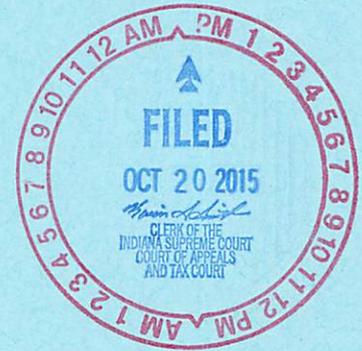


IN THE INDIANA COURT OF APPEALS
Cause No. 22A04-1506-CT-000722



TRESA MEGENITY,
Appellant,

v.

DAVID DUNN,
Appellee.

) Appeal from the
) Floyd Superior Court 3
)
) Trial Court Cause No.
) 22D03-1309-CT-1354
)
) The Honorable Maria Granger, Judge
)
)
)
)

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

In the context of a karate class, in a drill where participants have been instructed to perform a “front kick” on an exercise bag that is being held by another person, is a participant’s performance of a “jump kick” – rather than a “front kick” – within the range of ordinary behavior for that particular sporting activity as a matter of law?

In the above scenario, is the participant’s use of a “jump kick,” despite being instructed to perform a “front kick,” evidence from which a jury could reasonably conclude that the participant’s conduct was negligent, unreasonable, reckless, or otherwise a breach of the applicable duty of care?

STATEMENT OF THE CASE

Appellant Tresa Megenity (“Megenity”) filed her Complaint against Appellee David Dunn (“Dunn”) in the Floyd Superior Court 3 on September 11, 2013, alleging that Dunn had negligently, recklessly, and unreasonably caused her serious and permanent injuries when Dunn kicked her during a karate class on December 1, 2012. App. p. 6. In her Complaint, Megenity alleged that Dunn’s actions were “outside the range of ordinary conduct” for the karate class. *Id.* Megenity’s injuries included a complete ACL tear and damaged menisci in her left knee, which required surgery and physical therapy, and caused her to incur nearly \$55,000.00 in medical bills and to miss eighty (80) work days from her position as a Spanish teacher for Jeffersonville High School, for lost wages totaling \$30,740.00. App. pp. 68; 73; 75-77; 83-85.

On November 14, 2014, Dunn filed a Motion for Summary Judgment. App. p. 12. Megenity filed a timely response and designation of evidence. App. p. 28. On May 28, 2015, the Floyd Superior Court granted Dunn’s Motion in a written Order. App. p. 4-5. Megenity then timely filed her Notice of Appeal. App. p. 53.

STATEMENT OF THE FACTS

The Karate Class

Megenity had been attending karate classes at Terry Middleton's facility three or four times a week for approximately two years, and had achieved the level of black belt. App. p. 67-68. The owner and principle instructor of the facility, Terry Middleton, ran "the same activities every class." App. p. 68. The particular sporting activity at issue in this case involved kicking an exercise bag using "side kicks" and then a "front kick," *id.*, which are terms of art in karate, and both of which require keeping one foot on the ground during the performance of the kick:

22 **Q. Tell me a little bit about -- or, can you**

23 **describe what a front kick is?**

24 A. Yeah. You raise your knee and kick and snap

25 back. Kick with the heel and snap back.

1 **Q. So you're balancing on one foot?**

2 A. Uh-huh (affirmative). And then you hold your

3 hands in a block at all times.

4 **Q. Okay. How about a side kick?**

5 A. You chamber your leg and extend sideways holding

6 a block and retract it and put your leg down.

7 **Q. Does it matter which leg you kick with, left or**

8 **right?**

9 A. The requirements require right.

App. pp. 66-67. Only side kicks and a front kick were part of the "kicking the bag" exercise at issue. App. p. 68.

In karate, "jump kicks" are different than front kicks and side kicks: "jump kicks are never done with bags." App. p. 79. Jump kicks are never done with another student or with another individual holding a bag. App. p. 78. Jump kicks are "always done into the air." *Id.* There is an "exponential force difference" between a "running kick" and a "jump kick." *Id.* "A jump kick is done alone without an opponent as part of your requirements for a belt achievement - achieving a new level. It's not a class activity that you do on a bag." App. p. 79.

The “Kicking the Bag” Drill

The “bag” is a solid rectangular bag, approximately two feet by three feet, eight to ten inches thick, with riveted handles on the side. App. p. 69. The bags were held by instructors or other adult participants, while students took turns kicking the bags in succession. App. p. 68.

The person holding the bag is to brace him or herself properly: “[Y]ou have to have a good grip on the bag, so you hold the sides, and then you extend your left leg back, brace with your front leg because you’re going to be taking a kick. You don’t stand with two feet together because you can fly back. So you have to brace yourself to take an impact of the kick.” App. p. 69. Megenity was holding the bag in this manner at the time of the incident, as she had always held the bag over the previous two years of participation in the class. *Id.* Megenity had held the bag “[c]ountless times” in her “[t]wo-years-worth of multiple classes a week.” *Id.*

The “kicking the bag” drill involved the students kicking three (3) bags in succession, running from one bag to the next:

Bag 1: Side kick
Bag 2: Side kick
Bag 3: Front kick

App. p. 68.

The Incident

About sixty people – adults, children and teenagers – were participating in the “kicking the bag” drill on the day of the incident. App. p. 68. It was the “same drill every time”: Participants would line up, then run to Bag 1, perform a side kick; then run to Bag 2, perform a side kick; then run to Bag 3, perform a front kick; then get back in line. *Id.* At the time of the incident, Megenity was properly braced and holding Bag 3 for the front kick exercise. App. pp. 68-69. Megenity testified that she had “no reason” to be fearful of Dunn as he approached for

his turn. App. p. 72. Megenity held the bag up near her face to protect it, as she had been instructed to do, and therefore did not see Dunn's actual kick to the bag she was holding. App. p. 71; 79. Megenity was not "braced for a jump kick" because to do so "wouldn't come into anyone's realm of possibility because it's not done." App. p. 78.

Megenity described the impact of Dunn's kick as "outside the ordinary scope" of the exercise. App. p. 71. The impact was "extreme." *Id.* In her two years of participating in the karate class, Megenity had never experienced the type of impact she experienced with Dunn's kick. App. p. 78. The "difference between a running kick and a jump kick" is an "exponential force difference." *Id.* Megenity was knocked backward several feet and was airborne, with both of her feet coming off the ground. App. p.72-73. Megenity heard and felt her leg "snap." App. p. 71. "The force of the kick somehow made my leg double and sheared out my ACL and damaged my menisci." App. p. 73.

As Megenity was lying on the floor, Dunn told her, "I'm sorry, I didn't mean to jump." App. p. 72. Megenity testified that Dunn's comment that he "didn't mean to jump" "could not be interpreted any way except to mean that he did a jump kick." App. p. 79. "In that setting in a karate class between karate students, that's exactly what that means." *Id.*

An MRI revealed Megenity had a severed ACL and damage menisci in her left leg and knee. App. p. 75. Megenity was told that she had had "such a traumatic injury that I had to have it rehabed prior to surgery, so that was a couple of months of rehab. My surgery wasn't until February." App. p. 76. Despite the surgery, Megenity continues to have increased difficulty with ordinary movements and activities, including crouching, kneeling, extending her leg, and standing for long periods. App. pp. 76-77. Megenity has a permanent four-degree bend in her leg because of the injury. App. p. 77.

SUMMARY OF THE ARGUMENT

In *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011), the Indiana Supreme Court held that, in certain limited instances, a trial court may rule that a sports participant's conduct is reasonable as a matter of law. Significantly, the Indiana Court of Appeals, applying *Pfenning*, has consistently reversed summary judgment in sports injury negligence cases where plaintiffs have designated evidence that the defendant's conduct was outside the range of ordinary behavior for the particular sporting activity.

In the instant case, Megenity has designated specific evidence that participants in a "kicking the bag" drill in a karate class are never to perform "jump" kicks, and are expected to perform only kicks wherein the participant keeps one foot grounded on the floor. Megenity has also designated evidence that Dunn performed a "jump kick" when he had been instructed to perform a "front kick." This evidence, *inter alia*, presents genuine issues of material fact as to whether Dunn's conduct was within – or outside of – the ordinary range of behavior for that particular sporting activity, and is therefore sufficient under *Pfenning* and the other precedential Indiana case law cited below to overcome a motion for summary judgment.

ARGUMENT

I. Standard of review for summary judgment orders

The standard of review for summary judgment orders entered under Indiana Trial Rule 56 is *de novo*. *Indiana Bell Tel. Co. v. Time Warner Commc'ns of Indiana, L.P.*, 786 N.E.2d 301, 305 (Ind. Ct. App. 2003), *citing Greater Hammond Cmty. Servs., Inc. v. Mutka*, 735 N.E.2d 780, 782 (Ind.2000). "On a summary judgment motion, the court cannot weigh evidence to determine its credibility." *Galligan v. Galligan*, 741 N.E.2d 1217, 1227 (Ind. 2001), *citing National City Bank v. Shortridge*, 689 N.E.2d 1248, 1251 (Ind.1997). Summary judgment

cannot cut off the right to trial where factual disputes exist. *White v. Indiana Realty Associates II* (1990), Ind., 555 N.E.2d 454; *Jones v. City of Logansport* (1982), Ind.App., 436 N.E.2d 1138. A single genuine issue as to any material fact forecloses entry of summary judgment. *Brandon v. State* (1976), 264 Ind. 177, 340 N.E.2d 756. The procedure is summary in nature and the court does not weigh evidence or judge the credibility of witnesses. *Burke v. Capello* (1988), Ind., 520 N.E.2d 439.

State ex rel. Corll v. Wabash Circuit Court, 631 N.E.2d 914, 915-16 (Ind. 1994).

Significantly, the Indiana Supreme Court has recently affirmed that the bar for a grant of summary judgment is high, cautioning the lower courts that “summary judgment is not a summary trial,” and “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.

II. Applicable standard of review for sports injury cases.

In *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011), the Indiana Supreme Court definitively ruled that participants in sports activities owe a duty of care to each other. *Pfenning*, 947 N.E. at 403. In addition to eliminating the “no-duty” rule for sports injury case, the *Pfenning* Court also devised a “limited new rule”:

But in cases involving sports injuries, and in such cases only, we conclude that a limited new rule should apply acknowledging that reasonableness may be found by the court as a matter of law. As noted above, the sports participant engages in physical activity that is often inexact and imprecise and done in close proximity to others, thus creating an enhanced possibility of injury to others. The 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.

Pfenning v. Lineman, 947 N.E.2d 392, 403-04 (Ind. 2011). Thus, “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.” *Id.* at 404. Under *Pfenning*, therefore, in order for a trial court to find a defendant’s conduct reasonable as a matter of law, the defendant’s conduct must have been “reasonable and appropriate for a participant in a particular sporting activity.” *Id.*

III. Indiana precedent calls for reversal of summary judgment here.

To date, *Pfenning v. Lineman*, the seminal case in this area of sports injury law, has been applied in only two (2) other Indiana cases that actually concern sports injuries.¹ Significantly, both of those cases reversed grants of summary judgment because, just like in the instant case, the plaintiff had designated evidence from which a jury could reasonably conclude that the defendant tortfeasor had done something outside the ordinary range of conduct for the particular sporting activity at issue.

A. *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011)

In *Pfenning* itself, the plaintiff, 16-year old Cassie Pfenning, was driving a beverage cart around a golf course at a golf outing. *Pfenning v. Lineman*, 947 N.E.2d 392, 396 (Ind. 2011). After making several trips around the course, Pfenning “was suddenly struck in the mouth by a golf ball[.]” *Id.* at 397. The golfer, Joseph Lineman, had hit a drive that had severely hooked to the left after traveling straight for approximately sixty to seventy yards. *Id.* Lineman had

¹ The Indiana Supreme Court revisited *Pfenning* in *South Shore Baseball, LLC v. DeJesus*, 11 N.E.3d 903 (Ind. 2014), but only as to principles regarding premises liability, not ordinary negligence, thus *South Shore Baseball* is inapposite here. See *South Shore Baseball, LLC v. DeJesus*, 11 N.E.3d 903, 906-11 (Ind. 2014). *Pfenning* has also been cited in a number of other cases where summary judgment was reversed, but these cases are not quite on point here because they do not involve sports injuries. See, e.g., *Christmas v. Kindred Nursing Centers Ltd. P'ship*, 952 N.E.2d 872, 880 (Ind. Ct. App. 2011) (premises liability case; summary judgment reversed because plaintiff designated evidence that defendant breached duty of care); *J.H. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 19 N.E.3d 811, 818 (Ind. Ct. App. 2014) (summary judgment reversed where defendant did not designate an affidavit, expert opinion, or other evidence to affirmatively negate plaintiff’s claim); *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 28 N.E.3d 310 (Ind. Ct. App. 2015), *reh'g denied* (June 25, 2015) (reversing summary judgment, finding that a bar has a duty to take precautions to protect patrons from reasonably foreseeable third-party criminal acts on the bar’s premises).

noticed the roof of another cart in the direction of the shot and shouted “fore,” but neither the plaintiff nor her companion heard any warning. *Id.*

In the negligence action that followed, Lineman sought summary judgment on the grounds that he owed no duty of care to the plaintiff, who was a co-participant in the sporting event, and her injuries resulted from an inherent risk of the sport that she had assumed. *Id.* at 398. The trial court granted summary judgment. *Id.* at 396.

On appeal, the Indiana Supreme Court “reject[ed] the concept that a participant in a sporting event owes no duty of care to protect others from inherent risks of the sport,” but adopted “instead the view that summary judgment is proper when the conduct of a sports participant is within the range of ordinary behavior of participants in the sport and therefore is reasonable as a matter of law.” *Id.* at 396. “The 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 403-404. The *Pfenning* Court concluded that “[a]s to the golfer’s hitting an errant drive which resulted in the plaintiff’s injury, such conduct is clearly within the range of ordinary behavior of golfers and thus is reasonable as a matter of law and does not establish the element of breach required for a negligence action.” *Id.* at 404.

Here, the Court will note the salient fact of *Pfenning* that is missing in the instant case: there was no evidence or allegation that the golfer’s swing or drive in *Pfenning* was outside the range of ordinary behavior for the sport. Instead, Lineman hit his drive exactly as golfers are supposed to do. There was, therefore, simply no evidence that Lineman had been negligent.

In the instant case, by contrast, Dunn did not perform the kick he was instructed to perform. Dunn “jumped” when he was expected to perform a “front kick.” The performance of a front kick requires keeping one foot grounded on the floor, while a “jump” kick is a “projectile-

type kick” that produces an “exponential force difference” from a grounded front kick. App. pp. 67; 78. These material facts alone preclude summary judgment under *Pfenning* because they are evidence from which a reasonable jury can conclude that Dunn’s conduct was outside the range of ordinary behavior for the particular sporting activity, evidence that was missing as to the golfer in *Pfenning*.

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

The first post-*Pfenning* sports injury case addressed by this Court was *Welch v. Young*, in which a little league baseball player, Jordan Young, was taking practice swings outside the field when he struck Mrs. 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 Welch was a “participant,” but on whether Jordan Young’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. Just as the *Pfenning* Court had focused on the conduct of the defendant golfer and determined that there was no evidence that he had done anything unusual that could suggest negligence, the *Welch* Court focused on the conduct of the defendant baseball player to determine whether there was evidence that he had done anything 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 there is designated evidence before the Court that Dunn’s “jump” was outside the range of ordinary behavior for participants in the “kicking the bag” drill: Dunn said he was sorry he “jumped”; jump kicks are never done in the “kicking the bag” drill; and only side kicks and front kicks were to be performed by the participants. App. pp. 68; 72; 78. Accordingly, because Megenity has designated evidence from which a reasonable jury can conclude that Dunn’s conduct was outside the range of ordinary behavior for the particular sporting activity, summary judgment is improper under *Welch*.

C. *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 *Haire* Court reversed summary judgment, 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 during the “kicking the bag” exercise 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 showing that “jump kicks” are never performed with a partner holding a bag or in the context of the “kicking the bag” drill. App. pp. 78-79.

Therefore, *Haire, Welch* and *Pfenning* all support a finding that summary judgment is improper here. This is especially true in light of the Indiana Supreme 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, as noted above and expounded upon below.

IV. Genuine issues of material fact on the evidence of record preclude summary judgment.

A. There was no evidence before the trial court that a “jump kick” was within the ordinary range of behavior for the “kicking the bag” drill.

In the instant case, in its Order Granting Summary Judgment, the trial court determined that Dunn’s “actions were within the range of ordinary behavior of participants in karate within the context of the ‘kicking the bag’ drill, and thus his conduct is reasonable as a matter of law and does not constitute a breach of duty.” App. p. 5.

However, as shown in the Statement of the Facts, above, the evidence before the trial court regarding the “kicking the bag” drill was that the drill involved only front kicks and side kicks. App. p. 68. There was no evidence at all before the trial court that “jump kicks” were reasonable and appropriate for the drill. To the contrary, there was ample evidence that “jump kicks” are only performed solo, never with a partner holding a bag, and never in the context of the “kicking the bag” drill. App. pp. 78-79.

Despite this affirmative evidence that the jump kick was out of the ordinary in the “kicking the bag” drill, and without citation to any evidence of record, the trial court concluded that Dunn’s jump kick – during an exercise where jump kicks are not permitted – was reasonable as a matter of law. The trial court’s error appears to stem from its conflation of the variety of actions that may be *generally* practiced in the sport of karate with what was *specifically* practiced in the “kicking the bag” drill at Terry Middleton’s, as Appellant examines next.

B. The trial court erred by conflating the general sport of karate with the particular sporting activity of the “kicking the bag” drill.

Under Indiana law, a defendant’s conduct must have been “reasonable and appropriate for a participant in a particular sporting activity” in order for a trial court to find a defendant’s conduct reasonable as a matter of law. *Pfenning, supra*, 947 N.E.2d at 403-404. In the instant case, because there was affirmative evidence that Dunn’s “jump” was outside the range of ordinary conduct for the “kicking the bag” drill, the trial court’s error lies in its apparent conflation of two distinct concepts, namely: (1) the *general sport of karate*, in which a variety of kicks, punches and jumps are practiced in a variety of contexts, and (2) the “particular sporting activity” (*Pfenning, supra*, at 403) that is a “kicking the bag” drill.

At hearing in the trial court, Dunn emphasized that karate is a “high contact, inherently dangerous sport”; “Karate is defined as a striking art...” Tr. p. 6. Dunn also emphasized the application for membership that Megenity signed upon her enrollment at Terry Middleton’s, (Tr. p. 12; App. pp. 13, 24; 99), which contains language that participants acknowledge that the program involves “sweeps, takedowns, kicks, punches, and other strikes.”²

Importantly, in its grant of summary judgment, the trial court explicitly considered the language contained in Megenity’s membership contract. App. p. 4. Dunn’s eagerness to direct the trial court’s attention away from the conduct of Dunn is understandable, but is nevertheless contrary to *Pfenning*’s directive that it is the conduct of the alleged tortfeasor, not the injured person, that is to be the trial court’s subject of inquiry. *Pfenning, supra*, 947 N.E.2d at 403.

² Notably, any waiver in the application for enrollment has no applicability here as Dunn was not a party to that contract. Even if any such waiver were applicable, Dunn would equally have agreed that “Caution must be used while participating in this program,” and to abide by “all of the applicable rules and regulations of Terry Middleton’s [.]” App. p. 99. Dunn’s admission that he “jumped” during the “kicking the bag” drill is a material fact that goes directly to Dunn’s failure to abide by the rules of the sport, and to the issue of his breach of the duty of care he owed under *Pfenning* in so doing.

Moreover, the particular sporting activity at issue here is not the “sport of karate” in all its variety, but the “particular sporting activity” (*Pfenning, supra*, at 403) of “kicking the bag.” In the evidence of record, the particular sporting activity of “kicking the bag” never involves jump kicks, but only kicks where the participant keeps one foot grounded. App. p. 68; 78, 79.

The premise of this appeal is therefore very straightforward: There was no designated evidence before the trial court that Dunn’s actions were, in fact, within the range of ordinary behavior for the “kicking the bag” drill. Indiana law imposes the “onerous burden” on summary judgment movants 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). Dunn failed to meet that burden. Instead, the very specific evidence before the trial court pertaining to the “kicking the bag” drill was that only “side kicks” and “front kicks” were ordinarily – indeed, ever – to be used. App. p. 68; 78. Additionally, Megenity’s testimony that she had never experienced anything like the “extreme” impact of Dunn’s kick in her two years of karate lessons – including in her experience having held the bag “countless” times – permits a reasonable inference that Dunn’s kick was not “ordinary” for the drill. Thus, Dunn’s “jump” kick was, on the evidence of record, *outside* the range of ordinary behavior for the “kicking the bag” drill.

The “kicking the bag” drill *itself* is certainly within the ordinary range of activities of any karate class. The issue presented on this appeal is whether a “jump kick” within the context of a “kicking the bag” drill is within the ordinary range of activities for that “particular sporting activity.” Because the evidence of record is sufficient to permit a reasonable jury to conclude that Dunn’s kick was outside the ordinary range of behavior for the “kicking the bag” drill, this genuine issue of material fact precludes summary judgment.

C. Whether Dunn’s apology and comment meant he performed a “jump kick” or some other kind of kick is a genuine issue of material fact and requires the weighing of evidence and assessing witness credibility, which are functions for a jury under Indiana law.

As noted above, Indiana law requires a summary judgment movant to meet the “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). Indiana law also actively discourages trial courts from stepping into the jury box to act as fact-finders on motions for summary judgment. “The procedure is summary in nature and the court does not weigh evidence or judge the credibility of witnesses.” *State ex rel. Corll v. Wabash Circuit Court*, 631 N.E.2d 914, 915-16 (Ind. 1994), citing *Burke v. Capello*, 520 N.E.2d 439 (Ind. 1988). “On a summary judgment motion, the court cannot weigh evidence to determine its credibility.” *Galligan v. Galligan*, 741 N.E.2d 1217, 1227 (Ind. 2001), citing *National City Bank v. Shortridge*, 689 N.E.2d 1248, 1251 (Ind.1997).

On appeal, Dunn will doubtless insist that Megenity can do no more than “speculate” that Dunn’s apology – “I didn’t mean to jump” – meant that he in fact performed a jump kick. Nevertheless, the evidence of record before the trial court – which this Court must view in a light most favorable to Megenity – was that Dunn’s comment, “I’m sorry, I didn’t mean to jump,” could *only* have reasonably meant that he performed a jump kick, *and* that Dunn knew he wasn’t supposed to have performed a jump kick:

**4 Q. Is it possible that his comment that he did not
5 mean to jump does not mean he did a jump kick?**

6 A. I don't know.

7 Q. Or your --

8 A. I don't know what else he could've meant.

9 Q. My question is is it possible?

10 A. Is it possible? No, I don't think it's possible.

11 I think it -- I think it states very clearly what he meant

12 to say.

13 **Q. So your testimony is the fact that he said he did**
14 **not mean to jump could not be interpreted any way except to**
15 **mean that he did a jump kick?**

16 A. In that setting in a karate class between karate
17 students, that's exactly what that means.

App. p. 79.

The question of whether or not Dunn did a jump kick is a genuine issue of material fact. Megenity's testimony is affirmative evidence that Dunn performed a jump kick when he knew he wasn't supposed to. The undisputed material fact that Dunn admitted to having "jumped" supports conflicting reasonable inferences as to whether Dunn breached his duty of care. To the extent Dunn disputes that he performed a jump kick, the evidence is in conflict, and it is not the function of a judge, but of a jury, under Indiana law to weigh evidence and assess witness credibility. *State ex rel. Corll, supra*, 631 N.E.2d at 915-16; *Galligan, supra*, 741 N.E.2d at 1227; *Hughley, supra*, 15 N.E.3d at 1005.

Finally on this point, any claim that Dunn may make on appeal that his conduct was "within the range of ordinary behavior" for the "kicking the bag" drill, or even for the sport of karate in general, will materially conflict with Megenity's evidence that Dunn's kick was outside the range of ordinary behavior. Neither this Court nor the trial court is permitted to weigh evidence or assess witness credibility on a motion for summary judgment. Here, the trial court impermissibly weighed Dunn's argument that he behaved reasonably against Megenity's evidence that Dunn behaved *unreasonably*. Megenity testified that Dunn's conduct was not "reasonable and appropriate," and that Dunn's comment – "I'm sorry, I shouldn't have I jumped" – makes clear that he understood that a "jump" was not "reasonable and appropriate" in the context of the exercise. *Pfenning, supra*, 947 N.E.2d at 403-04. Discovery and trial will also permit experts, if necessary, to say whether this was or was not "within the range of ordinary

behavior” of karate participants. *Id.* These abundant issues of material fact require resolution by a jury at trial under Indiana law.

V. Public policy favors finding a jury question as to negligence exists when sports participants don’t play by the rules of the sport.

The Indiana Supreme Court premised its decision in *Pfenning*, at least in part, on the notion that participation in sports should be encouraged: “[S]trong 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.” *Pfenning v. Lineman*, 947 N.E.2d 392, 403 (Ind. 2011).

Underpinning this premise, however, is the fundamental expectation that sports participants will *play by the rules*. If sports participants cannot expect that others will abide by the rules of the sport, then an “anything goes” tort immunity will be just as discouraging to participation in sports as “excessive litigation” could be. The golfer in *Pfenning* was absolved of liability *precisely because* he was playing by the rules of golf when he hit an errant ball. *Pfenning, supra*, 947 N.E.2d at 404. Here, however, Dunn was *not* playing by the rules of the “kicking the bag” drill; he chose to “jump” for an exercise that called for “front kicks,” which require keeping one foot grounded on the floor. App. pp. 68; 72; 78.

Here, then, is the consequence that neither the *Pfenning* Court nor the trial court below could have intended: Per the “anything-goes-as-long-as-it’s-sports” logic undergirding the trial court’s grant of summary judgment in this case, an Indiana karate class can now be a free-for-all, where – as long as no one acts with an *intent* to harm anyone else – every sort of exercise should be permitted whenever a participant feels like doing it: Swipe kicks during punching practice; roundhouse kicks during back-kick exercises; take-downs during warm ups. But such an outcome is untenable and will discourage sports participation. The participants’ expectation that

other players will abide by the rules of the game is fundamental to encouraging participation in any sport, not just karate. For example, basketball players would (rightly) find it unacceptable and “outside the range of ordinary behavior” for a participant to decide he wants to practice his stealing drills during free-throw practice, especially if that decision caused someone to get hurt.

This leads to the final point. The trial court’s ruling here permits a broad prejudice against sports that may be less familiar to a particular sitting trial judge. Here, it appears that the distinctions between a “jump kick,” “front kick,” “side kick,” “flying kick,” “running kick” and so on, were distinctions without a difference to the trial judge. Yet within the context of karate, such distinctions are very real, and are easily as important as the differences any Hoosier can spot (or claim to spot) between “goaltending” and “basket interference,” or between a “personal foul” and a “flagrant foul,” or between “traveling” and “carrying,” or any number of other minutia one may argue about as to what constitutes playing the game by the rules. Megenity’s evidence that Dunn was not playing by the rules of karate, especially the rules of the “kick the bag” drill, constitutes a genuine issue of material fact that makes summary judgment improper.

CONCLUSION

In *Pfenning*, the Indiana Supreme Court did not rule that negligence can no longer be found in Indiana sports injury cases. Rather, the *Pfenning* Court devised a “limited new rule” that a sports participant’s conduct can be found reasonable as a matter of law when said conduct is “within the range of ordinary behavior” for that particular sporting activity. It necessarily follows, therefore, that when a participant’s conduct is *outside* the range of ordinary behavior for the activity, said conduct is *not* reasonable as a matter of law, and negligence may lie. In *Pfenning, supra*, there was no question that the defendant golfer was acting within the range of ordinary activity for the sport in question. In *Welch* and *Haire*, both *supra*, summary judgment

was reversed because the plaintiffs had designated evidence that the defendant participants' conduct was outside the range of ordinary behaviors for the respective sports in those cases, which were decided under *Pfenning*.

Here, the trial court was presented with affirmative evidence that the performance of a "jump kick" in the context of a "kicking the bag" drill was not within the range of ordinary behavior for the karate class. The trial court therefore erred in rejecting Meginity's affirmative evidence that a "jump kick" was not reasonable or appropriate.

WHEREFORE, Appellant, Tresa Megenity, respectfully requests that the Court REVERSE the trial court's grant of summary judgment in the cause below, and REMAND this cause so that the parties may be permitted to proceed in the court below on the merits, and for all other just and proper relief.

Respectfully submitted,

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FILED

MAY 28 2015

IN THE SUPERIOR COURT NO. 3 FOR FLOYD COUNTY
STATE OF INDIANA

Christina M. Euston
CLERK OF THE SUPERIOR COURT NO. 3
FLOYD COUNTY

TRESA MEGENITY,
Plaintiff,

vs.

CASE NO.: 22D03-1309-CT-1354

DAVID DUNN,
Defendant.

ORDER GRANTING SUMMARY JUDGMENT

This cause came before the Court upon Defendant's, David Dunn, Motion for Summary Judgment,

And the Court having examined said Motion and being duly advised in the premises now finds that same should be GRANTED.

The relevant facts presented in the designated evidence are mostly undisputed. Tresa Megenity was injured on December 1, 2012, during karate class at Terry Middleton's Karate Kickboxing and Boxing. She was injured during a routine drill referred to as "kicking the bag" which involved participants holding one of three bags and other participants running up to the bags and kicking. Tresa Megenity's injury occurred while David Dunn was executing a kick to the bag she was holding. Prior to this drill, the parties had no history of interaction in the program. During the drill, David Dunn executed a kick to the bag that Tresa Megenity was holding, not to her person. She had been a student of the karate and kickboxing program for over two years. She regularly participated in the sport on a weekly basis and volunteered to hold the bag for drills and exercises. Her application for membership included an express acknowledgement that members must sign which states: "I am aware that this art has many techniques such as sweeps, takedowns, kicks, punches, and other strikes. Caution must be used while participating in this program." Tresa Megenity had mastered the advanced skills of a

first degree black belt. David Dunn had mastered the skill of a green belt at the time of the injury. Tresa Megenity's suffered injury to her ACL and menisci in her left knee.

David Dunn is entitled to summary judgment as a matter of law. Pursuant to *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011), his 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 is reasonable as a matter of law and does not constitute a breach of duty. Tresa Megenity does not claim or designate evidence to support that David Dunn's conduct was reckless or was the result of his intent to injure her. David Dunn's conduct was within the ordinary range of behavior of participants in karate and did not exceed that range. David Dunn's conduct was reasonable as a matter of law.

The Court further finds that there is no just reason for delay and expressly direct entry of Judgement for the Defendant.

IT IS THEREFORE ORDERED by the Court that Defendant David Dunn's Motion for Summary Judgement be, and the same is hereby, GRANTED and Judgment is entered for Defednant.

SO ORDERED THIS 28TH DAY OF MAY, 2015.



Hon. Maria D. Granger, JUDGE
FLOYD SUPERIOR COURT 3

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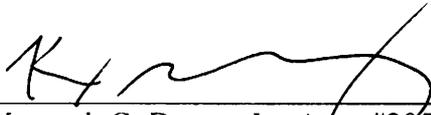
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of October, 2015, the foregoing was filed with the Clerk of the Indiana Court of Appeals, via United States mail, postage prepaid.

I also certify that on this 20th day of October, 2015, the foregoing was served upon the following in accordance with App. R. 24, via United States mail, postage prepaid:

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