In the
Indiana Supreme Court

Kathleen Burdick; Bruce Burdick,
Appellant(s),

v.

Julie Romano,
Appellee(s).

Court of Appeals Case No.
19A-CT-02739

Trial Court Case No.
45C01-1310-CT-152

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 10/1/2020.

Loretta H. Rush
Chief Justice of Indiana

Rush, C.J., and Massa, Slaughter, JJ., vote to deny transfer.
David, J. dissents from the denial of transfer with separate opinion in which Goff, J. joins.

David, Justice, dissenting.

This case presents an issue of first impression for our Court: Whether an injury resulting from a horse kick sounds in ordinary negligence or is subject to the higher burden imposed by a "sporting activity" jury instruction. Because I believe this matter is likely to recur in various forms, would benefit from this Court's guidance, and has created a conflict in Court of Appeals' decisions, see Indiana Appellate Rule 57(H)(1), (4), I respectfully dissent from the denial of transfer.

After Julie Romano's horse Sheza kicked and seriously injured Kathleen Burdick, Burdick and her husband sued Romano alleging she was negligent, grossly negligent, or reckless in her care and control of the horse. A jury was empaneled, evidence was heard, and proposed jury instructions were tendered. The trial court declined to read the Burdicks' proposed jury instructions on negligence, duty, and reasonable care. Instead, the trial court read Romano's proposed instructions on incurred risk, inherent risks of equine activities, and sporting event injuries. The jury returned a verdict in Romano's favor.

The Court of Appeals affirmed, finding, *inter alia*, the trial court did not abuse its discretion when it refused to read the Burdicks' tendered negligence instruction. *Burdick v. Romano*, 148 N.E.3d 335, 342 (Ind. Ct. App. 2020). The court found first that "the evidence did not support an instruction for negligence" and second, "an instruction on negligence could have confused and misled the jury about Burdick's burden of proof." *Id*. at 343. I respectfully disagree.

"Trial courts generally enjoy considerable discretion when instructing a jury." *Humphrey v. Tuck*, --- N.E.3d ----, 2020 WL 5361974 at *2 (Ind. Sept. 8, 2020) (citation omitted). Challenges to a trial court's decision to give or refuse proposed instructions are reviewed with three considerations in mind: (1) Whether the instruction correctly states the law; (2) whether the instruction is supported by evidence in the record; and (3) whether the instruction's substance is covered by other instructions. *Id*. The first

question is reviewed de novo while the other two are reviewed for an abuse of discretion. *Id*.

I take issue with each of these considerations. Primarily, I believe the trial court instructed the jury on the incorrect burden of proof under these facts. Additionally, a simple negligence instruction was supported by the evidence in this instance and the substance of the Burdicks' proffered instruction was not covered by other instructions.

I start with the burden of proof in this case. To prevail in their negligence action, the Burdicks were required to prove Romano (1) owed them a duty, (2) breached that duty, and (3) proximately caused injury to Burdick. *See Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). We have previously recognized that, "[a]lthough breach is usually a question of fact for the jury," our Court's prior decision in *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011) "created a 'limited new rule' applying only to sports-injury cases—cases where the alleged tortfeasor is a sports participant." *Megenity v. Dunn*, 68 N.E.3d 1080, 1083 (Ind. 2017) (quoting *Pfenning*, 947 N.E.2d at 403-04). Under this standard, we have held a participant in a sports activity breaches no duty by engaging in conduct "ordinary" in the sport, but "may breach a duty by injuring someone intentionally or recklessly." *Id*.

As previously noted, the trial court did not tender the Burdicks' proposed instruction on ordinary negligence and instead gave Romano's instruction on sporting events. Recognizing that there was no clear guidance from this Court or the Court of Appeals, the trial court ultimately relied on our decision in *Pfenning* to reach its determination that Burdick and Romano were sport participants. The resulting "sporting events" instruction was nearly identical to Indiana Model Civil Jury Instruction 961, which imposes liability upon sport participants if they act in an "intentional" or "reckless" way rather than a "reasonable care under the circumstances" standard imposed under ordinary negligence.

Perhaps this was the correct instruction for an injury sustained during a sporting event or involving sports participants. But I do not believe this case demanded such an instruction. Rather, I believe the circumstances here more closely resemble those of a classic "dog bite" case.

In those cases, we presume dogs are harmless, but that presumption may be overcome by "evidence of a known vicious or dangerous propensity." *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 275 (Ind. 2003). Under the common law, dog owners that are aware of these propensities are required to use **reasonable care under the circumstances** to prevent the animal from causing harm. *Id*. Unless the legislature has applied a different standard to a class of victims, *see, e.g., id.* at 275, courts have consistently applied an ordinary negligence standard in this context. *Plesha v. Edmonds ex rel. Edmonds*, 717 N.E.2d 981, 987 (Ind. Ct. App. 1999) (citations omitted). Stated differently:

> When negligence is claimed, in the absence of evidence that the owner knew or should have known of a vicious tendency, the rule is simply that the owner of a domestic animal is bound to know the natural propensities of the particular class of animals to which it belongs. *If these propensities are the kind which might be reasonably expected to cause injury, the owner must use reasonable care to prevent the injuries from occurring.*

Id. (quoting *Alfano v. Stutsman*, 471 N.E.2d 1143, 1145 (Ind. Ct. App. 1984) (emphasis in original); *see also Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind. 1993) (same).

Horses, like dogs, have historically been considered a domestic animal. *See Klenberg v. Russell*, (1890), 125 Ind. 531, 534, 25 N.E. 596, 597; *Einhorn v. Johnson*, 996 N.E.2d 823, 831 (Ind. Ct. App. 2013); *Forrest v. Gilley*, 570 N.E.2d 934, 935 (Ind. Ct. App. 1991). Combining this fact with my conclusion below that the parties were not sports participants, I believe a "reasonable care to prevent injury" standard—and not a "sporting events" standard—should have been read to the jury in this case.

To bolster this point, I turn to Indiana's "equine activity" statute. Both parties rely on this statute to define the boundaries of their conduct. The conduct at issue took place in a private arena and included riding horses around poles, Burdick demonstrating her horse's calm temperament, and Romano retrieving a barrel to demonstrate a trick with her horse.

Indiana Code section 34-6-2-41 reads:

> (a) "Equine activity," for the purposes of IC 34-31-5, includes the following:
>
> (1) Equine shows, fairs, competitions, performances, or parades that involve equines and any of the equine disciplines, including dressage, hunter and jumper horse shows, grand prix jumping, three (3) day events, combined training, rodeos, driving, pulling, cutting, polo steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting.
>
> (2) Equine training or teaching activities.
>
> (3) Boarding equines.
>
> (4) Riding, driving, inspecting, or evaluating an equine, whether or not monetary consideration or anything of value is exchanged.
>
> (5) Rides, trips, hunts, or other equine activities of any type (even if informal or impromptu) that are sponsored by an equine activity sponsor.
>
> (6) placing or replacing horseshoes on an equine.
>
> (b) The term does not include being a spectator at an equine activity.

Romano argued, and the Court of Appeals agreed, that this list is non-exclusive and that the aforementioned conduct by the parties showed both Burdick and Romano were engaged in a sporting activity. *See Burdick*, 148 N.E.3d at 343.

Again, I respectfully disagree. While this list may be non-exclusive, I am concerned that we are stretching the definition of "sporting activity" too far so as to encompass activities that should sound in ordinary negligence. As I stated above, horses are domestic animals. While certainly horses are used in sporting events, the two parties here were riding for leisure in a private arena.

In defining what constitutes a "sport," we have previously viewed the activity of the sport "generally" rather than the specific act within the sport that caused injury. *Megenity*, 68 N.E.3d at 1084. And, as the Court of Appeals below noted, "[a] person need not participate in a competitive sport to be engaged in a sporting activity." *Burdick*, 148 N.E.3d at 341 (citing *Gyuriak v. Millice*, 775 N.E.2d 391, 395 (Ind. Ct. App. 2002)). In that vein, several recreational activities have been deemed "sporting activities" throughout the years. *See Megenity*, 68 N.E.3d at 1084 (practicing karate kicks during a class); *Pfenning*, 947 N.E.2d at 400-01 (injury sustained by minor during non-competitive golf scramble); *Hoosier Mountain Bike Ass'n v. Kaler*, 73 N.E.3d 712, 714-15 (Ind. Ct. App. 2017) (mountain biking while alone on a trail).

To be sure, I take no issue with the precedent established by *Pfenning* and its progeny. These opinions are well-reasoned and present no need of reconsideration at this time. But none of them involved domestic animals.

In *Einhorn*, for example, a horse at a county fair got loose and injured an unpaid volunteer. 996 N.E.2d at 826. Our Court of Appeals observed that, when the injured plaintiff sued the fair and the owner of the horse, the equine activities statute applied to the claim against the fair, but an ordinary negligence standard (similar to dog bite cases) applied to the claim against the horse's owner. *Id*. at 830-31. It was undisputed in that case that the fair was an "equine activity sponsor" and thus the relevant statutes applied to those claims. *Id*. at 829. The owner of the horse, on the other hand, received no such designation. *See id.* at 830.

My ultimate concern is that pendulum has swung too far: The "sports activity" standard has started to encompass activities that should remain outside its parameters. I believe this case is a prime example.

Again, the parties were riding horses—a domestic animal—in a private arena. There were no sponsored events taking place and there were no classes being taught. To me, these factors indicate the Burdicks' remedy lies in ordinary negligence similar to a dog bite case and not a heightened sports activity standard. Therefore, I believe the trial court erred when it refused to give the Burdicks' tendered instruction on reasonable care.

Accordingly, I would find that the facts and circumstance of this case support and require that a "reasonable care to prevent injury" instruction be given to the jury. Because no such instruction was given, I would remand this matter for a new jury trial.

Goff, J., joins.