NO. 337821-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

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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*

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

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# SUPPLEMENTAL BRIEF OF RESPONDENT DR. BURNS RE APPLICATION OF *WOODWARD* DECISION

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## I. INTRODUCTION

*Woodward v. Taylor*, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 166491 (2016), was decided after briefing was completed. It addresses choice of law and conflict of law issues in litigation between two Washington residents arising out of an automobile accident in Idaho to determine which state's substantive law applied. *Woodward* holds that choice of law principles apply when there is a conflict in the competing jurisdictions which show that different results would occur under the law of the different states, as is the case here. If those principles applied as to Dr. Burns, which they cannot because Washington courts have no jurisdiction over him, they would require dismissal under Idaho law.

Dr. Burns is an Idaho physician who was sued in Washington for alleged malpractice and/or violation of Washington's Lystedt Act in treatment of his long-time Idaho patient, the late Drew Swank, an Idaho native and resident who tragically died in September 2009 after a high school football game in Washington. Discovery as to Dr. Burns was limited to jurisdictional facts *in lieu* of a motion to dismiss under CR 12(b)(6), following which Dr. Burns moved to dismiss for lack of jurisdiction under the long arm statute and federal law. He addressed choice of law and detailed the conflicts between Idaho and Washington law as to medical malpractice (CP 234 – 235, 241). As the Lystedt Act was the first such law passed in the

country and was enacted in June, 2009, neither Idaho nor any other state had an analogous law in place when Drew died. Judge Price dismissed Dr. Burns on summary judgment for lack of jurisdiction under the long arm statute and federal law. He therefore did not reach the choice of law or conflict of law issues. Judge Price also dismissed all other defendants on their summary judgment motions, Drew's Spokane-area private school and his football coach.

Since Dr. Burns was dismissed for lack of jurisdiction and Judge Price did not reach choice of law or conflict of law issues, Dr. Burns' position has been, and remains, that such issues need not be reached. *See* Burns RB, p. 37, §E.1. Since Appellants pursued those issues, counsel had to address them. *See* Burns RB, pp. 37-50.

To the extent this Court considers those issues in its decision-making process, *Woodward* supports Dr. Burns' position that dismissal must be affirmed. It supports affirmance due to the many legal and factual differences between it and this case, and by application of the rule it re-emphasizes.

## II. *WOODWARD* DOES NOT APPLY HERE

***First,*** at the most fundamental level, *Woodward* does not apply since Washington courts cannot exercise jurisdiction over him under binding federal authority. ***Second,*** binding Washington authority provides that, even if there arguably was jurisdiction in these circumstances, Idaho is the place of the tort and Idaho law

applies for that reason. *Lewis v. Bours*, 119 Wn.2d 667, 835 P.2d 221 (1992). *See* Dr. Burns RB, pp. 15-21.

***Third,*** even if those two insurmountable hurdles could be avoided, *Woodward* itself requires application of Idaho law. In *Woodward*, the Court re-emphasized that "a court must first determine that there is an actual conflict between the laws of the interested states" before applying the "most significant relationship test" to determine which forum's law should apply. *Woodward*, 2016 WL 166491 at *1 -*2.

Because the negligence action in Woodward was based on the defendant driving too fast for conditions rather than the violation of the speed limit, and because the pleadings established a lack of contributory negligence on the part of the plaintiff, the Court emphasized that the "application of the facts alleged in the complaint to the possibility of conflicting laws in the case" showed that there was no *actual* conflict of law, regardless of the difference between each forum's laws regarding comparative fault and speed limit, particularly as the standard of care for general negligence in both states was the same. *Id.* at * 4 & *6.

The *Woodward* standard, when applied to the facts of this case, plainly shows the existence of genuine conflicts of law. The significant differences between each state's medical negligence statutes would lead to very different results when applied to the facts alleged in Appellant's Complaint. CP 234-235. ***First,*** Washington's

medical malpractice statute provides for a state-wide standard of care, while the Idaho medical malpractice statute provides for a *local, community* standard of care. *Id.*; Dr. Burns' RB, pp. 9-10. ***Second,*** Idaho law also requires all medical malpractice claims to be approved by a pre-litigation hearing panel, a requirement which does not exist in Washington.[1] CP 234-235. ***Third,*** to the extent Appellants argue the Lystedt Act contains an implied cause of action for negligence applicable to health care providers, Idaho had no analogous statute to the Lystedt Act in 2009. The failure of Idaho to have a similar law is another conflict in the law of the two states which requires a different result. Given the conflict, and Idaho's interest given the parties' residence and entire relationship was in Idaho, the law of Idaho would apply and its statute of limitations would require dismissal. As noted, if Washington law applies, *Lewis v. Bours* also would require dismissal.

***Finally,*** even under Appellants' theory that the Lystedt Act independently imposes liability on health care providers, Washington's RCW 70.02.010(18) further demonstrates the conflict between applicable Washington and Idaho law and why, under its own terms, Washington's Lystedt Act does not apply to Dr. Burns as a foreign physician.

[1] Because the Swank's initially brought a medical malpractice suit against Dr. Burns in Idaho, their claim was reviewed by the state pre-litigation panel, which determined Dr. Burns' treatment of Drew Swank met the standard of care for the Coeur d'Alene area in 2009. CP 1175; Dr. Burns' RB, pp. 9-10.

Assuming *arguendo* that the Lystedt Act could impose liability, whether directly or via an implied cause of action (which it assuredly does not, *see* Dr. Burns' RB, pp. 40-50, esp. fns. 35, 36, 39 & 40, and appendices A & B), by its own terms the Lystedt Act requires clearance by a "health care provider." RCW 70.02.010(18) defines "health care provider" as "a person who is licensed, certified, registered, or otherwise ***authorized by the law of this state*** **to provide health care in the ordinary course of business or practice of a profession**". (Emphasis added.) The Lystedt Act thus necessarily excludes non-Washington health care providers from its reach, if it has a reach, which it does not.[2]

## III. CONCLUSION

*Woodward* does not help Appellants, even if it were deemed to apply, which it does not. Rather, *Woodward* reinforces that, even if Washington courts could constitutionally exercise jurisdiction over Dr. Burns—which they cannot—Idaho law would apply and require dismissal under its two-year statute of limitations.

[2] *See* Dr. Burns RB pp. 40-50, esp. fns. 34, 35, and 39, noting the text of the bill as passed does not support an argument it imposed any new liability on anyone, particularly since it was passed by both the House and Senate ***unanimously***.

Dated this 22nd day of February, 2016.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
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## 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 *Supplemental Brief of Respondent Timothy Burns, M.D. re Application of Woodward Decision* to be efiled with the Court of Appeals-Div. III and to be delivered in the manner indicated below on the following parties:

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DATED this 22nd day of February, 2016.

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