Going Down On Legal Diving Issues
by

Mark Ercolin
Attorney At Law
901 SE 17th Street Causeway, Suite 210
Fort Lauderdale, FL 33316

Phone: (954) 792-5425 Fax: (954) 462-0270

Diving is inherently dangerous. Nature designed humans to be land creatures, and they are normally ill suited for spending long amounts of time underwater. However, since people became interested in exploring the sea, they have also been interested in exploring and working below it, as well.

Interest in remaining under water for a sustained time period can certainly be dated back to the days of Alexander The Great, whom in legend ordered the manufacturing of a glass diving bell, so that he might observe the wonders of the deep.

However, man's ability to stay for long periods under water was fairly much restricted to lung capacity, the limited use of snorkels and the diving bell until the 19th century, when the technology was finally developed to pump air to a person at increased depths in a fully encompassing dive suit.

Then, just before World War II, such pioneers as Jacques Cousteau began to develop methods for people to take delivery of self contained bottled air at depth into the lungs without injury. This was the beginnings of scuba diving (SCUBA is actually an acronym for Self Contained Breathing Apparatus), and a popular increase in diving in not only the work place, but in recreational sport.

Now one might think that this increased interest in a potentially dangerous activity might result in a clear set of laws and precedents which would fully control the actions of those who participate in that activity. But, I have not found that assumption to be particularly true. In fact, much of what occurs in certain areas of diving, such as

the recreational sector, is virtually self-regulating.

Basically, Florida has two significant statutes which directly concern diving. One is **Fla.Stat. 327.331**, that deals most specifically with the use of a dive flag in state waters. The other is **Fla.Stat. 381.895**, that deals with purity standards for compressed air at diving facilities. (see both statutes in Appendix I).

Significantly, **Fla.Stat. 327.331** does actually give a definition for what a diver is :

> **"Diver" means any person who is wholly or partially submerged in the waters of the state and is equipped with a face mask and snorkel or underwater breathing apparatus.**

Statutorily though, this appears as far as Florida takes the definition of what is a diver. Beyond this, deciphering more on what is a diver and types of divers, and figuring out their rights and responsibilities can soon become a muddling affair. This is especially true since it appears that present court cases indicate that pursuant to the Supreme Court Case of **B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043 (1995)**, most recreational swimming or diving cases will not come under admiralty jurisdiction unless it can be shown that the "incident has a potentially disruptive impact on maritime commerce" and whether the "'general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" (see, **Borden v. Phillips, 752 So.2d 69 (Fla.App. Dist.1 02/16/2000)**), (see this case in Appendix II). And, so far, as in **Borden v. Phillips**, courts appear to be highly resistant to bridging the nexus between recreational diving and admiralty jurisdiction.

Personally, for purposes of analysis, I put divers and their situations into these rather crude and broad categories:

A) Commercial Divers;

B) Seaman (diving for the benefit of the vessel);

C) Recreational and Other (may include research diving).

Commercial Divers and Seamen Divers:

In the CFR's, **Title 46 Sec. 197.202** defines commercial divers and the scope of commercial diving operations pursuant to the Regulations found for them in **Title 46 Part 197 Subpart B** (**Sec. 197.202** included in Appendix III). If a commercial diver is not covered under Title 46, they will probably be covered under OSHA under **Title 29 Part 1910 Subpart T** starting at **Sec. 1910.401** (**Sec. 1910.401** included in Appendix III). If a diver's work comes under either Title 46 or Title 29, it will be found that the regulations are quite specific when it comes to safety, procedure, and the use of equipment, and, I believe, should prove instructive even under situations where the regulations may not actually apply.

Can a commercial diver also be considered a seaman? Apparently so, if they are doing the "ships work". This can also mean that when such a diver becomes injured seaman status may be maintained even while diving (see, **Kjar v. American Divers, Inc., 1994 AMC 522 (D. Hi. 1992)**, also **Sinclair v. Soniform, 935 F.2d 599 (3rd Cir. 1991)**). It should be noted, as it concerns divers, that Charles M. Davis, on page 140 of the **Maritime Law Deskbook**, states, "The questions of fact of defining the 'ship's work' of a particular vessel and whether a particular plaintiff had seagoing duties that contributed to that work will result in much future legislation."

As such, although I have found no cases on point, I am inclined to believe that in the realm of sports diving, a dive instructor doing their work as an instructor or divemaster in the water, while working with/on a "dive boat" may be a seaman. And, I am even more inclined to believe that if such an instructor is assigned as crew or mate while on board the vessel they should certainly be considered a seaman in the water, especially while doing "ship's work" such as setting an anchor.

As a seaman, pursuant to an injury in the water, a diver would not only be generally entitled to maintenance & cure, but the right to seek damages under Jones Act negligence and unseaworthiness.

Regarding unseaworthiness, there is one failure which may cause any dive by a seaman (at least in the 5th or 11th Federal Circuit) to be deemed as unseaworthy -- diving alone or without the ability to communicate to someone in case of crisis.

A good example of this principle is the 30 year old 5th Circuit Case (before the 11th Circuit was established) of **<u>Weeks v. Alonzo Cothron Inc</u>., 466 F.2d 578 (5th Cir. 09/15/1972)** (included in Appendix IV), which dealt with a crewmember (I believe a "Seracki Seaman") who had been diving to perform repairs to the bottom of the vessel without a partner or any line of communication with the surface. During this operation, this crewmember had apparently been injured and drowned. As one of their primary defenses against liability, the representatives of the vessel attempted to put forward that diving without a partner, or without a tender line, or without another way of communicating with the surface during operations was a usual and customary practice in the Florida Keys (which is where the incident occurred).

The Appellate Court was not swayed by this argument, and found that diving operations for the benefit of the vessel in that matter constituted an unseaworthy condition. In fact, they went so far as to clearly state that "The theory of the 'buddy system' is too well entrenched for water safety to be completely ignored." Then the court further pointed out that an unseaworthy practice does not become seaworthy because of its continued custom and usage.

Even worse for the vessel, when its representatives tried to put forward the idea that the diver had refused a tender line which had been offered to him at the time of the incident, the court responded by pointing out that since it was already on the record that using a tender line was not the customary practice, it meant that there was no real expectation on the part of the diver that he should have one.

Similarly, rules requiring a partner, or some form of communication with the surface, or a tender line can be found concerning most diving situations falling under Title 46 and OSHA (see **Title 46 §197.430(d)** and **Title 29 §1910.424** as prime examples).

Recreational Divers and Other:

As mentioned before, the courts appear highly resistant to viewing recreational diving under admiralty jurisdiction. This allows for some rulings which could prove difficult for a recreational diver who becomes a plaintiff.

For example, in the previously mentioned case of **<u>Borden v. Phillips</u>, 752 So.2d 69 (Fla.App. Dist.1 02/16/2000)**, because it was ruled that the incident which resulted in the death of a dive student while in the water wasn't cognizable under admiralty, it allowed the court to accept the language of the defendants' Release of Liability Form under Florida law. The release was quite firm (see this case in Appendix II).

As it pertains to dive instruction, the failure of a recreational diver to make known a potential health risk as it pertains to the activity could result in a reduced verdict pursuant to an incident, as may have been the final result in the case of **<u>Carnival Cruise Lines, Inc. v. Levalley</u>, 786 So.2d 18 (Fla.App. Dist.3 04/11/2001)** (see this case in Appendix V).

A string which seems to be the tying force in many recreational diving cases is the idea of that the recreational diver has taken on the "Assumption of Risk". Among the most interesting examples of this is the unpublished California case of **<u>Yace v. Dushane</u>, No. B162789 (Cal.App. Dist.2 12/16/2003)** (see this case in Appendix VI). In **<u>Yace</u>**, heirs of a decedent who died during a recreational dive sued her "dive buddy" because he panicked and bolted to the surface rather than "buddy breath" with his partner which resulted in the decedents death. The court held that:

> **The doctrine of assumption of risk operates as a complete bar to a plaintiff's recovery in cases involving "primary assumption of risk," that is, "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury .**

And then went on to say:

> **[A} diver's panicked ascent to the surface instead of sharing his air with a dive buddy in distress - is an inherent risk of the sport of scuba diving.**

In such a legal climate, it should not be surprising that with a few exceptions, such as the Florida statutes already mentioned, recreational diving is essentially a self regulated industry, with its own few self imposed constraints -- such as refusing to fill air tanks or rent equipment without a "C" card, or refusing to allow a diver from accompanying a party on a particularly "risky" dive without proof of previous similar experience. It also basically means that the recreational diver's legal remedies concerning an incident may be more limited than they may like.

Within this self regulatory culture, it should be noted that there may be tendency on those in the industry to become so complacent by the assumption of the risk taken on by their customers, they forget the duties which they may owe to their employees. It is something to watch for on some dive cases.

Products Liability:

My research concerning products liability in the dive arena yielded little which was evaluative at this time, but that may change in the future.

Innovations in dive computers that more easily allows for "multi-depth" diving, along with interest in mixed gas diving (often calculated by computer), both of which allegedly offering a diver longer underwater time could lead to greater concerns in the future.

The questions will come regarding warranty, maintenance schedules, design for purpose, and product accuracy.

What To Look For:

If a dive case comes your way, here are some of the things you may want to review:

A) Type of Diver (i.e. Commercial, Seaman, Recreational, Instructor...)?

B) Reason For Dive and Plan

C) Vessel Information (including registry, function, design concerns, crew, etc.)

D) Location of Incident

E) Jurisdiction Issues

F) Contracts and Releases

G) Equipment Utilized

H) Understanding the Injury (particularly if it's unique to diving -- like the bends)

F) Experience and Training of The Diver and Others Involved (check C cards and logs if appropriate).

Hopefully, the information and suggestions in this treatise will prove helpful. This paper is certainly not an all encompassing work on legal diving situations. It's actually more of a shallow wade to get a feel for the environment. But, if you're a diver now, then you already know that if you should never go down too deep.

APPENDIX I

327.331 Divers; definitions; divers-down flag required; obstruction to navigation of certain waters; penalty.--

(1) As used in this section:

(a) "Diver" means any person who is wholly or partially submerged in the waters of the state and is equipped with a face mask and snorkel or underwater breathing apparatus.

(b) "Underwater breathing apparatus" means any apparatus, whether self-contained or connected to a distant source of air or other gas, whereby a person wholly or partially submerged in water is enabled to obtain or reuse air or any other gas or gases for breathing without returning to the surface of the water.

(c) "Divers-down flag" means a flag that meets the following specifications:

1. The flag must be square or rectangular. If rectangular, the length must not be less than the height, or more than 25 percent longer than the height. The flag must have a wire or other stiffener to hold it fully unfurled and extended in the absence of a wind or breeze.

2. The flag must be red with a white diagonal stripe that begins at the top staff-side of the flag and extends diagonally to the lower opposite corner. The width of the stripe must be 25 percent of the height of the flag.

3. The minimum size for any divers-down flag displayed on a buoy or float towed by the diver is 12 inches by 12 inches. The minimum size for any divers-down flag displayed from a vessel or structure is 20 inches by 24 inches.

4. Any divers-down flag displayed from a vessel must be displayed from the highest point of the vessel or such other location which provides that the visibility of the divers-down flag is not obstructed in any direction.

(2) All divers must prominently display a divers-down flag in the area in which the diving occurs, other than when diving in an area customarily used for swimming only.

(3) No diver or group of divers shall display one or more divers-down flags on a river, inlet, or navigation channel, except in case of emergency, in a manner which shall unreasonably constitute a navigational hazard.

(4) Divers shall make reasonable efforts to stay within 100 feet of the divers-down flag on rivers, inlets, and navigation channels. Any person operating a vessel on a river, inlet, or navigation channel must make a reasonable effort to maintain a distance of at least 100 feet from any divers-down flag.

(5) Divers must make reasonable efforts to stay within 300 feet of the divers-down flag on all waters other than rivers, inlets, and navigation channels. Any person operating a vessel on waters other than a river, inlet, or navigation channel must make a reasonable effort to maintain a distance of at least 300 feet from any divers-down flag.

(6) Any vessel other than a law enforcement or rescue vessel that approaches within 100 feet of a divers-down flag on a river, inlet, or navigation channel, or within 300 feet of a divers-down flag on waters other than a river, inlet, or navigation channel, must proceed no faster than is necessary to maintain headway and steerageway.

(7) The divers-down flag must be lowered once all divers are aboard or ashore. No person may operate any vessel displaying a divers-down flag unless the vessel has one or more divers in the water.

(8) Except as provided in s. 327.33, any violation of this section shall be a noncriminal infraction punishable as provided in s. 327.73.

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381.895 Standards for compressed air used for recreational diving.--

(1) The Department of Health shall establish maximum allowable levels for contaminants in compressed air used for recreational sport diving in this state. In developing the standards, the department must take into consideration the levels of contaminants allowed by the Grade "E" Recreational Diving Standards of the Compressed Gas Association.

(2) The standards prescribed under this section do not apply to:

(a) Any person providing compressed air for his or her own use.

(b) Any governmental entity using a governmentally owned compressed air source for work related to the governmental entity.

(c) Foreign registered vessels upon which a compressor is used to provide compressed air for work related to the operation of the vessel.

(3) A person or entity that, for compensation, provides compressed air for recreational sport diving in this state, including compressed air provided as part of a dive package of equipment rental, dive boat rental, or dive boat charter, must ensure that the compressed air is tested quarterly by a laboratory that is accredited by either the American Industrial Hygiene Association or the American Association for Laboratory Accreditation and that the results of such tests are provided quarterly to the Department of Health. In addition, the person or entity must post the certificate issued by the laboratory accredited by the American Industrial Hygiene Association or the American Association for Laboratory Accreditation in a conspicuous location where it can readily be seen by any person purchasing compressed air.

(4) The Department of Health shall maintain a record of all quarterly test results provided under this section.

(5) It is a misdemeanor of the second degree for any person or entity to provide, for compensation, compressed air for recreational sport diving in this state, including compressed air provided as part of a dive package of equipment rental, dive boat rental, or dive boat charter, without:

(a) Having received a valid certificate issued by a laboratory accredited by the American Industrial Hygiene Association or the American Association for Laboratory Accreditation which certifies that the compressed air meets the standards for contaminant levels established by the Department of Health.

(b) Posting the certificate issued by a laboratory accredited by the American Industrial Hygiene Association or the American Association for Laboratory Accreditation in a conspicuous location where it can readily be seen by persons purchasing compressed air.

(6) The department shall adopt rules necessary to carry out the provisions of this section, which must include:

(a) Maximum allowable levels of contaminants in compressed air used for sport diving.

(b) Procedures for the submission of test results to the department.

APPENDIX II

Borden v. Phillips, 752 So.2d 69 (Fla.App. Dist.1 02/16/2000)

[1] Florida Court of Appeals

[2] CASE No. 1D98-3361

[3] 752 So.2d 69, 2000.FL.0042951 <http://www.versuslaw.com>

[4] February 16, 2000

[5] CAROL H. BORDEN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KENNETH EARL BORDEN, DECEASED,
APPELLANT,
V.
DONNA LEE PHILLIPS, INDIVIDUALLY AND D/B/A MANTA RAY DIVERS CO-OP; TIMOTHY FRANKLIN PHILLIPS, INDIVIDUALLY AND D/B/A MANTA RAY DIVERS CO-OP; INTERNATIONAL PADI, INC., ON INFORMATION AND BELIEF A CALIFORNIA CORPORATION DOING BUSINESS IN FLORIDA,

APPELLEES.

[6] Michael J. Pugh of Levin and Tannenbaum, P.A., Sarasota; and John T. O'Connell, Pro Hac Vice, of John T. O'Connell & Associates, P.C., Boston, Massachusetts, Attorneys for Appellant. Mark A. Hruska, Boca Raton; and John Beranek of Ausley & McMullen, Tallahassee, Attorneys for Appellees.

[7] Booth, J.

[8] NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF, IF FILED.

[9] An appeal from the Circuit Court for Okaloosa County. Jack R. Heflin, Judge.

[10] The personal representative of the estate of Kenneth Borden (the "decedent") appeals the trial court's Order Granting Final Summary Judgment in a wrongful death action brought against Appellees. We affirm.

[11] The pertinent facts of this tragic accident, construed in a light most favorable to Appellant, are as follows. On April 1, 1995, decedent died while participating in a PADI Advanced Open Water course taught by Appellee Donna Phillips, approximately one mile offshore from Destin, Florida. Participants in the diving class were transported by a vessel known as the Manta Ray, owned and captained by Appellee Timothy Phillips. Both Donna Phillips and Timothy Phillips were doing business as "Manta Ray Divers Co-op." Timothy Phillips was a PADI ("Professional Association of Diving Instructors") certified divemaster. International PADI, Inc. trained scuba diving instructors to certify scuba students, and had agreements with businesses such as the Manta Ray Divers Co-op to advertise and represent to the public that it was knowledgeable in scuba diving matters. Before the dive both Donna Phillips and Timothy Phillips briefed decedent that if he surfaced and needed assistance, he should wave to Captain Phillips. If he could not reach the boat, he should swim to and use the "tag line" (a rope tied to the vessel with a flotation ball on the end) to pull himself to the boat.

[12] Before participating in this class, decedent executed a document entitled "PADI Standard Safe Diving Practices Statement of Understanding" and "LIABILITY RELEASE AND EXPRESS ASSUMPTION OF RISK" purporting to release Appellees from their own negligence.

[13] During the dive, while in the water, decedent became separated from the Manta Ray, and he swam toward the boat's floating tag line. Captain Phillips saw decedent wave his hand, but interpreted the wave as an "OK" signal. Phillips detached the tag line from the Manta Ray. When decedent reached the tag line, he was unable to pull himself into the boat. When the Manta Ray reached decedent, he was found

unresponsive, floating, with his hand wrapped in the tag line. An autopsy found the cause of death was drowning.

[14] Appellant claimed 46 U.S.C. section 183c, a federal admiralty statute voiding certain releases between owners of vessels transporting passengers, applied to invalidate the release. *fn1 The trial court entered Final Summary Judgment in favor of Appellees, finding that section 183c did not apply. The trial court also found the release was valid under Florida law. Appellant appeals these findings.

[15] The threshold question concerning the validity of the release is whether admiralty law applies to the facts of this case. This is a question of law, and therefore we review the trial court's decision de novo. Menendez v. The Palms West Condominium Ass'n, Inc., 736 So. 2d 58 (Fla. 1st DCA 1999).

[16] State courts have concurrent jurisdiction with federal courts over admiralty cases under the savings to suitors clause. 28 U.S.C. § 1333(1). To establish admiralty jurisdiction, the court considers a two-prong test. First, the activity from which the claim arises must satisfy a location test, i.e., the tort must have occurred on navigable water or the injury suffered on land must have been caused by a vessel on navigable water; the second prong is whether the activity has a sufficient connection with maritime activity. This second prong requires an assessment whether, given the general features of the type of accident, the "incident has a potentially disruptive impact on maritime commerce" and whether the "general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 532-534, 115 S. Ct. 1043, 1048 (1995). In determining whether special admiralty rules apply, the court must inquire whether the defendant's activity on navigable waters is closely related to activity traditionally subject to admiralty law. Navigation of boats in navigable waters falls within this substantial relationship, as does the storing of boats at a marina. However, the relationship of activities such as swimming or flying an airplane over water is too attenuated. Id., 513 U.S. at 540, 115 S. Ct. at 1051.

[17] The Manta Ray was a vessel transporting passengers for a scuba diving excursion in navigable waters, and therefore 46 U.S.C. section 183c applies to its voyage. See Keys Jet Ski v. Kays, 893 F.2d 1225 (11th Cir. 1990)(pleasure craft such as jet skis are considered vessels under admiralty law); 1 U.S.C. § 3. The question arises, therefore, whether decedent's activity once he departed the Manta Ray for scuba diving falls within admiralty jurisdiction, thereby voiding the release.

[18] No reported Florida cases have addressed this issue. The only published opinion we have found concerning the applicability of section 183c to scuba diving is In re Pacific Adventures, Inc., 5 F. Supp. 2d 874 (D. Haw. 1998). In Pacific Adventures, the plaintiff's leg became entangled with the propeller of a vessel while she was diving. The

court held that admiralty law applied to the incident, and section 183c voided a release the plaintiff signed before the dive. The district court expressly stated that the plaintiff's injury arose from her "contact with a moving vessel." Id. at 880. However, had her injuries been "related solely to scuba diving and had no relationship to the operation or maintenance of a vessel, then there would be no admiralty jurisdiction and Section 183c would not apply." Id. n.5 (citation omitted).

[19] Whether the decedent's death was related to the operation or maintenance of the Manta Ray, or solely to scuba diving, is a close question. Unlike an incident in which a passenger falls overboard or suffers injuries from negligent maintenance, the decedent intentionally departed the Manta Ray to dive. This activity, scuba diving, was not dependent on his passage in the Manta Ray. Further, decedent ceased being a passenger when he entered the water. That the crew was allegedly negligent when it failed to respond to decedent's signal did not involve the operation or maintenance of the Manta Ray, but was related solely to the activity of scuba diving, and therefore admiralty law does not apply to invalidate the release.

[20] We are guided in this decision by the United States Supreme Court's rationale in Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955). In Bisso, the Court addressed a towage contract exempting a towboat owner from its own negligence. Pointing to judicial history and public policy, the Court applied a longstanding general rule used by courts and legislatures to prevent enforcement of release-from-negligence contracts. "The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Id., 349 at 91, 75 S. Ct. at 632-633. Here, Appellees were not overreaching; decedent voluntarily contracted with Appellees and boarded the Manta Ray to scuba dive, exposing himself to its associated risks. His death had no relationship to the operation or maintenance of the Manta Ray, and therefore 46 U.S.C. App. section 183c does not invalidate the release. *fn2

[21] Having found that the release is not voided by 46 U.S.C. section 183c, we now must examine whether the release validly released Appellees from liability for their own negligence under Florida law.

[22] The language of the release is clear and unambiguous, reflecting the decedent's assumption of the risks inherent in scuba diving and his intent to release Appellees from all liability, including any liability resulting from their own negligence. Although viewed with disfavor under Florida law, such exculpatory clauses are valid and enforceable when clear and unequivocal. Theis v. J & J Racing Promotions, 571 So. 2d 92, 94 (Fla. 2d DCA 1990), rev. denied, 581 So. 2d 168 (Fla. 1991). The release expressly states that the decedent "understands and agrees" that none of the "Released Parties"

(Appellees) "may be held liable or responsible in any way for any injury, death, or other damages to me [decedent] or my family, heirs, or assigns that may occur as a result of my [decedent's] participation in this diving class or as the result of the negligence of any party, including the Released Parties, whether passive or active." The release goes on to state that the decedent intends to exempt and release Appellees from all liability or responsibility whatsoever . . . "HOWEVER CAUSED, INCLUDING, BUT NOT LIMITED TO, THE NEGLIGENCE OF THE RELEASED PARTIES, WHETHER PASSIVE OR ACTIVE."

[23] This case concerns contractual assumption of risks, not implied assumption of risks associated with some activities. Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977). The release is a classic example of the type of contractual release that has been upheld as enforceable in sporting events, such as automobile racing events and triathlons. Theis; DeBoer v. Florida Off-roaders Driver's Ass'n, 622 So. 2d 1134 (Fla. 5th DCA 1993); Banfield v. Louis, 589 So. 2d 441 (Fla. 4th DCA 1991).

[24] The release also releases Appellees from any "gross negligence" as alleged in the Amended Complaint. The term "negligence" as used in the release is not limited, and therefore should be construed as intending to encompass all forms of negligence, simple or gross, with only intentional torts being excluded from the exculpatory clause. Theis, 571 So. 2d at 94.

[25] We find that 46 U.S.C. section 183c does not invalidate the release. We further find that the exculpatory clause contained in the release is valid under Florida law. We therefore AFFIRM the trial court's Order Granting Final Summary Judgment.

[26] SMITH, LARRY G., SENIOR JUDGE, CONCURS; BENTON, J., DISSENTS WITH WRITTEN OPINION.

[27] BENTON, J., dissenting.

[28] Like the majority opinion, I conclude that "[t]he Manta Ray was a vessel transporting passengers for a scuba diving excursion in navigable waters, and therefore 46 U.S.C. section 183c applies to its voyage." Ante at 5. It is immaterial--under the view shared by the whole panel-- that the voyage ended where it began, see In re Pacific Adventures, Inc., 5 F. Supp. 2d 874, 879 (D. Haw. 1998), or that--from the passengers' perspective--the voyage had a recreational rather than a commercial purpose. See Sinclair v. Soniform, Inc., 935 F.2d 599, 602 (3d Cir. 1991); see generally In re Keys Jet Ski, Inc., 893 F.2d 1225, 1228-29 (11th Cir. 1990). But see Shultz v. Florida Keys Dive Ctr., Case No. 97-10047 (S.D. Fla. Sept. 24, 1998) (Order Upon Defendants' Factual Stipulation), appeal filed, Case No. 98-5704 (11th Cir. 1998).

[29] As the majority opinion also states, "[w]hether the decedent's death was related to the operation or maintenance of the Manta Ray, or solely to scuba diving, is a close question." Ante at 6. But the question is one of fact, in my opinion, and therefore inappropriate for resolution on motion for summary judgment. See, e.g., Lindsey v. Bill Arflin Bonding Agency, Inc., 645 So. 2d 565, 566 (Fla. 1st DCA 1994). Essentially, the complaint alleges that the decedent, while he was a passenger on the Manta Ray, entered the water with instructions to give a certain signal if he was in distress, that while he was on the water's surface he gave the signal, that the vessel did not come to his aid, and that he drowned as a result.

[30] The facts alleged pertain to the operation of a boat. This is not a case in which a scuba diver died underwater, see In re Kanoa, Inc., 872 F. Supp. 740, 745 (D. Haw. 1994), or suffered the bends. See Thompson v. ITT Sheraton Corp., Case No. 97-10080 (S.D. Fla. Feb. 2, 1999) (Order on Motion for Summary Judgment), appeal filed, Case No. 99-11298 (11th Cir. 1999). That the decedent had been scuba diving was, indeed, fortuitous, under the allegations of the complaint. As in Pacific Adventures, where the United States District Court of Hawaii concluded that 46 U.S.C. app. § 183c precluded enforcement of a release signed by a scuba diver, the complaint in the present case alleges that the crew of the dive boat failed to operate the dive boat properly. 874 F. Supp. 2d at 880.

[31] Although in the water, Mr. Borden was still attached to the boat as a passenger. Cf. Chervy v. Peninsular & Oriental Steam Navigation Co., 243 F. Supp. 654, 654-55 (S.D. Cal. 1964), affirmed, 364 F.2d 908 (9th Cir. 1966). The Manta Ray had not put Mr. Borden off at his ultimate destination. See Chervy, 243 F. Supp. at 654-55; Carlisle v. Ulysses Line Ltd., 475 So. 2d 248, 249 (Fla. 3d DCA 1985). Boiled down, the question the complaint poses is whether the captain of the Manta Ray was negligent in failing to retrieve a passenger from the water more promptly. Because today's decision affirms taking this question from the jury, I respectfully dissent.

Opinion Footnotes

[32] *fn1 Subsection (a) of 46 U.S.C. § 183c states: (a) Negligence It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure or damages therefor. All such provisions or limitations contained in any such rule,

regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

[33] *fn2 Moreover, as a matter of law section 183c cannot apply to Appellee PADI. The statute's potential reach is limited only to owners, managers, agents or masters of a vessel transporting passengers, not to a professional association certifying diving instructors.

APPENDIX III

TITLE 46--SHIPPING

CHAPTER I--COAST GUARD, DEPARTMENT OF TRANSPORTATION (CONTINUED)

PART 197--GENERAL PROVISIONS--Table of Contents

Subpart B--Commercial Diving Operations

general

Sec. 197.200 Purpose of subpart.

This subpart prescribes rules for the design, construction, and use of equipment, and inspection, operation, and safety and health standards for commercial diving operations taking place from vessels and facilities under Coast Guard jurisdiction.

Sec. 197.202 Applicability.

(a) This subpart applies to commercial diving operations taking place at any deepwater port or the safety zone thereof as defined in 33 CFR part 150; from any artificial island, installation, or other device on the Outer Continental Shelf and the waters adjacent thereto as defined in 33 CFR part 147 or otherwise related to activities on the Outer Continental Shelf; and from all vessels required to have a certificate of inspection issued by the Coast Guard including mobile offshore drilling units regardless of their geographic location, or from any vessel connected with a deepwater port or within the deepwater port safety zone, or from any vessel engaged in activities related to the Outer Continental Shelf; except that this subpart does not apply to any

diving operation--
(1) Performed solely for marine scientific research and development purposes by educational institutions;
(2) Performed solely for research and development for the advancement of diving equipment and technology; or
(3) Performed solely for search and rescue or related public safety purposes by or under the control of a governmental agency.
(b) Diving operations may deviate from the requirements of this subpart to the extent necessary to prevent or minimize a situation which is likely to cause death, injury, or major environmental damage. The circumstances leading to the situation, the deviations made, and the corrective action taken, if appropriate, to reduce the possibility of recurrence shall be recorded by the diving supervisor in the logbook as required by Sec. 197.482(c).

Sec. 197.203 Right of appeal.

Any person directly affected by a decision or action taken under this subchapter, by or on behalf of the Coast Guard, may appeal therefrom in accordance with subpart 1.03 of this chapter.

[CGD 88-033, 54 FR 50382, Dec. 6, 1989]

Sec. 197.204 Definitions.

As used in this subpart:
ACFM means actual cubic feet per minute.
ANSI Code1 means the B31.1 American National Standards Institute ``Code for Pressure Piping, Power Piping.''
ASME Code means the American Society of Mechanical Engineers ``Boiler and Pressure Vessel Code.''
ASME PVHO-1 means the ANSI/ASME standard ``Safety Standard for Pressure Vessels for Human Occupancy.''
ATA means a measure of pressure expressed in terms of atmosphere absolute (includes barometric pressure).
Bell means a compartment either at ambient pressure (open bell) or pressurized (closed bell) that allows the diver to be transported to and from the underwater work site, allows the diver access to the surrounding environment, and is capable of being used as a refuge during diving operations.
Bottom time means the total elapsed time measured in minutes from the time the diver leaves the surface in descent to the time to the next whole minute that the diver begins ascent.

Breathing gas/breathing mixture means the mixed-gas, oxygen, or air as appropriate supplied to the diver for breathing.

Bursting pressure means the pressure at which a pressure containment device would fail structurally.

Commercial diver means a diver engaged in underwater work for hire excluding sport and recreational diving and the instruction thereof.

Commercial diving operation means all activities in support of a commercial diver.

Cylinder means a pressure vessel for the storage of gases under pressure.

Decompression chamber means a pressure vessel for human occupancy such as a surface decompression chamber, closed bell, or deep diving system especially equipped to recompress, decompress, and treat divers.

Decompression sickness means a condition caused by the formation of gas or gas bubbles in the blood or body tissue as a result of pressure reduction.

Decompression table means a profile or set of profiles of ascent rates and breathing mixtures designed to reduce the pressure on a diver safely to atmospheric pressure after the diver has been exposed to a specific depth and bottom time.

Depth means the maximum pressure expressed in feet of seawater attained by a diver and is used to express the depth of a dive.

Dive location means that portion of a vessel or facility from which a diving operation is conducted.

Dive team means the divers and diver support personnel involved in a diving operation, including the diving supervisor.

Diver means a person working beneath the surface, exposed to hyperbaric conditions, and using underwater breathing apparatus.

Diver-carried reserve breathing gas means a supply of air or mixed-gas, as appropriate, carried by the diver in addition to the primary or secondary breathing gas supplied to the diver.

Diving installation means all of the equipment used in support of a commercial diving operation.

Diving mode means a type of diving requiring SCUBA, surface-supplied air, or surface-supplied mixed-gas equipment, with related procedures and techniques.

Diving stage means a suspended platform constructed to carry one or more divers and used for putting divers into the water and bringing them to the surface when in-water decompression or a heavy-weight diving outfit is used.

Diving supervisor means the person having complete responsibility for the safety of a commercial diving operation including the responsibility for the safety and health of all diving personnel in

accordance with this subpart.

Facility means a deepwater port, or an artificial island, installation, or other device on the Outer Continental Shelf subject to Coast Guard jurisdiction.

Fsw means feet of seawater (or equivalent static pressure head).

Gas embolism means a condition caused by expanding gases, which have been taken into and retained in the lungs while breathing under pressure, being forced into the bloodstream or other tissues during ascent or decompression.

Heavy-weight diving outfit means diver-worn surface-supplied deep-sea dress.

Hyperbaric conditions means pressure conditions in excess of surface atmospheric pressure.

Injurious corrosion means an advanced state of corrosion which may impair the structural integrity or safe operation of the equipment.

Liveboating means the support of a surfaced-supplied diver from a vessel underway.

Maximum working pressure means the maximum pressure to which a pressure containment device can be exposed under operating conditions (usually the pressure setting of the pressure relief device).

No-decompression limits means the air depth and bottom time limits of appendix A.

Pressure vessel means a container capable of withstanding an internal maximum working pressure over 15 psig.

Psi(g) means pounds per square inch (gage).

PVHO means pressure vessel for human occupancy but does not include pressure vessels for human occupancy that may be subjected to external pressures in excess of 15 psig but can only be subjected to maximum internal pressures of 15 psig or less (i.e., submersibles, or one atmosphere observation bells).

Saturation diving means saturating a diver's tissues with the inert gas in the breathing mixture to allow an extension of bottom time without additional decompression.

SCUBA diving means a diving mode in which the diver is supplied with a compressed breathing mixture from diver carried equipment.

Standby diver means a diver at the dive location available to assist a diver in the water.

Surface-supplied air diving means a diving mode in which the diver is supplied from the dive location or bell with compressed breathing air including oxygen or oxygen enriched air if supplied for treatment.

Surface-supplied mixed-gas diving means a diving mode in which the diver is supplied from the dive location or bell with a compressed breathing mixture other than air.

Timekeeping device means a device for measuring the time of a dive in minutes.

Treatment table means a depth, time, and breathing gas profile designed to treat a diver for decompression sickness.

Umbilical means the hose bundle between a dive location and a diver or bell, or between a diver and a bell, that supplies the diver or bell with a life-line, breathing gas, communications, power, and heat as appropriate to the diving mode or conditions.

Vessel means any waterborne craft including mobile offshore drilling units required to have a Certificate of Inspection issued by the Coast Guard or any waterborne craft connected with a deepwater port or within the deepwater port safety zone, or any waterborne craft engaged in activities related to the Outer Continental Shelf.

Volume tank means a pressure vessel connected to the outlet of a compressor and used as an air reservoir.

Working pressure means the pressure to which a pressure containment device is exposed at any particular instant during normal operating conditions.

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TITLE 29--LABOR

CHAPTER XVII--OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1910--OCCUPATIONAL SAFETY AND HEALTH STANDARDS--Table of Contents

Subpart T--Commercial Diving Operations

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); sec. 107, Contract Work Hours and Safety Standards Act (the Construction Safety Act) (40 U.S.C. 333); sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Secretary of Labor's Order No. 8-76 (41 FR 25059), 9-83 (48 FR 35736), or 1-90 (55 FR 9033), as applicable; 29 CFR part 1911.

Source: 42 FR 37668, July 22, 1977, unless otherwise noted.

General

Sec. 1910.401 Scope and application.

(a) Scope. (1) This subpart (standard) applies to every place of employment within the waters of the United States, or within any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Johnston Island, the Canal Zone, or within the Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1331), where diving and related support operations are performed.

(2) This standard applies to diving and related support operations conducted in connection with all types of work and employments, including general industry, construction, ship repairing, shipbuilding, shipbreaking and longshoring. However, this standard does not apply to any diving operation:

(i) Performed solely for instructional purposes, using open-circuit, compressed-air SCUBA and conducted within the no-decompression limits;

(ii) Performed solely for search, rescue, or related public safety purposes by or under the control of a governmental agency; or

(iii) Governed by 45 CFR part 46 (Protection of Human Subjects, U.S. Department of Health and Human Services) or equivalent rules or regulations established by another federal agency, which regulate research, development, or related purposes involving human subjects.

(iv) Defined as scientific diving and which is under the direction and control of a diving program containing at least the following elements:

(A) Diving safety manual which includes at a minimum: Procedures covering all diving operations specific to the program; procedures for emergency care, including recompression and evacuation; and criteria for diver training and certification.

(B) Diving control (safety) board, with the majority of its members being active divers, which shall at a minimum have the authority to: Approve and monitor diving projects; review and revise the diving safety manual; assure compliance with the manual; certify the depths to which a diver has been trained; take disciplinary action for unsafe practices; and, assure adherence to the buddy system (a diver is accompanied by and is in continuous contact with another diver in the water) for SCUBA diving.

(b) Application in emergencies. An employer may deviate from the requirements of this standard to the extent necessary to prevent or minimize a situation which is likely to cause death, serious physical harm, or major environmental damage, provided that the employer:

(1) Notifies the Area Director, Occupational Safety and Health

Administration within 48 hours of the onset of the emergency situation indicating the nature of the emergency and extent of the deviation from the prescribed regulations; and

(2) Upon request from the Area Director, submits such information in writing.

(c) Employer obligation. The employer shall be responsible for compliance with:

(1) All provisions of this standard of general applicability; and

(2) All requirements pertaining to specific diving modes to the extent diving operations in such modes are conducted.

[42 FR 37668, July 22, 1977, as amended at 47 FR 53365, Nov. 26, 1982; 58 FR 35310, June 30, 1993]

Sec. 1910.402 Definitions.

As used in this standard, the listed terms are defined as follows:

Acfm: Actual cubic feet per minute.

ASME Code or equivalent: ASME (American Society of Mechanical Engineers) Boiler and Pressure Vessel Code, Section VIII, or an equivalent code which the employer can demonstrate to be equally effective.

ATA: Atmosphere absolute.

Bell: An enclosed compartment, pressurized (closed bell) or unpressurized (open bell), which allows the diver to be transported to and from the underwater work area and which may be used as a temporary refuge during diving operations.

Bottom time: The total elasped time measured in minutes from the time when the diver leaves the surface in descent to the time that the diver begins ascent.

Bursting pressure: The pressure at which a pressure containment device would fail structurally.

Cylinder: A pressure vessel for the storage of gases.

Decompression chamber: A pressure vessel for human occupancy such as a surface decompression chamber, closed bell, or deep diving system used to decompress divers and to treat decompression sickness.

Decompression sickness: A condition with a variety of symptoms which may result from gas or bubbles in the tissues of divers after pressure reduction.

Decompression table: A profile or set of profiles of depth-time relationships for ascent rates and breathing mixtures to be followed after a specific depth-time exposure or exposures.

Dive location: A surface or vessel from which a diving operation is

conducted.

Dive-location reserve breathing gas: A supply system of air or mixed-gas (as appropriate) at the dive location which is independent of the primary supply system and sufficient to support divers during the planned decompression.

Dive team: Divers and support employees involved in a diving operation, including the designated person-in-charge.

Diver: An employee working in water using underwater apparatus which supplies compressed breathing gas at the ambient pressure.

Diver-carried reserve breathing gas: A diver-carried supply of air or mixed gas (as appropriate) sufficient under standard operating conditions to allow the diver to reach the surface, or another source of breathing gas, or to be reached by a standby diver.

Diving mode: A type of diving requiring specific equipment, procedures and techniques (SCUBA, surface-supplied air, or mixed gas).

Fsw: Feet of seawater (or equivalent static pressure head).

Heavy gear: Diver-worn deep-sea dress including helmet, breastplate, dry suit, and weighted shoes.

Hyperbaric conditions: Pressure conditions in excess of surface pressure.

Inwater stage: A suspended underwater platform which supports a diver in the water.

Liveboating: The practice of supporting a surfaced-supplied air or mixed gas diver from a vessel which is underway.

Mixed-gas diving: A diving mode in which the diver is supplied in the water with a breathing gas other than air.

No-decompression limits: The depth-time limits of the ``no-decompression limits and repetitive dive group designation table for no-decompression air dives'', U.S. Navy Diving Manual or equivalent limits which the employer can demonstrate to be equally effective.

Psi(g): Pounds per square inch (gauge).

Scientific diving means diving performed solely as a necessary part of a scientific, research, or educational activity by employees whose sole purpose for diving is to perform scientific research tasks. Scientific diving does not include performing any tasks usually associated with commercial diving such as: Placing or removing heavy objects underwater; inspection of pipelines and similar objects; construction; demolition; cutting or welding; or the use of explosives.

SCUBA diving: A diving mode independent of surface supply in which the diver uses open circuit self-contained underwater breathing apparatus.

Standby diver: A diver at the dive location available to assist a diver in the water.

Surface-supplied air diving: A diving mode in which the diver in the water is supplied from the dive location with compressed air for breathing.

Treatment table: A depth-time and breathing gas profile designed to treat decompression sickness.

Umbilical: The composite hose bundle between a dive location and a diver or bell, or between a diver and a bell, which supplies the diver or bell with breathing gas, communications, power, or heat as appropriate to the diving mode or conditions, and includes a safety line between the diver and the dive location.

Volume tank: A pressure vessel connected to the outlet of a compressor and used as an air reservoir.

Working pressure: The maximum pressure to which a pressure containment device may be exposed under standard operating conditions.

APPENDIX IV

Weeks v. Alonzo Cothron Inc., 466 F.2d 578 (5th Cir. 09/15/1972)

[1] UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

[2] No. 71-2661

[3] 1972.C05.40328 <http://www.versuslaw.com>; 466 F.2d 578

[4] September 15, 1972

[5] EVELYN WEEKS, SURVIVING SPOUSE OF NORMAN LEE WEEKS, SR., DECEASED, PLAINTIFF-APPELLANT,
v.
ALONZO COTHRON, INC., ET AL., DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLEES, V. AMERICAN MUTUAL LIABILITY INSURANCE COMPANY AND MATSON SURETY, INC., THIRD PARTY DEFENDANTS.

[6] Before Phillips,*fn* Thornberry and Roney, Circuit Judges.

[7] Author: Roney

[8] RONEY, Circuit Judge:

[9] Norman Lee Weeks, Sr. died while making underwater repairs to a barge owned by defendants. He was their employee. His surviving spouse, Evelyn Weeks, brought suit against the shipowner-employer for damages for his death. The suit was based on

alleged negligence and unseaworthiness. The district court entered findings of fact and conclusions of law in favor of defendants. Finding the district court clearly erroneous on the issue of unseaworthiness, we reverse.

[10] On August 17, 1968, Norman Weeks, fifty, an employee of defendant Alonzo Cothron, Inc., was repairing a barge owned by defendants. The barge was located in a canal in lower Matecumbe Key, within the navigable waters of Florida. The vessel was 105 feet long and 30 feet wide, with a freeboard of 4 to 6 feet. It cleared the silt bottom of the canal by 5 or 6 feet. It was tied up parallel to the bank of the canal approximately 3 or 4 feet from the water's edge. The canal was dead end, so the barge was not subject to any water currents. The water was described as "so clear that you could throw a dime in it and see it all the way to the bottom."

[11] The barge had been used to haul heavy equipment onto beaches and the frequent beaching had forced the barge into rocks, punching holes in its bottom. On the day of Weeks' death, he and two other men, Robert Parnell and Manuel Arsua, who was foreman of the 3-man crew, were pumping water from the barge and applying sandwich-type patches to the leaks. These patches were constructed by attaching a piece of marine plywood directly under and directly over each hole with a bolt passing through a steel plate and the underside patch, then through the hole, and finally up through the topside patch and another steel plate. When the bolt was tightened, the leak would be sealed. The last leak to be patched was 7 to 9 feet in from the edge of the barge, and Weeks' job was to swim under the barge with the bolt and the 12 by 8 inch underside patch, find the leak, insert the patch and bolt, return under water to the edge of the barge, and surface. Arsua was in the barge's hold to receive the bolt and, with Parnell's assistance, was to apply the topside patch and secure it.

[12] Refusing Parnell's offer of a lifeline, Weks dove under the barge, wearing only a diving mask. Parnell stood at the edge of the barge as a lookout until Arsua, who was in the hold, called out that he had the patch. At that point Parnell left his lookout post and started down the ladder into the hold to assist Arsua, apparently assuming that Weeks would be on his way up to the surface. As he was descending the ladder, Arsua's six year old son, who had been playing around the barge, called out that Weks had failed to come up. Both Arsua and Parnell dove under the barge but were unable to find Weeks. They then moved the barge out into the canal and fifteen to twenty minutes later found Weeks' body floating up against the bottom of the barge, about thirty feet from the patch.

[13] We have previously reversed a dismissal of the first complaint in this case, which was based on a claim of negligence. We held that the Florida wrongful death statute covers claims of negligence occurring in the navigable waters of Florida, thus giving the district court admiralty jurisdiction. Weeks v. Alonzo Cothron, Inc., 426 F.2d 674 (5th Cir. 1970). Thereafter the United States Supreme Court decided Moragne v. States

Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), which held that an action lies under the general maritime law for death caused by unseaworthiness of a vessel on the navigable waters of Florida, without regard to the limited scope of the state wrongful death statute. The plaintiff then amended her complaint and sought relief both under the Florida statute on the theory of negligence and under the general maritime law on the theory of unseaworthiness, which contemplates liability without fault.

[14] The trial court denied relief on both grounds. The court was not convinced that Weeks had died of drowning and found that the plaintiff had failed to prove that her husband's death was proximately caused by the circumstances of his employment or the alleged negligence or unseaworthiness. The court further decided that the vessel was not unseaworthy and that the defendant employer was not negligent.

[15] We conclude that the vessel was unseaworthy and that the trial court was clearly erroneous in its finding of no proximate cause. Having decided this, we need not deal with the theory of negligence. The determination of damages on remand would be the same, regardless of the theory of recovery.

[16] I. Unseaworthiness

[17] Mrs. Weeks argues that defendants' barge was unseaworthy and that this unseaworthiness caused her husband's death. The trial court found that the evidence did not support a finding of unseaworthiness. It found that (1) a safety line was available and offered to Weeks but was refused; (2) scuba equipment was not required because the law does not impose upon a vessel owner the duty to furnish the highest degree of safety; (3) if Weeks had used the safety line offered to him, he could have been pulled out of the water when he failed to surface within a matter of minutes; and (4) no other equipment was necessary and defendants' failure to have any other equipment did not constitute unseaworthiness. We think the district court misperceived the obligation of defendant to provide safe working conditions for Weeks.

[18] Under the landmark case of Moragne v. States Marine Lines, Inc., supra, an action lies under the general maritime law for death caused by the unseaworthiness of a vessel in navigable waters. The duty to furnish a seaworthy vessel, i.e., a vessel and appurtenances reasonably fit for their intended use, is absolute, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960), and it is a kind of liability without fault that may be incurred without negligence. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

[19] At the outset, we acknowledge that the doctrine of seaworthiness does not require defendants' barge to be equipped with the latest developments in maritime

safety. In Mitchell v. Trawler Racer, Inc., supra, the Supreme Court stated that an owner is not

[20] "obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 U.S. at 550, 80 S. Ct. at 933.

[21] It is also true that unseaworthiness does not extend to the negligent use of seaworthy appliances. See, e.g., Little v. Green, 428 F.2d 1061 (5th Cir. 1970). See also 2 Norris, The Law of Seamen § 618 (1970).

[22] We rest our finding of unseaworthiness on defendants' complete failure to require the use of any safety procedure or equipment which would have enabled the crew to know immediately that Weeks had met with trouble and to locate and rescue him promptly from beneath the water. We hold defendants should have required their employees to follow some sort of safety procedure or use some kind of safety equipment. The evidence shows that Weeks was offered a lifeline but that he refused it. The lifeline was not required by defendants' rules and regulations. Even without a lifeline, however, some procedure could have been and should have been required to provide Weeks with a "connection" to his co-workers which would have enabled them to monitor his movements and to locate him quickly if trouble arose. The fifteen to twenty minute period which elapsed before Weeks' body was found attests to the need for a safety system of this kind. The theory of the "buddy system" of water safety is too well entrenched to be completely ignored. The defendants' practice of permitting a single diver to work alone under the barge without visual or physical connection to another member of the crew, and without any safety precautions, amounts to unseaworthiness.

[23] Defendants seek to avoid a finding of unseaworthiness in two ways. First, they argue that previous Fifth Circuit cases compel a finding that Weeks' failure to use the proffered lifeline was the sole proximate cause of his death. Second, defendants argue that divers in the Florida Keys customarily dove without lifelines. We find the first argument unpersuasive and the second one not controlling.

[24] As to the first argument, each case cited to us by defendant is distinguishable in at least one key respect. Our finding of unseaworthiness in the instant case rests upon defendant's failure to require the use of safety precautions. In contrast, none of the cited cases involves a failure of the shipowner to require safety procedures.

[25] In Chaney v. City of Galveston, 368 F.2d 774 (5th Cir. 1966), the plaintiff was injured when he disregarded a "long observed... safe practice" and attempted to spot a

grain spout over a ship by himself. The court correctly held that the sole proximate cause of plaintiff's injury was "his own heedlessness in not observing the safe practice of having spout tenders assist him and in attempting to spot the spout with only one tag line and permitting the second tag line to become secured to the ship." 368 F.2d at 776. In the instant case, Weeks' refusal of the lifeline was not in disregard of a long observed, safe practice. The practice was not to use the lifeline.

[26] In Reed v. MV Foylebank, 415 F.2d 838 (5th Cir. 1969), the plaintiff departed from the "usual custom" of hooking crates on available wooden corners and instead used his hand hook on a steel band which broke, injuring plaintiff. The court held that the proximate cause of plaintiff's injury was his own negligence in hooking the steel strap in a departure from usual custom. Weeks followed the usual custom.

[27] Similarly, in Boudreaux v. Sea Drilling Corp., 427 F.2d 1160 (5th Cir. 1970), plaintiff was injured when a wire rope on a crane broke. This court affirmed the district court's holding that plaintiff's injury was caused by his own negligence in choosing to use only a single line, not a double or triple line, "in violation of custom on the drilling platform and ordinary operating procedure...." 427 F.2d at 1161. Unlike Boudreaux, Weeks did not ignore a customary operating procedure. Rather, it is the complete absence of any such customary adequate safety procedures for the divers which renders defendants' barge unseaworthy.

[28] Rabb v. Canal Barge Co., 428 F.2d 201 (5th Cir. 1970), affirmed a jury verdict for the defendant in a drowning case. The jury decided that Rabb's failure to wear a lifejacket, which was "required under all circumstances," was the sole proximate cause of his drowning, and this court held that the verdict was supported by a reasonable evidentiary basis. Here again, unlike in the instant case, the injury was caused by a failure to use required equipment.

[29] In Little v. Green, 428 F.2d 1061 (5th Cir. 1970), plaintiff was injured while operating a winch when he kicked the cable to correct its override, instead of using the "preferred method" of eliminating the override by tapping the cable lightly with his hand. This court, in affirming a jury verdict for defendant, held that the injury was attributable to plaintiff's intentional negligent act. As in the other cases cited to us by defendants, the plaintiff in Little failed to follow a usual safe procedure and in fact performed his duties in a manner not sanctioned by his superiors. In the instant case, Weeks' diving procedure was consistent with past practice and acceptable to his foreman Arsua.

[30] A district court case, Taylor v. SS Helen Lykes, 268 F. Supp. 932 (E.D.La.1967), aff'd, 402 F.2d 777 (5th Cir. 1968), is likewise essentially different from this case. In Taylor, plaintiff longshoreman was injured when he chose not to use available pallet boards as a platform from which to unload bags of wheat. The district court found that

plaintiff's negligence in failing to follow "good stevedoring practice" was the sole cause of his injury.

[31] Defendants' second proposition, that the barge was seaworthy because its diving procedures conformed to those regularly used in the Florida Keys, we reject as not controlling. Defendants argue that divers in the Florida Keys traditionally dive without lifelines. In essence, their argument states that an unseaworthy practice becomes seaworthy if ratified by custom and usage. This court has previously rejected such an argument in Stevens v. Seacoast Co., 414 F.2d 1032 (5th Cir. 1969). In Stevens the defendant argued that its radioless oyster dredging vessel was not unseaworthy because vessels of its kind customarily had no radios. Rejecting this reasoning, the court stated that "the law can draw on its own resources to find a need and thus to reject a custom as wanting in due care as this one." 414 F.2d at 1039. The same reasoning is equally applicable in the instant case. Cf. Davis v. Associated Pipe Line Contractors, Inc., 305 F. Supp. 1345 (W.D.La.1968), aff'd, 418 F.2d 920 (5th Cir. 1969).

[32] II. Proximate Cause

[33] The district court found that the plaintiff had failed to prove that the decedent's death had been caused by the alleged unseaworthiness. Defendants suggested at trial that Weeks may have died of a heart attack. In support of this contention, defendants presented medical testimony to the effect that Weeks suffered from interior wall injury and that his heart condition had been diagnosed two years before his death. Additionally, there was a previous diagnosis of angina pectoris eighteen months before decedent's death, and only foam rathe than water came out of Weeks' mouth when he was brought to the surface. Without more, this evidence cannot refute the irresistible inference that a man who is beneath the water for fifteen or twenty minutes has died for lack of air. No autopsy having been performed, there was no controlling evidence of whether or not he had water in his lungs. Weeks was in apparent good health when he went below the surface. The fact that he had moved approximately thirty feet from the location of the patch along the bottom of the barge, when he was working no more than ten feet from the side of the barge, readily suggests that prompt rescue efforts would have brought him to the surface alive. A seaworthy vessel would have provided the means of such a prompt rescue. The failure to find that plaintiff had met the required burden of proof as to proximate cause was clearly erroneous.

[34] The judgment for the defendants is reversed and the case is remanded for entry of judgment for the plaintiff in such amount as the district court shall determine.

[35] Reversed and remanded.

Judges Footnotes

[36] *fn* Hon. Orie L. Phillips, of the Tenth Circuit, sitting by designation.

APPENDIX V

Carnival Cruise Lines, Inc. v. Levalley, 786 So.2d 18 (Fla.App. Dist.3 04/11/2001)

[1] Florida Court of Appeals

[2] CASE NOS. 3D99-232,, 3D99-497

[3] 786 So.2d 18, 2001.FL.0001738 <http://www.versuslaw.com>

[4] April 11, 2001

[5] CARNIVAL CRUISE LINES, INC., APPELLANT,
v.
DIANA LEVALLEY, ET AL., APPELLEES.

[6] LOWER TRIBUNAL NO. 93-9747

[7] Hicks, Anderson & Kneale and David J. Maher; Keller & Houck; Kaye, Rose, for appellant. Waks & Barnett; Russo Parrish and Stuart B. Yanofsky; William J. Turbeville, II, for appellees.

[8] Before Schwartz, C.J., and Gersten and Goderich, JJ.

[9] The opinion of the court was delivered by: Schwartz, Chief Judge

[10] Appeals from the Circuit Court for Dade County, Juan Ramirez, Jr.,

[11] While Diana Levalley was on a Carnival Line cruise in May, 1992, she was severely injured during a scuba class conducted under the lines' auspices on Grand Cayman Island. Mrs. Levalley and her husband sued the dive instructor, Maggie Soper, for negligence in failing to adequately instruct or supervise her, and Carnival, both for Soper's negligence and for the failure of other employees, Blum and Samms, to investigate, supervise and employ competent personnel (including Soper) to conduct the scuba program. The Levalleys settled their claim against Soper individually for $561,360.00, and the case went to the jury against the cruise line specifically based only on its alleged vicarious liability for the negligence of Blum and Samms. The jury found that Levalley had sustained $1,000,000.00 in damages and assessed the percentage of fault at 33% for Mrs. Levalley's comparative negligence, 33% for Carnival's "non-Soper" negligence and 34% attributable to Soper, who appeared on the verdict form as a Fabre defendant. The trial judge then granted Levalley's motion for partial directed verdict

that no comparative negligence had been demonstrated as a matter of law, "transferred" Lavalley's 33% share to Carnival, denied any setoff for Soper's $561,360.00 settlement, and accordingly entered a $660,000.00 judgment for the Levalleys from which Carnival now appeals. We find as follows:

[12] 1. A new trial on all liability issues is required because of the trial judge's peremptory instruction that an asthmatic condition from which Levalley suffered prior to the dive was not a causative factor in the accident, and his exclusion of proffered expert testimony to the contrary. It is clear that evidence the plaintiff falsely concealed that condition from Soper and Carnival, that she would not have been permitted to participate had she truthfully revealed it, and that she dove notwithstanding her knowledge that it was dangerous for an asthmatic to do so were all directly relevant to the issues of the legal causation of the accident and, even more obviously, of her comparative negligence. See Metropolitan Dade Co. v. St. Clair, 445 So. 2d 614 (Fla. 3d DCA 1984)(expert testimony should have been admitted as relevant to plaintiff's contributory negligence in suit for negligence).

[13] The same is true of proffered expert testimony that such a condition significantly increased the chances of causing a panicked reaction to a diving mishap, such as the one to which Mrs. Levalley herself testified, and which, a jury could undoubtedly find contributed to her injuries. Haas v. Zaccaria, 659 So. 2d 1130 (Fla. 4th DCA 1995)(new trial ordered where defendants precluded from offering admissible expert testimony as to possibility of cause of plaintiff's injury), review denied, 669 So. 2d 253 (Fla. 1996); State Farm Mut. Auto. Ins. Co. v. Roth, 552 So. 2d 332 (Fla. 4th DCA 1989)(trial court improperly excluded evidence of plaintiff's medical history related to the issue of causation of plaintiff's injury). While we find no reason for re-trying the damages issue, see Delva v. Value Rent-A-Car, 693 So. 2d 574 (Fla. 3d DCA 1997); D.R. Mead & Co. v. Cheshire, Inc., 489 So. 2d 830 (Fla. 3d DCA 1986), these rulings *fn1 require a new trial on all liability issues: Carnival's negligence, Soper's Fabre negligence, comparative negligence and legal causation.

[14] 2. We also hold, although it is not strictly necessary to do so in the light of our previous ruling, that, even on the evidence and under the instructions actually given the jury, it could properly have found Levalley comparatively negligent both in failing to follow the instructions given her before the accident, and in failing properly to protect herself against the risks of diving against which she had been warned. See generally Ashcroft v. Calder Race Course, Inc., 492 So. 2d 1309 (Fla. 1986); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977). The trial court therefore incorrectly struck the jury's 33% comparative negligence finding, and compounded that error by arbitrarily assigning that "share" only to Carnival. We can discern no legal basis for the latter ruling.

[15] 3. Finally, we treat the effect of the Soper settlement. Because the case went to the jury under specific instructions that Carnival's liability could be based only on the negligence of other employees, it is apparent that, notwithstanding her legal status as an agent of Carnival, for whose negligence it would ordinarily be liable, she was considered in this case as a run-of-the-mill third party tortfeasor, for whom Carnival was not vicariously responsible. It follows that Soper was properly treated simply as a Fabre party whose name properly appears on the verdict form to apportion fault.

[16] For that reason as well, in the event of any judgment against Carnival, the Soper settlement should be set off proportionally under Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995). See also Metropolitan Dade County v. Frederic, 698 So. 2d 291 (Fla. 3d DCA 1997), appeal denied, 705 So. 2d 9 (Fla. 1997). It should neither be treated as a complete setoff, as Carnival argues, nor totally disregarded, as the trial court erroneously determined. See Wells, 659 So. 2d at 249; McDermott Inc. v. AmClyde, 511 U.S. 202 (1994)(non-settling defendants' liability should be calculated with reference to the jury's allocation of proportionate responsibility and not by credit in the amount of settlement); Central State Transit & Leasing Co. v. Jones Boat Yard, Inc., 206 F. 3d 1373 (11th Cir. 2000) (same). Compare J.R. Brooks & Son, Inc. v. Quiroz, 707 So. 2d 861 (Fla. 3d DCA 1998)(non-settling defendant entitled to set off in amount of settlement where liability was purely vicarious).

[17] The judgment against Carnival is reversed as to all issues of liability only and for further proceedings in accordance with this opinion.

[18] Reversed and remanded with directions.

Opinion Footnotes

[19] *fn1 The trial judge's rulings were based on the fact that there was no evidence that Levalley had sustained an actual asthma attack during the dive. While this conclusion was probably correct, it has nothing to do with the pertinence of the condition itself to vital issues in the case.

APPENDIX VI

[U] Yace v. Dushane, No. B162789 (Cal.App. Dist.2 12/16/2003)

[1] IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION EIGHT

[2] B162789

[3] 2003.CA.0011614< http://www.versuslaw.com>

[4] December 16, 2003

[5] BRENDAN YACE ET AL., PLAINTIFFS AND APPELLANTS,
v.
DENNIS DUSHANE, DEFENDANT AND RESPONDENT.

[6] APPEAL from a judgment of the Superior Court for the County of Los Angeles. Frances Rothschild, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC272937)

[7] Steinbrecher & Associates and Edward Steinbrecher for Plaintiffs and Appellants.

[8] Hanger, Levine & Steinberg, Paul V. Ash and Anne C. Manalili for Defendant and Respondent.

[9] The opinion of the court was delivered by: Boland, J.

[10] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[11] California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

[12] SUMMARY

[13] A wrongful death lawsuit filed by the successors of a scuba diver, who died when her "dive buddy" panicked and ascended to the surface instead of assisting her by sharing his air supply, is barred by the doctrine of primary assumption of the risk.

[14] FACTUAL AND PROCEDURAL BACKGROUND

[15] Katherine Sentner died while scuba diving some sixty feet below the surface of the water at Big Rock near Santa Cruz Island. Her children, Brendan Yace, Christine Weber and Timothy Sentner (collectively, Yace), filed this lawsuit against Dennis Dushane, who was diving with Sentner at the time of the accident. *fn1 The complaint alleges that Dushane and Sentner agreed to be each other's "dive buddy" during their scuba diving on the day of the accident. During their second dive, Dushane separated from Sentner to obtain his bearings, leaving her at least sixty feet under water. When Dushane descended, he could not find Sentner until he felt her reach for his regulator. Dushane "then negligently panicked and abandoned decedent," ascending to the surface without sharing his air and assisting Sentner to the surface, as is required of a dive buddy. Dushane had sufficient air to share with Sentner, and if he had not "negligently panicked" and abandoned her, she would not have drowned. Yace also alleged a second cause of action for "reckless and intentional conduct," based on identical factual allegations.

[16] Dushane demurred to the negligence cause of action on the ground of failure to state a claim, based on the doctrine of assumption of the risk, and to the second cause of action on the ground of uncertainty. The trial court sustained the demurrer without leave to amend, concluding Yace's claim was barred by assumption of the risk, "which includes that your buddy will panic." Judgment was entered in favor of Dushane and this appeal followed.

[17] DISCUSSION

[18] Yace argues that under the rules of scuba diving, Dushane owed Sentner a duty to share his air supply. Dushane violated that duty, recklessly increasing the risk of death to Sentner. Under these facts, Yace contends, liability is not barred by the doctrine of assumption of the risk. We are compelled to disagree.

[19] The doctrine of assumption of risk operates as a complete bar to a plaintiff's recovery in cases involving "primary assumption of risk," that is, "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury . . . ." (Knight v. Jewett (1992) 3 Cal.4th 296, 314-315.) *fn2 The existence and scope of a defendant's duty of care is a legal question "which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." (Knight v. Jewett, supra, 3 Cal.4th at p. 313.)

[20]
A participant in an active sport breaches a duty of care to a coparticipant only if he or she "intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (Knight v. Jewett, supra, 3 Cal.4th at p. 320; see Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990, 996 [applying a similar standard to a sports instructor].) Thus, in general "it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport . . . ." *fn3 (Knight v. Jewett, supra, 3 Cal.4th at p. 318.) The Supreme Court cited examples of conduct to which liability was properly applied, such as a basketball player who wantonly assaulted an opposing player, a baseball catcher who deliberately and without warning hit a batter in the head with his fist, and a hockey player who intentionally punched another player in the face at the conclusion of the game. (Id. at pp. 319-320 [citing cases].) Subsequent cases emphasized Knight v. Jewett's observation that defendants "generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." *fn4 (Knight v. Jewett, supra, 3 Cal.4th at p. 316.) The cases also cite the reasoning underlying the application of a limited duty of care in sports situations: "vigorous participation in the sport likely would be chilled, and, as a result, the nature of the sport likely would be altered, in the event legal liability were to be imposed on a sports participant for ordinary careless conduct." (Ford v. Gouin (1992) 3 Cal.4th 339, 345 [applying the Knight standard to noncompetitive, cooperative sport of waterskiing].)

[21] In applying the Knight v. Jewett principles to the allegations in this case, it is clear Dushane's conduct - his panicked ascent to the surface without assisting Sentner - cannot be found to have breached a legal duty of care. This is because a diver's panic is an inherent risk of the sport of scuba diving. Moreover, Dushane's alleged conduct, while unfortunate, cannot be characterized as careless, much less as reckless or

intentional. Accordingly, the conduct falls well outside the standard established in Knight v. Jewett, and no legal duty of care was breached.

[22] First, we entertain no doubt that the conduct alleged to have caused Sentner's death - a diver's panicked ascent to the surface instead of sharing his air with a dive buddy in distress - is an inherent risk of the sport of scuba diving. *fn5 In scuba diving, the participant is far under water, and is entirely dependent upon her equipment for a supply of air and upon her fellow diver in an emergency. Circumstances may arise in which a diver's negligent acts might "increase the risks to a participant over and above those inherent" in scuba diving, thus giving rise to a duty of due care. (See Yancey v. Superior Court (1994) 28 Cal.App.4th 558, 565 [careless conduct of a participant in throwing the discus, without first ascertaining that the target area was clear, is not an inherent risk of the sport].) However, the same cannot be said for conduct during an underwater emergency, such as occurred in this case. *fn6 Unlike most other sports, the possibility of a life-threatening emergency in scuba diving is apparent, and indeed anticipated. *fn7 Just as an emergency problem with air supply is itself an inherent risk of the sport, so also is the reaction to that emergency of one's diving buddy.

[23] Second, a diver's panicked failure to assist a dive buddy in trouble cannot be characterized as either intentional or reckless. Panic is "a sudden overpowering fright; esp: a sudden unreasoning terror often accompanied by mass flight." (Webster's 9th New Collegiate Dict. (1989) p. 850.) Conduct that is reckless, by contrast, is "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk . . . ." (Black's Law Dict. (7th ed. 1999) p. 1276, col. 2.) The mere conjunction of the words "negligence" or "recklessness" with "panic" suffices to demonstrate that no liability can exist in this case: we would have to say a scuba diver has a duty to his dive buddy not to panic. That, of course, we cannot do.

[24] We note one final point. At oral argument before this court, Yace contended it was an abuse of discretion not to allow amendment of the complaint. However, at no time - not before the trial court, not in the appellate briefs, and not at oral argument - did Yace articulate any different or additional facts that might be alleged in an amended complaint. Indeed, at the hearing below, after reviewing the trial court's tentative ruling, Yace's counsel indicated his intention to take an appeal and said: "We disagree - just for the record, we disagree of course. We set out our position and I can't improve upon it." It was Yace's burden to show "in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636.) Yace did not even attempt to meet that burden.

[25] In sum, the rule in Knight v. Jewett applies. "Under Knight `inherent risk' defines duty." (Staten v. Superior Court (1996) 45 Cal.App.4th 1628, 1635.) A panicked reaction to an underwater emergency is an inherent risk of the sport of scuba diving, and in any

event cannot be characterized as the reckless or intentional conduct for which liability may be imposed. Accordingly, no legal duty of care exists, and Yace's action is barred by the doctrine of primary assumption of risk.

[26] DISPOSITION

[27] The judgment is affirmed. Dennis Dushane is to recover his costs on appeal.

[28] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[29] We concur:

[30] COOPER, P.J.

[31] RUBIN, J.

Opinion Footnotes

[32] *fn1 Yace also sued Christopher Allen Russello, doing business as Aloha Dive and Travel, and Matt Gilbertson, an employee of Aloha Dive and Travel, for negligence. That portion of Yace's lawsuit was settled.

[33] *fn2 "In cases involving `secondary assumption of risk' - where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty - the doctrine [of assumption of risk] is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (Knight v. Jewett, supra, 3 Cal.4th at p. 315.)

[34] *fn3 Knight v. Jewett noted that this limited duty of care has been applied in a wide variety of active sports; the Court did not decide "whether a comparable limited duty of care appropriately should be applied to other less active sports, such as archery or golf." (3 Cal.4th at p. 320, fn. 7.) Since Knight v. Jewett, the courts of appeal have applied Knight's limited standard of care to less active sports such as golf and sailing. (E.g., Dilger v. Moyles (1997) 54 Cal.App.4th 1452, 1455- 1456 [being struck by a golf ball is an inherent risk of the sport and failure to yell "fore" is not the reckless or intentional conduct contemplated by the Knight court].) The ordinary duty of care has been applied to hunting accidents because of the special danger to others posed by hunting. (Knight v. Jewett, supra, 3 Cal.4th at p. 320, fn. 7.)

[35] *fn4 See Campbell v. Derylo (1999) 75 Cal.App.4th 823, 828- 830 [jury could find that use of a snowboard without a retention strap in violation of ordinance and ski

resort rules increased the risk of harm to plaintiff beyond that inherent in the sport]; Dilger v. Moyles, supra, 54 Cal.App.4th at p. 1456 ["[w]hether a duty exists depends on whether the activity in question was an `inherent risk' of the sport"].

[36] *fn5 Yace argues that the abandonment of Sentner by her diving buddy "is not part of the sport of scuba diving," and that Dushane's conduct "affirmatively increased the risks inherent" in scuba diving. While these statements may be literally correct, they miss the point. The issue posed by Yace's complaint is whether Dushane's alleged conduct -that he "negligently panicked and abandoned decedent" when he felt her reach for his regulator - is an inherent risk of scuba diving.

[37] *fn6 As discussed above, Knight v. Jewett holds that a legal duty of care is breached by reckless conduct "totally outside the range of the ordinary activity involved in the sport." (Knight v. Jewett, supra, 3 Cal.4th at p. 320.) In this case, it may not even be appropriate to describe a diver's running out of air, as Sentner apparently did, as "the ordinary activity" involved in scuba diving. Something out of the ordinary obviously occurred causing Sentner's urgent need for air, and there is no allegation that Dushane in any way caused or contributed to that peril. Instead, the claim is that Dushane "negligently" - or recklessly - panicked when faced with the emergency.

[38] *fn7 As Yace points out, scuba diving requires training and certification, and the "buddy system" rules indicate that buddies provide general assistance to each other in putting on and checking equipment before a dive, reminding each other of depth and air supply limits, and "`giving you emergency assistance in the unlikely event you need it.'"