

IN THE INDIANA COURT OF APPEALS  
Cause No. 22A04-1506-CT-000722



TRESA MEGENITY,

Appellant,

v.

DAVID DUNN,

Appellee.

) Appeal from the  
) Floyd Superior Court 3  
)  
) Trial Court Cause No.  
) 22D03-1309-CT-1354  
)  
) The Honorable Maria Granger, Judge  
)  
)  
)  
)

---

REPLY BRIEF OF APPELLANT

---

Kenneth G. Doane, Jr., Atty. #20576-22  
DOANE LAW OFFICE, LLC  
300 Missouri Avenue, Suite 200  
Jeffersonville, IN 47130  
(812) 590-2213

Attorney for Appellant  
Tresa Megenity

## TABLE OF CONTENTS

Table of Authorities.....	ii
Summary of the Argument.....	1
Argument.....	2
I.    Dunn has materially misrepresented the facts of record and has failed to address Megenity’s designated evidence that Dunn’s jump kick was not in the ordinary range of behavior for the sport.....	2
II.   Megenity’s testimony concerning Dunn’s admission – “I’m sorry, I didn’t mean to jump” – is fully admissible under Indiana law. ....	3
III.  Dunn’s heavy reliance on an unreleased Colorado case concerning “martial arts sparring” is both misplaced and telling.....	6
IV.  Dunn’s argument that Megenity has produced no evidence that his jump kick was “reckless” or “intentional” is a bright red herring.....	8
Conclusion.....	8

## TABLE OF AUTHORITIES

### Cases

<i>Coghill v. Badger</i> , 430 N.E.2d 405 (Ind. Ct. App. 1982).....	5
<i>Comm'r of Labor ex rel. Shofstall v. Int'l Union Of Painters And Allied Trades AFL-CIO, CLC Dist. Council 91</i> , 962 N.E.2d 124, 132 (Ind. Ct. App. 2011).....	4
<i>Duke's GMC, Inc. v. Erskine</i> , 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983).....	7
<i>Etten v. Van Fegasus</i> , 803 N.E.2d 689, 692 (Ind. Ct. App. 2004).....	4
<i>Guzik v. Town of St. John</i> , 875 N.E.2d 258, 266 (Ind. Ct. App. 2007).....	5
<i>Laughman v. Girtakovskis</i> , 2015 WL 5895321 (Colo. App. Oct. 8, 2015).....	6-7
<i>Pfenning v. Lineman</i> , 947 N.E.2d 392 (Ind. 2011).....	6 et seq.
<i>Turner v. State</i> , 993 N.E.2d 640, 643 (Ind. Ct. App.) <i>trans. denied</i> . 997 N.E.2d 357 (Ind. 2013).....	4
<i>Vaughn v. Daniels Co. (W. Virginia)</i> , 841 N.E.2d 1133, 1137 (Ind. 2006).....	4

### Rules

Indiana Rule of Evidence 801(d)(2).....	4
---	---

### Other Authorities

Indiana Model Civil Jury Instruction, § 3156.....	8
---	---

## SUMMARY OF THE ARGUMENT

In his responsive brief, Dunn attempts to characterize the entire sport of karate as a chaotic, violent whirlwind of unpredictable kicks, chops and body-blows in which participants must expect to sustain severe bodily injury at any moment. In this vein, Dunn argues that because class participants could expect that, in Dunn's words, "inexact and imprecise" kicks could occur during the "kicking-the-bag" drill, Dunn's *jump* kick in the context of a *front*-kick exercise was therefore reasonable as a matter of law. But Dunn's kick was not "inexact and imprecise." It was dead-on. There is no evidence of record that Dunn lost control of his kick, nor that Megenity was trained to expect a jump kick while holding a training bag. To the contrary, Megenity has designated evidence that such a kick is never to be performed in a partner-held bag exercise. Dunn repeats the trial court's error of failing to consider Megenity's affirmative evidence that Dunn's jump kick was not "ordinary behavior" for the sport.

Moreover, contrary to well-settled Indiana summary judgment jurisprudence, Dunn is baldly asking this Court to compound the trial court's error by ignoring Megenity's testimony concerning Dunn's kick completely. Dunn's argument that his admission – "I'm sorry, I didn't mean to jump" – requires "speculation" as to its meaning is without merit. The record supports only one reasonable inference, namely, that Dunn performed a jump kick when he knew he shouldn't have, and Dunn fails to offer any other plausible interpretation of his admission.

Most significantly, Dunn fails to address in any way Megenity's designated evidence that Dunn's jump kick was *not* within the range of ordinary behavior for the sport. Megenity's evidence that jump kicks are never a part of a "kicking-the-bag" drill and are never performed with a partner (App. pp. 78-79) is affirmative evidence of Dunn's breach of duty, evidence that the trial court actively ignored, without explanation, and which warrants reversal here.

## ARGUMENT

- I. **Dunn has materially misrepresented the facts of record and has failed to address Megenity's designated evidence that Dunn's jump kick was not in the ordinary range of behavior for the sport.**

This appeal hinges on the factual issue of whether Dunn's decision to perform a jump kick during a front-kick drill was within the range of ordinary behavior for a karate class. The Court will note that Megenity, in contrast to Dunn, has designated in her opening brief ample evidence that Dunn's kick was out of the ordinary – evidence that Dunn glaringly fails to address or even acknowledge in his brief – while Dunn's brief points to not a single fact of record that would support an inference that Dunn's jump kick was "ordinary." Instead, Dunn relies solely on the fact that "kicks," in general, are ordinarily a part of a karate class. *Appellee's Brief*, at 11, fn. 3. Worse, at page 15 of his brief, as the entire factual basis for his argument that his jump kick was "ordinary," Dunn materially misstates the evidence of record, specifically:

In Megenity's own words, the impact from a karate class participant's kick causing the bag holder to "fly back" was a possibility and said impact causing the bag holder to "move back" was a certainty. (App. 69, 70.) Thus, Dunn's act of kicking the bag Megenity was holding, thereby impacting the bag, was within the ordinary range of conduct for a karate class participant.

*Appellee's Brief*, at 15. The Court can easily confirm that the record does not contain these "facts." To the contrary, Megenity testified that "You don't stand with two feet together because you can fly back. So you have to brace yourself to take an impact of the kick." App. p. 69. Dunn points to nothing in the record to contradict Megenity's testimony that she *was* properly braced, and the evidence of record is that a possibility of "flying back" exists *only* when a participant is *not* properly braced. *Id.* Just as significantly, Megenity testified not that it was "certain," but instead "common" – a clear synonym for "ordinary" – for the bag-holder to be "moved back" "[a] little bit" during the course of the "kicking the bag" drill. App. p. 70.

The crucial point here, of course, is that Megenity was not “moved back” “[a] little bit” by Dunn’s jump kick. Megenity’s testimony – which the trial court was not free to weigh or ignore on a summary judgment motion – was that Dunn’s kick caused her to move back “several feet” through the air despite being properly braced, and her fellow students noted that she “flew” and had been “airborne.” App. p. 72. 73. This evidence alone forces a conclusion that Dunn’s kick was not in the range of ordinary behavior for the sport.

Without putting too fine a point on it, Dunn’s attempt in his brief to gloss over what the designated evidence actually says leads to a conclusion precisely contrary to what Dunn wants: *Nothing in the record* supports a conclusion that Dunn’s kick was “ordinary.” Dunn’s repeated, conclusory statement in his brief that “[d]oing a karate kick – however defined – is within the ambit of reasonable behavior in karate” (*Appellee’s Brief*, at 11, 15) is a facile and unworthy attempt to sweep away the contrary evidence Megenity has designated and replace it with nothing more than an unsupported and self-serving conjecture. Under Indiana’s summary judgment standard, neither this Court nor the trial court is permitted to weigh testimony or to view Megenity’s evidence in any light other than the light most favorable to her. Because the trial court completely ignored Megenity’s designated evidence that Dunn’s jump kick was outside the range of ordinary behavior for the sport – an error that Dunn eagerly mimics in his brief – the trial court erred as a matter of law in granting summary judgment.

**II. Megenity’s testimony concerning Dunn’s admission – “I’m sorry, I didn’t mean to jump” – is fully admissible under Indiana law.**

Dunn contends that his admission to Megenity – “I’m sorry, I didn’t mean to jump” (App. p. 72) – would be inadmissible at trial and thus presents no issue of fact. *Appellee’s Brief*, at 12-14. In support, Dunn cites to a string of Indiana cases concerning affidavits that were presented in response to summary judgment motions, none of which concern admissions by

party-opponents.<sup>1</sup> *Id.* Notably, Dunn also fails to cite to any cases concerning a party's actual testimony – as opposed to affidavits – that a party is prepared to present at trial, or even to any cases concerning deposition testimony.

As a preliminary matter, Megenity notes that there is no dispute that Dunn's admission to Megenity after knocking her over – "I'm sorry, I didn't mean to jump" – is fully admissible at trial as an admission of a party-opponent. *See* Indiana Rule of Evidence 801(d)(2)<sup>2</sup>; *see also* *Ettan v. Van Fegaras*, 803 N.E.2d 689, 692 (Ind. Ct. App. 2004); *Turner v. State*, 993 N.E.2d 640, 643 (Ind. Ct. App.) *trans. denied*, 997 N.E.2d 357 (Ind. 2013).

Even if an affidavit were at issue, the cases on which Dunn relies easily support a finding that Dunn's admission presents a genuine issue of material fact sufficient to overcome summary

---

<sup>1</sup> Appellant notes here that two (2) of the cases on which Dunn relies for his contention that Megenity's testimony is inadmissible have been vacated, a fact Appellee fails to note to the Court. *See Vaughn v. Daniels Co. (W. Virginia)*, 777 N.E.2d 1110 (Ind. Ct. App. 2002), *trans. granted, opinion vacated* (Feb. 7, 2006), *decision clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003) and *vacated*, 841 N.E.2d 1133 (Ind. 2006); *Comm'r of Labor ex rel. Shofstall v. Int'l Union Of Painters And Allied Trades AFL-CIO, CLC Dist. Council 91*, 962 N.E.2d 124, 132 (Ind. Ct. App. 2011) *trans. granted, opinion vacated sub nom. Posey v. Int'l Union of Painters & Allied Trades AFL-CIO, CLC Dist. Council 91*, 967 N.E.2d 1035 (Ind. 2012) and *vacated sub nom. Comm'r of Labor ex rel. Shofstall v. Int'l Union of Painters & Allied Trades AFL-CIO, CLC Dist. Council 91*, 991 N.E.2d 100 (Ind. 2013). In addition to having been vacated, both of these decisions fail to support Dunn's contention. Specifically, *Vaughn* concerned an expert witness's affidavit that contained "opinions concerning reasonable care or proximate cause" that, per the Indiana Supreme Court, "embrace ultimate issues to be decided by the trier of fact and therefore **are admissible**." *Vaughn v. Daniels Co. (W. Virginia)*, 841 N.E.2d 1133, 1137 (Ind. 2006) (emphasis added). Similarly, *Shofstall* concerned one party's "extensive interpretation of [a] Union's by-laws and the Union's internal appeal process for which she does not provide any foundation, personal knowledge, or special competency." *Shofstall, supra*, 962 N.E.2d at 132. Because Megenity's testimony concerns her personal knowledge of what Dunn said to her, both *Shofstall* and *Vaughn* both support a finding that her testimony is admissible.

<sup>2</sup> **Statements That Are Not Hearsay.** Notwithstanding Rule 801(c), a statement is not hearsay if [...]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject;(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy." Indiana Rule of Evidence 801(d)(2).

judgment. Dunn's contention that his admission that he jumped requires "speculative" interpretation as to its meaning is unfounded in Indiana jurisprudence. Megenity is not speculating "as to what others actually knew or did not know." *Guzik v. Town of St. John*, 875 N.E.2d 258, 266 (Ind. Ct. App. 2007). Nor does this case resemble *Coghill v. Badger*, 430 N.E.2d 405 (Ind. Ct. App. 1982), another affidavit case on which Dunn relies. In *Coghill*, a personal injury claimant failed to timely file a Notice of Claim against the Indianapolis Public Transportation Corporation (IPTC). *Coghill, supra*, 430 N.E.2d at 407. On opposing summary judgment, the plaintiff's attorney submitted an affidavit stating that he thought that the IPTC representative had, in a phone call, meant to waive the notice requirement. *Id.* The *Coghill* court ruled that the attorney's conclusions as to what the IPTC representative was thinking during the phone call were inadmissible. *Id.*

In the instant case, Megenity isn't "speculating" as to whether Dunn was "sorry," or as to whether he "meant" to jump. Megenity specifically testified that "the fact that [Dunn] said he did not mean to jump could not be interpreted any way except to mean that he did a jump kick... In that setting in a karate class between karate students, that's exactly what that means." App. p. 79. Megenity is fully entitled under Indiana law to testify, based on her personal knowledge, as to what Dunn said to her after knocking her over. It is the function of the jury, not the trial court or the parties' counsel, to assess the parties' credibility and to weigh their respective testimonies. Moreover, Dunn's contention that his admission that he "jumped" could reasonably mean that he *didn't* jump is, respectfully, so speculative as to slip the bonds of reason.

Even more importantly, in his responsive brief, Dunn fails even to acknowledge – much less address – that fact that Megenity *has* in her opening brief designated evidence that "jump kicks" are only performed solo, never with a partner holding a bag, and never in the context of

the “kicking the bag” drill. App. pp. 78-79. Megenity has testified as to her personal knowledge, based on her two years of personal experience in the karate class, as to when jump kicks are to be performed and when they are not. Megenity’s testimony as to Dunn’s jump kick being “out of the ordinary” for the karate class is neither inadmissible nor speculative. Dunn’s eagerness to ignore this evidence of record is understandable. Nevertheless, the trial court erred in ignoring the evidence before it that Dunn’s jump kick was out of the ordinary. In fact, the trial court not only failed to view this affirmative evidence in a light most favorable to Megenity, but failed to view it *at all*, which is the basis of this appeal and calls for reversal and remand here.

**III. Dunn’s heavy reliance on an unreleased Colorado case concerning “martial arts sparring” is both misplaced and telling.**

In his Statement of Facts, Dunn concedes that the “kicking the bag drill” was not a part of the “sparring component” of the class. *Appellee’s Brief*, at 4. Thus, Dunn’s heavy reliance on an unreleased opinion from the Colorado Court of Appeals, *Laughman v. Girtakovskis*, 2015 WL 5895321 (Colo. App. Oct. 8, 2015),<sup>3</sup> is significant for the Court’s analysis of Dunn’s responsive brief, as *Laughman* is both legally and factually inapposite.

First, in *Laughman*, the Colorado Court of Appeals concluded that, under Colorado law, karate participants “do not owe each other a duty of ordinary care.” *Laughman v. Girtakovskis*, 2015 WL 5895321, at \*3 (Colo. App. Oct. 8, 2015). This legal conclusion is precisely contrary to the holding of *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011), in which the Indiana Supreme Court definitively ruled that participants in sports activities do in fact owe a duty of care to each other. *Pfenning*, 947 N.E. at 403. The Indiana Supreme Court went on to find that

---

<sup>3</sup> As of December 5, 2015, *Laughman* is prefaced with the following: “NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.” *Laughman v. Girtakovskis*, 2015 WL 5895321 (Colo. App. Oct. 8, 2015).

any conclusion that sports participants do not owe a duty of care to one another would be violative of Indiana's Comparative Fault Act. *Id.* Thus, the legal basis for the Colorado *Laughman* opinion cannot hold under Indiana law.

Second, *Laughman* concerned "a martial arts sparring activity." *Laughman, supra*, 2015 WL 5895321, at \*3. The instant case does not concern "martial arts sparring," as Dunn has conceded in his responsive brief. The "sparring match" in *Laughman* "involved attacking, defending, striking maneuvers, and blocking." *Id.* In sharp contrast, in the instant case, Megenity was not involved in any sort of "free-for-all" featuring a multitude of kicks and blows. Instead, Dunn was supposed to perform a very specific kind of kick at a specific time and place, namely, a front kick on the training bag, which, the evidence of record shows, is to be performed with one foot grounded on the floor, while a "jump" kick is a "projectile-type kick" that is never to be performed on a training bag held by a partner. App. pp. 67; 78-79.

Third, in *Laughman*, there was "evidence before the trial court that the ridge hand strike that Mr. Girtakovskis used is a **common technique** used in this form of martial arts sparring." *Laughman v. Girtakovskis*, 2015 WL 5895321, at \*4 (Colo. App. Oct. 8, 2015) (emphasis added). In the instant case, the evidence before the Court is exactly the opposite: Dunn executed a jump kick, which, per the same evidence of record, is not at all a "common technique" in the "kicking-the-bag" drill. App. pp. 78-79.

The Court need not look outside of Indiana to find reversal appropriate here. In addition to the cases Megenity has already cited in her opening brief, in Indiana, "[t]he recognized rules of a sport are at least an indicia of the standard of care which the players owe each other. While a violation of those rules may not be negligence per se, it may well be evidence of negligence." *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983).

**IV. Dunn's argument that Megenity has produced no evidence that his jump kick was "reckless" or "intentional" is a bright red herring.**

Indiana Model Civil Jury Instruction, § 3156, which was prepared after *Pfenning* was decided under the sponsorship of the Indiana Judges Association, reads as follows:

**3156 Sporting Event Injuries--Co-Participants, Spectators, and/or Third Persons**

A participant in [sport] must act reasonably and must not create an unreasonable risk of injury. A participant's conduct is reasonable if it is within the range of ordinary behavior of participants in the sport, even if the conduct might, in a different setting, be considered reckless or intentional.

In determining whether [defendant] acted reasonably, you may consider:

- (1) the nature of [sport].
- (2) the customs and practices of [sport] [at the level being played] [including the types of contact and the level of violence generally accepted].
- (3) what rules governed the game, and
- (4) any other relevant circumstances.

Indiana Model Civil Jury Instruction, § 3156. Under this jury instruction – of which the Court may take judicial notice as being a correct statement of Indiana law – there is no requirement that there be a finding of “recklessness” or “intent” in order for a sports participant’s act to be deemed unreasonable or negligent. Instead, whether a defendant’s conduct is “reasonable” is to be determined by the jury upon consideration of the factors outlined in the instruction.

**CONCLUSION**

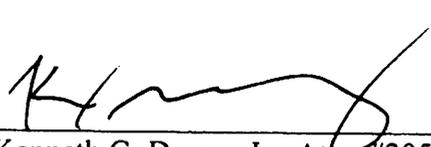
Megenity is not seeking to “punish” Dunn for “sprinting and kicking the bag held by Megenity.” *Appellee's Brief*, at 8. In this appeal, Megenity is, first and foremost, attempting simply to be *heard* by the Court, instead of being treated – as she was by the trial court – as if she has presented no affirmative evidence that Dunn’s jump kick was outside the range of ordinary behavior for the karate class. In his responsive brief, Dunn seeks to read into *Pfenning* a conclusion that isn’t there, namely, that *Pfenning* precludes claims of negligence in sports-

related cases. This honorable Court and the Indiana Judges Association have already interpreted *Pfenning* not as an absolute bar to negligence claims, but as a narrow limitation on negligence claims where the defendant-participant has clearly played by the rules of the sport.<sup>4</sup> Here, the trial court erred in taking this negligence case away from a jury because there is sufficient evidence of record for a jury reasonably to conclude that Dunn's jump kick was unreasonable under the circumstances. No matter how anxiously Dunn may wish otherwise, this case does not concern a *sparring* exercise, where a variety of kicks are to be expected. Dunn contends that, because jump kicks are to be expected in certain instances in a karate class, then it follows that jump kicks are permitted in *all* instances. In so arguing, Dunn directly fails to address the evidence Megenity has designated. Megenity respectfully requests that this honorable Court not do the same.

WHEREFORE, Appellant, Tresa Megenity, respectfully requests that the Court REVERSE the trial court's grant of summary judgment in the cause below, and REMAND this cause so that the parties may be permitted to proceed in the court below on the merits, and for all other just and proper relief.

Respectfully submitted,

DOANE LAW OFFICE, LLC



---

Kenneth G. Doane, Jr., Atty. #20576-22  
DOANE LAW OFFICE, LLC  
300 Missouri Avenue, Suite 200  
Jeffersonville, IN 47130  
(812) 590-2213

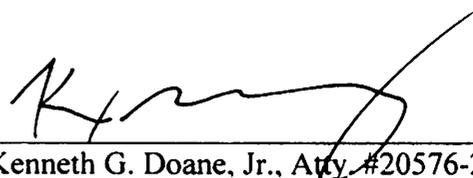
---

<sup>4</sup> See *Brief of Appellant* at pp. 7-12.

**CERTIFICATE OF SERVICE**

I hereby certify that on Monday, December 07, 2015, a copy of the foregoing Reply Brief for Appellant was served by depositing same in the U.S. Mail, First Class, postage prepaid, addressed to:

Richard T. Mullineaux  
Crystal G. Rowe  
Whitney E. Wood  
KIGHTLINGER & GRAY, LLP  
Bonterra Building, Suite 200  
3620 Blackiston Blvd.  
New Albany, IN 47150



---

Kenneth G. Doane, Jr., Atty. #20576-22  
DOANE LAW OFFICE, LLC  
300 Missouri Avenue, Suite 200  
Jeffersonville, IN 47130  
(812) 590-2213

