Supreme Court No. 93282-4

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,

Petitioners,

v.

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

Respondents.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Honorable

DR. BURNS' ANSWER TO PETITION FOR REVIEW

Corrected

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I. INTRODUCTION

The Petition's principle focus is that the Court needs to set the parameters for what the Lystedt Act does and does not require of schools, coaches, parents, athletes, and physicians, and that it needs to do so as "a case of first impression." This, of course, disregards the fact that Division III has not only addressed each of those points and did it correctly under the language and legislative history of the legislation enacted, it did so in a unanimous published decision. The guidance the Petition claims is needed already exists.

Further, if this Court takes review, the guidance the Petition claims is so important and which currently exists in the well-reasoned decision from Division III likely will be delayed for another nine-15 months after oral argument based on the current time-frame for issuing decisions. In football season terms, that would mean a delay from the current season of 2016 until the 2018 football season.[1] There is no reason to put the Lystedt Act and its efficacious directives on hold for two football seasons.

Finally, Dr. Burns reminds the Court of two salient facts. First, that the Petitioners initially began the litigation process in Idaho against him and his clinic alleging medical malpractice, but started their efforts ***after*** after Idaho's statute of limitation expired. *See* Dr.

[1] If review is granted in late 2016 or early 2017, oral argument would most likely occur in Spring, 2017 and a decision issued nine-fifteen months later: long after the start to the 2017 football season.

Burns RB pp. 8-10. Petitioners only chose to sue Dr. Burns in Washington as an individual physician, and not his clinic, in order to try and fix the blown statute of limitation. This is forum shopping.

Second, this Court already saw this case on the Petitioners' motion for direct review it rejected in September, 2015, then transferred it to Division III. *See* No. 90733-1. Nothing has changed since then except that Division III issued its published decision. *Swank v. Valley Christian School, et al.,* 194 Wn. App. 67, 374 P.3d 245 (2016) ("Decision" or *"Swank v. VCS"*). The Decision correctly construed the Lystedt Act and correctly upheld dismissal of Dr. Burns under settled Washington and federal law. There is nothing new which now calls for this Court's attention and use of its limited resources that did not exist in September 2015. Review should be denied for the reasons stated in Dr. Burns' Answer To Statement Of Grounds For Direct Review (Oct. 6, 2014) in No. 90733-1, *esp.* pp. 6-13, and the additional reasons given herein.

II. RESTATEMENT OF FACTS AND ISSUES

A. Restatement of Facts.

The basic facts stated in the Decision are sufficient for purposes of this Answer and consideration of the Petition. *See Swank v. VCS.,* 194 Wn. App. 67 at ¶¶ 4- 12. Fact-related points as to Dr. Burns are addressed in the course of this Answer as needed.

B. Summary.

The most important issue to Petitioners is their contention that the Lystedt Act creates an implied cause of action. *See* Petition for Review, pp. 5-13. It does not. *See* Dr. Burns' RB, pp. 41-42 and fn.35, discussing Justice Tom Chambers' decision in *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). It appears they make this argument primarily as to Dr. Burns, since Division III showed them a clear pathway to liability as to the School and coach, assuming sufficient facts. While the Petition also argues in favor of finding long arm jurisdiction over Dr. Burns, *see* Petition, pp. 16–19, in fact that analysis depends on a claim that the Lystedt Act imposes ***both*** liability as to health care providers ***and*** an implied right of action, then for a determination that Dr. Burns "violated" that imagined construction of the Lystedt Act.[2]

But even if one assumes those incorrect propositions (which are contrary to settled Washington law), Dr. Burns' dismissal must be affirmed under settled Washington precedent on jurisdiction. *Swank v. VCS,* 194 Wn. App. at ¶¶45-50, citing *Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 766-67, 783 P.2d 78 (1989) and *Lewis v. Bours,* 119 Wn.2d 667, 835 P.2d 221 (1992). The same is true when examining the most recent federal Supreme Court precedent which underlies the state decisions, as well as two recent decisions

[2] The Petition also re-argues the coach's alleged joint venture with the school both existed and should make him personally liable. Petition, pp. 14-16.

from 2014, *Daimler AG v. Bauman*, __ U.S. __, 134 S. Ct. 746, 754 (2014) and *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 1122 (2014). *See* Dr. Burns RB, pp. 15-37 (discussing the long arm statute RCW 4.28.185, state appellate decisions, and their consistency with early and recent federal Supreme Court decisions). Settled law required dismissal of Dr. Burns. That is why Judge Price dismissed the case on summary judgment and Division III affirmed.

It also accords with common sense given the state-based system of licensing and regulating physicians and other health care practitioners which does not allow the regulatory agency for Washington to supervise or discipline a physician in Idaho for care rendered in Idaho by a physician only licensed in Idaho and ***not*** licensed in Washington. *See* Dr. Burns RB pp. 46, 49-50. There is no pretense that Washington's medical licensing authorities have any jurisdiction over non-Washington physicians for care they provide in their own state.

Since the jurisdictional Gordian Knot cannot be solved to permit jurisdiction over Dr. Burns under binding federal law, as to him the construction of the Lystedt Act is irrelevant because it cannot have extra-territorial application outside Washington State. As was made plain in briefing below, if a Washington school or athletic program wants to insure it complied with the Lystedt Act, it should only accept a medical clearance from a Washington-licensed physician. *See, e.g.,* Dr. Burns RB, pp. 44-50, *esp.* fn. 39 & 40

(discussing the structure and construction of the Lystedt as enacted in 2009 and basic common sense policy considerations in our federal system of government with state regulation of local professionals). For the Court's convenience, copies of the bill as passed and the final bill report are attached hereto as Appendices A & B.

As to Dr. Burns, the first basic and undisputed point is that Petitioners – Idaho residents and long-time patients of Dr. Burns in Idaho – had the right to assert a medical negligence claim against him in Idaho for the care he rendered to their son Drew in Idaho at their request. As the record herein shows, they attempted to assert that right by naming him and his clinic in the pre-litigation process required by Idaho – but began that process long after the statute of limitation expired. Petitioners try to assert that expired negligence claim under Washington law in this later action by either of two ways. ***First***, they argue for changing the rules for locating the place of injury for professional negligence cases from the site of the professional services (here, Idaho) to the place where the plaintiff ends up, Washington. This runs afoul of *Lewis v. Bours,* 119 Wn.2d 667, 835 P.2d 221 (1992), which this Court decided 9-0, consistent with professional negligence cases around the country. ***Second,*** the Petition tries to assert both that 1) the Lystedt Act creates an implied right of action for alleged "violations" of it; and 2) that this new Washington statute somehow applies to an Idaho physician who is licensed only in Idaho, treats only in his Idaho clinic, is subject only

to the medical regulatory authorities in Idaho, and for whom there is no basis to imbue him with either actual or constructive knowledge of a brand-new Washington statute. If it really were the case that the Lystedt Act applies to out-of-state health care practitioners not licensed in Washington, that also means, as a practical matter, those physicians are practicing in Washington without a license. This would be an unreasonable and unwarranted expansion of Washington regulatory authority outside state borders, for which there is no proper basis.

The second issue as to Dr. Burns is the scope and effect of the Lystedt Act. Does it create a new form of liability as to health care providers for professional negligence beyond what is provided in Ch. 7.70 RCW, whatever it may do as to coaches, parents, athletes, and schools? Division III addressed this correctly in deciding that it does not. Since its analysis and application of the statute are correct, there is no need for this Court to take review because the Bench and Bar are correctly instructed on the statute.

III. REASONS WHY REVIEW SHOULD BE DENIED

A. Review Should Be Denied Because The Petition Does Not Demonstrate It Meets Any Of The Criteria Under RAP 13.4(b).

Rule 13.4(b) governs the Court's decision on whether to grant review of a Court of Appeals decision terminating review. It provides for review where the decision in question conflicts with a

decision of this Court or with another decision of the Court of Appeals; where it presents "a significant question of law" under either the state of federal constitutions; or where it raises an issue of substantial public interest that this Court should decide.

As pointed out *supra*, the issues Petitioners seek to raise were before this Court when they sought direct review in 2014, as seen in their Statement of Grounds for Direct Review. Petitioners were asking for review from the trial court decision dismissing Dr. Burns and the other defendants. This Court declined direct review and Division III's Decision fully and correctly construes and applies the Lystedt Act. *Swank v. VCS, supra*, 194 Wn. App. at ¶¶ 13-26.

The issues Petitioners asserted in seeking direct review have all been addressed. They simply did not like the result they received from Division III. But nothing has changed in the legal landscape in the past year other than the Court of Appeals now has issued a published decision which correctly states the parameters of the Lystedt Act under settled Washington law and correctly applied the law on jurisdiction for out of state medical care under federal law and this Court's decision in *Lewis v. Bours*. Review should be denied.

B. Review Should Be Denied Because, Since Jurisdiction Cannot Be Established Under Federal Law, This Court's Decision Would Not Establish New Principles Or Applications Of The Law This Court Needs To State. It Would Result In Application Of Settled Law. Asserting Jurisdiction Over Dr. Burns Would Be Contrary To Federal Decisions And Invite U.S. Supreme Court Review.

Because Petitioners failed to meaningfully brief the issue, the Court of Appeals correctly declined to address their argument that Washington has general jurisdiction over Dr. Burns. However, a review of the facts regarding Dr. Burn's professional contacts with Washington as an individual medical professional show any attempt by Petitioners to fully brief the issue would have failed, because they are simply insufficient to establish general jurisdiction in Washington without "offend[ing] traditional notions of fair play and substantial justice", the long-accepted standard for satisfying due process under state and federal constitutional law. *See* Burns RB, pp. 30-37.

Recent United States Supreme Court decisions addressing the constitutional limitations upon the exercise of jurisdiction make clear that a defendant may only be subject to jurisdiction for a cause of action unrelated to his contacts with a forum if those contacts with the state are "so 'continuous and systematic' as to render [him] essentially at home in the forum state." *Daimler AG v. Bauman*, __ U.S. __, 134 S. Ct. 746, 761 (2014); *see also* Dr. Burns RB 30-31. The "contacts" which Petitioners relies on to establish general

jurisdiction fall into four categories, and none of which come close to showing that Dr. Burns was "essentially at home in" Washington in the manner contemplated by United States Supreme Court constitutional jurisprudence. *See* Dr. Burns RB 31-37 (discussing the facts asserted and showing they fail to meet case law requirements).

These categories are: (1) minimal professional contacts Dr. Burns had with Washington that had completely ceased by 2003, six years before Dr. Burns' wrote Drew's clearance note in 2009; (2) contacts of Dr. Burns' employer Ironwood Family Practice, an entity which is not a party to this litigation; (3) contacts completely unrelated to Dr. Burns' professional life as a physicians, namely that his children attended school in Washington; and (4) the fact that a *de minimis* percentage of Dr. Burns' current patients live in Washington, although he only advertises and provides services to patients in Idaho. *Id.* None of these are sufficient to establish general jurisdiction over Dr. Burns in his capacity as an individual physician under *Daimler*, *Walden v. Fiore*__ *U.S.*__, 134 S. Ct. 1115 (2014), and *International Shoe Corp. v. Washington,* 326 U.S. 310 (1945). *See* Dr. Burns RB pp. 31-37.

C. Review Should Be Denied Since The Case Does Not Present A Significant New Public Issue That Needs To Be Determined By This Court Because, Even Assuming That Washington Courts Have Jurisdiction Over Dr. Burns, Which They Do Not, This Court's Settled Law Governing Choice Of Law Requires Affirmance Of Dr. Burns' Dismissal For Petitioners' Failure To Meet The Idaho Statute Of Limitations By Filing Late In Idaho, Then Belatedly Seeking Relief From Washington Courts To Try And Correct Their Error.

Petitioners rely on the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) and two factually inapposite cases to claim that a choice of law analysis is only necessary "in the absence of a statutory choice of law," and therefore is inapplicable to a claim brought under the Lystedt Act. Yet even if the Lystedt Act contained an implied cause of action, which it does not, the Lystedt Act does not contain a statutory choice of law. [3]

In the absence of a statutory choice of law, this Court's recent decision in *Woodward v. Taylor*, 184 Wn.2d 911, 917, 366 P.3d 432 (2016), indicates that, where an "actual conflict of substantive law" exists between jurisdictions, this Court conducts the "most significant relationship test to determine which state's substantive

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[3] *See In re Marriage of Abel*, 76 Wn. App. 536, 540, 886 P.2d 1139 (1995). (holding that Washington law overruled Montana law because it mandated application "[i]n all proceedings" regarding child support); *see also Thornell v. Seattle Serv. Bureau, Inc.* 184 Wn.2d 793, 803, 363 P.3d 587 (2015) (holding that a law specifically claiming jurisdiction over out-of-state persons does not require choice of law analysis). By contrast, the Lystedt Act provides no implicit, let alone explicit, statement of application. *See* App. A.

law applies." "[T]he chosen substantive law's statute of limitations" applies "according to RCW 4.18.020." *Id.*

In this case, an actual conflict of substantive law exists. Idaho did not have an equivalent statute to the Lystedt Act at the time of the incident, and Idaho's medical malpractice statute fundamentally differs from Washington's.[4]

In the presence of a conflict, this Court applies the most significant relationship test, which considers the contacts of the interested states, including the place of injury, the place of the injury-causing conduct, the domicile of the parties, and the place where the relationship between the parties is centered. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555, P.2d 997 (1976). Here, the alleged injury-causing conduct occurred ***in Idaho***, Dr. Burns is domiciled ***in Idaho***, and the relationship between Dr. Burns and Petitioners exists solely ***in Idaho***. CP 241-42. Therefore, even if there was jurisdiction (there is not), Idaho law must govern and Petitioners' claims against Dr. Burns are time-barred.

[4] *Compare* RCW 7.70.040 *with* Idaho Code § 6-10 (1976). *See* Respondent Burns' Supplemental Brief re *Woodward* Decision (filed Feb. 22, 2016), 3-4; Dr. Burns RB pp. 27-29.

D. Since This Is Review of Summary Judgment, All Of Dr. Burns' Issues Raised In His Defense Below Are Before The Court. Even If Review Is Granted, Dismissal Will Be Required.

If review is granted, since it is from summary judgment any review should include all the issues raised by Dr. Burns in his defense which were before the trial court and the Court of Appeals. As pointed out *supra*, those defenses require dismissal of the claims against him, whether under a jurisdictional or choice of law analysis. There simply is no pathway under Washington law and federal jurisdictional due process principles for holding Dr. Burns liable or for keeping him in litigation over this matter any longer.

Finally, should review be granted, Dr. Burns submits that the salient issues to be considered would be:

1. Must the dismissal of Dr. Burns be affirmed because, under *Lewis v. Bours* and applicable federal constitutional law, Washington courts have no jurisdiction over Dr. Burns for a medical negligence claim arising out medical care he provided to Drew Swank in Idaho, particularly where Dr. Burns practices medicine only in Idaho and has only an Idaho medical license?

2. Even assuming Washington jurisdiction over Dr. Burns (which does not exist), was dismissal still required because the Lystedt Act does not create independent liability for medical negligence outside of Ch. 7.70 RCW and, under *Lewis v. Bours* and settled Washington law construing those statutes, any medical

negligence claim is subject to Idaho law, whose two-year statute of limitations ran prior to Petitioners filing their complaint?

IV. CONCLUSION

This case does not present any unsettled questions of law or public policy that require this Court's attention and scarce resources. The legal issues raised by the appeal were correctly and fully decided by Division III. Review should be denied so that the correctly decided, and properly articulated published decision of Division III stands and guides the Bench, Bar, and youth sports participants at the earliest possible time.

Dated this 30th day of July, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA 14459
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WASHINGTON STATE SUPREME COURT

DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK, individually, Appellants, v. VALLEY CHRISTIAN SCHOOL, a Washington State Non-profit corporation, JIM PURYEAR, MIKE HEDEN, and DERICK TABISH, individually, and TIMOTHY F. BURNS M.D., individually, Respondents.	NO. CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date stated below, I caused to be delivered in the manner indicated a true and correct copy of *Dr. Timothy Burns' Answer to Petition for Review (Corrected)*, Appendices A, B, & C, and this certificate of service on the following parties:

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DATED this 30th day of July, 2016.

Gregory M. Miller

APPENDICES

APPENDIX A

ENGROSSED HOUSE BILL 1824

AS AMENDED BY THE SENATE

Passed Legislature - 2009 Regular Session

State of Washington 61st Legislature 2009 Regular Session

By Representatives Rodne, Quall, Anderson, Liias, Walsh, Pettigrew, Priest, Simpson, Kessler, Rolfes, Johnson, Sullivan, and Morrell

Read first time 01/30/09. Referred to Committee on Education.

AN ACT Relating to requiring the adoption of policies for the management of concussion and head injury in youth sports; amending RCW 4.24.660; and adding a new section to chapter 28A.600 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 4.24.660 and 1999 c 316 s 3 are each amended to read as follows:

(1) A school district shall not be liable for an injury to or the death of a person due to action or inaction of persons employed by, or under contract with, a youth program if:

(a) The action or inaction takes place on school property and during the delivery of services of the youth program;

(b) The private nonprofit group provides proof of being insured, under an accident and liability policy issued by an insurance company authorized to do business in this state, that covers any injury or damage arising from delivery of its services. Coverage for a policy meeting the requirements of this section must be at least fifty thousand dollars due to bodily injury or death of one person, or at least one hundred thousand dollars due to bodily injury or death of two or more persons in any incident. The private nonprofit shall also

provide a statement of compliance with the policies for the management of concussion and head injury in youth sports as set forth in section 2 of this act; and

(c) The group provides proof of such insurance before the first use of the school facilities. The immunity granted shall last only as long as the insurance remains in effect.

(2) Immunity under this section does not apply to any school district before January 1, 2000.

(3) As used in this section, "youth programs" means any program or service, offered by a private nonprofit group, that is operated primarily to provide persons under the age of eighteen with opportunities to participate in services or programs.

(4) This section does not impair or change the ability of any person to recover damages for harm done by: (a) Any contractor or employee of a school district acting in his or her capacity as a contractor or employee; or (b) the existence of unsafe facilities or structures or programs of any school district.

NEW SECTION. **Sec. 2.** A new section is added to chapter 28A.600 RCW to read as follows:

(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.

--- END ---

APPENDIX B

FINAL BILL REPORT
EHB 1824

C 475 L 09
Synopsis as Enacted

Brief Description: Requiring the adoption of policies for the management of concussion and head injury in youth sports.

Sponsors: Representatives Rodne, Quall, Anderson, Liias, Walsh, Pettigrew, Priest, Simpson, Kessler, Rolfes, Johnson, Sullivan and Morrell.

House Committee on Education
Senate Committee on Early Learning & K-12 Education

Background:

School districts are encouraged to allow private nonprofit youth programs to serve an area's youth by allowing the use of the school district facilities. To further this end, school districts are provided with limited immunity from liability for injuries to youth participating in an activity offered by a private nonprofit group on school property. This immunity applies only if the private nonprofit group provides proof of accident and liability insurance to the school district before the first use of the school facilities and lasts as long as the insurance remains in effect.

A head injury prevention program is in place at the Department of Health (DOH). The DOH must provide guidelines and training information on head injuries to various entities and personnel, including educational service districts. Information regarding head injuries and concussions is also available through the U.S. Centers for Disease Control and Prevention.

Concussions range in severity from mild to severe but all interfere with the way the brain works. They can affect memory, judgment, reflexes, speech, balance, and coordination. Concussions do not necessarily involve a loss of consciousness. Many people have had concussions and not realized it.

Summary:

In order for a school district to maintain immunity for acts of a private nonprofit youth program, the school district must, in addition to requiring proof of insurance, also require a statement of compliance from the program with respect to policies for the management of concussion and head injury in youth sports.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Each school district must work in concert with the Washington Interscholastic Activities Association to develop guidelines and inform coaches, athletes, and parents of the dangers of concussions and head injuries. Annually, youth athletes and their parents or guardians must sign and return a concussion and head injury form prior to the initiation of practice or competition.

A youth athlete who is suspected of sustaining a concussion or head injury must be removed from the practice or game. The athlete may not return to play until the athlete has been evaluated by a licensed health care provider and received a written clearance to play.

The licensed health care provider, from whom clearance to return to play is received, may be a volunteer. A volunteer who authorizes return to play is not liable for civil damages unless the volunteer's actions constitute gross negligence or willful or wanton misconduct.

This act is to be known and cited as the Zackery Lystedt law.

Votes on Final Passage:

House	94	0	
Senate	45	0	(Senate amended)
House	98	0	(House concurred)

Effective: July 26, 2009

APPENDIX C

Supreme Court No. 90733-1

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,

Petitioners,

v.

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

Respondents.

RESPONDENT BURNS' ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION AND SUMMARY OF ANSWER

Respondent Timothy Burns, M.D., an Idaho physician who practices only in Idaho, was properly dismissed on summary judgment because Washington courts have no jurisdiction over him for alleged negligent medical care rendered in Idaho, which is not actionable in Washington. In *Lewis v. Bours*, 119 Wn.2d 667, 670, 835 P.2d 221 (1992), this Court unanimously held that the tort of medical malpractice is ***not*** committed in Washington if the alleged malpractice ocurred out of state, even if the injuries manifest themselves in Washington. A plaintiff's remedy against a ***physician*** is in the state where the physician provided the care, here Idaho. *Id.*

Dr. Burns was sued in Washington because Petitioners failed to file within Idaho's statute of limitations. This suit tries to assert a medical negligence claim under the Lystedt Act without calling it that in order to avoid the settled law of *Lewis* that means Idaho law applies for alleged medical negligence. There is no alternative theory for potential liability under Washington law as to Dr. Burns based on allegedly negligent health care provided to Drew Swank. Any Washington claim is controlled by Ch. 7.70 RCW, no matter how Petitioners try to re-characterize it as a claim under the Lystedt Act or otherwise. Even if the Act imposed some new form of liability or duty on physicians, which it does not, it does not apply across state lines, particularly where, as here, there is no relationship between the physician and the school or team on which the student played.

Dr. Burns does not agree with most of Appellant's statement of issues presented for review. As to Dr. Burns, the only correctly stated issue is issue four, *i.e.,* whether the trial court properly dismissed Dr. Burns on summary judgment. That issue only raises well-established principles of summary judgment and Washington's lack of jurisdiction over a non-resident physician for medical care rendered outside Washington. There is no need for direct review.

Issue one asks whether the Lystedt Act creates any duty to comply with a standard of care that is not specified in the Act. It does not apply to Dr. Burns, but can only be directed at the other respondents because all claims for injury due to health care are governed by Ch. 7.70 RCW. Issue two seeks to assert liability for negligence established by breach of a statute. It similarly cannot apply to Dr. Burns because of Ch. 7.70 RCW's pre-emptive and exclusive governance of claims for alleged injuries due to health care, the only claim that can be stated as to Dr. Burns. A medical negligence claim is also the essence of Petitioners' issue three, phrased in terms of a physician "improperly releasing" a student athlete to return to play. As to a health care provider such as Dr. Burns, an "improper release" can only occur by alleged medical malpractice. Issue three thus also returns to the settled law of *Lewis,* the pre-emption of Ch. 7.70 RCW, and Idaho law.

This case is not a vehicle to decide if the Lystedt Act applies to physicians. The request for direct review should be denied.

II. RESTATEMENT OF THE FACTS

A. Dr. Burns Is An Idaho Physician Who Practices Exclusively In Idaho.

Respondent Timothy F. Burns, M.D., is a family medicine physician and Idaho resident who practices exclusively in Coeur D'Alene, Idaho, and, since 2003, has been licensed to practice medicine only in Idaho. Like Drew Swank and his family, virtually all Dr. Burns' patients are Idaho residents.[1]

B. Dr. Burns Examined Drew And Advised That He Not Play Football Until His Symptoms Ceased, Then Cleared Him To Play When Informed They Had Stopped.

Drew and his parents have been Idaho patients of Dr. Burns since 1990, shortly after he joined the Ironwood Family Practice clinic in Coeur d'Alene, Idaho. On September 18, 2009, while playing in a football game, Drew had a football injury to his head/neck region. On September 22, Drew was still having symptoms from the September 18, 2009 football game and went to see his local Idaho family physician, Dr. Burns, who examined Drew. Dr. Burns advised Drew and his mother that he was not to resume participation in football until his symptoms resolved.

Drew's mother Patricia Swank testified that on September 24, she reported to Dr. Burns' office staff that Drew was no longer

[1] Dr. Burns' few Washington patients are either former Idaho residents who now live in Washington but still visit Dr. Burns for treatment in Idaho, or live in Washington and work in Coeur D'Alene where they are seen and treated by Dr. Burns.

suffering symptoms and requested that Dr. Burns provide a written authorization so that Drew could return to play. Dr. Burns later gave a written note clearing Drew to participate in football as of September 25, 2009, which he left to be picked up at his office.

On September 25, 2009, Drew resumed playing football for Valley Christian School in a Friday night football game in Washtucna, Washington. During a play, Drew was hit by another player, staggered off the field, and collapsed. He was taken to the hospital in Ritzville, and later was airlifted to Sacred Heart Medical Center in Spokane, where he died two days later.

C. The Swanks Brought An Untimely Medical Malpractice Suit Against Dr. Burns In Idaho; Then, After Learning It Was Too Late Under Idaho Law, They Sued Dr. Burns In Washington Alleging He "Negligently Cleared" Drew To Play Football In Violation Of The Lystedt Act.

On July 18, 2012, Petitioners began Idaho's statutory pre-litigation hearing process for a medical negligence action against Dr. Burns and Ironwood Family Practice in Idaho. On August 1, 2012, Petitioners received notice from the Chair of Idaho's statutory Medical Malpractice Pre-Litigation Screening Panel that, although the two-year statute of limitations for malpractice claims had run for Donald and Patricia Swank and the estate, it was tolled for Drew's minor siblings and a claim could still proceed on their behalf.[2]

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[2] On October 17, 2012, the Panel Chair for the Idaho Board of Medicine concluded that, substantively, the remaining claimants failed to meet their burden

(Footnote continued next page)

Instead of pursuing that claim in Idaho against Dr. Burns and for vicarious liability for malpractice against Ironwood Family Practice, Petitioners filed the estate's claim and the parents' claim in Washington State -- but only naming Dr. Burns -- on September 21, 2012, and amended the complaint on September 25, 2012. Although the Washington State Amended Complaint does not expressly specify a medical malpractice claim, it alleges that Dr. Burns violated Washington's Lystedt Act by "his failure to exercise the degree of skill, care and learning expected of a reasonably prudent provider of medical and health care services **in the State of Washington** acting in the same or similar circumstances" when he cleared Drew to play football. Amended Complaint, ¶ 4.6 (emphasis added). This claim is, in essence, a claim for medical malpractice committed *in Washington.* Dr. Burns saw Drew *only* in Idaho, the only state he was then and continues to be licensed in.

D. The 2009 Lystedt Act.

In 2009, the Washington legislature passed House Bill 1824. The bill amended RCW 4.24.660 and created RCW 28A.600.190, known as the Zackery Lystedt Act, codified in Title 28A which governs common schools. The Lystedt Act requires schools and coaches to educate students and parents on the dangers of

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by a preponderance of the evidence to demonstrate that Dr. Burns' September 2009 treatment of Drew Swank violated the standard of care in Idaho.

concussion. It also seeks to promote increased safety for youth athletes when they are suspected of having sustained a concussion by having their teams remove them from play and having their teams not let the athlete return to play or practice until he or she has been evaluated by and received written clearance from a licensed health care provider. The Act lists no standard of care, no standards, and no processes that the health care provider must follow when evaluating and clearing a youth athlete to return to play. Nothing in the Act indicates the legislature intended the Act to create a private cause of action against health care providers outside the requirements of Ch. 7.70 RCW, which exclusively governs injuries from health care.

III. ARGUMENT

Petitioners seek direct review by this Court pursuant to RAP 4.2(a)(4), which requires Petitioners demonstrate that this is a "case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." The trial court's grant of summary judgment to Dr. Burns based on settled law does not raise a fundamental or urgent issue which requires prompt determination by this court.

A. The Issue Of A Washington Court's Personal Jurisdiction Over An Idaho Physician Who Provided Health Care For An Idaho Resident In Idaho Does Not Merit Direct Review.

Drew and his family were Idaho residents who sought care from Dr. Burns in Coeur D'Alene, Idaho. They allege Dr. Burns

was negligent in clearing Drew to return to play football after reporting that his symptoms had ceased.

Petitioners argue that the Lystedt Act creates a cause of action against Dr. Burns which is separate and distinct from a medical malpractice cause of action and which subjects Dr. Burns to personal jurisdiction in Washington by virtue of the fact that Drew played football for a private school in Washington. Dr. Burns sought and was granted dismissal on summary judgment for lack of personal jurisdiction, arguing that any allegedly negligent act or omission on his part occurred when he provided health care to Drew in Idaho.

A court's exercise of personal jurisdiction must satisfy both the provisions of the long-arm statute, RCW 4.28.185, and constitutional due process. *Lewis v. Bours, supra,* 119 Wn.2d at 670. Acts that support specific jurisdiction for non-residents are set out in the long arm statute, which provides in relevant part as follows:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> . . .

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this section.

RCW 4.28.185. Three criteria determine if a Washington court can assert jurisdiction under the statute consistent with due process:

(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 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.

Tyee Const. Co. v. Dulien Steel Productions, Inc. of Wash., 62 Wn.2d 106, 115-116, 381 P.2d 245 (1963); *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 768, 783 P.2d 78 (1989).

This Court held in *Lewis v. Bours* that, in the case of medical malpractice, a tort is ***not*** committed in Washington if the alleged act of malpractice was committed out of state, *even when the injuries manifest themselves in Washington. Lewis*, 119 Wn.2d at 670.

Here, Dr. Burns argued to the trial court that these established constitutional and statutory principles control and preclude the exercise of personal jurisdiction over a non-resident physician who allegedly committed medical malpractice outside of Washington.

The trial court's apparent application of those settled principles by dismissing all claims against Dr. Burns does not raise a fundamental or urgent issue which requires prompt determination by this Court.

B. Even Assuming Jurisdiction Over Dr. Burns, Any Claim Against Him Resulting From His Treatment of Drew Swank Is Determined Under Idaho Law Pursuant To Washington's Medical Malpractice Statutes And Cases, Which Require Application of Idaho Law As To The Medical Care Provided Out Of State.

Even assuming jurisdiction, under a Washington choice of law analysis Idaho law applies to the medical care Dr. Burns provided to Drew Swank in Idaho. *Lewis*, 119 Wn.2d at 670. The Lystedt Act simply is not implicated as to Dr. Burns under the facts here. This case thus does not present the issues as to health care providers under the Lystedt Act that Petitioners claim, and direct review should be denied.

C. Petitioners' Request The Court Construe The Lystedt Act To Impose New, Unstated, Unspecified Duties On Dr. Burns And A Specific Standard of Care Does Not Merit Direct Review Since The Act's Plain Terms Do Not State Such Duties or Standard Of Care And, Under RCW 7.70.010, The Court Cannot Create New Duties Or Standard Of Care Related To Alleged Injuries From Health Care; Any Analysis Will Not Apply To Dr. Burns.

First, and again assuming jurisdiction (which does not exist over Dr. Burns), any alleged cause of action as to medical negligence that may exist within the Lystedt Act is preempted as to Dr. Burns by the medical malpractice statutes, Ch. 7.70 RCW, which

means Idaho law will control. But even examining Petitioners' assertion that the Lystedt Act creates a cause of action against Dr. Burns which is separate and distinct from a medical malpractice cause of action, that claim does not withstand analysis.

Since 1976, all actions for an injury occurring as a result of health care have been governed exclusively by Ch. 7.70 RCW, the medical malpractice statutes. *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) ("When injury results from health care, any legal action is governed by RCW chapter 7.70."); RCW 7.70.010 (the Legislature expressly preempted in 1976 "all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care."). Nowhere in the text of the Lystedt Act is there an indication the legislature intended to make an exception to the explicit statutory medical malpractice preemption.[3] Thus, the normal analysis under the health care statutes and case law applies.

"Health care" is defined as the process of "examining, diagnosing, treating or caring for the plaintiff as (the physician's) patient." *Berger*, 144 Wn.2d at 109 (quoting *Branom v. State*, 94 Wn. App. 964, 969–70, 974 P.2d 335, *review denied*, 138 Wn.2d 1023 (1999)). This encompasses what Dr. Burns did for Drew. It

[3] For the same reason, the violation of any claimed "duty" created under the Lystedt Act, whether express or implied, does not serve as evidence of Dr. Burns' negligence under RCW 5.40.050, negating Appellant's Issue Two.

therefore also encompasses what the Complaint and Amended Complaint claim Dr. Burns did for Drew. It therefore returns the analysis to *Lewis* and that any potential liability is governed by Idaho law. These circumstances do not warrant direct review.

Second, application of well-established principles of statutory construction show the Lystedt Act does not include any such cause of action at all, even if it were not pre-empted. The basic statutory construction principles which apply here include that "[the Court's] duty in conducting statutory interpretation is to discern and implement the legislature's intent. Where the plain language of a statute is unambiguous, and legislative intent is therefore apparent, [the Court] will not construe the statute otherwise." *Ellensburg Cement Products, Inc. v. Kittitas County,* 179 Wn.2d 737, 743, 317 P.3d 1037 (2014) (internal citations and quotations omitted).

The Lystedt Act requires: (1) that public schools work with the Washington Interscholastic Activities Association to develop guidelines and forms to inform and educate coaches, youth athletes, and their parents or guardians of the nature and risk of concussion and the dangers of continuing to play after concussion or head injury, and that a youth athlete and his or her parent or guardian sign and return the form prior to beginning practice or competition; (2) that a youth athlete be removed from play by his team if he or she is suspected of sustaining a concussion or head injury in a practice or game; and (3) that a youth athlete who has been removed from play

not be allowed to return to play by his or her team until the athlete is evaluated by a licensed health care provider "trained in the evaluation and management of concussion." RCW 28A.600.190.

Petitioners assert in the Statement of Grounds, as they did below, that the Lystedt Act contains additional duties and a specific standard of care – but no such duties or standard of care are expressly stated. As to Dr. Burns, they also claim, without any basis in the statute, the licensed health care provider is held to specific "gradual return to play" standards which they describe, not from the statute and its express terms, but only by Petitioners' proposed expert witness. But the statute does not set forth any standard of care for health care providers, specific or otherwise. Nor does it invoke the specific "standards" Petitioners assert through their expert. Nothing like that exists in the Lystedt Act.

Focusing on the plain terms of the statute, as the Court must, *Ellensburg Cement, supra,* there is not a single reference to these supposed additional duties or the "gradual return to play" standard in the plain language of the Lystedt Act. Indeed, there is nothing within the statute to interpret that would provide for such duties or standard. Petitioners' desired construction of the statute has no basis in the statute. Judge Price got it right. This is not a fundamental or urgent issue requiring this Court's prompt determination.

IV. CONCLUSION

Petitioners cannot rewrite the law simply because they missed the statute of limitation in Idaho. Drew Swank's death, like that of any young person, is a tragedy. But it does not require this Court to rule the trial court erred under the undisputed facts of this case as to Dr. Burns where long-settled law establishes there is no jurisdiction over Dr. Burns and the trial court applied the law as is required.

As to Dr. Burns, this case does not raise fundamental or urgent issues which require a prompt determination by this Court. The only law that will apply to his medical care provided to Drew Swank is Idaho law. As such, this case does not present the kind of vehicle Petitioners assert because, on the undisputed facts, the Court cannot reach any analysis of the Lystedt Act as to Dr. Burns. Petitioners' request for direct review should be denied.

Dated this 6th day of October, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA 14459
Melissa J. Cunningham, WSBA 46537

KEEFE BOWMAN & BRUYA, P.S.

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Sent: Saturday, July 30, 2016 1:15 PM
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Subject: RE: Filing Attachments to Email in No. 93282-4 on behalf of Respondent Burns - Answer to Petition for Review - Corrected

Susan Carlson, Clerk of the Supreme Court

Re: No. 93282-4, *Swank v. Valley Christian School, Burns, et al.*,

Dear Clerk Carlson:

Attached for filing is Dr. Burns' Answer to Petition for Review (Corrected), Appendices A, B, and C thereto, and a certificate of service. I request it substituted for the filing made on July 29. I do not anticipate an objection from Mr. Ahrend.

This filing corrects form errors, including in the table of contents, references to "Appellants" rather than Petitioners, and two page cites. There are no substantive changes. Appendix C is a copy of a pleading filed in this Court's No. 907333-1 which is referenced in the Answer. It is added as a convenience to the Court and counsel. I apologize for any inconvenience to the Court or parties, and thank the Court for its consideration.

Very Truly Yours,

Gregory M. Miller, WSBA 14459

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Court Clerk:

Documents to be filed:

Respondent Burns' Answer to Petition for Review
Appendices A and B
Certificate of Service

Case Name: Swank v. Valley Christian School, Burns, et al.
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