FILED
FEB 22, 2016
Court of Appeals
Division III
State of Washington

COA No. 337821-III
Spokane County Superior Court No. 12-2-03766-8

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

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

Plaintiffs-Appellants,

vs.

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

Defendants-Respondents.

APPELLANTS' SUPPLEMENTAL BRIEF

George M. Ahrend, WSBA #25160
Mark E. DeForrest, WSBA #27397
AHREND LAW FIRM PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

Pursuant to the Court's letter ruling dated February 4, 2016, Appellants Donald R. Swank, individually and as personal representative of the Estate of Andrew F. Swank, and Patricia A. Swank, individually, submit the following supplemental brief:

I. ***Woodward v. Taylor*** is beside the point.

In his statement of additional authorities, Respondent Timothy F. Burns, M.D. (Dr. Burns), cites the recent decision in *Woodward v. Taylor,* — Wn. 2d —, — P.3d —, 2016 WL 166491 (Wn. Sup. Ct., Jan. 14, 2016), which holds that there is no basis for choosing the law of another state unless there is an actual conflict with the law of this state. This does not preclude application the Lystedt law, RCW 28A.190.600, to an out-of-state physician who clears a student-athlete to play sports within the state. Generally speaking, the most significant relationship test for choice of law, set forth in the Restatement (Second) of Conflict of Laws § 6 (1971), has been adopted and applied by the Washington courts. *See Woodward,* 2016 WL 166491, at *2-3. However, the most significant relationship test only applies in the absence of a statutory choice of law. *See* Restatement § 6(2) (stating the most significant relationship test only applies "[w]hen there is no [statutory] directive"). Statutory choice of law takes precedence

over the most significant relationship test. *See id.* § 6(1) (stating "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law"); *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 Montana 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:

> The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-stated facts involved, the court should so apply it unless constitutional considerations forbid.

Restatement § 6 cmt. *b*. The Lystedt law requires all student-athletes in the state of Washington to be properly evaluated and cleared by a health care provider before returning to competition following a concussion. *See* RCW 28A.600.190. It does not carve out an exception for circumstances where the clearance is provided

by an out-of-state health care providers, and it is unlikely in the extreme that the legislature would have intended such a result.

There is no need to engage in choice of law analysis. The Court simply needs to apply the Lystedt law as written. *Cf. Thornell v. Seattle Service Bureau, Inc.*, — Wn. 2d —, 363 P.3d 587 (Wn. Sup. Ct., Dec. 10, 2015) (holding coverage of Consumer Protection Act, Ch. 19.86 RCW, includes out-of-state plaintiffs and defendants, citing *State v. Reader's Digest Ass'n*, 81 Wn. 2d 259, 501 P.2d 290 (1972)).

II. It is no defense to Dr. Burns that he was not licensed to clear Drew Swank to return to competition in Washington.

In his statement of additional authorities, Dr. Burns also cites RCW 70.02.010(18), which defines "health care provider" in terms of those licensed to provide health care in Washington. The significance of this authority is unclear because it would nonsensical for the lack of a license to serve as a defense to liability for performing an act that requires a license. The fact that licensure is required by RCW 70.02.010(18)—as well as the Lystedt law, *see* RCW 28A.600.190(5)—only serves to compound Dr. Burns'

misconduct in clearing Drew Swank to return to competition in Washington.[1]

Respectfully submitted this 22nd day of February, 2016.

s/George M. Ahrend
George M. Ahrend, WSBA #25160
Co-Attorneys for Petitioners
AHREND LAW FIRM PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

[1] The lack of licensure also compounds the misconduct of Respondents Valley Christian School and Jim Puryear because they were not supposed to return Drew Swank to competition either unless and until he was evaluated and cleared by "a licensed health care provider trained in the evaluation and management of concussion" under RCW 28A.600.190(5).

CERTIFICATE OF SERVICE

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

On February 22, 2016, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Patrick J. Cronin (Email pjc@winstoncashatt.com)
Winston Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201

Gregory M. Miller (Email miller@carneylaw.com)
Melissa J. Cunningham (Email cunningham@carneylaw.com)
Carney Badley Spellman, P.S.
701 Fifth Ave., Ste. 3600
Seattle, WA 98104-7010

Gregory J. Arpin (Email greg.arpin@painehamblen.com)
William C. Schroeder (Email will.schroeder@painehamblen.com)
Paine Hamblen LLP
717 W. Sprague Ave., Ste. 1200
Spokane, WA 99201

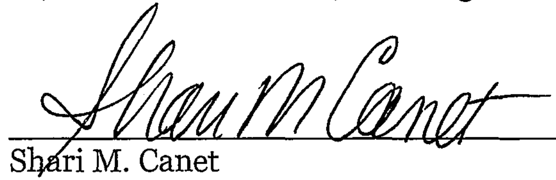
Edward J. Bruya (Email EBruya@KKBowman.com)
Keefe, Bowman & Bruya
221 N. Wall St., Ste. 210
Spokane, WA 99201-0910

Steven R. Stocker (Email sstocker@sslslawfirm.com)
Stocker, Smith, Luciani & Staub
312 W. Sprague Ave.
Spokane, WA 99201

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

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

Signed on February 22, 2016 at Moses Lake, Washington.



Shari M. Canet