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)

REPLY BRIEF FOR APPELLANTS

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I. INTRODUCTION

In their Brief for Appellants, plaintiffs demonstrated that the district court erred in holding that Svetlana Mavreshko, because she had co–signed her son Dmitriy's snowtubing release form, had thereby released her own ability to sue to recover the damages that she suffered as a result of the harm that defendants negligently inflicted on her son. Plaintiffs further demonstrated that under Pennsylvania law and applicable federal due process principles, the jury's verdict in favor of defendants on the claims asserted by Dmitriy and Igor Mavreshko did not preclude Svetlana Mavreshko from having her own day in court on her claims against defendants. Finally, plaintiffs demonstrated that the trial court's denial of Dmitriy and Igor Mavreshko's motion for a new trial — after the jury found that defendants had been negligent but inexplicably also found that defendants' negligence was not the cause of plaintiffs' damages — constituted an abuse of discretion because the jury's verdict shocks the conscience.

Defendants, in their Brief for Appellees, have chosen to respond in a scattershot approach, offering arguments in favor of affirmance that alternate between being unconvincing, irrelevant, and without merit.

As explained below in this Reply Brief for Appellants, the defendants' arguments in their Brief for Appellees fail to offer any valid bases for affirming the district court's entry of summary judgment against Svetlana Mavreshko or denial of a new trial in favor of Dmitriy and Igor Mavreshko. As a result, the judgments challenged on appeal should be reversed, and this Court should remand for a trial encompassing the claims of all three plaintiffs.

II. ARGUMENT IN REPLY

A. The "Release" That Svetlana Signed To Enable Her Minor Son Dmitriy To Engage In Snowtubing Failed To Put Her On Notice That, By Signing The Release, She Was Waiving Her Own Claims Arising Out Of Any Injuries To Her Son

In order to go snowtubing together, all three plaintiffs signed as users of Fernwood's snowtubing facility the identical "Release of Liability for Snowtubing" form drafted by defendants. The release form — a copy of which is attached to the Brief for Appellants at page 26a of Volume One of the Appendix — contains two spaces for the person who will be participating in the activity of snowtubing to sign. The first space for the user to sign is three–quarters of the way down the page, and the second and final space for the user to sign is at the bottom of the page.

If the user is a minor, one of the minor's parents is expected to co–sign the form on the line provided below the second signature of the user, at the very bottom of the page.

Dmitriy Mavreshko's father, Igor, signed his own identical "Release of Liability for Snowtubing" form in order to participate in the activity. Defendants argued in the district court that by signing his own form, Igor had waived any ability to recover the damages Igor sustained stemming from the injuries that Dmitriy suffered. The district court expressly rejected defendants' argument in this regard, holding that the "release" that Igor signed in order to use the snowtubing facility — a "release" containing the exact same text as Dmitriy's release that Svetlana co–signed — 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. Specifically, the district court wrote in its summary judgment opinion that the "Release of Liability for Snowtubing" form "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.

The district court properly held, in a ruling that defendants fail to challenge as incorrect in their Brief for Appellees, that Igor's signing of his own "Release of Liability for Snowtubing" form did not release his ability to sue the defendants for losses he suffered as a result of the injuries that Dmitriy sustained. Despite correctly rejecting defendants' argument that the "Release of Liability for Snowtubing" form when signed by a parent as a user of the facility did not waive the parent's ability to sue for damages resulting from injuries sustained by a son or daughter, the district court proceeded inconsistently to hold that Svetlana Mavreshko's co–signing of her son Dmitriy's identical "Release of Liability for Snowtubing" form accomplished Svetlana's release of her ability as a parent to sue defendants for the damages she incurred as a result of the injuries that her son Dmitriy sustained.

If the "Release of Liability for Snowtubing" form "does not refer to releasing the defendants with regard to claims for medical expenses if the plaintiff's minor child is injured while snowtubing" when a parent has signed the form in his or her own right as a user of the facility (App.11a), it is impossible to conclude that the identical "Release of Liability for Snowtubing" form suffices to release the defendants with

regard to a parent's claim to recover a child's medical expenses when the parent has signed the form as co–signer of the child's "release."

As plaintiffs explained in their Brief for Appellants, defendants' obvious purpose in having a parent co–sign a minor child's "Release of Liability for Snowtubing" form was in the mistaken belief that the presence of a parent's co–signature would make the "Release of Liability for Snowtubing" form enforceable against the child. It is notable that defendants' Brief for Appellees fails to respond to the argument in the Brief for Appellants at pages 26–28, based on the plain text of the "release" form, that the specific "undersigned" "I" who is "waiv[ing] any rights I may have to sue Operator for injuries and damages" is unquestionably the user who is signing the "release" form, and not the user's co–signing parent.

The leading Pennsylvania case on the enforceability of exculpatory clauses such as the one at issue here remains *Employers Liability Assur. Corp.* v. *Greenville Business Men's Ass'n*, 423 Pa. 288, 224 A.2d 620 (1966). In that decision, the Supreme Court of Pennsylvania provided the following summary of applicable Pennsylvania law:

> (1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favorites

> of the law; (2) such contracts must spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation and no inference from words of general import can establish it; (3) such contracts must be construed with every intendment against the party who seeks the immunity from liability; (4) the burden to establish immunity from liability is upon the party who asserts such immunity.

Id. at 292–93, 224 A.2d at 623 (internal quotations and citations omitted).

The "Release of Liability for Snowtubing" form that Svetlana co–signed to enable Dmitriy to use the facility fails to accomplish the release of her personal claims for damages resulting from the injuries her son sustained because the "release" fails to "spell out the intention of the parties with the greatest of particularity and show the intent to release from liability beyond doubt by express stipulation." *See Employers Liability Assur. Corp.*, 423 Pa. at 292, 224 A.2d at 623. Rather, defendants try to establish Svetlana's release by relying on an "inference from words of general import," even though the Pennsylvania Supreme Court's ruling in *Employers Liability Assur. Corp.* prohibits using any such inference to establish a release or waiver.

The English language allows the operator of a snowtubing facility to utilize a release form that clearly and expressly communicates that a

parent, by signing the release, is waiving any ability to sue for damages resulting from injury to a child or other family member who is also using the snowtubing facility. In *Mazza* v. *Ski Shawnee Inc.*, 74 Pa. D.&C.4th 416 (Pa. Ct. Comm. Pleas 2005) (available on Westlaw at 2005 WL 3823060) — a case that defendants themselves cite in their Brief for Appellees at page 22— the Monroe County, Pennsylvania state trial court quotes the language of the snowtubing release form that Ski Shawnee has utilized:

> (6) In Consideration Of The Above And Of Being Allowed To Participate In The Sport Of Snow Tubing, I Agree That I Will Not Sue And Will Release From Any And All Liability Ski Shawnee Inc. If I *Or Any Member Of My Family* Is Injured While Using Any Of The Snow Tubing Facilities Or While Being Present At The Facilities, Even If I Contend That Such Injuries Are The Result Of Negligence Or Any Other Improper Conduct On The Part Of The Snow Tubing Facility.
>
> (7) I Further Agree That I Will Indemnify And Hold Harmless Ski Shawnee Inc. from any loss, liability, damage or cost of any kind that may incur as the result of any injury to myself, *to any member of my family or to any person for whom I am signing this agreement*, even if it is contended that any such injury as caused by the negligence or other improper conduct on the part of Ski Shawnee Inc.
>
> (10) I have read and understood the foregoing acknowledgement of risks and agreement not to sue and am voluntarily signing below, intending to be legally bound thereby.

Mazza, 74 Pa. D.&C.4th at 419 (emphasis added).

Contrasting the "Release of Liability for Snowtubing" for that Svetlana Mavreshko co–signed here — a form that the district court in this very case already correctly recognized "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) — with the release form at issue in the *Mazza* case, it is perfectly clear that Fernwood in this case has failed to utilize a form of "release" that communicates to the parent co–signer that he or she is releasing any claim for damages in his or her own right stemming from injuries sustained by his or her child.

Defendants, in their Brief for Appellees, also assert that this Court should reject as waived Svetlana Mavreshko's effort to reverse the trial court's entry of summary judgment against her based on her having co–signed Dmitriy's "release" form. Defendants' waiver argument lacks any merit whatsoever, because plaintiffs made the identical argument before the district court that the plain language of the "release" forms did not bar any of their claims.

This Court need look no further than the district court's summary judgment ruling to confirm the absence of any waiver. As the district court's summary judgment opinion explains, "The plaintiffs have likewise moved for summary judgment on the issue of the release. They seek judgment in their favor and a ruling that the defendants may not use the release as a defense." App.7a. The district court's opinion later observes, "The Parent Plaintiffs argue that the release does not apply to them because the specific claims they assert are not excluded in the agreement." App.9a.

That is precisely what plaintiffs are now arguing on appeal. It remains Svetlana Mavreshko's argument that the claim she seeks to assert is not affected by the "release" that she co–signed because that release failed to expressly communicate any intention to release a parent's claim for damages stemming from injury to a child. Defendants' waiver argument is thus just as unpersuasive as defendants' argument that the language of the "release" encompasses Svetlana's claim for damages resulting from the injuries her son sustained while using defendants' snowtubing facility.

For all of these reasons, this Court should reverse the district court's entry of summary judgment against Svetlana Mavreshko's claims in her own right.

B. A Remand For Trial Of Svetlana's Personal Claim Is Necessary, Because She Has Not Had Her Day In Court, And The Jury's Verdict On Her Son's And Husband's Claims Do Not Bind Her

As plaintiffs anticipated in their Brief for Appellants, defendants in their Brief for Appellees have argued that the jury's verdict in favor of defendants on Dmitriy and Igor Mavreshko's claims should preclude Svetlana Mavreshko from having her day in court on her personal claim against defendants. While defendants' argument in this regard is predictable, it is also directly contrary to governing law and therefore must be rejected.

In *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), the Supreme Court held that the claim preclusive effect of a federal court judgment in a diversity case is governed by "the law that would be applied by state courts in the State in which the federal diversity court sits." Accordingly, the preclusive effect, if any, of the jury's verdict in favor of defendants on Dmitriy and Igor Mavreshko's claims

is to be determined under the substantive law of Pennsylvania, which is the state in which the district court is located.

Pennsylvania law, as demonstrated in plaintiffs' opening Brief for Appellants, does not permit defendants to use the jury's verdict to prevent Svetlana Mavreshko from having her own day in court on her claims. In arguing to the contrary, defendants rely heavily on Restatement (Second) of Judgments §48(2), which states:

> When a person with a family relationship to one suffering personal injury has a claim for loss to himself resulting from the injury, the determination of issues in an action by the injured person to recover for his injuries is preclusive against the family member, unless the judgment was based on a defense that is unavailable against the family member in the second action.

Restatement (Second) of Judgments §48(2) (1982). A nearly identical provision was in existence in 1976 as Section 93(2) of tentative draft number 3 of the Restatement (Second) of Judgments. *See Roy* v. *Jasper Corp.*, 666 F.2d 714, 716–17 (1st Cir. 1981) (citing and quoting §93(2) of the tentative draft).

In their Brief for Appellees, defendants have failed to cite to any Pennsylvania state court rulings that cite to or adopt either Restatement (Second) of Judgments §48(2) (1982) or Restatement (Second) of

Judgments §93(2) (Tent. Draft No. 3, 1976). This is because no Pennsylvania state court decision has ever cited to or adopted Restatement (Second) of Judgments §48(2) or its almost identical predecessor, Restatement (Second) of Judgments §93(2) (Tent. Draft No. 3, 1976), as the law of Pennsylvania.

Not only has Pennsylvania not adopted §48(2) of the Restatement (Second) of Judgments, but an official comment to that particular Restatement provision makes clear that §48(2) is contrary to Pennsylvania law. Comment a to Restatement (Second) of Judgments §48 explains in its fourth paragraph that where the medical expenses of a child can only be recovered in an action by the parent (as is the case in Pennsylvania), the rule set forth in Restatement (Second) of Judgments §48(2) *would* apply if the parent's action to recover medical expenses is treated as a "derivative" loss. But then the fourth paragraph of comment a proceeds to explain that the rule set forth in Restatement (Second) of Judgments §48(2) *does not* apply if the parent's action to recover medical expenses is treated as an "independent" claim, which is precisely how the parent's action is treated under Pennsylvania law.

The fourth paragraph of comment a states, in pertinent part:

> [I]n a few jurisdictions losses sustained by the family member, as distinct from the injured person himself, *are treated as "independent" claims* in that *the person sustaining them can recover even when judgment has previously been rendered against the injured party in his action for personal injuries*.

Restatement (Second) of Judgments 48 (comment a, fourth paragraph) (emphasis added).

Under Pennsylvania law, both the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania have held, a parent's claim to recover damages stemming from injuries a third–party has negligently inflicted on that parent's child is independent from, and not derivative of, the child's own claim for damages.

In *Meisel* v. *Little*, 407 Pa. 546, 180 A.2d 772 (1962), the Supreme Court of Pennsylvania expressly *rejected* the argument that a parent's claim to recover as damages the money expended to treat a child's injuries negligently inflicted by a third–party is derivative of the child's own claim against the tortfeasor. *Id.* at 547–48, 180 A.2d at 773. Pennsylvania's highest court explained:

> [T]he court below mistakenly said in the course of its opinion that the [mother's] action was derivative and could not be maintained. This is not correct. This action may be pursued irrespective of the action of the minor plaintiff.

Id. at 548, 180 A.2d at 773.

Likewise, in *Gould* v. *Nickel*, 407 A.2d 891 (Pa. Super. Ct. 1979), the Superior Court of Pennsylvania, relying on the Pa. Supreme Court's decision in *Meisel*, rejected the argument that a parent's claim to recover from a tortfeasor the money expended in connection with a child's injuries was derivative of the child's own claim for damages stemming from the injuries.

In *Gould*, a minor child was injured when struck in the eye with a snowball. A jury found that the injured minor was contributorily negligent and therefore denied the minor's own claim for damages. But that same jury awarded damages in favor of the injured minor's parents on their claim to recover the money they had expended in connection with the child's injuries.

The defendant argued on appeal in *Gould* that the jury's verdict against the injured minor child due to the injured child's contributory negligence should preclude the parents from prevailing on their claim to recover money they spent to treat the child's injuries, because the parents' claim was supposedly derivative of the child's claim. The Superior Court in *Gould*, relying on the Pa. Supreme Court's earlier ruling in

Meisel, rejected that argument, holding instead that "the right of the parent is a consequence of the accident to their son, but it is not 'derived' from his action." *Gould*, 407 A.2d at 892.

When the Superior Court issued its ruling in *Gould* in 1979, the nearly identical predecessor to Restatement (Second) of Judgments §48(2) — namely, Restatement (Second) of Judgments §93(2) (Tent. Draft No. 3, 1976) — had already been in existence for approximately three years. Nevertheless, in *Gould* the Pa. Superior Court did not rely on or cite to §93(2) as a basis for rejecting the parents' claim. Instead, the Superior Court in *Gould* allowed the parents to retain the damages that the jury awarded to them despite that same jury's rejection of the injured child's own claim for damages stemming from the injuries the child sustained.

Because Restatement (Second) of Judgments §48(2) has never been adopted by any Pennsylvania court and is directly contrary to the approach that Pennsylvania courts have repeatedly taken — treating a parent's claim to recover money expended in connection with the child's injuries as independent of a child's separate claim, rather than deriva-

tive of the child's claim — defendants' reliance on Restatement (Second) of Judgments §48(2) is misplaced.

Defendants' desperation to deny Svetlana Mavreshko her due process right to her own day in court is revealed when defendants question whether Svetlana's claim for lost wages would independently satisfy the jurisdictional amount for a diversity action. That question is irrelevant to the issues on appeal and likely will remain irrelevant on remand once this Court allows Svetlana's personal claims to go to trial.

Svetlana's personal claim for lost wages is not the only claim that she is asking this Court to allow her to pursue on remand. Rather, she has an independent right to seek to recover the medical expenses that have been and will be incurred in treating Dmitriy up until the time that he reaches the age of majority.

Defendants are incorrect when they argue in their Brief for Appellees that the jury's verdict against Igor Mavreshko precludes Svetlana from seeking to recover the money expended to treat Dmitriy's injuries. It is plaintiffs' position that Igor and Svetlana each have the ability to sue to recover those damages, and until the defendants have paid those dam-

ages once, they have no defense to avoid being sued for those damages by each parent separately.

Defendants, in their Brief for Appellees, fail to disclose to this Court that on July 22, 2005, they filed in the district court a motion in limine seeking to preclude Igor Mavreshko from pursuing any claim to recover for the medical expenses incurred to treat Dmitriy from the time of his injuries until Dmitriy reached the age of majority. Defendants' brief in support of their motion in limine argued:

> [G]iven that the payment of medical expenses came from Plaintiff Svetlana's insurance provider, any right to recover medical expenses belongs to Plaintiff Svetlana and not Plaintiff Igor. Consequently, Plaintiff Igor should be precluded from making a claim for medical expenses.

Brief in Support of Defendants' Motion in Limine to Preclude Plaintiff Igor Mavreshko from Presenting Evidence of Medical Expenses at 3 (docketed as district court document #47, *see* App.33a).

On October 25, 2005, the district court entered an order denying this particular motion in limine, but as authority for its ruling the district court cited only to a Wisconsin federal district court ruling from 1968 and a Pennsylvania state trial court decision from 1999. If the jury had allowed Igor to recover Dmitriy's medical expenses, surely defendants

would now instead be arguing on appeal that only Svetlana was permitted to pursue that claim.

To be clear, defendants were arguing before the district court that only Svetlana, and not Igor, possessed the ability to seek to recover as damages the cost of Dmitriy's medical care. Defendants' current argument on appeal, that the jury's rejection of Igor's claim should preclude Svetlana from pursuing the very claim that defendants previously contended belonged solely to her, is thus directly contrary to the argument defendants were seeking to prevail on while this case was pending before the district court.

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.

C. The District Court Abused Its Discretion In Denying The Motion For A New Trial That Dmitriy And Igor Mavreshko Filed Because The Jury's Finding That Defendants' Negligence Was Not A Cause Of Dmitriy's Injuries Shocks The Conscience

A new trial is appropriate where a jury's verdict is manifestly against the weight of the evidence. *See Roebuck* v. *Drexel Univ.*, 852 F.2d 715, 735–36 (3d Cir. 1988). This legal standard does not require the plaintiff, when seeking a new trial, to establish that absolutely no evidence supported a jury's verdict in favor of the defendant; rather, it merely requires the plaintiff to establish that the great weight of the evidence supported a verdict in favor of the plaintiff. *See id.*

In this case, the plaintiffs satisfy this stringent standard. Contrary to defendants' argument in their Brief for Appellees, the testimony of *none* of the eyewitnesses to the incident in which Dmitriy was severely injured exonerates the defendants from liability for negligently causing those injuries. On the contrary, the testimony of all of the eyewitnesses who testified under oath that they saw what caused Dmitriy's snowtube to change direction and slam him head first into the solid ice wall separating the snowtubing lanes compels only one verdict: that defendants' negligence was the cause of Dmitriy's injuries.

Of the seven eyewitnesses called by plaintiffs to testify at trial, five testified that they saw the snowtube on which Dmitriy was riding come into contact with the leg of Fernwood employee Travis Moya before the snowtube changed direction and slammed into the ice wall separating the lanes. Two of those seven eyewitnesses did not see whether or not Dmitriy's snowtube came into contact with Moya's leg.

The person with the best vantage point to testify about what happened was Moya himself, who was working at the snowtubing course as a Fernwood employee on the day that Dmitriy was injured. Defendants, however, did not call Moya to testify at trial, nor did defendants ever produce in discovery any statement from Moya about what happened on the snowtubing course that resulted in the injuries to Dmitriy. Defendants produced multiple, conflicting statements from Fernwood employee Howard Foreman and the statement of Fernwood employee Christina Larsh — and both Foreman and Larsh testified at trial — but Fernwood produced no statement from Moya, nor did defendants call Moya to testify at trial.

Because defendants failed to introduce Moya's testimony or any prior statements from him at trial, the jury only heard from the Fernwood

employee whom defendants' lawyers claim had the second best view of what happened on the snowtubing course that night, Howard Foreman. Foreman admitted that he planned to work at Fernwood again in the future, that he was a friend of Moya's, and that he had previously given various other inconsistent accounts of what he observed happen to Dmitriy on the snowtubing course that night. App.1158a; 1162a; 1168a.

Foreman testified at trial that it was Dmitriy's dragging of his leg that caused his snowtube to collide with the ice wall. Importantly, however, 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. App.1164a. The "release" form that users of the snowtubing facility were required to sign included the user's promise to follow the instructions of the course attendants. App.26a.

Yet Moya's shouted instructions to Dmitriy in the midst of the course, while Dmitriy's snowtube was proceeding at the ordinary high rate of speed at mid–course, were in violation of the provisions of defendants' snowtubing operations manual, which only permits workers to instruct the snowtubers to drag their feet to slow to a stop at the very

bottom of the course. App.1392–93a. At the bottom of the course, 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, thereby causing him to collide with the ice wall, it still remains the case that Dmitriy 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 properly and not created this extremely dangerous situation, Dmitriy would not have sustained any injuries.

Amazingly, defendants' Brief for Appellee *entirely ignores* Foreman's testimony (App.1164a) that Moya had improperly instructed Dmitriy to

drag his feet in the middle of the course, while the snowtube was descending the hill at a high rate of speed. The Brief for Appellee does correctly note that Dmitriy had been on numerous trips down the snowtubing course over a two–hour period on the night in question before suffering his serious injuries (*see also* Supp.App.2b), and thus it is apparent that Dmitriy knew how to descend the course on the tube without incident when no Fernwood employee unexpectedly appeared in the midst of the course to retrieve another user's discarded clothing, creating a hazard that either resulted in a collision or, at a minimum, in the improper delivery of highly dangerous instructions to drag feet.

To summarize, the testimony of defendants' lone eyewitness to the incident — just like the testimony of the eyewitnesses plaintiffs' called to testify — implicates defendants' negligence as the cause of Dmitriy's significant, permanent injuries. Although a plaintiff seeking a new trial must merely show that the jury's verdict in favor of the defendant is against the manifest weight of the evidence, here that verdict is contrary to *all* of the eyewitness testimony, presented by both the plaintiffs and the defendants.

Defendants admit in their Brief for Appellees that defendants' counsel in his opening statement to the jury disavowed the argument that Dmitriy's own negligence was to blame for the incident causing his injuries. And even after defendant's lone eyewitness Foreman testified that what caused Dmitriy to slam into the ice wall was dragging his foot in response to the improperly given instructions from Fernwood employee Travis Moya in the middle of the course, defendants never sought a comparative negligence instruction from the district court, nor did defendants seek a verdict sheet that allowed the jury to allocate the respective percentages of fault between the defendants and the plaintiff.

Indeed, in their Brief for Appellees, defendants are silent on why they did not request a comparative negligence instruction even though, 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.

The defendants' disavowal of any argument that Dmitriy's own negligence was responsible for causing his injuries is what distinguishes

this case from the Superior Court of Pennsylvania's ruling in *Daniel* v. *William R. Drach Co.*, 849 A.2d 1265 (Pa. Super. Ct. 2004) — the case on which defendants rely in arguing that the district court's denial of a new trial was not an abuse of discretion.

In the *Daniel* case, the jury found that the defendant was negligent in failing to properly maintain a loading dock where the plaintiff sustained injuries while picking up 800–pound barrels of scrap metal, but that the defendant's negligence was not the cause of the plaintiff's injuries. As the Superior Court's opinion in *Daniel* explains, however, the evidence in that case permitted the jury to conclude that the plaintiff was injured in a slip and fall due to his own negligence in losing control of the large and especially heavy barrels while attempting to load them, rather than due to any wet, greasy spot on the floor of the facility.

Thus, in *Daniel*, the defendant was arguing that the plaintiff's own negligence was to blame for the plaintiff's injuries, while here Fernwood and the other defendants have disclaimed and continue to expressly disclaim any argument that Dmitriy was at fault for his head first collision at a high rate of speed into the ice wall separating the snowtubing lanes.

Defendants' utterly implausible explanation is that they did not cause Dmitriy's snowtube to collide with the ice wall head first at a high rate of speed, nor did Dmitriy's own negligence cause that to happen. Rather, according to defendants, Dmitriy's collision with the ice wall just somehow inexplicably happened, and neither they nor Dmitriy was to blame. Defendants point to no evidence to establish that what happened on the snowtubing course to Dmitriy constituted an inherent risk of snowtubing, nor does any such evidence exist, nor did the trial court so conclude in denying plaintiffs' new trial motion.

Defendants note, in their Brief for Appellees at pages 49–50 (citing App.22a–23a), that the district court in denying plaintiffs' motion for a new trial theorized about three possible ways that the jury could have found that defendants' negligence was not the cause of Dmitriy's injuries. First, according to the district court, the jury could have found that even if Travis Moya's leg was present in Dmitriy's lane, Dmitriy's snowtube may not have made contact with Moya. For the reasons explained at length above, that theory was not a valid ground for denying plaintiffs' new trial motion.

Reason two posits that the jury could have found that defendants were negligent in failing to close down *all lanes* of the snowtubing course instead of just the lane or lanes where Moya was present. This theory lacks merit, because the jury could not have found that defendants owed *Dmitriy* a duty to shut down lanes other than the specific lane that Dmitriy was using. Rather, any such duty was owed only to the people using those other lanes. Thus, the district court's second hypothetical ground to justify the jury's verdict fails for the same reasons that the first ground fails.

And ground three fares no better. According to the district court, the jury could have found that defendants were negligent in designing a course that prevented Christina Larsh, the attendant working at the top of the hill, from seeing if anyone was present in the midst of the course simply by looking downhill. This ground merely explains how it came to be that Dmitriy's snowtube arrived onto the middle of the course at precisely the same time that Moya was standing in the middle of course with his leg in Dmitriy's lane. Ground three is thus no different from ground one, and therefore the district court's third hypotheti-

cal ground to justify the jury's verdict fails for the same reasons that the first ground fails.

Plaintiffs are not asking this Court to hold, as a matter of law, that defendants are liable in negligence for Dmitriy's substantial and permanent injuries. (As a result, defendants' waiver argument based on *Greenleaf* v. *Garlock, Inc.*, 174 F.3d 352, 365 (3d Cir. 1999), fails on the merits and not merely because defendants relegate it to a footnote. *See* Brief for Appellees at 42 n.7.)

Rather, plaintiffs are simply asking this Court to grant a new trial due 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, the fact that another trial of defendants' liability is necessary in any event to give Svetlana Mavreshko her initial day in court, and due to the seriousness of plaintiff's injuries. Accordingly, this Court should reverse the trial court's denial of Dmitriy and Igor's motion for a new trial.

* * * * *

Before concluding, plaintiffs are constrained to object to the highly offensive nature of many of the arguments contained in the Brief for

Appellees. A man and woman who are first generation Jewish immigrants from the former Soviet Union saw the life and future of their only child destroyed due to an incident that occurred on defendants' snowtubing course.

Perhaps it would be too much to expect that defendants' Brief for Appellees would be anything other than coldhearted and unsympathetic, but defendants abandon all decency when they maintain that plaintiffs' various eyewitnesses have fabricated their accounts under oath of what they saw and that Dmitriy's permanent injuries are feigned and he has instead miraculously made a full recovery.

As this Court is aware, eyewitnesses to any unexpected event commonly recount what they have seen in ways that contain minor discrepancies. Five eyewitnesses from different vantage points all saw Dmitriy's snowtube come into contact with the leg of the employee of defendant who was improperly on the course when Dmitriy's snowtube was released from the top of the course to begin its descent. If other eyewitnesses to the incident had seen something different transpire, or if Travis Moya (the employee on the course) had a different story to tell, surely defendants would have placed that testimony before the jury.

In explaining the severity of Dmitriy's injuries and the $10 million damages calculation, plaintiffs are not trying to benefit from this Court's sympathy. Rather, plaintiffs are merely seeking to explain why they are unwilling and unable to accept the jury's aberrant and inexplicable verdict finding defendants negligent but finding that defendants' negligence was not the cause of plaintiffs' damages.

As explained in plaintiffs' opening Brief for Appellants:

> 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.

Brief for Appellants at 15–16.

At trial, the defendants did not call any neurologist to testify in support of their side of the case. The plaintiffs' objective neurological evidence thus stands unrebutted. Instead, defendants in their Brief for Appellees at page 48 n.10 rely on a psychologist's evaluation which con-

cluded that if only Dmitriy would try harder, perhaps the results of his psychological testing would improve.

Defendants' unpersuasive attempt to downplay the consequences of Dmitriy's injuries is based on subjective evidence, rather than on objective medical evidence. Plaintiffs are satisfied to allow a jury at the new trial of this case to sort out the parties' disputes over damages. Defendants, by contrast, struggle mightily to avoid that outcome, no doubt mindful that their view of damages is unpersuasive, lacking any compelling evidentiary support.

On occasion, the outcome that the law requires in litigation may seem cruel and unyielding. Other times, as in this appeal, the legally correct result produces an outcome that is indeed just and appropriate. And that is why, based on applicable law rather than merely sympathy, this Court should grant a new trial in favor of all three plaintiffs.

III. 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 in accordance with 28 U.S.C. §2106.

Respectfully submitted,

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

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,331 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 2003 in 14 point Century Schoolbook font.

Dated: March 31, 2008

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

CERTIFICATE OF SERVICE

I hereby certify that I am serving two true and correct copies of the foregoing document via first class U.S. Mail, postage prepaid, on the attorney, at the address, and on the date shown below:

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Also on the date shown below, one original and nine copies of this document were dispatched for filing via Federal Express overnight delivery to the Clerk's Office of the U.S. Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

Dated: March 31, 2008

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

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel for appellants hereby certifies that the electronic copy of this Reply Brief for Appellants is identical to the paper copies filed with the Court and served as indicated on the attached Certificate of Service.

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Dated: March 31, 2008

/s/ *Howard J. Bashman*
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