

Navigating Novel Negligence Cases

—New York State—
ACADEMY
OF TRIAL LAWYERS

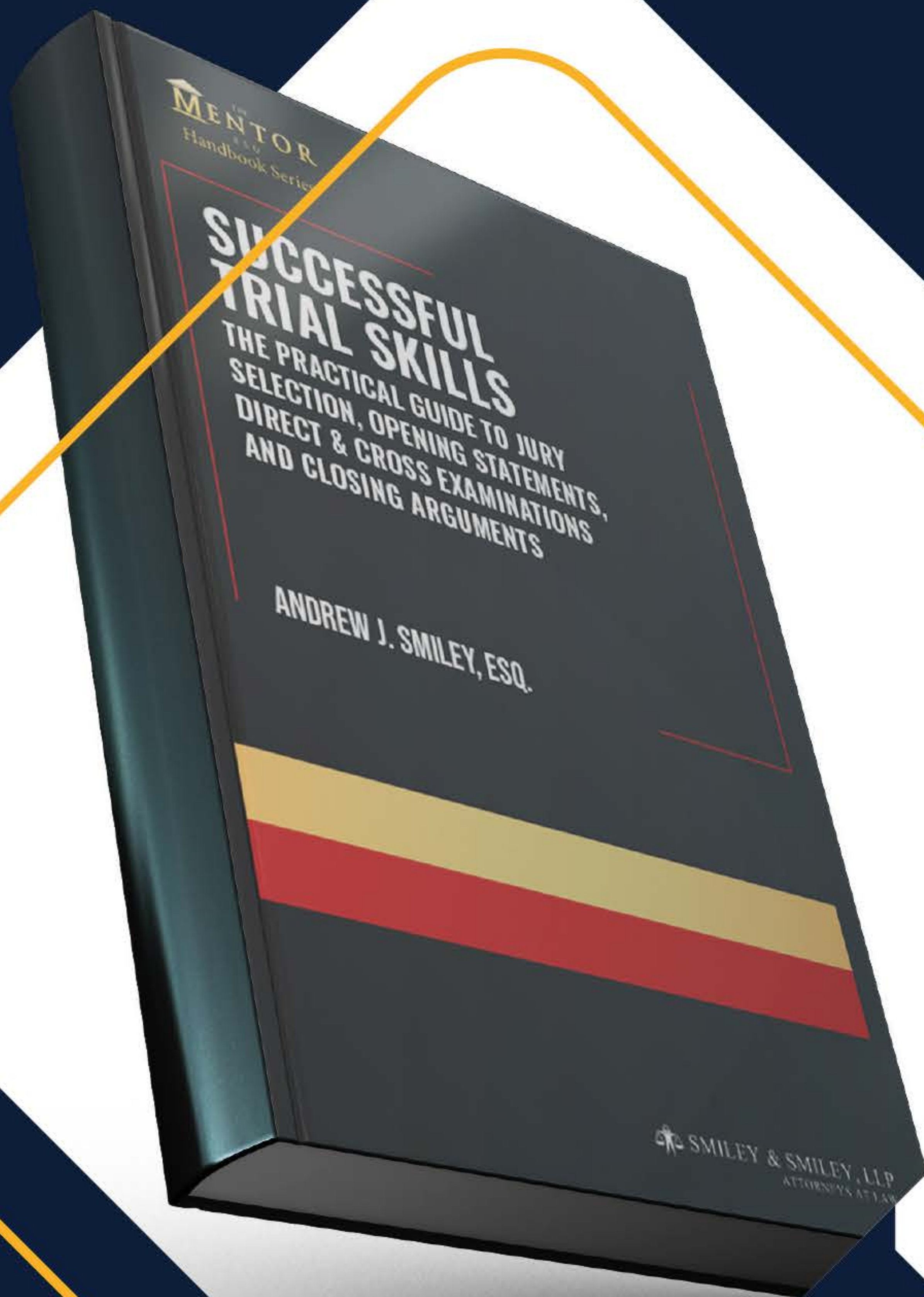
Part 1: How To Successfully Litigate Personal Trainer & Gym Negligence Cases

Materials BY
Andrew Smiley

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CURRICULUM VITAE

Education:

· Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

· Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

Andrew J. Smiley, Esq. Curriculum Vitae, Page 2

· *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023

· Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont

· Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- Immediate Past President (May 2018- May 2019)
- President (May 2017 – May 2018)
- President-Elect – (April 2016- May 2017)
- Vice President – 1st Dept. (July 2013-May 2016)
- Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

· New York City Trial Lawyers Alliance

- Chairman of Board of Governors (July 2017 – July 2019)
- President (July 2015 – July 2017)
- Vice President (June 2013 – July 2015)
- Treasurer (June 2011 – June 2013)
- Secretary (June 2009- June 2011)
- Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
 - Medical Malpractice Committee
 - Supreme Courts Committee
- American Bar Association
- The American Association for Justice

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- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors

Authored Books

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide* 2022, The Mentor Esq. Handbook Series – Available on Amazon

Smiley, Andrew J. *Successful Trial Skills – A Practical Guide to Jury Selection, Opening Statements, Direct & Cross Examinations and Closing Arguments*, 2024, The Mentor Esq. Handbook Series – Available on Amazon

Continuing Legal Education (CLE) Presentations:

(69) *Litigation Back to Basics – Part 3: Introducing Evidence and Impeaching Witnesses*, New York State Academy of Trial Lawyers, December 6, 2023

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties*, Strafford CLE/BarBri, October 17, 2023

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

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Continuing Legal Education (CLE) Presentations Continued:

- (59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023
- (58) *How to Litigate a Construction Accident Case – Part 4: Motion Practice*, New York State Academy of Trial Lawyers, December 7, 2022
- (57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022
- (56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022
- (55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022
- (54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022
- (53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022
- (52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022
- (51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022
- (50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022
- (49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022
- (48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022
- (47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022
- (46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022
- (45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021
- (44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

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Continuing Legal Education (CLE) Presentations Continued:

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements*, New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection*, New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!*, New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5: Pre-Trial Disclosures and Gearing up for Trial*, New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions*, New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery*, New York State Academy of Trial Lawyers, March 3, 2021

(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit*, New York State Academy of Trial Lawyers, February 3, 2021

(35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File*, New York State Academy of Trial Lawyers, January 6, 2021

(34) *Brick by Brick: Building a Personal Injury Practice*, New York State Academy of Trial Lawyers, December 10, 2020

(33) *Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020

(32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

(31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court*, New York State Academy of Trial Lawyers, June 9, 2020

(30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020

(29) *Do You Have a Federal Tort Claims Act Case in Your Office*, New York State Academy of Trial Lawyers, December 10, 2019

(28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019

Andrew J. Smiley, Esq. Curriculum Vitae, Page 6

Continuing Legal Education (CLE) Presentations Continued:

(27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff’s Perspective*, The Defense Association of New York, March 12, 2019

(26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

(25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018

(24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

(23) Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

(22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA*, New York State Bar Association, October 11, 2015

(21) *Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015

(19) *Powerful Opening Statements*, Clear Law Institute, January 13, 2015

(18) *The Dram Shop Law: New York Liquor Liability*, Lawline.com, November 20, 2014

(17) *Killer Cross Examination Strategies*, Lawline.com, November 20, 2014

(16) *Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014

(15) *Personal Trainer Negligence Update*, Lawline.com, October 14, 2014

(14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014

(13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014

(12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013

(11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013

(10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012

Andrew J. Smiley, Esq. Curriculum Vitae, Page 7

Continuing Legal Education (CLE) Presentations Continued:

- (9) *"You Had Me at Hello": Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012
- (8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012
- (7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011
- (6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011
- (5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011
Techniques: The Tricks of the Trade, Lawline.com, February 16, 2011
- (4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011
- (3) *Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010
- (2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010
- (1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances

Fox News Channel

- The O'Reilly Factor
- What's Happening Now with Martha McCallum
 - America's News Room
 - Fox & Friends
- Fox Business Channel
- Neil Cavuto
- Money with Melissa Francis

CNN -Anderson Cooper 360

ET – Entertainment Tonight

Bloomberg TV

Headline News

Tru TV

Court TV

The Morning Show with Mike and Juliet

Interests, Hobbies:

High Performance Driving Events, Sim Racing, Tennis, Lego, Cooking

[NY CLS Gen Oblig § 5-326](#)

Current through 2023 released Chapters 1-730

*New York Consolidated Laws Service > General Obligations Law (Arts. 1 — 19) > Article 5
Creation, Definition and Enforcement of Contractual Obligations (Titles 1 — 18) > Title 3 Certain
Prohibited Contracts and Provisions of Contracts (§§ 5-301 — 5-337)*

§ 5-326. Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable

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

History

Add, L 1976, ch 414, § 1, eff Sept 1, 1976.

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X		Index No. 34004/2018E Hon. Adrian Armstrong , Acting Justice Supreme Court
Shana Guins,	Plaintiff,	
- against -		
Streb, Inc.,	Defendant.	
-----X		

The following papers numbered ___ to ___ were read on these motions (Seq. No. 1) noticed on _____ and duly submitted as No. ___ on the Motion Calendar of _____

Sequence No. 1	Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	21-32
Cross Motion – Exhibits and Affidavits Annexed	33-36
Answering Affidavit and Exhibits, Memorandum of Law	40-41
Reply Affidavit	42

Upon the foregoing papers, the motion and cross-motion listed above are decided in accordance with the annexed decision and order.

Dated: 9-14-20

Hon. 
Adrian Armstrong, A.J.S.C.

- | | | |
|------------------------------|--|---|
| 1. CHECK ONE..... | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY | <input type="checkbox"/> CASE STILL ACTIVE |
| 2. MOTION IS..... | <input type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
Shana Guins,

DECISION and ORDER
Index No. 34004/2018E

Plaintiff,

- against -

Streb, Inc.,

Defendant.

-----X

Adrian Armstrong, J.

Upon the foregoing papers, the motion of the defendant Streb, Inc. (hereinafter, “Streb”) for summary judgment dismissing the complaint, and the cross-motion of the plaintiff for an order granting the plaintiff summary judgment against defendant on the issue of liability, striking the defendant’s affirmative defense of assumption of risk, and precluding the defendant from asserting an affirmative defense of release, are decided as follows.

On April 2, 2018, Shana Guins, who was then 32 years-old, 5’ 3” in height and weighed 180 pounds, was rendered quadriplegic when she was injured during an “Intro to Acrobatics” class at defendant Streb’s gym while attempting to perform a forward flip (also known as a dive roll) from a mini-trampoline at the direction of a Streb employee, non-party Arianna Dunmire (hereinafter “Dunmire”). The dive roll involved bouncing on a trampoline and then landing on a one foot thick mat. Plaintiff had undergone thoracic surgery in 2001 in connection with severe scoliosis. She had participated in various gym and pole dancing classes before suffering the subject accident.

Plaintiff testified at her examination before trial that she took a class at defendant’s gym prior to the class during which she was injured. The first class was “the Pop class,” which it involved free-falling, trampoline and tumbling. The tumbling involved a mini trampoline and a mat, on which a forward roll was performed – the same maneuver which plaintiff undertook before she was injured in the subsequent class. Admittedly, she expressed no concerns to the instructor about

the activity or her ability to perform it. In the second class, the instructor was approximately 8 to 10 feet away when she began the activity. She did not recall if the instructor said anything to her as she approached the trampoline. When the plaintiff reached the trampoline, she hopped with both legs on the trampoline, bounced on the trampoline, and tumbled forward. She did not recall what she did with her hands. She tumbled, made contact with the one foot thick mat, and felt a crack in her neck at the end of the tumble.

Defendant points to certain statements made to medical staff after the accident, which plaintiff now denies, to the effect that she was tired from having taken other classes prior to the injury, and that she was also tired from having spent Saturday night drinking heavily. Defendant also relies on the testimony of the instructor Dunmire. Ms. Dunmire testified that she was a substitute teacher at the defendant's facility. She asserted that plaintiff appeared "strong" and had successfully completed the prior class, including performing a forward roll. The testimony of Ms. Dunmire and Ms. Joseph, her supervisor, defendant argues, reflect that Dunmire was a moderate term employee with significant training at Streb. Albeit not the regular teacher for the introduction to acrobatics class, she had substituted to teach the class many times before, had taken the class as part of her training, and had followed the Streb protocol of conducting an initial meeting with the students, warm ups and then the actual exercises. Defendant argues that plaintiff's injury was an unfortunate accident, which was part of the foreseeable risks involved in acrobatics classes, and was not caused by any negligence on the part of the defendant.

In opposition, plaintiff argues that Dunmire did not hold any certification in the fields of physical fitness, gymnastics or acrobatics, had never competed or performed in those fields, and had never coached or taught gymnastics, acrobatics or fitness before commencing working for defendant several years earlier.

Plaintiff also relies on the expert affidavit of Beth Gardner, the owner of a gymnastics¹ training facility in Temple, Texas, who is a National Instructor for USA Gymnastics in State, Regional and National Congresses. Gardner has been a gymnastics coach for thirty (30) years, served on the USA Gymnastics Safety Review Board, and holds numerous certifications and has published articles in the field of gymnastics. Gardner's opinion was based on the depositions and the photographs taken of the set-up of the mini-trampoline and mats. Gardner opined that the supervision and training provided to plaintiff during her class by Dunmire did not meet the level of care required by industry standards. She opined that a dive roll is not appropriate for beginners, and that defendant failed to train plaintiff to safely perform a dive roll from a mini-trampoline to a lower surface. Specifically, "[t]he skill level of the dive roll from mini-tramp to a lower surface is a much higher level skill than a novice should be attempting . . . It is my opinion that this happened in Shana's case as she was asked to participate in skills she had not adequately progressed, including but not limited to the dive roll. Other more experienced students within her class may have been better prepared to perform the dive roll, but she had neither the time nor the experience in the gym to perform such a high-level tumbling or trampoline skill." Further, there was no testing to verify skill level, and there was no warning of the dangers of performing on a trampoline generally or of performing a dive roll specifically.

In reply, defendant submits an expert report by Miles Avery, an expert, who opines that a dive role, contrary to Gardner's expert report, is in fact an entry-level or beginners maneuver, and that the defendant met or exceeded industry standards.

¹ The experts for both sides appear to be qualified as experts in gymnastics. To the extent that plaintiff was injured while performing acrobatics, there appears to be a distinction without a difference between gymnastics and acrobatics in terms of safety and instructional protocols. Absent expert testimony establishing such a difference, this Court treats the field of gymnastics as encompassing the same safety and instructional protocols.

Enforceability of Waiver/Release

As a threshold issue, it is not disputed that plaintiff signed a waiver of liability form upon entering the gym, although plaintiff states that she did not read the form and was unaware that it contained a waiver of liability. The waiver extended to the negligent acts of the defendant and its employees. Plaintiff argues that the alleged waiver and release is unenforceable pursuant to General Obligations Law (“GOL”) § 5-326.

GOL § 5-326 voids as against public policy any waiver by the owner or operator of a “gymnasium” (as well as other “places of amusement”) “from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees” The statute, however does not apply to instructional courses taken by gymnasium users who pay a fee and participate in organized classes. In this regard, cases have drawn a distinction between activities involving *amusement* (as to which a waiver of liability is void), as opposed to participation in a course of *instruction* (as to which a waiver of liability is not void under the statute). (*Hsu v Krav Maga NYC, LLC*, 138 A.D.3d 463, 464, 29 N.Y.S.3d 307, 309 [1st Dept. 2016] [defendant’s self-defense classes were instructional, and other recreational uses were ancillary to defendant’s instructional purpose, and thus waiver was not barred by GOL § 5-326 from exacting a release from participants]; *Lemoine v. Cornell Univ.*, 2 A.D.3d 1017, 1017, 769 N.Y.S.2d 313, 314 [3d Dept. 2003] [dismissing complaint for injury which occurred during the first session of a seven-week basic rock climbing course, as program was instructional and waiver was thus not void]; *Baschuk v. Diver's Way Scuba*, 209 A.D.2d 369, 370, 618 N.Y.S.2d 428, 429 [2d Dept. 1994] [private swimming pool was used for instructional, not recreational or amusement, purposes; tuition fee paid for a course of instruction is not analogous to the use fee for recreational facilities contemplated by the statute].) “It is undisputed that General Obligations Law § 5-326 does not bar enforcement of [a] release as defendant's facility is an

instructional, and not a recreational, one.” (*Kim v. Harry Hanson, Inc.*, 122 A.D.3d 529, 530, 997 N.Y.S.2d 391, 392 [2014] [injury occurred as a result of personal trainer’s alleged negligent instruction and supervision of plaintiff in the lifting of an excessive amount of weight].)

Plaintiff assumes in her argument that her use of the defendant’s facility was “recreational.” Whether the usage was recreational or instructional is a factual issue which was not established by the plaintiff as a matter of law. In view of the foregoing, plaintiff has not established a prima facie case on her cross-motion seeking an order holding that any waiver is void as a matter of law under GOL § 5-326.

In the alternative, plaintiff argues that the affirmative defense of release is waived unless it is raised in a pre-answer motion to dismiss or in a responsive pleading. (CPLR 3211[e].) Plaintiff argues that by failing to assert waiver and release as an affirmative defense, the defendant did not give notice to the plaintiff of the defense, and therefore the plaintiff was not afforded an opportunity to conduct discovery on this issue, resulting in prejudice.

The effect of an unpleaded defense raised in connection with a summary judgment motion has been considered in *Horst v Brown* (72 A.D.3d 434, 436, 900 N.Y.S.2d 13, 15 [1st Dept. 2010].) In that case, the First Department held as follows:

“[W]hen a defendant fails to plead an affirmative defense, as required by CPLR 3211 (e) and 3018 (b), but nevertheless asserts that defense in connection with a motion for summary judgment, the waiver is said to be retracted and the court can grant, when the defendant is the movant, or deny, when the defendant is the opponent, summary judgment based upon the unpleaded affirmative defense (*see Lerwick v Kelsey*, 24 AD3d 918, 919-920, 806 NYS2d 732 [2005]; *Allen v Matthews*, 266 AD2d 782, 784, 699 NYS2d 166 [1999]; *Adsit v Quantum Chem. Corp.*, 199 AD2d 899, 605 NYS2d 788 [1993]). The threshold inquiry is whether in considering the unpleaded defense, the opponent of the defense is prejudiced thereby (*see BMX Worldwide v Coppola N.Y.C.*, 287 AD2d 383, 731 NYS2d 701 [2001]; *Allen v Matthews*, 266 AD2d 782, 784, 699 NYS2d 166 [1999]; *Seaboard Sur. Co. v Nigro, Bros.* 222 AD2d 574, 635 NYS2d 296 [1995]; *Rogoff v San Juan Racing Assn.*, 77 AD2d 831, 431 NYS2d 16 [1980], *affd* 54 NY2d 883, 429 NE2d 418, 444 NYS2d 911 [1981]).” (Emphasis added.)

The defendant has not opposed that part of the motion which seeks to dismiss the defense of waiver as unplead, and fails to counter the plaintiff's argument that consideration of the defense at this juncture is prejudicial. Accordingly, the Court grants that part of the cross-motion to dismiss the unplead defense to the extent of holding that defendant is barred from raising the defense of waiver at trial.

Assumption of Risk

The defendant argues that the complaint must be dismissed under the doctrine of assumption of the risk. Defendant argues that plaintiff was sufficiently experienced to understand the risks involved, and was injured solely as a result of her own actions in failing to properly perform the forward roll. Plaintiff argues that she was injured solely as a result of defendant's negligence in that its employee Dunmire (1) did not advise her of the risk of injury; (2) did not advise her of precautions to take to prevent injury; (3) failed to show her ways to safely learn and progress the dive roll so as to prevent serious injury; and (4) failed to "spot" her or stand in a position close enough to her so that she could assist her with the proper form of the forward flip.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

Assumption of risk applies² to certain types of athletic or recreational activities, and holds that plaintiff’s acceptance of a known risk inherent in the activity negates a duty on the part of the defendant to safeguard the plaintiff from that risk. (*Custodi v Town of Amherst*, 20 NY3d 83, 87, 980 NE2d 933, 957 NYS2d 268 [2012]; *Morgan v State of New York*, 90 NY2d 471, 484, 685 N.E.2d 202, 662 N.Y.S.2d 421 [1997] [“by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation”].) On the other hand, the doctrine of assumption of risk does not bar recovery where the injury results from the reckless or intentional conduct of others, risks that are concealed, or unreasonably enhanced risks. (*Custodi v Town of Amherst*, at 88).

In support of its motion, defendant argues that the same day of the accident, plaintiff had taken a prior class with the same exact activity, and performed the exercise without any difficulties and made no complaints. This as well as defendant’s other submissions raise a prima facie case. (*Marcano v. City of New York*, 99 N.Y.2d 548, 549 [2002] [“Plaintiff assumed the risk of injury when he swung on, and subsequently fell off, an exercise apparatus constructed over a concrete

² Consideration of assumption of risk doctrine is separate from consideration of the waiver previously discussed. (*Garnett v Strike Holdings LLC*, 131 A.D.3d 817, 15 N.Y.S.3d 786 [1st Dept. 2015] [considering assumption of risk after finding that waiver was void].)

floor.”]; see *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 56, 984 NYS2d 401 [2d Dept. 2014] [plaintiff, who voluntarily sat on an exercise ball during a body sculpting class, assumed the inherent risk that the ball would roll or rotate and cause her to fall, despite her claim that she had never used an exercise ball before].)

In opposition, however, plaintiff submits expert testimony that raises an issue of fact as to defendant’s negligence, which is not barred by the doctrine of the assumption of risk. (*Serin v Soulcycle Holdings, LLC*, 145 A.D.3d 468, 469, 41 N.Y.S.3d 714, 714-715 [1st Dept. 2016] [issues of fact existed as to whether defendants were negligent in failing to properly instruct plaintiff, a first-time spin cyler, in the operation of the cycle and of the nature of the risks involved, and whether plaintiff assumed concealed risks].) In this regard, plaintiff raises issues of fact as to whether the forward roll as taught was appropriate for beginners, and whether, given the skill set required to perform a forward roll safely, sufficient instruction and guidance was provided to the plaintiff.

While plaintiff evidently successfully completed the same forward roll in an earlier class, plaintiff’s expert raised issues of fact as to whether the plaintiff had sufficiently progressed to the point where she could perform a forward roll on her own with minimal supervision. Plaintiff has successfully raised an issue as to whether the instructor on duty misjudged plaintiff’s ability to perform the maneuver. (*See Mathis v. New York Health Club*, 261 A.D.2d 345, 346 [1st Dept. 1999] [factual issues were raised as to whether plaintiff’s injury, although inherent in weight training, was unreasonably augmented by culpable misjudgment by trainer as to plaintiff’s capacity to bear so much weight].)

To the extent that defendant’s expert opines that the forward roll is in fact a simple, beginner’s move, this contrary expert opinion raises issues of fact for the jury to resolve. Where conflicting expert testimony is presented, the jury is entitled to accept one expert’s opinion and

reject that of another expert. (*Bohan v DeLucia*, 178 A.D.3d 999, 116 N.Y.S.3d 315 [2d Dept. 2019].)

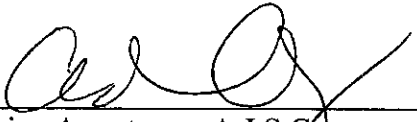
Accordingly, it is hereby,

ORDERED that defendant's motion is denied, and it is further

ORDERED that the cross-motion is granted only to the extent of holding that defendant is barred from raising the defense of waiver at trial, and is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: 9-14-20



Adrian Armstrong, A.J.S.C.



Cited

As of: December 26, 2023 7:38 PM Z

[Kim v. Harry Hanson, Inc.](#)

Supreme Court of New York, Appellate Division, First Department

November 25, 2014, Decided; November 25, 2014, Entered

13586, 152371/12

Reporter

122 A.D.3d 529 *; 997 N.Y.S.2d 391 **; 2014 N.Y. App. Div. LEXIS 8187 ***; 2014 NY Slip Op 08229 ****
unanimously affirmed, without costs.

[****1] Bernard Kim, Respondent, v Harry Hanson, Inc., Appellant.

[**392] Plaintiff sustained injuries while engaged in a personal training [*530] program, under a trainer's supervision and instruction, at a one-on-one training facility owned and operated by defendant. Plaintiff alleges, inter alia, that the personal trainer negligently instructed and supervised him in the lifting of an excessive amount of weight.

Core Terms

training, supervised, strenuous, injuries, trainer, risks

Headnotes/Summary

Headnotes

Release—Scope of Release—Injury to Student while Engaged in Personal Training Program

Counsel: [***1] Zaremba Brownell & Brown PLLC, New York (Richard J. Brownell of counsel), for appellant.

Smiley & Smiley, LLP, New York (Joshua E. Bardavid of counsel), for respondent.

Judges: Concur—Gonzalez, P.J., Mazzarelli, Manzanet-Daniels, Gische and Clark, JJ.

Opinion

[**391] [*529] Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 19, 2013, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint,

Prior to beginning training at defendant's facility, plaintiff executed a release wherein he acknowledged that there were "inherent risks in participating in a program of strenuous exercise" and released defendant from "all claims . . . which I . . . may have against [defendant] . . . for all injuries . . . which may occur in connection with my participation in the program." It is undisputed that [General Obligations Law § 5-326](#) does [***2] not bar enforcement of this release as defendant's facility is an instructional, and not a recreational, one. However, the language of the release does not reflect a clear and unequivocal intent to limit liability for negligence (see [Gross v Sweet, 49 NY2d 102, 400 NE2d 306, 424 NYS2d 365 \[1979\]](#)). While the release warned of the risks inherent in undergoing a strenuous exercise program, it does not "express[] any intention to exempt . . . defendant from liability for injury . . . which may result from [its] failure to use due care . . . in [its] training methods" (*id. at 109*). Unlike in [Debell v Wellbridge Club Mgt., Inc. \(40 AD3d 248, 835 NYS2d 170 \[1st Dept 2007\]\)](#), the

122 A.D.3d 529, *530; 997 N.Y.S.2d 391, **392; 2014 N.Y. App. Div. LEXIS 8187, ***2; 2014 NY Slip Op 08229, ****₁

release does not purport to [****2] release defendant from all personal injury claims, "*whether or not based on the acts or omissions of [defendant],*" or contain other language conveying a similar import (*id. at 248*; see also *Gross at 108*). Concur—Gonzalez, P.J., Mazzairelli, Manzanet-Daniels, Gische and Clark, JJ.

End of Document

PAR - Q & YOU

(A Questionnaire for People Aged 15 to 69)

Regular physical activity is fun and healthy, and increasingly more people are starting to become more active every day. Being more active is very safe for most people. However, some people should check with their doctor before they start becoming much more physically active.

If you are planning to become much more physically active than you are now, start by answering the seven questions in the box below. If you are between the ages of 15 and 69, the PAR-Q will tell you if you should check with your doctor before you start. If you are over 69 years of age, and you are not used to being very active, check with your doctor.

Common sense is your best guide when you answer these questions. Please read the questions carefully and answer each one honestly: check YES or NO.

YES	NO	
<input type="checkbox"/>	<input type="checkbox"/>	1. Has your doctor ever said that you have a heart condition <u>and</u> that you should only do physical activity recommended by a doctor?
<input type="checkbox"/>	<input type="checkbox"/>	2. Do you feel pain in your chest when you do physical activity?
<input type="checkbox"/>	<input type="checkbox"/>	3. In the past month, have you had chest pain when you were not doing physical activity?
<input type="checkbox"/>	<input type="checkbox"/>	4. Do you lose your balance because of dizziness or do you ever lose consciousness?
<input type="checkbox"/>	<input type="checkbox"/>	5. Do you have a bone or joint problem that could be made worse by a change in your physical activity?
<input type="checkbox"/>	<input type="checkbox"/>	6. Is your doctor currently prescribing drugs (for example, water pills) for your blood pressure or heart condition?
<input type="checkbox"/>	<input type="checkbox"/>	7. Do you know of <u>any other reason</u> why you should not do physical activity?

YES to one or more questions

If
you
answered

Talk with your doctor by phone or in person BEFORE you start becoming much more physically active or BEFORE you have a fitness appraisal. Tell your doctor about the PAR-Q and which questions you answered YES.

- You may be able to do any activity you want — as long as you start slowly and build up gradually. Or, you may need to restrict your activities to those which are safe for you. Talk with your doctor about the kinds of activities you wish to participate in and follow his/her advice.
- Find out which community programs are safe and helpful for you.

NO to all questions

If you answered NO honestly to all PAR-Q questions, you can be reasonably sure that you can:

- start becoming much more physically active — begin slowly and build up gradually. This is the safest and easiest way to go.
- take part in a fitness appraisal — this is an excellent way to determine your basic fitness so that you can plan the best way for you to live actively. It is also highly recommended that you have your blood pressure evaluated. If your reading is over 144/94, talk with your doctor before you start becoming much more physically active.

DELAY BECOMING MUCH MORE ACTIVE:

- if you are not feeling well because of a temporary illness such as a cold or a fever — wait until you feel better; or
- if you are or may be pregnant — talk to your doctor before you start becoming more active.

Please note: If your health changes so that you then answer YES to any of the above questions, tell your fitness or health professional. Ask whether you should change your physical activity plan.

Informed Use of the PAR-Q: The Canadian Society for Exercise Physiology, Health Canada, and their agents assume no liability for persons who undertake physical activity, and if in doubt after completing this questionnaire, consult your doctor prior to physical activity.

You are encouraged to copy the PAR-Q but only if you use the entire form

NOTE: If the PAR-Q is being given to a person before he or she participates in a physical activity program or a fitness appraisal, this section may be used for legal or administrative purposes.

I have read, understood and completed this questionnaire. Any questions I had were answered to my full satisfaction.

NAME _____

SIGNATURE _____

DATE _____

SIGNATURE OF PARENT
or GUARDIAN (for participants under the age of majority) _____

WITNESS _____

