

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 2018-P-0861.

Essex County Division.

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Margaret C. Doherty, as she is  
the Personal Representative of the Estate  
Of Gregg C. O'Brien,  
Plaintiff-Appellant,

v.

John Golbranson,  
Defendant-Appellee.

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ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT  
DEPARTMENT.

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Brief  
for the Plaintiff-Appellant,  
Margaret C. Doherty

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Statement of the Issue Presented for Review.

Does the Decedent's promise not to sue Defendant or any of its agents for his death due to their negligence as a matter of law prohibit his heirs who did not sign the Release from exercising their own statutory right under G.L.c. 229, § 2, to bring a wrongful death action against Defendant's agent seeking their own damages caused by Decedent's death?

Statement of the Case and Facts.

On May 5, 2015, the plaintiff-appellant Margaret C. Doherty ("Doherty"), as she is the duly appointed personal representative of the Estate of Gregg C. O'Brien ("Decedent"), brought this wrongful death action in the Essex Division of the Superior Court Department against Diving Unlimited International, Inc. ("DUI") and its agents or associates including the defendant-appellee John Golbranson ("Golbranson") (A.1-3).

According to the allegations of Doherty's second amended complaint filed on July 3, 2015, Decedent drowned while participating in a promotional diving equipment

event run by DUI at Stage Fort Park in Gloucester, Massachusetts on May 10, 2014 (A.4;10-17). As she alleged, DUI represents itself as the world's leader in the design and manufacture of dry suits for use by commercial, military, public safety and recreational divers (A.11). As a marketing tool to promote the sale of its dry suits, it has for many years sponsored such "Demotour Events" whereby local divers are allowed to test dive using its dry suit system and other equipment (Id.). DUI takes responsibility for properly sizing, fitting and supplying all the necessary dry suit components for the divers, staffing each of these events with its so-called Factory Professionals (Id.). It also provides "dive masters" like Golbranson who have the responsibility to show the diver the basics about how to use the dry suit (Id.). Divers who participate in the event need not be certified in the use of the dry suit; but they do pay a facility entrance fee to participate and use DUI's available equipment (Id.).

Before the dive, DUI is responsible for attaching the diver's own regulator to the dry suit hose which it supplies (A.12). A DUI Factory Professional then fits and supplies the diver with other DUI products which it is promoting for sale; and once the diver is fully outfitted and ready to dive, he or she is then assigned to a DUI



guide like Golbranson who instructs on the basics of the dry suit and takes them for a supervised dive (*Id.*). The defendant Nicholas Fazah ("Fazah") supplied and outfitted Decedent with his dive equipment including, but not limited to, a weight belt which Doherty alleged was improperly fitted and/or deployed leading to Decedent's drowning death (*Id.*). The defendant EC Divers, Inc. ("EC Divers") owned and rented out the diving equipment supplied and outfitted to Decedent; and defendant Golbranson was the "dive master" or dive guide responsible for the safety and well being of Decedent's dive group at the time of his death (*Id.*).

Claiming that DUI negligently allowed Decedent to be unsupervised and unattended during the dive which proximately caused his death, Doherty in Count I sought damages on behalf of the heirs of Decedent's Estate, i.e., his wife and children, for his conscious pain and suffering; and in Count II for his wrongful death pursuant to G.L.c. 229, § 2(A.12-13). As damages under Count II for Decedent's wrongful death, Doherty sought the fair monetary value of those elements of damages allowed claimants under G.L.c. 229, § 2, i.e., including, but not limited to, the value of the reasonably expected net income, services, protection, care, assistance, society, compan-

ionship, comfort, guidance, counsel, and advice of Decedent as a husband and father as well as the value of his reasonable funeral and burial expenses (A.13). Count III sought damages against DUI for breach of contract (13-14).

In Counts IV through VII, Doherty sought damages against the defendants Fazah and EC Divers, Inc., respectively, for Decedent's pain and suffering and for his wrongful death on account of each one's negligence in the circumstances (A.14-16). In Counts VIII and IX, she alleged that Golbranson negligently performed his duties and responsibilities as the dive master for Decedent's dive group, proximately causing Decedent's death, and that he was liable not only for Decedent's conscious pain and suffering (Count VIII) but also for his wrongful death (Count IX) and those elements of recoverable damages already described in Counts II, V, and VII (A.16-17). Doherty claimed a jury trial on all counts of her complaint (A.17).

All the defendants filed answers denying the material allegations of Doherty's second amended complaint with DUI filing a counterclaim as well as, among other things, a crossclaim against Golbranson for contribution; and Golbranson responded with a crossclaim of his own against DUI seeking the same relief (A.4-6;18-27). Among the af-

firmative defenses asserted by Golbranson in his answer to Doherty's second amended complaint was that Doherty's claims as the representative of Decedent's Estate "have been waived by virtue of the decedent's execution of a liability waiver in favor of" Golbranson; and that she was "contractually barred from asserting any and all claims against" him(A.22-23).

By July 28, 2017, Doherty entered into a settlement of all her claims against DUI on behalf of Decedent's minor heirs(A.7). On August 18, 2017, after hearing, an order entered allowing the settlement(Id.). On August 30, 2017, stipulations of dismissal with prejudice and without costs entered with respect to all claims among and between Doherty, DUI, the Defendant Fazah and the Defendant EC Divers(Id.). On September 12, 2017, upon the assent of all the parties, a separate and final judgment under Mass. R. Civ. P. 54(b) entered dismissing DUI from the action(A.7;28-29). The result of these proceedings was to leave Golbranson as the lone remaining defendant in this civil action, consistent with Counts VIII and IX of Doherty's second amended complaint(A.7-8).

On February 2, 2018, following further discovery, Golbranson moved for summary judgment in his favor on Counts VIII and IX of the second amended complaint(A.8;

30-130). He argued that the undisputed record established that he was an agent of DUI at all relevant times and, as such, he was entitled to the benefits and protection of the Liability Release Form ("the Release") and the Equipment Rental Agreement ("the Rental Agreement") executed by Decedent prior to his participation in the scuba diving event which ultimately led to his death(A.30; 84;86).

As he contended, the Release which Decedent signed contained his promises: (1) to indemnify, defend, and hold harmless DUI from all "claims or losses" arising from his participation in scuba diving; (2) to assume all risks associated with scuba diving; and (3) to release DUI, its agents and associates from any liability from diving and related activities(A.31;84). In addition, Decedent signed the Rental Agreement which described itself as a "release" of his right to sue for injuries or death as a result of using the scuba diving equipment(A.31-32;86).

Besides the language of the Release identified above, it also contains a section which describes the "Effect of [the] Agreement"(A.84). It provides:

This document is a legal contract. DIVER GIVES UP VALUABLE RIGHTS, INCLUDING THE RIGHT TO SUE FOR INJURIES OR DEATH. Read it carefully. Do not sign unless you understand.

(A.84). In addition, another section entitled "Covenant Not To Sue" provides that

DIVER agrees not to sue DUI for personal injury arising from scuba diving or its associated activities. *DIVER agrees that his heirs or executors may not sue DUI for death arising from scuba diving or its associated activities.*

(*Id.*) (emphasis supplied).

Doherty opposed the motion asserting that Decedent's promises contained in the Release and the Rental Agreement do not as a matter of law operate to release the right of Decedent's Estate to sue for wrongful death under G.L.c. 229, § 2(A.8;131-148). Furthermore, she argued that her second amended complaint seeks to hold Golbranson liable for his independent negligence in supervising a pre-dive check for adequate air delivery, his failure to perform a Dry Suit Confined Water Session with Decedent, and his decision as dive master to combine a student certification event involving another scuba diver with the supervision of Decedent, a decision which left him unable adequately to supervise and protect Decedent when he re-submerged for an additional dive (A.8;131-148;149-164).

On March 15, 2018, Golbranson's summary judgment motion was heard in the Superior Court Department before

Howe, J., who took the matter under advisement(A.8) . On May 1, 2018, the motion judge issued her Memorandum of Decision and Order allowing Golbranson's motion for summary judgment and dismissing Doherty's second amended complaint(A.8;168-183) .

Addressing the factual issues arising from this summary judgment record, the lower court noted that Decedent was assigned to a three-person dive group led by Golbranson as dive master in the early afternoon of May 10, 2014(A.171) . Besides Decedent, Golbranson was responsible for two other divers(Id.) . The first was Sean Mathies, Golbranson's own student and a customer of the dive shop where Golbranson worked; and the second diver was John Edwards(Id.) . Mathies, at Golbranson's invitation and suggestion, was completing two dives (open water and dry suit) for which he needed to become certified(Id.) . He did two one-on-one dives with Golbranson in the morning and then joined Golbranson for the dive with Decedent and Edwards in the afternoon(Id.) .

As dive master or dive guide, Golbranson admitted that he was responsible for insuring that Decedent was properly fitted with equipment, that Decedent knew how to use the equipment, and that he was safely guided dur-

ing his open water dive (Id.). He also admitted, however, that he did not physically check that each diver's air cylinder valve was completely open before starting the dive (Id.). Nor did he complete a dry suit Confined Water Session with Decedent or Edwards prior to their dive that afternoon (Id.). In fact, Edwards had already completed such a session with another dive guide earlier that day while Mathies as Golbranson's student completed the Confined Water Session with Golbranson at an earlier date (A.171-172).

In their deposition testimony, Golbranson, Mathies and Edwards all recalled that at some point during the afternoon dive, Mathies' air supply became depleted and Golbranson signaled all three divers to go to the surface (A.172). Once on the surface, Golbranson told the divers that Mathies was low on air and that they should all swim back to shore instead of continuing to dive (A.172). Decedent objected, stating that he still had enough air left and wanted to keep diving (Id.). Golbranson disagreed but Decedent, reiterating his desire to keep diving, went underwater on another dive, separating himself from the group (Id.).

What happened next is disputed. Golbranson admitted in his Statement of Undisputed Facts that he did not swim

to shore on the surface with Mathies and Edwards(Id.). Mathies, however, testified that Golbranson told him and Edwards that he was staying with them as they swam to shore because he had to stay with his student Mathies since he (Mathies) was not a certified diver(Id.). Edwards, on the other hand, testified that after Decedent separated from the group, he and Mathies started to swim to shore and that Golbranson stayed somewhere between them and Decedent(A.172-173).

As the motion judge observed, however, what was not disputed was that Golbranson did not follow Decedent when he separated from the group and that shortly after he had separated from the group, Decedent surfaced and called for help(A.173). He was thereafter retrieved from the water, given CPR and transported to the hospital where he was later pronounced dead(Id.). Decedent's death certificate identified the cause of his death as "SCUBA DROWNING AFTER UNEQUAL WEIGHT BELT DISTRIBUTION"(A.164;173).

On this summary judgment record creating genuine issues of material fact for trial whether Golbranson had exercised due care in the circumstances of performing his duties as dive master or dive guide, the motion judge then assessed the legal viability of Doherty's claims seeking damages for Decedent's conscious pain and



suffering under Count VIII and for his wrongful death pursuant to G.L.c. 229, § 2, under Count IX(A.173;174-182). In doing so, she first made clear that there was no duty on the part of the Decedent (or his Estate through Doherty) under the Release's "Duty to Indemnify" language to indemnify, hold harmless and reimburse Golbranson for all claims and losses arising from this scuba diving activity, including the payment of his legal costs and attorney's fees(A.84;175). Golbranson had failed to properly plead this issue of indemnification in either a counterclaim or an affirmative defense(A.175).

Turning to Doherty's claim for damages for Decedent's conscious pain and suffering under Count VIII, Judge Howe ruled that while as a general matter Doherty as the personal representative of Decedent's Estate had the right to bring an action against any responsible party for Decedent's conscious pain and suffering, she was foreclosed from doing so here because of the language of the Release and the Rental Agreement(A.175-178). That is, a claim for conscious pain and suffering is one which fundamentally belongs to Decedent; any recovery on this claim is held as an asset of his Estate; and he had the right to waive this claim---which he did---in the Release and Rental Agreement which he signed(A.175-176).

The only question was whether Golbranson was DUI's agent at the time of the relevant events and was thereby entitled to the protection afforded by the Release and the Rental Agreement(A.177-178). The motion judge ruled that "the undisputed material facts establish that, as they relate to [Decedent], Golbranson was acting as an agent of DUI at the time of the dive in question" (A.177-178). As she found from the summary judgment record, there was "mutual consent on the part of DUI and Golbranson that [he] would act on behalf of and for the benefit of DUI and subject to DUI's control in serving as a dive guide for the DemoTour event"(A.178). Thus Doherty was barred from bringing this claim now(*Id.*).

As for Doherty's claim against Golbranson under Count IX for wrongful death, Judge Howe first noted that while Decedent may release his own claim for conscious pain and suffering, "Massachusetts law is unsettled on whether he may do so with respect to a claim for wrongful death, which belongs to the beneficiaries defined under G.L.c. 229, §§ 1-2"(*Id.*). Finding no Massachusetts decisional law directly on point, the lower court referred to two federal district court decisions applying uncertain Massachusetts law to determine whether non-signatory wrongful death beneficiaries of an estate are bound by a dece-

dent's agreement to arbitrate his/her claims (A.180-181).

The first decision, *Chung v. StudentCity.com, Inc.*, 2011 WL 4074297 (D. Mass. 2011), holds that a decedent's consent to an arbitration clause does not prevent the executor of her estate from bringing a wrongful death action in court because the claim is not "derivative" of the decedent's claim and any recovery thereunder does not become part of her estate; and foreclosing the executor from bringing suit would be imposing terms of a contract upon persons who had never signed it, a position "inconsistent with fundamental tenets of contract law" (A.180).

The second decision, *GGNSC Chestnut Hill LLC v. Schrader*, 2018 WL 1582555 (D. Mass. 2018), reached the opposite conclusion and disagreed with *Chung* (A.180-181). The federal district judge there thought that the law in Massachusetts had moved toward interpreting wrongful death claims as derivative of the decedent's cause of action rather than independent of any claims the decedent may have had if he had survived (*Id.*).

Judge Howe agreed with the result in *GGNSC Chestnut Hill LLC* and held that Doherty's wrongful death claim in Count IX is a derivative claim as to which Doherty and the Estate's beneficiaries are bound by the Release and its Covenant Not to Sue (A.181). She also concluded that

this result was consistent with Massachusetts decisional law favoring the enforcement of releases, furthers the contracting parties' intent in entering into such a release and does not "subvert the expectations of the parties" who entered into the Release(A.181-182).

A judgment accordingly entered allowing Golbranson's summary judgment motion and dismissing Doherty's second amended complaint(A.8;165-167;183).This appeal by Doherty followed(A.8-9;184-185).

Argument.

Decedent's Promise Not To Sue DUI Or Any Of Its Agents For His Death Due To Their Negligence Does Not As A Matter Of Law Prohibit His Heirs Who Did Not Sign The Release From Exercising Their Own Common Law Right To Bring A Wrongful Death Action Against DUI's Agent Under G.L.c. 229, §§ 1 & 2, Seeking Their Own Damages Caused By Decedent's Death.

Golbranson's motion for summary judgment deserved to be allowed if this Court, after reviewing de novo the pleadings, depositions, affidavits and any other materials considered by the motion judge, show that there was no genuine issue of material fact for trial and that Golbranson is entitled to a judgment in his favor as a matter of law. Rule 56(c), as amended, 436 Mass. 1404 (2002). *Allstate Ins. Co. v. Bearce*, 412 Mass. 442, 446-447(1992). *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120(1991).

Golbranson's burden as the moving party is met if he demonstrated by reference to documents described in Rule 56, unmet by countervailing materials, that Doherty has no reasonable expectation of proving an essential element of her case at trial, i.e., that despite the Decedent's

execution of the Release, she was still entitled as a matter of law to bring this wrongful death action for the benefit of Decedent's heirs under G.L.c. 229, § 2. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). *Giuffrida v. High Country Investor, Inc.*, 73 Mass. App. Ct. 225, 227 (2008). Thus while there may be genuine issues of material fact for trial about whether Golbranson exercised due care in the course of performing his duties as dive master or dive guide on May 10, 2014, those triable fact issues are subordinate to the interpretation and effect of the Release's language which is a question of law for this Court to decide. *Post v. Belmont Country Club, Inc.*, 60 Mass. App. Ct. 645, 647 (2004).

Given this scope of review, Doherty submits that as a matter of the common law, statutory construction, fundamental tenets of contract law, constitutional law, and public policy, Decedent's promise not to sue DUI or any of its agents for negligence which caused his death cannot bind the heirs of Decedent's Estate who did not sign this Release. The right of Decedent's heirs to bring this wrongful death action pursuant to G.L.c. 229, §§ 1

& 2, is rooted in the common law, belongs solely to them and is independent of any rights the Decedent may have had to sue Golbranson for his injuries if he had survived. This right of the heirs derives not from any of Decedent's rights but rather from Golbranson's own tortious acts which caused Decedent injuries/death; and their claim is independent of any personal decisionmaking by Decedent arising from his relationship with DUI or Golbranson.

Stated another way, because Decedent did not own this right by the heirs to bring a wrongful death action, he had no power to waive its exercise without obtaining their consent thereto, e.g., by having the heirs sign the Release themselves. In the absence of such consent, Doherty as the personal representative of the Estate was not bound by the Release and could pursue this wrongful death action on behalf of the heirs.

Both the federal district courts of Massachusetts and the courts of the several States addressing this question have employed an either/or approach, i.e., if the right to bring a wrongful death action is characterized as independent, then the a decedent's estate is not bound by

a decedent's agreement waiving this right; but if this right is seen as derivative of a decedent's rights, then the right is waived.

Doherty submits that an either/or approach is ultimately unhelpful in determining the nature of Doherty's common law right to sue for wrongful death in Massachusetts. In this Commonwealth, the heirs do not "stand in both shoes" of Decedent which would make their claim an entirely derivative one. In reality, the heirs stand in, at most, *just one shoe* of Decedent because without his death, there is no remedy of a wrongful death claim---but that remedy once created by his death is independent of any rights Decedent may have had if he had survived to maintain his own cause of action for his injuries.

In this sense, the heirs' claim for wrongful death in Massachusetts is *both* derivative of Decedent's injuries and independent of Decedent's right to recover for his injuries if he had survived. If this characterization of the heirs' claim is appropriate, which Doherty submits it is, then there is no good doctrinal reason to rule that Doherty's independent right under the common law to bring this wrongful death action against Golbranson should be



diminished or qualified by Decedent's decision during his life to waive this right of his heirs to sue for wrongful death, a right which does not belong to him and which was not his to waive.

Moreover, to bar Doherty's claim here violates fundamental contract law that incidental third parties to a written agreement cannot be bound by a contract they did not sign; and it contravenes the heirs' right guaranteed them under the Massachusetts Constitution to a jury trial on their cognizable claim for statutory damages under G.L.c. 229, §§ 1 & 2. Finally, to interpret the Release as a bar to Doherty's wrongful death suit is unconscionably unfair and against the public policy of Massachusetts which supports the viability of the heirs' independent common law right to sue for wrongful death.

Judge Howe's ruling otherwise is therefore error as a matter of law warranting a reversal of the judgment below and a remand to the Superior Court Department for further discovery and an eventual trial on Doherty's claims against Golbranson.

1. *The right of Decedent's heirs to bring this wrongful death action is rooted in the common law, belongs solely to them and is independent of any rights the Decedent may have had to sue Golbranson for his injuries if he had survived.*

Massachusetts statutory law does not segregate the right to recover for wrongful death by claimant. Instead, G.L.c. 229, §§ 1 & 2, bundles the rights of all claimants for a wrongful death and vests a personal representative like Doherty with the power to bring suit. Section 2 provides that "[a] person who...by his negligence causes the death of a person...under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted...shall be liable in damages...as provided in section one." Section 1 provides the method of distributing any recovery, specifying the particular percentages allocated to various family members/claimants based on the marital status of the decedent and whether he had any children.

As the district judge observed in dicta in *Ellis v. Ford Motor Co.*, 628 F. Supp. 849, 858 & n.4 (D. Mass. 1986), "[a]t one time" a wrongful death action in Massachusetts was an independent cause of action, this desig-

nation flowing from the characterization of the wrongful death action as punitive rather than compensatory. *Id.* citing *McCarthy v. Wood Lumber Co.*, 219 Mass. 566, 567-568 (1914) (distinguishing a survival action from the "penal" nature of a wrongful death action where damages were awarded as a "gratuity" to next of kin based on the culpability of defendant's conduct). The defendant in *Ellis* claimed without any supporting legislative history that in 1958, the Legislature in enacting St. 1958, ch. 238, § 1, intended to overrule this earlier view and establish that such actions were now derivative from and not independent of the decedent's personal injury claim by limiting recovery to "such circumstances that the deceased could have recovered damages for personal injury if his death had not resulted." *Id.* at 858 n.4.

The district judge, however, refused to endorse this supposed legislative will, noting that the issue was complicated by the High Court's decision in *Gaudette v. Webb*, 362 Mass. 60, 71 (1982) which made clear that the heirs' right to recover for wrongful death is now rooted not in any legislative intent gleaned from statutory language but rather in the common law itself and that the

Legislature's will expressed in G.L.c. 229, §§ 1 & 2, was now limited to merely specifying the procedure and the mode of recovery, not the nature of underlying right. *Ellis*, 628 F. Supp. at 858 & n. 5. In addition, *Gaudette* reinforced the notion that a wrongful death claim is not the claim of the decedent but rather "[i]n a very real sense ...it is the [heirs' or beneficiaries'] cause of action." 362 Mass. at 72.

Indeed, in *Pobieglo v. Monsanto Company*, 402 Mass. 112, 117(1988), Justice Liacos, dissenting from the majority's decision refusing to apply a discovery rule to the wrongful death statute which would toll its limitations period, made the point that after *Gaudette*, the heirs' right to bring a wrongful death claim was now firmly established in the common law which made it now unnecessary to construe G.L.c. 229, §§ 1 & 2, narrowly as being in derogation of the common law; and that these provisions should now be construed liberally since they are remedial in nature and "designed to compensate those who have suffered a *direct loss* because of the tortiously caused death of a benefactor." 402 Mass. at 122 n. 3, quoting *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d

143,145 (Alaska 1984) (emphasis supplied) and citing *Boston v. Hospital Transp. Servs., Inc.*, 6 Mass. App. Ct. 198, 201-202 (1978) (remedial legislation should be construed "so as to accomplish more fully the remedial purpose which prompted its passage.").

In the aftermath of these cases, Doherty submits that contrary to the suggestion in *Ellis*, whether the wrongful death statute provides for punitive or compensatory damages should now have nothing to do with an analysis of whether the heirs' right to this remedy is derivative of or independent from a decedent's rights to bring his own action for injuries if he had survived. The Legislature's language of St. 1958, ch. 238, § 1, limiting recovery in these cases to "such circumstances that the deceased could have recovered damages for personal injury if his death had not resulted"---language which mirrors the present statute---does not change the independent nature of the wrongful death claim, especially when *Gaudette* decided twelve years later in 1972 that this claim was rooted in the common law, not in any statutory language, and that it belonged not to the decedent but to the heirs alone.

Moreover, as Pobiegló observed, the remedial purposes of G.L.c. 229, §§ 1 & 2, are best served by reading its limiting language as leaving undisturbed the independent nature of the right of a decedent's heirs to bring a wrongful death suit for their own "direct loss" caused by the decedent's death. See *Miga v. City of Holyoke*, 398 Mass.343, 352 n.10 (1986) ("Recovery for wrongful death represents damages to the survivor for the loss of value of the decedent's life...."). Nor does it matter that a wrongful death claim is limited by the comparative negligence of the decedent under G.L.c. 231, § 85. See *Tobin v. Norwood Country Club*, 422 Mass. 126, 138 (1996). There the Court accepted the premise that the claim was an independent one based on the heirs' own loss but nonetheless decided that the broad language of the comparative negligence statute, not the wrongful death statute, determined the outcome, expressly declining to consider any argument that the wrongful death claim was merely derivative of the decedent's own claims. *Id.*

All this more recent law reinforces the continuing vitality of the observation made years ago in *Beausoleil's Case*, 321 Mass. 344, 346-347 (1947), with an ear-

lier version of the wrongful death statute, that "as the injured party never possesses the right to damages for his death[,] he cannot prevent his statutory beneficiaries from exercising that right when it comes into existence at his death." *Id.* citing *Oliveria v. Oliveria*, 305 Mass. 297, 301(1940) ("The action for death is not derivative in character....[and] does not arise until death occurs, when it springs into existence by force of the statute. It is a different cause of action from any which the deceased ever had in his lifetime."); *Beauvais v. Springfield Institution for Savings*, 303 Mass. 136, 147(1939) (decedent cannot during his life prevent statutory heirs from suing for his wrongful death); *Wall v. Massachusetts Northeastern Street Railway*, 229 Mass. 506, 507(1918) (same).

When last presented with the contention based on *Beausoleil's Case* that a wrongful death claim under the current statute is not one within the competence of a living person to release, this Court declined to address it as unnecessary to its disposition. See *Post v. Belmont Country Club, Inc.*, 60 Mass. App. Ct. at 652. In the absence of a definitive ruling, the federal district courts

of Massachusetts have come to different conclusions about how this Court would currently decide the issue. In *Chung v. StudentCity.com, Inc.*, 2011 WL 4074297 at \*2 (D. Mass. 2011) and *Chung v. StudentCity.com, Inc.*, 2013 WL 504757 at \*1 (D. Mass. 2013), Judge Zobel twice ruled that a claim for wrongful death in Massachusetts is not derivative of the decedent's claim and that it would be inconsistent with fundamental tenets of contract law to hold that those beneficiaries who did not sign the arbitration agreement were still bound by the decision of the decedent, whose estate holds no interest in their claim, to submit it to arbitration. *Id.* Accord, *Angelo v. USA Triathlon*, 2014 WL 4716195 at \*3 (D. Mass. 2014) (Sorokin, J.) (agreeing with *Chung* and deciding that decedent lacked authority to bind his surviving family members to an indemnity agreement which they did not sign).

In *GGNSC Chestnut Hill LLC v. Schrader*, 2018 WL 1582555 at \*7 & n.3 (D. Mass. 2018), on the other hand, Judge Woodlock reasoned that the language of G.L.c. 229, § 2, hinging recovery for wrongful death on "such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted,"



makes a wrongful death claim necessarily "derivative" of the decedent's rights. *Id.* As such, the court was "persuaded that the Supreme Judicial Court..., if presented directly with the question, would conclude that a wrongful death claim is a derivative claim as to which the decedent's representatives and beneficiaries would be bound by an agreement to arbitrate." *Id.* at \*8.

The courts of the several States are also divided on the issue of whether a wrongful death claim is derivative of a decedent's rights or independent of those rights. Twelve states have concluded upon language both similar to or different from G.L.c. 229, § 2, that the right to bring a wrongful death claim belongs to the heirs or beneficiaries and is independent of a decedent's right to bring suit for his injuries if he had survived. See, e.g., *Wolcott v. Summerville at Outlook Manor, LLC*, 61 N.E.3d 853, 855-856 (Ohio App. 2016); *Norton v. United Health Servs. of Ga., Inc.*, 783 S.E.2d 437, 440-441 (Ga. App. 2016); *Roth v. Evangelical Lutheran Good Samaritan Soc'y*, 886 N.W.2d 601, 612-613 (Iowa 2016); *FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-210 (Md. App. 2016); *Boler v. Sec. Health Care, L.L.C.*, 336 P.3d 468,

476-477 (Okla. 2014); *Estate of Decamacho ex rel. Beneficiaries v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 613-614 (Ariz. App. 2014); *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 659-661 (Pa. Super. Ct. 2013); *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 359 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 599-600 (Ky. 2012); *Woodall v. Avalon Care Ctr.-Fed Way, LLC*, 231 P.3d 1252, 1258-1260 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 528-529 (Mo. 2009); and *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008).

Nine other states, however, have concluded upon language both similar to or different from G.L.c. 229, § 2, that a wrongful death claim is derivative of the decedent's rights and therefore can be extinguished or qualified by the decedent during his lifetime. See, e.g., *Laizure v. Avante At Leesburg, Inc.*, 109 So.3d 752, 761 (Fla. 2013); *Bales v. Arbor Manor*, 2008 WL 2660366 at \*8 (D. Neb. 2008) (applying Nebraska law); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 664-665 (Ala. 2004); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 422 (Ind. App. 2004); *Estate of Krahmer ex rel. Peck v. Laurel Healthcare Providers, LLC*, 315 P.3d

298, 300-301 (N. Mex. App. 2013); *Ruiz v. Podolsky*, 237 P.3d 584, 593 (Cal. 2010); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009); *Cleveland v. Mann*, 942 So.2d 108, 118-119 (Miss. 2006); and *Ballard v. Southwest Detroit Hosp.*, 327 N.W. 2d 370, 371 (Mich. App. 1983).

Both the federal district court judges in Massachusetts and the state courts identified here employ an either/or approach to resolve this question, i.e., if the right to bring a wrongful death action can be characterized as independent from the decedent's rights, then the heirs are not bound by a decedent's agreement waiving this right. But if this right is somehow derivative of a decedent's rights, then it can be waived by the decedent during his lifetime.

Doherty submits that this semantic inquiry is ultimately unhelpful in determining the nature of Doherty's common law right in Massachusetts to bring a wrongful death action, partly due to the expansive nature of the word "derivative." In this Commonwealth, the heirs do not "stand in both shoes" of a decedent, a posture which would make their claim an entirely derivative one. In reality, the heirs stand in, at most, just one shoe of

Decedent because like any claim for loss of consortium or the like tort, their claim springs from or arises from an injury to another person, i.e., Decedent, *not* to themselves. Without Decedent's death, there would be no remedy available to the heirs for Doherty to pursue on their behalf. However, once Decedent's death occurred, their claim for wrongful death arose under the common law and it is in every sense a claim which is independent of any rights Decedent may have had if he had survived to maintain his own cause of action for his injuries.

In this sense, the heirs' claim for wrongful death in Massachusetts is both derivative of Decedent's injuries and independent of Decedent's right to recover for his injuries if he had survived. Doherty therefore submits that there is no good doctrinal reason to rule that Doherty's independent right under the common law to bring this wrongful death action against Golbranson can be diminished or qualified by Decedent's decision during his life to waive this right of his heirs, a right which did not belong to him and which was not his to waive.

2. *Barring Doherty's claim violates fundamental tenets of contract law that incidental third parties to a written agreement cannot be bound by a contract they did not sign and to which they did not assent.*

While it is true that Massachusetts law favors the enforcement of releases, *Sharon v. City of Newton*, 437 Mass. 99, 105(2002), the court there was speaking about agreements whereby each party to a written contract may allocate risk by exempting itself or the other party from any negligence that might subsequently occur during the performance of the contract. *Id.* However, it is something else entirely to say---as the lower court did---that incidental beneficiaries of a contract like Decedent's heirs, individuals with no substantive rights under the contract and receiving no direct benefits, may have their tort claims against one of the parties swept up into the contract's Covenant Not To Sue clause merely by being mentioned in the contract as potential claimants.

A release in the form of a Covenant Not To Sue is a matter of contract and it is something that the contracting parties must agree to; it cannot simply be imposed upon third parties without their consent, an assent expressed usually in the form of a signature. *Situation*

*Management Systems, Inc. v. Malouf, Inc.*, 430 Mass. 875, 878(2000). *Targus Group International, Inc. v. Howard Sherman*, 76 Mass. App. Ct. 421, 428;433(2010) citing *McCarthy v. Tobin*, 429 Mass. 84, 87(1999). None of the heirs nor Doherty herself ever signed the Release or the Rental Agreement and none of them can now be bound by a written agreement which they did not sign. Nor can it be claimed that the wrongful death statute or this Court's decisional law provides a basis for dispensing with basic principles of contract law in deciding who is bound by the Release's terms. Accord, *Angelo v. USA Triathlon*, 2014 WL 4716195 at \*3; *Chung v. StudentCity.com, Inc.*, 2011 WL 4074297 at \*2; *FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d at 210; *Boler v. Sec. Health Care, L.L.C.*, 336 P.3d at 477; *Ping v. Beverly Enters., Inc.*, 376 S.W.3d at 600. Absent their consent---and there was none here---the heirs cannot be bound by any of the terms of the Release or the Rental Agreement.

3. *The ruling below contravenes the heirs' right guaranteed them under the Massachusetts Constitution to a jury trial on their cognizable claim for statutory damages under G.L.c. 229, §§ 1 & 2.*

The ruling below does not force Doherty to arbitrate her claims on behalf of the Estate's heirs. Instead, it extinguishes them entirely so that she is now foreclosed from seeking any redress on behalf of the heirs arising from Decedent's death by way of a jury trial guaranteed them under Article XV of the Massachusetts Declaration of Rights. Denying wrongful death claimants this right to a jury trial where they did not waive it of their own accord would amount to placing contract law above that of the Massachusetts Constitution and the fundamental rights it has established for all of its citizens.

4. *To interpret the Release as a bar to Doherty's wrongful death suit is unconscionably unfair and against the public policy of Massachusetts which supports the continuing viability of the heirs' common law right to sue for wrongful death.*

"The determination that a contract...is or is not unconscionable is made in the light of its setting, purpose and effect." *Miller v. Cotter*, 448 Mass. 671, 679 (2007) quoting Restatement (Second) of Contracts, § 208,

*comment c*(1999). If at the time of its execution, a contract provision results in unfair surprise or is oppressive to the allegedly disadvantaged party, the contract itself may be adjudged unconscionable. *Id.* citing *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 292-293 (1980).

This contract was made in the absence of and without the assent of non-party persons who are now sought to be held bound to its Covenant Not To Sue provisions. Its enforcement now against the heirs to extinguish their independent, common law remedy of a wrongful death claim is unfair, oppressive and unconscionable by any measure.

In addition, it runs afoul of the Commonwealth's sound public policy of maintaining the continuing viability of wrongful death actions as the most effective, independent remedy for heirs and beneficiaries when their benefactor dies as the result of negligence, a policy repeatedly confirmed in such decisions as *Gaudette*, *Pobieglo* and *Tobin*.



Conclusion.

For all the reasons identified herein, this Court should vacate and reverse the judgment below in Golbranson's favor and remand this matter to the Superior Court Department for further discovery and an eventual trial of Doherty's claims on behalf of Decedent's heirs pursuant to the provisions of G.L.c. 229, § 2, or provide Doherty with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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## **Addendum**

45

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT  
C.A. No. 1577CV00728

MARGARET C. DOHERTY, personal representative<sup>1</sup>

vs.

JOHN GOLDBRANSON

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This case arises from the death of Gregg C. O'Brien ("O'Brien"), who lost his life in a tragic scuba diving accident on May 10, 2014. The plaintiff, Margaret C. Doherty ("Doherty"), in her capacity as the personal representative of O'Brien's estate, brought this action against Diving Unlimited International, Inc. ("DUI"), Nicholas Fazah, EC Divers, Inc., and John Goldbranson ("Goldbranson"), alleging that O'Brien died as a result of their negligent failure to equip, train, supervise, and safeguard him properly. Goldbranson is the sole remaining defendant. The matter is now before the court on Goldbranson's motion for summary judgment. After a hearing on the motion on March 15, 2018, and for the reasons that follow, Goldbranson's motion for summary judgment is **ALLOWED**.

**BACKGROUND**

The following undisputed facts, and the disputed facts in the light most favorable to Doherty as the non-moving party, are taken from the Combined Statement of Undisputed Facts Pursuant to Superior Court Rule 9A(b)(5) submitted with the summary judgment pleadings.<sup>2</sup>

<sup>1</sup> Of the estate of Gregg C. O'Brien

<sup>2</sup> Paragraphs 16 through 22 of the Combined Statement of Undisputed Facts are additional statements of fact asserted by Doherty. Contrary to the requirements of Superior Court Rule 9A(b)(5)(iv), Goldbranson did not respond to any of those paragraphs. At the hearing on this matter, Goldbranson's counsel agreed that the facts contained in paragraphs 16 through 22 should be deemed admitted for purposes of this motion. The court, thus, treats them as such.

DUI is a manufacturer and seller of dry suits and scuba diving equipment. In 2014, DUI held a "DemoTour," a series of one-to-three-day events held at various locations throughout the United States, which was intended to provide scuba divers with an opportunity to try out a dry suit. O'Brien, a certified open-water scuba diver, drowned while participating in one of the DemoTour events at Stage Fort Park in Gloucester, Massachusetts, on May 10, 2014.

In connection with his participation in the event, O'Brien signed a document entitled, "DUI DEMOTOUR Express Assumption of Risk & Liability Release" (the "Liability Release"), on the day of the event. The Liability Release provides as follows:

**PARTIES**

Gregg O'Brien [hereinafter DIVER] makes the following promises and representations to Diving Unlimited International, Inc., its agents and associates [hereinafter DUI], so that DUI will allow DIVER to participate. Without these promises and representations, DUI would not allow DIVER to participate.

**EFFECT OF AGREEMENT**

This document is a legal contract. DIVER GIVES UP VALUABLE RIGHTS, INCLUDING THE RIGHT TO SUE FOR INJURIES OR DEATH. Read it carefully. Do not sign unless or until you understand.

**EXPERT STATUS**

DIVER is a certified scuba diver (or a student in a scuba diving course or program under the supervision of a certified scuba instructor).

**FITNESS TO DIVE**

DIVER is physically and emotionally fit to participate today, and is not under the influence of drugs or alcohol.

**ASSUMPTION OF RISK**

DIVER understands that scuba diving is an adventure sport and involves known risks of serious personal injury or death. DIVER understands the scope and nature of such risks, and freely and voluntarily chooses to encounter and assume all such risks.

**FULL RELEASE**

DIVER fully releases DUI from any liability whatsoever resulting from diving or associated activities.

**COVENANT NOT TO SUE**

DIVER agrees not to sue DUI for personal injury arising from scuba diving or its associated activities. DIVER agrees that his heirs or executors may not sue DUI for death arising from scuba diving or its associated activities.

#### INDEMNITY AGREEMENT

DIVER agrees to indemnify and hold DUI harmless from and against claims or losses arising out of scuba diving or its associated activities, whether initiated by DIVER or any other person or organization on DIVER'S behalf. This indemnity obligation includes reimbursement of all legal costs and reasonable attorneys' fees incurred by DUI for the defense of any such actions that may arise directly or indirectly from DIVER'S participation in scuba diving, the DUI DEMOTOUR or its associated activities.

#### ARBITRATION

DIVER agrees any and all claims against DUI not effectively released by this agreement will be determined by arbitration in accordance with the rules of the American Arbitration Association, and not by lawsuit or resort to court process (except as applicable law provides for judicial review or arbitration proceedings). The decision of the arbitrator(s) may be entered in any court having jurisdiction. The prevailing party in any arbitration shall be awarded actual costs and attorneys' fees necessarily incurred in addition to any other relief.

DIVER HEREBY GIVES UP THE RIGHT TO A COURT TRIAL AND A TRIAL BY JURY.

O'Brien also signed a "DUI DEMOTOUR Equipment Rental Agreement" (the "Equipment Rental Agreement") before participating in the event. It provides, in pertinent part:

This agreement is a release of the RENTOR/DIVER's rights to sue for injuries or death resulting from the rental and/or use of this equipment. The RENTOR/DIVER expressly assumes all risks of skin and/or scuba diving related in any way to the rental and/or use of this equipment.

According to DUI's Vice President of Sales, Faith Ortins, when planning its DemoTours, DUI would generally ask the local dive shops to provide a list of volunteers, along with their desired positions. Those volunteering for the position of dive guide would have to produce credentials to verify that they were certified instructors. At the beginning of the day of the event, DUI representatives would bring all the volunteers together for a briefing, then do individual briefings for specific jobs, including the dive guide position. During that briefing, DUI would

give the dive guides instructions regarding the maximum depths and times for the dives, remind them to show people how to use the equipment, and ask them to make sure people returned their equipment before leaving.

Goldbranson holds a number of current certifications and is a certified dry suit diving instructor. At his deposition, Goldbranson testified that he had participated in DUI DemoTour events on a couple of occasions prior to the May 10, 2014 event, and that his boss at the dive shop where he worked would generally ask him to attend to represent the shop.

The dive in question occurred in the early afternoon. O'Brien was assigned to a three-person group led by Goldbranson. The other two divers in the group were Sean Mathies ("Mathies") and John Edwards ("Edwards"). Mathies was a student of Goldbranson and a customer of the dive shop where Goldbranson worked. Mathies learned of the DemoTour event from Goldbranson, who told Mathies that if he joined him at the event Mathies could complete two dive certifications, open water and dry suit, in the same day. Mathies arrived at the event sometime between 8:00 a.m. and 8:30 a.m. and met up with Goldbranson, who helped Mathies get fitted for all the necessary equipment and made sure he was properly suited up. Because Mathies was doing the dives as part of a certification, the fee for the event was paid by the dive shop where Goldbranson worked. Mathies did two one-on-one dives with Goldbranson in the morning, then joined Goldbranson for the dive with O'Brien and Edwards after lunch.

Goldbranson admits that he was responsible for insuring that O'Brien was properly fitted with equipment, knew how to use the equipment, and was safely guided on an open water dive. He also admits that he did not physically check that each diver's air cylinder valve was completely open before starting the dive. Goldbranson did not complete a dry suit confined water session with O'Brien or Edwards prior to the dive in question. Edwards had completed such a

session with another dive guide earlier that day, while Mathies had completed the confined water session with Goldbranson in a pool with Goldbranson on a prior date.<sup>3</sup>

The deposition testimony of Goldbranson, Mathies, and Edwards, the only sources with personal knowledge of what took place during the dive with O'Brien, differs in some respects, but is consistent on several key points. They all recall that, at some point during the dive, Mathies' air supply became depleted and Goldbranson signaled everyone to go to the surface. Once on the surface, Goldbranson explained to the group that Mathies was low on air and that, as a result, they would be heading back to shore by swimming on the surface (as opposed to diving underwater). O'Brien objected, saying he still had 2,000 psi (pounds per square inch) of air left and that he wanted to keep diving. Goldbranson disagreed and told him they should all go to shore together. O'Brien reiterated his desire to keep diving and went underwater, separating from the group and disregarding Goldbranson's instructions.

The accounts of Goldbranson, Mathies, and Edwards diverge somewhat at this point. Goldbranson admits in the Combined Statement of Undisputed Facts that he did not swim into shore on the surface with Mathies and Edwards.<sup>4</sup> Mathies, however, testified at his deposition that Goldbranson told him and Edwards that he was staying with them, and that Goldbranson told Mathies he had to stay with Mathies because Mathies was not a certified diver. Edwards,

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<sup>3</sup> In her opposition to the motion for summary judgment, Doherty references and attaches a purported expert opinion that is critical of Goldbranson's conduct, including his failure to complete a dry suit confined water session with O'Brien and his decision to combine guiding two other divers in a dry suit dive with Mathies' open water certification dive. The attachments consist of four pages of what appear to be a portion of a larger document. The pages do not identify the author or his or her qualifications, are not signed, and are not properly authenticated. As a result, they are not admissible as expert opinion, and the court does not consider them or the information contained therein in connection with the motion for summary judgment.

<sup>4</sup> This is inconsistent with Goldbranson's deposition testimony that he stayed with Mathies and Edwards, and that the three began swimming on the surface together, but Goldbranson is bound by his admission in the Combined Statement of Undisputed Facts.

meanwhile, testified that after O'Brien separated from the group, Mathies and Edwards started to swim into shore while Goldbranson stayed somewhere between them and O'Brien.

What is not disputed is that Goldbranson did not follow O'Brien when he separated from the rest of the group, and that shortly after O'Brien separated, he surfaced and called for help. He was retrieved from the water, given CPR, and transported to a hospital, where he was later pronounced dead. O'Brien's death certificate lists the cause of death as "drowning" and how it occurred as "scuba drowning after unequal weight belt distribution."

The Second Amended Complaint alleges the following claims against Goldbranson: that he negligently performed his duties and responsibilities as dive master, causing O'Brien's conscious pain and suffering and death (Count VIII); and wrongful death pursuant to G. L. c. 229, § 2 (Count IX).

### DISCUSSION

#### A. Summary Judgment Standard

The familiar standard governing motions for summary judgment provides that summary judgment is to be granted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 625 (2012), citing Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983). A party moving for summary judgment is entitled to summary judgment if she affirmatively presents a set of undisputed facts that entitle her to judgment as a matter of law, or if the moving party demonstrates that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case. Kourouvacilis v. General Motors Corp., 410 Mass. 706 (1991). The moving party "need not prove that no factual disputes exist, only that there is no genuine dispute of material fact." Norwood v. Adams-Russell Co., 401 Mass. 677, 683 (1988). In assessing the record on a motion for summary judgment, all



reasonable inferences are drawn in favor of the nonmoving party. Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 411 (2007). The court does not “resolve issues of material fact, assess credibility or weigh evidence.” Kelly v. Brigham & Women’s Hosp., 51 Mass. App. Ct. 297, 299 n.4 (2001).

B. Analysis

There is no question that the Liability Release and Equipment Rental Agreement executed by O’Brien prior to his participation in the DemoTour event constitute enforceable contracts between O’Brien and DUI. In exchange for being allowed to participate in the DemoTour event and try out a dry suit, O’Brien gave up certain rights and assumed certain indemnity obligations. See Sharon v. Newton, 437 Mass. 99, 112 (2002) (participation in activity is adequate consideration for release). The issues raised in this case relate to whether those contracts are enforceable against O’Brien’s estate and whether Goldbranson is entitled to their benefits as an agent of DUI.

Goldbranson argues that summary judgment is warranted because, by virtue of his status as an agent of DUI, he is entitled to the benefits and protections of the Liability Release and the Equipment Rental Agreement. Doherty opposes Goldbranson’s summary judgment motion on several grounds. She contends: (1) that the Liability Release and Equipment Rental Agreement do not release O’Brien’s estate’s right to sue; and (2) that the Second Amended Complaint seeks to hold Goldbranson liable for his “independent negligence in supervising the pre-dive check for adequate air delivery as well as his failure to perform a Dry Suit Confined Water Session with O’Brien,” and for Goldbranson’s decision to combine a student certification event with the supervision of O’Brien, which left him unable to “adequately supervise and protect O’Brien when he re-submerged for an additional dive.” (Pl.’s Opp’n, p. 2).

For the reasons explained below, the court concludes that Goldbranson is entitled to summary judgment on Counts VIII and IX of the Second Amended Complaint because: (1) the language in the Liability Release and the Equipment Rental Agreement applies to the estate's right to sue for both conscious pain and suffering and wrongful death; and (2) Doherty cannot maintain claims against Goldbranson for his "independent negligence" because the undisputed facts establish that Goldbranson was acting as DUI's agent during the dive with O'Brien and is, thus, entitled to the benefit of the release language contained in the Liability Release and Equipment Rental Agreement.<sup>5</sup>

#### Count VIII – Conscious Pain and Suffering

The court concludes that summary judgment is warranted on Doherty's claim for O'Brien's conscious pain and suffering because the estate is bound by the Liability Release and because Goldbranson was acting as DUI's agent at the time of his allegedly negligent conduct. "[A] claim for conscious pain and suffering is a claim of the decedent, which may be brought on the decedent's behalf by his or her personal representative." Angelo v. USA Triathlon, 2014 WL 4716195, \*4 (D. Mass. 2014), citing Gaudette v. Webb, 362 Mass. 60, 62-63 (1972). "Any recovery on such a claim is held as an asset of the decedent's estate." Id., citing G. L. c. 229, § 6. The obligations undertaken by O'Brien in the Liability Release and Equipment Rental Agreement are binding on his estate. See Post v. Belmont Country Club, Inc., 60 Mass. App. Ct.

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<sup>5</sup> Goldbranson's memorandum in support of his motion for summary judgment also seeks judgment as a matter of law as to Doherty's duty to indemnify, arguing that the indemnity clause in the Liability Release is binding on O'Brien's estate, that the Second Amended Complaint asserts claims within the scope of the indemnity clause, and that O'Brien's estate has breached the indemnity clause by failing to indemnify, hold harmless, and reimburse Goldbranson for his legal costs and attorneys' fees. The court takes no action on this request, however, as Goldbranson has not properly pled a claim for indemnification. His Answer to the Second Amended Complaint makes no mention of indemnification as either a counterclaim or an affirmative defense.

645, 653 (2004) (contract of indemnity agreed to by decedent survived his death and became obligation of estate). In the Liability Release, O'Brien agreed to "fully release[] DUI from any liability whatsoever resulting from diving or associated activities" and "agree[d] not to sue DUI for personal injury arising from scuba diving or its associated activities." Meanwhile, in the Equipment Rental Agreement, O'Brien released his "rights to sue for injuries or death resulting from the rental and/or use of this equipment." As the estate is bound by O'Brien's releases and covenant not to sue DUI, whether Doherty may sue Goldbranson to recover for O'Brien's conscious pain and suffering turns on whether Goldbranson was acting as DUI's agent at the time of his allegedly negligent conduct.

Doherty first argues that a provision allegedly contained in a settlement agreement and release entered into by Doherty and DUI as a result of this litigation bars Goldbranson from assuming any benefits under the Liability Release and Equipment Rental Agreement. The settlement agreement and release is not contained in the summary judgment record before the court, but according to Doherty, provides, in pertinent part: "In signing this Agreement and Release, the Releasee and the Releasor specifically agree and acknowledge that it does not, and is not intended or understood to, release any other person and/or party to this law suit and specifically excludes the Defendant John Goldbranson, the Defendant Nicholas Fazah and EC Divers, Inc." Assuming this provision is contained in the settlement agreement between DUI and Doherty, it serves only to acknowledge that the settlement agreement between DUI and Doherty is not intended to release any claims brought against the other defendants in the above-captioned lawsuit. It has no effect on the validity and enforceability of the original contracts signed by O'Brien on May 10, 2014, and has no impact on the meaning of the language in the Liability Release as it relates to Goldbranson.

Doherty next contends that Goldbranson is not entitled to the benefits and protections of the Liability Release because Mathies' presence during the dive raises a question of fact regarding whether Goldbranson was acting as DUI's agent. Doherty argues that, rather than acting as DUI's agent during the dive, Goldbranson was acting in his own financial interest in certifying a student, Mathies, whom he safeguarded at the ultimately fatal peril of O'Brien. "An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal, and subject to the principal's control." Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 742 (2000). While proof of agency may normally be a question for the finder of fact, Stern v. Lieberman, 307 Mass. 77, 81 (1940), "[w]here the facts are undisputed, and the reasonable inferences which could be drawn therefrom are limited, this question may be resolved as one of law." O'Brien v. Christensen, 422 Mass. 281, 290 n.13 (1996). See Brown-Forman Corp. v. Alcoholic Beverages Control Comm'n, 65 Mass. App. Ct. 498, 503 (2006) ("question of agency becomes one of law in those instances where the relationship is found to exist on the basis of undisputed facts or unambiguous written documents").

Here, the undisputed material facts establish that, as they relate to O'Brien, Goldbranson was acting as an agent of DUI at the time of the dive in question. Based on the summary judgment record, there is no dispute that Goldbranson volunteered to serve as a dive guide at DUI's May 10, 2014 DemoTour event, as he had in past years. As DUI's Faith Ortins testified, when DUI held its DemoTour events, it would brief its volunteers at the beginning of the day. With respect to dive guide volunteers, the briefing included instructions regarding the maximum depths and times for the dives, reminders to show people how to use the equipment they were trying, and requests that the volunteers make sure people returned the equipment before leaving.

The record, thus, establishes that there was mutual consent on the part of DUI and Goldbranson that Goldbranson would act on behalf and for the benefit of DUI and subject to DUI's control in serving as a dive guide for the DemoTour event.

The only fact to which Doherty points as raising a triable issue regarding whether Goldbranson was acting as DUI's agent is Mathies' participation in the dive as Goldbranson's student. This fact, however, does not alter the nature of the relationship between Goldbranson and O'Brien. The event O'Brien attended that day was an event put on by DUI to give divers the opportunity to try out a dry suit. There is no evidence that O'Brien attended the event because of some personal connection with Goldbranson and no evidence that he knew Goldbranson in any way prior to Goldbranson serving as his dive guide in connection with the DemoTour on May 10, 2014. As far as O'Brien was concerned, Goldbranson was there as an agent of DUI to help show him how to use the equipment and lead him on a dive while he trialed a dry suit. The record establishes that all of Goldbranson's conduct as it related to O'Brien was in his capacity as a volunteer dive guide for DUI's event and, thus, as DUI's agent.

#### Count IX – Wrongful Death

As with the conscious pain and suffering claim, the court concludes that Goldbranson is entitled to summary judgment on Doherty's wrongful death claim because the estate is bound by the Liability Release and because Goldbranson was acting as DUI's agent at the time of his allegedly negligent conduct. A separate analysis of this claim is required, however, because, while it is clear that a decedent may release his own claim for conscious pain and suffering, Massachusetts law is unsettled on whether he may do so with respect to a claim for wrongful death, which belongs to the beneficiaries defined under G. L. c. 229. §§ 1-2. "[A]n action for wrongful death is 'brought by a personal representative on behalf of the designated categories of

beneficiaries' set forth by statute," and any damages recovered are distributed to those beneficiaries, not the estate. Angelo, 2014 WL 4716195 at \*3, quoting Gaudette v. Webb, 362 Mass. 60, 71 (1972).

Both parties cite to Post v. Belmont Country Club, Inc., 60 Mass. App. Ct. 645 (2004), and Angelo v. USA Triathlon, 2014 WL 4716195 (D. Mass. 2014), but acknowledge that neither case directly addresses whether a decedent's release of liability and covenant not to sue may bind his heirs and bar a claim for wrongful death. In Post, the Appeals Court concluded: that a release and indemnity clause contained in the defendant country club's handbook constituted binding contractual obligations of the plaintiff's decedent; that the indemnity clause's language requiring the decedent to indemnify the defendant for all losses, claims or expenses resulting from his use of the defendant's golf cart included any amounts paid on account of a wrongful death action arising from his use of the cart; and that the indemnity obligation survived the decedent's death and became an obligation of his estate. 60 Mass. App. Ct. at 647, 652-653. The plaintiff in Post argued that the indemnity provision effectively provided a release to the defendant for any wrongful death action and that this result is prohibited because "a wrongful death action is not within the competence of a living person to release, as the action belongs properly to the decedent's heirs." The court, however, did not reach that issue because the parties had agreed that recovery would be limited to insurance proceeds available under the decedent's homeowner's policy, leaving the claims for damages and wrongful death intact and not released. Id. at 652-653. In Angelo, the plaintiff sued USA Triathlon for wrongful death, conscious pain and suffering, and negligent infliction of emotional distress after the decedent died while participating in a triathlon. 2014 WL 4716195 at \*1. In ruling on the defendant's motion partial summary judgment on its counterclaim for indemnity, the court held that indemnity agreements

signed by the decedent were binding on the decedent's estate and that, to satisfy the indemnity obligation, the defendant could look to the assets of the decedent's estate, but not to any recovery on the wrongful death claim, because "that recovery would be held in trust for the statutory beneficiaries and would not become an asset of the estate." Id. at \*3. The court noted that the Appeals Court had "reserved the question of whether an indemnification provision would be enforced to effectively release the claims of people who were not signatories of such an agreement" in Post, and that, as in Post, the case before the court did not present that circumstance. Id. at \*3 n.5.

Two other recent cases from the United States District Court for the District of Massachusetts addressing whether non-signatory wrongful death beneficiaries of an estate are bound by an arbitration agreement entered into by the decedent are more on point, as they address a decedent's attempt to give up his non-signatory heirs' right to sue for wrongful death, as opposed to a decedent's assumption of indemnity obligations. In Chung v. StudentCity.com, Inc., 2011 WL 4074297 (D. Mass. 2011), the court held that a decedent's consent to an arbitration clause did not foreclose the executor of her estate from bringing a wrongful death action "[b]ecause wrongful death is not derivative of the decedent's claim" and because "it would be inconsistent with fundamental tenets of contract law to nonetheless hold that those beneficiaries, who did not sign an arbitration agreement, are bound by the decision of the decedent, whose estate holds no interest in this claim." Id. at \*2. A more recent decision from the District of Massachusetts, GGNSC Chestnut Hill LLC v. Schrader, 2018 WL 1582555 (D. Mass. 2018), decided in the weeks following the hearing on this matter, reached the opposite conclusion and "respectfully disagree[d] with the holding in Chung because the law in Massachusetts has moved toward interpreting wrongful death claims as derivative of the

decedent's cause of action." Id. at \*6. There, as in Chung, the court was asked to decide whether non-signatory wrongful death beneficiaries of an estate are bound by an arbitration agreement entered into by the decedent, a question the court noted "turns on whether wrongful death claims in Massachusetts are considered derivative or independent." Id. The court explained that it was once undisputed that wrongful death claims were independent of claims a decedent could have brought had he survived, but that since the late 1980s court have begun acknowledging that amendments to the wrongful death statute "'evidence the legislature's intention to overrule this earlier view and to establish that a claim for wrongful death in Massachusetts is derivative from and not independent of the decedent's personal injury claim.'" Id. at \*7, quoting Ellis v. Ford Motor Co., 628 F. Supp. 849, 858 (D. Mass. 1986). The court also noted that, unlike some states where individuals may bring their own wrongful death claims, "Massachusetts law only allows one to bring a wrongful death claim as the executor or administrator of the decedent's estate, and there is no separate cause of action for surviving family members." Id. After noting a split on the issue in other jurisdictions, the court concluded: "I am persuaded that the Supreme Judicial Court of Massachusetts, if presented directly with the question, would conclude that a wrongful death claim is a derivative claim as to which the decedent's representatives would be bound by an agreement to arbitrate." Id. at \*8.

The court agrees with the reasoning of GGNSC Chestnut Hill LLC and holds that the wrongful death claim alleged in Count IX of the Second Amended Complaint is a derivative claim as to which O'Brien's representatives and beneficiaries are bound by the release and covenant not to sue contained in the Liability Release. The court's holding is also consistent with Massachusetts law favoring the enforcement of releases. See Sharon, 437 Mass. at 105 ("Massachusetts law favors the enforcement of releases.").



"There can be no doubt . . . that under the law of Massachusetts . . . in the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf." Schell v. Ford, 270 F.2d 384, 386 (1st Cir. 1959). Whether such contracts be called releases, covenants not to sue, or indemnification agreements, they represent "a practice our courts have long found acceptable." Minassian v. Ogden Suffolk Downs, Inc., 400 Mass. 490, 493. (1987). See Shea v. Bay State Gas Co., 383 Mass. 218, 223-224 (1981); Clarke v. Ames, 267 Mass. 44, 47 (1929).

Sharon, 437 Mass. at 105. The conclusion that a decedent may bind his non-signatory heirs in an agreement not to sue for wrongful death furthers the contracting parties' intent in entering into the release, while the opposite conclusion would have the effect of limiting the effectiveness of releases as a risk and liability assignment tool, as the specter of the statutory heirs' wrongful death claim would always overshadow the agreement and subvert the expectations of the parties.

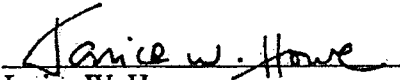
In the Liability Release, O'Brien agreed to "fully release[] DUI from any liability whatsoever resulting from diving or associated activities," "agree[d] not to sue DUI for personal injury arising from scuba diving or its associated activities," and "agree[d] that his heirs or executors may not sue DUI for death arising from scuba diving or its associated activities." The Liability Release was a binding contract between DUI and O'Brien, and O'Brien's statutorily defined heirs are likewise bound by it. In light of this holding, and the court's earlier conclusion that Goldbranson was acting as an agent of DUI at the time of his allegedly negligent conduct, Goldbranson is entitled to summary judgment on Doherty's wrongful death claim.

**ORDER**

For the foregoing reasons, Goldbranson's motion for summary judgment is **ALLOWED**.

The plaintiff's Second Amended Complaint is hereby **DISMISSED**.

Dated: May 1, 2018

  
Janice W. Howe  
Justice of the Superior Court

**Statutory and Rule  
Addendum**

G.L.c.229, § 1:

**Section 1. Damages for death from defective ways; persons entitled.**

Section 1. If the life of a person is lost by reason of a defect or a want of repair of or a want of a sufficient railing in or upon a way, causeway or bridge, the county, city, town or person by law obliged to repair the same shall, if it or he had previous reasonable notice of the defect or want of repair or want of railing, be liable in damages not exceeding four thousand dollars, to be assessed with reference to the degree of culpability of the defendant and recovered in an action of tort commenced within two years after the injury causing the death by the executor or administrator of the deceased person, to the use of the following persons and in the following shares:-

- (1) If the deceased shall have been survived by a wife or husband and no children or issue surviving, then to the use of such surviving spouse.
- (2) If the deceased shall have been survived by a wife or husband and by one child or by the issue of one deceased child, then one half to the use of such surviving spouse and one half to the use of such child or his issue by right of representation.
- (3) If the deceased shall have been survived by a wife or husband and by more than one child surviving either in person or by issue, then one third to the use of such surviving spouse and two thirds to the use of such surviving children or their issue by right of representation.
- (4) If there is no surviving wife or husband, then to the use of the next of kin.

G.L.c.229, § 2:

**Section 2. Wrongful death; damages.**

Section 2. A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant; except that (1) the liability of an employer to a person in his employment shall not be governed by this section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. An action to recover damages under this section shall be commenced within three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action, or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty. (*Amended by 1989, 215, Sec 1 eff. 10-9-89.*)

G.L.c.231, § 85:



## Massachusetts General Laws

## CHAPTER 231. PLEADING AND PRACTICE.

**Section 85. Comparative negligence; limited effect of contributory negligence as defense.**

Section 85. Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.

The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.

The defense of assumption of risk is hereby abolished in all actions hereunder.

The burden of alleging and proving negligence which serves to diminish a plaintiff's damages or bar recovery under this section shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to have been in the exercise of due care.

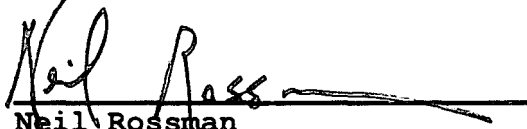
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**Massachusetts Declaration of Rights**  
**Article XV:**

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2].

## Certification.

I hereby certify consistent with Mass R. App. P. 16(k) that this Brief and Record Appendix filed on behalf of the Plaintiff-Appellant Margaret C. Doherty complies with the Rules of Court which pertain to the filing of such documents in the Appeals Court including, but not limited to, the requirements of Mass R. App. P. 16, 18, and 20.

A handwritten signature in black ink, appearing to read "Neil Rossman", is written over a horizontal line.

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Date: August 29, 2018

