

IN THE
INDIANA SUPREME COURT

CAUSE NO. _____

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

**DAVID DUNN'S REPLY TO MEGENITY'S OPPOSITION
TO PETITION TO TRANSFER**

KIGHTLINGER & GRAY, LLP

BY: Richard T. Mullineaux
Crystal G. Rowe
Whitney E. Wood
Bonterra Building, Suite 200
3620 Blackiston Boulevard
New Albany, IN 47150
Phone: 812-949-2300
Fax: 812-949-8556

Attorneys for David Dunn

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I. ARGUMENT

Transfer should be granted because the challenged opinion conflicts with this Court's decision in *Pfenning v. Lineman*, 947 N.E.2d 392, 404 (Ind. 2011), which held that, in negligence claims against a sports-activity participant, "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."¹ *Id.* Here, Dunn's conduct of performing a karate kick (in a karate class) was within the range of ordinary behavior of participants in the sport of karate. As such, his conduct was reasonable as a matter of law, thereby negating the breach-of-duty element of Megenity's negligence complaint.

Despite *Pfenning's* clear directive, the Court of Appeals circumvented the *Pfenning* rule by 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" as karate is not a sport with which most Americans are familiar. With *Pfenning* cast aside, the Appellate Court then applied the traditional breach analysis of negligence (as opposed to the limited rule carved out in *Pfenning* for sports-injury cases) and reversed Dunn's summary judgment. Transfer is warranted under Indiana Appellate Rules 57(H)(2), and (6).

¹ Exceptions to this rule are if the sports participant's conduct was reckless or intentional. However, a participant's violation of a sports rule is within the range of ordinary behavior of participants in the sport and does not support a claim for negligence or recklessness. *Pfenning*, 947 N.E.2d at 405.

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In her Response, Megenity does not address Dunn's transfer arguments. Instead, she first incorrectly contends that the Court of Appeals **applied** the *Pfenning* rule when it reversed the trial court's properly entered summary-judgment order. (Resp. 8-9.) The Appellate Court, however, expressly held that the sport of karate is outside the *Pfenning* rule because "karate is not a sport with which most Americans are familiar, either through personal participation or through enjoyment as a spectator." *Megenity v. Dunn*, 2016 WL 2986566, at *5 (Ind. App. May 24, 2016).

Rather than applying the *Pfenning* sports-injury rule to Megenity's negligence claim, the lower court simply utilized the breach-of-duty analysis governing standard negligence cases and ultimately found that material-fact issues exist (sufficient to preclude summary judgment) regarding whether the specific type of kick performed by Dunn was outside the range of ordinary behavior for a karate student engaged in a kicking-the-bag practice drill. *Id.* This refusal to apply the *Pfenning* rule is what prompted the current transfer petition.

Second, Megenity argues that transfer is not warranted because the lower court "got it right." (Resp. 4, 6-7.) This argument, too, is not responsive to the transfer petition. More problematic, in so arguing, Megenity employs a *different* standard than that enunciated by the *Pfenning* Court. By insisting that Dunn's kick was outside the range of ordinary behavior (or "**extraordinary**") for the "particular sporting activity"—as opposed to the sport of karate in general—Megenity is

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essentially rewriting the *Pfenning* rule to look at the particular sports activity and not the global sport itself.² (Resp. 4.) Neither Megenity nor the Indiana Court of Appeals, however, has the authority to overrule or rewrite Indiana Supreme Court precedent.

Third, Megenity takes issue with Dunn's discussion of the sister-jurisdiction cases considered by this Court in *Pfenning* (and collectively referred to as "sports-injury cases"). She calls this discussion "feckless paddling that is wasteful of the Court's time." (Resp. 9-10.) The contrary, however, is true. These foreign-jurisdiction cases reveal the error in the lower court's decision, which essentially carved out a *Pfenning*-rule exception for any sports injury stemming from a non-conventional sport (i.e., a sport that is not baseball, football, basketball, or golf). *Pfenning*, however, did not make such a distinction. Rather, the *Pfenning* Court considered all of these cases (many of which involved lesser-known sports like cheerleading, horse racing, skiing, etc.) as "sports-injury cases" and developed an Indiana negligence rule to deal globally with such sports-injury cases. By grouping these cases together as "sports-injury cases," the *Pfenning* Court painted with a broad brush and established a limited breach-of-duty rule governing all sports-injury cases. The Appellate Court's refusal to apply *Pfenning* to the sport of karate

² Megenity's claim that Dunn should have performed a "stationary kick" is inconsistent with her testimony that participants were required to sprint to the bag and perform a front or fly kick. (Resp. 8.)

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was erroneous and an improper attempt to arbitrarily narrow, or overrule, *Pfenning*.

Fourth, Megenity asserts that the challenged opinion does not conflict with other, inapposite, Court of Appeals opinions. (Resp. 10-13.) Dunn, however, has not claimed a conflict with other opinions from the Court of Appeals. Instead, Dunn has always insisted that *Welch v. Young*, 950 N.E.2d 1283 (Ind. Ct. App. 2011), *trans. not sought*, and *Haire v. Parker*, 957 N.E.2d 190 (Ind. Ct. App. 2011), *trans. denied*, are inapposite. (Appellee's Br. 20-22.)

Lastly, Megenity discusses Indiana's summary-judgment standard and how it differs from its federal counterpart. (Resp. 7-8, 12-13.) This discussion is irrelevant to the issues presented. This case does not concern the federal standard of review. Instead, under Indiana's standard, Dunn affirmatively negated the "breach" element of Megenity's negligence action by demonstrating that his conduct of performing a karate kick was within the range of ordinary behavior of participants in the sport of karate. Dunn's complained-of conduct was reasonable as a matter of law and did not constitute a breach of duty. *See, e.g., Pfenning*, 947 N.E.2d at 404. Absent a breach, there is no liability or negligence. *See, e.g., Kramer v. Catholic Charities of Diocese of Ft. Wayne-S. Bend, Inc.*, 32 N.E.3d 227, 231 (Ind. 2015) (summary judgment is appropriate if one element is negated); *see also Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind. 2004).

II. CONCLUSION

This Court should grant transfer, reverse the challenged opinion, and affirm summary judgment to Dunn.

Respectfully submitted,

BY: /s/ Crystal G. Rowe
Richard T. Mullineaux, Atty. No. 9874-22
Crystal G. Rowe, Atty. No. 22524-53
Whitney E. Wood, Atty. No. 32449-39
Attorneys for David Dunn

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this Reply in Support of Petition to Transfer complies with the type volume limitation of appellate Rule 44(E). The Reply does not exceed 1,000 words. The Reply in Support of Petition to Transfer contains 989 words (including those used in footnotes) based upon the count of the word processing system employed to prepare the brief, Microsoft Word 2010.

KIGHTLINGER & GRAY, LLP

By: /s/ Crystal G. Rowe
Crystal G. Rowe, Atty. No. 22524-53
Attorney for *David Dunn*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Reply in Support of Petition to Transfer was electronically filed with the Clerk of the Indiana Court of Appeals on this 20th day of July, 2016 and was served—through the Court's E-Filing system—on:

Kenneth G. Doane, Jr.
Doane Law Offices, LLC
300 Missouri Avenue, Suite 200
Jeffersonville, IN 47130

/s/ Crystal G. Rowe
Richard T. Mullineaux/Crystal G. Rowe/
Whitney E. Wood

KIGHTLINGER & GRAY, LLP
Bonterra Building, Suite 200
3620 Blackiston Boulevard
New Albany, IN 47150
(812) 949-2300