

IN THE
INDIANA SUPREME COURT

CAUSE NO. _____

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| TRESA MEGENITY |) | ON PETITION TO TRANSFER |
| |) | FROM THE INDIANA COURT |
| |) | OF APPEALS |
| Appellant (Plaintiff below) |) | |
| |) | CAUSE NO. 22A04-1506-CT-722 |
| |) | |
| |) | |
| v. |) | APPEAL FROM THE |
| |) | FLOYD SUPERIOR COURT 3 |
| |) | |
| |) | LOWER COURT CASE NO. |
| DAVID DUNN |) | 22D03-1309-CT-1354 |
| |) | |
| |) | |
| Appellee (Defendant below) |) | THE HONORABLE JUDGE, |
| |) | MARIA GRANGER |

PETITION TO TRANSFER OF DAVID DUNN

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QUESTIONS PRESENTED ON TRANSFER

In its landmark case of *Pfenning v. Lineman*, 947 N.E.2d 392, 404 (Ind. 2011), this Court 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 a breach of duty.” In adopting this “sports-injury” rule, the Court recognized the strong public-policy considerations favoring the encouragement of participation in athletic activities and the discouragement of excessive litigation of claims by persons who suffer injuries from co-participants’ conduct. *Id.* at 403. On balance, these public-policy concerns justify affording enhanced protection against liability to sports co-participants who engage in physical activity that is often inexact, imprecise, and done in close proximity to others. *Id.* at 403-04. Directing its attention to the “breach” (as opposed to “duty”) element of negligence, the *Pfenning* Court explained that “[t]he **general nature** of the conduct reasonable and appropriate for a participant in a particular sporting activity is usually commonly understood and subject to ascertainment as a matter of law.” *Id.* at 403-04 (emphasis added).

Here, by focusing upon the above explanation (instead of the rule itself) and, further, by misconstruing the explanation to require that the **specific nature** of the sports participant’s conduct be commonly understood, the challenged Court of Appeals decision effectively **overrules** *Pfenning* for any sports-injury case arising out of a sport with which the Appellate Court subjectively believes Americans are

less familiar (i.e., any sport other than “baseball, football, basketball, or golf”). The *Pfenning* rule, however, is not so narrow.

Still, in its **split** published opinion, the Court of Appeals determined that a karate-sports injury falls outside the *Pfenning* negligence rule because “karate is not a sport with which most Americans are familiar.” Essential to the Appellate Court’s analysis (and ultimate reversal of the trial court’s summary-judgment grant) was the fact that—according to the majority—it is unclear whether “the common understanding of karate includes detailed knowledge of the types of kicks that are within the range of ordinary behavior for a particular exercise.”

Succinctly put, the issue raised on Transfer is whether—when refusing to apply the *Pfenning* rule to a karate-sports injury between co-participants—the Indiana Court of Appeals entered a published decision in conflict with a decision from this Court on the same important issue and, in so doing, significantly departed from accepted law or practice.

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I. BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

This action stems from a sports injury that occurred when a karate-class participant, David Dunn (“Dunn”), kicked a bag that his fellow classmate, Tresa Megenity (“Megenity”), had volunteered to hold during a karate-practice drill. At the time of the incident, Megenity had been taking karate classes three or four times a week for approximately two years and had attained her black belt. Dunn, by contrast, was a newer student to the sport of karate and had only attained his green belt, which is five levels lower than Megenity’s black belt.

When Megenity was injured, she and Dunn (along with approximately 58 other students) were engaged in a karate-drill exercise known as “kicking the bag.” This drill involved three karate instructors and/or students standing in a triangular formation, 30 feet apart, holding a “punching bag” in front of their bodies. The lined-up karate students, in turn, sprinted (or ran) to each bag and performed karate kicks. At the first and second bags, which were being held by instructors, the students ran and performed karate “sidekicks” against each bag. At the third bag, which Megenity had volunteered to hold, the students sprinted and performed a “front kick”¹ or “fly kick” against the bag. (App.² 69 (p.38), 78 (p.75).)

Megenity and the other bag holders had to maintain “a good grip” on the punching bags and “brace” themselves, as such holders were “obviously ... going to take an impact from the bags.”

¹ Megenity described a front kick as a kick where participants raise their knees, kick with the heel, and snap back. (App. 66.)

² References to “App.” in this Petition are to the Appellant’s App. below.

Prior to her sports injury, Megenity saw Dunn perform running sidekicks on the first two punching bags, but noticed nothing unusual about these kicks. Dunn explained that when he performed the sidekicks against the first two, instructor-held bags, he made the kicks “as hard as [he] could make them.” (App. 48-49 (¶7).) As he approached the third bag (held by Megenity), the owner of the karate school advised Dunn (who weighs 190 to 200 pounds) “to hold back,” which Dunn “did considerably,” such that his kick was not a “full force frontal kick.” (App. 49 (¶7).)

Before his third kick, Megenity observed Dunn running at a “normal sprint.” (App. 69, 78, 79.) Although she did not see his third kick (because she was holding the punching bag to cover her face), Megenity testified that, from what she saw, there was nothing different about his kick than the first two kicks. (App. 68, 72, 79.)

Dunn kicked the bag Megenity was holding and the next thing she knew, she felt airborne, crashed on the floor, and was injured. (App. 68, 69, 75.) It is undisputed that Dunn kicked the bag—not Megenity. (App. 69.)

Megenity testified that Dunn approached her after the incident and said, “I’m sorry. I didn’t mean to jump.”³ (App. 72.) Megenity took this statement to mean that, instead of running and kicking the bag like he was supposed to do, Dunn must have added an additional jump at the end of his kick (thus performing a “jump kick” instead of a “fly” or “front” kick). (App. 78-79.) Megenity testified that the performance of a “jump kick” was outside the range of ordinary behavior for the

³ Although the substance of Dunn’s apology is disputed, for purposes of summary judgment **only**, the defense will assume Dunn made this statement.

“kicking-the-bag drill” because a “jump kick” is not an activity that is supposed to be performed on a bag.⁴ (App. 78-79.)

Megenity filed suit against Dunn, alleging that she was injured as a result of his negligent and reckless conduct. (App. 6.) After answering her complaint, Dunn moved for summary judgment under *Pfenning*, arguing his entitlement to judgment as a matter of law because his conduct of kicking the punching bag was within the range of ordinary behavior of participants in the sport of karate and, therefore, reasonable as a matter of law such that it did not constitute a breach of duty owed to Megenity. Dunn further established that he did not act recklessly or with the intent to injure Megenity in performing the sprinting (running) kick. Dunn, therefore, affirmatively negated an essential element of Megenity’s negligence claim—i.e., breach.

Megenity responded to Dunn’s summary-judgment motion, arguing that material-fact issues exist concerning whether the specific type of kick she assumes Dunn performed (a “jump kick”) was within the range of ordinary behavior for the kicking-the-bag drill.

On May 28, 2015, after conducting a hearing, the trial court granted summary judgment to Dunn, making the following persuasive findings:

⁴ Although not genuine or material for summary-judgment purposes, Megenity’s testimony on this point is conflicting. On the one hand, she claims that “jump kicks” are only supposed to be done in the air and are “never” done with bags. (App. 78 (p.76), 79 (p.77).) On the other hand, however, she describes a “jump kick” as “where you run and – you protect your body – you spring off of your body before you do the kick into the bag.” (App. 78 (p.75).)

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1. Pursuant to [*Pfenning*], [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.)

On May 24, 2016, the Court of Appeals—in a divided “for publication” opinion—reversed the trial court’s summary judgment to Dunn, holding that the general nature of the conduct reasonable and appropriate for a participant in a karate practice drill is not commonly understood and subject to ascertainment as a matter of law. *Megenity v. Dunn*, 2016 WL 2986566 *6 (Ind. Ct. App. 2016). In refusing to apply the *Pfenning* rule to a karate-sports injury (and instead merely employing a typical negligence “breach of duty” standard), the lower court noted that—unlike baseball, football, basketball, or golf (as likely examples)—“**karate** is not a **sport** with which most Americans are familiar either through personal participation or through enjoyment as a spectator.” *Id.* at 5 (emphasis in original). The Appellate Court remarked that unlike in *Pfenning*, where a golfer’s errant drive was clearly within the range of ordinary behavior of golfers and, therefore, reasonable as a matter of law, “we cannot say the common understanding of karate includes detailed knowledge of the types of kicks that are within the range of ordinary behavior for a particular exercise.” *Id.*

In a well-reasoned dissent, Judge Riley observed that the majority’s analysis “represents a more narrow rule” than that which this Court enunciated in *Pfenning*.

Id. at *6. She also noted that, although no Indiana case has addressed the sport of karate, the sport is generally commonly understood to be a high-contact sport involving throws, strikes, and other techniques encouraging physical contact between the participants. *Id.*

Judge Riley also recognized that karate, like most other sports, contemplates that mistakes will happen. Indeed, before commencing her karate classes, Megenity signed an application from the karate school, providing, in part:

*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.)

As the dissent appropriately pointed out, by focusing upon whether Dunn’s particular kick was “outside the range of ordinary behavior for a karate student engaged in a kicking-the-bag practice drill,” the majority limited “its review to the particular exercise instead of the broader scope of the sport of karate, as instructed by *Pfenning*.” *Id.* In so doing, and contra to *Pfenning*, the majority opinion “opens the door again to a fact sensitive inquiry in every sports negligence case as to the exactness and preciseness of a particular exercise within that broader sport.” *Id.* at 7.

For additional factual background, Dunn incorporates the Statement of Facts from his Appellee’s Brief below. *See* Ind. App. R. 57(G)(3).

II. ARGUMENT

Under Indiana Appellate Rule 57(H), transfer is appropriate where the Court of Appeals has entered a decision that conflicts with prior Supreme Court precedent on the same important issue, or has so significantly departed from accepted law or practice as to justify this Court's exercise of its discretionary jurisdiction. *See* App. R. 57(H)(2), (6). A review of the law and facts of this case establishes that transfer is appropriate on these two grounds.

A. The Appellate Court's Decision Excluding Karate from the Ambit of the Pfenning Rule Improperly Overrules the Pfenning Decision for any Sports Injury Arising from a Sport that is not Baseball, Football, Basketball, or Golf and, Further, Represents a Significant Departure from Accepted Law or Practice.

The issue presented in this case is narrow, involving the *Pfenning* sports-injury rule and whether it applies to the contact sport of karate—a sport with which the two judges comprising the majority below believe Americans are not familiar. If the *Pfenning* rule applies to Megenity's karate injury, this Court should grant transfer and affirm the trial court's summary judgment to Dunn (because there was no breach of duty as a matter of law).

The parties do not dispute that Megenity's injuries stem from a sports activity, that Dunn was a sports-activity participant when the incident occurred, and that the *Pfenning* decision governs the outcome of this appeal. It is also uncontested that Dunn did not intentionally injure Megenity. Dunn, likewise, did not engage in reckless conduct. Indeed, the only "reckless" allegation made against Dunn appears in Megenity's complaint in a broad clause claiming that he

“negligently, recklessly, and unreasonably caused injury to” her. (App. 6 (¶3).) This complaint allegation, however, cannot be considered when determining whether summary judgment in Dunn’s favor was appropriate because Megenity, as an adverse party, may not rest upon the mere allegations or denials of her pleadings but, instead, must set forth (via affidavit or other admissible evidence) specific facts showing that there is a genuine issue for trial. *See* Ind. Trial Rule 56(E).

Apparently recognizing this reality, on appeal Megenity seemed to abandon any allegation of recklessness. (See Reply Br. 8 (contending that “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.”) When pressed at the Court of Appeals oral argument, however, Megenity claimed that Dunn was reckless for violating a karate rule against performing “jump kicks” in the kicking-the-bag drill.

Despite Megenity’s contention, a sports-rule violation is expressly contemplated in the *Pfenning* negligence rule. In *Pfenning*, the injured plaintiff argued that the sports participant violated a safety (or etiquette) rule of golf requiring the golfer to yell “fore” when his or her shot might endanger others. *Pfenning*, 947 N.E.2d at 404. The *Pfenning* Court held that a golfer’s failure to yell “fore”—and, thus, commission of a sports-rule violation—is within the range of ordinary behavior of golfers and that, as a matter of law, neither the manner of doing so nor the failure to do so constitutes a breach sufficient to support a claim for negligence. *Id.* at 405.

The same analysis applies equally here. Dunn’s conduct in allegedly performing the wrong style of kick (i.e., a “jump kick” as opposed to a “front” or “fly” kick) in violation of a karate rule—the only allegation of reckless conduct in this case—is within the range of ordinary behavior of participants in the sport of karate, such that his actions do not constitute a breach of duty as a matter of law.

Armed with this backdrop, the sole issue before this Court involves the reach or scope of *Pfenning* and, more specifically, whether it applies to injuries arising from a sport like karate, which the challenged majority believes is not as widely known as baseball, football, basketball, or golf. To resolve this issue, a detailed examination of *Pfenning* is instructive.

In *Pfenning*, before adopting the rule governing this case, the Court analyzed 23 cases (spanning 17 jurisdictions)—which it broadly termed “sports injury cases”—and found that its sibling jurisdictions had taken essentially four different approaches to the liability issue involving sports injuries. The majority approach (which was taken in 13 cases) focuses upon the “duty” element of negligence and finds—as a matter of law—“no duty” owed by sports participants except to refrain from intentionally- or recklessly-induced injuries. *See Pfenning*, 947 N.E.2d at 401-02 (citing *Noffke v. Bakke*, 315 Wis.2d 350, 760 N.W.2d 156 (2009); *Turner v. Mandalay Sports Entm’t, LLC*, 124 Nev. 213, 180 P.3d 1172 (2008); *Schick v. Ferolito*, 167 N.J. 7, 767 A.2d 962 (2001); *Anand v. Kapoor*, 15 N.Y.3d 946, 917 N.Y.S.2d 86, 942 N.E.2d 295 (2010); *Monk v. Phillips*, 983 S.W.2d 323 (Tex. Ct. App. 1998); *Lawson by and through Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013

(Utah 1995); *Knight v. Jewett*, 3 Cal.4th 296, 320, 834 P.2d 696, 711, 11 Cal.Rptr.2d 2, 17 (1992); *Thompson v. McNeill*, 53 Ohio St.3d 102, 104, 559 N.E.2d 705, 707 (1990); *Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94 (1989); *Turcotte v. Fell*, 68 N.Y.2d 432, 441, 502 N.E.2d 964, 970, 510 N.Y.S.2d 49, 55 (1986); *Kabella v. Bouschelle*, 100 N.M. 461, 464, 672 P.2d 290, 293 (N.M. Ct. App. 1983); *Ross v. Clouser*, 637 S.W.2d 11, 13-14 (Mo. 1982); *Nabozny v. Barnhill*, 31 Ill.App.3d 212, 215, 334 N.E.2d 258, 261 (Ill. Ct. App. 1975)).

The jurisdictions adopting this “no duty” majority approach, however, did so by using widely different rationales. *Pfenning*, 947 N.E.2d at 401-02. Some did so, for example, under the assumption-of-risk doctrine. Others did so using an assumption-of-risk analysis coupled with the doctrine of implied consent. Still others adopted a “no duty” approach simply using the implied-consent doctrine. The remaining few “no duty” jurisdictions relied upon public-policy grounds. *Id.*

A second approach taken by only three jurisdictions (Nevada, Wisconsin, and Colorado) also focuses upon the “duty” element of negligence, but expressly declines to adopt a reduced-duty standard. Instead, these courts apply a traditional negligence analysis in all sports-injury cases. *See Pfenning*, 947 N.E.2d at 402 (citing *Graven v. Vail Assocs., Inc.*, 909 P.2d 514 (Colo. 1995); *Auckenthaler v. Grundmeyer*, 110 Nev. 682, 877 P.2d 1039 (1994); *Lestina v. West Bend Mut. Ins. Co.*, 176 Wis.2d 901, 501 N.W.2d 28 (1993)). The *Pfenning* Court noted, however, that Nevada and Wisconsin later reversed course and adopted the majority reduced-

duty standard. *See Pfenning*, 947 N.E.2d at 402 (citing *Noffke*, 315 Wis.2d 350, 760 N.W.2d 156; *Turner*, 124 Nev. 213, 180 P.3d 1172)).

A third approach taken by two jurisdictions (as well as Illinois whose courts have also adopted the “no duty” standard) concentrates on the “duty” element, but use a combination of approaches depending upon the nature of sport activity involved. This “combined” approach—which the *Pfenning* Court declined to follow—looks to the specific sport injury involved and only applies the “no duty” rule to injuries resulting from “team athletic contests” and “full contact” sports. *See, e.g., Pfenning*, 947 N.E.2d at 402 (citing *Jaworski v. Kiernan*, 241 Conn. 399, 412, 696 A.2d 332, 339 (1997); *Karas v. Strevell*, 227 Ill.2d 440, 459, 884 N.E.2d 122, 134 (2008)). For all other sports in “combined” jurisdictions, a traditional negligence analysis is applied. *See Pfenning*, 947 N.E.2d at 402 (citing *Jagger v. Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 849 A.2d 813 (2004); *Zurla v. Hydel*, 289 Ill.App.3d 215, 222, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997); *Thomas v. Wheat*, 143 P.3d 767 (Okla. Civ. App. 2006). The Indiana Supreme Court, however, chose not to adopt this sport-by-sport approach and, instead, opted to give more protection to sports participants.

The fourth—and final—approach taken by only two jurisdictions (New Hampshire and Arizona) provide enhanced protection from liability for sports participants by focusing upon the “breach” element of negligence, finding that no breach of duty occurs as a matter of law from the ordinary activities of a sport. *See Pfenning*, 947 N.E.2d at 402 (citing *Allen v. Dover Co-Recreational Softball League*,

148 N.H. 407, 419-20, 807 A.2d 1274, 1285-86 (2002); *Estes v. Tripson*, 188 Ariz. 93, 95-96, 932 P.2d 1364, 1366-67 (Ariz. Ct. App. 1997)).

Persuaded by this latter (albeit minority) approach, the *Pfenning* Court adopted Indiana’s sports-injury rule: “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 a breach of duty.” *Pfenning*, 947 N.E.2d at 404. The *Pfenning* rule takes into account the strong public-policy considerations at play in sports-injury cases, as well as the fact that “[a]thletic 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. *See id.*; *see also Welch v. Young*, 950 N.E.2d 1283, 1288-89 (Ind. Ct. App. 2011). Still, this reality does not render unreasonable the ordinary conduct involved in such sporting activities. *Pfenning*, 947 N.E.2d at 404.

To strike the necessary balance—after rejecting the majority “no duty” approach—the *Pfenning* Court held that in cases involving sports injuries, the above limited rule applies where reasonableness (under the breach prong of negligence) may be found by the court as a matter of law. *Id.*

Two important observations can be gleaned from *Pfenning*. First, in adopting the *Pfenning* rule, this Court was keenly aware of the “combined” approach to sports-injury cases taken by a small minority of jurisdictions (where the court looks to the specific sport injury involved and only applies the “no duty” rule to injuries

resulting from certain sports). The Indiana Supreme Court, however, rejected this “combined” approach. *Id.*

Second, and perhaps more telling, the *Pfenning* Court classified as “sports-injury cases” all claims arising from a sports injury, including those involving **non-conventional** (or less known) sports like horseback riding, cheerleading, informal football, recreational skiing, soccer, and ice hockey. *See, e.g., Pfenning*, 947 N.E.2d at 401-03 (*examining Noffke*, 315 Wis.2d 350, 760 N.W.2d 156 (cheerleading involving a “post-to-hands” stunt with a “flyer,” “post,” and “base”); *Karas*, 227 Ill.2d at 459, 318 Ill.Dec. 567, 884 N.E.2d at 134 (ice hockey, discussing rule against “bodychecking” players from behind). *Jagger*, 269 Conn. 672, 849 A.2d 813 (skiing where two recreational skiers collided); *Jaworski*, 241 Conn. at 412, 696 A.2d at 339 (soccer where participant allegedly “hit,” “tripped,” and “challenged” player—all in violation of game rules); *Graven*, 909 P.2d 514 (recreational informal skiing with companions doing “runs”); *Auckenthaler*, 110 Nev. 682, 877 P.2d 1039 (recreational horseback riding where rider was injured while participating in “field training” exercise with dogs); *Lestina*, 176 Wis.2d 901, 501 N.W.2d 28 (soccer, addressing the rule against “side-tackling”); *Knight*, 3 Cal.4th at 320, 834 P.2d at 711, 11 Cal.Rptr.2d at 17 (informal “touch football” game); *Gauvin*, 404 Mass. 450, 537 N.E.2d 94 (hockey where player was “butt-ended” by a co-participant); *Turcotte*, 68 N.Y.2d at 441, 502 N.E.2d at 970, 510 N.Y.S.2d at 55 (horse racing, addressing the “foul riding” rule); *Kabella*, 100 N.M. at 464, 672 P.2d at 293 (informal “tackle football” where ball-carrier announced he was “down” but defendant continued to

tackle him anyway, instead of terminating the play); *and Nabozny*, 31 Ill.App.3d at 215, 334 N.E.2d at 261 (soccer where goalie was injured while “crouched in the penalty area” in claimed violation of a safety rule).

The *Pfenning* Court classified all of these cases as “sports-injury cases,” without determining whether the sports (and their game rules) were as familiar to Americans—through either personal participation or enjoyment as a spectator—as “baseball, football, basketball, or golf.” Instead, the Supreme Court set forth a general “breach of duty” rule applying to sports-injury cases as a whole. *Pfenning*, 947 N.E.2d at 404. Other courts around the country dealing with karate injuries have likewise addressed them as sports injuries. *See, e.g., Laughman v. Girtakovskis*, 2015 Colo. App. LEXIS 1533 *20-22 (2015); *Bevolo v. Carter*, 447 F.3d 979, 982 (7th Cir. 2006); *Barakat v. Pordash*, 842 N.E.2d 120, 122-24 (Ohio Ct. App. 2005); *Kuehner v. Green*, 436 So.2d 78, 80 (Fla. 1983).⁵

By improperly limiting *Pfenning*’s application to sports injuries arising from sports with which the Court of Appeals subjectively believes Americans are more familiar, the challenged opinion effectively overrules *Pfenning* for any injury not derived from baseball, football, basketball, or golf.

Adding insult to injury, after unlawfully narrowing *Pfenning*’s reach, the Appellate Court’s decision misconstrues one of the rationales upon which the *Pfenning* rule rests—that “[t]he general nature of the conduct reasonable and

⁵ *See also Morales v. Longview Academy of Extreme Martial Arts, Inc.*, 2013 WL 3880130, *2 (N.Y. Sup. Ct. 2013) (unpublished); *Donahue v. Westmont College*, 2005 WL 1097223, *7 (Cal. Ct. App. 2005) (unpublished).

appropriate for a participant in a particular sporting activity is usually commonly understood and subject to ascertainment as a matter of law.” *Pfenning*, 947 N.E.2d at 4403-04 (emphasis added). Instead of focusing upon the “general nature” of Dunn’s conduct (i.e., his act of performing a karate kick in a karate drill), the lower court required that the **specific nature** of his conduct be commonly understood. Indeed, after discussing the perceived differences between various types of karate kicks, the Court of Appeals noted, “it is unclear whether ‘the common understanding of karate includes detailed knowledge of the types of kicks that are within the range of ordinary behavior for a particular exercise.’”

As aptly noted by the dissent, however, by focusing upon whether Dunn’s **particular** kick was “outside the range of ordinary behavior for a karate student engaged in a kicking-the-bag practice drill,” the majority improperly limited “its review to the particular exercise instead of the broader scope of the sport of karate, as instructed by *Pfenning*.” *Id.* This approach is contrary to *Pfenning* and “opens the door again to a fact sensitive inquiry in every sports negligence case as to the exactness and preciseness of a particular exercise within that broader sport.” *Id.* at 7.

Because the challenged opinions conflicts with prior Supreme Court precedent on the same important issue and, further, significantly departs from accepted law or practice, this Court should accept transfer under Indiana Appellate Rules 57(H)(2) and (6), vacate the Court of Appeals decision, and affirm the trial court’s summary judgment to Dunn.

III. CONCLUSION

Transfer should be granted, the Court of Appeals Opinion vacated, and the summary judgment to Dunn affirmed and/or reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this Petition to Transfer complies with the type volume limitation of appellate Rule 44(E). The Petition does not exceed 4,200 words. The Petition contains 4,192 words (including those used in footnotes) based upon the count of the word processing system employed to prepare the brief, Microsoft Word 2003.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Petition to Transfer was electronically filed with the Clerk of the Indiana Supreme Court on this 23rd day of June, 2016.

The undersigned further certifies that a copy of the foregoing was mailed by United States Mail, First Class, Postage Prepaid this 23rd day of June, 2016 to:

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