No. 93282-4

IN THE 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,

Petitioners,

vs.

VALLEY CHRISTIAN SCHOOL, a Washington State Non-Profit Corporation, JIM PURYEAR, MIKE HEDEN, and DERICK TABISH, individually, and TIMOTHY F. BURNS, M.D., individually,

Respondents.

JIM PURYEAR 'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Jim Puryear was an unpaid volunteer football coach for Valley Christian School (VCS). One of his players, Drew Swank, died after being hit by an opposing team's player during a game. Petitioners sued Mr. Puryear individually, claiming that he was liable for Drew's death because he allowed him to play in the football game after he had received a doctor's clearance from an injury in a previous game, because he did not remove him from the game before the fatal injury, and because he allegedly grabbed Drew's facemask and shook his helmet during the course of the game.

The trial court granted Mr. Puryear's summary judgment, which was affirmed by the Court of Appeals, because it is undisputed that Mr. Puryear was a volunteer, and as a volunteer, entitled to immunity under RCW 4.24.670. The statute remains unambiguously applicable, irrespective of Petitioners' attempt to circumvent it by claiming that a "joint venture" existed between Mr. Puryear and VCS because he donated football equipment and ran the football program as the coach (within the confines of the school). Petitioners also must then take the further leap that the Court of Appeals misreads the immunity statute to include individuals even if a part of a joint venture, in order to claim some ambiguity in the statute which requires the Court's review. Mr. Puryear

was not in a joint venture, but as recognized by the Court of Appeals, the immunity provided by the statute includes the services he provided for VCS no matter how they were characterized by Petitioners. There are no conflicting decisions on Mr. Puryear's right to immunity demanding this Court's review, and public policy would not vitiate statutorily required volunteer immunity of coaches simply because they contribute funds or equipment to a school sports program.

Summary judgment was also affirmed because Petitioners' claim regarding the "facemask" shaking would as a matter of law constitute a battery, which was time barred by the two year statute of limitations. Petitioners have failed to cite authority or make argument explaining why review of that decision is required, and have abandoned this claim. However, there similarly exists no conflicting decisions from any court which would demand review of this decision, and no public policy which would require this Court to intervene to change existing and well-settled law.

II. ISSUES

1. When it is undisputed that a football coach provided services to a qualified non-profit entity for which he was not being compensated, is he entitled to immunity under RCW 4.24.670?

2. When the Petitioners fail to cite authority or make argument relative to a statute of limitations bar, is that claim abandoned?

III. STATEMENT OF THE CASE

It has never been disputed that VCS was a non-profit organization that maintained $1 million in liability insurance, for whom Jim Puryear served as a football coach; it was similarly undisputed that Mr. Puryear was not paid to coach the VCS students.

Mr. Puryear signed a contract with VCS to coach its football team, which provided that Mr. Puryear was not compensated for his services. (See, CP 153, 158-163)[1] While, like many volunteers, Mr. Puryear was instrumental in the formation of the program, and donated his own time and money to the school, he was bound to follow the dictates of the school program. (See, CP 60, 624-625) His contract required him to follow the rules and regulations as outlined by the school, subjected him to an annual evaluation, provided he could be dismissed, and identified him as an employee. (CP 153, 158-163) The school and the league set the parameters and rules and schedules for play; and the school could certainly have terminated the program without Mr. Puryear's permission. In fact, it is further undisputed it was the school who terminated the

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[1] The citations are to the record at the Court of Appeals.

football program following Andrew's death, irrespective of Mr. Puryear's desire that it should be terminated. (See, CP 578-579)

The week before Drew Swank died, he had been injured during a game; he was removed from that game and was not allowed to practice with the team the following week. (CP 925, 172-173, 62, 151-152) Drew's parents thereafter obtained a release for Drew to play from Dr. Burns, and Mr. Puryear allowed him to play in the Washtucna game. (CP 3, 188, 174, 162, 157) During a play, Drew was hit by an opposing player and suffered head injuries from which he died. (CP 4)

Petitioners sued Coach Puryear individually, claiming that he was liable for Drew's death, based on duties they claim existed within the "Lystedt law", which they now assert creates an implied statutory tort, in addition to negligence.[2] In their Complaint, the Petitioners also

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[2] Petitioners' brief primarily challenges the Court of Appeals' decision that there is no implied statutory cause of action under the Lystedt Act; Mr. Puryear joins with VCS in its response to that issue, and denies he breached any duties established by he Lystedt law. However, he has been properly dismissed from this action based on immunity and the statute of limitations, and he limits his response solely to those issues; the existence of an implied statutory cause of action does not affect his dismissal.

asserted that Coach Puryear grabbed Drew's facemask and violently shook it up and down. (CP 4,6)

Mr. Puryear moved for summary dismissal because RCW 4.24.670 grants immunity for volunteer activities, and based on the statute of limitations bar to any alleged assault or battery. The trial court dismissed Mr. Puryear from the suit, and the Court of Appeals affirmed that dismissal based on the statutory immunity that a volunteer has for all acts or omissions in the course and scope of his volunteer activities, rejecting the Petitioners' claim that "joint venture" status precluded application of the statute. At the same time, the Court of Appeals affirmed the dismissal of any claims related to the alleged battery, i.e. the "facemask" claim, because the action had been brought over two years after the incident. (While the Petitioners have assigned error to that dismissal, they made no argument nor cited any authority in its brief.)

IV. LAW

A petition for review will be accepted by the Supreme Court only if the decision of the Court of Appeals is in conflict with either another Court of Appeals decision or a Supreme Court decision; if there is a significant constitutional question; or if the petition involved an issue of substantial public interest. RAP 13.4(b). The Court of Appeals decision affirming summary judgment as to Mr. Puryear does not conflict with any

decision of the Court of Appeals or Supreme Court; nor is there a constitutional issue. And because the statutory volunteer immunity to which Mr. Puryear is entitled has been clearly established by the Legislature, there is no public interest requiring intervention of this Court. As a result, there is no basis to accept review of the Court of Appeals decision affirming dismissal of Jim Puryear individually from this suit.

A. There is no ambiguity in the volunteer immunity statute, and the Court of Appeals decision creates no basis for this Court's review.

In an attempt to create some basis for review, Petitioners assert that the Courts below misread the immunity statute, or applied it too broadly, based on their claim of "joint venture." However, Mr. Puryear was a volunteer as defined by the statute, and Petitioners' novel assertion of joint venture status does not create some conflict in the interpretation of the statute or a public policy basis to preclude Mr. Puryear's right to statutory immunity.

The volunteer immunity statute very specifically defines a "volunteer":

> Volunteer means an individual performing services for a non-profit 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 $500 per year. **Volunteer includes a**

> **volunteer serving as a director, officer, trustee, or direct service volunteer.** (Emphasis added).

RCW 4.24.670(5)(e).[3]

Without citation to authority, Petitioners assert that this definition excludes a volunteer who exerts some "control" over a sport program by donating equipment or developing a team, because they are a "joint venturer" who is not "performing services for" an entity, and therefore not entitled to immunity. First, the Petitioners specifically and repeatedly pled that Mr. Puryear was an employee/agent of VCS in his coaching activities, and was liable in that capacity:

> 1.5 To the best information, knowledge, and belief of Plaintiffs, at all times material hereto, Defendant Jim Puryear...was an employee and/or agent of Defendant VCS acting in the capacity of head coach of the VCS football team...

(CP 2) All of the causes of action claim that Mr. Puryear's liability was based on conduct while "acting as an employee and/or agent" of VCS. (CP 6) Petitioners have thus judicially admitted that Mr. Puryear was indeed performing services for VCS, and it is on that basis they assert vicarious liability for his conduct. Petitioners cannot disclaim this agency

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[3] The entire statute is attached as an Appendix hereto.

status simply because they now recognize the immunity to which Mr. Puryear is entitled.

Moreover, the relationship between VCS and Mr. Puryear was not a joint venture. He had a volunteer coaching contract, which imposed a number of obligations on him in the performance of his volunteer duties. While he donated time and equipment as a head coach, and directed aspect of the football program for VCS, this does not place him in a "joint venture". Petitioners' argument was that a joint venture existed because Mr. Puryear decided to start the football program and could decide to terminate it; in reality, he of course got to decide if he would begin to volunteer his time and resources, and got to decide if he would no longer volunteer his time and resources. No facts establish a joint venture.

And while Mr. Puryear disagrees that a "joint venture" existed between he and VCS, nothing in Washington's voluntary immunity statute precludes its application under the circumstances that exist here. By definition in the Washington statute, a volunteer can include those individuals who control a program, such as an officer, a trustee, or director. These individuals may be principally in charge of a program, and yet are still defined as those who "perform services for" a non-profit entity. The fact that Mr. Puryear exerted some control in respect to the day-to-day functioning of the football program is thus irrelevant to his

definition as a volunteer. Thus, it is incorrect that the Court of Appeals misinterpreted the volunteer immunity statute by including any "individual", even if a member of a "joint venture". The terms of the statute itself encompasses situations in which the volunteer may direct or control a program for a non-profit entity.

In fact, the Petitioners' argument that joint venturers "serve as both principal and agent for each other" does not preclude application of immunity to one individual member; basically, Petitioners concede that in a joint venture, each individual member indeed "performs services" for the other, and thus falls within the statutory definition. As noted by the Court of Appeals, immunity offers a defense to the individual, even in a principal/agent relationship. The existence of any agency relationship does not eliminate the immunity to which any one individual is entitled. See, Restatement (Second) of Agency, §217, cmt. 6. (2014) (immunities are not delegable and are awardable as a defense only to persons who have them). As a result, Mr. Puryear remains an individual "volunteer" entitled to his individual immunity.

And public policy would not require a review of the current interpretation of the statute by the Court of Appeals. Under Petitioners' theory, any parent that helps start a team and offers to coach would lose the volunteer immunity to which he is entitled. For example, if a parent

helps form a soccer team in a non-profit league to include his or her daughter, attracts players, buys all the balls, sets practices, and plays the games and schedule set by the league, he or she is not a volunteer entitled to immunity, but is in a "joint venture" with the soccer league, and is not "performing services for" the entity. This is a common practice, and the exact conduct at which the Volunteer Immunity Act is aimed. The Petitioners' assertions would virtually eliminate volunteer immunity for a significant portion of volunteers in the State, and this position is neither supported by the express terms of Washington law, or the intent of the statute.

There is simply no basis to preclude the application of individual volunteer immunity to Mr. Puryear, and no necessity for the Court's review of the appropriate application of the statute.

B. Petitioners provide no basis to review the dismissal of any claims regarding the alleged "facemask" incident.

Petitioners cite no conflicting authority or any public interest which establish a basis for this Court's review, and the Court of Appeals' decision was based on well-settled law.

1. Petitioners fail to make argument or cite authority, and have abandoned this issue.

The Petitioners have included an "issue" relative to Mr. Puryear's alleged conduct in grabbing Andrew's facemask on the sidelines, which

the Court of Appeals found was barred by the statute of limitations applicable to such a battery. (Petition for Review, p. 4) However, the Petitioners have failed to cite authority or make argument relative to this issue within its brief, and thus it is not properly reviewed here. Erdmann v. Handerson, 50 Wn.2d 296, 311 P.2d 423 (1957) (an assignment of error which is not argued in the brief is deemed to have been abandoned); see also, Escude v. King County Public Hospital District No. 2, 117 Wn.App. 183, 190, 69 P.3d 895 (2003) (a party's failure to assign error or provide argument and citation to authority in support of an assignment of error precludes appellate consideration of any such alleged error).

2. The applicable statute of limitations depends on the nature of the allegations, not the characterization of a claim, and the proper application of that law raises no issue of conflicting decisions or public import for this Court's review.

The Court of Appeals found that Petitioners' allegations regarding Mr. Puryear shaking Drew's facemask were barred by the applicable statute of limitations, because such conduct constituted a battery. Petitioners pled that Mr. Puryear grabbed and shook Andrew's facemask "violently" and "in anger," which Petitioners allege caused or contributed

to "second impact syndrome";[4] it is undisputed that these allegations constitute a battery, which carries a two year statute of limitations and was thus untimely brought. See, RCW 4.16.100(1). A battery is the intentional infliction of harmful or offensive contact. Sutton v. Tacoma School District No. 10, 180 Wn.App. 859, 865, 324 P.3d 763 (2014). The requisite intent for a battery is the intent to cause the contact, not the harm. Id. Bodily contact is offensive if it offends a reasonable sense of personal dignity. Id.

It is well-settled that when a given set of facts rise to an intentional tort, it cannot be re-characterized for statute of limitations purposes. Eastwood v. Cascade Broadcasting Co., 106 Wn.2d 466, 469, 722 P.2d 1295 (1986). The limitation period applying to assault and battery cannot be avoided by disguising the real cause of action in a different form. Seely v. Gilbert, 16 Wn.2d 611, 615, 134 P.2d 710 (1943). The Petitioners could not restructure their claim as negligence or a statutory tort in order to avoid the statute of limitations,[5] and any cause of action

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[4] (See, CP 4,6) Mrs. Swank characterized the conduct as an assault. (CP 192) Ms. Swank wanted an investigation to determine if criminal charges should be brought. (CP 182)

[5] And even if the allegations constituted "negligence" or an "implied statutory claim", as the Petitioners' state in the "issue", Mr. Puryear has immunity for such claims. RCW 4.24.670 (volunteer immunity applies to "harm caused by an act or omission").

based on these facts was properly found to be time barred, and thus presents no basis for this Court's review.

V. CONCLUSION

For the foregoing reasons, this Court should decline to accept review and affirm the Court of Appeals decision dismissing Mr. Puryear from this action.

DATED this 29TH day of July, 2016.

PATRICK J. CRONIN
WINSTON & CASHATT, LAWYERS,
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Attorneys for Respondent Jim Puryear

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 29th day of July, 2016, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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DATED at Spokane, Washington, this 29th day of July, 2016.

Linda Lee

884746

APPENDIX

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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Dear Clerk of the Court:

Attached for filing is Jim Puryear's Answer to Petition for Review.

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