

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 OPPOSITION TO PETITION FOR REHEARING

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

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INTRODUCTION

“[I]f you are coming into a dive facility for whatever purposes, whether to go out boat diving or to rent equipment or buy equipment or something like that, the dive industry standard and PADI standard is that you must produce a certification card that is equivalent to your level of experience and what diving you’re anticipating doing and that would allow you to purchase equipment, rent equipment, get air fills, et cetera.” Depo. Bret Gilliam at 106:6–15, Exh. I to Dkt. 69.

Appellant Ellen Hubbell’s Petition for Rehearing is based on the argument that her first expert, Bret Gilliam, opined that, beyond verifying certification, a dive shop must also verify a certified diver’s experience, knowledge, and capabilities to rent equipment. Gilliam’s report and deposition establish this was not his opinion. The District Court and this Court were well within their discretion when excluding the new, additional opinions of Hubbell’s second expert, Maddox, because they went beyond the opinions of excluded expert Gilliam. This Court correctly determined that “Gilliam did not assert that Gull had a duty to Jesse beyond checking that he had a valid certification before renting him equipment.” Opinion, ¶19. Hubbell contests this conclusion by combining distinct parts of Gilliam’s report, attempting to make it state what it demonstrably does not. Furthermore, in Gilliam’s deposition, which Hubbell ignores, he testified a diver’s certification establishes the experience necessary to rent equipment, it “does not expire per se,” and it allows a diver to rent

gear “forever.” Hubbell has not established that this Court overlooked factual material or any question presented that would require reversal.

Critically, Hubbell’s petition does not raise an issue related to this Court’s dispositive holding: renting the equipment “was not the cause-in-fact of Jesse’s death” because, at the least, Jesse was certified to dive with John Mues, who rented the equipment with his Advanced Certification. *Id.*, ¶25. The Court correctly held that Hubbell’s expert does not dispute that Mues could rent two sets of equipment to dive with Jesse. *Id.*, ¶24. Hubbell has not established facts that would change the Court’s conclusion that Mues’ rental of the equipment did not cause the accident.

Hubbell has already settled with the parties she claimed were responsible for overseeing this dive and causing Jesse’s death. This Court correctly concluded that renting the equipment to certified divers was not the cause-in-fact of the death. Hubbell’s Petition for Rehearing should be rejected.

LEGAL STANDARD

This Court may consider a petition for rehearing only upon the following grounds:

- (i) That it overlooked some fact material to the decision;
- (ii) That it overlooked some question presented by counsel that would have proven decisive to the case; or

(iii) That its decision conflicts with a statute or controlling decision not addressed by the supreme court.

M. R. App. P. 20(1). Moreover, “it is the settled rule that this court will not, on an application for rehearing, consider grounds for reversal not presented upon the original hearing.” *Vernon Kills on Top v. Guyer*, No. OP 18-0656, 2019 WL 5057500, at *1 (Mont. Oct. 8, 2019) (quoting *Mares v. Mares*, 60 Mont. 36, 55, 199 P. 267, 272 (1921)).

ARGUMENT

A. The Court was within its discretion in excluding Maddox’s new opinion about verifying experience of certified divers renting equipment because this went beyond Gilliam’s report.

This Court held the “District Court properly exercised its broad discretion by excluding Maddox’s industry standard opinion pursuant to its March 9, 2023 Order.” Opinion, ¶19. The Court correctly reached this conclusion because Hubbell’s new expert Maddox’s opinion that a dive shop must discern a diver’s level of experience, knowledge, and capabilities before renting equipment went beyond the scope and substance of excluded expert Gilliam’s report. *Id.*

Selectively combining statements in Gilliam’s report, Hubbell argues for the first time in the Petition for Rehearing that Gilliam opined a dive shop must verify the experience, knowledge, and capabilities of a certified diver before renting equipment. Gull had argued on appeal that Maddox’s opinions should be excluded

because Gilliam's report "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.'" Gull's Answer Br. at 27-28. Hubbell did not challenge this in her Reply Brief or argue, as claimed now, that Gilliam offered such opinions. Hubbell's Petition and arguments should therefore be rejected because this Court will not "consider grounds for reversal not presented upon the original hearing." *Vernon Kills on Top*, *1.

Further, it remains clear Gilliam's report did not assert that Gull had the duty to verify experience, knowledge, and capabilities to rent equipment to a certified diver beyond checking for a certification. Moreover, Gilliam's deposition clearly established that his sole criticism was Gull's alleged failure to check Jesse's certification, which was indisputably verifiable online.

By tortuously combining two separate and distinct portions of Gilliam's report, Hubbell mistakenly claims Gilliam opined that Gull's alleged failure to verify Jesse's experience "was in flagrant violation of both diving industry standards and protocols and the requirements for compliance by PADI...." Petition at 3. However, this section of Gilliam's report clearly only discusses the alleged failure to verify Hubbell's certification as well as the alleged negligence of Defendant John Mues:

Mues deliberately orchestrated this deception and Gull Scuba Center LL never saw Hubbell's diving card or even sought to verify that he held any certification of any kind until after he had died. This was in flagrant violation of both diving industry standards and protocols and the requirements for compliance by PADI retail facilities that Gull Scuba was affiliated with. Mues completed the PADI Liability

Gilliam Rpt. at 7, Exh. B to Dkt. 69. Notably, on the same page of his report, Gilliam asserted that a diver's "training, skills mastery, and independent ability to dive [are] evidenced by earning diving certification[.]" *Id.* As noted above and discussed further below, Gilliam's opinion that the qualifications and experience to rent gear are established by certification was confirmed in his deposition. Again, his criticism of Gull was the alleged failure "to verify that [Jesse] held any certification...."

Christopher Hanson (PADI instructor #175640) was a Gull Dive Center employee who was in charge of confirming certification credentials of PADI divers at that facility on the day in question. Hanson, though fully qualified and holding multiple PADI certifications as an Instructor, never received any proof of certification from Hubbell and, apparently, never sought to verify that he held any certification whatsoever until after Jesse Hubbell had died.

Id.

Hubbell also inserts language to a subsequent portion of Gilliam's report to create additional opinions, arguing that Gilliam opined Gull was negligent for "[failing to require him to] demonstrate any familiarity or competence in proper assembly." Petition at 4 (brackets and italics added in Appellant's Petition). However, this section of Gilliam's report lists only one "obligation" he believed Gull had—to check Jesse's certification. Gilliam opined: "Gull[] was obligated to confirm

[Jesse] held the necessary scuba certification before renting the equipment to him. When Jesse [allegedly] failed to provide the proof that he held the necessary scuba certification, Gull [] should not have rented scuba equipment to him.”

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.

Gilliam Rpt. at 18, Exh. B to Dkt. 69.

Without support in Gilliam’s report for Maddox’s new, additional opinions, Hubbell now makes several new conclusory arguments not made before the District Court or in appellate briefing. *See* Petition at 4-7. For instance, Hubbell argues public safety would be better served if Gull was required to follow Maddox’s additional standards and further claims that dive shops are required to “err on the side of caution” and verify certified divers can competently assemble equipment. *Id.* at 4-5. However, neither Gilliam nor Maddox opined that Gull had such duties. These new, unsupported arguments should be summarily rejected because “this Court will not, on an application for rehearing, consider grounds for reversal not presented upon the original hearing.” *Vernon Kills on Top*, at *1.

In his deposition, Gilliam confirmed his opinion that a certification establishes the qualifications and experience necessary to rent equipment. When asked if an inexperienced certified diver must refresh themselves to dive (requiring equipment), Gilliam responded that certification is all that is necessary. He testified PADI

certification “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*[.]” Depo. Gilliam at 166:23–167:2, Exh. I to Dkt. 69 (emphasis added). When pressed on whether a diver like Jesse who had let a long passage of time go by must regain further experience and knowledge to dive again (which implicitly requires renting or obtaining scuba gear), 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.

Hubbell baldly argues that Gilliam opined that industry standards “impose clear obligations to actively ascertain the qualifications of divers, particularly regarding their experience and familiarity with scuba equipment and its assembly.” Petition at 5. However, Hubbell fails to identify any stated opinion or testimony from Gilliam that supports this argument. And again, Hubbell’s argument contradicts Gilliam’s own deposition testimony, where he overtly opined: “if you are coming into a dive facility for whatever purposes, whether to go out boat diving or to rent equipment or buy equipment or something like that, the dive industry standard and PADI standard is that you must produce a certification card that is equivalent to your level of experience and what diving you’re anticipating doing and that would allow you to purchase equipment, rent equipment, get air fills, et cetera.” Depo. Gilliam at

106:6–15, Exh. I to Dkt. 69. Not only did Gilliam not opine that a PADI dive center is required to independently verify a diver’s “experience, knowledge, and capabilities,” his testimony establishes his opinion that “a certification card [] is equivalent to your level of experience[,]” and “allow[s] you to purchase equipment, rent equipment, get air fills, et cetera.” *Id.* This is consistent with the statement in his report that a diver’s “training, skills mastery, and independent ability to dive [are] evidenced by earning diving certification[.]” Gilliam Rpt. at 7, Exh. B to Dkt. 69.

As the Court correctly concluded, Gilliam’s report did not state that, beyond verifying certification, Gull had the independent obligation to verify Jesse’s “level of experience, knowledge, and capabilities.” Opinion, ¶19. The Court was well within its discretion in determining that these new, additional opinions of Maddox went beyond the report of Gilliam and were therefore properly excluded.

B. The Court correctly concluded that Gull did not cause the accident when it rented equipment to John Mues, who held an Advanced Certification and was diving with Jesse Hubbell.

Even if Maddox’s opinions were similar enough to Gilliam’s to warrant overturning the District Court’s discretion in excluding them, this does 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 Jesse's use because he was accompanied by Mues, a certified Advanced Diver of legal age.

Hubbell does not contend the Court erred when it determined that neither Gilliam nor Maddox disputed the PADI Guide provision that allows a PADI Junior Open Water Diver to dive "when accompanied by another certified diver who is of legal age." Opinion, ¶23. Indeed, Maddox agreed that a diver with a Junior certification can "dive with a certified diver over the age of 18 or an instructor[.]" Appellant's Answer Br. at 8. Hubbell does not challenge the Court's conclusion that "Maddox does not contest that a certified diver could rent equipment for a junior diver they were accompanying." *Id.* Nor does Hubbell challenge this Court's conclusions that it is "undisputed that Mues could have rented two sets of equipment based on Jesse's Junior Open Water Diver certification[.]" or that it is "likewise undisputed that this is exactly what happened—Mues rented both sets of equipment for himself and Jesse." *Id.*, ¶20.

This is the crux of the case—at a minimum, Jesse was certified to dive with an adult certified diver, like Mues, who was indisputably certified to rent the equipment. Therefore, as the District Court and this Court correctly held, Mues' rental of the equipment from Gull was not the cause of the accident.

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CONCLUSION

Hubbell's Petition for Rehearing should be denied because this Court did not overlook critical facts or questions presented that would have proven decisive to the case. A review of Gilliam's report and testimony demonstrates that he squarely opined that the diving industry does not require a duty beyond checking for a valid certification to rent equipment. As this Court held, neither party disputed the District Court acted within its broad discretion to limit Maddox's opinions, *id.*, ¶18, and the undisputed facts demonstrate that Mues could rent two sets of equipment, *id.*, ¶20.

Hubbell has already settled with the parties she claimed were responsible for overseeing this dive and causing Jesse's death. This Court correctly concluded Gull renting the equipment was not the cause-in-fact of the accident. Summary Judgment was correctly granted, this Court correctly affirmed, and the Petition for Rehearing should be denied.

DATED this 26th day of November, 2024.

/s/ Peter B. Ivins
Peter B. Ivins
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20(3) 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 2,500-word limit in that it consists of 2,124 words, excluding the Cover, and Certificate of Compliance.

/s/ *Peter B. Ivins*

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CERTIFICATE OF SERVICE

I, Peter Babbel Ivins, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 11-26-2024:

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