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IN THE COURT OF APPEALS OF INDIANA

Tippecanoe School Corporation,
Appellant-Defendant,

v.

Michelle Reynolds and Steven Reynolds, as Parents and Legal Guardians of Isabella Reynolds, a minor,
Appellees-Plaintiffs,

April 7, 2022

Court of Appeals Case No. 21A-CT-1482

Appeal from the Tippecanoe Circuit Court

The Honorable Sean M. Persin, Judge

Trial Court Cause No. 79C01-1909-CT-127

Robb, Judge.

Case Summary and Issue

[1] Isabella Reynolds fell while performing a cheerleading routine for William Henry Harrison High School ("Harrison High School") in early 2019. As a result, Reynolds suffered extensive injuries to her face and mouth. Harrison High School is part of the Tippecanoe School Corporation ("TSC") and in the fall of 2019, Reynolds filed a negligence claim against TSC, among others, that was based, in part, on the failure of TSC to provide proper supervision. TSC filed a motion for summary judgment on Reynolds' negligence claim. The trial court denied TSC's motion for summary judgment as it pertained to whether TSC provided negligent supervision.

[2] TSC filed a motion to reconsider and, in the alternative, argued that Reynolds' claim for negligent supervision was barred by the doctrine of incurred risk. The trial court again denied summary judgment. TSC brings this interlocutory appeal, raising multiple issues for our review, which we consolidate and restate as whether the trial court abused its discretion in denying TSC's motion for summary judgment on reconsideration. Concluding that the trial court abused its discretion, we reverse and remand.

Facts and Procedural History[1]

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[1] We held oral argument in this case on March 11, 2022, at Swan Lake Resort in Plymouth, Indiana, during the annual Women's Bench Bar Retreat. We commend counsel on the quality of their oral and written advocacy, and we thank Swan Lake Resort, the Indiana State Bar Association, and the Women in Law

[3] At the time of her accident, Reynolds was a "flyer" on the Harrison High School junior varsity cheerleading squad. A flyer is the cheerleader lifted or thrown into the air during cheerleading routines. *See* Appellant Appendix, Volume II at 42-43. Reynolds, a then-sophomore, had been a flyer since seventh grade, knew the skills required of the position, and understood that being accidentally dropped by her fellow cheerleaders was one of the risks associated with being a flyer in the sport of cheerleading.

[4] In January 2019, Harrison High School's head varsity cheerleading coach, Roberta Patton, asked Reynolds to cheer with the varsity squad at an upcoming basketball game because the normal flyer was unavailable. Reynolds replied that she would "love to" and attended the varsity practice the night before the game. *Id*. at 46, 140. At the practice, while using protective mats to cover the floor, Reynolds performed the routine several times. Protective mats are utilized to "practice and learn new skills[,]" *id.* at 80, but once a routine is "game ready," mats are not used for warm-ups or games, *id*. at 147 (deposition page 20). Reynolds had also performed the routine multiple times prior to her practice with the varsity team and completed the routine at the varsity's practice "flawlessly" and "perfectly" several times. *Id*. at 80, 119. As a result, Patton determined that the squad, including Reynolds, was "game ready." *Id*. at 80.

Committee for hosting the event, as well as the attendees for their insightful questions posed to the panel and counsel after the argument.

[5] On the following night, Reynolds and her teammates warmed up for their routine in the Harrison High School auxiliary gymnasium. Although she did not focus solely on Reynolds, Patton was present and observed the warm-up. In order to replicate the conditions under which the cheerleaders would perform the routine at the basketball game, Patton elected to conduct the warm-up without protective mats over the floor or additional spotters for the flyers. Designated evidence demonstrated that the choice was not unusual in that such precautions would not be used during the performance itself. *See id*. at 53 (Reynolds' deposition), 80 (Patton's deposition). Jerry Galema, Harrison High School Athletics Director, testified similarly in his deposition that mats are typically not used at pregame warmups or at basketball or football contests. *See id*. at 143 (deposition page 14). However, Patton did indicate that there was nothing preventing the use of mats during the warm-up. *See id*. at 147 (deposition page 20).

[6] Part of the routine required that Reynolds be hoisted in the air and lowered back down to the ground. However, as the team was completing its run-through of the routine, Reynolds' teammates failed to lower her to the ground, and she was dropped onto the gymnasium's bare hardwood floor. As a result of the fall, Reynolds broke her jaw and most of her teeth. She required emergency surgery as well as extensive follow-up and rehabilitation.

[7] Two cheerleading coaches from other teams explained they would have conducted the warm-up differently; Reynolds' teammates made mistakes; and Patton made coaching errors regarding technique, the use of additional safety

mechanisms, and the extent to which she supervised Reynolds specifically.[2] However, neither coach indicated that the type of routine performed was out of the ordinary for the sport of cheerleading. Although the extent of the injury was not expected, falls and head injuries are a common concern. Patton indicated that head injuries due to falls are always a fear in cheerleading and said that in the previous year, multiple cheerleaders suffered concussions due to falling during either a practice or game. *See id*. at 147-48 (deposition pages 21and 24). Further, Reynolds testified that the biggest danger associated with being a flyer is "[c]oncussions mostly because people drop other girls." *Id*. at 43.

[8] In September 2019, Reynolds filed a complaint for damages alleging that Patton, Galema, Harrison High School, and TSC (collectively "Defendants") were negligent. Specifically, Reynolds alleged the Defendants carelessly and negligently failed to (1) inspect and discover a dangerous condition/activity, (2) warn Reynolds of the dangerous condition/activity, (3) provide proper supervision, and (4) correct the dangerous condition/activity. Subsequently, the parties stipulated to the dismissal without prejudice of Patton, Galema, and Harrison High School as Defendants which the trial court granted in November 2019, leaving TSC as the sole defendant in this case.

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[2] One of these coaches was Patton's assistant coach, Sandra Marrow, who coached Reynolds on the junior varsity team. Marrow was not present at the time of the injury.

[9] In January 2021, following extensive discovery, TSC filed a motion for summary judgment on all four of Reynolds' negligence claims. The trial court heard arguments on TSC's motion for summary judgment in March 2021 and granted TSC's motion for summary judgment as to all claims except Reynolds' claim of failure to provide proper supervision. TSC filed a motion to reconsider arguing that under current Indiana law, TSC was entitled to judgment as a matter of law on the negligent supervision claim and, in the alternative, the doctrine of incurred risk barred Reynolds' negligence claim. Upon reconsideration, the trial court denied summary judgment to TSC on Reynolds' negligent supervision claim and found that Reynolds' claim was not barred by the doctrine of incurred risk. At TSC's request, the trial court certified its orders for interlocutory appeal and this court accepted jurisdiction.

Discussion and Decision

I. Standard of Review

[10] A trial court has the inherent power to reconsider, vacate, or modify any of its previous orders as long as the case has not proceeded to final judgment. *Mitchell v. 10th & The Bypass, LLC*, 3 N.E.3d 967, 971 (Ind. 2014). We review a trial court's reconsideration of its prior ruling for an abuse of discretion, which occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it or when it misinterprets the law. *Id*. at 970. When reconsidering a summary judgment ruling, a trial court may only consider

material properly before it at the time the order on summary judgment was first entered. *Id*. at 973.

II. Negligent Supervision in Sport

A. The *Pfenning* Rule

[11] To prevail on a claim of negligence a plaintiff must show: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach proximately caused a compensable injury. *Matter of C.G.*, 157 N.E.3d 543, 546 (Ind. Ct. App. 2020). Under the doctrine of respondeat superior, an employer is liable for a coach's negligent acts where those acts occurred within the scope of employment. *Id*. Here, TSC and Reynolds agreed in their stipulation of dismissal that Patton was acting in the course and scope of her employment as head varsity cheerleading coach at the time of Reynolds' injury. *See* Appellant's App., Vol. II at 20.

[12] Whether a defendant breached a duty is typically a question of fact for the jury. *Matter of C.G.*, 157 N.E.3d at 546. However, in *Pfenning v. Lineman*, 947 N.E.2d 392, 403-04 (Ind. 2011), our supreme court established a limited new rule in regard to negligence claims "arising from ordinary sports activity." *Megenity v. Dunn*, 68 N.E.3d 1080, 1082 (Ind. 2017). "[A]s a matter of law, when a sports participant injures someone while engaging in conduct ordinary in the sport—and without intent or recklessness—the participant does not breach a duty." *Id*. "[U]nder *Pfenning* ordinary conduct in the sport turns on the sport generally—not the specific activity." *Id*.

[13] Here, at issue is whether the cheerleading routine Patton had Reynolds and her teammates perform was ordinary for the sport of cheerleading.[3] Also at issue is whether negligent supervision is a separate cause of action capable of escaping a *Pfenning* analysis.

B. Ordinary Behavior

[14] In *Pfenning*, a teenager was attending a golf scramble with her grandfather. The two were volunteering on the drink cart that serves the participants. Neither was intending to golf and the teenager was relatively unfamiliar with the sport. The grandfather selected the cart they would use. The cart had windows, but there was conflicting evidence as to whether the cart was equipped with a roof. Shortly after he selected the cart, the grandfather left the teenager on her own so he could join a shorthanded group of golfers. While on her own, the teenager suffered injuries to her face after she was hit by a golf ball that was struck by a participating golfer. The teenager brought negligence claims against multiple parties including the golfer.

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[3] We need not address either the participant or reckless/intentional elements of the *Pfenning* analysis. On appeal, neither party contends that Patton was acting either intentionally or recklessly. Further, there is designated evidence that Reynolds' mother did not believe Patton intentionally injured her daughter. *See* Appellant App., Vol. II at 69-70. And Reynolds has never alleged intentional conduct. Further, on appeal, Reynolds does not now argue that Patton was acting recklessly. Therefore, for the purposes of this appeal we need not address the intentional or reckless prong of *Pfenning*. *See C.G.*, 157 N.E.3d at 548 (indicating that recklessness cannot be shown where no such argument is made on appeal).

Additionally, prior to this appeal, Reynolds has made no argument that a coach is not a participant in the sport. In fact, at the hearings on summary judgment Reynolds agreed with the trial court and TSC that a coach *is* a participant for the purposes of the *Pfenning* rule. *See* Transcript, Volume 2 at 6. Therefore, she cannot argue otherwise on appeal. *See C.G.*, 157 N.E.3d at 547 (holding that failure to argue that a coach is not a participant prior to appeal results in waiver of that argument).

[15] Refusing to analyze the particular circumstances of the shot, including whether or not the golfer gave a warning shout of "fore," the court held that the golfer's behavior was ordinary. *Pfenning*, 947 N.E.2d at 404. The court explained that due to the variable nature of golf, hitting an errant drive even without a warning 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 [of duty]." *Id*. Because of this, the court determined that the golfer was not liable under a theory of negligence and affirmed the trial court's award of summary judgment to the golfer. *Id*. at 404-05.

[16] Subsequently, in *Megenity*, the court clarified the analysis needed to determine what is ordinary behavior and held that *ordinary behavior* for the purposes of the *Pfenning* rule *turns on a general analysis of the sport and not an analysis of the specific activity*. 68 N.E.3d at 1084. The court reasoned that *Pfenning* "did not get stuck in the rough, scrutinizing the specifics[.]" *Id*. In fact, "[w]e need not, and should not, parse nuances" of a particular sport. *Id*. Rather, a "broad, sport-centric focus makes sense[,]" as sports are "imprecise and physically intense" and participants "should not fear that judges will later armchair-quarterback their every movement." *Id*. "After all, judges are more likely to have *general* sports knowledge than *specific* sports expertise." *Id*.

[17] The backdrop for this clarification was a case in which a karate student injured a fellow participant when he performed a jump kick into a bag held by the fellow participant during a drill. The jump kick was against protocol for the drill. Applying a general analysis of the sport of karate, the court held that the

student's conduct was reasonable as a matter of law and therefore, the student did not breach his duty to the fellow participant. *Id*. at 1083-84. The court reasoned that it need not look at whether the kick was proper for the specific drill, but whether the kick takes place within the sport of karate generally. *Id*. at 1084. Because the sport of karate involves various kicks such as jump kicks, the karate student's actions were ordinary for the sport of karate. There were no material issues of fact and the court affirmed summary judgment in favor of the karate student. *Id*. at 1086

[18] Just as the karate student in *Megenity* could not be negligent for his errant jump kick because the kick was ordinary in the sport of karate generally, TSC argues that the routine performed by the cheer squad was ordinary within the sport of cheerleading generally and therefore, TSC could not be negligent. TSC contends its designated evidence shows that under a general analysis of the sport of cheerleading, these types of routines without the use of mats are ordinary. *See* Brief of Appellant at 29. TSC designated as evidence the testimony of Reynolds and Patton which shows that cheerleaders are regularly hoisted into the air and caught by their teammates. *See* Appellant's App., Vol. II at 42-43, 79-80. Additionally, TSC designated as evidence testimony that demonstrates mats are not ordinarily used for routines conducted during warm-ups and games. *See id*. at 53, 80. Therefore, TSC argues that when applying a general review of the sport as required by *Megenity*, TSC has demonstrated that the conduct of the cheerleading squad was ordinary and therefore, it is entitled to judgment as of law.

[19] On the other hand, Reynolds argues that the particular circumstances surrounding the injury and Patton's actions take the events outside the realm of ordinary. Specifically, Reynolds argues that this is not an ordinary sports activity; rather,

> it is an extremely unusual circumstance where Patton 'called up' a junior varsity cheerleader the day before a game who she had never coached before, had her practice a difficult stunt with a new stunt group two to three times, and then had her warmup with the new stunt group the next day with no mats, no additional spotters, and without directly watching her warm up. This behavior is not within the range of ordinary behaviors of coaches in supervising their cheerleaders[.]

Brief of Appellee at 17. In support of her argument, Reynolds designated as evidence statements from two coaches who opined that they would have conducted the warm-up differently; Reynolds' teammates made mistakes; and Patton made coaching errors regarding technique, the use of additional safety mechanisms, and the extent to which she supervised Reynolds specifically. *See* Appellant App., Vol. II at 164-66 (deposition pages 27-35), 167-68. However, no coach, or other material designated by Reynolds, articulated that these types of routines under these circumstances, in general, were not ordinary for the sport of cheerleading.

[20] Although Reynolds' designated evidence suggests that Patton's individual actions associated with coaching and supervision were inappropriate, nothing suggests that this routine was outside the ordinary conduct observed in the sport of cheerleading as a whole. Reynolds' argument requires a narrow review of

specific actions taken by Patton and such an analysis is not consistent with *Megenity* which requires a "broad, sport-centric" analysis to determine ordinary conduct for the sport, generally. 68 N.E.3d at 1084. Applying a general analysis of cheerleading, TSC's designated evidence demonstrates that the routine performed and the circumstances under which it was performed were ordinary. Both Reynolds and Patton testified to the nature of cheerleading which includes hoisting cheerleaders into the air and catching them as they are lowered to the ground. *See* Appellant App., Vol. II at 42-43, 79-80. Reynolds testified that the sport of cheerleading includes the risk that cheerleaders can suffer injuries from falling or being dropped. *See id*. at 43. Further, Reynolds and Patton testified that the use of additional safety mechanisms, such as mats, during warm-ups and contests was not typical under the circumstances. *See id*. at 53 (Reynolds' deposition), 80 (Patton's deposition). Nothing Reynolds has presented demonstrates otherwise.

[21] We conclude that the routine Patton had Reynolds and her teammates perform was ordinary within the sport of cheerleading as a whole. Therefore, TSC satisfies the ordinary behavior element of the *Pfenning* analysis. However, prior to determining that TSC is entitled to judgment as a matter of law, we must address whether negligent supervision is a separate claim that is outside the reach of *Pfenning*.

C. Negligent Supervision as a Separate Cause of Action

[22] In *Pfenning*, the injured teenager also brought a claim against her grandfather for negligent supervision. The court declined to grant summary judgment as to the negligent supervision claim against the grandfather. *Pfenning*, 947 N.E.2d at 410. The court made no determination as to whether the grandfather was a participant and simply stated that to hide behind protections offered to sports participants minimizes the grandfather's relationship with the teenager. *Id*. The court indicated that negligent supervision involves the well-recognized duty in tort law that persons entrusted with children and other individuals, whose characteristics make it likely that they may do unreasonable things, have a special responsibility recognized by the common law to supervise their charges. *Id*.

[23] TSC argues that negligent supervision cannot be a separate cause of action capable of surviving summary judgment under *Pfenning* and *Megenity.* In its original motion for summary judgment, TSC argued that if the act of performing the cheerleading routine is ordinary behavior in the sport of cheerleading in general, then to parse out separate actions by one participant related to supervision, unless reckless or intentional, is contrary to *Megenity*. *See* Appellant App., Vol. II at 30-31. On appeal, TSC makes the same argument. *See* Reply Brief of Appellant at 25.

[24] Conversely, Reynolds has consistently argued that *Pfenning* expressly allows for a separate analysis of negligent supervision. *See* Appellant App., Vol. II at 97-

99*; see also* Br. of Appellee at 17. According to Reynolds, *Pfenning* applies only to "routine accidents" and not the negligent failure to supervise. *See* Br. of Appellee at 18. In making her argument, she adopts the reasoning of the trial court that everyday decisions differ from circumstances where a coach places an athlete in a new situation and fails to provide ideal levels of supervision including failing to focus more on the new athlete and use additional safety measures. *See id*. at 19; *see also* Appellant App., Vol. II at 14-15.

[25] Although we are sympathetic to Reynolds' situation and the injuries she suffered, Reynolds' argument is incompatible with *Megenity.* As the routine Patton had the cheerleading squad perform was ordinary under a general analysis of the sport, we cannot now separate out a coach's specific conduct related to supervision of the routine as a separate cause of action. Instead, *Megenity* details that once an analysis of "ordinary" for the sport as a whole is conducted, then, if raised by a party, that same conduct is evaluated for recklessness and intent. 68 N.E.3d at 1085. And both recklessness and intent consider a participant's individual actions and thought processes during the conduct that caused the injury. *Id*. Therefore, it stands to reason that an analysis of a coach's individual actions related to supervising her athletes and the choices made therein are subsumed by a review of whether that coach was intentional or reckless in her conduct. To hold otherwise would leave us without a framework for evaluating a negligent supervision claim against a participant. As a result, a claim for negligent supervision cannot be considered a separate cause of action capable of eluding an analysis under the *Pfenning* rule.

[26] We have already concluded the cheerleading routine performed by Reynolds and her teammates was ordinary as a whole for the sport of cheerleading. Because there is no separate cause of action for negligent supervision and there is no claim that Patton was intentional or reckless in her conduct, we hold that the trial court abused its discretion in denying TSC's motion to reconsider as to Reynolds' negligent supervision claim and TSC was entitled to judgment as a matter of law.

[27] TSC also argues that the trial court abused its discretion in not finding that Reynolds' negligent supervision claim is barred by the doctrine of incurred risk. However, because we have concluded that TSC was entitled to judgment as a matter of law under the *Pfenning* rule, we need not address whether Reynolds' negligent supervision claim is barred by the doctrine of incurred risk. With that said, it is worth noting that Reynolds testified she knew cheerleading posed a risk of being dropped and suffering head injuries, *see* Appellant App., Vol. II at 43, voluntarily agreed to participate when asked, *see id*. at 140, and proceeded to participate although she knew she would be performing on a bare floor without additional safety measures, *see id*. at 53. Accordingly, it is unlikely Reynolds' negligent supervision claim would survive an analysis under the doctrine of incurred risk. *See Bowman ex rel. Bowman v. McNary,* 853 N.E.2d 984, 998 (Ind. Ct. App. 2006) (holding that an injured student-athlete incurred the risks associated with competing for her school's golf program because she testified that she knew the risks involved, accepted those risks by joining the golf team, and proceeded to step onto the driving range where she was injured while other

golfers were actively holding clubs), *disapproved of on other grounds* by *Pfenning*, 947 N.E.2d at 404 n.3.

Conclusion

[28] TSC's designated evidence demonstrated that the routine Patton had Reynolds and her teammates perform was ordinary and no evidence designated by Reynolds demonstrates otherwise. We also conclude that negligent supervision is not a separate claim capable of eluding the *Pfenning* rule. Accordingly, the trial court abused its discretion in denying TSC's motion to reconsider its summary judgment ruling. We therefore reverse the judgment of the trial court and remand with instructions to enter summary judgment for TSC.

[29] Reversed and remanded.

Riley, J., and Weissmann, J., concur.