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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

SUPPLEMENTAL BRIEF OF RESPONDENT DR. BURNS

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I. INTRODUCTION

This case arises out of the tragic death of Petitioners' high school son Idaho resident Drew Swank, following a football game in Washtucna, Washington, in late September, 2009. This action was filed in Washington only after Petitioners learned their Idaho medical negligence claim against their Idaho family physician for clearing Drew to return to play after a concussion was barred by Idaho's two-year statute of limitations. It was correctly dismissed.

The Swanks live in Idaho where Drew was born and raised. Almost three years after his death, Drew's parents began Idaho's pre-litigation process to sue Dr. Burns, their family physician in Coeur D'Alene, Idaho, for allegedly improperly clearing Drew to return to play football. Dr. Burns had examined Drew fully the Tuesday after a Friday game, diagnosed a mild concussion and advised he could return to sports after his headaches cleared. Dr. Burns signed a return to play slip after Drew's mother reported two days later that Drew's headaches had cleared. Only after Idaho's malpractice screening committee informed the Swanks the Idaho statute of limitations had run on their claims did the Swanks file this suit in Washington naming Dr. Burns and citing the Lystedt Act. After discovery limited to jurisdictional facts, Dr. Burns was dismissed by Judge Price for lack of jurisdiction. CP 1340, 1350-56. Division III affirmed, *Swank v. Valley Christian School, et al.*, 194 Wn. App. 67, 374 P.3d 245 (2016), and review was granted.

Though Petitioners raise several theories to assert liability against Dr. Burns, principally an implied cause of action under the Lystedt Act separate from a malpractice claim, all are secondary to whether Washington has personal jurisdiction over Dr. Burns for the medical care he rendered in Idaho to his Idaho patient. The lower courts correctly dismissed under settled federal and Washington law on jurisdiction, including *Lewis v. Bours*, 119 Wn.2d 667, 835 P.2d 221 (1992). Dismissal is still required if those issues are addressed.

First, there is no need to imply a remedy against health care providers under the Lystedt Act because a plaintiff complaining about a physician's concussion evaluation or clearance has a remedy via a professional negligence action. Second, the scope and text of the Act do not support an implied cause of action. The Act does not create new duties for health care providers for which liability can be implied. Third, even if jurisdiction existed for a malpractice action (which it does not), the applicable law would be Idaho's, which would require dismissal under the statute of limitations.

Since the Court wants to address the scope and application of the Lystedt Act, this brief gives it more attention, but reiterates that jurisdiction comes first and is not proper as to Dr. Burns.

II. SUPPLEMENTAL STATEMENT OF FACTS

A. Substantive Facts.

Timothy Burns, M.D., provided primary care to the Swanks since shortly after he began his family medical private practice at

Ironwood Family Practice in Coeur D'Alene, Idaho in 1989. CP 252-53. The Swanks had been patients of the Ironwood practice group since the 1970's and began receiving their care from Dr. Burns in 1990. CP 369. Two years later in 1992, Dr. Burns helped deliver the Swanks' son, Drew. CP 373, 887. Although Dr. Burns did not see Drew for every health care need,¹ he was Drew's and the Swank family's regular primary care provider from 1992 forward, CP 371-72, always at Ironwood in Idaho. CP 285.

Drew was hit on the head during a Friday night football game on September 18, 2009, in Washington State where he went to private high school. CP 386. When his headaches still persisted, his mother took him the following Tuesday the 22nd to Dr. Burns' office in Coeur D'Alene. CP 3¶ 2.3. Dr. Burns gave Drew a full exam, talking to him throughout the exam to get mental responses as well as physical. CP 345, 373-374. Dr. Burns told Drew and his mother at the end of the exam that Drew could resume sports after his headaches cleared. CP 3, 374. Drew's mother reported to Dr. Burns' nurse on Thursday the 24th that Drew's headaches had cleared, CP 376, then requested a return to play slip saying a Washington law required it. CP 3¶ 25. Dr. Burns wrote a return to play slip for Drew for Friday, CP 320-21; 367, consistent with his notes. CP 345 (stay out "next three days' time"). Ms. Swank picked it up and had it

¹ The Swanks were private pay and would occasionally see other providers such as for athletic physicals. See CP 888-890.

delivered to school so Drew could play in the game the next night. CP 174, 376. Drew had additional hits to his head at the game, staggered off the field, and died two days later. CP 4.

B. Jurisdictional and Procedural Facts.

Nearly three years after Drew's tragic death, the Swanks sought to initiate a malpractice lawsuit in Idaho against both Dr. Burns and the Ironwood clinic following Idaho's pre-litigation screening process necessary to bring a medical malpractice action in Idaho. *See* CP 393, 398, 377-83 (letter and application for medical malpractice pre-litigation hearing before Idaho Board of Medicine).² They alleged that Dr. Burns was liable for authorizing Drew's return to play without "appropriate evaluation," a medical negligence claim. CP 379 - 381. Upon learning the two-year statute of limitations had run for their claim, CP 398, the Swanks filed this suit in Spokane County Superior Court against Dr. Burns personally, Drew's school and coach. CP 1. The Washington complaint did not assert claims against Ironwood, nor against Dr. Burns as an officer, owner, or employee of Ironwood. *See* CP 1, 2, ¶1.8. Since the Idaho statute of limitation was tolled for Drew's minor siblings, the committee held a hearing on their potential claims' merits. CP 397, 400. Its post-hearing report concluded they "failed to meet their

² Idaho law requires evaluation by the Idaho Board of Medicine's Medical Malpractice Prelitigation Screening Panel. Although a prerequisite to bringing a medical negligence suit in Idaho, the Panel's proceedings are "informal and nonbinding." *See* CP 393 (copy of Idaho Code §6-1001).

burden by a preponderance of the evidence” to demonstrate Dr. Burns violated the local standard of care in September 2009 and that “the claims against Dr. Burns are without merit.” CP 387. *See* Dr. Burns Response Brief, 8-10 (“Burns RB”).

Dr. Burns is not licensed in Washington and never provided care to Drew or any of the Swanks in Washington State. He has not provided any medical care in Washington since 1993 and gave up his Washington license in 2003. CP 253, 258-259. The vast majority of his 2400 patients, like the Swanks, are Idaho residents or work in Coeur D’Alene. CP 286-287. Only a *de minimis* portion of patients are Washington residents and none were solicited in Washington. CP 286-287; CP 325-326. *See* Burns RB, 5-6.

III. RESTATEMENT OF ISSUES

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 Petitioners filing their complaint?

IV. SUPPLEMENTAL ARGUMENT

A. *Lewis v. Bours* Controls And Requires Dismissal.

1. Because Petitioners' claim against Dr. Burns is essentially one for medical malpractice, dismissal is required under *Lewis v. Bours*.

Despite Petitioners' attempts to distinguish this case from *Lewis v. Bours*, the Court of Appeals correctly held *Lewis* is both factually analogous and dispositive of Washington's lack of jurisdiction over Dr. Burns. *Lewis* held unanimously Washington did not have jurisdiction under RCW 4.28.185(2) over an Oregon physician for alleged negligent care provided at his clinic which manifested in Washington. 119 Wn.2d at 674. See Burns RB 15-16.

The Oregon physician in *Lewis* had provided prenatal care to the plaintiff, a Washington resident, who gave birth to her daughter at the physician's clinic in Oregon. *Lewis*, 119 Wn.2d at 668. The physician discharged plaintiff and her newborn with instructions to take the infant to a physician for follow-up care upon plaintiff's return to Washington later that day. On the way, the newborn stopped breathing, was hospitalized in Longview, Washington, and suffered irreversible brain damage and developmental problems. *Id.* Similar to this case, the plaintiff in *Lewis* brought suit in Washington after the statute of limitations for medical malpractice in Oregon had run. See Brief of Respondent in *Lewis v. Bours*, p. 31. By holding that the physician had not committed a tort in Washington for the purposes of the long-arm statute, this Court joined the Illinois

Supreme Court and created “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.

119 Wn.2d at 673. In carving out this exception, the Court carefully distinguished professional malpractice claims from tort claims “involving a product, instrumentality, agent or other form of representation of the plaintiff which was present in this state when the injury occurred” under circumstances where the professional knew the patient intended to go to Washington. *Id.* at 672.

In doing so, the *Lewis* Court implicitly addressed and rejected the same “effects” argument now put forth by Petitioner in an effort to apply the RESTATEMENT (SECOND) CONFLICT OF LAWS § 37 (1988 Rev.). Petitioner’s OB 47-48; Burns RB 15-21. Petitioner continues to argue that this case is distinguishable from *Lewis* “because the Swank family’s claims do not arise solely out of negligence by Dr. Burns in the State of Idaho, but rather from his releasing Drew Swank to play football in the State of Washington in violation of the Lystedt Law.” Petition for Review, 17-18. But this argument is virtually identical to that made by the petitioner in *Lewis* and rejected by this Court, namely, that “one of the operative facts of Dr. Bours’ negligence was that he released plaintiffs from his care to

travel back to Washington.”³ Brief of Appellants in *Lewis v. Bours*, p. 15. *See also* Burns RB 18-19; *Lewis*, 119 Wn.2d at 668. Because *Lewis* is not distinguishable, the Court of Appeals decision should be affirmed.

2. The Court should not ignore or distinguish *Lewis*.

Petitioners chose not to request that *Lewis* be overruled. They cannot seek that relief now. *See* Burns RB, pp. 43-44. But even if this Court wanted to distinguish *Lewis* to find liability as to Dr. Burns, that would violate federal due process principles governing long-arm jurisdiction. Indeed, the *Lewis* court recognized its decision was consistent with opinions from other jurisdictions under the due process clause holding that “residents of one State who travel to another jurisdiction for medical treatment cannot prosecute a malpractice action in their State of residence for injuries arising out of that treatment.”⁴ Moreover, in this case Drew Swank was *not* a Washington resident, removing the last arguable basis for arguing such jurisdiction is proper.

³ Petitioner also argues that *Lewis* is distinguished because this case involves a physician in violation of the Lystedt Act, rather than a medical malpractice claim. Petition for Review, 17-18. But any cause of action against health care providers under the Lystedt Act is pre-empted by Washington’s medical malpractice statute. Burn’s RB, pp. 40-42. Moreover, Dr. Burns did not “violate” the Lystedt Act which does not impose any duties on health care providers.

⁴ *Id.* at 672, citing *Veeninga v. Alt*, 111 Ill.App.3d 775 (1982); *Ballard v. Rawlins*, 101 Ill.App.3d 601 (1981); *Muffo v. Forsyth*, 37 Ill. App. 3d 6 (1976); *Wright v. Yackley*, 459 F.2d 287 (1972); *Gelineau v. New York University Hospital*, 375 F. Supp. 661 (D.N.J. 1974); *Kowalski v. Doherty, Wallace, Pillsbury & Murphy*, 797 F.2d 7, 11 (1st Cir. 1986); *State ex rel. Sperandio v. Clyerm*, 581 S.W.2d 377, 383 (Mo. 1979).

The Court of Appeals recognized that significant policy reasons preclude ignoring *Lewis*.⁵ Such a decision would actively impede the care of temporary and permanent Washington residents during their travels or residencies in other jurisdictions. It would require physicians to actively inquire and evaluate a patient's residency, school locale, and travel plans in determine whether or not he or she should provide care. Such an evaluation is hardly conducive to the physician-patient relationship, especially during a time when primary care physicians frequently struggle to find sufficient time to engage a patient in a thorough conversation about the actual health of a patient.⁶

B. United States Supreme Court Decisions Preclude Jurisdiction Over Dr. Burns Even If *Lewis* Is Not Applied.

Even in the absence of *Lewis*, recent United State Supreme Court decisions make clear that the exercise of either general or specific personal jurisdiction over Dr. Burns in Washington would “offend traditional notions of fair play and substantial justice” and consequently violate due process. Burns RB 30-33. Dr. Burns’ Washington contacts as an individual physician are *de minimis* and are not “so ‘continuous and systematic’ as to render [him]

⁵ “It is a national public policy to ensure medical services are available to all people. If physicians have to worry about defending malpractice suits in foreign jurisdictions, this policy might be inhibited.” *Swank v. Valley Christian School*, 194 Wn. App. 67, 91, 374 P.3d 245 (2016).

⁶ Roni Caryn Rabin, *15-Minute Visits Take a Toll on the Doctor-Patient Relationship*, Kaiser Health News, April 21, 2014, <http://khn.org/news/15-minute-doctor-visits/>.

essentially at home” in Washington,” the test for establishing general personal jurisdiction. *Daimler AG v. Bauman*, ___ U.S. ___, 134 S.Ct. 746, 761 (2014). See Burns RB 31, discussing *Daimler*.

Nor does the alleged fact that Dr. Burns knew Drew was to play football in Washington establish the requisite “minimum contacts” necessary for specific personal jurisdiction over Dr. Burns in Washington. See Burns RB 22-30. Rather, the due process analysis focuses on the *defendant’s* relationship with the foreign state, not the contacts of the plaintiff or a third party *i.e.*, Ironwood Family Practice. The U.S. Supreme Court recently explained that the defendants’ knowledge that the plaintiff was headed to a different state did *not* subject them to jurisdiction in the second state:

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*, ___ U.S. ___, 134 S. Ct. 1115, 1123 (2014) (emphasis added). See Burns RB, 32-37 (discussing that under controlling federal law per *International Shoe v. Washington*, 326 U.S. 310 (1945) and *Walden v. Fiore*, jurisdiction only arises based on the *defendant’s* contacts with the forum in the capacity in which he or she was sued).⁷

⁷ See also *State v. LG Electronics, Inc.*, 186 Wn.2d 169, 195, 375 P.3d 1035 (2016) (“[D]ue process requires more than just knowledge of the plaintiff’s strong forum connections or that the plaintiffs would suffer foreseeable harm in the forum from the defendants’ acts. It requires that the defendants themselves
(Footnote continued next page)

As set out below, this binding federal law restated in *Walden* is wholly consistent with the decision and analysis in *Lewis v. Bours*. See Burns RB at 21-37. It demonstrates the difference between stream of commerce and intentional tort cases such as *LG Electric* and *Calder v. Jones*, 465 U.S. 783 (1984), and a professional negligence case such as *Lewis* and this case. The operative test here, therefore, is *Walden*. The Supreme Court found no jurisdiction in Nevada because the acts of the out-of-state officers who seized the plaintiff's cash, the "relevant conduct" for which they were sued, "occurred entirely in Georgia [and] due process protections barred the Nevada court from exercising specific personal jurisdiction over them." *Walden*, 134 S.Ct. at 1126. The same is true as to Dr. Burns.

C. Even Assuming Jurisdiction Over Dr. Burns, Dismissal Must Be Affirmed Because Under Choice Of Law Principles Idaho Law Applies And Petitioners Missed The Two-Year Idaho Statute Of Limitations.

In the absence of personal jurisdiction over Dr. Burns in Washington, well recognized choice of law principles would require dismissal under Idaho's two-year statute of limitations. See Burns RB 37. The choice of law analysis, recently set out in *Woodward v. Taylor*, 184 Wn.2d 911, 366 P.3d 432 (2016), supports the application of Idaho's two-year statute of limitation in this matter. There is both an actual conflict between the applicable Idaho and

have some contact with the forum state.") (Gordon McCloud, J., concurring and dissenting) (internal citations omitted) (discussing *Walden*).

Washington law in this matter,⁸ *and* the application of Washington’s “most significant relationship” test requires the application of Idaho law since Idaho is the place of the tort and Idaho law applies for that reason. *Lewis. See also Burns RB*, pp. 15-21.⁹

Lastly, Petitioners conceded in the trial court when opposing summary judgment 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 Washington’s medical malpractice statute, RCW 7.70.010. *See CP 980-81& fn.3.*¹⁰ Later attempts to change position show the fallacy of their claim. *See Burns RB 37-42.*

D. The Lystedt Act Did Not Create An Implied Cause Of Action.

1. This Court’s test for an implied cause of action is not met by the terms of the statute.

Petitioners assert both that: 1) the Lystedt Act creates an implied cause of action for alleged “violations” of it; and 2) that this new Washington statute somehow applies to an Idaho physician who

⁸ *See Burns Supplemental Brief re Woodward Decision*, pp. 3-5

⁹ Even if jurisdiction existed, the record is inadequate to determine the applicable standard of care. *See Burns RB 37-38.* The limited record has conflicting “standards” between the opinions of Dr. Herring regarding the claimed standard of care under the Lystedt Act (rejected by the Court of Appeals) and the standard applied by the Idaho Board of Medicine prelitigation panel. Indeed, the “consensus document” Dr. Herring proffered as the standard of care specifically states it did *not* establish a standard of care. *See CP 514. Accord, Swank v. VCS*, 194 Wn. App at 79-80 & fn. 3 (specific return to play standards not adopted in statute). *See also Burns RB 38.*

¹⁰ “It would be a different case if the Swank family was alleging Dr. Burns negligently failed to diagnose Drew’s concussion because only a health care provider can make such a diagnosis. . . .” CP 980 fn.3.

is licensed only in Idaho, treats only in his Idaho clinic, is subject only to the medical regulatory authorities in Idaho, and for whom there is no basis to imbue him with either actual or constructive knowledge of a brand-new Washington statute. Applying the Lystedt Act to health care rendered outside Washington by out-of-state health care practitioners who do not practice in Washington would be an unreasonable and unwarranted expansion of Washington regulatory authority outside its borders, in addition to being beyond the permissible reach of state jurisdiction under controlling federal law. It also exceeds the plain text of the statute.

A cause of action will be implied from a statute *only* if three elements are met: (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) (statute’s mandatory reporting provisions created implied cause of action for failure to report); *Kim v. Lakeside Adult Fam. Home*, 185 Wn.2d 532, 542, 374 P.3d 121 (2016) (same). All three must be present. *Braam v. State*, 150 Wn.2d 689, 711, 81 P.3d 851 (2003).

In *Braam*, Justice Tom Chambers held there was no implied cause of action for the foster children plaintiffs, even though the statutes were created for their “especial benefit”, because they had another avenue of relief and the claimed implied remedy was

inconsistent with the structure of the statutes.¹¹ Similarly, Division III recognized that while Drew Swank was in the class of persons intended to be benefitted by the Act, its text and structure show the legislature did not intend to create new liability for health care providers that corresponded to the immunity provision for volunteers and that the Swanks have another remedy, the medical malpractice claim. 194 Wn. App. at 81-82, quoting *Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008).

2. The title and text of the Act preclude an implied cause of action as to health care providers.

This Court considers the title of a bill and the final legislative reports as part of determining both legislative intent and permissible scope of a statute.¹² This flows from the constitutional requirement that each bill contain a title which expresses the subject defining the scope of the proposed legislation: “No bill shall embrace more than one subject, and that shall be expressed in the title.” Wash. Const. art. 2, sec. 19. The purpose is twofold: to prevent “logrolling” of

¹¹ One of the statutes required the development, then mandatory implementation of guidelines to identify children needing long term care or assistance, showing some similarities to the Lystedt Act. See RCW 74.14A.050.

¹² See, e.g., *Covell v. City of Seattle*, 127 Wn.2d 874, 887-88, 905 P.2d 324 (1995) (considering both to determine intent); *State v. Broadway*, 133 Wn.2d 118, 123-128, 942 P.2d 363 (1997) (analyzing legislative title of initiative to the legislature to determine scope of the criminal statute adopted); *Daviscourt v. Peistrup*, 40 Wn. App. 433, 437-441, 698 P.2d 1093 (1985) (discussing difference between general and restrictive legislative titles and analyzing the constitutionally permissible scope of the statute’s provisions accordingly). See also, *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309-10, 237 P.3d 256 (2010) (criticizing “crabbed” notions of statutory interpretation that ignore indicators of legislative intent.

combining disparate subjects in one bill; and to give legislators and the public notice of the bill's subject matter. *Daviscourt*, 40 Wn. App. at 437-438. As this Court explained, "Under article II, section 19, the notice provided by a title must be 'notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law.'" *Broadway*, 133 Wn.2d at 125.

Key to the analysis is whether a title is general or restrictive since "[a] restrictive title expressly limits the scope of the act to that expressed in the title" and "provisions not fairly within it will not be given force." *Broadway*, 133 Wn.2d at 127. The settled law is that "A restrictive title 'is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.'" *Broadway* at 127, quoting earlier cases. The Lystedt Act's title is restrictive, limiting its scope:

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.

2009 Laws Ch. 475, App. C-1; EHB 1824, App. A-1.¹³

As pointed out in *Broadway*, *Covell*, and *Daviscourt*, the title defines the constitutional limits of the statute. While the Act is not

¹³ The final bill report describes it as encouraging public school districts to serve local youth by allowing private nonprofit youth programs to use the school district facilities in exchange for immunity if the youth programs meet certain requirements, adding the requirement of compliance with a concussion management program. Nowhere is there discussion of creating new duties or liability for health care providers. *See* App. B.

being challenged for its scope, that scoping analysis is pertinent to a proper limiting construction of the Act. For instance, in *Daviscourt* the restrictive title required a narrow interpretation of a statute to determine whether attorney fees were available in private condemnations. The Court used the bill title to decide the interpretation consistent with the maxim that where a statute is open to two constructions, one constitutional and the other not, the constitutional construction is adopted. 40 Wn. App. at 440. The Court thus cannot adopt a construction of the Lystedt Act which would be beyond its scope as defined by its title, just as it could not adopt a construction that is beyond the statute's terms.

Here the Lystedt Act is directed at school districts, the WIAA, non-profits which operate sports events on public school grounds, and those in charge of or responsible for youth athletes and their participation in organized youth sports – their coaches, parents and guardians, to establish policies for managing head injuries in youth sports. *See* App A & C; RCW 4.24.660(1) & 28A.600.190. The Act is not directed at health care providers.

The only new duties created are in RCW 28A.600.190(2), (3), & (4). Subsection 2 requires school districts to work in concert with the WIAA to develop concussion guidelines and information to educate coaches, youth athletes, parents and guardians, and to have the information sheets signed and returned annually by the athlete and the parent or guardian before starting practice. Subsection 3

requires immediate removal from practice or games of youth athletes suspected of a concussion or head injury, a duty on the coach and team. Subsection 4 requires the coach or team whose athlete was removed per subsection 3 to keep that athlete out of future practices and games until receipt of a written return to play form from a trained licensed health care provider who evaluated the athlete.

Licensed health care providers play a role in schools and teams meeting the policies for management of concussion and head injury in youth sports. They must be consulted by those who are the subject of the statute – the youth athletic programs, their coaches, and the parents and guardians of the youths. But no duties are imposed on health care providers by the Act.

Petitioners claimed below that they “alleged an implied statutory cause of action against Dr. Burns for violation of the Lystedt Act” and asserted that “the focus of their claims against [Dr.] Burns has always been his failure to comply with the *obligations imposed by the Lystedt law.*” Petitioners’ Reply, pp. 5 & 6. *See* OB at 30-32, 35-39. But as just described, the Act imposes no obligations on health care providers for them to violate.

Subsection (4) of the new statute is the only provision of the Act which references or pertains to health care providers. It states:

(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.

RCW 28A600.190(4) (emphasis added).

Petitioners' claim that Dr. Burns breached the statute simply is not supported by the plain text. *First*, nowhere does this provision impose any new duty on the health care provider. The athlete is not removed from play by a physician, but by the coach or parent or the athlete herself. One of those people must then send the athlete to the health care provider, if the athlete wants to return to play. There is no active role for the health care provider in the statute's removal and referral protocol.¹⁴ The health care provider only sees the athlete if the athlete is referred and wants to return to play. And then, unless they are a volunteer, their duty is to "render care" according to applicable professional standards when presented with the patient as in any other situation. If they do not, they are potentially liable for medical negligence under Ch. 7.70 RCW.

Second, while the Act does not define "health care provider," RCW 70.02.010(18) does. Its definition is "a person who is licensed, certified, registered, or otherwise authorized by the law of

¹⁴ A likely exception is when a physician parent or friend is attending an athletic event and gets involved in a head injury situation. The health care provider would likely be a volunteer and was one basis for the immunity provision.

this state to provide health care in the ordinary course of business or practice of a profession." This definition excludes Dr. Burns from its ambit since he is licensed only in Idaho. Limiting the licensed health care providers to Washington licensed providers makes sense as a statutory requirement because only those licensed in this state are subject to the medical regulation and requirements of our state and would be deemed to have notice of all Washington laws affecting medical practice and safety requirements.

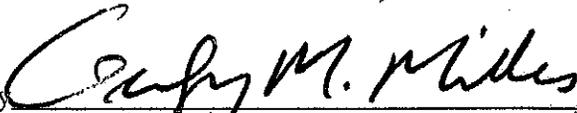
Third, any alleged cause of action as to medical negligence that may exist within the Lystedt Act is preempted as to Dr. Burns by the medical malpractice statutes, Ch. 7.70 RCW, which means Idaho law will control. Since 1976, all actions for an injury occurring as a result of health care have been governed exclusively by Ch. 7.70 RCW. *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) ("When injury results from health care, any legal action is governed by RCW chapter 7.70."); RCW 7.70.010 (the Legislature expressly preempted in 1976 "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."). Nowhere in the text of the Lystedt Act is there an indication the legislature intended to make an exception to the explicit statutory medical malpractice preemption. The Act's title plainly excludes any such exceptions. The Lystedt Act simply does not provide an independent basis for a claim against a health care provider.

V. CONCLUSION

Dr. Burns requests that the Court affirm the trial court's dismissal of claims against him for the reasons given above.

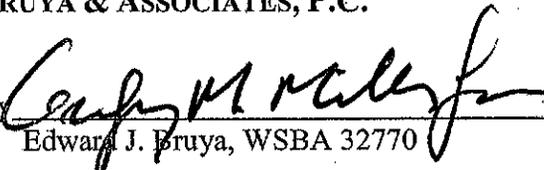
Respectfully submitted this 18th day of November, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By 

Gregory M. Miller, WSBA 14459
Melissa J. Cunningham, WSBA 46537

BRUYA & ASSOCIATES, P.C.

By 

Edward J. Bruya, WSBA 32770
Attorneys for Respondent Timothy F. Burns M.D.

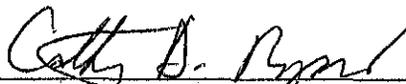
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

<p>Mark D. Kamitomo, WSBA 18803 Collin M. Harper, WSBA 44251 The Markam Group Inc, PS 421 W. Riverside Ave., Ste. 1060 Spokane, WA 99201-0406 P: 509-747-0902 F: 509-747-1993 Email: mark@markamgrp.com Email: collin@markamgrp.com <i>[counsel for Petitioners]</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other</p>
<p>George M. Ahrend, WSBA 25160 Ahrend Albrecht PLLC 100 E Broadway Ave. Moses Lake, WA 98837-1740 P: 509-764-9000 F: 509-464-6290 Email: gahrend@ahrendlaw.com <i>[counsel for Petitioners]</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other</p>
<p>Steven R. Stocker, WSBA 12129 Stocker, Smith, Luciani & Staub 312 W. Sprague Ave. Spokane, WA 99201-3711 P: 509-327-2500 F: 509-327-3504 Email: sstocker@ssslawfirm.com <i>[counsel for Respondent Puryear]</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other</p>

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<p>William C. Schroeder, WSBA 41986 Gerald Kobluk, WSBA 22994 KSB Litigation, P.S. 221 N Wall St., Ste. 210 Spokane, WA 99201-0824 P: 509-624-8988 gkobluk@ksblit.legal wcs@ksblit.legal <i>[counsel for Respondents Valley Christian School, Heden]</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other</p>
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DATED this 18th day of November, 2016.


Catherine A. Norgaard, Legal Assistant

APPENDICES

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Appendix C: 2009 Laws, Chapter 475 (H.B. No. 1824), "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"	C-1 to C-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, Liiias, Walsh, Pettigrew,
Priest, Simpson, Kessler, Rolfes, Johnson, Sullivan, and Morrell

Read first time 01/30/09. Referred to Committee on Education.

1 AN ACT Relating to requiring the adoption of policies for the
2 management of concussion and head injury in youth sports; amending RCW
3 4.24.660; and adding a new section to chapter 28A.600 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 4.24.660 and 1999 c 316 s 3 are each amended to read
6 as follows:

7 (1) A school district shall not be liable for an injury to or the
8 death of a person due to action or inaction of persons employed by, or
9 under contract with, a youth program if:

10 (a) The action or inaction takes place on school property and
11 during the delivery of services of the youth program;

12 (b) The private nonprofit group provides proof of being insured,
13 under an accident and liability policy issued by an insurance company
14 authorized to do business in this state, that covers any injury or
15 damage arising from delivery of its services. Coverage for a policy
16 meeting the requirements of this section must be at least fifty
17 thousand dollars due to bodily injury or death of one person, or at
18 least one hundred thousand dollars due to bodily injury or death of two
19 or more persons in any incident. The private nonprofit shall also

1 provide a statement of compliance with the policies for the management
2 of concussion and head injury in youth sports as set forth in section
3 2 of this act; and

4 (c) The group provides proof of such insurance before the first use
5 of the school facilities. The immunity granted shall last only as long
6 as the insurance remains in effect.

7 (2) Immunity under this section does not apply to any school
8 district before January 1, 2000.

9 (3) As used in this section, "youth programs" means any program or
10 service, offered by a private nonprofit group, that is operated
11 primarily to provide persons under the age of eighteen with
12 opportunities to participate in services or programs.

13 (4) This section does not impair or change the ability of any
14 person to recover damages for harm done by: (a) Any contractor or
15 employee of a school district acting in his or her capacity as a
16 contractor or employee; or (b) the existence of unsafe facilities or
17 structures or programs of any school district.

18 NEW SECTION. Sec. 2. A new section is added to chapter 28A.600
19 RCW to read as follows:

20 (1)(a) Concussions are one of the most commonly reported injuries
21 in children and adolescents who participate in sports and recreational
22 activities. The centers for disease control and prevention estimates
23 that as many as three million nine hundred thousand sports-related and
24 recreation-related concussions occur in the United States each year.
25 A concussion is caused by a blow or motion to the head or body that
26 causes the brain to move rapidly inside the skull. The risk of
27 catastrophic injuries or death are significant when a concussion or
28 head injury is not properly evaluated and managed.

29 (b) Concussions are a type of brain injury that can range from mild
30 to severe and can disrupt the way the brain normally works.
31 Concussions can occur in any organized or unorganized sport or
32 recreational activity and can result from a fall or from players
33 colliding with each other, the ground, or with obstacles. Concussions
34 occur with or without loss of consciousness, but the vast majority
35 occurs without loss of consciousness.

36 (c) Continuing to play with a concussion or symptoms of head injury
37 leaves the young athlete especially vulnerable to greater injury and

1 even death. The legislature recognizes that, despite having generally
2 recognized return to play standards for concussion and head injury,
3 some affected youth athletes are prematurely returned to play resulting
4 in actual or potential physical injury or death to youth athletes in
5 the state of Washington.

6 (2) Each school district's board of directors shall work in concert
7 with the Washington interscholastic activities association to develop
8 the guidelines and other pertinent information and forms to inform and
9 educate coaches, youth athletes, and their parents and/or guardians of
10 the nature and risk of concussion and head injury including continuing
11 to play after concussion or head injury. On a yearly basis, a
12 concussion and head injury information sheet shall be signed and
13 returned by the youth athlete and the athlete's parent and/or guardian
14 prior to the youth athlete's initiating practice or competition.

15 (3) A youth athlete who is suspected of sustaining a concussion or
16 head injury in a practice or game shall be removed from competition at
17 that time.

18 (4) A youth athlete who has been removed from play may not return
19 to play until the athlete is evaluated by a licensed health care
20 provider trained in the evaluation and management of concussion and
21 receives written clearance to return to play from that health care
22 provider. The health care provider may be a volunteer. A volunteer
23 who authorizes a youth athlete to return to play is not liable for
24 civil damages resulting from any act or omission in the rendering of
25 such care, other than acts or omissions constituting gross negligence
26 or willful or wanton misconduct.

27 (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, Lias, 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

APPENDIX C

2009 Wash. Legis. Serv. Ch. 475 (H.B. 1824) (WEST)

WASHINGTON 2009 LEGISLATIVE SERVICE
60th Legislature, 2009 Regular Session

Additions are indicated by Text; deletions by
Text . Changes in tables are made but not highlighted.
Vetoed provisions within tabular material are not displayed.

CHAPTER 475
H.B. No. 1824
SCHOOLS AND SCHOOL DISTRICTS—SPORTS—HEAD INJURIES

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:

<< WA ST 4.24.660 >>

(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:

<< WA ST 28A.600 >>

(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.

Approved May 14, 2009.

Effective July 26, 2009.

WA LEGIS 475 (2009)

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Filing Attachments to Email on behalf of Respondent Dr. Burns.

Documents to be filed: Supplemental Brief of Respondent Dr. Burns; Appendices A-C with Index; Certificate of Service.

Case Name: Swank v. Valley Christian School/Dr. Burns

Case No.: 93282-4

Filer(s): Gregory M. Miller, WSBA #14459, miller@carneylaw.com and Melissa J. Cunningham, WSBA #46537, cunningham@carneylaw.com; main phone #206-622-8020.

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