

IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 22A04-1506-CT-722

TRESA MEGENITY) APPEAL FROM THE
Appellant-Plaintiff) FLOYD COUNTY SUPERIOR COURT 3
v.)
DAVID DUNN) LOWER COURT CASE NO.
Appellee-Defendant) 22D03-1309-CT-1354
)
) THE HONORABLE JUDGE,
) MARIA GRANGER

BRIEF OF APPELLEE, DAVID DUNN

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The primary issue raised on appeal concerns the extent, if any, to which a karate class participant may be held liable in negligence for kicking a bag his fellow classmate volunteered to hold during practice, which act of kicking is within the range of ordinary behavior of participants in the sport and when the participant did not act with intent to injure or recklessly.

The specific issue presented for review by Appellant-Plaintiff Tresa Megenity ("Megenity") is whether the trial court properly awarded summary judgment to Appellee-Defendant David Dunn ("Dunn") because the latter affirmatively negated an element of Megenity's negligence claim- i.e., breach.

II. STATEMENT OF THE CASE

This case stems from an incident in a karate class that occurred between class participants, Megenity and Dunn. On September 11, 2013, Megenity filed suit against Dunn, alleging she was injured as a result of Dunn's negligent and reckless conduct. (App. 6.) Specifically, Megenity alleged Dunn's conduct was outside the range of ordinary conduct and increased her risk of serious and permanent injury. (App. 6.) Dunn answered the complaint, denied the essential averments made therein, and raised several affirmative defenses. (Appellee's App. 1-2.)

On November 14, 2014, Dunn moved for summary judgment arguing, in relevant part, that he is entitled to judgment as a matter of law on Megenity's complaint because he acted within the range of ordinary behavior of karate class participants and therefore his conduct was reasonable as a matter of law and did

not constitute a breach of duty owed to Megenity. (App. 12.) Dunn further established he did not act with intent to injure Megenity or recklessly in performing the sprinting/running kick. (App. 72.) Dunn, therefore, negated an essential element of Megenity's negligence claim.

Megenity responded to Dunn's motion for summary judgment, arguing that material-fact issues exist regarding whether Dunn's actions in kicking the bag she was holding were outside the range of ordinary behavior of karate participants because the type of kick she assumes Dunn performed (although did not see) was not within the range of ordinary behavior for the practice kicking drill being performed at the time of Dunn's kick. (Appellee's App.4-17.) To support her response, Megenity designated the following evidence:

- A. Megenity's Complaint;
- B. Megenity's Answers to Dunn's Interrogatories;
- C. Dunn's Answers to Megenity's Interrogatories;
- D. Megenity's Deposition;

(App. 28.)

On May 28, 2015, after conducting a hearing, the trial court granted summary judgment to Dunn. (App. 4.) In its well-reasoned Order, the trial court made the following persuasive findings:

1. "Pursuant to *Pfenning v. Lineman*, 974 N.E.2d 392 (Ind. 2011), [Dunn's] actions were within the range of ordinary behavior of participants in karate within the context of a 'kicking the bag' drill, and thus his conduct [was] reasonable as a matter of law and does not constitute a breach of duty."

2. Megenity did not claim or designate evidence that Dunn's conduct was reckless or was the result of his intent to injure her.

(App. 4-5.) It is from this Order that Megenity now appeals.

III. STATEMENT OF FACTS

This lawsuit arises out of an incident that occurred at Terry Middleton's Karate Kickboxing and Boxing studio ("Terry Middleton's") in New Albany, Indiana. At the time of the incident which gave rise to this action, both Megenity and Dunn were class participants in Terry Middleton's karate class. (Appellee's App. 18-19; App. 66, 68.)¹ Karate is a contact sport that specifically involves kicking, which was acknowledged by Megenity when she signed an Application for Membership, providing, in part:

"I understand that Karate is an exercise program that will stress muscles, joints, and work the cardiovascular system. Caution must be used while participating in this program. It is recommended that anyone see his or her physician before beginning any exercise program. . . *I understand that karate can be a contact sport. I am aware that this art has many techniques such as sweeps, takedowns, kicks, punches, and other strikes. . .*"

(App. 66, 99)(emphasis added.)

New karate participants enrolled at Terry Middleton obtain a uniform and white belt after attending the instructor's initial one-on-one basic training course and mastering a set criteria. (App. 66.) There are different belt colors that represent each level of skill mastered. *Id.* The belt levels, from least to most

¹ The evidence designated by Appellee Dunn in his Motion for Summary Judgment is included in Appellant Megenity's Appendix and not included in Appellee's Appendix for purposes of avoiding duplication. As such, any time Dunn cites to Appellant's Appendix pp. 59-80 in this brief, he is citing to evidence designated by him in his support of his Motion for Summary Judgment.

advanced, are as follows: white, yellow, orange, green, blue, purple, red, brown and black. (App. 66.) After achieving a certain belt, class participants focus and work on the set of skills that must be mastered and tested for promotion to the next level. (App. 66.) Each belt level requires increasingly more difficult kicks. (App. 66.) For example, a white belt requires a basic front kick, while a yellow belt requires a front and side kick. (App. 66.) The kicks required become progressively more difficult with each promotion to the next belt level. (App. 66.) Megenity could not recall every type of kick required at each belt level. (App. 67.) At the time of the incident giving rise to this lawsuit, Megenity held a first degree black belt and Dunn held only a green belt. (App. 68, 70.)

The complained of incident occurred during a Saturday class, which included all belts, skill levels, and ages. (App. 67.) On Saturdays, class participants worked with nunchucks and sticks. *Id.* Additionally, there was a sparring component at the end of each class for about 15 minutes. *Id.*

Immediately prior to the sparring component of the class, the instructor had class participants execute what is called the "kicking-the-bag drill." (App. 68.) In that drill, three adults (or in some cases a taller teenager, depending who was there) hold bags while standing in a triangular format. *Id.* There is approximately 30 feet between the "bag holders." (App. 69.) The rest of the class participants form a line. (App. 68.) When it is a class participant's turn, he or she (a) runs to "bag one" and performs a side kick, (b) runs to "bag two" and performs a side kick, (c) runs to "bag three" and performs a front kick, and (d) gets back in line. (App. 68.)

The bags are rectangular with riveted handles on the side and one on top. (App. 69.) The bags are approximately two feet wide, three feet wide and eight to ten inches thick. *Id.* According to Megenity, the bag holders “have to have a good grip on the bag” as such holders are “obviously . . . going to take an impact from the bags.” *Id.* Accordingly, bag holders must “brace” themselves to take the “impact of the kick.” *Id.*

At the time of the incident, Megenity was holding the third bag in the series. (App. 68.) Megenity described a front kick as a kick where “[y]ou raise your knee and kick and snap back. Kick with the heel and snap back.” (App. 66). When preparing for Dunn’s kick, Megenity was holding the side of the bag, extending her left leg back, and bracing with her front leg, as she had been instructed in the past to do by her instructor. (App. 69.) Megenity explained that when holding a bag, she does not stand with two feet together because doing so could cause her to “fly back.” (App. 69.) Additionally, her karate instructor taught her to hold the bag to protect her face because “a kick can slip and hit you in the face.” (App. 71.) Megenity also testified it was common for the impact from the kick to move the bag holder back a “little bit.” (App. 70.)

Megenity observed Dunn perform side kicks on “bag one” and “bag two.” (App. 72.) Nothing stuck out in her mind about those two kicks as unusual. Instead, “he just ran and kicked the bag.” (App. 72.) Megenity said she “only kind of tuned in when he was coming toward [her].” (App. 72). Megenity testified that prior to kicking her bag, Dunn was running at a “normal sprint,” which was normal because the exercise was to do a “running kick.” (App. 69, 78, 79.)

Dunn kicked the bag Megenity was holding and the next thing she knew, she felt airborne and crashed on the floor. (App. 68, 69.) Megenity specified that Dunn kicked the bag- not her person. (App. 69.) As a result of the incident, Megenity was injured. (App. 75.)

Megenity did not actually see Dunn's kick because she was holding the bag so that it covered her face. (App. 68, 79.) From what she saw, however, she testified there was nothing she observed that was different about his kick than the first two kicks in the series. (App. 72.) She also did not hear anyone else comment that Dunn performed a "jump kick." (App. 79.) Not one of the estimated 60 class participants produced an affidavit to say Dunn performed a "jump kick." (App. 68.) However, Megenity testified Dunn approached her immediately after the incident and said, "I'm sorry. I didn't mean to jump."² (App. 72.) Megenity took that to mean that, instead of running and kicking the bag like he was supposed to, Dunn must have added a jump at the end of his kick. (App. 78.) According to Megenity, the jump Dunn allegedly added at the end of his kick transformed his acceptable running kick into a "jump kick." (App. 78.) Megenity testified a "jump kick" is distinct type of kick, which is a requirement for achieving a new level of belt, though she could not remember which belt. (App. 78.) However, she stated that the performance of a "jump kick" was outside of the range of ordinary behavior for the "kicking the bag drill" because a "jump kick" is not an activity that is supposed to be performed on a bag. (App. 78-79.)

² Dunn acknowledges he apologized but has not conceded he said he shouldn't have jumped. However, for purposes of summary judgment, we are assuming he made that statement.

Apart from Dunn's alleged comment and her perception that the impact from Dunn's kick was much greater than it would have been had he performed a front kick, Megenity admitted she did not have any idea what kind of kick Dunn performed. (App. 79.) Megenity admitted she did not know Dunn personally, had never had any conversations with him prior to this incident, and did not have any evidence that he intentionally tried to hurt her. (App. 72.)

IV. SUMMARY OF THE ARGUMENT

This Court should affirm summary judgment to Dunn, on Megenity's complaint, because the undisputed material evidence negates at least one element of Megenity's negligence claim—i.e., breach of duty.

In Indiana, the standard of care in negligence claims against a participant in a sports activity is whether the conduct of such participant is within the range of ordinary behavior of participants in the sport. If so, the conduct is reasonable as a matter of law and does not constitute breach of duty. Karate is a contact sport which involves kicking. The objective of the drill Megenity and Dunn were participating in was for one class participant to sprint thirty (30) feet and kick a bag which was held by a fellow classmate. That the bag holders would be moved by the impact from the sprinting/running front kicks was a known and "obvious" certainty of the kicking-the-bag drill, for which the bag holders were trained to brace. The possibility of inexact and imprecise kicks was inherent in the drill – so much so that Megenity and other bag holders were warned of and trained how to prepare for physical contact, including the possibility of being kicked in the face if a kicker

missed a bag. Thus, when Dunn kicked the bag Megenity volunteered to hold during the drill and the impact therefrom allegedly caused her to "fly back," his conduct was within the range of ordinary behavior for the sport of karate overall, as well as the drill, and was therefore reasonable as a matter of law. Megenity has failed to designate any proper evidentiary material showing Dunn took any action that exceeded the ordinary behavior of participants in karate so as to create a genuine issue of material fact for trial.

As stated above, doing a karate kick—however defined—is within the ambit of reasonable behavior in karate. Therefore, to show such a kick is outside the ambit of reasonableness, Megenity must designate evidence that Dunn acted recklessly or with intent to injure her. Because Megenity has designated no such evidence, nor has she attempted to argue Dunn acted recklessly or with intent to cause her injury, Dunn's conduct did not exceed the ambit of such reasonableness. Moreover, Indiana courts have recognized that strong public policy considerations support affording enhanced protection against liability to co-participants in sports events as athletic activity by its very nature involves strenuous and often inexact and imprecise physical activity that may increase risks attendant to the activities of ordinary life. Because Megenity does not argue Dunn intended to injure her or acted recklessly, punishing him for sprinting and kicking the bag being held by Megenity, which was an expected and anticipated act of the sport of karate, would only serve to deter future participation in athletic activity and contravene the Indiana Supreme Court's recognition that inexact and impreciseness are inherent in sport, and reasonable as a matter of law.

For all these reasons, the Court should affirm summary judgment to Dunn.

V. ARGUMENT

A. Summary Judgment Standard of Review

Megenity appeals the trial court's grant of summary judgment to Dunn on her claim for negligence. On review of a trial court's decision to grant or deny summary judgment, this Court applies the same standard as the trial court: it must decide whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999).

Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. *See Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (holding that the movant must affirmatively negate an element of the opponent's claim, then the burden shifts to the nonmovant). A fact is "material" if its resolution would affect the outcome of the case, and an issue is "genuine" if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting Ind. T.R. 56(C)).

A grant of summary judgment is proper if the movant makes a *prima facie* showing that the designated evidence negates an element of the non-movant's claims and, in response, the non-movant fails to designate evidence to establish a genuine issue of material fact. *Id.*, see also *Cox v. Mayerstein-Burnell Co., Inc.*, 19

N.E.3d 799, 805 (Ind. Ct. App. 2014). The non-movant, however, may not rest upon the bare allegations made in the pleadings, but must respond with affidavits or other evidence setting forth specific facts showing that genuine issues are in dispute. *Willsey v. Peoples Fed. Sav. & Loan Assoc. of Chicago*, 529 N.E.2d 1199, 1204 (Ind. Ct. App. 1988), *trans. denied*. In ruling on a motion for summary judgment, the Court may consider only designated evidence that would be admissible at trial. *See* Ind. T.R. 56(C), (E); *see also Kronmiller v. Wangberg*, 665 N.E.2d 624, 627 (Ind. Ct. App. 1996), *trans. denied*. If the non-movant does not so respond, summary judgment shall be entered against him or her. *See, e.g.,* Ind. T.R. 56.

Further, a summary-judgment award may be affirmed upon any theory supported by the designated materials. *Bernstein v. Glavin*, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000), *trans. denied*. A presumption of validity clothes a trial court's grant of summary judgment. *Kincade v. MAC Corp.*, 773 N.E.2d 909, 911 (Ind. Ct. App. 2002). In that regard, the appellant—here, Megenity—bears the burden of proving that the trial court erred in determining that there are no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Schrum v. Moskaluk*, 655 N.E.2d 561, 564 (Ind. Ct. App. 1995), *trans. denied*.

B. The Trial Court Properly Granted Summary Judgment to Dunn because the Undisputed Material Evidence Negates at Least One Element of Megenity's Negligence Claim— Specifically, Dunn did not Breach any Duty Owed to Megenity.

To prevail on her negligence claim, Megenity must prove: (1) a duty owed by Dunn to her, (2) breach of the duty by Dunn, and (3) an injury to Megenity

proximately caused by the breach. *Wabash County Young Men's Christian Ass'n, Inc. v. Thompson*, 975 N.E.2d 362, 365 (Ind. Ct. App. 2012), *trans. denied*. In negligence cases, a defendant like Dunn is entitled to judgment as a matter of law when the undisputed material facts negate at least one of the above elements of the plaintiff's claim. *Id.*

Although the question of breach of duty is usually one for a trier of fact, the Indiana Supreme Court has held that "in negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute breach of duty." *Pfenning v. Lineman*, 947 N.E.2d 392, 404 (Ind. 2011). However, "a participant's particular conduct *may* exceed the ambit of such reasonableness as a matter of law if the participant either intentionally caused injury or engaged in reckless conduct." *Id.* at 404. (emphasis added).

Further, the analysis of breach is not based upon the status of the plaintiff as a participant or her incurrence of the risk. *Id.* at 1289. Rather, the analysis should address whether the conduct of the *defendant* is within the range of ordinary behavior of participants in the sport. *Id.*

This Court should affirm the challenged summary judgment to Dunn on Megenity's negligence claim because the designated evidence reveals— as a matter of law— Dunn did not act outside of the range of ordinary behavior of karate participants. Doing a karate kick—however defined³—is within the ambit of

³ Megenity acknowledged "kicks," generally are within the ordinary range of behavior in a karate class. (App. 66, 99.)

reasonable behavior in karate class overall and in the “kicking-the-bag” drill. Therefore, to show his conduct was outside the ambit, Megenity must designate evidence that Dunn intentionally caused her injury or engaged in reckless conduct. There is no such evidence. Therefore, Dunn’s conduct was reasonable and did not constitute breach of duty. *Id.* at 396.

1. Megenity has Failed to Designate any Proper Evidentiary Material Showing a Genuine Issue of Fact Exists for Trial.

Megenity’s assertion that Dunn’s conduct was outside the range of ordinary behavior by karate class participants is based on inadmissible speculation. Megenity’s sole basis for her argument that Dunn acted outside the range of ordinary behavior for karate class participants is her allegation that, instead of performing a sprinting/running front kick, Dunn added a jump at the end of his kick that neither she or any of the other 60 participants observed. (App. 78.)

Megenity grounds her assumption that Dunn performed a “jump kick” on his alleged statement to her in which he said, “I’m sorry. I didn’t mean to jump.” (App. 79.) Megenity admitted she didn’t see Dunn’s kick, the other kicks she saw him perform were appropriate and she didn’t see anything out of the ordinary with regard to his approach to her and the bag she was holding. (App. 79.) In addition, even though approximately 60 class participants witnessed the incident and relayed their perception of what happened either to Megenity directly or to other classmates in her presence, she admitted that not one of those witnesses said Dunn jumped. (App. 68, 79.) She also stated that Dunn kicked the bag she was holding and not her person, which was the objective of the drill. (App. 69.)

In ruling on a motion for summary judgment, the Court may consider only designated evidence that would be admissible at trial. See Ind. T.R. 56(C), (E); see also *Kronmiller v. Wangberg*, 665 N.E.2d 624, 627 (Ind. Ct. App. 1996), *trans. denied*; see also *Lee v. Schroeder*, 529 N.E.2d 349, 352 (Ind. Ct. App. 1988)(citing Ind. T.R. 56(E))(holding affidavits supporting or opposing summary judgment motions must be made upon personal knowledge of the affiant, shall set forth facts as would be admissible in evidence, and must show that the affiant is competent to testify upon the matter included and that a court should disregard any inadmissible evidence contained in an affidavit); *Vaughn v. Daniels Co.*, 777 N.E.2d 1110, 1117-1118 (Ind. Ct. App. 2002)(holding that the trial court may consider only evidence that can be admitted at trial in reaching a summary judgment determination.) Statements outside the declarant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory do not meet this requirement. See, e.g., *Coghill v. Badger*, 430 N.E.2d 405, 407 (Ind. Ct. App. 1982) (observing that conclusory statements of fact not based on personal knowledge are properly stricken from the record). Megenity does not have personal knowledge as to what Dunn meant when he made the alleged comment and should not be permitted to speculate what he meant. See, e.g., *Comm'r of Labor ex rel. Shofstall v Int'l Union of Painters & Allied Trades, AFL-CIO, CLC Dist. Council 91*, 962 N.E.2d 124, 132 (Ind. Ct. App. 2011)(holding where an affiant's statement that was not based on her own personal knowledge, but rather was speculation as to how another individual interpreted the by laws should have been stricken from the record); *Guzik v. Town of St. John*, 875 N.E.2d 258 (Ind. Ct. App. 2007). Any such

speculation is inadmissible, and therefore ineffective to create a question of fact with regard to whether Dunn acted outside the range of ordinary behavior of karate participants.

Based on the foregoing, Megenity has failed to come forward with proper evidentiary material showing specific facts as to why a genuine issue of fact exists for trial and the trial court's grant of summary judgment should be affirmed.

2. Dunn's Alleged Conduct in Sprinting and Kicking the Bag Held by Megenity is Within the Range of Ordinary Behavior by Participants in the Sport and is Therefore Reasonable as a Matter of Law.

Notwithstanding, even accepting Megenity's inadmissible suppositions and conjectures as truth so as to negate any possible dispute of material fact which may preclude an affirmation of summary judgment, the only reasonable inference is that Dunn still did not breach any duty owed to Megenity. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014).

The nature of the exercise was for class participants to gain momentum by sprinting thirty feet, a long enough distance to achieve a first down in football, before kicking the bag. (App. 69.) Said class participants were students of all skill levels, many of which had not yet been instructed on or mastered the "side kick," which was allegedly part of the "kicking-the-bag" drill. (App. 66, 67, 78.) As such, it is axiomatic that many of the kicks will be imperfectly performed. Indicative of the expectation that the kicks would be imperfectly performed is Megenity's testimony that she was instructed to hold the bag to protect her face to prevent kicks from slipping and hitting her in the face. (App. 71.)

Moreover, as noted in the title of the drill, the objective of the drill was to kick the bag Megenity was holding, which Dunn did. 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.

While Megenity repeatedly insists Dunn's alleged act of performing a "jump kick" rather than a running/sprinting "front kick" takes Dunn's conduct outside the ordinary range of behavior for karate class participants, as examined below, the Supreme Court's holding *Pfenning*, 947 N.E.2d at 404 (Ind. 2011) is not so narrow.⁴ *Pfenning* directs the Court to focus on whether action (the kick) was within the ordinary range of behavior in a sport—not whether the action (the kick) performed was executed in the precise manner specified by a specific drill within a sport. To narrow *Pfenning*'s holding the way Megenity urges would leave no room for error for sports participants, force the Court to engage in a fact-sensitive inquiry in every sports negligence case, and contravene the Supreme Court's recognition that inexact and impreciseness are inherent in sport, and reasonable as a matter of law as long as they are within the ordinary range of behavior of the sport.

⁴ In any event, although not genuine or material to this summary judgment, the distinction Megenity tries to make between the impact of a sprinting/running kick and a "jump kick" is a word distinction without a physical difference. (App. 69, 78, 79.)

Doing a karate kick—however defined—is within the ambit of reasonable behavior in karate class. Therefore, to show his conduct was outside the ambit, Megenity must designate evidence that Dunn intentionally caused or engaged in reckless conduct. There is no such evidence. (App. 72.)

An evaluation of Indiana case law and other relevant precedent calls for an affirmation of the trial court's grant of summary judgment.

- a. *Pfenning v. Lineman*, 947 N.E.2d 392, 404 (Ind. 2011) is Instructive and Supportive of Dunn's Position that his Conduct was Within the Range of Ordinary Conduct for a Karate Class Participant.

In *Pfenning*, Cassie was driving a beverage cart down a cart path at a golf scramble and was struck in the mouth by an errant golf ball. *Id.* at 397. The ball was a low drive that was struck from a tee located approximately eighty yards from Cassie's cart. The golfer's drive traveled straight for sixty to seventy yards, then severely hooked to the left. *Id.* Cassie did not hear the golfer shout "fore" and was struck by the ball. *Id.* Pfenning moved for summary judgment, which was granted by the trial court. *Id.* The trial court's decision was affirmed by the Court of Appeals. *Id.* On appeal, the Supreme Court set forth the standard stated above and held a golfer's hitting an errant drive is "clearly within the range of ordinary behavior of golfers" and therefore was reasonable as a matter of law, thus negating the breach element of Cassie's negligence claim. *Id.* at 404.

If we assume for the sake of argument Dunn's kick was in any way inaccurate, the analysis would be similar to the golfer's inaccurate swing in *Pfenning*. The objective of the golfer in driving his ball from the tee was to hit the

ball toward the hole and remain within the fairway. Either due to lack of focus, poor body alignment, misplaced momentum, lack of body control or a number of other factors, the golfer executed his strike of the ball in an unintended, imperfect manner. Because of imprecise and inaccurate execution, the golfer struck the ball so that it curved out of the field of play and struck Cassie, causing her injury.

In this case, the objective of Dunn was to kick the bag Megenity was holding, after sprinting a total of 90 feet in 30 foot increments (and having just performed two prior kicks without incident). If Dunn's third kick was less than perfect for any number of reasons, it does not take his conduct outside the range of ordinary behavior for karate participants, just like the golfer misstriking the ball in *Pfenning*. This is especially true as Megenity has not designated any evidence, nor does she argue, that Dunn acted recklessly or with intent to injure her. (Transcript, 17.)

Impreciseness was recognized as inherent in sport in *Pfenning*. 947 N.E.2d at 403. As such, the Court did not find it necessary to analyze every movement made by the golfer to determine whether such movement was proper. Rather, the Court stated that hitting an inaccurate ball is an accepted part and ordinary part of the sport of golf and was therefore reasonable as a matter of law. Similarly here, it is not necessary to analyze every movement made by Dunn to determine whether such movement was proper in the context of the drill. Even if Dunn's kick was inaccurate as Megenity alleges, Megenity acknowledged inaccurate kicks are part of the sport of karate. Thus, Dunn's errant kick, like the golfer's errant drive, is

within the range of ordinary conduct of karate class participants and was therefore reasonable as a matter of law.

- b. *Laughman v. Girtakovskis, 2015 COA 142 (Colo. Ct. App. October 8, 2015) is Instructive and Supportive of Dunn's Position that his Conduct was Within the Range of Ordinary Conduct for a Karate Class Participant.*

Most analogous to the facts of this case are the facts in the Court of Appeals of Colorado's decision, *Laughman v. Girtakovskis, 2015 COA 142 (Colo. Ct. App. 2015)*. As part of a pre-test Girtakovskis was required to complete before earning his black belt, Laughman and another student were asked to attack him so he could demonstrate his defense skills. *Id.* at *1. The exercise was supposed to involve light sparring. *Id.* at *2. The attackers were in full protective gear but Laughman's helmet did not have a facemask. *Id.* at *1-2. While sparring, Girtakovski performed a ridge hand strike and unintentionally struck Laughman's face, causing severe and permanent injuries. *Id.* at *2. While the strike was an accepted technique in martial arts sparring, the head was supposed to have been off limits during Girtakovskis' pre-test. *Id.*

Laughman brought a negligence action against Girtakovskis. *Id.* Subsequently, Girtovskis filed a motion for summary judgment, which was granted. *Id.* On appeal, the Court cited to *Pfenning* in support of its holding that it is only when the conduct of a participant in a contact sport "moves beyond the anticipated vigorous bounds of the activity- beyond negligence and into the realm of reckless or intentional conduct- that he or she may become legally liable for that conduct." *Id.* at *20.

Laughman asserted the rules of the particular activity in which he was involved- namely, sparring- specified there was to be no contact with the head or face. *Id.* at *21. The Court acknowledged the existence of such a rule but said “knowledge that physical contact might occur, including to the head and face, [was] evidenced by the fact that the participants were wearing protective headgear, padded gloves, and chest pads.” *Id.* Further, Girtakovskis’ striking of Laughman was an unintentional act. *Id.* As such, the Court held Girtakovskis did not owe a duty because his conduct was within the realm of conduct anticipated in the sport, and summary judgment in his favor was proper. *Id.* at *22.

Similarly, in this case, Megenity assumes there was a “jump kick” and infers there is a rule that no one is supposed to perform jump kicks in the “kicking-the-bag” drill because the drill specifies sprinting/running “front kicks.” While such rule may or may not exist, knowledge that physical contact might occur is evidenced by the thick mat used, in part, for protection. (App. 69.) In addition, Megenity acknowledged bag holders expect physical contact and that she had to brace herself for impact when holding the bag as it was “obvious” such impact would occur and stated it was common for the impact from the kicks to move her back. (App. 69, 70.) Megenity and other class members were explicitly instructed how to properly hold the bag so they did not, in her words, “fly back” from the impact of the kick and so that a kick did not “slip and hit [her] in the face.” (App. 69, 71.) No evidence was designated—and Megenity does not assert— Dunn intentionally try to hurt her and further admits she has no such evidence. (App. 72.) Indeed, her sole evidence that he did anything out of the ordinary- i.e., his alleged apology- is indicative of the fact

he did not intend to injure her. Thus, like in *Laughman*, Dunn's conduct was within the realm of conduct anticipated in the sport.

c. *Haire v. Parker*, 957 N.E.2d 190 (Ind. Ct. App. 2011) and *Welch v. Young*, 950 N.E.2d 1283 (Ind. Ct. App. 2011) are inapplicable.

Megenity's reliance on *Haire v. Parker*, 957 N.E.2d 190 (Ind. Ct. App. 2011) and *Welch v. Young*, 950 N.E.2d 1283 (Ind. Ct. App. 2011) is misplaced.

In *Haire*, Parker was riding an all-terrain vehicle ("ATV"), when his ATV rolled down a hill and tipped over. 957 N.E.2d at 192. Parker then proceeded to turn his ATV to its upright position and started it while standing beside it. *Id.* When Parker started the ATV, it "took off." *Id.* With no one steering the ATV, it struck Donald, causing him serious injuries. *Id.* at 193-94.

After Donald filed a complaint against Parker, alleging negligence, Parker moved for summary judgment, which was granted. *Id.* at 194. On appeal, Parker argued the trial court's grant of summary judgment should be upheld because there were no facts alleged that suggested Parker acted outside the scope of ordinary behavior for a person participating in an ATV activity. *Id.* at 199. The Court of Appeals reversed, concluding that an issue of fact existed as to whether Parker's actions constituted a breach of duty. *Id.* at 201. Specifically, the Court refused to say that Parker's conduct of starting his ATV while standing beside it was conduct within the range of ordinary behavior of participants in the sport because the general nature of reasonable and appropriate conduct for an ATV rider is not "commonly understood and subject to ascertainment as a matter of law." *Id.*

While Megenity argues “the salient facts in the instant case are no different than those in *Haire*,” they are actually very different. Indeed, it is difficult to make a comparison between a case where an individual started a vehicle that was intended to be steered without someone in the driver’s position with a case where an individual allegedly kicked a bag harder than anticipated by the bag holder, in a sport which recognizes physical contact and kicking as within the range of ordinary behavior. Moreover, unlike the circumstances in *Haire*, the general nature of reasonable and appropriate conduct for a karate class participant is commonly understood and subject to ascertainment as a matter of law, as is indicated above in *Laughman v. Girtakovskis*, 2015 COA 142 (Colo. Ct. App. October 8, 2015).

In *Welch v. Young*, 950 N.E.2d 1283, 1284 (Ind. Ct. App. 2011), a little league “team mom” was injured when a member of the team was taking practice swings and struck her knee with the bat. The Court’s focus was on whether the team member’s action— i.e., taking practice swings at the time and place of the injury— was within the range of ordinary behavior of participants in the sport. *Id.* at 1289. The Court reversed the trial court’s grant of summary judgment, finding there were factual issues as to whether the injury took place on the field or outside the playing area, inside the ball field or outside it in an area where spectators normally were present and whether the game was underway or had not yet started. *Id.* at 1291.

Megenity argues this case is analogous to *Welch* because in both instances, there was a genuine issue of material fact as to whether the defendant’s conduct was outside the range of ordinary behavior for participants. Such an analysis is incorrect. In *Welch*, there were questions of fact with regard to the defendant’s

conduct, what actions the defendant actually took and where he took them. In this case, it is undisputed that when Dunn kicked the bag, he was in karate class and performing a drill where kicking the bag was the established objective and where Megenity, the bag holder, was bracing in anticipation of the impact from his kick. Megenity cannot make blanket conclusions of law that “Dunn’s activity was outside the ordinary range” and use that to create a question of fact to preclude summary judgment. Such a legal determination, under *Pfenning*, is for the Court to decide as a matter of law.

3. Megenity has not Produced any Evidence to Suggest Dunn Intentionally Caused her Injury or Engaged in Reckless Conduct.

“A participant’s particular conduct *may* exceed the ambit of [] reasonableness as a matter of law if the ‘participant either intentionally caused injury or engaged in reckless conduct.” *Pfenning*, 947 N.E.2d at 404 (Ind. 2011)(emphasis added). Megenity admitted she did not know Dunn personally, had never had any conversations with him prior to this incident and has no evidence whatsoever that Dunn intentionally tried to hurt her. (App. 72.) She also has not designated any evidence or attempted to argue Dunn acted recklessly or with intent to injure her. (Transcript, 17.) Moreover, Megenity’s sole true support for her claim that he performed a “jump kick” rather than a sprinting, running front kick is based on her allegation that he told her, “I’m sorry. I didn’t mean to jump.” (App. 72.) Such an apology is evidence that Dunn’s alleged action was unintentional. Because Megenity’s own admissions, designated evidence, and arguments do not show Dunn

acted recklessly or with intent to cause her injury, his action of kicking the bag did not exceed the ambit of reasonable conduct.

4. Public Policy Considerations Support the Trial Court's Grant of Summary Judgment to Dunn.

In *Pfenning, supra*, the Supreme Court reaffirmed that “strong public policy considerations favor the encouragement of participation in athletic activities and the discouragement of excessive litigation of claims by persons who suffer injuries from participants’ conduct.” 947 N.E.2d at 403 (citing *Bowman v. McNary*, 853 N.E.2d 984, 991-92 (Ind. Ct. App. 2006). “Sound policy reasons support affording enhanced protection against liability to co-participants in sports events.” *Id.* “Athletic activity by its nature involves strenuous and often inexact and imprecise physical activity that may somewhat increase the normal risks attendant to the activities of ordinary life outside the sports arena, but this does not render unreasonable the ordinary conduct involved in such sporting activities.” *Id.*

Thus, assuming *arguendo* that Dunn’s kick was inaccurate or harder than Megenity anticipated, any inexactness or impreciseness on his part is ordinary and reasonable in the context of a karate class and he is therefore shielded from liability as a matter of public policy.

Megenity argues that public policy favors this Court overturning the trial court’s grant of summary judgment and states if sports participants can’t play sports with the expectation that participants will “play by the rules,” participation in sports will be discouraged. (Appellant’s Brief, 17.) However, sports acknowledge that, on occasion, rules will be broken and mistakes will happen. Indicative of such

an acknowledgement is the existence of penalties, fouls, technical fouls, cards, scratches and ejections. If a sports participant was subject to legal liability every time they didn't "play by the rules," then no one would ever play sports.

Because Megenity does not argue Dunn intended to injure her or acted recklessly, punishing him for sprinting and kicking the bag being held by Megenity, which was an expected and anticipated act of the sport of karate, would only serve to deter future participation in athletic activity.

Moreover, the analysis urged by Megenity requires a Court to analyze each drill or exercise within the realm of a particular sport and whether each body movement made in the execution of said drill was proper. To adopt such an analysis would narrow *Pfenning's* holding and effectively contravene the Supreme Court's recognition that inexact and impreciseness are inherent in sport, and reasonable as a matter of law.

Based on the foregoing, for public policy reasons, this Court should affirm the trial court's finding that Dunn did not breach his duty to Megenity as a matter of law.

VI. CONCLUSION

For the above reasons, this Court should affirm summary judgment to Dunn on Megenity's complaint, in its entirety.

Respectfully submitted,

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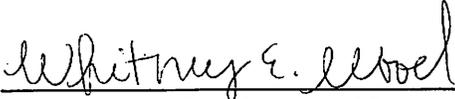
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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this Brief complies with the type-volume limitation of Appellate Rule 44(E). The brief does not exceed 14,000 words. The brief contains 6798 words (including those used in footnotes) based upon the count of the word processing system used to prepare the brief, Microsoft Word 2010.

Respectfully submitted,

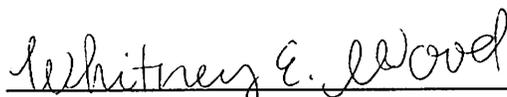


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed United States Mail, First Class, Postage Prepaid this 23rd day of November, 2015 to:

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