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)

REPLY BRIEF FOR APPELLANT

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Kenneth M. Rothweiler
Daniel Jeck
Daniel J. Sherry, Jr.
Eisenberg, Rothweiler, Winkler,
Eisenberg & Jack
1634 Spruce Street
Philadelphia, PA 19103
(215) 546–6636

Counsel for plaintiff/appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. INTRODUCTION

In addition to being remarkably callous (describing plaintiff's spending the remainder of his life as a quadriplegic as among the appropriate life lessons one attends college to learn), Cornell's Brief for Appellee seeks to distract this Court from the pervasive prejudicial misconduct of Cornell's counsel necessitating a new trial that is at the center of this appeal. Cornell's attempts to draw this Court's focus away from the issues actually involved in this appeal lack merit and fail to furnish any alternate basis for affirmance.

After Cornell's counsel, to quote the district court, engaged in "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), Cornell's counsel displayed to the jury, or unambiguously drew to the jury's attention, the redacted version of the "Waiver and Assumption of Risk" agreement Duchesneau signed another nine times during the remaining three weeks of trial. Cornell's counsel cross–examined Duchesneau about the document for an extended period spanning five pages of the trial

transcript, and Cornell's counsel in his closing argument ensured that the jury had the document at the forefront of its collective mind heading into deliberations.

Each time that Cornell's counsel drew the document to the jury's attention, after originally having advised the jury 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), the jury could not help to conclude, in the contemporaneous words of the district court, that what the judge was keeping from them was "something that said waiver." App.2989a (N.T. 10/4/12 p.m. at p.36).

"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). If the jury concluded, as the district court reasonably and contemporaneously feared, that Duchesneau had signed a document waiving Cornell's liability for his

injuries as a condition of using the university's gymnastics facilities, the only possible way for the jury to reflect that impermissible conclusion on the jury verdict slip was to find Cornell not negligent in response to the very first jury verdict interrogatory. App.5475a-78a (N.T. 10/26/12 at p.46-49). That is precisely what the jury did. App.5485a (N.T. 10/26/12 at p.56).

Under the substantive law of New York State, which the parties acknowledge governs this case, 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.

Cornell's counsel's improper statement to the jury when first seeking to use this exhibit, as the district court immediately recognized, improperly sought to convey that Duchesneau had signed a waiver in favor of Cornell that the trial judge was withholding from the jury's view. That improper statement, which the jury could not help but recollect on each of nine additional occasions culminating in the

defense's closing argument, when Cornell's counsel either displayed or made unambiguous reference to the document, make it far more than reasonably probable that the jury's verdict was influenced by Cornell's counsel's prejudicial statements.

This Court should therefore 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.

II. ARGUMENT IN REPLY

A. Prejudice From Cornell's Counsel's Improper Comment About The "Waiver and Assumption of Risk" Document Pervaded Trial, As The Exhibit Was Central To Cornell's Only Affirmative Defense And Was Displayed And Referenced Repeatedly During The Remainder Of Trial

In an attempt to minimize its counsel's improper remark about the "Waiver and Assumption of Risk" document when the exhibit was first shown to the jury, which the district court immediately recognized in a passionate exchange was a blatantly intentional and egregiously harmful attempt to communicate to the jury that Duchesneau had executed a written waiver in Cornell's favor (App.2989a (N.T. 10/4/12

p.m. at p.36)), Cornell in its Brief for Appellee characterizes the remark as a "snippet" consisting of a "single two–sentence comment, more than three weeks before the jury deliberated." Br. for Appellee at 35.

But several critical differences distinguish this case from a case in which a single, isolated improper comment from counsel can be disregarded as inconsequential. To begin with, Cornell convinced the district court that Cornell should be able to introduce the redacted "Waiver and Assumption of Risk" document because, according to Cornell, the document was relevant to Cornell's one and only affirmative defense, implied assumption of the risk. *See* Br. for Appellee at 28.

As explained in Duchesneau's Brief for Appellant and discussed below in this Reply Brief, under applicable New York State law the district court erred in allowing even the redacted "Waiver and Assumption of Risk" document to be introduced into evidence in this case, in clear violation of N.Y. Gen. Oblig. Law §5–326. It is also an illogical non sequitur for Cornell to argue, and for the district court to have agreed, that an express assumption of risk agreement, which this exhibit clearly represents, although inadmissible as an express

assumption of risk agreement could still be used to establish Duchesneau's implied assumption of the risk. Admitting the document as relevant to Cornell's implied assumption of the risk defense was particularly improper given that Duchesneau testified that he did not read the document before signing it (App.4265a-66a (N.T. 10/18/12 p.m. at p.88-89)), and no contrary evidence existed or was introduced to prove that he had read the document.

Second, once Cornell's counsel introduced the document by improperly communicating to the jury that Duchesneau had signed a waiver that the jury was not being permitted to see, Cornell's counsel proceeded to display the document or unambiguously refer to it another nine times during the remaining three weeks of trial, which consisted of fewer than 15 days of trial.[1] During Cornell's cross–examination of Duchesneau, counsel for Cornell questioned plaintiff about the document for five pages of the transcript. App.4263a-68a (N.T. 10/18/12

[1] App.2993a (N.T. 10/4/12 p.m. at p.40); App.3055a (*id.* at p.102); App.3119a (N.T. 10/9/12 a.m. at p.32); App.4263a-68a (N.T. 10/18/12 p.m. at p.86-91); App.4646a (N.T. 10/22/12 a.m. at p.89); App.4686a (N.T. 10/22/12 p.m. at p.9); App.4891a (N.T. 10/23/12 p.m. at p.21); App.5257a (N.T. 10/25/12 a.m. at p.12); App.5409a-10a (N.T. 10/25/12 p.m. at p.76-77).

p.m. at p.86-91). And, during Cornell's closing argument to the jury, counsel reminded the jury about the document again and again. App.5409a-10a (N.T. 10/25/12 p.m. at p.76-77). As Cornell's Brief for Appellee concedes at page 36, every time the jury saw this document, the jury was reminded of what the document did not contain, and here counsel for Cornell had specifically communicated to the jury (as the district court recognized in the immediate aftermath of the improper remarks) that the document contained Duchesneau's express waiver of Cornell's liability that the district court was not permitting the jury to see.

Third, the district court in this case issued no cautionary instruction to the jury following Cornell's counsel's improper remark, because instructing the jury not to pay attention to an unquestionably inadmissible and critically harmful waiver that Duchesneau had executed would only have served to exacerbate the harm stemming from Cornell's counsel's improper remark, rather than ameliorating it. App.2990a-92a (N.T. 10/4/12 p.m. at p.37-39). Telling the jury to ignore the obvious "elephant in the room" that waiver represented would have been no more effective than when the ordinary mortal portraying the

Wizard of Oz told Dorothy and her companions to "pay no attention to that man behind the curtain." Here, it was impossible for the district judge to tell the jury to disregard that the original document contained provisions that the district court had decided the jury should not see without both confirming and further reemphasizing the very harmful information that counsel for Cornell had already improperly communicated to the jury — namely, that the complete document contained a waiver/release.

To be sure, as Cornell points out on page 37 of its Brief for Appellee, the district judge himself opined out loud, before the jury selection process commenced and outside the hearing of any of the potential jury members, that jurors might not think about "one question" on waiver during the jury selection process even "three days or a week later" when deciding this case. App.2199a-200a (N.T. 9/25/12 a.m. at p.11-12). However, Cornell tells only the beginning of that story, when what actually happened during the jury *voir dire* process itself is far more revealing of the district judge's fully considered views on the matter. When jury selection actually took place, the district judge carefully refrained from even once mentioning, or allowing counsel to mention,

the term "waiver." App.2205a-07a (N.T. 9/27/12 at p.3-5). Thus, between the time of the offhanded musing that Cornell quotes and the actual jury selection process, the district judge reconsidered his view and determined that it was in fact too potentially prejudicial for the term "waiver" to be used in front of the jurors even once, not only during the trial, but also during the jury selection process.

In *Fineman* v. *Armstrong World Indus.*, 980 F.2d 171, 210 (3d Cir.1992), this Court reiterated that, "[a]s we made clear in *Ayoub* v. *Spencer*, [550 F.2d 164, 170 (3d Cir. 1977),] argument injecting prejudicial extraneous evidence constitutes reversible error." That is precisely what happened here.

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) (emphasis added) (quoting *Greate Bay Hotel & Casino* v. *Tose*, 34 F.3d 1227, 1236 (3d Cir.1994) (in turn citing *Fineman*, 980 F.2d at 207 (3d Cir.1992)).

The reasonable probability standard is the same standard that many federal appellate courts employ when evaluating whether to grant a new trial due to attorney misconduct. The Sixth Circuit, in *City of Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980), explained how that standard should be applied in any particular case:

> In determining whether "there is a reasonable probability that the verdict of a jury has been influenced" by improper conduct, warranting that the verdict be set aside, a court must examine, on a case–by–case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e. g. whether it is a close case), and the verdict itself.

Id. The D.C. Circuit likewise undertakes this same inquiry. *See Ashcraft & Gerel* v. *Coady*, 244 F.3d 948, 953 (D.C. Cir. 2001).

Applying that analysis to this case confirms the need for a new trial. First, the nature of the comments, while requiring the jury to exercise its collective powers of inference, was immediately recognized by both the district judge serving as neutral arbiter and by counsel for plaintiff as an unquestionably improper attempt to convey to the jury that Duchesneau had executed a waiver agreement in favor of Cornell. App.2985a-92a (N.T. 10/4/12 p.m. at p.32-39).

Second, although the wrongful comment itself only occurred once, Cornell's counsel had laid the groundwork for the harmful consequences that flowed from the comment from the outset of the trial, *see* Br. for Appellant at 45-52, and the jury was reminded of the improper comment another nine times after it occurred when Cornell's counsel again and again displayed the exhibit or unambiguously referred to it in the jury's presence. *See* transcript cites listed *supra* at page 6 n.1.

The relevance of the improper information is clear — if Duchesneau had executed an enforceable waiver/release against Cornell (and the jury, of course, was never told that such a waiver was unenforceable), then Duchesneau had no legal right to recover from Cornell.

The manner in which the district judge treated the comments consisted of a lengthy and heated diatribe against Cornell's counsel for his misconduct, which included the district court's recognition that grounds for a mistrial existed and would continue to exist even after the

time of a verdict if the jury found in Cornell's favor.[2] App.2985a-92a (N.T. 10/4/12 p.m. at p.32-39).

As the opposing briefs filed in this Court demonstrate, this was a close case in which the jury could have found for either side in the absence of the improper, outcome–determinative thumb on the scale placed by Cornell's counsel by means of his improper remarks.

Finally, the verdict itself is at least equally consistent with the conclusion that the jury impermissibly enforced a legally invalid waiver/release against Duchesneau as that the jury found Cornell had not been negligent. Without anywhere on the verdict slip for the jury to enforce a waiver or release, the only way that the jury was capable of doing so was by finding that Cornell was not negligent. App.5475a-78a (N.T. 10/26/12 at p.46-49). Both Cornell and the district court are correct in observing that one cannot tell for certain whether the jury found Cornell not negligent because of an improper belief that Duchesneau had signed a waiver/release. But the converse is also true — neither the

[2] Because counsel for plaintiff immediately objected to Cornell's counsel's improper comments, it was unnecessary for counsel for plaintiff to move for a mistrial to preserve plaintiff's ability to obtain a new trial based on the prejudicial effect of those comments. *See Park West Galleries, Inc.* v. *Hochman*, 692 F.3d 539, 543–49 (6th Cir. 2012).

district court nor Cornell can establish that the jury *did not* improperly rely on the existence of a waiver/release as its sole basis for finding that Cornell was not negligent.

The improper, outcome–determinative thumb that Cornell's counsel's misconduct placed on the scale of the jury's deliberations makes it reasonably probable that the verdict was influenced by prejudicial statements, thereby necessitating a new trial at which the "Waiver and Assumption of Risk" document is excluded from evidence altogether.[3]

[3] Having failed to learn any lesson from the stern admonishment received from the district judge, counsel for Cornell in their Brief for Appellee similarly have attempted to place an improper thumb on the scales of this Court's consideration of this case, by emphasizing the irrelevant facts that Duchesneau entered into a small monetary settlement with the manufacturer of TumblTrak and received the benefit of some insurance coverage to pay for his very expensive ongoing medical care. That counsel for Cornell would bring up this irrelevant information in a misbegotten attempt to prejudice the Court's consideration of this appeal only serves to confirm the strength of Duchesneau's case for reversal; why else would Cornell's counsel again resort to using such unfair and improper litigation tactics.

B. 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

As explained in Duchesneau's Brief for Appellant, if the district court had not improperly allowed, contrary to governing New York law, counsel for Cornell to use as an exhibit at trial even the redacted version of the "Waiver and Assumption of Risk" document, the highly prejudicial improper comments from Cornell's counsel that now necessitate new trial never would have occurred. Although Cornell's brief maintains that plaintiff has failed to allege any prejudice from the district court's admission into evidence of the redacted the "Waiver and Assumption of Risk" document, the resulting prejudice could not be more clear — opposing counsel's prejudicial and improper communication to the jury that plaintiff had executed a waiver in Cornell's favor flowed directly from the district court's legally erroneous admission of this exhibit.

In seeking to justify the district court's admission into evidence of the "Waiver and Assumption of Risk" document notwithstanding N.Y. Gen. Oblig. Law §5–326, Cornell's Brief for Appellee advances a series of meritless and occasionally bizarre arguments. For example, Cornell

argues that even if plaintiff is correct that the "Waiver and Assumption of Risk" document is "void as against public policy and wholly unenforceable" under N.Y. Gen. Oblig. Law §5–326 as a matter of New York substantive law, the document is nevertheless admissible under the Federal Rules of Evidence as relevant to Cornell's assumption of risk defense. This Court would need to adopt a very unusual understanding of the statutory terms "void" and "wholly unenforceable" in order for Cornell's argument to have any chance of succeeding.

Cornell's Brief for Appellee also vastly overstates the type of assumption of risk defense that the district court permitted Cornell to advance in this case. As Cornell's brief explains, New York law recognizes three types of assumption of risk: primary, express, and implied. *See* Br. for Appellee at 21 n.9. Because of N.Y. Gen. Oblig. Law §5–326, the district court did not permit Cornell to present an express assumption of the risk defense to the jury at trial. App.2206a-07a (N.T. 9/27/12 at p.4-5). Yet if the redacted written "Waiver and Assumption of Risk" document that Duchesneau had signed was relevant to anything, it would be relevant to express assumption of the risk, which was not an issue at trial. *See Arbegast* v. *Board of Educ.*, 480 N.E.2d 365, 371 (N.Y.

1985) ("Express assumption, which was held to preclude any recovery, *resulted from agreement in advance* that defendant need not use reasonable care for the benefit of plaintiff and would not be liable for the consequence of conduct that would otherwise be negligent.") (emphasis added).

Likewise, primary assumption of the risk (a subject to which Cornell devotes an extravagant amount of attention in its appellate brief) was *not* an issue that the district court allowed the jury to consider in this case. There are several reasons for this. First, Cornell in its original and amended answers did not plead the affirmative defense of primary assumption of the risk. App.90a-102a (DDE#26); DDE#155 (Cornell's amended answer). Second, primary assumption of the risk is in essence a purely legal defense, whereby someone who voluntarily engages in an activity whose risks are readily apparent is completely barred from recovery due to the primary assumption of the risk doctrine. *See Menter* v. *City of Olean*, 964 N.Y.S.2d 372, 373 (N.Y. Sup. Ct. App. Div. 4th Dep't 2013) ("[t]he doctrine of primary assumption of risk generally constitutes a complete defense to an action to recover damages for personal injuries") (internal quotations omitted).

Thus, someone who collides with a football goalpost (which happened far more often in the olden days) or the pole supporting a basketball hoop would be precluded under the doctrine of primary assumption of the risk as a matter of law from recovering for whatever injuries were sustained. Here, by contrast, the risks of a TumblTrak, which is a 30–foot by seven–foot trampoline–type rebound device consisting of a polypropylene mat stretched over a steel frame with springs, are not readily apparent, nor did Cornell ever try to convince either the district judge or the jury that they were. App.1420a (DDE#229 at p.13). It was one of those not readily apparent risks of a TumblTrak that led to Duchesneau's specific, life–altering injury that gives rise to this lawsuit.

Finally, that the jury in this case was only permitted to consider the defense of implied assumption of the risk is also conclusively apparent from the jury instructions and verdict form that the jury received. App.5459a-60a, 5476a-77a (N.T. 10/26/12 at p.30-31, 47-48.) Those instructions and that verdict form permitted the jury to reduce by percentage, akin to a comparative negligence finding, Duchesneau's recovery depending on the percentage of his injuries, if any, that the jury chose to attribute to assumption of the risk. *See* N.Y. Civil Practice

Law and Rules §1411; *see also Arbegast*, 480 N.E.2d at 371 ("[w]e conclude, therefore, that CPLR 1411 requires diminishment of damages in the case of an implied assumption of risk"). New York State law's primary assumption of the risk doctrine, had it applied, would have entirely barred any recovery by Duchesneau whatsoever. *See Menter*, 964 N.Y.S.2d at 373.

Thus, although Cornell devotes the first subsection of its appellate brief to arguing that the redacted "Waiver and Assumption of Risk" document that Duchesneau had signed was relevant to Cornell's defense of primary assumption of risk at trial, Cornell is flat wrong. That defense was not before the jury at trial.

Plaintiff acknowledges, and the Brief for Appellant filed in this case did not challenge, that Cornell upon retrial of this case will be able to again pursue the defense of implied assumption of the risk. But, for two reasons, at the retrial this Court should prohibit Cornell from introducing into evidence the redacted "Waiver and Assumption of Risk" document that Duchesneau had signed. The first reason, as explained at length in the Brief for Appellant, is that N.Y. Gen. Oblig.

Law §5–326 prohibits admission into evidence of even the assumption of risk language from that document.

Cornell's Brief for Appellee ignores the central distinction between this case and *DiMaria* v. *Coordinated Ranches, Inc.*, 526 N.Y.S.2d 19 (N.Y. Sup. Ct. App. Div. 2d Dep't 1988), on which Cornell so heavily relies. *DiMaria* involved only assumption of risk language, and the appellate court in *DiMaria* explained 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 proceeded to observe 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 from 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).

Cornell is also incorrect in arguing that *DiMaria* is the only case considering whether a redacted document consisting of assumption of risk language can be admitted. *See* Br. for Appellee at 30. In actuality, as the Brief for Appellant explained at pages 35–37, at least four other decisions have directly considered that question and have concluded that assumption of risk language contained in the waiver documents at issue in those cases was no more admissible than the waiver language. *See Brancati* v. *Bar–U–Farm*, 583 N.Y.S.2d 660, 662 n.2 (N.Y. Sup. Ct. App. Div. 3d Dep't 1992); *Owen* v. *R.J.S. Safety Equip., Inc.*, 572 N.Y.S.2d 390, 394 (N.Y. Sup. Ct. App. Div. 3d Dep't 1991), *aff'd*, 591 N.E.2d 1184 (1992); *Garnett* v. *Strike Holdings LLC*, 882 N.Y.S.2d 115, 116–17 (N.Y. Sup. Ct. App. Div. 1st Dep't 2009); *Applebaum* v. *Golden Acres Farm & Ranch*, 333 F. Supp. 2d 31, 35–37 (N.D.N.Y. 2004). Thus, plaintiff's position is clearly the majority position, and the lone *DiMaria* case on which Cornell relies consists of not only clearly distinguishable dicta but also represents a jurisprudential outlier.

Last but not least, admitting the assumption of risk language together with Duchesneau's signature as redacted from the "Waiver and Assumption of Risk" document, which the uncontested evidence establishes Duchesneau denies having read at any time before his accident (App.4265a-66a (N.T. 10/18/12 p.m. at p.88-89)), as relevant to the subject of Cornell's defense of *implied* assumption of the risk makes absolutely no sense whatsoever. A signed document purporting to be an agreement to assume risk constitutes, at most, an *express* assumption of the risk. *See Arbegast*, 480 N.E.2d at 371.

Of course, Cornell can certainly use the fact that Duchesneau had previously performed back flips and had previously used the TumblTrak to argue implied assumption of the risk. Yet how a document that Duchesneau signed without reading is in any way relevant to the issue of implied assumption of the risk defies understanding, even after reading Cornell's Brief for Appellee.

Accordingly, 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.

C. The Alternative Grounds For Affirmance That Cornell Advances Were All Correctly Rejected By The District Court And Are Without Merit

1. The district court properly ruled that N.Y. Gen. Oblig. Law §5–326 applies to the facts of this case

As the first of its three proposed alternate grounds for affirmance, Cornell asserts that N.Y. Gen. Oblig. Law §5–326 does not apply to the facts of this case, because the defendant is a college or university and, according to Cornell, no entrance fee was charged. Cornell is wrong on both points.

In arguing that the statute does not apply to a college or university, Cornell relies primarily on *Lemoine* v. *Cornell Univ.*, 769 N.Y.S.2d 313 (N.Y. Sup. Ct. App. Div. 3d Dep't 2003). That decision, however, is readily distinguishable from the facts of this case because in *Lemoine* the plaintiff was indisputably receiving instruction at the time of her injury and, more importantly, was taking a class that did not require her to pay a fee separate and apart from tuition.

In Duchesneau's case, by contrast, he was not receiving instruction (nor was instruction even being offered) during the open gym night at which he was injured (App.4158a (N.T. 10/18/12 a.m. at p.84)), and he was required to pay a fee separate and apart from tuition to gain

admission to open gym night. App.4186a (N.T. 10/18/12 p.m. at p.9). Had he not paid that separate fee, he would have not been allowed to enter the gymnasium on the evening he was injured.

In rejecting Cornell's argument that N.Y. Gen. Oblig. Law §5–326 does not apply to colleges and universities, the district court correctly relied on *Eddy* v. *Syracuse Univ.*, 433 N.Y.S.2d 923 (N.Y. Sup. Ct. App. Div. 4th Dep't 1980). App.1421a (DDE#229 at p.14 n.11). In *Eddy*, the court recognized non–delegable duties owed by New York resident colleges and universities to students (and non–students) that enter their gymnasiums. Moreover, N.Y. Gen. Oblig. Law §5–326 is broadly phrased and contains no express or implied exemption for colleges and universities. As the statute provides, the owners or operators of gymnasiums located in New York State are prevented from entering into any agreements absolving themselves of negligent conduct with respect to individuals who are paying fees or other compensation to enter and use a gymnasium.

The only two considerations that the statute makes pertinent to its applicability are whether compensation was paid to the owner or the operator in order for the user to gain access to the facility and whether

the individual seeking to invalidate the waiver received any instruction or lessons at the facility or from the owner or operator. *See* N.Y. Gen. Oblig. Law §5–326. In this case, it is undisputed that Duchesneau never received any training or lessons at the Teagle Hall Gymnasium, was not enrolled in a course (or receiving lessons or supervision) at the time of his injury at the gymnasium, and the evidence at trial established that he paid a fee separate from and in addition to his college tuition as a prerequisite to using the gymnasium and its equipment.

Contrary to Cornell's erroneous argument, the statute does not require that payment be made exclusively to the owner of the facility or that payment made to the operator somehow must be eventually funneled to the owner. Rather, the statute dictates that either the "owner or operator" receives a fee or other compensation "for the use of such facilities." N.Y. Gen. Oblig. Law §5–326. Once that occurs, as it unquestionably did here, all contracts purporting to inoculate the gymnasium owner and operator from liability are void.

For these reasons, the district court correctly held as a matter of New York State law that N.Y. Gen. Oblig. Law §5–326 applied to the facts of

this case, and that statute thus required the invalidation of the "Waiver and Assumption of Risk" document signed by Duchesneau.

2. The district court correctly recognized that the defense of primary assumption of the risk was not even at issue in this case, and thus that defense does not provide any alternate basis for affirmance

As the record in this case confirms, Cornell never properly raised the affirmative defense of primary assumption of the risk, which Cornell asserts is unique to New York law, in Cornell's original or amended answer. App.90a-102a (DDE#26); DDE#155 (Cornell's amended answer). Moreover, Cornell never introduced any evidence whatsoever that the dangers of the TumblTrak, a 30–foot by seven–foot trampoline–type rebound device consisting of a polypropylene mat stretched over a steel frame with springs, were readily apparent either to an ordinary person or to Duchesneau in particular.

Cornell's argument heading on this point seeks to direct this Court's focus to the risks of performing a backflip, but it is and has always been Duchesneau's argument that it was the particular risks of performing a backflip *on the TumblTrak* that caused his grievous injury, and that if he had simply under–rotated on a gymnastics mat with a solid surface

underneath it he would not have been rendered a quadriplegic. The question is not whether Cornell somehow made the risks of a backflip hidden; rather, the issue here is whether the inherent risks of the TumblTrak were hidden. As to that issue, the district court correctly recognized that the particular risks of this particular trampoline–like device were not readily apparent to the average person or to Duchesneau. App.1420a (DDE#229 at p.13).

In sum, the defense of primary assumption of the risk was neither properly raised by Cornell in this case, nor is this case one in which a New York State court would apply that doctrine to deprive the plaintiff, as a matter of law, of his day in court. Accordingly, this alternate ground for affirmance lacks merit.

3. Cornell's contention that plaintiff's proof of causation was too speculative to reach a jury disregards that causation is traditionally a jury question and that Cornell could have easily avoided the harm to plaintiff

Cornell argues that neither a spotter nor a qualified supervisor would have enabled Duchesneau to avoid his injuries as the result of under–rotating while attempting a backflip on the TumblTrak. That, however, was a question for the jury given the disputed evidence the

jury received on those issues in this case. *See Aloe Coal Co.* v. *Clark Equip. Co.*, 816 F.2d 110, 114 (3d Cir. 1987) (recognizing that "[t]he question of causation is ordinarily for the jury").

Moreover, if the TumblTrak device was incapable of being made safe for novice or unqualified users such as Duchesneau, Cornell had the option of simply declaring the device off–limits during open gym night, as Cornell had in fact already done with regard to its ordinary trampoline. App.2715a (N.T. 10/3/12 a.m. at p.69). Cornell's negligence, described in detail in the Brief for Appellant, facilitated an accident waiting to happen at the university's open gym night, and as a result of that negligence Duchesneau will now spend the rest of his life as a quadriplegic.

The facts of this case confirm that it does not require any impermissible speculation to understand how Duchesneau's accident could have and reasonably should have been prevented. But if Cornell is correct that lesser reasonable precautions such as spotters and instructors could not have prevented the injury, which is an assertion that plaintiff disputes, then Cornell could have and should have

declared the TumblTrak off–limits at open gym night, which indisputably would have avoided Duchesneau's injury.

III. CONCLUSION

For all of the foregoing reasons, and for the reasons contained in the Brief for Appellant, 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: December 2, 2013

/s/ *Howard J. Bashman*

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Kenneth M. Rothweiler
Daniel Jeck
Daniel J. Sherry, Jr.
Eisenberg, Rothweiler, Winkler,
Eisenberg & Jack
1634 Spruce Street
Philadelphia, PA 19103
(215) 546–6636
Counsel for plaintiff/appellant

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 5,499 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: December 2, 2013

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

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Reply 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: December 2, 2013

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

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:

Teresa F. Sachs

Joe H. Tucker, Jr.

Richard B. Wickersham, Jr.

Dated: December 2, 2013

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