

Supreme Court No. 932824

COA No. 337821-III

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.

SUPPLEMENTAL BRIEF OF PETITIONERS

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Plaintiffs-Petitioners Donald R. Swank, individually and as personal representative of the Estate of Andrew F. (Drew) Swank, and Patricia A. Swank, individually (collectively Swanks), submit the following supplemental brief:

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 filed suit against the school (Valley Christian School or VCS), the coach (Jim Puryear or Puryear), and the physician (Timothy F. Burns, M.D., or Burns), among others, alleging negligence and violation of the Zackery Lystedt law.

The Lystedt law is "the country's first comprehensive concussion law for youth athletes." *Swank v. Valley Christian Sch.*, 194 Wn. App. 67, 77, 374 P.3d 245, *rev. granted*, 186 Wn. 2d 1009 (2016). "The purpose of [the law] is to reduce the risk of injury or death to youth athletes who suffer concussion." *Id.*, 194 Wn. App. at 73 (brackets added). In the text of the law, the Legislature finds that:

(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.

RCW 28A.600.190(1)(a)-(c).

In addition to affirming “generally recognized return to play standards for concussion and head injury,” the Lystedt law imposes three additional obligations to ensure that young athletes are not prematurely returned to play after a concussion: (1) to establish concussion management guidelines in order to educate coaches,

parents, and young athletes about the nature and risk associated with concussions; (2) to remove young athletes from competition if they exhibit any sign or symptom of concussion; and (3) to require evaluation and written clearance from a licensed health care provider trained in the evaluation and management of concussion before the young athlete may return to competition. *See Swank*, at 77 (citing RCW 28A.600.190(2)-(4)).¹

The superior court granted summary judgment dismissing the Swanks' claims against VCS, Puryear and Burns, and the Court of Appeals reversed in part and affirmed in part. The appellate court reversed summary judgment in favor of VCS, reasoning that Swanks stated a claim for negligence under the common law and the Lystedt law, and that violations of the Lystedt law could serve as evidence of negligence under RCW 5.40.050. *See Swank*, at 72 & 82-85. This ruling is not before the Court.²

However, the Court of Appeals declined to recognize that the Lystedt law creates an implied statutory cause of action, *see Swank*,

¹ The full text of the Lystedt law, RCW 28A.600.190, is reproduced in the Appendix.

² *See Swank Pet. for Rev.*, at 3-5 (describing issues on review); VCS Ans. to Pet. for Rev., at 1 (describing issues); *see also* RAP 13.7(b) (limiting scope of review to "questions raised in ... the petition for review and the answer"). Only VCS is aggrieved by this ruling of the Court of Appeals, but Puryear and Burns do not question this aspect of the appellate court's decision either. *See Puryear Ans. to Pet. for Rev.*, at 2-3; Burns Ans. to Pet. for Rev., at 3-6; *see also* RAP 3.1 (providing that "[o]nly an aggrieved party may seek review"; brackets added).

at 80-82, and affirmed summary judgment in favor of Puryear on grounds of volunteer immunity and the statute of limitations for battery, *see id.*, at 85-88, and in favor of Burns on grounds of personal jurisdiction, *see id.*, at 88-91. These rulings are before the Court. *See Swank Pet. for Rev.*, at 3-5.

II. ISSUES PRESENTED FOR REVIEW

1. What is the nature of the obligations imposed by the Lystedt law on schools, coaches and physicians? In particular:
 - a. Do schools and coaches have an obligation (i) to monitor student athletes for signs of concussion, (ii) to remove students showing signs of concussion from competition, (iii) to ensure that students are not returned to competition until after they have been evaluated by a licensed health care provider trained in the evaluation and management of concussion and receive written clearance from that health care provider, and (iv) to return students to competition gradually rather than immediately after a concussion?
 - b. Do physicians have a duty (i) to evaluate student athletes before clearing them to return to competition, and (ii) to clear them to return to competition gradually rather than immediately after a concussion?
2. Does violation of the Lystedt law give rise to an implied statutory cause of action in addition to serving as evidence of negligence under RCW 5.40.050?
3. Where there is evidence that the VCS football team was actually a joint venture between himself and the school, has Coach 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 that he is immune from liability under the Lystedt law pursuant to the statute

conferring immunity on volunteers of nonprofit entities, RCW 4.24.670?

4. Where the Swanks' complaint for violation of the Lystedt law and negligence contained a factual allegation that "[a]s a result of Andrew's uncharacteristically poor play, Defendant Mr. Puryear called Andrew to the sidelines, grabbed him by the facemask and proceeded to violently shake his head up and down in anger[,]" does the complaint state a separate "face mask claim" that is barred by the two-year statute of limitations for assault and battery, RCW 4.16.100(1), rather than the three-year statute of limitations for negligence and implied statutory claims, RCW 4.16.080(2)?
5. Where Dr. Burns, an Idaho physician, improperly cleared Drew Swank to return to competition in Washington in violation of the Lystedt law, is he subject to personal jurisdiction in Washington?
6. Where Dr. Burns improperly cleared Drew Swank to return to competition in Washington in violation of the Lystedt law, are claims against him nonetheless subject to Idaho law and barred by the two-year Idaho statute of limitations for professional negligence, Idaho Code § 5-219(4)?

IV. SUPPLEMENTAL STATEMENT OF THE CASE

The underlying facts are described in the Swanks' opening brief in the Court of Appeals. *See Swank Br.*, at 4-24.

V. SUPPLEMENTAL ARGUMENT

- A. **The Court of Appeals erred in declining to recognize that the Lystedt law creates an implied statutory cause of action.**

There is no dispute regarding the applicable test for determining whether a statute creates an implied cause of action.

See Swank, at 80-81 (quoting *Bennett v. Hardy*, 113 Wn. 2d 912,

920-21, 784 P.2d 1258 (1990)). Under the *Bennett* test, a statutory cause of action is implied if: (1) the plaintiff is within the class for whose benefit the statute was enacted; (2) the legislative intent supports the creation of a remedy; and (3) the remedy implied is consistent with the underlying purpose of the legislation. See *Bennett*, 113 Wn. 2d at 920-21; *Beggs v. State Dep't of Social & Health Services*, 171 Wn. 2d 69, 77, 247 P.3d 421 (2011) (quoting *Bennett*).³

There is no dispute that the Lystedt law satisfies the first element of the *Bennett* test because, as the Court of Appeals correctly noted, "[w]ithout question, Drew [Swank] was within the class who was intended to be benefitted and protected by [the law]." *Swank*, at 81 (brackets added).⁴ The dispute centers around the second and third elements of the *Bennett* test, involving consideration of legislative intent and the purpose of the law.

³ The *Bennett* test is not disputed by VCS or coach Puryear in their briefing, and it is acknowledged by Dr. Burns in his. See *Burns Br.*, at 41-42 n.35 (citing *Beggs*).

⁴ VCS and Puryear do not address the first element of the *Bennett* test in their briefing, and Burns assumes for the sake of argument that it is satisfied. See *Burns Br.*, at 41-42 n.35.

- 1. Legislative intent supports an implied statutory remedy because of: (a) the clear identification of the class of youth athletes protected by the Lystedt law; (b) the mandatory phrasing of the law; (c) the absence of an alternative enforcement mechanism; and (d) the limited grant of immunity for volunteer health care providers for violations of the law.**

Clear identification of the protected class indicates legislative intent to create a remedy because it eliminates uncertainty regarding who is entitled to pursue an implied statutory remedy.⁵ 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.”⁶ In this case, the Lystedt law clearly identifies the protected class. Subsection (1)(a) of the law 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.”

The mandatory phrasing of obligations imposed by the Lystedt law also demonstrates legislative intent to create a remedy because mandatory language avoids problems inherent in trying to

⁵ *Cf. Bennett*, 113 Wn. 2d at 921 (identifying class of persons aged 40-70); *Beggs*, 171 Wn. 2d at 77 (identifying class of victims of child abuse and neglect).

⁶ *Bennett*, 113 Wn. 2d at 921; *accord Beggs*, 171 Wn. 2d at 78 (quoting *Bennett*).

enforce a statute phrased in permissive or discretionary terms.⁷ Section (3) of the Lystedt 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. (Emphasis added.)⁸

The absence of an alternative enforcement mechanism for the Lystedt law further evidences legislative intent to create a remedy. A statute phrased in mandatory terms cannot be mandatory in effect if there is no way to enforce it. In other words, in the absence of an implied remedy, the statute would be permissive and discretionary in effect. The Lystedt law does not contain any express mechanism to enforce the mandatory obligations contained therein.⁹

⁷ *Cf. Beggs*, at 75-78 (implying remedy under statute providing that designated individuals “shall” report suspected child abuse or neglect, and emphasizing mandatory nature of statute).

⁸ *See State v. Rice*, 174 Wn. 2d 884, 896, 279 P.3d 849 (2012) (indicating “shall” is 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”).

⁹ Considering violations of the Lystedt law as evidence of negligence is insufficient because the inference of negligence arising from such evidence is permissive, not mandatory. *See* RCW 5.40.050 (abolishing negligence per se in most circumstances, and stating “[a] breach of a duty imposed by statute ... *may* be considered by the trier of fact as evidence of negligence”; brackets, ellipses & emphasis added).

Lastly, the limited grant of immunity for volunteer health care providers in the Lystedt law supports legislative intent to create a remedy. Section (4) of the law provides that a volunteer health care provider who improperly clears a young athlete to return to play is not liable for negligence (but presumably remains liable for gross negligence or willful or wanton misconduct). 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.” *Beggs*, at 78 (quotation omitted).

Individually and in combination, the clear identification of the protected class, the mandatory phrasing of the Lystedt law, the absence of an alternative enforcement mechanism, and the limited grant of immunity for volunteer health care providers establish legislative intent to create a remedy, and there are no contrary indications of legislative intent.¹⁰

¹⁰ VCS and Puryear do not dispute any of the indicia of legislative intent to create an implied remedy in the text of the Lystedt law highlighted by the Swanks. For his part, Dr. Burns argues that nothing in the *legislative history*, as distinguished from the text of the statute, indicates the legislature intended to imply a civil remedy. *See Burns Br.*, at 41-42 n.35; *id.* at 44-45 & n.39 (summarizing session law and bill report); *id.* at App. A & B (reproducing session law and final bill report). However, legislative intent is discerned primarily from statutory language. *See Town of Woodway v. Snohomish County*, 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014). As stated in the bill report discussed by Burns, it “is not a part of the legislation nor does it constitute a statement of legislative intent.” *Burns Br.*, App. B. In any event, the bill report contains the same indicia of

The Court of Appeals did not court did not address the foregoing evidence of legislative intent, except for the limited grant of immunity granted for health care providers, stating:

The Washington Supreme Court's precedent is divided over how grants of immunity play into the intent to create an implied cause of action. In *Beggs*, the court used the grant of good faith immunity seen in RCW 26.44.030, which requires certain professionals to report suspected child abuse to the proper authorities, to find the statute implicitly supported a civil remedy. *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wash.2d 69, 78, 247 P.3d 421 (2011). But in *Adams*, the court specifically rejected the appellant's argument that good faith immunity sufficed to establish legislative intent to create an implied cause of action for violations of the former Washington Uniform Anatomical Gift Act (WAGA). *Adams*, 164 Wash.2d at 656, 192 P.3d 891. The court noted "if the legislature had intended to provide a remedy under the WAGA, it would have expressly created the liability to which the immunity corresponds." *Id.* The court found further support for its rejection of an implied cause of action in the comment to the revised Uniform Anatomical Gift Act of 2006, which recognized that common law provides remedies if a person acts in bad faith. *Id.*

Swank, at 81-82. Even if correct, this analysis is insufficient to undercut or ignore the other evidence of legislative intent to create a remedy for violations of the Lystedt law.

Moreover, the Court of Appeals' analysis of precedent is flawed on several levels. The availability of alternate remedies is not part of the *Bennett* test for determining whether a statute creates an

legislative intent as the text of the statute: (1) a clearly identified protected class, (2) mandatory obligations, (3) no alternative enforcement mechanism, and (4) limited immunity for volunteer health care providers. In this way, the legislative history confirms the indicia of legislative intent that are present in the statute.

implied cause of action. In *Bennett*, this Court took the opposite approach from the Court of Appeals in this case, and determined that the existence of an implied statutory remedy for age discrimination under RCW 49.44.090 made it unnecessary to determine whether an alternate common law remedy for wrongful discharge was available. *See* 113 Wn. 2d at 923.

Following *Bennett*, this Court recognized an implied statutory cause of action without regard for the availability of alternate remedies in *Beggs*, as the Court of Appeals seemed to acknowledge. *See Swank*, at 81-82. In fact, in *Beggs*, this Court recognized an implied statutory remedy for failure to report suspected child abuse that potentially overlaps with medical negligence claims under Ch. 7.70 RCW.¹¹

The discussion of common law remedies in *Adams v. King County*, 164 Wn. 2d 640, 192 P.3d 891 (2008), does not suggest that the availability of such remedies precludes recognition of an implied statutory remedy in all cases. Instead, *Adams* relied on the official comment to the statute at issue in the case, the revised Uniform Anatomical Gift Act of 2006 (UAGA), which states that

¹¹ *See Beggs*, 171 Wn. 2d at 79 (noting "[t]he doctors argue that their reporting duty could arise only when providing ... health care because they acted in the course of their employment and in the context of a doctor-patient relationship" and that "[a] doctor's duty ... to report suspected child abuse does not necessarily arise while the doctor is providing health care"; brackets & ellipses added).

"the common law provides remedies" for violations of that statute. *See* 164 Wn. 2d at 656 (quoting UAGA § 18 cmt., 8A U.L.A. 70 (2006) (Supp. 2008)). Properly interpreted, *Adams* simply reflects a determination that the Legislature did *not* intend to create an implied statutory remedy for violations of the UAGA. There is no comparable evidence of legislative intent not to create a remedy under the Lystedt law.¹²

The Court should clarify that the availability of alternate remedies does not preclude legislative intent to create an implied statutory remedy, and hold that the Legislature intended to create an implied remedy for violations of the Lystedt law.

2. The purpose of the Lystedt law to reduce the risk of injury or death to young athletes from concussion supports an implied statutory remedy.

The Court of Appeals correctly recognized that the purpose of the Lystedt law is to reduce the risk of injury or death to young athletes from concussion. *See Swank*, at 73 & 77. This purpose is consistent with an implied remedy because the existence of generally recognized return to play standards, and common law remedies proved inadequate to prevent young athletes from being

¹² The discussion of common law remedies in *Adams* also appears to be dicta because, after first determining that the UAGA did not protect a clearly identifiable class, the Court's discussion of the remaining elements of the *Bennett* test was unnecessary. *See* 164 Wn. 2d at 653-56.

prematurely returned to competition after a concussion, and the prospect of liability will encourage schools, coaches and physicians to comply with those standards.¹³

However, the Court of Appeals again relied on *Adams*, stating:

Here, as in *Adams*, the Swanks have remedies apart from implying a cause of action under the Zackery Lystedt law. The availability of remedies weighs against the third *Bennett* prong, which asks whether the legislative purpose is best achieved by implying a cause of action. The Swanks have common law negligence remedies against VCS and Mr. Puryear. They also have a medical malpractice remedy against Dr. Burns. Because RCW 5.40.050 allows a trier of fact to consider the breach of a statutory duty as evidence of negligence, the Swanks may bootstrap their contentions that VCS and Mr. Puryear violated the Zackery Lystedt law into their assertions of negligence. Because the Swanks already have these remedies, we conclude that we need not imply a new cause of action given the legislature's murky intent in this regard.

Swank, at 82 (footnote omitted). The court narrowed the third element of the *Bennett* test, rephrasing it in terms of whether the legislative purpose is *best achieved* by implying a cause of action,"

¹³ See RCW 28A.600.190(1)(a)-(c); cf. *Tyner v. State Dep't of Social & Health Servs.*, 141 Wn. 2d 68, 80-81, 1 P.3d 1148 (2000) (holding implied statutory remedy under RCW 26.44.050 for failure to act upon a report of possible child abuse or neglect satisfies third prong of the *Bennett* test because it encourages non-negligent conduct and compliance with standards); *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).

rather than using the formulation from *Bennett*, which is phrased in terms of "whether implying a remedy is *consistent with* the underlying purpose of the legislation." Compare *id.* at 82 (rephrasing *Bennett* with emphasis added), *with id.* at 80 (quoting *Bennett* with emphasis added). Counsel for the Swanks has found no other decision attempting to narrow *Bennett* in this way.¹⁴ At any rate, as noted above, the availability of common law remedies in *Adams* was not intended to add an element to the *Bennett* test when the legislative purpose is otherwise consistent with an implied statutory remedy.

The Court should clarify that *Bennett* simply requires an implied statutory remedy to be "consistent" with the purpose of the statute, and that such a remedy is consistent with the purpose of the Lystedt law, notwithstanding the availability of a potentially overlapping alternate remedy.

¹⁴ Compare *Becker v. Community Health Sys., Inc.*, 184 Wn. 2d 252, 359 P.3d 746 (2015), *Rose v. Anderson Hay & Grain Co.*, 184 Wn. 2d 268, 358 P.3d 1139 (2015), and *Rickman v. Premera Blue Cross*, 184 Wn. 2d 300, 358 P.3d 1153 (2015), where the Court overruled case law holding that claims for wrongful discharge in violation of public policy could only be brought when they were the only adequate means of vindicating public policy, which generally precluded such claims when other remedies were available.

B. The Court of Appeals erred in holding that Washington courts lack personal jurisdiction over Burns because he released Drew Swank to play football in Washington in violation of the Lystedt law, distinguishing this case from the Court's decision in *Lewis v. Bours*.

The Court of Appeals held that Burns, as an Idaho physician, was not subject to personal jurisdiction in Washington despite the fact that he released Drew Swank to play football in Washington, for a Washington school, pursuant to the requirements of Washington law. *See* CP 188, 373 & 897. The court relied on this Court's decision in *Lewis v. Bours*, 119 Wn. 2d 667, 835 P.2d 221 (1992). *See Swank*, at 89-90. In *Lewis*, the Court recognized an exception to the general rule that personal jurisdiction exists where a tort is committed, and that the place of the tort is where injury manifests. *See Lewis*, 119 Wn. 2d at 673. Specifically, the Court stated:

In 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 regardless of whether the Washington State resident suffered injury upon his or her return to Washington.

Id. at 673 (emphasis added); *accord id.* at 674 (similar). The "standing alone" language indicates that the exception to the general rule of personal jurisdiction is limited to malpractice claims arising from out-of-state treatment, under circumstances where the

sole fact supporting the exercise of personal jurisdiction is the manifestation of injury within the state. In other circumstances, the general rule applies.

Lewis is distinguishable because the Swanks' claims against Burns do not arise solely out of his negligence in the State of Idaho, but rather from releasing Drew Swank to play football in Washington, for a Washington school, pursuant to the requirements of the Lystedt law. The Court of Appeals acknowledged that "Burns may have known Drew played football in Washington." *Swank*, at 90. However, Burns did not merely *know* that Drew played football in Washington. He *released* him to play football in Washington, for a Washington school, in order to satisfy a requirement imposed by the Lystedt law.¹⁵ The Court of Appeals did not address these dispositive facts.

¹⁵ Cf. *Failla v. FixtureOne Corp.*, 181 Wn. 2d 642, 336 P.3d 112 (2014) (upholding exercise of personal jurisdiction over out-of-state officer of corporation that violated statutes prohibiting willful withholding of wages, RCW 49.52.050 & .070). While the release to play football in Washington in violation of the Lystedt law should suffice to establish specific personal jurisdiction, the extent to which Burns' practice of medicine involves the State of Washington further distinguishes *Lewis*, and supports the exercise of personal jurisdiction in this case. See *Swank Br.*, at 16-19. It appears that the Court of Appeals declined to consider this information on grounds that general, as distinguished from specific, personal jurisdiction was not adequately argued. See *Swank*, at *12 n.7. The court is incorrect because the Swanks identified the facts and law supporting general as well as specific jurisdiction. See *Swank Br.*, at 16-19 (facts); *id.* at 47 n.91 (law).

The Court of Appeals attempted to justify its decision based on "public policy reasons" derived from "the personal nature of rendering services as opposed to the sale of goods." *Swank*, at 91. However, in addition to ignoring the dispositive facts, the court completely overlooked the compelling public policy underlying the Lystedt law. *See* RCW 28A.600.190(1)(a)-(c). The effect of applying *Lewis* is to undercut this policy and create gaps in the coverage of the law for young athletes who live or go to school near Washington's borders, such as Spokane or Vancouver. Given that Burns released Swank to play football in Washington pursuant to the requirements of the Lystedt law, the general rule of personal jurisdiction should apply.¹⁶

¹⁶ The parties also addressed choice of law, but this issue was not reached by the Court of Appeals. Generally speaking, the most significant relationship test, set forth in the Restatement (Second) of Conflict of Laws § 6 (1971), governs choice of law in Washington. *See, e.g., Woodward v. Taylor*, 184 Wn. 2d 911, 918, 366 P.3d 432 (2016). However, the most significant relationship test applies only in the absence of a statutory choice of law. *See* Restatement § 6(1) (stating "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law"); *id.* § 6(2) (stating the most significant relationship test only applies "[w]hen there is no [statutory] directive"); *id.* § 6 cmt. *a* (stating "[a] court, subject to constitutional limitations, must follow the directions of its legislature"); *see also In re Marriage of Abel*, 76 Wn. App. 536, 539-40, 886 P.2d 1139 (1995) (holding superior court erred in calculating child support in accordance with Mont. Law because RCW 26.19.035(1) represents a statutory choice of law, citing Restatement § 6(1)). A statute must be applied as written within its intended range of application. *See* Restatement § 6 cmt. *b* (stating "[i]f the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it"). The Lystedt law requires all young athletes to be properly evaluated and cleared by a licensed health care provider trained in the management of concussion before returning to competition. *See* RCW 28A.600.190(4). It does not permit an exception for out-of-state health care

* * *

Due to space constraints, the Swanks refer the Court to their prior briefing regarding the affirmative defense of Puryear based on volunteer immunity, *see* Swank Br., at 40-43; Swank Reply to VCS & Puryear, at 13-14; Swank Pet. for Rev., at 14-16; and the partial affirmative defense of Puryear based on the statute of limitations for battery, *see* Swank Br., at 44-45; Swank Reply to VCS & Puryear, at 14-16.

V. CONCLUSION

The Swanks ask this Court to reverse the Court of Appeals decision in all respects except the common law liability of VCS, and remand the case for trial against VCS, Puryear and Burns.

providers who clear young athletes to return to competition in Washington, and it is unlikely that the Legislature would have intended such a result. As a result, there is no need to engage in choice of law analysis, at least with respect to the Lystedt law claim. *Cf. Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn. 2d 793, 363 P.3d 587 (2015) (holding that the coverage of the Consumer Protection Act, Ch. 19.86 RCW, includes out-of-state plaintiffs as well as defendants). Washington's statute of limitations for statutory claims would apply, rather than Idaho's statute for medical negligence claims because the choice of limitations period follows substantive law. *See* RCW 4.18.020.

Respectfully submitted this 18th day of November, 2016.

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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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Signed at Moses Lake, Washington on November 18, 2016.



Shari M. Canet, Paralegal

APPENDIX

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

West's RCWA 28A.600.190

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

Effective: July 26, 2009

Currentness

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

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

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

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

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

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

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

Credits

[2009 c 475 § 2, eff. July 26, 2009.]

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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