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Supreme Court No. 93282-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT

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ORIGINAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT 2

A. Adoption of the Medical Association's and WDTL's Jurisdictional Arguments. 2

B. EHB 1824 Did Not, And Could Not Constitutionally Have Created A New, Novel Cause Of Action By Implication Or Otherwise. 5

1. For a cause of action to be implied in a statute the legislature must have intended to provide for that relief. The enacting legislation therefore must demonstrate that intent consistent with the Constitution. 5

2. Background of the statute – its bill title, consideration and passage. 7

3. Legislative Hearings. 8

4. Text of the bill. 11

5. The Constitution requires all bill titles to give adequate notice of the subject matter of the bill so that proper consideration may be given by both legislators and interested members of the public and precludes an interpretation of a statute which goes beyond the scope of its title. 11

C. The "Lystedt Law" portion of EHB 1824 Does Not Even Arguably Impose Duties On Non-Volunteer Health Care Professionals, Who Are Charged To Act Within The Standard Of Care Per Ch. 7.70 RCW. 13

III. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Beggs v. State,
171 Wn.2d 69, 247 P.3d 421 (2011).....9

Braam v. State,
150 Wn.2d 689, 81 P.3d 851 (2003).....5, 16

Daviscourt v. Peistrup,
40 Wn. App. 433, 698 P.2d 1093 (1985).....11, 12

Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints,
141 Wn. App. 407, 167 P.3d 1193 (2007).....9

Kim v. Lakeside Adult Fam. Home,
185 Wn.2d 532, 374 P.3d 121 (2016).....9

Patrice v. Murphy,
136 Wn.2d 845, 966 P.2d 1271 (1998).....7, 11, 12

State v. Broadway,
133 Wn.2d 118, 942 P.2d 363 (1997).....11

State ex re. Seattle Elec. Co. v. Superior Court,
28 Wash. 317, 68 Pac. 957 (1902).....12

Swank v. VCS et al,
194 Wn. App. 67, 374 P.3d 245 (2016).....8

Federal Cases

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989).....5

Walden v. Fiore,
134 S.Ct. 1115 (2014).....4

Wright v. Yackley,
459 F.2d 287 (9th Cir. 1972).....3

Page(s)

Constitutional Provisions, Statutes and Court Rules

Const. art. II, § 19 ..... 7, 11

EHB 1824 ..... *passim*

RCW 7.70 ..... 1, 3, 13

RCW 7.70.140 13

RCW 28A.600.190(2)–(4) 8

RCW 70.02.010(18); 14

Other Authorities

Hr'g on H.B. 1824, Hse. Educ. Comm.,
60th Leg., Reg. Sess. (Wash. Feb. 13, 2009),
http://www.tvw.org/watch/?eventID=2009021238
(statement of Rep. Jay Rodne) 8

I. INTRODUCTION

This answer addresses the *amicus curiae* briefs filed by the Washington Defense Trial Lawyers ("WDTL"); the Washington, Idaho, Oregon, and American Medical Associations and the Idaho Academy of Family Physicians ("Medical Associations"); and by the Washington Association For Justice Foundation ("WAJF").

Dr. Burns will focus most of his answer on the WAJF brief which argues that the Lystedt Law creates an implied cause of action that is different and distinct from a claim of medical negligence for the care rendered by a health care provider under Ch. 7.70 RCW, the exclusive basis for compensating an injury due to health care in Washingotn. The WAJF brief makes this claim despite the fact that there is no explicit evidence of any legislative intent to create a new cause of action in the bill that unanimously passed an otherwise sharply divided legislature in 2009, EHB 1824. The bill contained more than the Lystedt Law touted by WAJF, which is limited to section 2. Had any such cause of action been expressly stated in EHB 1824 as passed, it would be unconstitutional as outside the scope of the title of the bill. The unanimous passage is ample evidence there was no notice or intent that a new cause of action was being created. And the hearings and text confirm that EHB 1824 was meant to be a "carrot" to get concussion protocols adopted, accepted, and used, not a "stick" designed to punish those who did not. If followed, youth programs could still use school facilities and

the schools would continue to have immunity from their use. All the stakeholders (youth programs, coaches, WIAA, parents) would have bought into the new protocol in order to preserve the use of public school fields and improve safety for youth athletes.

Dr. Burns also expressly adopts the arguments of the Medical Associations and the WDTL as specified herein.

II. ARGUMENT

A. Adoption of the Medical Association's and WDTL's Jurisdictional Arguments.

The Medical Associations focus on the jurisdictional question, which, as to Dr. Burns, obviates any need to address the Lystedt Law. Because there is no jurisdiction over Dr. Burns, any discussion of the Statute as to him is *dicta*. Nevertheless, Dr. Burns addresses the Act in Section B since the WAJF amicus does.

The Medical Associations make several points consistent with his position which Dr. Burns specifically adopts:

- The key issue for determining jurisdiction is ***where medical judgment was exercised.*** *See* MA Brief, 1, 2, 5, 8, 17. in this case, Dr. Burns' medical judgment was exercised wholly in Idaho.

- A critical distinction in long arm jurisdiction exists "between personal medical services and forum-focused economic activities." MA Brief, 7, citing *Grange* and *Bartusch*. Here the activities were focused on the Idaho ***patient***, not on Washington.

- ***No forum state anywhere*** has asserted jurisdiction over a doctor treating patients in the doctor's home state where that

doctor was not licensed in the forum state. Licensure means something. MA Brief, pp. 9-11 & fn. 2 & 3 and cases cited.

- The Swanks' and WAJF's asserted claim under the Lystedt Law is for his ***exercise of medical judgment*** and is, thus, a medical negligence claim subject to Ch. 7.70 RCW:

  > The answer as to whether Dr. Burns engaged in purposeful activity in Washington will be the same whether the Swanks assert a medical negligence claim or a claim under the Lystedt law (assuming such a claim exists), as ***both claims necessarily turn on Dr. Burns' exercise of medical judgment*** in Idaho.

  MA Brief p. 17 (emphasis added).

- Public policy, access to care, and continuity of care for Washington citizens would be compromised by finding jurisdiction over Dr. Burns: "[T]he forum state's natural interest in the protection of its citizens is here countered by an interest in their ***access to medical services wherever needed***. . . . a state's dominant interest on behalf of its citizens . . . is not that they should be free from injury by out-of-state doctors, but rather that they should be able to secure adequate medical services to meet their needs wherever they may go." MA Brief p. 13, quoting *Wright v. Yackley*, 459 F.2d 287, 290-91 (9th Cir. 1972). *See* generally MA Brief pp. 11-15.

The WDTL amicus brief also primarily focuses on the failure to establish the federal due process requirements for allowing jurisdiction, such that Dr. Burns adopts its arguments as follows:

- The argument that federal law on jurisdiction requires that it is the ***defendant*** who must create the connection with Washington —the defendant must "purposefully avail himself of the privilege of conducting activities in the forum state" – that jurisdiction is not proper if the connection was supplied

by the plaintiff or a third party; and that here it fails because the only connection between Dr. Burns and Washington is supplied by Drew Swank and his parents when they sought out Dr. Burns for evaluation. *See* WDTL Brief, pp. 4-12, citing U.S. Supreme Court cases; pp. 12-16 citing cases applying *Walden v. Fiore,* 134 S.Ct. 1115 (2014).

- The argument relying on recent cases from 2015 and 2016 applying *Walden* that the medical services provided by Dr. Burns were "not directed to any particular place, but to the patient himself," here Drew Swank, and thus were not directed at the forum state of Washington; he was simply seeing one of his long-time, local Idaho patients. *See* WDTL Brief, pp. 12-15

- The argument that the state licensure of health care providers precludes assertion of Washington law over out of state health care practitioners providing care under their state law. WDTL Brief, pp. 16-18 & fn. 7:

> The notion that the Washington legislature has authority to regulate the conduct of an Idaho physician delivering medical treatment in Idaho to Idaho residents is one that this Court should approach with considerable caution. Furthermore, it hardly makes sense that the Washington legislature would imply a cause of action against an Idaho physician under a Washington law that cannot permissibly govern the Idaho physician's conduct in the first place.

- The commerce clause argument that refutes an argument that any cause of action that may be created by the Lystedt Law can be exported beyond the state borders. WDTL Brief pp. 17-18, fn. 7:

> [E]ven if Washington's legislature intended the Lystedt Law to somehow govern the conduct of physicians practicing medicine in other states, "[n]o state has the authority to tell other polities what laws

> they must enact or how affairs must be conducted outside its borders." [quoting and citing 7th Circuit and U.S. Supreme Court cases.] Furthermore, "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[]'...." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37 (1989).

B. EHB 1824 Did Not, And Could Not Constitutionally Have Created A New, Novel Cause Of Action By Implication Or Otherwise.

1. For a cause of action to be implied in a statute the legislature must have intended to provide for that relief. The enacting legislation therefore must demonstrate that intent consistent with the Constitution.

The WAJF's brief agrees that an implied cause of action depends on finding a legislative intent to create that cause of action with the legislation. *E.g.,* WAJF Brief, p. 16. But there nothing to suggest that the legislature intended to imply a new civil remedy against health care providers under EHB 1824. A cause of action will be implied from a statute 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, all three of which must be present. *Braam v. State,* 150 Wn.2d 689, 711, 81 P.3d 851 (2003). Dr. Burns argued below in his summary judgment reply that the Swanks cannot establish the latter two elements.

Review of the hearings, discussed *infra*, confirms Dr. Burns' point made in his summary judgment reply:

> Nothing in the legislative history of the Lystedt Act indicates the legislature intended to imply a civil remedy against health care providers for an alleged violation of the Act, which does not impose any duty on the health care providers, only on the school and youth athletic programs. Rather ... the Act goes out of its way to give a voluntary health care provider extra protection under the otherwise applicable statute if they help a school or youth athletic program try to satisfy the school or program's duties under the Act.

CP 1178:15-21, Burns SJ Reply p. 6.

Liability of health care providers was only brought up in the context of providing properly licensed volunteers with immunity under the statute, invariably on the sidelines. There was no challenge to that proposition. By including provisions allowing volunteer health care providers to treat students on the sidelines without fear of civil liability under the statute, it seems evident that the bill's sponsors wanted nothing in the law that might prevent a provider from immediately coming to a student's aid after suffering a possible concussion.

The hearings show it would be ***contrary*** to the legislative purpose of the statute to imply some cause of action against Dr. Burns, or any health care provider, who sees a student athlete removed from competition. Besides providing parents, students, and coaches with education on the dangers of concussion and the need to protect youth athletes, a primary purpose of this legislation is to

ensure there is a mandate in place for coaches to make the right decision when a player suffers a possible concussion - especially given that coaches are often under the most pressure to let the athlete continue when injuries occur.

2. Background of the statute – its bill title, consideration and passage.

Every statute begins as a bill before the legislature and every bill has a title. As discussed *infra,* the title of the bill limits its reach. Const. art. II, § 19; *Patrice v. Murphy,* 136 Wn.2d 845, 851-855, 966 P.2d 1271 (1998) (per C. Johnson, J.). EHB 1824 contained in its section 2 what became and now is commonly referred to as the "Zachery Lystedt Law" or more simply, the "Lystedt Law", has the following title:

> 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.

EHB 1824, App. A-1 to Burns' Supp. Brief. Section 1 of the bill is the school district immunity provision related to private use of their public facilities.

The legislative hearings and bill reports confirm that the limited purpose of the bill is what was reflected in the title: encouraging public school districts to serve local youth by allowing private, nonprofit youth programs to use school district facilities in exchange for immunity if the youth programs meet the new the

requirement of complying with a concussion management program. *See* App. B to Burns Supp. Brief.

3. Legislative Hearings.

The Court of Appeals correctly indicated that the overarching purpose of the Lystedt Law is "to reduce the risk of injury or death to youth athletes who suffer concussions." *Swank v. VCS et al*, 194 Wn. App. 67, 77, 374 P.3d 245 (2016). When presenting the initial bill to the House Education Committee, Representative Jay Rodne, the bill's prime sponsors and the congressman for the district in which the Lystedt family resided, offered the following summary of the bill's three key requirements:

> [T]he bill . . . simply requires notification to parents and players about the dangers and risks associated with concussion. It requires that information be also given to coaches about concussion awareness . . . [M]ost importantly, it requires . . . young athletes to be removed from play when there is a suspected concussion injury that that youth has sustained . . . and prevents and prohibits their return to play until they have been cleared by a licensed health care provider trained in the treatment of concussions.

Hr'g on H.B. 1824, Hse. Educ. Comm., 60th Leg., Reg. Sess. (Wash. Feb. 13, 2009), http://www.tvw.org/watch/?eventID=2009021238 (statement of Rep. Jay Rodne). *See* EHB 1824 § 2 (2)-(4) (App A to Burns Supp Br.), codified at RCW 28A.600.190(2)–(4).

Representative Rodne's statements regarding the bill's requirements and underlying purpose support that these new duties created by the HB 1824 under § 2's subsections (2)-(4) were

intended to apply to these persons and entities alone. This Court should not presume that the legislature intended any active role for health care providers in the statute's removal and referral protocol, especially given that schools are not required to employ on-the-field medical personnel. Liability of health care providers was discussed only once as the bill was presented to several committees, and all that was said was that the amendment providing for the immunity provision for volunteers was a welcome improvement.

The WAJF relied on *Kim*, *Doe*, and *Beggs*,[1] all of which implied a cause of action for violations of mandatory reporting statutes, to support its argument that the limited immunity provision in the Lystedt portion of EHB 1824 "evidences a broader legislative intent to create liability where the Act's provisions are otherwise violated." WAJF Brief, 15-16. However, the WAJF also conceded that a limited immunity provision may be treated differently depending on the "evaluation of the particular provision in the context of the overall legislative purpose unique to that statute." *Id.* at 15. Again, the relevant intent to construe is that of the entire bill that was passed creating the statute, EHB 1824, not just the Lystedt Law portion, section 2. This is reflected in the hearings.

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[1] *Kim v. Lakeside Adult Fam. Home*, 185 Wn.2d 532, 374 P.3d 121 (2016); *Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007); *Beggs v. State*, 171 Wn.2d 69, 247 P.3d 421 (2011).

The clear intent of the sponsors of the bill at the hearings was to include nothing in the bill that might prevent a licensed health care provider on the sidelines from immediately coming to a student's aid after suffering a possible concussion. Without a grant of such immunity, an otherwise willing and qualified volunteer might hesitate to assume the duty of care for an injured athlete that they have no obligation to treat. This cannot be taken to mean that an implied cause of action exists against non-voluntary health care providers because: (1) HB 1824 does not provide any obligations for health care providers to violate in the first instance; and (2) the creation of a new risk of liability under the law may deter providers from treating concussed athletes, which would undermine the purpose of the bill altogether.

The WAJF also contends that an implied cause of action is supported by legislative intent and consistent with the Lystedt portion of EHB 1824's purpose, in part, because it "creates an incentive to comply with its terms." WAJF Brief, 16. However, the WAJF also concedes that a statute must be read as a whole to discern legislative intent, *id.* at 16, at the same time ignoring the requirement to examine the entire bill creating the statute to determine its permissible scope and intent, as discussed *infra* §5. Because even the Lystedt portion of EHB 1824 is missing critical indicia of legislative intent to impose a unique civil remedy for violations of it, and the hearings make no mention of any other remedies for

violations beyond those that already exist in the common law, there is insufficient evidence for this Court to imply a cause of action.

4. Text of the bill.

Dr. Burns has pointed out that the text of EHB 1824 does not provide a basis for implying a cause of action, whether against him or anyone else. *See, e.g.,* Burns Supp. Br., pp. 16-19.

5. The Constitution requires all bill titles to give adequate notice of the subject matter of the bill so that proper consideration may be given by both legislators and interested members of the public and precludes an interpretation of a statute which goes beyond the scope of its title.

The Constitution limits the reach of any bill passed by the legislature pursuant to the single subject rule. Const. art. II, § 19; *Patrice v. Murphy,* 136 Wn.2d 845, 851-855; *State v. Broadway,* 133 Wn.2d 118, 123-128, 942 P.2d 363 (1997); *Daviscourt v. Peistrup,* 40 Wn. App. 433, 437-441, 698 P.2d 1093 (1985). *See* Burns Supp. Brief at 14-15. Further, since the title is restrictive because "a particular part or branch of a subject is carved out and selected as the subject of the legislation," *State v. Broadway,* 133 Wn.2d at 125. The scope of the act is limited "to that expressed in the title." *Id.*

Justice Johnson explained the purposes of this rule for a unanimous court in *Patrice* that are pertinent here: to give notice to the legislators of what is in the bill ("to protect and enlighten" legislators from provisions in the bill which the title does not give an

"intimation"); and to give proper notice of the public of the subject of legislation being considered ("apprise the people . . . concerning the subjects of legislation . . . being considered"). *Patrice,* 136 Wn.2d at 852. The ultimate point was made by this Court in 1902:

> The wisdom of the rule suggests itself, in that the reader, whether a member of the legislature or otherwise, may, by a mere glance at a few catch words in the title, be apprised of what the act treats, without further search. Does the title of the act in question contain such a statement of the subject-matter?

State ex re. Seattle Elec. Co. v. Superior Court, 28 Wash. 317, 321, 68 Pac. 957 (1902), *quoted in Patrice*, 136 Wn.2d at 852.

Patrice showed the teeth in these principles by invalidating a statute that the Ninth Circuit held in an earlier case had created an implied cause of action from a section of the statute not reflected in the title. *Daviscourt v. Peistrup* is similar, as it analyzed the statute at issue to determine its permissible scope and application. The same principles apply here to preclude a construction that EHB 1824 (section 2 of which became known as the Zachery Lystedt Law or the Lystedt Law for short) created an implied cause of action. Here the title and text of EHB 1824 use the "carrot" of public school district immunity for use of their facilities to get the districts, the WIAA, and youth sports programs to adopt their own guidelines for concussion education and a protocol and to provide immunity from normal tort liability for volunteer health care providers for sideline assistance so that the youth athletic programs could both use the

public facilities and also would not have to incur the cost of paid medical staff at practices and events.

C. The "Lystedt Law" portion of EHB 1824 Does Not Even Arguably Impose Duties On Non-Volunteer Health Care Professionals, Who Are Charged To Act Within The Standard Of Care Per Ch. 7.70 RCW.

Dr. Burns pointed out in his Supplemental Brief that the plain language of the statute does not impose any duties on a licensed health care provider who ends up seeing a youth athlete with a head injury. Burns Supp. Brief, pp. 16-19. Such professionals are already required to act non-negligently pursuant to the applicable standard of care of their profession and class. *See* RCW 7.70.140. If the statute imposes any new duties related to youth injuries, it is on the coach and the athletic program to remove the athlete and not let the athlete return to play until cleared by "a licensed health care professional trained in concussion protocol." As the hearings amply show, in 2009 when no other state in the country had concussion legislation for youth sports, and when the knowledge and understanding of concussion assessment and treatment was far less developed than it is today, the focus was not on compliance with a mandate, but on concussion-related education and encouraging the removal of athletes from competition and having them evaluated by licensed professionals when it appeared a concussion had or might have occurred. Thus, the goal of the legislation was three-fold: 1) to educate coaches, parents/guardians, and youth athletes about

concussions and their treatment; 2) to get guidelines for concussion prevention adopted by school districts, youth athletic programs, and the WIAA; and 3) to get the myriad of volunteer and professional coaches engaged in youth athletics for all ages to immediately remove their athletes from competition if a concussion was suspected and have the athlete seen by a licensed health professional before he or she could return. As the first piece of legislation in the country, and consistent with Washington State's approach, the point of the legislation was to use a carrot, not a stick; to educate and guide by shedding light and focus on the issue, not to order and punish.

As noted in Dr. Burns' Supplemental Brief, specification of a "licensed" health care provider normally means licensed in Washington State. *See* RCW 70.02.010(18); Burns Supp. Brief p.18-19. If any new duties were imposed on health care providers (which they were not), Washington licensure would be necessary to meet the basic requirement of adequate notice to the given health care provider of what the rules are that must be met and to meet the constitutional requirement of fundamental fairness; there is no proper basis to impute knowledge of Washington law on an out of state physician, much less of a newly-passed law.

Here, the evidence is that Mrs. Swank told Dr. Burns' nurse by phone when calling to get the clearance note that Washington has a new law that requires a note. But Dr. Burns was not licensed in Washington. There is no reason for him to know what Washington

laws are that may apply to his medical practice – he practices in Idaho. Further, he was not treating a "student athlete" sent to him by a coach or school or athletic team. He was treating his long-time local Idaho patient. He did not address the clearance note to any school or coach or team, but simply left it for Mrs. Swank to pick up at his Idaho office.

On the evidence provided by the Swanks, there is no reason or basis to impute any knowledge of the specifics of the Washington statute to Dr. Burns. Indeed, it would be fundamentally unfair to impute such knowledge to him. And as the Medical Associations so aptly point out, attempting to impute such knowledge and asserting jurisdiction over Dr. Burns will likely have a chilling effect on physicians' willingness to treat Washington athletes who happen to be in Idaho (or any other state) for whatever reason – sports team tournaments or individual games or events, individual or family ski trips, etc. See MA Brief, pp. 13-16. Thus, not only does imputing notice of the statute on Dr. Burns not make legal sense because it is fundamentally unfair and offends traditional notions of fair play, it is very bad public policy and will cause Washington citizens to have diminished opportunities for health care treatment when they are out of state.

III. CONCLUSION

The legislature did not create a new form of liability when it passed EHB 1824. The legislature was lobbied to promote education

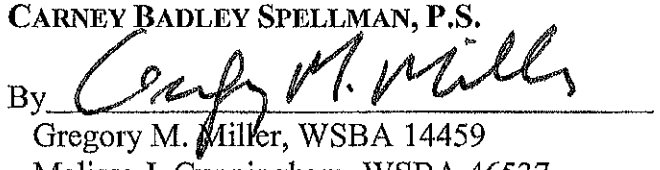
and agreed guidelines to have student athletes removed from play if there was a head injury and suspicion of a concussion, then get evaluated by a licensed health professional before returning to play. The legislature did not mandate that all youth sports teams had to adopt a specific protocol related to potential or actual concussion injuries to youth athletes. It used the "carrot" for the youth teams and leagues of continued use of public fields, and the "hook" of telling public school districts they could continue to receive immunity from liability for the private use of their public fields and facilities by private and non-profit organizations if they required adoption of concussion education and management protocols from those groups. That is what the title of the bill presented to the legislature said it was going to do. That is what was discussed in the hearings. And that is why the bill passed unanimously. No rules of liability were being created, changed, or imposed. EHB 1824 stated guidelines were to be adopted to get student athletes suspected of head injuries to be seen by licensed health professionals trained in concussion management and then cleared before returning to play in order for school districts to continue to have immunity for letting the youth teams use their facilities.

As in *Braam*, there are other remedies than the statute for negligent acts other than volunteers. So long as an injured party is mindful of the applicable statute of limitations, there are ready bases for claims of negligent conduct related to concussion injuries. But

as in *Lewis v. Bours,* this Court should not, and properly cannot, create new, unfounded jurisdiction or liability simply to save a party who failed to file their claim timely. Dr. Burns requests that the Court affirm the trial court's and Division III's dismissal of claims against him and recognize that EHB 1824 does not create an implied cause of action.

Respectfully submitted this 5th day of January, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By 

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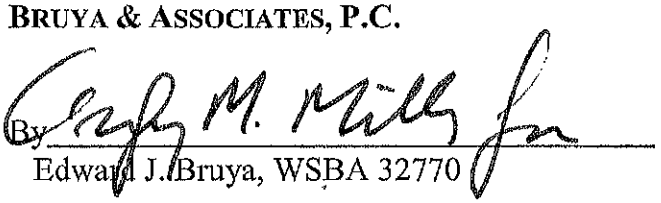
By 

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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 to be delivered in the manner indicated a true and correct copy of *Dr. Burns' Consolidated Answer to the Briefs of Amici Curiae* on the following parties:

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Subject: 93282-4; Swank v. Valley Christian School

Dear Clerk:

Attached for filing please find *Dr. Burns' Consolidated Answer to the Briefs of Amici Curiae and certificate of service.*

Case Name: DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK, individually V. VALLEY CHRISTIAN SCHOOL, a Washington State Non-profit corporation, JIM PURYEAR, individually, and TIMOTHY F. BURNS M.D., individually

Cause #: 93282-4

Filing Attorney:

Gregory M. Miller, WSBA No. 14459
Carney Badley Spellman

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