

IN THE INDIANA SUPREME COURT

Cause No. _____

TRESA MEGENITY,)	
)	On Petition to Transfer
Respondent)	From the Indiana Court of Appeals
(Appellant and Plaintiff below))	Case No. 22A04-1506-CT-000722
)	
v.)	Appeal from the
)	Floyd Superior Court 3
DAVID DUNN,)	Trial Court Case No.
)	22D03-1309-CT-1354
Petitioner)	
(Appellee and Defendant below))	The Honorable Maria Granger, Judge

**BRIEF IN RESPONSE
TO PETITION TO TRANSFER OF DAVID DUNN**

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SUMMARY OF THE ARGUMENT

Transfer should be denied because the Court of Appeals got it right: summary judgment is improper in this case. Specifically, the Court of Appeals properly considered Megenity's designated evidence that Dunn's rogue jump kick was outside the range of ordinary behavior for the particular sporting activity. Because the trial court, by contrast, failed to consider Megenity's designated evidence, summary judgment was properly reversed here under *Pfenning, infra*.

Moreover, the Court of Appeals has entered an opinion that is not in conflict with any decision of this Court, including *Pfenning*, nor with the decision of any other Indiana court, and does not depart from accepted law or practice in Indiana.

ARGUMENT

- 1. Pursuant to *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011), the Court of Appeals correctly decided that summary judgment was improper because there exist genuine issues of material fact regarding whether Dunn's conduct was "ordinary."**

In reversing the trial court's grant of summary judgment, the Court of Appeals ruled that

Megenity has designated evidence to establish a genuine issue of material fact whether Dunn's kick was a jump kick and, if so, whether such a kick was outside the range of ordinary behavior for a karate student engaged in a kicking-the-bag practice drill. Accordingly, we cannot say that Dunn did not breach his duty of care to Megenity as a matter of law, and the trial court erred when it entered summary judgment in favor of Dunn.

Court of Appeals of Indiana, Opinion 22A04-1506-CT-000722 ("*Court of Appeals Opinion*"), at p. 11. The Court of Appeals reached this conclusion after considering the following designated facts of record, all of which are taken directly from the *Court of Appeals Opinion*, and all of which must be viewed in a light most favorable to Megenity:

- (1) Megenity and Dunn were engaged in a drill called "kicking the bag";

- (2) The drill involved the following: three people (students and/or instructors), forming a triangle with approximately thirty feet between them, holding rectangular bags in front of their bodies, and the students lining up and sprinting to each bag in succession to perform a kick against the bag;
- (3) The first two bags were for side kicks, and the third bag was for a front kick;
- (4) A front kick involves a student “balancing on one foot,” raising his knee, and kicking “with the heel and snap[ping] back”;
- (5) When Dunn kicked the bag being held by Megenity, instead of keeping one foot on the ground as he kicked, he jumped as he kicked the bag;
- (6) As a result of Dunn’s kick, Megenity “felt airborne and crashed on the floor[.]”;
- (7) The force of the impact caused Megenity's left knee to “double” and “sheared out” her anterior cruciate ligament (“ACL”) and “damaged [her] menisci”;
- (8) Dunn later apologized to her, saying, “I'm sorry. I didn't mean to jump”;
- (9) Megenity underwent surgery and rehabilitation, and she missed several months of work as a result;
- (10) Dunn was supposed to perform a front kick, which involves keeping one foot on the floor while the kicking foot strikes the bag;
- (11) Megenity had held bags during kicking-the-bag drills “countless” times during her time at the studio without incident, and she knew how to brace herself for a front kick;
- (12) Dunn apologized for jumping during the kick;

- (13) Megenity inferred from Dunn’s apology that he had performed a jump kick, which “is where you run and ... spring off of your body before you do the kick into the bag”;
- (14) The difference in impact between a running front kick and a jump kick is “[e]xponential”; “[j]ump kicks [had] nothing to do with [the kicking-the-bag drill]”; jump kicks are “always done into the air,” not with another person; and jump kicks were “not done” in the course of normal conduct for the class; and
- (15) Megenity, who holds a black belt, testified that Dunn had performed a jump kick and that a jump kick directed toward another person is unreasonable, inappropriate, and not within the range of a karate participant’s ordinary behavior, whether in practice or in competition.

Court of Appeals Opinion, at pp. 2-3, 11.

Here, then, is why the Court of Appeals got it right: The trial court below failed to consider the above facts regarding just how extraordinary – not “ordinary” – Dunn’s conduct was in the context of a karate class drill. Instead, in a tersely-worded, 2-page Order granting summary judgment, the trial court conclusorily held that Dunn’s conduct was reasonable as a matter of law. *See Trial Court Order*, App. p. 4-5.

Under well-settled and binding Indiana precedent, even in “sports injury” cases, on a summary judgment motion, “[t]he reviewing court must ‘construe the evidence in favor of the non-movant, and resolve all doubts against the moving party.’” *Pfenning v. Lineman*, 947 N.E.2d 392, 397 (Ind. 2011), *citing Shambaugh & Son, Inc. v. Carlisle*, 763 N.E.2d 459, 461 (Ind.

2002). Accordingly, in the instant case, the Court of Appeals abided by its duty not only to consider Megenity's designated evidence that Dunn's jump kick was not "ordinary" in the context of a "kicking-the-bag" drill, but also to construe that evidence in a light most favorable to Megenity. *See also Butler v. City of Peru*, 733 N.E.2d 912, 915 (Ind. 2000); *Wagner v. Yates*, 912 N.E.2d 805, 808 (Ind. 2009); *Perdue v. Gargano*, 964 N.E.2d 825, 831 (Ind. 2012). In contrast, the trial court below did not just fail to construe the above-cited designated evidence in Megenity's favor: the trial court below failed to consider the above-cited designated evidence at all. *See Trial Court Order*, App. p. 4-5. Thus, the trial court erred under Indiana's summary judgment jurisprudence, and the Court of Appeals properly corrected the trial court's error.

Moreover, "while federal practice permits the moving party to merely show that the party carrying the burden of proof *lacks* evidence on a necessary element, we impose a more onerous burden: to affirmatively 'negate an opponent's claim.'" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014), *citing Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind.1994) (emphasis in original).

Here, at the trial court level – in sharp contrast to the multitude of facts Megenity designated that show the existence of genuine issues of material fact – Dunn failed to designate any evidence to negate Megenity's claim. In fact, Megenity is still the only party to have testified in the court below. In contrast, the Court will note that Dunn – from the trial court briefs, to the Court of Appeals briefs, to the instant Petition to Transfer – has failed to designate any evidence that would show that his "jump kick" was "ordinary."

Significantly, however, even if Dunn *had* designated such evidence, the trial court would still be precluded from weighing that evidence on a summary judgment motion, and Dunn's

motion for summary judgment would still have failed. “Summary judgment should not be granted when it is necessary to weigh the evidence.” *Hughley, supra*, 15 N.E.3d at 1005, *quoting Bochnowski v. Peoples Fed. Sav. & Loan Ass’n*, 571 N.E.2d 282, 285 (Ind. 1991). “If a court must weigh conflicting evidence to reach a decision, summary judgment is improper.” *Jackson v. Trancik*, 953 N.E.2d 1087, 1094 (Ind. Ct. App. 2011), *citing Madison County Bank & Trust Co. v. Kreegar*, 514 N.E.2d 279, 281 (Ind. 1987). As the record now stands, Megenity’s testimony stands unrefuted. The bare legal arguments of Dunn’s counsel – which are notably unsupported by any citation to any designated evidence to be found in the record – do not constitute “evidence.” Accordingly, Megenity’s testimony alone is sufficient to overcome Dunn’s summary judgment motion under Indiana law.

Therefore, because the Court of Appeals – unlike the trial court – properly considered Megenity’s designated evidence that Dunn performed a “jump kick” when he knew he should have been performing a stationary kick, and because the evidence of record further shows that such a “jump kick” is not “ordinary” in a karate class practice drill, the Court of Appeals did not err in reversing summary judgment under *Pfenning v. Lineman*, as examined in detail next.

2. The Court of Appeals’ opinion is not in conflict with any other Indiana decision.

2.1 The Court of Appeals’ opinion is not in conflict with *Pfenning v. Lineman*

The Court of Appeals did not “refuse to apply the *Pfenning* rule” (*Dunn’s Petition*, at p. 3). Quite the opposite: The Court of Appeals used the precise language – *verbatim* – of the holding from *Pfenning* in its ruling. The holding of *Pfenning* reads thus: “We hold 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.” *Pfenning v. Lineman*, 947 N.E.2d 392, 404 (Ind. 2011) (emphasis added). Here, in its opinion reversing, the Court of Appeals concluded that “Megenity has designated evidence to establish a genuine issue of material fact whether Dunn’s kick was a jump kick and, if so, whether such a kick was outside **the range of ordinary behavior** for a karate student engaged in a kicking-the-bag practice drill.” *Id.* at p. 11 (emphasis added). Indeed, from the very beginning of its opinion, the Court of Appeals noted that “The parties agree that, because Megenity’s injuries stem from a sporting activity, our supreme court’s decision in *Pfenning* governs the outcome of this appeal.” *Court of Appeals Opinion*, at p. 5. The Court of Appeals then went on to quote large sections *Pfenning* at length, including *Pfenning*’s holding, or “rule.” *Id.* at pp. 5-7. Therefore, contrary to Dunn’s contention, the Court of Appeals did not “effectively overrule” *Pfenning*, but took care to use the very language of *Pfenning*’s holding in deciding the case.

On top of this, Dunn’s warmed-over recitation (*Dunn’s Petition*, at pp. 14-17) to the very same out-of-jurisdiction cases that this Court has already considered in *Pfenning* is feckless padding that is wasteful of the Court’s time.¹ This Court has already determined that Indiana sports participants owe a reasonable duty of care to one another, and has defined the contours of when breach of that duty occurs. *Pfenning, supra*, 947 N.E.2d at 403. The Court of Appeals properly abided by those contours in reversing the trial court here because it found that genuine issues of material fact exist as to “whether Dunn’s kick was a jump kick and, if so, whether such

¹ *Cf. Pfenning, supra*, 947 N.E.2d at 401-403 (discussing how foreign jurisdictions have approached sports injury cases) *with Dunn’s Petition* at pp. 14-17 (discussing those very same cases that this Court has already considered in issuing its ruling in *Pfenning*)

a kick was outside the range of ordinary behavior for a karate student engaged in a kicking-the-bag practice drill.” *Court of Appeals Opinion*, at p. 11.

2.2 The Court of Appeals’ opinion is not in conflict with any other Indiana decisions that have applied *Pfenning*.

Since *Pfenning* was handed down, the Indiana Court of Appeals has consistently reversed summary judgment in sports injury negligence cases where plaintiffs have designated evidence showing that the defendant’s conduct was outside the range of ordinary behavior for the particular sporting activity. The instant case is wholly in accord with these precedents.

2.2.1 *Welch v. Young*, 950 N.E.2d 1283 (Ind. App. 2011)

In *Welch*, a little league baseball player was taking practice swings outside the field when he struck Ms. Welch, the mother of another player, in the knee. *Welch v. Young*, 950 N.E.2d 1283, 1285 (Ind. Ct. App. 2011). The trial court granted summary judgment, finding that “Welch was a participant in the event because she was the ‘Team Mom,’ and she therefore “incurred the risk of such injury as a spectator at the event.” *Id.* at 1285-86.

The Court of Appeals reversed, pointing out that the proper focus under *Pfenning* is not on whether the *plaintiff* was a “participant,” but on whether the *defendant*’s action – i.e., taking practice swings outside the baseball field – was within the range of ordinary behavior of participants in the sport. *Id.* at 1289. The *Welch* Court reversed summary judgment because it found that it was “faced with factual issues about ‘the conduct of [the] participant’ that precluded a determination as to whether, as a matter of law, the participant’s conduct was ‘within the range of ordinary behavior of participants in the sport’”:

Specifically, there are fact issues as to whether the injury took place on the field or outside the playing area, and whether the game was underway or had not yet started. As we cannot be certain from the designated evidence before us whether

Welch was injured before or during the game and whether she and Jordan Young were inside the ball field or outside it in an area where spectators normally are present, we cannot determine as a matter of law whether Jordan Young's behavior while taking warmup swings was within the range of ordinary behavior of participants in little league baseball.

Welch v. Young, 950 N.E.2d 1283, 1292 (Ind. Ct. App. 2011).

The reasoning of the *Welch* Court is significant for the instant case. The *Pfenning* Court had instructed the lower courts to focus on the conduct of the defendant, not the status of the plaintiff. Thus, the *Welch* court properly focused on the conduct of the defendant baseball player to determine whether there was evidence that he had done something outside the ordinary range of behavior in that context. Because there *was* such evidence, summary judgment was reversed. *Id.* at 1293. The instant case is readily analogous to *Welch* because Megenity has designated evidence from which a jury can reasonably conclude that Dunn's conduct was outside the range of ordinary behavior for the particular sporting activity, and the Court of Appeals properly focused on Megenity's designated evidence, whereas the trial court ignored it.

2.2.2 *Haire v. Parker*, 957 N.E.2d 190 (Ind. App. 2011)

Haire concerned an injury a plaintiff sustained on an all-terrain vehicle (ATV) course. The *Haire* defendant's ATV rolled down a hill and tipped over. *Haire v. Parker*, 957 N.E.2d 190, 193 (Ind. Ct. App. 2011). The defendant then rolled his ATV back upright, and then restarted it while he was standing on the ground next to it. *Id.* at 193-94. When he restarted it, the ATV unexpectedly took off without a rider and crashed into the plaintiff. *Id.* at 194. The trial court granted the defendant's motion for summary judgment. *Id.*

On appeal, the defendant, Parker, argued that he was entitled to summary judgment because "there has been absolutely no facts alleged that would suggest that Parker acted outside

of the scope of ordinary behavior for a person participating in an ATV activity.” *Id.* at 199. The Court of Appeals reversed, finding that “Parker does not direct our attention to any designated evidence suggesting that his conduct of starting his ATV while standing beside it after the ATV had ‘tipped over’ was conduct within the range of ordinary behavior of participants in the sport and reasonable as a matter of law.” *Id.* at 201.

The salient facts in the instant case are no different than those in *Haire*: Dunn failed to designate any evidence that his conduct of having “jumped” when he had been instructed to perform a front kick was “conduct within the range of ordinary behavior of participants in the sport and reasonable as a matter of law.” *Haire, supra*, 957 N.E.2d at 201. And in stark contrast, Plaintiff has specifically designated evidence, *supra*, showing that “jump kicks” are never performed with a partner holding a bag or in the context of the “kicking the bag” drill.

Therefore, *Haire, Welch* and *Pfenning* all support the Court of Appeals’ finding that summary judgment is improper here. This is especially true in light of this Court’s directives in *Hughley, supra*, that “summary judgment is not a summary trial,” and summary judgment “is not appropriate merely because the non-movant appears unlikely to prevail at trial.” *Hughley v. State*, 15 N.E.3d 1000, 1003-04 (Ind. 2014) (internal citations omitted). “In essence, Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.” *Id.* at 1004. Where “the undisputed material facts support conflicting reasonable inferences” then the factual issues are “genuine”: “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.” *Id.* at 1003, *citing Williams v. Tharp*,

914 N.E.2d 756, 761 (Ind.2009) (quoting T.R. 56(C)) (internal citations omitted). The instant case abounds with disputed material facts that preclude summary judgment.

CONCLUSION

In *Pfenning*, this honorable Court took care not to rule that the lower courts *must* find that *all* conduct by *all* Indiana sports participants is reasonable as a matter of law. Instead, Indiana's lower courts "*may*" find that *some* conduct by *some* participants is reasonable as a matter of law. Specifically, *Pfenning* provided a "limited new rule" that a sports participant's conduct "*may*" be found reasonable as a matter of law when said conduct is "within the range of ordinary behavior" for that "particular sporting activity." *Pfenning, supra*, 947 N.E.2d at 403-404.

In full accord with *Pfenning*, the Court of Appeals in the instant case found that genuine issues of material fact exist as to "whether Dunn's kick was a jump kick and, if so, whether such a kick was outside the range of ordinary behavior for a karate student engaged in a kicking-the-bag practice drill." *Court of Appeals Opinion*, at p. 11. The Court of Appeals' opinion is therefore fully consistent with Indiana jurisprudence regarding both summary judgment and sports injury claims.

WHEREFORE, Appellant, Tresa Megenity, respectfully requests that the Court DENY Appellant David Dunn's Petition to Transfer.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this Brief in Response contains 2,986 words, including headings, subheadings, and footnotes, and excluding cover information, table of contents, table of authorities, signature blocks, certificate of service, and word count certificate.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Brief in Response to Petition to Transfer of David Dunn was electronically filed with the Clerk of the Indiana Supreme Court on this 11th day of July, 2016.

The undersigned further certifies that the foregoing was served by Electronic service via the Indiana E-filing System this 11th day of July, 2016 to:

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