Filed 1/16/18 Frost v. Eco Dive Center CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| MARIA VILMA FROST,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ECO DIVE CENTER et al.,<br><br>Defendants and Respondents. | B279482<br><br>(Los Angeles County Super. Ct. No. BC557093) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi | Keese, Thomas V. Girardi, Keith D. Griffin and Jennifer Siegel for Plaintiff and Appellant.

Nelson ◊ Griffin, Thomas J. Griffin and Raymond J. Muro for Defendants and Respondents.

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## I. INTRODUCTION

A student in an advanced scuba diving course died as a result of injuries sustained during a night dive in rough waters. His wife here sues for wrongful death the instructor and the company that offered the course. The student had signed a liability release, which, under the law, precludes a claim of ordinary negligence but not a claim for gross negligence. We conclude on the facts presented that the trial court properly granted summary judgment to the defendants because there was no triable issue of material fact as to whether defendants' conduct constituted gross negligence.

## II. BACKGROUND

### A. *Facts*[1]

Plaintiff Maria Vilma Frost was the wife of Frank Frost (the decedent), who died on December 5, 2012, while taking a scuba diving course offered by defendant Eco Dive Center and taught by defendant Daniel Rood.

The decedent learned to scuba dive in 2007 and had been a PADI (Professional Association of Diving Instructors) certified open water diver since November 2007. The decedent surfed approximately one to two hours per week and was a good swimmer. Because he wanted advanced scuba diving training, the decedent enrolled in Eco Dive's PADI advanced open water

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[1] These facts are taken from the record before the trial court when it ruled on the summary judgment motions. The facts are undisputed unless otherwise noted.

diver course, which was open only to students with his certification.

Eco Dive required students to sign a liability release and assumption of risk agreement (the release agreement) before participating in the course. The decedent signed the release agreement and dated it November 27, 2012. The release agreement released both defendants from all claims of liability, including negligence, arising from the decedent's participation in the diving course, and it also contained an express assumption of the risk involved in the course.[2]

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[2] The liability release provided: "I understand and agree that neither my instructor(s) [including Rood], this facility through which I receive my instruction [Eco Center] . . . nor any of their respective employees, officers, agents, contractors, or assigns (hereinafter referred to as 'Released Parties') may be held liable or responsible in any way for any injury, death or other damages to me, my family, estate, heirs or assigns that may occur as a result of my participation in this diving program or as a result of the negligence of any party, including the Released Parties, whether passive or active. [¶] . . . [¶] I understand and agree that I am not only giving up my right to sue the Released Parties but also any rights my heirs, assigns, or beneficiaries may have to sue the Released Parties resulting from my death."

As to assumption of risk, the release agreement stated: "In consideration of being allowed to participate in this course . . . hereinafter referred to as 'program,' I hereby personally assume all risks of this program, whether foreseen or unforeseen, that may befall me while I am a participant in this program including, but not limited to, the academics, confined water and/or open water activities. [¶] . . . [¶] I also understand that skin diving and scuba diving are physically strenuous activities and that I will be exerting myself during this program, and that if I am injured as a result of heart attack, panic, hyperventilation,

Prior to enrolling in the advanced diving course, the decedent also signed a medical questionnaire, indicating good health by responding "No" to every question. If a student answered "Yes" to any question on the medical form, he or she would need to first see a doctor prior to participating and have the doctor submit a form clearing the student for participation.

Some of the decedent's answers were false. He falsely stated he was not a smoker and did not have high cholesterol. Also apparently falsely, he stated that he was not under medical care, though he had Hepatitis C and cirrhosis of the liver. The decedent also responded "No" to the question "Have you ever had or do you currently have . . . [¶] . . . [¶] Blackouts or fainting (full/partial loss of consciousness)?" He also had been admitted to the emergency department for a dizzy spell and loss of consciousness on February 7, 2011.

Rood received his PADI divemaster certification in 2001. Around 2007, Rood received a PADI open water scuba instructor certificate which enabled him to teach all of PADI's recreational scuba courses. In 2008, Rood received a master scuba diver trainer certificate from PADI, indicating he had experience teaching and certifying advanced dive specialties. Rood also had instructor ratings with TDI (Technical Diving International) and SDI (Scuba Diving International).

Three days before the incident, on December 2, 2012, Rood and the class, including the decedent, traveled to Catalina Island to complete three of the five dives required for the advanced open

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drowning or any other cause, that I expressly assume the risk of said injuries and that I will not hold the Released Parties responsible for the same."

water diver certification. The decedent had no issues with his gear and did not appear winded performing these dives.

On December 5, 2012, the class met at Veteran's Park in Redondo Beach for a night dive. Rood arrived an hour before the stated class time, found the decedent already there, and gave him a pre-dive briefing. After the other students arrived, Rood gave another pre-dive briefing to the class. The briefing discussed how to get into the water, how to exit, how to deal with the waves, the sloping bottom of the floor, and how to signal distress with the flashlight. The class discussed the surf conditions, including wave height and interval.

All certified divers are involved in deciding whether to make a particular dive, and no one said they did not want to dive. Rood and the students concluded that based on the wave sets having a sufficient lull to make it through the surf zone, the conditions were diveable.

There were about 15 to 20 other divers going into the water before Rood's class started their dive. Other divers present included diving instructors Kelly McGlothlin and Rocqueford Watts. McGlothlin lost a fin attempting to dive. McGlothlin, Watts, and another diver decided to abort their dive based on the water conditions. As Rood was walking to the water, Watts warned Rood that the dive conditions were not conducive for taking a class.

As soon as the class entered the water, a student, Nicholas Fries, was unable to make it through the surf zone. Fries attempted to signal Rood or the rest of the class with his flashlight, but they were 30 feet away and no one responded. Both Fries and Rood recalled being the decedent's diving buddy for the dive.

At the parking lot, McGlothlin and Watts heard shouts and a commotion at the beach and returned to see the class spread out. The decedent was in the area just past the surf zone while the rest of the students drifted away from the surf zone. McGlothin and Watts went about helping divers out of the water. According to Watts, the decedent appeared to be in distress, as the waves crashed on him and he did not move much.

The decedent eventually returned back to shore with the help of two divers. The decedent was unconscious and not breathing by the time he was on the beach. When Rood returned to the shore, he observed other divers administering CPR (cardiopulmonary resuscitation) to the decedent. Arriving paramedics also administered CPR to the decedent and transported him to the local emergency room, where he died. According to the coroner's report, his cause of death was drowning.

After the incident, PADI's quality management committee investigated. The committee determined Rood had violated standards regarding maintaining direct supervision and buddy contact. To be reinstated, the committee required Rood to take a continuing education course and to sign a standards compliance agreement. Rood refused. In contrast with the PADI committee's determination that direct supervision was required, Ron Beltramo, Eco Dive's person most knowledgeable, testified that under the PADI standards, Rood was not required to maintain visual contact with his students and had the option of indirect supervision without going into the water because the class was an advanced open water night dive.

Plaintiff's expert, Ron Ungar, is a PADI scuba instructor. Ungar reviewed the autopsy report, witness deposition transcripts, data concerning the water conditions on the day of the incident, the PADI Open Water Dive Instructor's Manual, and other documents and facts surrounding the incident. He opined Rood should have obtained information about the water conditions prior to the beach dive with the students. Ungar declared that Rood should have been close enough to his students to recognize they are having difficulty. Ungar opined Rood flagrantly disregarded safety when Rood ignored Watts's warnings about the water conditions. Rood had stated in a deposition that he was much more qualified to determine whether a site was diveable than was Watts.

B. *Summary Judgment Motions and Alternative Writ*

Both defendants moved for summary judgment on the sole cause of action for negligence for the decedent's wrongful death. The trial court initially found, among other things, that triable issues of material fact existed as to whether defendants' conduct was gross negligence and thus could not be released by the release agreement.

Eco Dive and Rood petitioned for a writ of mandate, and this court issued an alternative writ on August 26, 2016, stating: "The court tentatively concludes that there is no triable issue of material fact as to whether defendants' conduct constituted gross negligence." We ordered the trial court to either vacate its July 29, 2016 order and enter a new order, or show cause why a peremptory writ ordering the trial court to do so should not issue.

In response to the alternative writ, the trial court vacated its previous order and issued a new order granting defendants' summary judgment motions. The trial court ruled defendants' conduct was neither negligence nor gross negligence. The trial court also determined the release agreement was an express assumption of risk by the decedent that waived all claims of ordinary negligence against defendants. The trial court entered judgment in favor of defendants.

## III. DISCUSSION

### A. *Summary Judgment Standard of Review*

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof . . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact . . . . A prima facie showing is one that is sufficient to support the position of the

party in question. [Citation.] [Fns. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.)

We review an order granting summary judgment de novo. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.) The trial court's stated reasons for granting summary judgment are not binding because we review its ruling, not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco, supra*, 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) These are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250.)

B. *Negligence and Express Assumption of Risk*

"'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury."'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.)

Defendants assert the release agreement waived any claims by plaintiff against them for negligence pertaining to the scuba diving class. "While often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant's duty of care, an element of the plaintiff's case. '[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes

no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk . . . . "In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone . . . . *The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence*." [Citation.]' [Citations.]" (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719.)

Here, it is undisputed the decedent signed a release agreement that expressly waives negligence claims against defendants for injury or death that results from participation in the diving course. The release agreement constituted an express assumption of risk for the ordinary activities of that course. (*Eriksson v. Nunnink*, *supra*, 233 Cal.App.4th at p. 719.) Due to the release agreement, defendants were relieved of a legal duty to the decedent as to ordinary negligence pertaining to the scuba diving course. We must then address whether defendants potentially are subject to liability based on gross negligence.

C. *Gross Negligence*

"'Gross negligence' long has been defined in California and other jurisdictions as either a ""want of even scant care"" or ""an extreme departure from the ordinary standard of conduct."" [Citations.]" (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 (*Santa Barbara*).) Gross negligence is not a separate and distinct cause of action from negligence. (*Jimenez v.*

*24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 552, fn. 3 (*Jimenez*).) Rather, gross negligence is distinct from ordinary negligence by degree. (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 (*Anderson*).) Liability for gross negligence cannot be released via an express contractual provision. (*Santa Barbara, supra*, 41 Cal.4th at pp. 750-751; *Jimenez, supra*, 237 Cal.App.4th at pp. 554-555.)

Typically, whether conduct amounts to gross negligence is a triable issue of fact. (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640.) However, "[w]here the evidence on summary judgment fails to demonstrate a triable issue of material fact, the existence of gross negligence can be resolved as a matter of law." (*Anderson, supra*, 4 Cal.App.5th at p. 882; *Chavez v. 24 Hour Fitness USA, Inc., supra*, 238 Cal.App.4th at p. 640.)

Defendants contend their alleged conduct does not rise to the level of gross negligence, asserting that Rood's conduct does not demonstrate "want of even scant care" or "an extreme departure from the ordinary standard of conduct." Based on the undisputed facts that defendants offered, they met their initial burden of production. Those facts demonstrated that Rood acted with some care on the day of the incident. He gave a pre-dive briefing to the class, and an earlier pre-dive briefing to the decedent. The class discussed entering and exiting the water, dealing with waves, the sloping floor, and how to signal distress. As well, each diver in the class, including the decedent, an experienced diver, made the choice to dive after the class decided that the amount of lull in the waves would allow them to make it through the surf zone.

Additionally, defendants offered the testimony of Ron Beltramo, their person most knowledgeable, that, under PADI standards, Rood "had the option to elect indirect supervision" of his students in the advanced open water diving course and did not have to enter into the water with them. He testified that Rood did not have to maintain visual contact with the advanced students.

With these facts, there was insufficient evidence indicating Rood's conduct showed a lack of any care or an extreme departure from the ordinary standard of conduct. The burden shifts to plaintiff to present evidence raising a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

In support, Plaintiff argues that under *Jimenez* there is a triable issue of material fact as to whether there has been an extreme departure from an ordinary standard of conduct. In *Jimenez*, the plaintiff claimed 24 Hour Fitness was grossly negligent in placing exercise equipment too close together. The plaintiff had executed a liability release with an express assumption of risk as to 24 Hour Fitness facilities, and was using a treadmill at that gym when she fell. (*Jimenez, supra,* 237 Cal.App.4th at pp. 549-550.) The treadmill manufacturer's owner's manual instructed that there should be a minimum of six feet clearance behind the treadmill for user safety. (*Ibid*.) There was only 3 feet and 10 inches of clear space behind the treadmill where the plaintiff was injured. (*Ibid*.)

The Court of Appeal held that summary judgment was improperly granted to the defendant: "In our view, based on the evidence plaintiffs presented, a jury could reasonably find that (1) it is standard practice in the industry to provide a minimum six-foot safety zone behind treadmills, based on the owner's manual,

assembly guide, and Waldon's [the plaintiffs' expert] declaration as an expert; (2) 24 Hour did not provide this minimum six-foot safety zone . . . ; and (3) the failure to provide *the minimum* safety zone was an extreme departure from the ordinary standard of conduct, as implied in Waldon's declaration." (*Jimenez, supra,* 237 Cal.App.4th at p. 557.)

Plaintiff argues that Rood likewise violated industry standards by violating PADI's standards for direct supervision by instructors and PADI's buddy contact standard for divers. As plaintiff notes, Rood was found by PADI to have violated those standards.

However, unlike the plaintiff in *Jimenez*, plaintiff does not demonstrate a triable issue as to whether Rood's conduct was an extreme departure from an industry standard. Plaintiff relies on a portion of the PADI Open Water Dive Instructor's Manual entitled "Direct Supervision" but has not included the manual or that portion of it. Plaintiff's expert Ron Ungar testified that "when a PADI instructor makes the choice to directly supervise his or her students" he must remain close enough to them to "observe and evaluate the student diver's ability to perform skills and understand theoretical knowledge." Ungar's testimony does not necessarily contradict defendants' position that, under PADI standards, Rood had the option of electing "indirect supervision" of advanced students. We have not been shown that Rood engaged in an extreme departure from an ordinary standard of conduct by his supervision of the decedent.

Plaintiff also alleges that Rood violated PADI's safe diving practices buddy system standard. The record indicates that this is a standard imposed on divers (not directly on instructors), as the record contains a PADI "Standard Safe Diving Practices

Statement of Understanding" signed by the decedent that contains the buddy standard. That standard simply instructs divers to "adhere to the buddy system throughout every dive." In this case, the evidence appears undisputed that Rood set up a buddy system, based on Rood's uncontradicted testimony that he did so during the pre-dive briefing, and because Rood and Fries each testified that they recalled being the decedent's buddy. Rood did not violate any duty he had, as an instructor, to set up such a system. To the extent plaintiff claims that Rood violated the standard as a diver, we find the standard imposed on divers to "adhere" to the buddy system too vague to conclude that there is evidence supporting a triable issue as to whether Rood violated it.

At least as presented in this record, Rood did not engage in an extreme departure from any PADI standard, unlike the gym's violation of the very specific six-foot clearance requirement for the treadmill installation in *Jimenez*.

Plaintiff also argues Rood was grossly negligent for disregarding Watts's warning to not take students into the water and not sufficiently inquiring into the water conditions. Watts testified that he had a "short" conversation in which he told Rood that the conditions were not conducive to a class. Rood, however, knew he had an advanced class of certified open water divers, and that they had discussed the water conditions and all concluded it was diveable because of a sufficient lull between wave sets to make it through the surf zone.

There were 15 to 20 other divers in the water when Rood and the class entered it. "[Gross negligence] 'connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results . . . .' [Citation.]" (*Eriksson v. Nunnink*

(2011) 191 Cal.App.4th 825, 857.) "'"[M]ere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty,"' amounts to ordinary negligence. [Citation.]" (*Anderson, supra*, 4 Cal.App.5th at p. 881.) With the evidence in the record as to the affirmative reasons that the water was satisfactory for an advanced class of certified divers, there is no triable issue as to gross negligence for disregarding Watts's warning that the conditions were not conducive to a class, or failing to inquire further, even construing the facts in the light most favorable to plaintiff.

Because, there is no triable issue of material fact as to plaintiff's negligence cause of action, defendants are entitled to judgment as a matter of law. We need not discuss the parties' remaining arguments concerning vicarious liability, primary assumption of risk, and causation.

## IV. DISPOSITION

The judgment is affirmed. Defendants Eco Dive Center and Daniel Rood may recover their appellate costs from plaintiff Maria Vilma Frost.

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RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.