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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DONALD R. SWANK, individually and as personal representative of the  
ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK,  
individually,

Petitioners,

vs.

VALLEY CHRISTIAN SCHOOL, a Washington State Non-Profit  
Corporation, JIM PURYEAR, MIKE HEDEN, and DERICK TABISH,  
individually, and TIMOTHY F. BURNS, M.D., individually,

Respondents.

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SUPPLEMENTAL BRIEF OF JAMES PURYEAR

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**1. Introduction.**

The parents of high school football player Andrew Swank, who died from injuries incurred in a football game, sued the school, the coaches, and a physician. The Supreme Court has accepted the Petitioners' Motion for Discretionary Review of the Court of Appeals decision affirming partial summary judgment in favor of Coach James Puryear, Valley Christian School (VCS) and Dr. Edward Burns. The summary judgment as to Coach Puryear dismissed all claims against him based on the statutory immunity to which he was entitled as a volunteer football coach, and because the statute of limitations barred any claims that Coach Puryear grabbed Andrew's facemask. The Petitioners limited their motion for discretionary review as to James Puryear to two issues: 1) that questions of fact exist as to whether Coach Puryear was in a "joint venture" with VCS, and thus not entitled to statutory volunteer immunity; and 2) that their claim that Mr. Puryear grabbed Drew Swank's facemask was either "negligence" or a "breach of the Lystedt Act," and thus the statute of limitations for assault and battery did not bar the claim.

The scope of review is thus similarly limited to the Petitioners' unsupported theory that a parent who volunteers to coach a school team, and donates equipment and expenses, as well as his time, is in a "joint venture" with a school and is thus deprived of his statutory volunteer

immunity, and that an alleged intentional and violent grabbing of a facemask did not constitute a battery. See, RAP 13.7(b). However, the unambiguous volunteer immunity statute, and the law providing the appropriate analysis of claims for statute of limitations act purposes, both establish that summary judgment dismissal of all claims against Coach Puryear should be affirmed.

**2. Statement of the Case.**

Mr. Puryear, a parent of students at VCS, approached VCS about starting a football program at the school. (CP 60) Mr. Puryear signed a contract with VCS to coach its football team, which provided that Mr. Puryear was not compensated for his services. (See, CP 153, 158-163) It has never been disputed that VCS was a non-profit organization that maintained \$1 million in liability insurance; it was similarly undisputed that Mr. Puryear was not paid to coach the VCS students. (CP 48, 51-53, 153) While, like many volunteers, Mr. Puryear was instrumental in the formation of the program, and donated his own time and money to the school, he was bound to follow the dictates of the school program. (See, CP 60, 624-625) His contract required him to follow the rules and regulations as outlined by the school, subjected him to an annual evaluation, provided he could be dismissed, and identified him as an employee. (CP 153, 158-163) The school and the league set the

parameters and rules for play; and the school could certainly have terminated the program without Mr. Puryear's permission. (CP 158-163) In fact, it is further undisputed it was the school who terminated the football program following Andrew's death, although Mr. Puryear also desired that it should be terminated, and he would no longer participate. (See, CP 578-579)

The week before Drew Swank died, he had been injured during a game; he was removed from that game and was not allowed to practice with the team the following week. (CP 925, 172-173, 62, 151-152) Drew's parents thereafter obtained a release for Drew to play from Dr. Burns, and Mr. Puryear allowed him to play in the Washtucna game. (CP 3, 188, 174, 162, 157) During a play, Drew was hit by an opposing player and suffered head injuries from which he died. (CP 4)

Petitioners sued Coach Puryear individually, claiming that he was liable for Drew's death, based on duties they claim existed within the "Lystedt Law," which they assert creates an implied statutory tort, in addition to negligence.<sup>1</sup> In their Complaint, the Petitioners also asserted

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<sup>1</sup> Petitioners primarily challenge the Court of Appeals' decision that there is no implied statutory cause of action under the Lystedt Act; Mr. Puryear joins with VCS in its response to that issue, and denies he breached any duties established by the Lystedt law. However, he has been properly dismissed from this action based on volunteer immunity and the statute of limitations, and he limits his response solely to those issues; the

that Coach Puryear grabbed Drew's facemask and violently shook it up and down. (CP 4,6)

Mr. Puryear moved for summary dismissal because RCW 4.24.670 grants immunity for volunteer activities, and because the statute of limitations bars any alleged assault or battery. The trial court dismissed Mr. Puryear from the suit, and the Court of Appeals affirmed that dismissal rejecting the Petitioners' claim that "joint venture" status precluded application of the volunteer immunity statute. At the same time, the Court of Appeals affirmed the dismissal of any claims related to the alleged battery, i.e. the "facemask" claim, because the action had been brought over two years after the incident. (While the Petitioners have assigned error to that dismissal, they made no argument nor cited any authority in its brief.)

**3. Law.**

The volunteer immunity statute was enacted in 2001, and unambiguously provides in relevant part:

- (1) [A] volunteer of a nonprofit organization...shall not be personally liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if:

...

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existence of an implied statutory cause of action does not impact his dismissal on either of these bases.

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

RCW 4.24.670.

A volunteer is defined as:

An individual performing services for a nonprofit organization...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(5)(c).

Petitioners began to argue that a "joint venture" existed between VCS and Mr. Puryear which precluded the volunteer immunity provided by the statute, apparently based on the theory that a participant in a joint venture was not "an individual performing services" for a nonprofit. The law, however, would not rob Mr. Puryear of volunteer immunity under the statute, even if a joint venture existed; moreover, no evidence of a "joint venture" exists to create an issue for trial.

And the allegations that Coach Puryear grabbed Drew's facemask constitute battery, which as a matter of law is barred by the statute of limitations. Moreover, to the extent the Petitioners claim such conduct

was negligent or a breach of the Lystedt Act, the volunteer immunity also applies to preclude the claim.

**3.1 Petitioners have conceded that Mr. Puryear was an employee and agent of VCS, and he is thus entitled to the statutory immunity for volunteers performing services for a nonprofit.**

The Petitioners specifically and repeatedly pled that Mr. Puryear was an employee/agent of VCS in his coaching activities, and was liable in that capacity:

1.5 To the best information, knowledge, and belief of plaintiff, at all times material hereto, defendant Jim Puryear...was an employee and/or agent of defendant VCS acting in the capacity of head coach of the VCS football team...

(CP 2)

All the causes of action the Petitioners assert claim that Mr. Puryear's liability was based on conduct while "acting as an employee and/or agent" of VCS. (CP 6) Petitioners have judicially admitted that Mr. Puryear was indeed "performing services" for VCS, and it is on that basis they assert vicarious liability for his conduct. They should now be entitled to disclaim this status because they have recognized the immunity to which Mr. Puryear is entitled.

**3.2 The volunteer immunity statute is broad and would not exclude individual volunteers even as "joint venturers."**

While Mr. Puryear disagrees that a joint venture existed, such a claim does not impact his immunity under RCW 4.24.670. Petitioners assert that because joint venturers "serve as both principal and agent for each other," Mr. Puryear could not be "an individual performing services for" the nonprofit entity as required for the immunity. However, nothing in Washington's voluntary immunity statute precludes its application under the circumstances that exist here, and it is the Petitioner's argument that would require an improper interpretation of that statute.

First, by definition in the Washington statute, a volunteer can include those individuals who control the program, such as an officer, a trustee, or a director. These individuals may be principally in charge of a program, and yet are still defined as those who "perform services for" a nonprofit entity. The fact that Mr. Puryear exerted some control in respect to the day to day functioning of the football program is thus irrelevant to his definition as an individual volunteer.

Moreover, as noted by the Court of Appeals, immunity offers a defense to the individual, even if that individual is also in a principal/agent relationship. Nothing in the immunity statute suggests that the word "individual" must be read to **exclude** individuals who may be members of

an entity. An individual in a joint venture retains the right to any specific immunities that he may be afforded; the volunteer statute cannot be read to preclude "individuals" who may also act in some other capacity without adding absent terms, which the court may not do. See e.g., State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts may neither add nor delete language from an unambiguous statute).

A principal is entitled to claim immunity as a defense, while not entitled to claim an agent's immunity; immunity offers a defense to the individual, irrespective of the entity. See, Restatement (Second) of Agency, §217, comment 6 (2014) (immunities are not delegable and are awardable as a defense only to persons who have them). Because the existence of a joint venture/partnership does not eliminate the immunity to which one of the members is entitled, the discussion is usually relegated to whether all members of a joint venture or partnership are entitled to an extension of the statutory immunity of one member. See, Salswedel v. Enerpharm, Ltd., 764 P.2d 499, 503 (N.M. 1988) (where one partner is statutorily immune from suit "it does not necessarily follow that the...other partner must be given immunity"); Scramstad v. Plumb Creek Merger Co., Inc., 45 F.Supp.2d 1022, 1026 (D. Mont. 1999) (immunity from suit of one joint venturer under the worker's compensation statute extended to other joint venturers).

This analysis simply confirms the well-recognized concept an individual partner may have personal immunity, notwithstanding his or her status as a member of an entity such as a partnership,<sup>2</sup> although such immunity may not be imputed to the partnership. See, Hatzinicolos v. Protopapas, 550 A.2d 947 (Md. 1988) (individual partners' parental immunity not available to the partnership); Mathews v. Wosick, 205 N.W.2d 813 (Mich. 1973) (individual partners' defense under the "fellow servant" rule was not available to the partnership entity); Wayne-Oakland Bank v. Adam's Rib, 210 N.W.2d 121 (Mich. 1973) (individual partners' parental immunity not available to the partnership); General Machinery & Supply Co. v. National Acceptance Co., 472 P.2d 735 (Colo. 1970) (contract made by partnership is not void merely because infant was a partner, but the infant partner may be able to void or disaffirm the contract to the extent of his or her personal liability thereon).

Ultimately, Petitioners' desperate attempt to avoid the volunteer immunity statute has no basis in the law, or the unambiguous reading of the statute. The Petitioners' assertions would virtually eliminate volunteer immunity for a significant portion of volunteers in the state, i.e. any parent

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<sup>2</sup> In Washington, a joint venture is akin to a partnership, and is analyzed in the same fashion and under the same rules. Pietz v. Indermuehle, 89 Wn.App. 503, 510, 949 P.2d 449 (1998).

that coaches a team, and volunteers time and resources to the nonprofit, would not be "an individual performing services" for the entity, and not be entitled to the express immunity to which they are entitled.

**3.3 There is no disputed issue of fact to establish a "joint venture."**

Even were immunity to be vitiated in the existence of a joint venture, the undisputed facts fails to create any genuine issue for trial that a joint venture existed. The "community interest" necessary for a joint venture must include a common purpose that benefits both parties, from which each derive a material benefit:

...The parties may have a common objective or purpose, and still a community of interest may be lacking. For instance, two parties may be engaged in the performance of a purpose or object, which may be for the sole advantage of one, and from which the other is to derive no benefit whatsoever, or the interest of the one may be different and distinct from that of the other; in either of these cases there would not be a joint adventure. The term "community of interest" ...means a mixture or identity of an interest...from which each and all derive a material benefit...

Carboneau v. Peterson, 1 Wn.2d 347, 376, 95 P.2d 1043 (1939) (if common purpose is "social," no joint venture arises). While not limited solely to business transactions, the parties must each have the same common benefit.

The Petitioners evidence on which they rely to create an issue for trial is that Coach Puryear was instrumental in starting the football

program by donating personal funds, that he acted as the head coach, and "cancelled" the program when he decided to cease his volunteer efforts. (Petition for Review, p. 14; Petitioners' Opening Brief in the Court of Appeals, pp. 5-6) This evidence does not create an issue for trial on a "joint venture." Coach Puryear acted as a volunteer offering services to a non-profit school, and he did not materially benefit in the same inherent way as the school. The school obtained the benefit of a school athletic program, and Coach Puryear's benefit was the social good of the act of volunteering.

The donations of funds by a parent volunteer, or his willingness to coach simply underscores his status as a typical volunteer; and his decision to stop volunteering, while it may impact the continuation of the team, does not establish a partnership; obviously an individual can choose to stop donating and volunteering. This was not in the nature of a joint venture, and all the facts are undisputed; when reasonable minds cannot differ on an issue of fact, summary judgment is properly granted. See, Daugert v. Pappas, 104 Wn.2d 254, 257, 704 P.2d 600 (1985) (when facts are undisputed and inferences therefrom are plain and incapable of doubt, the issue becomes a question of law for the court).

**3.4 To the extent the Petitioners claim the "facemask" incident is negligent or a breach of the Lystedt Act, the volunteer immunity also applies to bar this claim.**

In its Petition for Review, the Petitioners failed to cite any authority or make any argument in its brief relating to their assertion that its Complaint stated a "facemask claim" which should not be barred by the two year statute of limitations for assault and battery, pursuant to RCW 4.16.100(1). However, in their statement of that issue, Petitioners concede that their Complaint asserted a "**violation of the Lystedt Law and negligence**" in relation to the "facemask" claim, and that the three year statute of limitations for "negligence and implied statutory claims" was at issue. (See, Petition for Review, p. 4) To the extent that the Petitioners argue only that their Complaint stated a violation of the Lystedt Law and simple negligence, the same statutory immunity applicable to the remainder of their claim also provides immunity for Coach Puryear, as to this claim.

The immunity statute unambiguously precludes liability for the volunteer of a nonprofit organization for "an act or omission" if 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." RCW 4.24.670(1)(c). This includes not only any claim for simple negligence, but also an implied statutory cause of

action as well, which is in the nature of a tort action. See, Pepper v. J.J. Welcome Constr. Co., 73 Wn.App. 523, 532, 871 P.2d 601 (1994) (individuals with a private statutory cause of action may bring a "tort action"); Neighorn v. Quest Health Care, 870 F.Supp. 1069, 1108 (D.Or. 2012) (implied right of action for statutory violation is a "statutory tort").

Thus, irrespective of the statute of limitations, immunity would preclude the Petitioners' claim for negligence or breach of the Lystedt Law in relation to the facemask incident.<sup>3</sup>

**3.5 The facemask "claim" is barred by the statute of limitations.**

It is the underlying set of facts which establish the appropriate statute of limitations for a claim. When a given set of facts rise to an intentional tort, the party cannot re-characterize those facts in order to avoid the statute of limitations. See, Eastwood v. Cascade Broadcasting Co., 106 Wn.2d 466, 469, 722 P.2d 1295 (1986). The limitation period

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<sup>3</sup> In fact, this issue has not been made with any specificity throughout the course of the Petitioners' appeal, and while the court has not indicated any restriction in its acceptance of review here, the Petitioners have abandoned this assignment of error by failing to make any argument in the previous briefing. See, Erdmann v. Henderson, 50 Wn.2d 296, 311 P.2d 423 (1957); Escude v. King County Public Hospital Dist. No. 2, 117 Wn.App. 183, 190, 69 P.3d 895 (2003) (a party's failure to assign error or provide argument and citation to authority in support of an assignment of error precludes appellate consideration of any such error). Mr. Puryear would request the court decline to review this issue.

applying to assault and battery cannot be avoided by disguising the real cause of action in a different form. See, Seely v. Gilbert, 16 Wn.2d 611, 615, 134 P.2d 710 (1943). Courts have specifically rejected attempts to transform claims involving intentional torts into claims of gross negligence. See, Livermore v. Lubelan, 476 F.3d 397, 408 (6th Cir. 2007) (state immunity statute applied unless gross negligence occurred, but claims were predicated on intentional conduct) [cited in Bradfield v. Dare, 2007 WL 1452913 (E.D.Mich. 2007) (a party cannot characterize a claim as one for "gross negligence" when clearly premised on intentional torts such as assault and battery)].

The Petitioners pled that Mr. Puryear grabbed and shook Andrew's facemask "violently" and "in anger," which they allege caused or contributed to "second impact syndrome." (CP 4, 6) Ms. Swank characterized the conduct as an assault, and Mr. Swank described the act as Mr. Puryear "violently" jerking Drew's helmet up and down while he "screamed" at Drew. (CP 192, 175) The court must look to the facts of the case, the evidence relied on, and the pleadings to determine the nature of the claim for statute of limitations purposes. Martin v. Patent Scaffolding, 37 Wn.App. 37, 40, 678 P.2d 362 (1984); Van Scoik v. Dept. Nat. Resources, 149 Wn.App. 328, 203 P.3d 389 (2009). It is undisputed these allegations constitute a battery, which is intentional infliction of harmful

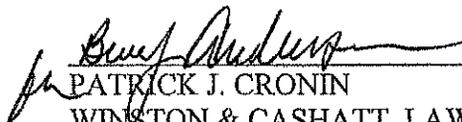
or offensive contact. See, Sutton v. Tacoma School Dist. No. 10, 180 Wn.App. 859, 865, 324 P.3d 763 (2014). The requisite intent for a battery is the intent to cause the contact, not the harm; bodily contact is offensive if it offends a reasonable sense of personal dignity. Id.

The Petitioners cannot restructure their claim as negligence or a statutory tort in order to avoid the statute of limitations, and any cause of action based on these facts was properly found to be time barred.

**4. Conclusion.**

For the foregoing reasons, the summary judgment dismissing all claims against Mr. Puryear should be affirmed.

DATED this 18<sup>th</sup> day of November, 2016.

  
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 18th day of November, 2016, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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DATED at Spokane, Washington, this 18th day of November,  
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**Subject:** 93282-4 - Donald R. Swank, et al. v. Valley Christian School, et al.

Dear Clerk of the Court:

Attached for filing with the court is the Supplemental Brief of James Puryear.

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