

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2011

A. John Voelker
Acting 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. 2010AP581

STATE OF WISCONSIN

**Cir. Ct. Nos. 2006CV404
2006CV405**

**IN COURT OF APPEALS
DISTRICT IV**

CHARLES A. BEER,

PLAINTIFF-APPELLANT,

DARIN D. TOOT AND DAWN TOOT,

PLAINTIFFS,

v.

**LA CROSSE COUNTY AGRICULTURAL SOCIETY, MOTORSPORTS
MANAGEMENT SERVICES, INC. D/B/A LA CROSSE COUNTY
FAIRGROUNDS SPEEDWAY, INC., VIRGINIA SURETY COMPANY, INC.,
ACE AMERICAN INSURANCE COMPANY AND CARE FIRST BLUE CROSS
BLUE SHIELD,**

DEFENDANTS-RESPONDENTS,

**WELLMARK BLUE CROSS BLUE SHIELD OF IOWA P/K/A BLUE CROSS
BLUE SHIELD OF IOWA,**

DEFENDANT.

DARIN D. TOOT, DAWN TOOT AND CHRISTOPHER TOOT,

PLAINTIFFS-APPELLANTS,

V.

**LA CROSSE COUNTY AGRICULTURAL SOCIETY, MOTORSPORTS
MANAGEMENT SERVICES, INC. D/B/A LA CROSSE COUNTY
FAIRGROUNDS SPEEDWAY, INC., VIRGINIA SURETY COMPANY, INC.,
ACE AMERICAN INSURANCE COMPANY AND BLUE CROSS BLUE SHIELD
OF IOWA P/K/A WELLMARK BLUE CROSS BLUE SHIELD OF IOWA,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
DALE T. PASELL, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Charles Beer and Darin Toot appeal an order of summary judgment in favor of La Crosse County Agricultural Society, MotorSports Management Services, Inc., Virginia Surety Company, Inc., and ACE American Insurance Company (collectively The Speedway).¹ The circuit court held that a “Release And Waiver of Liability” form (the “Speedway Release”) signed by both Beer and Toot was a valid exculpatory contract which released The Speedway from liability for injuries sustained by both men. Beer and Toot contend that The Speedway was not entitled to summary judgment because the Speedway Release is void as against public policy. We disagree and affirm.

¹ Suits were brought individually by Beer and Toot against the named defendants. The cases were consolidated for purposes of discovery.

BACKGROUND

¶2 On October 3, 2003, Beer and Toot were severely injured at the La Crosse County Fairgrounds Speedway² when a racecar lost control and left the racing area, striking both Beer and Toot who were standing in the restricted area in the infield of the track. Beer and Toot brought suit against The Speedway seeking damages they sustained as a result of the accident. The Speedway moved the circuit court for summary judgment, arguing in part that the Speedway Release signed by both Beer and Toot released it from any liability arising from the accident. The Speedway Release provided:

RELEASE AND WAIVER OF LIABILITY,
ASSUMPTION OF RISK AND INDEMNITY
AGREEMENT

....

IN CONSIDERATION of being permitted to compete, officiate, observe, work for, or participate in any way in the EVENT(S) or being permitted to enter for any purpose any RESTRICTED AREA (defined as any area requiring special authorization, credentials, or permission to enter or any area to which admission by the general public is restricted or prohibited), EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin:

1. Acknowledges, agrees, and represents that he have or will immediately upon entering any of such RESTRICTED AREAS, and will continuously thereafter, inspect the RESTRICTED AREAS which he enters, and he further agrees and warrants that, if at any time, he is in or about RESTRICTED AREAS and he feels anything to be unsafe, he will

² The property upon which the La Crosse County Fairgrounds Speedway operated is owned by The La Crosse County Agricultural Society and leased to MotorSports Management Services, Inc., which operates stock car races at the La Crosse County Fairgrounds Speedway, including the race which took place on October 3, 2003.

immediately advise the officials of such and if necessary will leave the RESTRICTED AREAS and/or refuse to participate further in the EVENT(S).

2. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any person in any RESTRICTED AREA, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the EVENT(S), premises and event inspectors, surveyors, underwriters, consultants and others who give recommendations, directions or instructions or engage in risk evaluation or loss control activities regarding the premises or EVENT(S) and each of them, their directors, officers, agents and employees, all for the purposes herein referred to as "Releasees," FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFOR ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY OR RESULTING IN DEATH OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE.
3. HEREBY AGREES 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.
4. HEREBY ASSUMES 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.
5. HEREBY acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage. Each of THE

UNDERSIGNED, also expressly acknowledges that INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.

6. HEREBY agrees that this Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement extends to all acts of negligence by the Releasees, INCLUDING NEGLIGENT RESCUE OPERATIONS and is intended to be as broad and inclusive as is permitted by the laws of the Province or State in which the Event(s) is/are conducted and that if any portion thereof is held in valid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

I HAVE READ THIS RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT, FULLY UNDERSTAND ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND HAVE SIGNED IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT, ASSURANCE OR GUARANTEE BEING MADE TO ME AND INTEND MY SIGNATURE TO BE A COMPLETE AND UNCONDITIONAL RELEASE OF ALL LIABILITY TO THE GREATEST EXTENT ALLOWED BY LAW.

Below this language were multiple lines where multiple individuals, including Beer and Toot, printed and signed their names and indicated their “duties.”

¶3 The circuit court determined that the Speedway Release was not void as against public policy and that it released The Speedway from any liability arising out of the October 3, 2003 accident. Accordingly, the court entered an order of summary judgment in favor of The Speedway. Beer and Toot appeal. Additional facts will be discussed below as necessary.

DISCUSSION

I. Standard of Review

¶4 We review summary judgments de novo, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).

II. The Speedway's Exculpatory Contract

¶5 Exculpatory contracts, while not invalid per se, are not favored by Wisconsin case law and the provisions of such contracts are construed strictly against the party seeking to rely on it.³ *Atkins v. Swimwest Family Fitness Center*, 2005 WI 4, ¶12, 277 Wis. 2d 303, 691 N.W.2d 334. A determination of the enforceability of an exculpatory contract entails a two-part inquiry. First, the court looks to determine whether the exculpatory contract is contractually valid, meaning the exculpatory contract is broad enough to cover the activity at issue. *See id.*, ¶13. If the contract is valid, the second part of the inquiry addresses whether the contract is unenforceable on public policy grounds. *Id.*

¶6 Beer and Toot do not dispute the contractual validity of the Speedway Release, but do dispute the circuit court's conclusion that the Speedway

³ In fact, in a 2005 decision, the supreme court noted that "each exculpatory contract that [it] has looked at in the past 25 years has been held unenforceable." *Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ'g, Inc.*, 2005 WI 153, ¶35, 286 Wis. 2d 170, 706 N.W.2d 95.

Release does not contravene public policy. We therefore focus our analysis on the second inquiry.

¶7 Beer and Toot contend that the Speedway Release is contrary to public policy because: (1) the language of the release is “overly broad and all-inclusive”; (2) the release served two purposes—as registration form and as a release; and (3) neither Beer nor Toot had an opportunity to bargain. We disagree.

¶8 An exculpatory contract, identical in all relevant respects to the Speedway Release here, was held to be not “void as contrary to public policy” by the court of appeals in *Werdehoff v. General Star Indem. Co.*, 229 Wis. 2d 489, 506, 600 N.W.2d 214 (Ct. App. 1999). In *Werdehoff*, as here, plaintiffs signed the exculpatory contract prior to participating in a racing event and were subsequently injured. *Id.* at 493-94. Our analysis included identifying five public policy factors from prior cases: (1) whether “the contract serve[s] two purposes, not clearly identified or distinguished”; (2) whether “the release is extremely broad and all-inclusive”; (3) whether “the release [is] in a standardized agreement ... offering little or no opportunity for negotiation or free and voluntary bargaining”; (4) whether “the document clearly, unambiguously and unmistakably explain[s] to the signer that he or she is accepting the risk of the releasee’s negligence”; and (5) whether “the form, when viewed in its entirety, fail[s] to alert the signer to the nature and significance of the document being signed.” *Id.* at 501 (citing and quoting *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 78, 557 N.W.2d 60 (1996); and *Richards v. Richards*, 181 Wis. 2d 1007, 1011, 513 N.W.2d 118 (1994)).

¶9 In *Werdehoff*, when we turned our attention to the particular release before us, we addressed three of the above policy factors. We addressed whether

the release was “clear as to its application,” and concluded that it was; whether the release “clearly communicate[d] the terms of the agreement to the signer,” and concluded that it did; and whether the release “serve[d] two purposes,” and concluded that it did not.⁴ *Id.* at 503, 505. Consequently, we concluded that the waiver did not violate public policy.

¶10 As we have explained, the waiver in *Werdehoff* is, in all pertinent respects, the same as the waiver here. Accordingly, we are bound by our conclusions in that case. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (the court of appeals is bound by its own prior precedent and may not overrule, modify, or withdraw language from its prior published opinions).

¶11 Nonetheless, Beer and Toot ask us to distinguish *Werdehoff* and hold that the Speedway Release *is* contrary to public policy in light of *Atkins*. According to Beer and Toot, *Atkins* adds an additional policy consideration not considered in *Werdehoff*—whether the signer had an “opportunity to negotiate or bargain over the contract.” *Atkins*, 277 Wis. 2d 303, ¶17. However, as we have seen, we identified this policy factor in *Werdehoff* and, therefore, were mindful of it.

¶12 Because we are bound by the conclusion in *Werdehoff* that the exculpatory contract language in question is not contrary to public policy, we affirm the circuit court’s order of summary judgment.

By the Court.—Order affirmed.

⁴ The court in *Werdehoff* explained that the “sole purpose [of the release was] to secure a release, waiver of liability and assumption of risk.” *Werdehoff v. General Star Indem. Co.*, 229 Wis. 2d 489, 505, 600 N.W.2d 214 (Ct. App. 1999).

Not recommended for publication in the official reports.

