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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,

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

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SUPREME COURT

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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of the Lystedt Act, RCW 28A.600.190.¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal presents the Court with an opportunity to address the proper interpretation of the Lystedt Act, and to determine whether violation of its provisions gives rise to an implied statutory cause of action.² Donald Swank, both individually and on behalf of the estate, and Patricia Swank, individually (the Swanks), commenced this action after their son, Andrew F. Swank (Drew), died from concussion-related injuries suffered while playing high school football. The Swanks brought claims against Valley Christian School (VCS), coach Jim Puryear (Puryear), and Timothy F. Burns, M.D. (Burns), alleging negligence and violations of the Lystedt Act, RCW 28A.600.190. The facts are drawn from the Court of

¹ Counsel for petitioners in this case are Mark D. Kamitomo, who is the current WSAJ Foundation President, and George M. Ahrend, who is a former WSAJ Foundation Amicus Co-Coordinator. Neither Mr. Kamitomo nor Mr. Ahrend participated in the Foundation's decision to seek amicus curiae status in this case or in the preparation of this brief.

² The full text of the Lystedt Act, RCW 28A.600.190, is reproduced in the Appendix.

Appeals opinion and the briefing of the parties. See Swank v. Valley Christian School, 194 Wn. App. 67, 374 P.3d 245, *review granted*, 186 Wn.2d 1009 (2016); Swank Br. at 4-24; Burns Br. at 5-13; Puryear Br. at 2-8; VCS Br. 3-25; Burns Supp. Br. at 2-5; Puryear Supp. Br. at 2-4.

For purposes of this brief, the following facts are relevant. Puryear started an interscholastic football team at VCS and acted as the team's coach. Drew joined the team as a freshman in the fall of 2008, and returned the following year. In the opening game of the 2009 season, Drew was hit in the head and suffered a concussion. The following Monday, Drew stayed home from school due to continuing headaches. The next day, Drew's mother took him to see Burns (whose office is located in Coeur d'Alene, Idaho), and Burns diagnosed Drew with a mild concussion. At that time, Burns instructed Drew to take ibuprofen and refrain from engaging in contact sports for at least three days, or until the headaches stopped. Burns further directed that if Drew suffered a second concussion, he should not play contact sports for up to two months.

On Thursday, September 24, Drew's mother called Burns' office, informed his nurse that Drew's headaches had ceased, and inquired whether he should be released to play football. Later that day, without conducting a follow-up examination, Burns' nurse informed Mrs. Swank that Burns had prepared a note releasing Drew to play. Drew gave Burns' medical release to Puryear that day.

The following evening, Drew returned to play. Teammates and spectators observed that Drew appeared sluggish and disoriented and did not play at his usual level of ability. The Swanks state that Puryear called Drew off the field, yelling at him and violently grabbing his face mask, jerking it up and down. When Drew returned to play, he was hit hard by an opposing player. Drew staggered to the sidelines, began vomiting, and collapsed. Emergency medical services were called, and he was taken to Ritzville Hospital. Drew died two days later.

The Swanks brought suit against VCS, Puryear and Burns, alleging, *inter alia*, that VCS, Puryear and Burns violated the Lystedt Act (or Act), and that violation of the Act gives rise to an implied statutory cause of action. All defendants moved for summary judgment on various grounds, and the superior court granted defendants' motions without specifying the legal grounds for its decision.

The Court of Appeals affirmed in part and reversed in part. The court held, *inter alia*, that the Lystedt Act does not give rise to an implied cause of action.³ The court acknowledged the three-part test for evaluating the existence of an implied cause of action established in Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990), but found that the second

³ The court reached other conclusions not addressed here, including: 1) the Lystedt Act does not mandate specific return to play standards; 2) genuine issues of material fact exist as to whether VCS, acting through Puryear, acted negligently; 3) Puryear is immune from simple negligence under RCW 4.24.670; 4) the claim against Puryear based on the face mask incident constitutes a claim for battery and is thus barred by the two-year statute of limitations under RCW 4.16.100(1); and 5) Washington lacks personal jurisdiction over Burns. See Swank, 194 Wn. App. at 72.

and third factors of the Bennett test were not satisfied in this case. This Court granted Swanks' petition for review.

III. ISSUE PRESENTED

Whether violation of the Lystedt Act, RCW 28A.600.190, gives rise to an implied statutory cause of action.

IV. SUMMARY OF ARGUMENT

The implied cause of action doctrine tasks the Court with determining whether a remedy is implied in a statute. The three-part test employed by the Court inquires whether the plaintiff is in the class of persons meant to be protected by the statute, whether legislative intent supports the creation of a remedy, and whether implying a remedy is consistent with legislative purpose. Because the inquiry primarily involves statutory construction, the evidence the Court considers to determine whether an implied cause of action exists should bear on capturing and effectuating legislative intent.

The Court of Appeals misapplied the second factor of the Bennett test, which inquires whether evidence of legislative intent supports creating or denying a remedy. The court failed to employ the proper rules of statutory construction as articulated by this Court, overlooking multiple key provisions evidencing legislative intent and failing to examine the immunity provision in the context of the statute as a whole.

Regarding the third Bennett factor, which inquires whether implying a cause of action is “consistent with” legislative purpose, the court misapplied this prong by focusing on whether the purposes of the statute are “best achieved” by implying a remedy. This formulation improperly reframes the third factor by placing the court in the position of making what should be a legislative determination.

V. ARGUMENT

A. Overview Of The Implied Cause Of Action Doctrine.

In the dissenting opinion that would later form the foundation of the implied cause of action doctrine under Washington law, Justice Brachtenbach observed: “A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.” McNeal v. Allen, 95 Wn.2d 265, 274, 621 P.2d 1285 (1980) (Brachtenbach, J., dissenting; quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1915)). Reflecting on the Court’s role in carrying out legislative intent, Justice Brachtenbach recognized that the Court “must be mindful of [its] duty ‘to be alert to provide such remedies as are necessary to make effective’ the legislative purpose.” Id., 95 Wn.2d at 276 (brackets added; quoting J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

In Bennett v. Hardy, *supra*, this Court embraced the principles articulated by Justice Brachtenbach, explicitly adopting the implied cause of action doctrine. The Court addressed whether two employees who had been terminated at the ages of 60 and 61 could bring a discrimination claim under RCW 49.44.090, which declares age discrimination an unfair employment practice, but does not explicitly provide a remedy.⁴ *See id.*, 113 Wn.2d at 915. The Court recognized that “a legislative enactment may be the foundation of a right of action.” Bennett, 113 Wn.2d at 919 (citations omitted). It stated that the legislature was deemed to be familiar with the implied cause of action doctrine, and the Court should consider this fact as it endeavors to carry out legislative intent:

[W]e can assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless.

Id. (brackets added; citations omitted).

The Court looked to multiple sources of law, including prior decisions of this Court, the Restatement (Second) of Torts § 874A (1979), and federal law, to examine the principles underlying the implied cause of

⁴ While a claim for age discrimination would generally be available under the Washington Law Against Discrimination, Ch. 49.60 RCW, the defendants in Bennett were owners of a small business that employed fewer than eight employees, and were excluded from the definition of employer under that chapter. The Court thus considered whether an action for age discrimination was implied by 49.44.090. *See Bennett*, 113 Wn. 2d at 916-17.

action doctrine. See Bennett, 113 Wn.2d at 920. The Restatement contemplated the doctrine as one in which a court:

[M]ay, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Bennett, 113 Wn.2d at 920 (brackets added; quoting Restatement (Second) of Torts § 874A).

Despite its discussion of the Restatement in its analysis of the authorities addressing the implied cause of action doctrine, the Bennett Court did not explicitly adopt the Restatement formulation. Compare Young v. Key Pharm., Inc., 130 Wn.2d 160, 166-67, 922 P.2d 59 (1996) (recognizing that “Washington has adopted the strict liability formulation of the Restatement (Second) of Torts § 402A (1965)”), with Bank of America v. Prestance Corp., 160 Wn.2d 560, 576 n.11, 160 P.3d 17 (2007) (recognizing cases where courts have cited the Restatement “but declined to clearly articulate a rule adopting the Restatement approach”). Instead, the Court adopted the three-part test used under federal case law to determine whether a cause of action may be implied:

[I]n determining whether to imply a cause of action, we must resolve the following issues: first, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett, 113 Wn.2d at 920-21 (brackets added; citing In re WPPSS Sec. Litig., 823 F.2d 1349, 1353 (9th Cir. 1987)). The Court has applied the Bennett test to require all three elements to be present. See Bennett, 113 Wn.2d at 920-21; Braam v. State, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003). In contrast to the Restatement, this federal test inquires whether implying a remedy is “consistent with” the legislative purpose, and does not, by its terms, contemplate using existing remedies as a mechanism for vindicating the statutory right.⁵

In Bennett, this Court determined the plaintiffs’ claim met the three-part test. First, the Court found the plaintiffs were “clearly part of the class of persons entitled to the protection of RCW 49.44.090.” See 113 Wn.2d at 921. Regarding elements (2) and (3), the Court concluded: “[W]e may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights.” Id. at 921 (brackets added). Bennett thus appears to assume that where the Legislature expressly creates a right with no corresponding statutory remedy, the legislature intends the remedy to be implied. See also Tyner v. State Dep’t of Soc. & Health Servs., 141 Wn.2d 68, 80, 1 P.3d 1148 (2000) (concluding that where a statute creates a right but is “silent” as to a remedy, the Court “can assume that the

⁵ In Bennett, the Court evaluated the existence of an implied cause of action independent of the availability of a common law remedy. The Court explained: “[W]e decline to address whether defendant’s conduct provides the basis for a wrongful discharge tort because we conclude that the implied cause of action under RCW 49.44.090 recognized above encompasses these claims.” Bennett, 113 Wn.2d at 923 (brackets added).

legislature is aware of the doctrine of implied statutory causes of action”;
internal citations and quotations omitted).

Subsequent opinions by this Court have further refined the implied cause of action doctrine. See, e.g., Ducote v. Dep't of Soc. & Health Servs., 167 Wn.2d 697, 222 P.3d 785 (2009); Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 334 P.3d 529 (2014). In Ducote, the Court considered whether a stepparent had an implied cause of an action for negligent investigation of child abuse under RCW 26.44.050. It examined the language of the statute to conclude that unlike parents, stepparents were not in the “class of persons who may sue for negligent investigation.” Id., 167 Wn.2d at 704-05. The Court contrasted the implied cause of action doctrine to the development of common law doctrines, such as parental immunity at common law. It explained:

In Zellmer, however, we reexamined and explored a common law doctrine. We did not engage in the statutory construction required by the Bennett test for implied causes of action. Implied causes of action are based upon the assumption that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights.... Although the remedy is implicit, the right and the recipients of the right are explicit. Thus, the Bennett test asks whether a remedy can be implied from legislative intent and whether implying a remedy is consistent with the purpose of the legislation[.]

Id. at 706 (examining Zellmer v. Zellmer, 164 Wn.2d 147, 169, 188 P.3d 497 (2008); brackets added; internal citations and quotation marks omitted); see also Frias, 181 Wn.2d at 422 (noting that in applying the

Bennett test, “[a]s in all questions of statutory construction, our goal is to discern and give effect to legislative intent”).

In sum, under Bennett, the implied cause of action doctrine contemplates that the Court’s primary role is discerning and effectuating legislative intent, and the evidence used to guide the Court’s analysis should accordingly inform the Court’s understanding of what the Legislature intended in enacting the statute in question.

B. The Court Of Appeals Erred In Concluding There Is No Implied Cause Of Action Under The Lystedt Act.

Applying the Bennett factors, the Court of Appeals agreed that “[w]ithout question, Drew was within the class who was intended to be benefited and protected by the Zackery Lystedt law.” Swank, 194 Wn. App. at 81 (brackets added). However, the court held that an implied cause of action was not supported by the second and third prongs of the Bennett test. See id. at 82.

- 1. The Court of Appeals incorrectly concluded that plaintiffs failed to meet the second prong of the Bennett test, because it overlooked critical indicia of legislative intent and misapprehended the import of the Act’s limited immunity provision, and thus failed to discern legislative intent by reading the statute as a whole.**

The second prong of the Bennett test asks “whether legislative intent, explicitly or implicitly, supports creating or denying a remedy.” Bennett, 113 Wn.2d at 920. Legislative intent is discerned not from analyzing an isolated provision, but rather, from examining the language

of the statute as a whole, read in its full context. See Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11-12, 43 P.2d 4 (2002). The Swanks identify four aspects of the Act evidencing legislative intent supporting an implied cause of action: 1) the "clear identification of the protected class," 2) the "mandatory phrasing of the obligations imposed," 3) the "absence of an alternative enforcement mechanism," and 4) the "limited grant of immunity for volunteer health providers" contained in RCW 28A.600.190(4). Swanks' Pet. for Rev. at 7-9. The Swanks also highlight the purpose of the Act, which the Court of Appeals recognized is "to reduce the risk of injury or death to youth athletes who suffer concussions." See Swanks' Pet. for Rev. at 2 (quoting Swank, 194 Wn. App. at 73).

In this case, the Court of Appeals failed to apply the rules of statutory construction articulated by this Court, which require that legislative intent be discerned from reading the statute as a whole. See Dep't of Ecology, 146 Wn.2d at 11-12. To begin, the court overlooked the first three features of the Act the Swanks identify in support of their legislative intent argument. The statute specifically identifies the protected class as "children and adolescents who participate in sports and recreational activities." RCW 28A.600.190(1)(a). Second, the Act's mandatory provisions include, in relevant part:

(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.

RCW 28A.600.190 (italics added). Finally, the statute provides no explicit mechanism for enforcing these mandatory provisions.

These factors, read together, plainly evidence legislative intent to protect youth athletes from concussion-related injuries by imposing mandatory requirements on school districts, coaches and health care providers. The absence of an explicit mechanism for enforcing these provisions, combined with the general rule that the legislature is deemed to be aware of the implied cause of action doctrine, offers strong evidence of legislative intent supporting an implied cause of action.

Overlooking Swanks' first three arguments, the court addresses only the volunteer immunity provision, and concludes: "The Washington Supreme Court's precedent is divided over how grants of immunity play into the intent to create an implied cause of action." Swank, 194 Wn. App.

at 81. The court's conclusion that precedent is "divided" on this point rests on its analysis of two cases: Beggs v. Dep't of Soc. & Health Servs., 171 Wn.2d 69, 247 P.3d 421 (2011), and Adams v. King County, 164 Wn.2d 640, 192 P.3d 891 (2008). The Court of Appeals concludes on this basis alone that the evidence of legislative intent is "murky" and does not warrant implying a cause of action. Swank, 194 Wn. App. at 82.

The court correctly recognized that Beggs held an implied cause of action existed under a mandatory reporting statute, relying, in part, on the presence of an immunity provision. See Beggs, 171 Wn.2d at 78 (observing that a "grant of immunity from liability clearly implies that civil liability can exist in the first place"; internal citations omitted). Other opinions by this Court and the court of appeals have reached the same conclusion. See Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 374 P.3d 121 (2016); Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (2007) (finding that immunity provision in mandated reporting statute implies liability otherwise exists under the statute), *review denied*, 164 Wn.2d 1009 (2008).

This Court most recently recognized the relevance of an immunity provision to evidence legislative intent supporting the creation of a remedy in Kim. There, the Court considered whether the Abuse of Vulnerable Adults Act (AVAA), Ch. 74.34 RCW, gives rise to an implied statutory cause of action against mandated reporters who fail to report abuse.

Recognizing that “[s]tatutory interpretation is a question of law,” Kim, 185 Wn.2d at 542 (brackets added; internal citations and quotations omitted), the Court relied on the immunity provision as evidence of legislative intent to create a remedy, observing that “the provision of immunity from liability implies the possibility of civil liability.” Id. at 545 (citing Beggs, 171 Wn.2d at 78).⁶

The Court of Appeals’ reliance on Adams to reach the contrary conclusion in this case is misplaced. In Adams, this Court considered whether the former Washington Uniform Anatomical Gift Act (WAGA), RCW 68.50.520-.620, *repealed by* Laws of 2008, ch. 139, § 31, .901-.903, provided parents with an implied cause of action for unauthorized use of a child’s organ tissue after death. The Court held that WAGA did not give rise to an implied cause of action, in part, because it contained an immunity provision. See Adams, 164 Wn.2d at 655-56.

Adams does not support the Court of Appeals’ conclusion. First, it appears the Adams Court’s primary basis for rejecting an implied cause of action is its conclusion that the plaintiffs were not in the class of persons sought to be protected by the statute, because the “legislature enacted the WAGA in order to provide a program that will increase the number of anatomical gifts available for donation,” and “does not specifically benefit

⁶ Notably, a cause of action against mandatory reporters who failed to report abuse was implied in Kim, notwithstanding the presence of an *express* cause of action to redress actual abuse contained in the same statute. See Kim, 185 Wn.2d at 546.

family members of organ donors.” Id., 164 Wn.2d at 654 (internal citations and quotations omitted).

Second, the Adams Court seems to construe the broad-based immunity provision at issue there as part of an overall statutory scheme designed to encourage organ donation. The Court observes:

[T]he legislature created the WAGA to increase the procurement of anatomical gifts. The legislature even provided immunity for anyone who complies with the WAGA or attempts to comply in good faith....Establishing good faith immunity serves the legislative purpose by encouraging potential donees to seek anatomical gifts without increasing the risk of liability. Implying a cause of action would be inconsistent with the effort to encourage the increased procurement of anatomical gifts.

Id., 164 Wn.2d at 655-56 (brackets added). Thus, Adams’ treatment of the immunity provision there rests on an evaluation of the particular provision in the context of the overall legislative purpose unique to that statute.⁷

The immunity provision in this case, read in the context of the statute as a whole, indicates the Legislature understood liability to otherwise exist. The Act carves out a narrow immunity solely for a volunteer health provider who “authorizes a youth athlete to return to play.” RCW 28A.600.190(4). Against the broader scheme created by the Act’s other provisions, which encompasses a variety of duties imposed on school districts, coaches and health care providers, the Act’s limited immunity provision applies to a single subset of responsible parties who

⁷ To the extent Adams can be read for the broader proposition that grants of immunity evidence legislative intent to deny a remedy, it would appear to be anomalous in light of Beggs, Kim and Doe. See supra at 13.

fall within the reach of the statute. This narrow immunity, understood in context, evidences a broader legislative intent to create liability where the Act's provisions are otherwise violated.

In sum, the court below misapplied the second prong of Bennett, failing to accurately discern legislative intent by reading the statute as a whole. The court overlooked critical indicia of legislative intent, and, with respect to the immunity provision, failed to fully appreciate the context in which that provision arises and how that informs legislative intent in this case. When the statute is read as a whole, the evidence of legislative intent clearly supports the creation of an implied remedy.

2. **The Court of Appeals incorrectly concluded that plaintiffs did not meet the third prong of the Bennett test, because it focused on whether the legislative purpose is “best achieved” by implying a cause of action, instead of inquiring whether an implied cause of action is “consistent with” the legislative purpose.**

The court below recognized that the Act's purpose is “to reduce the risk of injury or death to youth athletes who suffer concussions.” Swank, 194 Wn. App. at 73. The Swanks argue an implied cause of action is consistent with this purpose, in part, because it creates an incentive to comply with its terms. See Swank Pet. for Rev. at 11-12 & n.10.

The Court of Appeals concludes, however, that the Swanks failed to meet the third prong of the Bennett test, relying *solely* on the availability of alternative remedies:

[T]he Swanks have remedies apart from implying a cause of action under the Zackery Lystedt law. The availability of remedies weighs against the third Bennett prong, which asks whether the legislative purpose *is best achieved* by implying a cause of action. . . . Because RCW 5.40.050 allows a trier of fact to consider the breach of a statutory duty as evidence of negligence, the Swanks may bootstrap their contentions that VCS and Mr. Puryear violated the Zachary Lystedt law into their assertions of negligence.

Swank, 194 Wn. App. at 82 (*italics added*).⁸

The court’s analysis misapprehends the thrust of the third Bennett prong, which inquires not whether the purpose of the statute is “best achieved” by an implied remedy, but rather, whether an implied remedy is “consistent with” the legislative purpose. This formulation is misguided because it requires the court to evaluate the “best” method to “achieve” the legislative purpose, rather than determining whether, given evidence of legislative intent and purpose, implying a remedy is “consistent with” the purposes of the statute. See Bennett, 113 Wn.2d at 920-21.

Because the Legislature is deemed to be aware of the implied cause of action doctrine, and a court’s implied cause of action analysis is primarily an act of statutory construction, the availability of alternative remedies should be deemed relevant only to the extent it may illuminate the Legislature’s intent and purposes in enacting the statute.⁹ Here,

⁸ The Court of Appeals declined to address whether the Act also imposes distinct duties on health care providers. See Swank, 194 Wn. App. at 82 n.4. This brief confines its analysis to the court’s broad conclusion that there is no implied statutory cause of action under the Act.

⁹ The Court of Appeals discusses the relevance of alternative remedies under the third prong of the Bennett test. For the sake of uniformity, this brief follows suit. However, as discussed herein, the availability of alternative remedies in this case informs *both* the second Bennett prong, legislative intent, and the third prong, legislative purpose.

mandatory phrasing in select provisions indicates the Legislature could not have intended that violations of the Act would constitute mere evidence of negligence. A common law cause of action for negligence would permit a jury to find that a defendant had not acted negligently despite violating the Act's mandatory provisions (unless reasonable minds could not differ under the particular facts). See RCW 5.40.050; see also Washington Pattern Jury Instructions - Civil 6th WPI 60.03. Allowing violation of the Act to serve only as evidence of negligence, giving to the jury the determination of whether violation constitutes negligence, ignores that the Legislature has already determined the Act's mandates must be followed.

Limiting consideration of alternative remedies solely to the extent they may bear on legislative intent is consistent with this Court's opinions recognizing implied causes of action despite the existence of alternative remedies. See e.g. Bravo v. Dolsen Companies, 125 Wn.2d 745, 755-58, 888 P.2d 147 (1995) (holding that RCW 49.32.020 gives rise to both an implied cause of action and a claim in tort for wrongful discharge in violation of public policy); Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 850, 50 P.3d 256 (2002) (finding an implied cause of action under Ch. 49.12 RCW for failure to provide rest periods despite other remedies, where the statute lacked an exclusive remedy provision); Beggs, 171 Wn.2d at 79-80 (finding implied cause of action despite potentially overlapping medical malpractice claims).

Notwithstanding the Court of Appeals opinion below, the Adams Court's analysis is arguably consistent with this approach. In Adams, the Court relied, in part, on the availability of common law remedies to conclude there was no implied cause of action under WAGA. However, in the Uniform Anatomical Gift Act (UAGA), 8A U.L.A. 70 (2006) (Supp. 2008), on which WAGA was based, a comment to UAGA explicitly referenced the availability of common law remedies for bad faith violations of the Act, and this Court relied on the comment to discern legislative intent. See Adams, 164 Wn.2d at 656 (noting that "the comment to the revised UAGA of 2006 recognizes that 'if a person acts in subjective bad faith, the common law provides remedies,'" quoting UAGA, 8A U.L.A. 70, § 18 cmt. (2006) (Supp. 2008)). This suggests the Court referenced the common law remedy not because it determined that the common law remedy obviated the need for an implied statutory remedy, but rather, because there was evidence the legislature intended the common law would provide the remedy for statutory violations.

Burns relies on Braam, 150 Wn.2d at 712, to argue that the mere availability of alternative remedies is relevant in determining whether a cause of action may be implied. See Supp. Br. of Resp. at 13-14. Burns characterizes Braam as denying an implied cause of action because the plaintiffs there "had another avenue of relief and the claimed implied remedy was inconsistent with the structure of the statutes." Id. at 13-14. In

fact, in Braam, the Court did not reach its conclusion because of the availability of alternative remedies, but rather, because it concluded the Bennett factors were not met:

[W]e find no evidence of legislative intent to create a private cause of action, and that implying one is inconsistent with the broad power vested in DSHS to administer these statutes. *We note that parties believing themselves aggrieved by DSHS's failure to abide by these statutes, including a foster child through an attorney or guardian ad litem, will have an opportunity to raise the issue in the context of dependency actions.*

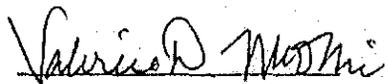
Braam, 150 Wn.2d at 712 (brackets and italics added).

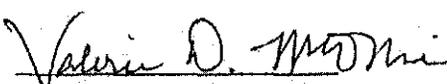
In this case, implying a cause of action under the Act provides an important incentive for responsible parties entrusted with the safety of youth athletes to comply with its provisions, and is consistent with the legislative purpose of reducing "the risk of injury or death to youth athletes who suffer concussions." Swank, 194 Wn. App. at 73.

VI. CONCLUSION

This Court should adopt the arguments advanced in this brief and hold that violation of the Lystedt Act gives rise to an implied statutory cause of action.

DATED this 14th day of December, 2016.


VALERIE D. MCOMIE


For DANIEL E. HUNTINGTON,

On Behalf of WSAJ Foundation

with authority

APPENDIX

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

West's RCWA 28A.600.190

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

Effective: July 26, 2009

Currentness

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

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

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

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

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

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

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

Credits

[2009 c 475 § 2, eff. July 26, 2009.]

Notes of Decisions (4)

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

The statutes and Constitution are current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature.

End of Document

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Subject: Swank v. Burns, et al. - SC # 93282-4

Dear Ms. Carlson:

On December 5, 2016, WSAJ Foundation submitted a letter request for amicus curiae status, for permission to file amicus curiae status, and for an extension of time to file an amicus curiae brief in this case. As of this date, the Court has not yet ruled on WSAJ Foundation's letter request.

In anticipation of the Court's ruling, and in the event the Court grants WSAJ Foundation's letter request, attached please find WSAJ Foundation's proposed amicus curiae brief. For the convenience of the Court, WSAJ Foundation has also attached its December 5, 2016 letter request. Counsel for the parties are being served simultaneously by copy of this email, per prior arrangement.

Sincerely,

Valerie McOmie
Amicus Co-Coordinator
WSAJ Foundation
4549 NW Aspen St.
Camas, WA 98607
valeriemcomie@gmail.com

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