

COA #337821-III

CASE NO. 90733-1

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**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

Appellants,

v.

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.

**BRIEF OF RESPONDENTS
VALLEY CHRISTIAN SCHOOL AND DERICK TABISH**

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I. INTRODUCTION

On September 25, 2009, Appellants' decedent, Andrew Swank ("Swank") was playing defensive back in the second quarter of a high school eight-man football game. After taking a hit from another player, he came off the field, collapsed, and then died two days later.

Immediately prior to the September 25 game, and during the day prior the game, Swank's parents and friend confirm that Swank was acting normally, and that he said he was not experiencing any headaches or other concussion symptoms.

The day before the game, Swank's mother obtained a written clearance for him to return to play from their family physician, Respondent Dr. Timothy Burns, M.D. ("Dr. Burns"). The written clearance to return to play was provided to Respondent Valley Christian School ("VCS") by Swank's father, Donald Swank.

VCS is a small, non-profit, religious school, and the coaches for its football team, Respondent James Puryear ("Puryear") and Mike Heden ("Heden"), were both volunteers.

The sole claim brought against VCS and its high school principal, Derick Tabish ("Tabish"), individually, is that they "failed to adopt, implement and carryout the protocols and procedures required by [RCW 28A.600.190]."

Prior to the start of the 2009 school year, VCS adopted the head injury and return to play protocols required by RCW 28A.600.190 (“the Lystedt Act”) and the Washington Interscholastic Activities Association (“WIAA”).

Consistent with these protocols, when Swank reported a potential head injury suffered during a football game on September 18, 2009, he was not allowed to return to play until he was cleared in writing by a health care provider.

VCS and its lay volunteers were entitled to rely upon the written clearance to return to play, which was signed by a medical doctor and furnished to the school by Swank’s parents, particularly since there is no factual dispute that Swank was behaving normally prior to the September 25 football game.

The trial court did not err in dismissing the claim against these Respondents, as there was no dispute of fact that the specific requirements of the Lystedt Act were met.

II. ISSUES PRESENTED PERTINENT TO THESE RESPONDENTS

- A. Whether the dismissal of the claim against Tabish should be affirmed, since Appellants 1) presented no specific basis for his individual liability to the trial court; 2) presented no specific basis for his individual liability to this Court; and 3) have dropped Tabish’s name from the caption of their Brief to this Court?

- B. Whether a statute can impliedly incorporate standards or duties described in documents not specifically referred to or incorporated by that statute?
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- E. Whether a lay volunteer has a greater obligation than a volunteer health care provider under the Lystedt Act?

III. STATEMENT OF THE CASE

A. Valley Christian School Established A High School Football Program With Volunteer Coaches in 2007.

VCS is a non-profit religious school located in Spokane County, Washington. (CP 48) Founded in 1975, it is a non-denominational, non-profit 501(c)(3) school which provides both elementary and secondary education. (*Id.*) Consistent with RCW 4.24.670, VCS carries a policy of insurance with \$1 million in liability coverage. (CP 51-53)

Tabish is the elementary principal and the assistant administrator for VCS. (CP 56) In September 2009, Tabish was the principal of the VCS high school. (CP 57)

VCS first established a high school football team in 2007. (CP 58)

Puryear is the parent of three children who attended VCS, and was the

volunteer head coach of the VCS football team. (CP 59-60) One of Puryear's children was on the VCS football team. (*Id.*)

Heden was a volunteer assistant coach for the VCS football team in 2009. (CP 72-73) Heden's son also played on the VCS football team. (*Id.*)

Both Puryear and Heden were volunteers at VCS, and were not paid employees. (CP 59) Puryear signed a volunteer contract with VCS. (*Id.*) Heden, a volunteer assistant coach, did not sign a volunteer contract. (*Id.*)

B. The Lystedt Act, RCW 28A.600.190, Took Effect In 2009, And VCS Implemented The Policies And Training Requirements.

In 2009, the Legislature enacted RCW 28A.600.190, entitled "Youth Sports – Concussion and Head Injury Guidelines." The statute, in its entirety, provides:

(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.

The WIAA has clarified that a “licensed health care provider trained in the evaluation and management of concussion” means a Medical Doctor, Doctor of Osteopathy, Advanced Registered Nurse Practitioner, Physicians Assistant, or Licensed Certified Athletic Trainer. (CP 119)

In the summer of 2009, VCS sent Puryear to a WIAA Training Program which covered the risks of concussions in sports, and Washington’s new legal requirements concerning concussion management. (CP 61)

As described by Tabish:

A. The WIAA made it aware to all schools, and our athletic director, and then they provided a summer concussion management training that we sent all of our -- well, we sent Mr. Puryear to specifically to receive training, in addition to all our coaches getting their -- all of our varsity level coaches, according to WIAA and our policy manual, had to complete their coaching clinic requirements and they had to have a valid first aid/CPR, and all of our varsity coaches complied according to the handbook and according to WIAA.

...

Q. In the fall of 2009, did the football team have a meeting to discuss the Lystedt Act with players and parents?

A. From that point on, in 2009 in the fall sports, each coach with the athletic director had parent meetings and each parent was given the school concussion management form that they had to read and sign with their student and it's in our documentation, and it specifically lists the Zackery Lystedt Law and all of the protocols that the school required.

(CP 61)

Puryear received a verification of attendance of the WIAA Rules Interpretation Clinic, dated September 4, 2009. (CP 66) Included within Puryear's 2009 WIAA continuing education seminar was a discussion of the Lystedt Act. (CP 68-69)

In 2009, prior to the commencement of the fall football season, students and their parents were provided with a form concerning the dangers of head injuries and concussions, which they were required to sign and return to VCS as a condition to participating in school athletics. (CP 61-62; 74-75)

In 2009, the VCS athletic policy required that students be examined and cleared to play by a medical professional prior to the student's participation in athletics. (CP 94)

In 2009, VCS had a head injury protocol that required that if a player complained of a headache or possible injury, he or she could not

practice or appear for game day until being cleared to return to play by a medical doctor and the student's parents. (CP 74; 94)

C. Swank And His Parents Received The WIAA Concussion Information Forms, Completed The Required Pre-Season Health Examination, And Signed And Returned The Clearance To Play Form.

Swank was a student at VCS and a participant on the football team. (CP 3) Prior to playing sports at VCS, Swank and his parents received an information sheet concerning concussions and head injuries, and signed and returned their acknowledgement of receiving and understanding the concussion and head injury information form. (CP 79-80)

On August 19, 2009, Swank was examined by Dr. Paul Haynes at North Idaho Medical Care Center in Post Falls, Idaho. Dr. Haynes, Swank, and his mother filled out a health examination consent form and a physical examination form, which provided that Swank had been physically examined by Dr. Haynes and that Swank was cleared and authorized to play football at VCS in the Fall of 2009. (CP 104-106)

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D. Swank Was Injured At A September 18, 2009 Football Game, And Suffered Headaches The Following Weekend.

On September 18, 2009, Swank, “playing in a Friday night high school football game for the VCS football team, was hit in the head and began suffering severe headaches.”¹ (CP 3)

Swank’s mother testified:

Q. ...[T]ell me about what happened after the game on September 18th.

...

A. After the game, the boys come off the field and usually everybody, you know, the fans go down to greet them. And we went down there, and Drew was walking off, and we came up to him and, you know, we go, hi, you know, and immediately he said, I have a really bad headache, and I don’t feel very good, and we just thought, oh, and you could tell by his face that he wasn’t feeling good... [He] asked if somebody could drive home for him because he wasn’t feeling good. And he explained to us that when he was down on the ground, some big guy landed on his head and he got an immediate headache... When we got home, my daughter Tara, who is the registered nurse... said, his eyes are a little dilated, if he shows any symptoms that... get worse or anything or if he just starts throwing up or anything like that, get him to the emergency room immediately. And if he's just maintaining, you know, not getting worse, then definitely take him to the doctor on Monday[.]

...

I did get up and check on Drew a few times that night because for some reason I've heard that if it is a concussion, you’ve got to make sure they wake up... [H]e said, I’m okay, mom. And then of course he slept in pretty late that day, and when he got up, I asked, how are your headaches, he said it’s still there, it’s not going away, it’s constant. We

¹ Heden was not present at the September 18, 2009 game, as he was on weekend U.S. Army Reserve duty. (CP 75)

gave him some Ibuprofen and he said it's constant, it's still there.

...

Q. And so then on Saturday when he gets up, he slept in, he had a bad headache. Right?

A. Yes.

...

Q. And then how about on Sunday then?

A. Sunday, I think his headache was still there. I think we went to church... We let him stay home and sleep and rest... that's not normal, and so I was ready to take him in on Monday to the doctor if I needed to.

(CP 846-848)

E. Swank Did Not Attend School On Monday, And An Appointment Was Made To See Dr. Burns The Next Day.

On the following Monday, because Swank was still experiencing headaches, he did not go to school and did not attend football practice.

(CP 109-110)

Swank's mother testified:

A. [...] [W]e just watched him during the weekend, and on Monday, he said he still had [headaches] and that's when I called the doctor and made the appointment.

...

Q. ...[D]id he stay home from school on Monday?

A. Yes, I let him stay home because he said he was having headaches, and I let him sleep in as long as he wanted to to get rested up. And when he woke up, which was late morning or early afternoon, we talked about calling the doctor, and he said, yeah, I'm still having them, it might be a good idea to go to see the doctor, so I called the doctor.

Q. Was it your understanding that these headaches had been constant?

...

A. ...It was an intense constant headache.

Q. Okay. And so you called the doctor then on Monday afternoon?

A. ...[T]hey couldn't really get him in until early Tuesday morning.

(CP 847-848)

F. On Tuesday, Swank Was Examined By Dr. Burns, Then He Returned To School.

On Tuesday, September 22, Swank was taken by his mother to Dr. Timothy Burns, the family's regular physician in Coeur d'Alene, Idaho. (CP 3, 848) As recalled by Swank's mother:

Q. And by Tuesday morning, had the headaches gotten any better?

A. He actually said they were getting better.

(CP 848)

Swank told Dr. Burns he suffered a neck injury at the September 18, 2009 football game, and was experiencing neck pain and headaches. Dr. Burns told Swank to avoid contact sports for the next three days, and if he had further headaches in playing football after those three days, to take an additional week off. Dr. Burns further said that if Swank suffered another concussion, he would need to take a two month break from contact sports. (CP 115)

Swank's mother testified:

A. ... [Dr. Burns] started getting more in depth about how he got his headache and his neck thing. And Drew was

talking to him and explaining when it happened, as he was examining him, and then when he was done, he just said, well, I think he has a mild concussion, and he just needs to not practice or play football this -- until these headaches are gone. And then he recommended a dosage of Ibuprofen, just take Ibuprofen like he's been doing and that was it.

Q. ... How long did the examination last?

A. Not very long, five, ten, minutes. It didn't take that long.

Q. Okay. So you left with the understanding then that as long as he had the headaches, he couldn't practice or play in the game?

A. That's what Dr. Burns said, he cannot return to play until the headaches are gone.

Q. Okay... You drove him to school that day?

A. Yes, he went to school that day.

(CP 848)

G. Swank Went To Tuesday's Practice With His Father And Brother, But Did Not Participate.

On the same day he was examined by Dr. Burns, Swank went to football practice, but did not suit up or participate. (CP 619) Swank told Puryear about his headaches at the practice. (CP 619) Swank's father told Puryear that Swank had been diagnosed with a concussion, which was the reason he could not participate. (CP 849)

H. Swank Went To School On Wednesday And Thursday, And Also Attended, But Did Not Participate In Football Practice.

On Wednesday and Thursday, September 23 and 24, 2009, Drew again went to practice without suiting up or participating. (CP 619)

Swank's mother testified:

Q. ...So the next day is Wednesday the 23rd, did Drew go to school the next day then?

A. I want to say yes.

...

Q. ...You do recall having a discussion with him about his headaches on that Wednesday morning?

A. Yes, I asked every morning how he was doing.

Q. What did he tell you on Wednesday regarding his headaches?

A. He would say that they were getting better.

...

Q. And when he got home that night on Wednesday, did you talk with him about his headaches?

...

A. Wednesday night, I think he said that they were not too bad.

Q. ...Did you talk with Drew then Thursday morning about his headaches?

...

A. He said he wasn't having any headaches.

...

Q. Do you know if Drew participated in practice [on Thursday]?

A. ...No, I do not believe he participated in practice on Thursday.

...

Q. Okay. So on Thursday evening, was there any discussion then with Drew about playing in the Washtucna game the next day?

A. I didn't discuss it with him.

...

Q. Did you talk with Drew about whether or not he had any headaches?

A. Yes, and he said, no, he hadn't had any all day.

(CP 850-852)

Swank's father testified:

Q. Did you have any discussions with Drew on Thursday to find out if he really, if the headaches really

were gone or if he had any of these other signs or symptoms?

A. Through the week he said that the headaches were getting better like on Tuesday, Wednesday... until Thursday when he said that he didn't have headaches anymore. It wasn't like it was some gargantuan headache. It was more of a mild headache and then it was becoming less severe like two or three days in a row until he didn't have it[.]

(CP 807-808)

I. Swank's Mother Obtained A Written Clearance To Return To Play From Dr. Burns' Office For Swank, Which Was Delivered To VCS And Puryear.

On Thursday, September 24, Swank's mother called Dr. Burns' office, said that Swank's headaches had subsided, and requested a release from Dr. Burns so Swank could play in the game the following night in Washtucna. (CP 3) Dr. Burns signed a note clearing Swank to resume playing football as of September 25, 2009. (CP 117)

Swank's mother testified:

Q. And did you have a discussion with him then about the Washtucna game?

A. I believe I said, oh, do you want me to call the doctor and see, you know, if you're not having headaches anymore, call the doctor, and he said, yeah.

...

A. ...I asked him, do you want me to call the doctor to see if you can get, re -- you know, whatever, released to play. I'm the one that asked.

Q. He didn't bring that up with you?

A. No.

Q. Why did you bring that up?

A. Because the doctor said when his headaches were gone, he could return to play.

...

Q. ...Tell me about that conversation that you had with the receptionist[?]

...

A. ... I had to explain Drew's headache and... 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.

Q. And what did the nurse say?

A. She said, okay, I will get this information to Dr. Burns, and we will get back to you later.

...

A. ... She called me back and said there was a note from Dr. Burns for Drew to return to play, that I could come and pick it up at the office.

...

Q. And I assume you were trusting Drew when he said that he no longer had a headache?

A. I had no reason not to believe him.

...

Q. And apparently on, at least as of Thursday evening, you didn't have any concerns at all that it would have been unsafe for Drew to return to play?

A. I was trusting my doctor's medical knowledge and care. So I didn't, you know, question it. As a mother, you're always concerned.

(CP 851-852; *see also* CP 809-810)

Swank's father recalls:

A. ... Patti ... got the signed release that ... had to be turned into the school and ... got it to me prior to me heading over to Spokane.

...

A. ...[O]n Thursday ... I made some extra copies of it, went to the school, and dropped one copy off in the

office... I specifically gave a copy to Jim Puryear to let him know that he is cleared to play starting tomorrow. He wasn't cleared to play that night from my understanding of it and he didn't play Thursday night or practice.

...

Q. And then you did have a specific discussion with Jim Puryear when you gave him the release, right?

A. Yeah, I gave him the release and said that Drew's headaches were gone and he was, there is a release from the doctor.

Q. What did Jim say?

A. He acknowledged it.

(CP 808; *see also* CP 852)

Puryear recalls that Swank's father gave him a written note from Dr. Burns, clearing Swank to return to play. (CP 619-620)

J. Swank Reported He Had No Headache, And His Parents and Friend Confirm He Was Acting Normally The Day Before The September 25 Game.

Tabish was not at the September 25, 2009 football game in Washtunca, Washington. (CP 64) Tabish did not interact with or see Swank at school on the day before the football game. (CP 64)

On September 25, 2009, Heden did not observe any abnormal behavior on the part of Swank, either prior to or during the football game, up until about the time Swank left the game in the second quarter. (CP 76)

Swank's mother testified:

Q. And did you talk with Drew on Friday morning about whether or not he had any headaches?

A. I did when I was dropping him off -- Well, I didn't talk to him about having headaches. I told him, as he was

getting his stuff and hopping out of the car at school, because he was playing in the game, getting his football gear and all that stuff all together, I said now, if you get a headache, do not play. And I gave him three Ibuprofen, and I said, take these in case you get a headache.

Q. That's as he's getting out of the car at school?

A. Yes. Well, I gave him three Ibuprofen before he went to school.

Q. All right. And did he say anything in response?

A. He said, yes, I won't.

Q. And to you, he appeared perfectly normal?

A. Yeah.

...

Q. Did you speak with Drew before the game?

A. No.

Q. Did you observe him during the warmups?

A. I didn't see warmups.

(CP 852-853)

K. Swank's Parents And Friend Described Swank's Quality Of Play Declining Through The First Quarter Of The September 25 Game.

Lawson, Swank's teammate, testified that Swank was his 'normal self' prior to and at the beginning of the September 25, 2009 game, but that his play "grew worse and worse as the game progressed." (CP 402-403)

Swank's mother testified:

A. Well, early on from the very start, Drew wasn't playing the way he normally plays. His caliber had dropped... He seemed very slow, like his timing was completely off, he was not crisp and sharp when he was cutting when he had the ball. It was like he couldn't get any place. On a few tackles, it's like he should have been there, and I couldn't see -- He should have been there and

he wasn't there and then other boys would come in and I thought that was odd that he wasn't crisp and sharp and fast like he normally is. He just wasn't playing well.

...

Q. You weren't concerned at that time that perhaps he could be experiencing concussion signs?

A. No, that didn't cross my head. I was focused on headaches, that's the symptoms he's had, and that's what I - and I can't see if he's having a headache.

...

Q. Did you see him take any hits to the head?

A. No, I didn't see anything like that.

(CP 853-854)

Swank's father testified:

Q. Okay. So let's go to then when the game starts, was Drew playing?

A. He was.

Q. And what position was he playing?

A. Well, his normal position of running back on offense and defensive back on defense. And then he played on part of the special teams too running kick-offs back.

...

Q. So did Drew play the entire first quarter?

A. I don't know if he played the whole first quarter. I don't - I don't remember the exact time that he got hit if it was in the second quarter or the end of the first quarter. But up until the time he got hit he played most of the game. I mean he was out for some plays, until he got hurt there he was, he was on the field most of the plays, not all of them.

...

A. Well, Drew didn't seem to be playing up to his usual standards. The whole team seemed like they were kind of in disarray but Drew as well. They were getting blown out and they all kind of seemed somewhat dazed and confused. You are watching your own son primarily in a game and he looked to me like he -- I mean he for sure was not sharp...they are getting blown out and there is a certain amount of confusion that comes with that.

...

A. His performance started like that and went downhill and I don't know if it was the end of the first quarter or sometime in the second quarter, I don't remember that, it was first or second quarter, early in the second quarter, it was early in the game.

...

Q. If they are eight minutes and you watched him for eight minutes and you watched his performance continue to deteriorate with the knowledge that he had a concussion, he had been out of play, he had been taking medication for headaches the week before, and it still didn't register to you that perhaps it was a concussion that was causing him to play poorly?

...

A. I didn't come to that conclusion until I, you know, whatever it was, eight to 12 minutes into the game approximately, instead of his play picking up, it got worse, kicking balls over his head, not understanding, I'm primarily wondering, I don't see him pulling it -- I mean one time he pulled at his head, I don't see him holding his head like this or giving indication of headaches or anything, and I finally strung the beads together that he's, his whole night is terrible, I mean he doesn't have a whole, a very big long night that night but it was terrible and it was getting worse, and as it got worse, I said, I'm pulling him off the field.

Q. Whom did you say that to?

A. To myself.

(CP 810, 814)

Swank's aunt, Janie Burke, recalls she did not speak to Swank prior to the game. (CP 526) She was watching the game from the sidelines, and testified that she thought Swank was slow and appeared confused. (CP 526-527)

Heden, the assistant coach, recalled:

- Q. Were you at the game on September 25th, 2009?
- A. Yes.
- Q. And were you watching the players during warm-ups during that game?
- A. Yes.
- Q. How did Drew appear during warm-ups of that game?
- A. Fine.
- Q. Do you recall what position Drew was playing at the beginning of that game?
- A. I -- I believe that he was one of the running backs and defensive back in that game.
- Q. Do you recall if Drew carried the ball during the first quarter of that game as a running back?
- A. Probably.
- Q. Do you know if anybody was specifically assigned to monitor Drew during the game of September 25th for signs or symptoms of a head injury?
- A. No. We all -- we monitored all the players.
- Q. During the game, did you notice Drew's performance begin to deteriorate in any way?
- A. No.
- Q. Do you recall Drew being out of position on any plays during that game?
- A. Not to my recollection.
- Q. Do you recall Drew Swank asking any questions, repeating questions during that game?
- A. Not to my knowledge.
- Q. Do you recall him appearing fatigued in any way during that game?
- A. Define "fatigued." I mean, you're playing football.
- Q. Poor question. Do you recall him being more fatigued than the average football player during that game?
- A. No.
- Q. Do you recall Drew Swank taking any hits more severe than an average hit during the football game?
- Q. (BY MR. HARPER:) Do you recall Drew Swank taking any hits more severe than an average football hit during the first quarter of that game?
- A. No.

Q. Do you recall him taking any such hits during the second quarter of that game?

A. Nothing any more average than a normal hit.

(CP 76).

L. Swank Collapsed On The Sidelines In The Second Quarter, And Died Two Days Later.

Heden testified:

Q. Was Drew's final quarter the second quarter?

A. Yes.

Q. Do you recall watching the final play that Drew was a part of during the second quarter of that game?

A. Yes.

Q. Can you describe what happened during that final play.

A. Jim and I were watching the football game -- watching the football play, and it's all recorded in the statement that I put down at the end of the -- end of the -- after the game, the next couple of days when I was told to write a statement. That's all included in the documentation. Basically, it was a sweep to the right and Drew was playing cornerback on the left side, and it was a play away from Drew, and in eight-man football, the off side cornerback is equivalent to 11-man football safety, and so the play was going away. We were watching the play. It was a sweep. They scored on that play and it was I'd say probably 40, 50 yard run. I don't know exactly. And so we were watching the play and then as stated in the statement, I heard a loud pop, turn, and Drew was on his back. He jumped up and we informed him to come off the field because the play was all the way at the other end and there was no way he would get down there in time, so I told him to come off the field and then at that time he come off the field and then -- and then noticed that his eyes were dilated.

Q. Did you ask Drew to come off the field because of the significance of the hit that he had just taken?

A. No. It was -- it was kind of a combination of the fact that when he jumped up he went to a knee, like the

wind had been knocked out of him, and then, again, the play was way off so it was like, Drew, come on off, get your wind, so to speak, and then get somebody else in to play.

Q. And when he came off the field, you noticed his eyes were dilated?

A. Correct. Because I was the first person that met him at the sidelines.

Q. Do you recall if Mr. Puryear examined Drew at all after that final play?

A. I -- I don't know because that -- as soon as I'd saw that I had turned -- and this is all in the statement -- I had turned and tried to get the game stopped so I can get the ambulance over there because something was wrong.

(CP 76-77; *see also* CP 4)

M. This Wrongful Death, Lystedt Act, And Medical Malpractice Lawsuit Was Commenced September 21, 2012.

This wrongful death, Lystedt Act, and medical malpractice lawsuit was filed on September 21, 2012. (CP 1-8) The lawsuit named as defendants Valley Christian School, Tabish (VCS' high school principal in September 2009), Puryear, Heden, and Dr. Burns. (CP 1-8)

The Complaint states VCS, Heden, and Tabish failed "to adopt, implement and carryout the protocols and procedures required by [RCW 28A.600.190]." (*See* CP 4-7)

N. VCS, Tabish, And Heden Moved For Summary Judgment, Arguing VCS Complied With The Lystedt Act By, *inter alia*, Relying Upon Swank's Parents And Medical Doctor To Determine Whether Swank Could Return To Play.

On January 14, 2014, VCS, Tabish, Heden moved for summary judgment as to the only claim presented against them: their alleged failure

to comply with RCW 28A.600.190. (CP 23-41; 43-119) They argued the undisputed evidence demonstrated they complied with the requirements of the statute by, *inter alia*, removing Swank from play after he took a hit at the September 18 game, and not allowing him to return until his parents provided a written clearance to return to play from his doctor. (CP 23-41)²

O. Puryear Moved For Summary Judgment Arguing The Volunteer Immunity Statute Applied, And That Any Intentional Tort Claims Were Time Barred.

Shortly after VCS, Puryear also moved for summary judgment. (CP 124-139; 142-202) Puryear argued that RCW 28A.600.190 was not breached; that as a volunteer coach he was entitled to immunity under the volunteer immunity statute, RCW 4.24.670; and that insofar as intentional tort claims were asserted against him, they were barred by the statute of limitations. (*Id.*)

P. Heden Was Dismissed With Prejudice, By Stipulation.

Several months after VCS, Heden, Tabish, and Puryear filed their summary judgment motions, but before a response was filed, all parties stipulated to the dismissal of Heden, with prejudice. (CP 203-212)

² It was also argued that Heden was entitled to summary dismissal pursuant to the volunteer immunity statute, RCW 4.24.670. As Heden was later dismissed with prejudice by stipulation, the issue of the applicability of the volunteer immunity statute to him is now moot.

Q. Dr. Burns Moved For Summary Judgment Arguing, *inter alia*, The Trial Court Lacked Personal Jurisdiction.

On June 20, 2014, Burns also moved for summary judgment, arguing that Washington courts lack personal jurisdiction; that no breach of RCW 28A.600.190 had been established; and that the applicable statute of limitations for medical malpractice in Idaho had already run. (CP 222-242; 244-400)

R. Appellants Responded To The VCS, Puryear, And Dr. Burns Motions; VCS, Puryear, And Dr. Burns Replied And Objected To Various Evidence.

Appellants responded to VCS's summary judgment motion on July 14, 2014. (CP 476-500) Accompanying their opposition were an affidavit from Perry Lawson, a student teammate of Swank; a declaration of Dr. Stanley Herring; and a declaration of counsel which included the transcripts of various fact witness depositions. (CP 401-404; 406-475; 504-968) Appellants separately responded to Burns' motion. (CP 969-984; 988-1061)

VCS replied, and also moved to strike various evidence. (CP 1088-1103; 1105-1107; 1109-1112; 1114-1155) Pertinent here, VCS argued no case had been presented against Tabish, individually, and that regardless of the outcome of the other motions, the trial court should dismiss the claims against him. (CP 1088-1089) VCS also argued that neither the

documents found by Appellants' counsel on the internet, nor the

declaration of a medical doctor purporting to interpret the statute, could be a legitimate basis to impose additional duties upon VCS not otherwise set forth in RCW 28A.600.190. (CP 1089-1102)

Puryear replied, and also moved to strike portions of the Lawson declaration. (CP 1062-1072; 1075-1087; 1160-1165) Burns replied as well, and likewise moved to strike various evidence. (CP 1173-1192; 1194-1202; 1203-1205)

Appellants responded to the various evidentiary motions, though because of the short timeframe prior to the hearing on the summary judgment motion, no replies were filed. (*See* CP 1207-1244; 1249-1252; 1245-48)

S. The Trial Court Granted Summary Judgment To All Respondents.

The trial court granted the various Respondents' summary judgment motions on August 6, 2014. (CP 1337-1340)

IV. ARGUMENT

A. The Standard of Review is *de novo*.

Summary judgment orders are reviewed *de novo*. *See Camicia v. Howards. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

The Court performs the same inquiry as the trial court, reviewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in the nonmoving party's favor. *See*

Lahey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

B. Tabish Has No Individual Liability, And No Basis Has Been Articulated To Either The Trial Court Or This Court. Summary Dismissal Of The Claims Against Tabish, Individually, Should Be Affirmed.

Tabish, the high school principal of VCS in 2009, was not present at the September 25, 2009 game. (CP 64) He did not see or interact with Swank on September 25. (*Id.*)

While he was principal in 2009 VCS adopted the head injury and concussion protocols required by RCW 28A.600.190 and the WIAA. (*See* CP 61-62, 66, 68-69, 74-75, 79-80, 94, 104-106)

Tabish moved for summary judgment before the trial court, and Appellants supplied no response as to why the claims against Tabish, individually, should not have been dismissed. (*Compare* CP 476-503 with CP 1088-1089)

Appellants, in their Brief to this Court, do not argue that the trial court erred in dismissing the claims against Tabish, individually. (*See* App. Brief, *passim*) Moreover, Appellants have tacitly acknowledged that they have no viable claim against Tabish, individually, by dropping Tabish's name from the title page of their Brief to this Court. (*Id.*)

Therefore, regardless of the disposition of the claims against VCS and the other Respondents, the trial court's dismissal of the claims against Tabish, individually, should be affirmed.

C. The Lystedt Act Does Not Impliedly Incorporate Standards Or Duties From Other Sources.

"[A] court cannot indulge in speculation about the Legislature's subjective intent or its group psychology. Unambiguous statutory language must be given its unambiguous meaning." *Caritas Services v. Dept. Soc. & Health Servs.*, 123 Wn.2d 391, 409, 869 P.2d 28 (1994) (citing *State v. Smith*, 117 Wn.2d 263, 270-71, 814 P.2d 652 (1991)).

"A court may not add words to a statute even if it believes the Legislature intended something else but failed to express it adequately." *Caritas*, 123 Wn.2d at 409 (citing *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978)).

While there are statutes and administrative code provisions which specifically incorporate standards by reference³, a statute cannot incorporate something by reference without specifically referring to that something. *See e.g. State v. Hovrud*, 60 Wn. App. 573, 575, 805 P.2d 250, *review denied*, 117 Wn.2d 1005 (1991).

³ *See e.g.* RCW 47.36.020 and WAC 468-95 *et seq.*, adopting the Manual on Uniform Traffic Control Devices.

Appellants argued to the trial court that the Lystedt Act impliedly incorporated additional duties from three sources: a document published in the British Journal of Medicine (CP 509-518); a flyer published by the CDC (519-522); and a declaration of a medical doctor. (CP 406-410)

On appeal, Appellants have focused upon the CDC document. Given that this Court's review of the trial court's decision is *de novo*, VCS will address in turn each of the three proposed extra-statutory sources presented to the trial court.

1. *The Lystedt Act does not impliedly incorporate standards described in a CDC flyer of unknown publication date.*

In response to VCS's summary judgment motion, counsel for Appellants obtained from the internet and furnished to the trial court a four page flyer from the CDC of unknown publication date. (See CP 481-482; 490-93; 504-505; 519-522) The flyer refers readers to another webpage. (CP 522) On this webpage are additional CDC flyers which are part of the same "Heads Up" concussion prevention program. (CP 1118-1155) The copyright date indicates that these "Heads Up" program flyers were promulgated in 2010.⁴ (See CP 1155)

⁴ Additional documents from the CDC concerning the Lystedt Act were referenced for the trial court. See CP 1118-1155. As described in one of those documents:

It should be noted that the evidence presented in this guide is preliminary and presents information based only on the implementation of Return to Play from these two early adopters. The information presented does not reach the standard of 'best-practice' or 'evidence-

Neither the CDC webpage, nor these specific documents are incorporated or referred to by the Lystedt Act. They therefore cannot supply additional statutory duties with which schools such as VCS must comply. Insofar as Appellants' claim against VCS was premised upon a breach of standards and duties not contained within or specifically incorporated by the Lystedt Act, the trial court did not err in dismissing Appellants' Lystedt Act claim.

2. *The Lystedt Act does not impliedly incorporate standards from the British Journal of Medicine document.*

Before the trial court, Appellants argued that a document downloaded by Appellants' counsel on July 14, 2014⁵, which was published in the British Journal of Medicine, supplies the duties with which VCS must comply under RCW 28A.600.190. (CP 481-482; 490-93; 504-505; 509-518). The British Journal of Medicine document provides:

10. Medico-legal considerations

This consensus document reflects the current state of knowledge and will need to be modified according to the development of new knowledge. It provides an overview of issues that may be of importance to healthcare providers involved in the management of

based' because Washington and Massachusetts are in the early stages of implementing Return to Play.

(CP 1122)

⁵ The same day Appellants responded to VCS's summary judgment motion.

sports related concussion. It is not intended as a standard of care, and should not be interpreted as such.

(CP 514)

As with the CDC document, this document, which is also not specifically referenced or incorporated by the Lystedt Act, does not supply duties additional to those already set forth in the statute.

3. *An expert witness may not offer opinions on matters of law, or the interpretation of a statute.*

Before the trial court, Appellants argued that an interpretation of the Lystedt Act proposed by one of Appellants' expert witnesses was determinative of duty and breach. (*See* CP 480; 492-93; 407-410)

Evidence submitted in support of or in opposition to a summary judgment motion must be admissible. CR 56(e).

For an expert to testify to the jury on the law usurps the role of the trial judge. Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards. A contrary rule would confuse the jury because each party would find an expert who would state the law in the light most favorable to its position.

Washington Constitution article IV, section 16, provides that the court "shall declare the law." Legal questions are decided by the court, not the jury, for good reason. By arguing to the court, the lawyers have the opportunity to argue canons of construction; applicable law, including case precedent; and all the other traditional elements that make up legal argument. A judge trained in law then decides whether or not the

proposition is legally correct. And he or she can then craft an instruction for the jury. To allow a lay person to answer a legal question puts the lawyers in the impossible position of making these legal arguments to a lay jury.

State v. Clausing, 147 Wn.2d 620, 628-29, 56 P.3d 550 (2002) (internal citations and marks omitted).

As argued by VCS to the trial court, several paragraphs of the expert declaration Appellants supplied in response to summary judgment purported to instruct the Court as to the purpose, meaning, and interpretation of RCW 28A.600.190, and further purported to instruct the Court as to the duty owed. (CP 1105-1108)

Experts may not offer legal opinions or legal conclusions; the existence of a duty is a question of law for the Court; and the interpretation of a statute, in this case RCW 28A.600.190, is a question of law. The trial court did not err in disregarding the inadmissible opinions of Appellants' expert in determining the meaning and application of the Lystedt Act.

D. VCS Complied With The Lystedt Act By Adopting The Required Head Injury Protocols, And By Relying Upon The Written Clearance To Return To Play Furnished By The Student's Parents And Their Chosen Medical Doctor.

Statutory interpretation is a question of law reviewed *de novo*.

State v. Franklin, 172 Wn.2d 831, 835, 263 P.3d 585 (2011). The Court

should give effect to the plain meaning of the statute. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, the Court will "give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn, LLC*, 146 Wn.2d at 9-10. The Court derives the plain meaning from the language of the statute and related statutes. *Id.* "When the plain language is unambiguous — that is, when the statutory language admits of only one meaning — the legislative intent is apparent, and we will not construe the statute otherwise." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The Complaint against VCS⁶ was that it failed "to adopt, implement and carryout the protocols and procedures required by [the Lysted Act, RCW 28A.600.190]." (CP 4-7) The Lystedt Act describes three requirements with which schools such as VCS must comply:

- First, each year, prior to a student's participation in athletics, a concussion and head injury information sheet must be signed by both the student and his parent or guardian, and that form must be returned to the school, before the student is permitted to participate in athletics. RCW 28A.600.190(2).
- Second, any student athlete who "is suspected of sustaining a concussion or head injury in a practice

⁶ As well as against Heden and Tabish.

or game must be removed from participation.”
RCW 28A.600.190(3).

- Third, once a student athlete has been removed from play, he must be evaluated by a licensed health care provider, and receive a written clearance to return to play. RCW 28A.600.190(4).

Here, as argued to the trial court, and as described below, VCS met each specific requirement of RCW 28A.600.190.

1. *Swank and his parents received, signed, and returned the concussion and head injury form, and Swank was examined and cleared to play by a medical doctor prior to the commencement of the football season.*

RCW 28A.600.190(2) requires that a concussion and head injury information sheet be signed by both the student and his parent or guardian, and that form must be returned to the school prior to participation in sports.

Swank and his parents received, signed, and returned to VCS an information sheet concerning concussions and head injuries. (CP 79-80)

On August 19, 2009, Swank was examined by Dr. Paul Haynes. A health examination consent form and a physical examination form, which provided that Swank had been physically examined by Dr. Haynes and that Swank was cleared and authorized to play football at VCS in the Fall of 2009, was signed and returned to VCS. (CP 104-106)

2. *The head injury protocol adopted by VCS mirrored that required by the Lystedt Act and the WIAA.*

RCW 28A.600.190(2) requires each school's board of directors to work with the WIAA to develop and adopt guidelines and forms concerning head injury and concussions.

In 2009, VCS adopted a head injury protocol which mirrored the specific requirements of RCW 28A.600.190(3) and (4), which required that if a player complained of a headache or possible injury, he or she could not practice or appear for game day until being cleared and released to play by a medical doctor and the student's parents. (CP 74, 94)

The WIAA also required coaches to attend a concussion management training course, to complete coaching clinic requirements, and to have first aid / CPR training; there was no dispute that each requirement was fulfilled here. (See CP 61-62, 66, 68-69, 94)

3. *When Swank reported a head injury after the September 18 game, he was not permitted to return to practice or play until he was cleared in writing by a medical professional.*

On September 18, 2009, Swank, "playing in a Friday night high school football game for the VCS football team, was hit in the head and began suffering severe headaches." (See CP 2-4) Since Swank was experiencing headaches after the September 18, 2009 game, he was not allowed to participate in any practices or play until he was cleared, in writing, by a medical professional. He did not practice with the team for

the remainder of the week, and Dr. Burns told him not to return to play until his headaches ceased and he felt better.

Swank's mother obtained a written clearance for Swank to return to play from Dr. Burns' office, and that written clearance was furnished to VCS and Puryear.

4. *A student who has been cleared to return to play is no longer "suspected" for the purposes of the statute. In relying upon a note from a medical doctor furnished by the student's parents, VCS did not breach any duty imposed by the Lystedt Act.*

In order to reduce the risk that a still-injured student athlete will be returned to play, RCW 28A.600.190 seeks to remove the decision from the hands of laypersons, by imposing a requirement that a trained healthcare professional make the determination.

Here, given that 1) Swank was 'his normal self' before the September 25 game; 2) Swank had received a written note from Dr. Burns clearing him to return to play; and 3) the note was furnished to VCS by Swank's parents; the specific requirements of the statute were satisfied. For the purposes of the statute, Swank was no longer "suspected" once he had been cleared to return to play by his doctor, and laypersons should be entitled to rely upon a written clearance to return to play signed by a medical doctor and furnished to the school by the student's parents.

The Lystedt Act imposes no additional implied duty that VCS assume the healthcare provider erred, or that Swank had not actually been “clear[ed] to return to play.”

Appellants did not argue to the trial court, and do not argue now, that Swank, after being cleared to return to play by Dr. Burns, took another hit in practice, warm-ups, or during the first quarter of the September 25 game, which rendered him “suspected of sustaining a concussion or head injury” for the purposes of the statute.

Rather, Appellants impliedly argue that 1) the Dr. Burns written clearance to return to play was not valid; and so 2) VCS had a duty to not allow Swank to return to play in the September 25 game, written clearance notwithstanding.

Dr. Burns is not a VCS agent or employee; he is the chosen physician for the Swank family. Any claim Appellants have against Dr. Burns is separate and distinct from their Lystedt Act claim against VCS.

Under these facts, this Court should affirm the decision of the trial court. The question of whether the student should, in fact, have been “clear[ed] to return to play” by a health care provider is a separate one of medical malpractice, properly directed at the allegedly negligent provider.

E. The Lystedt Act Imposes No Greater Duty On Laypersons Than Upon Volunteer Health Care Providers.

The Lystedt Act contemplates that a volunteer health care provider may negligently clear a youth athlete to return to play. When such negligence occurs, the Legislature specifically exempts the volunteer health care provider from liability.

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.

RCW 28A.600.190(4) (emphasis added).

Had Dr. Burns been a volunteer at VCS, and had he negligently cleared Swank to return to play, pursuant to the Lystedt Act he would “not [be] liable for civil damages[.]” In the present case, though, Dr. Burns was not a volunteer, meaning the immunity clause does not apply.

On the other hand, the VCS coach and assistant coach were volunteers, and neither was a health care provider. Lay volunteers are also immune from suit, pursuant to RCW 4.24.670.

Given that the Lystedt Act specifically exempts negligent volunteer health care providers from civil liability, and given that the public policy of this State is already to exempt lay volunteers from liability, any civil liability imposed by the Lystedt Act upon lay volunteers should be interpreted by this Court to be no greater than the liability imposed upon negligent volunteer health care providers.

Moreover, as noted above, in order to reduce the risk that a still-injured student athlete will be returned to play, RCW 28A.600.190 seeks to remove the decision from the hands of laypersons, by imposing a requirement that a trained healthcare professional make the determination. If a volunteer health care provider negligently clears a student athlete to return to play, that provider is immune from suit. If a non-volunteer health care provider negligently clears a student athlete to return to play, the statutory immunity would not apply. But, in either instance, laypersons should be entitled under the statute to rely upon the written clearance provided by the healthcare provider.

If laypersons are not entitled to rely upon the written clearances, and a student athlete is hurt once returned to play, it effectively makes the laypersons the indemnitors of the negligent health care providers.

The Court should hold that the Lystedt Act imposes no greater duty on laypersons than it does upon volunteer health care professionals.

The Court should further hold that the Lystedt Act entitles laypersons to rely upon the written return to play clearances furnished by health care providers.

F. Promotion Of Volunteer Participation And Charitable Donations Are Matters Of Public Policy. Appellants' Joint Venture Theory Of Liability Is Contrary To State And Federal Public Policy, And Should Be Rejected.

VCS, a non-profit, private, religious school, relies upon the charitable donations and volunteer time of its families and boosters. Having 501(c)(3) status, charitable donations to VCS are promoted as a matter of federal law and policy through, *inter alia*, tax deductions and write-offs.

Washington public policy, as manifested in the volunteer immunity statute, as well as in the immunity afforded negligent health care providers under the Lystedt Act, is to promote volunteering in youth sports.

Appellant's joint-venture theory of liability against Puryear, if accepted as viable and permitted to proceed, would effectively circumvent the volunteer immunity statute, contrary to Washington public policy, and would discourage charitable donations to non-profit and religious entities, contrary to federal public policy.

The trial court did not err in declining to allow Appellants to proceed against Puryear on a joint-venture theory.

V. CONCLUSION

The trial court did not err in its dismissal of the claim against Tabish, individually, as no basis for individual liability against him has been argued, and the summary dismissal of the claim against him should be affirmed.

The trial court likewise did not err in its dismissal of the Lystedt Act claim against VCS, and the summary dismissal of that claim against VCS should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of May, 2015.

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Attorneys for Respondents Valley Christian School, Derick Tabish, and Mike Heden

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2105, I caused to be served a true and correct copy of the foregoing BRIEF OF RESPONDENTS VALLEY CHRISTIAN SCHOOL AND DERICK TABISH, by the method indicated below and addressed to the following:

Mark D. Kamitomo	<u> X </u>	U.S. MAIL
Collin M. Harper	<u> </u>	HAND DELIVERED
The Markam Group, Inc., P.S.	<u> </u>	OVERNIGHT MAIL
421 W. Riverside Ave., Ste. 1060	<u> X </u>	ELECTRONIC MAIL
Spokane, WA 99201		

George M. Ahrend	<u> X </u>	U.S. MAIL
Ahrend Law Firm PLLC	<u> </u>	HAND DELIVERED
16 Basin St. S.W.	<u> </u>	OVERNIGHT MAIL
Ephrata, WA 98223	<u> X </u>	ELECTRONIC MAIL

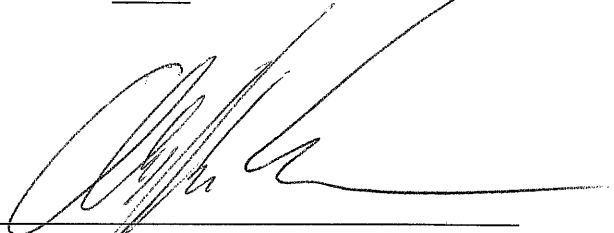
Edward J. Bruya	<u> X </u>	U.S. MAIL
Keefe, Bowman & Bruya P.S.	<u> </u>	HAND DELIVERED
221 N. Wall St., Ste. 210	<u> </u>	OVERNIGHT MAIL
Spokane, WA 99201-0824	<u> X </u>	ELECTRONIC MAIL

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Patrick J. Cronin	<u> X </u>	U.S. MAIL
Caitlin O'Brien	<u> </u>	HAND DELIVERED
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Gregory M. Miller
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