

COA# 337821-III

Supreme Court No. 90733-1  
Spokane County Superior Court No. 12-2-03766-8

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SUPREME COURT OF THE STATE OF WASHINGTON

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

*Plaintiffs-Petitioners,*

vs.

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

*Defendants-Respondents.*

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PETITIONERS' REPLY TO BRIEF FILED BY  
RESPONDENT TIMOTHY F. BURNS, M.D.

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## I. INTRODUCTION

Petitioners Donald R. Swank, individually and as personal representative of the Estate of Andrew F. Swank, and Patricia A. Swank (collectively the Swanks), submit the following reply to the brief filed by Respondent Timothy F. Burns (Burns). They have filed a separate reply to the briefs filed by Respondents Valley Christian School (VCS) and Jim Puryear (Puryear).

## II. REPLY REGARDING THE FACTS

- A. Burns' contention that he did not know or intend to release Drew Swank to return to play football in Washington is contrary to the record, especially when the record is evaluated under standard of review for summary judgment.**

Although omitted from his restatement of the case, Burns includes factual argument that “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[.]” Burns Br., at 18 (citing CP 317-18; brackets added). Burns further suggests that the fact that he released Drew to play football in Washington “is not supported by the actual facts in the record.” Burns Br., at 18 (no citation to record).

Burns' characterization of the record is incorrect and does not properly reflect the standard of review on summary judgment.

Burns acknowledges that the facts and all reasonable inferences from the facts must be viewed in the light most favorable to the Swanks, as the nonmoving parties. *See Burns Br.*, at 13. Burns cites his own self-serving testimony. *See Burns Br.*, at 18. However, he does not acknowledge evidence that, during the office visit on September 29, 2009, when he diagnosed Drew's concussion, Drew specifically told him that he played football at Valley Christian School. *See CP 373 (P. Swank Depo., at 38:22-23)*.<sup>1</sup>

Burns also fails to acknowledge evidence that, on September 24, 2009, when Drew's mother called to inquire about a release for Drew to return to play, she specifically informed Burns' nurse that "Drew plays [for a] school in the State of Washington and they have a new law and before he can go back to play, he has to have a release from the doctor." CP 188 (P. Swank Depo., at 52:3-11; brackets added); *accord* CP 878 (P. Swank Depo., at 160:8-14); CP 897 (P. Swank Depo., at 233:23-234:6).<sup>2</sup> Later that same day, Burns' nurse called Drew's mother back and said that Burns wrote a note releasing Drew to return to play. *See CP 188*.

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<sup>1</sup> The relevant evidence, contained in the record at CP 373-74, is reproduced in the Appendix to this reply brief. *See also Swank Br.*, at 13 & n.37 (discussing this evidence)

<sup>2</sup> The relevant evidence, contained in the record at CP 188, 878 & 897, is reproduced in the Appendix. *See also Swank Br.*, at 13-14 & nn.40-42 (discussing this evidence).

The foregoing direct evidence is further supported by circumstantial evidence in the record showing that Burns knew that Drew played football in Washington when he provided the release. Burns previously performed a preseason sports physical for Drew on July 11, 2007, filling out a form indicating that Drew played football for Valley Christian School, in Spokane, Washington. *See* CP 358-59.<sup>3</sup> Burns' records also include a chart note dated August 23, 2007, indicating that Drew suffered a left wrist sprain while practicing football at Valley Christian School. *See* CP 346.<sup>4</sup> In light of this evidence, Burns' reliance on his own testimony that he did not know he was clearing Drew to play football in Washington cannot be given credence on summary judgment.

**B. The remaining material facts relating to Burns' release of Drew Swank to play football are undisputed.**

Burns does not dispute that he diagnosed Drew with a concussion. *See* CP 345 (chart note). He does not dispute that he did not evaluate Drew before clearing him to return to play, and he

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<sup>3</sup> A copy of the preseason physical form, contained in the record at CP 358-59, is reproduced in the Appendix. *See also* Swank Br., at 15 & nn.45-46 (discussing this evidence).

<sup>4</sup> A copy of the chart note, contained in the record at CP 346, is reproduced in the Appendix. *See also* Swank Br., at 15 & n.47 (discussing and citing this evidence).

does not dispute that he cleared him to return to play without restriction. *See* CP 648 (release).<sup>5</sup>

## II. REPLY ARGUMENT

**A. This Court’s decision in *Lewis v. Bours*, which carved out an exception to the general rule of personal jurisdiction for certain medical negligence claims, and which is expressly limited to its facts, is distinguishable from this case and not controlling; the exercise of personal jurisdiction is warranted based on Burns’ clearing Drew Swank to play football in Washington in violation of the Lystedt law.**

Burns principally relies on this Court’s decision in *Lewis v. Bours*, 119 Wn. 2d 667, 835 P.2d 221 (1992), to support his argument that Washington courts lack jurisdiction over his person. *See* Burns Br., at 1, 2, 4, 13, 15-19, 21, 23, 25, 43-44, 49-50 (discussing *Lewis*). In their opening brief, the Swanks addressed *Lewis*, acknowledging that the place where a tort occurs for purposes of personal jurisdiction under the long-arm statute, RCW 4.28.185(1)(b), is different for certain medical negligence claims than in other tort contexts. *See* Swank Br., at 49-50. In *Lewis*, the Court held that the place of the tort was the place where medical treatment was rendered. *See* 119 Wn. 2d at 673-74. The case represents “an exception to the general rule that the place of the

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<sup>5</sup> A legible copy of the release is reproduced in the Appendix to the Swank’s opening brief.

tort is the place where the injury occurs.” *Id.* at 673. The Court specifically limited *Lewis* to its facts:

We ... hereby create an exception to the general rule that the place of the tort is the place where the injury occurs. In the event that a nonresident professional commits malpractice in another state against a Washington State resident, that, *standing alone*, does not constitute a tortious act committed in this state regardless of whether the Washington State resident suffered injury upon his or her return to Washington.

*Id.* at 673 (ellipses & emphasis added). The holding is thus confined to malpractice claims arising from out-of-state treatment, under circumstances where the sole fact supporting the exercise of jurisdiction is the manifestation of injury within the state of Washington.<sup>6</sup> Outside of this context, *Lewis* does not purport to alter the general rule for exercising personal jurisdiction under the long-arm statute. *Lewis* is distinguishable and not controlling here because the Swanks alleged an implied statutory cause of action against Burns for violation of the Lystedt law, independent of a traditional medical negligence claim.

In order to come within the rule of *Lewis*, Burns mischaracterizes the Swanks’ claims *solely* in terms of medical negligence. *See, e.g.*, Burns Br., at 15 & 40. While the Swanks

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<sup>6</sup> Although plaintiffs in *Lewis* were residents of Washington, the focus of the *Lewis* decision is on the place of injury rather than on the residency of the plaintiffs.

included such allegations in their complaint and submitted standard of care evidence in opposition to summary judgment, as acknowledged in their opening brief, the focus of their claims against Burns has always been his failure to comply with the obligations imposed by the Lystedt law, separate from a claim for medical negligence. *See, e.g.*, CP 5-7 (complaint ¶¶ 2.13 & 4.6, alleging Burns clearance of Drew to resume playing football in Washington was subject to, and a violation of, the Lystedt law); CP 977-80 (summary judgment briefing, arguing that the Lystedt law creates an implied statutory cause of action against Burns that is independent of medical negligence claims under Ch. 7.70 RCW); Swank Br., at 35-39 (arguing the Lystedt law imposes obligations on health care providers, and that a claim for violating these obligations is not preempted by the medical negligence statute). Burns' statement to the contrary, that "the essence of [the Swanks'] claim against Dr. Burns is a medical malpractice claim" is impossible to reconcile with the record and the briefing before the Court. *See* Burns Br., at 15 (brackets added).

Burns does not dispute the existence or nature of the duties imposed by the Lystedt law.<sup>7</sup> As noted in the Swanks' opening brief, the law imposes independent duties to obtain an evaluation of student-athletes such as Drew Swank before clearing them to return to play, and to return them to play gradually rather than immediately. *See Swank Br.*, at 35-37. These duties are incidental to the provision of health care and apply to schools and coaches to the same extent as health care providers. *See id.* at 37-39.

Also as noted in the Swank's opening brief, violation of the duties imposed by the Lystedt law gives rise to an implied cause of action against health care providers that is not preempted by the medical negligence statute, Ch. 7.70 RCW. *See Swank Br.*, at 30-32 (regarding implied cause of action); *id.* at 37-39 (regarding relationship to medical negligence statute). Burns acknowledges the Swanks' argument in a footnote. *See Burns Br.*, at 41-42 n.35. He appears to concede that the Lystedt law was created for the "especial benefit" of young athletes such as Drew Swank, but urges that "nothing in the legislative history indicates the legislature

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<sup>7</sup> Burns argues that the applicable standard of care is not before the Court, and seems to include the nature of the duties imposed by the Lystedt law within that argument. *See Burns Br.*, at 37-38. Nonetheless, it is necessary to discuss the duties imposed by the Lystedt law in connection with the implied cause of action, and to distinguish the Lystedt law claim from a medical negligence claim.

intended to imply a civil remedy against health care providers for an alleged violation of the Act.” Burns Br., at 41-42 n.35.

While the parties agree that the legislative *history* appears to be silent on the issue of an implied remedy, the relevant inquiry is legislative *intent*, which is discerned primarily from the text of a statute and is not limited to consideration of legislative history. *See Beggs v. State*, 171 Wn. 2d 69, 77, 247 P.3d 421 (2011) (stating inquiry in terms of legislative intent); *Town of Woodway v. Snohomish County*, 180 Wn. 2d 165, 174, 322 P.3d 1219 (2014) (indicating legislative intent is discerned primarily from the text of a statute). Burns does not address the indicia of legislative intent to create an implied remedy in the text of the Lystedt law. *See Swank Br.*, at 30-32; Burns Br., at 41-42 n.35. In particular:

- The clear identification of the protected class—consisting of young athletes such as Drew Swank, *see Bennett v. Hardy*, 113 Wn. 2d 912, 921, 784 P.2d 1258 (1990) (stating “we may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights”);
- The mandatory phrasing of the obligations imposed by the Lystedt law, *see Beggs*, 171 Wn. 2d at 75-78 (relying in part on mandatory language to imply remedy for failure to report child abuse under RCW 26.44.030);

- The absence of an alternate enforcement mechanism, *see Bennett*, 113 Wn. 2d at 921 (relying in part on absence of an express method of redress to imply remedy for age discrimination in employment under RCW 49.44.090); and
- The limited grant of immunity for volunteer health care providers, *see Beggs*, at 78 (stating a “grant of immunity from liability clearly implies that civil liability can exist in the first place”).

Rather than dealing with the duties imposed by the Lystedt law, or the corresponding implied cause of action, Burns seems to be arguing that the Swanks’ claim for violation of the Lystedt law is somehow inconsistent with their alternative claim for medical negligence, and that the claim for violation of the Lystedt law should therefore be ignored in conducting the jurisdictional analysis. *See Burns Br.*, at 40-43. The reasoning that underlies this argument is not explained, but seems counterintuitive.<sup>8</sup>

The long-arm statute authorizes the exercise of personal jurisdiction over any cause of action arising from commission of a tortious act in this state. *See RCW 4.85.185(1)(b)*. Under the general rule for personal jurisdiction, the location of a tort is the place

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<sup>8</sup> It is contrary to the rule allowing parties to pursue alternative claims for relief. *See CR 8(a)*.

where injury manifests. *See Lewis*, 119 Wn. 2d at 670 & 673.<sup>9</sup> Because Burns' violations of the Lystedt law caused Drew Swank to suffer injury in Washington, the tort is deemed to occur in Washington, and the exercise of personal jurisdiction is warranted here.<sup>10</sup>

**B. Exercise of specific personal jurisdiction over Burns by Washington satisfies the requirements of due process because his provision of a medical release for use in Washington availed himself of Washington's forum and foreseeably subjects him to suit here for injuries resulting from his actions.**

Burns argues that “[t]he most recent U.S. Supreme Court decisions in 2014 would not permit assertion of jurisdiction even if *Lewis* did not already exist.” *See Burns Br.*, at 21 (brackets added); *accord id.* at 43 (suggesting that *Lewis* could not be overruled without violating due process). The implication of this argument is that the general rule of personal jurisdiction under the long-arm statute based on the place of injury, from which *Lewis* carved an

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<sup>9</sup> The general rule recognized in *Lewis* is also consistent with the general rule stated in the Restatement (Second) of Conflicts of Laws § 37 (1971), which is synthesized from U.S. Supreme Court and state law precedent, including Washington precedent. *See Swank Br.*, at 47-49 (discussing Restatement § 37).

<sup>10</sup> Burns asserts that the exercise of personal jurisdiction under these circumstances would “effectively nationalize medical negligence law.” *See Burns Br.*, at 43. This assertion is improbable because the reach of the Lystedt law is limited to health care providers and others who improperly return a student-athlete to competition *in Washington*. In any event, the generally recognized return-to-play standards affirmed by the Lystedt law represent an *international* consensus. *See CP 509-18* (reproducing Consensus Statement on Concussion in Sport: the 3<sup>rd</sup> International Conference on Concussion in Sport held in Zurich, November 2008); RCW 28A.600.190(1)(c).

exception, is unconstitutional. This argument and its implication overstate constitutional limits on the exercise of personal jurisdiction.

The long-arm statute permits the exercise of personal jurisdiction to the full extent of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Shute v. Carnival Cruise Lines*, 113 Wn. 2d 763, 766-67, 783 P.2d 78 (1989), *rev'd on other grounds*, 499 U.S. 585 (1991). Under the Due Process Clause, a defendant need not be physically present in the forum state, so long as the defendant “purposefully ‘reach[ed] out beyond’ their State and into another,” creating requisite minimum contacts to establish a substantial connection with the forum state. *See Walden v. Fiore*, — U.S. —, 134 S.Ct. 1125, 1121-22 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80 (1985)). While a defendant’s physical presence inside the state is not required, physical entry into the forum state accomplished by “an agent, goods, mail or some other means ... is certainly a relevant contact.” *Id.* at 1122 (ellipses added); *see also Burger King*, 471 U.S. at 476.<sup>11</sup>

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<sup>11</sup> While the due process clause limits the power of a state to adjudicate over a defendant from another state out of a concern for the liberty of the non-resident

For example, in *Calder v. Jones*, 465 U.S. 783, 789 (1984), the Supreme Court found that defendants who expressly aimed their activities at a forum state were subject to that state’s jurisdiction where they knew that their activities would have an effect in the forum state and that “injury would be felt” there. The petitioners argued that their actions were too remote to justify jurisdiction in the forum state, analogizing their actions in publishing a story for a nationwide publication to the acts of a welder who works on an object in one state that later is transported to and injures another party in another state. *Id.* at 789. The Court rejected that analogy, noting that the petitioners were not charged with “untargeted negligence,” but with actions that were expressly aimed at the forum state. *Id.* at 789-90. Instead, the Court found that given the petitioners’ actions and knowledge that those actions would have effect in the forum state, “petitioners must ‘reasonably anticipate being haled into court there’ to answer” for the allegations made against them. *Id.* at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Kulko v.*

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defendant, that concern is no longer present when a defendant reaches into the forum state. *See Walden*, 134 S.Ct. at 1122; *Burns Br.*, at 27.

*California Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).

The necessary minimum contacts are with the forum state itself. *Id.* at 790 (“Each defendant’s contacts with the forum State must be assessed individually”); *see also Walden*, 134 S.Ct. at 1121 (“Inquiry as to whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum and the litigation”) and 1122 (“Our ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there”); *see also Burger King*, 471 U.S. at 474 (“Notwithstanding [other] considerations, the constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum State”).

The application of the “purposeful availment” requirement “will vary with the quality and nature of the defendant’s activity[.]” *Id.* at 474. It is not a “black and white” inquiry. *Kulko*, 436 U.S. at 92. A singular act may be sufficient to trigger jurisdiction. *Id.* at 94. Effective resolution of disputes and the substantive social policies of the various states can establish the reasonableness of jurisdiction “upon a lesser showing of minimum contacts than would otherwise

be required.” *Id.* at 477. The Court has reasoned that it would be unfair to allow a defendant who has “purposefully derive[d] benefit” in a forum state to avoid accountability. *Burger King*, 471 U.S. at 474. “The Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” *Id.*

As the Court recognized in *McGee v. International Life Insurance*, 355 U.S. 220, 222 (1957), there is a long trend “toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.” Washington’s personal jurisdiction over Burns meets the requirements set out by the Supreme Court for specific personal jurisdiction. Burns reached out to Washington when he cleared Drew Swank to play football in Washington. He knew that the release would be used in Washington and have effect in Washington. In this sense, his actions were expressly aimed at Washington. The fact that he was outside Washington when provided the release does not defeat personal jurisdiction because his actions were targeted toward

Washington. For these reasons Washington's exercise of personal jurisdiction over Burns comports with due process.<sup>12</sup>

**C. Idaho pre-litigation proceedings have no bearing on the jurisdictional analysis.**

Burns includes extended discussion of Idaho pre-litigation proceedings in his brief, and insinuates that the Swanks "botched" the Idaho statute of limitations for a medical negligence claim in that state and are engaged in forum shopping. *See* Burns Br., at 8-10, 29, 43-44. This discussion is irrelevant, inadmissible and should have no bearing on the jurisdictional analysis. *See* CR 56(e) (indicating the Court should only consider admissible evidence on summary judgment); RP 57:15-58:8 (Swanks' objection to evidence of Idaho pre-litigation proceedings).

The Idaho pre-litigation proceedings are "informal and nonbinding." Idaho Code § 6-1001. The rules of evidence do not apply. *See id.* Discovery is not available. *See id.* § 6-1003. The parties are not generally allowed to attend, except when giving testimony. *See id.* § 6-1008. There is no cross-examination or rebuttal evidence. *See id.* § 6-1008. There is no record of the proceedings. *See id.* § 6-1003. The decisions of the pre-litigation

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<sup>12</sup> If Washington courts do not exercise jurisdiction, there will be no one forum that has jurisdiction over all defendants.

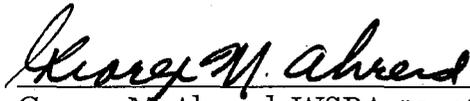
panel are advisory. *See id.* § 6-1004. The proceedings are also supposed to be confidential. *See id.* § 6-1008.

The Idaho pre-litigation panel did not consider whether the Swanks stated a claim under the Lystedt law, or whether Washington courts have jurisdiction over such a claim. These proceedings should play no part in the Court's resolution of this appeal.

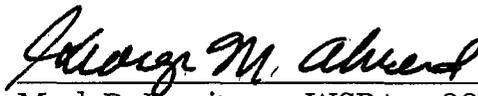
### III. CONCLUSION

The Swanks ask this Court to reverse the superior court's summary judgment order and remand this case for trial.

Respectfully submitted this 13th day of July, 2015.



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## CERTIFICATE OF SERVICE

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

On July 13, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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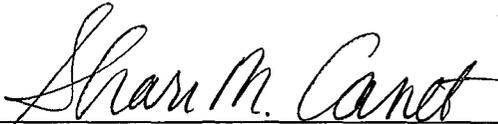
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Signed on July 13, 2015 at Ephrata, Washington.

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Shari M. Canet

## **APPENDIX**

Chart note (CP 346)

Preseason physical form (CP 358-59)

P. Swank Depo., at 38:22-23 (CP 188)

P. Swank Depo., at 38:22-23 (CP 373-74)

P. Swank Depo., at 160:8-14 (CP 878)

P. Swank Depo., at 233:23-234:6 (CP 897)

JUL 11 2007

In for  
Well child Exam  
MC

NAME Andrew Swank  
AGE 15 WT. 122 HT. 6'4 1/2"  
DOB 11/05/91 TEMP. 97.5 PULSE 84  
OX \_\_\_\_\_  
NURSE M. Davidson

SWANK, ANDREW F.  
7/11/07

SPX

This is a 15-year-old male in for SPX and update on her immunizations. Please see SPX sheet, normal examination. We will update his immunizations with a hepatitis A, chicken pox, second MMR, and Tdap. Follow up p.r.n.  
Timothy F. Burns, MD/kl

AUG 23 2007

Wrist pain x 2 days

NAME Andrew Swank  
AGE 15 WT. 120 HT. \_\_\_\_\_  
TEMP. \_\_\_\_\_ PULSE \_\_\_\_\_  
OX \_\_\_\_\_  
NURSE C. Jada

SWANK, Andrew  
8/23/07

LEFT WRIST SPRAIN

- S: Andrew is a 15-year-old male who comes in because of left wrist pain following an injury two days ago at football practice. He is going to be entering 9<sup>th</sup> grade at Valley Christian. He is playing on the football team there and was at practice on Tuesday and fell on his outstretched left hand. He is right hand dominant.  
PAST MEDICAL HISTORY: He denies any history of fractures or injuries to that side. Otherwise, he is generally healthy, denies chronic medical problems and has no known drug allergies.
- O: A 15-year-old male in no apparent distress. Exam of the left wrist appears grossly normal. He complains of pain at the distal radius. There is no obvious swelling or erythema associated with it. He has good range of motion, radial pulse and sensation to light touch distally.  
X-RAY: An x-ray was obtained and did not show any obvious fractures.
- A/P: Left wrist sprain. I gave him a 3-inch Ace wrap and will have him wrap and/or tape it before practices. Follow up here if not improving.  
Geoffrey T. Emry, MD/lj

000002 CH

IDAHO HEALTH EXAMINATION AND CONSENT FORM

It is required that all students complete a History and Physical examination prior to his/her first 9<sup>th</sup> and 11<sup>th</sup> grade practice in the interscholastic (9-12) athletic program in the State of Idaho. The exam is at the expense of the student and may not be taken prior to May 15 of the 8<sup>th</sup> and 10<sup>th</sup> grade years. This examination is to be done by a licensed physician, physician's assistant or nurse practitioner under optimal conditions. Interim history forms are required during the 10<sup>th</sup> and 12<sup>th</sup> grade years and must be submitted to the principal prior to the first practice.

Name Andrew Swank Home Address 1894 N. Haver Lake Rd Est Falls Phone 204-8128  
 Grade 9 Sports Football, Track  
 Personal Physician T. Burns MD Physician's Phone Number 607-9857  
 Date of Birth 5/4/92 Sex M School Village Christian Spokane WA

\*Fill in details of "YES" answers in space below:

	YES	NO		YES	NO
1. A. Have you ever been hospitalized?	___	___	5. Do you have any skin problems? (itching, rash, acne)	___	___
B. Have you ever had surgery?	___	___	6. A. Have you ever had a head injury?	___	___
2. Are you presently taking Medication or pills?	___	___	B. Have you ever been knocked out or unconscious?	___	___
3. Do you have any allergies (Medicine, bees, other stinging insects)?	___	___	C. Have you ever had a seizure?	___	___
4. A. Have you ever passed out during Or after exercise?	___	___	D. Have you ever had a sting, burner Or pinched nerve?	___	___
B. Have you ever been dizzy during Or after exercise?	___	___	7. A. Have you ever had heat cramps?	___	___
C. Have you ever had a chest pain During or after exercise?	___	___	B. Have you ever been dizzy or passed Out in the heat?	___	___
D. Do you tire more quickly than Your friends during exercise?	___	___	8. Do you have trouble breathing or Cough during or after exercise?	___	___
E. Have you ever had high blood Pressure?	___	___	9. Do you use special equipment, pads, Braces, mouth or eyeguards?	___	___
F. Have you ever been told you have A heart murmur?	___	___	10. A. Have you had problems with your eyes Or vision?	___	___
G. Have you ever had racing of your Or skipped beats?	___	___	B. Do you wear glasses, contacts or Protective eyewear?	___	___
H. Has anyone in your family died Of heart problems or a sudden Death before age 50?	___	___			

11. Have you ever sprained/strained, dislocated, fractured/broken, or had repeated swelling or other injuries of any of your bones or joints?

___ Head	___ Neck	___ Chest	___ Back	___ Hip
___ Shoulder	___ Elbow	___ Forearm	___ Wrist	___ Hand
___ Thigh	___ Knee	___ Shin/Calf	___ Ankle	___ Foot

12. Have you ever had any other medical problems such as:

___ Mononucleosis	___ Diabetes	___ Asthma	___ Hepatitis	___ Headaches (frequent)
___ Tuberculosis	___ Eye injuries	___ Stomach ulcer	___ Other	

13. Have you had a medical problem or injury since last exam? NO

14. When was your last tetanus shot? 2002

When was your last measles immunization? \_\_\_\_\_

15. When was your first menstrual period? \_\_\_\_\_ When was your last menstrual period? \_\_\_\_\_

What was the longest time between periods last year? \_\_\_\_\_

Explain "YES" answers here:

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CONSENT FORM

(Parent or Guardian and Student Permission and Approval)

I hereby consent to the above named student participating in the interscholastic athletic program at his/her school of attendance. This consent includes travel to and from athletic contests and practice sessions. I further consent to treatment deemed necessary by physicians designated by school authorities for any illness or injury from his/her athletic participation.

PARENT OR GUARDIAN SIGNATURE Jatti Swank DATE 7/11/02

This application to compete in interscholastic athletics for the above school is entirely voluntary on my part and is made with the understanding that I have not violated any of the eligibility rules and regulations of the State Association.

SIGNATURE OF STUDENT Andrew Swank DATE 2002

Height 6'4 1/2" Weight 122 lbs BP 110 / 54 T 97° Pulse 81 R \_\_\_\_\_  
 Visual acuity R 20 / 20 L 20 / 20 Corrected Y (N) Pupils \_\_\_\_\_

Ears; Nose, Throat	Normal <input checked="" type="checkbox"/>	Abnormal _____
Cardiopulmonary	_____	_____
Pulses	_____	_____
Heart	_____	_____
Lungs	_____	_____
Skin	_____	_____
Abdominal	_____	_____
Musculoskeletal	_____	_____
Neck	_____	_____
Shoulder	_____	_____
Elbow	_____	_____
Wrist	_____	_____
Hand	_____	_____
Back	_____	_____
Knee	_____	_____
Ankle	_____	_____
Foot	_____	_____

**CLEARANCE / RECOMMENDATIONS**

Clearance:  A. Cleared for all sports and other school-sponsored activities

\_\_\_\_\_ B. Cleared after completing evaluation / rehabilitation for: \_\_\_\_\_

\_\_\_\_\_ C. **NOT** cleared to participate in the following IHSA sponsored sports:

Baseball	Cross Country	Golf	Tennis	Volleyball
Basketball	Football	Softball	Track	Wrestling

NOT cleared for other school-sponsored activities:  
 (Example) 1. Soccer 2. Swimming 3. \_\_\_\_\_ 4. \_\_\_\_\_

\_\_\_\_\_ D. Student is **NOT** permitted to participate in high school athletics. Reason: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Recommendation: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Examiner's Signature: [Signature] Date: 7-11-07  
 (This Physical form must be signed by a licensed physician, physician's assistant or nurse practitioner)

Address: \_\_\_\_\_ Phone: ( ) \_\_\_\_\_

**IRONWOOD FAMILY PRACTICE**  
 920 IRONWOOD DRIVE, SUITE 101  
 OOEUR D'ALENE, ID 83814  
 867-4557 864-8251

000015

1 Q. And did you have a discussion with him then about the  
 2 Washtucna game?  
 3 A. I believe I said, oh, do you want me to call the doctor  
 4 and see, you know, if you're not having headaches anymore,  
 5 call the doctor, and he said, yeah. That's all.  
 6 Q. So do you recall anything specifically about getting a  
 7 release for him so that he could play in the Washtucna game?  
 8 A. Could you ask that question again, please?  
 9 Q. So -- let me rephrase it. Was it your suggestion that  
 10 you call the doctor then because he told you his headaches  
 11 were gone, that you called the doctor so he could be  
 12 released to play?  
 13 A. Yeah, I asked him, do you want me to call the doctor to  
 14 see if you can get, re -- you know, whatever, released to  
 15 play. I'm the one that asked.  
 16 Q. He didn't bring that up with you?  
 17 A. No.  
 18 Q. Why did you bring that up?  
 19 A. Because the doctor said when his headaches were gone, he  
 20 could return to play.  
 21 Q. Was that of a particular concern to you that he be  
 22 allowed to return to play?  
 23 A. It wasn't a concern of mine whether he played or not.  
 24 It's just I was following what the doctor's directions were.  
 25 Q. So did you call the doctor before Drew left for school?

1 A. No, I don't.  
 2 Q. Tell me about that conversation then.  
 3 A. I told her that Drew plays for school in the State of  
 4 Washington and they have a new law that says that -- Well, I  
 5 explained that first of all, that I had to explain Drew's  
 6 headache and everything that I told the receptionist that he  
 7 had a concussion and Dr. Burns saw him and said he couldn't  
 8 play. He says his headaches are gone now, and he plays  
 9 school in the State of Washington and they have a new law  
 10 and before he can go back to play, he has to have a release  
 11 from the doctor.  
 12 Q. And what did the nurse say?  
 13 A. She said, okay, I will get this information to Dr.  
 14 Burns, and we will get back to you later.  
 15 Q. All right. So then what happened?  
 16 A. Then she said goodbye and I said goodbye and that was  
 17 it.  
 18 Q. And so did she get back with you later then or somebody?  
 19 A. Oh, yeah, later during the day, yes. She called me back  
 20 and said there was a note from Dr. Burns for Drew to return  
 21 to play, that I could come and pick it up at the office.  
 22 Q. Did you have any concern that Dr. Burns should see Drew  
 23 again before he was released to play?  
 24 MR. KAMITOMO: Object to form.  
 25 A. I was trusting him in his ability as a doctor to know

1 A. No.  
 2 Q. Do you remember what time you called the doctor?  
 3 A. No, I don't.  
 4 Q. Do you remember, was it morning or afternoon?  
 5 A. It probably was in the morning. I can't say for sure.  
 6 Q. Do you recall who it was that you spoke with at the  
 7 doctor's office?  
 8 A. I spoke to the receptionist first.  
 9 Q. And do you recall her name?  
 10 A. No, I don't.  
 11 Q. Could have been, I guess it could have been a he, too.  
 12 A. It was a woman.  
 13 Q. You said you spoke to the receptionist first. Tell me  
 14 about that conversation that you had with the receptionist,  
 15 and then who did you speak with next?  
 16 A. I believe I said, I'm calling for Andrew, Drew, is what  
 17 I said, Drew Swank, and he had a concussion and Dr. Burns  
 18 said he couldn't -- you know, that he got during the  
 19 football game and Dr. Burns said he couldn't play until his  
 20 headaches were gone and he said his headaches were gone.  
 21 And she said, I will have to put you in touch with the  
 22 nurse.  
 23 Q. And so then did you talk with the nurse?  
 24 A. Yeah, she connected me to the nurse.  
 25 Q. Do you remember the nurse's name?

1 what was best for Drew, so I didn't know what to think. I  
 2 mean, I just was trusting my doctor that he was making the  
 3 right decision.  
 4 Q. You understood that head concussions are a serious  
 5 matter. Is that right?  
 6 A. Yes, I understand that.  
 7 Q. And I assume you were trusting Drew when he said that he  
 8 no longer had a headache?  
 9 A. I had no reason not to believe him.  
 10 Q. Okay. Was Tara there that week?  
 11 A. She was gone all week. She came home Thursday evening.  
 12 Q. All right. So then the nurse called you back and said  
 13 there's a release for you to pick up?  
 14 A. Yes.  
 15 Q. So did you go pick it up?  
 16 A. Yes, I did.  
 17 Q. And who gave it to you at the doctor's office?  
 18 A. I think I just went to the front office and said that  
 19 I'm supposed to pick up a note from Dr. Burns for Drew Swank  
 20 and they had it up there and I got it.  
 21 Q. Then what did you do with it?  
 22 A. I had called Don earlier during the day and told him  
 23 that I had called the doctor and they had given Drew a  
 24 release and I had picked it up and we made arrangements to  
 25 meet and he was going to go take it to Dr. Burns -- I mean,

1 Q. And the doctor's office is in Coeur d'Alene?  
2 A. Yes, on Ironwood Drive.  
3 Q. And about what time was it?  
4 A. You know, I don't recall the exact time.. It was in the  
5 morning, probably 9:30, 10:00, 10:30, something like that.  
6 Q. Okay. I will show you what's been marked as Exhibit 18.  
7 Have you seen that record before?  
8 A. I think I've seen it one time before.  
9 Q. This is a record from Dr. Burns's medical chart  
10 regarding Drew for that visit that day. Did you go into the  
11 examination room with Drew?  
12 A. Yes, I did.  
13 Q. And so could you tell me then, what do you remember  
14 about what Dr. Burns did in terms of his examination of  
15 Drew?  
16 A. He came in, said hi to me, turned around to Drew, and he  
17 said, oh, hi, Drew, I don't remember you. I said, well, you  
18 should, you delivered him. And he just laughed, and he  
19 said, so you have headaches and some neck pain, and Drew  
20 said, yeah, and this is while he's coming up and starting  
21 to, you know, kind of check on him and do his exam.  
22 He asked him, so where do you go school, and he said  
23 Valley Christian. He said, Oh, what team were you playing  
24 against? Pateros. And he said was it a home game, yeah, he  
25 said, and did you guys win, just asking him things about

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1 that, and then he started getting more in depth about how he  
2 got his headache and his neck thing.

3 And Drew was talking to him and explaining when it  
4 happened, as he was examining him, and then when he was  
5 done, he just said, well, I think he has a mild concussion,  
6 and he just needs to not practice or play football this --  
7 until these headaches are gone. And then he recommended a  
8 dosage of Ibuprofen, just take Ibuprofen like he's been  
9 doing and that was it.

10 Q. Mm-hmm. How long did the examination last?

11 A. Not very long, five, ten, minutes. It didn't take that  
12 long.

13 Q. Okay. So you left with the understanding then that as  
14 long as he had the headaches, he couldn't practice or play  
15 in the game?

16 A. That's what Dr. Burns said, he cannot return to play  
17 until the headaches are gone.

18 Q. Okay. And so then you drive home with Drew. Is that  
19 right?

20 A. Actually, I drove him to school.

21 Q. You drove him to school that day?

22 A. Yes, he went to school that day.

23 Q. Okay. How long of a drive would that have been?

24 A. From Coeur d'Alene, probably 35 minutes, something like  
25 that.

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STOREY & MILLER COURT REPORTERS

601 W. Riverside, Suite 1950, Spokane WA 99201 (509) 455-6931

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1 BY MR. CRONIN:  
 2 Q. And you know that the doctor had examined him on the  
 3 22nd of September. Correct?  
 4 A. Tuesday, yes.  
 5 Q. Right. And you know that there's no penalty to Drew  
 6 academically for taking him out of school. Right?  
 7 A. I'm not quite sure what you mean by penalty.  
 8 Q. You were free to take Drew -- not take Drew in to school  
 9 until such time as he had seen Dr. Burns on Thursday or pick  
 10 him up from school on Thursday to take him to see Dr. Burns.  
 11 Correct?  
 12 A. I was free to take Drew out on Thursday? I guess I  
 13 could have taken him out if I needed to, yeah.  
 14 Q. Why didn't you?  
 15 MR. KAMITOMO: Form.  
 16 A. Why did I need to? I don't know what you mean. I  
 17 didn't take him out because I had no reason to take him out.  
 18 BY MR. CRONIN:  
 19 Q. So you decided yourself, that Dr. Burns didn't need to  
 20 see Tim [sic]?  
 21 MR. KAMITOMO: Form.  
 22 MR. ARPIN: Drew.  
 23 A. No. I never --  
 24 BY MR. CRONIN:  
 25 Q. Excuse me, Drew.

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1 A. I never decided that at all.  
 2 Q. Okay. All right. And so your reason for not taking  
 3 Drew to see Dr. Burns on Thursday is you didn't think it was  
 4 necessary?  
 5 MR. KAMITOMO: Form.  
 6 A. No.  
 7 BY MR. CRONIN:  
 8 Q. Why is it then?  
 9 MR. KAMITOMO: Asked and answered. Form.  
 10 MR. CRONIN: No, Actually, it isn't asked and answered.  
 11 MR. KAMITOMO: At least three or four times, but you go  
 12 ahead and provide another answer, anything further than what  
 13 the record is in.  
 14 BY MR. CRONIN:  
 15 Q. Thank you. I want to know why you didn't take Drew to  
 16 see Dr. Burns knowing that Drew had sustained a football  
 17 injury, described as a concussion, operating under the  
 18 assumption that you had had a concussion information sheet  
 19 that talks about concussions being very dangerous to a  
 20 player?  
 21 A. I didn't take Drew because I called the doctor's office  
 22 to find out the procedure to go through.  
 23 Q. And what did they tell you?  
 24 MR. KAMITOMO: Form. Asked and answered. Go ahead.  
 25 A. The nurse said that she would talk to the doctor.

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1 BY MR. CRONIN:  
 2 Q. And then what's the next thing you heard back?  
 3 A. The nurse called me and said there's a note for you here  
 4 from the doctor for Drew.  
 5 Q. And you decided that day to go pick it up. Correct?  
 6 A. Yes, I did.  
 7 Q. Okay. And was it your goal in picking up the note at  
 8 that time that that would allow Drew to play football the  
 9 next day, Friday?  
 10 A. That wasn't my goal at all.  
 11 Q. Okay. Your goal was to just simply get the note then?  
 12 A. Yes, because it was waiting there for me.  
 13 Q. Anything else?  
 14 A. I just went to pick up the note that was ready for me.  
 15 Q. Did Drew go to the Puryear's house on the evening of  
 16 September 24th for a pregame function?  
 17 A. I don't remember if he went that Thursday or not.  
 18 Q. Okay. Did any of the players tell you that Drew had  
 19 gone there on September 24th?  
 20 A. Not that I recall.  
 21 Q. Do you ever recall seeing a videotape in which a  
 22 co-player of Drew's was recalling Drew fondly and indicating  
 23 on that night that Drew had hot wired his car?  
 24 A. I heard about the hot wiring of his car, but I don't  
 25 remember what took place or anything.

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1 Q. Did Drew regularly go to the Puryear's house for pregame  
 2 meetings generally the night before a game?  
 3 A. They had Thursday night dinners to look at tapes, and  
 4 that was part of their requirements I guess for football.  
 5 Q. And do you have any reason to believe that Drew didn't  
 6 go?  
 7 A. I just don't recall that he went or not.  
 8 Q. When you were speaking with Dr. Burns's office on  
 9 September 24th, 2009, did you tell them what you wanted the  
 10 note that you were going to get which would allow Drew to  
 11 return to play, what you wanted that note to say on it?  
 12 A. I just told the nurse that Washington State has a law  
 13 where before he can return to play, he needs to have a  
 14 release from the doctor. That's all I told her.  
 15 Q. And did the person you talked to tell you what the note  
 16 you were going to pick up said?  
 17 A. No. I believe she said that there's a note here from  
 18 Dr. Burns for Drew.  
 19 Q. And you drove there. Correct?  
 20 A. Yes.  
 21 Q. And you went inside. Correct?  
 22 A. Yes.  
 23 Q. And then did you look at the note before you left the  
 24 office?  
 25 A. I don't remember reading it.

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1 of the symptoms on the front page of it, that form that I  
 2 was given.  
 3 Q. And you signed that form twice. Correct?  
 4 A. Yes.  
 5 Q. But you did not read it the second time?  
 6 A. No, because it was just a re-sign of the previous form.  
 7 Q. How do you know that that document didn't change and  
 8 that they were asking you to sign additional documents, for  
 9 example, a waiver of your rights?  
 10 MR. KAMITOMO: Form.  
 11 A. Because I remember signing it just a few days earlier  
 12 and, so, I had read it, so that's why.  
 13 BY MR. BRUYA:  
 14 Q. But do you know for sure, when you signed it, nothing  
 15 had changed on that document?  
 16 A. Well, no, I can't say that.  
 17 Q. So you don't know what document you signed on the 17th.  
 18 Correct?  
 19 MR. KAMITOMO: Form.  
 20 A. No, I knew it was the one that was for -- I read it  
 21 enough to know that it was for the concussion management in  
 22 the thing.  
 23 Q. Okay. And can you tell me again what you discussed with  
 24 Dr. Burns's nurse on the 24th of September 2009?  
 25 A. When the nurse got on the phone, I said, hi, my son Drew

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1 was in to see Dr. Burns on Tuesday with a headache that he  
 2 received in a football game. Washington State has a new law  
 3 that says that the boys have to have a note to release them  
 4 to play again and Dr. Burns said when his headaches were  
 5 gone, he could return to play, so he will need a note to  
 6 return to play.  
 7 Q. How did you know that Drew could return to play if he  
 8 had no headaches?  
 9 MR. KAMITOMO: Form.  
 10 BY MR. BRUYA:  
 11 Q. Where did you learn that information?  
 12 A. From Dr. Burns.  
 13 Q. On Tuesday?  
 14 A. Yes.  
 15 Q. And did she say that she would talk to Dr. Burns and get  
 16 back to you?  
 17 A. Yes. She said she would get this information to the  
 18 doctor.  
 19 Q. Did you, at any point in time, tell the nurse that you  
 20 could bring Drew in if needed?  
 21 A. She didn't ask me, and I didn't offer it. I mean, I  
 22 didn't know what was going on. It's up to them to  
 23 determine.  
 24 Q. I am getting close, ma'am, just bear with me here. How  
 25 would you describe your relationship with Dr. Burns prior to

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1 September 22nd, 2009?  
 2 A. Well, he had been our family doctor since Drew was born  
 3 in '92, and so I knew him and he was a friendly, you know, a  
 4 friendly doctor.  
 5 Q. And you mentioned, and I'm going to skip forward now to  
 6 the game on the 25th. How was Drew acting that morning?  
 7 A. That morning?  
 8 Q. Correct.  
 9 MR. KAMITOMO: Form.  
 10 BY MR. BRUYA:  
 11 Q. The morning of the 25th.  
 12 A. He was fine. He was busy getting all of his stuff  
 13 together because he was going on the bus for the game that  
 14 night. So I didn't see a lot of him because he's showering,  
 15 getting dressed, packing stuff, getting all that stuff  
 16 together, get that together, trying to get three kids off to  
 17 school on time in the morning and get them all loaded up, so  
 18 you can make it on time, so, you know, but he seemed fine.  
 19 Q. Was he back to his happy, go-lucky self as you described  
 20 it?  
 21 A. Oh, he seemed lots more himself.  
 22 Q. By that, meaning he was more jovial, more like the Drew  
 23 you had known?  
 24 A. It's morning, he's not a morning person, so you can't  
 25 base it on that. But he was much more --

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1 Q. Vibrant?  
 2 A. Yeah, I guess you could say that.  
 3 Q. And I think you've already testified, you didn't see him  
 4 after you dropped him off for school that morning. Correct?  
 5 A. No, I never saw him until the game that night.  
 6 Q. And I think it's your testimony that you gave him the  
 7 three Advil pills that were found in his pocket or in his  
 8 locker at school?  
 9 A. Yeah, they were found in his pocket. I said, take these  
 10 in case you get a headache.  
 11 Q. And can you please tell me -- You mentioned earlier that  
 12 you had a conversation with your son, that should he have  
 13 any headaches throughout the day, please tell me how that  
 14 conversation went. And if you can use the same tone and  
 15 reflection, that would be greatly appreciated.  
 16 MR. KAMITOMO: Form.  
 17 A. I said, take these three, you know, Ibuprofen, put them  
 18 in your pocket in case you need them. Then when I was  
 19 dropping him off at school and he was getting his stuff out  
 20 of the back seat, I said, okay, if your headache comes  
 21 tonight, do not play in that game, and if you get one while  
 22 you're playing, get out of that game, and that's what I  
 23 said.  
 24 Q. Did Drew acknowledge that?  
 25 A. He said, yeah, and then he had his stuff out and I said,