Supreme Court No. 93282-4

COA No. 337821-III

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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Donald R. Swank, individually and as personal representative of the Estate of Andrew F. (Drew) Swank, and Patricia A. Swank, individually (collectively the Swanks), ask the Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

The Swanks seek review of the published Court of Appeals decision filed May 17, 2016, to the extent that it affirmed summary judgment dismissing their claims. *See Swank v. Valley Christian Sch.*, — Wn. App. —, — P.3d —, 2016 WL 2869739 (2016). A copy of the decision is reproduced in the Appendix.[1]

III. ISSUES PRESENTED FOR REVIEW

Drew Swank died from a concussion sustained while playing in a high school football game. His coach and physician cleared him to play within a week after suffering a concussion in a previous game, and his coach failed to remove him from competition after he continued to exhibit signs of concussion. Drew's parents filed suit against the school (Valley Christian School or VCS), the coach (James Puryear), and the physician (Timothy F. Burns, M.D.),

[1] This Court previously denied direct review, and a copy of the Court's order is reproduced in the Appendix.

among others, alleging negligence and violation of the Zackery Lystedt law.

The Lystedt law is "the country's first comprehensive concussion law for youth athletes." *Swank*, 2016 WL 2869739, at *4. The purpose of the law "is to reduce the risk of injury or death to youth athletes who suffer concussion." *Id.* at *1. In the text of the law, the Legislature finds that:

> (1)(a) Concussions are one of the most commonly reported injuries in children and adolescents who participate in sports and recreational activities. The centers for disease control and prevention estimates that as many as three million nine hundred thousand sports-related and recreation-related concussions occur in the United States each year. A concussion is caused by a blow or motion to the head or body that causes the brain to move rapidly inside the skull. The risk of catastrophic injuries or death are significant when a concussion or head injury is not properly evaluated and managed.
>
> (b) Concussions are a type of brain injury that can range from mild to severe and can disrupt the way the brain normally works. Concussions can occur in any organized or unorganized sport or recreational activity and can result from a fall or from players colliding with each other, the ground, or with obstacles. Concussions occur with or without loss of consciousness, but the vast majority occurs without loss of consciousness.
>
> (c) Continuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and even death. The legislature recognizes that, despite having generally recognized return to play standards for concussion and head injury, some affected youth athletes are prematurely returned to play resulting in

> actual or potential physical injury or death to youth athletes in the state of Washington.

RCW 28A.600.190(1)(a)-(c).

In addition to affirming "generally recognized return to play standards for concussion and head injury," the Lystedt law imposes three additional obligations to ensure that young athletes are not prematurely returned to play after a concussion: (1) to establish concussion management guidelines in order to educate coaches, parents, and young athletes about the nature and risk associated with concussions; (2) to remove young athletes from competition if they exhibit any sign or symptom of concussion; and (3) to require evaluation and written clearance from a licensed health care provider trained in the evaluation and management of concussion before the young athlete may return to competition. *See Swank*, at *4 (citing RCW 28A.600.190(2)-(4)).[2]

This decision below raises a number of issues of first impression arising under the Lystedt law:

1. What is the nature of the obligations imposed by the Lystedt law impose on schools, coaches and physicians? In particular:

    a. Do schools and coaches have an obligation (i) to monitor student athletes for signs of concussion, (ii) to remove students showing

[2] The full text of the Lystedt law is reproduced in the Appendix.

signs of concussion from competition, (iii) to ensure that students are not returned to competition until after they have been evaluated by a licensed health care provider trained in the evaluation and management of concussion and receive written clearance from that health care provider, and (iv) to return students to competition gradually rather than immediately after a concussion?

b. Do physicians have a duty (i) to evaluate student athletes before clearing them to return to competition, and (ii) to clear them to return to competition gradually rather than immediately after a concussion?

2. Does violation of the Lystedt law give rise to an implied statutory cause of action in addition to serving as evidence of negligence under RCW 5.40.050?

3. Where there is evidence that the VCS football team was actually a joint venture between himself and the school, has Coach Puryear met his burden to prove that there are no genuine issues of material fact for trial and that he is entitled to judgment as a matter of law that he is immune from liability under the Lystedt law pursuant to the statute conferring immunity on volunteers of nonprofit entities, RCW 4.24.670?

4. Where the Swanks' complaint for violation of the Lystedt law and negligence contained a factual allegation that "[a]s a result of Andrew's uncharacteristically poor play, Defendant Mr. Puryear called Andrew to the sidelines, grabbed him by the facemask and proceeded to violently shake his head up and down in anger[,]" does the complaint state a separate "face mask claim" that is barred by the two-year statute of limitations for assault and battery, RCW 4.16.100(1), rather than the three-year statute of limitations for negligence and implied statutory claims, RCW 4.16.080(2)?

5. Where Dr. Burns, an Idaho physician, improperly cleared Drew Swank to return to competition in Washington in violation of the Lystedt law, is he subject to personal jurisdiction in Washington?

6. Where Dr. Burns improperly cleared Drew Swank to return to competition in Washington in violation of the Lystedt law, are claims against him nonetheless subject to Idaho law and barred by the two-year Idaho statute of limitations for professional negligence, Idaho Code § 5-219(4)?

IV. STATEMENT OF THE CASE

The underlying facts are described in the Swanks' opening brief in the Court of Appeals. *See* Swank Br., at 4-24.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. In determining that the Lystedt law does not create an implied statutory cause of action, the Court of Appeals chose from what it described as "divided" precedent, creating a conflict with the precedent it chose not to follow and presenting questions of substantial public interest that should be determined by this Court under RAP 13.4(b)(1) and (4).

The Swanks urged the lower courts to recognize that the Lystedt law creates an implied statutory cause of action. The significance of an implied cause of action is that violation of the statute would be conclusive of liability, rather than merely serving as evidence of negligence under RCW 5.40.050. The existence of statutory liability also influences the analysis of personal jurisdiction over Dr. Burns. *See infra.*

1. There is no dispute regarding the 3-part test for determining whether a statute creates an implied cause of action.

The Court of Appeals correctly applied the 3-part test for determining whether a statute creates an implied cause of action adopted in *Bennett v. Hardy*, 113 Wn. 2d 912, 920-21, 784 P.2d 1258 (1990). *See Swank*, at *6. Under the *Bennett* test, a cause of action is implied if: (1) the plaintiff is within the class for whose benefit the statute was enacted; (2) the legislative intent supports the creation of a remedy; and (3) the remedy implied is consistent with the underlying purpose of the legislation. *See Bennett*, 113 Wn. 2d at 920-21; *Beggs v. State Dep't of Social & Health Services*, 171 Wn. 2d 69, 77, 247 P.3d 421 (2011) (quoting *Bennett*).[3]

2. There is no dispute that the Lystedt law satisfies the first requirement for an implied statutory cause of action because it was enacted to protect student athletes such as Drew Swank from the risk of injury or death from concussion.

The Court of Appeals correctly noted that, "[w]ithout question, Drew was within the class who was intended to be benefitted and protected by the Zackery Lystedt law." *Swank*, at *6. Subsection (1)(a) of the Lystedt law specifically refers to "children

[3] The *Bennett* test is not disputed by VCS or coach Puryear in their briefing, and it is acknowledged by Dr. Burns in his. *See* Burns Br., at 41-42 n.35 (citing *Beggs*).

and adolescents who participate in sports." Subsection (1)(c) and sections (2), (3) and (4) each refer to "young athletes" and/or "youth athletes." Clear identification of the protected class eliminates uncertainty regarding who is entitled to pursue an implied statutory remedy. *Cf. Bennett*, 113 Wn. 2d at 921 (identifying class of persons aged 40-70); *Beggs*, 171 Wn. 2d at 77 (identifying class of victims of child abuse and neglect).[4]

3. In addressing the second requirement for an implied statutory cause of action, based on the legislative intent of the Lystedt law, the Court of Appeals chose from what it described as "divided" precedent from this Court, and held that the availability of other non-identical remedies precludes a finding of legislative intent to create an implied statutory remedy.

The Swanks contend that the legislative intent underlying the Lystedt law supports an implied cause of action. Legislative intent is discerned primarily from the language of the statute. *See Town of Woodway v. Snohomish County*, 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014). There are four indications in the text of the Lystedt law that the Legislature intended to create a remedy:

First, the clear identification of the protected class—"children and adolescents who participate in sports" and "young

[4] VCS and Puryear do not address the first element of the *Bennett* test in their briefing, and Burns assumes for the sake of argument that it is satisfied. *See* Burns Br., at 41-42 n.35.

athletes"/"youth athletes"—leads to a presumption of legislative intent to create a remedy. The Court "may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights." *Bennett*, 113 Wn. 2d at 921; *accord Beggs*, 171 Wn. 2d at 78 (quoting *Bennett*).

Second, the mandatory phrasing of the obligations imposed by the Lystedt law supports an implied remedy. Section (3) of the law provides that "[a] young athlete who is suspected of sustaining a concussion or head injury in a practice or game *shall* be removed from competition at that time," and Section (4) provides that "[a] youth athlete who has been removed from play *may not* return to play" until properly cleared to do so. (Emphasis added.)[5] Mandatory language avoids problems inherent in trying to enforce a statute phrased in permissive or discretionary terms.[6]

Third, the absence of an alternative enforcement mechanism for the Lystedt law supports an implied remedy. The law contains no express mechanism to enforce the mandatory obligations

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[5] *See State v. Rice*, 174 Wn. 2d 884, 896, 279 P.3d 849 (2012) (indicating "shall" is mandatory); *State v. Gettman*, 56 Wn. App. 51, 55 & n.2, 782 P.2d 216 (1989) (stating "may not" is mandatory and synonymous with "shall not").

[6] *Cf. Beggs*, at 75-78 (implying remedy under statute providing that designated individuals "shall" report suspected child abuse or neglect, and emphasizing mandatory nature of statute).

imposed by the statute. It is difficult to imagine how a statute written in mandatory terms could be mandatory in effect if there is no way to enforce it. In the absence of an implied remedy, the statute would effectively be permissive and discretionary.

Fourth, the limited grant of immunity for volunteer health care providers in the Lystedt law supports an implied remedy. Section (4) of the law provides that a volunteer health care provider who improperly clears a young athlete to return to play is not liable for negligence (but is liable for gross negligence or willful or wanton misconduct). There would be no reason to grant this immunity in the absence of an implied statutory remedy. "A grant of immunity from liability clearly implies that civil liability can exist in the first place." *Beggs*, at 78 (quotation omitted).[7]

The Court of Appeals did not address the first three indicia of legislative intent highlighted by the Swanks. Instead, the court

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[7] VCS and Puryear do not dispute any of the indicia of legislative intent to create an implied remedy in the text of the Lystedt law highlighted by the Swanks. For his part, Dr. Burns argues that nothing in the *legislative history,* as distinguished from the text of the statute, indicates the legislature intended to imply a civil remedy. *See* Burns Br., at 41-42 n.35; *id.* at 44-45 & n.39 (summarizing session law and bill report); *id.* at App. A & B (reproducing session law and final bill report). As stated in the bill report discussed by Burns, however, it "is not a part of the legislation nor does it constitute a statement of legislative intent." Burns Br., App. B. In any event, the bill report contains the same indicia of legislative intent as the text of the statute: (1) a clearly identified protected class, (2) mandatory obligations, (3) no alternative enforcement mechanism, and (4) limited immunity for volunteer health care providers. In this way, the legislative history confirms the indicia of legislative intent that are present in the statute.

focused solely on the limited immunity granted to volunteer health care providers, stating "[*t*]*he Washington Supreme Court's precedent is divided over how grants of immunity play into the intent to create an implied cause of action.*" *Swank*, at *6 (emphasis added; discussing *Beggs, supra*, and *Adams v. King County*, 164 Wn. 2d 640, 653, 192 P.3d 891 (2008)). The court seemed to acknowledge that this Court recognized an implied statutory cause of action in *Beggs* without regard for other remedies available to the plaintiffs. *See Swank*, at *6; *Beggs*, 171 Wn. 2d at 72, 75 & n.6 (noting plaintiffs also had claims for medical negligence under Ch. 7.70 RCW). However, the court interpreted this Court's decision in *Adams* as declining to recognize an implied cause of action where other remedies were available. *See Swank*, at *6-7.[8] The court chose to follow its reading of *Adams* rather than *Beggs* and concluded that the Lystedt law's limited grant of immunity to volunteer health care providers was not indicative of legislative intent to create a remedy because the Swanks have

[8] The portion of *Adams* on which the Court of Appeals relied appears to be dicta because, after determining that the first requirement for an implied statutory cause of action was not met, the Court's discussion of the remaining requirements was unnecessary. The Court held that family members of an organ donor did not have an implied statutory cause of action under the former Washington Uniform Anatomical Gift Act because the purpose of the Act was to increase organ donations for transplantation, not to protect family members of the donor. *See* 164 Wn. 2d at 653-54.

remedies for common law negligence and medical negligence. *See Swank,* at *7.[9]

4. In addressing the third requirement for an implied statutory cause of action, based on whether an implied remedy is consistent with the purpose of the Lystedt law, the Court of Appeals again chose from the same "divided" precedent, and held that the availability of other non-identical remedies renders an implied statutory remedy inconsistent with the purpose of the statute.

The Court of Appeals correctly recognized that the purpose of the Lystedt law is to reduce the risk of injury or death to youth athletes who suffer concussions. *See Swank*, at *1-2 (¶¶ 5 & 13). The Swanks contend that this purpose is consistent with an implied remedy because the existence of "generally recognized return to play standards" has proved inadequate to prevent young athletes from being prematurely returned to competition after a concussion,

[9] The availability of alternate remedies has never been an explicit component of the *Bennett* test for determining whether a statute creates an implied cause of action. In *Bennett*, this Court took the opposite approach of the Court of Appeals below and determined that the existence of an implied statutory remedy for age discrimination under RCW 49.44.090 made it unnecessary to determine whether an alternate common law remedy for wrongful discharge was available. *See* 113 Wn. 2d at 923 (stating "we decline to address whether defendant's conduct provides the basis for a wrongful discharge tort because we conclude that the implied cause of action under RCW 49.44.090 recognized above encompasses these claims"). In *Braam ex rel. Braam v. State*, 150 Wn. 2d 689, 712, 81 P.3d 851 (2003), after determining that an implied statutory remedy to limit the number of times foster children can be moved was inconsistent with legislative intent, the Court merely noted that parties objecting to moves can raise the issue in the context of a dependency action. However, the analysis of legislative intent in *Braam* does not appear to hinge on the existence of this alternate remedy. *See id.*

see RCW 28A.600.190(1)(c), and the prospect of liability will encourage schools, coaches and physicians to comply with those standards.[10]

However, the Court of Appeals again relied on *Adams*, stating that the availability of alternate remedies "weighs against" the third requirement for an implied statutory cause of action as well as the second. *Swank*, at *7. The court seemed to narrow the third requirement, rephrasing it in terms of "whether the legislative purpose is *best achieved* by implying a cause of action," rather than using the formulation from *Bennett*, which is phrased in terms of "whether implying a remedy *is consistent with* the underlying purpose of the legislation." *Compare Swank*, at *7 (rephrasing *Bennett* with emphasis added), *with id.* at *6 (quoting *Bennett* with emphasis added).

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[10] *Cf. Tyner v. State Dep't of Social & Health Servs.*, 141 Wn. 2d 68, 80-81, 1 P.3d 1148 (2000) (holding implied statutory remedy under RCW 26.44.050 for failure to act upon a report of possible child abuse or neglect satisfies third prong of the *Bennett* test because it encourages non-negligent conduct and compliance with standards); *Bennett*, 113 Wn. 2d at 921 (stating "the purpose of this legislation is obviously to confront the problem of age discrimination, and according a private right of action to persons within the protected class is consistent with this underlying legislative purpose"); *Beggs*, at 78 (stating that "[i]mplying a civil remedy as a means of enforcing mandatory reporting duty is consistent with" legislative intent to prevent, deter and punish child abuse; brackets added).

5. Review of the Court of Appeals decision is warranted under RAP 13.4(b)(1) and (4).

Review is warranted "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court," or "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1) & (4) (brackets added). Both of these criteria for review are satisfied by the Court of Appeals' decision.

The court's choice to follow *Adams* necessarily creates a conflict between the decision below and *Beggs*. The division of precedent recognized by the court, and the corresponding uncertainty for bench and bar regarding the relationship between an implied statutory cause of action and alternate remedies presents questions of substantial public interest that should be resolved by this Court.[11] Just as importantly, questions regarding the legislative intent and purpose of the Lystedt law and the availability of an implied statutory cause of action for violations of the statute also present questions of substantial public interest that should be resolved by this Court.

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[11] This Court has recently overruled case law limiting claims for wrongful discharge based on the availability of alternate remedies. *See Becker v. Community Health Sys., Inc.*, 184 Wn. 2d 252, 359 P.3d 746 (2015); *Rose v. Anderson Hay & Grain Co.*, 184 Wn. 2d 268, 358 P.3d 1139 (2015); *Rickman v. Premera Blue Cross*, 184 Wn. 2d 300, 358 P.3d 1153 (2015).

B. Because there is a question of fact whether the VCS football team was a joint venture with Coach Puryear, the Court of Appeals' determination as a matter of law that Coach Puryear is entitled to volunteer immunity under RCW 4.24.670 conflicts with precedent either requiring statutes to be construed in accordance with their plain language, or requiring ambiguous immunity statutes to be strictly construed, and presents questions of substantial public importance that should be decided by this Court under RAP 13.4(b)(1) and (4).

In response to the Swanks' claims for negligence and violation of the Lystedt law, Coach Puryear raised an affirmative defense of immunity under RCW 4.24.670. The statute confers immunity on volunteers of nonprofit or governmental entities, and defines "volunteer" as follows:

> "Volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation, other than reasonable reimbursement or allowance for expenses actually incurred, or any other thing of value, in excess of five hundred dollars per year. "Volunteer" includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

RCW 4.24.670(e).[12]

The Swanks submitted evidence that Coach Puryear started, funded, controlled and eventually cancelled the VCS football team, and that it was therefore a joint venture between himself and the school. *See* Swank Br., at 4-6 & 40-43. They argued that a joint

[12] The full text of the volunteer immunity statute is reproduced in the Appendix.

venturer does not merely perform services for a nonprofit or governmental entity, as required by the definition of a volunteer, but rather is a co-principal with the entity. *See id.* at 41-43. Alternatively, to the extent of any ambiguity in the statute, they argued that the volunteer immunity statute should be strictly construed to exclude joint venturers. *See id.* at 41 n.86; Swank Reply to VCS & Puyear, at 13-14.

The Court of Appeals rejected the Swanks' arguments on grounds that the plain meaning of "individual," as used in the definition of a volunteer, includes individuals in any capacity, including joint venturers. *See Swank*, at *9. The court did not address the qualifying language limiting immune individuals to those "performing services for" a nonprofit or governmental entity. To the extent this qualifying language is unambiguous, the court's decision conflicts with this Court's precedent requiring statutes to be construed in accordance with their plain language. *E.g., State v. Larson,* 184 Wn. 2d 843, 848, 365 P.3d 740 (2015) (noting rule that the court must give effect to the plain meaning of statutory language). To the extent this qualifying language is ambiguous, the decision conflicts with this Court's precedent requiring immunity statutes to be strictly construed. *E.g., Michaels v. CH2M Hill, Inc.*,

171 Wn. 2d 587, 257 P.3d 532 (2001) (strictly construing the design professional immunity statute, RCW 51.24.035, on grounds that "[s]tatutory grants of immunity in derogation of the common law are strictly construed"; brackets added). In either case, review is warranted under RAP 13.4(b)(1). Furthermore, the proper scope of volunteer immunity under RCW 4.24.670 presents a question of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

C. The Court of Appeals' determination that Dr. Burns is not subject to personal jurisdiction in Washington courts for improperly releasing Drew Swank to play high school football in Washington in violation of the Lystedt law presents a question of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

In response to the Swanks' claims, Dr. Burns argued that Washington courts lacked personal jurisdiction over him, as an Idaho physician. In response, the Swanks contended that the exercise of personal jurisdiction is warranted, primarily because Dr. Burns released Drew to play football in Washington in violation of the Lystedt law. Specifically, Dr. Burns released Drew to play football after being told by Drew and his mother that Drew played football for VCS, CP 373, and after his mother told Dr. Burns' staff that a release was needed because Drew "plays [for a] school in

Washington and they have a new law and before he can go back to play, he has to have a release from the doctor," CP 188; *accord* CP 897.

The Court of Appeals determined that Washington courts lack personal jurisdiction over Dr. Burns based on *Lewis v. Bours,* 119 Wn. 2d 667, 835 P.2d 221 (1992). *See Swank,* at *11-12. In *Lewis* the Court created an exception to the general rule of jurisdiction that the place of the tort is the place where the injury occurs. *See* 119 Wn. 2d at 673. Specifically, the Court held:

> In the event that a nonresident professional commits malpractice in another state against a Washington State resident, that, *standing alone*, does not constitute a tortious act committed in this state regardless of whether the Washington State resident suffered injury upon his or her return to Washington.

Id. at 673 (emphasis added); *accord id.* at 674 (similar). The holding is thus limited to malpractice claims arising from out-of-state treatment, under circumstances where the sole fact supporting the exercise of jurisdiction is the manifestation of injury within the State of Washington.

Lewis is distinguishable because the Swank family's claims do not arise solely out of negligence by Dr. Burns in the State of Idaho, but rather from his releasing Drew to play football in the

State of Washington in violation of the Lystedt law.[13] The effect of applying *Lewis* under these circumstances is to deprive young athletes who live or go to school near Washington's borders—e.g., Vancouver or Spokane—from the protection of the Lystedt law. The question of whether the normal rule of jurisdiction based on the place of injury or the exception to the normal rule established in *Lewis* should be applied in cases such as this one involves an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).[14]

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[13] *Cf. Failla v. FixtureOne Corp.*, 181 Wn. 2d 642, 336 P.3d 112 (2014) (upholding exercise of personal jurisdiction over out-of-state officer of corporation that violated statutes prohibiting willful withholding of wages, RCW 49.52.050 & .070). While the release to play football in Washington in violation of the Lystedt law should suffice to establish specific personal jurisdiction, the extent to which Burns' practice of medicine involves the State of Washington further distinguishes *Lewis*, and supports the exercise of personal jurisdiction in this case. *See* Swank Br., at 16-19. It appears that the Court of Appeals declined to consider this information on grounds that general, as distinguished from specific, personal jurisdiction was not adequately argued. *See Swank*, at *12 n.7. The court is incorrect because the Swanks identified the facts and law supporting general as well as specific jurisdiction. *See* Swank Br., at 16-19 (facts); *id.* at 47 n.91 (law).

[14] The parties also addressed choice of law, but this issue was not reached by the Court of Appeals. Generally speaking, the most significant relationship test, set forth in the Restatement (Second) of Conflict of Laws § 6 (1971), governs choice of law in Washington. *See, e.g., Woodward v. Taylor,* 184 Wn. 2d 911, 918, 366 P.3d 432 (2016). However, the most significant relationship test applies only in the absence of a statutory choice of law. *See* Restatement § 6(1) (stating "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law"); *id.* § 6(2) (stating the most significant relationship test only applies "[w]hen there is no [statutory] directive"); *id.* § 6 cmt. *a* (stating "[a] court, subject to constitutional limitations, must follow the directions of its legislature"); *see also In re Marriage of Abel*, 76 Wn. App. 536, 539-40, 886 P.2d 1139 (1995) (holding superior court erred in calculating child support in accordance with Mont. Law because RCW 26.19.035(1) represents a statutory choice of law, citing Restatement § 6(1)). A statute must be applied as written

VI. CONCLUSION

The Swanks ask this Court to reverse the Court of Appeals decision, and remand the case for trial against VCS, Coach Puryear and Dr. Burns.

Respectfully submitted this 16th day of June, 2016.

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within its intended range of application. *See* Restatement § 6 cmt. *b* (stating "[i]f the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it"). The Lystedt law requires all young athletes to be properly evaluated and cleared by a licensed health care provider trained in the management of concussion before returning to competition. *See* RCW 28A.600.190(4). It does not permit an exception for out-of-state health care providers who clear young athletes to return to competition in Washington, and it is unlikely that the legislature would have intended such a result. As a result, there is no need to engage in choice of law analysis, at least with respect to the Lystedt law claim. *Cf. Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn. 2d 793, 363 P.3d 587 (2015) (holding that the coverage of the Consumer Protection Act, Ch. 19.86 RCW, includes out-of-state plaintiffs as well as defendants).

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 the date set forth below, I served the document to which this is annexed by First Class Mail, postage prepaid, as follows:

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Signed at Moses Lake, Washington on June 16, 2016.

Shari M. Canet

Shari M. Canet, Paralegal

APPENDIX

2016 WL 2869739
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 3.

Donald R. **SWANK**, individually and as personal representative of the Estate of Andrew F. **Swank**, and Patricia A. **Swank**, individually, Appellants,
v.
VALLEY CHRISTIAN SCHOOL, a Washington State Non-profit Corporation, Jim Puryear, and Timothy F. Burns, M.D. individually, Respondents,
Mike Heden and Derick Tabish, individually, Defendants.

No. 33782–1–III.
|
May 17, **2016**.

Synopsis
Background: High school student's parents filed wrongful death suit against nonprofit religious school, volunteer football coach, and nonresident, treating physician for negligence, medical negligence, and violation of Zackery Lystedt law, stemming from student's death after suffering concussion during football game. The Superior Court, Spokane County, Michael P. Price, J., granted school, coach, and physician summary judgment. Parents appealed.

Holdings: The Court of Appeals, Lawrence–Berrey, J., held that:

[1] Zackery Lystedt law did not mandate specific return to play standards;

[2] Zackery Lystedt law did not create implied cause of action;

[3] fact issue as to whether school breached duty to protect student precluded summary judgment on claims against school; but

[4] coach was subject to nonprofit volunteer immunity;

[5] claim based on coach's actions of grabbing and shaking student's face mask was subject to two-year statute of limitations for battery; and

[6] forum state did not have personal jurisdiction over physician.

Affirmed in part, reversed in part, and remanded.

West Headnotes (22)

[1] **Education**
Sports, Athletics, and Recreation
Public Amusement and Entertainment
Games, Sports, Athletic Activities and Contests in General

Zackery Lystedt law, which provided guidelines for concussions and head injuries in youth sports, did not mandate specific "return to play" standards that mandated gradually returning youth athletes to play after sustaining a concussion or head injury; law did not specifically reference any return to play standard, and legislature did not intend to adopt generally recognized "return to play" standards providing for gradual return to play. West's RCWA 28A.600.190.

Cases that cite this headnote

[2] **Action**
Statutory Rights of Action
Education
Actions
Health
Right of Action; Standing

Zackery Lystedt law, which provided guidelines for concussions and head injuries in youth sports, did not create implied cause of action based on grant of immunity to volunteer health care providers under law, mandatory phrasing of obligations imposed by law, or absence of alternative enforcement mechanism in wrongful death action asserted by parents of high school student against nonprofit religious

school, football coach, and treating physician for violations of law, stemming from student's death after suffering concussion during football game; although student was within class who was intended to be benefited and protected by law, parents had remedies apart from implying cause of action under law. West's RCWA 28A.600.190.

Cases that cite this headnote

[3] **Action**

Statutory Rights of Action

Court will imply a statutory cause of action under a three-prong test: (1) whether plaintiff is within the class for whose especial benefit statute was enacted; (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and (3) whether implying a remedy is consistent with underlying purpose of legislation.

Cases that cite this headnote

[4] **Action**

Statutory Rights of Action

Premise for implied cause of action is assumption that legislature would not specifically grant rights to a class of persons without enabling members of that class to enforce those rights.

Cases that cite this headnote

[5] **Judgment**

Tort Cases in General

Genuine issue of material fact existed as to whether nonprofit religious school breached its duty to protect high school student during football game by failing to remove student from game in which student appeared to be suffering from symptoms of a prior concussion, took a hit, and shuffled off the field and collapsed, precluding summary judgment in wrongful death action filed against school by student's parents for negligence and violations of Zackery Lystedt law, which provided guidelines for concussions and head injuries in youth sports, stemming from student's death two days after football game. West's RCWA 28A.600.190; CR 56(c).

Cases that cite this headnote

[6] **Judgment**

Tort Cases in General

Negligence

Elements in General

To overcome a motion for summary judgment, plaintiffs must allege facts showing existence of the four basic elements of a negligence claim: (1) existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause. CR 56(c).

Cases that cite this headnote

[7] **Education**

Duty and Standard of Care

Under common law, schools owe a duty to their students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in their custody from such dangers.

Cases that cite this headnote

[8] **Education**

Duties and Liabilities

Even if volunteer football coach entered into joint venture with nonprofit religious school, coach was an individual subject to nonprofit volunteer immunity in wrongful death action filed by parents of high school student against coach for negligence, recklessness, and violation of Zackery Lystedt law, which provided guidelines for concussions and head injuries in youth sports; legal capacity in which coach participated in endeavor did not change the fact that he was still an individual subject to immunity. West's RCWA 4.24.670, 28A.600.190.

Cases that cite this headnote

[9] **Limitation of Actions**

Limitation as Affected by Nature or Form of Remedy in General

Factual allegations of complaint determine applicable statute of limitations.

Cases that cite this headnote

[10] **Limitation of Actions**

Matters Avoiding Bar of Statute

Plaintiff cannot avoid the battery statute of limitation period by disguising real cause of action in a different form. West's RCWA 4.16.100(1).

Cases that cite this headnote

[11] **Assault and Battery**

Nature and Elements of Assault and Battery

Assault and Battery

Time to Sue and Limitations

Claim asserted by parents of high school student against football coach based on coach's actions of grabbing student by the face mask and shaking it was properly characterized as claim for battery, and thus two-year statute of limitations applied to claim; shaking of student's face mask was harmful and offensive, and by reaching out to grab and shake face mask, coach intended to make harmful or offensive contact. West's RCWA 4.16.100(1).

Cases that cite this headnote

[12] **Assault and Battery**

Nature and Elements of Assault and Battery

Assault and Battery

Intent and Malice

"Battery" is intentional and unpermitted contact with plaintiff's person.

Cases that cite this headnote

[13] **Assault and Battery**

Intent and Malice

It is not necessary that defendant intended specific harm that befell plaintiff for defendant to be liable for battery; it is the conduct that must be intended, not the result.

Cases that cite this headnote

[14] **Judgment**

Evidence and Affidavits in Particular Cases

In summary judgment context, party asserting personal jurisdiction bears burden of presenting a prima facie case establishing jurisdiction. CR 56(c).

Cases that cite this headnote

[15] **Appeal and Error**

Dismissal or Nonsuit in General

On review of dismissal of claims against party for lack of personal jurisdiction, appellate court treats allegations in the complaint as true in determining whether party asserting jurisdiction met their burden of presenting a prima facie case establishing jurisdiction. CR 56(c).

Cases that cite this headnote

[16] **Courts**

Professional Services; Malpractice

Forum state did not have personal jurisdiction over nonresident physician in wrongful death action asserted by parents of high school student against physician for medical negligence, stemming from student's death following concussion-related football injury, even though physician cleared student to return to play football in forum state after student had suffered concussion; parents unilaterally sought physician's professional services in non-forum state, all care was rendered in non-forum state, and any knowledge that physician had that student would go to forum state and foreseeably suffer injury was insufficient to create personal jurisdiction. West's RCWA 4.28.185.

Cases that cite this headnote

[17] **Constitutional Law**

Non-Residents in General

Constitutional Law

Business, Business Organizations, and Corporations in General

Courts

Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

Courts

Corporations and Business Organizations

Under the long-arm statute, courts may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by due process clause of United States Constitution, except as limited by the terms of the statute. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185.

Cases that cite this headnote

[18] **Constitutional Law**

Non-Residents in General

Courts

Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

Long-arm statute should be interpreted broadly consistent with purpose to assert jurisdiction over nonresident defendants to the extent permitted by due process clause. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185.

Cases that cite this headnote

[19] **Courts**

Torts in General

Generally, when injury occurs in forum state, it is inseparable part of tortious act and that act is deemed to have occurred in state for purposes of long-arm statute. West's RCWA 4.28.185.

Cases that cite this headnote

[20] **Courts**

Torts in General

When determining whether court has personal jurisdiction over a party, location where services are performed is of greater jurisdictional importance than is location where a product is bought.

Cases that cite this headnote

[21] **Courts**

Torts in General

When determining whether court has personal jurisdiction over a party, in the case of personal services, focus must be on the place where services are rendered, since this is the place of the receiver's need; the need is personal and services rendered are in response to dimensions of that personal need and are directed to no place but to the needy person herself..

Cases that cite this headnote

[22] **Courts**

Torts in General

When determining whether court has personal jurisdiction over a party, idea that tortious rendition of such services is a portable tort that can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available.

Cases that cite this headnote

Appeal from Spokane Superior Court; Honorable Michael P. Price, J.

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PUBLISHED OPINION

LAWRENCE–BERREY, J.

*1 ¶ 1 In 2009, the Washington Legislature passed the Zackery Lystedt law, RCW 28A.600.190, entitled "Youth Sports—Concussion and Head Injury Guidelines." High school junior Andrew (Drew) **Swank**, an Idaho resident, played football for **Valley Christian** School (VCS), located in Spokane **Valley**, Washington. On September 18, 2009, Drew sustained a head injury during a game. Days later, Dr. Timothy Burns, an Idaho physician, saw Drew in his Idaho clinic and diagnosed Drew as having sustained a concussion. Later that week, Dr. Burns received word that Drew's headaches were gone and cleared Drew to return to play. The next day, one week after receiving his concussion, Drew played his final football game. During the game, Drew showed signs of a continued concussive injury. He remained in the game, was hit hard by an opposing player, and shuffled off the field. Two days later, Drew died.

¶ 2 In September 2012, Drew's parents, Donald and Patricia **Swank**, filed a wrongful death suit against multiple entities, including VCS, head football coach Jim Puryear, and Dr. Burns. The suit alleged causes of action for negligence, medical negligence, and violation of the Zackery Lystedt law. On summary judgment, the Spokane County Superior Court dismissed the claims against all defendants. The **Swanks** appeal.

¶ 3 We hold (1) the Zackery Lystedt law does not create an implied cause of action, but the violation of the Zackery Lystedt law by one on whom the law imposes a duty may be evidence of negligence, (2) genuine issues of material fact preclude summary dismissal of VCS even though Dr. Burns cleared Drew to return to play, when Mr. Puryear permitted Drew to continue playing even after Drew showed observable signs of continued concussive injury, (3) the nonprofit volunteer immunity statute, RCW 4.24.670, insulates Mr. Puryear from personal liability for simple negligence, and (4) Washington lacks personal jurisdiction over Dr. Burns, an Idaho physician, for alleged medical malpractice occurring in Idaho. We, therefore, reverse the summary dismissal of VCS but affirm the summary dismissals of Mr. Puryear and Dr. Burns.

FACTS [1]

¶ 4 VCS is a nonprofit religious school located in Spokane **Valley**, Washington. In 2007, Mr. Puryear, a parent of students at VCS, approached VCS about starting a football program at the school. VCS did not have a football program because it lacked money. To start the program, VCS relied extensively on outside donations, with Mr. Puryear's family providing the bulk of the money. With the money, Mr. Puryear purchased equipment and paid for team meals, transportation, referees, and emergency personnel. Mr. Puryear served as the head coach of the football team, but he received no payment. Mike Heden was the volunteer assistant coach. Drew played football for VCS in 2009.

¶ 5 In 2009, the Washington Legislature passed the Zackery Lystedt law. RCW 28A.600.190. The purpose of the Zackery Lystedt law is to reduce the risk of injury or death to youth athletes who suffer concussions.

*2 ¶ 6 As a consequence of this new law, VCS developed a concussion information sheet (CIS). The CIS noted it was "[a]dapted from the CDC [Center for Disease Control] and the 3rd International Conference on Concussion in Sport." Clerk's Papers (CP) at 79–80. In late July 2009, VCS sent Mr. Puryear to a multi-day Washington Interscholastic Activities Association (WIAA) training program. A portion of this program discussed the new Zackery Lystedt law.

¶ 7 Prior to the fall 2009 football season, Mr. Puryear held a meeting with parents where he discussed the Zackery Lystedt law and distributed the CIS. The CIS defined concussion and warned that concussions could lead to serious complications, including brain damage and death. The CIS also listed several observable signs that could indicate a youth athlete might be suffering from a concussion. These signs included a dazed appearance, confusion about an assignment, and a loss of coordination. Prophetically, the CIS also provided:

> ***What can happen if my child keeps on playing with a concussion or returns to soon?***
>
> Athletes with the signs and symptoms of concussion should be removed from play immediately. Continuing to play with the signs and symptoms of a concussion leaves the young athlete especially vulnerable to greater injury. *There is an increased risk of significant damage from a concussion for a period of time after that concussion occurs, particularly if the athlete suffers another concussion before completely recovering from the first one. This can lead to prolonged recovery, or even to severe brain swelling (second impact syndrome) with devastating and even fatal consequences.* It is well known that adolescent or teenage athlete[s] will often under report symptoms of injuries. And concussions are no different.... CP at 80 (emphasis added). The CIS required any athlete even suspected of suffering a concussion to be removed from the game or practice immediately, and to not return until medically cleared. The CIS also provided: "The new 'Zackery Lystedt Law' in Washington now requires the consistent and uniform implementation of long and well-established return to play concussion guidelines that have been recommended for several years." CP at 80. Finally, the CIS provided an official CDC link for current and up-to-date information on concussions. Ms. **Swank** and Drew'signed the CIS.

¶ 8 On September 18, 2009, during the first game of the season, Drew took a hit and experienced a headache and neck pain. Mr. Puryear immediately removed Drew from the game. The following Monday, Drew did not go to school or attend practice because he still had a headache. On Tuesday, Ms. **Swank** took Drew to Dr. Burns, the **Swanks**' regular physician in Coeur d'Alene, Idaho. Drew told Dr. Burns he attended VCS and discussed what had happened in the game. Dr. Burns diagnosed Drew with a mild concussion, instructed him to take ibuprofen for the next few days, and prescribed the following course of treatment:

> ***3** I am also going to have [Drew] stay out of contact sports for the next three days' period of time. If he has a bad headache, after playing football, he is to be out of the sport for a week's period of time. If he has another concussion, following that, then I would have him out probably for a two-month period of time.

CP at 115. Mr. **Swank** told Mr. Puryear that Drew's doctor diagnosed Drew with a concussion. Drew attended practices that Tuesday, Wednesday, and Thursday, but he did not participate.

¶ 9 On Thursday, September 24, Drew's headaches stopped, and Ms. **Swank** called Dr. Burns to get a release for Drew to play in the game the next day. Ms. **Swank** told Dr. Burns's receptionist the following:

> I told the receptionist that he had a concussion and Dr. Burns saw him and said he couldn't play. He says his headaches are gone now, and he plays school in the State of Washington and they have a new law and before he can go back to play, he has to have a release from the doctor.

CP at 188. Later that day, Dr. Burns wrote a note clearing Drew to return to play on September 25, 2009.

¶ 10 Dr. Burns is an Idaho resident who practices medicine at Ironwood Family Practice, an Idaho corporation. While he was licensed in Washington starting in 1988 and completed his residency in Spokane in 1989, he has been licensed to practice medicine only in Idaho since 2003. Out of Dr. Burns's approximately 2,400 patients, one to three percent are Washington residents. Dr. Burns sends prescriptions to Washington pharmacies, and Ironwood uses laboratories in Washington and contracts with Washington insurance companies. Dr. Burns first met the **Swanks** in Idaho in the early 1990s shortly after Dr. Burns joined Ironwood. The **Swanks** were Idaho residents at that time and were still Idaho residents in 2009. Dr. Burns provided all treatment to Drew in Idaho.

¶ 11 On Thursday, September 24, VCS and Mr. Puryear received the note clearing Drew to return to play the following day. During school on Friday, September 25, Drew appeared to be his normal self. Mr. Heden did not notice anything wrong with Drew during warmups before the game, and Drew played in the game against Washtucna. Soon after the game began, multiple people observed Drew's quality of play decline. One of Drew's teammates said, "his play grew worse and worse as the game progressed" and "Drew became sluggish during the game and was frequently out of position." CP at 402–03. Drew's aunt stated, "he wasn't the same player he was the year before. He wasn't running fast. He wasn't

quick, and he was just kind of standing." CP at 526. Mr. **Swank** said Drew misjudged where the ball was going on kickoffs, missed blocking assignments, looked sluggish, and appeared dazed and confused. Ms. **Swank** said Drew's timing was off, he was not crisp and sharp when cutting, he missed tackles, and he looked confused and sluggish. Mr. Puryear was also aware Drew was playing poorly because he yelled at Drew several times to come to the sidelines. In addition, on one occasion Mr. Puryear "grabbed Drew by the face mask and violently began to jerk it up and down hard while he screamed at him, 'What are you doing out there, what are you doing out there?' " CP at 175. At the end of the second quarter, an opposing player hit Drew. Drew shuffled off the field and collapsed. Two days later, Drew died.

***4** ¶ 12 In September 2012, Mr. **Swank**, as personal representative of the estate of his son, and individually with his wife, filed suit against VCS, its principal Derick Tabish, Mr. Puryear, Mr. Heden, and Dr. Burns. As to Mr. Puryear, the suit alleged negligence, recklessness, and violation of the Zackery Lystedt law. As to VCS, Mr. Tabish, and Mr. Heden, the suit alleged negligence and violation of the Zackery Lystedt law. As to Dr. Burns, the suit alleged medical malpractice and violation of the Zackery Lystedt law. The parties later agreed to dismiss Mr. Heden. VCS, Mr. Tabish, Mr. Puryear, and Dr. Burns moved for summary judgment. The superior court granted dismissal for all defendants, specifically noting it dismissed Dr. Burns for lack of personal jurisdiction. The **Swanks** appealed. [2]

LAW

A. *Zackery Lystedt Law*

¶ 13 In 2009, Washington passed the Zackery Lystedt law, RCW 28A.600.190, the country's first comprehensive concussion law for youth athletes. Josh Hunsucker, *Buckle Your Chinstrap: Why Youth, High School, and College Football Should Adopt the NFL's Concussion Management Policies and Procedures,* 45 MCGEORGE L.REV. 801, 814 (2014). The purpose of the Zackery Lystedt law is to reduce the risk of injury or death to youth athletes who sustain concussions. *See* RCW 28A.600.190. The three core tenets of the Zackery Lystedt law are: (1) to establish a set of concussion management guidelines in order to educate coaches, parents, and youth athletes about the risks associated with concussions, (2) to remove youth athletes from competition if they exhibit any sign or symptom of a concussion, and (3) to require youth athletes to be cleared by a licensed health care provider before returning to play. RCW 28A.600.190(2)-(4).

¶ 14 The law requires school districts to work in concert with the WIAA to develop guidelines, pertinent information, and forms to inform and educate coaches, youth athletes, and their parents concerning the nature and risk of concussions and head injuries, including the heightened risk of continuing to play after suffering an initial concussion or head injury. RCW 28A.600.190(2). Each youth athlete and the athlete's parent or guardian must sign and return a concussion and head injury information sheet circulated by the school district before the youth athlete is allowed to participate in any sporting practice or competition. RCW 28A.600.190(2).

¶ 15 If a youth athlete is suspected of sustaining a concussion or head injury in a practice or game, the youth athlete must be immediately removed from play at that time. RCW 28A.600.190(3). A youth athlete who has been removed from play may not return until he receives written clearance from a properly trained licensed health care provider. RCW 28A.600.190(4).

1. *The Zackery Lystedt law does not mandate specific return to play standards*

[1] ¶ 16 The **Swanks** argue the Zackery Lystedt law requires schools and coaches to adhere to "generally recognized return to play standards" that mandate gradually returning an athlete to play after sustaining a concussion or head injury. The **Swanks** point to numerous publications outlining these gradual return to play standards and rely on the following language in the Zackery Lystedt law in making this argument:

> ***5** Continuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and even death. The legislature recognizes that, *despite having generally recognized return to play standards for concussion and head injury,* some affected youth athletes are prematurely returned to play resulting in actual or potential physical injury or death to youth athletes in the state of Washington.

RCW 28A.600.190(1)(c) (emphasis added).

¶ 17 "Statutory interpretation is a question of law which this court reviews de novo." *Berger v. Sonneland,* 144 Wash.2d 91, 104–05, 26 P.3d 257 (2001). Statutory interpretation is used " 'to determine and give effect to the intent of the legislature.' " *State v. Reeves,* 184 Wash.App. 154, 158, 336 P.3d 105 (2014) (internal quotation marks omitted) (quoting *State v. Evans,* 177 Wash.2d 186, 192, 298 P.3d 724 (2013)). But this court will not indulge in speculation about the legislature's subjective intent. *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.,* 123 Wash.2d 391, 409, 869 P.2d 28 (1994). Thus, if the statute is plain and unambiguous, this court does not engage in statutory interpretation. *Berger,* 144 Wash.2d at 105, 26 P.3d 257. "A court may not add words to a statute even if it believes the [l]egislature intended something else but failed to express it adequately." *Caritas Servs.,* 123 Wash.2d at 409, 869 P.2d 28. Nor can a statute incorporate something by reference without ever specifically referring to that something. *See State v. Hovrud,* 60 Wash.App. 573, 576, 805 P.2d 250 (1991) (stating the court knows of no authority for the proposition that a statute incorporates other statutes by reference without ever referring to them).

¶ 18 Contrary to the **Swanks'** contention, the Zackery Lystedt law does not adopt "generally recognized return to play standards." Rather, in the Zackery Lystedt law's introductory section, the law notes—notwithstanding the presence of standards for returning athletes to play after sustaining a concussion—some athletes are still prematurely returned to play. The Zackery Lystedt law does not specifically reference any return to play standard.

¶ 19 To the extent there is any ambiguity in what the legislature intended, the legislative history of the Zackery Lystedt law shows the legislature did not intend to adopt "generally recognized return to play standards" providing for gradual return to play. *See Reeves,* 184 Wash.App. at 158, 336 P.3d 105 (In resolving ambiguity, this court "resort[s] to other indicia of legislative intent, including ... legislative history."). When proposing the initial bill to the House Education Committee, the bill's proponents stated Zackery Lystedt's injury led to the creation of the bill. Hr'g on H.B. 1824 Before the H. Educ. Comm., 60th Leg., Reg. Sess. (Wash. Feb. 13, 2009), http://www.tvw.org/watch/?eventID=2009021239 (statement of Rep. Jay Rodne) [hereinafter February House Hearing]. Thirteen-year-old Zackery Lystedt suffered a brain injury following his return to play in a football game after sustaining a concussion in that same game. Tom Wyrwich, *Special Report: The Dangers of Adolescents Playing Football with Concussions,* THE SEATTLE TIMES (Nov. 4, 2008), http://seattletimes.nwsource.com/html/highschoolsports/2008347382_concussions04.htm. Accordingly, testimony before the House Education Committee focused on removing young athletes from play if a brain injury is suspected and not returning them to play until cleared by a licensed health care provider. *See generally* February House Hearing; Hr'g on E.H.B. 1824 Before the S. Early Learning & K–12 Educ. Comm., 60th Leg., Reg. Sess. (Wash. Mar. 18, 2009), http://www.tvw.org/watch/?eventID=2009031207. There was no legislative testimony regarding or contemplating gradual return to play standards. [3]

2. *The Zackery Lystedt law does not create an implied cause of action*

***6** **[2]** ¶ 20 The **Swanks** seek both common law and statutory remedies. The **Swanks** argue violation of the Zackery Lystedt law creates an implied statutory cause of action. While the Zackery Lystedt law does not expressly provide a civil remedy, the **Swanks** contend it implies a remedy because of the grant of immunity to volunteer health care providers, the mandatory phrasing of the obligations imposed, and the absence of an alternative enforcement mechanism.

[3] **[4]** ¶ 21 This court will imply a statutory cause of action under a three-prong test:

> [F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett v. Hardy, 113 Wash.2d 912, 920–21, 784 P.2d 1258 (1990). The premise for an implied cause of action is "the assumption that the legislature would not specifically grant rights to a class of persons 'without enabling members of that class to enforce those rights.' " *Adams v. King County,* 164 Wash.2d 640, 653, 192 P.3d 891 (2008) (quoting *Bennett,* 113 Wash.2d at 921, 784 P.2d 1258).

¶ 22 The first *Bennett* prong asks whether the plaintiff was within the class intended to be benefited by the statute. This question is resolved in the **Swanks'** favor. Drew was a youth athlete who suffered a concussion in a game. Without

question, Drew was within the class who was intended to be benefited and protected by the Zackery Lystedt law.

¶ 23 The second *Bennett* prong require us to discern legislative intent. The **Swanks**' strongest argument for an implied cause of action is the legislature's grant of immunity to volunteer health care providers who evaluate the youth athlete for concussion and/or provide written clearance to return to play. *See* RCW 28A .600.190(4). The **Swanks** argue that the legislature would not have provided for immunity had it not intended there to be liability.

¶ 24 The Washington Supreme Court's precedent is divided over how grants of immunity play into the intent to create an implied cause of action. In *Beggs,* the court used the grant of good faith immunity seen in RCW 26.44.030, which requires certain professionals to report suspected child abuse to the proper authorities, to find the statute implicitly supported a civil remedy. *Beggs v. Dep't of Soc. & Health Servs.,* 171 Wash.2d 69, 78, 247 P.3d 421 (2011). But in *Adams,* the court specifically rejected the appellant's argument that good faith immunity sufficed to establish legislative intent to create an implied cause of action for violations of the former Washington Uniform Anatomical Gift Act (WAGA). *Adams,* 164 Wash.2d at 656, 192 P.3d 891. The court noted "if the legislature had intended to provide a remedy under the WAGA, it would have expressly created the liability to which the immunity corresponds." *Id.* The court found further support for its rejection of an implied cause of action in the comment to the revised Uniform Anatomical Gift Act of 2006, which recognized that common law provides remedies if a person acts in bad faith. *Id.*

*7 ¶ 25 Here, as in *Adams,* the **Swanks** have remedies apart from implying a cause of action under the Zackery Lystedt law. The availability of remedies weighs against the third *Bennett* prong, which asks whether the legislative purpose is best achieved by implying a cause of action. The **Swanks** have common law negligence remedies against VCS and Mr. Puryear. They also have a medical malpractice remedy against Dr. Burns. Because RCW 5.40.050 allows a trier of fact to consider the breach of a statutory duty as evidence of negligence, the **Swanks** may bootstrap their contentions that VCS and Mr. Puryear violated the Zackery Lystedt law into their assertions of negligence.[4] Because the **Swanks** already have these remedies, we conclude that we need not imply a new cause of action given the legislature's murky intent in this regard.

¶ 26 Having discussed the Zackery Lystedt law and concluded that the law neither mandates a specific return to play standard nor gives rise to an implied cause of action, we now address whether the trial court erred in dismissing the **Swanks**' claims on summary judgment.

B. *Summary Judgment Standard and Analysis*

¶ 27 This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Smith v. Safeco Ins. Co.,* 150 Wash.2d 478, 483, 78 P.3d 1274 (2003) (quoting *Jones v. Allstate Ins. Co.,* 146 Wash.2d 291, 300, 45 P.3d 1068 (2002)). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." CR 56(c). Evidence is construed in the light most favorable to the nonmoving party. *Osborn v. Mason County,* 157 Wash.2d 18, 22, 134 P.3d 197 (2006).

1. *Claims against VCS*

[5] [6] ¶ 28 The **Swanks** argue VCS was negligent when it failed to (1) utilize gradual return to play standards and (2) remove Drew from the Washtucna game when he exhibited signs of a concussion. To overcome a motion for summary judgment, the **Swanks** must allege facts showing the existence of the four basic elements of a negligence claim: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Ranger Ins. Co. v. Pierce County,* 164 Wash.2d 545, 552, 192 P.3d 886 (2008) (quoting *Degel v. Majestic Mobile Manor, Inc.,* 129 Wash.2d 43, 48, 914 P.2d 728 (1996)).

[7] ¶ 29 The first two elements are at issue here. The common law and the Zackery Lystedt law each provide VCS with duties it owes to student athletes. Under the common law, schools "owe[ ] a duty to [their] students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in [their] custody from such dangers." *Wagenblast v. Odessa Sch. Dist. No. 105–157–166J,* 110 Wash.2d 845, 856, 758 P.2d 968 (1988) (stating this duty extends to student athletes). As discussed previously, the Zackery Lystedt law imposes duties on schools and coaches to protect youth athletes suspected of sustaining a concussion.

*8 ¶ 30 Although the Zackery Lystedt law does not explicitly adopt gradual return to play standards, it does explicitly require schools to work together with the WIAA "to develop guidelines and other pertinent information and

forms to inform and educate coaches ... of the nature and risk of concussion and head injury including continuing to play after concussion or head injury." RCW 28A.600.190(2). By logical extension, the Zackery Lystedt law requires schools and their coaches to protect their youth athletes by *complying* with the training they received or reasonably should have received. To the extent that Washington high school football coaches actually received or should have received concussion protocol training prior to the fall 2009 football season, this evidence is highly relevant and admissible in this case. Here, the CIS explicitly states, "Athletes with the signs and symptoms of concussion should be removed from play immediately. Continuing to play with the signs and symptoms of a concussion leaves the young athlete especially vulnerable to greater injury." CP at 80. VCS and Mr. Puryear were aware of this language because VCS participated in creating the CIS, and Mr. Puryear handed out the CIS to athletes and parents prior to the commencement of the fall 2009 football season.

¶ 31 There is a genuine issue of material fact as to whether VCS breached its duty to Drew during the Washtucna game. Although VCS argues it had a right to rely on Dr. Burns' note that Drew was fit to play, the Zackery Lystedt law does not permit VCS to ignore observable signs that Drew continued to suffer from the concussion he earlier sustained and ignore its own CIS that required VCS to remove Drew from play. Under the Zackery Lystedt law, VCS and Mr. Puryear knew that "some affected youth athletes are prematurely returned to play" "and that "[c]ontinuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and even death." RCW 28A.600.190(1)(c). With this knowledge, VCS was charged with the duty of ordinary care and protecting Drew consistent with the training Mr. Puryear received or should have received prior to the fall 2009 football season.

¶ 32 According to Drew's family and a teammate, Drew's performance in the Washtucna game was atypical: he was slow, uncoordinated, and missed plays he did not normally miss. These characteristics are those the CIS lists as observable characteristics of an athlete who is exhibiting signs of a concussion. Further, there is evidence that VCS, through Mr. Puryear, had knowledge of Drew's concussion-related deficits. Mr. Puryear called Drew over to the sidelines multiple times to yell at him and once even grabbed Drew by his face mask and shook it violently. With all this knowledge, together with the duty of ordinary care buttressed with proper training, there is a genuine issue of material fact whether, and at what point, Mr. Puryear should have removed Drew from the Washtucna game. The trial court erred in granting summary judgment dismissal for VCS.

2. *Claims against Mr. Puryear*

***9** ¶ 33 Having concluded that VCS was improperly dismissed because issues of material fact existed whether Mr. Puryear acted with ordinary care, we preliminarily conclude that Mr. Puryear, as the agent of VCS, also has personal tort liability. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash.2d 380, 400, 241 P.3d 1256 (2010). Mr. Puryear's primary defense to personal liability is the nonprofit volunteer immunity statute, RCW 4.24.670.

a. *Nonprofit volunteer immunity*

¶ 34 RCW 4.24.670 provides in relevant part:

> (1) [A] volunteer of a nonprofit organization ... shall not be personally liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if:
>
> ....
>
> (c) The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.

The statute further defines "volunteer" as

> an individual performing services for a nonprofit organization ... who does not receive compensation, other than reasonable reimbursement or allowance for expenses actually incurred, or any other thing of value, in excess of five hundred dollars per year. "Volunteer" includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

RCW 4.24.670(5)(e).

¶ 35 The **Swanks** do not dispute that VCS is a nonprofit organization. The **Swanks** argue: (1) Mr. Puryear was not a "volunteer" because he was not an individual, but instead entered into a joint venture with VCS, and (2) Mr. Puryear acted with gross negligence or acted recklessly when he grabbed Drew by the face mask and shook it.

i. *Joint venture rebuttal to volunteer immunity*

[8] ¶ 36 An individual can participate in an endeavor in many legal capacities. For instance, an individual can be an employee and hence an agent of a principal, an individual can be an independent contractor, or an individual can be a partner. The legal capacity in which the individual participates in an endeavor does not change the fact that the individual still is an individual. Even if we were to conclude that Mr. Puryear entered into a joint venture with VCS, this does not detract from the fact that he did so as an individual. We conclude that Mr. Puryear was an individual and subject to the immunity of RCW 4.24.670.

ii. *Gross negligence/recklessness rebuttal to volunteer immunity*

¶ 37 In footnote 88 of their opening brief, the **Swanks** obliquely argue Mr. Puryear does not have volunteer immunity for grabbing Drew by the face mask and shaking it because such conduct amounts to gross negligence or recklessness.[5] Mr. Puryear's response to the **Swanks'** footnoted argument is that the face mask claim is one for battery and is barred by RCW 4.16.100(1), the two-year statute of limitations.

[9] [10] [11] ¶ 38 The factual allegations of the complaint determine the applicable statute of limitations. *Boyles v. City of Kennewick,* 62 Wash.App. 174, 177, 813 P.2d 178 (1991). A plaintiff cannot avoid the battery limitation period "by disguising the real cause of action in a different form." *Id.* The **Swanks** alleged the following facts in their complaint:

> ***10** 2.7 As a result of Andrew's uncharacteristically poor play, Defendant Mr. Puryear called Andrew to the sidelines, grabbed him by the facemask and proceeded to violently shake his head up and down in anger. To the best information, knowledge, and belief of Plaintiffs, the violent shaking of Andrew's head caused and/or contributed to the second impact syndrome that resulted in Andrew's death.

CP at 4.

[12] [13] ¶ 39 These factual allegations are consistent with battery. A battery is "an intentional and unpermitted contact with the plaintiff's person." *Kumar v. Gate Gourmet, Inc.,* 180 Wash.2d 481, 504, 325 P.3d 193 (2014). A defendant is liable for battery if he intends to cause a harmful or offensive contact with the plaintiff and such a contact results. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 13 (1965)). It is not necessary that the defendant intended the specific harm that befell the plaintiff; it is the conduct that must be intended, not the result. *Sutton v. Tacoma Sch. Dist. No. 10,* 180 Wash.App. 859, 866, 324 P.3d 763 (2014).

¶ 40 The **Swanks'** complaint and depositions show this shaking of Drew's face mask was harmful and/or offensive. The words used in the complaint demonstrate this was a harmful contact, alleging it led to second impact syndrome. In his deposition, Mr. **Swank** states the contact was offensive to him. By reaching out to grab and shake Drew's face mask, Mr. Puryear obviously intended to make the harmful or offensive contact. Thus, this claim is properly characterized as one for battery and is barred by the two-year statute of limitations.

¶ 41 In summary, we conclude that Mr. Puryear was an individual for purposes of RCW 4.24.670(5)(e) and therefore protected by the nonprofit volunteer immunity statute. We further conclude that the two-year statute of limitations shields Mr. Puryear from potential liability for the face mask claim. The trial court did not err in granting summary judgment dismissal in favor of Mr. Puryear.

3. *Claims against Dr. Burns*

[14] [15] ¶ 42 The **Swanks** contend the court erred in dismissing their claims against Dr. Burns for lack of personal jurisdiction. In a summary judgment context, the party asserting personal jurisdiction, here the **Swanks,** bears the burden of presenting a prima facie case establishing jurisdiction. *Shaffer v. McFadden,* 125 Wash.App. 364, 370, 104 P.3d 742 (2005). This court treats the allegations in the complaint as true in determining whether the **Swanks** have met their burden. *Id.*

¶ 43 The **Swanks** first assert the Zackery Lystedt law creates an implied cause of action that is not preempted by the medical negligence statute, chapter 7.70 RCW. They next contend Washington has personal jurisdiction over Dr. Burns because Dr. Burns knew Drew could suffer injury or death in Washington if he was cleared to return to play too soon.

a. *The Zackery Lystedt law does not create an implied cause of action*

*11 ¶ 44 We previously analyzed whether the Zackery Lystedt law created an implied cause of action. We held the Zackery Lystedt law did not create an implied cause of action. Therefore, the **Swanks**' only viable cause of action against Dr. Burns is one for medical negligence.

b. *No personal jurisdiction* [6]

[16] [17] [18] ¶ 45 The **Swanks** argue that Washington has personal jurisdiction over Dr. Burns because Dr. Burns cleared Drew to return to play football in Washington. "It is well established in Washington 'that under the long-arm statute, RCW 4.28.185, our courts may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute.' " *Shute v. Carnival Cruise Lines,* 113 Wash.2d 763, 766–67, 783 P.2d 78 (1989) (quoting *Deutsch v. W. Coast Mach. Co.,* 80 Wash.2d 707, 711, 497 P.2d 1311 (1972)). "Our long-arm statute is patterned after the Illinois statute," which " 'reflects on the part of the [Illinois] legislature a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause.' " *Id.* at 767, 783 P.2d 78 (internal quotation marks omitted) (quoting *Tyee Constr. Co. v. Dulien Steel Prods., Inc.,* 62 Wash.2d 106, 109, 381 P.2d 245 (1963)). So RCW 4.28.185 should be interpreted broadly consistent with this purpose. *Shute,* 113 Wash.2d at 767, 783 P.2d 78.

¶ 46 RCW 4.28.185(1) provides in relevant part:

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> ....
>
> (b) The commission of a tortious act within this state.

[19] ¶ 47 The dispositive case is *Lewis v. Bours,* 119 Wash.2d 667, 835 P.2d 221 (1992). As recognized in *Lewis,* Washington generally follows the rule that "when an injury occurs in Washington, it is an inseparable part of the 'tortious act' and that act is deemed to have occurred in this state for purposes of the long-arm statute." *Id.* at 670, 835 P.2d 221 (internal quotation marks omitted). But the *Lewis* court deviated from this general rule. In *Lewis,* Jeanne Lewis, a Washington resident, went to Oregon to receive prenatal care at Dr. Peter Bours's clinic. *Id.* at 668, 835 P.2d 221. Ms. Lewis gave birth to a baby girl at the clinic in Oregon, and Dr. Bours released them with instructions to see a doctor upon returning to Washington. *Id.* at 668–69, 835 P.2d 221. The baby suffered severe complications during the return drive home. *Id.* at 669, 835 P.2d 221. Ms. Lewis sued Dr. Bours, alleging he committed a tort in Washington under the long-arm statute because the injury manifested itself in Washington. *Id.* In rejecting Ms. Lewis's argument, the court was persuaded by an Illinois decision. That decision reasoned that the place of injury for a professional malpractice action is the state where the professional service was performed, even if the injury later manifested itself in the forum state. *Id.* at 671–73, 835 P.2d 221. The *Lewis* court held:

> *12 We thus align ourselves with the Illinois Supreme Court and hereby create an exception to the general rule that the place of the tort is the where the injury occurs. In the event that a nonresident professional commits malpractice in another state against a Washington State resident, that, standing alone, does not constitute a tortious act committed in this state regardless of whether the Washington State resident suffered injury upon his or her return to Washington.

Id. at 673, 835 P.2d 221.

¶ 48 Like in *Lewis,* the **Swanks** unilaterally sought Dr. Burns's professional services in Idaho. All care, negligent and/or otherwise, was rendered in Idaho. Dr. Burns was not a part of any care Drew may have received in Washington. Dr. Burns may have known Drew played football in Washington, but as *Lewis* holds, knowledge that a patient will go to Washington and foreseeably suffer injury in this state is insufficient to create personal jurisdiction. [7]

[20] [21] [22] ¶ 49 There are also public policy reasons supporting Dr. Burns's dismissal for lack of personal jurisdiction. The exception carved out in *Lewis* is based on the personal nature of rendering services as opposed to the sale of goods: "the location where the services are performed is of greater jurisdictional importance than is the location where a product is bought." *Grange Ins. Ass'n v. State,* 110 Wash.2d 752, 763, 757 P.2d 933 (1988). It is a national public policy to ensure medical services are available to all people. *Id.* If physicians have to worry about defending malpractice suits in

foreign jurisdictions, this policy might be inhibited. *Id*. Along similar lines,

> "In the case of personal services focus must be on the place where the services are rendered, since this is the place of the receiver's (here the patient's) need. The need is personal and the services rendered are in response to the dimensions of that personal need. *They are directed to no place but to the needy person herself. It is in the very nature of such services that their consequences will be felt wherever the person may choose to go.* However, the idea that tortious rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available. Medical services in particular should not be proscribed by the doctor's concerns as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it."

Hogan v. Johnson, 39 Wash.App. 96, 102–03, 692 P.2d 198 (1984) (quoting *Wright v. Yackley,* 459 F.2d 287, 289–90 (9th Cir.1972)) (emphasis added).

¶ 50 *Lewis* controls. We conclude Washington does not have personal jurisdiction over Dr. Burns as to the tortious cause of action asserted here. The trial court properly dismissed Dr. Burns for lack of personal jurisdiction.

***13** ¶ 51 Based on the foregoing, we affirm the dismissals of Mr. Puryear and Dr. Burns. We reverse the dismissal of VCS. This matter is remanded to the superior court for proceedings consistent with this opinion.

WE CONCUR: FEARING, C.J., and KORSMO, J.

All Citations

--- P.3d ----, 2016 WL 2869739

Footnotes

1 Because this case is before this court on summary judgment dismissal, the facts are recited in the light most favorable to the nonmoving party, the **Swanks**. *Osborn v. Mason County,* 157 Wash.2d 18, 22, 134 P.3d 197 (2006).

2 During the pendency of their appeal, the **Swanks** moved to dismiss their claims against Mr. Tabish with VCS's agreement that evidence of his alleged fault could be presented and imputed to VCS. This court granted the **Swanks**' motion.

3 Indeed, return to play standards in 2009 were not uniform. In North America in 2010, there were "no uniform guidelines for the identification of post-concussion management of sport-related concussions for young athletes." Marie–France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues,* 21 MARQ. SPORTS L.REV. 241, 257 (2010). Even in 2014, there were at least 16 different concussion guidelines in existence. Samuel D. Hodge, Jr., *A Heads–Up on Traumatic Brain Injuries in Sports,* 17 J. HEALTH CARE L. & POL'Y 155, 166, 172 (2014) (noting these disparate guidelines lack agreement on the specific time in which an athlete may return to play).

4 Neither VCS nor Mr. Puryear deny that RCW 28A.600.190 creates duties for schools and coaches. We do not answer the question of whether RCW 28A.600.190 creates a duty for licensed health care providers.

5 The **Swanks** do not argue that Mr. Puryear's failure to remove Drew from the Washtucna game amounted to gross negligence. Our analysis of this issue therefore is limited to the face mask shaking claim.

6 In their facts section of their opening brief, the **Swanks** set forth numerous contacts that Dr. Burns and/or his practice group had with the state of Washington. Yet, in the argument section of their opening brief, the **Swanks** limit their general jurisdiction argument to the second paragraph of footnote 91. We decline to consider the **Swanks'** argument that Washington has general jurisdiction over Dr. Burns because the **Swanks** have not meaningfully briefed this issue. *Ameriquest Mortg. Co. v. Att'y Gen.,* 148 Wash.App. 145, 166, 199 P.3d 468 (2009).

7 The **Swanks** emphasize the phrase "standing alone" within the above-quoted holding in *Lewis.* They argue the contacts Dr. Burns and/or his clinic has with Washington takes the present case outside of *Lewis.* The **Swanks** are potentially correct. Had they adequately argued general jurisdiction, *Lewis* might be distinguishable. But they did not adequately

argue general jurisdiction in their opening brief. Nor did they respond to Dr. Burns's numerous counter-arguments on the issue of general jurisdiction in their reply brief.

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THE SUPREME COURT OF WASHINGTON

DONALD R. SWANK, et al., Appellants, v. VALLEY CHRISTIAN SCHOOL, et al., Respondents.	)	NO. 90733-1 **ORDER**

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered this matter at its September 29, 2015, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That this case will be transferred to Division Three of the Court of Appeals.

DATED at Olympia, Washington this 30th day of September, 2015.

For the Court

Madsen, C.J.
CHIEF JUSTICE

West's Revised Code of Washington Annotated
Title 28a. Common School Provisions (Refs & Annos)
Chapter 28A.600. Students (Refs & Annos)

West's RCWA 28A.600.190

28A.600.190. Youth sports--Concussion and head injury guidelines--Injured athlete restrictions--Short title

Effective: July 26, 2009
Currentness

(1)(a) Concussions are one of the most commonly reported injuries in children and adolescents who participate in sports and recreational activities. The centers for disease control and prevention estimates that as many as three million nine hundred thousand sports-related and recreation-related concussions occur in the United States each year. A concussion is caused by a blow or motion to the head or body that causes the brain to move rapidly inside the skull. The risk of catastrophic injuries or death are significant when a concussion or head injury is not properly evaluated and managed.

(b) Concussions are a type of brain injury that can range from mild to severe and can disrupt the way the brain normally works. Concussions can occur in any organized or unorganized sport or recreational activity and can result from a fall or from players colliding with each other, the ground, or with obstacles. Concussions occur with or without loss of consciousness, but the vast majority occurs without loss of consciousness.

(c) Continuing to play with a concussion or symptoms of head injury leaves the young athlete especially vulnerable to greater injury and even death. The legislature recognizes that, despite having generally recognized return to play standards for concussion and head injury, some affected youth athletes are prematurely returned to play resulting in actual or potential physical injury or death to youth athletes in the state of Washington.

(2) Each school district's board of directors shall work in concert with the Washington interscholastic activities association to develop the guidelines and other pertinent information and forms 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 after concussion or head injury. On a yearly basis, a concussion and head injury information sheet shall be signed and returned by the youth athlete and the athlete's parent and/or guardian prior to the youth athlete's initiating practice or competition.

(3) A youth athlete who is suspected of sustaining a concussion or head injury in a practice or game shall be removed from competition at that time.

(4) A youth athlete who has been removed from play may not return to play until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider. The health care provider may be a volunteer. A volunteer who authorizes a youth athlete to return to play is not liable for civil damages resulting from any act or omission in the rendering of such care, other than acts or omissions constituting gross negligence or willful or wanton misconduct.

(5) This section may be known and cited as the Zackery Lystedt law.

Credits

[2009 c 475 § 2, eff. July 26, 2009.]

West's RCWA 28A.600.190, WA ST 28A.600.190

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

West's RCWA 4.24.670

4.24.670. Liability of volunteers of nonprofit or governmental entities

Currentness

(1) Except as provided in subsection (2) of this section, a volunteer of a nonprofit organization or governmental entity shall not be personally liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if:

(a) The volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(b) If appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(c) The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer;

(d) The harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires the operator or the owner of the vehicle, craft, or vessel to either possess an operator's license or maintain insurance; and

(e) The nonprofit organization carries public liability insurance covering the organization's liability for harm caused to others for which it is directly or vicariously liable of not less than the following amounts:

(i) For organizations with gross revenues of less than twenty-five thousand dollars, at least fifty thousand dollars due to the bodily injury or death of one person or at least one hundred thousand dollars due to the bodily injury or death of two or more persons;

(ii) For organizations with gross revenues of twenty-five thousand dollars or more but less than one hundred thousand dollars, at least one hundred thousand dollars due to the bodily injury or death of one person or at least two hundred thousand dollars due to the bodily injury or death of two or more persons;

(iii) For organizations with gross revenues of one hundred thousand dollars or more, at least five hundred thousand dollars due to bodily injury or death.

(2) Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of the organization or entity.

(3) Nothing in this section shall be construed to affect the liability, or vicarious liability, of any nonprofit organization or governmental entity with respect to harm caused to any person, including harm caused by the negligence of a volunteer.

(4) Nothing in this section shall be construed to apply to the emergency workers registered in accordance with chapter 38.52 RCW nor to the related volunteer organizations to which they may belong.

(5) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Economic loss" means any pecuniary loss resulting from harm, including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities.

(b) "Harm" includes physical, nonphysical, economic, and noneconomic losses.

(c) "Noneconomic loss" means loss for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium other than loss of domestic service, hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(d) "Nonprofit organization" means: (i) Any organization described in section 501(c)(3) of the internal revenue code of 1986 (26 U.S.C. Sec. 501(c)(3)) and exempt from tax under section 501(a) of the internal revenue code; (ii) any not-for-profit organization that is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes; or (iii) any organization described in section 501(c)(14)(A) of the internal revenue code of 1986 (26 U.S.C. Sec. 501(c)(14)(A)) and exempt from tax under section 501(a) of the internal revenue code.

(e) "Volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation, other than reasonable reimbursement or allowance for expenses actually incurred, or any other thing of value, in excess of five hundred dollars per year. "Volunteer" includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

Credits

[2001 c 209 § 1.]

West's RCWA 4.24.670, WA ST 4.24.670

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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