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' REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

STATUTES

RULES

Hubbell appealed the District Court's erroneous dismissal of her claims against Gull. Gull's Response Brief was filed and docketed on July 15, 2024. Hubbell now respectfully replies pursuant to M. R. App. P. 12(3). For the reasons discussed in Hubbell's Principal Brief and herein, the District Court's decision should be reversed.

I. REPLY ARGUMENT

A. PRA Membership Standards are non-exclusive.

Hubbell correctly argues in her Principal Brief that, "PRA Membership Standards have not been adopted by a governmental agency, so they do not have the force of law." Gull did not address this argument on the merits, instead urging the Court to simply ignore it because Hubbell allegedly failed to preserve the issue in District Court. (Gull Response, pp. 21-22). Gull is incorrect. While the general rule in Montana is that issues not raised before the trial court and new legal theories will not be considered for the first time on appeal because it is unfair to raise issues on appeal that the trial court was never given an opportunity to consider (*State v. Montgomery*, 2010 MT 193, ¶ 11, 357 Mont. 348, 239 P.3d 929), it is well-settled that the parties are permitted to bolster their preserved issues with additional legal authority or to make further arguments within the scope of the legal theory articulated to the trial court. *Montgomery*, ¶ 12. *See also*, *e.g.*, *Becker v. Rosebud*

Operating Servs., 2008 MT 285, ¶ 18, 345 Mont. 368, 191 P.3d 435; *Whitehorn v. Whitehorn Farms, Inc.*, 2008 MT 361, ¶ 23, 346 Mont. 394, 195 P.3d 836.

In *Wicklund v. Sundheim*, 2016 MT 62, 383 Mont. 1, 367 P.3d 403, Sundheims argued the Court should not consider Teisingers' argument for application of § 70-1-516, M.C.A., because they never presented argument regarding rules of construction in District Court.[1] *Id.*, ¶ 24. The Court considered the applicability of the statute notwithstanding Sundheims' argument because Teisingers argued in District Court that it should resolve the deed's ambiguity in their favor. *Id.*, ¶ 26. The Court explained that "[w]hile Teisingers did not cite § 70-1-516, M.C.A. [in District Court], the statute is additional authority that supports their legal theory." *Id.*

The same goes here. Gull is critical of Hubbell for not citing in District Court "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." (Gull Response, pp. 21-22). But like *Wicklund*, these cases are additional authority that support the theory presented by Hubbell in the District Court.

Indeed, Hubbell argued in District Court that PRA Membership Standards are non-exclusive. (Doc. 99, pp. 10-15). "Gull's expert does not get to unilaterally

[1] However, unlike Gull, Sundheims alternatively addressed the issue on the merits in their appellate brief, arguing Teisingers misinterpreted the statute. *Id.*, ¶ 24.

decide which standards prevail or control over others. Maddox is qualified to opine on industry standards, including those beyond PADI." (Doc. 99, p. 12). Any disputes as to the lack of Maddox's textual authority for his opinions on industry standards go to the weight, not the admissibility, of his testimony. (Doc. 99, p. 13) (citing *Spearman Corp. v. Boeing Co.*, 2022 U.S. Dist. LEXIS 185703, *11 (W.D. Wash. October 11, 2022)). Hubbell's position has been consistent all along – e.g., customary methods of conduct such as those provided for in PRA Membership Standards 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. *See Ganz v. United States Cycling Federation*, 273 Mont. 360, 903 P.2d 212 (1995). Hubbell is free to bolster a duly preserved issue with additional legal authority, including *Lynch* and *Runkle*, to make further arguments that fall within the scope of a theory sufficiently articulated in District Court.

Gull's failure to respond on the merits is fatal. Under M. R. App. 23, the Court is not obligated to develop arguments on behalf of parties to an appeal, nor is it to guess a party's precise position, or develop legal analysis that may lend support to his position. *McCulley v. Am. Land Title Co.*, 2013 MT 89, ¶ 20, 369 Mont. 433, 300 P.3d 679 (citing *Botz v. Bridger Canyon Planning & Zoning Comm'n*, 2012 MT 262, ¶ 46, 367 Mont. 47, 289 P.3d 180; *Estate of Bayers*, 1999 MT 154, ¶ 19, 295 Mont. 89, 983 P.2d 339).

Because Gull fails to develop any substantive legal argument, authority, or analysis of its position that PRA Membership Standards are somehow exclusively controlling of the issue of negligence, the Court should not give it any weight. Gull has not, and simply cannot, show that PRA Membership Standards have been adopted by any governmental agency so as to have the force of law. Ergo, even if Gull hypothetically complied with PRA Membership Standards – an issue the parties' experts strongly disagree about[2] – Gull could still be found negligent by the jury. Gull's alleged compliance with PRA Membership Standards is merely one of the factors to be considered in determining whether or not ordinary care was exercised. This is by far the most important issue on appeal. Gull did not provide a substantive response or even attempt to distinguish the controlling cases cited by Hubbell, which is quite telling.

B. Maddox's field is reliable.

Gull argues the District Court properly rejected Maddox's testimony because it is based on an unreliable field. Gull's argument misses the mark.

[2] Among other things, it is significant to note that even the PADI Standards referenced by Gull recommend that a Junior Open Water Diver take a Scuba Review course when seeking to upgrade to an Open Water Diver certification more than one year after obtaining a Junior Open Water Diver certification, suggesting that a jury could find that the exercise of reasonable care warrants action ensuring that the diver has familiarity with both Scuba diving procedures and current Scuba equipment before an upgrade is issued. (*See* Junior Open Water Diver Certification Procedures set forth in Gull's Response Brief, p. 5).

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As noted previously, the general rule in Montana is that this Court will not address either an issue raised for the first time on appeal or a party's change in legal theory. *Day v. Payne*, 280 Mont. 273, 276, 929 P.2d 864, 866 (1996). The basis for the general rule is that, "it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Day*, 280 Mont. at 276-77, 929 P.2d at 866.

M. R. Evid. 702 requires testing an expert's reliability against "(1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts." *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489. Under Rule 702, the District Court needed simply to determine "whether the expert field is reliable" and "whether the expert is qualified," leaving to the jury "whether the qualified expert reliably applied the reliable field to the facts." *Harris v. Hanson*, 2009 MT 13, ¶ 36, 349 Mont. 29, 201 P.3d 151.

Gull did not challenge Maddox's qualifications or otherwise move *in limine* to exclude his testimony on grounds that his field is unreliable. Maddox was deemed qualified, and his testimony based on the results of his examination of the facts is admissible – even if that evidence is challenged at trial. *Harris*, ¶ 36. The Court should not address Gull's "reliability" argument for the first time on appeal. Reliability is not a basis upon which the District Court granted summary judgment.

(Doc. 105). The District Court's Order is devoid of any discussion about Maddox's qualifications or whether his field is reliable.[3]

Gull's argument also fails on the merits. A "field" of expertise is "an area, category, or division wherein a particular activity or pursuit is carried out." *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 25, 380 Mont. 204, 354 P.3d 604. Maddox has "extensive knowledge, training, experience, and expertise" from "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." (Doc. 100, p. 4). Like *Harris*, whether Maddox "gathered and examined sufficient facts, and correctly applied the facts to reach his opinions, [is] a question for the jury to decide after cross-examination, presentation of contrary evidence, and application of the law." *Harris*, ¶ 37.

Regardless, Gull should be judicially estopped from raising a "reliability" argument. *See Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 15, 307 Mont. 45, 36 P.3d 408 ("The fundamental purpose of judicial estoppel is to protect the integrity of the judicial system and thus to estop a party from playing 'fast and loose' with the court system."). Arguing that Maddox's field is unreliable forces Gull to take

[3] Similarly, alleged differences between Maddox's and Gilliam's expert testimony were not material to the District Court's decision. (Doc. 105).

inconsistent positions. Though he applies the reliable field (e.g., commercial diving) to the facts differently and ultimately reaches different conclusions, Gull's own expert, Pehl, offers testimony regarding the very same issues – standard of care, breach, and causation – as Maddox. By offering Pehl's testimony in District Court, Gull admits its "reliability" argument is unfounded. How can Pehl's field be reliable but not Maddox's when their respective fields are the same? Gull should be bound by its admission. *See Bilesky v. Shopko Stores Operating Co.*, 2014 MT 300, ¶ 12, 377 Mont. 58, 338 P.3d 76 ("Judicial admissions have the effect of stipulations, and were previously referred to as such.").

At the summary judgment stage, "the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Fasch v. M.K. Weeden Constr., Inc.*, 2011 MT 258, ¶ 17, 362 Mont. 256, 262 P.3d 1117. The jury is the sole arbiter of the relative weight, credibility, and persuasiveness of evidence, including expert and non-expert testimony. *State v. Sanchez*, 2017 MT 192, ¶ 19, 388 Mont. 262, 399 P.3d 886. The District Court improperly declared the winner of a classic "battle of the experts" on summary judgment thereby depriving Hubbell of her right to a jury trial.

C. Causation cannot be determined as a question of law.

Gull argues causation was properly determined as a matter of law because Hubbell was "eligible to rent equipment." (Gull Response, pp. 31-35). Gull's argument should be rejected.

Gull criticizes Maddox's causation opinion for disregarding the actions of the former Defendants with whom Hubbell has settled. (Gull Response, p. 29). But this is a question of fact for the jury to decide. *See Lawlor v. County of Flathead*, 177 Mont. 508, 514, 582 P.2d 751, 755 (1978) (quoting *Suhr v. Sears Roebuck Company*, 152 Mont. 344, 348-49, 450 P.2d 87, 89-90 (1969)); *see also Fisher v. Swift Transp. Co.*, 2008 MT 105, 342 Mont. 335, 181 P.3d 601 (held: District Court erred in determining an injury was unforeseeable and therefore erred in granting transportation company summary judgment because reasonable minds could differ as to whether the injury was a foreseeable result of the driver's negligence or whether it was caused by the tow truck operator).

Gull claims that even if it was negligent in providing scuba equipment for Hubbell to use, the chain of causation was severed by an independent, intervening cause – e.g., the negligence of the settled parties and Jesse Hubbell himself. This invokes a two-tiered analysis. First, whether Gull's negligent act was a cause-in-fact of Hubbell's injury. Second, whether Gull's act was a proximate cause of Hubbell's injury. To establish proximate cause, Hubbell must show it was Gull's breach which

foreseeably and substantially caused his injury. *Fisher*, ¶ 39. Like here, where a dispute presents the issue of an intervening act of a third party, we address foreseeability in the proximate cause context instead of confining it to the duty element. *Id*. (citing *Estate of Strever v. Cline*, 278 Mont. 165, 175, 924 P.2d 666, 672 (1996); *Prindel v. Ravalli County*, 2006 MT 62, ¶ 44, 331 Mont. 338, 133 P.3d 165). "The issue of whether an intervening cause was foreseeable or not is a question of fact that is normally properly left to the fact-finder for resolution." *Fisher*, ¶ 42 (citing *Prindel*, ¶ 45).

The District Court erred in determining causation as a matter of law. Reasonable minds could differ as to whether Hubbell's death was a foreseeable result of Gull's negligence or whether it was caused by the settled parties and/or Jesse Hubbell, who will all be on the verdict form. But for Gull providing scuba equipment for Hubbell to use, he would not have died. *See Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139 (1996). A reasonable jury could conclude Gull's negligence was a substantial factor in bringing about Hubbell's tragic death. *See Rudeck v. Wright*, 218 Mont. 41, 54, 709 P.2d 621, 629 (1985).

D. The Montana Recreation Responsibility Act is inapplicable.

Gull argues Hubbell's claims are barred by Montana's Recreation Responsibility Act ("MRRA"). (Gull's Response Brief, pp. 37-42). Gull's argument is unavailing for several reasons.

First, it is well-established that the appellate court will not address issues on appeal that were either not properly raised in the District Court *or* "*that the [D]istrict [C]ourt does not address in its order*." *LHC, Inc. v. Alvarez*, 2007 MT 123, ¶ 20, 290 Mont. 460, 963 P.2d 1279 (1998) (emphasis added) (citing *Nason v. Leistiko*, 1998 MT 217, 290 Mont. 460, 963 P.2d 1279; *Marsh v. Overland*, 274 Mont. 21, 29, 905 P.2d 1088, 1093 (1995)); *see also Wilkes v. State*, 2015 MT 243, ¶¶ 15-16, 380 Mont. 388, 355 P.3d 755 ("The District Court has not had the opportunity to address Wilkes's claim according to this standard, and we will not address the claim here…As such, we will not hold that the District Court's failure to adequately address Wilkes's claim was harmless."); *Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411, 428 (1995).

The District Court's Order Granting Gull's Motion for Summary Judgment (Doc. 105) is devoid of discussion about the MRRA issue. The District Court erroneously granted Gull's motion solely on the purported basis that Gull did not breach a duty or cause Hubbell's damages as a matter of law. (Doc. 105, p. 14). It would be "fundamentally unfair" to deny Hubbell appellate relief based upon an argument which the District Court failed to consider. *City of Missoula v. Williams*, 2017 MT 282, ¶ 26, 389 Mont. 303, 406 P.3d 8.

Second, Gull's argument fails on the merits. "In the construction of a statute, the intention of the legislature is to be pursued, if possible." *State v. Alpine Aviation*,

Inc., 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035 (citing § 1-2-102, M.C.A.). "[L]egislative intent is to be ascertained, in the first instance, from the plain meaning of the words used" by the legislature. *Alpine Aviation*, ¶ 11 (quoting *W. Energy Co. v. Dep't of Revenue*, 1999 MT 289, ¶ 11, 297 Mont. 55, 990 P.2d 767).

The MRRA does not apply to Hubbell's claim even if Gull was a "Provider" as defined in § 27-1-752(3), M.C.A.[4] "Sections 27-1-751 through 27-1-754 do not apply to a cause of action based on the design, manufacture, *provision*, or maintenance of sports or recreational equipment or products or safety equipment used incidental to or required by the sport or recreational activity." § 27-1-753, M.C.A. (emphasis added). The MRRA does not define "provision," so the Court must implement the intent of the legislature by looking to the plain meaning of the words used. *MM&I, LLC v. Bd. of Co. Commrs. of Gallatin Co.*, 2010 MT 274, ¶ 44, 358 Mont. 420, 246 P.3d 1029. In discerning the plain meaning, the words used shall be reasonably and logically interpreted, to give them their usual and ordinary meaning. *Id.* "Provision" as a noun means the act or process of providing. "Provision" as a verb means to supply with needed materials. *Merriam-Webster Dictionary*. Hubbell's claim is based on Gull's "provision" of scuba equipment

[4] "Provider" means a person, corporation, partnership, or other business entity, including a governmental entity as defined in § 2-9-111, M.C.A., that promotes, offers, or conducts a sport or recreational opportunity for profit or otherwise. Gull does not meet this definition given the facts of this case.

incidental to or required by the diving activity itself, which Gull did not promote, offer, or conduct.

Finally, even if the MRRA hypothetically applied, there are genuine issues of material fact that preclude summary judgment for Gull. (Doc. 99, pp. 16-19). Like *McJunkin v. Yeager*, 2018 U.S. Dist. LEXIS 169321 (D. Mont. September 28, 2018), the determination of whether Hubbell's drowning resulted from an inherent risk of scuba diving is not appropriate for summary judgment. *McJunkin*, ¶ 15. The determination of whether a risk is an inherent risk is generally a factual determination for the jury to decide. *Id.* (citing *Mead v. M.S.B., Inc*., 264 Mont. 465, 872 P.2d 782, 788-89 (Mont. 1994) (holding whether an inherent risk had been established under the Skier Responsibility Act was a question of fact to be resolved by the trier of fact); *Cooperman v. David*, 214 F.3d 1162, 1169 (10th Cir. 2000) (noting the question of what is an inherent risk is normally a question of fact for the jury); *Halpern v. Wheeldon*, 890 P.2d 562, 566 (Wyo. 1995) ("when genuine issues of material fact exist, it is proper to present the issue to the jury of whether a risk is inherent to a particular activity.")).[5]

[5] When *Halpern* was decided, the Wyoming Act's definition of inherent risk was similar to the MRRA. It was defined as "any risk that is characteristic of or intrinsic to any sport or recreational opportunity *and which cannot reasonably be eliminated, altered or controlled*." *Halpern*, 890 P.2d at 564 (emphasis supplied). The italicized language in the definition was later removed by the Wyoming legislature.

II. CONCLUSION

Montana courts have long recognized that the summary judgment procedure is in derogation of the right to trial by jury. The case law interpretation of the rule reflects that principle, and it has been held that summary judgment is a drastic remedy which must be cautiously administered.

The District Court erred in going beyond determining whether material factual issues exist to actually resolving those issues. Summary judgment should not have been granted because there are facts in dispute, conflicting inferences may be drawn from the evidence, and there are issues of credibility. The District Court failed to view the evidence submitted in the light most favorable to Hubbell as the party opposing the Rule 56 motion. The District Court's decision should be reversed.

DATED this 29th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rule of Appellate Procedure 11(4)(e), I certify that this Reply 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 3,171 words, excluding Table of Contents, Certificate of Service and Certificate of Compliance.

DATED this 29th day of July, 2024.

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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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