COA# 337821-III

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,

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

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Hon. Michael P. Price

BRIEF OF RESPONDENT TIMOTHY F. BURNS, M.D.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is before the Court on review of the trial court's dismissal of Timothy Burns, M.D., of Coeur d'Alene, Idaho, for lack of jurisdiction over of the alleged medical negligence claims arising from his treatment in Idaho of his patient Drew Swank in 2009 when he allegedly knew Mr. Swank was going to Washington. The central issue is whether a Washington court has jurisdiction over such a claim where Dr. Burns treated Mr. Swank in Idaho, he practiced medicine only in Idaho, and the Swank family were (and are) Idaho residents? *Lewis v. Bours,* 119 Wn.2d 667, 835 P.2d 221 (1992), says unanimously, no.

Lewis held that Washington courts do not have jurisdiction over physicians for care given in a foreign state when the patient later asserts the care or treatment caused an injury that manifested in Washington. *Lewis* is wholly consistent with U.S. Supreme Court decisions from *International Shoe v. Washington* to the present. *Lewis* held that an injury from alleged negligent medical care "occurs" where the care is rendered (Oregon), not where the patient asserted the negligence manifested and where the doctor knew the patient was going (Washington); and not even when the patient is a Washington citizen. Rather, under *Lewis,* the patient must sue the doctor under the law of, and in the state where, the care was given.

This rule applies here with extra force. Not only was Drew Swank treated in *Idaho* by an *Idaho* physician licensed only in

Idaho, but he lived in Idaho and was not a Washington resident, as was the *Lewis* patient. Further, even if, *arguendo*, Washington courts could assert jurisdiction over Dr. Burns (which they cannot), only Idaho law will apply to the care rendered by Dr. Burns in Idaho – and Idaho's two-year statute of limitations ran before the complaint was filed. The dismissal was correct.

Appellants' search via discovery for the minimum contacts required by due process to assert specific or general jurisdiction failed. All the even arguably significant contacts were either through Drew Swank or Dr. Burns' employer Ironwood Family Practice, which was not sued. Two unanimous U.S. Supreme Court decisions in 2014 reaffirmed the traditional due process requirement of showing minimum contacts of the ***defendant party*** with the forum state. They re-emphasized that the central concern of due process limits on a state's jurisdictional reach is to protect the non-resident defendant's liberty, not to protect the convenience of the plaintiff or third parties. Thus, a ***plaintiff/patient's*** association with the forum, ***as a matter of law***, is inadequate to impose specific or general jurisdiction on the defendant, here Dr. Burns. Just because Drew Swank went to school in Washington is insufficient to subject Dr. Burns to Washington's jurisdiction. Similarly, the contacts of a ***non-party***, here Dr. Burns' employer Ironwood Family Practice, cannot be a proper basis to assert jurisdiction over the named defendant, even if they satisfied due process, which they do not.

Finally, there is no medical standard of care issue before the Court, despite Appellants' valiant effort to raise it on the topical and important issue of concussion prevention in sports. Dr. Burns' counsel immediately addressed the jurisdictional issue with Appellants' counsel, who wanted discovery to establish jurisdiction. In order to bring a motion to dismiss without the interruption of a CR 56(f) continuance, discovery as to Dr. Burns was limited to jurisdictional facts. *See* CP 250. Discovery and the motion before the trial court thus did not address what the standard of care is or ought to be, nor whether Dr. Burns breached any such standard. Despite Appellants' understandable efforts to inject a standard in their summary judgment documents and raise it as an issue at this late date, that issue was not developed in discovery. Nor was it the subject of the summary judgment, which focused on jurisdiction, choice of law, and the Idaho statute of limitations. That issue is not only irrelevant to the issues in this appeal, it is not properly reached on this undeveloped record. Moreover, Appellants' own written materials, submitted in their effort to raise the issue, explicitly refused to establish a standard of care. Instead, the "consensus document" itself states it "is **not** intended as a standard of care, and should not be interpreted as such." CP 514 (emphasis added). That issue must await a proper case.

II. RESTATEMENT OF ISSUES ON APPEAL

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 Appellants filing their complaint?

III. RESTATEMENT OF THE CASE

A. Facts.

1. Dr. Burns has practiced medicine exclusively in Idaho since 1993 and has no Washington license.

When Dr. Timothy Burns completed his medical residency 25 years ago in 1989, he chose to locate his family medical practice in Coeur d'Alene Idaho. CP 252- 53 (Burns Dep.). He opened his medical practice at Ironwood Family Practice and last provided health care in Washington State in 1993, over 20 years ago. CP 258-259. He let his Washington license lapse in 2003. CP 253. He only sees patients at Ironwood Family Practice in Coeur d'Alene, Idaho. CP 285 ("I don't treat any patients in the state of Washington." Burns Dep., 39:2-3). His patients come to him because they live in Coeur d'Alene, work there or used to work there, and in any event want to see Dr. Burns for their primary care even if they now live elsewhere, including in Washington State. CP 286-287. Out of his approximately 2400 patients, all of whom he sees in Idaho, the portion who happen to reside in Washington is less than *de minimis* and are not solicited there.[1]

[1] Of Dr. Burns' approximately 2400 patients, perhaps 1-3% are Washington residents. CP 341-344 (Interrogatory Response no. 7); CP 286 (Burns Dep., 40:11-19). Neither Dr. Burns nor Ironwood Family practice solicits patients from Washington. CP 286-287 (Burns Dep., 40:23-41:4); CP 325-326 (Burns Dep., 79:24-80:2).

2. Dr. Burns' long history of caring for the Swanks exclusively in Idaho.

Dr. Burns first met the Swanks in Coeur d'Alene, Idaho in 1990, shortly after he joined Ironwood. CP 1-2; 369. Drew's father Don testified that the Swanks, who then and now live in Idaho, had by 1990 already been long-time patients at Ironwood before Dr. Burns joined it. CP 369 (D. Swank Dep. 111). Dr. Burns provided primary care for Drew Swank from the time of his birth in 1992, always at Ironwood. CP 223. Drew's mother Patricia testified that the Swanks were self-insured (CP 890, P. Swank Dep. 205:11-14), and thus they never were covered by any of the health insurance carriers that otherwise contracted with Ironwood.[2]

3. Dr. Burns practiced medicine only in Idaho in 2009.

The Appellants' allegations as to Dr. Burns related to Drew Swank's untimely death all occurred in 2009. *See* Amended Complaint, CP 3-5. Dr. Burns never saw Drew Swank anywhere but in Idaho (including in 2009) and practiced medicine only in Idaho. CP 331; 286. As noted, he last saw patients in Washington State in 1993, 16 years before the events at issue. CP 258-259 (Burns Dep. 12:23-13:5).

[2] This makes all of Appellants' allegations as to Dr. Burns' clinic's health insurance contracts irrelevant for any purpose, including under the long arm statute, as discussed *infra*, §D.2.b.

4. Dr. Burns examined Drew and advised that he not play football until his symptoms, which were self-reported, ceased, then cleared him to play when informed they had stopped.

On September 18, 2009, while playing in a high school football game, Drew had an injury to his head region. CP 380. He was not instructed by his school or coaching staff to be examined by any specific health care professional retained by or acting for the school. On September 22, Drew was still suffering from severe headaches from the game and went to see his long-time Idaho family physician Dr. Burns, who examined Drew. CP 3 ¶ 2.3 (amended complaint). Dr. Burns advised Drew and his mother that he was not to resume participation in football until his symptoms resolved. *Id*.; CP 374 (P. Swank Dep.). These symptoms were, necessarily, self-reported by Drew. *See* CP 373-374 (description of symptoms).

Drew's mother Patricia Swank testified that on September 24, she reported to Dr. Burns' office staff that Drew was no longer suffering headache symptoms and she then requested that Dr. Burns provide a written authorization so that Drew could return to play. CP 376 (P. Swank Dep. 52: 8-11). CP 3 ¶ 2.5. 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. CP 320-321 (Burns Dep. 74:19-75:1). Mrs. Swank picked up the note and gave it to Mr. Swank who delivered it to the school's coach. CP 174 (Don Swank Dep., 94:6-22).

On September 25, 2009, Drew resumed playing football for Valley Christian School in a Friday night football game in Washtucna, Washington. CP 4. During the game, Drew was hit by another player, staggered off the field, and collapsed. CP 4. He was taken to the hospital in Ritzville, and later airlifted to Sacred Heart Medical Center in Spokane, where he died two days later. CP 4.

B. Procedural History.

1. The belated, time-barred Idaho suit against Dr. Burns and Ironwood Family Practice.

On July 20, 2012 Appellants initiated Idaho's pre-litigation screening process necessary to bring a medical malpractice action in Idaho against both Dr. Burns and Ironwood Family Practice. CP 399, 377-83 (letter and application for medical malpractice prelitigation hearing before Idaho Board of Medicine).[3] By letter of July 26, 2012, the Chair of the Board's Medical Malpractice Screening Committee informed the Swanks' counsel that Idaho's two-year statute of limitations for such actions had run so that the Board was "declining to consider" their application, which is a prerequisite for a medical negligence lawsuit. CP 398. An exchange of letters clarified that, while the statute had run as to the Appellants (the estate and Donald and Patricia Swank), it was tolled as to

[3] Although the prelitigation hearing process is a prerequisite to bringing a medical negligence suit in Idaho, its proceedings are nevertheless "informal and nonbinding." *See* CP 393 (copy of Idaho Code §6-1001).

potential claims on behalf of Drew Swank's minor siblings, so that the Swank's request for a hearing on behalf of the siblings was honored and held on September 28, 2012. *See* CP 397, 400.

On October 12, 2012, the Panel issued its post-hearing report. CP 384-387. The report states Drew Swank reported daily headaches on the September 22, 2009 exam, but not other abnormalities. CP 385.[4] It states Dr. Burns "performed a thorough evaluation of Mr. Swank," sets out the normal findings with only one area of mild muscular tenderness, and related that Dr. Burns "directed Andrew to stay out of contact sports for the next three days." *Id.* It states that, after Drew's mother Patricia Swank called "requesting that a release be signed because Andrew had a game the next day, on September 25," that Dr. Burns gave the release "believing that the headache symptoms had resolved." CP 386.

The Panel considered the standard of care that existed in September 2009 in the Coeur d'Alene area as required under Idaho law,[5] specifically noting that "[t]he post concussion treatment Standard of Care is a rapidly evolving Standard and is substantially different [in] 2012 than existed in 2009." CP 386. It ultimately concluded:

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[4] The Panel report states that Drew reported daily headaches "but reported no visual abnormalities, no nausea, no vomiting, or any neurological losses." CP 385.

[5] *See* CP 394 (copy of Idaho Code §6-1012).

> Releasing Andrew Swank to play football without a subsequent follow up was consistent with the information that Dr. Burns had indicating no other post concussion symptoms were demonstrated and is consistent with the Standard of Care that existed in 2009.

CP 387. The panel concluded that the claimants "failed to meet their burden by a preponderance of the evidence" to demonstrate Dr. Burns violated the standard of care in September 2009. *Id.* The Panel report thus ultimately concluded that "the claims against Dr. Burns are without merit." *Id.*

2. Commencement of the Washington litigation.

Six weeks after learning their Idaho claims against Dr. Burns and Ironwood were barred, Appellants filed this lawsuit in Washington against Dr. Burns[6] and the other respondents, filing on September 21, 2012, just days before the three-year Washington statute of limitations ran and naming Dr. Burns but not Ironwood. CP 32. The Amended Complaint was filed four days later. CP 1.

Appellants engaged in discovery as to Dr. Burns which, though limited to their effort to establish jurisdiction over him as opposed to exploring any alleged negligence,[7] was nevertheless

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[6] The Swanks did not sue Ironwood Family Practice in Washington. CP 1. Nor did they name Dr. Burns in his capacity as an employee of Ironwood. *See* CP 2, Amended Complaint ¶1.8.

[7] *See* CP 250:4-13 (Burns Dep. 4:4-13).

> MR. BRUYA: Before we start, I just want to put on the record that we are having a deposition today for Dr. Burns on jurisdictional issues only. Mark Kamitomo and I have agreed to these terms pending [an] upcoming summary judgment motion on jurisdictional issues. And then following that, depending

(Footnote continued next page)

extensive, taking over a year. *See, e.g.,* CP 1011-1014, CP 1018-1019. Once Appellants' efforts were completed so there would be no need for a CR 56(f) continuance (*see, e.g.,* CP 250*)*, Dr. Burns moved to dismiss all claims against him on three grounds: 1) that Appellants could not establish personal jurisdiction over him in Washington; 2) that Appellants could state no claim against Dr. Burns under the Lystedt Act because any cause of action under that Act was preempted by Washington's medical negligence statutes; and 3) that because a medical negligence claim was the only potential claim against Dr. Burns, it had to be brought pursuant to Idaho law and, since under Idaho law the statute of limitations had long since passed, dismissal was required. CP 222-243.

Appellants responded with arguments that Dr. Burns' authorization in Idaho for Drew Swank to return to play high school football was sufficient to establish jurisdiction because the school was in Washington, that the Lystedt Act contained an implied statutory cause of action, and that the cause of action was not preempted by the medical negligence statute because it was applicable to coaches and other school personnel as well as

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on the court's rulings, plaintiffs will be allowed to take the remainder of Dr. Burns' deposition, related to the care and treatment or Andrew Swank.

Is that correct, Counsel?

Mr. Kamitomo: Agreed.

Accord, CP 284: 5-12 (Burns Dep. 38:5-12) (Dr. Burns' counsel objecting to questions related to Dr. Burns' competence: "We are getting a little bit beyond the scope of jurisdiction.").

healthcare providers. CP 969-993 (Plaintiffs' SJ Response to Burns' MSJ).

Appellants' response also included a declaration from a physician who both opined that Dr. Burns had committed medical negligence and purported to state what the Lystedt Act meant. *See* CP 973. (Appellants' SJ Response to Burns) and CP 409 (Dr. Herring declaration). As part of his reply, Dr. Burns pointed out that Appellants attempted to interpret and apply the Lystedt Act through their medical expert which was impermissible under settled law, usurping the province of the court.[8] Dr. Burns argued below, and renews here, that those principles and authorities make paragraphs 3, 4, 6, and 7 of the Herring Declaration (CP 407-408 & 409-410) irrelevant as a matter of law and they therefore must be excluded under ER 402. *See* CP 1178 (Burns SJ Reply p. 6, fn. 4); CP 1173-1175 (Burns' Motion to Strike Legal Opinions, pp. 1-3). As irrelevant, inadmissible evidence, they also cannot be a proper basis to resist summary judgment since CR 56(e) by its terms requires use only of evidence that would be admissible at trial.

[8] *See State v. Clausing*, 147 Wn.2d 620, 628-29, 56 P.3d 550 (2002) and authorities cited therein (expert may not testify on the law, which usurps the role of the court; it is the court that "shall declare the law"); *In re Custody of E.A.T.W.,* 168 Wn.2d 335, 343, 227 P.3d 1284 (2010) (the court construes the meaning of a statute to determine the intent of the legislature).

The trial court granted all defendants' motions to dismiss without analysis. CP 1340. It later clarified that the dismissal of Dr. Burns was for lack of jurisdiction. CP 1350-56.

IV. RESPONSE ARGUMENT

A. Standard of Review.

Review of summary judgment is *de novo* based on the record before the trial court. *Lewis v. Bours,* 119 Wn.2d 667, 669, 835 P.2d 221 (1992); RAP 9.12. A "trial court's assertion of personal jurisdiction is a question of law reviewable de novo" where the underlying facts are undisputed. *Lewis v. Bours,* 119 Wn.2d at 669.

Pursuant to the express terms of the rule, a party responding to a motion for summary judgment must submit specific facts that would both: 1) be admissible at trial; and 2) demonstrate a genuine issue for trial. CR 56(e).[9] Although all facts and reasonable inferences are construed in its favor, the responding party cannot rely on either speculation or inadmissible evidence to defeat summary judgment.[10] Further, all inferences that are taken in their favor must be reasonable inferences.[11]

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[9] *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986).

[10] *King County Fire Protection Dists. Nos. 16, 36, & 40 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) ("A trial court may not consider inadmissible evidence when ruling on a summary judgment motion."); *Young v. Key Pharmaceuticals, Inc*., 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989) (medical malpractice defendants were entitled to summary judgment where plaintiff failed to offer competent evidence to support prima facie case).

[11] *Fairbanks v. J.B. McLoughlin Co., Inc*., 131 Wn.2d 96, 101, 929 P.2d 433 (1997) ("We must accept [plaintiff's] evidence as true and must consider all the

(Footnote continued next page)

Second, review of the meaning, interpretation, and application of a statute by the court is de novo. *Berger v. Sonnelund,* 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001); *In re Custody of E.A.T.W.,* 168 Wn.2d 335, 343-44, 227 P.3d 1284 (2010). The "primary goal in construing a statute is to determine and give effect to the intent of the legislature" beginning with the text and "examining everything the legislature has said in the statute itself and any related statutes that reveal legislative intent regarding the provision at issue." *Custody of E.A.T.W.*, 168 Wn.2d at 343. The plain meaning of a statute is determined by examining the entire act in which it was created as well as associated statutory provisions. *Id.,* pp. 343-44.[12] Thus, the purported interpretation or a statute or the legislative intent by a so-called expert are irrelevant, inadmissible, and will be disregarded by the court. *State v. Clausing*, 147 Wn.2d 620, 628-29, 56 P.3d 550 (2002).

Third, the Court will not lightly overrule settled precedent, but only upon a clear showing that the rule it announced is both

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facts and all *reasonable* inferences therefrom in the light most favorable to her.") (emphasis added).

[12] The Court stated at 168 Wn.2d at 343-44 (internal quotes and citations omitted):

> The plain meaning of a statute is discernable by examining everything the legislature has said in the statute itself and any related statutes that reveal legislative intent regarding the provision at issue. . . . The meaning of words in a statute is not determined from those words alone but from all the terms and provisions of the act as they relate to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.

incorrect and harmful. *State v. Njonge*, 181 Wn.2d 546, 555, 334 P.3d 1068 (2014); *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

B. Dismissal Was Required Because Washington Jurisdiction Over Dr. Burns Is Improper: He Practices Medicine Only in Idaho; Is Licensed Only in Idaho; Sees Patients Only in Idaho; Was Sought Out by the Swanks to Treat Drew in Idaho; Saw Drew Swank Only Idaho; and Had No Relationship With Drew's School or Its Football Program.

1. *Lewis v. Bours* required dismissal because the claim against Dr. Burns is, at heart, a medical malpractice claim and *Lewis* settled Washington law in 1991 that a physician in a foreign state cannot be sued in Washington for the care rendered outside Washington, even when the physician knows the patient is going to Washington.

Appellants now contend the essence of their claim against Dr. Burns is a medical malpractice claim, changing their strategy in the trial court where they argued that there was some sort of independent duty imposed on Dr. Burns by the Lystedt Act. *See* OB 39; CP 977-980 (Appellants' briefing below). As such, the claim of medical negligence is subject to the governing statutes, Ch. 7.70 RCW, and associated case law, including as to jurisdiction and (as discussed *infra*) choice of law. In this case, that means Washington courts' jurisdiction over Dr. Burns is evaluated under *Lewis v. Bours.*

In *Lewis,* this Court affirmed a summary judgment dismissal of the plaintiff's claim by holding that Washington courts did ***not*** have jurisdiction over an Oregon physician for alleged negligent care

at his clinic which allegedly manifested in Washington. 119 Wn.2d at 674. The Oregon physician had provided prenatal care to the plaintiff, a Washington resident, who later gave birth at his Oregon clinic. *Id.* at 668. The plaintiff and her newborn daughter were discharged with instructions for the plaintiff to take the newborn to a doctor for follow-up care when she returned home in Washington. *Id.* at 669. The newborn stopped breathing on the way home, was taken to a hospital at Longview, and later transferred to Oregon Health Services. She was ultimately determined to suffer from irreversible brain damage and other, developmental problems. *Id.*

The plaintiff claimed Washington had jurisdiction under RCW 4.28.185(1)(b) for an alleged tortious act committed in Washington because the Oregon doctor knew she was returning to Washington, advised her to take her newborn to a doctor in Washington to seek follow-up care there, and because the injury resulting from the alleged negligence manifested in Washington so that, for purposes of long arm jurisdiction, the injury occurred in Washington. *See Lewis,* 119 Wn.2d at 669, 673-74. This Court unanimously rejected the plaintiff's claim of jurisdiction on those alleged facts,[13] concluding that "the criteria of RCW 4.28.185 have

[13] The Court's factual analysis at 119 Wn.2d at 673-74 is strikingly similar to the facts here except that it showed a stronger connection to Washington since the *Lewis* plaintiff was a Washington resident and the Oregon physician specifically advised the plaintiff to seek treatment in Washington, neither of which is the case here:

Treating the allegations in the complaint as established for the limited

(Footnote continued next page)

not been met," and affirmed the trial court's dismissal. *Id.* The Court relied on the earlier decision of *Hogan v. Johnson,* 39 Wn. App. 96, 692 P.2d 198 (1984), which also shows that a physician's knowledge the patient will be going to a different state is not enough to establish jurisdiction for an alleged injury due to out-of-state treatment.[14]

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purpose of the jurisdictional question, defendant did not commit a tortious act in Washington. Plaintiff unilaterally sought out defendant's professional services in Oregon and traveled to Oregon to receive them. All care, negligent and/or otherwise, was rendered in Oregon. Defendant was not a part of any ongoing care that [the newborn] received in Washington nor was he or is he a part of her institutional care given in Oregon. At no relevant time was defendant in Washington, either physically, through a device that he manufactured or designed, by an agent or otherwise. The fact that defendant advised plaintiff, while she was in Oregon, to take [the newborn] to a doctor in Washington does not constitute a tortious act committed in this state.

[14] In *Hogan,* the plaintiff received allegedly negligent medical care in California, but did not begin to experience the resulting injury until a few months after she moved to Washington State. She attempted to bring a medical negligence suit against the California physician under Washington's long-arm statute on the grounds that he "knew she was a transient when she was treated in California and [was] aware or should have been aware that she would not be remaining there, but would be locating elsewhere." *Hogan*, 39 Wn. App. at 97. The physician had no other contacts with Washington State. The Court of Appeals, recognizing that the assertion of jurisdiction must "not offend traditional notions of fair play and substantial justice" found that "there is no jurisdiction over respondents merely because it was foreseeable that a patient treated in California would later move to Washington." *Id.* at 102.

See also Bartusch v. Oregon State Bd. of Higher Ed., supra, 131 Wn. App. at 306-09. The Court of Appeals cited and relied on *Grange Ins. Ass'n v. State,* 110 Wn.2d 752, 763-64, 757 P.2d 933 (1988), in holding that "when considering whether to subject a medical services provider to the jurisdiction of the patient's home state, there is an important distinction between economic activity focusing on the forum state's economic markets and medical services rendered outside the forum state that do not involve direct patient solicitation." *Bartusch*, 131 Wn. App. at 309. These considerations preclude jurisdiction over Dr. Burns here, especially since Washington was not Drew Swank's home state.

This Court specifically held in *Lewis* that "[t]he fact that defendant advised plaintiff, while she was in Oregon, to take [the newborn] to a doctor in Washington does not constitute a tortious act committed in this state." *Id.* Thus, the alleged fact that Dr. Burns gave the Swanks a return to play note with knowledge the note was for sports at a school in Washington (for which there is no evidence, as Dr. Burns testified at the time of the exam he was not aware what school Drew attended or where it was, CP 317-18), would still "not constitute a tortious act committed in this state" under *Lewis*.

Appellants' effort at OB 49-50 to argue that it was Dr. Burns who was "returning Drew to play football in the state of Washington" creates an argument that is not supported by the actual facts in the record. It was not Dr. Burns who "returned" Drew to play football in Washington. He gave a medical clearance for Drew to resume activities. It was Appellants who, literally, returned him to play football in Washington.

Even so, this misstatement of facts brings the case closer in alignment with *Lewis.* After all, in *Lewis* the Oregon doctor released the plaintiff from his clinic where she had given birth and "returned" her to Washington with her newborn with instructions to see a Washington physician. The essence of the claim in *Lewis* was that the plaintiff ***should not have been released*** from the doctor's clinic to travel back to Washington State with her newborn; there was too much medical risk and the doctor failed to ascertain and advise the

plaintiff as to that risk before "sending" her to Washington. *See Lewis*, 119 Wn.2d at 668, quoting complaint.[15] This is precisely what Appellants allege here – that Dr. Burns negligently released – "sent" – Drew Swank to play football in Washington.

It is undisputed that all care provided by Dr. Burns to Drew Swank, and any other relevant actions by Dr. Burns as to Mr. Swank, took place within Idaho. Appellants try to avoid this fact by arguing the return-to-play note was written by Dr. Burns for the intended purpose of returning Drew "to play football in the State of Washington" in an effort to invoke the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §37 (1988 Rev.). OB, pp. 47-48. This argument has several problems. ***First*** and most important, Appellants conveniently ignore the controlling Washington law of *Lewis v. Bours,* which settled the issue. The Restatement is irrelevant.

Second, the Restatement argument falls apart on examination since it is predicated on far different facts – the intentional discharge of a firearm sending an inherently dangerous instrumentality into another state, yielding liability for injuries caused to third parties in

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[15] The allegations in *Lewis v. Bours* are quoted as follows:

> Due to her condition at birth, [the newborn] required the attention of a trained pediatrician or a neonatologist, hospital admission, and monitoring for signs or symptoms of neonatal disease for at least 24 hours.
>
> Defendant Bours discharged Plaintiff from his care at approximately three (3) hours of age, without arranging for or instructing Plaintiff's parents to seek immediate admission at a nearby hospital, without providing for immediate attention of a trained pediatrician, and without instructing Plaintiff's parents that Plaintiff was at high risk for neonatal distress.

the neighboring state.[16] In addition to its unseemliness, there is no credible contention the facts in its example are analogous.

First, Drew Swank was not an inherently dangerous instrumentality that could be expected to strike a third party in Washington State. Second, Dr. Burns did not "aim" Drew Swank at Washington State with his return to play note. Moreover, while there is evidence Dr. Burns knew the release was to let Drew play in a high school football game, there is no evidence Dr. Burns knew where the game was to be played, much less that it would be played in Washington and not in Idaho. He testified he did not know what school Drew attended and that it did not make a difference as far as far as treatment. CP 317-18.[17] As far as Dr. Burns knew, the game would be played in Idaho, either as an away game for a Washington school, or a home game if Drew was playing for an Idaho school.

Based on this record, it is not a *reasonable* inference that Dr. Burns knew the clearance was for sports participation in a Washington school or that he attached any significance to such knowledge if he had it. But this is an academic exercise because Dr.

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[16] As they did below, Appellants argue that Dr. Burns' treatment of Drew is comparable to "a person in state X [who] discharges a firearm under circumstances where he or she either intends of [sic] should expect that it will cross state lines, and the bullet hits another person located in state Y" because "the shooter would be subject to jurisdiction in state Y" under the Restatement. *See* CP 982-983 (Plaintiff's Opposition to Burns SJ).

[17] Dr. Burns had not conducted Drew's preseason physical in 2009. CP 331. Patricia Swank testified she sometimes went to other providers than Dr. Burns to minimize costs so that not all of Drew's care was through Dr. Burns. CP 843.

Burns' knowledge of where Drew played football, or in which state the game was to be played, is not a material issue of fact under *Lewis v. Bours*. There the Court found ***no*** jurisdiction even though that physician ***had*** such knowledge. *Lewis* required the dismissal.

2. *Lewis v. Bours* is consistent with Federal decisions limiting the reach of state long arm jurisdiction under due process requirements. The most recent U.S. Supreme Court decisions in 2014 would not permit assertion of jurisdiction even if *Lewis* did not already exist.

The trial court's dismissal of Dr. Burns for lack of personal jurisdiction is also required by federal law governing personal jurisdiction which has grown out of the seminal case of *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945).[18] Under current federal due process analysis, there are two types of personal jurisdiction: general jurisdiction, which arises where a person's activities "are so continuous and systematic as to render them essentially at home in the forum State" regardless of whether the suit actually related to those activities; and specific jurisdiction, which is exercised where the cause of action relates to the defendant's contacts with the forum. *Daimler AG v. Bauman*, __ U.S. __, 134 S. Ct. 746, 754 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A., v. Brown,* 564 U.S. ___, 131 S. Ct. 2846, 2851 (2011)) (internal

[18] It is telling that Appellants rely on the language of the Restatement (Second) of Conflict of Laws §37 (1988 Rev.) rather than engaging in analysis of the case law. This shows they cannot meet the jurisdictional requirements under the cases, which control.

quotations omitted). Again relying on her earlier decision in *Goodyear,* Justice Ginsberg noted in *Daimler* that, "Since *International Shoe,* specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role." *Id.,* 134 S. Ct. at 755 (internal quotations and citations omitted). The trial court correctly concluded that Washington courts do not have either type of personal jurisdiction over Dr. Burns.

C. Specific Jurisdiction: The Trial Court Correctly Determined That It Did Not Have Specific Jurisdiction Over Dr. Burns.

1. Specific jurisdiction under Washington's statute.

Acts that support specific jurisdiction for non-residents are set out in Washington's long-arm statute.[19] The Court has specified three criteria to determine when a Washington court can assume specific jurisdiction under the long-arm statute consistent with due process requirements:

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[19] RCW 4.28.185 provides in relevant part as follows (emphasis added):

(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.

- "The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;"
- "The cause of action must arise from, or be connected with, such act or transaction"
- "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). As set out in §IV.B., *supra,* and pursuant to *Lewis v. Bours,* none of these criteria are met by Dr. Burns' treatment of an Idaho resident within Idaho.

(a) Dr. Burns did not purposefully do some act or consummate a transaction in Washington under this Court's holding in *Lewis v. Bours*.

The *Lewis v. Bours* analysis *supra* determined that, for purposes of RCW 4.28.185(1)(b), the manifestation in Washington of the alleged negligent medical treatment rendered out of state did ***not*** meet the statute's requirement that the complained-of act occurred in Washington.

(b) The cause of action alleged by Appellants does not *arise from* an act or transaction performed by Dr. Burns *in Washington*.

A claim "arises from" the defendant's action in the forum state if it can satisfy the "but for" test: Would the claim have arisen "but for" the activities of the nonresident ***in the forum*** where he is ultimately sued? *Shute v. Carnival Cruise Lines, supra,* 113 Wn.2d at 772.

Shute involved a Washington resident who brought a personal injury suit against a Panamanian cruise ship operator with its principal place of business in Florida. The injury occurred off the coast of Mexico, but the cruise line had advertised extensively within the state of Washington. On a certified question from the Ninth Circuit, the Court held that the cause of action arose from the cruise line's Washington advertising because the plaintiff's injury would not have occurred "but for" the cruise line's activities in the State of Washington; *i.e.,* Ms. Shute, a Washington resident, would not have purchased tickets on that particular cruise line and subsequently injured herself but for Carnival's Washington advertisements. *Id*. at 772. No such causation exists here.

The Swank family had received care from Dr. Burns since 1990, before Drew was born, and before the advent of the internet, much less internet advertising. Drew and his family were Idaho residents. The undisputed evidence shows Appellants chose to see Dr. Burns in 2009 because of their long-standing relationship based

on his presence in Idaho where they lived – not as a result of any Washington activities done by him. CP 307-308, CP 313, CP 373. Here, any alleged injury resulting from Dr. Burns' care of Drew in Idaho would have occurred regardless of Dr. Burns' non-existent activities in Washington State. And *Lewis* precludes considering Dr. Burns' allegedly negligent treatment as an act or transaction performed in Washington. *Shute*'s "but for" test is not met.[20]

(c) The exercise of personal jurisdiction over Dr. Burns in this case would offend traditional notions of fair play and substantial justice.

To determine if this test is met, the court must consider: (1) the quality, nature and extent of the defendant's activity in Washington; (2) the relative convenience of the parties; (3) the benefit and protection of the laws of Washington afforded the respective parties; and (4) the basic equities of the situation. *Tyee Const. Co., supra,* 62 Wn.2d at 115-116.

Plainly Appellants knew how to name Ironwood since the belated Idaho suit sued both Ironwood and Dr. Burns. *See* CP 377-383. Having made the careful decision of whom to sue in Washington, Appellants cannot now try to assert as the basis for jurisdiction facts relevant to parties they did not sue. To do so would both disregard basic distinctions between persons and the

[20] Nor does the Restatement argument asserted by Appellants provide a basis for liability, as discussed *supra*, §B.1.a.

basis under which they are sued or not sued. It also would offend traditional notions of fair play and substantial justice by making one person subject to jurisdiction and potential liability based on the contacts of another who was not sued.

Applying these factors, Washington may not exercise personal jurisdiction over Dr. Burns consistent with due process most basically because Dr. Burns has chosen to, and does, practice medicine only in Idaho, limits his professional activities to Idaho, and only treated Drew in Idaho. First, as to the quality, nature, and extent of Dr. Burns' activity in Washington in 2009 when he saw Drew for the concussion: as detailed *supra*, it is undisputed Dr. Burns practiced medicine in Idaho, not Washington. He was licensed in only Idaho, not Washington. The Swank family chose him to see Drew because he was their long-time family physician. The treatment at issue in this case was provided in Idaho.

As to Dr. Burns' so-called Washington contacts professionally as a physician in his practice, they are, at most, *de minimis*. Virtually all of his patients are Idaho residents. The less-than-*de minimis* patients who live in Washington either work in Coeur d'Alene and choose to see him there, or used to work or live in Coeur d'Alene and wanted to continue to see him once they moved to Washington. Dr. Burns does not advertise in Washington. His out-of-Idaho referrals are made only when local medical resources are insufficient, are minimal, and are what any physician

would and should do to insure proper care of his or her patients; but they are not a basis for imposing long-arm jurisdiction.[21] More importantly, such referrals have no bearing on the case here, as no such referrals were involved. The quality, nature and extent of these activities do not support the exercise of personal jurisdiction in Washington.

(d) Weighing the benefit and protection of the laws of Idaho and Washington, and basic equities, weighs strongly in favor of declining jurisdiction, especially given the focus of the due process protections in protecting the liberty of the defendant, here Dr. Burns.

Review of the benefit and protection of the laws of the different states and the basic equities weigh even more strongly in favor of declining jurisdiction in Washington, particularly when one keeps in mind the Supreme Court's unanimous reminder that the due process protections being applied are designed to "principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden v. Fiore,* ___ U.S. ___, 134 S. Ct. 1115, 1122 (2014). The material differences between the medical negligence law in Idaho and Washington show that a physician practicing in Idaho is in a far different and more

[21] *See, e.g., Bartusch v. Oregon St. Bd. of Higher Ed.,* 131 Wn. App. 298, 126 P.3d 840 (2006) (reversing trial court's assertion of long-arm jurisdiction over veterinary hospital and rejecting the referral network as a proper basis for imposing such jurisdiction over out-of-state medical services providers).

favorable posture than a physician practicing in Washington and will have his or her liberty better protected by the Idaho laws under which he or she practices.

The differences between Idaho and Washington law governing medical malpractice actions are significant. For instance, as noted *supra,* Idaho law provides for a shorter, two-year statute of limitations for medical negligence in Idaho Code §5-219.4. CP 395. In addition, Idaho law places a statutory cap on non-economic damages (Idaho Code §6-1603, at CP 391), and is a modified comparative fault jurisdiction per Idaho Code §6-801. CP 392. Idaho law requires all medical malpractice claims to be approved by a pre-litigation hearing panel, a requirement that does not exist in Washington. Idaho Code §6-1001. Finally, Idaho law provides for a community standard of care pursuant to Idaho Code §6-1012 (at CP 394), rather than the state-wide standard of care applied in Washington. *Compare*, Idaho Code §6-1012[22] with RCW 7.70.040(1).[23]

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[22] " . . . negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, . .. 'community' refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided." CP 394.

[23] "The health care provider failed to exercise that degree of care, skill and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, in acting in the same or similar circumstances."

Finally, when examining the differences in state law, it must be kept in mind that Appellants were entitled to bring a medical negligence suit in Idaho and chose the Washington venue for suing Dr. Burns ***only after*** they learned in July, 2012, that the Idaho statute of limitations has expired so that their Idaho claim was barred, as described *supra*. This raises the issue of forum-shopping, which is highly disfavored where, as here, it would make for variable imposition of liability on physicians depending on which state the case was filed in, a result rejected by both the U.S. Supreme Court as well as this Court.[24]

The remaining factors also disfavor the exercise of jurisdiction over Dr. Burns. The relative convenience of the parties favors Idaho jurisdiction since both the Appellants and Dr. Burns reside in or close to Coeur d'Alene, the same town as the Idaho

[24] *See, e.g., Agency Holding Corp. v. Malley-Duff & Assoc., Inc*., 483 U.S. 143, 154 (1987) (adoption of uniform federal statute of limitation for RICO claims would avoid forum-shopping among different state statutes of limitations for the same action); *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004) (limiting *habeas* jurisdiction to district of prisoner's confinement in part because otherwise "The result would be rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation 137 years ago."). *Accord, W.G. Clark Const. Co. v. Pac. N.W. Reg'l Council of Carpenters*, 180 Wn. 2d 54, 58, 322 P.3d 1207 (2014) (overruling prior decisions so that the outcome of ERISA cases would not be "entirely dependent on whether the lawsuit is filed in federal or state court," and eliminate forum shopping and inconsistent results for parties). *Accord, Bunch v. Nationwide Mutual Insurance Co*. 180 Wn. App. 37, 321 P.3d 266 (2014) (reversing trial court's refusal to enter stay in order to let related and first-filed federal action to proceed and prevent forum-shopping).

District Court, which makes the Spokane Superior Court inconvenient by comparison.

D. General Jurisdiction: Even After Full Discovery on Jurisdictional Issues, the Contacts of Dr. Burns Are Insufficient to Establish General Jurisdiction Over Him.

Appellants contend Washington courts can properly assert jurisdiction over Dr. Burns for his medical care rendered in Idaho because his overall contacts with Washington State make such jurisdiction proper. *See* OB pp. 16-19 (listing supposed jurisdiction facts as to Dr. Burns); 47-50 (Argument). But the vast majority of contacts they claim are relevant have nothing to do with Dr. Burns' individual work as a medical professional. Rather, examination of the actual facts relative to ***Dr. Burns' professional*** contacts with Washington as an ***individual medical professional*** – the only capacity in which he was sued – demonstrates that the assertion of jurisdiction by the Washington courts would "offend traditional notions of fair play and substantial justice" the well-established test for satisfying due process under both established Washington cases and the most recent federal decisions from 2014.

1. General jurisdiction requires "continuous and systematic" contacts such that the defendant is "essentially at home in the forum state," which test is not met.

A defendant may be subject to jurisdiction over a cause of action unrelated to his contacts in the forum, but ***only*** if his contacts

with the state are "so 'continuous and systematic' as to render [him] essentially at home in the forum state." *Daimler*, 134 S. Ct. at 761, invoking *International Shoe.*[25] The Court has emphasized that it is the **defendant's** contacts with the forum state which allows long arm jurisdiction, not the contacts of anyone else. *Walden v. Fiore,* 134 S. Ct. at 1123. Without "continuous and systematic general business contacts," the decisions Justice Ginsburg discusses in *Daimler* show that general jurisdiction normally will not be found.

2. Dr. Burns' Washington contacts as an individual physician are *de minimis* and insufficient under general jurisdiction principles.

Although Appellants scoured Dr. Burns' professional life (and attempt, regrettably, to invoke his personal family life) in their vain attempt to establish sufficient contact over Dr. Burns, they fail. Many contacts are not proper factors in assessing ***Dr. Burns'*** contacts with Washington either because 1) they are actually the contacts of non-party Ironwood, as discussed *supra*; or because 2) they occurred before the incident giving rise to the claim took place. For instance, Appellants try to trumpet the facts that Dr. Burns completed his medical internship and residency in Spokane over 25

[25] *See Daimler,* 134 S. Ct. at 754-758, where Justice Ginsburg reviews the sparse number of cases on general jurisdiction compared to specific jurisdiction, noting the Court's reluctance to find general jurisdiction without also finding "continuous and systematic general business contacts" in cases not related to the transactions that had occurred.

years ago, that he stopped his early-career occasional supplemental medical work in Spokane over 20 years ago, and let his Washington medical license lapse over a decade ago in 2003. But as the facts *supra* demonstrate, even the most recent of these temporally distant events occurred six years before Dr. Burns wrote Drew's clearance note. Even if all of Appellants' asserted contacts are taken at face value and applied – which they cannot because they are so old they are irrelevant – they still would not meet the due process test of *International Shoe, Daimler,* and *Walden* to subject Dr. Burns to general jurisdiction because they are not "so continuous and systematic as to render" him "essentially at home in" Washington.

(a) Due Process requires that jurisdiction be based on the <u>defendant's</u> contacts made in the capacity in which he or she was sued.

Pertinent to Appellants' contentions of "extensive contacts" is that the extent of the defendant's contacts with Washington must be in the capacity in which he was sued.[26] Dr. Burns was sued in his

[26] Similar attempts to use the contacts of a non-party clinic or hospital to gain jurisdiction over a physician defendant have been consistently rejected in other jurisdictions. *See Pijanowksi v. Cleveland Clinic Foundation*, 635 F. Supp. 1435, 1436 (E.D. Mich. 1986) ("The Clinic's contacts do not confer jurisdiction over members of its staff.")(citations omitted); *Soares v. Roberts*, 417 F. Supp. 304, 307 (D.R.I. 1976) ("[T]he Court must reject plaintiff's assertion that personal jurisdiction over Dr. Roberts may rest simply upon her status as a nonresident agent of a principal [Clinic] which itself has sufficient contacts with the forum state"); *Lemke v. St. Margaret Hosp*., 594 F. Supp. 25, 27 (N.D. Ill. 1983) (no personal jurisdiction over physician who treated forum state patients at hospital despite personal jurisdiction over hospital who solicited those patients); *Creech v. Roberts*, 908 F. 2d 75, 80 (6th Cir. 1990) ("The Court has been unable to find…any case in which a trial court has asserted personal jurisdiction over a nonresident doctor who committed a tortious act outside the forum state – even

(Footnote continued next page)

capacity as an individual physician for his treatment of Drew Swank ***in Idaho***. He was not sued as the father of children who attended schools in Washington, making the claimed jurisdictional facts related to his personal life irrelevant as a matter of law.[27]

Dr. Burns also was not sued in his capacity as an employee of Ironwood. Thus, the allegedly relevant contacts which are, in fact, the contacts of Ironwood, means they cannot be used in the analysis of asserting jurisdiction over Dr. Burns. The federal due process requirement is that it is the **defendant's own** affiliation with the forum state that is required to hale him into court. *Walden v. Fiore, supra*.

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where the doctor worked for a hospital that advertised in the forum state. Indeed, every case reported seems to reach the opposite result.").

[27] Thus, the last bullet at OB p. 19 stating where Dr. Burns sent his children to school is both irrelevant and offensive in trying to inject his personal, family life into a claim regarding his medical practice and allegations of professional negligence.

Do Appellants really contend that if Dr. Burns and his family had taken every weekend and vacation in Washington State to ski, fish, camp, or otherwise recreate in 2009 that he would be subject to Washington jurisdiction for his medical practice conducted solely in Idaho? Would they make the same claim had Dr. Burns and Drew Swank lived and had treatment in Montana or Illinois and Drew returned to school athletics in Washington, be it a residential high school, or a college or university such as UW or WSU or Gonzaga, and Dr. Burns' children also were schooled in Washington? The implications for searching out a professional's personal life to assert jurisdiction for claims arising out of his or her work are both profound and troubling – and unworkable. Such overreaching offends any notion of fair play or substantial justice.

(b) The Washington contacts of Ironwood, even if sufficient for general jurisdiction as to Ironwood (which they are not) are irrelevant as to Dr. Burns, who was sued only in his individual capacity as a practicing physician.

Appellants did not sue Dr. Burns' Idaho employer, Ironwood Family Practice. Appellants also chose not to sue Dr. Burns in his capacity as an owner of Ironwood and how it operates. This makes Appellants' claimed "Washington contacts" by way of Ironwood's alleged contacts, such as Ironwood's insurance contracts, irrelevant for a second fundamental reason[28] in addition to the fact that the Swanks did not use medical insurance.

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[28] Thus, the Ironwood Family Practice contracts with First Choice, Regence and Group Health do not subject Dr. Burns to personal jurisdiction in Washington in this case because: (1) Dr. Burns was only named by Appellants in his individual capacity and not as an employee, owner or agent of Ironwood; (2) Ironwood was not named as a party; (3) Ironwood is not Dr. Burns' alter ego; (4) Appellants are self-insured and were not an intended recipient, beneficiary, or insured under any requested insurance contract as a private payee for medical services; and (5) the contracts do not include reference to liability, jurisdiction, venue or governing law regarding care provided by a covered physician to uninsured and non-covered individuals such as Drew Swank. *See* CP 890 (P. Swank Dep., 205:11-14, Swanks were private pay). *See also* CP 1288-1336 (insurance contracts).

As for the clinic's contracts themselves, they do not provide a proper basis for asserting jurisdiction over Dr. Burns individually. ***First,*** as noted, this suit does not have anything to do with insurance contracts, as the Swanks did not have insurance and there is no insurance-related claim at issue. ***Second,*** they are not Dr. Burns' contact with Washington State individually because Dr. Burns, as an individual, was not a party to, a guarantor of, or a signor of the agreements. CP 1280–1336. The Group Health contract in effect in 2009 was signed by Dr. Burns only in his capacity as president of Ironwood Family Practice, not individually. *See* CP 1305. ***Third,*** the choice of venue clauses do not support Washington jurisdiction even if the insurance contracts were relevant to the analysis, which they are not. For instance, the Regence contract selects the state of Idaho, Ada County for venue, not Washington (CP 1330¶11.6), while the Ironwood contract with Group Health in effect in 2009 has no venue selection clause. *See* CP 1288-1307.

Appellants' choices to not sue Ironwood, or Dr. Burns in his capacity as an owner and employee of Ironwood, in the Washington case makes all the alleged facts as to Ironwood's operational contacts with Washington irrelevant as a matter of law because they simply do not apply to Dr. Burns personally – he can only be sued based on **his own** professional contacts with Washington State, not the contacts of his local patients he treated who went to Washington. *Walden v. Fiore, supra.*[29]

The U.S. Supreme Court unanimously restated last year the basic principle on general jurisdiction which flows from *International Shoe*:

> Due process requires that a defendant be haled into court in a forum State **based on his own affiliation with the State**, not based on the "random, fortuitous, or attenuated" contacts he makes by interacting with other persons affiliated with the State.

Walden v. Fiore, 134 S. Ct. at 1123 (2014) (emphasis added), *quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). This is because the "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden*, 134 S. Ct. at 1122.

[29] Thus, of the bullets with supposedly jurisdictional facts ***as to Dr. Burns as an individual physician*** listed at OB pp. 17-19, the first bullet on page 17 (regarding Dr. Burns' responsibilities as an owner of Ironwood), and all but the first two bullets on page 18, are irrelevant as a matter of law.

In sum, due process analysis for general jurisdiction focuses on the *defendant's* relationship with the forum state, not the *plaintiff's* or a *third party's* relationship or contacts with the forum. The Supreme Court thus unanimously ***rejected*** the Ninth Circuit's reliance on the defendant's knowledge of the plaintiff's "strong forum connections" combined with the conclusion that the plaintiffs had "suffered foreseeable harm" in the forum state of Nevada to satisfy the "minimum contacts inquiry." *Id.* at 1124. Why?

> This approach to the "minimum contacts" analysis **impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis.** [Defendant's] actions in Georgia did not create sufficient contacts with Nevada simply because [the defendant] allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections "decisive" in the jurisdictional analysis.

Walden v. Fiore, 134 S. Ct. at 1125 (emphasis added).

Similarly here, Dr. Burns' actions in Idaho treating Drew Swank "did not create sufficient contacts with [Washington] simply because [Dr. Burns] allegedly directed his conduct at [Drew]" even assuming *arguendo* that "he knew [Drew] had [Washington] connections." The same federal due process principles apply with even more force to the alleged contacts by Ironwood with Washington. Plain and simple, Dr. Burns as the defendant cannot be amenable to Washington jurisdiction because of the general contacts

that Ironwood may have had with the state, even assuming they were adequate, which they are not.

E. If Any Medical Negligence Claim Exists, It Is Under Washington's Medical Malpractice Statutes, Not the Lystedt Act, and Under Washington Choice of Law Principles, Idaho Law Applies and Requires Dismissal Under Idaho's Two-Year Statute of Limitations.

1. The negligence-based claims against Dr. Burns need not be addressed if there is no jurisdiction.

Without finding jurisdiction over Dr. Burns, there is no need for the Court to address any professional negligence claims as to Dr. Burns, whether in the guise of the Lystedt Act or a more straightforward argument under Washington's medical malpractice statutes and choice of law principles, which call for application of the Idaho statute of limitations.

2. Even assuming jurisdiction, the record is inadequate to determine the applicable standard of care. That issue must be deferred to another case.

Should the Court find jurisdiction (which does not exist) or otherwise want to address what should be the standard of care for a concussion case, this record is inadequate to determine the boundaries for the standard of care as to Dr. Burns or for any physician. The record as to Dr. Burns is limited to jurisdictional facts, as discussed *supra*. *See* CP 250. No discovery was done on the standard of care for a physician or under the circumstances here. It would be inappropriate under these circumstances to use the

Herring declaration where he had never been subject to deposition and Dr. Burns had not provided alternative opinions, either from himself or experts. Since Appellants tacitly admit that they did not argue or present the medical malpractice claim to the trial court (OB 39, fn. 84: "their medical negligence claim was not a focus of the summary judgment argument in the superior court"), they cannot raise it now. The appellate court will only consider theories and issues raised to the trial court on summary judgment.[30]

Moreover, even if the Court wanted to address the standard of care, this limited record has conflicting "standards" between Dr. Herring's opinions and the determinations from the Idaho Board of Medicine prelitigation panel, which applied the local standard of care required by the applicable Idaho statute. Finally, the alleged standard proffered by Dr. Herring, the "consensus document," expressly disclaimed any interpretation that it was establishing a standard of care. CP 514.[31] There is no proper basis for the

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[30] *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 117, 126, 330 P.3d 190 (2014) (refusing to consider arguments raised for the first time during appeal of summary judgment); *Erdman v. Chapel Hill Presbyterian Church*, 175 Wn.2d 659, 687-88, 286 P.3d 357 (2012) ([T]his court is designed to decide arguments properly presented and developed by disputing parties. In this case, neither party has. It would be wise to leave it for another day when it has been vigorously, and actually, litigated.).

[31] The Consensus Statement proffered by Appellants' expert in fact ***explicitly refused to establish a standard of care***. Instead, it contains a critical limiting statement, as follows, at CP 514 (emphasis added):

> 10. Medico-legal considerations
>
> This consensus document reflects the current state of knowledge and will need to be modified according to the development of new knowledge. It provides an overview of issues that may be of importance to healthcare

(Footnote continued next page)

appellate court to choose between conflicting standards, since that is a function for a trier of fact, whether judge or jury, and particularly with this incomplete record.

3. The improper so-called opinions of Appellants' medical experts on the Lystedt Act and what standard of care it allegedly requires must be disregarded as an improper intrusion into the Court's role in determining the law.

Dr. Burns objected below to Dr. Herring's declaration purporting to interpret and apply the Lystedt Act as beyond the province of an expert and invading that of the Court. CP 1203-1205. As noted *supra*, his testimony in that regard is irrelevant as a matter of law and must be discarded under this Court's decisions, including *State v. Clausing*, and ER 402.[32] Since irrelevant evidence cannot be considered as substantive evidence on summary judgment, CR 56(e), it also cannot be considered on de novo review, as the same rules of admissibility necessarily apply.

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

Indeed, the same Consensus Statement supports Dr. Burns' medical judgment and decision to sign a clearance slip for Drew Swank after the symptoms reportedly resolved. It states in pertinent part: "[w]hile agreement exists pertaining to principal messages conveyed within this document, the authors acknowledge that the science of concussion is evolving and therefore management and return to play decision remain in the realm of clinical judgment on an individualized basis." CP 509 ¶1.

[32] *State v. Clausing*, *supra,* 147 Wn. 2d at 628-29 and authorities cited therein, require disregarding Dr. Herring's opinion about what the Lystedt Act means and the legislature's intent in passing it. Because such "opinion" is impermissible, it is irrelevant as a matter of law and must be excluded. ER 402.

4. Appellants conceded below that there is no medical negligence claim under the Lystedt Act and that any medical negligence claim against Dr. Burns would be pre-empted by the medical malpractice statutes.

In the trial court Appellants contended that Dr. Burns was subject to an independent source of liability under the Lystedt Act that was not, in fact, medical negligence. *See* CP 977-980 (Appellants' SJ Response, pp. 9-12). In the course of arguing for such liability, Appellants acknowledged that the Act would be preempted by Ch. 7.70 RCW: "It would be a different case if the Swank family was alleging that Dr. Burns negligently failed to diagnose Drew's concussion because only a health care provider can make such a diagnosis, even though coaches and others can observe the signs and symptoms of concussion." CP 980-981 (Appellants SJ Response p. 12-13, fn. 3). Dr. Burns' SJ Reply pointed out that, despite their denials to the trial court, such medical negligence was ***precisely*** what Appellants were alleging.[33]

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[33] Dr. Burns argued below:

> The Amended Complaint specifically alleges Dr. Burns' negligent health care as the basis for the cause of action:
>
> > 4.6 Defendant Dr. Burns was ***negligent and at fault*** and ***proximately caused Andrew's death*** and the resulting damages/injuries which Plaintiffs have suffered and will continue to suffer in the future ***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 at the time of the care and treatment of concussion/head injury.***
>
> Amended Complaint, ¶ 4.6 (emphasis added).
>
> By their own pleading, [Appellants] thus abandon their claim stated in ¶ 4.6. Nothing in the record indicates a claim for actions of Dr. Burns other than his diagnosis and clearance based upon his earlier diagnosis. Thus, the

(Footnote continued next page)

Surprisingly, Appellants have changed their trial court position that their claim against Dr. Burns was ***not*** a medical negligence claim but was based only on an implied cause of action under the Act. *Compare,* OB 39 n. 84[34] with CP 977-981 (Appellants' SJ Response). But now that Appellants have made a 180º change in legal position on appeal and are contending that the Amended Complaint ***does*** state a viable medical negligence claim against Dr. Burns (OB 39, n. 84), in addition to a cause of action implied in the Lystedt Act (OB 35-37),[35] their own pleadings below

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> claims stated against Dr. Burns in ¶ 4.6 must be dismissed because [Appellants] agree that such medical negligence claims are pre-empted and they have not even alleged the heightened level of gross negligence or wanton misconduct required under the Act.

CP 1181 - 1182 (Burns SJ Reply, pp. 9-10) (emphases in original).

[34] Compare OB 36-37:

> [T]he specific obligations to perform an evaluation and provide the necessary clearance fall directly upon 'a licensed health care provider' who is 'trained in the evaluation and management of concussion.' RCW 28A.600.190(4). Schools and coaches cannot perform the evaluation nor provided the clearance, . . .

with OB 39, fn. 84 (emphasis added):

> [i]t might be a different situation if the Swank family had alleged that Burns negligently failed to diagnose Drew's concussion because only a health care provider can make such a diagnosis, even though coaches and others can observe the signs and symptoms of concussion. At any rate, **while their medical negligence claim was not a focus of the summary judgment argument in the superior court**, the Swanks alleged a claim for medical negligence in their complaint and submitted expert testimony that Burns' breach of the standard of care, proximately causing [sic]Drew's death.

[35] Nevertheless, Appellants have still failed to establish that the Lystedt Act contains all three elements necessary for an implied cause of action, which will be implied from a statute *only* 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. *Beggs v. State*, 171 Wn.2d 69, 77, 247 P.3d 421 (2011). All three elements must be present. *Braam v. State,* 150 Wn.2d 689, 711, 81 P.3d 851 (2003) (per Chambers, J.). In *Braam*, Justice Tom Chambers held there was no implied cause of action for the foster children plaintiffs even though the statute

(Footnote continued next page)

concede any such claim must be analyzed under Washington's health care statutes codified at Ch. 7.70 RCW.[36] *See* CP 979-980.

Appellants now claim that "the specific obligation to perform an evaluation and provide the necessary clearance fall directly upon 'a licensed health care provider' who is 'trained in the evaluation and management of concussion.' Schools and coaches cannot perform the evaluation nor provide clearance." OB, pp. 36-37. But almost immediately after this, and completely at odds with their position in the trial court, Appellants claim that "[c]ompliance with the Law does not necessarily involve the provision of healthcare, **and the statute is not preempted by the medical negligence statute, Ch. 7.70 RCW**." *Id*. at p. 37. It is curious that these two arguments were placed next to each other as they contradict one another and demonstrate the logical failure of Appellants' claim.

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was created for their "especial benefit". Even if, *arguendo*, the Lystedt Act's text supports an intent it was created for the "especial benefit" of youth athletes such as Drew, nothing in the legislative history indicates the legislature intended to imply a civil remedy against health care providers for an alleged violation of the Act. *See* fn. 39, *infra*. Rather, its unanimous passage would indicate no one thought the Act created significant new duties or liabilities. Further, any implied cause of action for medical negligence is preempted by RCW Chapter 7.70.

[36] Under those statutes the legislature took control of health care claims for "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 which is provided after June 25, 1976." RCW 7.70.010.

F. To Assert Jurisdiction Over Dr. Burns, the Court Would Have to Overrule *Lewis v. Bours* and Effectively Nationalize Medical Negligence Law. But This Would Trench on the Rights of Sister States to Control Health Care Within Their Borders and the Practitioners They License; Create an Unpredictable Patchwork of Varying Liability Law Applicable to a Single Event, Encouraging Forum Shopping; Prevent Health Care Providers From Being Able to Predict Their Potential Liability Based on Where They Choose to Practice; and Violate Due Process.

1. Appellants did not argue *Lewis v. Bours* should be overruled and thus are precluded from asserting that issue now; and it would be futile for conflicting with federal due process rights.

Appellants argue *Lewis* is distinguished so that it does not apply. OB, pp. 49-50. As noted in §IV.B., *supra*, that is not correct. Any distinguishing facts in *Lewis* (the plaintiff was a Washington resident; the Oregon doctor advised the plaintiff to take the patient to a physician in Washington) only provided the *Lewis* plaintiff more arguments why jurisdiction in Washington should have been asserted – and they were rejected. *Lewis* controls.

Appellants only have a potential case if *Lewis* is overruled. But Appellants have failed to argue *Lewis* should be overruled, much less supply the reasons that would meet this Court's criteria, such as the earlier decision was based on a fundamentally mistaken view of the law at the time it was made.[37] No such argument was made. It is

[37] *See, e.g., Keene v. Edie,* 131 Wn.2d 822, 935 P.2d 588 (1997) (overruling a decision from the Court's first term in 1890 on enforcement of separate tort judgments on community real property because of a basic misunderstanding of community property law and its underlying Spanish roots).

now too late. Appellants may not argue the issue for the first time in their reply brief.[38]

More to the point, any such effort would be futile. Even if this Court wanted to reach the issue and wanted to overrule *Lewis* on some state law ground, as set forth in detail in §§ I.V. C & D, *supra*, federal due process principles as applied by the U.S. Supreme Court in 2014 would nevertheless preclude long arm jurisdiction.

2. Basic policy considerations counsel against allowing jurisdiction to cure a botched statute of limitation in a neighboring state. That hardly justifies expanding medical negligence liability and regulation of health care by one state across state borders. It would effectively nationalize health care liability, create an unworkable patchwork of different state standards applicable to the same circumstances that yield different results, and encourage rampant forum shopping.

Neither Dr. Burns nor other out-of-state physician serving their local patients are bound by, or subject to, Washington law just because their student-patient is schooling in Washington. It is the **physician's** contacts with Washington that are key, not the patient's. *See Walden v. Fiore* and §§IV. C. & D., *supra.* Nor does the Lystedt Act contemplate any such reach.[39] What is required to establish

[38] *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78 n. 20, 322 P.3d 6 (2014) *citing In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); RAP 10.3(c).

[39] Nothing in the plain language of the statute purports to establish liability which would apply to Dr. Burns under the allegations of the Amended Complaint. *See* H.B. Rep. 1824, App. 1 hereto. Rather, the text of the full bill as adopted states the purpose and legislative intent: **1)** encouraging participation of

(Footnote continued next page)

such a duty and consequent liability under the Lystedt Act for medical negligence related to concussion clearance?

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non-profit youth sports programs on public school property by expanding immunity to public school districts under limited circumstances, by amending RCW 4.24.660 (immunity provisions for public school districts), HB 1824 §1; **2)** the development of guidelines and information for the management of concussion and head injuries by school districts required to be shared with and signed by students and their families annually, HB 1824 §2(2); and **3)** setting out the policy non-profits must state they comply with for the school districts to keep their immunity for use of their facilities by the non-profits, *i.e.,* removal of athletes suspected of a concussion or head injury from competition coupled with a return to play only after evaluation and clearance. HB 1824 §2(3) & (4).

Despite the broad language of section, nothing in the bill expressly states anyone is bound by any of the terms of the statute – other than the requirement in §2(2) for public school districts to develop information and guidelines and have information sheets reviewed and signed by their students and parents or guardians annually. The fact the bill added to, and was codified within, the common school provisions presumptively limits its mandatory application to public school districts who have youth sports programs potentially using their facilities. The statute as adopted only expressly applies to public school districts by extending them immunity if the non-profit groups that use their facilities comply with the policies set out in the second section of the bill, and requires the districts to distribute and get signed the concussion information sheet.

Read literally, section 2 of HB 1824 which sets out the policies for management of concussion and head injury in youth sports, does not apply to the public school districts – only to the non-profit youth athletic programs that use the public school facilities.

The Final Bill Report for EHB 1824 (App. B hereto) supports this limited reading of the statute's application. It summarized the final bill as follows:

> 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.

Final Bill Report for EHB 1824, App. B. The fact the bill as enacted did not purport to impose any new liability on any class of persons or organizations, but instead extended immunities for use of public facilities in exchange for the private users "voluntarily" adopting and complying with the concussion management policies, may be a major reason why it passed both the Senate and House unanimously. The statute as passed imposed no mandates other than informational on the districts. And there were immunities extended to the public school districts for obtaining the "voluntary" compliance with the non-profit programs using their facilities, and immunities extended for volunteer health professionals.

There should be no potential liability for an out-of-state physician unless, at minimum, the physician agrees with a school or sports program to provide concussion-related head injury clearance to their student-athletes to comply with the statute, which is not the case here. Any such school or program should seek a Washington-licensed physician as a pre-condition of such an affiliation to insure compliance with Washington law and insurance coverage for the school. Again, that was not the case here.

At the time a school or sports program seeks such an arrangement, the physician can learn about the law when considering the school's or program's request. He or she can then decide: 1) whether to be so engaged; and, if so, 2) whether to do so as a "volunteer" and fall under the much higher "Good Samaritan" type liability,[40] or for pay.

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[40] The Lystedt Act's higher standard of care for volunteer health care providers recognizes the long-standing practice of many physicians of volunteering as the "team physician" for schools for one of many reasons, such as they have a child participating or have a special relationship with the school (such as the physician attended that school or has a special relationship with or dedication to the coach, or faculty member), a special interest or dedication to the sport itself, or out of simple community volunteerism. It accords with and expands in the school sports context the state policy of granting "Good Samaritan" immunity to those, including physicians, who "volunteer" their services because they are at an event where an injury occurs and respond as a "Good Samaritan" to the circumstance. *See, e.g.,* RCW 4.24.300 ("Good Samaritan" statute); *Youngblood v. Schireman*, 53 Wn. App. 95, 108-110, 765 P.2d 1312 (1988) (affirming summary judgment dismissal of tort claim against parents of girlfriend's adult boyfriend's parents for assault by him in his parents; home because their conduct in delay of taking the girlfriend to the hospital after an injury did not constitute gross negligence or willful and wanton misconduct that could give rise to liability under exception to "Good Samaritan" statute); *State v. Hillman*, 66 Wn. App. 770, 776, 832 P.2d 1369 (1992) ("It has long been the policy of our law to protect the "Good Samaritan" [who renders] emergency

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In terms of the "requirements" that the Lystedt Act could arguably impose, a Washington school or sports program could only responsibly engage a physician licensed in Washington to provide such clearance for their Washington sports program. Licensure and the detailed regulatory system that goes with it are what best define the limits of a physician's professional liability.

What is the local, long-time patient's physician supposed to do? Ask each school-age patient: "OK, where do you go to school, or where is the sports program tournament located, and what are the legal requirements for that state?" before beginning treatment? Ask this of patients who might attend school outside Washington in Idaho, Montana, Oregon, Canada, California, or other states in boarding schools, or with a parent who is separated or divorced from the local parent? Or where one parent is on extended out-of-state work assignment and the student is schooling at that location to take advantage of that unique opportunity? Does the physician really have to know, or learn all the laws of, any and all of those jurisdictions as part of treating his or her long-term local patients, even though the physician was not retained by the "recipient" or host school to comply with their local laws?

None of this makes sense, but would be required by the Appellants' theories for imposing liability. Nor does it comport with

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care at the scene of an emergency, unless they commit gross negligence or willful or wanton misconduct," citing statute).

the law, or with good policy. What makes good legal and policy sense is for the school sports program to be responsible for getting an acceptable clearance, not the student-athlete and his or her family. The legislature gave schools a potentially inexpensive way to recruit health care providers to provide such clearances on a formal basis: the much higher standard of liability for "volunteers" that is akin to Good Samaritan immunity. The legislature clearly recognized that many, if not most schools could not afford to have staff or contract physicians for all their sports programs. Schools are short of money, as this Court knows. Allowing schools to recruit volunteer physicians with the Good Samaritan immunity must have been a key element to include in the Lystedt Act to assure all schools could obtain adequate medical review.

But from a policy standpoint, the liability for failing to take proper precautions – which ***includes*** getting medical clearance from qualified Washington physicians – should lie with the school because, in the last analysis, it is the school and its sports program that determines whether the athlete will play after the injury.

V. CONCLUSION

Each year thousands of out-of-state students return to school at Washington's many colleges, and universities from vacations, weekends, or term breaks, be that near or far. Some of those student athletes have received care from their care provider in their home state. The same holds true for out-of-state student-athletes returning

to their secondary schools located in Washington. To find personal jurisdiction over those out-of-state providers simply because they treated their local patients who would return to athletic programs at the University of Washington, Washington State University, The Evergreen State College, Western Washington University, Gonzaga University, Seattle University, Whitman College, or Whitworth College, or secondary schools, and without even completing a school-generated form, would unfairly subject these providers to liability in Washington and unnecessarily burden the Washington courts, while relieving the schools of their responsibility to insure the safety of their athletes.

Liability for out-of-state medical care has been rejected by Washington courts before in *Lewis v. Bours* and *Hogan v. Johnson*. The Lystedt Act did not change these basic principles. Nor could it consistent with federal due process requirements that underlie long arm jurisdiction. This issue is thus long settled: non-Washington physicians who provide care in their foreign state pursuant to that state's licensure laws, are not subject to jurisdiction under Washington law just because their patients headed back to Washington – whether to live, travel, work or, as in this case, to attend school. The assertion of jurisdiction over Dr. Burns by Washington courts for his practice of medicine and rendering of care solely in Idaho would require overruling this Court's unanimous decision in *Lewis v. Bours*. It would effectively nationalize medical

negligence law by making physicians liable under the standards of any foreign state where their patients happened to go after getting treatment, despite not practicing, being licensed, nor being subject to medical board regulation in those foreign states. Such an assertion of jurisdiction would offend traditional notions of justice and fair play under the U.S. Constitution.

These points were all raised to Judge Price. He followed *Lewis v. Bours* and the federal long arm jurisdiction cases under the U.S. Constitution and dismissed the claims against Dr. Burns. He had no discretion to do otherwise. Dr. Burns respectfully asks the Court to affirm the dismissal of the claims asserted against him.

Dated this 12th day of May, 2015.

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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. 90733-1 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 true and correct copies of the *Brief of Respondent Timothy F. Burns M.D.* to be efiled with the Washington Supreme Court and to be delivered in the manner indicated below on the following parties:

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DATED this 12th day of May, 2015.

Catherine A. Norgaard, Legal Assistant

APPENDICES

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Appendix A: EHB 1824 (2009): "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"..... A-1 – A-3

Appendix B: Final Bill Report EHB 1824 ..... B-1 to B-2

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

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Appendix A: EHB 1824 (2009): "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"..... A-1 – A-3

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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.

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--- 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.

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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

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Passed Legislature - 2009 Regular Session

State of Washington 61st Legislature 2009 Regular Session

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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.

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(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.

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Votes on Final Passage:

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House	98	0	(House concurred)

Effective: July 26, 2009