COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2003AP2876 **Cir. Ct. No. 2000CV67; 2001CV323**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DAVID WALSH, MARY WALSH AND WALSH GRAIN FARMS, INC.,

PLAINTIFFS-APPELLANTS,

UNITY HEALTH PLAN,

INVOLUNTARY-PLAINTIFF,

V.

JAMES A. LUEDTKE, ROBERT MENN, WORLD PULLING INTERNATIONAL, INC., NATIONAL TRACTOR PULLERS ASSOCIATION AND TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Columbia County: JAMES O. MILLER, Judge. *Affirmed*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DEININGER, J. David and Mary Walsh and Walsh Grain Farms, Inc., appeal an order for judgment that dismissed their claims against James A. Luedtke, Robert Menn, the National Tractor Pullers Association, Inc. (NTPA), and World Pulling International, Inc. (WPI). The Walshes sought in their action to recover damages for David's personal injuries and other losses allegedly incurred in a mishap during a tractor pulling event in Ohio. They claim the circuit court erred in dismissing their negligence, reckless misconduct and misrepresentation claims against Luedtke because the record shows that facts material to those claims are in dispute. The Walshes also claim the circuit court erroneously exercised its discretion in denying their motion to amend their complaint to allege additional claims against Menn and the two associations.

¶2 The parties agree that, for purposes of the summary judgment analysis, Ohio law applies. We conclude that, under Ohio law, the exculpatory and indemnification agreements that David Walsh signed effectively bar the Walshes' claims against Luedtke. We further conclude that the circuit court did not erroneously exercise its discretion in denying the motion to amend. Accordingly, we affirm the appealed order dismissing the Walshes' claims against all defendants.

BACKGROUND

¶3 David Walsh was injured while competing in a tractor pulling competition in Fort Recovery, Ohio. Walsh was operating a tractor owned by Walsh Grain Farms, Inc., which was pulling a weighted sled owned and operated by James Luedtke. During Walsh's pull, the weight transfer system on Luedtke's

sled failed to properly move the required weight forward to increase friction and slow or stop the tractor's forward movement.[1] In addition, three methods of stopping the tractor's and sled's forward movement failed to do so: the "kill switch," a mechanism that shuts down the tractor's engines; the box brake, a device that fixes the weight box on the sled in place and prevents the weight from shifting backwards on the sled; and the wheel or ground brakes on the sled itself. As a result, the sled and tractor continued to move forward until the tractor collided with a cement barrier and tipped over, injuring Walsh.

¶4 More than six months prior to the Ohio tractor pulling event, David Walsh had signed an annual NTPA vehicle registration and competition license application form that included a broadly worded "agreement of release." By its terms, David released the NTPA and other entities and individuals participating in sanctioned events from liability to him for personal injuries or property damage he might sustain "which in any way grows out of or results from any NTPA event activity or part thereof." The agreement also included an indemnification and hold harmless provision regarding any loss or liability the releasees might incur as a result of David's participation in an NTPA event.

¶5 In addition, prior to his participation in the Ohio event, David Walsh signed a "**RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF**

[1] Tractor pulling is a form of competition in which tractor operators test the pulling strength of their machines. Tractors are hitched to weighted sleds, and the tractor drivers attempt to pull the sleds a certain distance along a designated track. As the tractor hauls the sled down the track, the weight on the sled moves forward, creating more friction and making it harder for the tractor to pull the sled. Eventually, this process forces the tractor to a halt. The distance from the starting point to the point at which the front of the sled eventually rests is measured to determine a winner. *See*, *e.g.*, Truck and Tractor Pulling, What's it all about?, http://www.greatlakespull.com/pulling.html (last visited Aug. 25, 2005).

RISK, AND INDEMNITY AGREEMENT." Walsh testified that releases like this one are signed prior to entering specific events and that he read and understood its contents before signing the document. Under its terms, any person signing the document agreed to:

> … RELEASE, WAIVE, DISCHARGE, AND COVENANT NOT TO SUE [all persons and entities associated with this event]… FROM ALL LIABILITY TO THE UNDERSIGNED… FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFOR ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY… OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
>
> ….
>
> … ASSUME FULL RESPONSIBILITY FOR ANY RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE arising out of or related to the EVENT(S) whether caused by the NEGLIGENCE OF RELEASEES or otherwise.
>
> … acknowledge that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage.

In addition, the agreement also contained an indemnity clause:

> [I] HEREBY AGREE TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and each of them FROM ANY LOSS, LIABILITY, DAMAGE, OR COST they may incur arising out of or related to the EVENT(S) WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.

¶6 David Walsh, his wife Mary Walsh, and Walsh Grain Farms, Inc. filed suit against Luedtke, the NTPA, the WPI, and Robert Menn, an event official responsible for inspecting weight sleds before the tractor pull. The causes of action included negligence and reckless misconduct alleged against the weight

sled owner-operator, Luedtke. The Walshes also alleged that all of the defendants made untrue representations regarding compliance with safety rules and the performance of inspections, upon which David Walsh relied, and absent which he would not have participated in the tractor pull. The plaintiffs sought compensation for David Walsh's personal injuries, Mary Walsh's loss of consortium, and damage to the farm corporation's tractor.

¶7 The defendants moved for summary judgment, arguing that the releases and indemnification agreements David Walsh had signed barred the plaintiffs' claims. The defendants also argued that Walsh had assumed all the risks incident to the tractor pull, which, under Ohio law, barred the plaintiffs' claims. While the summary judgment motion was pending, the Walshes moved the court for leave to amend their complaint to add claims of reckless misconduct against Menn, NTPA and WPI. The circuit court denied the Walshes leave to amend their complaint, concluding that the request, filed some two and one-half years after the commencement of the action and after discovery had closed, came too late. The court granted the defendants' motions for summary judgment and entered an order for judgment dismissing all of the Walshes' claims. The Walshes appeal.

DISCUSSION

¶8 We review an order for summary judgment without deference to the decision of the circuit court. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). When there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law, summary judgment is appropriate. *See* WIS. STAT. § 802.08(2) (2003-04).[2] When reviewing the granting of summary judgment, we are to use the same standards and methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or if material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). We, like the circuit court, are prohibited from deciding issues of fact and may decide only whether a factual issue exists. ***Id***.

¶9 The Walshes conceded in the circuit court that, for the purposes of the summary judgment analysis, Ohio substantive law applied. They repeat that concession in their opening brief to this court. The concession is significant because Ohio courts appear more amenable to enforcing exculpatory agreements of the kind at issue in this case than might be the case if Wisconsin precedents applied.[3] We nonetheless accept the Walshes' concession without independently considering whether a choice of law analysis under Wisconsin precedent would result in the application of Ohio substantive law. We note in passing that virtually

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] *See*, *e.g.*, ***Hurst v. Enterprise Title Agency, Inc.***, 809 N.E.2d 689, 694 (Ohio Ct. App. 2004) (noting that "limiting or exculpatory language in a contract will be enforced unless that language is unconscionable, in violation of important public policy considerations, or vague and ambiguous," and that the "inclusion of an exculpatory clause in a contract, generally, does not violate public policy"). By contrast, the Wisconsin Supreme Court has explained that "[e]xculpatory contracts are not favored by the law because they tend to allow conduct below the acceptable standard of care applicable to the activity." ***Richards v. Richards***, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118 (1994); *see also* ***Atkins v. Swimwest Family Fitness Center***, 2005 WI 4, ¶12, 277 Wis. 2d 303, 691 N.W.2d 334 (noting that "Wisconsin case law does not favor such agreements").

all of the significant acts giving rise to this litigation took place in Ohio: that is where David Walsh signed the event release and suffered his injuries. It is also where virtually all of the defendants' allegedly wrongful conduct took place.

I. Effectiveness of the Exculpatory Agreements

¶10 Under Ohio law, an exculpatory contract may relieve a party of liability for negligent acts but not for "willful or wanton misconduct." *See* ***Bowen v. Kil-Kare, Inc.***, 585 N.E.2d 384, 390 (Ohio 1992). The Ohio Court of Appeals has explained that a "participant in sporting activities can contract with the proprietor to relieve the proprietor from any damages or injuries he may cause, unless they are caused by willful or wanton conduct." ***Simmons v. Am. Motorcyclist Ass'n***, 591 N.E.2d 1322, 1324 (Ohio Ct. App. 1990). For actions to constitute willful misconduct in Ohio, they generally must involve "'an intent, purpose or design to injure.'" ***Gladon v. Greater Cleveland Reg'l Transit Auth.***, 662 N.E.2d 287, 294 (Ohio 1996) (citation omitted). Wanton conduct, by contrast, encompasses "the failure to exercise 'any care whatsoever toward those to whom [a person] owes a duty of care, and [the] failure occurs under the circumstances in which there is great probability that harm will result.'" ***Id***. (citation omitted).

¶11 The Walshes argue that the releases David Walsh signed do not bar them from pursuing claims against Luedtke because his actions rise to the level of willful or wanton misconduct. They contend that Luedtke's failure to observe rules or regulations designed to safeguard the well-being of others amounts to wanton misconduct under the holding in ***Gladon***, where the Ohio Supreme Court concluded a jury could reasonably find wanton misconduct in the operation of a commuter train in excess of regulations governing the maximum speed for trains. ***Gladon***, 662 N.E.2d at 294. Specifically, the Walshes claim that the record

establishes, or at least places in dispute, that Luedtke entered his weight sled in the tractor pulling event knowing that its wheel brakes were not operating correctly. They note that an inspection of the sled after the accident revealed that the wheel brakes were not functioning properly. According to the affidavit of a witness, an inspection of the sled revealed that three of the four brakes were not in working order. The witness also averred that Luedtke had stated three weeks prior to the event that he needed to "put brakes on his sled because he was tired of taking county roads to avoid DOT inspection scales on the highways." Thus, in the Walshes' view, Luedtke's conduct was at least "wanton" because Luedtke knowingly violated safety rules applicable to the tractor pulling event.[4]

¶12 For summary judgment purposes, we must view the evidence in the light most favorable to the nonmoving party, in this case, the Walshes. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986). Accordingly, for the purposes of our analysis, we will accept the Walshes' contention that their submissions on summary judgment would permit a fact finder to infer that Luedtke's sled was in violation of recognized safety rules and that Luedtke was aware that the wheel brakes on his weight sled were not fully operable. Nevertheless, it is undisputed that, in the month prior to the Ohio pulling event, Luedtke's sled had passed an annual safety inspection mandated by the North American Sled Operators Association, which was required for an operator to receive a license to operate at NTPA events. There is also no dispute

[4] Although the Walshes do not cite the specific safety rule Luedtke allegedly violated, the NTPA-approved North American Sled Operators Association Rules state as follows: "All wheels on all sleds must have working brakes installed with brakes being strong enough to lock all wheels when unit is fully loaded."

that Luedtke made certain repairs to the sled in the weeks before the competition, including replacing an axle and brake pads.

¶13 The record further shows that Luedtke's weight sled underwent a pre-event inspection performed by Robert Menn on the afternoon of the accident. Both men testified that the sled performed properly during the pre-event inspection.[5] Finally, Luedtke testified at deposition that, after David Walsh's pull began and Luedtke saw that the weight box was not moving properly, he acted to trigger all three stopping mechanisms on the sled (the kill switch, the box brake and the wheel brakes), but none succeeded in stopping the sled and tractor before the tractor hit the barrier.

¶14 We conclude that the record on summary judgment fails to establish wanton misconduct on Luedtke's part. Although there can be little question that a tractor pulling competition presents circumstances in which a failure to exercise care creates a "great probability that harm will result," the Walshes have failed to establish or place in dispute that Luedtke failed to "exercise 'any care whatsoever toward those to whom he owe[d] a duty of care.'" *See* ***Gladon***, 662 N.E.2d 287, 294. Even if Luedtke knew or suspected that the wheel brakes on his sled were not working properly, and he was thus negligent in maintaining the sled, that does

[5] Although the Walshes suggest that this inspection was never conducted or that it was done improperly, the record contains no evidence to support the claim. The Walshes state that "Luedtke was supposedly present for the alleged inspection," but inserting loaded adverbs and adjectives into one's argument is no substitute for evidentiary submissions. A party opposing summary judgment must "submit materials on summary judgment to counter the submissions of the moving party. It is not enough to simply claim that the moving party's submission should be disbelieved…." ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001 WI App 148, ¶54, 246 Wis. 2d 933, 632 N.W.2d 59. Quite simply, the Walshes presented nothing beyond their own speculation to show or place in dispute that the pre-event inspection was either not performed or performed improperly.

not mean he completely disregarded applicable safety regulations or failed to exercise any care to prevent the accident. It is undisputed that: (1) his sled, prior to the event, passed two inspections required for sleds to be employed in NTPA events; (2) Luedtke made repairs to his sled during the weeks before the event in question; and (3) when the mechanical problem with the weight box manifested, Luedtke attempted to stop the forward movement of the tractor and sled by all means at his disposal.[6]

¶15 The Walshes contend, however, that the steps Luedtke took were "minimal," and that Luedtke's efforts to reduce the danger in using his sled were insufficient to demonstrate that his conduct was not wanton. They rely on ***Hunter v. City of Columbus***, 746 N.E.2d 246 (Ohio Ct. App. 2000), where an ambulance driver drove the emergency vehicle into oncoming traffic while driving at sixty-one miles per hour in a thirty-five mile per hour zone. ***Id***. at 249. The vehicle struck a car attempting to turn into a parking lot, killing the driver of the car. ***Id***. The ambulance had activated its lights and siren, ***id***., but the Ohio Court of Appeals concluded the driver's actions were "extreme enough that evaluation of whether the recklessness was great enough to be willful or wanton misconduct" should be left to a jury to decide, ***id***. at 253.

¶16 The holding in ***Hunter*** is distinguishable, however. We note first that it is not a release case where a participant in a hazardous activity agreed in advance to assume the risk of injuries, even if incurred as a result of the

[6] We also agree with Luedtke that the fact that he was riding the sled at the time of the incident, and was thus very much in harm's way if malfunction were to occur, creates a strong inference that he lacked knowledge or awareness that his sled was mechanically unsafe for use in a pulling competition. We do not rely on this inference, however, because a fact finder could reasonably decline to draw it.

negligence of those conducting or supervising the activity. The parties in ***Hunter*** had no underlying contractual relationship, and the legal context for their dispute was provided by Ohio statutes that grant immunity to emergency service providers except when their operation of a vehicle constitutes "willful or wanton misconduct." *See* ***id***. at 250. The court analyzed and applied precedents interpreting the statutory language at issue. *See* ***id***. at 251-53. Although some of the ***Hunter*** court's discussion of the concept of "willful or wanton misconduct" is no doubt helpful in other contexts, we are not persuaded that all of the court's analysis, and the result it reached based on the facts before it, are readily transferable to other factual and legal contexts, such as those before us now.

¶17 The defendants in ***Hunter*** pointed to their activation of the red lights and siren as demonstrating some care on their part, which, they argued, was sufficient to remove their conduct from the statutory exception to immunity. ***Id***. at 252. The court was unwilling, however, to find that the single act of energizing emergency signals served to immunize all manner of "wanton or reckless misconduct" on the part of emergency vehicle drivers, noting that such an interpretation would render the statutory exception "virtually meaningless." ***Id***. at 253. The court also rejected the defendants' arguments that were based on other cases in which emergency drivers had been found not "to be driving in a wanton or reckless manner," noting that "each situation must be evaluated on its own unique facts." ***Id***. at 253. We conclude that the facts before us are sufficiently dissimilar from those in ***Hunter*** to render its analysis and conclusions regarding the Ohio emergency driver immunity statutes of no assistance in resolving the present dispute involving a release of liability by a participant in a sporting event.

¶18 Rather, we find the facts and analysis in ***Gardner v. Ohio Valley Region, Sports Car Club of Am.***, 2002-Ohio-3556,[7] a much closer fit on the present record. The plaintiff was seriously injured while driving in a sports car race. ***Id***., ¶¶2-6. He had signed a release absolving the defendants from all liability arising from his participation in the race, which the Ohio Court of Appeals noted did not "release claims for willful or wanton misconduct." ***Id***., ¶6 n.1. The trial court granted summary judgment to the defendants and the appellate court affirmed. Applying some of the definitions discussed in ***Hunter*** and other precedents, the court reiterated that "wanton misconduct is the failure to exercise any care," and was sometimes described as encompassing "a disposition to perversity on the part of the tortfeasor." ***Id***., ¶13.

¶19 The court rejected the plaintiff's assertion in ***Gardner*** that the waving of a yellow flag was "only token care" after a car spun out and came to rest on the track where the plaintiff's car collided with it. ***Id***., ¶15. Noting that "[w]aving flags are precisely the way track officials communicate with drivers and warn them of potential hazards," the court concluded that, "even when the evidence is viewed in a light most favorable to appellants, reasonable minds can only conclude that there was no breach of duty under the wanton misconduct standard." ***Id***. Here, submitting a weight sled to annual and pre-event inspections by cognizant officials is "precisely the way" a sled operator endeavors to ensure that the sled is fit for use in competition. The record shows that Luedtke did so prior to the pulling event in question. We conclude that, in so doing, Luedtke

[7] *See* Ohio Supreme Court Rules for Reporting Opinions, Rule 4 (B): "All court of appeals opinions issued after the effective date [May 1, 2002] of these rules may be cited as legal authority and weighted as deemed appropriate by the courts." ***Gardner*** was released on July 11, 2002.

exercised some care to avoid the accident that ensued, such that his conduct cannot be said to be "wanton" so as to avoid the effect under Ohio law of the releases David Walsh signed prior to the event.

¶20 Alternatively, the Walshes maintain that the record on summary judgment would permit a fact finder to conclude that Luedtke engaged in willful misconduct because he operated his sled in the competition knowing that its brakes were not working properly. They maintain that willful misconduct under Ohio law can include an "intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." ***Tighe v. Diamond***, 80 N.E.2d 122, 127 (Ohio 1948). Like ***Hunter***, however, ***Tighe*** is not a release case, but one in which the Ohio Supreme Court interpreted "wil[l]ful misconduct" within the meaning of Ohio statutes dealing with "guest" passengers in automobiles and the imputed liability of sponsors for the acts of minor drivers. *See* ***id***. at 125-26. The court concluded that the "constructive intention" definition, quoted above, was a permissible substitute for an actual intention to injure "within the contemplation of guest statutes similar to the Ohio guest statute." ***Id***. at 127. We thus find ***Tighe***, like ***Hunter***, another case dealing with the interpretation of Ohio motor vehicle statutes, to be of little assistance here.

¶21 For the application of the "willful misconduct" standard to facts more germane to the present dispute, we again turn to ***Gardner***, where the plaintiffs also claimed that permitting a second wave of race cars to start the race under a green flag after a car in the first wave became disabled on the track constituted willful misconduct that would negate the effect of the injured driver's release. ***Gardner***, 2002-Ohio-3556, ¶19. Noting that in ***Hunter*** it had equated

willful misconduct with reckless misconduct for purposes of the Ohio emergency vehicle driver liability statute, the court emphasized that, in release cases, the relevant standard is "willful and wanton—not reckless." ***Id***., ¶25. The court also reiterated that willful misconduct "involves 'an intent, purpose, or design to injure,'" and that it "imports a more positive mental condition prompting an act than wanton misconduct." ***Id***., ¶18. Even applying the arguably broader notion of an "intentional deviation from a clear duty or definite rule of conduct," as espoused in ***Hunter*** and ***Tighe***, however, the court concluded that summary judgment in favor of the defendants in ***Gardner*** was proper because the plaintiff had not established willful misconduct. ***Id***., ¶24.

¶22 Similarly, we here conclude that the record does not establish Luedtke knowingly violated any clear duty or definite rule of conduct when he employed his officially-inspected weight sled in the tractor pulling event. Among the potential causes of injury or damages for which David Walsh released the defendants from liability were those stemming from mechanical equipment malfunctions occurring during a competition. To show an intentional deviation on Luedtke's part, the Walshes would need to offer some proof that Luedtke knowingly avoided the required sled inspections or somehow arranged to have inspection reports falsified. The record contains no such showing. While the Walshes offer conjecture that that is what occurred, conjecture does not avoid summary judgment—evidentiary submissions are required. *See* ***Physicians Plus Ins. Corp.***, 246 Wis. 2d 933, ¶48 (noting that an opponent of summary judgment "may not rely on a conjecture that evidence in support of the motion 'may' not be accurate or reliable," but must affirmatively "counter with evidentiary materials demonstrating there is a dispute").

¶23 Thus, we conclude the exculpatory agreements bar David Walsh's claims against Luedtke as a matter of law because there is no dispute of material fact that Luedtke did not engage in willful or wanton misconduct that would allow the Walshes to avoid the effect of the agreements under Ohio Law. Luedtke may well have been negligent in his operation or maintenance of the sled, as perhaps were Menn or other NTPA agents in failing to discover the allegedly defective wheel brakes prior to the Fort Recovery event. By executing the releases prior to the event, however, David Walsh expressly waived his right to press claims for injuries or damages incurred as a result of the defendants' negligence. We read the relevant Ohio precedents as requiring a much greater degree of misconduct than that appearing on this record before a plaintiff may avoid the effect of the releases David signed.[8]

[8] The parties also discuss at some length the Ohio common law doctrines of "express assumption of risk" and "primary assumption of risk." It appears that any analysis of "express assumption of risk" is subsumed in our discussion of the releases, whereby David Walsh expressly agreed to assume the risks of injury or losses associated with his participation in the tractor pull. *See* ***Toth v. Toledo Speedway***, 583 N.E.2d 357, 360 (Ohio App. 1989). It also appears that, because we conclude the record contains insufficient evidence for the Walshes' claims to survive summary judgment on the issues of willful or wanton misconduct, there is no need for us to address the Ohio "primary assumption of risk" doctrine, which might apply if the exculpatory agreements David executed were found to be ineffective for some reason. *See* ***id***. Finally, it appears that a plaintiff can defeat the primary assumption of risk defense only by showing that a defendant engaged in "reckless or intentional misconduct" that arguably increases the risks in an already dangerous activity beyond those that are inherent to the activity. *See* ***Thompson v. McNeill***, 559 N.E.2d 705 (Ohio 1990). Although our understanding of the parties' arguments is that we need not address the primary assumption of risk doctrine, were we to do so, we would conclude that the record on summary judgment also establishes that David Walsh knowingly and deliberately assumed the risks of participating in the dangerous activity of competitive tractor pulling, including the risk of equipment malfunctions, and that for the reasons we have discussed why the record fails to establish or place in dispute that Luedtke engaged in willful or wanton misconduct, neither does it do so with respect to "reckless or intentional" conduct on Luedtke's part. *See* ***id***. at 708 n.1 (noting that the "term 'reckless' is often used interchangeably with 'willful' and 'wanton'" and that the court's "comments regarding recklessness apply to conduct characterized as willful and wanton as well").

II. Fraudulent Inducement of Exculpatory Agreements

¶24 The Walshes also attempt to avoid the effect of the releases David Walsh signed before the Fort Recovery event by claiming that they are null and void because he signed them in reliance on misrepresentations made by Luedtke and (possibly) by other defendants or their agents. Specifically, the Walshes claim that Luedtke, by entering his sled in the Ohio event, falsely represented to competitors, including David Walsh, that his sled met the NTPA requirements for safety. If the Walshes can establish that David was induced to sign the exculpatory agreements by intentional misrepresentations on the part of one or more of the defendants, the appropriate remedy would be to rescind the agreement. *See* ***Dlouhy v. Frymier***, 634 N.E.2d 649, 651 (Ohio Ct. App. 1993). The record, however, reveals no evidence that the defendants made intentional misrepresentations that induced David Walsh into signing the exculpatory agreements.

¶25 Under Ohio law, claims of misrepresentation or fraudulent inducement of a contract require the following: (1) a false representation that is material to the contract; (2) made with the intent of deceiving another into relying on it; (3) justifiable reliance upon the representation; and (4) resulting injury proximately caused by the reliance. ***Id***. We will assume for the purpose of this argument that Luedtke entered his weight sled in the Ohio pulling competition knowing that its wheel brakes were not operating properly. Nothing in the record, however, suggests that any of the other defendants (inspector Menn and the two associations) had any knowledge of the falsity of Luedtke's (implied) representation that the wheel brakes on his sled were in proper working order. Menn in fact testified that he observed the operation of the wheel brakes in the pre-event inspection and found them satisfactory.

¶26 As for Luedtke, he made no representations of any kind to David Walsh about the safety of his sled or the condition of its brakes prior to David's execution of the releases. Nothing in the record on summary judgment suggests that Walsh even knew Luedtke's sled would be taking part in the Fort Recovery event at the time the releases were signed, or that Luedtke's sled would be the one Walsh would pull during the competition. Thus, even if Luedtke constructively made false representations to Menn and the NTPA by presenting a sled with known wheel brake deficiencies for use in the Ohio pulling event, David Walsh was unaware of the misrepresentation when he signed the two releases prior to the event. Walsh cannot, therefore, be said to have relied on Luedtke's constructive misrepresentation when he signed the documents. We conclude that the summary judgment record provides no support for the Walshes' claims of fraudulent inducement.[9]

III. Claims of Mary Walsh and Walsh Grain Farms, Inc.

¶27 Even though we uphold the circuit court's dismissal on summary judgment of David Walsh's claims against Luedtke on the basis of the releases he signed, Mary Walsh's loss of consortium claim may still survive under Ohio law.

[9] If we were to adopt the Walshes' position on this issue, it would essentially render pre-event releases signed by tractor pull contestants ineffective against most if not all claims for damages arising from equipment malfunctions. All participants and those who furnish equipment for tractor pulls could be said to have constructively represented that their machines were in proper working order and in compliance with event and association rules. If we were to conclude further that such constructive representations were constructively made to all contestants in an event, and a machine failed during competition causing an injury, the machine was arguably not in fact fit for use in the competition. The injured party could readily assert that the owner knew or should have known of the faulty condition of his equipment, thus constituting an intentional or negligent misrepresentation. We conclude that such an extension of the concept of fraudulent inducement to avoid the effect of exculpatory agreements would be inconsistent with our reading of Ohio common law, which broadly permits and enforces exculpatory agreements executed by participants in sporting events such as the tractor pull in question.

See ***Bowen***, 585 N.E.2d 384 (upholding the right of a wife to pursue recovery of damages for loss of consortium even though her husband had signed an exculpatory contract before entering a stock car race in which he was injured). Ohio courts, however, have also held that agreements to indemnify another party are generally enforceable unless a specific public policy exception exists to warrant unenforceability. *See* ***Worth v. Aetna Cas. & Sur. Co.***, 513 N.E.2d 253, 257 (Ohio 1987).

¶28 In determining the scope and effect of an indemnity agreement, Ohio courts review the language of the agreement to see if it is clear and precise, employs evident meanings, "and tends to no absurd conclusion[s]." ***Id***. at 256 (citation omitted). In the case before us, the indemnity provision in the Fort Recovery event exculpatory agreement is stated clearly and precisely, and it is free of arguable ambiguity: "[I] HEREBY AGREE TO INDEMNIFY AND SAVE AND HOLD HARMLESS the Releasees and each of them FROM ANY LOSS, LIABILITY, DAMAGE, OR COST they may incur arising out of or related to the EVENT(S) WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE." The language indemnifying the defendants in this case is stated in boldface in the agreement, and it allows no reasonable interpretation other than that David Walsh agreed to indemnify the defendants for all losses and damages they might incur arising from David's participation in the event in question.

¶29 Accordingly, we conclude that the agreement requires David Walsh to indemnify the defendants in this suit for all claims arising from his participation in the Fort Recovery tractor pulling contest, including Mary Walsh's loss of consortium claim and Walsh Grain Farms, Inc.'s property damage claim. The three plaintiffs have thus far been united in pursuing their claims against the

defendants in this action. They have filed joint pleadings and advanced their arguments in common through a single counsel. They have not specifically replied to the defendants' indemnification arguments. Because we conclude the release and indemnification agreements are valid and render David liable for Mary's and the farm corporation's claims against the defendants, we assume that Mary and the farm corporation will no longer wish to pursue their separate claims. If our assumption is incorrect, Mary and Walsh Grain Farms, Inc., should so inform us in a motion for reconsideration. Absent such a motion, we affirm the dismissal of their claims.[10]

IV. The Walshes' Motion for Leave to Amend

¶30 The final issue before us is the Walshes' claim that the circuit court erred in denying them leave to amend their complaint. In addressing this claim, we return to the more familiar terrain of Wisconsin procedural rules and the common law interpreting them. WISCONSIN STAT. § 802.09(1) provides that, after six months have elapsed from the commencement of an action, a party may amend a complaint only with leave of the court or the consent of adverse parties. The rule instructs courts to "freely" grant such leave "when justice so requires." ***Id***. "Whether 'justice so requires' depends upon 'whether the party opposing amendment has been given such notice of the operative facts which form the basis for the claim as to enable him to prepare a defense or response.'" ***Carl v. Spickler***

[10] Luedtke also argues that the release and its indemnity provision bars the property damage claim of Walsh Grain Farms, Inc., because David Walsh had the authority to act on its behalf and did so when he signed the exculpatory agreement. We do not address this argument because we conclude that the indemnity provision in the agreement effectively converts the claim of Walsh Grain Farms, Inc., against the defendants to a claim against David Walsh.

Enter., Ltd., 165 Wis. 2d 611, 623, 478 N.W.2d 48 (Ct. App. 1991) (citation omitted).

¶31 The decision to grant a motion to amend a pleading lies within the discretion of the circuit court. ***Id***. at 622. Properly exercised discretion involves "a statement on the record of the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case." ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 204-05, 366 N.W.2d 160 (Ct. App. 1985). If the circuit court does not fully explicate its reasoning, we may "examine the record to determine whether the facts support" its decision. ***Id***. at 205.

¶32 The Walshes commenced this action in April 2000. Their complaint alleged negligence and reckless misconduct against Luedtke and strict-liability, negligent and intentional misrepresentation against all of the defendants. In October 2002, some two and one-half years after filing the action and sixteen months after deposing Robert Menn, the Walshes moved to amend their complaint to include claims of negligence and reckless misconduct against Menn and the two associations. The Walshes asserted that Menn's deposition testimony shows that he had not "visually inspected" the wheel brakes on Luedtke's sled as NTPA safety rules allegedly require.[11] The Walshes argued in the circuit court that Menn's purported admission gave rise to claims of negligence and reckless misconduct against him and justified their request for leave to amend their

[11] Menn said that he observed the operation of the wheel brakes by having Luedtke move the sled forward and backward and engage the brakes to stop the sled's movements. Menn testified that this is how he was taught to do the pre-event wheel-brake inspection and that his observations constituted the necessary "visual inspection" of the wheel brakes. The Walshes claim, however, that because Menn did not personally look under the sled to view the conditions of the brake components, he did not make a "visual inspection of them."

complaint. The Walshes also pointed to the opinion of a defense expert who had testified at a recent deposition that Luedtke could not have prevented the accident because the distance from the dirt pulling track to the concrete barriers provided insufficient space for the Walshes' tractor and Luedtke's sled to stop. According to the Walshes, this recently acquired evidence justified amending their complaint to include claims of negligence and reckless misconduct against the NTPA and the WPI.

¶33 The circuit court concluded that the Walshes' motion for leave to amend came too late. It noted that the Walshes made their request when only a relatively short time remained before the then-scheduled trial date. The court concluded that there was no apparent reason that the amendment could not have been proposed much earlier during the two and one-half year pendency of the case. The court also noted that several scheduling orders had been entered and that discovery had been completed. It concluded that the new claims would likely require additional discovery, and, consequently, additional delay of the trial, further noting that it had before it motions for summary judgment based on the original claims and the completed discovery. The court summarized its January 13, 2003 ruling denying leave to amend this way: "I have had this case now since April of 2000. It's been the subject of at least two scheduling conferences, lots of motions here, and we can't keep coming up with new theories."

¶34 We upheld in ***Carl***, 165 Wis. 2d at 623, a circuit court's decision to deny a motion for leave to amend that was filed eight days before trial in a case that had been before the court for a "substantial time." The trial court in ***Carl***, like the circuit court in this case, was concerned about the need for additional

discovery and delay in trying the case that would result from allowing an amendment:

> [T]he trial court stated that if it granted the motion to amend, it would have to also grant a continuance to give the defense time for additional discovery concerning the defects under the implied warranty claim so they would not be prejudiced. However, because of the timing of the motion, the trial court concluded that it was not fair to the court and to the defense to grant a continuance because the case had already been pending for a substantial time.

Id. Similarly, we affirmed a circuit court's decision to deny a motion to amend in ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, 239 Wis. 2d 406, 620 N.W.2d 463, noting that it was filed "nearly two years" after the original complaint and after a defendant had moved for summary judgment. ***Id***., ¶13.

¶35 The fact that we have upheld denials of leave to amend on arguably similar records as proper exercises of discretion does not mean, of course, that the circuit court in the present action could not have determined that "justice required" it to grant the Walshes' leave to amend their complaint. That is not what the circuit court concluded, however, and the Walshes have not persuaded us that the court erroneously exercised its discretion in denying their request for leave to amend. The present circumstances are sufficiently similar to those in ***Carl*** and ***Grothe*** that we cannot justify a different outcome on the issue in this appeal.

¶36 Menn and the associations assert in their response brief that, if we conclude the circuit court did not err in denying the Walshes leave to amend their complaint, we do not need to further address the merits of any of the Walshes' originally pleaded claims against these three defendants. In their reply to that brief, the Walshes make no effort to convince us otherwise, thereby effectively conceding the point. Accordingly, we conclude that the circuit court, not having

erred in denying the Walshes' request for leave to amend their complaint, also did not err in dismissing on summary judgment the Walshes' claims against Menn and the two associations.

CONCLUSION

¶37 For the reasons discussed above, we affirm the appealed order for judgment.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶38 DYKMAN, J. (*dissenting*). The majority has concluded, despite disputed facts, that the Walshes cannot succeed on their claim that the conduct of the defendants could be either "willful" or "wanton," under Ohio law. Ohio, unlike Wisconsin, routinely finds exculpatory contracts valid unless defendants' conduct is willful or wanton. Thus, it is not surprising that Ohio plaintiffs assert that this test is met, and that Ohio appellate courts have decided on several occasions what is and is not willful or wanton conduct. Part of the problem is that Ohio's definition of those terms is different than Wisconsin's. For instance, in Ohio, speeding may be evidence of wanton misconduct. ***Hunter v. City of Columbus***, 746 N.E.2d 246 (Ohio Ct. App. 2000). We must therefore think like Ohio judges, not Wisconsin judges.

¶39 But Wisconsin law governs the procedure we use to decide this case, and the majority has not considered that summary judgment methodology is weighted in favor of having cases decided by juries rather than on a paper review of affidavits. The test is: "Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy." ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 296, 531 N.W.2d 357 (Ct. App. 1995) (citing ***City of Edgerton v. General Casualty Co.***, 184 Wis. 2d 750, 763-64, 517 N.W.2d 463 (1994), *overruled on other grounds*, ***Johnson Controls v. Employer's Ins. of Wausau***, 2003 WI 108, ¶121, 264 Wis. 2d 60, 665 N.W.2d 257). There is considerable controversy here.

¶40 Three Ohio cases tell me that the "no room for controversy" test is not met. The first is ***Bowen v. Kil-Kare, Inc. et al.***, 585 N.E.2d 384 (Ohio 1992).

There, a flagman at an auto race saw the plaintiff's car stopped on the racetrack in a hazardous position, and looked directly at the disabled car while its driver motioned for help. ***Id.*** at 387. Contrary to the rules of the race and normal practice, the flagman allowed the race to continue. ***Id.*** The plaintiff was injured when rear-ended by a competitor. ***Id.*** The court said: "Viewing the evidence in a light most favorable to appellants, we believe that reasonable minds can reach differing conclusions as to whether appellee's failure to timely stop the race, in clear violation of the rules of the event, was either negligent or willful and wanton." ***Id.*** at 390.

¶41 In ***Gladon v. Greater Cleveland Regional Transit Authority***, 662 N.E.2d 287 (Ohio 1996), a rapid transit train operator, operating her train on wet tracks, failed to adjust her speed so as to operate the train within her range of vision, and struck and injured a passenger who had fallen onto the tracks. The court said:

> Viewing these facts in the light most favorable to Gladon, we find that in this trial reasonable minds could have reached different conclusions regarding whether the speed of the train at the time the operator approached the West 65th platform meets the wanton standard in light of the operator's duty to adjust the train's speed to her range of vision and to the known track conditions.

Id. at 294. The majority discounts ***Gladon's*** holding by focusing on the defendants' affidavits which dispute the Walshes' assertions that Luedtke entered his weight sled in the competition knowing that its brakes were partly inoperable. In effect, the majority has tried this case on affidavits, a practice the supreme court has specifically prohibited. *See* ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). The correct methodology is to accept the Walshes' contentions as true, and then consider, as Ohio's courts do, whether

"reasonable minds could have reached different conclusions as to whether Luedtke's conduct was wanton." ***Gladon***, 662 N.E.2d at 319-320. After examining the third case in my analysis, I will consider that question.

¶42 The third case which underlies my view here is ***Hunter v. City of Columbus***, 746 N.E.2d 246 (Ohio Ct. App. 2000). The majority discounts ***Hunter*** because it is not a release case. It concludes that the ***Hunter*** analysis is not "readily transferable" to the facts and law in this case. The majority does not explain why this is so, or why Ohio courts would define "willful or wanton" differently in different contexts. The parties do not explain this. I cannot conjure up a reason for the majority's distinction, and so, for me, an Ohio court's discussion of the meaning of those terms is valid whatever the context.

¶43 In ***Hunter***, the question was whether an ambulance driver forfeited statutory immunity because his conduct was "willful or wanton." The ***Hunter*** defendant was an ambulance driver, who left the station with lights and siren operating. ***Id.*** at 294. At a point where vehicles blocked the lanes in which the ambulance was being driven, the speed limit was thirty-five miles per hour. ***Id.*** A few car lengths before reaching the stopped vehicles, the driver, traveling fifty-two to sixty-one miles per hour, veered into the opposing lane of traffic, striking and killing the occupant of a car traveling toward the ambulance. ***Id.*** Fire Department rules provided that when proceeding left of center, a driver should not exceed twenty miles per hour. ***Id.*** The court reversed the trial court's dismissal of the plaintiff's complaint, concluding that the question of whether conduct is willful or wanton is considered in relation to whether the probability of harm is great and known to the alleged tortfeasor. ***Id.*** at 253. The court concluded, citing ***Brockman v. Bell***, 605 N.E.2d 445, 450 (Ohio Ct. App. 1992) and ***Matkovich v Penn. Central Trans. Co.***, 431 N.E.2d 652, 655 (Ohio 1982):

> Because the line between willful or reckless misconduct, wanton misconduct, and ordinary negligence can be a fine one, the issue of whether conduct was willful or wanton should be submitted to the jury for consideration in light of the surrounding circumstances when reasonable minds might differ as to the import of the evidence.… [T]he issue of wanton misconduct is normally a jury question.

Hunter at 252.

¶44 I believe that here, as in ***Hunter***, "the circumstances are extreme enough that evaluation of whether the recklessness was great enough to be willful or wanton misconduct is a matter for the trier of fact." ***Hunter***, 746 N.E.2d at 253.

¶45 What are the facts of this case? I take them from the Walshes' submissions on the summary judgment motion. Unlike the majority, I do not compare and contrast these facts with opposing facts submitted by the defendants, because in both Wisconsin and Ohio, we are to consider the facts in the light most favorable to the non-moving party. ***Linden v. Cascade Stone Company, Inc.*** 2004 WI App 184, ¶6, 276 Wis. 2d 267, 687 N.W.2d 823; ***Harless v. Willis Day Warehousing Co.***, 375 N.E.2d 46, 47 (Ohio 1978).

¶46 Roger Simon observed the accident. He had spoken to Luedtke, the sled owner, about three weeks prior to the accident. Luedtke told him that he needed to get his weight box back to Wisconsin so he could "put brakes on his sled." Luedtke's reason for wanting to do so was that weight boxes travel on the highways and are self-propelled. Luedtke explained to Simon that he was tired of taking county roads to avoid DOT inspections of the weight box. Simon also examined Luedtke's weight box after the accident, and noticed that the brakes were not even hooked up and three of its four wheel brakes were not in working condition. One of the brake lines was cut and had been tied up. A picture of the cut and tied up brake line corroborates this testimony. If viewed by a jury, that

picture is evidence that could destroy any assertion that the brakes were in working order. A videotape of the accident showed that the wheels on the weight box never stopped turning, and did not lock up as they would have if the brakes had functioned. There were no skid marks on the dirt track. There was rust on the brake drums, indicating that they had not been used. The Walshes' expert witness testified that the brakes on the weight box violated a number of Department of Transportation rules for over-the-road vehicles.

¶47 What is the majority's response to this evidence? It disbelieves Roger Simon's testimony, the videotape of the accident, and the photographs, branding them "conjecture." It invents a new test for this case, a requirement that the Walshes show falsified reports. In reality, "falsified reports" is but an inference a trier of fact could draw after viewing the videotape and picture, and hearing the testimony about rusted brake drums. Unfortunately, the Washes, having failed the test the majority has invented, lose this lawsuit before the disputed facts can be presented to a jury.

¶48 Ohio's analysis of cases like this is that when the probability of harm is great and the tortfeasor knows of this probability, it is more likely that misconduct will be willful or wanton. *See* ***Hunter***, 746 N.E.2d at 252. I conclude that knowingly providing a weight box with non-functioning brakes to a contestant who is depending on the brakes to stop a tractor powered by three turbine helicopter engines operating at 13,500 rpm and pulling a 55,000 pound sled is easily willful or wanton misconduct as those terms are defined under Ohio law. Indeed, had the accident happened in Wisconsin, and had Walsh died as a result of the accident, the conduct I have described would support a conviction for homicide by criminal negligence, WIS. STAT. § 940.10.

¶49 Unlike the majority, I have examined the evidence a fact finder could use to support a finding in the Walshes' favor. Competing evidence presented by the defendant should prevent summary judgment in the Walshes' favor, but it should not foreclose a trial to decide disputed facts. I conclude, using the test Ohio courts use, that the facts the Walshes allege are extreme enough that evaluation of whether the recklessness was egregious enough to be willful or wanton misconduct is a matter for the trier of fact. ***Bowen***, 585 N.W.2d at 390. That is why I respectfully dissent.