COA# 337821-III

Supreme Court No. 90733-1
Spokane County Superior Court No. 12-2-03766-8

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK, individually,

Plaintiffs-Petitioners,

vs.

VALLEY CHRISTIAN SCHOOL, a Washington State non-profit corporation, JIM PURYEAR, individually, and TIMOTHY F. BURNS, M.D., individually,

Defendants-Respondents.

PETITIONERS' REPLY TO BRIEFS FILED BY RESPONDENTS VALLEY CHRISTIAN SCHOOL AND JIM PURYEAR

George M. Ahrend, WSBA #25160
AHREND LAW FIRM PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

I. INTRODUCTION

Petitioners Donald R. Swank, individually and as personal representative of the Estate of Andrew F. Swank, and Patricia A. Swank (collectively the Swanks), submit the following reply to the briefs filed by Respondents Valley Christian School (VCS) and Jim Puryear (Puryear). The Swanks intend to file a separate reply to the brief filed by Timothy F. Burns.

VCS and Puryear do not dispute their common law duty to exercise reasonable care to protect Drew Swank from injury while playing football. *See* Swank Br., at 26-27 (quoting *Wagenblast v. Odessa Sch. Dist.,* 110 Wn. 2d 845, 856, 758 P.2d 968 (1988), and *Morris v. Union High Sch. Dist.*, 160 Wn. 2d 121, 125-26, 294 P. 998 (1931)).

VCS and Puryear also do not dispute that the Lystedt law imposes duties on them, and that breach of those duties constitutes evidence of negligence under RCW 5.40.050 and gives rise to an implied statutory cause of action. *See* Swank Br., at 28-33 (applying elements of implied statutory cause of action under *Bennett v. Hardy*, 113 Wn. 2d 912, 920-21, 784 P.2d 1258 (1990), and *Beggs v. State*, 171 Wn. 2d 69, 77-78, 247 P.3d 421 (2011), to the Lystedt law).

The parties disagree regarding the nature of these common law and statutory duties. The Swanks contend that VCS and Puryear had an obligation to return Drew Swank to play gradually, rather than immediately, after returning from a prior concussion. The Swanks also contend that VCS and Puryear had a duty to remove Drew from play when he exhibited signs of concussion upon his return to play during the Washtucna game.

VCS and Puryear do not dispute that generally recognized return-to-play standards exist, or that under these standards they should have returned Drew Swank to play gradually, rather than immediately. CP 509-18. Despite the fact that these generally recognized return-to-play standards are affirmed by the Lystedt law, *see* RCW 28A.600.190(1)(c), and specifically referenced in the Concussion Information Sheet distributed to VCS coaches, students and parents, *see* CP 79-80, VCS and Puryear deny that failure to comply with these standards subjects them to common law or statutory liability.

With respect to removal, VCS and Puryear do not dispute that they have a duty to monitor student-athletes for signs and symptoms of concussion and to remove them from competition if they exhibit such signs or symptoms. *See* Swank Br., at 8-9 & 19-20

(summarizing record evidence of VCS employees' admissions regarding duty to monitor and remove). VCS acknowledges, and Puryear does not dispute, evidence that Drew Swank exhibited signs of concussion at the Washtucna game, which should have led to his removal, especially in light of the fact that he had suffered a concussion the week before. *See* Swank Br., at 19-24 (summarizing record evidence of Drew's signs of concussion during the game). Nonetheless, VCS and Puryear urge the Court to affirm summary judgment on this issue.

II. REPLY

A. VCS and Puryear improperly characterize the Swank's complaint as being limited to violations of the Lystedt law, presumably in an attempt to avoid their common law liability for failing to protect Drew Swank from injury while playing interscholastic sports.

VCS and Puryear characterize the Swanks' complaint as being limited to alleging violations of the Lystedt law. *See* VCS Br., at 1, 22-23; Puryear Br., at 17-19. This view of the Swanks' complaint is too narrow. The complaint also includes allegations that VCS and Puryear were "negligent" and "at fault" in addition to violating the Lystedt law. *See* CP 5-6 (¶¶ 4.1-4.3). It provided more

than enough detail to satisfy notice-pleading requirements for the Swanks' common law negligence claim.[1]

Even if the complaint were deemed to be insufficient, however, the negligence claim was specifically argued in opposition to VCS's and Puryear's motions for summary judgment. *See* CP 488-89. A claim that is argued in opposition to summary judgment is deemed to be raised by the pleadings. *See Reichelt v. Johns-Manville Corp.*, 107 Wn. 2d 761, 767, 733 P.2d 530 (1987). The Court should not allow VCS and Puryear to avoid their common law liability by taking an unduly narrow view of the Swanks' complaint.

[1] *Cf. Waller v. State*, 64 Wn. App. 318, 337, 824 P.2d 1225 (1992) (stating "under notice pleading, the [plaintiffs] need not have specifically listed [claim for negligent infliction of emotional distress] to obtain recovery, if the facts supporting the claim were properly pleaded"; brackets added), *rev. denied*, 119 Wn. 2d 1014 (1992); *Schoening v. Grays Harbor Cmty. Hosp.*, 40 Wn. App. 331, 336-37, 698 P.2d 593, 596 (1985) (holding complaint raised issue of corporate negligence of hospital, even though it did not mention corporate negligence), *rev. denied,* 104 Wn. 2d 1008 (1985).

B. What VCS and Puryear may have done right is not a defense to what they did wrong, and their emphasis on obtaining a pre-season health examination, signatures on the school's concussion information form, and written clearance before returning Drew Swank to competition is immaterial to their liability for (1) failing to return Drew gradually in accordance with generally recognized return-to-play standards, and (2) failing to remove him from the Washtucna game when he exhibited signs of concussion.

In their statements of the case, VCS and Puryear point out that the school obtained a pre-season health examination from Drew Swank and signatures from Drew and his mother on the school's concussion information sheet. *See* VCS Br., at 8; Puryear Br., at 4-6. They also point out that the school kept Drew from practicing after he suffered a concussion in the Pateros game, and obtained a note from Dr. Burns before returning Drew to competition the following week at the Washtucna game. *See* VCS Br., at 9-16. On the basis of these facts, they argue that they fully complied with the requirements of the Lystedt law. *See* VCS Br., at 31-36; Puryear Br., at 17-19. However, these facts and arguments are immaterial because they do not form the basis for the Swanks' claims. *See* CR 56(c) & (d) (indicating summary judgment focuses on material facts); *Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989) (indicating material facts are those that

relate to the essential elements of the plaintiff's case).[2] The Swanks allege that VCS and Puryear were negligent and violated the Lystedt law by failing to return Drew gradually in accordance with generally recognized return-to-play standards, and failing to remove him from the Washtucna game when he showed signs of concussion. *See* Swank Br., at 34.

C. VCS's and Puryear's common law duty of care and the Lystedt law required them to comply with the generally recognized return-to-play standards described by the Third International Conference on Concussion in Sport, including those providing for gradual return to play, and their failure to do so subjects them to liability.

The Lystedt law affirms "generally recognized return to play standards for concussion and head injury," and notes that, despite these standards, "youth athletes are prematurely returned to play resulting in actual or potential physical injury or death[.]" RCW 28A.600.190(1)(c) (brackets added). Accordingly, the Lystedt law requires, among other things, annual distribution of a concussion and head injury information sheet "to inform and educate coaches, youth athletes, and their parents and/or guardians of the nature and risk of concussion and head injury including continuing to play

[2] VCS's and Puryear's argument is akin to the defendant in a motor vehicle collision case arguing that he should not be held liable for failure to yield the right-of-way on grounds that he was driving the speed limit.

after concussion or head injury." RCW 28A.600.190(2) (emphasis added).

The Concussion Information Sheet distributed by VCS in compliance with the Lystedt law references "long and well-established return to play concussion guidelines that have been recommended for several years," and states that it was adapted from the Centers for Disease Control (CDC) and "the 3rd International Conference on Concussion in Sport." CP 79-80.

The Third International Conference on Concussion in Sport prescribes a 6-step gradual return to play for athletes who suffer a concussion, with each step taking a minimum of 24 hours. CP 511; *see also* Swank Br., at 10-11 (quoting & discussing Consensus Statement of the Third International Conference on Concussion in Sport); *id.* at A-6 to A-15 (reproducing Consensus Statement, CP 509-18). The gradual return-to-play requirement is mirrored in standards prepared by the CDC. CP 519-522. There are no contrary standards identified by VCS or Puryear, and they do not deny that the Third International Conference on Concussion in Sport describes generally recognized return-to-play standards, including those requiring gradual return to play.

Despite adapting its Concussion Information Sheet from the Third International Conference on Concussion in Sport, VCS characterizes it as a "British Journal of Medicine document" that is not "specifically referenced or incorporated by the Lystedt Act[.]" VCS Br., at 29-30 (brackets added). The copy of the Third International Conference on Concussion in Sport that the Swanks submitted in connection with summary judgment proceedings happens to have been reprinted in the *British Journal of Medicine*, but it is readily available from a variety of sources,[3] and it describes generally recognized return to play standards referenced in the Lystedt law.

VCS argues that it should not be bound by these return to play standards because the Consensus Statement of the Third International Conference on Concussion in Sport contains a disclaimer stating that it does not purport to establish a standard of care for healthcare providers. *See* VCS Br., at 29-30 (citing CP 514). The disclaimer is limited to healthcare providers, and does not

[3] *See, e.g.,* "Consensus Statement on Concussion in Sport 3rd International Conference on Concussion in Sport Held in Zurich, November 2008," 19(3) Clinical Journal of Sports Medicine 185-200 (May 2009); "Consensus statement on concussion in sport – the Third International Conference on Concussion in Sport held in Zurich, November 2008," 37(2) Physician & Sports Medicine 141-59 (June 2009). "Consensus Statement on Concussion in Sport: The 3rd International Conference on Concussion in Sport Held in Zurich, November 2008," 44(4) Journal of Athletic Training 434-448 (2009).

apply to coaches and schools. It is understandable to the extent that the Consensus Statement is an international document for use in jurisdictions with varying legal systems.

The duty to comply with the generally accepted return-to-play standards described by the Third International Conference on Concussion in Sport arises not from the standards themselves, but rather from the common law duty to exercise reasonable care to protect student-athletes from injury while playing sports as well as the terms of the Lystedt law. *See Wagenblast,* 110 Wn. 2d at 856; *Morris*, 160 Wn. 2d at 125-26; RCW 28A.600.190(1)(c). In light of these duties, VCS should be subject to liability for failure to follow generally recognized gradual return-to-play standards.

D. There is no dispute that VCS and Puryear returned Drew Swank to full competition immediately, rather than gradually, contrary to generally recognized return-to-play standards.

VCS and Puryear do not dispute that Drew Swank was returned to full competition immediately after receiving written clearance from his doctor to return to play. VCS seems to argue that the doctor's note somehow relieves the school and Puryear of the obligation to comply with generally recognized gradual return-to-play standards. *See* VCS Br., at 2, 22, 31, 35-36, 38-39 (arguing that VCS was entitled to "rely" on the written clearance to play). This

argument is not explained, nor is it supported by authority. The doctor's note merely stated that "Andrew Swank may resume playing football on 9-25-09." While the doctor should be subject to liability for failing to specifically prescribe gradual return to play, the note does not purport to relieve VCS and Puryear from their independent duties to comply with generally recognized return-to-play standards. *See* Swank Br., at A-17 (legible copy of doctor's note, CP 648). A breach of duty by one tortfeasor (the doctor) does not excuse a breach of duty by joint tortfeasors (VCS and Puryear).

Furthermore, the Swanks are not seeking to impose liability on VCS and Puryear for returning Drew Swank to competition without clearance from a healthcare provider. Instead, they are seeking to impose liability for returning him immediately, rather than gradually, once they received such clearance. Neither generally recognized return-to-play standards, nor the Lystedt law relieves VCS and Puryear from the obligation to return a student-athlete to play gradually once a healthcare provider authorizes the student-athlete to return. Summary judgment in favor of VCS and Puryear

should be reversed based on their failure to return Drew Swank to play gradually.[4]

E. VCS acknowledges some signs of concussion, and VCS and Puryear do not dispute others, exhibited by Drew Swank during the Washtucna game, which should have led to his removal before the hit that resulted in his death.

VCS acknowledges that Drew Swank exhibited signs of concussion during the Washtucna game, although it tries to minimize the signs. In particular, VCS states that Drew's parents and a friend described the quality of his play "declining" through the first quarter of the Washtucna game, quoting testimony from Drew's teammate, his mother, his father, and his aunt. *See* VCS Br., at 17-19. In actuality, the teammate and Drew's family described his performance in terms that match the signs of concussion on VCS's Concussion Information Sheet, which should have led to his removal from the game, especially in light of the fact that he had a previously diagnosed concussion. *See* Swank Br., at 19-24 (summarizing record evidence of Drew's signs of concussion during the game); CP 79-80 (Concussion Information Sheet); CP 409

[4] Because there are no genuine issues of material fact regarding gradual return to play, the Court has authority to order partial summary judgment in the Swanks' favor on the liability of VCS and Puryear under CR 56(c) & (d).

(expert testimony that Drew should have been removed from the game).[5]

Neither VCS nor Puryear dispute the other evidence in the record indicating that Drew was suffering from a concussion and should have been removed before the hit that ultimately led to his death, including, significantly, Puryear's undisputed post-game admission that Drew "didn't have a clue to what was going on" during the game, and "wasn't even tracking." CP 525. This evidence constitutes an independent basis for reversing summary judgment in favor of VCS and Puryear, because, at a minimum, it raises genuine issues of material fact.[6]

---

[5] VCS argues that the expert testimony of Stanley A. Herring, M.D., who is the co-Medical Director of the Sports Concussion Program at UW Medicine/Harborview Medical Center/Seattle Children's Hospital, consists of inadmissible legal conclusions. *See* VCS Br., at 30. However, Dr. Herring simply testifies within the framework of the Lystedt law and attests to what VCS and Puryear admit, i.e., that they have a duty to monitor student-athletes for signs and symptoms of concussion and to remove them from competition if they exhibit such signs. *Compare* CP 409 (Herring), *with* Swank Br., at 8-9 & 19-20 (summarizing record evidence regarding duty to monitor and remove).

[6] VCS and Puryear also cite additional testimony of Puryear himself and assistant coach Mike Heden to the effect that they did not notice anything wrong with Drew's performance during the game before the final hit. Their reliance on this testimony is not consistent with the requirement to view the evidence in the light most favorable to the Swanks, as the non-moving parties against whom summary judgment was granted. *See, e.g., Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn. 2d 665, 680, 343 P.3d 746 (2015) (stating the evidence must be viewed "in the light most favorable to the nonmoving party … drawing all reasonable inferences in that party's favor"; ellipses added).

F. There are, at a minimum, questions of fact whether Puryear was a joint venturer with VCS, and joint venture status should preclude application of the volunteer immunity statute.

With respect to his volunteer immunity defense, on which he bears the burden of proof, Puryear "disagrees" that a joint venture existed between him and VCS, *see* Puryear Br., at 12, but he does not address the elements of a joint venture, *see* Swank Br., at 41-43. He does not contest the facts on which his status as a joint venturer is based, except one: He argues that VCS terminated the football program, rather than Puryear. *See* Puryear Br., at 10 & n.3 (citing CP 578-79). However, the cited record does not support this argument. The record cited by Puryear states that he "canceled the season" unilaterally, that a school administrator "told him it was irresponsible and wrong … to make that statement/decision without me," and that Puryear and the administrator subsequently informed parents of "our decision," suggesting that it was jointly made. CP 579 (ellipses added). Other evidence in the record confirms Puryear's role in the termination of the program. *See* Swank Br., at 6 & nn.13-15. There is at least a question of fact whether Puryear was a joint venturer.

In any event, Puryear argues that unpaid joint venturers satisfy the definition of volunteer under RCW 4.24.670(5)(3),

primarily because the definition does not expressly exclude joint venturers, even though the definition is phrased solely in terms of simple agents. *See* Puryear Br., at 11-12. Puryear's argument is at odds with the required strict construction of immunity statutes. *See, e.g., Michaels v. CH2M Hill, Inc.*, 171 Wn. 2d 587, 600, 257 P.3d 532 (2001). The Court should hold that volunteer immunity is inapplicable under these circumstances.[7]

G. The statute of limitations for assault and battery has no relevance to the Swanks' claims against Puryear.

With respect to the partial statute of limitations defense, on which he bears the burden of proof, Puryear labels the incident where he shook Drew Swank's helmet as an "intentional assault" and equates it with the tort of battery. *See* Puryear Br., at 20. In civil cases, Washington follows the definition of the tort of battery contained in the Restatement (Second) of Torts §§ 13-20 (1965). *See Kumar v. Gate Gourmet, Inc.*, 180 Wn. 2d 481, 504-05, 325 P.3d 193 (2014). Under the Restatement, a "defendant is liable for battery if (a) "he [or she] acts *intending* to cause a harmful or offensive contact with the [plaintiff or a third party], or an

[7] Puryear argues that the allegations of the Swanks' complaint identifying him as VCS's agent are inconsistent with his status as a joint venturer. This argument is incorrect to the extent that joint venturers serve as both principal and agent for each other. *See, e.g., Wilkinson v. Smith*, 31 Wn. App. 1, 11, 639 P.2d 768, *rev. denied,* 97 Wn. 2d 1023 (1982).

imminent apprehension of such contact, and (b) a harmful or offensive contact with the [plaintiff] directly or indirectly results." *Id.,* 180 Wn. 2d at 505 (quoting Restatement § 13; brackets in original; emphasis added). As used in this Restatement provision, the word "intending" means "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement § 8A; *accord id.* § 13 cmt. *c* (referring to definition of "intent" in § 8A). The *desire* to cause certain consequences or the *belief* that such consequences are substantially certain to result from it are subjective states of mind. *See* Restatement § 8A cmt. *b*. In this case, there is no allegation, evidence or admission that Mr. Puryear possessed the requisite state of mind and subjectively intended to injure Drew.[8] It may have been negligent or reckless, as alleged by the Swank family, but there is no battery.[9] As a result, none of the

[8] The difference between intentional, reckless and negligent conduct is one of degree rather than kind, as explained by the Restatement § 8A cmt. *b*: "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent and becomes mere recklessness .... As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence[.]" (Brackets & ellipses added.); *accord Garratt v. Dailey,* 46 Wn. 2d 197, 201-02, 279 P.2d 1091 (1955) (quoting similar analysis from Restatement (First) of Torts).

[9] *Cf. Garratt*, 46 Wn. 2d at 200-02 (1955) (indicating intent to commit battery lacking where defendant does not know with substantial certainty that plaintiff

Swank's claims are subject to the two-year statute of limitations for assault and battery.

III. CONCLUSION

The Swanks ask this Court to reverse the superior court's summary judgment order and remand this case for trial.[10]

Respectfully submitted this 8th day of July, 2015.

George M. Ahrend, WSBA #25160
AHREND LAW FIRM PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

---

would be injured; remanding for findings on this issue); *Morinaga v. Vue*, 85 Wn. App. 822, 834, 935 P.2d 637, *rev. denied*, 133 Wn. 2d 1012 (1997) (affirming dismissal of battery claim based on lack of intent where the defendant did not know with substantial certainty that the harm would occur).

[10] The Swanks agree with Respondent Derek Tabish that he should not be party to this appeal, and were under the (incorrect) impression that he had been dismissed by stipulation in the superior court. A motion to dismiss pursuant to RAP 18.2 is forthcoming.

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On July 8, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

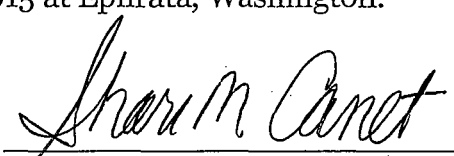
Edward J. Bruya
Keefe, Bowman & Bruya
221 N. Wall St., Ste. 210
Spokane, WA 99201-0910
Email: EBruya@KKBowman.com

Gregory J. Arpin
Paine Hamblen LLP
717 W. Sprague Ave., Ste. 1200
Spokane, WA 99201
Email: greg.arpin@painehamblen.com

Patrick J. Cronin
Winston Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201
Email: pjc@winstoncashatt.com

Steven R. Stocker
Stocker, Smith, Luciani & Staub
312 W. Sprague Ave.
Spokane, WA 99201
Email: sstocker@sslslawfirm.com

Signed on July 8, 2015 at Ephrata, Washington.



Shari M. Canet