CAR RACE WAIVERS' CHECKERED FLAG ON THIRD PARTY LOSS OF CONSORTIUM CLAIMS

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I. INTRODUCTION

Waivers or releases or exculpatory contracts or hold harmless agreements are different names for any exculpatory or fault-freeing agreement. Waivers will relieve one party from all or part of its responsibility to another.[2]

> A waiver is a contract and presents a conflict between two fundamental legal truisms, namely, the truism of contracts that all persons should have the freedom to contract as they so desire, and the truism of negligence that one should be responsible for negligent acts which cause injury to others.[3]

Although releases are valid in certain circumstances, they are not favored by the courts.[4] Waivers will be strictly construed against the author,[5] and the clause will be disallowed if it is ambiguous in scope, or purports to release the dominant party from liability from intentional, willful, or wanton acts.[6]

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2 WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW §11.2 (1990).

3 *Id.*

4 *Id.*

5 *Id.*

6 Scholobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982). *See* Masciola v. Chicago Metropolitan Ski Council, 628 N.E.2d 1067, 1070-71:

> Under certain circumstances, exculpatory clauses may bar a plaintiff's negligence claim. Exculpatory clauses will be upheld in the absence of fraud, willful and wanton conduct; legislation to the contrary; where the

But, waivers will usually be upheld in ultrahazardous activities, such as race car driving, especially when the signed waiver is voluntary and the product of knowledgeable agreement:

> It should be noted that participation in automobile races and other sporting events is a voluntary undertaking. If a prospective participant wishes to place himself in the competition sufficiently to voluntarily agree that he will not hold the organizer or sponsor of the event liable for his injuries, the court should enforce such agreements. If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest.[7]

Waivers for participation in a racing event will especially be upheld if there is valuable consideration in exchange for the signed waiver, usually the right to participate.[8]

Car racing, of course, is the sedative of choice for the masses, and the importance of the validity of waivers cannot be overlooked in the continuing marketability of this sport.[9]

> The death last month of race car legend Dale Earnhardt at the Daytona 500 was tragic, but not unpredictable. Indeed, the sport of automobile racing is a hazardous activity, and drivers on the NASCAR circuit know very well that they risk life and limb every time they get into a race. The same can be said, though to a lesser degree, to be sure, of go-kart racers. As karts have become faster and more maneuverable, the sport has matured from little more than child's play to a rather dangerous activity. Although the risks of negotiating a race course at high speeds in a vehicle that offers little protection seem obvious, organizers of go kart races have adopted the practice of requiring participants to sign a release flagging those risks and waiving claims arising from injuries sustained

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exculpatory clause is not contrary to the public policy of this State; where there is no substantial disparity in the bargaining position of the parties and where there is nothing in the social relationship of the parties which militates against upholding the agreement [citations omitted].

7 Gore v. Tri-County Raceway, Inc., 407 F. Supp. 489, 492 (M.D. Ala. 1972).

8 Rhea v. Horn-Keen Corp., 582 F. Supp 687, 690 (W.D. Va. 1984).

9 *Id.* at 692.

> during a race. In this case we confront the question of whether such a release can be enforced against a racer who likely was aware of the requirement that she executed it, but somehow participated in the race without doing so.[10]

The point is that waivers should be enforced in vehicular racing, since the participants are experienced and well aware of the risks associated with their endeavors.

But, a race car release will not waive liability for a defendant's gross negligence.[11] It will also not release a defendant from liability under a state's dram shop act, since that type of waiver would violate public policy.[12] The courts, however, are split on whether a valid release of the participant will also bar their spouse's third party loss of consortium claim. The basic conundrum is whether the loss of consortium claim is purely derivative of the original complaint or an independent cause of action. To me, since waivers are not favored by courts, it seems the best response would be to allow loss of consortium claims unless both participant and spouse signed the waiver.[13]

II. CONSORTIUM GENERALLY.

There are two ways of looking at a loss of consortium claim. Where the action is viewed as purely derivative of the original claim, courts have held that once the original claim has been released, the cause of action for loss of consortium is also barred.[14] However, the more prevalent view is that loss of consortium is an independent and separate cause of action that

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10 Beaver v. Grand Prix Karting Ass'n, 246 F.3d 905, 907 (7th Cir. 2001).

11 Wade v. Watson, 527 F. Supp. 1049, 1052 (N.D. Ga. 1981), *aff'd*, 731 F.2d 890 (11th Cir. 1984).

12 Scheff v. Homestretch, Inc., 60 Ill. App. 3d 424, 429, 377 N.E.2d 305, 308 (1978).

13 *See generally* Gillespie v. Papale, 541 F. Supp. 1042 (D. Mass. 1982) (explaining that a valid release did not act as a bar to an action by decedent's spouse on the ground of loss of consortium); Bowen v. Kil-Kare, Inc., 63 Ohio St. 3d 84, 92, 585 N.E.2d 384, 392 (1992). *But see* Groves v. Firebird Raceway, 849 F. Supp. 1385, 1391 (D. Idaho 1994); Wolfgang v. Mid-American Motorsports, Inc., 898 F. Supp. 783, 792 (D. Kan. 1995) (holding that the release survived summary judgment but loss of consortium claim was barred); Rosen v. Nat'l Hot Rod Ass'n, No. 14-94-00775-CV, 1995 WL 755712, *8 (Tex. Ct. App 1995).

14 Caroll J. Miller, Annotation, *Injured Party's Release of Tortfeasor as Barring Spouse's Action for Loss of Consortium*, 29 A.L.R. 4TH 1200, 1200 (1984).

is the property of the spouse, and thus cannot be controlled by the injured individual.[15] Under this view, the injured party is not the agent of the spouse simply because of the marital relationship.[16] The consortium claim then "is seen as derivative only to the extent that the defendant must be proved to have caused the original injury, which in turn caused the spouse to suffer."[17]

The crux of the problem is how the courts interpret the relationship between the loss of consortium claim and the original suit as filed by the injured spouse. In vehicular racing injuries, the court must first look to the original waiver and then make a threshold determination under the laws of that jurisdiction of whether a judgment that precludes the original suit will by necessity bar the spouse's consortium claims. "In

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15 *Id.*

16 *Id.*

17 *Id. See generally* Malia T. McLaughlin, *Wife's Damages for Loss of Consortium*, 10 AM. JUR. P.O.F.3D 97 (2002). *See also* Schwartz v. City of Milwaukee, 54 Wis. 2d 268, 195 N.W.2d 480 (1972) (holding that the husband's claim for loss of consortium was a distinct and separate cause of action from his wife's personal injury claim against city); Rosander v. Copco Steel & Engineering Co., 429 N.E.2d 990 (Ind. Ct. App. 1982) (arguing that wife's cause of action for loss of consortium was not barred because her husband settled his cause of action against a third party and executed a release; also, the fact that he additionally recovered under the relevant worker's compensation statute did not preclude wife's cause of action); Bd. of Commissioners of Cass County v. Nevitt, 448 N.E.2d 333 (Ind. Ct. App. 1983) (explaining that neither fact that husband's personal injury claim against driver was barred, nor the fact his claim against county board of commissioners would allegedly be barred by statute of limitations if he refiled it, would bar wife from maintaining claim for loss of consortium); Lantis v. Condon, 95 Cal. App.3d 152, 157 Cal. Rptr. 22 (1979) (holding that wife's recovery for loss of consortium was not subject to reduction by the proportion of negligence attributable to her spouse, either on the basis of imputation of contributory negligence or on the theory that consortium is a derivative cause of action); Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988) (finding that a third party tortfeasor could not assert comparative fault of their injured spouse in defense of the deprived spouse's loss of consortium claim because the deprived spouse has an independent loss of consortium claim which is not derived from the injured spouse's claim); McCoy v. Colonial Baking Co., Inc., 572 So. 2d 850 (Miss. 1990) (ruling in favor of defendant in personal injury action collaterally estops family member from maintaining loss of consortium action unless judgment in favor of defendant in personal injury action was based on a defense (e.g., comparative negligence, assumption of risk, contributory negligence) that is unavailable against family member); Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980) (explaining that alleged contributory negligence of injured spouse, which was not sole proximate cause of spouse's injury, did not bar claim of husband for loss of consortium).

some jurisdictions, a claim for loss of consortium is totally 'derivative', and cannot succeed unless the injured spouse has won a suit for damages."[18] The loss of consortium claim will fail if the injured spouse is prevented from recovering.[19] Some states though have adopted a less restrictive view.[20] Traditionally, a spouse's right of action for loss of consortium has been viewed as independent and separate from the original claim for injuries.[21] In these jurisdictions, a successful suit by the injured spouse is not a prerequisite to recovery for loss of consortium.[22] Also, not every bar to an injured spouse's suit necessarily precludes recovery for loss of consortium.[23] In these jurisdictions, the claim for loss of consortium will be barred only when the injured spouse's claim is completely invalid.[24] "Absent an actionable injury to one spouse, the other spouse cannot recover for loss of consortium."[25] In some jurisdictions, however, a spouse's loss of consortium claim will be barred by a release signed by the injured spouse, prior to and as a prerequisite to his participation in the

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18 *Nevitt*, 448 N.E.2d at 340 (citing Tollett v. Mashburn, 291 F.2d 89 (8th Cir. 1961); Bitsos v. Red Owl Stores, Inc., 350 F. Supp. 850, 852 (D.S.D. 1972); Sisemore v. Neal, 367 S.W.2d 417, 419 (Ark. 1967); Hopson v. St. Mary's Hospital, 408 A.2d 260 (Conn. 1979); Thill v. Modern Erecting Co., 170 N.W.2d 865, 869 (Minn. 1969)).

19 *Nevitt*, 448 N.E.2d at 340 (citing *Hopson*, 408 A.2d 260; *Thill*, 170 N.W. 2d 865). Jurisdictions that adhere to this view will often allow a claim for loss of consortium only if it is joined with the injured spouse's personal injury claim. *Id.* (citing *Thill*, 170 N.W. 2d 865)

20 Indiana, for example. *Id.* at 340. In Indiana, the husband's right of loss of consortium was traditionally and uniformly held to be independent and separate from the wife's claim for her injuries. By the time of *Nevitt* (1983), the wife's right of consortium, in Indiana, was likewise viewed as separate and independent from the husband's original claim for injuries.

21 *Id.* (citing Burk v. Anderson, 109 N.E. 2d 407 (Ind. 1952); Rogers v. Smith, 17 Ind. 323 (1861)).

22 *Id.* More recent Indiana cases, more closely chronological to *Nevitt* have held that a wife may also bring a loss of consortium suit against one who has injured her husband. *See* Troue v. Marker, 252 N.E.2d 800, 807 (Ind. 1969); Rosander v. Copco Steel & Engineering Co., 429 N.E.2d 990, 991 (Ind. Ct. App. 1982).

23 *Nevitt*, 448 N.E.2d at 340.

24 *Id.* at 341.

25 *Id.* (quoting *Rosander*, 429 N.E.2d at 991). If the original contested injuries were not caused by defendant's tortious misconduct or where the injured spouse's cause of action was abrogated, then the injured spouse has no valid claim, and a loss of consortium suit will also be barred. *See id.* at 341. But, if an injured spouse's recovery is prevented by a procedural bar unrelated to the merits of the claim then the claim will still be viewed as valid, for the purpose of supporting the uninjured spouse's claim for loss of consortium. *Id.*

automobile race.[26] That is, the loss of consortium claim is wholly derivative in nature and is subject to the same defenses that barred the underlying claim.[27] In *Conradt v. Four Star Promotions, Inc.*,[28] the rationale for this interpretation was that:

> [n]o claim for loss of consortium will arise if no tort is committed against the impaired spouse. Here, the injured husband, by signing the release, entered into a contract expressly agreeing to participate in an undertaking posing known risk. He assumed the risk and evidenced that assumption by signing the release. The husband thus previously abandoned the right to complain if an accident occurred .... There can be no actionable negligence where no duty was owed to the person injured .... Even though loss of consortium has been held a separate, independent, nonderivative action of the deprived spouse and not affected by the negligence of the impaired spouse ... nevertheless, an element of this cause of action is the "tort committed against the 'impaired' spouse" ... [A] consortium claim by a lone spouse will not be recognized where the underlying tort has been prohibited or abolished.[29]

The goal of this essay is to ascertain if there are any factual differences between the cases of one jurisdiction which views consortium as derivative and the cases from other jurisdictions where consortium is a wholly independent claim. An unfortunate lingering suspicion is that part of the subliminal rationale for finding a wife's loss of consortium claim to be derivative to her husband's original suit may be based on misguided paternalistic and outdated, sexist notions of the inferiority of the wife to the husband and the relative lack of value to the female spouse of the male's spouse consortium merit.

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26 *See* Conradt v. Four Star Promotions, Inc., 728 P.2d 617, 627 (Wash. Ct. App. 1986).

27 *See e.g.*, Hall v. Garden Services, Inc., 332 S.E.2d 3, 4 (Ga. Ct. App. 1985) (holding that wife's signed release before renting a horse precluded her right to recover, and therefore her husband's loss of consortium was also barred because his right to recover was dependent upon the right of his wife to recover).

28 *Conradt*, 728 P.2d 617.

29 *Id.* at 621-22 (citations omitted).

III. WAIVERS GENERALLY

This paper focuses specifically on those waivers that are associated with races of motorized, wheeled vehicles. Races of this sort, whether they are NASCAR, go-karts, motorcycles, stock cars, demolition derbies, or ATVs, demand a certain amount of specific expertise based on, to some extent, a real appreciation of the race's inherent dangers. Participant waivers in more pedestrian, less dangerous sports, will correspondingly not include an expectancy that participants possess a high degree of expertise commensurate with the heightened risks and skills necessary to navigate daunting curves at high rates of speed. These sports will also contain waivers that might preclude recovery even though these types of exculpatory contracts will be strictly construed.[30] However, recreational participants are free to contract so as to relieve defendant of responsibility for injuries caused by negligence, but not if caused by willful or wanton misconduct.[31]

Generally, "a release signed by a participant, invitee, or patron exempting an organizer or promoter of sports activities from liability for injuries sustained by the participant, invitee, or patron is valid and enforceable."[32] However, it cannot be overbroad,[33] or ambiguous,[34] or amount to a contract of adhesion;[35] it cannot be against public policy,[36] nor purport to release one

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30 Cain v. Cleveland Parachute Training Center, 457 N.E.2d 1185, 1187 (Ohio Ct. App. 1983) (parachuting student).

31 *Id.*

32 Release or Exemption from Liability, 30A C.J.S. *Entertainment & Amusement* § 56 (2003).

33 *See* Haines v. St. Charles Speedway, Inc., 874 F.2d 572, 575 (8th Cir. 1989); Milligan v. Big Valley Corp., 754 P.2d 1063 (Wyo. 1987).

34 *See* Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa App. 1988); Milligan, 754 P.2d at 1068 (Wyo. 1987); Day v. Snowmass Stables, Inc., 810 F. Supp 289 (D. Colo. 1993) (explaining that waiver did not clearly and unambiguously release stable from negligence claim).

35 *See* Haines , 874 F.2d at 575.

36 *See id.*; Haines v. St. Charles Speedway, Inc. 689 F.Supp. 964, 967 (E.D. Mo. 1988), *aff'd*, 874 F.2d 572; Valley Nat. Bank v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 736 P.2d 1186, 1189 (Ariz. Ct. App. 1987); Schlessman v. Henson, 413 N.E.2d 1252, 1254 (Ill. 1980); Barnes v. New Hampshire Karting Ass'n, Inc., 509 A.2d 151, 154 (N.H. 1986); Valeo v. Pocono Int'l. Raceway, Inc., 500 A.2d 492, 493 (Pa. Super. Ct. 1985); Trainor v. Aztalan Cycle Club, Inc., 432 N.W.2d 626, 629 (Wis. Ct. App. 1988); Yauger v. Skiing Enterprises, Inc., 557 N.W.2d 60, 65 (Wis. 1986) (rendering

from responsibility for willful misconduct,[37] or conduct caused by gross negligence.[38]

> Exculpatory clauses will be upheld in the absence of fraud; willful and wanton conduct; legislation to the contrary; where the exculpatory clause is not contrary to the settled public policy of this State; where there is no substantial disparity in the bargaining position of the parties; and where there is nothing in the social relationship of the parties which militates against upholding the agreement. Absent any of the above factors, the question of whether or not an exculpatory clause will be enforced depends upon whether or not defendant's conduct and the risk of injury inherent in said conduct was of a type intended by the parties to fall within the scope of the clause.[39]

The exact occurrence that results in injury did not have to have been contemplated by the parties at the time they entered into the agreement.[40]

Releases will be allowed if there is no duty to the public or if the contract is not adhesionary.[41] This will be so, if the intent is clear, notwithstanding the fact that the title of the agreement did not indicate its exculpatory nature.[42] Nor does providing ski racing for disabled skiers rise to the level of an essential service

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inconspicuous waiver void as against public policy).

37 *See* Barnes v. Birmingham Int'l Raceway, Inc., 551 So. 2d 929, 933 (Ala. 1989), *overruling* Young v. City of Gadsden, 482 So. 2d 1158 (Ala. 1985); Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 946 (Ill. App. Ct. 1989); Milligan v. Big Valley Corp., 754 P.2d 1063, 1068 (Wyo. 1987); Smith v. Golden Triangle Raceway, 708 S.W.2d 574 (Tex. Ct. App. 1986) (stating release exempting from liability by gross negligence is against public policy); Murphy v. North American River Runners, Inc., 412 S.E.2d 504, 509 n.4 (W. Va. 1991).

38 *See Haines*, 874 F.2d at 575.

39 Masciola v. Chicago Metropolitan Ski Council, 628 N.E.2d 1067, 1071 (Ill. App. Ct. 1993). *See also* Garrison v. Combined Fitness Ctr., Ltd., 559 N.E.2d 187, 189-90 (Ill. App. Ct. 1990); Larsen v. Vic Tanny Int'l, 474 N.E.2d 729, 732 (Ill. App. Ct. 1984); Simpson v. Byron Dragway, Inc., 569 N.E.2d 579, 584 (Ill. App. Ct. 1991).

40 *Garrison*, 559 N.E.2d at 190. *See Masciola*, 628 N.E.2d at 1071.. *See generally* Randy J. Sutton, Annotation, *Validity, Construction, and Effect of Agreement Exempting Operator of Amusement Facility from Liability for Personal Injury or Death of Patron*, 54 A.L.R.5TH 513 (1997).

41 Bauer v. Aspen Highlands Skiing Corp., 788 F. Supp. 472, 474 (D. Colo. 1992).

42 Zimmer v. Mitchell and Ness, 385 A.2d 437, 439 (Pa. Super. Ct. 1978), *aff'd*, 416 A.2d 1010 (Pa. 1980).

that would preclude waiver enforcement.[43]

A paradigm of a successful road race waiver is the case of *Williams v. Cox Enterprises, Inc.*, which involved a young law student who was gravely injured while participating in a 10,000 meter event in Atlanta, Georgia, in July.[44] The young man accused the organizer of being negligent by failing to adequately warn that he could suffer serious injuries from participation in the extreme heat and humidity.[45] The plaintiff also alleged that the defendant did not provide liquids and medical facilities along the race, and failed to determine whether all entrants were physically capable of completing the race.[46] However, the plaintiff not only signed but understood the waiver agreement.[47] Each participant was required to pay a fee and sign a very specific and particular application form that described the race and the physical conditioning necessary in a very specific manner, along with a particular description of the type of heat and humidity that would be expected.[48] The application form added that all of this made it "a grueling ten thousand meter race." [49] Regardless of the explicit warning, the law student, as a result of extreme exertion in the exact conditions that were described in the waiver, succumbed to heat prostration which resulted in a permanent impairment of some motor functions.[50] It was decided that this waiver was not against public policy.[51] There was no disparity in bargaining position.[52] Plaintiff alleged that road racing had become so popular and this race in particular was one of a kind that "he and other participants were under enormous pressure to enter it under whatever terms were offered to them."[53] The court made short account of this

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43 Potter v. National Handicapped Sports, 849 F. Supp. 1407, 1410 (D. Colo. 1994). *See also* Kotovsky v. Ski Liberty Operating Corp., 603 A.2d 663, 665 (Pa. Super. Ct. 1992).

44 Williams v. Cox Enterprises, Inc., 283 S.E.2d 367, 368-70 (Ga. Ct. App. 1981).

45 *Id.* at 368.

46 *Id.*

47 *Id.* at 369.

48 *Williams*, 238 S.E.2d at 369.

49 *Id.*

50 *Id.* at 368.

51 *Id.* at 369.

52 *Williams*, 283 S.E.2d at 369.

53 *Id.*

argument. This court also determined that recovery was precluded under assumption of risk because the waiver was described in extremely particular terms and the plaintiff agreed that he read the waiver and was already aware of the danger.[54] Because of this, any injury that resulted from over heating and dehydration could not reasonably be construed to have emanated from any breach of duty on the part of the defendant.[55]

IV. CAR RACE WAIVERS GENERALLY

There are three types of waivers that must be used to release the owner/operator from potential liability for injuries that occur in or around the premises.[56] Spectators must sign a release before gaining admission.[57] There are also waivers for the "Pit Area" which is populated by the pit crew that services the race cars and "pit spectators" who pay a premium and sign waivers to enter and observe from this area.[58] The last group to sign waivers are the participants themselves.[59] The question is the same for all of the releases: does a valid, signed waiver bar a third-party loss-of-consortium suit by the non-injured spouse? In all of these waivers:

> [i]t should be noted that participation in automobile races and other sporting events is a voluntary undertaking. If a

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54 *Id.*

55 *Id.* at 369.*See also* Coates v. Newhall Land & Farming, Inc., 236 Cal. Rptr. 181 (Cal. Ct. App. 1987) (holding that the release for dirt bike rider was not against public policy and precluded heirs from bringing action for wrongful death); Lux v. Cox, 32 F. Supp. 2d 92 (W.D.N.Y. 1998) (explaining that high-performance driving school participant's release precluded liability but fact issues precluded summary judgment in favor of defendants on defense of assumption of risk); Estate of Peters v. United States Cycling Federation, 779 F. Supp. 853 (E.D. Ky. 1991) (holding that wrongful death suit for participant in amateur bicycle race was precluded by releases); Walton v. Oz Bicycle Club of Wichita, No. 90-1597-K, 1991 WL 257088 (D. Kan.), *aff'd*, 977 F.2d 597 (10th Cir.) (bicycle racing); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781 (D. Colo. 1989) (horseback riding); Baschuk v. Diver's Way Scuba, Inc., 618 N.Y.S.2d 428 (App. Div. 1994) (scuba diving); Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa App. Ct. 1988) (participant in waterskiing tournament). *See generally* Walter T. Champion, Jr., SPORTS LAW IN A NUTSHELL 175-76 (2d ed. 2000).

56 Michael A. Cokley, *In the Fast Lane to Big Bucks: The Growth of Nascar*, 8 SPORTS LAW J. 67, 78-81 (Spr. 2001).

57 *Id.* at 79.

58 *Id.* at 79-80.

59 *Id.* at 81.

> prospective participant wishes to place himself in the competition sufficiently to voluntarily agree that he will not hold the organizer or sponsor of the event liable for his injuries, the courts should enforce such agreements. If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, this would not be in the public interest.[60]

Agreements of this sort are generally upheld because these races do not involve a public

utility or quasi-public situation, therefore, they will not violate any public policy.[61]

1. Spectator Waivers

Spectators at racing events are an ever-ebbing flow of human jetson that permeates the edges of the track. The question is usually whether the injury was the type of injury that was contemplated at the time the release was signed. When a spectator was injured after a a maintenance vehicle, which was not involved in the race, drove through the crowd rather than using the provided access road, the court held that there was an issue of material fact as to whether this type of incident was contemplated.[62] Nor will a waiver protect the driver of a vehicle who struck the patron/spectator when he crossed the infield of the track.[63]

The spectator release is usually sufficiently limited in scope

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60 *Gore*, 407 F.Supp. at 492.

61 *Id.*

62 Johnson v. Thruway Speedways, Inc., 407 N.Y.S.2d 81, 82-83 (App. Div. 1978).

63 Church v. Seneca County Agric. Soc'y, 341 N.Y.S.2d 45, 47 (A.D. 1973). *See also* Thomas v. Dundee Raceway Park, 882 F. Supp. 34 (N.D.N.Y. 1995) (holding that there was a genuine issue of material fact as to whether an injured racetrack patron was a member of his son's pit crew on the night of injury, and was thus deemed to be a "participant," who would not be granted protection under a N.Y. statute that voids releases that purport to exempt owners from liability for injuries to "users"); Green v. WLS Promotions, Inc., 517 N.Y.S.2d 537, 538 (App. Div. 1987) (stating that a N.Y. statute voiding releases applies to injuries suffered by automobile race track patron/spectator).

to be upheld.[64] If a spectator is killed while attempting to walk across a race track, the court will generally grant summary judgment on the basis that the spectator as a reasonable person should be aware of the dangers of stepping onto the racing surface of an active racetrack.[65] But, a release in the case of an injured spectator will be void as against public policy if it is ambiguously drafted, as it is difficult to determine if it applies to race spectators or participants.[66] Each waiver must be designed for each type of individual who inhabits the track environs.[67] In *Eder v. Lake Geneva Raceway, Inc.*, one version of the form asked signee/spectator to indicate job description and car number, which clearly did not (or could not) apply to spectators.[68]

2. Pit Area Waivers

There are participants and spectators in all sports, but only one sport has a pit area which will include both spectators and participants. Pit waivers are comparable to other waivers and will be enforced if not against public policy. However, pit releases will not waive willful and wanton misconduct because of a failure to extend a guardrail prior to an accident involving a car that flipped, skidded, and pinned a crew member against a wall.[69] A pit release must also be knowingly and voluntarily entered into.[70] Pit area waivers will not release racetrack owners

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64 Deboer v. Florida Offroaders Driver's Ass'n, Inc., 622 So. 2d 1134, 1134 (Fla. Dist. Ct. App. 1993).

65 *Id.* at 1136.

66 *See generally* Eder v. Lake Geneva Raceway, Inc., 523 N.W.2d 429 (Wis. Ct. App. 1994).

67 *See generally* Champion, *supra* note 2, § 11.2.

68 *Eder*, 523 N.W.2d at 434.

69 Downing v. United Auto Racing Ass'n, 570 N.E.2d 828, 834 (Ill. App. Ct. 1991). *See also* Harsh v. Lorain County Speedway, Inc., 675 N.E.2d 885, 888 (Ohio Ct. App. 1996) (arguing that injured spectator was not given sufficient time to read and understand multipurpose document); Smith v. Golden Triangle Raceway, 708 S.W.2d 574 (Tex. Ct. App. 1986) (holding that a release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy); Gaskey v. Vollertsen, 488 N.Y.S.2d 922, 923 (App. Div. 1985) (explaining that pit spectators were "users" under statute so that release was against public policy); Gilkerson v. Five Mile Point Speedway, Inc., 648 N.Y.S.2d 844, 846 (App. Div. 1996) (holding that racetrack patron injured in pit area was "user" within meaning of N.Y. statute, such that release signed by him was void as against public policy).

70 Johnson v. Dunlap, 280 S.E.2d 759, 763 (N.C. Ct. App. 1981).

from liability for injuries proximately caused by defendants' active negligence.[71] Also, a pit spectator struck by a racecar towed by wrecker did not assume the risk of the wrecker negligently towing the car without a driver to steer the front wheels.[72]

Since pit areas are not open to the general public, a release signed by an injured pit crew encompassed the dismounting of an old tire and mounting of new tire on wheel rim.[73] In *LaFrenz v. Lake Country Fair Board,* the Indiana Court of Appeals held that when the defendants and decedent had equal bargaining power, and when the decedent was not compelled to be in the restricted pit area during demolition derby, the release that the decedent signed prior to entering the pit area was not void as against public policy.[74] Even though the evidence indicated that an official told another individual that the release form was for

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71 Celli v. Sports Car Club of America, Inc., 105 Cal. Rptr. 904 (Cal. App. 1972).

72 Sutton v. Summer, 482 S.E.2d 486, 489 (Ga. Ct. App. 1997).

73 Kircos v. Goodyear Tire and Rubber Co., 311 N.W.2d 139 (Mich. Ct. App. 1981). *See also* Rudolph v. Santa Fe Park Enter., Inc., 461 N.E.2d 622 (Ill. Ct. App. 1984) (stating that injured spectator failed to allege circumstances amounting to fraud in the execution or inducement; therefore, the release was valid and barred action); Lee v. Allied Sports Associates, Inc., 209 N.E.2d 329 (Mass. 1965) (holding that absent any concealment or false misrepresentation, the release was not procured by fraud); Valley National Bank v. National Ass'n for Stock Car Auto Racing, Inc., 736 P.2d 1186 (Ariz. 1987) (explaining that automobile racetrack releases required for persons obtaining pit passes were not invalid as a matter of law where form and language were so conspicuous that reasonable people could not fail to realize they were releasing liability, notwithstanding spectators' claim that relevant language was folded under clipboard); Lago v. Krollage, 575 N.E.2d 107, 110 (N.Y. 1991) (holding that an auto racing association, which was a sponsor of the racing event, was not an "owner or operator of any place of amusement or recreation," within the meaning of the statute stating that agreements that exempt places of public amusement or recreation from liability on the basis of negligence are void and unenforceable); Church v. Seneca County Agric. Soc'y, 310 N.E.2d 541 (N.Y. 1974) (holding release that plaintiff signed in order to gain entrance to infield area of racetrack was valid); Gervasi v. Holland Raceway, Inc., 334 N.Y.S.2d 527, 529 (N.Y. App. Div. 1972) (demonstrating that under a N.Y. statute, a racetrack was not a "place of assembly," and therefore, the release did not violate public policy); Stone v. Bridgehampton Race Circuit, 629 N.Y.S.2d 80 (A.D. 1995) (holding that a N.Y. statute voiding releases did not invalidate pit area release signed by plaintiff); Howell v. Dundee Fair Association, 533 N.E.2d 1056 (N.Y. 1988) (explaining that a volunteer fire fighter who was injured at a raceway was not a "user" of the raceway, and was thus entitled to protection of a statute that makes void as against public policy any agreement that exempts an owner from liability as a result from a recreational facilities user's injuries resulting from the owner's negligence).

74 La Frenz v. Lake County Fair Bd., 360 N.E.2d 605, 608 (Ind. Ct. App. 1977)

insurance purposes, there was no evidence countering the fact that decedent had knowingly and willingly executed release.[75] Therefore, the decedent's estate was bound by the release and could not seek recovery against the defendants.[76] In another case, a pit crew member who was injured by flying debris at a racetrack sued the owners for negligence, and the court held that the waiver released owners from any liability for injuries sustained in the restricted area of racetrack.[77]

3. Participant Waivers

The classic form for car race waivers are those that are dedicated to the participant: the steely-eyed NASCAR professional. However, many participants are not professionals, also many participant waivers involve something other than NASCAR or Indianapolis-style racers. Participant waivers may include ATVs, motorcycles, go-karts, demolition derbies, stock cars, and motocross. In the classic example of an experienced professional driver participating in a high-risk endeavor, waivers

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75 *Id.* at 609.

76 *Id.* at 606-10. *See also* Provence v. Doolin, 414 N.E.2d 786, 793, 795 (Ill. App. 1980) (holding that payment of a fee in order to enter recreational premises could create a "contractual relationship" for the purpose of applying the defense of assumption of risk in contemplation of activities normally accompanied by a danger that causes injury).

77 Plant v. Wilbur, 47 S.W.3d 889, 891, 894 (Ark. 2001). *See also* United States Auto Club, Inc. v. Smith, 717 N.E.2d 919, 924-95 (Ind. Ct. App. 1999) (holding that a waiver is valid unless conduct was willful or wanton); Haines v. St. Charles Speedway, Inc., 874 F.2d 572 (8th Cir. 1989) (stating that a release signed by a race car owner was valid as to injuries he suffered when he was struck in the infield of the racetrack by his own car while attempting to have it started before event); Seaton v. East Windsor Speedway, Inc., 582 A.2d 1380, 1383 (Pa. Super. 1990) (discussing that a release signed by a pit crew member failed to violate public policy, since the plaintiff knowingly and voluntarily signed the release); Holzer v. Dakota Speedway, Inc., 610 N.W.2d 787, 793-94 (S.D. 2000) (holding that a release signed by a pit crew member was enforceable because the track owner did not recklessly or consciously disregard the risk of harm to pit crew members, since the track owner did not know nor had any reason to know that the decision regarding the location of the pit area would create an unreasonable risk of harm); Kellar v. Lloyd, 509 N.W.2d 87 (Wis. 1993) (explaining that in the case where a volunteer crew worker at a racetrack brought a personal injury action against the race car driver, pit crew, track owner, racing clubs, race car manufacturer, and distributor of the race car, the release signed by the worker was enforceable; covered the injuries which she sustained; extended to the manufacturer and distributor of the race car; and that allegations were insufficient in establishing recklessness).

will usually be upheld. In cases where the waiver is not upheld, unexpected circumstances that should be under the control of the owner-operator may interfere with the vehicle and cause a mishap, for example, a wrecker on the track fixing the loudspeaker[78] or a collision with a deer.[79] The question is whether circumstances behind the accident were reasonably foreseeable risks, and whether the failure to take proper precautions to avoid the accident constituted wanton and willful negligence.[80]

In New York, there is a statute[81] that "prohibits an owner or operator of a recreational facility such as a raceway from enforcing a release given by an individual who has paid it a fee or other compensation for the use of the facility."[82] Releases cannot be enforced if the defendant received a share of the fee which the plaintiff paid for the use for the track.[83] If the racer/participant was a "user" of the recreational facility within the meaning of the statute, then the release will be invalid.[84] In *Petrie v. Bridgehampton Road Races Corporation,* [85] there was a genuine issue of material fact as to whether the owner received a share of the fee in a case where the injured plaintiff was classified as a novice racer and paid a fee to enter a race at defendant's raceway.[86]

Most participant waivers for vehicular races will be upheld,

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78 Doster v. C.V. Nalley, Inc., 99 S.E.2d 432, 433-37 (Ga. Ct. App. 1957).

79 Simpson v. Byron Dragway, Inc., 569 N.E.2d 579, 580 (Ill. App. Ct. 1991).

80 *Id.* at 586. *See also* Barnes v. Birmingham Int'l Raceway, 551 So. 2d 929, 933 (Ala. 1989) (involving a stock car participant who signed two releases: one was valid as to releasing the owner/operator from negligence, while the other was invalid since it attempted to release owner from wanton misconduct).

81 N.Y. General Obligations Law § 5-326 (McKinney 2003).

82 Petrie v. Bridgehampton Road Races Corp., 670 N.Y.S.2d 504, 505 (App. Div. 1998).

83 Owen v. R.J.S. Safety Equip., Inc., 572 N.Y.S.2d 390, 393 (App. Div. 1991), *aff'd,* 591 N.E.2d 1184, 1185 (N.Y. 1992).

84 *Id. But see* Lago v. Krollage, 575 N.E.2d 107, 110 (N.Y. 1991) (rendering statute inapplicable where fee was to only obtain membership and become a member and licensee of a race promotion organization, rather than for the use of a particular track).

85 *Petrie,* 670 N.Y.S.2d 504.

86 *Id.* at 505. *See also* Miranda v. Hampton Auto Raceway, Inc., 515 N.Y.S.2d 291 (App. Div. 1987) (holding releases void under § 5-326 since he paid a fee to use racing facility); Beardslee v. Blomberg, 416 N.Y.S.2d 855 (App. Div. 1979) (debating whether release at Powder Puff Derby extended to faulty equipment or lack of essential equipment).

even if the alleged negligence complained of would constitute gross negligence.[87] Waivers will also bar suit for simple negligence, for example, failing to warn of a cylinder head on end of dragway track.[88] Valid waivers will encompass motorcycle races,[89] ATV races,[90] road races,[91] Enduro Karts,[92] go-karts,[93] stock cars;[94] and funny cars.[95] Negligence actions have been barred on valid waivers when the automobile racer was injured when another automobile struck the racer while he was working in the pit area.[96] Waivers barred collisions with immobilized cars;[97] a collision which pinned driver's leg against guardrail;[98] an accident allegedly caused by a curved

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87 Theis v. J&J Racing Promotions, 571 So. 2d 92, 94 (Fla. Dist. Ct. App. 1990). *See also* Donegan v. Beech Band Raceway Race, Inc., 894 F.2d 205 (6th Cir. 1989) (holding that a water patch on track did not constitute willful or wanton conduct).

88 Winterstein v. Wilcom, 293 A.2d 821, 824 (Md. Ct. Spec. App. 1972). *See* French v. Special Services, Inc., 159 N.E.2d 785 (Ohio Ct. App. 1958) (holding release valid for stock car races for prizes); Schlessman v. Henson, 413 N.E.2d 1252 (Ill. 1980) (holding a release valid for an amateur driver injured when a banked portion of the racetrack caved in); Dunn v. Paducah Int'l Raceway, 599 F. Supp. 612 (W.D.Ky. 1984) (explaining that survivors suit was barred).

89 Mayer v. Howard, 370 N.W.2d 93 (Neb. 1985) (release included injury from falling off cycle, even if it was a result of design defect in track); Littlefield v. Schaefer, 955 S.W.2d 858 (Tex. Ct. App. 1996) (estate of motorcycle rider); Trainor v. Aztalan Cycle Club, Inc., 432 N.W.2d 626 (Wis. Ct. App. 1988) (waiver also barred).

90 Schillachi v. Flying Dutchman Motorcycle Club, 751 F. Supp. 1169, 1173 (E.D. Pa. 1990); *dismissed w/ prej.* No. CIV.A. 88-7196, 1991 WL 24696 (E.D. Pa.) (suit against insurer).

91 Tope v. Waterford Hills Road Racing Corp., 265 N.W.2d 761 (Mich. Ct. App. 1978) (involving a needle-nose car that collided with and slid under a single beam guardrail).

92 Barnes v. New Hampshire Karting Ass'n, 509 A.2d 151, 152 (N.H. 1986).

93 Bertotti v. Charlotte Motor Speedway, Inc., 893 F. Supp. 565 (W.D.N.C. 1995) (involving a go-kart driver who was injured when his kart spun into racetrack guardrail).

94 McDuffie v. Watkins Glen Int'l, Inc., 833 F. Supp. 197, 202 (W.D. N.Y. 1993).

95 Cadek v. Great Lakes Dragaway, Inc., 843 F. Supp. 420, 421 (N.D. Ill. 1994).

96 Morrow v. Auto Championship Racing Ass'n, Inc., 291 N.E.2d 30 (Ill. App. Ct. 1972).

97 Theroux v. Kedenburg Racing Ass'n, 269 N.Y.S.2d 789, 790 (Sup. Ct. 1965). *See also* Valeo v. Pocono International Raceway, Inc., 500 A.2d 492 (Pa. Super. Ct. 1985) (explaining that plaintiff unsuccessfully argued that negligent maintenance of track amounted to gross negligence).

98 Corpus Christi Speedway, Inc., v. Morton, 279 S.W.2d 903, 904 (Tex. App. Ct. 1955).

embankment at the end of the dragway;[99] inadequate safety precautions after a driver caught on fire;[100] and alleged improper installment and maintenance of a guardrail.[101]

V. WAIVERS AND LOSS OF CONSORTIUM

The case of *Conradt v. Four Star Promotions, Inc.*,[102] is the preeminent exponent of the proposition that a signed release bars a third party loss of consortium claim. Conradt's injuries occurred in an automobile demolition race when there was a change in direction.[103] Why should this case not be followed? It is a 1986 Washington Court of Appeals case that involves a less than mainstream variation of the sport. "Here, because of the release, no cause of action arose from which a court could conclude a tort had been committed upon Mr. Conradt. Therefore, an element of the consortium was lacking and summary judgment dismissal was proper."[104] *Conradt's* concurrence goes farther in an admonition against allowing third-party loss of consortium claims: "I find it incomprehensible that society is ready to countenance such actions."[105]

But, *Conradt* is essentially an anomaly in the specific context of participant car race waivers precluding third party loss of consortium suits.[106] There are other cases that support *Conradt,* but they are problematic at best. For example, in *Gardner v. Ohio*

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99 Rhea v. Horn-Keen Corp., 582 F. Supp. 687, 692 (W.D.Va. 1984).

100 Seymour v. New Bremen Speedway, Inc., 287 N.E.2d 111 (Ohio Ct. App. 1971) (holding that the release was a full defense to any claim based on negligence).

101 Huckaby v. Confederate Motor Speedway, Inc., 281 S.E.2d 223 (S.C. 1981).

102 728 P.2d 617 (Wash. Ct. App. 1986).

103 *Id.* at 619-20.

104 *Id.* at 622.

105 *Id.* (Madison, J., concurring).

106 But, there are other third party suits that have historically been precluded by car race waivers. *See* Dunn v. Paducah Int'l Raceway, 599 F. Supp. 612, 614 (W.D. Ky. 1984) (holding that a release signed by driver precluded third party survivor's suit against race track); Grbac v. Redding Fair Co., Inc., 521 F. Supp. 1351, 1358 (W.D. Pa. 1981), *aff'd,* 688 F.2d 215 (3d Cir. 1982) (holding that wrongful death claim was barred by release); Lohman v. Morris, 497 N.E.2d 143 (Ill. App. Ct. 1986) (involving an injured pit crew member who sued a race car driver who then brought third-party claim against raceway owners for indemnity; suit disallowed on basis of signed release). *But see* Scheff v. Homestretch, Inc., 377 N.E.2d 305 (Ill. App. Ct. 1978) (holding that release did not protect owner from third party dram shop action; plaintiff/participant was struck by drunk participant).

Valley Region Sports Car Club of America,[107] in dictim, the court averred that the loss of consortium claim is "subject to the same willful and wanton standard because both Gardner and his wife released appellees from all liability prior to the commencement of the race."[108] In *Clutter v. Karshner*,[109] the loss of consortium claim was denied summary judgment in the trial court and was not before the appellate court.[110] *Caron v. Waterford Sports Center, Inc.*, affirmed summary judgment for defendant in both the original and loss of consortium suits.[111] *Caron* is a recent case (Dec. 13, 2002), but is from the Connecticut Superior Court and involves go-kart racing.[112] The plaintiff was experienced and although the court noted that the release "relinquished his, and derivatively his spouse's, rights to bring this lawsuit for injuries he sustained while racing his go-kart," there was no discussion on the specific loss of consortium claims.[113] Therefore, the effect of *Caron*, if any, is again problematic.

The Supreme Court of Mississippi in *Byrd v. Matthews*[114] alluded to the problem, but did not specifically address it. In *Byrd*, the wife of a race car driver brought suit against another driver and her husband's uninsured motorist carrier, seeking to recover for loss of consortium as a result of her husband's raceway accident.[115] The court held that where assumption of risk is an available defense in a personal injury action arising from a sports injury, then it is also available in a spouse's derivative loss of consortium claim.[116] But, in *Byrd*, the court did not use the release in finding that assumption of risk was available.[117] In fact, *Byrd* apparently avers in dictim that an injured party cannot, without permission, bind the non-injured spouse to a release:

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107 Gardner v. Ohio Valley Region Sports Car Club of America, No. 01-AP-1280, 2002 WL 1477335 (Ohio App. 2002).

108 *Id.* at *5.

109 Clutter v. Karshner, No. 99-4307, 2001 WL 1006155, *1 (6th Cir. 2001).

110 *Id.*

111 Caron v. Waterford Sports Center, Inc., No. X07CV010077059S, 2002 WL 31898081, *5 (Conn. Super. Ct. 2002).

112 *Id.* at *1.

113 *Id.* at *2.

114 571 So. 2d 258 (Miss. 1990).

115 *Id.* at 259-60.

116 *Id.* at 261.

117 *Id.*

"When no consent has been given, a spouse is not the agent of his marital partner – meaning one spouse cannot bind the other to an agreement or contract to which he or she is not a party merely due to the martial relationship."[118] Similarly in *Rosen v. National Hot Rod Association*, the loss of consortium claim was barred, but again as dicta.[119]

The District Court of Idaho caused a fleeting sensation in *Groves v. Firebird Raceway, Inc.*, in which they barred the spouse's loss of consortium claim, but this was reversed on appeal by the Ninth Circuit.[120]

> We affirm the grant of summary judgment regarding the validity of the release signed by Mr. Groves because it is not ambiguous and does not violate public policy. We reverse the judgment dismissing Mrs. Groves' claim for loss of consortium because we conclude that the Idaho Supreme Court would hold that the agreement signed by Mr. Groves releasing Firebird of any tort liability sustained by Mr. Groves does not bar her separate claim for loss of consortium.[121]

Groves noted that "[c]ourts in other states have recognized

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118 *Byrd*, 571 So. 2d at 262.

119 Rosen v. Nat'l Hot Rod Ass'n, No. 14-94-00775-CV, 1995 WL 755712, *8 (Tex. Ct. App. 1995). The court stated:

> In their final point of error, the Rosens assert the release does not apply to the cause of action brought by Alice M. Rosen for loss of consortium. We find, however, no mention of her loss of consortium claim in the response to appellees' motion for summary judgment. Furthermore, Alice Rosen's right to maintain a cause of action for loss of consortium based on her husband's serious personal injuries is derivative of the tortfeasor's liability to her husband for his injuries. *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978). Thus, Alice Rosen was required to establish the alleged tortfeasor's liability for her husband's injuries. *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 738 (Tex. 1980). Absent her establishing such liability, she has no cause of action. *Id.* Nevertheless, a husband cannot sign away his wife's separate property right to sue for loss of consortium. *Whittlesey*, 572 S.W.2d at 669. . . Thus, just as Richard Rosen could avoid the release on the ground of gross negligence, Alice Rosen could also maintain a cause of action for loss of consortium arising out of any facts amounting to gross negligence. However, we have already found the Rosens failed to present the trial court with any fact questions concerning gross negligence; therefore, we find Alice Rosen's derivative action fails for the same reason.

Id. at *8.

120 Groves v. Firebird Raceway, Inc., 849 F. Supp. 1385 (D. Idaho 1994), *aff'd in part, rev'd in part*, No. 93-0310-S-HLR, 1995 WL 574619 (9th Cir. 1995).

121 *Groves*, at *1.

that . . . consortium . . . is. . .derivative [but it] constitutes a separate and distinct cause of action personal to the deprived spouse . . .' "[122] The appeals court childed the district court's inconsistency:

> The district court acknowledged that the majority of the states that have confronted the issue recognize loss of consortium as a separate and independent cause of action. The district court declined, however, to follow the overwhelming weight of authority. . . . The fact that a claim for loss of consortium is derivative does not logically support the conclusion reached by the district court that this cause of action is barred when the other spouse enters into a contract releasing the alleged tortfeasor from the risk of an award for damages in a tort action.[123]

The fact that the appeals court upheld the release did not resolve the question of whether the racetrack is responsible to Mrs. Groves for loss of consortium. The release did not mention Mrs. Groves, nor did it refer in any way to a consortium claim.[124] "Because she was not a party to the release and did not receive any consideration for abandoning her own claim, Mrs. Groves is not bound by the release."[125] The *Groves'* appeals court specifically deals with the *Conradt* "anomaly"—"[o]nly one state has held that a spouse's unilateral release of liability for negligence extinguishes the other spouse's claim for loss of consortium."[126] The *Groves* appeals court was persuaded that the Idaho Supreme Court would have decided *Conradt* differently:

> We are persuaded that the Idaho Supreme Court would follow the reasoning of the overwhelming majority of state courts that have addressed this issue and hold that a release executed by a spouse does not bar the other spouse's loss of consortium claim. As noted above, the Idaho Supreme Court has recognized that a spouse has a separate cause of action for loss of consortium.[127]

Again, *Conradt* is relegated to the backwaters of this

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122 *Id.* at *6.
123 *Id.* at *4, *5.
124 *Id.* at *1.
125 *Groves*, at *8.
126 *Id.* at *10.
127 *Id.* at *11.

discussion.

The District Court of Kansas in *Wolfgang v. Mid-American Motorsports, Inc.*, barred consortium claims only to the extent they were based on simple negligence [128] and left the question of whether defendants were grossly negligent to the jury in a case where the plaintiff was allegedly burned unnecessarily due to inadequate firefighting capabilities.[129] But, *Wolfgang's* decision on consortium was based on the district court's decision in *Groves*, which was overruled.[130]

There are four state supreme courts that allow loss of consortium suits. In *Bowen v. Kil-Care, Inc.*, Ohio views it as a separate and distinct cause of action, with the caveat that the release must be signed by both parties if it is expected to also bar consortium suits.[131] However, *Bowen* was the product of a divided court with a strong dissent:

> The majority appears to go out of its way to create new law in order to preserve appellants' loss-of-consortium claims

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128 898 F. Supp. 783 (D. Kan. 1995).

129 *Id.* at 792.

130 *Id.* at 790.

131 Bowen v. Kil-Kare, Inc., 585 N.E.2d 384 (Ohio 1992). The Court explains its position on consortium suits:

> In Ohio, it is well established that a wife has a cause of action for damages for loss of consortium against a person who, either intentionally or negligently, injures her husband and thereby deprives her of the love, care and companionship of her husband. Likewise, a husband has a cause of action for injuries caused his wife by a person who, thereby, deprives the husband of love, care and companionship of his wife. "Consortium" consists of society, services, sexual relations and conjugal affection, which includes companionship, comfort, love and solace. At paragraph three of the syllabus . . . Our review of the foregoing authorities demonstrates that Ohio has long recognized, and properly so, an independent right of the wife to be compensated for her loss of consortium. The right is her separate and personal right arising from the damages she sustains as a result of the tortfeasor's conduct. The right of the wife to maintain an action for loss of consortium occasioned by her husband's injury is a cause of action which belongs to her and which does not belong to her husband . . . Accordingly, we hold that an action for loss of consortium occasioned by a spouse's injury is a separate and distinct cause of action that cannot be defeated by a contractual release of liability which has not been signed by the spouse who is entitled to maintain the action. In so holding, we recognize that a claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury.

Id. at 391-92 (citations omitted).

> contrary to the undeniable tradition that such claims are inextricably linked to the underlying tort action. By invoking law from a scattering of other jurisdictions and declaring that a contractual release cannot bar those who are not parties to the release, the majority ignores the historical underpinnings of loss-of-consortium claims.[132]

But, the dissent can only cite to cases that miss the point (e.g., *Winterstein, Byrd,* and *Barker*); at least the majority's "law from a scattering of other jurisdictions" is on point.

The pro consortium position is ably championed by the Supreme Court of Wisconsin in *Arnold v. Shawano County Agricultural Society,* in which the court held that only the defense of contributory negligence against plaintiff-driver would be sufficient to defeat the spouse's loss of consortium claim again, and the spouse would only be bound if she signed the agreement. [133] "[A]n action for consortium occasioned by a spouse's injury is a separate cause of action which never belonged to the other spouse."[134]

The Supreme Court of Maine brought the banner to spouses of injured pit crew members.[135] This is a logical extension: a position as a pit crew mechanic is more of a work-a-day endeavor than the "glamorous," inherently dangerous job of a race car jockey. In *Hardy v. St. Clair,* the court held a wife's loss of consortium claim to be an independent cause of action, which was separate from her husband's negligence claim, and thus her husband's execution of the release did not bar her claim. [136]

The Supreme Court of Iowa continued *Arnold's* logic and included injured spectators in the group that allows third-party loss of consortium suits in a case styled *Huber v. Hovey.*[137] Again

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132 *Id.* at 394-95 (Wright, J., concurring in part and dissenting in part). The opinion was divided as follows: it was affirmed in part, reversed in part and remanded; written by Douglas, J.; Brown, J., concurred in the syllabus and judgment; Moyer, C.J., concurred in the syllabus but dissented in the judgment; Wright, J., filed a concurring and dissenting opinion in which Holmes, J., joined.

133 Arnold v. Shawano County Agric. Soc'y, 317 N.W.2d 161, 163 (Wis. Ct. App. 1982), *aff'd,* 330 N.W.2d 773 (Wis. 1983).

134 *Id.* at 163 (quoting Schwartz v. Milwaukee, 195 N.W.2d 480 (Wis. 1972)).

135 Hardy v. St. Clair, 739 A.2d 368 (Me. 1999).

136 *Id.* at 369-70. (holding that the husband's suit for injuries suffered when a bleacher collapsed beneath him was barred by signed release).

137 Huber v. Hovey, 501 N.W.2d 53, 57 (Iowa 1993). *But see_* Leatherwood v.

this makes sense, since the husband was a mere spectator, and surely he did not, nor should he, or could he, anticipate that signing a waiver would preclude his wife's suit based on future injuries to him. *Huber* can be summarized to say that you need another signature, that of the non-injured spouse, if you expect to preclude her suit. "[A] separate tort is committed when an actor's conduct deprives a spouse of the right to consortium."[138]

Beaver v. Grand Prix Karting Association, Inc.[139] is a disturbing

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Wadley, No. W2002-01994-COA-R3-CV, 2003 WL 327517 (Tenn. Ct. App. 2003) (granting summary judgment against injured pit spectator and wife; injury occurred when wheel broke and caromed from stock car driving race and struck plaintiff; plaintiff's claim included negligence, gross negligence, strict liability, strict liability under the Tennessee Product's Liability Act, and a loss of consortium suit joined by spectator's wife; the court did not discuss the consortium claim in its affirmation of summary judgment).

138 *Id. Huber* too takes aim at *Conradt* and skews it as an anomaly. "Contrary to the view held by the court in *Conradt*, we are not persuaded that the injured party's release erases the underlying tort." *Id. See also* Barker v. Colorado Region-Sports Car Club of America, 532 P.2d 372 (Colo. Ct. App. 1974) (holding that *Barker* is the definitive statement that a signed release to a spectator injured in the pit area will not bar third-party loss of consortium suits); Martinez v. Swartzbaugh, No. G029777, 2002 WL 31888855 (Cal. Ct. App. 2002) (holding that a "ride around" in a vintage McLaren race car won in a silent auction turned into a white knuckle experience with no seat belts at 140 miles per hour was gross negligence which negated the validity of the waiver as to both the original injury and the loss of consortium claim).

139 Beaver v. Grand Prix Karting Ass'n, Inc., 181 F. Supp. 2d 968 (N.D. Ind. 2002). *Beaver* is a Phyrric victory for advocating allowing a loss of consortium, although it uses strong language asserting it is not a derivative claim, thus, a non-injured spouse could not be prevented from asserting the claim. *Id.* at 973. It appears to be a case of throwing the baby out with the bathwater -

> However, as a practical matter to achieve the ultimate objective of the Plaintiff (i.e. that being compensated by the Defendants for their negligence under a loss of consortium claim.). The Seventh Circuit panel's decision also stated that our decision [involving the loss of consortium claim] may have little practical effect, however, because Beaver agreed in the release to indemnify the race organizers for any liability they incur due to her participation in the race. Thus, any recovery by Beaver's husband will ultimately be paid by Beaver herself. This statement of law and fact is also part of the law of the case and cannot be overlooked by the Beavers. Thus, any attempt to pursue this claim would be futile because even if Stacey Beaver were to be successful in proving that GPKA was liable under a loss of consortium claim any recovery would be paid by Dorothy. Therefore, GPKA's motion for summary judgment on the loss of consortium claim is DENIED. However, the court strongly suggests that counsel for the Plaintiffs engage in serious reality therapy before pursing this claim, which at the end of the day would waste not only the court's time, but also the time and money of the parties involved and may subject the plaintiffs to further costs

case from the Seventh Circuit of Appeals (under Indiana law), which although allows the loss of consortium suit, also honors the indemnity clause in the release signed by the injured plaintiff, so that the award of damages for loss of consortium must be indemnified by the injured spouse. That is, the court held that the release's indemnification was valid, so, in effect, the injured wife must now pay her husband for his loss of consortium claim. *Beaver* though deals with go-karting injuries which does not precisely fit the paradigm of professional (or near professional) race car drivers bravely risking life and limb in an effort to test the limits of machine and sinew.

VI. CONCLUSION

Other than *Conradt*, it is clear that the best approach appears to be to allow the third-party loss of consortium claims. This view is better nuanced if the injuries are to someone other than the professional car driver—spectators, spectators in the pit, or the pit crew. Regardless, *Conradt* ignores the obvious—one spouse should not, by signing a release, preclude a loss of consortium suit by the non-injured, non-signing spouse. Remember, releases are not favored by the law, and to somehow imply or extrapolate the acquiescence of a non-signing spouse is ludicrous. An easier and fairer solution would be to secure another signature on the release, that of the non-participating spouse as a precondition to the participating spouse's entrance and admission into the racing competition. What would be the negative? Some might argue that this would dramatically decrease the number of participants in vehicular racing events. So what- this hardly constitutes an affront to public policy.

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and expenses of GPKA's counsel.
Id. at 974 (citation omitted).