DA 24-0025

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 247

ELLEN HUBBELL, INDIVIDUALLY and as PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE HUBBELL,

Plaintiff and Appellant,

v.

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

Defendant and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-32-2020-810
Honorable Jason Marks, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Molly K. Howard, J.R. Casillas, Datsopoulos, MacDonald & Lind, P.C., Missoula, Montana

For Appellee:

Susan Moriarity Miltko, Williams Law Firm, P.C. Missoula, Montana

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Submitted on Briefs: October 9, 2024

Decided: October 29, 2024

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Ellen Hubbell ("Ellen") appeals from the Fourth Judicial District Court, Missoula County's December 12, 2023 Order Granting Defendant Gull Scuba Center's ("Gull") Motion for Summary Judgment. Ellen appeals the District Court's determination that there was no dispute of material fact as to Gull's liability for her husband Jesse Hubbell's ("Jesse"), death.

¶2 We restate the issues on appeal as follows:[1]

Issue 1: Whether the District Court abused its discretion by relying on the PRA Membership Standards to establish Gull's duty to Jesse.

Issue 2: Whether the District Court abused its discretion by excluding the industry standard opinion of Thomas Maddox.

Issue 3: Whether the District Court erred when it determined that Gull's failure to check Jesse's certification did not cause his death.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In 2019, Jesse was hired to film a scuba-diving campaign advertisement for John Mues's U.S. Senate campaign. On June 14, 2019, Mues and Jesse traveled to Missoula to rent scuba gear for the shoot from Gull. Gull's scuba instructor, Chris Hanson, asked both men for their diving certification cards in keeping with Professional Association of Diving Instructors ("PADI") regulations. Mues provided his "Advanced Diver" certification,

[1] Gull also argues that Ellen's claims are barred by Montana's Recreation Responsibility Act. Because we hold that the District Court properly granted Gull's motion for summary judgment on other grounds, we do not address this argument.

which qualified him to rent scuba gear. Jesse told Hanson that he did not have his card with him, but that he was PADI certified, and his certification could be verified online.

¶4 Hanson could not recall whether he verified Jesse's certification online, but it is undisputed that the online system would have confirmed that Jesse had a "Junior Open Water Diver" certification. Hanson rented two sets of scuba gear to Mues. While attempting to film the campaign advertisement three days later, Jesse drowned using the rented scuba gear during a dive with Mues at Canyon Ferry Lake.

¶5 Ellen, on her own behalf and as Personal Representative of Jesse's Estate, sued several defendants, including the companies that had hired Jesse to shoot the advertisement, Mues, Gull, and several unnamed defendants. The claims pertaining to Mues and the companies that hired Jesse were dismissed after settlement. Gull, the only remaining named defendant, faced four counts, which alleged it had acted negligently by renting the equipment to Mues and Jesse without properly verifying Jesse's certification: Negligence (Survival), Negligence (Wrongful Death), Negligent Infliction of Emotional Distress, and Intentional Infliction of Emotional Distress.

¶6 Gull moved for summary judgment on June 30, 2022. Ellen responded on July 25, 2022. On October 24, 2022, Ellen moved for an amended scheduling order based on the District Court's exclusion of her first expert, Brett Gilliam. The District Court amended the scheduling order pursuant to M. R. Civ. P. 16(b)(4) to allow Ellen to retain a new expert, Tom Maddox, but cautioned that Ellen could not "raise any new theories of any

claim, and any opinion or testimony from [Maddox] that substantively differ[ed] from Gilliam's report [would] not be considered."

¶7 On December 12, 2023, the District Court granted Gull's Motion for Summary Judgment. In its order, the District Court (1) excluded Maddox's assertion that the applicable industry standard required Gull to assess Jesse's capabilities before renting him equipment; (2) held that the applicable industry standard was found in the PADI Retailer Association ("PRA") Membership Standards; (3) found that there was a "material dispute as to whether Gull breached PRA Membership Standards when it rented equipment to . . . Mues for both himself and" Jesse without checking Jesse's certification; and (4) found that there was no dispute that any breach was not the cause of Jesse's death because the parties did not dispute that when Jesse turned 15 his Junior Open Water Diver certification automatically became an Open Water Diver certification, and he would have been able to rent equipment even if Gull had checked his certification.

STANDARD OF REVIEW

¶8 We review an entry of summary judgment de novo. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604 (citing *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704). Summary judgment is appropriate when the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *McClue*, ¶ 8. This determination is based on "facts that would be admissible in evidence," M. R. Civ. P. 56(e)(1), viewed in the light most

favorable to the non-moving party, *McClue*, ¶ 8 (citing *Malpeli v. State*, 2012 MT 181, ¶ 12, 366 Mont. 69, 285 P.3d 509).

¶9 When reviewing an entry of summary judgment, we review rulings regarding evidence for an abuse of discretion except "[t]o the extent that the . . . ruling is based purely on an interpretation of the evidentiary rules," which we review "like any other question of law, for correctness." *McClue*, ¶ 14 (citing *In re T.W.*, 2006 MT 153, ¶ 8, 332 Mont. 454, 139 P.3d 810).

¶10 In recognition of the district court's "inherent discretionary power to control discovery" and its "authority to control trial administration[,]" we review discretionary pre-trial and discovery rulings for abuse of discretion. *Brookins v. Mote*, 2012 MT 283, ¶ 21, 367 Mont. 193, 292 P.3d 347 (quoting *Anderson v. Werner Enters., Inc.*, 1998 MT 333, ¶ 13, 292 Mont. 284, 972 P.2d 806). Further, in interpreting discovery rules, "this Court will reverse the trial judge only when his or her judgment may materially affect the substantial rights of the complaining party and allow the possibility of a miscarriage of justice." *Brookins*, ¶ 21 (quoting *Anderson*, ¶ 13).

DISCUSSION

¶11 To prove negligence, "a plaintiff must establish: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached the duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; (4) that damages resulted." *Bonilla v. Univ. of Mont.*, 2005 MT 183, ¶ 14, 328 Mont. 41, 116 P.3d 823. "Failure to prove any single

element of a negligence claim is fatal to the entire claim." *Norris v. Olsen*, 2024 MT 123, ¶ 21, 417 Mont. 14, 550 P.3d 323.

¶12 *Issue 1: Whether the District Court abused its discretion by relying on the PRA Membership Standards to establish Gull's duty to Jesse.*

¶13 Ellen argues that the District Court improperly relied exclusively on the PRA Membership Standards to establish Gull's duty to Jesse because they do not have the force of law. Gull argues that Ellen did not raise this argument below and should be precluded from raising it here for the first time. But Ellen did argue in her Supplemental Brief in Opposition to Gull's Motion for Summary Judgment that "Gull breached standards of care that are separate and distinct from PADI standards." Generally, we do not address an issue raised for the first time on appeal or a party's change in legal theory. *Wicklund v. Sundheim*, 2016 MT 62, ¶ 26, 383 Mont. 1, 367 P.3d 403 (citing *State v. Montgomery*, 2010 MT 193, ¶ 11, 357 Mont. 348, 239 P.3d 929). However, "we have permitted parties 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." *Wicklund*, ¶ 26 (quoting *Montgomery*, ¶ 12). Ellen's argument that the District Court improperly relied solely on the PRA Membership Standards is within the scope of her argument below that additional standards of care applied to Gull's rental to Jesse and the additional authority she cites on appeal is in support of that argument.

¶14 "Unless [written] codes or standards are adopted by a governmental agency so as to have the force of law, they are not to be admitted . . . as substantive evidence of negligence, *unless coupled with a showing of general acceptance in the industry concerned*." *Lynch v.*

Reed, 284 Mont. 321, 328, 944 P.2d 218, 222-23 (1997) (quoting *Runkle v. Burlington N.*, 188 Mont. 286, 304, 613 P.2d 982, 993 (1989)) (emphasis added). While neither party argues that a governmental agency has adopted the PRA Membership Standards, both parties' experts indicated that the standards are generally accepted in the scuba rental industry. Gull's expert Peter Pehl asserted in his report that "the [PRA] Membership Standards [are] the industry standard." By the same token, Maddox based his conclusion that Gull breached its duty to Jesse by not checking his certification on the fact that Gull was required to do so by the PRA Membership Standards. Because the PRA Membership Standards were coupled with a showing from both parties of general acceptance in the scuba industry, the District Court did not abuse its discretion by relying on them to establish Gull's duty to Jesse.

¶15 *Issue 2: Whether the District Court abused its discretion by excluding the industry standard opinion of Thomas Maddox.*

¶16 Ellen argues that because the District Court admitted Maddox as an expert, it abused its discretion when it excluded his formulation of the industry standard that established Gull's duty to Jesse. Gull responds that the District Court properly excluded Maddox's formulation of the industry standard because it differed "substantively . . . from [that] of the prior expert, Gilliam."[2] Ellen replies that the District Court's decision was not based

[2] Gull also argues that the District Court properly excluded Maddox's assertion on the basis of its reliability. Because we affirm the District Court's decision on other grounds, we do not address that argument.

on the difference between Maddox and Gilliam's reports, so it cannot be affirmed on that basis.

¶17 The District Court did not specify the basis on which it excluded Maddox's assertion, but "[w]e may affirm a trial court on any ground supported by the record, regardless of its reasoning." *State v. Wilson*, 2022 MT 11, ¶ 34, 407 Mont. 225, 502 P.3d 679.

¶18 Neither party argues that the District Court acted outside of its broad discretion in its March 9, 2023 Order Granting Plaintiff's Motion to Amend Scheduling Order by limiting Maddox's testimony to the scope and substance of Gilliam's prior testimony. "A schedule may be modified only for good cause and with the judge's consent." M. R. Civ. P. 16(b)(4). We have noted that M. R. Civ. P. 16(b)(4) is identical to Fed. R. Civ. P. 16(b)(4), so federal court precedent interpreting the federal version of the rule is informative of our interpretation of the Montana rule. *Brookins*, ¶ 27. When applying Fed. R. Civ. P. 16(b)(4)'s "good cause" standard, federal courts regularly limit the testimony of substituted experts to prevent prejudice to the non-moving party. *See, e.g., Labcaz v. Rohr*, 2024 U.S. Dist. LEXIS 162802, at *8 (E.D.N.Y. Sept. 10, 2024); *Martin v. Bimbo Foods Bakeries Distrib., LLC*, 2016 U.S. Dist. LEXIS 58979, at *8 (E.D.N.C. May 2, 2016); *City of Phoenix v. AMBAC*, 2012 U.S. Dist. LEXIS 191632, at *6 (D. Ariz. Oct. 5, 2012).

¶19 The District Court restricted Maddox's report to the scope and substance of Gilliam's report to prevent prejudice to Gull. Gilliam did not assert that Gull had a duty to Jesse beyond checking that he had a valid certification before renting him equipment.

Maddox's assertion that Gull owed an additional duty to discern Jesse's "level of experience, knowledge, and capabilities before renting equipment to" him goes beyond the scope and substance of Gilliam's report. The District Court properly exercised its broad discretion by excluding Maddox's industry standard opinion pursuant to its March 9, 2023 Order.

¶20 *Issue 3: Whether the District Court erred when it determined that Gull's failure to check Jesse's certification did not cause his death.*

¶21 Ellen argues that the District Court erred when it determined that Hanson's failure to check Jesse's certification was not the cause of his death. The District Court rested its determination on a finding that the parties did not dispute that Jesse's Junior Open Water Diver certification automatically became an Open Water Diver certification when he turned 15. The District Court reasoned that had Hanson checked Jesse's certification online, he would have found the converted Open Water Diver certification and rented him the equipment anyway. This meant that Hanson's alleged failure to check Jesse's certification was not the cause-in-fact of his death.

¶22 "While causation is ordinarily a question of fact for the trier of fact, it may be determined as a matter of law where reasonable minds can reach but one conclusion regarding causation." *Riley v. Am. Honda Motor Co.*, 259 Mont. 128, 132, 856 P.2d 196, 198 (1993). "[I]n those cases which do not involve issues of intervening cause, proof of causation is satisfied by proof that the party's conduct was a cause-in-fact of the damage alleged." *Norris*, ¶ 21 (quoting *Abraham v. Nelson*, 2002 MT 94, ¶ 11, 309 Mont. 366, 46 P.3d 628). In *Norris*, we held that an expert report alleging a causal chain between a

defendant's failure to ensure safe operation of a furnace and a resulting fire was sufficient proof of cause in-fact to avoid summary judgment. *Norris*, ¶ 25.

¶23 Both parties agree that the 1988 PADI Open Water Diver Course Instructor Guide ("PADI Guide") applies to this transaction. The PADI Guide states, in relevant part:

> 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 . . . . PADI Junior Open Water Divers may upgrade their certification level to PADI Open Water Diver when they reach age 15 with no additional requirements.

Citing the PADI Guide, Maddox asserts in his report that Jesse would have had to apply to upgrade his Junior Open Water Diver certification to an Open Water Diver certification. Because he did not do so, Maddox opines that Hanson could not have rented him equipment. Maddox's report illustrates a sufficient causal chain that a reasonable mind could find that Jesse could not have rented equipment on his own. But our analysis cannot end there.

¶24 "We will not reverse the District Court when it reaches the right result, even if for the wrong reason." *Brookins*, ¶ 21 (quoting *Palmer v. Bahm*, 2006 MT 29, ¶ 20, 331 Mont. 105, 128 P.3d 1031). While there is a genuine material dispute in the record as to whether Jesse could have rented the scuba equipment *on his own*, there is no dispute as to whether Mues could have rented the equipment for Jesse. The PADI Guide states that "[a] Junior Open Water Diver is qualified to dive *only when accompanied by another certified diver who is of legal age*." There is no dispute that Mues was of legal age and held an Advanced Diver certification at the time of the accident. Even if Jesse's Junior Open Water Diver

certification did not automatically upgrade to an Open Water Diver certification, there is no dispute he held at least a valid Junior Open Water Diver certification. Maddox does not contest that a certified diver could rent equipment for a junior diver they were accompanying. Therefore, it is undisputed that Mues could have rented two sets of equipment based on Jesse's Junior Open Water Diver certification. It is likewise undisputed that this is exactly what happened—Mues rented both sets of equipment for himself and Jesse.

¶25 Irrespective of whether or not Hanson failed to check Jesse's certification, the undisputed facts could lead reasonable minds to reach only one conclusion regarding causation—Hanson's purported failure was not the cause-in-fact of Jesse's death because even if Hanson had checked for Jesse's certification, he still would have rented Mues the two sets of equipment based on Mues's and Jesse's respective diver certifications. The District Court did not err when it determined that Gull's failure to check Jesse's certification was not the cause of his death.

CONCLUSION

¶26 The District Court did not err by granting Gull's motion for summary judgment. The District Court's December 12, 2023 Order is affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ JIM RICE