In the United States Court of Appeals for the Third Circuit

No. 13–1772

RANDALL DUCHESNEAU,
Appellant

v.

CORNELL UNIVERSITY;
CORNELL GYMNASTICS CLUB;
TUMBL TRAK.

On Appeal from the U.S. District Court for the
Eastern District of Pennsylvania, No. 08–cv–4856
(Honorable C. Darnell Jones, II, U.S. District Judge)

BRIEF FOR APPELLANT AND
VOLUME ONE OF THE JOINT APPENDIX
(Pages 1a–18a)

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I. INTRODUCTION

This Court has recognized that "fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right." *Bailey* v. *Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). This fundamental right to a fair trial applies not only to claims of questionable significance, but also to the most important claims that a person is likely to possess in his or her lifetime. This case involves a claim clearly in that latter category, making the district court's errors and abuses of discretion at issue in this appeal all the more troubling and deserving of correction.

As the result of Cornell University's negligent failure to adequately supervise dangerous recreational activities that, for a fee, were made available to members of the public who lacked any relevant training whatsoever on sophisticated gymnasium equipment, undergraduate student Randall Duchesneau was rendered a C5–C6 quadriplegic who has no sensation from his nipple line down through his lower extremities. He is permanently confined to a reclined motorized wheelchair and requires around–the–clock assistance with all activities of daily living. App.4005a-12a (N.T. 10/17/12 p.m. at p.6-13). He lacks

control of both his bowel and bladder and requires assistance with dressing, feeding and transfers. He requires assistance with catheterization and needs to be turned in the middle of the night to prevent the formation of pressure sores. App.4218a-22a (N.T. 10/18/12 p.m. at p.41-45). Due to his condition, Randall Duchesneau suffers from daily intractable pain and spasm in his back and shoulders. App.4005a-06a (N.T. 10/17/12 p.m. at p.6-7).

In addition to paying a fee to access the gymnasium equipment, Cornell also required Duchesneau to sign a document titled "Waiver and Assumption of Risk" intended to completely insulate and exculpate Cornell from any liability whatsoever to anyone injured on the highly dangerous gymnasium equipment in question. App.2078a (DDE#449-1 at p.25). Under the law of New York State, which the opposing parties and the district court agree provided the substantive law governing plaintiff's claims, agreements intended to exempt or exculpate the owner of any gymnasium or recreational facility from liability for damages caused by or resulting from the owner's negligence, or the negligence of the operator of the establishment or their agents and

employees, "shall be deemed to be void as against public policy and wholly enforceable." N.Y. Gen. Oblig. Law §5–326.

Unfortunately, the district court committed its first critical error in ruling that defendants could admit into evidence a redacted version of the "Waiver and Assumption of Risk" agreement Duchesneau signed containing only the contents allegedly relevant to assumption of the risk. App.6a (DDE#382 at p.2); App.2080a (DDE#449-1 at p.27). This was clear error under New York law, because the statute in question, N.Y. Gen. Oblig. Law §5–326, deems "void as against public policy and wholly unenforceable" "[e]very covenant, agreement or understanding in or in connection with, or collateral to, any contract * * * which exempts the said owner or operator [of a gymnasium or recreational facility] from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees." *Id.*

Had the district court properly applied New York law, it would have excluded from evidence all portions of the "Waiver and Assumption of Risk" document that Duchesneau had signed. Excluding the document in its entirety would have avoided the grievous and irreversible harm

inflicted on plaintiff's case when counsel for Cornell, on the record and in the presence of the jury, advised the jury in violation of the district court's applicable order and instructions that the exhibit containing only the assumption of the risk portions of the "Waiver" document "is not the actual document but was something that [the district court] had asked counsel to piece together." App.2985a (N.T. 10/4/12 p.m. at p.32).

Jurors are familiar with this sort of document. Nearly all of us have seen waiver agreements. We are asked to read and sign them for ourselves and for our children. These agreements cover a wide range of commonplace activities, such as school class trips, dance classes, amusement parks, and sporting activities. They are part of our daily lives. It is the fair and reasonable inference from defense counsel's remarks that members of the jury, drawing on their everyday experience, understood that Duchesneau had signed a document that waived his legal right to sue Cornell for injuries he might sustain while using the gymnasium equipment.

The district court recognized that defense counsel's repeated references to the assumption of the risk document as an "agreement," and specific statement advising the jury that the document was part of

a larger document whose complete contents the district court had ordered to remain hidden from the jury, were improper and in violation of the district court's order and instructions. The district judge said on the record at trial that Cornell's counsel's statement "was a blatant attempt to tell the jury that essentially this was something else but the Judge is keeping it from them, leaving them to guess what it could be that would be kept from them, possibly something that said waiver, assumption of the risk and the like * * *." App.2989a (N.T. 10/4/12 p.m. at p.36). The district court nevertheless denied plaintiff's motion for a new trial, following a defense verdict, based on the district court's view that the misconduct of Cornell's counsel was harmless because the jury's verdict consisted simply of a finding that Cornell was not negligent in response to the very first jury verdict interrogatory. App.15a-18a (DDE#498 at p.5-8).

This too was reversible error. The controlling New York statute itself recognizes the devastating nature of waiver–related evidence, making "void as against public policy and wholly unenforceable" "[e]very covenant, agreement or understanding * * * which exempts the said owner or operator [of a gymnasium or recreational facility] from liability

for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees." N.Y. Gen. Oblig. Law §5–326. Moreover, because the issue of waiver was not presented to the jury for express resolution on the jury verdict slip, the jury had no alternative other than to rely on the inadmissible waiver evidence that Cornell's counsel improperly interjected into this case when deciding whether or not Cornell was negligent. App.5475a-78a (N.T. 10/26/12 at p.46-49).

The evidence of Cornell's negligence in causing plaintiff's injuries is exceptionally strong on this record. The district court's error under New York law in allowing admission into evidence of any aspect of the "Waiver and Assumption of Risk" document is crystal clear. That Cornell's counsel violated the district court's orders and instructions in advising the jury that the assumption of risk document was part of a larger document or agreement signed by Duchesneau is clear both from the record and from the district court's ruling on plaintiff's motion for a new trial.

Because the district court erred as a matter of law and clearly abused its discretion in failing to recognize that the legally improper

references by Cornell's counsel in front of the jury to Duchesneau's waiver agreement fatally undermined Duchesneau's ability to have the jury find that Cornell was negligent, this Court should reverse the district court's denial of Duchesneau's new trial motion and remand for a new trial at which the entirety of the "Waiver and Assumption of Risk" agreement, and any references to it, are excluded in their entirety, as New York law requires.

II. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

The district court possessed subject–matter jurisdiction pursuant to 28 U.S.C. §1332(a). Plaintiff Randall Duchesneau is a citizen of Pennsylvania. App.75a (DDE#1 at p.1). Defendants are incorporated under the laws of states other than Pennsylvania and have their principal places of business in states other than Pennsylvania. App.75a-76a (*id.* at p.1-2). In addition, the amount in controversy exceeds the amount of $75,000.00, exclusive of interest and costs. App.77a (*id.* at p.3).

This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291. The district court entered its final judgment, in favor of

defendants and against Duchesneau, on November 7, 2012. App.4a (DDE#448). Duchesneau filed his timely motion for a new trial on December 3, 2012. App.2083a (DDE#486 at p.2). On February 20, 2013, the district court issued its opinion and order denying Duchesneau's new trial motion. App.2a (DDE#449); App.11a (DDE#498). Duchesneau filed his timely notice of appeal on March 15, 2013. App.1a (DDE#502).

III. STATEMENT OF THE ISSUES ON APPEAL

1. Did the district court err or abuse its discretion in denying plaintiff's motion *in limine* to preclude any reference to a signed waiver and assumption of risk agreement, in contravention of N.Y. Gen. Oblig. §5–326, by admitting portions of the waiver and assumption of risk document signed by plaintiff into evidence at trial?

Where preserved: Duchesneau preserved this issue in his motion in limine to preclude any reference at trial to a signed waiver and assumption of risk agreement (App.1309a (DDE#254)) and in his motion for a new trial (App.2083a (DDE#486)).

2. Did the district court err or abuse its discretion in denying plaintiff's motion for new trial by ruling that the misconduct that

counsel for Cornell engaged in at trial regarding the inadmissible "Waiver and Assumption of Risk" document — culminating in defense counsel's statement to the jury that the document approved by the district court for introduction into evidence was "not the actual document but something the court asked counsel to piece together" — caused no harm to plaintiff given the jury's finding against plaintiff and in favor of Cornell on the issue of negligence?

Where preserved: Duchesneau preserved this issue by means of contemporaneous objections during trial (App.2985a (N.T. 10/4/12 p.m. at p.32)) and his motion for new trial (App.2083a (DDE#486)).

IV. STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellant Randall Duchesneau is not aware of any related cases or proceedings.

V. STATEMENT OF THE CASE

In October 2008, plaintiff Randall Duchesneau initiated this suit against Cornell University, the Cornell Gymnastics Club, and TumblTrak (the manufacturer of the equipment on which Duchesneau

was injured, rendering him quadriplegic) in the United States District Court for the Eastern District of Pennsylvania. App.75a (DDE#1).

At the appropriate point before trial, plaintiff filed a motion *in limine* pursuant to N.Y. Gen. Oblig. Law §5–326 asking the district court to exclude, in its entirety in accordance with that statute, any and all portions of the "Waiver and Assumption of Risk" document that Randall Duchesneau had signed as one of the conditions of using the gymnastics equipment located in the Cornell gymnasium. App.1309a (DDE#254). The district court agreed that §5–326 was applicable and prevented Cornell from introducing into evidence or otherwise relying on Duchesneau's purported waiver of liability. App.6a (DDE#382 at p.2). However, over Duchesneau's objection, the district court ruled that the portions of the "Waiver and Assumption of Risk" document that allegedly were relevant to Cornell's defense of assumption of risk could be introduced into evidence. *Id.*

Originally, counsel for Cornell proposed using either a redacted document (with the inadmissible text blacked–out) or a document that noted the omissions from the original agreement through the use of ellipses. App.1808a (DDE#387-2); App.2693a-94a (N.T. 10/3/12 a.m. at

p.47-48). These proposals were objectionable to plaintiff, and the district court refused to allow Cornell's use of an obviously redacted document or ellipses. App.2693a-96a (N.T. 10/3/12 a.m. at p.47-50). Ultimately, the document that Cornell's counsel prepared, in which the text of certain paragraphs was reproduced within quotation marks, followed by the executed signature block from the original document, was approved for introduction into evidence by the district court. *Id.*; App.2080a (DDE #449-1 at p.27).

Because the district court's admission of a portion of the "Waiver and Assumption of Risk" document, and defense counsel's improper reference to the redacted version of that document as part of a larger agreement that the district court was not permitting the jury to see, are at the heart of this appeal, it is necessary for this Court to understand precisely what the "Waiver and Assumption of Risk" document provided both in its original form and in the form as displayed to the jury.

The original document stated, in full:

Waiver and Assumption of Risk
Each Participant Must Read, Print His/Her Name, and Sign

Gymnastics
WAIVER AND ASSUMPTION OF RISK
NOTICE: THIS IS A LEGALLY BINDING AGREEMENT. By signing this agreement you give up your right to bring a court action to recover compensation or obtain any other remedy for any injury to yourself or your property or your death however caused arising out of your participation in this activity.

I HEREBY ACKNOWELDGE AND AGREE that the sport of gymnastics has inherent risks. I have full knowledge of the nature and the extent of all the dangers and risks associated with gymnastics including but not limited to sprained, fractured, and broken body parts, death, eye injuries, facial injuries, head injuries, and back injuries. I further acknowledge that the above list is not inclusive of all possible risks associated with the Cornell Gymnastics Club, and that the above list in no way limits the extent or reach of this release and covenant not to sue. I voluntarily assume the risks associated with this activity. Further, if it is determined that one section of this agreement is not enforceable, the rest of the agreement shall survive that section. Finally, I understand and accept that the Cornell Gymnastics Club is an independent organization and that Cornell University is not involved in the supervision, instruction or running of the club.

Waiver and Assumption of Risk

In consideration of my participation in the Cornell Gymnastics Club, I, the undersigned, on behalf of myself, my heirs, representatives, and executors, agree to release immediately and hold harmless Dean Altes, David Collum,

> Eugene Madsen, Phil Rach, Cornell University and the Cornell Gymnastics Club, their officers, trustees, agents, and employees from any cause of action, claims, or demands of any nature, which I, my heirs, representatives or executors may now or in the future have, on account of personal injury, property damage, death or accident of any kind, arising out of or in any way related to my participation in the Cornell Gymnastics Club, whether that participation is supervised or unsupervised, however the injury or damage is caused.
>
> I hereby certify that I have full knowledge of the nature and extent of the risks inherent in this sports activity and that I am voluntarily assuming the risks. I understand that I will be solely responsible for any loss or damage, including death, I sustain while participating and that by this agreement I am relieving, Dean Altes, Jayme Altes, David Collum, Eugene Madsen, Phil Rach, Cornell University and the Cornell Gymnastics Club, their officers, trustees, agents and employees of any and all liability for such loss, damage, or death.
>
> I certify that I am in good health and that I have no physical limitations that would preclude my safe participation.
>
> I further certify that I am of lawful age (18 years or older) and otherwise legally competent to sign this agreement. I understand that the terms of this agreement are legally binding and I certify that I am signing this agreement, after carefully reading it, and with full knowledge and understanding of its terms, of my own free will.
>
> [signature and date area omitted]

App.2078a (DDE#449-1 at p.25).

The document shown to the jury at trial, over plaintiff's objection, stated in full:

> EACH PARTICIPANT MUST READ, PRINT HIS/HER NAME, AND SIGN
>
> GYMNASTICS
>
> "I hereby acknowledge and agree that the sport of gymnastics has inherent risks. I have full knowledge of the nature and the extent of all the dangers and risks associated with gymnastics including but not limited to sprained, fractured, and broken body parts, death, eye injuries, facial injuries, head injuries, and back injuries. I further acknowledge that the above list is not inclusive of all possible risks associated with the Cornell Gymnastics Club."
>
> "I hereby certify that I have full knowledge of the nature and extent of the risks inherent in this sports activity."
>
> "I further certify that I am of lawful age (18 years or older) and that I am signing this agreement, after carefully reading it, and with full knowledge and understanding of its terms, of my own free will."
>
> [signature and date area omitted]

App.2080a (DDE#449-1 at p.27).

During trial, plaintiff's counsel spent the morning of October 4, 2012 eliciting testimony from the creator of TumblTrak that was especially devastating to Cornell. The equipment's creator, Doug Davis, testified that "never in [his] wildest dreams" had he envisioned that TumblTrak

would be used in the manner permitted by Cornell, allowing students to access the equipment without having received any safety instruction and without having any responsible supervision. App.2903a (N.T. 10/4/12 a.m. at p.28).

That afternoon, counsel for Cornell stood up before the jury and, intending to use the approved assumption of risk excerpts exhibit from the "Waiver and Assumption of Risk" document in the questioning of a witness, stated as follows:

> MR. WICKERSHAM: Judge, this is the first time that we've had use of this document. Obviously this was prepared at the request of Your Honor. I didn't know if it was appropriate for you to give an instruction to the jury that this is not the actual document but was something that you asked counsel to piece together.

App.2985a (N.T. 10/4/12 p.m. at p.32).

Immediately recognizing the immensely harmful consequences that could flow from Cornell's counsel's comment, the district judge adjourned the trial, dismissed the jury from the courtroom, and expressed at considerable length his profound irritation and disappointment with Cornell's counsel for having provided the above–quoted information to the jury. App.2985a-92a (N.T. 10/4/12 p.m. at p.32-39). The district judge immediately observed that Cornell's

counsel's statement "was a blatant attempt to tell the jury that essentially this was something else but the Judge is keeping it from them, leaving them to guess what it could be that would be kept from them, possibly something that said waiver, assumption of the risk and the like, since we spent time on those questions on voir dire." App.2989a (*id.* at p.36). The district judge also, on his own motion, preserved plaintiff's ability to move for a mistrial following any verdict against plaintiff and in favor of Cornell. App.2988a (*id.* at p.35).

At the conclusion of this lengthy trial, the jury — after only three hours of deliberations — returned a verdict in favor of Cornell and against plaintiff. The jury's verdict was based on a single finding: its answer of "no" to the very first jury verdict interrogatory, asking whether Cornell was negligent. App.5485a (N.T. 10/26/12 at p.56). What the district judge had feared had in fact come to pass.

Following the district court's entry of judgment in favor of Cornell, plaintiff filed timely post–judgment motions for a mistrial and for a new trial. App.1953a, 2082a (DDE#444, 486). The district court eventually denied the mistrial motion, concluding that a district court does not

have the power to allow a party to move for a mistrial following a jury's adjudication of an entire case. App.3a (DDE#500).

With regard to plaintiff's motion for a new trial, the district court concluded that — although counsel for Cornell had violated the district court's orders and instructions by informing the jury that assumption of the risk exhibit consisted of excerpts from a larger document or agreement that the parties had pieced together at the district court's direction — plaintiff could not show that it was "reasonably probable that the verdict was influenced by the resulting prejudice." App.15a-18a (DDE#498 at p.5-8).

The district court's reasoning in support of that court's denial of plaintiff's motion for a new trial is somewhat cryptic, but it appears that the district court concluded plaintiff was unable to show harm resulting from defense counsel's misconduct because the jury found that Cornell was not negligent. App.18a (DDE#498 at p.8). How else plaintiff could have shown prejudice resulting from the misconduct of Cornell's counsel following a defense verdict, given the precise language of a jury verdict slip that did not expressly provide for the jury to consider the issue of waiver (App.5475a-78a (N.T. 10/26/12 at p.46-49)), the district

court's opinion failed to explain. The issue of "waiver" did not appear on the jury verdict slip, because the district court previously had properly ruled the evidence directly bearing on waiver was inadmissible under New York law a "void as against public policy and wholly unenforceable." N.Y. Gen. Oblig. Law §5–362.

Following the district court's entry of its order denying plaintiff's motion for a new trial, Duchesneau filed a timely notice of appeal to this Court. App.1a (DDE#502).

VI. STATEMENT OF FACTS

On October 12, 2006, Cornell University authorized the Cornell Gymnastics Club to operate an "Open Gym Night" during which, in exchange for payment of a specific fee, Cornell students could have access to the gymnasium and all of the gymnastics equipment located therein. App.4186a (N.T. 10/18/12 p.m. at p.9). While attempting a backflip on a trampoline–type device known as a TumblTrak, Randall Duchesneau landed on his head in the center of the TumblTrak, resulting in catastrophic paralyzing spinal injuries, including a C–5/C–

6 dislocation, which has left him a permanent quadriplegic. App.4192a-93a (N.T. 10/18/12 p.m. at p.15-16); 3247a (N.T. 10/9/12 p.m. at p.58).

On the night of the accident, Duchesneau went to Cornell's Teagle Hall gymnastics facility in order to use some of the equipment there — specifically, the mats and the TumblTrak. App.4186-92 (N.T. 10/18/12 at p.9-15). Cornell knew that the Gymnastics Club was using the university's gymnastics facility, as Cornell had approved all sessions in advance by scheduling gym time through its Department of Athletics, which was responsible for the operation of Teagle Hall. App.6431a-32a (Gantert video dep. displayed to jury).

During "Open Gym" night, students with varying degrees of experience, including little to no experience in gymnastics, were permitted to use practically any of the Olympic–type gymnastics equipment they wanted, regardless of their skill set and without any type of screening, instruction, or direct supervision whatsoever. App.5279a (N.T. 10/25/12 a.m. at p.34). As long as someone was a Cornell student, even if he or she had never used or had instruction on how to use the equipment, the student was permitted to use the gymnastics equipment. *Id.* Although Cornell prohibited the use of the

trampoline during "Open Gym" night for safety reasons, all of the other equipment, including the uneven parallel bars, high bar, and the TumblTrak, were available for use. App.2715a-16a (N.T. 10/3/12 a.m. at p.69-70); 4155a, 4160a (N.T. 10/18/12 a.m. at p.81, 86). At trial, plaintiff claimed that Cornell was both negligent and reckless in its operation and supervision of "Open Gym," as the university failed to adopt and enforce any policies for the screening, orientation, instruction, or spotting of student participants on the equipment made available for use.

Duchesneau testified that although he had limited gymnastics experience as a young child, he was allowed to use Cornell's TumblTrak on his own without first having been cleared by a qualified instructor and, further, without any direct supervision by a qualified spotter. App.4121, 4156a-57a (N.T. 10/18/12 a.m. at p.47, 82-83). Duchesneau further testified that he did not know that one should be spotted or supervised on the TumblTrak at Cornell because there were no rules or policies given to him or anyone present to direct that the TumblTrak be used only with supervision. App.4155a-61a, 4173a (*id.* at p.81-87, 99). Moreover, Duchesneau had used the TumblTrak previously and seen

others use it previously at Teagle without any supervision and without incident. App.4161a-63a (*id.* at p.87-89).

This standardless and precautionless policy on "Open Gym" night was strikingly dissimilar from the ordinary policy followed by Diane Beckwith, an experienced gymnastics coach and physical education instructor of a gymnastics course at Cornell. Beckwith testified that, in her class, no student is permitted to use the TumblTrak and certainly would never be allowed to attempt an aerial maneuver such as a back flip without the presence of a qualified instructor (usually herself) for the safety of the gymnasts. App.6508a (D. Beckwith video dep. displayed to jury).

On the night of this accident, after having successfully completed a total of only three or four back flips (including two back flips earlier on the night of the accident) on the TumblTrak at Teagle, and never thinking that it may have been unsafe to do so or that it may be improper or dangerous to do so without a spotter, Duchesneau attempted a back flip, and, as is common to novice or beginner gymnasts performing this maneuver, under–rotated, tragically landing

on his head in the middle of the TumblTrak and dislocating his neck. App.4192a-93a (N.T. 10/18/12 p.m. at p.15-16).

The evidence demonstrating the negligence of Cornell, including how the university chose to operate its facility and as conveyed to the jury by not only plaintiff's gymnastics expert but, perhaps more significantly, fact witnesses called as on cross-examination in plaintiff's case–in–chief, was compelling. Al Gantert, head of the Cornell Department of Athletics and Physical Education and the person responsible for the safe use of the Teagle Hall athletic facility, admitted that prior to this accident, no one created or enforced any rules or policies for the safe use of any of the gymnastics equipment (including the TumbleTrak) by students during "Open Gym" night. App.6435a-36a, 6439a (Gantert video dep. displayed to jury). There existed no written policies or procedures on how to safely use the equipment, and there was no coaching, screening, or spotting required of the students. App.4157a-59a (N.T. 10/18/12 a.m. at p.83-85). Cornell even neglected to post the safety poster that had been provided with the TumblTrak. App.2420-21a (N.T. 10/2/12 p.m. at p.56-57). Safety manuals promulgated by the USAG

(United States Gymnastics) and GymCert were never provided or made available for reference, either. *Id.*

At trial, the jury heard testimony that Cornell recognized that Teagle Hall had not been properly supervised prior to this accident. Approximately nine months before this accident, Gantert closed the gym at Teagle Hall after he had learned that there may have been students using the equipment who were not supervised by adults with the requisite experience in gymnastics, and he refused to reopen the facility for "Open Gym" until he personally interviewed the adult advisors of the Cornell Gymnastics Club and was satisfied with their qualifications for supervising. Gantert testified:

> Q. In early 2006 did you establish a procedure whereby you would personally vet the advisors of the Cornell Gymnastics Club before allowing the club to use the Teagle facility?
>
> A. I wanted to interview them, yes.
>
> Q. Personally?
>
> A. Yes.
>
> Q. Why did you want to interview them personally?
>
> A. To be satisfied with their qualifications for supervising.
>
> Q. What qualifications were you looking for that would satisfy you during this vetting process with respect to the

> advisors who would be supervising the Cornell Gymnastics Club while they were using the Teagle Hall facility?
>
> A. That they were experienced with gymnastics.
>
> Q. What type of experience level were you looking for that would satisfy your requirement in gymnastics for people who supervise in gymnastics? How much experience are we talking about?
>
> A. Minimum would be that they've put some time in as gymnasts and an ideal would be that there was some prior coaching experience, but that wasn't necessarily a requirement. They needed to know what they were looking at when they were in a gymnasium with gymnasts.
>
> Q. And, again, this is for the safety of the students?
>
> A. Certainly.

App.6438a (Gantert video dep.).

Under New York law, all gymnasium owners and/or operators have a non–delegable duty to provide for reasonable supervision and care to prevent foreseeable injury. The evidence at trial was that Cornell recognized its obligation to provide a reasonably safe facility. Gantert further testified:

> Q. Well, did someone — did you require that the person supervising the gymnastics facility have gymnastics experience and gymnastics background?
>
> A. That is something I preferred.

Q. Did you require it?

A. Yes, I suppose.

App.6433a (*id.*).

Gantert, however, violated his own standards and never interviewed Torrey Jacobs, the Cornell Gymnastics Club Advisor who was the only non–student advisor present on the night of plaintiff's accident. App.2389a (N.T. 10/2/12 p.m. at p.25). None of the other non–student gymnastics club advisors interviewed or ever interacted with Jacobs, either. App.2404a (*id.* at p.40). Had Gantert conducted an interview, he would have learned that Jacobs had no gymnastics experience, whatsoever. At trial, Jacobs admitted that she did not have the expertise, due to the absence of a background in gymnastics, to ascertain whether or not someone was doing anything wrong on the equipment (including the TumblTrak) at Teagle so that she could direct them on or off the equipment or intercede if what they were attempting was beyond their skill set or required a spot. Jacobs specifically admitted that, if it had been explained to her that her responsibility was to supervise gymnastics activities on the equipment, she would

never had undertaken the role of an advisor to the Cornell Gymnastics Club. App.2412a (*id.* at p.48).

The potential danger that Gantert recognized when he previously shut down the gym for not having a qualified supervisor present was eventually and tragically realized. On the night of plaintiff's accident, Jacobs, who had no experience or familiarity with any of the equipment in Teagle Hall and who had not even been provided with the TumblTrak handbook (or instructional videotape) by Cornell, positioned herself so that she was located where she could not see the students, including Duchesneau, on the TumblTrak. App.2441-44a (*id.* at p.77-80). Jacobs admitted that, instead of supervising gymnastic activities at the time Duchesneau dislocated his neck, she was most likely reading a book and/or knitting out of boredom. *Id.*

The numerous failures committed by Cornell in the way it permitted students to use potentially dangerous equipment without any rules or proper supervision on the night of this accident was unequivocally not the way the TumblTrak should have been used. Doug Davis, the designer and originator of the TumblTrak, testified in plaintiff's case at trial as on cross–examination. According to Davis and the safety

manual he authored that accompanied the TumblTrak sold to Cornell, the TumblTrak should be used "under proper supervision only." Davis testified as follows:

> Q. All right. Let's take a look at number two, if we could. "The TumblTrak should be used under proper supervision only." Are those your words?
>
> A. Yes.
>
> Q. Tell us why you put that in your owner's manual.
>
> A. For the sake of safety, proper supervision is absolutely a necessity.
>
> Q. Did you intend this TumblTrak to be used by anybody at any time by just coming in and just getting on that surface and jumping and twisting and flipping and so forth? Was that your intention, sir?
>
> A. Never in my wildest dreams, no.
>
> Q. Well, when you say never in your wildest dreams, what was your contemplation of how a consumer was to use your TumblTrak in terms of supervision?
>
> A. Well, first of all, it was designed to be used as a training device for gymnastics–related activities, and any of those types of gymnastics activities should be supervised, always, by an expert, by someone that knows how to teach and how to coach.

App.2902a-03a (N.T. 10/4/12 a.m. at p. 27-28).

Further, according to Davis, the manner in which Cornell allowed its gymnastics facility to be operated, with an unqualified supervisor such as Jacobs and without any rules for the screening and spotting of students using the TumblTrak, was incompatible with how he expected his equipment to be safely used:

> Q. Okay. "Use only under the supervision of a qualified spotter." And what would be your definition of a qualified spotter?
>
> A. Someone that has the training to ascertain that the participant could safely do the skill, and, if necessary, physically spot them and help them be safe.
>
> Q. From your view of this spot — of this case, did Torrey Jacobs qualify as a qualified spotter?
>
> MR. WICKERSHAM: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: No.
>
> BY MR. ROTHWEILER:
>
> Q. And why didn't she? Why didn't she meet the criteria that you set out in your warning?
>
> A. My understanding is she had no background whatsoever in gymnastics. There is no way she could judge what was safe and what wasn't.

> Q. So when you put together the warning, your contemplation is that she's not the person you're talking about?
>
> A. Never.

App.2926a (*id.* at p 51).

Davis specifically testified at trial that "if they [Cornell] don't give the proper training and warnings and supervision, it's an injury waiting to happen." App.3030a (N.T. 10/4/12 p.m. at p.77).

> Q. It's an accident waiting to happen, isn't it?
>
> A. Yes.

Id.

In short, this was not a case in which a jury would find that the weight of the evidence concerning negligence preponderated in Cornell's favor, unless the jury had something else on its mind, such as the legally impermissible consideration of waiver.

VII. SUMMARY OF THE ARGUMENT

Under New York law, a signed waiver is recognized as so toxic to and destructive of a plaintiff's ability to recover for personal injuries against the negligent operator of a gymnasium that the waiver is declared void as against public policy and inadmissible into evidence. N.Y. Gen. Oblig. Law §5–326. Nevertheless, at the trial of this case, counsel for Cornell improperly engaged in a deliberate campaign to convey to the jury that plaintiff Randall Duchesneau had in fact executed such a waiver of all liability in favor of Cornell.

Cornell's counsel's misconduct culminated in a statement to the jury about an exhibit displayed to the jury, containing Duchesneau's signature, that the presiding district judge immediately recognized was "a blatant attempt to tell the jury that essentially this was something else but the Judge is keeping it from them, leaving them to guess what it could be that would be kept from them, possibly something that said *waiver*." App.2989a (N.T. 10/4/12 p.m. at p.36) (emphasis added). In response, the district judge harshly chastised Cornell's counsel, repeatedly told Cornell's counsel that what he had done was "wrong," told Cornell's counsel never to do it again, and *sua sponte* preserved

plaintiff's ability to move for a post–verdict mistrial in the event that the jury ruled in Cornell's favor following the trial's conclusion. App.2985a-92a (*id.* at 32-39).

Unfortunately, after the jury verdict in Cornell's favor that the district court had foreshadowed became a reality, the district court denied plaintiff's motion for a new trial. While the district court acknowledged that Cornell's counsel had committed misconduct, the district court believed that a pattern of misconduct was both required and lacking and that plaintiff could not show that it was reasonably probable that the jury's verdict finding Cornell not negligent was influenced by Cornell's counsel's misconduct. In so ruling, the district court committed errors of law and abused its discretion.

Under New York law, the district court was required to keep out of evidence any and all portions of the Waiver and Assumption of Risk document that Duchesneau had executed in Cornell's favor. By erroneously allowing the assumption of risk portions of those documents into evidence as a defense exhibit, in violation of New York law, the district court laid the groundwork for Cornell's counsel to

improperly communicate to the jury that Duchesneau had in fact signed a waiver.

Communicating to the jury only once that Duchesneau had signed a waiver is damaging enough, under applicable law, to require a new trial. Here, however, Cornell's counsel's misconduct in this regard was not merely an isolated incident, but instead rose to the level of a pattern. Moreover, the district court's attempt to portray the misconduct as harmless cannot be upheld, because the existence of a waiver is directly relevant to Cornell's duties and potential breaches thereof, and because the jury verdict slip did not allow the jury to take waiver into account other than in deciding whether or not Cornell was negligent. Because here it was reasonably probable that Cornell's counsel's misconduct influenced the jury's verdict in favor of Cornell, the district court abused its discretion in denying Duchesneau's motion for a new trial.

For these reasons, this Court should reverse the district court's denial of plaintiff's motion for a new trial and remand this case for a new trial at which no portion of the "Waiver and Assumption of Risk" document signed by plaintiff is admissible into evidence.

VIII. ARGUMENT

A. The District Court Erred As A Matter Of Law By Allowing The Introduction Into Evidence Of Any Portion Of The "Waiver and Assumption of Risk" Document

1. Standard of review

The meaning and application of the New York statute prohibiting any use of any portion of an agreement purporting to exempt or exculpate from liability the operator of a gymnasium or place of recreation, *see* N.Y. Gen. Oblig. Law §5–326, presents a question of law over which this Court exercises plenary review. *See United States* v. *Soto*, 539 F.3d 191, 194 (3d Cir. 2008) ("When reviewing a question of law, or a District Court's interpretation of a statute, we exercise plenary review.").

2. N.Y. Gen. Oblig. Law §5–326, as construed by New York state appellate courts, required the exclusion in its entirety of the "Waiver and Assumption of Risk" document signed by Duchesneau

This is a diversity case governed by the substantive law of New York State. A New York statute titled "Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar

establishments from liability for negligence void and unenforceable" provides in full:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

N.Y. Gen. Oblig. Law §5–326.

The New York State Supreme Court, Appellate Division, Third Department, in *Brancati* v. *Bar–U–Farm*, 583 N.Y.S.2d 660 (N.Y. Sup. Ct. App. Div. 3d Dep't 1992), recognized that "[i]t is now clear that a release found to be unenforceable under General Obligations Law §5–326 cannot be used to establish one's express assumption of the risk."[1]

[1] Cornell University is located in Ithaca, New York, within the territorial boundaries of the Third Department of the New York State Supreme Court, Appellate Division. Had Duchesneau sued Cornell in state court in Ithaca, where his injury occurred, the Third Department rulings discussed herein would have operated as binding precedent to preclude Cornell's introduction into evidence of any portion of the "Waiver and Assumption of Risk" document signed by Duchesneau.

Here, the district court correctly held that the "Waiver" aspect of the "Waiver and Assumption of Risk" agreement was unenforceable under §5–326, but the district court nevertheless allowed that same document to be used to establish Duchesneau's express assumption of the risk. App.6a (DDE#382 at p.2); 2080a (DDE#449-1 at p.27). By allowing any portion of the "Waiver" document to remain in evidence, the district court erroneously enabled counsel for Cornell to convey to the jury that Duchesneau had in fact executed a waiver that was being kept hidden from the jury's view. The district court's ruling, which allowed a portion of the "Waiver and Assumption of Risk" document into evidence, was contrary to the New York state appellate court's ruling in *Brancati*.

The Third Department's decision in *Brancati* cited as authority that same court's ruling a year earlier in *Owen* v. *R.J.S. Safety Equip., Inc.*, 572 N.Y.S.2d 390 (N.Y. Sup. Ct. App. Div. 3d Dep't 1991), *aff'd*, 591 N.E.2d 1184 (1992). As in this case, *Owen* involved a document that the plaintiff signed containing *both* a waiver of liability *and* express language assuming the risk of bodily injury or death. In rejecting the defendants' argument that the assumption of risk language contained

in the document should remain admissible even if the waiver aspect of the document was not admissible, the court explained:

> Defendants also contend that irrespective of the enforceability of the release or waiver provision of the agreement, the express assumption of risk is a separate and distinct provision of the agreement which is not affected by the public policy embodied in General Obligations Law § 5–326. We disagree. The statute applies to agreements which exempt the facility's owner or operator from liability for damages caused by the negligence of the owner, operator or person in charge of the facility, and the purported effect of the express assumption of risk provision is to exempt defendants from liability for bodily injury, death or property damage due to defendants' negligence.

Id. at 394.

Accordingly, the court in *Owen* held that the assumption of risk language contained in the waiver document at issue in that case was no more admissible in evidence than the waiver language. The district court's ruling in this case is directly contrary to the New York state appellate court's ruling in *Owen*. *See also Garnett* v. *Strike Holdings LLC*, 882 N.Y.S.2d 115, 116–17 (N.Y. Sup. Ct. App. Div. 1st Dep't 2009) (holding that §5–326 barred any use of a document titled "Express Assumption of Risk, Waiver, Indemnity and Agreement Not to Sue" to prove either waiver or assumption of the risk); *Applebaum* v. *Golden Acres Farm & Ranch*, 333 F. Supp. 2d 31, 35–37 (N.D.N.Y. 2004)

(holding that a release void under §5–326 could not be used to prove express assumption of the risk).

Instead of following the holdings of the above–cited, directly applicable New York state appellate court rulings demonstrating the inadmissibility of any portion of a void waiver to establish assumption of the risk, the district court in this case apparently relied on *DiMaria* v. *Coordinated Ranches, Inc.*, 526 N.Y.S.2d 19 (N.Y. Sup. Ct. App. Div. 2d Dep't 1988), as Cornell had urged (App.1803a (DDE#387 at p.4), to hold that it was proper to admit in a redacted manner the assumption of the risk language from the "Waiver and Assumption of Risk" document that Duchesneau signed. *DiMaria*, however, provides no support for the district court's ruling.

Unlike this case, *DiMaria* did not involve a situation where the waiver portion of a "Waiver and Assumption of Risk" document was excluded but the assumption of risk portion was allowed into evidence.[2]

[2] To be sure, the Second Appellate Department's cryptic opinion in *DiMaria* did refer to some aspect of the "guest registration cards and horseback riding sign–up sheets bearing [plaintiff's] signature" as having been redacted, but nothing in the *DiMaria* opinion communicates or suggests that whatever redactions that did occur were based on N.Y. Gen. Oblig. Law §5–326. *See* 526 N.Y.S.2d at 20.

Rather, *DiMaria* involved only assumption of risk language, and the appellate court in *DiMaria* found that §5–326 did not apply because the particular assumption of risk language at issue in that case "cannot be interpreted so broadly as to suggest to the jury that the defendant is exempt from liability for damages caused by its negligence." *Id.* at 20. The appellate court then noted that "[n]either is the subject language susceptible to an interpretation that the plaintiff, by affixing her signature to the documents, expressly assumed *all risks* associated with the use of the facilities." *Id.* (emphasis added).

By contrast, in this case the assumption of risk aspect of the "Waiver and Assumption of Risk" document that Duchesneau signed is itself so broad as to violate §5–326 by exempting Cornell for liability for its own negligence and by stating that Duchesneau expressly assumed *all risks* associated with the use of the gymnastics facilities. App. 2078a, 2080a (DDE#449-1 at p.25, 27). For these reasons as well, the district court erred in relying on *DiMaria*.

Last but not least, the court's discussion of assumption of the risk in *DiMaria* concludes with the statement: "In any event, the jury never reached the issue of assumption of risk." 526 N.Y.S.2d at 20. The

DiMaria decision's observation in that regard serves to render as dicta that opinion's preceding discussion about whether or not the admission of the evidence related to assumption of the risk was erroneous.

The *DiMaria* case and the other New York state appellate and federal district court rulings discussed above do share a critically important understanding of N.Y. Gen. Oblig. Law §5–326, which is that either waiver *or* assumption of risk agreements are void against public policy whenever their intent is to completely insulate or exculpate the operator of a gymnasium from liability. In *DiMaria*, such a complete exculpation from liability was not the purpose of the assumption of risk language involved. By contrast, here one cannot read the entirety of the "Waiver and Assumption of Risk" document that Duchesneau signed without concluding that each and every portion of it was drafted and included with the intent to completely insulate and exculpate Cornell from any and all liability whatsoever.

The redacted version of the "Waiver and Assumption of Risk" agreement that the district court allowed into evidence over plaintiff's objections violated N.Y. Gen. Oblig. Law §5–326, because even as redacted the document still consists of Duchesneau's affirmative

statements that he acknowledges and agrees that he has "full knowledge of the nature of the extent of ***all the dangers and risks associated with gymnastics including but not limited to: sprained, fractured and broken body parts, death, eye injuries, facial injuries, head injuries, and back injuries.***" App.2080a (DDE#449-1 at p.27). This language can only reasonably be understood as Duchesneau's assuming the risk of all possible injuries from participating in the activities in question, which is precisely what New York state law, contained in N.Y. Gen. Oblig. Law §5–326, expressly renders void against public policy.[3]

For the reasons set forth above, this Court should hold that the district court erred as a matter of New York law in allowing any portion of the "Waiver and Assumption of Risk" document that Duchesneau

[3] The assumption of risk language allowed in *DiMaria* was far more limited, stating only "I recognize that the sporting facilities provided at PINEGROVE have a certain amount of danger connected with them." *See DiMaria*, 526 N.Y.S.2d at 20. Accordingly, the assumption of risk language allowed into evidence in *DiMaria* could not be understood to relinquish any right to recovery. By contrast, the sweeping and all–inclusive assumption of risk language that Cornell used in the Waiver and Assumption of Risk document *was intended* to extinguish entirely an injured person's ability to recover for whatever injuries were incurred, and therefore New York law, as codified in N.Y. Gen. Oblig. Law §5–326, prohibits its introduction into evidence.

signed to be admitted into evidence at trial. That error had devastating consequences, as it allowed counsel for Cornell to signal to the jury that Duchesneau had in fact signed an agreement containing additional provisions that the district court had kept from the jury, causing the jury to understand, as the district court promptly and perceptively recognized, that Duchesneau had executed a waiver of liability in Cornell's favor.

B. The District Judge Clearly Abused His Discretion In Holding That Cornell's Counsel's Improper Introduction Of The Defense Of Waiver Into This Proceeding Was Harmless Because The Jury Found That Cornell Was Not Negligent

1. Standard of review

This Court reviews a district court's denial of a motion for a new trial for abuse of discretion except when the district court's decision is based on the application of a legal precept, in which case this Court's review is plenary. *See Curley* v. *Klem*, 499 F.3d 199, 206 (3d Cir.2007) (citing *Honeywell, Inc.* v. *American Standards Testing Bureau, Inc.*, 851 F.2d 652, 655 (3d Cir.1988)).

2. Cornell's relentless efforts to cause the jury to conclude that plaintiff had signed a waiver in Cornell's favor, despite the district court's prohibition on such evidence, mandates a new trial

The district court's opinion in support of its order denying plaintiff's motion for a new trial recognizes that Cornell's counsel engaged in misconduct in seeking to have the jury conclude that plaintiff had executed a waiver in Cornell's favor. App.15a-18a (DDE#498 at p.5-8). However, the district court nevertheless concluded that plaintiff had failed to establish that Cornell had engaged in a "pattern of misconduct" sufficient to justify a new trial. App.16a (*id.* at p.6).

As plaintiff now turns to demonstrate, the district court erred both in concluding that plaintiff had to demonstrate a pattern of misconduct to justify a new trial and in concluding that Cornell's counsel's misconduct did not rise to the level of a pattern.

To begin with, it is not the overall quantity of an attorney's misconduct, but rather its impact, that must control whether a new trial is necessary. In *Blanche Road Corp.* v. *Bensalem Township*, 57 F.3d 253, 262 (3d Cir. 1995), this Court upheld the district court's conditional grant of a new trial (after overturning that court's entry of judgment as a matter of law) based on the *district court's* conclusion

that a new trial was necessary due to a pattern of plaintiff counsel's misconduct. However, *Blanche Road* did not announce any sort of blanket, unequivocal holding that a pervasive pattern of opposing counsel's misconduct must be established before a new trial is necessary or appropriate. Furthermore, no other Third Circuit case has adopted or imposed any such "pattern of misconduct" requirement. *See*, *e.g.*, *Fineman* v. *Armstrong World Indus.*, 980 F.2d 171, 207 (3d Cir.1992) (recognizing that "often" — but not *always* — "a combination of improper remarks are required to persuade us of prejudicial impact").

A hypothetical helps illustrate this point. Assume a defendant has been sued in a wrongful death lawsuit after having been acquitted in a criminal trial of having caused the death in question. Assume further that the defendant had signed a confession that was ruled inadmissible in the criminal trial due to police misconduct. Assume finally that in the course of referencing for the first time in the civil trial an exhibit signed by the defendant to be used in examining a witness, counsel for the plaintiff stated in open court, standing before the jury, that "This document is not the defendant's signed murder confession, which the Court has ruled is inadmissible in this case."

Assuredly, in these circumstances, after the jury found in plaintiff's favor, a new trial would be required (assuming the other evidence was such that the jury could have reasonably ruled in favor of either party) because, once having heard counsel's truthful statement that the defendant had signed a confession to murdering the victim, surely the jury could never be expected to "un–remember" that fact or otherwise fairly consider only the admissible evidence concerning whether the defendant had caused the victim's death.

Similarly, here, New York state law statutorily precluded under the rubric of public policy the admission into evidence that the plaintiff had signed a waiver of liability in favor of Cornell. For that reason, the district court, before trial, excluded the signed waiver from evidence. App.6a (DDE#382 at p.2). But counsel for Cornell did not need to state or imply more than once that plaintiff had signed a waiver in Cornell's favor in order for the existence of such phantom evidence to fatally derail plaintiff's case. Rather, just as one mention of a signed confession would be as harmful as multiple mentions, here one statement before the jury by Cornell's counsel intended to cause the jury to conclude that Duchesneau had signed a waiver in Cornell's favor was more than

sufficient to justify a new trial after the jury's "no negligence" finding in favor of Cornell.

To be clear, plaintiff's argument is not that a pattern of misconduct by counsel can never justify a new trial. Rather, plaintiff maintains that even one instance of misconduct, if consequential enough, can suffice to justify a new trial, and that this is such a case — even though, as plaintiff now turns to demonstrate, Cornell's misconduct at trial did in fact constitute a pattern of improper behavior.

As counsel for Cornell was well aware, the district court's most important pretrial evidentiary decision by far involved the waiver agreement, which was the subject of plaintiff's fifty–page motion *in limine*. App.1308a (DDE#254). The parties undoubtedly understood that evidence of a waiver agreement plaintiff had signed to use Cornell's gymnasium would be fatal to plaintiff's case. For this reason, the evidentiary issues of whether and to what extent, if any, the waiver was admissible were vigorously fought. After briefing and argument on this issue, the district court ruled, pursuant to New York law, that the jury would not be allowed to consider waiver language at all. App.6a (DDE#382 at p.2). The Court postponed until the time of trial deciding

what specific language, if any, from the document could be presented to the jury and what the document would then be called. Before the district court decided these issues, Cornell's counsel repeatedly referred to the waiver as a "participation agreement" in his opening statement to the jury:

> MR. WICKERSHAM: Moreover, mainstream gymnasiums and routine gymnastics operations of facilities around the country require the filling out of a participation agreement which set forth for participants the risks inherent in gymnastics.

App.2311a (N.T. 10/1/12 a.m. at p.78).

> MR. WICKERSHAM: And Mr. Duchesneau is not going to disagree. He'll tell you that the first time that he came to a gymnastics club practice, he was stopped at the door by the officers of the club who were doing what they did on any other night, they stopped him to find out if he was willing, and when he said that yes, I do, they made sure that he paid the dues for the club and to the club and that he completed the participation agreement that he was required.

Id.

> MR. WICKERSHAM: Mr. Duchesneau does not dispute that he did both, paid both and signed that participation agreement in order to participate in the club. That participation agreement states in part that each participant must read, print his or her name and sign.

App.2311a-12a (*id.* at p.78-79).

> MR. WICKERSHAM: "I am signing this agreement after carefully reading it and with full knowledge and understanding of its terms of my own free will."

App.2312a (*id.* at p.79).

> MR. WICKERSHAM: Signing such a participation agreement and choosing to voluntarily participate are just the types of life lessons that we learn in college, to make an informed decision to engage in an activity or not and the consequences.

Id.

Opening statements were followed by the district court's directing all counsel to refer to the waiver agreement as "the document." App.2363a (N.T. 10/1/12 p.m. at p.46). The district court's ruling was intended to prevent the jury from reflecting on their own life experiences in signing waivers to participate in athletic activities, and to dispel any impression that plaintiff had entered into a legally enforceable "hold harmless" agreement with Cornell that immunized Cornell from this type of lawsuit. Yet, on the next day, October 2, 2012, Cornell's counsel — in violation of the district court's explicit directives — continued to refer to the document as a "participation agreement." The district court immediately called counsel to sidebar and directed Cornell's counsel to

correct his prejudicial characterization of the document as an agreement before the jury:

> MR. TUCKER: I'm going to show only to you a participation agreement that Mr. Duchesneau signed, and I want you to tell us what date that is...
>
> (SIDEBAR)
>
> MR. ROTHWEILER: ...If I can finish, Mr. Tucker? Now, my objection is two fold. Number one, he called it the agreement, the record will reflect. And we've already … and I want to be clear about this, Your Honor, because I know you've been very careful —
>
> THE COURT: I think I used the word the document.
>
> MR. ROTHWEILER: You've said the document. You actually said that in Court yesterday. You said, very firmly said, because I wrote it down, that you wanted this referred to as the document. I heard you loud and clear. And now it's being referred to as the agreement, and I think that's beyond what the Court ruled.
>
> THE COURT: And that will be corrected either by counsel or by me...
>
> (SIDEBAR CONCLUDES)
>
> MR. TUCKER: Based upon conversation at sidebar, this is not an agreement, it is a form that we are referring to. And I apologize for saying that in front of the Court.
>
> THE COURT: It's a document, nothing more than that. Thank you very much. The question's withdrawn. You may move on.

App.2466a-70a (N.T. 10/2/12 p.m. at p.102-06).

Thereafter, the district court directed all counsel to work on language in the document that would be presented to the jury. The following day, October 3, 2012, Cornell presented to plaintiff's counsel a proposed document that included ellipses, which resulted in a hearing at which the following exchanges occurred:

> MR. SHERRY: There are … just make sure that the door is closed. As Your Honor is aware, yesterday a decision was rendered by this Court about certain … certain portions of the document being excised and a new document created, and there was vigorous discussion about it, about what type of language can be in. Mr. Wickersham this morning provided me with a copy of what I'll call the first version
>
> THE COURT: I have it.
>
> MR. SHERRY: I'll just … I'll just give you the first version of it first. The first version I objected to, Your Honor, because there were ellipses included which indicated to the jury –
>
> THE COURT: That's version A?
>
> MR. SHERRY: Yeah.
>
> THE COURT: One second, please. All right. Let me identify what I have, and you can tell me what you're referring to. I have a … basically, yellow highlights that's otherwise unannotated, and then I have a red marker version A and a red marker version B, both with … in parentheses, one says as is, version A, and version B, objection, I believe.
>
> MR. WICKERSHAM: Yes, sir.

> THE COURT: All right. So which one are you speaking of?
>
> MR. SHERRY: Well, the one I just handed up to Mr. Leahy was the one that actually had ellipses included just to give Your Honor some context as to how this is continuing to progress, and I objected to it, because the ellipses indicate to the jury that there's more parts of the document there.

App.2693a-94a (N.T. 10/3/12 a.m. at p.47-48).

Cornell's counsel's incessant attempts to indicate to the jury that plaintiff signed a written agreement not to sue Cornell are key to appreciating the intended impact of Mr. Wickersham's eventual statements about the document in front of the jury on October 4, 2012. In opening statements and witness questioning before October 4th, Cornell's counsel had carefully selected the words "participation agreement" to invite the jury to speculate that there was some type of contract or "agreement" between plaintiff and Cornell.

Based on these characterizations alone, it is reasonably probable that the jury would conclude that plaintiff, as a condition of using the Teagle Hall Gymnasium, agreed to a blanket release of liability. But these were only Cornell's first attempts to characterize the document as something that it was not: namely, a legally enforceable agreement. Cornell next attempted, through the use of ellipses in the document, to

telegraph to the jury that the document contained more provisions than the jury was being shown.

The culmination of Cornell's strategy to inform the jury that plaintiff had signed a waiver document occurred on October 4, 2012, following an entire morning's worth of critical testimony from TumblTrak's creator, Doug Davis. Davis testified that "never in [his] wildest dreams" did he envision that the TumblTrak could be used in the manner permitted by Cornell. App.2903a (N.T. 10/4/12 a.m. at p.28). After improperly and repeatedly referring to the waiver as a "participation agreement," and having failed in the attempt to signal to the jury that there was more to the document through the use of ellipses, Cornell's counsel then highlighted the existence of a waiver in the most unambiguous way possible:

> MR. WICKERSHAM: Judge, this is the first time that we've had use of this document. Obviously this was prepared at the request of Your Honor. I didn't know if it was appropriate for you to give an instruction to the jury that this is not the actual document but was something that you asked counsel to piece together.

App.2985a (N.T. 10/4/12 p.m. at p.32).

To understand the extremely prejudicial consequences of Mr. Wickersham's comments, it is useful to study the colloquy sentence by

sentence, taking into consideration when and how this information was transmitted to the jury. Mr. Wickersham's statement occurred the first time the document was being shown to the jury. While the document had been mentioned in the opening and during the testimony of Torrey Jacobs, this was the first time the jury actually saw any portion of the document in writing. The document not only appeared on the big screen in the courtroom but also on the individual jurors' screens in the jury box. To those present, the jurors' focus on the document was palpable.

In his introduction, Mr. Wickersham said, "Judge, this is the first time that we've had use of the document." *Id.* This statement focused the jury's attention on the document. Mr. Wickersham then added, "[o]bviously this was prepared at the request of your Honor." *Id.* This comment heightened the importance of the document, as it now had the approval of the Court. Mr. Wickersham next stated, "I didn't know if it was appropriate for you to give an instruction to the jury that this is not the actual document but was something that you asked counsel to piece together." *Id.* Mr. Wickersham unambiguously signaled to the jury that there was more to the document than what the jury was being shown

and that the document the jury was being shown was not the original document.

Mr. Wickersham's colloquy — which was made in direct contravention of the district court's directives — invited the jury to contemplate what else had originally been included in the document they were seeing on their screens. Under these circumstances, it was reasonably probable that the jury would realize that waiver language was part of the original document, since such language is routinely present in documents executed to participate in athletic and other recreational activities. As the district court had already recognized, a jury's reaction to a redacted document carried the very real potential that jurors would focus on what was being kept from them, rather than what was being given to them, which was why a new document was created. App.2198a (N.T. 9/25/12 a.m. at p.10). Counsel for Cornell's statement to the jury undermined all of the efforts to prevent the jury from considering what had been removed from the document.

Mr. Wickersham's statements led to an immediate objection, which the district court sustained. App.2985a (N.T. 10/4/12 p.m. at p.32). Right after the district court sustained the objection, the jury was

excused. *Id.* Since the dismissal occurred shortly after that day's lunch break had ended, the jury surely concluded that the Court stopped trial because of what Mr. Wickersham had just said about the document they were being shown for the very first time: "this is not the actual document but was something that [the Court] had asked counsel to piece together." Under these circumstances, it was inevitable that the jury would understand that the complete version of the document contained waiver language.

Such waivers are familiar to all of us. They are commonly encountered in such activities as skiing, swimming, and other sports and recreational activities at both private and public facilities. The jury's correct suspicion that plaintiff had signed a waiver in favor of Cornell would make a plaintiff's verdict virtually impossible. Consequently, here it was far more than "reasonably probable" that the verdict in Cornell's favor resulted from the improper remarks of Cornell's counsel implying to the jury that plaintiff had, in the document in question, waived any ability to recover for injuries sustained.

Most revealing of the impact of counsel's statement, though, is not what plaintiff's counsel indicated in the moment on the record, but how the district court reacted to it. The district court recognized immediately that what Cornell had said in front of the jury was so prejudicial as to be toxic to plaintiff's case.

In response, the district court — not plaintiff's counsel — opined that the prejudice the improper comment by Cornell's counsel created was sufficient ground for a new trial. App.2987a-88a (N.T. 10/4/12 p.m. at p.34-35). Plaintiff's counsel heard the district court's question asked in the negative and was presented with an impossible choice: move for a mistrial in a trial perceived to be going well for the plaintiff, or continue trial despite knowing that, if the jury thought a waiver had been signed, plaintiff would almost certainly be precluded from any recovery. *Id.* In response to counsel's discussion about a mistrial, this district court took the extraordinary step of granting counsel leave to move for a new trial at the end of trial even if the verdict was against the plaintiff:

> THE COURT: I think based upon that representation the best the Court can do at this juncture is to grant your leave, Mr. Rothweiler, to make the motion at the end of the case, even if it goes to verdict by jury and the jury comes out against you, to bringing that motion at that time.

> MR. ROTHWEILER: I appreciate that, Your Honor. Thank you very much.

App.2988a (N.T. 10/4/12 p.m. at 35).

This district court's immediate reaction to Mr. Wickersham's improper and prejudicial comments about the Waiver and Assumption of Risk document demonstrates more than anything the pervasive harm that those comments threatened to inflict, and ultimately did inflict, on plaintiff's ability to recover against Cornell:

> THE COURT [to Cornell]: I don't think that Mr. Rothweiler had any objection to your content inquiry because up to that point in time, I think he objected to what to him … we won't talk about what it did to me — but to him, it appeared that it was a blatant attempt to tell the jury that essentially this was something else but the judge is keeping it from them, leaving them to guess what it could be that would be kept from them, possibly something that said *waiver*, assumption of risk and the like, since we spent time on those questions on voir dire.

App.2989a (*id.* at p.36) (emphasis added). This remark reveals the district judge's contemporaneous understanding of what Cornell had attempted to do and its intended impact on the jury.

The transcript demonstrates how serious and prejudicial the district court immediately recognized Mr. Wickersham's comments were:

> THE COURT: Now, Mr. Wickersham

MR. WICKERSHAM: Yes, sir.

THE COURT: sir, you and I have known each other for many, many years and I don't mind telling you I'm frankly hurt by what you did. I just think that you're above that and I don't think that that was necessary. If you have an issue in the case, as the Judge in the case, I've granted you exceptions and Mr. Tucker exceptions throughout all of this. That's the protocol. That's what we're supposed to do as Judges, as lawyers, and as Appellate Courts. As I said, I sit by designation upstairs. Now, if you have an issue with a ruling that this Court makes, it's preserved by an objection, by an exception. But if I tell you not to do something, I expect that it not be done because if you do it, as you've just done here, really you and your client are liable to not only contempt, but more importantly to this Court, planning a mistrial after a week, a month, year of this case. It started in 2005 and if that's the game you want to play, so be it. I won't get sucked into it.

MR. WICKERSHAM: Judge

THE COURT: I'm the Judge in the case.

MR. WICKERSHAM: I appreciate that. So that you know, my intent was much like the request for admissions, to seek guidance on how the document should be introduced.

THE COURT: You were able to conduct an examination I thought adeptly. You covered it the way it was supposed to be covered, you made all the points in the world and better points, quite honestly in that examination, and I don't know why you felt that you had to do what you just did.

MR. WICKERSHAM: It was simply an introductory.

THE COURT: Well, it was wrong.

MR. WICKERSHAM: That was the plain intent.

THE COURT: It was wrong. Don't do it again.

App.2991a-92a (*id.* at 38-39).

As plaintiff now turns to demonstrate, under applicable precedent the district court's denial of plaintiff's motion for a new trial due to Cornell's counsel's misconduct described above must be reversed, regardless of whether that misconduct is viewed as a pattern or merely a fatally prejudicial isolated instance.

3. In accordance with this Court's precedents, the district court's denial of plaintiff's motion for a new trial should be reversed

Although the district court's explanation of its reasons for denying plaintiff's motion for a new trial is not entirely clear, the district court unquestionably agreed that Cornell's counsel violated the district court's orders and instructions when Cornell's counsel informed the jury that the exhibit containing the assumption of the risk language from the "Waiver and Assumption of Risk" document was part of a larger document that the district court was not allowing the jury to see. App.15a-17a (DDE#498 at p.5-7). That information, combined with Cornell's counsel's earlier repeated references to a so–called

"participation agreement" that Duchesneau entered into to gain admission to the gymnasium, deliberately invited the jury to connect the dots to conclude, as the district court immediately recognized, that Duchesneau had signed a waiver of Cornell's liability.

In addition to recognizing that Cornell's counsel acted improperly in advising the jury that the assumption of the risk document was part of a larger document that the district court was not permitting the jury to see, the district court also recognized the devastating effect on plaintiff's case that the jury's understanding that plaintiff had signed a waiver in Cornell's favor would have. Nevertheless, in denying plaintiff's motion for a new trial, the district court ruled that Duchesneau could not show harmful prejudice given the jury's finding that Cornell was not negligent. App.15a-18a (DDE#498 at p.5-8).

The district court's conclusion that the jury's finding of no negligence on Cornell's behalf disproved harmful prejudice flowing from Cornell's counsel's improper introduction of the subject of a signed waiver represents a clear abuse of discretion. The jury verdict slip did not contain any place where the jury was called on to indicate any finding of waiver, because the district court had properly sought, in accordance

with N.Y. Gen. Oblig. Law §5–326, to entirely exclude the issue of waiver or release from the jury's consideration in this case. App.5475a-78a (N.T. 10/26/12 at p.46-49). The district court's opinion further fails to address how the jury, in its verdict slip, could have reflected a finding of waiver or release other than by finding Cornell not negligent.

Indeed, finding Cornell not negligent was the most logical way for the jury to communicate a finding of waiver or release in the absence of any other way to express such a finding. Under New York law, "[t]o establish a cause of action for common–law negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries." *Wendt* v. *Bent Pyramid Productions, LLC*, 970 N.Y.S.2d 138, 140 (N.Y. Sup. Ct. App. Div. 4th Dep't 2013) (internal quotations omitted). Without anywhere else on the verdict slip to take waiver and release explicitly into consideration, it was inevitable that the jury would reflect its finding of waiver or release to vitiate either the existence of any duty or the breach of any duty. *See*, *e.g.*, *Weinberger* v. *Solomon Schechter Sch.*, 961 N.Y.S.2d 178, 181–82 (N.Y. Sup. Ct. App. Div. 2d Dep't 2013) ("[t]he doctrine [of primary assumption of the risk] operates to limit the scope

of the defendant's duty"). A released party neither has a duty, nor therefore can the released party breach any duty, to an injured party.

On the record of this case, the evidence of Cornell's negligence was overwhelming. The district court immediately recognized that Cornell's counsel's comments to the jury were improper and were deliberately intended to cause the jury to conclude that plaintiff had signed a waiver in favor of Cornell. App.2989a (N.T. 10/4/12 p.m. at p.36). As explained above, under New York law the defense of waiver or release is recognized as vitiating the defendant's duty to the plaintiff. Accordingly, in the absence of anywhere else on the jury verdict slip for the jury to take waiver into account, the only place where the jury could and did take waiver into account was in finding Cornell not negligent.

The district court thus clearly abused its discretion in holding that the jury's verdict finding Cornell not negligent prevented plaintiff from establishing harmful prejudice as the result of Cornell's counsel's improper statements to the jury. On the contrary, the jury's finding of no negligence actually establishes the devastatingly harmful effect of Cornell's counsel's improper comments on the jury's ability to fairly and impartially consider the actually admissible evidence.

As this Court has repeatedly explained, "In this circuit, the test for determining whether to grant a new trial in cases involving counsel misconduct is whether the improper assertions have made it reasonably probable that the verdict was influenced by prejudicial statements." *Blanche Road Corp.* v. *Bensalem Township*, 57 F.3d 253, 264 (3d Cir. 1995) (quoting *Greate Bay Hotel & Casino* v. *Tose*, 34 F.3d 1227, 1236 (3d Cir.1994) (in turn citing *Fineman* v. *Armstrong World Indus.*, 980 F.2d 171, 207 (3d Cir.1992))); *see also Dillinger* v. *Caterpillar, Inc.*, 959 F.2d 430, 448 (3d Cir. 1992) ("we are quite clear that the proper application of the procedural rules as well as the interests of justice require that Dillinger, who was seriously injured in the accident, be granted a new trial at which prejudicial inadmissible evidence will not be heard by the jury"); *Habecker* v. *Clark Equip. Co.*, 942 F.2d 210, 216 (3d Cir. 1991) (recognizing that a new trial must be granted unless it is "highly probable that the jury would have reached the same verdict without hearing the inadmissible evidence").

Here, counsel for Cornell labored strenuously both before and during the trial of this case to secure the admission into evidence of the waiver aspect of the "Waiver and Assumption of Risk" document that

Duchesneau signed, recognizing the likely fatal impact on plaintiff's case of the existence of a waiver. Yet even after Cornell erroneously convinced the district court, over plaintiff's objections, to admit a portion of the "Waiver and Assumption of Risk" document into evidence, counsel for Cornell could not resist telling the jury — in violation of the district court's orders and instructions — that what the jury was being allowed to see was only a portion of a larger document, which the district court was not permitting the jury to see in full, that Duchesneau had signed as a condition of using the gymnasium.

Cornell's counsel's impermissible statement immediately offended the district judge's fundamental sense of fairness, as the district judge recognized right away that Cornell's counsel had just deliberately communicated to the jury that Duchesneau had executed a waiver in Cornell's favor. App.2989a (N.T. 10/4/12 p.m. at p.36). The district court thus immediately sought to preserve Duchesneau's ability to obtain a mistrial due to Cornell's counsel's misconduct following any defense verdict. App.2988a (*id.* at p.35).

Inexplicably, however, following the very defense verdict that the district court understandably and immediately understood that the

Cornell's counsel's misconduct was intended to produce, the district court held that plaintiff could not establish prejudice due to the jury's verdict finding Cornell not negligent. Under the proper legal standards set forth above, this Court should hold that the district court committed legal error and abused its discretion in failing to conclude that it was reasonably probable that the defense verdict in this case was influenced by Cornell's counsel's deliberate introduction of waiver into this case. This Court should further conclude that Cornell is unable to establish that it is highly probable that the jury would have reached the same verdict without hearing the inadmissible evidence that Cornell's counsel's comments interjected into this case.

For the reasons set forth above, this Court should reverse the district court's denial of plaintiff's motion for a new trial and direct the district court to prohibit the use of any portion of the "Waiver and Assumption of Risk" document at the retrial of this case.

IX. CONCLUSION

For all of the foregoing reasons, this Court should reverse the denial of plaintiff's motion for a new trial and remand this case for a new trial at which no portion of the "Waiver and Assumption of Risk" document signed by plaintiff is admissible into evidence.

Respectfully submitted,

Dated: September 11, 2013

/s/ *Howard J. Bashman*

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,961 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook font.

Dated: September 11, 2013

/s/ *Howard J. Bashman*
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: September 11, 2013

/s/ *Howard J. Bashman*
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Brief for Appellant is identical to the paper copies filed with the Court.

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: September 11, 2013

/s/ *Howard J. Bashman*
Howard J. Bashman

In the United States Court of Appeals for the Third Circuit

No. 13–1772

RANDALL DUCHESNEAU,
Appellant

v.

CORNELL UNIVERSITY;
CORNELL GYMNASTICS CLUB;
TUMBL TRAK.

On Appeal from the U.S. District Court for the
Eastern District of Pennsylvania, No. 08–cv–4856
(Honorable C. Darnell Jones, II, U.S. District Judge)

JOINT APPENDIX
Volume One of Eleven
(Pages 1a–18a)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RANDALL DUCHESNEAU	:	
	:	
vs.	:	CIVIL ACTION
	:	
CORNELL UNIVERSITY	:	No. 08-4856
	:	

NOTICE OF APPEAL

Notice is hereby given that Randall Duchesneau, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from: (i) the judgment entered November 8, 2012; (ii) the order entered February 20, 2013 denying plaintiff's timely filed motion for a new trial; and (iii) the order entered February 20, 2013 denying plaintiff's motion for a post-defense-verdict mistrial; (iv) the order entered September 28, 2012 granting, in part and denying, in part, plaintiff's motion to strike defendant, Cornell University's affirmative defense of the March 3, 2006 waiver and assumption of risk agreement and plaintiff's motion in limine to preclude all testimony, arguments, evidence exhibits and references pertaining to waivers and assumption of risk agreements at trial; and, (v) the order entered September 28, 2012 granting, in part and denying in part plaintiff's motion in limine to preclude all testimony, arguments, evidence, exhibits and references pertaining to ISO agreements or any other document that purports to insulate Cornell University from liability.

Respectfully submitted,

EISENBERG, ROTHWEILER,
WINKLER, EISENBERG & JECK, P.C.

s/ Kenneth M. Rothweiler
BY: Kenneth M. Rothweiler, Esquire
Daniel Jeck, Esquire
Daniel J. Sherry, Jr., Esquire
Counsel for Plaintiff

DATED: March 15, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RANDALL DUCHESNEAU,	:	CIVIL ACTION
	:	
Plaintiff,	:	No. 08-4856
	:	
v.	:	
	:	
CORNELL UNIVERSITY, *et al.*,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 19th day of February 2013, upon consideration of Plaintiff Randall Duchesneau's Motion for a New Trial ("Motion") (Dkt. No. 486), Defendant Cornell University's Response to Plaintiff's Motion for a New Trial (Dkt. No. 488), Plaintiff's Reply thereto (Dkt. No 494), and Defendant's Supplemental Memorandum of Law (Dkt. No 497), it is hereby ORDERED that said Motion is DENIED.

BY THE COURT:

C. DARNELL JONES, II J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RANDALL DUCHESNEAU,	:	CIVIL ACTION
Plaintiff,	:	No. 08-4856
v.	:	
CORNELL UNIVERSITY, *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, this 19th day of February 2013, upon consideration of Plaintiff's Motion for a Post-Defense-Verdict Mistrial ("Motion") (Dkt. No. 444), Defendant Cornell University's Response to Plaintiff's Post-Defense-Verdict Motion for Mistrial (Dkt. No. 449), Plaintiff's Reply thereto (Dkt. No 491), Defendant's Supplemental Memorandum of Law (Dkt. No 497), and Parties' oral arguments of December 10, 2012, it is hereby ORDERED that said Motion is DENIED.[1]

BY THE COURT:

/s/ C. Darnell Jones, II

C. DARNELL JONES, II J.

[1] The Court's *sua sponte* preservation of a Motion for "Post-Verdict Mistrial" is not authorized by the Federal Rules of Civil Procedure. Notably, this Court, after dismissing the jury from the room, inquired at sidebar if Plaintiff wished to move for a mistrial at that point, to which Plaintiff declined. Although styled as a "Motion for Post-Defense-Verdict Mistrial," Plaintiff is essentially making a motion for new trial. In fact, all of Plaintiff's cited authority involved a post-judgment motion for new trial.

This Court has previously recognized the similarity of motions for mistrial and motions for new trial, noting that "a motion for a new trial functions as a post-trial mistrial motion," which is precisely what Plaintiff requests. *See Haymond v. Lundy*, 205 F. Supp. 2d 390, 394 (E.D. Pa. 2002). Thus, this Court will analyze the instant motion the under the same standard as a motion for a new trial under Fed. R. Civ. P. 59. As discussed in detail in this Court's Memorandum and Order Denying Plaintiff's Motion for New Trial, the conduct of counsel for Defendant Cornell University did not engender prejudice such that it was "reasonably probable" that the verdict was influenced by said conduct. *See Marion v. TDI, Inc.*, 591 F.3d 137, 148 n.14 (3d Cir. 2012) (quoting *Forrest v. Beloit Corp.*, 424 F.3d 344, 351 (3d Cir. 2005); *cf. Farra v. Stanley-Bostitch, Inc.*, 838 F. Supp. 1021, 1027 (E.D. Pa. 1993) (citation omitted)(holding that new trial will not be granted on issues that jury did not reach).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DUCHESNEAU		
	:	CIVIL ACTION
	:	
v.	:	
	:	
CORNELL UNIVERSITY, ET AL	:	NO. 08-4856

CIVIL JUDGMENT

AND NOW, this 5th day of November, 2012, in accordance with the jury verdict on 10/26/12,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Cornell University.

BY THE COURT

ATTEST: /s/ AiShah El-Shabazz
AiShah El-Shabazz
Courtroom Deputy Clerk to C. Darnell Jones II, J.

Civ 1 (8/80)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RANDALL DUCHESNEAU,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 08-4856
	:	
v.	:	
	:	
CORNELL UNIVERSITY and TUMBLTRAK,	:	
	:	
Defendants.	:	

ORDER

The Court has carefully reviewed all the Motions *in Limine*, and responses thereto, in this matter, and rules as follows.

AND NOW, this 24th day of September, 2012, it is hereby ORDERED that:

1. The Motions docketed at Numbers 249, 251, 256, 262, 263, 265, 268, 269, 271, 272, 274, 276, 279, 280, 282, 298, 300, and 364 are GRANTED.

2. The Motions docketed at Numbers 252, 257, 275, 284, 286, 287, 289, 290, 291, 292, 293, 294, 296, 297, 299, 365, 366, and 367 are DENIED.

3. The Motion docketed at Number 247 is DENIED AS MOOT based on the representations of counsel.

4. Motion Number 248 is GRANTED IN PART AND DENIED IN PART as follows. The Motion is granted as to Christmas cards. The Motion is denied as to evidence adduced by Defendants to refute Plaintiff's need for twenty-four hour medical care.

5. Motion Number 250 is GRANTED IN PART, DENIED IN PART, AND STAYED IN PART as follows. The Motion is granted as to the use of the purported extrajudicial statement of Yusang Lee as substantive evidence. However, Defendants may use the evidence for impeachment purposes. The Motion is denied as to any testimony during a deposition. The Motion is stayed as to the examination of Mr. Lee during the deposition regarding the statement; the Court will entertain argument outside the hearing of the jury prior to any attempt to introduce such evidence.

6. Motion Number 253 is STAYED. The Court will entertain argument outside the hearing of the jury prior to any attempt to introduce the evidence.

7. Motion Number 254 is GRANTED IN PART AND DENIED IN PART. Consistent with prior rulings, the Motion is granted as to arguing waiver as an absolute bar to suit or recovery; waiver documents purportedly signed by Plaintiff are inadmissible for that purpose. The Motion is denied as to evidence or argument concerning risks the Plaintiff purportedly assumed.[1]

8. Motion Number 255 is GRANTED IN PART AND DENIED IN PART. Evidence of policies, procedures or conditions of any and all breakdancing, breakdancing clubs, or other "non-gymnastics organizations" is prohibited. The Motion is denied as to competent, relevant, rebuttal evidence offered to refute evidence introduced by Plaintiff that "all in the business" did not adhere to certain policies, procedures, or conditions.

[1] If some language in a waiver form purportedly informed Plaintiff of risks, such would be admissible, however Defendants will not be permitted to present the evidence as, e.g., a "waiver of liability form" or any such suggestive title.

9. Motion Number 258 is GRANTED IN PART AND DENIED IN PART. The Motion is granted to the extent that Defendants' represented, in the opposition to the Motion, that Dr. Corrigan was not proffered for the subject of the instant Motion. The Motion is also granted as to evidence regarding surrogate testing – to wit, photos/film of gymnasts performing backflips, as Dr. Corrigan testified that such evidence was neither produced nor relied upon for the expert opinion. The Motion is denied in all other respects.

10. Motion Number 259 is GRANTED IN PART AND DENIED IN PART. The Motion is granted as to documents (waiver agreements, etc...) for the purposes of inoculation from liability by their operation. However, Defendants may offer documentary evidence which demonstrates (a) they were not negligent and (b) Plaintiff understood the risks to himself.[2]

11. Motion Number 261 is GRANTED IN PART AND DENIED IN PART. The Motion is granted as to documents (waiver agreements, etc...) for the purposes of inoculation from liability by their operation. However, Defendants may offer documentary evidence which demonstrates (a) they were not negligent and (b) Plaintiff understood the risks to himself.[3]

12. Motion Number 266 is GRANTED IN PART AND DENIED IN PART. The Motion is granted in that Michael Jacki may not testify as to a purported waiver by Plaintiff, nor may he show or utilize video of someone performing a backward flip maneuver. Testimony is allowed in all other regards.

---

[2] See supra n.1.

[3] Id.

13. Motion Number 267 is GRANTED IN PART AND DENIED IN PART. Timothy Daggett may testify in all respects, as a fact witness and expert witness, except he may not render the following testimony: "Plaintiff knew how a TumblTrak worked from his own personal years of use at his gymnastics facility and any adult participating in gymnastics would know that there are inherent risks involved in the activity (not only from the activity and equipment itself, but also from acknowledgment of risk forms signed throughout the industry)."

14. Motion Number 270 is GRANTED IN PART AND DENIED IN PART. The Motion is granted in that Dr. Williams is not permitted to testify that "most spinal cord injured patients prefer not to have 24-hour care and are grateful for the personal and private time they have without a personal care assistant in their home. Dr. Williams is also precluded from rendering an opinion as to the life expectancy of Plaintiff. Dr. Williams may testify in all other respects.

15. Motion Number 273 is GRANTED IN PART AND DENIED IN PART. It appears to the Court that the sole purpose of Dr. Ceserek's testimony is to discuss how he "was engaged to conduct a survey of each college and university similarly situated to Cornell University circa 2006 (*i.e.,* a varsity gymnastics program with a dedicated gymnastics training facility on campus) to identify how many such collegiate educational institutions owned a TumblTrak and, for those that did own a TumblTrak, whether any of them had a fixed or traveling overhead mechanical installed for that piece of gymnastics training equipment." Testimony on this subject is admissible. However, Dr. Cesarek is not permitted to testify as an expert witness. Defendant is prohibited from introducing Dr. Cesarek's

qualifications, and no evidence of any writing with an "NCAA" caption will be permitted.

16. Motion Number 277 is GRANTED IN PART AND DENIED IN PART. The motion is granted only as to the specific questions "a" through "e" identified in the Motion. The appropriateness of any other questions will be decided on a case-by-case basis during trial. However, counsel are cautioned: "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." See Fed. R. Evid. 701 Advisory Committee Note. Simply put – that a particular individual may or may not need a spotter or harness on the device in question here is not in dispute. An opinion, if any, as to who does and who does not need a spotter or harness, shall only come from one qualified as an expert witness on the issue.

17. Motion Number 278 is GRANTED only as to the exact language in Plaintiff's Proposed Order, items 1-7.

18. Motion Number 281 is STAYED. The Court will entertain a proffer and argument outside the hearing of the jury prior to introduction of the evidence.

19. Motion Number 283 is GRANTED IN PART AND DENIED IN PART. The evidence is disallowed unless Defendants introduce any evidence which would allow admission.

20. Motion Number 285 is GRANTED IN PART AND DENIED IN PART. The Motion is granted to the extent that the witness offers inadmissible personal opinions. The Motion is denied as to the extent the witness offers legitimate expert opinions.

21. The Objections docketed at Number 362 are DENIED AS MOOT based on the representations of counsel.

22. It is the understanding of the Court that the subject matter of the Objections docketed at Numbers 360 and 361 was still under discussion by the parties. The parties shall advise the Court as to any discrete ruling(s) necessary for trial.

BY THE COURT:

/s/ C. Darnell Jones, II

C. DARNELL JONES, II, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RANDALL DUCHESNEAU,	:	CIVIL ACTION
	:	
Plaintiff,	:	No. 08-4856
	:	
v.	:	
	:	
CORNELL UNIVERSITY, *et al.*,	:	
	:	
Defendants.	:	

Jones, II, U.S.D.J. **February 19, 2013**

MEMORANDUM

Presently before the Court is Plaintiff Randall Duchesneau's Motion for a New Trial (Dkt. No. 486), Defendant Cornell University's Response to Plaintiff's Motion for a New Trial (Dkt. No. 488), Plaintiff's Reply thereto (Dkt. No 494), and Defendant's Supplemental Memorandum (Dkt. No. 497).[1] For the reasons set forth below, Plaintiff's Motion is DENIED.

1) Background

This case involves a tragic accident that occurred at Cornell University on October 12, 2006, which resulted in the paralysis of the Plaintiff. Given the well-documented nature of this case, there is no need for a complete recitation of the background. The accident has been the subject of protracted litigation, involving in excess of 260 evidentiary motions, and numerous hearings which culminated in an eighteen-day trial. Ultimately, the jury returned a verdict that the Defendant, Cornell University, was not negligent. Not only has this litigation been drawn out over half a

[1] The Court has thoroughly reviewed the parties' various submissions and the robust record in this case and has determined that no oral argument is warranted.

decade, it has been colored by the unnecessarily vitriolic behavior of counsel.

As this Court has previously discussed, the evidentiary issue of "waiver" has been prominent throughout this litigation. Perhaps it should come as no surprise that "waiver" is at the heart of Plaintiff's Motion for a New Trial. In short, in March 2006, it is undisputed that Plaintiff executed a document with the heading "Waiver and Assumption of Risk Agreement." That document was the subject of several rounds of briefing, motions in limine, and hearings before this Court.

Vigorous discussion and argument took place regarding the Waiver and Assumption of Risk Agreement, as to what could and could not be part of the document ultimately shown to the jury and discussed at trial.[2] This Court issued several rulings regarding the Waiver and Assumption of Risk Agreement including: 1) the manner in which parties would refer to the Waiver and Assumption of Risk Agreement –it would be called "the document"; and 2) if said document was shown to the jury, certain portions of the document must be redacted.

A. Alleged Misconduct

Plaintiff alleges that over the course of the eighteen-day trial, and in disregard of this Court's directives, "Cornell's counsel repeatedly engaged in a pattern of misconduct to have the jury consider the inadmissible and highly prejudicial issue of waiver." (Pl.'s Mot. for New Trial 1). Plaintiff argues that Defendant fashioned a multi-day "strategy" to get this critical issue before the

[2] This Court interpreted N.Y. GEN. OBLIG. § 5-326, which states that agreements exempting gymnasiums from liability for negligence are void and unenforceable as against public policy, as applicable to Defendant Cornell University's gymnasium–the situs of Plaintiff's accident. Based on the applicability of Section 5-326, this Court determined that the signed waiver portion of the Waiver and Assumption of Risk Agreement was void as against public policy. However, given that assumption of the risk remained a viable issue, this Court ruled that portion of the document admissible. The Waiver and Assumption of Risk Agreement was ordered redacted accordingly.

jury. According to Plaintiff, this "strategy" of misconduct included:

1) Defense counsel's "repeated[] refer[ence] to the waiver as a 'participation agreement' in opening statements" (Pl.'s Mot. for New Trial 8);

2) Defense counsel's subsequent reference to the Waiver and Assumption of Risk Agreement as a "participation agreement," even after the Court's directive after opening statements that all counsel refer to the Waiver and Assumption of Risk Agreement as "the document"(Pl.'s Mot. for New Trial 9);

3) After this Court directed the parties to remove certain language from the Waiver and Assumption of Risk Agreement before it was submitted to the jury, defense counsel "proposed a document that included ellipses" as an attempt to indicate there was "more" to the document (Pl.'s Mot. for New Trial 10); and

4) Following this Court's directive that the parties create an altered version of the Waiver and Assumption of Risk Agreement to present to the jury, counsel for the defense, Richard B. Wickersham, Jr., engaged in a colloquy in the jury's presence in which he stated, *inter alia,*"I didn't know if it was appropriate for you to give an instruction to the jury that this is not the actual document, but was something that you asked counsel to piece together." (Pl.'s Mot. for New Trial 13-14).

According to Plaintiff, these complained-of occurrences, taken together, made it "'reasonably probable' that the verdict was influenced by prejudicial statements." Plaintiff further argues that "misconduct in this case clearly rose to the level such that it is reasonably probable that the verdict was influenced" and as such, a new trial should be granted. (Pl.'s Mot. for New Trial 7).

2) Legal Standard

A court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Generally, a court will order a new trial: (1) when the jury's verdict is against the clear weight of the evidence, and a new trial must be granted to prevent a miscarriage of justice; (2) when improper conduct by an attorney or the court unfairly influenced the verdict; (3) when the jury verdict was facially inconsistent; or (4) where a verdict is so grossly excessive or inadequate "as to shock the conscience." *Suarez v. Mattingly*, 212 F. Supp. 2d 350, 352 (D.N.J. 2002) (citations omitted). Determining whether to grant a new trial is within the sound discretion of the trial court. *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1017 (3d Cir.1995). "Such an endeavor is not, however, lightly undertaken, because it necessarily 'effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.'" *Guynup v. Lancaster Co.*, 2009 U.S. Dist. LEXIS 19424 at *1(E.D. Pa. Mar. 3, 2009) (quoting *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir.1960)). "Courts have granted new trials when there have been prejudicial errors of law or when the verdict is against the weight of the evidence." *Jones v. City of Phila.*, 2008 U.S. Dist. LEXIS 31991 at *1 (E.D. Pa. Apr. 18, 2008).

The Court's inquiry in evaluating a motion for a new trial on the basis of trial error is twofold: the Court must first determine whether an error was made in the course of the trial; then the Court must determine "whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice." *Gunyup*, 2009 U.S. Dist. LEXIS 19424 at *1 (*quoting Farra v. Stanley–Bostitch, Inc.*, 838 F. Supp. 1021, 1026 (E.D. Pa.1993)); *see Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129, 133 (3d Cir.1965) ("If the evidence in the record, viewed from the

standpoint of the successful party, is sufficient to support the jury verdict, a new trial is not warranted merely because the jury could have reached a different result."). With respect to the determination of prejudice under the second prong, "a new trial must be granted unless it is highly probable that [the erroneous ruling] did not affect the [objecting party's] substantial rights." *Reynolds v. Univ. of Pa.*, 747 F. Supp. 2d 522, 534 (E.D. Pa. 2010) (citations omitted).

3) Discussion

A new trial is not warranted.

Though this Court, as it did on record during trial, admonishes some of the conduct of defense counsel,[3] it is nevertheless clear that a new trial is not warranted. **This Court disapproved of – and still disproves of – defense counsel's conduct** relative to the inquiry made to the Court in front of the jury: "this is not the actual document, but was something that you asked counsel to piece together."[4] Yet, due to the jury's finding that defendant Cornell University was not negligent, any error in this case was harmless. Furthermore, this Court cannot hold that defense counsel's conduct made it "'reasonably probable' that the verdict was influenced by prejudicial statements." *See Forrest v. Beloit Corp.*, 424 F.3d 344, 351 (3d Cir. 2005) (determining that although counsel "crossed the line," the complained-of conduct "was not so severe as to warrant a new trial"); *see also Price v. Tans Union, L.L.C.*, 839 F. Supp. 2d 785, 803-04 (E.D. Pa. 2012) ("[C]onjecture about the possibility that the jury took Defense Counsel's objections to heart either by finding no liability or

[3] This Court notes that the vitriol, at times, was between some of plaintiff's counsel and some of defendant Cornell's counsel. The Court does not wish to unfairly label all participating counsel as demonstrating incivility.

[4] There is no excuse for counsel, where a court orders redaction of a document, to stand before the jury and inform them that it was not the actual document, rather one that the judge told counsel to "piece together."

having reduced damages cannot support granting a new trial.").

Under the two-step inquiry required by Rule 59, to grant a new trial, this Court must first determine that misconduct occurred, and then further that it was "reasonably probable" that the "verdict was influenced by the resulting prejudice." *Marion v. TDI, Inc.*, 591 F.3d 137, 148 n.14 (3d Cir. 2012)(quoting *Forrest v. Beloit Corp.*, 424 F.3d 344, 351 (3d Cir. 2005)).

As to the first criterion, Plaintiff argues that defense counsel "repeatedly" engaged in a "pattern of misconduct" over the course of the eighteen-day trial, so that defense counsel could "have the jury consider the inadmissible and highly prejudicial issue of waiver." (Pl.'s Mot. for New Trial 1). The limited occasions over the course of the eighteen-day trial in which defense counsel's complained-of conduct occurred cannot be considered a "pattern of misconduct" as Plaintiff argues. Though these comments could not be categorized as "benign", as defense counsel suggests, they were not so egregious or pervasive as to be considered a pattern of misconduct. The Court is unpersuaded that Plaintiff has met its burden of proof that there was harmful error. *See Corrigan v. Methodist Hosp.*, 234 F. Supp. 2d 494, 503 (E.D. Pa. 2002) (citations omitted) ("the burden of proving harmful error rests on the party moving for a new trial").

The waiver issue was the subject of several motions in limine, and the record in this case speaks for itself regarding the outcome of such motions. This Court afforded counsel for both sides ample opportunity to seek clarification on any of this Court's rulings in order to ensure compliance with such rulings. It was in seeking this clarification that much of the complained-of conduct occurred.

Plaintiff identifies four instances relating to the Waiver and Assumption of Risk Agreement that were allegedly part of defense counsel's "four day trial strategy" to bring the issue of waiver

before the jury, with the first three instances building up to the fourth– "a colloquy in front of the jury by Cornell's counsel" regarding a newly-created document, prepared at the Court's direction, which included language extracted from the Waiver and Assumption of Risk Agreement. (Pl.'s Mot. for New Trial 1).

Immediately following defense counsel's colloquy, this Court dismissed the jury from the room to further discuss the matter. Though this Court had permitted the parties to seek clarification on its rulings, this Court agrees that the "colloquy" made by defense counsel regarding the altered Waiver and Assumption of Risk form exhibit should have been made at sidebar (as was frequently the practice throughout the trial). Clearly, the Court expressed its disapproval that defense counsel decided to raise this issue in front of the jury when this court dismissed the jury and immediately called counsel to sidebar to discuss the issue.

Plaintiff devotes lengthy discussion in the Motion for a New Trial to the Court's admonishment of defense counsel at said sidebar, in an effort to equate the Court's reaction to an inference that the jury was harmed by defense counsel's alleged misconduct.[5]

That colloquy in and of itself, however, and taken in concert with the other three instances

[5] This Court's commentary at sidebar warrants a contextual explanation. This Court is well-aware of defense counsel's reputation as an accomplished trial attorney, by reason of defense counsel having appeared in several matters before me in state court over the course of many years. Based on those experiences, this Court had a certain expectation of conduct –expectations that defense counsel failed to meet on this occasion. The primary reason this Court said it was "hurt" by counsel's actions, was not because this Court believed the jury was prejudiced; rather, because of this Court's years of experience with counsel, this Court could not fathom that counsel would patently disobey the Motion in Limine order and the Court's directives as he did. Perhaps this Court should have used the term "disappointed," rather than hurt, because such conduct was surprising, insulting, and otherwise unexpected.

of complained-of conduct did not amount to error. Nor did counsel's conduct affect the indisputable result of the jury verdict: the unanimous conclusion that the defendant was not negligent. Having answered in the negative to the first interrogatory, that rendered moot the other issues in this case, including that of waiver.

Plaintiff's perceived issues of disobedience of the Motion in Limine ruling and this Court's directives did not go to the issue of whether or not Defendant was negligent. This alleged misconduct did not affect Plaintiff's substantial rights because it did not touch upon the aggrieved issues. Plaintiff speculates that the jury, in its unequivocal finding of "no negligence" on the part of Cornell, somehow considered the concept of "waiver". Such speculation is unsupported by the record and Plaintiff simply does not meet its burden of proof that would require a new trial. *See Price*, 839 F. Supp. 2d at 803-04. Under a Rule 59 analysis, even assuming *in arguendo* that the complained-of conduct was harmful error, Plaintiff fails to satisfy the second criterion that it was "reasonably probable" that the jury's ultimate determination that Defendant was not negligent was "influenced by the resulting prejudice." *Marion,* 591 F.3d at 148 n.14.

In fact, the only instance that this Court can fathom that the actions of either counsel affected the jury in any tangible way, was when, during the lunch break on one of the trial days, the courtroom deputy alerted this Court that the jury could overhear counsel for both sides engaged in a shouting match in the courtroom. That alone should speak volumes about the need for civility in the courtroom.

An appropriate Order follows.

CERTIFICATE OF SERVICE

I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this document is being served electronically on them by the Notice of Docket Activity:

Daniel Jeck

Kenneth M. Rothweiler

Teresa F. Sachs

Daniel J. Sherry, Jr.

Joe H. Tucker, Jr.

Richard B. Wickersham, Jr.

Dated: September 11, 2013

/s/ *Howard J. Bashman*
Howard J. Bashman