In the United States Court of Appeals for the Third Circuit

No. 06–4403

DMITRIY MAVRESHKO; IGOR MAVRESHKO; and SVETLANA MAVRESHKO,

Plaintiffs/Appellants,

v.

RESORTS USA, INC.; FERNWOOD RESORTS, INC.; HRP CORP.; TREETOPS, INC.; and OUTDOOR WORLD CORPORATION,

Defendants/Appellees.

On Appeal from the U.S. District Court for the Middle District of Pennsylvania, No. 04–cv–457 (Honorable James M. Munley, District Judge)

BRIEF FOR APPELLANTS AND APPENDIX VOLUME ONE OF FIVE (Pages 1a–26a)

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I. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

The district court possessed subject–matter jurisdiction pursuant to 28 U.S.C. §1332(a). The plaintiffs are citizens of the State of New York. App.39a. The defendants all have their principal place of business in Pennsylvania, and each is incorporated under the laws of a State other than New York. App.39a–40a. In addition, the amount in controversy exceeds the amount of $75,000.00, exclusive of interest and costs. App.46a.

This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291. Two orders are the subject of this appeal. The first is the trial court's order entered May 31, 2005 granting summary judgment in favor of defendants against plaintiff Svetlana Mavreshko's personal claim for damages. App.13a. Because the claims of plaintiffs Dmitriy and Igor Mavreshko survived defendants' motion for summary judgment, the order granting summary judgment against plaintiff Svetlana Mavreshko's claim was not final or appealable when entered.

On November 9, 2005, the trial court entered final judgment on the jury's verdict in favor of defendants and against plaintiffs Dmitriy and Igor Mavreshko. App.14a. Those two plaintiffs, on November 22, 2005,

filed a timely motion for a new trial pursuant to Federal Rule of Civil Procedure 59(a). App.124a. On September 7, 2006, the trial court entered an order denying the motion for a new trial. App.25a.

On October 6, 2006, all three plaintiffs filed a timely notice of appeal. App.1a. Svetlana Mavreshko appeals from the grant of summary judgment against her personal claim, while Dmitriy and Igor Mavreshko appeal from the denial of their motion for a new trial.

II. ISSUES ON APPEAL

1. Did the district court err in ruling on summary judgment that a mother's co–signing of a snowtubing liability release — required for her minor son to engage in that recreational activity — precluded the mother from suing to recover in her own right damages arising from her minor son's injuries even though the release did not bar the minor son's own claim, and nothing in the text of the release communicates that by executing the form a parent would be waiving his or her claim arising from injuries to the child?

Where preserved: Svetlana Mavreshko preserved this issue in plaintiffs' brief in opposition to defendants' motion for summary judgment. App.98a–104a.

Standard of review: Because this appeal arises from the grant of summary judgment, this Court exercises plenary review. *See Reichley* v. *Pa. Dep't of Agriculture*, 427 F.3d 236, 244 (3d Cir. 2005).

2. Did the district court abuse its discretion in denying plaintiffs' motion for a new trial, given that: the jury had specifically found that defendants were negligent; it was undisputed that Dmitriy Mavreshko sustained serious injuries in the accident; defendants had expressly disavowed any contention that Dmitriy's own negligence was responsible for his injuries; and no other potential third–party cause was suggested by the evidence or argued to the jury?

Where preserved: Dmitriy and Igor Mavreshko preserved this argument in their motion for a new trial and the briefing submitted in support of that motion. App.124a–30a; 132a–44a.

Standard of review: This Court reviews a trial court's ruling on a motion for a new trial for abuse of discretion. *See Pryer* v. *C.O. 3 Slavic*, 251 F.3d 448, 453 (3d Cir.2001); *see also Ford Motor Co.* v. *Summit Mo-*

tor Products, Inc., 930 F.2d 277, 290–301 (3d Cir. 1991) (reversing district court's denial of plaintiff's motion for a new trial because insufficient evidence existed to uphold jury's verdict for defendant).

3. If this Court concludes that the trial court erred in granting summary judgment against Svetlana Mavreshko's personal claim for damages, should this Court remand to allow the district court to consider in the first instance whether the need for a retrial of defendants' liability to resolve Svetlana's claim would lead the district court to exercise its discretion in favor of granting a new trial on Dmitriy and Igor's claims, given the aberrant nature of the first jury's finding of no causation and to avoid the likelihood of inconsistent adjudications of these plaintiffs' claims.

Where preserved: This issue, involving the scope of this Court's remand to the district court, may arise in the future. Thus, plaintiffs are preserving this issue by raising it now. It was not possible or necessary for plaintiffs to have raised this issue previously before the district court.

Standard of Review: This third and final question presented for review concerns the scope of this Court's remand to the district court

once this Court concludes that the district court erred in entering summary judgment against Svetlana Mavreshko. This Court has discretion to decide that question in the first instance. *See* 28 U.S.C. §2106 (empowering a federal appellate court to "require such further proceedings to be had as may be just under the circumstances").

III. STATEMENT OF THE CASE

The accident and resulting significant permanent brain injury that minor Dmitriy Mavreshko sustained took place on the evening of December 24, 2002 at a snowtubing facility on the premises of Fernwood Hotel and Resort located in Bushkill, Monroe County, Pennsylvania. App.41a.

Dmitriy Mavreshko and his parents, Igor and Svetlana Mavreshko — each suing in their own right — initiated this lawsuit on March 2, 2004 in the U.S. District Court for the Middle District of Pennsylvania. App.30a. In May 2004, plaintiffs filed an amended complaint, which the defendants answered, and this case proceeded to discovery.

In December 2004, the defendants filed a motion for summary judgment asserting that the "Release of Liability for Snowtubing" forms that

each of the three plaintiffs signed on December 24, 2002 in order to participate in the snowtubing activity at Fernwood Hotel and Resort precluded the plaintiffs from obtaining any recovery on plaintiffs' claims for damages arising from the significant, permanent injuries that minor Dmitriy Mavreshko sustained while snowtubing. App.56a.

Also in December 2004, plaintiffs filed a cross–motion for summary judgment asking the district court to hold that the "Release of Liability for Snowtubing" forms that each of the three plaintiffs signed did not bar their claims against the defendants. App.31a (docket entry 23). After those motions had been fully briefed, and after holding oral argument, the district court on May 31, 2005 issued a memorandum and order deciding the motions. App.4a.

First, with regard to the claims of minor Dmitriy Mavreshko, the district court held that the release contract was subject to being disapproved by the minor under Pennsylvania law, that by filing suit the minor had evidenced his disapproval of the release agreement, and that therefore the release agreement did not operate to bar Dmitriy's own claims. App.7a–9a.

The district court next ruled that Igor Mavreshko's claim in his own right for the injuries his son Dmitriy sustained was not precluded by the release that Igor himself had signed to go snowtubing, and therefore the district court permitted Igor's personal claim to go to trial. App.11a.

Svetlana Mavreshko, Dmitriy's mother, had not only signed her own release form to use the snowtubing facility, but she also co–signed the release form that Dmitriy had signed in accordance with the snowtubing facility's policy of having an adult co–signer of a minor's snowtubing release form. Based on Svetlana's having co–signed Dmitriy's release, the district court ruled that Svetlana was prohibited from placing before the jury her personal claim for damages arising from Dmitriy's accident and resulting injuries. App.11a.

On October 31, 2005, a jury trial began on Dmitriy and Igor Mavreshko's claims against the defendants. App.350a. The evidence concluded on November 8, 2005, and counsel for the parties delivered closing arguments that afternoon, after which the district court charged the jury. App.1292a–365a.

On November 9, 2005, the jury returned its verdict. The verdict sheet contained three questions for the jury to answer. In response to the first

question, the jury found that defendants were negligent. App.15a. In response to the second question, the jury found that the defendants' negligence *was not* a cause of plaintiffs' injuries. App.15a. As a result of that finding, the jury did not address the third and final question, which asked the jury to set forth separately the amount of damages being awarded to Dmitriy and Igor Mavreshko. App.16a.

On November 9, 2005, the district court entered judgment on the jury's verdict in favor of defendants and against Dmitriy and Igor Mavreshko. App.14a. Next, on November 22, 2005, Dmitriy and Igor Mavreshko filed a timely motion for a new trial. App.124a. The motion for a new trial advanced two arguments: that the jury's verdict was against the greater weight of the evidence (App.140a); and that the verdict was inconsistent and irreconcilable in finding that defendants were negligent but that defendants' negligence was not the cause of Dmitriy's accident and resulting injuries (App.142a).

On September 7, 2006, the district court issued a memorandum and order denying the new trial motion. App.17a. At that point, the district court's order dismissing Lana Mavreshko's personal claim on summary judgment also became subject to appeal. Accordingly, on October 6,

2006, Dmitriy and Igor Mavreshko appealed from the district court's order denying their new trial motion, and Svetlana Mavreshko appealed from the district court's order entering summary judgment as to her claim. App.1a.

IV. STATEMENT OF FACTS

On the evening of December 24, 2002, thirteen–year–old Dmitriy Mavreshko was snowtubing at a snowtubing facility operated on the premises of the Fernwood Hotel and Resort in Bushkill, Monroe County, Pennsylvania. A patron rides across the snowtube as the tube descends the snowtubing hill in lanes that are separated by solid ice walls.

The instruction manual governing operation of the snowtubing course instructs employees to not permit snowtubers to descend the course while workers or other patrons are present in the midst of the course. App.1392a–93a. According to uncontradicted testimony at trial, that rule was violated when Dmitriy was allowed to descend the hill while an employee of the facility was present in Dmitriy's lane in the middle the course to retrieve an item of clothing that an earlier snowtuber had dropped while descending the course.

Eyewitnesses at trial testified that the employee who entered the course to retrieve an item of clothing was physically present in the lane Dmitriy's snowtube was descending. Various eyewitnesses who were guests at the resort, and who observed the accident from two separate vantage points, testified that they saw Dmitriy's snowtube come into contact with that employee's leg or foot, after which Dmitriy was propelled at a high rate of speed head–first into the ice wall on the opposite side of his lane, rendering Dmitriy unconscious and causing him severe, permanent brain injuries. This testimony is described in great detail *infra*, with plentiful cites to the record, at pages 45 to 57 of this Brief for Appellants.

The employee working at the top of the course, who in violation of the facility's instruction manual allowed Dmitriy to descend the course while another employee was present on the hill, likewise testified that an employee named Travis Moya was standing in Dmitriy's lane halfway up the hill when Dmitriy's snowtube reached that point in its high–speed descent down the 110–yard course. App.782a. According to her testimony, she was unable to see whether any contact between Moya and the Dmitriy's snowtube took place before Dmitriy's snowtube

changed direction and plowed into the ice wall at a high rate of speed just after passing the spot where Travis Moya stood. App.784a–85a.

Finally, an employee working at the bottom of the snowtube course, Howard Foreman, testified that no contact occurred between Dmitriy and Moya, the employee present in Dmitriy's lane midway up the course. App.1162a. According to Foreman's testimony, Moya yelled to Dmitriy to drag his feet to slow down. App.1164a. In reaction to those yelled instructions, and/or in an effort to avoid a collision with the employee in the lane, the employee at the bottom of the hill testified that he saw Dmitriy drag one foot, which made the snowtube change direction and collide with the ice wall with great force at high speed. App.1164a–67a.

The instruction manual indicates that patrons should only be instructed to drag their feet at the very bottom of the snowtube course, where the lanes are angled upward, to slow the snowtube to a stop. App.1393a. At the bottom of the course, there are no solid ice walls separating the lanes, nor is the snowtube traveling at a high rate of speed. Even Foreman's testimony compels the conclusion that the attendant at the top of the hill violated the rules when she released

Dmitriy to descend the hill while Moya was present in Dmitriy's lane in the middle of the course, thereby placing a child in an extremely dangerous situation.

To summarize, eyewitness testimony at trial placed an employee in Dmitriy's lane midway up the snowtubing course at the time Dmitriy's snowtube, at its ordinary high rate of speed, passed the point on the course where the employee was present. It was undisputed that patrons were not to be allowed to descend the course when a course employee was physically present in the midst of the course.

The vast majority of the eyewitnesses perceived that the snowtube on which Dmitriy was riding came into contact with the employee who was standing midway up the hill. According to those witnesses, that contact caused Dmitriy's snowtube to change direction and caused Dmitriy's head to hit the ice wall on the opposite side of the lane at a high rate of speed and with great force. One eyewitness, the employee based at the bottom of the hill, testified that he saw no contact but that the employee in Dmitriy's lane in the midst of the course shouted instructions that Dmitriy should drag his feet. Those instructions, however, are only proper at the end of the course.

The evidence and arguments at trial focused on whether the defendants had been negligent and, if so, what amount of damages should the plaintiffs recover as a result. The question of whether the defendants' conduct, assuming it was negligent, was a factual cause of Dmitriy's injuries was not directly disputed at trial. Thus, in his closing argument, counsel for the defendants never argued to the jury that even if the jury should find that the defendants were negligent, the jury should nevertheless proceed to find that the defendants' negligence was not a cause in fact of Dmitriy's injuries. App.1317a–35a. Earlier, in his opening statement, counsel for defendants expressly informed the jury that defendants did not contend and would not be contending that Dmitriy was negligent or that Dmitriy's negligence caused the accident. App.371a.

Dmitriy's parents, Igor and Svetlana Mavreshko, had also been snowtubing on the evening of December 24, 2002, but they did not observe the incident that caused their only child to sustain severe injuries that night, although they arrived at the scene a few moments later and discovered their son's motionless and unresponsive body near where the collision occurred in the midst of the snowtubing course. App.402a. All

three plaintiffs signed release forms before using the snowtubing course, and Svetlana also co–signed Dmitriy's release form because the facility required an adult co–signer for before allowing a minor to engage in the activity.

As noted above, at the summary judgment stage the district court ruled that Dmitriy's release form could not be used to bar Dmitriy's claims in his own right, because as a minor he possessed the right to disaffirm the contract that the release form represented. App.7a–9a. The district court also ruled that Igor, Dmitriy's father, retained the ability to sue in his own right for damages resulting from Dmitriy's injuries, even though Igor had signed a release form governing Igor's own use of the snowtubing course. App.11a.

However, the district court ruled on summary judgment that Svetlana's signature on Dmitriy's release form prevented her from suing in her own right for damages resulting from Dmitriy's injuries, and therefore Svetlana's own claim were not presented to the jury for resolution. App.11a. Svetlana's own claim for damages was not identical to the claim her husband, Igor, possessed. To give just one example of a difference, Svetlana's personal claim included lost wages that she suffered in

caring for her son after the accident, while Igor's personal claim did not seek to recover his lost wages because he was temporarily unemployed when the accident occurred and for a time thereafter. App.45a; 824a.

Dmitriy was diagnosed as having suffered a severe traumatic brain injury in the collision with the ice wall. His physicians placed him into a medically–induced coma for the first six days following the incident. App.817a. Before the incident, Dmitriy had been a happy child who achieved very high grades in school and who had, as a result, been admitted into one of the most competitive of New York City's public schools. App.385a–98a; 808a–13a. After the accident, he has been unable to achieve at or anywhere near the same high level in school, he suffers from constant severe headaches, he has become depressed and withdrawn, he has cut classes, he has attempted suicide, he has used alcohol and illegal drugs, he has committed petty criminal offenses, and he has spoken about killing himself and feeling worthless. App.414a–28a; 824a–35a; 955a–66a.

A neurologist who testified as an expert witness in this case stated under oath that Dmitriy sustained "a severe traumatic brain injury" with intercerebral hemorrhage. App.597a–605a. The neurologist further

testified that Dmitriy has sustained serious brain damage that is permanent in nature and that will require ongoing medical care. App. 619a; 624a. And one of the worst consequences of these injuries is that Dmitriy recognizes that he is not capable of functioning at anywhere near the same level of achievement and accomplishment as he did before he sustained the injuries that give rise to this suit. App.514a–31a.

The neurologist estimated that the lifetime cost of medical care for Dmitriy arising from his brain injuries is $4 million. App.575a–76a. In addition, an economist testified at trial that Dmitriy's reduced earning capacity as a result of having sustained the injuries would total as much as $4 million. App.1038a. These two damages figures do not include any compensation for the pain and suffering that Dmitriy experienced due to the accident. As a result of the district court's summary judgment ruling against Svetlana's claim and the jury's verdict finding that defendants were negligent but that defendants' negligence was not a cause–in–fact of plaintiffs' injuries, plaintiffs have to date recovered no compensation for their losses from defendants, losses that a jury reasonably could conclude exceed $10 million.

V. STATEMENT OF RELATED CASES AND PROCEEDINGS

Plaintiffs/appellants are unaware of any related cases or proceedings.

VI. SUMMARY OF THE ARGUMENT

The district court entered summary judgment against Svetlana Mavreshko's personal claim, arising from the injuries her minor son sustained while snowtubing at defendants' recreational facility, because Svetlana had co–signed as parent the "release" form that her minor son Dmitriy had to sign before he could go snowtubing.

The district court's grant of summary judgment against Svetlana's personal claim constituted reversible error for the following reasons. For one thing, the release fails to communicate to a parent who is co–signing her minor child's "release" that, by co–signing, the parent will be waiving the parent's own claim for damages arising from injuries the child sustains due to the facility's negligence. For another thing, as defendants themselves have conceded (App.113a–14a), the purpose of having a parent co–sign a minor child's "release" is to make the release enforceable against the child, not to make the release enforceable against the parent. Enforcing a child's release against a parent even

after, as here, the district court holds that the release cannot be enforced against the child is a truly absurd outcome. Indeed, the district court's entry of summary judgment against Svetlana Mavreshko's personal claims is not just contrary to law, but it fails the test of practical common sense.

Because Svetlana has not had her day in court on her personal claim, reversing the district court's grant of summary judgment against her necessitates a retrial on the issue of defendants' liability. Neither Svetlana's husband nor her son asserted Svetlana's personal claim during the original trial, nor were the claims that they did assert coextensive with her personal claim. Finally, the law of collateral estoppel does not permit defendants to invoke the jury's finding of no "causation" on the claims that Dmitriy and Igor Mavreshko asserted to deprive Svetlana of her day in court, because the necessary privity is lacking.

Next, this Court should hold that the district court abused its discretion in denying Dmitriy and Igor Mavreshko's motion for a new trial. Plaintiffs recognize that this Court does not frequently grant new trials in favor of plaintiffs based on weight of the evidence, but a combination

of three factors makes the grant of a new trial in this case necessary and appropriate.

First, the jury expressly found that defendants were negligent, meaning that defendants breached the duty of care they owed to Dmitriy Mavreshko. Second, it was undisputed that Dmitriy sustained significant injuries and substantial damages in the accident giving rise to this case. The district court nevertheless entered judgment in favor of defendants on the jury's finding that defendants' negligence was not a cause–in–fact of Dmitriy's injuries. Third, defendants expressly disavowed, through their words and actions, any contention that Dmitriy's own negligence caused his injuries, nor was there any evidence from which a jury could conclude that some third–party or outside force other than defendants was to blame for Dmitriy's accident. Under these circumstances, as a substantial body of case law confirms, a jury's finding that defendants' negligence did not cause plaintiff's injuries is manifestly against the weight of the evidence, shocks the conscience, and necessitates a new trial.

At a minimum — given that defendants' liability must be retried on Svetlana's personal claim for damages that was erroneously dismissed

at the summary judgment stage — this Court should remand Dmitriy and Igor's new trial motion to the district court for further consideration. When the district court originally denied Dmitriy and Igor's new trial motion, the district court did not know that a retrial of defendants' liability on Svetlana's personal claim would be necessary.

Given the significant, permanent brain injuries Dmitriy sustained in the accident; the $8 million in actual damages (excluding pain and suffering) necessary to make plaintiffs whole; the aberrant nature of the first jury's findings that defendants were negligent but not the cause of plaintiff's injuries, despite the fact that no other possible cause was before the jury for its consideration; and the great injustice that would be inflicted on a severely injured minor if a second jury rules in favor of Svetlana but the first jury's judgment against Dmitriy and Igor is permitted to stand, this Court at a minimum should remand to allow the district court to reconsider under these new circumstances whether to grant Dmitriy and Igor's new trial motion.

VII. ARGUMENT

A. The District Court Erred In Entering Summary Judgment In Favor Of Defendants On Svetlana Mavreshko's Personal Claim For Damages

1. The "release" that Svetlana signed to enable her minor son Dmitriy to engage in snowtubing failed to put a parent on notice that, by signing the release, the parent was waiving his or her own claims arising out of any injuries to the child

Each of the three plaintiffs — parents Igor and Svetlana Mavreshko and minor child Dmitriy Mavreshko — signed identical separate preprinted form documents titled "Release of Liability for Snowtubing" supplied by the operator of the snowtubing facility at the Fernwood Hotel and Resort in order to gain admission to use the facility. In addition, Svetlana Mavreshko, Dmitriy's mother, co–signed Dmitriy's "release" at the very bottom on the line designated "Parent's Signature" over the preprinted parenthetical statement "If user is a minor." App.26a.

At the close of discovery, defendants filed a motion for summary judgment asserting that each plaintiff's signature on his or her "Release of Liability for Snowtubing" form should cause the district court to hold that none of plaintiffs' claims merited a trial. Plaintiffs soon thereafter

filed a cross–motion for summary judgment asking the district court to rule that the "releases" did not bar any of their claims from reaching trial.

In ruling on the motions for summary judgment, the district court held with respect to the claim of minor Dmitriy Mavreshko that the "release" was unenforceable. App.7a–9a. The district court recognized that a minor retains the right to disapprove contracts, with rare exceptions not applicable here, until the minor reaches the age of majority. By filing a suit to recover on account of his personal injuries arising from defendants' negligence, the district court recognized, minor Dmitriy Mavreshko had indicated his intention to disapprove the "release," and therefore defendants could not enforce the release against him.

With respect to Dmitriy's father, Igor, the district court held that Igor's having signed his own separate "release" in order to use the snowtubing facility did not encompass any release of Igor's ability to assert a personal claim as parent arising from injuries sustained by his minor child. App.11a. This holding with respect to Igor also meant that Svetlana's having signed her own "release" in order to use the snowtub-

ing facility likewise did not include a release of her ability to assert a personal claim as parent arising from injuries sustained by her minor child.

Nevertheless, with respect to Svetlana only, the district court went on to hold that because she had co–signed Dmitriy's "release" in the capacity of Dmitriy's parent, the release prohibited Svetlana from asserting her personal claim as parent arising from injuries sustained by his minor child. App.11a.

Before turning to explain why the district court's entry of summary judgment against Svetlana's personal claim was error and must be reversed, it is useful to begin with a review of Pennsylvania law — the substantive law that the parties agree governs the resolution of the negligence claims in this case — on the enforceability of releases.

Pennsylvania law provides that releases — especially releases purporting to release a party from liability stemming from that party's own negligence — must be strictly construed against the party asserting them. *Beck–Hummel* v. *Ski Shawnee, Inc.*, 902 A.2d 1266, 1269 (Pa. Super. Ct. 2006) (Todd, J.). In addition, "[w]hen a releasing party receives a release drafted by a releaser, the releasing party must have

been aware of and understood the terms of the release before his agreement can be deemed a particularized expression of the intent to assume risk." *Wang* v. *Whitetail Mountain Resort*, 933 A.2d 110, 113 (Pa. Super. Ct. 2007). Thus, at a minimum, a court cannot enforce a "release" to forfeit claims that the signer of the release is not put on notice of forfeiting as a result of signing the release.

The district court's grant of summary judgment against Svetlana's personal claim as parent based on the release that she co–signed for Dmitriy must be reversed because the text of that release failed to communicate to the parent co–signer that, by co–signing a minor child's release, the parent would be releasing his or her ability to sue in his or her own right for damages resulting from injuries to the child. Indeed, even the district court recognized this point, writing in its summary judgment opinion that the release "does not refer to releasing the defendants with regard to claims for medical expenses if the plaintiff's minor child is injured while snowtubing." App.11a.

A copy of the "Release of Liability for Snowtubing" that Dmitriy signed and Svetlana co–signed is attached to this Brief for Appellants at page 26a of Volume One of the Appendix. Immediately underneath the

title of the document are spaces where the user — here, Dmitriy — fills in his name, address, and phone number. Then the preprinted form contains seven paragraphs of statements referring to the user by the first person pronoun, "I." Included among those statements are:

> I hereby release Operator and its owners, agents, affiliates, parent companies, and employees, as well as the equipment manufacturers and distributors, from any and all liability to me or my property resulting from their acts of negligence.* * *
>
> I understand and am aware that snowtubing is a HAZARDOUS ACTIVITY. I understand that snowtubing and the use of snowtubes involves a risk of injury to any and all parts of my body. I hereby freely and expressly assume and accept responsibility for any and all risks of injury or death while participating in this activity.
>
> I was informed to and agree to read and follow all instructional signage and the directions of Operator's personnel.
>
> I am taking no medications which would impair my ability to safely perform this activity. I have not and will not consume alcoholic beverages to the point where it would impair my ability to safely perform this activity.

App.26a.

Approximately three–quarters of the way down the page, following the above–quoted language, appears a signature bloc for the user to sign. Above that signature line, where Dmitriy Mavreshko himself

signed as the user of the snowtubing facility, the "release" states, "I have read the above paragraphs and fully understand them."

The remainder of the text on the page appears above two additional signature blocs found at the very bottom of the page, another for the user to sign and one for a parent to sign "if user is a minor." Because the language found below the user's first signature and above the signature lines for the user and the parent is of great importance to determining whether the district court erred in holding that Svetlana's co–signing of Dmitriy's "release" barred her from pursuing her personal claim as Dmitriy's mother, plaintiffs reproduce here the full text of that lower portion of the release form:

> This agreement is governed by the laws of Pennsylvania and venue shall be proper in the courts of Monroe County, Pennsylvania. If any part of this agreement is determined to be unenforceable, all other parts shall be given full force and effect.
>
> I agree that there have been no warranties, expressed or implied, which have been made to me beyond the information written on this form. I, the undersigned, acknowledge that I have read this agreement and release of liability and I understand its contents. I understand that my signature below expressly waives any rights I may have to sue Operator for injuries and damages.
>
> I/we understand the undersigned must not slide until the tube chute is clear.

> I/we understand the undersigned should immediately exit the tube run upon completion of the run.
>
> I/w [sic] agree to heed all signs and follow the directions of the tube hill attendants.
>
> USER'S SIGNATURE: /s/ Dmitriy Mavreshko DATE:_____
>
> PARENT'S SIGNATURE:/s/ Svetlana Mavreshko DATE:_____
> (If user is a minor)

App.26a.

It is pellucidly clear from the above text of the "Release of Liability for Snowtubing" form that the pronoun "I" and term "the undersigned" are used to refer to the person who will be snowtubing, which in the context of this particular release is Dmitriy. Thus, when the "release" states:

> I, the undersigned, acknowledge that I have read this agreement and release of liability and I understand its contents. I understand that my signature below expressly waives any rights I may have to sue Operator for injuries and damages.

it is clear that the words "I" and "the undersigned" are meant to refer to the user, and not the parent co–signer. Any doubt as to the correctness of this point disappears when text of the immediately following paragraphs are examined:

> I/we understand the undersigned must not slide until the tube chute is clear.

> I/we understand the undersigned should immediately exit the tube run upon completion of the run.
>
> I/w [sic] agree to heed all signs and follow the directions of the tube hill attendants.

These three paragraphs make indisputably clear that the "undersigned" as the term is used in the release refers to the person who will be snowtubing, and not to the parent as co–signer. Moreover, the alternative use of the pronoun "we" in these three paragraphs make clear that when the singular pronoun "I" is used in the "release," the person being referred to by the use of the singular "I" is the user, here Dmitriy.

Stated plainly, as even the district court has recognized (App.11a), nothing in the text or language of the "release" communicates to a parent co–signer that by co–signing the release, the parent is thereby releasing whatever claim the parent would otherwise possess to sue in the parent's own right for damages arising from injuries to the child. Rather, it is clear that the purpose of having the parent co–sign the form was the snowtubing facility's legally incorrect belief that the parent's signature would make the "release" enforceable against the child by releasing the child's own claims. Indeed, in opposing plaintiffs' motion for partial summary judgment, defendants conceded that the rea-

son they required a parental co–signer for a minor was to make the release enforceable against the minor. App.113a–14a.

Here, the district court correctly ruled that the "release," even with the presence of a parent's signature, was ineffective to release the minor child's own claims. The district court's ruling thus produces the preposterous situation where the parent's signature is ineffective to accomplish its intended purpose — effectuating a release of the child's own claims — but is effective for the unintended and uncommunicated purpose of releasing the parent's claim in the parent's own right.

To summarize, the resort's admitted purpose in having a parent or guardian sign a child's release form was to make the release enforceable against the child, and not to make the release enforceable against the parent or guardian even if the release was unenforceable against the child. There was nothing in the release form that Dmitriy signed and that Svetlana co–signed to inform Svetlana that by co–signing Dmitriy's release, she would be forfeiting her ability as a parent to sue defendants in her own right for damages resulting from Dmitriy's injuries.

Nor was it appropriate for the district court to enforce Dmitriy's release against Svetlana after the district court held that the release

could not be enforced against Dmitriy's own claims. In so ruling, the district court relied solely and exclusively on a Pennsylvania federal district court ruling from 1987 in a quite distinguishable case. *See Simmons* v. *Parkette National Gymnastic Training Ctr.*, 670 F. Supp. 140 (E.D. Pa. 1987).

Two important differences make the federal district court's waiver ruling in *Simmons* distinguishable from this case. First, the activity involved in *Simmons* was a minor child's participation in an ongoing gymnastics program. Thus, the "release" at issue in *Simmons* was presumably provided to the minor and her parent for a leisurely review, instead of what happened in this case, where the release had to be executed immediately in order to participate in a recreational activity at a resort's snowtubing facility.

Even more importantly, however, is the fact that the release in *Simmons* actually communicated to the parent co–signer that the waiver was intended not only to waive the child's own claims, but also the claims of close family members who could otherwise sue in their own rights if the child was injured. The release at issue in *Simmons* stated:

> In consideration of my participation in Parkettes, I, intending to be legally bound, do hereby, for myself, my heirs, executors, and

> administrators, waive and release any and all right and claims for damages which I may hereafter accrue to me against the United States Gymnastic Federation, the Parkette National Gymnastic Team, their officers, representatives, successors, and/or assigns for any and all damages which may by sustained and suffered by me in connection with the above gymnastic program, or participating in and returning from any activity associated with the program.

Simmons, 640 F. Supp. at 141. That release expressly covered not only the child, but also her "heirs, executors, and administrators." No such language is found in the release that Dmitriy signed and Svetlana co–signed.

The district court's ruling in *Simmons* contains a paucity of legal analysis concerning why that release should be enforceable against the mother even though it was unenforceable against the child, and the district court's analysis in *Simmons* fails to recognize that the pronoun "I" used in the release at issue in that case plainly refers to the child and not the parent co–signer. Thus, for many of the same reasons already discussed above, the district court's ruling in *Simmons* is legally unsound. But, regardless, that case is plainly distinguishable from this case given the different language of the releases involved.

The district court's decision to enforce Dmitriy's "release" against Svetlana as parent co–signer should also be rejected as failing the test

of practical common sense. In a case where a child has two living parents, only one of whom has co–signed the "release," the non–signing parent can still sue the facility for many of the same damages that the parent who signed the release is prohibited from seeking.

Moreover, in this day and age, it is common for a child's parents to invite on a recreational outing not only their own child, but also one or more friends of their child. If an adult brings his own child and one of the child's friends to the snowtubing facility, that adult would presumably be allowed to co–sign the release for both minors, even though the adult was only the parent of one of the two youths. If the child's friend was injured, the friend's parents would both be able to sue the snowtubing facility, because neither had signed the "release." This scenario is not simply hypothetical. Rather, in this very case, one of the eyewitnesses who testified at trial was a minor who went snowtubing as the guest of his minor friend and that friend's parents. App.720a.

Pennsylvania law, the text of the snowtubing "release" that Svetlana Mavreshko co–signed as parent, and practical common sense all dictate the same result here: the district court erred in holding that the snowtubing "release" could fairly be construed to release a parent co–signer's

own claim for damages arising from injuries sustained by her child while snowtubing. Accordingly, the district court's entry of summary judgment against Svetlana Mavreshko's personal claim against defendants should be reversed.

2. Because Svetlana Mavreshko has not yet had her day in court before a jury on her own claim for damages, and because the first jury's verdict cannot collaterally estop her from having that day in court, a remand for trial of Svetlana's personal claim is necessary

As noted above, Svetlana Mavreshko's personal claim for damages was in some respects similar to, but was not identical to, her husband Igor's personal claim for damages that the jury heard and decided. To name just one difference, Svetlana Mavreshko's personal claim for damages includes a claim for the lost wages she sustained in caring for her son as a result of the injuries he sustained due to defendants' negligence. The jury was not presented with Svetlana's lost wages claim, nor did the verdict sheet even permit the jury to award any damages whatsoever to Svetlana. App.15a–16a. As the verdict sheet reflects, the jury only addressed the claims of Dmitriy and Igor. *Id.*

When this Court overturns the district court's entry of summary judgment against Svetlana's personal claim, a retrial of defendants' liability will be necessary. For having to undergo this second trial, however, defendants will have no one to blame but themselves. It was the defendants that moved for summary judgment based on the "release" that Svetlana co–signed, and had defendants not so moved, all three of the plaintiffs' claims could have been tried to the original jury simultaneously.

Defendants have never previously had occasion to assert that the jury's verdict in favor of defendants on Dmitriy and Igor's claims should preclude Svetlana from having her day in court before a jury on her personal claim. As a result, the district court has not had occasion to consider in the first instance any such collateral estoppel defense advanced by the defendants. Plaintiffs do not believe that a remand is necessary for that purpose, however, because existing law makes clear that the jury's verdict in favor of defendants on Dmitriy and Igor's claims cannot be invoked by defendants to deny Svetlana her day in court on her own personal claim — a day in court that she has yet to receive.

At issue is whether a defendant can invoke collateral estoppel against a plaintiff whose claims were not before the jury, and who has not yet had her own day in court, predicated on a jury's verdict in the defendant's favor against another plaintiff. Applicable case law reveals that the answer to this question is a resounding "no": a defendant cannot invoke collateral estoppel against a plaintiff who has not yet had her day in court, even if that plaintiff's claim arises from the same circumstances as the claim of another plaintiff whose identical claim against the same defendant a jury has already rejected. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 330 & n.14 (1979) (if a railroad collision injures fifty plaintiffs who each bring separate suits against the railroad, not even defense verdicts in the first twenty–five lawsuits to reach trial can prevent the twenty–sixth plaintiff from taking her case before a jury and obtaining a plaintiff's verdict).

As the U.S. Supreme Court recognized in *Blonder–Tongue Labs., Inc.* v. *University of Illinois Found.*, 402 U.S. 313 (1971):

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Id. at 329.

Under Pennsylvania law, which provides the substantive rule of decision in this case, it is clear that collateral estoppel only applies where "the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior adjudication." *Capek* v. *Devito*, 767 A.2d 1047, 1051 (Pa. 2001). This Court applies these very same factors in cases arising under federal law. *See Temple Univ.* v. *White*, 941 F.2d 201, 212 (3d Cir.1991).

It is the defendants' inability to satisfy these two necessary elements of the collateral estoppel analysis that precludes defendants from invoking collateral estoppel against Svetlana Mavreshko based on the jury's verdict in favor of defendants and against Dmitriy and Igor Mavreshko. Svetlana was not a party to the jury's adjudication. Her personal claim, including her claim for lost wages, was not before the jury for its consideration, due to the district court's earlier grant of summary judgment against Svetlana at defendants' behest. The verdict slip that the jury received to record its verdict and any monetary award in favor of the

plaintiffs had plenty of lines for listing the damages being awarded to Dmitriy and Igor Mavreshko, but not one line for recording any damages to be awarded to Svetlana Mavreshko. App.15a–16a.

Likewise, the law is clear that Svetlana was not in privity with either Dmitriy or Igor for purposes of the collateral estoppel inquiry. At trial, Igor was not asserting Svetlana's claim — nor could he permissibly do so, given that the district court had previously granted summary judgment in defendants' favor as to Svetlana's claim. Rather, Igor was asserting only Igor's claim, which was distinct from and not coextensive with Svetlana's claim.

Svetlana's name appears on the trial court caption of this case in two capacities: suing in her own right (the claim the district court dismissed on summary judgment) and suing together with her husband Igor as parents and natural guardians of Dmitriy. Under Pennsylvania law, a minor cannot sue in his own name but must bring suit to recover damages in his own right by a claim nominally asserted by his parents and natural guardians. On the verdict slip that was presented to the jury, however, this legal fiction had been removed from the case; the jury was instructed to decide what amount of damages it wished to award di-

rectly to Dmitriy, and what amount of damages it wished to award to Igor. App.16a.

The fact that Svetlana joined with Igor as Dmitriy's parents and natural guardians in order to allow the adjudication of Dmitriy's claim does not collaterally estop Svetlana from now being able to pursue the adjudication of her own personal claim against the defendants. In *Robbins* v. *Kristofic*, 643 A.2d 1079, 1082 (Pa. Super. Ct. 1994), the Superior Court of Pennsylvania held that an identity of the parties does not exist for purposes of collateral estoppel if a mother sues in her own right in one suit and sues as guardian of her child in another suit, even if the underlying claim is the same. *See also Hathi* v. *Krewstown Park Apartments*, 561 A.2d 1261, 1262 (Pa. Super. Ct. 1989) ("If both the parent and the child have claims against a defendant for injury to the child, the parents may prevail while the child loses."); *Gould* v. *Nickel*, 407 A.2d 891, 891–93 (Pa. Super. Ct. 1979) (same).

The Restatement (Second) of Judgments §36 (1982) is in accord. It states, "A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in an-

other capacity." And Moore's Federal Practice treatise reaches the same conclusion. *See Brown* v. *Terry*, 375 So. 2d 457, 458–59 (Ala. 1979) ("The rule is generally recognized that privity for purposes of judicial finality, does not normally arise from the marital relationship, nor from the relationship between parent and child.") (quoting 1B Moore's Federal Practice ¶0.414(11), at 1660 (2d ed. 1974)).

Numerous other state appellate courts have likewise held that a parent asserting the parent's own personal claim for damages arising from injury to a child is not in privity for purposes of collateral estoppel with that parent's assertion, in the role of guardian, of the child's claim for damages. *See Church* v. *Fleishour Homes, Inc.*, 874 N.E.2d 795, 807 (Ohio Ct. App. 2007); *McGowen* v. *Huang*, 120 S.W.3d 452, 463 (Tex. Ct. App. 2003); *Hales* v. *North Caroline Ins. Guar. Ass'n*, 445 S.E.2d 590, 594–95 (N.C. 1994); *Johnson* v. *Hunter*, 447 N.W.2d 871, 874 (Minn. 1989) ("The parent–child relationship, however, is traditionally excluded from privity notions for res judicata purposes."); *Richburg* v. *Baughman*, 351 S.E.2d 164, 166 (S.C. 1986) ("Privity does not typically arise from the relationship between parent and child."); *Glover* v. *Narick*, 400 S.E.2d 816, 824 (W. Va. 1990) ("the mere fact that the

plaintiffs had appeared in the prior litigation as representatives of the interests of the minor child did not preclude them from proceeding upon their own claims against the same defendants").

Similarly, this Court has taken a narrow view of the doctrines of privity and "virtual representation," rejecting preclusion arguments that would result in denying a litigant his or her own day in court. *See*, *e.g.*, *Marshak* v. *Treadwell*, 240 F.3d 184, 195–96 (3d Cir. 2001) (Alito, J.) (rejecting collateral estoppel defense that was predicated on "virtual representation" theory).

In *Collins* v. *E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 178 (3d Cir. 1994), Circuit Judge Edward R. Becker recognized the principle when rejecting a defendant's assertion of collateral estoppel that "every individual is entitled to his or her day in court." According to Judge Becker, writing for a unanimous three–judge panel, "Unless the individual chose another party to represent him or her in the prior suit or a law designated an agent as his or her representative, the outcome of a prior lawsuit in which the individual did not take part should not bind him or her." *Id.* at 178–79.

Because the district court at defendants' behest erroneously granted summary judgment dismissing Svetlana Mavreshko's personal claim arising from the injuries that her son sustained, she has not yet received her day in court on her personal claim. The fact that her husband was permitted to assert before a jury his separate personal claim, and that her son was able to take his claim before a jury, does not allow defendants to invoke collateral estoppel against Svetlana Mavreshko to deny her the day in court that due process entails she is entitled to receive.

For these reasons, upon overturning the district court's grant of summary judgment dismissing Svetlana Mavreshko's claim in her own right, this Court should remand that claim to the district court for a trial on the merits.

B. The District Court Abused Its Discretion In Denying The Motion For A New Trial That Dmitriy And Igor Mavreshko Filed

1. Overview and relevant legal standards

The district court permitted Dmitriy and Igor Mavreshko to present their negligence claims to a jury. Under Pennsylvania law, a claim for

negligence has four elements, for which the plaintiff bears the burden of proof by a preponderance of the evidence. The four elements of a negligence claim are: (1) did the defendant owe the plaintiff a duty of care; (2) did the defendant breach the duty of care it owed to the plaintiff; (3) was the defendant's breach of its duty of care a cause–in–fact of the injuries that the plaintiff alleges; (4) did the plaintiff sustain damages as a result of the defendant's negligence. *See City of Philadelphia* v. *Beretta U.S.A. Corp.*, 277 F.3d 415, 422 n.9 (3d Cir. 2002) (listing the elements of a negligence claim under Pennsylvania law); *R.W.* v. *Manzek*, 888 A.2d 740, 746 (Pa. 2005) (same).

During the trial of this case, the parties' evidentiary presentation and their arguments to the jury focused exclusively on two issues: were the defendants negligent, meaning did the defendants breach a duty of care that they owed to Dmitriy Mavreshko; and, if so, what amount of damages was required to compensate for the significant, permanent brain injuries that Dmitriy suffered in the accident.

The plaintiffs claimed that the defendants' conduct was negligent, and the plaintiffs introduced a substantial amount of eyewitness testimony describing the role of defendants' employees in the events result-

ing in Dmitriy's accident to prove by a preponderance of the evidence that defendants' conduct was negligent. Defendants, by contrast, produced a single eyewitness — a former employee of defendants who hoped to work for them again in the future— from which defendants argued that their conduct was not negligent. Before defendants' eyewitness had finished testifying before the jury, he admitted that he had given three conflicting accounts of the circumstances he observed surrounding Dmitriy's accident and that he remained a friend of the employee who was present halfway up the hill in Dmitriy's lane when the attendant at the top of the hill carelessly cleared Dmitriy's snowtube to begin its descent. App.1158a–68a.

The defendants also aggressively contested the extent and nature of Dmitriy's injuries and the amount of damages that would be necessary to compensate him for those injuries. Dmitriy was seeking upwards of $10 million, including compensation for pain and suffering, while defendants maintained that any award of damages should be far smaller.

One thing that defendants were not arguing to the jury, either through their evidentiary presentation or in their counsel's closing argument, was that even if the jury found defendants' conduct to be negli-

gent, the jury should nonetheless find that defendants' negligence was not a cause in fact of Dmitriy Mavreshko's injuries. In his opening statement to the jury, counsel for defendants informed the jury that defendants were not contending that Dmitriy's own negligence was the cause of the accident. App.371a. Nor did the evidence presented to the jury suggest that any third–party or outside force other than defendants was the cause of the accident. Thus, the parties to this lawsuit received quite a surprise when the jury, despite finding that defendants were negligent, nevertheless found that defendants' negligence was not a cause in fact of Dmitriy's injuries.

After the district court entered judgment on the jury's verdict, Dmitriy and Igor Mavreshko filed a timely motion for a new trial, arguing among other things that the jury's verdict was against the great weight of the evidence and that the verdict was inconsistent with the defendants' own theory of defense, in that defendants had not argued to the jury that even if they were negligent, their negligence was not a cause in fact of Dmitriy's injuries.

A careful review of the evidence that was before the jury compels the conclusion that the jury's finding of "no causation" shocks the con-

science. Therefore, this Court should hold that the district court abused its discretion in denying the new trial motion, and this Court should order that Dmitriy and Igor Mavreshko's negligence claims be retried on remand.

2. Based on the evidence and arguments before the jury about how the snowtubing accident occurred, the jury's finding that defendants' negligence was not a cause of Dmitriy's injuries shocks the conscience

Dmitriy Mavreshko sustained his injuries while snowtubing at defendants' snowtubing facility on the evening of December 24, 2002. The snowtubing facility consists of four separate snowtubing lanes that descend parallel to one another straight down the snowtubing course. The surface of the snowtubing course is ice and snow, and the lanes are formed in a manner that creates solid ice walls, also known as "windrows," between the lanes.

Two workers, known as attendants, are responsible for the entry and exit of customers onto and off of the course, while a third worker sells tickets and processes the "release" forms discussed earlier. One attendant is based at the top of the hill, and her duty is to control when snowtubers are released onto the course to descend the hill. An instruc-

tion manual that the facility provided to its workers instructs the attendant at the top to ensure that the previous snowtuber has completed the course, and that no one is physically present in the lane, before releasing the next snowtuber to descend the hill. App.1392a–93a.

The attendant at the bottom of the hill has the job of making certain that snowtubers who have completed the course gather their tube and other possessions and depart from the run–out area at the bottom of the hill so that the area is clear for the next snowtuber to descend the hill. App.1393a. The attendant at the bottom is also responsible for retrieving any items of clothing that a snowtuber may have carelessly discarded on the course while descending the hill. App.1393a.

To retrieve an item of clothing present on the course, the attendant at the bottom walks up the lane to retrieve the item of clothing and then walks back down to the bottom of the course. App.1393a. While the attendant from the bottom of the course is present in a snowtubing lane on a portion of the course where a snowtuber would otherwise be descending at a high rate of speed, the attendant at the top is instructed to not release any additional snowtubers, to avoid collision and possible injury to the customer or the worker. App.1392a–93a.

On the facts of this case, it is undisputed that the attendant at the top of the hill violated this policy because she released Dmitriy's snowtube to begin its descent while the attendant from the bottom was present approximately halfway up Dmitriy's lane to retrieve an item of clothing that an earlier customer had dropped in that lane. Dmitriy, lying headfirst across his snowtube, would certainly have seen the employee in his lane on the well–lit course after he began descending the hill at a high rate of speed, although Dmitriy has no recollection of the circumstances of his accident due to the significant brain injuries he sustained. Once the descent begins, there is no way for the person on the snowtube to stop until he or she reaches the bottom of the hill.

At trial, the plaintiffs presented the jury with the testimony of seven eyewitnesses to the accident. The first eyewitness who testified was a high school student named Eugene Livits who went to the snowtubing facility as the guest of Max Pashinskiy's parents. App.719a–20a. (This shows, as discussed above, that minors whose own parents were not present to co–sign the "release" form were nevertheless able to use the facility if a non–parent adult co–signed their "release.")

Eugene testified that he knew Dmitriy from before but did not consider him a close friend. App.720a. Eugene further testified that he was first in line to descend down lane one of the course when the attendant released Dmitriy's snowtube to descend neighboring lane two. App.723a. From his vantage point at the top of the hill ready to descend lane one, Eugene testified about what he observed after Dmitriy's snowtube began to descend lane two:

> A. Then there was a guard walking up his lane on the right side, and then Dmitriy went down, and he collided with the guard, and he went in sort of like a zig–zag pattern and down, and then he came off — well, then he came to a stop.

App.723a.

The next eyewitness to testify was Milana Tarnavsky, a woman who was observing the snowtubing course from the side of the hill to decide whether she would join her husband in snowtubing. She testified:

> A. I saw the slope. It was lighted in the first half, what it looked like, and then there was a dark spot in the middle across the lanes, and then it continued, and then the slope continued outward.
>
> I saw the tube — there were tubes going down with people in them. I saw a tube come out from that dark area, that, like a dent, like a very, very large dent, and it struck a man that was walking across the lane.

App.738a.

In response to further questioning, Ms. Tarnavsky testified:

> Q. Did the tube strike the man?
>
> A. Yes, it did.
>
> Q. When that collision occurred, where was the man?
>
> A. He was inside the lane.
>
> Q. Was he up on the ice walls we have heard about?
>
> A. No. He was inside the second lane from me.
>
> Q. So there was a lane between you and where this accident occurred?
>
> A. Yes, that's correct.
>
> Q. What happened after the tube hit the man?
>
> A. The tube collided, bashed into the wall. It was like a glistening, an ice mirror wall between the second and third lanes. It changed direction, and it went right into the barrier, and then it just — that tube went toward me again, but more down.
>
> The boy was flipped from the tube, and the tube just slided down, continued toward the bottom of the slope.

App.739a.

The next eyewitness to testify was Vladimir Korniyenko, Ms. Tarnavsky's husband, who was standing with her on the side of the hill when Dmitriy's accident occurred. Mr. Korniyenko testified:

> A. We saw a boy going down the hill. This was the second lane from us, right before us where the hill continued around the middle of the second lane. A worker was standing in the lane, and the boy struck the worker.
>
> After the impact, the boy in the tube went across the lane, the opposite side, they hit the wall, and after the impact, the boy struck the other side as well, and then the tube proceeded down the hill by itself without the boy. The boy remained lying there in the lane.

App.755a.

The next eyewitness to testify was Christina Larsh, the course attendant working at the top of the hill at the time the accident occurred. App.776a. She testified that Travis Moya, the employee who was physically present in the middle of the course, was straddling the ice berm between lanes of the course, with one leg in Dmitriy's lane and the other leg in the next lane. App.782a–83a. Ms. Larsh testified that the path snowtubers were following down Dmitriy's lane would have taken Dmitriy's snowtube towards Moya's leg, but Ms. Larsh testified that she did not see whether or not Dmitriy's snowtube made contact with Moya from her vantage point, although she repeatedly agreed that Dmitriy's snowtube and Moya's body were in "close" proximity. App.783a–84a. A written statement that Larsh supplied on the night of the accident

stated that Dmitriy's snowtube hit the ice wall after passing the point where Moya was standing. App.1367a.

The next eyewitness who testified was Margarita Tarnavsky, Milana Tarnavsky's mother. Margarita testified that she was standing on the side of the hill with her daughter and son–in–law observing the snow-tubing course when Dmitriy's accident occurred. She testified as follows:

> Q. Can you tell us what you saw?
>
> A. I saw the snow tubing, actually, when we came there. We were standing for several minutes, and then I saw a man walking in a second lane, and then I saw the tube coming out from the dip, and it was a matter of seconds.
>
> The snow tube hit, bounced off man and slammed into the opposite wall, the divider between second and third line, and then it changed direction and went down with the person on the tube, and then the person, like, slide down from the tube and turned over and tube was continuing moving. That's what happened.
>
> * * *
>
> Q. Tell us where the man was when the tube hit him.
>
> A. He was closer to the divider between the first and second lane, and he was trying to bypass the collision. He was trying to move faster.
>
> He was in the lane. Yeah, he was in the lane.
>
> * * *
>
> [Q.] There are ice walls separating the lanes?

A. Right.

Q. And the man was not on the ice wall when he was hit?

A. No, no. He was in a lane. He was in lane closer to the barrier between first and second.

Q. Did the tube change direction after it hit the man?

A. Yes, it did. It bounced off him, and it slammed into the opposite wall, like, perpendicular, and then went down with the man.

App.989a–91a.

The next eyewitness who testified was Gueorgui Kasparov, Margarita Tarnavsky's husband. He was standing with his wife, daughter and son–in–law at the side of the hill observing the course when Dmitriy's accident occurred. Mr. Kasparov testified:

Q. Can you tell us what you saw, please?

A. I saw a worker in a uniform walking on the second lane. At the time that he was walking the lane, a tube popped out.

Seeing the tube, the worker tried to avoid it, but he didn't move quickly enough, and the tube struck him in his right leg below the knee.

Then the tube, after striking the worker's leg, it ricocheted to the opposite wall, struck the wall, and then rolled down, and the person who was on that tube flipped over onto his back.

App.1006a–07a.

The final eyewitness whose testimony the plaintiffs presented was Max Pashinskiy, whose deposition was read into evidence. Max testified as follows:

> Q. Did you see Dmitriy's accident?
>
> A. Yes.
>
> Q. Why don't you describe for us what you saw.
>
> A. Okay, I was in line behind Dmitriy in the second row and after the lady told Dmitriy to go down the hill, Dmitriy was going down the hill on the tube, and there was a man coming up by one of the ice barriers that were dividing the rows. And I didn't actually see the collision between the man and Dmitriy, but after the collision happened, Dmitriy's snowtube was going slower and at an angle off.

App.148a–49a.

To counter the testimony of these seven eyewitnesses to the accident whose testimony plaintiffs presented to the jury, the defense presented the jury with the testimony of only one eyewitness, Howard Foreman, an employee of the snowtubing facility who testified that he observed the accident from the bottom of the course, where he had arrived to replace Travis Moya, the attendant who was halfway up the hill retrieving an item of clothing from Dmitriy's snowtubing lane when the accident occurred. Mr. Foreman testified that he hoped to continue working

at the snowtubing facility in the future and that he was and continues to consider himself Moya's friend. App.1158a; 1168a.

On direct examination, Mr. Foreman testified as follows:

> Q. Tell us what you saw. Tell the jury what you saw.
>
> A. What I saw was, I was walking up to relieve Travis, because the tuber was coming down the hill. He was dragging his left foot. He dragged his left foot so hard that he spun the tube into the windrow and hit the windrow with his head.
>
> Q. Where was Travis when this happened?
>
> A. Travis was standing on the windrow.
>
> Q. On the location that you have indicated on the diagram?
>
> A. Yes, sir.
>
> Q. Was there any impact at all between the boy on the tube and Travis?
>
> A. No, sir.

App.1157a.

On cross–examination, Mr. Forman admitted that he had provided two other versions of the accident, one in a written report filed on the night the accident occurred and another at his deposition in the case:

> [Q.] [In the written report you completed on the night of the accident,] You said patient came down Lane 2, which is what you said here in court, right.

A. Yes.

Q. But that's not what you said in the deposition, correct?

A. No, sir.

Q. And then you go on and say, he passed one worker, Travis Moya. Patient went left on the lane, hit his head on the windrow.

Now, here, you have told the jury that he hit his head before he got to Travis Moya, didn't you.

A. Yes, he did.

Q. So this statement that you gave on December 24, 2002, the night of the accident, says he hit his head after he passed Moya, but your testimony here today is he hit his head before he got to Moya, is that correct?

A. He hit his head before he passed Travis.

Q. Was your recollection better of this accident the night it happened than it is now?

A. My recollection is better now than that night because of all the excitement that was going on.

App.1162a.

As plaintiff's counsel's cross–examination of Foreman suggests, the written statement that Foreman provided on the night of the accident states that Dmitriy hit the ice wall after passing the point on the course where Moya was standing. In contrast to his trial testimony, Forman's

written statement given immediately after observing the accident was consistent with the accounts of all other eyewitnesses.

Travis Moya did not testify at trial, nor did he testify during discovery, because the parties were unable to locate him. And because of the brain damage he sustained, Dmitriy Mavreshko has no recollection of how or why the accident occurred.

It is important to note that, in his closing argument to the jury, counsel for defendants did not argue that the jury could or should find that the defendants' negligence was not the factual cause of Dmitriy Mavreshko's injuries in the event that the jury found that defendants were negligent. App.1317a–35a.

Rather, the issue of causation in the event the jury found defendants negligent was essentially uncontested. Dmitriy indisputably sustained injuries and damages in the accident. Defendants have never claimed that some third–party is responsible for Dmitriy's accident. And while Howard Foreman, defendant's lone eyewitness to the accident, testified at trial that it was Dmitriy's dragging of his leg that caused his snowtube to collide with the ice wall, Foreman also testified that Travis Moya — the attendant in the midst of the snowtubing course — had

yelled instructions to Dmitriy that he should drag his feet at that juncture while moving at 25 to 30 miles–per–hour, contrary to the snowtubing operations manual. App.1164a.

That manual only permits workers to instruct the snowtubers to drag their feet to slow to a stop at the very bottom of the course. App.1393a. At that point, the snowtube is no longer moving at a high rate of speed, there are no ice barriers between the lanes, and the course is slanted upwards to assist the rider in slowing to a stop.

In short, even if one were to assume that the jury believed the lone eyewitness to report that Dmitriy dragged his foot, thus causing him to collide with the ice wall, it still remains the case that he either did so in an attempt to avoid colliding with Moya, who should not have been present in the middle of the course while a snowtube was descending the hill, or in response to the oral instruction that Moya hollered, given in violation of the facility's written policy. How should a thirteen–year–old child react when he is on a snowtube moving at a speed of twenty–five to thirty miles per hour and sees an employee ahead in his path of travel, who is supposedly hollering "drag your feet," according to Forman's testimony? If Larsh and Moya had performed their duties prop-

erly and not created this dangerous situation, Dmitriy Mavreshko would not have sustained any injuries.

The jury's finding that defendants' negligence was not a factual cause of Dmitriy's injuries not only gains scant if any support from the evidence, but that was not even a theory that the defendants themselves advocated before the jury. On the contrary, defendants expressly disavowed that theory.

By statute, Pennsylvania has adopted what is known as a modified comparative negligence approach, whereby if a plaintiff's and a defendant's negligence combine to cause injuries to the plaintiff, the plaintiff can recover from the defendant so long as the plaintiff's own negligence is not more than 50% responsible for the accident. *See* 42 Pa. Cons. Stat. Ann. §7102(a); *Casselli* v. *Powlen*, 2007 WL 4226977, at *1 n.1 (Pa. Super. Ct. Dec. 3, 2007).

Thus, if the defendants actually wanted to enable the jury to consider whether Dmitriy's own negligence was a cause in part or in whole of his injuries, they would have sought a comparative negligence instruction from the district court, along with a verdict sheet that allowed the jury to allocate the respective percentages of fault between the defendants

and the plaintiff. No such instruction was given to the jury, however, and the verdict sheet did not enable the jury to assign relative liability between the plaintiff and the defendants.

Under Pennsylvania's comparative negligence statute, had the jury found Dmitriy's negligence to be more than zero percent but not more than 50% responsible for the accident, then Dmitriy's ability to recover on the jury's award of damages would have been reduced by that percentage. Thus, on a $10 million claim, if the jury had found Dmitriy 10% negligent, the defendants would have saved $1 million. It is thus quite noteworthy that the defendants did not seek any such comparative negligence instruction or finding from the jury.

The jury found that defendants were negligent, and it is undisputed that Dmitriy sustained serious injuries in the accident. Those injuries were either caused by defendants' negligence or Dmitriy's negligence, yet counsel for defendants expressly informed the jury in his opening statement that defendants were not contending that Dmitriy was negligent. App.371a. And there was no evidence or argument from defendants that some third–party or external force was the cause of Dmitriy's accident. Under these circumstances, the jury's verdict that defendants'

negligence was not the cause of Dmitriy's injuries was manifestly against the weight of the evidence, and a new trial should be granted.

3. The trial court abused its discretion in denying plaintiffs' motion for a new trial under the circumstances of this case, where defendants did not dispute the issue of "causation"

Plaintiffs realize that this Court is not ordinarily predisposed to grant a new trial based on weight of the evidence. But this is not an ordinary case. This case involves a minor who sustained significant, permanent brain damage that will affect him for the remainder of his life. He will require continual care and suffer a sizeable wage loss. The damages plaintiffs' experts estimate that will be required simply to make him whole for future medical expenses and lost wages total $8 million. Together with pain and suffering, Dmitriy Mavreshko's losses from the accident total in excess of $10 million.

The jury found that defendants breached the duty of care that they owed to Dmitriy and thus were negligent. Despite an absence of any dispute over causation, the jury nevertheless inexplicably found that defendants' negligence was not the cause of Dmitriy's injuries. If defendants are not liable, then Dmitriy and his parents, individuals of mod-

est means, will have to suffer that devastating $8 million to $10 million loss themselves.

Fortunately, there exists case law from both this Court and the Pennsylvania state appellate courts (which apply an identically stringent new trial standard) holding that a new trial should be granted under the circumstances presented here. *See*, *e.g.*, *Ford Motor Co.* v. *Summit Motor Products, Inc.*, 930 F.2d 277, 290–301 (3d Cir. 1991) (reversing the district court's denial of plaintiff's new trial motion, holding that insufficient evidence existed to uphold jury's verdict for defendant, and remanding for a new trial).

In cases where, as here, the defendant did not seriously contest the causation element, numerous Pennsylvania state appellate court rulings exist in which the court has reversed a trial court's refusal to grant a new trial where a jury has found the defendant negligent but then inexplicably found that the defendant's negligence was not the cause of the plaintiff's injuries. These cases are highly relevant because Pennsylvania law is the substantive law that controls the outcome of plaintiffs' claims, and the standard for obtaining a new trial under Pennsylvania law is identical to the federal standard.

For example, in *Winschel* v. *Jain*, 925 A.2d 782 (Pa. Super. Ct. 2007), the Superior Court of Pennsylvania reviewed a trial court's refusal to grant a new trial in a case where the jury found the defendant negligent but found that the negligence was not a cause of the plaintiffs' damages. In that case, plaintiffs were the survivor of a man who died of a heart attack, and they were suing a cardiologist alleged to have been negligent in failing to diagnose an obstruction in the man's coronary artery.

In his opinion for a unanimous three–judge panel, Judge McCaffery — who now serves as a Justice on Pennsylvania's Supreme Court — explained:

> Given this undisputed evidence, we must conclude that Appellant succeeded in establishing the causation element under the increased risk of harm standard. Dr. Jain's failure to diagnose Decedent's obstructed LAD artery clearly increased the risk that Decedent would experience a fatal cardiac event due to the obstructed artery. The jury's conclusion that, although Dr. Jain was negligent, his negligence was not a factual cause of Decedent's death, bears no rational relationship to the undisputed evidence. Therefore, we reverse the judgment against Appellant and grant Appellant a new trial.

Id. at 793; *see also Cangemi* v. *Cone*, 774 A.2d 1262 (Pa. Super. Ct. 2001) (reversing the denial of a new trial where the jury found defendant negligent but causation lacking where causation was essentially uncontested).

And, in *Campagna* v. *Rogan*, 829 A.2d 322 (Pa. Super. Ct. 2003), Pennsylvania's intermediate appellate court ruled:

> Where there is no dispute that the defendant is negligent and both parties' medical experts agree the accident caused **some** injury to the plaintiff, the jury may not find the defendant's negligence was not a substantial factor in bringing about at least **some** of plaintiff's injuries. Such a verdict is contrary to the weight of the evidence adduced at trial. In other words, a jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic.

Id. at 329 (internal quotations omitted). Thus, in *Campagna*, the Superior Court reversed the trial court's refusal to grant a new trial following a jury verdict which found that the defendant was negligent but that the defendant's negligence was not the cause of plaintiff's injury.

What this case law demonstrates is that, as here, where a jury finds the defendant negligent and the defendant has not contested the issue of causation, a trial court abuses its discretion in failing to grant a new trial if the jury has found that the defendant's negligence was not the cause of plaintiff's injuries.

Here, given the seriousness of plaintiff's injuries, the lopsided nature of the evidence, defendants' failure to contend that they were not the cause of plaintiff's injuries even if they were negligent, and the fact that

another trial of defendants' liability is necessary in any event to give Svetlana Mavreshko her initial day in court, this Court should reverse the trial court's denial of Dmitriy and Igor's motion for a new trial.

C. At A Minimum, The District Court On Remand Should Be Given The Opportunity To Reconsider Whether To Grant A New Trial On Dmitriy And Igor Mavreshko's Claims Now That Defendants' Liability Must Be Retried On Svetlana Mavreshko's Claim

The question whether to grant a new trial is initially vested in the discretion of the trial court. When the district court denied Dmitriy and Igor Mavreshko's motion for a new trial, the district court was unaware that this Court would reverse the district court's grant of summary judgment as to Svetlana Mavreshko's personal claim, thereby necessitating a retrial of defendants' liability.

The fact that the issue of defendants' liability must now be retried could permissibly cause the district court to conclude that Dmitriy and Igor's claims should simultaneously be retried. Doing so would create little additional work, especially if the district court were to bifurcate the issues of liability from damages and only allow the jury to hear evidence of damages if the jury first finds that defendants are liable.

In the absence of a second trial involving all three plaintiffs, a very real possibility exists that the jury's verdict in Svetlana's trial would be inconsistent with the jury's verdict in Dmitriy and Igor's trial. This result would constitute a miscarriage of justice, given that Dmitriy is the one who personally sustained serious, permanent brain damage and who will suffer the bulk of the damages throughout the remainder of his life.

Plaintiffs believe, based on the highly persuasive Pennsylvania case law granting new trials in the circumstances of this case, that this Court should reverse the district court's denial of a new trial at this time on this record. But, if this Court disagrees, this Court should at the very least remand the issue of whether to grant a new trial to the district court for reconsideration in light of the fact that a retrial of defendants' liability is necessary in any event to adjudicate Svetlana's personal claim. *See* 28 U.S.C. §2106 (empowering a federal appellate court to "require such further proceedings to be had as may be just under the circumstances").

VIII. CONCLUSION

For the foregoing reasons, plaintiffs–appellants respectfully request that the entry of summary judgment on Svetlana Mavreshko's claim be reversed and the denial of a new trial on Dmitriy and Igor Mavreshko's claims be reversed. At a minimum, in remanding Svetlana's claim for trial, this Court should allow the trial court to reconsider whether to grant Dmitriy and Igor a new trial.

Respectfully submitted,

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