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Division I
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No. 72916-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SEAN PERRYMAN,

Plaintiff-Appellant,

v.

BELLEVUE COLLEGE, an agency/division of the
STATE OF WASHINGTON,

Defendant-Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Bellevue College owed Perryman a duty of care based on the special relationship between Bellevue College and Perryman in his capacity as a student participating in one of their classes on the school's campus and taught by a Bellevue College employee. The trial court erroneously granted summary judgment to Bellevue College because Bellevue College cannot establish that there are no genuine issues of material fact as to whether any duty was breached, whether Bellevue College failed to exercise reasonable care, and whether Perryman assumed the risk of injury.

In its response, Bellevue College attempts to divert the court to debate over whether Perryman presented sufficient evidence of causation and breach. But these arguments are mere diversions. To succeed on a summary judgment motion, Bellevue College must first show the absence of an issue of material fact. Whether it was foreseeable that Perryman would be kicked in the head during class, whether Bellevue College should have taken additional precautions, whether the balance between potential precautions and the foreseeable risk recommends liability are all necessary and fact-dependent inquiries. These factual questions, among a myriad of others reflected in the record, preclude summary judgment. Perryman respectfully requests that the Court reverse the decision of the

trial court and remand this case for trial on the merits. Perryman also requests that the trial court's award of attorney fees and costs be reversed and remanded.

II. ARGUMENT

A. Bellevue College owed Perryman a special duty of care because he was a business invitee.

Common sense dictates that colleges owe a duty to students to use reasonable care for their safety – in this case, a duty to protect students against an unreasonable risk of injury during class where Bellevue College had primary control over the classroom, course curriculum, and the instructor. Bellevue College does not dispute that Perryman was a business invitee and lawfully on the premises of Bellevue College at the time of his injury. To avoid the consequence of its admission, Bellevue College argues that the holding in *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), is limited to situations where there is evidence of criminal activity. Opp. at 9-10. However, there is nothing in the opinion that limits the duty to a business invitee as a duty to protect them only from criminal activity. In fact, the Washington Supreme Court in *Nivens* specifically recognized that a special relationship exists between a business and an invitee and found that businesses have a duty to protect invitees from foreseeable injuries. *Nivens*, 133 Wn.2d at 202.

Likewise, Bellevue College is incorrect in its claim that Bellevue College did not owe Perryman a duty and misrepresents the holding in *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995), when it states that "universities do not owe a special duty of care to students arising from their status as students, but that a university owes a duty to ascertain and warn of any condition of the premises that poses an unreasonable risk of harm." Opp. at 10. Indeed, the court in *Johnson* reversed the trial court's dismissal of the student's claims as a matter of law and found that Washington State University, as possessor of the campus, owed the plaintiff a duty to use reasonable care for her personal safety because of her status as a business invitee. *Johnson*, 77 Wn. App. at 941. In addition, the court found issues of the university's negligence and whether the university's acts or omissions were the legal cause of the student's injuries are jury questions. *Id*. at 941-42.

Bellevue College's assertion that "Perryman did not submit any evidence of any unreasonable risk of harm created by the College's premises or any of his PE 240 classmates" is also incorrect. Opp. at 10. Perryman presented evidence that Bellevue College failed to reasonably protect him by not providing adequate protective gear, thus increasing the risk of harm to students participating in the self-defense class. CP 7-8, 235-237. Perryman also presented evidence that Bellevue College failed

to reasonably protect him by not training students on avoiding injuries or warning students as to the risk of injury. CP 8, 235-37. Finally, Perryman presented evidence that dangerous ground-fighting exercises should have been choreographed with clear parameters set and the instructor should have been present at all times in order to avoid injury. CP 235-37.

Bellevue College clearly owed Perryman a special duty of care and, therefore, the trial court erred in dismissing Perryman's claims insofar as the dismissal was based on a purported lack of duty.

B. The evidence shows there are genuine issues of material fact as to whether Perryman assumed the risk of injury.

Bellevue College also claims summary judgment was proper because Perryman assumed any duty the college owed to him. However, under the facts in this case, assumption of risk is not resolvable as a matter of law.

To prove the affirmative defense of assumption of risk, Bellevue College must show that plaintiff had full subjective understanding of the presence and nature of the specific risk and voluntarily chose to encounter the risk. *Home v. North Kitsap Sch. Dist.*, 92 Wn. App. 709, 720, 965 P.2d 1112 (1998). Whether a plaintiff decides *knowingly* to encounter a risk turns on whether he or she, at the time of the decision, *actually and subjectively* knew all facts that a reasonable person in the defendant's

shoes would know and disclose, or concomitantly, all facts that a reasonable person in the plaintiff's shoes would want to know and consider. *Id*. Thus, "[t]he test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk." *Id*. (citing *Shorter v. Drury*, 103 Wn.2d 645, 656-57, 695 P.2d 116 (1985)). In addition, the plaintiff must "be aware of more than just the generalized risk of [his or her] activities; there must be proof [he or she] knew of and appreciated the specific hazard which caused the injury." *Id*. at 720-21.

Bellevue College relies on non-controlling out-of-state cases to support its argument that the assumption of risk doctrine specifically precludes liability for injuries that occur practicing martial arts. Opp. at 11-12. This case is different than *Tadmor v. New York Jiu Jitsu, Inc.*, 109 A.D.3d 440, 441, 970 N.Y.S.2d 777 (App. Div. 2013), because the plaintiff in that case had extensive training in mixed martial arts, military combat training, and survival krav maga. Similarly, the plaintiff in *Barakat v. Pordash*, 164 Ohio App. 3d 328, 330, 842 N.E.2d 120 (2005), had a second-degree black belt in kung fu, and a brown belt (which is one step below black belt) in judo at the time of his injury.[1] In contrast,

[1] In *Morgan v. State*, 90 N.Y.2d 471, 662 N.Y.S.2d 421, 685 N.E.2d 202 (1997), it is difficult to determine how relevant or factually similar the

Perryman did not have any experience of any kind in self-defense or ground fighting before he enrolled in PE 240 – Self-Defense. CP 182-83.

Whether or not plaintiff "knew" of the risk, and whether or not he "voluntarily" chose to encounter it, are normally questions of fact for a jury. *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997). In this case, Perryman was never trained on how to avoid injuries and was never warned of the risk of injury associated with self-defense. CP 8. Perryman seriously disputes that he knew all of the facts that a reasonable person would have wanted to know and consider when deciding whether to engage in dangerous, actual fighting exercises with another student who was much more experienced than he was in martial arts. Accordingly, summary judgment should not have been granted because whether Perryman *knowingly* and *voluntarily* assumed the risk is a question of fact for the jury.

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two martial arts plaintiffs are to the present case because the court provided little to no facts about them in the opinion. However, the general rule in Washington is that for persons to assume a risk, they must be aware of more than just the generalized risk of their activities; there must be proof that they knew of and appreciated the specific hazard which caused the injury. *Shorter v. Drury*, 103 Wn.2d 645, 657, 695 P.2d 116 (1985). The holding in *Morgan* appears to contradict the law in Washington.

C. The evidence shows there are genuine issues of material fact as to whether Bellevue College breached its duty.

Bellevue College also claims summary judgment was proper because there is no evidence Bellevue College breached a duty. But the party that moves for summary judgment has the burden of proving that there is no genuine issue of fact, irrespective of whether he or his opponent would, at trial, have the burden of proof on the issue concerned. *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960) (citations omitted). Here, there is, *at minimum*, a question of fact as to whether the instructor failed to exercise reasonable care.

Bellevue College asserts that there "was nothing about the College's premises or the actions or inactions of his instructor that led to [Perryman's injury]." Opp. at 13. Not surprisingly, Perryman disputes this and takes the position that his injury was caused by the instructor's failure to provide safety gear, failure to properly instruct students, and failure to properly supervise the class.

Breach and proximate cause are generally fact questions for the trier of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Here, the evidence shows the presence of genuine issues of material fact about whether the College breached a duty. Perryman presented evidence that Bellevue College failed to protect him by not

providing adequate protective gear. CP 7-8, 235-37. Perryman also presented evidence that the failure to provide protective gear fell below the applicable standard of care and created unsafe conditions for Perryman and the other students in the self-defense class. CP 8, 235-37. In addition, Perryman presented evidence that Bellevue College failed to reasonably protect him by not training students on avoiding injuries or warning students as to the risk of injury. *Id.* Under the facts in this case, a trier of fact could find that the instructor breached his duty of reasonable care and that Bellevue College was negligent.

Because there is a question of fact as to the reasonableness of Bellevue College's actions, its motion for summary judgment should have been denied.

D. Perryman presented ample evidence of causation.

Bellevue College also claims summary judgment was proper because there is no evidence of causation. This is incorrect. Perryman offered expert testimony that establishes causation. According to Mr. Kipp, "[the instructor's] failure to set up these drills correctly combined with his failure to supervise the drills caused Sean Perryman to be injured by another student while performing the drills." CP 237.

Proximate cause consists of two elements: cause in fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985).

Cause in fact (also called "but for" causation) refers to the "physical connection between an act and an injury." *Id*. at 778. Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment. *Owen v. Burlington N. & Santa Fe. R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) ("issues of negligence and proximate cause are generally not susceptible to summary judgment"); *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998) ("Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury.").

Here, when facts are viewed in the light most favorable to Perryman and reasonable inferences are drawn in his favor, it is clear that Perryman presented evidence that "but for" the failures of Bellevue College – to provide safety gear, proper instruction, and supervision – Perryman would not have been injured by two successive blows to his head.

Again, there are disputed fact questions which preclude summary judgment.

E. The award of attorney fees and costs should be reversed.

Perryman also argued that the trial court incorrectly awarded attorney fees to Bellevue College. In response, Bellevue College claims

that the award of attorney fees and costs was proper because Perryman did not oppose the request for attorney fees and costs. Opp. at 17. This is incorrect. Perryman asked the trial court to refrain from entering judgment. CP 339-45.

The trial court's award of attorney fees should be reversed and remanded – first, because the court erred in granting Bellevue College's motion for summary judgment; and second, because the judgment does not establish the amount awarded was equitable or reasonable, or how it was calculated and arrived at.

III. CONCLUSION

For all these reasons, the Court should reverse the trial court's order granting summary judgment in favor of Bellevue College and awarding attorney fees and costs to Bellevue College.

DATED this 29th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015, I caused to be served upon counsel of record, at the address and in the manner described below, a copy of the document to which this certificate is attached, for delivery to the following:

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s/Shelby Smith
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