

NO. 72916-1-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

SEAN PERRYMAN,

APPELLANT,

v.

BELLEVUE COLLEGE,

RESPONDENT.

BRIEF OF RESPONDENT

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 STATE OF WASHINGTON
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I. INTRODUCTION

Sean Perryman appeals from an order of summary judgment, which dismissed his *de novo* appeal from an arbitration award in favor of the Bellevue College. He also appeals the trial court's award of attorney fees and costs to the College, though he did not raise that issue below.

Perryman is a former student at the College. He claims the College was negligent because he sustained a concussion when his head hit a fellow student's knee during two successive PE 240 (self-defense) classes. The College denies negligence and affirmatively alleges that Perryman's claim is barred by the doctrine of implied primary assumption of risk, and is otherwise unsupported by evidence of breach and proximate cause.

As a matter of law, Perryman assumed his own duty of care, because he knowingly and voluntarily accepted the open and obvious risks inherent in grappling with fellow students. Perryman admits that there was nothing the instructor of PE 240 did or failed to do, and nothing about the College's premises, that increased those open and obvious risks. This court should affirm the trial court's orders granting summary judgment of dismissal and reimbursing the College's attorney fees and costs.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the College owe Perryman a special duty of care? (Assignment of Error A.1)**
- B. If the College owed Perryman a special duty of care, did he assume that duty by knowingly and voluntarily engaging in the self-defense exercises from which he claims injury? (Assignment of Error A.1)**
- C. Does Perryman present admissible evidence that the College breached a duty of care owed to him? (Assignment of Error A.1)**
- D. Does Perryman present admissible evidence that the College's breach of a duty of care owed to him that proximately caused his damages? (Assignment of Error A.1)**
- E. May this court consider the trial court's award of attorney fees and costs to the College under MAR 7.3 and RCW 7.06.060(1), where Perryman did not contest that award below? (Assignment of Error A.2)**

III. COUNTERSTATEMENT OF THE CASE

A. Standard of Review

An appellate court reviews summary judgment orders *de novo*, undertaking the same inquiry as the trial court. *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 713-14, 248 P.3d 150 (2011). The court considers the materials before the trial court and construes the facts and inferences in the light most favorable to the nonmoving party. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002).

An appellate court reviews an award of attorney's fees for an abuse of discretion. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 524, 280 P.3d 1133, *review denied*, 175 Wn.2d 1028, 291 P.3d 254 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

B. Procedural Summary

Perryman commenced this action on April 30, 2013. CP 1-5. The College moved for summary judgment and Perryman moved this action into arbitration, staying the College's motion. CP 63-96; 300-02. On February 18, 2014, the arbitrator issued a decision in favor of the College. CP 312-13. Perryman then requested a trial *de novo* in superior court. CP 310.

On October 17, 2014, the College renewed its motion for summary judgment. CP 63-217; 239-44; 268-73; 283-86. The trial court initially denied that motion, finding an issue of material fact regarding "negligent supervision" by the College. CP 266-67. The College then moved for reconsideration, because the theory of negligent supervision was not applicable or at issue, which Perryman conceded, and because there were no facts to support that theory. CP 268-73, 283-86; *see also* CP 277.

On December 18, 2014, the trial court granted reconsideration and summary judgment. CP 287-88. The College then moved to unseal the arbitration award and requested attorney fees and costs, pursuant to MAR 7.3 and RCW 7.06.060(1). CP 315-19; 351-53. Perryman did not oppose those motions, both of which the trial court granted. CP 354-59.

C. Summary of the Argument

Perryman is an accomplished athlete who fully understood, appreciated, and voluntarily accepted the risks inherent in practicing self-defense in PE 240. His claim is barred by the doctrine of implied primary assumption of risk because, as a matter of law, Perryman assumed his own duty of care. He admits there was nothing that the instructor of PE 240 did or failed to do that increased his risk beyond the open and obvious risk inherent in grappling with fellow students. He also admits the College premises did not in any way increase that risk. And even if the College owed Perryman a duty, there is no evidence that the College either breached that duty or proximately caused his claimed concussion.

Because Perryman failed to improve his position by seeking *de novo* review of the arbitration decision against him, the trial court properly reimbursed the College's attorney fees and costs. Perryman declined to challenge the trial court's award of fees and costs below, so he may not do so on appeal. This court should affirm the trial court.

D. Counterstatement of the Facts

Perryman is 23 years old, 5'10" tall and weighs "around 195" pounds. CP 116, 122. He is an accomplished athlete who played select and college-level baseball, among numerous other active sports. CP 134-35. He enrolled in PE 240 at the College in Spring Quarter 2012, because "it was one of the only PE classes that were available to fit within (his) schedule times." CP 30, 121-22. PE 240 is a self-defense class. CP 119.

There were 25 to 30 students in Perryman's section of PE 240 and "probably a third" were female. CP 124. Perryman admits he was among the biggest, strongest and most capable students in the class. CP 124; CP 125, 150-53. He also admits that he "definitely took some off knowing (he) was one of the stronger ones." CP 128. When Perryman engaged in "ground exercises" involving grappling with other students, he would routinely prevail. CP 124; CP 125, 150-53.

Perryman admits that he understood from the first day of PE 240 what was involved in the class. CP 122-23. He was familiar with martial arts before taking PE 240, because he observed his younger brother taking Karate classes. CP 119-20. His father took Kung Fu. CP 116-17, 121. Perryman's field of study is kinesiology, which is "the study of the human body and movement and mechanics . . ." CP 119.

The PE 240 instructor provided Perryman with a class syllabus informing him of what would be taught during the eight week quarter. CP 122-23, 210-11. Perryman was aware that PE 240 would involve physical contact with other students, including “escapes and take-downs and ground applications” occurring in padded areas. CP 123-24, 128.

Though Perryman practiced with “every guy that was in (PE 240),” he primarily practiced with Torey Bearly. CP 124, 150-52. Bearly had taken PE 240 on “six or seven” prior occasions, holds a black belt in Shudokan Karate and acted as a teaching assistant. CP 150-52. Perryman enjoyed practicing with Bearly. CP 125. He felt that the instructor matched him with Bearly because he “saw (Perryman’s) strengths and athleticism, and just that (he) was a very driven, focused person.” CP 125.

Perryman admits that in 60 to 70 percent of the PE 240 sessions, the students engaged in some kind of “ground grappling,” which he describes as “very intense.” CP 128-29. The main ground grappling exercise was a form of “winner stays in,” in which one student grapples with 11 or 12 students consecutively, until he or she gives up or the opponent gives up. CP 128-29. Perryman engaged in “winner stays in” at least ten times before May 29, 2012, losing only once, when he grappled two opponents simultaneously. CP 128-29.

On May 29, 2012, Perryman was engaged in a “take-down drill” with Bearly when the back of Perryman’s head hit Bearly’s knee. CP 126, 132. Perryman admits “it was just an inadvertent bump on the head by (Bearly’s) knee.” CP 130. Perryman did not “see stars” or believe that he was injured. CP 126. He continued with the drill and went on to engage in other self-defense exercises during that May 29 session. CP 126.

Perryman admits that the “take down drill” was within his level of ability. CP 126, 130. He also admits he understood that inadvertent contact could occur during a “take down drill” and that contact with other students was an expectation for PE 240. CP 130-31.

On May 30, 2012, Perryman was engaged in a knife exercise with Bearly on a padded mat. CP 126-27. During the exercise, Bearly’s knee again inadvertently struck Perryman’s head “in the process of both of (them) going after the knife.” CP 127. Perryman previously performed the knife exercise five to ten times, without incident. CP 127. Again, Perryman did not “see stars” or believe that he was injured. CP 130, 132.

Perryman later noticed “dizziness, a headache, short-term memory losses, forgetting a lot of things” while working at the Islander Restaurant. CP 130, 132. His physician diagnosed a concussion. CP 130, 132.

Thereafter, Perryman continued to work at the Islander Restaurant until September 2012, when he went to work at the Roanoke Tavern.

CP 143-44. He performed well at both jobs. CP 143-44. Perryman then enrolled at the Seattle Central Community College. CP 136.

IV. ARGUMENT

A. Summary Judgment Was Proper

Perryman presents no evidence that the College breached a duty of care owed to him that proximately caused his damages.

1. The College Did Not Owe Perryman a Special Duty

Perryman argues that because he was a student at the College, he had a special relationship with the College that created a duty of care. In support of this argument, he cites *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953). Perryman's reliance on *McLeod* is misplaced. This court has distinguished cases involving adult college students from *McLeod*, which deals with school-aged children where the school acts *in loco parentis*. See e.g. *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995). The college-student relationship does not impose a duty upon colleges to protect students from the actions of fellow students or third parties. *Johnson*, 77 Wn. App. at 939.

Perryman cites several Washington cases in addition to *McLeod*, but each of those cases, too, is distinguishable. In *Caulfield v. Kitsap Cnty.*, 108 Wn. App. 242, 29 P.3d 738 (2001), the court found a special relationship existed between a caregiver hired by the county to care for a

developmentally disabled patient, such that the county could be liable to the patient for injuries sustained from the caregiver's negligence. But here, the College is not a special-needs caregiver and Perryman is not developmentally disabled. He is an athletic, capable, adult student.

In *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), the court held that a group home for developmentally disabled persons had a duty to protect disabled residents from the foreseeable consequences of their impairments. Again, the College is not a group home for developmentally disabled persons and Perryman is not disabled.

In *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997), the court held that a special relationship existed between a store and its customer, such that the store had a duty to take reasonable steps to protect customers from imminent criminal harm or reasonably foreseeable criminal conduct by third persons. The conflicting evidence before the *Nivens* court was that numerous assaults occurred in the Hoagy's Corner parking lot caused by loitering youth. *Nivens*, 133 Wn.2d at 195. The court addressed the duty a landowner owes a business invitee where there is evidence of criminal activity on the premises that makes injury by that activity reasonably foreseeable. Here, the College acknowledges that Perryman was a business invitee while participating in PE 240, but there is no evidence of criminal activity in PE 240 or that Perryman was injured

by criminal activity or a condition of the premises.

In *Johnson*, a state university student who was raped while attempting to gain access to her dormitory brought a negligence action against the university. *Johnson*, 77 Wn. App. 934. In reversing a summary judgment for the university, this court held 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. *Johnson*, 77 Wn. App. at 941. Here, 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.

2. Perryman Assumed Any Duty the College Owed

Even if the College owed Perryman a duty, he assumed that duty by engaging in PE 240 despite subjectively knowing of the open and obvious risks inherent in grappling with fellow students. Therefore, the doctrine of implied primary assumption of risk bars his negligence claim.

Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by the defendant) to relieve the defendant of a duty to the plaintiff regarding specific known and appreciated risks. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992) (citing *Kirk v. WSU*, 109 Wn.2d 448, 453,

746 P.2d. 285 (1987)) (“Primary implied assumption of risk continues as a complete bar to recovery [even] after the adoption of comparative negligence laws.”); *see also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts*, 496 (5th ed. 1984). A classic example of implied primary assumption of risk occurs in sports cases:

One who participates in sports ‘assumes the risks’ which are *inherent in the sport*. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is not negligence. Therefore, that type of assumption acts as a complete bar to recovery.

Scott, 119 Wn.2d at 498 (emphasis original) (*citing Ridge v. Kladnick*, 42 Wn. App. 785, 788, 713 P.2d 1131, *review denied*, 106 Wn.2d 1011 (1986) and *ITT Rayonier v. Puget Sound Freight Lines*, 44 Wn. App. 368, 376, n.5, 722 P.2d 1310 (1986)). Perryman’s negligence claim is barred.

Cases from other jurisdictions hold that the assumption of risk doctrine specifically precludes liability for injuries that occur in practicing martial arts. In *Tadmor v. New York Jiu Jitsu, Inc.*, 109 A.D.3d 440, 970 N.Y.S.2d 777 (App. Div. 2013), the court held that “take downs” are a reasonably foreseeable consequence of participating in a martial arts sparring session, precluding the liability of the training center. In *Barakat v. Pordash*, 164 Ohio App.3d 328, 842 N.E.2d 120 (2005), the court held that injury in the course of a martial arts hold or maneuver was a risk that was foreseeable and customary, which encourages physical contact.

In *Rodrigo v. Koryo Martial Arts*, 100 Cal.App.4th 946, 122 Cal. Rptr. 2d 832 (2002), the court affirmed summary judgment for the martial arts studio where a student claimed injury from a kick by a fellow student. In *Morgan v. State*, 685 N.E.2d 202, 90 N.Y.2d 471, 662 N.Y.S.2d 421 (1997), the court evaluated the application of primary assumption of risk to four personal injury cases, two of which involved the practice of martial arts. In both martial arts cases, the court affirmed the trial court's dismissal on the grounds that the students had assumed the risk of their injuries, thereby relieving the owners and operators of the premises of liability. The same analysis applies here.

Before Perryman engaged in any self-defense exercises in PE 240, he was informed and he subjectively understood all facts that a reasonable person would have known regarding what was involved in the class and the risks inherent in learning self-defense. Ironically, Perryman believed (incorrectly) and therefore assumed the risk that PE 240 would involve strikes between students, though no hitting, kicking or body blows were taught or allowed in that class. CP 123, 147-49. And though Perryman could have discontinued PE 240 at any time, he instead attended all classes and participated in all exercises throughout the eight week quarter. His injury occurred at the very end of the quarter, right before finals. CP 132.

Even if Perryman could establish that the College owed him a duty, the doctrine of implied primary assumption of risk shifted that duty back to him. He impliedly consented to relieve the College of any duty regarding the specific known and appreciated risks of PE 240. *Scott*, 119 Wn.2d at 497; *Kirk*, 109 Wn.2d at 453. His negligence claim is barred.

3. There Is No Evidence the College Breached a Duty

Even if the doctrine of implied primary assumption of risk did not bar Perryman's negligence claim, there is no evidence that the College breached a duty of care owed to him. Perryman acknowledges that his damages came from two successive, inadvertent contacts with a classmate's knee. There was nothing about the College's premises or the actions or inactions of his instructor that led to these inadvertent contacts.

Perryman argues that his instructor was not supervising the exercises from which he claims injury, but he cites no supporting evidence for this claim. The evidence is to the contrary. His instructor testified:

Q: What are you doing during these exercises?

A: Just moving around and watching the class.

Q: And do you think it's important to have a person of authority be there to observe when a person taps or not?

A: Well, I'm in the room. It isn't that big and I usually monitor the class pretty well.

CP 47, 49. Perryman argues that his PE 240 instructor admitted that he was not supervising Perryman at the time his injury, but his instructor's actual testimony was merely that he was unaware that Perryman had been injured. CP 50-51. This does not prove he was negligent, only that he was unaware of Perryman's injury (as were Bearly and Perryman himself).

Perryman argues that the exercises taught in PE 240 should have been choreographed and clear parameters should have been set by the instructor, but he fails to present evidence that the exercises were *not* choreographed or that clear parameters were *not* set. In short, there is no admissible evidence to support an argument that the PE 240 instructor engaged in some negligence that exceeded the scope of the assumed risk.

4. There is No Evidence Proving Proximate Cause

In a negligence action, the plaintiff has the burden of establishing that the defendant's negligence was a proximate cause of injury. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992) (citing *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)). Here, Perryman does not establish that a negligent act or omission by the College proximately caused his concussion. He simply argues that the College failed to provide him with protective "gear" and that students should be wearing protective "gear" during self-defense exercises. CP 236.

However, there is no evidence of what protective “gear” would have prevented Perryman’s claimed concussion or how it would have done so. When an injury involves obscure medical factors that would require an ordinary lay person to speculate in making a finding, expert testimony is required to establish causation. *Bruns v. Paccar, Inc.*, 77 Wn. App. 201, 214, 890 P.2d 469 (1995) (citing *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986)). Perryman never offered medical evidence to establish causation, nor did he prove that specific protective “gear” would have prevented his claimed concussion.

Moreover, this court can take judicial notice of the fact that concussions occasionally occur in a variety of settings, including football, where protective head gear is required, and soccer, where protective head gear is not required. Concussions can occur, or not, despite mandatory padding and head gear. Evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). The record is devoid of such evidence. As there is no medical evidence that the alleged breach of duty Perryman claims proximately caused his damages, dismissal is proper.

B. The Trial Court Properly Reconsidered Summary Judgment

Perryman argues that the trial court erred in reconsidering and granting the College's motion for summary judgment, because the College did not meet the requirements for reconsideration under CR 59. But a summary judgment ruling is interlocutory and subject to modification at any time. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992). Moreover, the court's initial order denying summary judgment stated simply that "issues of negligent supervision" remain for trial. CP 266-67. But a cause of action for negligent supervision is redundant, and was properly dismissed, where a plaintiff had also sought to hold the state vicariously liable for its employee's acts and the state acknowledges that the employee's acts were within the scope of employment. *Gilliam v. State*, 89 Wn. App. 569, 950 P.2d 20 (1998). As negligent supervision does not apply, the trial court properly reconsidered its ruling under CR 59(a)(8) (error of law).

Additionally, to the extent the question of "negligent supervision" asks whether Perryman assumed the risk of his PE 240 instructor's "negligent supervision," thereby rendering his implied primary assumption of risk an incomplete bar to his negligence claim, there must be admissible evidence of such negligence. Here, there is no such evidence. The trial

court therefore properly reconsidered its ruling under CR 59(a)(7) (no evidence or reasonable inference from evidence to justify decision).

C. The Award of Attorney Fees and Costs Was Proper

Perryman's challenge to the trial court's award of attorney fees and costs to the College under MAR 7.3 and RCW 7.06.060(1) was not raised below and cannot be asserted for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009). RAP 2.5(a) generally provides that issues may not be raised for the first time on appeal. *See also State v. Senqay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995). "The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials." *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003); *First Am. Title Ins. Co. v. Liberty Capital Starpoint Equity Fund, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument).

V. ATTORNEY FEES ON APPEAL

The College requests an award of attorney fees and costs on appeal, pursuant to RAP 18.1, MAR 7.3 and RCW 7.06.060(1).

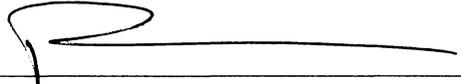
VI. CONCLUSION

On appeal, the court can affirm summary judgment on any theory raised below that is supported by the pleadings and the proof. *LaMon v.*

Butler, 112 Wn.2d 193, 200, 770 P.2d 1027 (1989). Based on the foregoing arguments and authorities, the College respectfully requests that this court affirm the trial court's order granting summary judgment and awarding the College its attorney fees and costs.

RESPECTFULLY SUBMITTED this 27th day of May, 2015.

ROBERT W. FERGUSON
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A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a long horizontal line.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the preceding Brief of Respondent was sent by Legal Messenger to the Court of Appeals, at:

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