COA #337821-III

No. 90733-1

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.

RESPONDENT JIM PURYEAR'S BRIEF

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I. INTRODUCTION

It was undisputed before the trial court that Respondent Jim Puryear was an unpaid coach for the Valley Christian School (VCS) at the time that one of the high school footballs players, Andrew Swank, died after being hit by an opposing player during a game. It was also undisputed that Coach Puryear attended the required training on concussion injuries required by Washington's "Lystedt Law," had held an athlete and parents' meeting, and distributed "Concussion Information Sheets," which both Andrew and his mother Patricia Swank signed.

It is undisputed that in the week before Andrew Swank's death, he was removed from a game with an injury, and in accordance with VCS policy and the Lystedt Law, was prohibited from practicing or playing until cleared by a physician. Andrew Swank's parents requested and obtained physician clearance for Andrew to play in the game in which he died.

The Petitioners sued VCS, Coach Puryear, Assistant Coach Mike Heden, VCS Athletic Director Derick Tabish, and Dr. Timothy Burns for Andrew's death. As to Coach Puryear, they claimed he was negligent by failing to a adopt, implement and carry out the protocols required by the Lystedt Law, and also asserted Puryear had grabbed Andrew's facemask

and shook it during the game, which contributed to his death, and which they termed a violent, intentional assault.

The trial court granted summary judgment dismissing Coach Puryear because under Washington law, he was entitled to volunteer immunity for any claims of negligence, and because any claimed conduct relating to the facemask allegations constituted an assault which was barred by the statute of limitations as a matter of law. It was also undisputed that all of the Respondents had complied with the dictates of the Lystedt Law, on which Petitioners' Complaint was based, and thus the defendants breached no duties and had no resultant liability as a matter of law.

These rulings were proper based on the pleadings, the applicable law, and the undisputed facts of this very sad incident, and summary judgment should be affirmed.

II. STATEMENT OF THE CASE

Valley Christian School (VCS) is a religious and educational institution and a non-profit 501(c)(3) organization exempt from tax under the Internal Revenue Code. (CP 48) It provides private religious high school education in the Spokane Valley, and maintained a $1 million liability insurance policy at the time of the events outlined herein. (CP 51-53)

Jim Puryear was a football coach for VCS who served in a volunteer capacity; he was not paid to coach the VCS students. (Puryear Dep., p. 108, CP 153) VCS was approached by Mr. Puryear and Mr. Eggleston, VCS' Booster Club president, to start a football program. (Tabish Dep., pp. 18-19, CP 60) Mr. Puryear helped form VCS' football program and he and his family donated the money for the equipment; Mr. Puryear also donated necessary funds for playbooks, and other incidentals the team needed. (Puryear Dep., pp. 102-107, CP 624-625) VCS provided what minimal funding it could, and held fundraisers to support the football program. (Tabish Dep., pp. 20-21, CP 60) The team originally utilized the school's bus for travel, and played home games on a field leased by VCS, who paid for the necessary lights for games. (Puryear Dep., pp. 105-107, CP 153, 625) Insurance was paid for by VCS, not Mr. Puryear. (Puryear Dep., p. 107, CP 153)

Mr. Puryear's contracts confirm that he was listed as a "volunteer coach," with a stipend amount listed as "0." (Puryear Dep., Exs. 3, 5 and 7, CP 158-163) His contract stated that Mr. Puryear would "teach" or "perform such duties" as prescribed by the laws of Washington and the school. (CP 158) The school reserved the right to dismiss Mr. Puryear and he was defined as an "employee." (Id.) The Addendum to the Contract required Mr. Puryear to comply with all the various duties and

responsibilities as dictated by the school, its policies, and Athletic Director, and he was subject to evaluation by the school authorities. (CP 160-161)

Before the start of the 2009 football season, Mr. Puryear attended the annual Washington Interscholastic Activities Association (WIAA) Coaches Camp, and received instruction on the "Lystedt Law," which had been passed in July of 2009 by the Washington State Legislature; he received a certificate conferring completion of the "Concussion Management Training." (Puryear Dep., pp. 51-57, Ex. 16, CP 149-150, 165-167) The "Lystedt Law" required school districts to work in concert with the WIAA to develop guidelines, information and forms to educate coaches, youth athletes and their parents about the risk of concussions. RCW 28A.600.190(2). It required a "Concussion and Head Injury Information Sheet" be signed and returned by the youth athlete and his or her parents. Id.

In accordance with that law, prior to the 2009 football season, Mr. Puryear held a parents meeting, at which the "Concussion Information Sheet" was distributed to Valley Christian football players and their parents, which Andrew Swank and his mother, Patricia Swank, received and signed. (D. Swank Dep., pp. 43-48, Ex. 2, CP 170, 177-178;

P. Swank Dep., pp. 20-24, CP 185-186)[1] In addition to the concussion sheet, the "Lystedt Law" provided that a youth athlete who is suspected of sustaining a concussion or head injury must be removed from competition and may not be returned to play until the athlete is evaluated by a licensed healthcare provider and receives written clearance to return to play from that provider. RCW 28A.600.190(3)(4).

On September 18, 2009, Andrew Swank was playing in a VCS football game and was hit by another player; he was removed from the game, and reported to his parents after the game that he had a headache. (Tiffany Dep., pp. 31-32, CP 925; D. Swank Dep., pp. 68-71, CP 172-173) In accordance with the dictates of the "Lystedt Law," VCS had a policy that a player who complained of an injury could not practice or play until they had received a release from a medical doctor and the student's parents. (Tabish Dep., pp. 35-36, CP 62) Andrew's parents took him to the doctor the following Tuesday, September 23, 2009; his mother accompanied him to Dr. Tim Burns, the family's regular physician, in Coeur d'Alene, Idaho. (Amended Complaint, ¶2.3, CP 3) Dr. Burns recommended that Andrew refrain from practicing or playing until his

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[1] The original form the Swanks signed was apparently lost, but they signed a second one on 9/17/2009, before Andrew Swank played in a game. (P. Swank Dep., pp. 26-27, CP 187)

headache resolved. (Amended Complaint, ¶2.3, CP 3) Andrew did not practice with the rest of the team during the week after the September 18, 2009, game. (Puryear Dep., pp. 81-82, CP 151-152)

However, on Thursday, September 24, 2009, Andrew's mother asked him if he would like her to call Dr. Burns and get a release for him to play in the Friday game. (P. Swank Dep., p. 50, CP 188) She did call Dr. Burns' office and advised them that Andrew's headache had subsided and requested a release so he could play in the game of Friday night, September 25, 2009, in Washtucna. (Amended Complaint, ¶2.5, CP 3; P. Swank Dep., pp. 50-52, CP 188) Dr. Burns signed the release to play and the Swanks provided it to the school on September 24, 2009. (CP 117; D. Swank Dep., p. 94, CP 174) Jim Puryear was advised that Andrew had been released by his physician to play in the September 25th game. (D. Swank Dep., 94-95, CP 174; Puryear Dep., pp. 84-85, CP 152, 157)

As a result of the signed medical release, Andrew went to the Washtucna game, riding with the team and participating in pregame warm up exercise. (P. Swank Dep., p. 235, CP 193; Heden Dep., pp. 35-36, CP 76) Assistant coach Mike Heden did not observe any abnormal issues with Andrew prior to the game, or during the game prior to the last play. (Heden Dep., pp. 35-37, CP 76) Andrew played "wing" back, defensive

back, and special teams in the first and second quarters of the game, and Mr. Puryear did not notice anything abnormal about Andrew's play. (Puryear Dep., pp. 156, 161, CP 154-155)

However, at the end of the second quarter, Andrew was hit by an opposing player, and had trouble getting up; when he moved off the field to the sideline, he collapsed and was transported by EMT personnel to Ritzville, Washington, and later by helicopter to Sacred Heart Hospital in Spokane, where he died on September 27, 2009. (Amended Complaint, ¶¶2.8-2.9, CP 4)

A wrongful death action was started on September 21, 2012, by the Estate of Andrew Swank and his mother, which named Jim Puryear as a defendant; the Complaint asserts that Mr. Puryear "was negligent" by "failing to adopt, implement and carry out the protocols and procedures required by the "Lystedt Law." (Amended Complaint, ¶4.2, CP 6) Petitioners further assert that Mr. Puryear grabbed Andrew's facemask after a play and violently shook it up and down "in anger," which caused or contributed to the "second impact syndrome" that resulted in his death. (Amended Complaint, ¶¶2.7, 4.3, CP 4, 6) The Petitioners concede this was an intentional act; Mr. Swank described the act as Mr. Puryear "violently" jerking the helmet up and down while he "screamed" at

Andrew. (D. Swank Dep., p. 108, CP 175) Mrs. Swank testified that the conduct was "an assault." (P. Swank Dep., pp. 163-164, CP 192)

While no facts exist to establish that Mr. Puryear failed to comply with the standards established by the "Lystedt Law," whether the claim made constituted common law negligence or breach of a statutory duty, such claims do not survive the immunity to which he is entitled under the Volunteer Protection Act. And, any claims made as a result of the alleged shaking of Andrew's football helmet constitute intentional assault, and are time barred by the statute of limitations.

III. ARGUMENT

A. Jim Puryear is immune from Petitioners' claims for the claimed breach of common law duties or the dictates of the Lystedt Law.

Washington law provides immunity to volunteers of non-profit or governmental entities. RCW 4.24.670. Volunteers of a non-profit organization or 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:

1. The volunteer was acting within the scope of the volunteer's responsibilities in the non-profit organization or governmental entity at the time of the act or omissions;
2. 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; and

3. The non-profit organization carries public liability insurance covering the organization's liability for harm caused to others, in an amount not less than $500,000.[2]

RCW 4.24.670.

The Washington statute tracks the Federal Volunteer Protection Act enacted in 1997, which applies within states unless a state statute provides greater protection. 46 U.S.C. §14502(a). Washington's law is virtually identical to the federal act, except that Washington's law provides immunity for all harm caused, while the federal act limits the immunity to only economic harm. See, RCW 4.24.670(1)(c); (5)(b). Congress recognized that volunteering is a national activity and a decline in volunteerism based on potential liability is of national concern; the "heart" of such legislation is to bar liability for individual volunteers, and to encourage continued contribution of volunteers. See, HR Rep. No. 105-101(i) at 6 (1997).

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[2] The other elements of the statute requiring licensure and excluding vehicle accidents are not applicable here. See, RCW 4.24.670(1)(b), (d). While the Petitioners briefly challenged the "licensure" issue below, they do not do so here, Nor do they challenge the undisputed existence of the appropriate insurance, or that VCS is a non-profit organization under the statute.

1. Mr. Puryear was a volunteer as defined by the statute, and Petitioners' novel assertion of joint venture status does not preclude Coach Puryear's right to statutory immunity.

Mr. Puryear signed a contract with VCS to coach its football team, which provided that Mr. Puryear was not compensated for his services. (See, Puryear Dep., p. 108, Ex. 5, CP 153, 158-163) 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. 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. 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.[3] There is no dispute that he was a volunteer.

However, Petitioners assert that Mr. Puryear is "ineligible" to claim volunteer immunity because there existed a "joint venture" between him and VCS, and thus he was not a mere volunteer. Nothing in Washington law supports this.

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[3] And contrary to Petitioners' assertion, it is undisputed it was the school who terminated the football program following Andrew's death, irrespective of Mr. Puryear's desire that it should be terminated. (See, Kimberly Dep., Ex. 5, CP 578-579)

The volunteer immunity statute very specifically establishes when an individual is entitled to be defined as 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).

Without citation to authority, Petitioners assert that this definition means that volunteers must be powerless "agents" to obtain immunity, and apparently argue that anyone exerting "control" becomes a "joint venturer" and a "principal" 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 cannot disclaim this agency status simply because they apparently recognized the immunity to which Mr. Puryear is entitled; thus,

their new claim that he is instead a joint venturer and equal principal in the football program endeavor should be discarded.

And while Mr. Puryear disagrees that a "joint venture" existed between he and VCS, nothing in Washington's voluntary immunity statute precludes its application in such instances. Thus, even were Petitioners' assertions true that Mr. Puryear exerted some control over the football team, it is irrelevant to his claim of volunteer immunity.

By definition in the Washington statute, a volunteer can include those individuals who "control" a program, such as an officer, a trustee, or director. 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. And it remains undisputed that Mr. Puryear received no compensation; Petitioners' assertions that he donated, or paid out of his own pocket for equipment or other necessary costs of the program, does not vitiate his status as a volunteer. Under this 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 to include his or her daughter, attracts players and enters the team in the youth soccer league, 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 a joint venturer with the soccer league. This is

a common practice, and the exact conduct at which the Volunteer Immunity statute is aimed. The Petitioners' assertions could well 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.

Moreover, the Petitioners' assertion that joint venturers "serve as both principal and agent for each other" does not preclude application of immunity to one member. Instead, a principal is entitled to claim his immunity as a defense, but not his agent's immunity; immunity offers a defense to the individual, irrespective of the imputation of any negligence. 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). Because the existence of a joint venture does not eliminate the immunity to which one of the members is entitled, the discussion is usually instead whether all members of a joint venture or partnership are entitled to an extension of the statutory immunity of one member. See, Salswedel v. Enerpharm, Ltd., 764 P.2d 499 (N.M. 1988) (where one partner is statutorily immune from suit "it does not necessarily follow that the other partner must be given immunity"); Skramstad v. Plum Creek Merger Co., Inc., 45 F. Supp. 2d 1026 (D. Mont. 1999) (immunity from suit of one joint venturer under the worker's compensation statute

extended to other joint venturers). As a result, so long as Mr. Puryear is a "volunteer" he is entitled to his immunity, irrespective of the other terms of the relationship with VCS.

There is simply no basis to preclude the application of individual volunteer immunity to Mr. Puryear.

2. Mr. Puryear's coaching activity was within the scope of his responsibility as a volunteer.

While no Washington case addresses the volunteer scope of authority, Washington law generally provides that an employee acts within the scope of employment if he is engaged in the performance of the duties required of him by his contract or employment. Rahman v. State, 170 Wn.2d 810, 246 P.3d 182 (2011). Mr. Puryear's contract established coaching football as the scope of his volunteer activities, and the Petitioners pled that the conduct complained of was all in the scope of Mr. Puryear's coaching for VCS. Thus, it is undisputed that Mr. Puryear was acting as a football coach for VCS pursuant to the scope of his volunteer contract at all times relevant to Andrew Swank's injuries, and in relation to all of the Petitioners' claims.

3. The claims against Coach Puryear based on allowing Andrew Swank to play in the football game in which he was injured, and failing to remove him from play, are all negligent acts and covered under Coach Puryear's immunity.

Petitioners' Complaint pleads only that Mr. Puryear was negligent and at fault for failing to implement and carry out the protocols and procedures of the "Lystedt law." (Amended Compl., ¶4.2, CP 6) Petitioners continue to assert that Mr. Puryear was negligent in failing to gradually return Andrew to play following his first concussion and by failing to remove Andrew from play during the game in which he received his fatal injury. Petitioners have neither pled nor argued gross negligence or recklessness in any aspect of their claims, other than Mr. Puryear's alleged grabbing of Andrew's face mask. In fact, the Petitioners apparently concede that it is solely the face mask shaking incident that "potentially" satisfies the definitions of gross negligence and recklessness. (Petitioners' Brief, p. 43, n. 88)

Such concession is appropriate because allegations of fact rising to the heightened level of gross negligence or similar conduct must be pled to establish a claim. In fact, simply using the words such as "wantonness" is insufficient; the facts must establish the elements of the heightened degree of culpability, not merely be characterized as such. See, Ranniger v. Bryce, 51 Wn.2d 383, 318 P.2d 618 (1957). There is no issue of gross

negligence without "substantial" evidence. Kelley v. State, 104 Wn. App. 328, 17 P.3d 1189 (2000). Willfulness, recklessness or conscious disregard for safety requires evidence rising to the level of intentional acts with knowledge of the likelihood of substantial harm. See, Youngblood v. Schireman, 53 Wn.App. 95, 765 P.2d 1312 (1988). Petitioners provided no such evidence to oppose summary judgment.

Thus, while it is sometimes unclear as to whether Petitioners concede that the face mask incident is the only allegation which would raise any issue as to an exception to Mr. Puryear's immunity for gross negligence or recklessness (which is time barred, see, infra.), Petitioners pled nor raised any issue of fact as to any other conduct which would constitute gross negligence or recklessness, and immunity thus applies to all claims of negligence.

4. Claims of a "statutory" cause of action do not vitiate Mr. Puryear's volunteer immunity.

The volunteer immunity statute provides that a volunteer is not personally liable for "harm caused by an act or omission." RCW 4.24.670. The broadly phrased immunity would not be limited to common law causes of action; while Mr. Puryear disagrees that the "Lystedt law" creates any private statutory cause of action, his immunity would include such claims, and they similarly must be dismissed. Even if a statute

evidences a legislative intent to protect a particular class of individuals, sufficient to create a private cause of action, members of such a class bring a **tort** action for such alleged statutory violations. See, Pepper v. J.J. Welcome Const. Co. 73 Wn. App. 523, 871, 871 P.2d 601 (1994); see also, Neighorn v. Quest Health Care, 870 F.Supp.2d 1069, 1108 (D. Or. 2012) (implied right of action of private remedy for statutory violation is termed a "statutory tort"). And violation of statute, like most other torts, is actionable by a private individual only if the statute imposes a duty, the duty is breached, and the breach was a proximate cause of damage to the claimant. Northwest Ind. Forest Mfrs. v. Dept. of Labor & Industries, 78 Wn. App. 707, 899 P.2d 6 (1995). The immunity offered to volunteers includes claims for "harm caused by an act or omission"; it does not limit the conduct covered to only common law claims. See, RCW 4.24.670. The claims by Petitioners are that Mr. Puryear's acts and omissions in allegedly violating the "Lystedt law" caused Andrew Swank harm, and whether framed as a statutory tort or a common law tort, the volunteer immunity statute covers the conduct.

B. It is undisputed that Coach Puryear did not breach any common law or statutory duties under the Lystedt Act.

Petitioners' Amended Complaint asserting that Jim Puryear violated the "Lystedt Law" overstates the requirements of the law, and

fails to recognize that the undisputed facts establish Mr. Puryear's compliance. As outlined above, the "Lystedt Law" required **school districts** to work with the WIAA to develop guidelines and "pertinent information and forms" to inform coaches, student athletes, and parents of the risk of concussion and head injuries. RCW 28A.600.190. It also requires a concussion and head injury information sheet be given to student athletes and their parents prior to participation in sports. Id. This provision does not place any responsibility on an individual coach such as Mr. Puryear to develop protocols or guidelines; however, Mr. Puryear fully complied with the WIAA training and certification, and concussion information sheets were distributed and signed by parents and students in accordance with the law. It is undisputed that Andrew and his mother signed such a form before he played.

The only other dictate contained in the statute is that a youth athlete is to be removed from competition if there is a suspected concussion or head injury and that student may not return to play until a healthcare provider clears him to do so. RCW 28A.600.190(3)(4). It is undisputed Mr. Puryear did not allow Andrew to practice or play until he had been released by the physician his mother took him to see. There simply are no provisions, protocols, or standards of the "Lystedt Law"

which Mr. Puryear violated, and the claims based on such allegations must be dismissed.

Petitioners rely on "gradual return to play" protocols not adopted in the Lystedt Law to argue that Mr. Puryear violated the law's requirements, and that lack of appropriate monitoring during the game also was a negligent violation of the law. They also claim a common law duty to protect a student athlete from harm, but their Complaint and argument continues to establish that the duty on which they rest liability is based on the Lystedt Law dictates. However, it remains undisputed that the Lystedt Law has no "gradual return to play" requirements which Mr. Puryear violated, and that he properly allowed Andrew to play once medically released to do so; and the coaching staff noted no abnormalities to override the medical release obtained by Andrew's parents. To establish negligence based on violation of the Lystedt Law, Petitioners have to expand it well beyond its parameters; Mr. Puryear followed the conditions required of him under the law to the letter and breached no duties which proximately caused Andrew harm.

C. The only claim against Coach Puryear for which he was not immune involved allegedly shaking Andrew's facemask, which is time barred by the applicable statute of limitations.

The only other claims against Mr. Puryear for breach of duty other than negligence in failing to follow the protocols and procedures of the "Lystedt Law" (for which Mr. Puryear is immune), are that he grabbed and shook Andrew's facemask "violently," and "in anger" which Petitioners allege caused or contributed to "second impact syndrome" that resulted in his death. (Amended Complaint, ¶¶2.7, 4.3, CP 4, 6) However, it is undisputed that the underlying allegations of that claim constitute intentional assault, which carries a 2-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 Dist. 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. A bodily contact is offensive if it offends a reasonable sense of personal dignity. Id. Similarly, an assault is "any act of such nature that causes apprehension of a battery." McKinney v. City of Tukwila, 103 Wn. App. 391, 13 P.3d 631 (2000). The intent for an assault thus occurs when the actor intends to cause harmful or offensive contact with another, or in imminent apprehension of such contact, and the other is thereby put in such imminent apprehension. Brower v. Ackerley, 88 Wn. App. 67,

943 P.2d 1141 (1997). Petitioners' allegations are that Coach Puryear grabbed Andrew's face mask and shook his head, and this alleged conduct, although denied by Coach Puryear, constitutes an intentional assault and battery.

It is well settled that when a given set of facts rise to an intentional tort, it cannot be "recharacterized" 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).

Thus, the Petitioners cannot restructure a claim as negligence in order to avoid the statute of limitations. See, Zamfino v. Washington State Dept. of Corrections, 2013 WL 222703 (Wash. App. 2013). In Zamfino, a plaintiff attempted to avoid the intentional tort statute of limitations by claiming the conduct was negligent; the court noted:

> Here the factual allegations set forth in Zamfino's complaint constitute a claim for false imprisonment, not withstanding his attempt to characterize is as one for negligence...Our legislature has determined that a cause of action arising from such factual obligations must be filed within two years after the claim occurs. RCW 4.16.100(1). Accordingly, allowing Zamfino to proceed with his state tort claims would permit evasion of this legislative determination. See e.g., Love v. City of Port Clinton, 37 Ohio St.3d 98, 524 N.E.2d 166 (1988) ("**Where the essential character of an alleged tort is an intentional,**

> **offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence. To hold otherwise would defeat the assault and battery statute of limitations.**") (Emphasis added).

Zamfino, 2013 WL 222703 at *3.[4]

Here, Petitioners allege that Mr. Puryear "violently" grabbed and jerked Andrew's helmet by his facemask "in anger." (Petitioners' Brief, p. 23; Amended Compl., ¶2.7, CP 4) Mrs. Swank characterized the conduct as an "assault." (P. Swank Dep., pp. 163-164, CP 192) Mr. Swank wanted an investigation to determine if criminal charges should be brought. (Dep. of D. Swank, p. 138, CP 182) In attempting to prove the conduct occurred, Petitioners cited to one alleged witness who said Coach Puryear was "raging" at Andrew, and shaking his helmet. (See, Petitioners' Brief, p. 21) The underlying facts pled establish the nature of the claim, which is assault. While Petitioners simply state that they have not stated a claim for intentional assault, they fail to explain how the conduct alleged is not an assault. There was intentional offensive touching.

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[4] While unpublished, the Zamfino case is not cited for precedential value and concerns a false imprisonment claim, but outlines Washington law, and the adoption of the concept relating to assault and battery as addressed by other states' courts.

There is no dispute that the conduct alleged by the Petitioners was that Mr. Puryear intended to (and did) touch Andrew in a harmful or offensive manner. They cannot claim that Mr. Puryear was angry, screaming, grabbing, and shaking, and then claim the conduct was mere negligence. The conduct pled constituted assault and battery, and the action for it is time barred.

It cannot be re-characterized in some other fashion to avoid the limitation period. While in a footnote, Petitioners also claim the helmet incident could "potentially" be gross negligence or reckless conduct (see, Petitioners' Brief, p. 43), this also constitutes a re-characterization of the actual incident; it is the actual conduct that must be reviewed to determine the statute of limitations, and once the intentional offensive touching allegedly occurred, there can be no re-naming of it to avoid the correct statute of limitations. Such claim cannot be disguised or reworded as negligence, and the 2-year statute of limitations is applicable. This action was brought over two years after that conduct occurred, and any cause of action based on these facts is time-barred.

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IV. CONCLUSION

For the foregoing reasons, Respondent Jim Puryear requests that the court affirm the trial court's summary judgment dismissing all claims against him.

DATED this 15th day of May, 2015.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 8th day of May, 2015, 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 8th day of May, 2015.

Linda Lee

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