***Pfenning v. Lineman*: A New Approach To Sport's Injury Cases**

By Chris Stevenson

The Indiana Supreme Court has given us a new approach on how to address sport's injury cases in Indiana. For a decade, Indiana has followed the "primary assumption of risk" doctrine as described in: *Parsons v. Arrowhead Golf, Inc.*, 874 N.E.2d 993 (Ind.Ct.App. 2007); *Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984 (Ind.Ct.App. 2006); *Davis v. LeCuyer*. 849 N.E.750 (Ind. Ct. App. 2006); *Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind. Ct. App. 2004), *Gyuriak v. Millice*, 775 N.E.2d 391 (Ind. Ct. App. 2002), and *Mark v. Moser*, 746 N.E.2d 410 (Ind. Ct. App. 2001). The rule developed by this string of cases is that participants in athletic events owe no duty of care as to risks inherent in the sport and must refrain only from intentional or reckless infliction of injury to others. All of these cases focused on the conduct of the plaintiffs, addressing whether they had assumed or incurred the risks of harm associated with the sport. When an injury is related to one of these inherent risks, Indiana courts have held that no duty, and thus no liability, attaches to the co-participant in the sporting activity who caused the injury.[1]

After a decade of wandering rationales and outcomes, the Indiana Supreme Court in *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011) has finally addressed the issue and, in so doing, has completely changed the way sports injury cases are to be analyzed in Indiana. First, *Pfenning* has removed "primary assumption of risk" from the equation, shifting the focus from the risks assumed by the injured plaintiff, to the reasonableness of the defendant tortfeasor's conduct. This eliminates all discussion concerning legal duty, and puts the focus on whether the defendant committed any acts of negligence through his or her participation in the sporting activity. While *Pfenning* does not vacate any of the prior holdings in the companion cases, it does expressly reject those cases' analysis of the issues. *Pfenning* sets out the following new method for analyzing sporting event injuries:

> 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.

[1] Chris Stevenson, *Bicycles, Baseballs, and Golf: Assumption of the Risk of Injury in Sporting Activities*, 31 VERDICT 39 (2010).

Id. at 404.

Pfenning, involved an errant golf shot which struck sixteen-year-old Cassie Pfenning when she was driving a beverage cart in an organized golf scramble. *Pfenning v Lineman*, 922 N.E.2d at 49 (Ind.Ct.App. 2010). Despite the fact that Cassie was not playing golf at the time of her injury, the court of appeals held that she was "a participant in the golf scramble." As such, the defendant owed Cassie no duty. In affirming summary judgment the Indiana Court of Appeals drew upon the no-duty rationale developed by the preceding line of "primary assumption of risk" cases.

The Indiana Supreme Court affirmed summary judgment for the golfer who hit the errant shot, but did not agree with the no-duty rationale behind the court of appeal's ruling. The Indiana Supreme Court cut to the heart of the problem with linking assumption of risk/incurred risk to legal duty. Under *Heck v. Roby*, 659 N.E.2s 498, 504 (Ind. 1995), the Indiana Supreme Court noted assumption of risk and incurred risk had both been expressly subsumed by Indiana's Comparative Fault act. *Pfenning*, 947 N.E.2d at 399-400 (Ind. 2011). Under Ind.Code § 34–6–2–45(b), "fault" includes "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." The *Pfenning* Court concluded that the risks a plaintiff accepts in participating in a sport go to the analysis of comparative fault and not to duty. This was the same rule followed in the 1995 *Heck* opinion which stated, "[w]e reject this primary assumption-of-risk terminology to the extent that it suggests that a lack of duty may stem from a plaintiff's incurred risk." *Id*. at 400. According to *Pfenning,* all of the sporting injury cases over the past decade had errantly ignored *Heck*, resulting in flawed reasoning.

According to the *Pfenning* Court, the right approach is to determine if the defendant's conduct was in the range of ordinary behavior for the sporting activity involved. If it was, then that conduct was reasonable as a matter of law. Under the facts presented in *Pfenning*, a golfer hitting an errant drive was ordinary behavior in the game of golf, and therefore the defendant's conduct was reasonable as a matter of law. *Id*. at 404. Additionally, the issue of fact regarding whether the golfer who hit the errant shot yelled "fore" could not be a basis for negligence. Although the *Pfenning C*ourt used a completely different analysis than the one previously applied using primary assumption of risk, it ultimately reached the same conclusion—a golfer

cannot be liable for causing injury to another by hitting an errant shot unless the golfer's conduct rises to the level of a reckless or intentional act.

While *Pfenning* clears up much of the legal morass of divergent reasoning which developed over the past decade in sports injury cases, it leaves some questions unanswered. First, it is unclear if there are any limits to the element of "participation" in the sporting activity. Historically, arguments have been presented as to whether the plaintiff and defendant were "co-participants" in the activity at issue. This was certainly an issue in *Pfenning,* where the injured plaintiff was driving a beverage cart rather than playing golf at the time she was injured. The *Pfenning C*ourt glossed over this issue by focusing on the defendant. It concluded that "the blanket protection from liability embodied in the new formulation does not extend to persons or entities other than the athlete whose conduct allegedly caused a claimed injury." Thus, because the golfer who hit the errant shot was a participant in the game, it did not matter that Cassie Pfenning was not.

Second, because the blanket protection from liability only extended to the golfer, the *Pfenning C*ourt applied general premises liability law to Cassie Pfenning's claims against the Elks Club golf course which hosted the golf outing. *Id*. at 404-07. Analyzing the golf course's liability separately from the participant who caused the injury raises questions for future cases. What happens when a participant in the sporting activity is not injured by another participant, but rather is injured by some dangerous condition related to the property, or by some allegedly defective equipment used in the sporting activity. This was what occurred in *Parsons v. Arrowhead Golf, Inc.,* 874 N.E.2d 993 (Ind.Ct.App. 2007). *Parsons* involved a back injury to a golfer caused by stepping off a cart path which had a four to twelve inch drop-off. The golfer sued the Arrowhead golf course. Summary judgment was granted for the golf course, and the golfer appealed. The Indiana Court of Appeal held the golf course did not owe the golfer a duty to prevent this type of injury, which was an inherent risk of the game of golf. The golfer was a willing participant in the sporting activity, and thereby assumed the risk of injuries resulting from all reasonably foreseeable parts of the game. "The assumed risks not only included flying golf balls, but also traversing the grounds of the golf course." *Id.* at 997. This analysis directly conflicts with that used in *Pfenning*. Post-*Pfenning,* a different outcome may result given that a defendant golf course will not be protected from liability under the old primary assumption of risk doctrine. Still, even under a premises liability analysis, the *Pfenning* Court ruled that the Elks Club golf course was not liable because there was no evidence that it should have

reasonably expected that its invitees would fail to discover the danger of an errant golf shot, or that the risk of being struck by an errant golf ball involved an unreasonable risk of harm. Nevertheless, this shift in focus opens the potential to bring premises liability claims against sporting facilities and equipment manufacturers and designers who formerly could escape liability under the "no-duty rule."

Another question left open by *Pfenning* is what level of organization is required for the blanket protection from liability to apply? For example, in *Davis v. LeCuyer*. 849 N.E.750 (Ind. Ct. App. 2006) sixteen-year-old Benton LeCuyer was spending the day with his friend, Doug Davis, at Doug's parent's home on Geist to ride jetskis. While out on the Reservoir, Benton rode ahead of Doug, and Doug responded by chasing Benton. Not realizing that Doug was chasing him, Benton began a turn, which resulted in a collision with Doug. Benton suffered severe leg injuries from the collision. The LeCuyers brought a claim against Doug and his parents, and defendants moved for summary judgment, claiming that jet skiing was a sporting activity falling under the primary assumption of risk doctrine. The *Davis* Court held that the sporting or recreational event must be **organized** for the doctrine of primary assumption of risk to apply, thus, it did not apply to the jet skiing incident which involved a casual, unorganized activity. *Pfenning* did not expressly disapprove of the reasoning used in *Davis*. However, it is unclear if *Pfenning's* shift of focus somehow changes the level of organization required for the liability protection to apply. By using the term "athlete" in its description of who may be entitled to the blanket protection from liability, it would appear that *Pfenning* intends to steer courts away from extending the ruling beyond traditional athletic activities. Nevertheless, the qualifications of an "athlete" could be construed quite broadly. For example, is an indoor rock wall climber an athlete? Is a snow/water skier an athlete? What about an ice skater? In light of *Pfenning,* there are a myriad of possibilities that may need to be considered and ruled upon by future courts.

Pfenning has already been tested and applied in two recent appellate court decisions. In *Welch v. Young*, 950 N.E.2d 1283 (Ind. Ct. App. 2011) 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.. The defendants moved for summary judgment under *Pfenning.* Not surprisingly, the plaintff argued that Mrs. Welch was not a participant, but was merely a spectator. The court in *Welch* astutely pointed out that the focus is not on whether Welch was a "participant," but on whether Jordan Young's action—*i.e.,* taking practice swings at the time and

place of the injury—was within the range of ordinary behavior of participants in the sport. *Id*. at 1287. The *Welch* Court denied summary judgment under the following rationale:

> 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.

Id. at 1292. The court's analysis clearly conforms to *Pfenning's* new formula for evaluating sports injury cases and is a good example of how this new approach can greatly affect the outcome. Had this case been considered under the primary assumption of risk doctrine, the outcome might very well have been different. Under the old primary assumption of risk doctrine the focus would have been solely on Mrs. Welch. The circumstance surrounding when and where the injury occurred would not have been considered. However, *Pfenning* opens the door to consideration of what constitutes "ordinary behavior" of the participant. Thus, Jordan Young's conduct and all of the surrounding circumstances become key factors to evaluating the whether the althlete's conduct was within the range of ordinary behavior of little league participants.

In a similar post -*Pfenning* decision, summary judgment was denied in *Haire v. Parker*, 24A01-1102-CT-24, 2011 WL 5057722 (Ind. Ct. App. Oct. 25, 2011). *Haire*, involved an ATV injury sustained at an outdoor riding park. The defendant flipped his ATV, rolled it back over, and restarted it while he was standing on the ground next to it. When he restarted it, the ATV unexpectedly took off without a rider and crashed into the plaintiff. In arguing against summary judgment, the plaintiff questioned whether riding ATVs was an organized sporting activity. The *Haire* Court declined to definitively rule that riding an ATV at an off-road park was an organized sport or a non-organized recreational activity. *Id*. at *9. Instead it denied summary judgment based upon *Pfenning's* rationale that the defendant's conduct must be examined in the context of what is reasonable and appropriate for a participant riding an ATV. The *Haire* Court stated: "even assuming that this case is one 'involving sports injuries,' we cannot say that the 'general

nature of the conduct reasonable and appropriate for a participant' in ATV riding 'is usually commonly understood and subject to ascertainment as a matter of law.'" *Id*. at *9 (citing *Pfenning*, 947 N.E.2d at 403–404). The *Haire* Court could not say that starting an 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. Both *Haire* and *Welch* offer insight into the future of sports injury cases, and it is clear that *Pfenning* has completely altered the landscape of this type of litigation.

In sum, *Pfenning* does serve to clear up a confusing and increasingly untenable series of cases governing sports injury cases. Shifting the focus to the defendant to determine if the conduct falls within the range of ordinary behavior of participants in the sport makes the legal analysis much cleaner. It also opens up the ability to argue the circumstances surrounding the injury and the conduct of the defendant. Additionally, it prevents property owners and equipment manufacturers from latching on to no-duty arguments which completely shield them from liability. It will be interesting to see what is in store for sports related injury cases in the years ahead.