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Supreme Court No. 90733-1
Spokane County Superior Court No. 12-2-03766-8

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.

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

Drew Swank died from a concussion sustained while playing in a high school football game. His coach and physician cleared him to play within a week after suffering a concussion in a previous game, and his coach failed to remove him from competition after he continued to exhibit signs of concussion.

Drew's parents subsequently filed suit against the school (Valley Christian School or VCS), the coach (James Puryear) and the physician (Timothy F. Burns, M.D.), alleging negligence and violation of the Zackery Lystedt law, RCW 28A.600.190. In the text of the Lystedt law, the Legislature finds that:

> (a) Concussions are one of the most commonly reported injuries in children and adolescents who participate in sports and recreational activities. The centers for disease control and prevention estimates that as many as three million nine hundred thousand sports-related and recreation-related concussions occur in the United States each year. A concussion is caused by a blow or motion to the head or body that causes the brain to move rapidly inside the skull. The risk of catastrophic injuries or death are significant when a concussion or head injury is not properly evaluated and managed.
>
> (b) Concussions are a type of brain injury that can range from mild to severe and can disrupt the way the brain normally works. Concussions can occur in any organized or unorganized sport or recreational activity and can result from a fall or from players colliding with each other, the ground, or with obstacles. Concussions occur with or without loss of consciousness, but the vast majority occurs without loss of consciousness.

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

RCW 28A.600.190(1) (formatting in original). In light of these findings, the Lystedt law requires young athletes who are suspected of sustaining a concussion to be removed from competition until properly evaluated and cleared to return to play, among other things. *See* RCW 28A.600.190(3) & (4).[1]

The superior court dismissed all claims on summary judgment. From this decision, Drew's parents, Donald and Patricia Swank, seek direct review in this Court.[2]

II. ASSIGNMENT OF ERROR

The superior court erred in dismissing the Swanks' claims against VCS, Puryear and Burns on summary judgment. CP 1337-41.

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[1] The full text of the Lystedt law, RCW 28A.600.190, is reproduced in the Appendix to this brief.
[2] A statement of grounds for direct review was previously filed herein.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. What obligations does the Lystedt law impose on schools, coaches and physicians? In particular:

    a. Do schools and coaches have an obligation to monitor student athletes for signs of concussion, to remove students showing signs of concussion from competition, and to gradually return student athletes to play after a concussion?

    b. Do physicians have a duty to evaluate student athletes before clearing them to return to play, and to clear them to return to play gradually rather than immediately?

2. Does violation of the Lystedt law constitute evidence of negligence, or does it also give rise to an implied statutory cause of action, or both? And, in the case of a physician, does the medical negligence statute, Ch. 7.70 RCW, preempt an implied cause of action under the Lystedt law?

3. Did the superior court properly dismiss the Swank's lawsuit on summary judgment? In particular:

    a. Are there genuine issues of material fact regarding VCS's, Puryear's and Burns' violations of their common law and statutory duties?

    b. Has Puryear met his burden to prove that there are no genuine issues of material fact for trial, and that he is entitled to judgment as a matter of law on his affirmative defense of volunteer immunity under RCW 4.24.670?

    c. Has Puryear met his burden to prove that there are no genuine issues of material fact for trial, and that he is entitled to judgment as a matter of law on his affirmative defense that a portion of the Swank's claim is barred by the two-year statute of limitations for assault and battery, RCW 4.16.100(1)?

d. Has Burns met his burden to prove that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law on his affirmative defense based on the two-year Idaho statute of limitations for professional malpractice, Idaho Code § 5-219(4)?

e. Is Burns subject to personal jurisdiction in Washington? Specifically, when an Idaho physician improperly clears a student athlete to play football in Washington after a concussion, is the physician subject to suit in Washington based on violation of the Lystedt law?

IV. STATEMENT OF THE CASE

A. The football team.

Puryear, a parent of students at VCS, started an interscholastic football program at the school. According to VCS's Athletic Director, "Mr. Puryear was definitely a motivating factor in starting the program ... along with our administration and board in agreement there."[3] According to Puryear himself, he approached the school administrator and athletic director at the time and said, "Hey, is this something you guys are interested in? If you are, then I would be willing to help make this a reality."[4]

Puryear obtained the funds for the football program.[5] According to the former athletic director, "we knew that the school

[3] CP 558 (C. Kimberley Depo., at 17:14-18; ellipses added).
[4] CP 624 (J. Puryear Depo., at 104:21-25).
[5] *See* CP 624 (J. Puryear Depo., at 102:6-103:17).

couldn't afford it … and Mr. Puryear basically offered to fund the things because it's very expensive to run a football program."[6] Puryear provided funding for the team because "the school didn't have a budget for it whatsoever."[7]

Puryear was head coach of the football team for the duration of its existence.[8] He "chose not to take a salary to help offset the cost for the school."[9] He signed a "Valley Christian School Coaches Contract," also described as an "Employee Contract," with the job title of "Volunteer Football Coach" for the 2007-08 and 2008-09 school years.[10] His performance was reviewed annually.[11]

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[6] CP 938 (R. White Depo., at 18:3-8; ellipses added).

[7] CP 938 (R. White Depo., at 18:9-12); *accord* CP 558 (C. Kimberley Depo., at 17:21-23). Puryear procured the uniforms and equipment for the football program. *See* CP 938 (R. White Depo., at 18:13-14); CP 558 (C. Kimberley Depo., at 17:25-18:1); CP 907 (D. Tabish Depo., at 19:22-20:7). A reasonable estimate of the initial cost is between $25,000 and $50,000. *See* CP 624 (J. Puryear Depo., at 103:18-104:3). The bulk of the startup money came from Puryear and his wife, and the balance came from his father. *See* CP 624 (J. Puryear Depo., at 103:5-17). Over time, Puryear upgraded the equipment he initially purchased, also at his expense. *See* CP 624 (J. Puryear Depo., at 104:12-17). In addition to equipment, he paid for anything else that needed to be done for the football team, from printing up playbooks to paying for team meals, referees and emergency personnel. *See* CP 625 (J. Puryear Depo., at 105:22-107:23); CP 908 (D. Tabish Depo., at 21:5-7).

[8] *See* CP 603 (J. Puryear Depo., at 19:20-23); CP 549 (M. Heden Depo., at 41:17-20); CP 906 & 908 (D. Tabish Depo., at 14:9-14 & 24:16-21).

[9] CP 558 (C. Kimberley Depo., at 17:25-18:1).

[10] *See* CP 649-54 (J. Puryear Depo., Exs. 3, 4 & 5). Under the contracts, Puryear agreed to "perform such duties as are prescribed by the laws of the State of Washington and by existing policies, rules and regulations of the School," among other things. CP 649 (2007-08 contract); *accord* CP 652 (2008-09 contract).

[11] *See* CP 661-66 (J. Puryear Depo., Exs. 8, 9 & 10).

One of Mr. Puryear's children played on the VCS football team.[12] Drew Swank also played on the team, as a freshman in 2008 and as a sophomore for the first two games of 2009 before he died.

After Drew's death, Puryear cancelled (or attempted to cancel) the football program before the 2010 season, without the prior approval of anyone at VCS.[13] VCS subsequently agreed with the cancellation decision.[14] Puryear describes the termination of the program in terms of his "withdrawal" as the head coach.[15]

B. Concussion and return-to-play policies.

VCS developed a "Concussion Information Sheet," which was adapted from the Centers for Disease Control and Prevention (CDC) and the Third International Conference on Concussion in Sport.[16] According to the Concussion Information Sheet:

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[12] *See* CP 907 (D. Tabish Depo., at 19:13-21); CP 549 (M. Heden Depo., at 41:6-8).
[13] *See* CP 565 (C. Kimberley Depo., at 48:10-18, indicating Puryear "made a statement that we weren't going to continue on"); CP 579 (C. Kimberley Depo., Ex. 5, noting that "Jim canceled the season").
[14] *See* CP 566 (C. Kimberley Depo., at 49:23-50:3); CP 908 (D. Tabish Depo., at 22:4-12).
[15] CP 635-36 (J. Puryear Depo., at 148:16-149:6). Now that the football team has been disbanded, Puryear stores the equipment at his home, although he claims that it belongs to the school. *See* CP 636 (J. Puryear Depo., at 149:19-150:19). Under VCS policy, equipment is supposed to be inventoried and returned to the athletic director at the end of the season. *See* CP 945-46 (R. White Depo., at 48:1-49:2).
[16] *See* CP 79-80 (Concussion Information Sheet signed by Drew Swank and his mother); *see also* CP 24 (VCS Mot. & Memo. for Summ. Jdgmt., at 2:16-19, indicating the Concussion Information Sheet was developed and distributed pursuant to "VCS's athletic participation policy, and the requirements of RCW 28A.600.190").

• "A concussion is a brain injury and all brain injuries are serious. They are caused by a bump, blow, or jolt to the head, or by a blow to another part of the body with the force transmitted to the head ... **all concussions are potentially serious and may result in complications including prolonged brain damage and death if not recognized and managed properly.**" CP 79 (emphasis in original; ellipses added).

• Signs of concussion that can be observed by teammates, parents and coaches include: "[a]ppears dazed," "[c]onfused about assignment," "[f]orgets plays," "[i]s unsure of game, score or opponent," "[m]oves clumsily or displays incoordination," "[s]hows behavior or personality changes," and "[a]ny change in typical behavior or personality." CP 79 (brackets added).

• "Athletes with the signs and symptoms of concussion should be removed from play immediately. Continuing to play with the signs and symptoms of a concussion leaves the young athlete especially vulnerable to greater injury. There is an increased risk of significant damage from a concussion for a period of time after that concussion occurs, particularly if the athlete suffers another concussion before completely recovering from the first one. This can lead to prolonged recovery, or even to severe brain swelling (second impact syndrome) with devastating and even fatal consequences. It is well known that adolescent or teenage athlete [sic] will often under report symptoms of injuries. And concussions are no different. As a result, education of administrators, coaches, parents and students is the key for student athlete's safety [sic]." CP 80 (parentheses in original; brackets added).

• "Any athlete even suspected of suffering a concussion should be removed from the game or practice immediately. No athlete may return to activity after an apparent head injury or concussion, regardless of how mild it seems or how quickly symptoms clear, without medical clearance."

CP 80. The VCS Concussion Information Sheet refers to "[t]he new 'Zackery Lystedt Law' in Washington [that] now requires the

consistent and uniform implementation of long and well-established return to play concussion guidelines that have been recommended for several years[.]" *Id.* (quotation marks in original; brackets added).[17]

The VCS Athletics Handbook requires the athletic department to give the Concussion Information Sheet to parents and students. *See* CP 94 (internal ¶ 1.4.4). The Athletics Handbook further states that "[a]ll suspected head injuries will require immediate removal from participation until cleared by WIAA approval [sic] medical professional." CP 97 (internal ¶ 1.5.5(10); brackets added). Apart from the Concussion Information Sheet and the foregoing provisions of the Athletics Handbook, VCS does not have any other written policies relating to concussion.

Under these policies, VCS and its football coaches acknowledge the duty to monitor players and immediately remove them from competition if they show any signs of concussion.[18] Parents do not have responsibility to monitor the players during games.[19]

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[17] A copy of the Concussion Information Sheet, CP 79-80, is reproduced in the Appendix to this brief.
[18] *See* CP 609, 612-13 & 641 (J. Puryear Depo., at 41:8-43:15, 56:6-57:10 & 172:4-24); CP 560 (C. Kimberley Depo., at 25:10-26:17); CP 545 (M. Heden Depo., at 28:14-18); CP 912 (D. Tabish Depo., at 37:5-13).
[19] *See* CP 546 (M. Heden Depo., at 29:7-10).

Puryear acknowledges that the need for monitoring is especially acute in the case of a player who had already suffered a prior concussion.[20] The fact that a doctor had cleared the player to return after a prior concussion would not relieve the coach of this duty because it is possible that the doctor missed something.[21] However, VCS players who suffered a concussion were not monitored any differently upon their return.[22]

As head coach, Puryear was the person responsible for determining whether a player could return to play after a concussion.[23] He had what appears to be no more than one hour of formal training regarding concussion.[24] Assistant coaches received no formal training while coaching football for the school.[25]

Because the team was "very shorthanded," Mr. Puryear asked his wife and a volunteer nurse to help monitor the players for signs of concussion.[26] Neither of them had any formal training in monitoring for concussion.[27]

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[20] *See* CP 609 & 613 (J. Puryear Depo., at 43:7-9 & 58:18-59:18).
[21] *See* CP 609 (J. Puryear Depo., at 43:10-15).
[22] *See* CP 546 & 550 (M. Heden Depo., at 32:18-24 & 45:15-23).
[23] *See* CP 547 (M. Heden Depo., at 35:8-11).
[24] *See* CP 68-69 & 687-89 (training records).
[25] *See* CP 545 (M. Heden Depo., at 25:7-10).
[26] *See* CP 617 (J. Puryear Depo., at 73:23-76:10); CP 912 (D. Tabish Depo., at 37:5-13).
[27] *See* CP 623 (J. Puryear Depo., at 98:23-99:1); CP 713 & 719 (K. Puryear Depo., at 8:10-16 & 32:5-7); CP 923 (N. Tiffany Depo., at 24:9-12).

VCS did not have any policies regarding gradual return to play following concussion.[28] However, the Third International Conference on Concussion in Sport—a document developed for use by coaches, physicians and others, *and from which the VCS Concussion Information Sheet was adapted*—prescribes a gradual return to play for athletes suffering from concussion:

> **4.1 Graduated return to play protocol**
>
> Return to play protocol following a concussion follows a stepwise process .... With this stepwise progression, the athlete should continue to proceed to the next level if asymptomatic at the current level. Generally each step should take 24 hours so that an athlete would take approximately one week to proceed through the full rehabilitation protocol once they are asymptomatic at rest and with provocative exercise. If any post-concussion symptoms occur while in the stepwise programme, the patient should drop back to the previous asymptomatic level and try to progress again after a further 24-hour period of rest has passed.

CP 511 (formatting in original; ellipses added).[29]

The first step for gradual return to play following concussion consists of complete physical and cognitive rest to allow for recovery; the second step consists of light aerobic exercise to increase heart rate; the third step consists of sport-specific exercise

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[28] *See* CP 546 (M. Heden Depo., at 32:14-17); CP 640-41 (J. Puryear Depo., at 168:4-12 & 171:19-21); CP 912 (D. Tabish Depo., at 38:14-39:5).

[29] A copy of the Third International Conference on Concussion in Sport, CP 509-518, is reproduced in the Appendix to this brief. CDC standards, also referenced in VCS's Concussion Information sheet, similarly provide for gradual return to play. *See* CP 519-522.

to add movement; the fourth step consists of non-contact training drills to provide exercise, coordination and cognitive load; the fifth step involves full contact practice; and the final sixth step is a return to normal play. *See* CP 511-12 (Table 1). Generally, each step should take a minimum of 24 hours so that an athlete would take at least six days to complete the return-to-play process. CP 511.

Gradual return to play is especially important for children and adolescents because they have different physiological response and longer recovery after concussion, as well as specific risks related to head impact during childhood and adolescence. *See* CP 512-13.

C. Before the Washtucna game.

During the first game of the 2009 season against Pateros on September 18, 2009, Drew Swank was removed from the game after being hit in the head and experiencing neck pain and headaches. Before leaving the field, the team's volunteer nurse told Puryear that Drew "took a big hit and she thought it was wise for him to go to the doctor."[30] Puryear assumed she meant that Drew was suffering signs of concussion.[31]

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[30] CP 618 (J. Puryear Depo., at 78:20-79:4).
[31] *See* CP 618, 620 & 647 (J. Puryear Depo., at 79:23-80:20, 87:24-88:19 & Ex. 1); CP 925-26 (N. Tiffany Depo., at 32:23-34:4).

On Monday, September 21, 2009, Drew did not go to school or turn out for practice because he was still experiencing headaches.[32] From Tuesday, September 22, through Thursday, September 24, 2009, Drew went to practice, but he did not suit up or participate.[33] Drew told Mr. Puryear about continued headaches at the practice.[34] Drew's father told Mr. Puryear that Drew had been diagnosed with a concussion by his doctor, and that that was the reason he could not participate.[35] Friday, September 25, 2009, was the Washtucna game.

D. Clearance to return to play.

During the week before the Washtucna game, on Tuesday, September 22, 2009, Drew Swank and his mother went to see Burns about his neck pain and headaches. CP 345 (medical record).[36] Burns diagnosed Drew Swank with a "CLOSED HEAD INJURY OF MILD CONCUSSION" suffered while playing football.

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[32] *See* CP 109-10 (D. Swank Depo., at 81:1-82:1); CP 618 (J. Puryear Depo., at 80:21-23).
[33] *See* CP 619 (J. Puryear Depo., at 81:22-82:3 & 82:23-24).
[34] *See id.* (internal 82:4-18).
[35] *See* CP 181 (D. Swank Depo., at 27:5-21); CP 849 (P. Swank Depo., at 41:15-42:1 & 43:8-12).
[36] A copy of the medical record, CP 345, is reproduced in the Appendix to this brief.

In the course of the office visit, Burns asked Drew, "where do you go to school, and he said Valley Christian."[37]

Burns' plan for Drew following the visit was:

> We are going to have the patient take ibuprofen 600 mg p.o. t.i.d. for the next few days. I am also going to have him stay out of contact sports for the next three days' period of time. If he has a bad headache, after playing football, he is to be out of the sport for a week's period of time. If he has another concussion, following that, then I would have him out probably for a two-month period of time.

CP 345. Drew's mother understood that he could return to play after the headaches stopped. CP 193 (P. Swank Depo., at 234:7-12).

On Thursday, September 24, 2009, Drew's headaches stopped, so Mrs. Swank called Dr. Burns' office. At first she spoke with the receptionist: "I'm calling for ... Drew Swank, and he had a concussion and Dr. Burns said he couldn't — you know, that he got during the football game and Dr. Burns said he couldn't play until his headaches were gone and he said his headaches were gone."[38]

The receptionist transferred Mrs. Swank to Dr. Burns' nurse.[39] Mrs. Swank then said to the nurse:

> I told her that Drew plays for school in the State of Washington and they have a new law that says that — Well, I explained that first of all, that I had to explain Drew's headache and everything that I told the receptionist that he

[37] CP 373 (P. Swank Depo., at 38:22-23).
[38] CP 188 (P. Swank Depo., at 51:16-20; ellipses added).
[39] *See* CP 188 & 896 (P. Swank Depo., at 51:21-24 & 231:2-15).

> 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.[40]

She did not tell the nurse what needed to be in the note, only "that Washington State has a law where before he can return to play he needs to have a release from the doctor."[41] The nurse told Mrs. Swank that she would convey this information to Burns and call back later.[42]

Later the same day, the nurse called Mrs. Swank back and said there was a note from Dr. Burns for Drew to return to play.[43] The note, handwritten by Dr. Burns on his prescription pad, simply stated: "Andrew Swank may resume playing football on 9-25-09."[44]

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[40] CP 188 (P. Swank Depo., at 52:3-11); *accord* CP 897 (P. Swank Depo., at 233:23-234:6).
[41] CP 878 (P. Swank Depo., at 160:8-14).
[42] *See* CP 188 & 897 (P. Swank Depo., at 52:12-14 & 234:15-18).
[43] *See* CP 188 (P. Swank Depo., at 52:18-21).
[44] CP 318-19 (T. Burns Depo., at 72:18-73:12). The copies of Burns' note in the Clerk's Papers are unreadable. *See, e.g.,* CP 648. A more legible copy is included in the Appendix to this brief. For his part, Burns "can't recall the specific discussion" he had with his nurse, but he denies being told "that Washington State had a law that required a written return-to-play slip. CP 320-21 (T. Burns Depo., at 74:19-75:23). His nurse does not remember the conversation with Drew's mother or Burns. *See* CP 1060 (S. Hanks Depo., at 32:6-23). Dr. Burns claims that, if he had been told that Washington had legal requirements for a return-to-play slip, he would not have signed the note without knowing what the law was. *See* CP 322 (T. Burns Depo., at 76:10-23).

Burns previously knew that Drew attended VCS. On July 11, 2007, he performed a preseason sports physical for Drew.[45] He signed a form specifically stating that the "School" for which the physical was performed is "Valley Christian Spokane."[46] Burns' records also indicate that Drew received treatment on August 23, 2007, for a left wrist sprain sustained at football practice. The record states that Drew "is going to be entering 9th grade at Valley Christian" and "is playing on the football team there."[47]

Burns did not follow generally recognized return to play guidelines for Drew, in particular those requiring gradual return to play following concussion. The Third International Conference on Concussion in Sport, which provides for gradual return to play, is a document developed for use by "physicians … health professionals … and other people involved in the care of injured athletes[.]" CP 509 (ellipses & brackets added).

Burns violated the applicable standard of care and the Lystedt law when he cleared Drew to return to play. As explained by the Swanks' expert, Stanley A. Herring, M.D., who is the Medical Director of the University of Washington (UW) Medicine Sports,

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[45] *See* CP 313-14 & 358 (T. Burns Depo., at 67:21-68:12 & Ex. 4 (internal p. 14))
[46] *See* CP 358 (T. Burns Depo., Ex. 4 (internal p. 14)).
[47] *See* CP 346 (T. Burns Depo., Ex. 4 (internal p. 2))

Spine and Orthopedic Health, and the co-Medical Director of the Sports Concussion Program at UW Medicine/Harborview Medical Center/Seattle Children's Hospital:

> With respect to Dr. Timothy Burns, it is my opinion to a reasonable degree of medical probability or certainty that he violated the standard of care and the requirements of the Lystedt Law when he returned Drew to play without properly evaluating him prior to doing so. Specifically, it is my understanding from reviewing the medical records and depositions that Dr. Burns initially diagnosed Drew with concussion or closed head injury. Approximately three days later, based upon a telephone call from Drew's mother Patti Swank to Dr. Burns' office, Dr. Burns cleared Drew to return to play based upon the mother's representation that the headaches had resolved. The standard of care for concussion evaluation and management required that Dr. Burns see Drew in his office and engage in an examination to determine if Drew's concussion had resolved and that he was an appropriate candidate to begin the return to play process. Dr. Burns' clearance based upon limited information provided to his office staff by Drew Swank's mother over the telephone did not meet with the standard of care required and was a proximate cause of Drew's decline during the football game in question and his eventual death. The opinions I am expressing are based on a reasonable degree of medical probability or certainty.

CP 409-10 (internal ¶ 7).[48]

E. Burns' contacts with Washington.

Although Burns practices from Idaho, he has significant contacts with Washington, including:

[48] A copy of Dr. Herring's declaration, CP 406-10, excluding exhibits, is reproduced in the Appendix to this brief.

• He practices with Ironwood Family Practice, P.A., an Idaho corporation. At various times, Dr. Burns has served as Director, President, Vice-President, and Secretary of the corporation. He was Director and President of the corporation during 2009, when he treated Drew Swank.[49]

• His practice currently serves approximately 611 patients with Washington addresses, and 641 patients with Washington telephone numbers.[50]

• He personally has between 23 and 72 patients who reside in the State of Washington. He specifically recalls three patients who are minors involved in sports and attending school in the State of Washington.[51]

• He refers patients to other physicians located in Washington State, including Drew Swank.[52]

• He sends prescriptions for patients directly to pharmacies in Washington State.[53]

• His practice sends routine reminders for annual wellness exams to its patients, including his patients with Washington addresses.[54]

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[49] *See* CP 1004-10. Burns completed his medical internship and residency in Spokane with Sacred Heart, Deaconess and St. Luke's Hospitals, from June 1986 through May 1989. *See* CP 251-52 & 338 (T. Burns Depo., 5:20-6:5 & Ex. 1). He lived in Spokane during his internship and residency. *See* CP 261-62 (T. Burns Depo., at 15:24-16:5). He was licensed to practice medicine in Washington from 1988 until 2003, and he worked part-time at two urgent care facilities in Spokane to earn extra money from 1989 to 1993. *See* CP 253 (T. Burns Depo., at 7:5-17); CP 253-55 & 258-60 (T. Burns Depo., at 7:18-9:6 & 12:24-14:1).

[50] *See* CP 1012-13 (Third Supp. Answer to Interrogs. #4 & #6B); CP 1022 (K. Carey Depo., at 9:14-17). The computer software used by Burns' practice is unable to isolate the number of patients with Washington addresses and telephone numbers during 2009.

[51] *See* CP 286 & 341-42 (T. Burns Depo., at 40:4-19 & Ex. 3 (answer to interrog. ## 7-9)). Burns' practice switched medical record software in 2010 making it unduly burdensome, if not impossible, to determine the number of patients he treated in 2009 with Washington addresses. Going back as far as possible, Burns treated 99 patients who provided Washington addresses as of September 7, 2010.

[52] *See* CP 264, 303 & 339-40 (T. Burns Depo., at 18:5-7, 57:1-11 & Ex. 2).

[53] *See* CP 327-28 (T. Burns Depo., at 81:21-82:9).

• His practice routinely telephones patients with reminders about upcoming appointments, including his patients with Washington telephone numbers.[55]

• His practice uses labs based in the State of Washington.[56]

• His practice sends staff to meetings and training in Washington State.[57]

• His practice maintains a website (ironwoodfp.com) accessible on the internet. The website was hosted by a company in Spokane starting in 2007 or 2008.[58]

• His practice has contracts with several insurance companies and other organizations providing for or contemplating (1) treatment of Washington patients, (2) payment by Washington insurers, (3) choice of a Washington forum for resolution of disputes, and (4) compliance with and/or application of Washington law.[59]

• In particular, the "Preferred Provider/Group Agreement" between Burns' practice and "First Choice Health Network," a Washington corporation, provides for venue in Seattle, and choice of Washington law. The agreement contemplates treatment of Washington patients, and payment by Washington payors.[60]

• The "Primary Care Services Agreement" between Burns' practice and "Group Health Cooperative," a Washington corporation, is renewed and monitored by Group Health personnel located in Spokane and Seattle.[61] It contemplates

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[54] CP 1045-46 & 1049 (C. Hall Depo., at 12:22-13:6 & 27:23-28:4); CP 1028 (K. Fremgen Depo., at 9:5-21); CP 1024 (K. Carey Depo., at 19:12-20:2).
[55] *See* CP 1049 (C. Hall Depo., at 28:6-17).
[56] *See* CP 1048-49 (C. Hall Depo., at 24:11-25:2).
[57] *See* CP 1049 (C. Hall Depo., at 27:1-13, computer classes); CP 1049 (B. Halen Depo., at 25:21-26:8, Washington Medical Group Management Association); CP 1027 (K. Fremgen Depo., at 8:6-17, SkillPath).
[58] *See* CP 326 (T. Burns Depo., at 80:3-4).
[59] *See* CP 1037 (B. Halen Depo., at 24:6-8 (stating "[i]t is fairly common for a border town ... with border states to cross-contract"; brackets & ellipses added)).
[60] *See* CP 1281 & 1283-86 (internal ¶¶ 2.10, 3.9, 6.2(a), 9.1 & 10.6).
[61] CP 1047 (C. Hall Depo., at 18:5-13); CP 1037 (B. Halen Depo., at 21:8-19); CP 1028 (K. Fremgen Depo., at 11:22-12:11); CP 1304 (internal ¶ XVI).

provision of services in Washington, and compliance with Washington laws, and the agreement contains a signature block for "Timothy F. Burns" as "President" of "Ironwood Family Practice, P.C."[62]

• The "Participating Medical Group Agreement" between Burns' practice and "Regence BlueShield of Idaho" provides for venue in Spokane under certain circumstances.[63]

• Burns sent his children to school at Gonzaga Prep in Spokane. All of the children participated in sports, and one of his sons played football for Gonzaga Prep during the same time that Drew Swank played football for VCS.[64]

F. The Washtucna game.

On Thursday, September 24, 2009, Drew gave the note from Burns to Puryear.[65] Puryear returned Drew to play in the game against Washtucna the next day, Friday, September 25, 2009. He admits being aware that Drew needed to be monitored for signs of concussion. There were conversations with his wife and the team's volunteer nurse to the effect that "I want you to watch Drew Swank and make sure he's okay throughout the game[.]" CP 617 (J. Puryear Depo., at 74:20-75:4; brackets added). Puryear, his wife, the volunteer nurse and the assistant coach all had the

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[62] *See* CP 1289, 1296 & 1298-1302 (definition of "physician" & internal ¶¶ XI(C), XIII & XIV); CP 1305 (signature page).
[63] CP 1328 (internal ¶ 9.3.3).
[64] *See* CP 290-96 (T. Burns Depo., at 44:2-50:13).
[65] *See* CP 619-20 (J. Puryear Depo., at 84:1-23 & 85:10-86:7); Appendix (legible copy of doctor's note, CP 648).

responsibility to watch Drew during the game. *See* CP 617 (J. Puryear Depo., at 76:14-17).

Drew started the game at Washtucna. *See* CP 621 (J. Puryear Depo., at 91:2-3). During the game, he exhibited signs of concussion. Perry Lawson was a member of the VCS football team on the sidelines during the game. CP 401-02 (P. Lawson Aff., ¶¶ 2 & 9). He noticed that:

> Drew Swank started out the game playing like his normal self but his play grew worse and worse as the game progressed. This was evidenced by the fact that the coaches were yelling at Drew frequently during the game, especially about his positioning. Drew was one of the better players on the team and it was uncommon for the coaches to be yelling at him. Drew became sluggish during the game and was frequently out of position."

CP 402-03 (internal ¶ 9).

Drew's aunt was watching the game from the sidelines. *See* CP 526 (J. Burke Depo., at 15:9-19). She had watched a game the previous year and noted how fast Drew was. *See* CP 524 (7:22-8:1). However, at the Washtucna game "he wasn't the same player he was the year before. He wasn't running fast. He wasn't quick, and he was just kind of standing." CP 526 (16:2-7).

Drew's aunt observed that he appeared to be confused:

> One thing that does stick out in my mind was Drew was on a line getting ready for a play, and Coach Heden — and I didn't know it was Coach Heden at the time. I learned different

> later — was telling Drew to back up, get back, and Drew just shuffled his feet. And he said, Drew, I said, get back, get back, and so he moved back a little bit further. And right after that I remember kind of a conversation — and I'm not 100 percent sure when I say this — but that Patty [Swank, Drew's mother] was saying, he's confused. He doesn't know, what is wrong? He's not listening. Why isn't he listening?

CP 526 (J. Burke Depo., at 16:11-22; brackets added).

Drew's aunt also perceived that Puryear recognized something was wrong with Drew:

> The boys were out on a play or getting ready to start a play, I guess, and the coach started yelling for Drew to get off the field. Evidently he shouldn't have been in there on that play. And as he come [sic] running out Coach Puryear grabbed him by the helmet, and he just shakes it up and down: What are you doing? What are you doing (indicating?) And just raging at him and shaking his helmet."

CP 527-28 (J. Burke Depo., at 20:15-21:2; brackets added; parentheses in original).

At the hospital after the Washtucna game, Drew's aunt had a conversation with Puryear. She asked him:

> Coach ... when you called Drew out of the game and you were yelling at him, he didn't have a clue to what you were doing. He didn't have a clue to what was going on. He wasn't following, was he? He wasn't even tracking.

CP 525 (J. Burke Depo., at 11:17-22; ellipses added). In response, Puryear nodded his head in agreement. CP 525 (11:22-24).

Drew's father was watching the game from sidelines, estimated to be between 20 and 50 feet away from the field at

different times. He observed that "Drew didn't seem to be playing up to his usual standards." CP 755 (D. Swank Depo., at 104:22-23. He "was not playing anywhere near close to his normal ability[,]" "probably less than ten percent of his normal capability of playing," worse than when he was in sixth grade, some four years earlier. CP 757 (111:22-23, 112:15-16 & 112:6-7). He misjudged where the ball was going on kick-offs. CP 756 (106:10-107:2). He missed blocking assignments. CP 756-57 (107:3-10 & 111:25-112:1). He was not "cutting," while playing running back on offense. CP 757 (112:1-3). He "looked sluggish" and appeared "dazed" and "confused." CP 757 (112:3-10. Drew's performance got worse over the course of the game, to the point that Mr. Swank started toward the field to remove him from play. CP 758 (116:17-22).

Drew's mother was also watching the game from the sidelines. She observed that "Drew wasn't playing the way he normally plays .... He just wasn't playing well." CP 853 (P. Swank Depo., at 60:10-11 & 19-20; ellipses added). "[H]is timing was completely off, he was not crisp and sharp when he was cutting when he had the ball[,]" and he missed tackles, all in contrast to his on-the-field behavior. CP 853 (60:13-20; brackets added); *accord* CP 863 (98:3-7). According to her, he looked "confused." CP 856

(70:21). "He was very slow, very sluggish on his play, he just didn't seem very quick that night, and not cutting and not hitting — he didn't seem like he knew where he was supposed to go at times." CP 880 (168:12-15).

Drew's parents witnessed Puryear getting upset with Drew's performance. From about 30 feet away, Drew's father heard Puryear scream at Drew several times to come to the sidelines. When he got to the sidelines, Puryear "grabbed Drew by the face mask and violently began to jerk it up and down hard while he screamed at him, 'What are you doing out there, what are you doing out there?'"[66]

VCS's coaches were closer to the game than Drew's family, they were more familiar with Drew's performance from practices as well as games, they were more familiar with the plays that were being run, and they had received at least some training in concussion; as a result, the coaches were in the best position to see the problems with Drew's performance.[67] They should have recognized the signs of concussion and immediately removed him from competition. *See* CP 409 (internal ¶ 6). However, they left him

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[66] CP 175 (D. Swank Depo., at 107:11-108:23); *accord* CP 856 (P. Swank Depo., at 70:12-71:11).
[67] CP 758 & 762-63 (D. Swank Depo., at 114:23-115:1, 129:11-131:12 & 134:11-17).

in the game, and after taking a final hit, Drew collapsed, lost consciousness, and ultimately succumbed to his injuries.

G. Procedural history.

Donald Swank, individually and as personal representative of the estate of his son, and Patricia Swank, individually, filed suit against VCS, Puryear and Burns.[68] They alleged that Puryear acted negligently and recklessly, and violated the Lystedt law. *See* CP 6 (amended complaint, ¶¶ 4.2-4.3). They alleged that VCS was negligent and violated the Lystedt law in its own right, and that the school is vicariously liable for the conduct of Puryear. *See* CP 2 & 5-6 (¶¶ 1.5 & 4.1-4.3). They alleged that Burns violated the applicable standard of care and the Lystedt law. *See* CP 6-7 (¶¶ 4.6-4.7).

All defendants moved for summary judgment, seeking dismissal the Swanks' complaint. VCS moved for summary judgment on grounds that the school and its coaches fully complied with the requirements of the Lystedt law. *See* CP 23-42 (motion & memorandum). Puryear moved for summary judgment on grounds that he fully complied with the Lystedt law, that he is entitled to volunteer immunity under RCW 4.24.670, and that the statute of limitations for intentional assault, RCW 4.16.100(1), barred claims

[68] Claims alleged against two other defendants named in the complaint were voluntarily dismissed and are not part of this appeal.

related to the helmet-shaking incident. *See* CP 120-23 (motion); CP 124-41 (memorandum). Burns moved for summary judgment on grounds that the superior court lacked personal jurisdiction over him, that neither the Lystedt law nor Washington's medical negligence statute applied to his release of Drew Swank to play football in Washington, and that any claims against him were barred by the Idaho statute of limitations for professional malpractice, Idaho Code § 5-219(4). *See* CP 220-21 (motion); CP 222-243 (memorandum).

The superior court granted all defendants' motions for summary judgment, without identifying the specific grounds for its decision. *See* CP 1337-41. The Swanks timely sought direct review by this Court. CP 1342-49 (notice of appeal).

V. ARGUMENT

The standard of review for summary judgment is de novo, and no deference is due to the order of the superior court. *See Folsom v. Burger King,* 135 Wn. 2d 658, 663, 958 P.2d 301 (1998). Summary judgment should not be affirmed if there are genuine issues of material fact for trial. *See id.*, 135 Wn. 2d at 663. In reviewing summary judgment, the facts and all reasonable inferences from the facts must be viewed in the light most favorable

to the Swanks as the non-moving parties. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225-26, 770 P.2d 182 (1989).

A. The superior court erred in granting summary judgment in favor of VCS and Puryear because they breached their common law duty of care and violated the Lystedt law by failing to implement gradual return-to-play standards, allowing Drew Swank to play in the Washtucna game, and failing to remove him from the game when he exhibited signs of concussion.

VCS and Puryear had a common law duty of care to protect Drew Swank from injury in interscholastic sports and a duty to comply with the requirements of the Lystedt law. The evidence in the record establishes genuine issues of material fact for trial regarding VCS's and Puryear's breaches of their common law and statutory duties, and on de novo review this Court should reverse summary judgment in their favor.

1. VCS and Puryear had a common law duty to protect Drew Swank from injury.

A school has a duty to exercise reasonable care to protect student-athletes from injury in interscholastic sports:

> A school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in its custody from such dangers. This duty extends to students engaged in interscholastic sports. As a natural incident to the relationship of a student athlete and his or her coach, the student athlete is usually placed under the coach's considerable degree of control. The student is thus

> subject to the risk that the school district or its agent will breach this duty of care.

Wagenblast v. Odessa Sch. Dist., 110 Wn. 2d 845, 856, 758 P.2d 968 (1988) (footnotes omitted).

A school breaches its duty by permitting a student-athlete to compete under circumstances where school personnel know or should know that he or she is physically unfit to do so:

> It certainly cannot be that a district can maintain a football team, have one of its teachers as trainer and coach, who knows, or in the exercise of reasonable care should know, that one of the players is physically unfit to enter the game, but nevertheless permits, persuades, and coerces such player to play, and in the event of injury to the player be held not liable for such negligent and careless act of its officer or agent.

Morris v. Union High Sch. Dist., 160 Wn. 121, 125-26, 294 P. 998 (1931).[69]

The school's duty is grounded in the doctrine of *in loco parentis*. *See Chapman v. State,* 6 Wn. App. 316, 320, 492 P.2d 607 (1972). The phrase "in loco parentis" literally means "in the place of a parent." *Black's Law Dictionary, s.v. "in loco parentis"* (10th ed. 2014). It normally "refers to a person who has put himself or herself in the situation of a lawful parent by assuming all obligations incident to the parental relation ... and embodies the two ideas of

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[69] *Accord Sherwood v. Moxee Sch. Dist.*, 58 Wn. 2d 351, 358, 363 P.2d 138 (1961) (citing *Morris* with approval for this proposition).

assuming the status and discharging the duties of parenthood." *Zellmer v. Zellmer,* 164 Wn. 2d 147, 164, 188 P.3d 497 (2008) (ellipses added). The *in loco parentis* doctrine applies with equal, if not greater, force in the private school context than in the public school context. *See Vernonia Sch. Dist. v. Acton,* 515 U.S. 646, 654 (1995).[70] Accordingly, VCS and Puryear had a common law duty to exercise reasonable care to protect Drew Swank from injury while playing football for the school.

2. VCS and Puryear had a duty to comply with the requirements of the Lystedt law, and their failure to do so constitutes evidence of negligence and gives rise to an implied statutory cause of action.

The Lystedt law affirms "generally recognized return to play standards for concussion and head injury," RCW 28A.600.190(1)(c), and imposes three additional obligations to ensure that student-athletes are not prematurely returned to play. The first is to inform and educate coaches, students and parents of the nature and risk of concussion and head injury including continuing to play after concussion or head injury. *See* RCW 28A.600.190(2). This includes annual distribution of an

[70] The *in loco parentis* doctrine may apply with greater force in a private school context because it rests upon a delegation of parental authority to a non-parent, and the delegation is more explicit when parents choose send their child to a private school rather than a public school. *See Vernonia,* 515 U.S. at 654-55.

information sheet, such as the VCS Concussion Information Sheet, to students and parents. *See id.* The second obligation is to remove from competition any student who is suspected of sustaining a concussion or head injury in a practice or game. *See* RCW 28A.600.190(3). The third obligation is to keep the student out of competition until he or she 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. *See* RCW 29A.600.190(4).

Violation of the Lystedt law can be used to establish that VCS and Puryear breached their common law duty of care. "A breach of a duty imposed by statute … may be considered by the trier of fact as evidence of negligence[.]" RCW 5.40.050 (ellipses & brackets added).[71] In this way, VCS's and Puryear's common law duty of care and the Lystedt law are interrelated.

Furthermore, violation of the Lystedt law also gives rise to an implied statutory cause of action. A cause of action is implied from a statute if the plaintiff is within the class for whose benefit the statute was enacted; the legislative intent supports implying a civil

[71] The full text of the current version of RCW 5.40.050 is reproduced in the Appendix. The statute was amended in 2010 to provide for certain violations of statutes and regulations not pertinent here to be deemed negligence per se. *See* Laws of 2009, Ch. 412, § 19.

remedy; and an implied remedy is consistent with the underlying purpose of the legislation.[72] The Lystedt law satisfies each of these requirements.

Drew Swank was within the class of persons for whose benefit the Lystedt law was enacted. Subsection (1)(a) of the law specifically refers to "children and adolescents who participate in sports." Subsection (1)(c) and sections (2), (3) and (4) each refer to "young athletes" and/or "youth athletes." Clear identification of the protected class eliminates uncertainty regarding who is entitled to pursue an implied statutory remedy.[73]

The legislative intent of the Lystedt law further supports an implied remedy. Legislative intent is discerned primarily from the language of the statute. *See Town of Woodway v. Snohomish County,* 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014). The language of the Lystedt law supports an implied remedy in at least four ways.

First, the clear identification of the protected class—children and adolescents who participate in sports—also serves as evidence

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[72] *See Bennett v. Hardy,* 113 Wn. 2d 912, 920-21, 784 P.2d 1258 (1990) (recognizing implied statutory cause of action for age discrimination under RCW 49.44.090); *Beggs v. State,* 171 Wn. 2d 69, 77-78, 247 P.3d 421 (2011) (relying on *Bennett,* and recognizing implied statutory cause of action for failure to report suspected child abuse or neglect under RCW 26.44.030).

[73] *Cf. Bennett,* 113 Wn. 2d at 921 (class of persons aged 40-70 referenced in RCW 49.44.090 held to be protected); *Beggs,* 171 Wn. 2d at 77 (victims of child abuse and neglect mentioned in RCW 26.44.030 held to be protected).

of legislative intent supporting an implied remedy. The Court "may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights."[74]

Second, the mandatory phrasing of the obligations imposed by the Lystedt law supports an implied remedy. Section (3) of the law provides that "[a] young athlete who is suspected of sustaining a concussion or head injury in a practice or game *shall* be removed from competition at that time," and section (4) provides that "[a] youth athlete who has been removed from play *may not* return to play" until properly cleared to do so. (Brackets & emphasis added.) These statutory obligations are phrased in mandatory terms.[75] Mandatory language supports an implied remedy, and avoids problems inherent in trying to enforce a statute that is phrased in merely permissive or discretionary terms.[76]

Third, the absence of an alternative enforcement mechanism in the Lystedt law supports an implied remedy. The law contains no

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[74] *Bennett,* 113 Wn. 2d at 921; *accord Beggs*, 171 Wn. 2d at 78.
[75] *See State v. Rice,* 174 Wn. 2d 884, 896, 279 P.3d 849 (2012) (indicating "shall" is presumptively mandatory); *State v. Gettman,* 56 Wn. App. 51, 55 & n.2, 782 P.2d 216 (1989) (stating "may not" is mandatory and synonymous with "shall not").
[76] *Cf. Beggs*, at 75-78 (implying remedy under statute providing that designated individuals "shall" report suspected child abuse or neglect, and emphasizing the mandatory nature of the statute).

express mechanism to enforce the mandatory obligations to remove a young athlete from competition or obtain proper clearance before returning him or her to play. It is difficult to imagine how a statute written in mandatory terms could be mandatory in application if there is no way to enforce it. In the absence of an implied remedy, the statute would be permissive and discretionary in effect.[77]

Fourth, the limited grant of immunity for volunteer health care providers in the Lystedt law supports an implied remedy. Section (4) of the law provides that a volunteer health care provider who improperly authorizes a youth athlete to return to play is not liable for negligence. There would be no reason to grant this immunity in the absence of an implied statutory remedy. "A grant of immunity from liability clearly implies that civil liability can exist in the first place."[78] In each of the foregoing respects, the language of the Lystedt law evinces legislative intent supporting an implied remedy, and there is no contrary evidence of intent that would militate against implying a remedy.

Turning to the final element of the implied remedy analysis, an implied remedy is consistent with the underlying purpose of the

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[77] *Cf. Bennett,* at 919 (implying remedy based on statute designating age discrimination as an "unfair practice" without providing an express remedy).
[78] *Beggs,* at 78 (quotation omitted).

Lystedt law. The purpose of the law that can be discerned from the findings codified in subsections (1)(a) through (c) is to reduce the epidemic of concussions and head injuries suffered by children and adolescents who participate in sports. Subsection (1)(c), in particular, 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." An implied remedy is consistent with the purpose of reducing such injuries in light of the function that tort liability serves to encourage careful behavior.[79] On this basis, violations of the Lystedt law give rise to an independent statutory cause of action in addition to serving as evidence of negligence.[80]

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[79] *Cf. Bennett,* 113 Wn. 2d at 921 (stating "the purpose of this legislation is obviously to confront the problem of age discrimination, and according a private right of action to persons within the protected class is consistent with this underlying legislative purpose"); *Beggs,* at 78 (stating that "[i]mplying a civil remedy as a means of enforcing mandatory reporting duty is consistent with" legislative intent to prevent, deter and punish child abuse; brackets added); *see generally Mohr v. Grantham,* 172 Wn. 2d 844, 851-52, 262 P.3d 490 (2011) (noting deterrence objectives of tort law).

[80] The availability of both common law and statutory claims does not entail a risk of double recovery if the jury is properly instructed. *See Conrad ex rel. Conrad v. Alderwood Manor,* 119 Wn. App. 275, 290-91, 78 P.3d 177 (2003) (involving overlapping common law and statutory claims, and rejecting appeal based on the rule against double recovery).

3. VCS and Puryear violated their common law duty and the Lystedt law.

VCS and Puryear breached their common law duty of care and the Lystedt law by allowing Drew to play in the Washtucna game in the first place, rather than returning him to competition gradually in accordance with generally recognized return-to-play standards. They further breached their common law and statutory duties by failing to remove Drew from the Washtucna game when he showed signs of concussion.

For the most part, VCS and Puryear did not dispute the existence of their common law or statutory duties in the superior court.[81] Instead, they argued that they exercised reasonable care and complied with the Lystedt law.[82] Because there are questions of fact regarding these issues, the summary judgment in their favor should be reversed.

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[81] Puryear argued that the portion of the Lystedt law requiring schools to work with the WIAA to develop guidelines did not apply to him. *See* CP 130 (Puryear Memo., at 7:1-8, referring to first sentence of RCW 28A.600.190(2)). However, the Swanks have not alleged a claim against him for failure to develop such guidelines, and this argument does not vitiate Puryear's duty to exercise reasonable care or comply with the other requirements of the Lystedt law.

[82] In the superior court, both VCS and Puryear focused on conduct that is not the subject of the Swank family's claims, such as obtaining pre-season medical clearance for Drew's participation in football, distribution of the school's Concussion Information Sheet, and requiring a written note from Burns. *See* CP 35-38 (VCS Mot., at 13:21-16:2); CP 130 (Puryear Memo., at 7:8-18). What they may have done right is not a defense to what they did wrong.

B. The superior court erred in granting summary judgment in favor of Burns because he violated the Lystedt law by failing to evaluate Drew Swank, and clearing him to play immediately rather than gradually.

Burns had a duty to comply with the requirements of the Lystedt law, and is subject to an implied statutory cause of action, no less than VCS and Puryear. *See supra*. The evidence in the record establishes genuine issues of fact regarding Burns' violations of the Lystedt law, and this Court should reverse summary judgment in his favor.

1. The duties imposed by the Lystedt law are not limited to schools and coaches, but also apply to health care providers involved in the evaluation and management of a young athlete's concussion.

In the superior court, Burns argued that, while the Lystedt law imposes duties on schools and coaches, it does not impose any duties on health care providers. *See* CP 239-41 (Burns Memo., at 18:13-20:2). This reading of the Lystedt law is incorrect for at least five reasons.

First, the statutory findings are not limited to schools and coaches. Instead, they relate to the "evaluat[ion] and manage[ment]" of concussion in youth sports in general, and the problem of prematurely returning young athletes to play following

concussion in particular. *See* RCW 28A.600.190(1)(a) & (c) (brackets added). Because health care providers are involved in evaluating and managing concussions in young athletes, the statutory findings implicate them as well as schools and coaches.

Second, the Lystedt law affirms "generally recognized return to play standards." RCW 28A.600.190(1)(c). These standards have been "developed for use by physicians, therapists, certified athletic trainers, health professionals, coaches and other people involved in the care of injured athletes[.]" CP 509 (brackets added). The standards are not limited to schools and coaches, but rather include all parties involved in evaluating and managing concussions.

Third, the general obligation delineated in subsection (4) of the Lystedt law—to prevent a young athlete who has suffered a concussion from returning to play without proper evaluation and clearance—is not limited to schools and coaches. *See* RCW 28A.600.190(4). This obligation applies to all parties in a position to prevent the young athlete from returning to play prematurely, including health care providers.

Fourth, the specific obligations to perform an evaluation and provide the necessary clearance fall directly upon "a licensed health care provider" who is "trained in the evaluation and management of

concussion." RCW 28A.600.190(4). Schools and coaches cannot perform the evaluation nor provide the clearance.

Fifth, the provision of immunity to volunteer health care providers "for civil damages resulting from any act or omission in the rendering of such care[83]" indicates that health care providers are otherwise subject to liability. *See* RCW 28A.600.190(4) (brackets added). There would be no reason to provide immunity unless the Lystedt law imposed one or more obligations upon health care providers.

In light of the foregoing, the duties imposed by the Lystedt law must be read to apply to health care providers such as Burns. Burns violated those duties by clearing Drew Swank to return to play without evaluating him, and by returning him to play immediately rather than gradually.

2. Compliance with the Lystedt law does not necessarily involve the provision of health care, and the statute is not preempted by the medical negligence statute, Ch. 7.70 RCW.

In the superior court, Burns also argued that any claim against him under the Lystedt law would be preempted by the medical negligence statute, Ch. 7.70 RCW. *See* CP 236-37 (Burns

[83] In context, the antecedent for "such care" is "authoriz[ing] a youth athlete to return to play[.]" RCW 28A.600.190(4) (brackets added).

Memo., at 15:15-16:23). This argument is incorrect to the extent that generally accepted return to play standards apply to schools, coaches and others in addition to health care providers.

The medical negligence statute is limited to claims arising from the provision of "health care." *See Beggs,* 171 Wn. 2d at 79. Health care has been defined by case law to mean "'the process in which [the physician] was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient.'" *Id.* (brackets & quotation marks in original). Not everything that a health care provider does in the course of his or professional employment can be considered health care. *See id.* at 80. Instead, only those tasks that a health care provider can uniquely perform by virtue of his or her skills and training are properly considered health care. *See id.* For example, in *Beggs,* this Court held that a physician's duty to report suspected child abuse or neglect under RCW 26.44.030(1)(a) did not constitute health care, even if he or she learned about the abuse or neglect while providing health care, because the same duty to report fell upon others, including school personnel. *See id.*

As in *Beggs,* the Court should find that compliance with the Lystedt law does not constitute health care because schools and

coaches have the same duties that health care providers have under generally recognized return to play standards. One does not need to be a health care provider to ensure that a young athlete receives an evaluation from a health care provider before returning to play, or to return the athlete to play gradually rather than immediately. In this case, Burns fulfilled neither duty and he should not be able to avoid liability under the Lystedt law simply because he happens to be a health care provider.[84]

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[84] It might be a different situation if the Swank family had alleged that Burns negligently failed to diagnose Drew's concussion because only a health care provider can make such a diagnosis, even though coaches and others can observe the signs and symptoms of concussion. At any rate, while their medical negligence claim was not a focus of the summary judgment argument in the superior court, the Swanks alleged a claim for medical negligence in their complaint, *see* CP 6-7 (amended complaint, ¶ 4.6), and submitted expert testimony that Burns' breach of the standard of care, proximately causing Drew's death, *see* CP 409-10 (S. Herring Decl., ¶ 7). The Third International Conference on Concussion in Sport states that "[i]t is not intended as a standard of care[,]" CP 514 (internal ¶ 10), which makes sense since it represents an international scholarly consensus and cannot account for the standards of liability in different jurisdiction. However, in Washington the Lystedt law elevates these generally recognized return to play standards to a standard of care, *see* RCW 28A.600.190(1)(c) & (2)-(4), as confirmed by plaintiff's expert, Dr. Herring, who is familiar with the standard of care for health care providers in Washington, *see* CP 409-10 (¶ 7).

C. The superior court's summary judgment order cannot be upheld based on the other arguments raised by Puryear and Burns.

1. Puryear cannot satisfy his burden to prove as a matter of law that he is entitled to volunteer immunity because the football team was a joint venture between him and VCS.

In the superior court, Puryear characterized his relationship with VCS as a mere volunteer, and claimed that he is entitled to volunteer immunity under RCW 4.24.670. CP 130-37 (Puryear Memo., at 7:19-14:3). This is an affirmative defense on which Puryear bears the burden of proof. *See Camicia v. Howard S. Wright Constr. Co.*, 179 Wn. 2d 684, 693, 317 P.3d 987 (2014) (involving recreational use immunity under RCW 4.24.210). To justify summary judgment on this basis, he must show that there is no material issue of fact, and that he is entitled to judgment as a matter of law. *See Young*, 112 Wn. 2d at 225 (regarding relationship between burden of proof and summary judgment). Puryear cannot meet his burden because there is a question of fact whether he is a joint venturer.

Properly construed, a volunteer does not include a joint venturer. The immunity statute defines a volunteer as follows:

> "Volunteer" means an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation, other than reasonable

> reimbursement or allowance for expenses actually incurred, or any other thing of value, in excess of five hundred dollars per year. "Volunteer" includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

RCW 4.24.670(e).[85] Under the plain language of this definition, a volunteer is a mere agent of a nonprofit or governmental entity. Thus, a volunteer is defined solely in terms of "an individual performing services for" a nonprofit or governmental entity without compensation, and the enumerated examples of volunteers—from director to direct service volunteer—are all agents.[86]

Joint venturers are not mere agents, but rather serve as both principal and agent for each other. *See, e.g., Wilkinson v. Smith,* 31 Wn. App. 1, 11, 639 P.2d 768, *rev. denied,* 97 Wn. 2d 1023 (1982). The elements of a joint venture are (1) a contract, express or implied; (2) a common purpose; (3) a community of interest; and (4) an equal right to a voice accompanied by an equal right to control. *See Paulson v. Pierce County,* 99 Wn. 2d 645, 654, 664 P.2d 1202 (1983). The existence of a joint venture is fact intensive and based on the totality of the circumstances, and it may not be

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[85] The full text of the volunteer immunity statute, RCW 4.24.670, is reproduced in the Appendix.

[86] To the extent there is any ambiguity, the definition of volunteer should be strictly construed. *See Michaels v. CH2M Hill, Inc.*, 171 Wn. 2d 587, 600, 257 P.3d 532 (2001) (strictly construing design professional immunity statute, RCW 51.24.035, on grounds that "[s]tatutory grants of immunity in derogation of the common law are strictly construed"; brackets added).

necessary for all elements to be satisfied in a given case. *See Carboneau v. Peterson*, 1 Wn. 2d 347, 376, 95 P.2d 1043 (1939).

In this case, Puryear's relationship with VCS satisfies the requirements of a joint venture. Puryear had an implied contract with VCS to fund the school's football program, and an express contract to serve as head coach of the team. The school was not capable of starting the football program without Puryear, and he was not capable of starting it without the school.

Puryear and VCS shared a common purpose in starting the football team. A joint venture is not limited to business enterprises, and it can be formed for "pleasure, or for some other objective[.]" *Carboneau,* 1 Wn. 2d at 374-75 (brackets added). Here, the common purpose was to provide an opportunity for VCS students to participate in an interscholastic football program.

Puryear and VCS also had a community of interest in the football program. "While this element is usually connected, and often identified, with the purpose to be accomplished, it is nevertheless, a distinct factor." *Carboneau,* at 375. Community of interest refers to the fact that each joint venturer benefits from pursuit of the common purpose, as distinguished from a common purpose pursued for the sole interest or advantage of one or the

other. *See id.* Here, Puryear benefitted personally in being able to coach a football team, and provide what he described as a "Christian football environment" for his son, while the school benefitted from being able to provide an interscholastic athletic program for its students.[87]

Lastly, Puryear and VCS had equal voice and control of the football program. It appears that Mr. Puryear and VCS shared control from the beginning to the end of the program. In the beginning, Puryear and the school started the program together. At the end, Puryear either unilaterally terminated the program or the program terminated upon his withdrawal as head coach. While the program was in existence, Puryear exercised day-to-day control as head coach, and VCS exercised control to the extent that it required certain stipulations from Mr. Puryear in his contract and conducted performance reviews. All of these facts distinguish Puryear's relationship with VCS from that of a mere volunteer, and should preclude him from claiming volunteer immunity.[88]

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[87] *See* CP 657 (J. Puryear Depo., Ex. 6 (coaching application, p. 3, regarding desire to coach and provide Christian football environment)); CP 83-86 (VCS athletics handbook, pp. 1-4, regarding school's desire to provide athletic programs for its students).

[88] Volunteer immunity is limited to negligent conduct, and does not protect conduct that is grossly negligent or reckless. *See* RCW 4.24.670(c). The face mask-shaking incident potentially satisfies the definitions of gross negligence and recklessness. Whereas negligence refers to the failure to exercise reasonable

2. Puryear cannot satisfy his burden to prove as a matter of law that the two-year limitations period for assault and battery bars the Swanks' claims against him.

In the superior court, Puryear also argued that the Swanks' claims against him are barred in part by the two-year statute of limitations for assault and battery, RCW 4.16.100(1). *See* CP 137-38 (Puryear Memo., at 14:4-15:16). As with volunteer immunity, this is an affirmative defense on which Puryear bears the burden of proof, and summary judgment must be denied unless he demonstrates there is no material issue of fact, and that he is entitled to judgment as a matter of law.

The scope of this argument is limited to claims arising from the incident at the Washtucna game when Puryear grabbed and shook Drew Swank by the face mask of his helmet. *See id.* It does not apply to claims against Puryear arising from improperly returning Drew to play in the Washtucna game in the first place, and failing to remove him immediately after he started showing

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care, *see* WPI 10.01; gross negligence refers to the failure to exercise slight care, *see* WPI 10.07; and recklessness refers to conscious disregard for or indifference to a substantial risk of harm, *see Black's Law Dictionary, s.v.* "reckless" (10th ed. 2014); Restatement (Second) of Torts § 500 (1965). *See also* RCW 4.22.015 (defining "fault" to encompass gross negligence and recklessness as well as negligence). The difference is a matter of degree rather than category. To the extent that a jury could find Mr. Puryear's conduct grossly negligent or reckless, volunteer immunity would be further inapplicable, and summary judgment should be denied on this basis as well.

signs of concussion. Thus, even if Puryear were correct in characterizing claims arising from the face-masking incident as an "intentional assault," it would not relieve him from liability for negligence or violation of the Lystedt law.

In any event, the Swank family has not alleged a claim against Puryear for intentional assault, and the allegations and evidence in this case do not bring any aspect of this case within the two-year statute of limitations.[89]

3. Burns cannot satisfy his burden to prove as a matter of law that the two-year Idaho statute of limitations for professional negligence bars the Swanks' claims against him.

In the superior court, Burns argued that Idaho law applies to this case, including the Idaho statute of limitations for medical negligence claims. It is undisputed that, under Washington's Uniform Conflict of Laws—Limitations Act, the choice of limitations period hinges upon the choice of substantive law. *See* RCW 4.18.020(1)(a)). It also appears to be undisputed that, under the relevant Washington statute of limitations, the Swank family's claims were timely filed. *See* RCW 4.16.080(2) (three year statute of

[89] *See* CP 3-6 (amended complaint, ¶¶ 2.2, 2.6, 2.7, 2.9, 4.2 & 4.3, allegations regarding Puryear). While Patricia Swank said that she considered the helmet-shaking by Puryear to be "harmful," "offensive," and an "assault" from her perspective, such language could be used by lay persons to describe a wide variety of tortious conduct.

limitations for "injury to the person or rights of another not hereinafter enumerated"). The focus of the dispute is upon whether Washington or Idaho law applies in this case. However, Burns' contention that Idaho law applies is premised on the assumption that clearing Drew Swank to play football in Washington does not implicate the Lystedt law. Because the Swanks state a valid claim based on the Lystedt law, this assumption is incorrect and argument based upon it should be rejected.[90]

4. Washington courts have personal jurisdiction over Burns because he cleared Drew Swank to play football in Washington.

In the superior court, Burns argued that Washington courts lack personal jurisdiction over him. Consistent with constitutional and statutory limitations, specific personal jurisdiction is established under the following circumstances:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
>
> (2) the cause of action must arise from, or be connected with, such act or transaction; and
>
> (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative

[90] The most-significant-relationship test for choice of law is satisfied by claims arising from a statute within its intended range of application. *See* Restatement (Second) of Conflict of Laws § 6 cmt. *b* (1971).

> convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Shute v. Carnival Cruise Lines, 113 Wn. 2d 763, 767, 783 P.2d 78 (1989), *rev'd on other grounds,* 499 U.S. 585 (1991). Here, the requirements for jurisdiction are satisfied. Burns purposefully cleared Drew Swank to play football in the State of Washington. The Swanks' claims against him arise from this act. The assumption of jurisdiction under these circumstances is consistent with traditional notions of fair play and substantial justice, especially in light of the extent to which Dr. Burns' practice of medicine extends into the State of Washington.[91]

This case fits within the rule stated in the Restatement (Second) of Conflict of Laws § 37 (1988 Rev.):

> A state has power to exercise judicial jurisdiction over an individual who causes effects in a state by an act done

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[91] *See, e.g., Donner v. Tams-Witmark Music Library, Inc.,* 480 F. Supp. 1229, 1234 (E.D. Pa. 1979) (upholding exercise of personal jurisdiction over defendant based on contacts with the forum state as officer of corporation, reasoning "[i]t would be anomalous, and would defeat the purposes of the law creating substantive liability, to permit a corporate to shield himself from jurisdiction by means of the corporate entity, when he could not interpose the same shield as a defense against substantive liability").

The nature and extent of Burns' contacts with Washington would also appear to subject him to general personal jurisdiction in the state. A defendant is subject to general jurisdiction if his or her contacts with the state are "substantial and continuous." *See Crose v. Volkswagenwerk Atkiengesellschaft,* 88 Wn. 2d 50, 54, 558 P.2d 764 (1977); *SeaHAVN, Ltd. v. Glitnir Bank,* 154 Wn. App. 550, 572, 226 P.3d 141 (2010) (citing *Crose*). Whether the defendant's contacts are sufficient "is necessarily dependent upon the facts of each situation," including "economic realities" and foreseeability. *See Crose,* 88 Wn. 2d at 55.

> elsewhere with respect to any claim arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of jurisdiction unreasonable.

"A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere." *Id.* § 37 cmt. *a*. Where an act was done with the intention of causing particular effects in the state, or the effects are reasonably foreseeable, the exercise of jurisdiction is warranted. *See id.* § 37 cmt. *e*.

The reasonableness of the exercise of jurisdiction is based on a totality of the circumstances. "The closer the defendant's relationship to the state, the greater is the likelihood that the state may exercise judicial jurisdiction over him as to claims arising from the effects of the act in the state." *Id.* § 37 cmt. *c*. Given the extent to which Dr. Burns' practice involves Washington State, the exercise of jurisdiction is reasonable.

Also, "[t]he greater the danger threatened to persons or things in the state, the greater is the likelihood that the state will have judicial jurisdiction over the defendant." *Id.* § 37 cmt. *d* (brackets added). Given the importance of properly dealing with concussions in youth sports, as expressed in the Lystedt law, and the potentially fatal consequences of improperly returning an

athlete to play, the exercise of jurisdiction is additionally reasonable.

This case is unlike the traditional medical negligence claim involved in *Lewis v. Bours,* 119 Wn. 2d 667, 835 P.2d 221 (1992). In *Lewis* the Court created an exception to the general rule of jurisdiction that the place of the tort is the place where the injury occurs. *See* 119 Wn. 2d at 673. Specifically, the Court held "[i]n the event that a nonresident professional commits malpractice in another state against a Washington State resident, that, *standing alone*, does not constitute a tortious act committed in this state[.]" *Id*. at 673 (brackets & emphasis added); *accord id*. at 674 (similar). The holding is thus limited to malpractice claims arising from out-of-state treatment, under circumstances where the sole fact supporting the exercise of jurisdiction is the manifestation of injury within the State of Washington. *Lewis* is distinguishable and not controlling here because the Swank family's claims do not arise out of malpractice committed by Dr. Burns in the State of Idaho, but rather from his returning Drew to play football in the State of Washington. The extent to which Burns' practice of medicine

involves the State of Washington further distinguishes *Lewis*, and supports the exercise of jurisdiction in this case.[92]

VI. CONCLUSION

Donald and Patricia Swank ask this Court to reverse the superior court's summary judgment order remand this case for trial.

Respectfully submitted this 2nd day of March, 2015.

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[92] *Hogan v. Johnson,* 39 Wn. App. 96, 692 P.2d 198 (1984), is similar to *Lewis* and is distinguishable on the same grounds.

This case is more akin to *Grange Ins. Ass'n v. Washington,* 110 Wn. 2d 752, 762, 757 P.2d 933 (1988), *cert. denied,* 490 U.S. 1004 (1989), where the Court recognized a certification that livestock was disease-free performed for profit, knowing that the livestock were destined for Washington, would subject a private out-of-state company performing the certification to personal jurisdiction in Washington. The Court declined to exercise personal jurisdiction in *Grange*, however, because the State of Idaho, which performed the certification, did not profit, and therefore did not receive the same benefit as a private company. *See id.*, 110 Wn. 2d at 762. The certification at issue in *Grange* is sufficiently analogous to the clearance provided by Burns to support the exercise of jurisdiction here.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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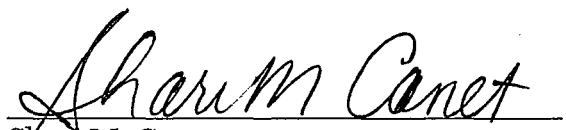

Shari M. Canet

APPENDIX

Zackery Lystedt law, RCW 28A.600.190 ..... A-1

Negligence per se statute, RCW 5.40.050 ..... A-3

Concussion Information Sheet, CP 79-80 ..... A-4

Third International Conference on Concussion in Sport,
CP 509-518 ..... A-6

Medical record for Drew Swank, CP 345 ..... A-16

Note clearing Drew Swank to return to play, CP 648 ..... A-17

Declaration of Stanley A. Herring, M.D., CP 406-10 ..... A-18

Volunteer immunity statute, RCW 4.24.670 ..... A-25

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.

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Credits
[2009 c 475 § 2, eff. July 26, 2009.]

West's RCWA 28A.600.190, WA ST 28A.600.190
Current with Chapters 1, 2, and 3 from the 2015 Regular Session

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West's Revised Code of Washington Annotated
Title 5. Evidence (Refs & Annos)
Chapter 5.40. Proof--General Provisions (Refs & Annos)

West's RCWA 5.40.050

5.40.050. Breach of duty--Evidence of negligence--Negligence per se

Effective: July 1, 2010
Currentness

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) Electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

Credits
[2009 c 412 § 20, eff. July 1, 2010; 2001 c 194 § 5; 1986 c 305 § 901.]

Notes of Decisions (29)

West's RCWA 5.40.050, WA ST 5.40.050
Current with Chapters 1, 2, and 3 from the 2015 Regular Session

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DREW SWANK

Valley Christian School
Concussion Information Sheet

A concussion is a brain injury and all brain injuries are serious. They are caused by a bump, blow, or jolt to the head, or by a blow to another part of the body with the force transmitted to the head. They can range from mild to severe and can disrupt the way the brain normally works. Even though most concussions are mild, **all concussions are potentially serious and may result in complications including prolonged brain damage and death if not recognized and managed properly.** In other words, even a "ding" or a bump on the head can be serious. You can't see a concussion and most sports concussions occur without loss of consciousness. Signs and symptoms of concussion may show up right after the injury or can take hours or days to fully appear. If your child reports any symptoms of concussion, or if you notice the symptoms or signs of concussion yourself, seek medical attention right away.

Symptoms may include one or more of the following:	
• Headaches • "Pressure in head" • Nausea or vomiting • Neck pain • Balance problems or dizziness • Blurred, double, or fuzzy vision • Sensitivity to light or noise • Feeling sluggish or slowed down • Feeling foggy or groggy • Drowsiness • Change in sleep patterns	• Amnesia • "Don't feel right" • Fatigue or low energy • Sadness • Nervousness or anxiety • Irritability • More emotional • Confusion • Concentration or memory problems (forgetting game plays) • Repeating the same question/comment

Signs observed by teammates, parents and coaches include:
• Appears dazed • Vacant facial expression • Confused about assignment • Forgets plays • Is unsure of game, score, or opponent • Moves clumsily or displays incoordination • Answers questions slowly • Slurred speech • Shows behavior or personality changes • Can't recall events prior to hit • Can't recall events after hit • Seizures or convulsions • Any change in typical behavior or personality • Loses consciousness

Adapted from the CDC and the 3rd International Conference on Concussion in Sport
Document created 6/15/2009

Valley Christian School
Concussion Information Sheet

What can happen if my child keeps on playing with a concussion or returns to soon?

Athletes with the signs and symptoms of concussion should be removed from play immediately. Continuing to play with the signs and symptoms of a concussion leaves the young athlete especially vulnerable to greater injury. There is an increased risk of significant damage from a concussion for a period of time after that concussion occurs, particularly if the athlete suffers another concussion before completely recovering from the first one. This can lead to prolonged recovery, or even to severe brain swelling (second impact syndrome) with devastating and even fatal consequences. It is well known that adolescent or teenage athlete will often under report symptoms of injuries. And concussions are no different. As a result, education of administrators, coaches, parents and students is the key for student-athlete's safety.

If you think your child has suffered a concussion

Any athlete even suspected of suffering a concussion should be removed from the game or practice immediately. No athlete may return to activity after an apparent head injury or concussion, regardless of how mild it seems or how quickly symptoms clear, without medical clearance. Close observation of the athlete should continue for several hours. The new "Zackery Lystedt Law" in Washington now requires the consistent and uniform implementation of long and well-established return to play concussion guidelines that have been recommended for several years:

> "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"
>
> and
>
> "...may not return to play until the athlete is evaluated by a licensed heath care provider trained in the evaluation and management of concussion and received written clearance to return to play from that health care provider".

You should also inform your child's coach if you think that your child may have a concussion Remember its better to miss one game than miss the whole season. And when in doubt, the athlete sits out.

For current and up-to-date information on concussions you can go to:
http://www.cdc.gov/ConcussionInYouthSports/

Drew Swank	Andrew Swank	9/17/09
Student-athlete Name Printed	Student-athlete Signature	Date
Patricia Swank	Patricia Swank	9/17/09
Parent or Legal Guardian Printed	Parent or Legal Guardian Signature	Date

Adapted from the CDC and the 3rd International Conference on Concussion in Sport
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Consensus Statement on Concussion in Sport: the 3rd International Conference on Concussion in Sport held in Zurich, November 2008

EDITOR'S CHOICE

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This paper is a revision and update of the recommendations developed following the 1st (Vienna) and 2nd (Prague) International Symposia on Concussion in Sport.[1 2] The Zurich Consensus statement is designed to build on the principles outlined in the original Vienna and Prague documents and to develop further conceptual understanding of this problem using a formal consensus-based approach. A detailed description of the consensus process is outlined at the end of this document. This document is developed for use by physicians, therapists, certified athletic trainers, health professionals, coaches and other people involved in the care of injured athletes, whether at the recreational, elite or professional level. While agreement exists pertaining to principal messages conveyed within this document, the authors acknowledge that the science of concussion is evolving and therefore management and return to play decisions remain in the realm of clinical judgement on an individualised basis. Readers are encouraged to copy and distribute freely the Zurich Consensus document and/or the Sports Concussion Assessment Tool (SCAT2) card and neither is subject to any copyright restriction. The authors request, however that the document and/or the SCAT2 card be distributed in their full and complete format.

The following focus questions formed the foundation for the Zurich concussion consensus statement:

Acute simple concussion

- Which symptom scale and which sideline assessment tool is best for diagnosis and/or follow up?
- How extensive should the cognitive assessment be in elite athletes?
- How extensive should clinical and neuropsychological (NP) testing be at non-elite level?
- Who should do/interpret the cognitive assessment?
- Is there a gender difference in concussion incidence and outcomes?

Return to play (RTP) issues

- Is provocative exercise testing useful in guiding RTP?
- What is the best RTP strategy for elite athletes?
- What is the best RTP strategy for non-elite athletes?
- Is protective equipment (eg, mouthguards and helmets) useful in reducing concussion incidence and/or severity?

Complex concussion and long-term issues

- Is the simple versus complex classification a valid and useful differentiation?
- Are there specific patient populations at risk of long-term problems?
- Is there a role for additional tests (eg, structural and/or functional MRI, balance testing, biomarkers)?
- Should athletes with persistent symptoms be screened for depression/anxiety?

Paediatric concussion

- Which symptoms scale is appropriate for this age group?
- Which tests are useful and how often should baseline testing be performed in this age group?
- What is the most appropriate RTP guideline for elite and non-elite child and adolescent athletes?

Future directions

- What is the best method of knowledge transfer and education?
- Is there evidence that new and novel injury prevention strategies work (eg, changes to rules of the game, fair play strategies, etc)?

The Zurich document additionally examines the management issues raised in the previous Prague and Vienna documents and applies the consensus questions to these areas.

SPECIFIC RESEARCH QUESTIONS AND CONSENSUS DISCUSSION

1. Concussion

1.1 Definition of concussion

A panel discussion regarding the definition of concussion and its separation from mild traumatic brain injury (mTBI) was held. Although there was acknowledgement that the terms refer to different injury constructs and should not be used interchangeably, it was not felt that the panel would define mTBI for the purpose of this document. There was unanimous agreement, however, that concussion is defined as follows:

> Concussion is defined as a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces. Several common features that incorporate clinical, pathologic and biomechanical injury constructs that may be utilised in defining the nature of a concussive head injury include:
> 1. Concussion may be caused either by a direct blow to the head, face, neck or elsewhere on the body with an "impulsive" force transmitted to the head.
> 2. Concussion typically results in the rapid onset of short-lived impairment of neurologic function that resolves spontaneously.
> 3. Concussion may result in neuropathological changes but the acute clinical symptoms largely reflect a functional

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disturbance rather than a structural injury.
4. Concussion results in a graded set of clinical symptoms that may or may not involve loss of consciousness. Resolution of the clinical and cognitive symptoms typically follows a sequential course; however it is important to note that in a small percentage of cases however, post-concussive symptoms may be prolonged.
5. No abnormality on standard structural neuroimaging studies is seen in concussion.

1.2 Classification of concussion

There was unanimous agreement to abandon the simple versus complex terminology that had been proposed in the Prague agreement statement as the panel felt that the terminology itself did not fully describe the entities. The panel however unanimously retained the concept that the majority (80–90%) of concussions resolve in a short (7–10 day) period, although the recovery time frame may be longer in children and adolescents.[2]

2. Concussion evaluation

2.1 Symptoms and signs of acute concussion

The panel agreed that the diagnosis of acute concussion usually involves the assessment of a range of domains including clinical symptoms, physical signs, behaviour, balance, sleep and cognition. Furthermore, a detailed concussion history is an important part of the evaluation both in the injured athlete and when conducting a pre-participation examination. The detailed clinical assessment of concussion is outlined in the *SCAT2* form *(see p 85)*.

The suspected diagnosis of concussion can include one or more of the following clinical domains:

a. Symptoms—somatic (eg, headache), cognitive (eg, feeling like in a fog) and/or emotional symptoms (eg, lability).
b. Physical signs (eg, loss of consciousness, amnesia).
c. Behavioural changes (eg, irritability).
d. Cognitive impairment (eg, slowed reaction times).
e. Sleep disturbance (eg, drowsiness).

If any one or more of these components is present, a concussion should be suspected and the appropriate management strategy instituted.

2.2 On-field or sideline evaluation of acute concussion

When a player shows *any* features of a concussion:

a. The player should be medically evaluated onsite using standard emergency management principles and particular attention should be given to excluding a cervical spine injury.
b. The appropriate disposition of the player must be determined by the treating healthcare provider in a timely manner. If no healthcare provider is available, the player should be safely removed from practice or play and urgent referral to a physician arranged.
c. Once the first aid issues are addressed, then an assessment of the concussive injury should be made using the SCAT2 or other similar tool.
d. The player should not be left alone following the injury and serial monitoring for deterioration is essential over the initial few hours following injury.
e. A player with diagnosed concussion should not be allowed to return to play on the day of injury. Occasionally in adult athletes, there may be return to play on the same day as the injury. See Section 4.2.

It was unanimously agreed that sufficient time for assessment and adequate facilities should be provided for the appropriate medical assessment both on and off the field for all injured athletes. In some sports this may require rule change to allow an off-field medical assessment to occur without affecting the flow of the game or unduly penalising the injured player's team.

Sideline evaluation of cognitive function is an essential component in the assessment of this injury. Brief neuropsychological test batteries that assess attention and memory function have been shown to be practical and effective. Such tests include the Maddocks questions[5 4] and the Standardized Assessment of Concussion (SAC).[5-7] It is worth noting that standard orientation questions (eg, time, place, person) have been shown to be unreliable in the sporting situation when compared with memory assessment.[4 8] It is recognised, however, that abbreviated testing paradigms are designed for rapid concussion screening on the sidelines and are not meant to replace comprehensive neuropsychological testing which is sensitive to detect subtle deficits that may exist beyond the acute episode; nor should they be used as a stand-alone tool for the ongoing management of sports concussions.

It should also be recognised that the appearance of symptoms might be delayed several hours following a concussive episode.

2.3 Evaluation in emergency room or office by medical personnel

An athlete with concussion may be evaluated in the emergency room or doctor's office as a point of first contact following injury or may have been referred from another care provider. In addition to the points outlined above, the key features of this exam should encompass:

a. A medical assessment including a comprehensive history, and detailed neurological examination including a thorough assessment of mental status, cognitive functioning and gait and balance.
b. A determination of the clinical status of the patient including whether there has been improvement or deterioration since the time of injury. This may involve seeking additional information from parents, coaches, teammates and eyewitnesses to the injury.
c. A determination of the need for emergent neuroimaging in order to exclude a more severe brain injury involving a structural abnormality

In large part, these points above are included in the SCAT2 assessment, which forms part of the Zurich consensus statement.

3. Concussion investigations

A range of additional investigations may be utilised to assist in the diagnosis and/or exclusion of injury. These include the following.

3.1 Neuroimaging

It was recognised by the panellists that conventional structural neuroimaging is normal in concussive injury. Given that caveat, the following suggestions are made: brain CT (or where available, MR brain scan) contributes little to concussion evaluation but should be employed whenever suspicion of an intracerebral structural lesion exists. Examples of such situations may include prolonged disturbance of conscious state, focal neurological deficit or worsening symptoms.

Newer structural MRI modalities including gradient echo, perfusion and diffusion imaging have greater sensitivity for structural abnormalities. However, the lack of published studies as well as absent pre-injury neuroimaging data limits the usefulness of this approach in clinical management at the present time. In

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addition, the predictive value of various MR abnormalities that may be incidentally discovered is not established at the present time.

Other imaging modalities such as functional MRI (fMRI) show activation patterns that correlate with symptom severity and recovery in concussion.[9-13] While not part of routine assessment at the present time, they nevertheless provide additional insight to pathophysiological mechanisms. Alternative imaging technologies (eg, positron emission tomography, diffusion tensor imaging, magnetic resonance spectroscopy, functional connectivity), while demonstrating some compelling findings, are still at early stages of development and cannot be recommended other than in a research setting.

3.2 Objective balance assessment

Published studies, using both sophisticated force plate technology and less sophisticated clinical balance tests (eg, balance error scoring system (BESS)), have identified postural stability deficits lasting approximately 72 hours following sport-related concussion. It appears that postural stability testing provides a useful tool for objectively assessing the motor domain of neurological functioning, and should be considered a reliable and valid addition to the assessment of athletes suffering from concussion, particularly where symptoms or signs indicate a balance component.[14-20]

3.3 Neuropsychological assessment

The application of neuropsychological (NP) testing in concussion has been shown to be of clinical value and continues to contribute significant information in concussion evaluation.[21-26] Although in most case cognitive recovery largely overlaps with the time course of symptom recovery, it has been demonstrated that cognitive recovery may occasionally precede or more commonly follow clinical symptom resolution, suggesting that the assessment of cognitive function should be an important component in any return to play protocol.[27 28] It must be emphasised however, that NP assessment should not be the sole basis of management decisions; rather it should be seen as an aid to the clinical decision-making process in conjunction with a range of clinical domains and investigational results.

Neuropsychologists are in the best position to interpret NP tests by virtue of their background and training. However, there may be situations where neuropsychologists are not available and other medical professionals may perform or interpret NP screening tests. The ultimate return to play decision should remain a medical one in which a multidisciplinary approach, when possible, has been taken. In the absence of NP and other (eg, formal balance assessment) testing, a more conservative return to play approach may be appropriate.

In the majority of cases, NP testing will be used to assist return to play decisions and will not be done until patient is symptom free.[29 30] There may be situations (eg, child and adolescent athletes) where testing may be performed early while the patient is still symptomatic to assist in determining management. This will normally be best determined in consultation with a trained neuropsychologist.[31 32]

3.4 Genetic testing

The significance of apolipoprotein (Apo) E4, ApoE promotor gene, tau polymerase and other genetic markers in the management of sports concussion risk or injury outcome is unclear at this time.[33 34] Evidence from human and animal studies in more severe traumatic brain injury shows induction of a variety of genetic and cytokine factors, such as: insulin-like growth factor-1 (IGF-1), IGF binding protein-2, fibroblast growth factor, Cu–Zn superoxide dismutase, superoxide dismutase-1 (SOD-1), nerve growth factor, glial fibrillary acidic protein (GFAP) and S-100. Whether such factors are affected in sporting concussion is not known at this stage.[35-42]

3.5 Experimental concussion assessment modalities

Different electrophysiological recording techniques (eg, evoked response potential (ERP), cortical magnetic stimulation and electroencephalography) have demonstrated reproducible abnormalities in the post-concussive state; however not all studies reliably differentiated concussed athletes from controls.[43-49] The clinical significance of these changes remains to be established.

In addition, biochemical serum and cerebral spinal fluid markers of brain injury (including S-100, neuron specific enolase (NSE), myelin basic protein (MBP), GFAP, tau, etc) have been proposed as means by which cellular damage may be detected if present.[50-56] There is currently insufficient evidence however, to justify the routine use of these biomarkers clinically.

4. Concussion management

The cornerstone of concussion management is physical and cognitive rest until symptoms resolve and then a graded programme of exertion prior to medical clearance and return to play. The recovery and outcome of this injury may be modified by a number of factors that may require more sophisticated management strategies. These are outlined in the section on modifiers below.

As described above, the majority of injuries will recover spontaneously over several days. In these situations, it is expected that an athlete will proceed progressively through a stepwise return to play strategy.[57] During this period of recovery while symptomatic, following an injury, it is important to emphasise to the athlete that physical *and* cognitive rest is required. Activities that require concentration and attention (eg, scholastic work, videogames, text messaging, etc) may exacerbate symptoms and possibly delay recovery. In such cases, apart from limiting relevant physical and cognitive activities (and other risk-taking opportunities for re-injury) while symptomatic, no further intervention is required during the period of recovery and the athlete typically resumes sport without further problem.

4.1 Graduated return to play protocol

Return to play protocol following a concussion follows a stepwise process as outlined in table 1.

With this stepwise progression, the athlete should continue to proceed to the next level if asymptomatic at the current level. Generally each step should take 24 hours so that an athlete would take approximately one week to proceed through the full rehabilitation protocol once they are asymptomatic at rest and with provocative exercise. If any post-concussion symptoms occur while in the stepwise programme, the patient should drop back to the previous asymptomatic level and try to progress again after a further 24-hour period of rest has passed.

4.2 Same day RTP

With adult athletes, in some settings, where there are team physicians experienced in concussion management and sufficient resources (eg, access to neuropsychologists, consultants, neuroimaging, etc) as well as access to immediate (ie, sideline) neurocognitive assessment, return to play management may be more rapid. The RTP strategy must still follow the same basic management principles,

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Table 1 Graduated return to play protocol

Rehabilitation stage	Functional exercise at each stage of rehabilitation	Objective of each stage
1. No activity	Complete physical and cognitive rest	Recovery
2. Light aerobic exercise	Walking, swimming or stationary cycling keeping intensity <70% maximum predicted heart rate No resistance training	Increase heart rate
3. Sport-specific exercise	Skating drills in ice hockey, running drills in soccer. No head impact activities	Add movement
4. Non-contact training drills	Progression to more complex training drills, eg passing drills in football and ice hockey May start progressive resistance training)	Exercise, coordination, and cognitive load
5. Full contact practice	Following medical clearance participate in normal training activities	Restore confidence and assess functional skills by coaching staff
6. Return to play	Normal game play	

namely full clinical and cognitive recovery before consideration of return to play. This approach is supported by published guidelines, such as the American Academy of Neurology, US Team Physician Consensus Statement, and US National Athletic Trainers Association Position Statement.[58–60] This issue was extensively discussed by the consensus panellists and it was acknowledged that there is evidence that some professional American football players are able to RTP more quickly, with even same day RTP supported by National Football League studies without a risk of recurrence or sequelae.[61] There are data however, demonstrating that at the collegiate and high school level, athletes allowed to RTP on the same day may demonstrate NP deficits post-injury that may not be evident on the sidelines and are more likely to have delayed onset of symptoms.[62–68] It should be emphasised however, that the young (<18) elite athlete should be treated more conservatively even though the resources may be the same as for an older professional athlete (see Section 6.1).

4.3 Psychological management and mental health issues

In addition, psychological approaches may have potential application in this injury, particularly with the modifiers listed below.[69 70] Caregivers are also encouraged to evaluate the concussed athlete for affective symptoms such as depression, as these symptoms may be common in concussed athletes.[57]

4.4 The role of pharmacological therapy

Pharmacological therapy in sports concussion may be applied in two distinct situations. The first of these situations is the management of specific prolonged symptoms (eg, sleep disturbance, anxiety, etc). The second situation is where drug therapy is used to modify the underlying pathophysiology of the condition with the aim of shortening the duration of the concussion symptoms.[71] In broad terms, this approach to management should only be considered by clinicians experienced in concussion management.

An important consideration in RTP is that concussed athletes should not only be symptom-free but also should not be taking any pharmacological agents/medications that may mask or modify the symptoms of concussion. Where antidepressant therapy may be commenced during the management of a concussion, the decision to return to play while still on such medication must be considered carefully by the treating clinician.

4.5 The role of pre-participation concussion evaluation

Recognising the importance of a concussion history, and appreciating the fact that many athletes will not recognise all the concussions they may have suffered in the past, a detailed concussion history is of value.[72–75] Such a history may pre-identify athletes that fit into a high risk category and provides an opportunity for the healthcare provider to educate the athlete in regard to the significance of concussive injury. A structured concussion history should include specific questions as to previous symptoms of a concussion; not just the perceived number of past concussions. It is also worth noting that dependence on the recall of concussive injuries by teammates or coaches has been shown to be unreliable.[72] The clinical history should also include information about all previous head, face or cervical spine injuries as these may also have clinical relevance. It is worth emphasising that in the setting of maxillofacial and cervical spine injuries, coexistent concussive injuries may be missed unless specifically assessed. Questions pertaining to disproportionate impact versus symptom severity matching may alert the clinician to a progressively increasing vulnerability to injury. As part of the clinical history it is advised that details regarding protective equipment employed at time of injury be sought, for both recent and remote injuries. A comprehensive pre-participation concussion evaluation allows for modification and optimisation of protective behaviour and an opportunity for education.

5. Modifying factors in concussion management

The consensus panel agreed that a range of 'modifying' factors may influence the investigation and management of concussion and in some cases, may predict the potential for prolonged or persistent symptoms. These modifiers would also be important to consider in a detailed concussion history and are outlined in Table 2.

In this setting, there may be additional management considerations beyond simple RTP advice. There may be a more important role for additional investigations, including formal NP testing, balance assessment and neuroimaging. It is envisioned that athletes with such modifying features would be managed in a multidisciplinary manner coordinated by a physician with specific expertise in the management of concussive injury.

The role of female gender as a possible modifier in the management of concussion was discussed at length by the panel. There was not unanimous agreement that the current published research evidence is conclusive that this should be included as a modifying factor, although it was accepted that gender may be a risk factor for injury and/or influence injury severity.[76 78]

5.1 The significance of loss of consciousness (LOC)

In the overall management of moderate to severe traumatic brain injury, duration of LOC is an acknowledged predictor of outcome.[79] While published findings in concussion describe LOC associated with specific early cognitive deficits it has not been noted as a measure of injury severity.[80 81] Consensus discussion determined that prolonged (>1 minute duration) LOC would be considered as a factor that may modify management.

5.2 The significance of amnesia and other symptoms

There is renewed interest in the role of post-traumatic amnesia and its role as a

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Table 2 Concussion modifiers

Factors	Modifier
Symptoms	Number
	Duration (>10 days)
	Severity
Signs	Prolonged loss of consciousness (>1 min), amnesia
Sequelae	Concussive convulsions
Temporal	Frequency—repeated concussions over time
	Timing—injuries close together in time
	"Recency"—recent concussion or traumatic brain injury
Threshold	Repeated concussions occurring with progressively less impact force or slower recovery after each successive concussion
Age	Child and adolescent (<18 years old)
Co- and pre-morbidities	Migraine, depression or other mental health disorders, attention deficit hyperactivity disorder, learning disabilities, sleep disorders
Medication	Psychoactive drugs, anticoagulants
Behaviour	Dangerous style of play
Sport	High risk activity, contact and collision sport, high sporting level

surrogate measure of injury severity.[67 82 83] Published evidence suggests that the nature, burden and duration of the clinical post-concussive symptoms may be more important than the presence or duration of amnesia alone.[80 84 85] Further it must be noted that retrograde amnesia varies with the time of measurement post-injury and hence is poorly reflective of injury severity.[86 87]

5.3 Motor and convulsive phenomena

A variety of immediate motor phenomena (eg, tonic posturing) or convulsive movements may accompany a concussion. Although dramatic, these clinical features are generally benign and require no specific management beyond the standard treatment of the underlying concussive injury.[88 89]

5.4 Depression

Mental health issues (such as depression) have been reported as a long-term consequence of traumatic brain injury, including sports related concussion. Neuroimaging studies using fMRI suggest that a depressed mood following concussion may reflect an underlying pathophysiological abnormality consistent with a limbic-frontal model of depression.[52 90–100]

6. Special populations

6.1 The child and adolescent athlete

There was unanimous agreement by the panel that the evaluation and management recommendations contained herein could be applied to children and adolescents down to the age of 10 years. Below that age children report different concussion symptoms from adults and would require age appropriate symptom checklists as a component of assessment. An additional consideration in assessing the child or adolescent athlete with a concussion is that in the clinical evaluation by the healthcare professional there may be the need to include both patient and parent input as well as teacher and school input when appropriate.[101–107]

The decision to use NP testing is broadly the same as the adult assessment paradigm. However, timing of testing may differ in order to assist planning in school and home management (and may be performed while the patient is still symptomatic). If cognitive testing is performed, it must be developmentally sensitive until the late teen years due to the ongoing cognitive maturation that occurs during this period which, in turn, makes the utility of comparison to either the person's own baseline performance or to population norms limited.[20] In this age group it is more important to consider the use of trained neuropsychologists to interpret assessment data, particularly in children with learning disorders and/or attention deficit hyperactivity disorder (ADHD) who may need more sophisticated assessment strategies.[31 32 101]

The panel strongly endorsed the view that children should not be returned to practice or play until clinically completely symptom-free, which may require a longer time frame than for adults. In addition, the concept of "cognitive rest" was highlighted with special reference to a child's need to limit exertion with activities of daily living and to limit scholastic and other cognitive stressors (eg, text messaging, videogames, etc) while symptomatic. School attendance and activities may also need to be modified to avoid provocation of symptoms.

Because of the different physiological response and longer recovery after concussion and specific risks (eg, diffuse cerebral swelling) related to head impact during childhood and adolescence, a more conservative return to play approach is recommended. It is appropriate to extend the amount of time of asymptomatic rest and/or the length of the graded exertion in children and adolescents. It is not appropriate for a child or adolescent athlete with concussion to RTP on the same day as the injury regardless of the level of athletic performance. Concussion modifiers apply even more to this population than adults and may mandate more cautious RTP advice.

6.2 Elite versus non-elite athletes

The panel unanimously agreed that all athletes regardless of level of participation should be managed using the same treatment and return to play paradigm. A more useful construct was agreed whereby the available resources and expertise in concussion evaluation were of more importance in determining management than a separation between elite and non-elite athlete management. Although formal baseline NP screening may be beyond the resources of many sports or individuals, it is recommended that in all organised high risk sports consideration be given to having this cognitive evaluation regardless of the age or level of performance.

6.3 Chronic traumatic brain injury

Epidemiological studies have suggested an association between repeated sports concussions during a career and late life cognitive impairment. Similarly, case reports have noted anecdotal cases where neuropathological evidence of chronic traumatic encephalopathy was observed in retired football players.[108–112] Panel discussion was held and no consensus was reached on the significance of such observations at this stage. Clinicians need to be mindful of the potential for long-term problems in the management of all athletes.

7. Injury prevention

7.1 Protective equipment: mouthguards and helmets

There is no good clinical evidence that currently available protective equipment will prevent concussion although mouthguards have a definite role in preventing dental and orofacial injury. Biomechanical studies have shown a reduction in impact forces to the brain with the use of head gear and helmets, but these findings have not been translated to show a reduction

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in concussion incidence. For skiing and snowboarding there are a number of studies to suggest that helmets provide protection against head and facial injury and hence should be recommended for participants in alpine sports.[113-116] In specific sports such as cycling, motor and equestrian sports, protective helmets may prevent other forms of head injury (eg, skull fracture) that are related to falling on hard road surfaces; these may be an important injury prevention issue for those sports.[116-128]

7.2 Rule change

Consideration of rule changes to reduce the head injury incidence or severity may be appropriate where a clear-cut mechanism is implicated in a particular sport. An example of this is in football (soccer) where research studies demonstrated that upper limb to head contact in heading contests accounted for approximately 50% of concussions.[129] As noted earlier, rule changes may also be needed in some sports to allow an effective off-field medical assessment to occur without compromising the athlete's welfare, affecting the flow of the game or unduly penalising the player's team. It is important to note that rule enforcement may be a critical aspect of modifying injury risk in these settings; referees play an important role in this regard.

7.3 Risk compensation

An important consideration in the use of protective equipment is the concept of risk compensation.[130] This is where the use of protective equipment results in behavioural change, such as the adoption of more dangerous playing techniques, which can result in a paradoxical increase in injury rates. This may be a particular concern in child and adolescent athletes where head injury rates are often higher than in adult athletes.[131-133]

7.4 Aggression versus violence in sport

The competitive/aggressive nature of sport which makes it fun to play and watch should not be discouraged. However, sporting organisations should be encouraged to address violence that may increase concussion risk.[134 135] Fair play and respect should be supported as key elements of sport.

8. Knowledge transfer

As the ability to treat or reduce the effects of concussive injury after the event is minimal, education of athletes, colleagues and the general public is a mainstay of progress in this field. Athletes, referees, administrators, parents, coaches and healthcare providers must be educated regarding the detection of concussion, its clinical features, assessment techniques and principles of safe return to play. Methods to improve education, including web-based resources, educational videos and international outreach programmes are important in delivering the message. In addition, concussion working groups plus the support and endorsement of enlightened sport groups, such as Fédération Internationale de Football Association (FIFA), International Olympic Commission (IOC), International Rugby Board (IRB) and International Ice Hockey Federation (IIHF), who initiated this endeavour have enormous value and must be pursued vigorously. Fair play and respect for opponents are ethical values that should be encouraged in all sports and sporting associations. Similarly coaches, parents and managers play an important part in ensuring these values are implemented on the field of play.[57 136-148]

9. Future directions

The consensus panellists recognise that research is needed across a range of areas in order to answer some critical research questions. The key areas for research identified include:

- Validation of the SCAT2.
- Gender effects on injury risk, severity and outcome.
- Paediatric injury and management paradigms.
- Virtual reality tools in the assessment of injury.
- Rehabilitation strategies (eg, exercise therapy).
- Novel imaging modalities and their role in clinical assessment.
- Concussion surveillance using consistent definitions and outcome measures.
- Clinical assessment where no baseline assessment has been performed.
- "Best-practice" neuropsychological testing.
- Long-term outcomes.
- On-field injury severity predictors.

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 sports related concussion. It is not intended as a standard of care, and should not be interpreted as such. This document is only a guide, and is of a general nature, consistent with the reasonable practice of a healthcare professional. Individual treatment will depend on the facts and circumstances specific to each individual case.

It is intended that this document will be formally reviewed and updated prior to 1 December 2012.

11. Statement on background to consensus process

In November 2001, the 1st International Conference on Concussion in Sport was held in Vienna, Austria. This meeting was organised by the IIHF in partnership with FIFA and the Medical Commission of the IOC. As part of the resulting mandate for the future, the need for leadership and future updates was identified. The 2nd International Conference on Concussion in Sport was organised by the same group with the additional involvement of the IRB and was held in Prague, Czech Republic in November 2004. The original aims of the symposia were to provide recommendations for the improvement of safety and health of athletes who suffer concussive injuries in ice hockey, rugby, football (soccer) and other sports. To this end, a range of experts were invited to both meetings to address specific issues of epidemiology, basic and clinical science, injury grading systems, cognitive assessment, new research methods, protective equipment, management, prevention and long-term outcome.[1 2]

The 3rd International Conference on Concussion in Sport was held in Zurich, Switzerland on 29–30 October 2008 and was designed as a formal consensus meeting following the organisational guidelines set forth by the US National Institutes of Health. (Details of the consensus methodology can be obtained at: http://consensus.nih.gov/ABOUTCDP.htm) The basic principles governing the conduct of a consensus development conference are summarised below:

1. A broad based non-government, non-advocacy panel was assembled to give balanced, objective and knowledgeable attention to the topic. Panel members excluded anyone with scientific or commercial conflicts of interest and included researchers in clinical medicine, sports medicine, neuroscience, neuroimaging, athletic training and sports science.

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2. These experts presented data in a public session, followed by inquiry and discussion. The panel then met in an executive session to prepare the consensus statement.
3. A number of specific questions were prepared and posed in advance to define the scope and guide the direction of the conference. The principle task of the panel was to elucidate responses to these questions. These questions are outlined above.
4. A systematic literature review was prepared and circulated in advance for use by the panel in addressing the conference questions.
5. The consensus statement is intended to serve as the scientific record of the conference.
6. The consensus statement will be widely disseminated to achieve maximum impact on both current healthcare practice and future medical research.

The panel chairperson (WM) did not identify with any advocacy position. The chairperson was responsible for directing the consensus session and guiding the panel's deliberations. Panellists were drawn from clinical practice, academic and research in the field of sports related concussion. They do not represent organisations per se but were selected for their expertise, experience and understanding of this field.

Competing interests: None.

Consensus panellists (listed in alphabetical order): In addition to the authors above, the consensus panellists were S Broglio, G Davis, R Dick, J Dvorak, R Echemendia, G Gioia, K Guskiewicz, S Herring, G Iverson, J Kelly, J Kissick, M Makdissi, M McCrea, A Ptito, L Purcell, M Putukian. Also invited but not in attendance: R Bahr, L Engebretsen, P Hamlyn, B Jordan, P Schamasch.

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APPENDIX 1

Sport Concussion Assessment Tool (SCAT2) form: a clinical tool used by practitioners managing athletes with concussion.

APPENDIX 2

Pocket SCAT2: a pocket card designed for lay practitioners to suspect the diagnosis of a concussion.

EXHIBIT R-1 - Page 9 of 10

Br J Sports Med 2009;**43**(Suppl I):i76–i84. doi:10.1136/bjsm.2009.058248

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Consensus Statement on Concussion in Sport: the 3rd International Conference on Concussion in Sport held in Zurich, November 2008

P McCrory, W Meeuwisse, K Johnston, et al.

Br J Sports Med 2009 43: i76-i84
doi: 10.1136/bjsm.2009.058248

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SEP 2 0 2009

C/o neck pain x 5d p̄ football injury, c/o daily HA since injury

NAME Andrew Swank
AGE 17 HT 158
BP 138/74 PULSE 74
RR 16
MEDS IBU 600mg QD
NURSE Sdaniels-CMA

SWANK, Andrew
9/22/09

CLOSED HEAD INJURY OF MILD CONCUSSION

S: The patient is in today stating that he was playing football. He got hit in the head by another helmet, and then landed on, and then had another person jump on, hitting him in the head once again or else in the neck. He had pain in the neck. He was out of the game for a period of time. He had no loss of consciousness. However, since that time, he has been getting headaches on a daily basis. He has had no visual abnormalities. No nausea or vomiting. No neurological losses. He had problems with a concussion many years ago, but no recurrent problems.

O: Well-appearing male in no acute distress. Afebrile. Vital signs stable. Pupils are equal, round, and reactive to light. Extraocular movements are intact. Funduscopic exam was benign. No hemorrhages. No exudates. No papilledema. Oropharynx was clear. Neck was supple with no lymphadenopathy or thyromegaly. He had some mild tenderness over the cervical strap muscles bilaterally, a little bit worse on the right than on the left. Lungs were clear to auscultation. Heart: Regular rate and rhythm. The patient had good range of motion of the neck with no limitations and only a minimal amount of discomfort with full flexion. Neurological Exam: Cranial nerves II through XII grossly intact. Deep tendon reflexes 2+ and symmetric. Negative Romberg. Negative ulnar drift. Normal finger-to-nose and heel-to-shin testing.

A: As above.

P: We are going to have the patient take ibuprofen 600 mg p.o. t.i.d. for the next few days. I am also going to have him stay out of contact sports for the next three days' period of time. If he has a bad headache, after playing football, he is to be out of the sport for a week's period of time. If he has another concussion, following that, then I would have him out probably for a two-month period of time.

Timothy F. Burns, MD:csm

EXHIBIT 4
WITNESS: Burns
DAVID STOREY
STOREY & MILLER

000002

RONALDOB FAMILY PRACTICE
TIMOTHY E. BURNS, M.D.
926 E. KATHLEEN DRIVE
COEUR D'ALENE, ID 83814-2463

(208) 667-4557 BY APP'T.

NAME _____ AGE _____

ADDRESS _____ DATE 9/3/09

TAMPER RESISTANT FEATURES INCLUDE:
SAFETY BLUE ERASE-RESISTANT BACKGROUND
AND "ULTEGAL" PANTOGRAPH

℞

Andrew Swank May return
to play football on
9-25-09

- ☐ 1-24
- ☐ 25-49
- ☐ 50-75
- ☐ 76-100
- ☐ 101-150
- ☐ 151 and over
- _____ refills

FILL NO. 1 2 3 4 5

Brand Only

Brand Medically Necessary - must be handwritten by the practitioner for
each and each individual product selected. Refills will be allowed.

BLFP5026 L30

EXHIBIT 5
WITNESS: [signature]
DAVID STOREY
STOREY & MILLER

FILED

JUL 14 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK, individually, Plaintiffs, vs. VALLEY CHRISTIAN SCHOOL, a Washington State Non-profit Corporation, JIM PURYEAR and DERICK TABISH, individually, and TIMOTHY F. BURNS M.D., individually, Defendants.	No. 12-2-03766-8 **DECLARATION OF STANLEY A. HERRING, M.D.**

I, STANLEY A. HERRING, M.D., declare and state under penalty of perjury as follows:

1. I am a Board Certified physical medicine and rehabilitation physician with specific expertise in the areas of sports concussion and spinal injury in athletes and active people. I am competent to testify and have personal knowledge of the matters herein.

2. I am employed with the University of Washington and am the Medical Director, UW Medicine Sports, Spine and Orthopedic Health. I am also the co-Medical Director of the Sports Concussion Program at UW Medicine/Harborview Medical Center/Seattle Children's Hospital as

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well. I also hold the Zackery Lystedt Sports Concussion Endowed Professorship. A complete copy of my CV is attached to this Declaration as **Exhibit 1**.

3. I was asked to review the case involving Drew Swank to determine whether the coaching staff, school and Dr. Timothy Burns had complied with the requirements set forth in the Lystedt legislation. In this regard, I was involved in the development and the passage of the Lystedt Law and am specifically familiar with the law's intent and purpose. As part of the ongoing purpose of the Lystedt Law, I provide concussion education training to coaches for the WIAA through video and live lecture. Additionally, I developed the concussion information sheet that is provided to the parents and athletes and was signed by the Swanks at the start of Drew's football season. A copy of that concussion information sheet is attached as **Exhibit 2**.

4. The material contained in the concussion information sheet reflects the signs and symptoms of a possible concussion or head injury that might be exhibited by an athlete. The information sheet was developed to reflect the intent and purpose of the Lystedt Law which was to educate parents, coaches, medical professionals and anyone else involved with the student athlete and provide them with information necessary to recognize the possible signs and symptoms consistent with concussion or closed head injuries. The Lystedt Law was intended to place responsibility for the athlete's ongoing safety by requiring coaching staff, and other individuals on the field to be responsible for monitoring or otherwise supervising the athlete for any ongoing or returning signs and symptoms of concussion and to immediately remove the player upon observing any signs consistent with concussion or head injury. The Lystedt Law was never intended to absolve coaching staff and other individuals on the field from ongoing monitoring of a student athlete simply because the athlete had been returned to play by a medical professional. Concussion is a diagnosis made primarily upon clinical symptoms which are included in the concussion information

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sheet attached as **Exhibit 2**. The symptoms can reoccur after an athlete has been cleared to return to play and would be potential evidence that the previously diagnosed concussion was not fully healed. Because the signs and symptoms of a concussion can show up right after the injury or take hours or days to fully appear, the Lystedt Law was intended to place an ongoing responsibility upon healthcare professionals, coaching staff, and other individuals on the field to monitor or otherwise supervise an athlete for signs and symptoms of concussion and to immediately remove the player upon observation of the same. This obligation was intended to apply even where an athlete had been returned to play or otherwise cleared to play by a qualified medical health professional.

5. In the instant case, I have been provided and reviewed the following:

- Medical Records from Dr. Timothy Burns
- Medical Records from E. Adams Rural Hospital
- Medical Records and imaging from Inland Imaging
- Medical Records from Kootenai Medical Center
- Medical Records from Kootenai Urgent Care
- Medical Records and imaging from Sacred Heart Medical Center
- Deposition of Donald Swank
- Deposition of Patricia Swank
- Deposition of Rosharon Swank
- Deposition of Timothy Swank
- Deposition of Nora Tiffany, RN
- Deposition of Richard White
- Deposition of Timothy Burns, MD
- Deposition of Donald Cambra
- Deposition of Derick Tabish
- Deposition of Michael Heden
- Deposition of Glen Miles
- Deposition of James Puryear
- Deposition of Kelly Puryear
- Affidavit of Jannette Lawson
- Affidavit of Perry Lawson

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6. It is my opinion to a reasonable degree of probability or certainty that per the Lystedt legislation, the coaching staff and school Defendants had an ongoing responsibility for Drew's safety that required them to continue to monitor or otherwise supervise Drew for any ongoing or returning signs or symptoms of concussion and to immediately remove Drew once he demonstrated signs that included an appearance of being dazed, confusion about his on-field assignments and movements that displayed incoordination or slowed reflex times or reactions. It is my understanding that these observations were made by individuals who attended the September 25, 2009 game in Washtucna and were an indication that Drew Swank more likely than not continued to suffer from the concussion he had been previously diagnosed with by Defendant Dr. Timothy Burns. Consistent with the requirements of the Lystedt legislation, the coaching staff should have removed Drew from play once he began to exhibit the signs and symptoms and kept Drew off the field until he had been properly evaluated and cleared to return to play again.

7. With respect to Dr. Timothy Burns, it is my opinion to a reasonable degree of medical probability or certainty that he violated the standard of care and the requirements of the Lystedt Law when he returned Drew to play without properly evaluating him prior to doing so. Specifically, it is my understanding from reviewing the medical records and depositions that Dr. Burns initially diagnosed Drew with concussion or closed head injury. Approximately three days later, based upon a telephone call from Drew's mother Patti Swank to Dr. Burns' office, Dr. Burns cleared Drew to return to play based upon the mother's representation that the headaches had resolved. The standard of care for concussion evaluation and management required that Dr. Burns see Drew in his office and engage in an examination to determine if Drew's concussion had resolved and that he was an appropriate candidate to begin the return to play process. Dr. Burns' clearance based upon limited

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information provided to his office staff by Drew Swank's mother over the telephone did not meet with the standard of care required and was a proximate cause of Drew's decline during the football game in question and his eventual death. The opinions I am expressing are based on a reasonable degree of medical probability or certainty.

EXECUTED UNDER PENALTY OF PERJURY at Seattle, Washington this 11th day of July, 2014.

Stanley A. Herring MD

STANLEY A. HERRING

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed as follows:

Gregory J. Arpin *Paine Hamblen* 717 West Sprague Avenue, Suite 1200 Spokane, WA 99201	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery [ ] Messenger Delivery
Edward J. Bruya *Keefe, Bowman & Bruya* 221 N. Wall Street, Suite 210 Spokane, WA 99201-0910	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery [ ] Messenger Delivery
Patrick J. Cronin Carl E. Hueber WINSTON & CASHATT 601 W. Riverside, Suite 1900 Spokane, WA 99201	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery [ ] Messenger Delivery
Steven R Stocker STOCKER, SMITH, LUCIANI & STAUB 312 W. Sprague Avenue Spokane, WA 99201	[ ] U.S. Mail [ ] Fax [ ] Overnight Delivery [X] Hand Delivery [ ] Messenger Delivery

Mary A Rue

Bench Copy to: Honorable Michael P.Price

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SUPERIOR COURT, STATE OF WASHINGTON, SPOKANE COUNTY

DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK and PATRICIA A. SWANK, individually, Plaintiffs, vs. VALLEY CHRISTIAN SCHOOL, a Washington State Non-profit Corporation, JIM PURYEAR and DERICK TABISH, individually, and TIMOTHY F. BURNS, M.D., individually, Defendants.	No. 12-2-03766-8 **GR 17 DECLARATION RE: FAXED MATERIAL**

I, MARY A. RUA, declare under penalty of perjury of the laws of the State of Washington that this statement is true and correct to the best of my knowledge.

I received and examined the complete and legible Declaration of Stanley A. Herring, M.D., on July 11, 2014, and have determined that the Declaration, without exhibits, consists of 7 pages, including this declaration. I have confirmed with Stanley A. Herring, M.D. that he approved the signature on the Declaration on July 11, 2014.

Signed in Spokane, Washington on July 14, 2014.

Mary A. Rua

Mary A. Rua, Paralegal

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

West's RCWA 4.24.670

4.24.670. Liability of volunteers of nonprofit or governmental entities

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Credits
[2001 c 209 § 1.]

West's RCWA 4.24.670, WA ST 4.24.670
Current with Chapters 1, 2, and 3 from the 2015 Regular Session

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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.

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES

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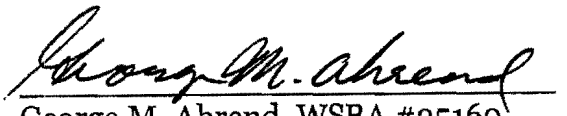
FILED AS
ATTACHMENT TO EMAIL

Pursuant to RAP 10.8, Plaintiffs-Petitioners Donald R. Swank, individually and as personal representative of the Estate of Andrew F. Swank, and Patricia A. Swank (collectively Swank), submit the following statement of additional authority regarding the exercise of personal jurisdiction by Washington courts over Defendant-Respondent Timothy F. Burns (*see* Petitioners' Opening Brief, at 46-50; Brief of Respondent Timothy F. Burns, at 15-30; Petitioners' Reply to Burns, at 10-15):

Failla v. FixtureOne Corp., 181 Wn. 2d 642, 336 P.3d 112 (2014) (upholding exercise of personal jurisdiction over out-of-state corporate officer for violation of statutes prohibiting willful withholding of wages, RCW 49.52.050 & .070; copy attached).

Respectfully submitted this 20th day of August, 2015.



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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On August 20, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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and upon Petitioners' co-counsel, Mark D. Kamitomo and Collin M. Harper, via email pursuant to prior agreement for electronic service, as follows:

Mark D. Kamitomo at mark@markamgrp.com
Collin M. Harper at collin@markamgrp.com

Signed on August 20, 2015 at Ephrata, Washington.

Shari M. Canet

181 Wash.2d 642
Supreme Court of Washington,
En Banc.

Kristine **FAILLA**, Petitioner,
v.
FIXTUREONE CORPORATION; and
Kenneth A. Schutz, Respondents.

No. 89671–2. | Oct. 2, 2014.
| Reconsideration Denied Nov. 25,
2014. | As Amended Nov. 25, 2014.

Synopsis

Background: Former employee filed a complaint against former employer and former employer's chief executive officer (CEO), asserting claims for unpaid wages and breach of employment contract. Former employee was unable to obtain service on former employer, which was a Pennsylvania corporation, and proceeded only against CEO and served him in Pennsylvania. The Superior Court, Pierce County, Garold E. Johnson, J., denied CEO's motion to dismiss for lack of personal jurisdiction and granted former employee's motion for summary judgment. CEO appealed. The Court of Appeals, Bjorgen, J., 177 Wash.App. 813, 312 P.3d 1005, reversed. Former employee petitioned for further review.

Holdings: The Supreme Court, En Banc, Yu, J., held that:

[1] under long-arm statute, CEO's contacts with Washington were sufficient to confer personal jurisdiction over him for purposes of adjudicating wage dispute, and

[2] CEO was personally liable for willfully failing to pay Washington resident wages she was owed.

Reversed.

Owens, J., filed dissenting opinion.

West Headnotes (15)

[1] **Appeal and Error**
Cases Triable in Appellate Court
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
The Supreme Court reviews the grant of summary judgment de novo and engages in the same inquiry as the trial court, determining whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law; in so doing, the Court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

2 Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
A trial court's assertion of personal jurisdiction is a question of law that is reviewed de novo, where the jurisdictionally relevant facts are undisputed.

Cases that cite this headnote

[3] **Constitutional Law**
Representatives of organizations; officers, agents, and employees
Courts
Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(10) Representatives of organizations; officers, agents, and employees
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.6 Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction
106k13.6(3) Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106k13.6(4) In general

Under the long-arm statute, Pennsylvania corporation's chief executive officer's (CEO) contacts with Washington were sufficient to confer personal jurisdiction over him for purposes of adjudicating wage dispute with Washington resident; CEO was the officer directly responsible for the hiring, firing, promotion, and payment of Washington resident's wages, and because it was not unreasonable to require corporation that knowingly employed a Washington resident to abide by Washington's laws, it did not offend fair play or substantial justice to require CEO to defend against Washington resident's wage claim in Washington, and it was not unreasonable to require the individual responsible for payroll to answer for failing to comply with Washington's wage laws. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185(1)(a), 49.52.050, 49.52.070.

Cases that cite this headnote

[4] **Constitutional Law**
Non-residents in general
92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 Non-residents in general

Washington courts are authorized to assert personal jurisdiction over nonresident defendants to the extent permitted by the federal due process clause. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[5] **Constitutional Law**
Non-residents in general
92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 Non-residents in general

States can exercise jurisdiction without violating due process if the nonresident defendant has certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice; the central concern of the federal constitutional inquiry is the relationship between the defendant, the forum, and the litigation. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[6] **Constitutional Law**
Non-residents in general
Courts
Related contacts and activities; specific jurisdiction
Courts
Corporations and business organizations
92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3964 Non-residents in general
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.3 Factors Considered in General
106k13.3(5) Connection with Litigation
106k13.3(8) Related contacts and activities; specific jurisdiction
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.4 Particular Nonresident Entities
106k13.4(3) Corporations and business organizations

Three factors must coincide for the long-arm statute to apply, which encompasses both the statutory and due process concerns of exercising personal jurisdiction: (1) the

nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction must not offend traditional notions of fair play and substantial justice, considering the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of state laws afforded the respective parties, and the basic equities of the situation. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185.

1 Cases that cite this headnote

[7] **Courts**
Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.6 Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction
106k13.6(3) Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106k13.6(4) In general
A foreign corporation's actions cannot be simply imputed to a corporate officer or employee for purposes of determining whether there are minimum contacts necessary to establish jurisdiction under the long-arm statute. West's RCWA 4.28.185.

Cases that cite this headnote

[8] **Courts**
Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.6 Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction
106k13.6(3) Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106k13.6(4) In general
An officer or employee of a foreign corporation is not automatically shielded from personal jurisdiction just because his contacts occurred in the context of his employment; instead, each defendant's contacts with the forum State must be assessed individually. West's RCWA 4.28.185.

Cases that cite this headnote

[9] **Courts**
Corporations and business organizations
Courts
Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.4 Particular Nonresident Entities
106k13.4(3) Corporations and business organizations
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.6 Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction
106k13.6(3) Jurisdiction of Agents, Representatives, or Other Third Parties Themselves
106k13.6(4) In general
The Supreme Court determines personal jurisdiction over a foreign corporation or its employees on a case-by-case basis. West's RCWA 4.28.185.

Cases that cite this headnote

[10] **Constitutional Law**

Business, business organizations, and corporations in general

Courts

Business contacts and activities; transacting or doing business

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3961 Jurisdiction and Venue
92k3965 Particular Parties or Circumstances
92k3965(3) Business, business organizations, and corporations in general
106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction
106k13.3 Factors Considered in General
106k13.3(9) Commercial Contacts and Activities; Contracts and Transactions
106k13.3(11) Business contacts and activities; transacting or doing business

Employing a Washington resident to perform work in Washington constitutes the "transaction of any business within this state" under the long-arm statute; jurisdiction is proper in Washington for wage claims arising from that employment, and employees may seek redress in the state's courts absent an enforceable contract selecting an alternative forum and assuming fair play and substantial justice are not offended. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185(1)(a).

Cases that cite this headnote

[11] **Labor and Employment**

Payment of wages in general

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2178 Payment of wages in general

Pennsylvania corporation's chief executive officer (CEO) was personally liable for willfully failing to pay Washington resident wages which she was owed; CEO hired Washington resident, unilaterally promoted her, directed the corporation's comptroller to increase Washington resident's salary, and admitted his fiscal authority in an e-mail to Washington resident. West's RCWA 49.52.050, 49.52.070.

Cases that cite this headnote

[12] **Labor and Employment**

Payment of wages in general

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2178 Payment of wages in general

The critical, but not stringent, prerequisite to liability in a case under statutes that create a cause of action against an employer or an employer's officer who willfully and with intent deprives an employee of his or her wages, is that the employer's, or officer's, failure to pay wages was wilful. West's RCWA 49.52.050, 49.52.070.

Cases that cite this headnote

[13] **Labor and Employment**

Payment of wages in general

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2178 Payment of wages in general

The employee seeking to recover under statutory provision that prohibits an employer or an employer's officer from willfully depriving the employee of any part of his or her wages need show only that the refusal to pay was a volitional act, not the product of mere carelessness and not the result of a bona fide dispute. West's RCWA 49.52.050, 49.52.070.

Cases that cite this headnote

[14] **Judgment**

Labor and employment

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) Labor and employment

Usually, the issue of whether an employer acts "willfully," for purposes of statutes that prohibit an employer or an employer's officer from

willfully depriving the employee of any part of his or her wages, is a question of fact, but as with all fact questions, summary judgment is proper as a matter of law if the evidence supports a single reasonable conclusion. West's RCWA 49.52.050, 49.52.070.

Cases that cite this headnote

[15] **Labor and Employment**

Payment of wages in general

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(A) In General
231Hk2178 Payment of wages in general

Officers, vice principals, and agents act "wilfully," for purposes of statutory directive that holds personally liable the party responsible for paying wages who willfully fails to pay the wages owed, if those individuals exercise control over the employer's funds and still fail to pay their employees. West's RCWA 49.52.050, 49.52.070.

Cases that cite this headnote

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Opinion

YU, J.

*646 ¶ 1 This case asks whether Washington's long-arm statute, RCW 4.28.185, confers personal jurisdiction over an officer of a foreign corporation that employs a Washington resident. On the facts before us, we conclude it does for wage claims arising from that employment relationship and reverse the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

¶ 2 In 2009, Kristine Failla, a Washington resident and experienced salesperson, was looking for a job she could perform from her Gig Harbor home. She e-mailed Kenneth A. Schutz looking for such a position. Schutz is the founder and chief executive officer (CEO) of FixtureOne Corporation, which sells fixtures, casework, and displays for use in retail stores. Clerk's Papers (CP) at 62. Both FixtureOne and Schutz are based in Pennsylvania, and at the time of Failla's e-mail, FixtureOne had no physical presence or customers in Washington.

¶ 3 Failla's inquiry caught the interest of Schutz, who replied to Failla that she "may be a fit" for FixtureOne because the company did "not have a sales representative in [this] area of the country." CP at 93. The parties continued negotiating, and Schutz eventually invited Failla to interview with FixtureOne in Pennsylvania knowing she lived and planned to work in Washington. Schutz admits the nature of FixtureOne's business allows sales representatives to work anywhere with Internet and telephone access. CP at 63.

*647 ¶ 4 FixtureOne hired Failla as an account executive in November 2009 and agreed to pay her an annual salary of $75,000, plus an additional three percent commission on sales. Failla's job responsibilities included, among other duties, "leading the company" in "[p]lanning, execution and management of profitable growth and expansion of the company's **1115 revenue base and market share." CP at 30. The job also involved the "[d]esign, implementation and management of business development, client acquisition, and sales strategies." *Id.* Failla reported directly to Schutz, and the two communicated extensively by e-mail.

¶ 5 In December 2010, Failla requested a promotion and a raise. Schutz agreed and promoted her to FixtureOne's vice president of sales, increasing her salary to $135,000. Although there were outstanding commissions owed, Failla accepted the promotion and salary increase based on the assurances that the commissions would be paid. CP at 36. Schutz provided a draft employment agreement for Failla to sign in connection with the promotion. Among other things, the agreement contained a provision that it would be interpreted in accordance with Pennsylvania law. Failla proposed revisions to the agreement, but for reasons unknown neither Failla nor Schutz ever signed it.

¶ 6 Failla continued working for FixtureOne from her Washington home until May 2011. She received regular paychecks, and the only issue in this case is the sales

commissions owed to her that were not paid. On May 26, 2011, Schutz e-mailed Failla to tell her that FixtureOne was "clos[ing] its doors" and ending her employment the following day. CP at 44. He assured Failla that FixtureOne would "pay your commissions and expenses asap in the next several weeks." *Id.* For two months following her termination, Schutz returned Failla's requests for payment with various explanations as to why the commissions remained unpaid. At one point he told Failla that he signed her commission check and blamed another employee for not mailing it. At other times he faulted the company's comptroller ***648** for failing to calculate the commission amount. Schutz eventually advised Failla that she would not receive a commission check and for the first time disputed whether such commissions were even owed. CP at 50.

¶ 7 Failla filed suit against FixtureOne and Schutz for the wilfull withholding of wages, including an allegation that Schutz was individually liable under Washington's wage laws, RCW 49.52.050 and .070. Failla served Schutz in Pennsylvania but was unable to serve FixtureOne. Consequently the suit proceeded against Schutz alone.

¶ 8 Failla and Schutz cross moved for summary judgment.[1] Schutz argued that the trial court lacked personal jurisdiction because he did not have the requisite minimum contacts with the state, and even if Washington could exercise jurisdiction over him, there were genuine issues of material fact preventing the entry of summary judgment. The trial court concluded it had personal jurisdiction and denied Schutz's summary judgment motion. Instead, the court granted summary judgment to Failla, awarding double damages pursuant to RCW 49.52.070, which provides for such damages when an employer wilfully withholds wages due an employee.

1 Schutz styled his motion as one to dismiss, but because he relied on materials outside the complaint, the superior court properly treated the motion as one for summary judgment. CR 12(b), 56.

¶ 9 The Court of Appeals reversed, holding that Washington's long-arm statute did not reach Schutz because the employment relationship between Failla and FixtureOne was inadequate to confer jurisdiction over Schutz. *Failla v. FixtureOne Corp.*, 177 Wash.App. 813, 312 P.3d 1005 (2013). We granted review. *Failla v. FixtureOne Corp.*, 180 Wash.2d 1007, 321 P.3d 1207 (2014).

¶ 10 Both parties agree FixtureOne, not Schutz, was the employer entity that hired Failla and that Failla performed work for FixtureOne in Washington. The disputed issue is whether Schutz, as the president and CEO of FixtureOne, is ***649** subject to Washington's jurisdiction and, if so, whether the trial court erred in finding he is liable under Washington's wage statute for nonpayment of wages under RCW 49.52.050 and .070. We hold that Schutz is subject to Washington's jurisdiction based on his level of contacts and transactions in Washington, regardless of whether he ever personally set foot in the state, and that the record supports the trial court's finding of liability.

****1116 ANALYSIS

I. Standard of Review

[1] ¶ 11 We review the grant of summary judgment de novo and engage in the same inquiry as the trial court, determining whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Lewis v. Bours*, 119 Wash.2d 667, 669, 835 P.2d 221 (1992). "In so doing, '[t]he court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.' " *Id.* (alteration in original) (quoting *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990)).

[2] ¶ 12 Similarly, a trial court's assertion of personal jurisdiction is a question of law that we review de novo, where, as here, the jurisdictionally relevant facts are undisputed. *Id.*

II. Personal Jurisdiction

[3] [4] [5] ¶ 13 Washington courts are authorized to assert personal jurisdiction over nonresident defendants to the extent permitted by the federal due process clause. *Shute v. Carnival Cruise Lines*, 113 Wash.2d 763, 766–67, 783 P.2d 78 (1989). States can exercise jurisdiction without violating due process if the nonresident defendant has certain minimum contacts with the state such that the maintenance of ***650** the suit does not offend traditional notions of fair play and substantial justice. *Daimler AG v. Bauman*, —U.S. —, 134 S.Ct. 746, 754, 187 L.Ed.2d 624 (2014) (citing the Court's

canonical opinion *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). The central concern of the federal constitutional inquiry is the relationship between the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

[6] ¶ 14 Our long-arm statute, designed to be coextensive with federal due process, subjects nonresident defendants to personal jurisdiction of Washington courts for any cause of action that arises from the transaction of any business within the state, among other conduct. RCW 4.28.185(1)(a). Three factors must coincide for the long-arm statute to apply:

> "(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction must not offend traditional notions of fair play and substantial justice, considering the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of state laws afforded the respective parties, and the basic equities of the situation."

Shute, 113 Wash.2d at 767, 783 P.2d 78 (quoting *Deutsch v. W. Coast Mach. Co.*, 80 Wash.2d 707, 711, 497 P.2d 1311 (1972)). This inquiry encompasses both the statutory and due process concerns of exercising personal jurisdiction. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash.2d 954, 964, 331 P.3d 29 (2014).

¶ 15 Schutz argues he is not subject to Washington's jurisdiction because he has never been to Washington and because he acted only as an employee and officer of the corporation that employed Failla. He asserts that jurisdiction and liability, if any, rests exclusively with the employing corporation.

[7] [8] [9] *651 ¶ 16 We agree that a corporation's actions cannot be simply imputed to a corporate officer or employee for purposes of determining whether there are minimum contacts necessary to establish jurisdiction. But it is just as true that an officer or employee is not automatically shielded from personal jurisdiction just because his contacts occurred in the context of his employment. *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Instead, "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.; see also Davis v. Metro Prods., Inc.*, 885 F.2d 515, 522 (9th Cir.1989) (affirming states' authority to assert personal jurisdiction over corporate officers based on contacts performed **1117 in that capacity). We determine personal jurisdiction on a case-by-case basis.

¶ 17 Schutz is the founder and CEO of FixtureOne. He was the individual who responded to Failla's job inquiry, interviewed her, and hired her because of the potential benefits to FixtureOne of having a sales representative in Washington. During the two-year course of her employment, Schutz set her salary, issued her payroll checks, promoted her, gave her a raise, and calculated her commissions. He appeared to be the primary contact for Failla, and in fact, there is no evidence in the record that Failla had contact with anyone other than Schutz. Failla was FixtureOne's employee located in the State of Washington who, while working in this state, generated over $700,000 in revenue for the company in 2010. CP at 40.

¶ 18 The Court of Appeals held that Washington could not exert jurisdiction over Schutz because

> FixtureOne did not register to do business in Washington and never had operations, officers, or customers in this state. Nothing about Schutz's employment of Failla anticipated that her activities in Washington would consist of more than residing here, working from home, and collecting a paycheck. Nothing in the record shows any attempt to do business with a Washington company, let alone any transactions with Washington companies.

*652 *Failla*, 177 Wash.App. at 823–24, 312 P.3d 1005. The Court of Appeals' analysis relies upon a finding that a person or company must target potential *consumers* in Washington, a subset of all this state's residents, to have transacted business here and to come within reach of the long-arm statute. But we have interpreted RCW 4.28.185(1)(a) more broadly.

¶ 19 For example, in *Toulouse v. Swanson*, 73 Wash.2d 331, 334, 438 P.2d 578 (1968), we held that it was "beyond dispute" that an Idaho resident transacted business in this state under the long-arm statute when he employed a Washington lawyer. We found it particularly relevant that the parties' contract " 'called for services over an extended period of time,' " giving the nonresident defendant an ongoing connection to this state. *Id.* at 331, 438 P.2d 578 (quoting trial court order). Likewise, in *Thornton v. Interstate Securities Co.*, 35 Wash.App. 19, 23–25, 666 P.2d 370 (1983), the Court of Appeals determined that Washington could assert personal jurisdiction over a Kansas successor corporation on the basis that it consummated a transaction when it employed a Washington resident. "It has availed itself, however, of the knowledge and services of [the Washington employee] to collect accounts receivable here. It has thus carried on activity which touched the matter in issue—use of [the employee's] services under the employment contract." *Id.* at 25, 666 P.2d 370.

¶ 20 Similarly, in *Cofinco of Seattle, Ltd. v. Weiss*, 25 Wash.App. 195, 196, 605 P.2d 794 (1980), the Court of Appeals exercised jurisdiction over a nonresident defendant who agreed to work for a Washington corporation selling shoes on the East Coast. Jurisdiction was proper despite the fact that the defendant, who lived and worked in New York, had never been to Washington, never owned real property situated in Washington, and "never engaged in any activities, business or otherwise, in the state." *Id.* The court correctly held that Washington courts had the jurisdictional power to adjudicate the employment dispute and that by entering into the employment contract, the employee purposefully ***653** availed himself of the privilege of conducting activities within the state of Washington. *Id.* at 197, 605 P.2d 794.

¶ 21 Logically, if a nonresident employee defendant in New York is afforded the protection of Washington's laws governing the employer-employee relationship, at the very least a Washington resident should also be afforded the statutory protection of Washington's wage laws. A Pennsylvania employer that employs a Washington resident, and through that employee, conducts business from Washington for over two years forms a sufficient connection to the state such that it should reasonably anticipate defending a wage dispute here.[2]

2 A relevant inquiry in this case is whether Schutz could " 'reasonably anticipate being haled into court' " in Washington. *Calder*, 465 U.S. at 790, 104 S.Ct. 1482 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). This standard "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or 'the unilateral activity of another party or a third person.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citations omitted) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)); *World-Wide Volkswagen*, 444 U.S. at 299, 100 S.Ct. 559; *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

The dissent agrees the "contact" in question here is Schutz's correspondence with and decision to hire Failla. But it fails to evaluate the extent of contact and subsequent contacts under the proper precedent. Instead, the dissent concludes Washington lacks minimum contacts because Failla "did not solicit any business in Washington, and there is no record that [FixtureOne] made any sales or did any advertising in Washington." Dissent at 3. The dissent does not explain why Schutz would have been better able to foresee Failla's lawsuit for unpaid wages if FixtureOne had solicited more business in Washington.

Moreover, the dissent relies principally on *Walden v. Fiore*, ——U.S. ——, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014), a case easily distinguishable. *Walden* involved a federal agent who stopped a couple at an airport in Georgia, seized from them $97,000 in cash, and allegedly filed a false and misleading affidavit in support of forfeiture. *Id.* at 1120–21. The couple, who had residences in California and Nevada, sued in Nevada. *Id.* at 1121. The United States Supreme Court unanimously held the Nevada court lacked personal jurisdiction over the agent, who "never traveled to, conducted activities within, *contacted anyone in, or sent anything or anyone to Nevada*." *Id.* at 1124 (emphasis added). The plaintiffs' residence in Nevada was, from the point of view of the defendant, random and fortuitous.

Schutz's connection to Washington was not random and fortuitous. It was the product of deliberate negotiation with Failla over the terms of her employment and salary and apparently stemmed in part from his decision that FixtureOne needed a sales representative in that part of the country. For this reason, *Walden* is inapposite.

****1118 [10] *654** ¶ 22 Thus, we hold that employing a Washington resident to perform work in Washington constitutes the "transaction of any business within this state" under RCW 4.28.185(1)(a) and satisfies the first *Shute* prong.

Jurisdiction is proper in Washington for wage claims arising from that employment, and employees may seek redress in this state's courts absent an enforceable contract selecting an alternative forum and assuming fair play and substantial justice are not offended.

¶ 23 This analysis is a practical application of the principles delineated in *Toulouse*, *Thornton*, and *Cofinco* and conforms the long-arm statute to the "phenomena of [the] modern economy." *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wash.2d 679, 684, 430 P.2d 600 (1967) (interpreting RCW 4.28.185 consistently with contemporary business practices). We recognize many employers no longer do business in physical buildings or rely upon hands-on or face-to-face presence for there to be actual presence in a geographical location.

¶ 24 In this case, as outlined above, Schutz is not just *any* corporate officer, and we do not hold today that any corporate officer of a nonresident corporation may be subject to the state's jurisdiction. Rather, Schutz was the officer directly responsible for the hiring, firing, promotion, and payment of Failla's wages. Schutz's contacts with the state of Washington were sufficient to confer jurisdiction over him for wage disputes arising from those contacts.

¶ 25 Likewise, it does not offend fair play or substantial justice to require Schutz to defend Failla's wage claim here. It is not unreasonable to require a company that knowingly employs a Washington resident to abide by this state's wage laws, nor is it unreasonable to require the individual responsible for payroll to answer for failing to comply with those laws. Schutz knew from the outset that he was hiring an employee in Washington and, as Failla's primary contact ***655** at FixtureOne, was ultimately responsible for paying her. Employers have fair notice of our laws governing the employer-employee relationship, including RCW 49.52.050 and .070, which impose individual liability. We cannot say under the facts of this case that exercising jurisdiction violates due process. This satisfies the third *Shute* prong,[3] and the ****1119** trial court was correct to exercise personal jurisdiction over Schutz.

3 The second *Shute* prong is not at issue. Neither party contests that Failla's claim arises from Schutz's contacts with Washington (the non-payment of wages due under the employment relationship).

III. Summary Judgment

[11] [12] [13] [14] ¶ 26 The trial court entered judgment in favor of Failla under RCW 49.52.050 and .070. Together these statutes create a cause of action against

> [a]ny employer *or officer, vice principal or agent of any employer* ... who ...
>
> [w]ilfully and with intent to deprive the employee of any part of his or her wages, [pays] any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract.

RCW 49.52.050(2) (emphasis added). The critical, but not stringent, prerequisite to liability is that the employer's (or officer's) failure to pay wages was "wilfull." *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159–60, 961 P.2d 371 (1998). The employee need show only that the refusal to pay was a volitional act, not the product of mere carelessness and not the result of a bona fide dispute. *Id.* at 160, 961 P.2d 371. Usually wilfullness is a question of fact, but as with all fact questions, summary judgment is proper as a matter of law if the evidence supports a single reasonable conclusion. *Id.*

[15] ¶ 27 We affirm the trial court's judgment. The evidence that Schutz offered the trial court-e-mails in which he faults other employees under his direction for not ***656** calculating and paying the commissions to Failla—does not create a genuine issue of fact regarding wilfullness such that it requires a trial on the issue. RCW 49.52.050 and .070 express the legislature's "strong policy in favor of ensuring the payment of the full amount of wages earned." *Morgan v. Kingen*, 166 Wash.2d 526, 538, 210 P.3d 995 (2009). Corporations act only through individuals, and by extending personal liability to individual officers for wages owed by the corporation, the legislature recognized that "officers control the choices over how the corporation's money is used." *Id.* at 537, 210 P.3d 995. Thus, officers, vice principals, and agents act wilfully if those individuals exercise control over the employer's funds and still fail to pay their employees. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash.2d 514, 522–23, 22 P.3d 795 (2001) (rejecting liability based on mere agency). We affirmed summary judgment for the employees in *Morgan* based on the employing CEO's ultimate control of the business's finances, which included the authority to hire employees and set compensation. 166 Wash.2d at 531, 210 P.3d 995.

¶ 28 Schutz's evidence creates a factual dispute only if we accept as reasonable his suggestion that he lacked power over FixtureOne's assets. The e-mails on which Schutz relies to negate wilfullness, all of which he sent after he terminated Failla, conflict with Schutz's obvious control of the company during Failla's employment. He interviewed her. He hired her. He unilaterally promoted her and directed the company's comptroller to increase her salary. Schutz even admitted his fiscal authority in an e-mail to Failla. CP at 50 ("I know [the comptroller] cut a payroll check for you and I signed it."). The trial court found it possible to draw only one conclusion from this evidence—that Schutz controlled FixtureOne's finances, had the ability to pay Failla, and failed to do so wilfully. We agree.

¶ 29 Nor do we find persuasive Schutz's argument that a bona fide dispute exists regarding the amount of commissions owed to Failla. *See Schilling*, 136 Wash.2d at 160, 961 P.2d 371 (recognizing a bona fide dispute over wages negates wilfullness ***657** under RCW 49.52.050 and .070). Schutz offered the trial court no evidence refuting Failla's accounting and instead relies upon bare allegations in his summary judgment response. Unsupported allegations do not create a question of fact. *Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989).

CONCLUSION

¶ 30 For the above stated reasons, we reverse the Court of Appeals and reinstate the judgment of the trial court. Failla is entitled to her costs and attorney fees on appeal. RCW 49.52.070; *Brandt v. Impero*, 1 Wash.App. 678, 683, 463 P.2d 197 (1969).

WE CONCUR: MADSEN, C.J., JOHNSON, FAIRHURST, STEPHENS, WIGGINS, GONZÁLEZ, and GORDON McCLOUD, JJ.

****1120** OWENS, J. (dissenting).

¶ 31 The constitutional right to due process prohibits courts from asserting personal jurisdiction over a defendant unless he or she has certain "minimum contacts" with the forum. U.S. Const. amend. XIV, § 1; *WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Importantly, the " 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, —— U.S. ——, 134 S.Ct. 1115, 1122, 188 L.Ed.2d 12 (2014). In this case, the out-of-state employer had no contacts with Washington other than hiring the plaintiff, who chose to reside here. Yet, the majority holds that Washington courts have jurisdiction over the employer in his personal capacity. Because this is contrary to the United States Supreme Court's rule that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State," *id.* at 1126, I respectfully dissent.

***658** ANALYSIS

¶ 32 A state's authority to assert jurisdiction over a nonresident defendant is limited by the due process clause of the Fourteenth Amendment. *World–Wide Volkswagen*, 444 U.S. at 291, 100 S.Ct. 559. A nonresident defendant is subject to personal jurisdiction only when he or she has had "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The United States Supreme Court has reiterated that "the 'minimum contacts' inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff." *Walden*, 134 S.Ct. at 1125 n. 9 (citing *World–Wide Volkswagen*, 444 U.S. at 291–92, 100 S.Ct. 559).

¶ 33 In evaluating whether a defendant had such "minimum contacts," courts look to the relationship between the defendant and the forum. *Id.* at 1121. The United States Supreme Court recently pointed out two key aspects of this relationship in a personal jurisdiction case: first, whether the relationship arose "out of contacts that the 'defendant *himself* create[d] with the forum State,' " and second, whether the defendant had contacts with the forum state itself, not just contacts with persons who reside there. *Id.* at 1122.

¶ 34 In this case, the only contact that the defendant had with this state was his contact with the plaintiff, who chose to reside here. The plaintiff was the one who initiated the relationship by contacting the defendant in Pennsylvania, seeking employment. She then flew to Pennsylvania to interview for the position. The plaintiff then conducted all of her work via phone, e-mail, and occasional travel. She did not solicit any business in Washington, and there is no record that the business made any sales or did any advertising ***659** in

Washington. Even the payroll checks signed by the employer were signed in Pennsylvania. In sum, the defendant did not initiate any contact with Washington nor did he conduct any business in Washington. The only contact the defendant had with Washington came from the plaintiff.

¶ 35 The United States Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the *plaintiff* (or third parties) and the forum State." *Id.* (emphasis added). In fact, no matter how "significant the plaintiff's contacts with the forum may be," they cannot be decisive when determining whether the defendant had minimum contacts. *Id.* As described above, the employer's only contacts with Washington were his contacts with the plaintiff. He took no actions related to this state. The majority's inquiry is focused on the defendant's contact with the plaintiff, but none of those contacts related to Washington. Since the plaintiff has not demonstrated minimum contacts between the defendant and the state, there is not a sufficient basis for personal jurisdiction.

¶ 36 Furthermore, the decision of the plaintiff to reside in Washington was hers alone. The "unilateral activity of another party or a third person is not an appropriate **1121 consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, SA v. Hall,* 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). If the plaintiff had chosen to move to another state, there is no indication that the move would have had any effect on the defendant, his actions, or his business. The defendant had no contact with the state other than the plaintiff's unilateral choice to reside here. This is insufficient to confer personal jurisdiction over the defendant.

¶ 37 The Court of Appeals properly noted that "[n]othing about [the defendant's] employment of [the plaintiff] anticipated that her activities in Washington would consist of ***660** more than residing here, working from home, and collecting a paycheck." *Failla v. FixtureOne Corp.,* 177 Wash.App. 813, 823, 312 P.3d 1005 (2013), *review granted,* 180 Wash.2d 1007, 321 P.3d 1207 (2014). The Court of Appeals correctly concluded that the defendant did not have minimum contacts with the state and thus the state's courts lacked personal jurisdiction. *Id.* at 827, 312 P.3d 1005. I would affirm.

CONCLUSION

¶ 38 As the United States Supreme Court has explained, "the plaintiff cannot be the only link between the defendant and the forum." *Walden,* 134 S.Ct. at 1122. Here, the plaintiff is the only link between the defendant and Washington. Following the rules laid out by the United States Supreme Court, I do not see how the state courts have personal jurisdiction in this case.

¶ 39 I respectfully dissent.

All Citations

181 Wash.2d 642, 336 P.3d 1112, 165 Lab.Cas. P 61,528, 2014 Wage & Hour Cas.2d (BNA) 169,349

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