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Judge: Kick to the head danger in tae kwon do

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After a bench trial in which a tae kwon do student sued a fitness instructor for kicking him in the head, a Wisconsin circuit judge found no liability on the fitness company's behalf — because getting kicked in the head is a risk that comes with learning and practicing the martial art.

Plaintiff Michael Palmisano sued Chicago-based Bally Total Fitness Corp. in 2015, alleging tae kwon do instructor Giwon Lee's negligent sparring caused him to suffer a retinal injury after getting kicked in the head in April 2012.

Palmisano, who possesses a first-degree black belt, was participating in a tae kwon do sparring class and avoided one kick from Lee, a fifth-degree black belt, but leaned into a follow-up roundhouse kick, said Norman T. Finkel, a partner at Schoenberg Finkel Newman & Rosenberg LLC who represented Bally.

All of the students in the class were wearing the required protective gear — including a helmet and mouth guard — at the time of the incident.

"You almost look like a Ninja Turtle when you're wearing it," Finkel said.

The kick landed on Palmisano's head and resulted in a retinal detachment of one of his eyes.

Palmisano's injury required surgery to reattach the retina, which his attorney Michael I. Tarnoff said he underwent at the Froedtert Eye Institute in Milwaukee.

"It wasn't like a devastating injury where he was blind in one eye, but still he has some vision problems and the doctor testified that he has a 70 percent chance down the line that he would need cataract surgery," said Tarnoff, a partner at Warshafsky Law Firm in Milwaukee.

Palmisano initially named Lee in his lawsuit but voluntarily dismissed him before trial.

In denying his allegations, Bally contended Palmisano signed releases that frees the company from liability for any alleged negligence on behalf of its instructors. It also contended he assumed the risk of getting kicked in the head when he decided to learn, participate in and gear up for the sport — which actually awards points when people land the kick at issue.

"Under the World Taekwondo Federation rules, and this was testified at trial by everybody, you actually score more points by kicking your opponent in the head," Finkel said. "There's a reason for that: That's the sport. That defines the sport, and that's why you wear a helmet."

But Palmisano contended Lee had never kicked him in the head during their previous sparring sessions, and the higher degree black-belt instructor never should have kicked him in the head.

"He never got kicked in the head, didn't expect that he would get kicked in the head and didn't want to get kicked in the head," Tarnoff said. "That's why he never entered into one of those tournaments."

Tarnoff said he knew the case would be hard to try when he took it and warned his client of the possibility that he could lose the case on a possible assumed-risk argument from Bally.

"He was more optimistic than I was," Tarnoff said. "I think he was aware of the risk, but he thought there was a better chance to win."

Bally first moved for summary judgment on its release argument, but Timothy Dugan, who was hearing the case before he was elevated to the Wisconsin Court of Appeals, denied that request for relief.

"It's very, very difficult to have those upheld in Wisconsin," Finkel said. "We gave it a shot, and the judge said no."

Bally moved again for summary judgment after the parties had completed a number of depositions — this time alleging Palmisano assumed the risk of injury.

Bally argued Palmisano was more negligent than Bally — if Bally was negligent at all — because participating in a sport and actively wearing head and other types of protection evidences the fact that he knew he could get kicked in the head.

Dugan initially granted summary judgment to Bally during the hearing on that motion, but he switched gears shortly after allowing Palmisano's opportunity for a rebuttal.

"The judge abruptly said, 'Come back tomorrow morning,'" Finkel said. "The next day, he denied summary judgment."

"I don't know what happened from one day to the next, but he basically said, 'I think we have an issue of fact that needs a trial because the plaintiff had asserted that the policy and practice on sparring was no kicks to the head, and he had never been kicked to the head.' That was very disappointing and very interesting how that all evolved, but it happened," Finkel said.

Tarnoff said he did not think Lee was truthful when he testified that he had kicked Palmisano in the head during previous sparring sessions.

"If he had been kicked in the head in previous sparring events with Lee, Michael never would have gotten in with him," he said.

The parties mediated privately in September. Finkel said their failure to reach an agreement that day was disappointing because it seemed as though Palmisano "wanted nothing to do with it."

"It was frustrating because I believe virtually every case is settleable," Finkel said.

The parties proceeded to a three-day bench trial before Milwaukee County Circuit Judge Rebecca F. Dallet, who took the case after Dugan's elevation.

After the trial, Finkel said, Dallet found the evidence did not support Palmisano's allegations, as head-kicks are permitted in the martial art. She also found that he assumed the risk of injuries to the head area by having previously participated in several sparring sessions over three years — where such moves were permitted.

"The client was very happy," Finkel said. "The client was particularly happy because for two years we tried to resolve the case."

Tarnoff said he doesn't anticipate filing an appeal in his client's case because it's hard to appeal a judge's bench ruling that includes legal and witness testimony findings.

"Motions after [a] verdict are much more important and much more useful when there's a jury verdict," he said. "Dallet can say, 'I believe the testimony that Master Lee has kicked Palmisano in the head before and I believe that kicks to the head are allowed in tae kwon do,' and that's what it is."

Palmisano was also represented by Krista Rosolino, an attorney in Tarnoff's firm.

Bally was also represented by William R. Klein, a partner at Finkel's firm.

The Milwaukee County Circuit Court case is *Michael R. Palmisano v. Bally Total Fitness Corp.*, 2015CV002006.

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