compressed air to certified divers. To be sure, the PRA "Requirements" do not suggest PADI Dive Centers must only rent compressed air to certified divers who are "experienced, knowledgeable, and capable," or that a Dive Center must require a diver who has not dived for years to take a refresher course before renting compressed air. Maddox's insertion of such a "requirement" is wholly unsupported by the

standards or any other identified authority. The District Court did not abuse its discretion in rejecting Maddox's interpretation of what was required of Gull when his opinions directly contradicted the PRA Requirements. Indeed, the "disagreement over the correct interpretation of, or conclusion from, facts not otherwise subject to genuine material dispute generally does not create a genuine issue of material fact precluding summary judgment." *Speer*, ¶ 24.

Hubbell argues the District Court erred by concluding the "PRA Membership Standards control as the sole and conclusive standard of care applicable to Gull." (Principal Br. at 4.) However, the Court's order was more nuanced and directed at whether Maddox's opinions can create different standards when the PRA clearly required Gull "must" rent compressed air to certified divers. (*See* Or. Granting MSJ at 10.) The Court's order also addressed the PADI Instructor Guide, which provides that, for a Junior Open Water Diver requesting an upgrade, "it is recommended, though not required, that the diver complete a Scuba Review course." (Appx. 1 at 1-6.) The Court's reasoning is further understood by reviewing the transcript of the hearing on Gull's motion. Counsel for Hubbell argued "[Gull] should have required that he take the refresher course before they provided any equipment that they knew was going to be used by him. That's exactly what Maddox is saying. That's how that PADI standard is to be interpreted and applied to a retail dive shop." (Sept. 13, 2023, Hearing Transcript at 32:11-15,

filed March 14, 2024.) The Court responded: "I also am concerned that … [Maddox is] saying that [the written PADI standard] means something that it doesn't say[.]" (*Id.* at 32:16-18.)

Based on this reasoning, the Court did not abuse its discretion when it rejected, as unreliable, Maddox's opinions that Gull was subject to unidentified standards that contradict the admittedly applicable PRA "Requirements." Nor did it abuse its discretion when it determined "[t]he evidence before the Court establishes that [the PRA Membership Standards] are internationally recognized. Therefore, the PRA Membership Standards—not amorphous industry standards worldwide—are controlling." (Or. Granting MSJ at 10.) Indeed, at least one Court has "determine[d] that PADI's guidelines, recommendations, and requirements—contained for example in its training materials—establish what a reasonably prudent divemaster and rescue diver, should follow." *Hambrook v. Smith*, 2016 WL 4408991, at *29 (D. Haw. Aug. 17, 2016).

Notably, Hubbell changes legal theories on appeal by arguing "PRA Membership Standards have not been adopted by a governmental agency, so they do not have the force of law." (Principal Br. at 16.) Hubbell did not raise this argument before the District Court, and did not cite either *Lynch v. Reed*, 284 Mont. 321, 328, 944 P.2d 218, 223 (1997), *Runkle v. Burlington N.*, 188 Mont. 286, 304, 613 P.2d 982, 993 (1980), or the litany of out of state cases referenced on

pages 17 to 21 of the Principal Brief. Nor did Hubbell argue below that "proof of adherence to an industry practice or custom is not dispositive on the issue of negligence[.]" (Principal Br. at 19.) These arguments are not properly before the Court because "[a]n issue which is presented for the first time to the Supreme Court is untimely and cannot be considered on appeal." *Akhtar v. Van de Wetering*, 197 Mont. 205, 209, 642 P.2d 149, 152 (1982). Gull respectfully submits Hubbell should be limited to the same arguments and issues raised before the District Court. *See Ryffel Family P'ship, Ltd. v. Alpine Country Constr., Inc.*, 2016 MT 350, ¶ 24, 386 Mont. 165, 386 P.3d 971 ("We will not unfairly fault a trial court for failing to rule correctly on an issue that it was not asked to consider.")

What the Court should consider, however, is that Hubbell has not identified any caselaw supporting the proposition that an expert may offer opinions, based on personal experience, that directly contradict the written "requirements" a defendant "must" follow. Again, Maddox agrees Gull "was a member of the PADI Retailers Association and was subject to their policies and membership standards." (Maddox Rpt. at p. 11.) His opinions or interpretations that contradict these membership standards do not create a genuine issue of material fact for purposes of summary judgment. *Speer*, ¶ 24 (disagreement over the correct interpretation of facts does not create a genuine issue of material fact).

While Hubbell's arguments about expert interpretation of industry standards may apply in different cases, here, Maddox's opinions about the rental of compressed air are based on a field that is unreliable. Importantly, as part of its gate keeper role, a district court "must determine whether the [expert] field is reliable and whether the expert is qualified." *McClue*, ¶ 16. Here, the District Court acted within its discretion when it implicitly determined the field of "amorphous industry standards worldwide" is unreliable as applied to the issue of whether the PRA requirements controlled Gull's operations related to the rental of compressed air. (Or. Granting MSJ at p. 10.) Hubbell has not established that the "amorphous" standards Maddox proffers are reliable or applicable. Again, Maddox's opinions contradict the "requirements" in the PRA Standards and the PADI Guide. In the words of the District Court: "[Maddox is] saying that [the written PADI standard] means something that it doesn't say[.]" (Transcript at 32:16-18.) Neither Hubbel nor Maddox have identified any other authority besides the PRA requirements that control when a PADI Dive Shop may rent compressed air cylinders to scuba divers. And the other three major certification agencies (NAUI, SSI and SDI) do not have any standards addressing a PADI Dive Shop's rental of equipment. Maddox has not provided or identified any scuba dive shop materials, rules, or anything of substance beyond his beliefs that would require a dive shop to do anything beyond verifying a diver's certification before renting compressed air.

An expert opinion that is based upon speculative and conjectural evidence should be stricken upon a proper objection. *State v. Smith*, 141 Mont. 302, 308, 377 P.2d 352, 355 (1962). And opinions that are supported only by the expert's own beliefs, or *ipse dixit*, should not be permitted to prove a liability. *See State Highway Comm'n v. Biastoch Meats, Inc.*, 145 Mont. 261, 275, 400 P.2d 274, 281 (1965). Again, by invoking amorphous industry standards, Maddox impermissibly injects his own personal opinion to try and make the PRA Membership Standards say what they do not. The personal and speculative opinions of Maddox, which not only lack any supporting industry authority but overtly contradict the PRA Requirements and PADI Guide, were rejected within the discretion of the District Court. *See Cottrell v. Burlington N. R.R. Co.*, 261 Mont. 296, 303, 863 P.2d 381, 385 (1993) (speculative opinions are inadmissible as evidence); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) ("speculative testimony is inherently unreliable").

The weight of authority nationally provides that where an expert fails to identify any source of any industry standards or peer-reviewed or generally accepted methodology in the industry, the expert's opinions are no more than subjective belief or unsupported speculation and are inadmissible. *See Murray v. Marina Dist. Dev. Co.*, 311 F. App'x 521, 524 (3d Cir. 2008); *Grdinich v. Bradlees*, 187 F.R.D. 77, 81 (S.D.N.Y.1999) (rejecting expert testimony regarding

industry standards in part because of expert's inability to refer to written industry standards or guidelines); *Scrofani v. Stihl Inc.*, 44 Fed. Appx. 559, 562 (3d Cir.2002) (affirming district court's exclusion of expert testimony, explaining the expert's opinions were not "the product of reliable methods applied to the facts in a reliable manner" because the expert "employed absolutely no methodology at all, merely setting forth a series of unsubstantiated opinions.") (internal quotations omitted). Where there is a lack of "citations to any sources to form the basis for [an] opinion of the applicable industry standards," this may be grounds for finding the expert's opinions unreliable and inadmissible. *Halliday v. Cruise Ship Excursions, Inc.*, 2016 WL 6635157, at *11 (V.I. Super. Nov. 4, 2016). Moreover, an expert's purported "prominence in the [] industry does not entitle him to unilaterally convey the industry standard applicable" to the defendant's operations. *Id.* at *10.

Mr. Maddox's personal beliefs that Gull had the duty to "discern[] the diver's level of experience, knowledge, and capabilities before renting equipment to them" is unsupported by any authority. Mr. Maddox fails to explain under what circumstances this purported duty arises. He fails to explain or identify which dive shops are required to "discern" this information before renting out the equipment. Perhaps most importantly, Mr. Maddox fails to opine that attempting to discern this information is the responsibility for PADI authorized dive shops, like Gull, when

they are renting out equipment for use in a commercial operation like the one at issue. Indeed, Mr. Maddox fails to even acknowledge this was a commercial dive operation that was, in the opinion of Hubbell's prior expert, entirely controlled by former Defendants Putnam Partners and John Mues. (Rpt. of Gilliam at 16-19, Exh. A to Dkt. 101.) The Court should find Mr. Maddox's opinions do not create a genuine issue of material fact because they are based upon his personal beliefs and because they are not specific to a commercial dive operation like the one at issue here. The undefined field of "amorphous industry standards worldwide," which lacks any specific authority and contradicts the PRA requirements, is not reliable when applied to the issue of when a PADI dive shop may rent compressed air. *McClue*, ¶ 16. As such, the District Court acted within its discretion when it rejected Mr. Maddox's unreliable opinions that contradicted the PRA.

2. The District Court acted within its discretion by rejecting Maddox's opinions that were substantively different from those of the prior expert, Gilliam.

As discussed above, after it excluded Gilliam, the District Court allowed, over Gull's objection, Hubbell to disclose the opinions of Maddox. However, the District Court ruled: "Plaintiff may not seek to avoid summary judgment on any new bases. Further, to be clear, Plaintiff may not raise any new theories of any claim, and any opinion or testimony from Mr. Maddox that substantively differs from Mr. Gilliam's report will not be considered." (Dkt. 93 at p. 15.) In its Order

granting summary judgment, the District Court determined that Maddox's opinion that this was a recreational rather than commercial scuba dive was inadmissible because "it [was] a substantive departure from Mr. Gilliam's expert report and because the nature of the dive cannot be genuinely disputed given the evidence before the Court." (Or. Granting MSJ at 11, n.2.) While the District Court did not determine, one way or another, whether Maddox's other opinions substantively differed from those of Gilliam, Gull identified several opinions that did. (Dkt. 101 at 3-8.) Gull submits that, should this Court find Maddox's opinions raise a genuine issue of fact, the Court should then determine whether such opinions substantively differed from those of Gilliam and thus should "not be considered" based on the District Court's compromise ruling allowing Hubbell to disclose a new expert. (Dkt. 93 at p. 15.) In other words, this Court should determine, if necessary, that Maddox's opinions are inadmissible because they are substantively different from those of Gilliam, and thus do not raise a material issue of fact. *See Johnson Farms, Inc.*, ¶ 11 (if this Court "reach[es] the same conclusion as the district court, but on different grounds, [it] may affirm the district court's judgment.")

Hubbell's initial expert, Gilliam, summarized his opinion against Gull as follows:

> Gull Scuba Center, LLC breached the duty of care that it owed to Jesse Hubbell in a number of ways including the following:

> Failure by Gull Scuba Center to confirm Hubbell's scuba diving certification before allowing him to receive rental equipment and demonstrate any familiarity or competence in proper assembly. Gull Scuba Center, LLC knew that Jesse Hubbell was going to use the scuba equipment to dive and he is also the person who paid for the equipment rental. Gull Scuba Center, LLC was obligated to confirm that Jesse Hubbell held the necessary scuba certification before renting the equipment to him. When Jesse Hubbell failed to provide proof that he held the necessary scuba certification, Gull Scuba Center, LLC should not have rented scuba equipment to him.

(Rpt. of Gilliam, p. 18, Exh. C to Dkt. 63.) In summary, Gilliam opined Gull breached its duty of care by renting scuba equipment to Mr. Hubbell without checking for proof of certification or demonstrate any familiarity or competence in proper assembly. However, this opinion does not include Maddox's unreliable opinions that dive centers have the responsibility to "discern[] the diver's level of experience, knowledge, and capabilities before renting equipment to them." (Rpt. of Maddox at p. 16.) Maddox's opinions go beyond Gilliam's opinions by stating the following:

> 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. (Rpt. of Maddox at p. 3 (emphasis added).)
>
> ***
>
> 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*). (Rpt. of Maddox at p. 4 (emphasis added).)
>
> ***
>
> 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. (*Id.*)
>
> ***
>
> … indicating that *it is an industry standard* to seek out additional information before renting life support equipment. (*Id.* at p. 12.)
>
> ***
>
> *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. (*Id.* at p. 16.)

Because these go beyond Gilliam's report, the District Court properly excluded them in consideration of summary judgment.

Further, Maddox disregarded the actions of the former Defendants because Hubbell had already settled with and dismissed them. Gilliam opined that it was *all of* "The Defendants' reckless disregard for all diving industry standards of reasonable care for divers in all regards and their failure to have exercised even minimal 'situational awareness' and to have addressed foreseeable contingencies [that] was the direct and proximate cause of Jesse Hubbell's death." (Rpt. of Gilliam at p. 20.) Despite the District Court's order barring new theories of any claim and testimony that differs from Gilliam, Maddox did both by opining that it

was Gull's "rental of the equipment to Jesse Hubbell [that] led directly to his death." (Rpt. of Maddox at p. 16.) By disregarding the negligence of other parties, Maddox impermissibly created a new opinion/theory of the case in violation of the District Court's order.

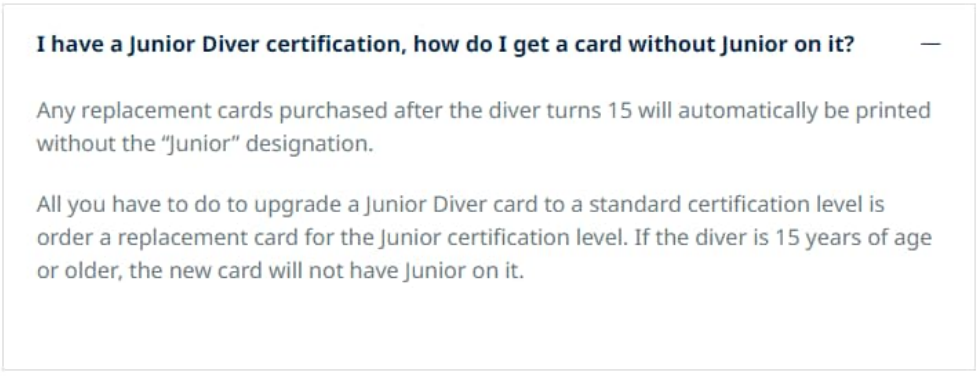
On appeal, Hubbell continues to claim the PADI standards required Gull to obtain "proof of recreational scuba certification by all divers participating in noninstructional recreational scuba dives." (Principal Br. at 5.) As noted above, the District Court ruled that "[c]ategorizing the dive as "recreational" as opposed to "commercial" is a departure from [Hubbell's] first expert's report." (Dkt. 105 at 11, n.2.) The Court thus determined "this argument is disregarded because it is a substantive departure from Mr. Gilliam's expert report and because the nature of the dive cannot be genuinely disputed given the evidence before the Court." (*Id.*)

Maddox also proffered new opinions in an affidavit submitted in response to Gull's Supplemental Brief in Support of Summary Judgment. (Aff. Maddox, Dkt. 100, July 31, 2023.) In the affidavit, he opined the risk of drowning can be prevented by the use of reasonable care. (*Id.*, ¶ 13.) Maddox added that Gull increased the risks to Hubbell and failed to adhere to industry standards by not taking basic precautions in renting or providing the equipment. (*Id.*, ¶ 14.) Again, Gilliam did not make the same opinions and they should not be considered in relation to whether there is a genuine issue of material fact.

B. The District Court did not err when it determined that Gull's rental of equipment was not the cause of Mr. Hubbell's death because he had a PADI certification that was "good for life" and he was diving with another certified diver, who rented the equipment.

1. *The accident was not caused by the rental of the equipment because Mr. Hubbell had the necessary PADI certification to rent equipment.*

It is undisputed that Jesse Hubbell had a Junior Open Water certification. It is also undisputed this certification was "good for life" and Mr. Hubbell understood this. (Depo. J. Mues at 112:10-20; 127:9-13.) Further, the PADI Guide states: "PADI Junior Open Water Divers may upgrade their certification level to PADI Open Water Diver when they reach age 15 **with no additional requirements**." (Appx. 1 at 1-6) (emphasis added). The old version of the PADI website states "Junior Open Water Divers automatically become Open Water Divers at age 15." (Depo. Gilliam at 80:7-25, Exh. H to Dkt. 63.) Further, the current version of the PADI website states a "Junior" Open Water certification automatically loses the "Junior" designation when a diver turns 15 and orders a replacement card.



https://www.padi.com/certification-cards (accessed July 8, 2024).

Hubbell also argues Gull should have required Mr. Hubbell to attend a refresher course before renting equipment, generally referencing the PRA Membership Standards. (Principal Br. at p. 25.) However, nothing in the PRA standards suggests a refresher course is necessary for a certified diver to rent equipment. On the contrary, the PADI Guide unequivocally contradicts Hubbell's argument that a refresher course was "required," as it states, "If more than one year has transpired since a student was certified as a Junior Open Water Diver … it is **recommended, though not required**, that the diver complete a Scuba Review course." (Appx. 1 at 1-6) (emphasis added.)

This is also consistent with the deposition of Hubbell's initial expert, Gilliam, who testified no refresher course is generally "required" in the industry to rent equipment. When asked about whether divers should take a refresher course, Gilliam testified: "Right now under the [Recreational Scuba Training Council], if you are issued an open water diving card, for instance, which would not have any age restrictions, meaning you would have to be 15 years or older, there -- it does not expire per se. You could hang onto that card forever and keep using it over and over again for whatever you might like to do. ***You can rent gear***, buy gear, ***get air fills, et cetera***, but it is not -- that's not what the diving industry would recommend." (Depo. Gilliam 166:19–167:3, Exh. I to Dkt. 69) (emphasis added.) When pressed on whether, when a diver like Mr. Hubbell takes the open water

diver course, “isn’t part of that course telling the newly minted divers that if you let a long passage of time go by before diving, you've got to refresh yourself?” Mr. Gilliam responded: “Actually, no. You would think that -- and I completely agree with you, sir, that would be the most logical way of doing it, but the diving industry has resisted over the years to adopt that type of protocol.” (*Id.* at 167:16-24.) Mr. Gilliam’s own testimony acknowledges that if Mr. Hubbell had been 15, instead of 14, when he took the open water scuba training course (which is the same regardless of whether the student is 14, 15, or older), then Mr. Hubbell would be qualified to rent equipment for the rest of his life without taking a refresher course.[6] According to Gilliam, the diving industry has resisted the type of protocol requiring certified divers to take a refresher course if they go a long time without diving. To the extent Maddox’s expert opinions are inconsistent with Gilliam’s testimony about refresher courses being mandatory, this Court should reject Maddox’s opinions, because the District Court prohibited Hubbell from “seek[ing] to avoid summary judgment on any new bases[,]” and ruled “any opinion or testimony from Mr. Maddox that substantively differs from Mr. Gilliam’s report will not be considered.” (Dkt. 93 at p. 15.)

[6] Again, Mr. Gilliam’s entire opinion was premised upon checking the certification (Rpt. of Gilliam, p. 18, Exh. C to Dkt. 63). The District Court acted within its discretion in rejecting any new, alternative, or contradictory theories and opinions proffered by Maddox.

When considering Gilliam's testimony, the only possible dispute regarding whether a refresher course was necessary is whether a diver with a Junior Open Water certification must take a refresher course. However, such a dispute would not be genuine because the PADI Guide unequivocally states such a course is only "recommended, though not required." (Appx. 1 at 1-6.)

Despite these undisputed facts, including Mr. Hubbell's own confirmation that his certification was "good for life," Hubbell continues to argue Mr. Hubbell was not certified to rent equipment from Gull and a refresher course was necessary. (Principal Br. at p. 24.) However, neither Hubbell nor Maddox have identified any actual authority from PADI, or any other scuba diving authority, contradicting the PADI Guide. As such, Maddox's purported opinions to the contrary are not based upon a reliable field of expertise, and they should not be considered. *McClue*, ¶ 16 (court must determine whether the expert field is reliable). As there is no other verifiable authority that contradicts Mr. Hubbell's own confirmation he was certified "for life," the PADI standards should control, and there is no "genuine dispute" over the interpretation of these provisions. *Speer*, ¶ 24 (disagreements over the interpretation of facts does not create a genuine issue of material fact).

In the hearing, the District Court compared the alleged lack of verifying Mr. Hubbell's certification to a situation where a gas station attendant does not check the ID of a friend who is accompanying a person of legal age who is purchasing

alcohol, when the friend is also of legal age. The Court inquired: "Let's go to the no harm, no foul argument. So they have the passenger come in and the passenger is . . . in fact actually 21. What's the problem? Like right here if, you know, he had run Mr. Hubbell's certification, he actually did have a certification. So what did they do wrong." (Sept. 13, 2023, Hearing Transcript at 32:4-10.) This is the crux of the case—Hubbell was certified to rent equipment, so the rental of the equipment cannot be the cause of the accident.

"Though causation generally is a question of fact, 'it may be determined as a matter of law where reasonable minds can reach only one conclusion regarding causation.'" *Young*, ¶ 24 (quoting *Wood*, 286 Mont. at 30, 952 P.2d at 1383). As the District Court ruled, "the evidence … establishes that Mr. Hubbell was eligible to rent equipment. Therefore, 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 the PRA Membership Standards—did not cause Mr. Hubbell's death." (Dkt. 105 at 12-13).

2. Gull did not cause the accident because it rented scuba diving gear to Mues, a certified Advanced Diver, who was diving with Mr. Hubbell.

Even if Mr. Hubbell was not qualified on his own to rent air cylinders with his Open Water certification, which he was, it is undisputed he was still qualified to use the equipment rented to Mues, since Mues was a certified diver over the age of

18. Even according to Maddox, "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." (Principal Br. at 8.) It is undisputed Mr. Hubbell was "div[ing] with a certified diver over the age of 18" when he was accompanying Mues, who held an advanced diver certification. The PADI Guide states: "A Junior Open Water Diver is qualified to dive only when accompanied by another certified diver who is of legal age. Legal age is defined as an individual who is at least 18 years of age." (Appx. 1 at p.1-6.) Assuming *arguendo* that Mr. Hubbell's Junior certification did not automatically transition when he turned 15 (which it did), he simply needed to be accompanied by a certified diver of legal age to rent from Gull. Mues was undisputedly a certified diver of legal age, and there is no question he was accompanying Mr. Hubbell. It was thus appropriate, under both the PADI Guide and the opinion of Maddox, to rent the equipment to Mues for the use of Mr. Hubbell and Mues.

Hubbell and Maddox still do not address the separate dispositive issue that PADI allows a Junior Open Water Diver to rent equipment and dive "when accompanied by another certified diver who is of legal age." *See* Doc. 98 at 11. There is no genuine dispute that it was appropriate to rent equipment to Mues for Mr. Hubbell's use because he was accompanied by Mues, a certified Advanced Diver of legal age.

Despite this, Hubbell continues to erroneously claim, based on unidentified standards, Chris Hanson would not have rented equipment if he had verified Mr. Hubbell's certification online. (Principal Br. at p. 24.) However, Hanson never testified he would have refused to rent Hubbell the equipment, just that he would have offered a refresher course. (Depo. C. Hanson at 30:6-11, Exh. H to Dkt. 70.) Hubbell cannot create a genuine issue of fact by speculating Hanson may have not rented the equipment if he knew Mr. Hubbell had a Junior certification. *See Speer*, ¶ 17 (opposing party must by more than mere denial or speculation set out specific facts showing the existence of a material fact).

There is no genuine dispute that, in one way or another, it was appropriate for Gull to furnish the scuba diving equipment for Mr. Hubbell to use with Mues. Therefore, the rental of the equipment to Mues to be used by Mr. Hubbell was not, as a matter of law, the cause of the accident. *Young*, ¶ 24 (causation may be determined "as a matter of law where reasonable minds can reach only one conclusion regarding causation").

C. Hubbell's claims against Gull are barred by Montana's Recreation Responsibility Act because Mr. Hubbell's accidental drowning death was a risk that was characteristic and intrinsic to scuba diving.

The Montana legislature has immunized providers of sports and recreational activities from liability for accidents caused by the "inherent risks" of those activities. The legislature defined this term as "those dangers or conditions that are

characteristic of, intrinsic to, or an integral part of any sport or recreational activity and that cannot be prevented by the use of reasonable care." Mont. Code Ann. § 27-1-752(2). By voluntarily participating in scuba diving, Mr. Hubbell accepted the legal responsibility for any injury or death resulting from the inherent risks involved with the dive.[7]

The Act limits liability for injuries resulting from risks inherent to a recreational activity, such as scuba diving. The Act's "limitation on liability" includes the following key provisions:

> (1) A person who participates in any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity, whether those risks are known or unknown, and is legally responsible for all injury or death to the person and for all damage to the person's property that result from the inherent risks in that sport or recreational opportunity
>
> ***
>
> (3) (a) Sections 27-1-751 through 27-1-754 do not preclude an action based on the negligence of the provider if the injury, death, or damage is not the result of an inherent risk of the sport or recreational opportunity.

[7] While the District Court did not address this issue because it correctly determined that causation could not be established as a matter of law, it was not necessary for Gull to cross-appeal this issue and it is properly before the court. *See Nasca v. Hull*, 2004 MT 306, 323 Mont. 484, 100 P.3d 997 ("[as a] general rule … a cross-appeal is not necessary" for the prevailing party to defend itself on appeal with arguments properly raised below despite those arguments not being considered below.) (citation omitted); *Missoula Rural Fire Dist. v. Missoula Cnty.*, 222 Mont. 178, 183, 720 P.2d 1170, 1173 (1986) (The Montana Supreme Court has also previously stated that "where the conclusion of the District Court is correct, it is immaterial, for the purpose of affirmance on appeal, what reasons the District Court gives for its conclusion.") (citation omitted).

Mont. Code Ann. § 27-1-753 (emphasis added). In Montana, recreationalists assume the risk of injury from the risks inherent in a recreational activity. Under the Act, legal actions are barred for accidents arising from such activity unless the alleged injury was not the result of a risk inherent in the activity. However, if a participant's injury results from an inherent risk, the participant is "legally responsible" for their own injury or death. Here, Hubbell does not allege Gull is liable for providing inadequate or malfunctioning scuba equipment leading to the accident. (*See generally* Rpt. of Maddox.)

"Inherent risks" are "those dangers or conditions that are characteristic of, intrinsic to, or an integral part of any sport or recreational activity and that cannot be prevented by the use of reasonable care." Mont. Code Ann. § 27-1-752(2). "Provider" means "a person, corporation, partnership, or other business entity … that promotes, offers, or conducts a sport or recreational opportunity for profit or otherwise." § 27-1-752(3). Because Gull promoted and offered sporting opportunities, they are a Provider. And "Sport or recreational opportunity" means "any sporting activity, whether undertaken with or without permission" as well as "any similar recreational activity." § 27-1-752(4). It is clear the legislature defined "Sport or recreational opportunity" within the Act to be as broad as possible. Scuba diving is the type of sport or recreational activity clearly covered by the Act.

Under the Act, inherent risk corresponds to the duty element of negligence claims. § 27-1-753(2) ("a provider is not required to eliminate, alter, or control the inherent risks"). Whether a legal duty is owed by one person to another, and the scope of such a duty, are questions of law. *Poole ex rel. Meyer v. Poole*, 2000 MT 117, ¶ 19, 299 Mont. 435, 1 P.3d 936 (citation omitted). And as this Court has made clear, "in the absence of duty, there is no negligence." *Id.*, ¶ 20.

Unlike Montana's Skier Responsibility Act, Mont. Code Ann. § 23-2-733 *et seq.*, which codifies a non-exhaustive list of risks inherent in the sport of snow skiing, the Act does not list the inherent risks of the activities defined as "Sport or recreational opportunity" in § 27-1-752(4). However, the fact that inherent risks are those "that cannot be prevented by the use of reasonable care," § 27-1-752(2), further insulates Gull here. As Hubbell alleged in the Complaint, the other original named Defendants were responsible for controlling the dive. (Dkt. 1, Compl., ¶¶ 18-19, 22.) Gull could not have prevented the risks associated with the dive because the dive was controlled by other parties, not Gull.

This Court has not yet interpreted the Act since it was enacted, however, the Supreme Court of California has recognized "judges deciding inherent risk questions … may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published

materials, and documentary evidence introduced by the parties on a motion for summary judgment." *Nalwa v. Cedar Fair, L.P.*, 55 Cal.4th 1148, 1158 (Cal. 2012).

Further, several other states have recreation statutes similar to the Act. For example, the Tenth Circuit Court of Appeals, interpreting a Wyoming law in a case involving whether a loose saddle was an inherent risk of horseback riding, noted an inherent risk "is an undesirable risk which is simply a collateral part of the sport." *Cooperman v. David*, 214 F.3d 1162, 1168 (10th Cir. 2000). And the Supreme Court of California has held "white water rafting has certain inherent risks. For example, violent movement of the raft while traversing rapids can cause the raft to overturn or the occupants to be thrown into the water where they risk striking rocks or even drowning. The risk of being thrown involuntarily about inside the raft and colliding with objects or people therein is also an inherent part of the activity." *Ferrari v. Grand Canyon Dories*, 32 Cal. App. 4th 248, 253-54 (1995).

In *Hewitt v. Miller*, Hewitt was in an advanced scuba diving class when he disappeared beneath the surface of Puget Sound. 521 P.2d 244 (Wash. Ct. App. 1974). The release signed by Hewitt provided that Hewitt assumed "all risks in connection with said course." *Id.* at 248. The Court of Appeals of Washington affirmed summary judgment for the defendant, recognizing "the failure of a diver to surface is obviously an inherent danger of the sport of scuba diving." *Id.* at 249. Here, Mr. Hubbell's death was caused by a risk inherent in scuba diving. As such,

summary judgment was properly granted to Gull because Hubbell's negligence claim fails as a matter of law under the Act.

VII. CONCLUSION

The District Court has a duty to determine whether an expert's proffered field is reliable and is within its discretion in excluding expert testimony based on an unreliable field. Here, the Court properly disregarded the unsupported, inherently unreliable field of "amorphous" industry standards worldwide, which contradicted the PADI requirements that controlled Gull's operations. Gull complied with PADI as it rented the equipment to John Mues. Even so, because his certification was "good for life" just like he said, Jesse Hubbell was independently qualified to rent. Any dive shop was allowed to rent to Mr. Hubbell and Mues. Even if Mr. Hubbell rented from another shop, this would not have altered how he put together the scuba equipment. Therefore, Gull could not have been the cause of Mr. Hubbell's drowning. As there are no genuine issues of material fact regarding causation, the District Court correctly granted summary judgment to Gull.

DATED this 15th day of July, 2024.

/s/ Susan Moriarity Miltko
Susan Moriarity Miltko, Esq.
Attorney for Defendant / Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Response Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and quoted, indented material, and the word count calculated by Microsoft Word 2016 complies with the 10,000-word limit in that it consists of 9,937 words, excluding the Cover, Table of Content, Table of Authorities, and Certificate of Compliance.

/s/ Susan Moriarity Miltko
Susan Moriarity Miltko, Esq.
Attorney for Defendant / Appellee

APPENDIX INDEX

Appx.	Description
1	Excerpts from PADI Course Instructor Guide (Depo. Exh. 191, Exh H to Dkt. 63), pp. 1 and 1-6.
2	Excerpts from PADI Retailer Association Standards (Depo. Exh. 188, Exh. E to Dkt. 63), pp. 1, 7, and 13–14.

CERTIFICATE OF SERVICE

I, Susan Moriarity Miltko, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-15-2024:

Joseph Ray Casillas (Attorney)
201 West Main Street
Suite 201
Missoula MT 59802
Representing: Ellen Hubbell, Personal Representative, ELLEN HUBBELL
Service Method: eService

Molly K. Howard (Attorney)
201 W Main, Ste 201
Missoula MT 59802
Representing: Ellen Hubbell, Personal Representative, ELLEN HUBBELL
Service Method: eService

Electronically signed by Shea Mann on behalf of Susan Moriarity Miltko
Dated: 07-15-2024