

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 13, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 01-0743**

**Cir. Ct. No. 98-CV-599**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JILL K. NIESE, INDIVIDUALLY, AND AS THE PARENT  
AND NEXT FRIEND OF SAMANTHA L. NIESE AND ALYSSA  
K. NIESE, MINORS, AND JILL K. NIESE, AS  
INDEPENDENT EXECUTOR FOR THE ESTATE OF RANDALL  
L. NIESE, DECEASED,**

**PLAINTIFF-APPELLANT,**

**v.**

**SKIP BARBER RACING SCHOOL, INC., ELKHART LAKE'S  
ROAD AMERICA, INC. AND TIG INSURANCE GROUP,**

**DEFENDANTS-RESPONDENTS,**

**CHICAGO REGION SPORTS CAR CLUB OF AMERICA, INC.  
AND SPORTS CAR CLUB OF AMERICA, INC.,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Sheboygan  
County: GARY LANGHOFF, Judge. *Reversed and cause remanded.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 ANDERSON, J. Jill K. Niese, individually, and as the parent and next friend of Samantha L. Niese and Alyssa K. Niese, minors, and Jill K. Niese, as independent executor for the estate of Randall L. Niese, deceased (collectively, “Jill”) appeals from a judgment dismissing her wrongful death/survival complaint against Skip Barber Racing School, Inc., Elkhart Lake’s Road America, Inc. and TIG Insurance Group (“Skip Barber and Road America”), Chicago Region Sports Car Club of America, Inc. and Sports Car Club of America, Inc.

¶2 Jill alleged that Skip Barber and Road America were negligent in the manner in which they carried out the duties and responsibilities of sponsoring and conducting an August 12, 1995 racing event at Elkhart Lake’s Road America; and that Skip Barber and Road America were guilty of negligence and reckless disregard for the safety of Randall in the manner in which they carried out their duties and responsibilities of preparing and maintaining safe conditions for the racing event held on August 11, 1995, through August 13, 1995.<sup>1</sup> The trial court’s dismissal was based on several grounds: that an exculpatory agreement signed by Jill’s husband Randall was valid and enforceable and barred Jill’s claim; that the exculpatory agreement signed by Randall did not release Jill’s consortium rights but since Randall’s death was immediate, Jill had no loss of consortium claim; that, as to the exculpatory agreement signed by Jill, it did not release her wrongful death claim against Skip Barber and Road America; however, the agreement

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<sup>1</sup> Jill also asserted a claim that Skip Barber and Road America violated the safe-place statute, WIS. STAT. § 101.11 (1993-94). Jill does not renew her safe-place argument on appeal. Additionally, Jill asserted claims for product liability and spoliation of evidence. These two claims were not pursued in the trial court.

signed by Randall did bar her wrongful death claim. The court also held that there were no genuine issues of material fact that would entitle Jill to a trial on whether Skip Barber and Road America's conduct was reckless.

¶3 We agree with the trial court that the exculpatory contract signed by Randall is valid and thus bars Jill's negligence claims. However, we reverse the trial court's conclusion that there were no genuine issues of material fact on the issue of whether Skip Barber and Road America acted recklessly.

¶4 In 1995, Road America Racetrack in Elkhart Lake, Wisconsin, functioned as a multi-use racetrack that was available to lease for automobile racing, motorcycle racing, go-cart racing and other motor vehicle and racecar exhibitions. The week of August 7, 1995, through August 13, 1995, Skip Barber Racing School leased the premises in preparation for a racing series weekend of an open-wheel Formula Dodge full-course race. On the previous weekend of August 5 and 6, 1995, Road America was leased to conduct motorcycle races. For motorcycle races in 1995, it was common to place hay bales along the perimeter of the track. The weekend of August 5 and 6, 1995, Road America placed hay bales at various locations along the perimeter of the four-mile track in the areas at and beyond corners and turns.

¶5 The hay bales, having not been removed from the weekend before, were still in place on the day of Randall's fatal accident. The Road America Racetrack is a four-mile asphalt-paved track with a number of corners and turns. One of the turns on the track is referred to as the "Kink." The outside of the "Kink" is protected with a grass recovery area and an Aarmco guardrail. The guardrail is designed to prevent an out-of-control car from entering protected areas where serious injury or damage could occur. It is also designed to capture an

errant racecar so the car does not become an obstacle in the path of other racecars. The purpose of the ten- to fifteen-foot space between the road pavement and the Aarmco guardrail is to provide recovery space for errant racecars. On the day of the accident, this space was occupied by the hay bales left from the motorcycle races the weekend before.

¶6 On August 12, 1995, Randall participated in an automobile race at the Road America Racetrack. Before the race, Jill and Randall signed exculpatory contracts releasing Skip Barber and Road America from any and all liability as a result of their negligence. During the race, near the “Kink,” Randall encountered a gear oil slick on the track, which caused him and several other drivers to slide and lose control of their racecars. Randall’s car was behind car #17. Car #17, after sliding off the track, impacted with some hay bales and eventually came to rest with its front end on the ground and its rear end elevated off the ground, on top of one or more hay bales. As Randall’s car slid left off of the track and onto the recovery area, it rotated slightly clockwise and came to an abrupt deceleration and stop as it “T-boned” on its left side with the elevated rear end of car #17. Randall died as a result of the crash.

¶7 On appeal, Jill claims that Skip Barber and Road America were negligent in the manner in which they carried out the duties and responsibilities of sponsoring and conducting the racing event and that Skip Barber and Road America were guilty of negligence and reckless disregard for the safety of Randall in the manner in which they carried out their duties and responsibilities of preparing and maintaining safe conditions for the race. Jill’s theory is that the placement of the hay bales between the track and the permanent guardrail prevented the recovery area and the guardrail from operating as designed.

¶8 The issues to be addressed are as follows: (1) is the exculpatory contract signed by Randall valid; (2) does the release signed by Randall bar the wrongful death claim brought by Jill; and (3) are there genuine issues of material fact on the question of whether Skip Barber and Road America acted intentionally or recklessly.

¶9 Jill claims that the trial court erred in granting summary judgment to Skip Barber and Road America based on the exculpatory contract signed by Randall. Jill argues that the exculpatory contract is void as contrary to public policy. We disagree.

¶10 We review a summary judgment applying the same methodology as the trial court and we consider the issues de novo. *Werdehoff v. Gen. Star Indem. Co.*, 229 Wis. 2d 489, 498, 600 N.W.2d 214 (Ct. App. 1999). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment cannot be granted if there is a dispute regarding material facts or if different inferences might be drawn from the facts. *Id.*

¶11 We conclude that the exculpatory contract signed by Randall is valid. We recently examined the validity of an exculpatory contract with the identical language as the exculpatory contract before us.<sup>2</sup> See *id.* at 495 n.3.

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<sup>2</sup> The accident in *Werdehoff v. General Star Indemnity Co.*, 229 Wis. 2d 489, 600 N.W.2d 214 (Ct. App. 1999), occurred on August 5, 1995; Randall's accident occurred only one week later on August 12, 1995. Both accidents occurred at Elkhart Lake's Road America Racetrack. From our reading of the exculpatory contract at issue in *Werdehoff* and our review of the exculpatory contract before us, it appears that they are identical. The contract is a standard contract that Road America asks its race participants to sign and it does not appear that it was altered in any way in the week's time between the accidents. Even if it were altered in any way, our review of the record satisfies us that the contract in *Werdehoff* and the contract before us are substantively the same.

Ironically, *Werdehoff* involved an accident that took place on the same racetrack just one week before Randall's accident. *Id.* at 492-93. We find *Werdehoff* to be controlling.

¶12 The facts in *Werdehoff* are similar to those in the case at bar. In *Werdehoff*, two motorcycle racers (Douglas R. Werdehoff and David R. Smith) were injured during an August 5, 1995 motorcycle race at Road America Racetrack in Elkhart Lake, Wisconsin. *Id.* The race was sanctioned by CCS-RMS, Inc. *Id.* at 492. Werdehoff and Smith and their respective wives sued Elkhart Lake's Road America, Inc., CCS-RMS, Inc. and its insurers alleging negligence and a violation of the safe-place statute, WIS. STAT. § 101.11 (1993-94). *Werdehoff*, 229 Wis. 2d at 492. They additionally alleged that the defendants had acted maliciously and with intentional disregard for their rights in carrying out their responsibilities of sponsoring and conducting the racing event. *Id.* The spouses asserted claims for loss of consortium. *Id.* at 493. The trial court dismissed the plaintiffs' claims at summary judgment based on the validity of the exculpatory contracts that Werdehoff and Smith had signed prior to the race. *Id.* Werdehoff and Smith appealed the dismissal, renewing their claims.

¶13 On appeal, we applied a public policy analysis. A public policy analysis is the germane analysis in determining whether an exculpatory contract is valid. See *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 86, 557 N.W.2d 60 (1996). A public policy analysis sets forth the following principles:

Exculpatory contracts are not favored by the law because they tend to allow conduct below the acceptable standard of care applicable to the activity. Exculpatory contracts are not, however, automatically void and unenforceable as contrary to public policy. Rather, a court closely examines whether such agreements violate public policy and construes them strictly against the party seeking to rely on them.

In determining whether an exculpatory agreement violates public policy and is therefore void, courts recognize that public policy is not an easily defined concept. The concept embodies the common sense and common conscience of the community. Public policy is that principle of law under which “freedom of contract is restricted by law for the good of the community.” An exculpatory agreement will be held to contravene public policy if it is so broad “that it would absolve the defendant from any injury to the plaintiff for any reason.”

**Werdehoff**, 229 Wis. 2d at 498-99 (citations omitted).

¶14 Accordingly, we apply the public policy analysis to the contract before us keeping in mind that an exculpatory contract must have two primary characteristics to be enforceable: (1) the waiver must clearly, unambiguously and unmistakably inform the signer of what is being waived; and (2) the form, viewed in its entirety, must alert the signer to the nature and significance of what is being waived. **Yauger**, 206 Wis. 2d at 86-87.

¶15 For our analysis, we track and adopt the **Werdehoff** analysis. The contract signed by Randall is clear as to its application and it clearly communicates the terms of the agreement to the signer. *See Werdehoff*, 229 Wis. 2d at 503. The contract uses the words “negligence” and “negligent” five to six times, several of those times using emphasis. *See id.* The contract is broken down into six numbered paragraphs drawing the signer’s attention to the releases, waivers and acknowledgements covered by the document. *See id.* at 503-04. The second paragraph provides that the signer agrees to release, waive, discharge and covenant not to sue the “sanctioning organizations” or “track owners” for any loss or damage due to an injury related to the event whether caused by the negligence of the releasees or otherwise. *See id.* at 504. The language makes clear that the signer is agreeing to release, waive liability, assume the risk and indemnify the releasees for their negligence with respect to each right forfeited. *See id.* The

Road America contract clearly, unambiguously and unmistakably explained to Randall that he was accepting the risk of the releasees' negligence. *See id.*

¶16 The contract's significance is communicated not only by the requirement that it be signed before participation in the event but by the bold, capitalized language in the release, including the final statement: "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 ...." *See id.* at 505. Viewed in its totality, the contract clearly communicates its nature and significance to the signer. *See id.* at 505-06.

¶17 Just as we concluded in *Werdehoff*, we conclude here that the exculpatory contract is valid and is not void as contrary to public policy. *See id.* at 506. Therefore, to the extent that Skip Barber and Road America's negligence caused Randall's death, Jill's claims are barred.

¶18 We now address the last two issues: whether the exculpatory contract signed by Randall bars Jill's wrongful death claim under her theory of recklessness and whether there are genuine issues of material fact on the question of whether Skip Barber and Road America acted recklessly. We hold that as to Jill's wrongful death claim, it is not barred under a theory of recklessness. Recklessness contemplates a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another. *Id.* at 507. In *Werdehoff*, we observed that an exculpatory contract exempting a party from tort liability for harm caused intentionally or recklessly is void as against public policy. *Id.* (citing *Kellar v. Lloyd*, 180 Wis. 2d 162, 183, 509 N.W.2d 87 (Ct. App. 1993)). Thus, Skip Barber and Road America cannot exempt themselves from liability for wrongful death caused by their recklessness. The exculpatory contract signed by



Randall cannot and does not bar Jill's wrongful death claim under a theory of recklessness.

¶19 We next turn to whether a genuine issue of material fact exists as to whether Skip Barber and Road America's conduct leading to Randall's death was reckless. Skip Barber and Road America argue that Jill failed to present any evidence of recklessness and, like the defendants in *Werdehoff*, ask this court to decide, as a matter of law, that they did not act recklessly. See *Werdehoff*, 229 Wis. 2d at 507. We declined to do so in *Werdehoff*, and we decline to do so here. *Id.*

¶20 Our review of the record satisfies us that Jill alleges material facts that are disputed by Skip Barber and Road America. One fair reading of the evidence is that Skip Barber and Road America allowed the race to go on with the *knowledge* that there were hay bales along the perimeter of the track and the *knowledge* that these hay bales were not within the contemplation of Randall when he signed the agreement; that Skip Barber and Road America *knew* that hay bales left in the area meant for recovery of errant cars could or would impair the safety functions of the recovery area and the guardrail; that Skip Barber and Road America *knew* that hay bales along the perimeter during car racing were a fire hazard; and that Skip Barber and Road America *consciously made the decision* to leave the hay bales in place after the motorcycle race weekend because of time constraints *despite knowing* that it may not be as safe to have hay bales in the perimeter during car races. From such evidence, a jury could fairly conclude that Skip Barber and Road America acted in "conscious disregard of an unreasonable and substantial risk of serious bodily harm to another." See *id.* at 511.

¶21 We reverse the summary judgment and remand for further proceedings on the question of whether Skip Barber and Road America's conduct was reckless and, if so, whether such conduct caused the death of Randall.

¶22 Finally, current law bars Jill's wrongful death claim. *See Rupp v. Am. States Ins. Co.*, 91 Wis. 2d 628, 646-47, 284 N.W.2d 318 (1979). In *Rupp*, our supreme court held that a sufficient waiver of liability signed by one spouse may affect a beneficiary's rights under the wrongful death statute. *Id.* at 646. The court held that "[u]nder sec. 895.03, Stats., an action for wrongful death is derivative." *Rupp*, 91 Wis. 2d at 646. A derivative right is a claim for a loss sustained by one person as a result of a loss sustained by another person. *White v. Lunder*, 66 Wis. 2d 563, 225 N.W.2d 442 (1975). One is liable to the plaintiff in an action under that statute only if and to the extent that he or she would have been liable to the decedent had death not ensued. *Rupp*, 91 Wis. 2d at 646. Randall signed a valid exculpatory agreement releasing Skip Barber and Road America from any liability for negligence in conjunction with any claim that could have been brought by Randall as a result of the August 12, 1995 accident. Thus, since Randall would be foreclosed from suing Skip Barber and Road America (had he lived), Jill, by virtue of the derivative nature of the wrongful death claim, is also barred from securing recovery under the wrongful death statute.

¶23 We may not overrule the supreme court's holding in *Rupp*. Only the supreme court has the power to overrule, modify or withdraw language from a supreme court case or from a published opinion of the court of appeals. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

*By the Court.*—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.



