

NOTICE  
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2011 IL App (4th) 100955-U

Filed 10/26/11

NOS. 4-10-0955, 4-10-0967, 4-10-0968 cons.

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

ROBERT O. BAKER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v. (No. 4-10-0955)	)	Logan County
B&K PROMOTIONS, INC., an Illinois Corporation;	)	No. 08L15
BILL WEST, JR.; KIMBERLY WEST; MORGAN	)	
COUNTY, ILLINOIS, a Municipal Corporation; and	)	
MORGAN COUNTY FAIR ASSOCIATION, a/k/a	)	
MORGAN COUNTY AGRICULTURAL FAIR	)	
ASSOCIATION, an Illinois Corporation,	)	
Defendants-Appellees.	)	
_____	)	No. 08L14
	)	
MATTHEW ICENOGL and JAMES HURLEY,	)	
Plaintiffs-Appellants,	)	
v. (No. 4-10-0967)	)	
B&K PROMOTIONS, INC., an Illinois Corporation;	)	
BILL WEST, JR.; KIMBERLY WEST; MORGAN	)	
COUNTY, a Municipal Corporation; and MORGAN	)	
COUNTY FAIR ASSOCIATION, a/k/a MORGAN	)	
COUNTY AGRICULTURAL FAIR ASSOCIATION,	)	
an Illinois Corporation,	)	
Defendants-Appellees.	)	
_____	)	No. 08L16
	)	
MATTHEW ICENOGL and JAMES HURLEY,	)	
Plaintiffs-Appellants,	)	
v. (No. 4-10-0968)	)	
MORGAN COUNTY FAIR ASSOCIATION, INC., an	)	Honorable
Illinois Corporation,	)	Joshua A. Meyer,
Defendant-Appellee. (4-10-0968)	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

## ORDER

¶ 1 *Held:* In this consolidated appeal, the appellate court affirmed the trial court's dismissal of the defendants' personal injury lawsuits, concluding that the defendants had signed a valid release.

¶ 2 In October 2008, plaintiff, Robert O. Baker, filed an amended complaint, asserting that defendants, B&K Promotions, Inc., Bill and Kimberly West, and the Morgan County Agricultural Fair Association, negligently, willfully, and wantonly caused injuries he sustained while attending an automobile race at the Morgan County Raceway (Morgan County case No. 08-L-15). In December 2008, plaintiffs, Matthew Icenogle and James Hurley, filed two separate amended complaints, asserting that (1) defendants negligently, willfully, and wantonly caused the injuries they sustained while attending that same automobile race (Morgan County case No. 08-L-14) and (2) the Fair Association negligently, willfully, and wantonly failed to warn them of certain risks associated with watching that automobile race (Morgan County case No. 08-L-16). The trial court later began treating all three cases as consolidated.

¶ 3 In November 2010, having previously dismissed two of plaintiffs' allegations against defendants, the trial court granted summary judgment in favor of defendants, finding that plaintiffs had signed a valid release.

¶ 4 Plaintiffs appeal, arguing that the trial court erred by finding that they had signed a valid release. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Race, the Release, and Plaintiffs' Injuries

¶ 7 In May 2007, plaintiffs attended a race at the Morgan County Speedway; Hurley and Baker as veteran race fans and members of separate race car pit crews, and Icenogle as a

first-time spectator. When plaintiffs arrived at the speedway, they entered the track through a restricted area designed to accommodate the race cars and pit crews. Before they were allowed to enter, however, plaintiffs were required to (1) pay an additional fee and (2) sign a "Release and Waiver." That release and waiver—which each plaintiff in this case signed—stated, in pertinent part, as follows:

"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:

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2. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, racing associations, sanctioning organizations or any subdivision thereof, track operators, track owners, officials, car owners, drivers, pit crews, rescue personnel, any persons in any RESTRICTED AREA \*\*\* 'Releases,' 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.

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 the INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS OR PROCEDURES OF THE RELEASEES.

\* \* \*

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."

¶ 8 After signing this release and waiver, plaintiffs were provided "wristband" credentials, which allowed them full access to the restricted areas of the raceway. Later in the evening, plaintiffs moved from the pit area to a separate restricted area of the raceway near the grandstand. Shortly thereafter, plaintiffs were injured when a race car left the track, crashing into the area in which they were standing.

¶ 9 B. Plaintiffs' Subsequent Lawsuits

¶ 10 In October 2008, Baker filed an amended complaint, asserting that defendants negligently, willfully, and wantonly caused the injuries he sustained when the race car crashed into the area in which he was standing (Morgan County case No. 08-L-15). In December 2008, Icenogle and Hurley filed two separate amended complaints, asserting that (1) defendants negligently, willfully, and wantonly caused the injuries they sustained when the race car crashed into them (Morgan County case No. 08-L-14) and (2) the Fair Association negligently, willfully

and wantonly failed to warn them of certain risks associated with watching the race (Morgan County case No. 08-L-16). The trial court later began treating all three cases as consolidated.

¶ 11 C. Defendants' Motions and the Trial Court's Ruling

¶ 12 In November 2010, having previously dismissed two of plaintiffs' allegations against defendants related to willful and wanton conduct, the trial court granted summary judgment in favor of defendants on the issue of negligence, finding that plaintiffs had signed a valid release.

¶ 13 D. Plaintiffs' Appeals

¶ 14 On November 29, 2010, Baker appealed in Morgan County case No. 08-L-15 (this court's case No. 4-10-0955). Three days later, Icenogle and Hurley filed separate appeals in Morgan County case Nos. 08-L-14 and 08-L-16 (this court's case Nos. 4-10-0967 and 4-10-0968, respectively).

¶ 15 In January 2011, this court granted defendants' motion to consolidate those appeals.

¶ 16 II. ANALYSIS

¶ 17 Plaintiffs argue that the trial court erred by finding that they each had signed a valid release. Specifically, plaintiffs contend that the court erred by (1) dismissing their willful-and-wanton claims, and (2) granting defendants' motion for summary judgment on plaintiffs' negligence claims. We address plaintiffs' contentions in turn.

¶ 18 A. Plaintiffs' Claim That the Trial Court Erred by Dismissing Their Willful-and-Wanton Claim

¶ 19 Plaintiffs contend that the trial court erred by dismissing their willful-and-wanton claims pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West

2008)). Specifically, plaintiffs assert that the court erred because defendants created (1) "a death trap for the spectators in the extended grandstand area" and (2) a "false sense of security by erecting an inadequate safety barrier," and thereby they acted in reckless disregard for plaintiffs' safety. We disagree.

¶ 20 *1. Section 2-615 and the Standard of Review*

¶ 21 A section 2-615 motion to dismiss presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, are sufficient to entitle the plaintiff to relief as a matter of law. *Chandler v. Illinois Central R.R. Co.*, 207 Ill.2d 331, 348, 798 N.E.2d 724, 733 (2003). When reviewing a section 2-615 motion, the trial court must presume that the motion admits all well-pleaded facts and all reasonable inferences that reasonably flow therefrom. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 320, 891 N.E.2d 839, 853 (2008).

¶ 22 When ruling on a section 2-615 motion, the trial court may consider only the allegations in the pleadings. *Hadley v. Ryan*, 345 Ill. App. 3d 297, 300-01, 803 N.E.2d 48, 52 (2003). Further, the trial court should dismiss a cause of action only when it is clearly apparent that no set of facts can be proved that will entitle a plaintiff to recovery. *Hadley*, 345 Ill. App. 3d at 300-01, 803 N.E.2d at 52. Because a section 2-615 motion raises issues of law, we review orders granting section 2-615 dismissals *de novo*. *Heastie v. Roberts*, 226 Ill.2d 515, 530-31, 877 N.E.2d 1064, 1075 (2007).

¶ 23 *2. Section 2-615 and This Case*

¶ 24 As part of their amended complaints, plaintiffs alleged that defendants' conduct was "willful and wanton" because defendants inadequately constructed the fence protecting the

grandstand area and did not provide adequate means of exiting the grandstand in the event of an accident.

¶ 25 "Willful and wanton conduct" is defined as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2008). " 'When the plaintiff is alleging that the defendant engaged in willful and wanton conduct, such conduct must be shown through well-pled facts, and not by merely labelling the conduct willful and wanton.' " *Thurman v. Champaign County Park District*, 2011 IL App (4th) 101024, ¶10, 2011 WL 3524439 (quoting *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 943, 654 N.E.2d 508, 512 (1995)).

¶ 26 Here, as previously explained, plaintiffs merely alleged defendants' conduct was willful and wanton without pleading any facts indicating how that conduct was willful and wanton. In other words, plaintiffs' willful and wanton claim was simply a recasting of their negligence claim. Therefore, we conclude, as did the trial court, that plaintiffs' willful and wanton claims failed to state a cause of action under section 2-615.

¶ 27 B. Plaintiffs' Contention That the Trial Court Erred by Granting Defendants' Motion for Summary Judgment

¶ 28 Plaintiffs next contend that the trial court erred by granting defendants' motion for summary judgment as to their negligence claims. Specifically, plaintiffs assert that the court erred by upholding the exculpatory agreement they signed as a condition of entering the restricted area of the track given that they were not told that the area they entered after leaving the pit area was a "restricted area." We disagree.

¶ 29 1. *Summary Judgment and the Standard of Review*

¶ 30 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 321, 943 N.E.2d 752, 756 (2010). "A triable issue of fact precluding summary judgment exists where the material facts are disputed or where the material facts are undisputed, but reasonable persons might draw different inferences from those undisputed facts." *Simmons*, 406 Ill. App. 3d at 321, 943 N.E.2d at 756.

¶ 31 The party moving for summary judgment bears the initial burden of proof. *Atanus v. American Airlines Inc.*, 403 Ill. App. 3d 549, 553, 932 N.E.2d 1044, 1048 (2010). "When reviewing a grant of summary judgment, this court must determine whether, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal any genuine issues of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." *Brugger v. Joseph Academy, Inc.*, 202 Ill. 2d 435, 446, 781 N.E.2d 269, 275 (2002). We review *de novo* the trial court's grant of summary judgment. *Simmons*, 406 Ill. App. 3d at 322, 943 N.E.2d at 756.

¶ 32 *2. Exculpatory Agreements*

¶ 33 " 'An exculpatory agreement constitutes an express assumption of risk wherein one party consents to relieve another party of a particular obligation.' " *Johnson v. The Salvation Army*, 2011 IL App (1st) 103323, ¶19, 2011 WL 3524439 (2011) (quoting *Platt v. Gateway International Motorsports Corp.*, 351 Ill. App. 3d 326, 330, 813 N. E. 2d 279, 283 (2004)). "Generally, exculpatory agreements are enforceable unless: (1) it would be against the settled public policy of the state to do so; or (2) there is something in the social relationship of the

parties which militates against upholding the agreement." *Johnson*, at ¶19, 2011 WL 3524439. An agreement in the nature of release or exculpatory clause is a contract, and the legal effect is to be decided by the court as a matter of law. *Hamer v. Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42, 44, 930 N.E.2d 578, 581 (2010). The party opposing an exculpatory agreement bears the burden of attacking its validity. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 116, 927 N.E.2d 137, 144 (2010).

¶ 34 *3. The Exculpatory Agreement in This Case*

¶ 35 The exculpatory agreement that plaintiffs signed in this case—which we have quoted extensively above—released defendants from any liability for negligence, indicating that plaintiffs accepted "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" within the "RESTRICTED AREA."

¶ 36 In a case involving a similar agreement, the supreme court rejected the plaintiff's arguments that (1) the parties were operating under a mutual mistake and (2) the exculpatory agreement was "tantamount to an adhesion contract." *Schlessman III v. Henson*, 83 Ill. 2d 82, 86-87, 413 N.E.2d 1252, 1253-54 (1980). The court concluded that freakish accidents that cause serious injury or death are a part of raceway events and are precisely the reason why event promoters require such exculpatory agreements for participants and spectators, and are not contrary to the public policy of this State:

"The racing of automobiles at a high speed in limited areas gives rise to various situations which have resulted in the death or injury to drivers, mechanics and spectators at these events. These

accidents may occur because of factors involving mechanical failures, defective design of guardrails, driver error or weather conditions affecting driving surfaces. In sum, a myriad of factors, which are either obvious or unknown, may singly or in combination result in unexpected and freakish racing accidents. \*\*\* The parties may not have contemplated the precise occurrence which resulted in [the] plaintiff's accident, but this does not render the exculpatory clause inoperable. In adopting the broad language employed in the agreement, it seems reasonable to conclude that the parties contemplated the similarly broad range of accidents which occur in auto racing.

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\*\*\* While it is obvious that [the] plaintiff would not have been allowed to use the racetrack had he not signed the release, [the] plaintiff was under no economic or other compulsion to sign the release in order to engage in amateur auto racing [citation], and as previously noted, it has been held that [the] defendant's exculpatory provision is not contrary to public policy." *Schlessman III*, 83 Ill. 2d at 86-87, 413 N.E.2d at 1253-54 (1980). See also *Platt v. Gateway International Motor Sports Corp.*, 351 Ill. App. 3d 326, 332-33, 813 N.E.2d 279, 284 (2004) (quoting *Schlessman II* in upholding an exculpatory agreement from a racetrack).

¶ 37 We conclude that the circumstances in this case related to the exculpatory agreement are virtually indistinguishable from the agreement in *Schlessman III*. In so concluding, we reject plaintiffs' claim that the exculpatory agreement is unenforceable because they were not told that the area in which they were injured was "restricted." The exculpatory agreement that plaintiffs signed released defendants from liability for injuries that plaintiffs might sustain in restricted areas, not areas that plaintiff *knew* were restricted. Accordingly, the trial court's decision to grant summary judgment in favor of defendants was not erroneous.

¶ 38 In closing, we note that Baker posits that as an alternative to affirming the trial court's rulings, this court should "stay proceedings until discovery requests are complied with by Appellees." Because we conclude that plaintiffs—including Baker—had "ample opportunity to discover facts in opposition to defendant[s'] motion for summary judgment," we decline Baker's invitation to stay the proceedings for additional discovery. *Giannoble v. P & M Heating and Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1065, 599 N.E.2d 1183, 1192 (1992).

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.