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**IN THE
COURT OF APPEALS OF INDIANA**

YVONNE C. STOREY)
and her husband, KENNETH STOREY,)
)
Appellants-Plaintiffs,)

vs.)

No. 87A05-0605-CV-260

HAROLD BAKER d/b/a CHANDLER)
MOTOR SPEEDWAY f/k/a CHANDLER)
MOTOR SPEEDWAY PARK,)
JEFF MEECE and)
DERRICK C. WILLIAMS, a minor,)
by and through his next of kin,)
MICHAEL WILLIAMS,)
)
Appellees-Defendants.)

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0506-CC-272

February 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Plaintiffs-Appellants Yvonne and Kenneth Storey (“the Storeys”) appeal from the trial court’s decision granting summary judgment to Defendants-Appellees Harold Baker d/b/a Chandler Motor Speedway, Jeff Meece, and Derrick Williams (collectively, “the Defendants”) on the Storeys’ complaint for negligence. Because the Storeys signed a valid release and waiver as to all claims of negligence against the Defendants, and because they failed to properly raise any other claims before the trial court, we affirm summary judgment.

Facts and Procedural History

Defendant Harold Baker owns the Chandler Motorsports Dragstrip (“the racetrack”) in Chandler, Indiana. Defendant Jeff Meece is the manager of the racetrack. Defendant Derrick Williams was a participant in a drag race at the racetrack on July 3, 2004. Plaintiffs Yvonne and Kenneth Storey were also at the racetrack on this date; Kenneth was a participant in the drag race and his wife, Yvonne, was a member of his pit crew team.

The racetrack holds races as a sanctioned body under the National Hotrod Association (“NHRA”). As such, races held at the track are subject to the rules and regulations of the NHRA. One such regulation provides that drivers seeking to participate in the Super Pro Racing classification must have driven a 1/8-mile racetrack

faster than 6.39 seconds and then must receive a competition license through NHRA testing.

In order to participate in the July 3, 2004, race, all drivers and crew members were required to sign a Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement (“the Waiver”), which provided in pertinent part that by signing the waiver, the signatory:

HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoters, participants, . . . track operators, track owners, . . . drivers, . . . 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 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.

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.

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.

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.

HEREBY agrees that this [Waiver] extends to all acts of negligence by the Releasees, . . . 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 .

..

[HAS READ THIS WAIVER], FULLY UNDERSTANDS 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.

Appellee's App. p. 8. The Storeys each signed the Waiver on the date of the race.

While in the pits preparing her husband's vehicle for a Super Pro race against Williams, Yvonne was struck and injured by Williams' vehicle when it suddenly went into reverse. Williams had previously experienced problems at the track with his vehicle unexpectedly going into reverse when it was in parked gear. Additionally, although Williams had previously exceeded the minimum 6.39 seconds time at the racetrack, which qualified him to apply for a competition license to participate in Super Pro races, he had not yet successfully tested for and received such a license. Therefore, he was not qualified under NHRA regulations to participate in the race.¹

On June 30, 2005, the Storeys filed a complaint alleging negligence on the part of the Defendants and seeking compensation for Yvonne's injuries and for pain and suffering. The complaint also included a claim for loss of consortium as to Kenneth. On August 10, 2005, the Defendants filed their answer and asserted, *inter alia*, that the Waiver signed by the Storeys constituted an affirmative defense as to all negligence on the part of the Defendants.

¹ Although the Storeys submitted affidavits to the trial court regarding the status of Williams' competition license, the Defendants never directly concede to nor contest the Storeys' claims on the matter. Further, the trial court made no specific findings on the issue, possibly because the affidavits may have been untimely, as discussed below. We proceed under the assumption that the Storeys are correct that Williams lacked the proper licensure on the day Yvonne was injured.

On September 14, 2005, the Defendants collectively filed a Motion for Summary Judgment. Thereafter, the Storeys filed a timely Response to the Motion for Summary Judgment stating that the motion was premature as no discovery had been completed and the Storeys were therefore unable to properly respond to the motion. The Defendants filed a Reply to the Response to Motion for Summary Judgment on October 5, 2005, and the Motion for Summary Judgment was set for a hearing on January 19, 2006. However, the Storeys filed a motion to continue the hearing, which was granted based on their assertion that they had only recently received Answers to Interrogatories from the Defendants and had been unable to schedule depositions of the parties due to the unavailability of one of the Defendants.

On February 24, 2006, the Storeys filed affidavits (“the Affidavits”) from themselves and several persons who had been at the racetrack on the day of the accident. *See* Appellant’s App. p. 31-40. In sum, the affidavits set forth evidence that (1) Williams had experienced previous mechanical problems causing his vehicle to suddenly shift into reverse; (2) Williams had exceeded the minimum time limit, requiring him to receive a competition license through the NHRA in order to compete in Super Pro races; (3) Williams was allowed to participate at the track on July 3, 2004, without the license; and (4) Williams’ co-defendants were each aware of at least some of these facts.

On March 1, 2006, a summary judgment hearing was held. The parties discussed the admissibility of the Affidavits with the trial court, and the Storeys argued that the Affidavits established evidence of willful or wanton misconduct on the part of the Defendants. The Defendants objected to the Affidavits’ admissibility on grounds that

they were untimely filed. They also argued that to the extent that the Affidavits contained evidence of willful or wanton misconduct, they were inadmissible because their content was outside the scope of the complaint for negligence. On March 9, 2006, the trial court entered its Findings of Fact, Conclusions of Law and Entry of Summary Judgment for Defendants (“the Order”). The trial court’s Order included a Finding “[t]hat pursuant to [Indiana Trial Rule] 56, the court has only considered those filings done on or before October 5, 2005.” *Id.* at 8. The Order also included the following Conclusions:

2. When Plaintiffs signed the [Waiver] they released, waived, discharged and covenanted not to sue the Defendants.
3. When Plaintiffs signed the [Waiver] they released Defendants from all liability related to the accident that took place on July 3, 2004.
4. When Plaintiffs signed the [Waiver] they assumed the risk of the activities that took place at Chandler Motorsports Dragstrip in the restricted area in which Plaintiffs were present when the accident took place on July 3, 2004.
5. The law is with the Defendant and against the Plaintiff as it relates to the [Waiver].
6. Plaintiffs have failed to meet their burden of demonstrating the existence of any genuine issue of material fact as to whether the [Waiver] bars Plaintiffs from bringing this action.
7. Defendants are entitled to summary judgment on any and all claims by Plaintiffs grounded in, concerning, or relating to any negligence or liability associated with the injuries sustained by Plaintiffs arising from the accident on June 3, 2004.

Id. at 8-9. On April 1, 2006, the Storeys filed a Motion to Correct Errors, which was denied by the trial court. This appeal now ensues.

Discussion and Decision

The Storeys raise two issues on appeal. First, they contend that the trial court erred when it determined that it could only consider filings submitted to the court on or

before October 5, 2005. Second, they argue that had the trial court considered the Affidavits that were filed on February 24, 2006, it would have necessarily determined that summary judgment was inappropriate because the Affidavits contained evidence sufficient to add a claim of willful or wanton misconduct. As we explain herein, however, our review of the record indicates that even if the trial court had admitted the Affidavits into evidence and even if they contained sufficient evidence to suggest a claim of willful or wanton misconduct, summary judgment was appropriate.²

I. Summary Judgment

Our standard of review is well settled:

Summary judgment is appropriate when the designated evidentiary matter reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that there is an entitlement to judgment as a matter of law. If the moving party meets these requirements, the burden then shifts to the nonmovant to establish genuine issues of material fact for trial.

In reviewing the grant or denial of a motion for summary judgment, we are bound by the same standard as the trial court. We consider only those facts [that] were designated to the trial court at the summary judgment stage. We do not reweigh the evidence, but rather, liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. Even if the facts are undisputed, summary judgment is inappropriate where the record reveals an incorrect application of the law to the facts. Summary judgment is rarely appropriate in negligence cases because issues of contributory fault, causation, and reasonable care are more appropriately left for determination by the trier of fact.

Zubrenic v. Dunes Valley Mobile Home Park, Inc., 797 N.E.2d 802, 804-5 (Ind. Ct. App.

² We therefore need not decide whether the Affidavits were timely filed under Indiana Trial Rule 56 or whether they contained sufficient evidence to raise a claim of willful or wanton misconduct. Accordingly, we deny Appellees' motion to strike the Affidavits in this appeal without deciding the merit of that motion.

2003) (citations omitted), *trans. denied*.

II. Appellants' Complaint Raised Only Negligence

The Storeys' complaint before the trial court sought recovery based only on injuries alleged to arise as a direct or proximal result of the Defendants' negligence. On appeal, the Storeys do not contest the trial court's determination that the Waiver protected the Defendants from their claims of negligence. Indeed, the Waiver is entirely sufficient to cover the Storeys' negligence claims. *See U. S. Auto Club, Inc. (USAC) v. Smith*, 717 N.E.2d 919, 924 (Ind. Ct. App. 1999) (holding that a similar waiver form released defendants from any claim sounding in negligence), *trans. denied*. Rather, they argue that the Defendants are liable under a theory of willful or wanton misconduct, which they claim to have raised at the trial level either through their complaint or through the Affidavits they sought to have admitted at summary judgment.³ The Defendants contend, however, that the Storeys failed to allege willful or wanton misconduct at the trial level. They also argue that the Storeys failed to demonstrate any genuine issue of material fact as to their lone claim of negligence, and therefore that summary judgment was appropriate.

Both parties cite *USAC* for support of their positions. *USAC* involved a wrongful death complaint wherein the plaintiff, Smith, was killed while in a restricted section of a racetrack's pit area. In the complaint, the plaintiff alleged negligence and willful or

³ It is not entirely clear from the Storeys' brief how they contend this theory of willful or wanton misconduct arose. They allude to this argument, however, in the context of their allegation that the Affidavits presented evidence establishing willful or wanton misconduct and their discussion of *U. S. Auto Club, Inc. (USAC) v. Smith*, 717 N.E.2d 919, 924 (Ind. Ct. App. 1999). Though the Storeys' argument is not entirely clear, we decline to find that it has been waived for failure to present cogent reasoning. *See* Ind. Appellate Rule 46(A)(8)(a).

wanton misconduct. Smith had signed a waiver agreeing to release the defendants from any liability “whether caused by the negligence of the release[e]s or otherwise.” *USAC*, 717 N.E.2d at 921. As in the present case, the defendants in *USAC* raised this waiver as an affirmative defense to Smith’s negligence claim. The defendants moved for summary judgment on both the negligence and willful or wanton misconduct claims, and the trial court denied the motion. *Id.* at 922. In reversing the trial court on this point, we found “that Waivers of liability for participation at racetracks are enforceable,” *id.* at 924, and that the language used in the *USAC* waiver was sufficient to release the defendants from liability for their own negligence. *Id.*

We then went on to consider Smith’s claim under a theory of willful or wanton misconduct. We noted the elements of such a claim: “(1) the defendant must have knowledge of an impending danger or consciousness of a course of misconduct calculated to result in probable injury; and (2) the actor’s conduct must have exhibited an indifference to the consequences of his conduct.” *Id.* (citing *Witham v. Norfolk & Western Ry. Co.*, 561 N.E.2d 484, 486 (Ind. 1990), *reh’g denied*). Finding no evidence in the record to support the first of these two elements, we reversed the trial court on summary judgment on the claim of willful and wanton misconduct as well. *Id.* at 925.

As noted above, the Storeys apparently concede that the Waiver they signed precludes their recovery on a theory of mere negligence.⁴ They contend, however, that

⁴ The Defendants argue that the Waiver also protects them from any personal injury claim, even one arising out of their “extreme negligence or intentional conduct.” Appellees’ Br. p. 15. They argue that the Storeys’ assertion that “general exculpatory agreements are not construed to cover more extreme forms of negligence or intentional conduct” is incorrect under Indiana law. *Id.* at 16, n.8. While we need not address the merits of this argument herein, we point out that the *USAC* case, which involved a similar waiver and release form as used by the Defendants, appears to hold that such a waiver does not cover, at

because the *USAC* court went on to analyze the potential relief available to Smith under a theory of willful or wanton misconduct, the trial court here should have likewise considered that theory on summary judgment. This fails to account for one of the major distinguishing points of these two cases: in *USAC*, the plaintiff alleged both negligence *and* willful or wanton misconduct in his complaint, while the Storeys rested their complaint on negligence alone. Nothing in the Storeys' complaint references willful or wanton misconduct or either of the elements of the action. Further, the Storeys never sought leave from the trial court or the consent of the Defendants to amend their complaint to add a claim of willful or wanton misconduct. *See* Ind. Trial Rule 15(A) (setting forth procedure for requesting amendments to pleadings). They cannot maintain, then, that their complaint was sufficient to allege the claim at the trial level.

However, the Storeys also argue that had the trial court properly considered the Affidavits submitted at summary judgment, the evidence contained therein was sufficient to raise the issue of willful or wanton misconduct. We agree with the Storeys' assertion that under certain circumstances a cause of action presented to the trial court on summary judgment may be validly preserved even if the pleadings are never formally amended to include that cause of action. Indiana Trial Rule 15(B) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence

the least, willful, wanton, or intentional misconduct. *See* 717 N.E.2d at 924-25 (analyzing plaintiff's action for willful, wanton, intentional misconduct separate from analysis of the applicability of a waiver and release form).

would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

See also Columbia Club, Inc. v. Am. Fletcher Realty Corp., 720 N.E.2d 411, 422-23 (Ind. Ct. App. 1999) (recognizing applicability of Trial Rule 15(B) to summary judgment proceedings), *trans. denied*. However, the Storeys' analysis of this issue fails to apply the Rule to the particular facts of this case.

Trial Rule 15(B) requires that both parties expressly or impliedly consent to the adjudication of the issues raised outside the pleadings. Where one party objects to the evidence containing the newly-raised issues on grounds that the issues are not contained in the pleadings, they cannot be said to have consented to the adjudication of those issues. *See* T.R. 56; *Mercantile Nat. Bank of Ind. v. First Builders of Ind., Inc.*, 774 N.E.2d 488, 493 (Ind. 2002), *reh'g denied*. The Defendants here objected—indeed, they *successfully* objected—to the Affidavits on two grounds: that they were untimely filed and that they introduced the issue of willful or wanton misconduct where it was not previously covered in the pleadings. In order to say, then, that the issue was before the trial court, the Storeys were required to comply with the remainder of Rule 15(B), which requires an amendment to the pleadings subject to the trial court's review of whether the evidence will aid in the presentation of the merits of the action, whether it will prejudice the adverse party, and whether a continuance is in order. The Storeys never sought to amend their complaint in the manner set forth in Rule 15(B), so they cannot now argue that their claim of willful or wanton misconduct was properly raised before the trial court.

Having waived any claims against the Defendants based on negligence and having failed to amend the pleadings or otherwise place the issue of willful and wanton misconduct before the trial court, the Storeys cannot demonstrate that any genuine issue of material fact exists to preclude summary judgment in favor of the Defendants. We therefore affirm the trial court.

Affirmed.

BAKER, J., and CRONE, J., concur.