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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

**NO. 277011**

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**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

**DELBERT WILLIAMS, APPELLANT**

**v.**

**LEONE & KEEBLE, INC., RESPONDENT**

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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Williams urges that the interest analysis should only apply to one issue – whether Idaho’s immunity statute bars Williams’ claims. This brief contains three sections.

1. If the Idaho immunity statute applies, all other conflict issues are moot. If the immunity statute does not apply, Washington law should apply ipso facto on all other issues.

2. Should this Court nonetheless require an interest analysis of issues of conflict of law other than statutory immunity of L&K, all five additional issues require application of Washington law.

2.1. Liability of Defendant

2.2. Comparative negligence.

2.3. Offset of collateral source payment of medical specials.

2.4. Statutory caps.

2.5. Negligence per se.

3. All authorities on conflicts of law require rejection of Idaho’s immunity statute under the interest analysis.

**1. If the Idaho immunity statute applies, all other conflict issues are moot. If the immunity statute does not apply, Washington law should apply ipso facto on all other issues.** Idaho Code §72-223 immunizes L&K from liability to Williams. In f.n.3 of its opinion in this case, the Supreme Court

acknowledged that §72-223 does not allow Williams' claims in this case.<sup>1</sup> In other contexts Idaho has ruled that its §72-223 defines the subject matter jurisdiction of the Idaho District Court [court of general jurisdiction]. *Williams v. Blue Cross of Idaho*, 260 P.3d 1186 (Idaho 2011); *Idaho State Ins. Fund v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1997); *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994). A statutory limitation on a court's power to adjudicate a particular type of case defines the scope of the court's subject matter jurisdiction. *State v. Jensen*, 241 P.3d 1 (Idaho App. 2010).

Likewise, Washington has ruled that a statute may limit subject matter jurisdiction of a court of general jurisdiction. *In Re Marriage of Owens*, 126 Wn. App. 487, 494, 108 P.3d 824 (2005). Specifically, Washington courts have held that a court of general jurisdiction has no subject matter jurisdiction if a statute provides the defendant with immunity. *Hatch v. City of Algona*, 140 Wn. App. 751, 167 P.3d 1175 (2007); *Gennoe v. Sypolt*, 60 Wn. App. 517, 804 P.2d 653 (1991).

Thus, both Washington and Idaho law support the position that application of the Idaho immunity statute to protect L&K from all liability to Williams deprives the court of subject matter jurisdiction over this dispute.

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<sup>1</sup> Prior to the Supreme Court's opinion L&K repeatedly claimed that §72-223 did not bar Williams' claims. See p.19 of L&K's 2009 brief to the Court of Appeals asserting that §72-223 does not bar Williams' claims and that Williams' position that §72-223 bars him from recovering "continues to waste this court's time" and "has continued to joust at this legal windmill."

If, due to its immunity statute, Idaho law permits no subject matter jurisdiction over this case, then Idaho cannot make available any of the other doctrines upon which L&K relies. Specifically, those unavailable doctrines include Idaho's law of liability of L&K, Idaho's law of comparative negligence, Idaho's rule of offset (described on p. 27 of L&K 2011 brief) , statutory caps, and negligence per se. There is between these parties no possible Idaho cause of action applying these Idaho legal doctrines. So if this Court starts utilizing those doctrines in this case in Washington, it will create a new cause of action which never previously existed in either Idaho or Washington! Ironically this Court would be doing so in the name of following Idaho law. This would be a classic case of a party "putting together half a donkey and half a camel, and then ride[ing] to victory on the synthetic hybrid." (quote from conflicts of law maven Brainerd Currie found in Juenger, How Do You Rate a Century?, 37 Willamette L. Rev. 89, 106 (2001) )

L&K devotes over half of its 43 page 2011 brief to demonstrating Idaho's interest in applying its law of comparative negligence, statutory damages caps, and offset of medical liens against jury verdict (pp. 20-43 of L&K's 2011 brief). Yet, these doctrines are unavailable under Idaho law because Idaho law mandates that there is no subject matter jurisdiction over this case.

Most jurisdictions which refuse to apply the immunity of a jurisdiction then apply all aspects of the law of another state which does not grant immunity. *See Appendix 1* to this brief. This conclusion relates to two issues.

A. Whether a declination to adopt the law of the state granting immunity leads to the adoption of any other legal doctrine of the immunity granting state.

B. How the law resolves the conflict of law between the immunity granting state and the state which does not grant immunity. Williams discusses this second issue in section 3 of this brief.

Williams notes that in **Appendix 1** he has cited the law of twenty-five American jurisdictions which declined to adopt the law of immunity of a state when both parties were residents of another state. Twelve of those jurisdictions adopted the entirety of the law of the state not granting immunity (AK, Va., Md., Ill., Del., Ia., D.C., Conn., Me., Tex., Mich., KY) Six of the jurisdictions only adopted the law of immunity of the state of common domicile, but adopted the rules of the road of the state where the injury occurred (R.I., Ind., N.J., Minn., CA, Mass.). The other seven states were silent as to whether they would apply more than the law of immunity of the state of the parties' common residence. Washington should

follow the majority rule of those states which have spoken, and apply the totality of the law of Washington, the state of common residence of Williams and L&K. However, because Washington law is not definitive on the “all or nothing” approach from the preponderant number of states in **Appendix 1**, Williams will analyze each separate conflict of law.

**2. Should this Court require an interest analysis of issues of conflict of law other than statutory immunity of L&K, all five additional issues require application of Washington law.**

The five relevant conflicts of law are:

- 2.1. Liability of Defendant
- 2.2. Comparative negligence.
- 2.3. Offset of collateral source payment of medical specials.
- 2.4. Statutory caps.
- 2.5. Negligence per se.

This brief will discuss each of these issues in turn.

- 2.1. Liability of defendant.

2.1.1 The safety enforcement agent of L&K in this case testified that there was no conflict between the standards of conduct required by WISHA (required under Washington law) and OSHA (required under Idaho law) under the

precise facts of this case. See references to record at bottom of p. 34 of Williams' 2011 brief. This refers to a lack of conflict regarding the required behavior, but section 2.2, *infra*, suggests that there may be a conflict of law between Washington and Idaho regarding the civil liability of L&K for not enforcing OSHA safety standards.

Of course, to the extent that there is an absence of conflict of law between two states the law of the forum should apply. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104, 864 P.2d 937 (1994); RESTATEMENT (SECOND) §145 comment i. Washington clearly imposes civil liability upon L&K for failure to protect Williams by not enforcing OSHA and WISHA fall protection standards. See *Kelley, Hoff* and *Gilbert H. Moen, infra* pp. 7-8 of this brief.

2.1.2 L&K would be immune under Idaho law even without the benefit of §72-223. Originally L&K was not immune under an earlier version of §72-223. Nonetheless at that time Idaho narrowly circumscribed the civil liability which a general contractor had for not enforcing OSHA regulations to protect employees of his subcontractor. *Walton v. Potlatch Co.*, 116 Idaho 892, 781 P.2d 229 (1989) is the seminal Idaho case on this issue. *Walton* holds that for civil liability purposes, certain OSHA regulations are only the responsibility of the immediate employer and do not constitute the basis for civil liability of the general contractor to the employees of the subcontractor (Pro Set Erectors).

The question is whether OSHA fall protection standards create a duty of the general contractor to the employees of a subcontractor. *Vickers v. Hanover Construction*, 125 Idaho 832, 875 P.2d 929 (1994) takes a narrow view of the civil liability of a general contractor related to enforcement of OSHA safety regulations for the benefit of a subcontractor's direct employees. *Vickers* seems to remove civil liability of the general contractor for enforcing OSHA safety standards on the jobsite if the subcontract imposes upon the subcontractor the responsibility for enforcing jobsite safety. In the present case the subcontract between L&K and Pro Set imposed upon Pro Set the responsibility for maintaining safety standards on the jobsite. **CP 153- 156.**

Contrast *Vickers* with the Washington case of *Kelley v. Howard S. Wright*, 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978) which recites a common law duty of the general contractor for workplace safety for the workers of all subcontractors if the general contractor had the right to control the jobsite, not merely if he controlled the jobsite. In *Vickers* the general contractor had the right to control the jobsite by virtue of his obligation under the terms of his general contract with the owner "to safely supervise the jobsite," but the general contractor escaped civil liability because of the language in the subcontract imposing control of the jobsite upon

the subcontractor, the claimant's immune immediate employer. Williams urges that because of the right to control, *Kelley* would still impose liability under Washington law upon the general contractor in *Vickers*. Moreover, both *Moen* and *Hoff, infra*, impose under Washington law a nondelegable duty upon the general contractor to enforce fall protection standards for the benefit of subcontractors' employees.

Thus it appears that even without §72-223, Idaho would impose no civil liability upon L&K for Williams' unrestrained fall of over forty feet on a jobsite where L&K was the general contractor. In effect Idaho grants immunity to L&K simply by L&K writing a subcontract that imposes responsibility for job safety on Pro Set. This is in sharp contrast to the law of Washington. *Kelley v. Howard S. Wright Construction, supra*, and the following cases impose upon the general contractor a nondelegable duty to enforce fall protection standards for the benefit of all on jobsite: *Gilbert H. Moen Co. v. Island Steel Erectors*, 128 Wn.2d 745, 756, 912 P.2d 472 (1996); *Hoff v. Mountain Construction, Inc.*, 124 Wn. App. 538, 102 P.3d 816 (2004).

In a different context Washington has disapproved an advance contractual waiver by a non-injured party of the tort claims of a subsequently injured party. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) (public policy

prohibits advance waiver by parent of tort claim of child). Further, Washington forbids an employer from requiring an employee to release the employer in advance from claims for job related injuries. *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 758 P.2d 968 text at n.9 (1988). Such forbidden releases are analytically indistinguishable from Pro Set signing a subcontract which, for civil liability purposes, removes from L&K its OSHA-imposed responsibility for overseeing fall protection safety of all trades' employees on the jobsite.

For authority establishing the duty under OSHA of L&K to assure fall protection for all on the job see *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8<sup>th</sup> Cir. 2009). *Solis* teaches that OSHA's requirement that general contractors enforce jobsite fall protection does not affect a state's right to impose such civil liability as it wishes upon a general contractor who does not enforce fall protection standards. *Vickers, supra*, seems to remove Idaho civil liability of a general contractor whose subcontractor contracted to be responsible for jobsite safety of the subcontractor's employees. *Vickers* explicitly applies even if the general contract with the owner of the job imposes upon the general contractor the duty of jobsite safety for employees of all subcontractors. Contrast *Gilbert H. Moen* and *Hoff, supra*, which impose upon the general contractor a Washington duty for fall protection for all workers on the job, and do not appear to permit the general contractor to contract away that duty.

SUMMARY RE: CONFLICT ON ISSUE OF LIABILITY OF DEFENDANT

*Ellis v. Barto*, 82 Wn. App. 454, 459, 918 P.2d 540 (1996) finds that the state where the accident occurred has an interest in imposing its law on the parties to establish “rules of the road” for both parties in auto accident cases. For the same conclusion, see *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 832, 61 P.3d 1190 (2003). Perhaps, *Ellis* would also apply in a construction accident case, but that is not certain. **CP 235-36.**

The Idaho OSHA fall protection standards, which would have protected Williams if enforced, are identical to the Washington WISHA fall protection standards under the precise facts of this case. In that context there is no conflict regarding the “rules of the road” of the two states.

However, there may be a conflict as to whether L&K has civil liability under Idaho law for its failure to enforce those OSHA standards to protect Williams. *Solis, supra*, makes it clear that OSHA requires the general contractor to enforce OSHA fall protection standards to safeguard “every employment and place of employment of every employee.” 29 C.F.R §19010.12(a). *i* states that this is a duty of “general contractors at construction sites who have the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable use of supervisory authority.”

Yet it appears that the wording of the L&K-Pro-Set subcontract exculpates L&K from Idaho civil liability for failure to enforce OSHA fall protection standards. If that interpretation of Idaho law, discussed above, is not clear to this Court, the Court can elect between at least two options.

First, this Court can try to predict what an Idaho court would do with this set of facts. If this Court rules that Idaho imposes civil liability upon L&K for not enforcing OSHA fall protection standards, then Williams has no objection to imposing Idaho's "rules of the road" in imposing civil liability upon L&K. Alternatively, this Court can rule that Idaho's law establishing rules of the road in this case is difficult to ascertain under RESTATEMENT (SECOND) CONFLICTS OF LAW §6(2) (g). [RESTATEMENT (SECOND) §146, referenced as authoritative by the Supreme Court in the present case, specifically relies upon §6 of the RESTATEMENT (SECOND).] In that event, this Court should apply Washington's rules of the road which are eminently clearer regarding the civil liability of the general contractor for failing to enforce fall protection standards. These two alternatives in the case of unclear law of another state are set forth in *Lucero v. Valdez*, 180 Ariz. 313, 884 P.2d 199 (Ariz. App. 1994).

A third alternative would be for this Court to hold that there is no conflict between WISHA and OSHA on fall protection duties of L&K in this case. In that case no conflict of law analysis is necessary and the rules of Washington, the forum, apply. *Burnside* and RESTATEMENT (SECOND) §145 COMMENT i, *supra*. See also, summary of Professor Baxter's widely cited law review article on pp. 13-14, *infra*. The OSHA standards used in Idaho would be the rules of the road if that doctrine applies in a non-auto accident case. However, Idaho's *Vickers* rule of no general contractor liability in certain circumstances is in the parlance of the Baxter article a "subrule" which is a rule of loss allocation. As stated on pp. 12-14 of this brief, rules of loss allocation, including subrules which state the legal significance of rules of the road, are rules requiring application of the law of common domicile.

There is a fourth alternative. This Court should rule that the advance release of L&K pursuant to the subcontract between L&K and Pro-Set is violative of Washington public policy under *Scott* and *Wagenblast*, *supra*.

Fifth, this Court should follow the overwhelming majority of jurisdictions as set forth in **Appendices 1 and 2**. **Appendix 2** involves all known states which enforce the law of immunity of the state of common domicile of the parties even though other interested states in these cases do not have laws of immunity. Every

known jurisdiction holds that the law of common domicile of the parties determines whether immunity is granted to the defendant. There are thirty-one states combined in **Appendices 1** and **2** (Both appendices have citations from Wisconsin.) Twelve of twenty-five jurisdictions in **Appendix 1** further hold that if the law of common domicile rejects immunity of the defendant, then the entirety of the law of the state not granting immunity should be adopted. (Seven states in **Appendix 1** are silent on this issue.) Because Washington is the state of common domicile, this Court should follow Washington law and reject the Idaho *Vickers* doctrine which seems to immunize L&K due to the terms of the subcontract between L&K and Pro Set.

Sixth this Court should treat Idaho's apparent removal of civil liability of L&K (due to subcontract terms) as another form of immunity which should fail for the same reasons that I.C. §72-223 should be unenforceable in Washington. (See section 3 of this brief for those reasons.) It would be contradictory for this Court to dispense with Idaho's statutory immunity under I.C. §72-223, but then to give L&K a second type of immunity pursuant to Idaho case law which imposes no OSHA enforcement duties on a general contractor if the subcontract removes that responsibility from the general contractor. There is no known case which removes a defendant's statutory immunity and then protects an equivalent immunity under the guise of a common law doctrine. The case of *Williams v. L&K* should not be a precedent for such an aberrational and illogical decision.

Seventh, this Court should hold that for purposes of all Idaho legal doctrines, Idaho law removes all subject matter jurisdiction over this case because §72-223 applies to this case. (Pp.2-3 and **Appendix 1** of this brief support this legal issue.)

Eighth, this Court should rule that only Washington has an interest on the issue of Idaho immunity, and therefore Washington's law of no immunity should apply. See section 3.4 of this brief.

2.2. Comparative negligence. Idaho's law of comparative negligence bars Williams' claims if he is found to have greater negligence than a defendant. CP 112 explains the difference between the law of Washington and Idaho on comparative negligence.

Williams reiterates that even if Idaho's rules of the road apply in this case, that does not mean that Idaho's law of comparative negligence should apply. See pp. 24-25 of Williams' 2011 brief demonstrating that this Court should not consider Idaho's law of comparative negligence because there cannot be comparative negligence unless there is first negligence of L&K. Because Idaho does not even grant to its courts the subject matter jurisdiction to adjudicate whether L&K was

negligent toward Williams, then Idaho's comparative negligence doctrine cannot possibly be available under any circumstance.

Equally importantly the strong trend of the law is now contrary to *Ellis* and RESTATEMENT (SECOND) § 164 on the issue of automatically enforcing the law of the accident site on the issue of comparative negligence. The cases now look to the law of common domicile on the comparative negligence issue. See pp. 27-40, 44-46 of Williams' 2009 brief to the Court of Appeals; and see pp. 25-26, 38-40, 41 (*Garcia* case) of Williams' 2011 brief to the Court of Appeals for analyses and authorities that Idaho's law of comparative negligence, a rule of loss allocation, should not apply when both parties have common residence in Washington. **Appendix 1** of Williams' 2011 brief cites cases nos. 1-8 and 10 holding that the law of common residence determines which state's comparative or contributory negligence rule should apply. Williams submits six additional cases to the same effect in **Appendix 3** of this brief. The modern view is that comparative negligence is not a rule of conduct, but a rule of loss allocation thus requiring application of the law of the state of the parties' common residence. *Bankers Trust Co. v. Keeling*, 20 F.3d 1092 (10<sup>th</sup> Cir. 1994); *Calla v. Shulsky*, 148 A.D.2d 60, 543 N.Y.S.2d 666 (1989); JOHN S. HERBRAND, ANNOT., CHOICE OF LAW AS TO APPLICATION OF COMPARATIVE NEGLIGENCE DOCTRINE, 86 A.L.R.3d 1206 (1978). The modern rule (which departs from RESTATEMENT

(SECOND) §164 and from *Ellis, supra*) is succinctly summarized in 2 Best, COMPARATIVE NEGLIGENCE LAW AND PRACTICE §12.60[2] which states:

“When parties are both domiciled in a comparative negligence state, and the injury takes place in a contributory negligence state (or a state which follows a modified version of comparative fault) all states which follow modern policy oriented-choice-of-law-analysis will almost certainly apply the comparative negligence rule.” (emphasis supplied)

Idaho has a modified version of comparative negligence because a plaintiff who is more at fault than a defendant recovers nothing. Therefore, the unanimous view of modern cases and commentators is that the law of common domicile should dictate which version of comparative negligence applies. Thus, Washington should apply its law of comparative negligence.

#### SUMMARY RE: COMPARATIVE NEGLIGENCE

The Idaho rule of comparative negligence does not define any conduct which Williams must follow, but is merely a rule of loss allocation. This is similar to the rules in *Watts v. Pioneer Corn Co.*, 342 F.2d 617 (7<sup>th</sup> Cir. 1965); *Fox v. Morrison Motor Transit, Inc.*, 25 Ohio St.2d 193, 267 N.E.2d 405 (1971). In these cases the estate of the deceased could not recover under the law of one of the relevant states because each of the two deceased individuals in the two cases

had no dependents. However, the estate could recover under the law of the other state. In *Fox* the estate could not recover without dependents under the law of the state of the accident. In *Watts* the estate could not recover without dependents under the law of common domicile. In both cases the courts followed the law of common domicile. The question of whether the deceased had dependents is not a rule establishing conduct (“a rule of the road” as referenced in *Ellis*). In both states the rules simply allocate losses.

Similarly, the Idaho rule of comparative negligence does not define any standard of conduct for Williams to have followed. It simply denies him recovery under certain circumstances – circumstances which are not the basis for the denial of recovery in Washington. This also is just a rule of loss allocation and should not be considered a rule of the road as *Ellis* construed it. It is because comparative negligence rules do not define conduct that states have departed from RESTATEMENT (SECOND) §164 which is the basis for the comparative negligence portion of *Ellis*. All recent authorities which have considered the matter state that rules of loss allocation should be determined by the law of the state of common residence, the state which has the greatest interest in dividing resources between two of its residents. CP 238-241. See particularly, the often quoted law review article of Baxter, Choice of Law in the Federal Court System, 16 STAN. L. REV. 1, 12-13 (1963) which states:

“No choice-of-law problem is thought to exist when regulatory provisions come to bear in a penal or licensing context. The choice problem becomes apparent, however, when the lawmakers of state X implement regulatory provisions by loss-distribution subrules. Vehicle speed rules, for example, may be implemented by a per se negligence subrule.

...It is that the X regulatory interest will not be impaired significantly if it is subordinated in the comparatively rare instances involving two non-residents, who are residents of a state or states that reject the per se subrule. Conduct on X’s highways will not be affected by knowledge of Y residents that the X per se rule will not be applied to them if the person they injure happens to be a co-citizen. To the extent that the objective of the per se rule is loss-distribution rather than regulation, X has no legitimate interest in the rule application because neither party is identified with X.”

This has ramifications for Idaho’s rule of comparative negligence, its rule of offset, its statutory caps on general damages and its rule of per se negligence – all of which are discussed herein. With regard to the present topic of comparative negligence, the Baxter article means that Idaho has no interest in a rule which relates to loss allocation between the parties, even if the loss allocation is a subrule which originates with violation of Idaho’s rules of the road. Idaho’s rule of depriving a plaintiff’s rights if he is more than fifty percent negligent is a rule that allocates losses and not a rule that defines conduct on Idaho construction sites. Therefore, Idaho has no interest in applying its law in the present case. Section 3.4 of this brief involves a detailed discussion of the meaning of the term “interest” in a conflicts of law context. However, a definition of that term is found

in Weintraub, Comments on Reich v. Purcell, 15 U.C.L.A. L. Rev. 556, 557 (1968) which states:

“The ‘interest,’ meaning the policy, of any state ... to give appropriate recognition to the legitimate interests of the litigants.”

As elaborated in section 3.4, *infra*, an “interest” in a conflicts analysis requires that there be a party litigant from the state before that state has sufficient interest that its laws should be applied. Thus, the lack of interest of Idaho in applying its law is yet another reason why Washington law should apply.

Based upon the above authorities and upon sheer logic there is no reason for Idaho to get involved in loss allocation issues. The 2007 Washington case of *Chavez v. Chavez* (referenced on pp. 26-27 of Williams’ 2011 brief) also adopts the law of comparative negligence of the parties’ common domicile.

The rules of the road doctrine is the only exception which permits a state to impose its law on a conflicts case without a party litigant who is a resident of that state. As stated in the above quotation, that exception relates to conduct only. *See also Reich v. Purcell*, 67 Cal.2d 551, 63 Cal. Rptr. 31 (1967) which holds that a state without a party litigant needs to enforce standards of conduct on everyone who comes to the state, but such a state has no interest in imposing damages limitations on parties who reside in other states. *Reich* states, “Defendant’s

liability should not be limited when no party to the action is from a state limiting liability and when defendant, therefore, would have secured insurance, if any, without any such limit in mind.” Idaho’s comparative negligence statute is a rule of limitation of damages. L&K’s owner testified that he purchased insurance without any thought of Idaho’s immunity statute. CP 51-53. Under every standard (except mechanical genuflection to *Ellis’* dicta regarding Idaho comparative negligence law) it would be against the overwhelming trend of modern case law and against sound reason to classify Idaho’s comparative negligence statute as a rule of the road. Washington comparative negligence law must therefore apply because the only parties to the current litigation are from Washington, which is the only state with an interest in applying its law.

2.3. Offset of collateral source payment of medical specials. The above heading intends to capulate Idaho’s rule of deducting gross workers compensation payments from a plaintiff’s jury award. CP 111-12 explains this Idaho rule in more detail. If Pro Set is found to be negligent to any extent, then all workers compensation benefits are deducted from the jury verdict. As explained by *Schneider v. Farmers Merchant*, 106 Idaho 241, 678 P.2d 33 (1983), this rule intends to deny subrogation to an employer who shares fault in causing the employee’s injuries. It is virtually certain that Pro-Set, the immediate employer, would have some fault for this accident were a jury to weigh it, and therefore

Idaho law would require deduction of all medical and wage loss workers compensation benefits from the jury verdict.

Washington has no trigger which requires automatic elimination of the subrogation of the workers compensation insurer.

RESTATEMENT (SECOND) CONFLICTS OF LAW §6(2) (c) scrutinizes the policy reasons underlying a rule of a state which may be interested in applying its law in a conflicts case.<sup>2</sup> Assuming, while still adamantly disputing, that Idaho has an interest in applying its rule of offset, *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419, 422 (1993) provides the policy reasons for the Idaho offset rule.

- (1) To balance competing interests between “the sheltered employer and overburdened third party”
- (2) To ensure against double recovery
- (3) To prevent the immediate employer from profiting by his own wrong

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<sup>2</sup> Once again, Williams maintains that Idaho has no interest in imposing its rule of offset in this case because neither party is a resident (citizen) of Idaho. See §3.4 *infra*.

(4) To protect the right of contribution against the immediate employer

In the present case Pro-Set has contractually agreed to indemnify L&K for losses which L&K might suffer as a result of Williams' claims. **CP 161, 167.** Interestingly all disputes between Pro Set and L&K must be resolved pursuant to Washington law. **CP 163.** Because of this contract, which supervenes applicable case law that is only effective without a contract, all of the policy concerns of *Barnett* are well satisfied.

(1) The "sheltered employer" (Pro-Set) is no longer sheltered, but must pay for all losses resulting from the negligence of Pro-Set. Correspondingly, L&K is no longer an "overburdened third party."

(2) Williams will not receive double recovery because he has contracted to repay the Idaho State Insurance Fund pursuant to a very fair and equitable formula. *See* reference to this agreement in the 2011 Williams' brief at pp. 30-31. Indeed, because Williams must honor this contract, a further deduction of the special damages under the Idaho offset rule will force Williams into paying twice for the same special damages, the very opposite of the double recovery concern expressed in *Barnett*.

(3) Pro-Set will not profit by its own wrong because it is obligated to pay for its own share of negligence and to pay substantial defense costs to L&K's

current counsel who has for four and one-half years been working diligently on the account of Pro-Set.

(4) The Idaho offset rule is not necessary to protect L&K's right of contribution because the indemnity contract provides rights to L&K which are at least as plenary as the right of contribution under the case law.

#### SUMMARY RE: OFFSET RULE

The indemnity provisions of the subcontract between L&K and Pro-Set fully satisfy every policy of Idaho justifying application of its offset rule. Having satisfied Idaho's policy concerns expressed in *Barnett, supra*, Idaho has no additional interest in applying its offset rule which denies subrogation to a culpable employer.

Washington has a policy of not even admitting evidence of collateral source payments from whatever source, including workers compensation benefits. A fortiori Washington does not deduct collateral source payments. Washington's policy is to provide any windfall to the injury victim rather than to the culpable defendant. Moreover, Washington seeks to avoid jury prejudice in cases where there is no windfall but where the collateral source payer collects subrogation from the eventual judgment or settlement by the tort victim. Washington's policy of not mentioning or deducting collateral source payments assures that a jury will

award sufficient money to permit payment of the victim's subrogation. For an enunciation of these Washington's policies, *see Cox v. Spangler*, 141 Wn.2d 431, 5 P.3d 1265 (2000).

These Washington policies constitute loss allocation between L&K and Williams, two Washington residents. Washington has an interest in advancing the above stated policies, and that interest is an essential factor in conducting the interest analysis. RESTATEMENT (SECOND) CONFLICTS OF LAW §146 and RESTATEMENT (SECOND) CONFLICTS OF LAW §6(2) (b). There is no way to satisfy Washington's interests except by imposing Washington law in this case. This Court should adopt Washington law because it would be the only state with an unsatisfied interest on the issue of whether to apply Idaho's offset rule or Washington's collateral source rule.<sup>3</sup> *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 555 P.2d 997 (1976) at 583 states that if only one state is interested in the outcome of a case, then the law of that state should be applied. (*See* §3.4 of this brief, *infra*.) Washington is the only state with an unsatisfied interest on the issue of offset and collateral source. Therefore, Washington law must apply on this issue.

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<sup>3</sup> An otherwise valid interest of a state may be held to be satisfied based upon the unique facts of a case. *See e.g., McSwain v. McSwain*, 420 Pa. 86, 96, 215 A.2d 677 (1966) (Interest of state of accident site in securing payment for its local medical providers is insubstantial and need not be weighed when the accident caused an immediate death and almost no resulting medical bills.)

2.4. Statutory caps. I.C. §6-1603, Idaho's statutory caps on general damages is intended "so Idaho policyholders would have more control over the prices and conditions of liability insurance." *Kirkland v. Blaine County Medical Center, et al.*, 134 Idaho 464, 4 P.3d 1115 (2000). *Kirkland* states that the caps reflect the state's "legitimate interest in protecting the availability of liability insurance for Idaho citizens."

The Washington Supreme Court, however, has held that statutory damages caps violate the right to trial by jury. *Sofie v. Fireboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989).

There is, therefore, a real conflict between the law of Idaho and Washington on the issue of statutory caps. *Johnson v. Spider Staging* resolves the same conflict against a sister state (Kansas) whose law was pleaded in an effort to limit damages assessed against a Washington corporation. However, *Johnson* rules in favor of a Kansas plaintiff and against the Washington corporation, and permits no damages caps to protect the Washington corporation. *Johnson* is based upon Washington's interest in assuring the care and workmanship of output by Washington corporations. The present case militates more strongly than *Johnson* in favor of not applying statutory caps of another state (Idaho) because the present case involves two parties who are both Washington citizens (residents).

*Reich v. Purcell*, *infra*, also refuses to apply statutory caps of the state of the accident site (Missouri) when that state had no citizen who was a party to the litigation. Other cases with similar holdings are *Olmstead v. Anderson*, 428 Mich. 1, 400 N.W.2d 292 (1987) (Site of accident had statutory caps, but the two states of residence of the parties did not have caps. *Olmstead* does not apply statutory caps.); *Rosenthal v. Warren*, 475 F.2d 438 (2d. Cir. 1973) (N.Y. resident injured by Mass. doctor. Mass. had statutory caps, but N.Y. did not. Court applies N.Y. rule of no caps because of strong N.Y. public policy and constitutional prohibition against caps.).

The only policy supporting Idaho's caps is to protect Idaho citizens' liability insurance rates. *Kirkland*. Yet, neither party to the present case is an Idaho citizen. As stated by the U.S. Supreme Court, "State legislators generally do not focus on an interstate setting when drafting statutes." *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. \_\_\_\_\_, 130 S. Ct. 1431, 176 L. Ed.2d 311 (2010).

In other words, the only Idaho interest which the case law articulates on behalf of its statutory caps is to protect Idahoans from excessive liability insurance premiums. As is customary, neither the Idaho state statute nor its case law

expressed an interest in protecting Washington corporations which do business in Idaho. Equally importantly L&K's insurance rates were, to the knowledge of L&K's owner, unrelated to Idaho's law of immunity of L&K. CP 51-53.

Washington, on the other hand, has an interest in protecting the rights of its citizens to a full jury trial. L&K tries to refute this logic by stating that *Johnson* involved a Washington corporation performing its work in Washington, but the present case involves a Washington corporation performing its work in Idaho. (2011 L&K brief, pp. 28-29). This is a distinction without a difference, particularly because many of L&K's safety standards, applicable to this job, originated in an L&K handbook which applied equally in Idaho and Washington. CP 55-59.

Under the facts of both *Johnson* and the present case the statutory caps of a sister state could only have been intended to protect corporations which are domiciled or incorporated in the state whose law provides for statutory caps. Idaho never intended to protect a Washington corporation with its law, and it would be a sheer concoction to postulate an Idaho interest for that purpose. Moreover the statute establishing statutory caps is a classic loss allocation statute, and under the overwhelming weight of the case law, the law of Washington, the parties' common domicile, should apply. Idaho's law pertaining to statutory caps should not be a part of this case.

2.5. Negligence per se. Idaho follows the traditional negligence per se rule. Therefore, in Idaho the violation of a statute or administrative regulation establishes the elements of duty and breach in a tort action. This rule lessens the plaintiff's burden. *O'Gain v. Bingham County*, 142 Idaho 49, 122 P.3d 308 (2005). In Washington, however, violation of a statute or administrative regulation is only evidence of negligence. RCW 5.40.050.

Idaho's law on this issue is more favorable to Williams. However, neither Williams nor L&K is a resident of Idaho, and therefore Idaho has no interest in applying its law on this issue. Accordingly, Washington law should also apply on the issue of negligence per se. Williams merely mentions this doctrine in case this Court finds some predominant Idaho interest of Idaho in applying its law on one of the first four legal doctrines discussed. (Sections 2.1 through 2.4 of brief)

If there is some interest of Idaho in applying its law to one of those other doctrines, then Williams wishes to preserve his right to assert that the same interest applies to give Williams the benefit of the negligence per se doctrine. Despite this formal preservation of Williams' rights, however, Williams anticipates that the Court will find no interest of Idaho in applying its law regarding any of the doctrines discussed in part 2 of this brief.

3. **All authorities on conflicts of law require rejection of Idaho's immunity statute under the interest analysis.**

3.1. Five sections of the RESTATEMENT (SECOND) CONFLICTS OF LAW direct courts and counsel to the law of common domicile of the parties if one of two states provides immunity to the defendant. Most explicitly §145 of the RESTATEMENT (SECOND) comment d states:

“On the other hand, the local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether one party is immune from tort liability to the other.”

Four other RESTATEMENT (SECOND) sections mirror comment d to §145. §156 comment f states that a court should apply the law of the parties' domicile if there are to be exceptions to tort liability, particularly when immunity of the defendant is based upon defendant's relationship to the plaintiff. Of course, I.C. §72-223 establishes the requisite relationship between plaintiff and defendant so as to create defendant immunity.

RESTATEMENT (SECOND) §159 comment b states that a defendant should not escape liability because of the law of the place of wrongdoing if the defendant is claiming immunity from liability. In such a case the law of the domicile of the parties should apply. To the same effect are RESTATEMENT (SECOND) §161 comment e and RESTATEMENT (SECOND) §169(2).

These sections of the RESTATEMENT (SECOND) reflect the rule that the state of the parties' domicile has the greater interest in determining loss allocations between two residents of one state. *See* pp. 30, 34 of Williams' 2009 brief to the Court of Appeals. *See also Bankers Trust Co. and Calla v. Shulsky, supra*, and the Trautman law review article cited in Williams' 2011 Sixth Supplemental Authorities. The Trautman article, cited with approval by *Johnson v. Spider Staging*, criticizes *Jeffrey v. Whitworth College*, 128 F. Supp. 219 (E.D. Wash. 1955). *Jeffrey*, decided under the now outdated *lex loci* doctrine, applies Idaho charitable immunity to immunize a Washington college which was negligent in conducting a ski trip to Idaho. Trautman states that *Jeffrey* is inconsistent with modern interest analysis because Idaho had no interest in applying its law because there were no Idaho residents who were parties in the case. Justice Traynor at 668-69 of his article, cited on p. 4 of Williams' 2011 brief and by Washington authority referenced therein, also states that in *Jeffrey* Idaho had no interest in applying its law of charitable immunity when none of the parties to the suit were from Idaho. By an irrefutable analogy Idaho has no interest in applying its

statutory immunity in §72-223 in the present case involving only Washington residents.

3.2. Besides the unanimous view expressed in five separate sections of the RESTATEMENT (SECOND) and expressed by the commentators, the case law uniformly applies the law of common domicile to determine whether one state's immunity should protect the defendant.

In **Appendix 1** of this brief Williams cited cases from twenty-five states which apply the law of the state of the parties' common domicile and ignore the immunity law of the site of the accident. Twelve of those states also ignore all other aspects of the law of the site of the accident and seven are silent on that issue. However, there are also many jurisdictions which apply the law of common domicile even when it is the state which grants immunity to the defendant. Cases from those seven states are set forth in **Appendix 2** of this brief. The point is that when one state grants immunity to the defendant, the law of common domicile applies regardless whether that law favors the plaintiff or the defendant. The application of the law of common domicile is outcome neutral. Accordingly, the law of Washington, the state of common domicile of Williams and L&K, should apply in this case. The overwhelming weight of national case law requires that

this Court apply the law of no statutory immunity of Washington, the state of the parties' common domicile.

3.3. The public interest of Washington in providing a judicial forum to its residents outweighs any contravening interests of Idaho.

Washington will prioritize its overriding public policy over the interest of any other state which contravenes that overriding policy of Washington. As set forth in section 3.4 of this brief, *infra*, Idaho has no interest in applying its law in this case. However, even if Idaho had a hypothetical interest in applying its law of immunity, such an interest would be outweighed by Washington's strong public policy in favor of providing a judicial forum to its domiciliaries.

*Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 618 P.2d 1330 (1980), *aff'd*, 96 Wn.2d 416, 635 P.2d 708 (1981) and *Mirgon v. Sherk*, 196 Wash. 690, 84 P.2d 362 (1938) cited on p.14 of Williams' 2011 brief, state the general rule that Washington's overriding public policy will defeat any contravening interest of another state.

This same rule adheres when determining whether Washington should apply comity in adopting a rule of immunity from another state. *Haberman v. WPPSS*, 109 Wn.2d 107, 750 P.2d 254 (1987) suggests that comity may be the test in determining whether Washington should adopt the immunity of another state. *Haberman* is consistent with *Nevada v. Hall*, 440 U.S. 410, 416, 99 S. Ct. 1182, 59 L. Ed.2d 416 (1979) (cited in Williams' 2011 Sixth Supplemental Authorities) that comity determines whether to enforce the sovereign immunity of another state. Yet, *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984) and *Streubin v. State*, 322 N.W.2d 84 (Iowa 1982) (cases no. 13 and 14 in **Appendix 1** of current brief) refuse to apply comity in adopting another state's immunity when doing so violates the public policy of the forum.

Three Washington decisions refuse to adopt the law of another jurisdiction if doing so will close the courts to Washington residents. Those decisions are *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 P.613 (1910), *McRea v. Denison*, 76 Wn. App. 395, 885 P.2d 856 (1994), and *Nelson v. Kaanapali Properties*, 19 Wn. App. 893, 899-900, 578 P.2d 1319 (1978) in Williams' 2011 Sixth Supplemental Authorities. *McRea* specifically considers the doctrine of comity in determining whether to permit tribal courts to decide Washington automobile cases. *McRea* holds that under a comity analysis Washington's principle of full compensation in accident cases outweighs deference to tribal courts. *Nelson* performs a conflict of law analysis, but

emphasizes the preeminence of Washington's policy of providing access to Washington courts for Washington domiciliaries. Therefore, *Nelson* refuses to enforce the Hawaii contractor's registration statute which would have barred all relief to the plaintiff. Thus, under either a comity or a conflict of law analysis Washington has an overriding policy of permitting its domiciliaries access to Washington courts and permitting them full compensation for tort injuries. Applying these authorities to the present case, Washington's policy of permitting its residents access to its courts defeats Idaho's immunity statute.<sup>4</sup>

3.4. Williams has reserved his strongest argument for last. *Johnson v. Spider Staging* is one of the authorities specifically referenced by the Supreme Court for guidance of the Court of Appeals in the present case. *Johnson* at 583 states,

“When one of two states related to a case has a legitimate interest in the application of its law and the other state has no such interest, clearly the interested state's law should apply.”

In the present case only Washington has an interest in applying its law because both litigants are Washington residents. *Mentry v. Smith*, 18 Wn. App. 668, 571 P.2d 589 (1977) illustrates the interest analysis when both litigants are from the same state. In *Mentry* the accident occurred in Oregon and a second driver (not a

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<sup>4</sup> Consistent with the rule under the doctrine of comity and under a conflict of law analysis, Washington has adopted the same rule in forum non conveniens cases. Under the forum non conveniens doctrine Washington will not transfer a case to another jurisdiction which provides no remedy to the plaintiff. See p. 21 of Williams' 2009 brief to this Court.

party to the litigation) was from Oregon. Both parties to the litigation were from Washington. Oregon had a host-guest statute which would bar Mentry's claims, but Washington did not. *Mentry* applies Washington law because only Washington had an interest in applying its law. Washington's interest was to permit its domiciliaries to recover for injuries without meeting the claim barring burden of Oregon's host-guest statute. The interest of hypothetical Oregon parties was irrelevant to the outcome.

A similar case is *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 830, 61 P.3d 1196 (2003). *Martin* involves a conflict of law between Oregon and Washington. All parties to the suit were from Oregon which would have barred plaintiff's claims because of the Oregon statute of repose. The accident occurred in Washington. There was a non-party Oregon company which owned, operated, maintained, and installed the vehicle wheel assembly which failed. Yet, Oregon had no resident who was a litigant in the *Martin* case and who would benefit from the Oregon statute of repose. The defendant, Goodyear Tire, did not have its principal place of business in Oregon, nor was it incorporated in Oregon. *Martin* holds that Washington had the superior interest in enforcing its law, i.e. of protecting persons from defective products within its borders. Williams suggests that a better analysis for the result in *Martin* is that §146 of the RESTATEMENT (SECOND) mandates application of the law of the state of the accident site unless Oregon had a greater interest in applying its law. Oregon did not have any

resident that would be protected by Oregon's statute of repose, and therefore had no interest in the outcome of the case. *Martin* discusses the lack of interest of Oregon.

*Johnson v. Spider Staging* also cites *Hurtado v. Superior Court*, 11 Cal.3d 574, 114 Cal. Rptr. 1066 (1974). See full discussion of this case at p. 3 of Williams' 2011 brief. Also, see Currie treatise in same footnote and the two law review articles on p. 4 of Williams' 2011 brief. See also *Reich v. Purcell*, 67 Cal.2d 551, 63 Cal. Rptr. 31 (1967) (cited in *Johnson*) and the Indiana Law Review article in Williams' 2011 Fifth Supplemental Authorities). All of these authorities require a simple predicate before applying the law of any state as part of the interest analysis under conflict of law principles. There must be a party to the litigation who is a resident of the state and who would benefit from the law of his home state.<sup>5</sup> As stated in Posnak, Choice of Law-Interest Analysis: They Still Don't Get It, 40 Wayne L. Rev. 1121, 1146 (1994) a state's law normally was intended for its own residents, and its interest therefore only extends to protecting its residents.

Since both parties in the present case reside in Washington, Washington law suggests that no other state can have an interest in applying its law. Thus under

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<sup>5</sup> The only exception is when a state wants to enforce its rules of the road against the defendant. This brief already discussed the inapplicability of that doctrine in the present case.

the mandate of *Johnson v. Spider Staging* (quoted verbatim *supra*), if there is only one interested state then that state's law must apply. Washington is that sole interested state.

In its 2011 brief L&K devotes nearly half of its brief to expostulating on the interest of Idaho in protecting hypothetical parties in hypothetical litigation. Unfortunately, the interests of phantom parties do not qualify for the benefit of the interest analysis under Washington law. In *Mentry, Martin, and Johnson, supra*, Washington courts could have taken the tact of L&K and concocted hypothetical interests of imaginary parties in order to posit an interest of a state other than Washington.

In *Mentry* the Court could have said that Oregon had an interest in assuring that Washington drivers who travel into Oregon can rest assured that those Washington drivers can drive negligently in Oregon without risking civil liability to their passengers. In other words, the argument could be that Oregon wanted Washington drivers who come to Oregon to know that they can "let their hair down" when driving in Oregon.

Similarly, in *Martin* the Court could have ruled that the Oregon statute of repose was designed to protect corporations from outside Oregon which sell tires in

Oregon. Instead *Martin* rules that Oregon had no interest in applying its short statute of repose to protect Goodyear Tire, an Ohio corporation.

Likewise in *Johnson* the Supreme Court could have said that Kansas' statutory caps were designed to encourage Washington corporations to sell their products in Kansas, thereby stimulating Kansas construction projects. That [fallacious] argument would be that Kansas statutory caps protecting Washington corporations stimulate business in Kansas. However, the actual holding in *Johnson* was that no Kansas litigant would benefit by imposing Kansas statutory caps to protect a Washington corporation. Therefore, *Johnson* holds that Kansas had no interest in the application of its law and therefore Kansas statutory caps did not protect the Washington defendant.

The preceding far-fetched arguments are virtually identical to L&K trying to demonstrate an Idaho interest in applying the various Idaho legal doctrines to the present case. L&K's 2011 brief discusses the purposes of the Idaho legal doctrines at issue in this case. (2011 L&K brief pp. 25-27) However, L&K only tangentially discusses why Idaho has an interest in accomplishing these purposes with reference to a Washington defendant corporation and a Washington accident victim.

L&K states that Idaho's statutory caps encourage Washington corporations to do business in Idaho. (2011 L&K brief p. 30) Yet, that is precisely the argument that our courts rejected in *Martin* and *Johnson*. There is direct equivalence between the fallacious argument that Oregon wants Goodyear to open more retail tire outlets in Oregon (thereby justifying the protection of Goodyear with Oregon's statute of repose) and L&K's argument that Washington corporations will do more construction work in Idaho if they know they have the benefit of statutory caps. L&K's argument failed in *Martin* and in *Johnson*, and should also fail in the present case. That argument should particularly fail because L&K's owner has testified that he imposes the same safety standards on L&K's Washington projects as its Idaho projects. **CP 55-59**, with particular emphasis on **CP 59**. The owner of L&K also testified that L&K purchases insurance applicable in all states where it does business and without any thought of Idaho's protective legal doctrine of statutory immunity. **CP 51-53**.

It would be fiction to confabulate that Oregon had an interest in luring Washington drivers to Oregon so that they could drive negligently, thereby endangering their passengers in a way that Washington prohibited. However, this is essentially the same convoluted argument which L&K makes in stating that Idaho had an interest in luring Washington contractors to do work in Idaho by promising them the benefit of the various Idaho legal doctrines discussed in this brief. Contractors do not decide to work in Idaho based upon such ephemeral

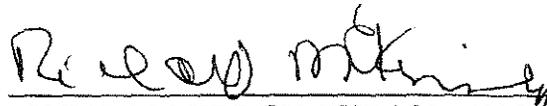
considerations which are far removed from the immediate issue of the projected profitability of a construction job.

The above discussion illustrates a simple point. Although it is clear beyond cavil that no Idaho interest exists in applying Idaho doctrines of comparative negligence, offset, or statutory caps, L&K stretches beyond logic to gin up imaginary Idaho interests in applying these doctrines to protect L&K, a Washington corporation.

Apart from the rules of the road doctrine, the definition of “interest” in a conflicts case venued in Washington relates only to the interest of the state in protecting its own residents and domestic corporations which are parties to the case at issue. This is consistent with case law across the nation. *See* Weintraub article, *supra*, p. 15 of this brief.

No such Idaho domiciliary exists in this case, and therefore Idaho has no interest in applying its doctrines of immunity, comparative negligence, offset of special damages paid by the State Insurance Fund, or statutory caps. Accordingly Washington law should apply on all issues.

RESPECTFULLY SUBMITTED this <sup>th</sup> 19 day of February, 2012.

  
RICHARD MCKINNEY, WSBA No. 4895  
Attorney for Williams

## APPENDIX 1

Cases which decline to adopt immunity of state of injury, but adopt law of no immunity of state of common residence of the parties.

A. Cases from pp. 41-45 of Williams' 2011 brief

1. *Forsman v. Forsman*, 779 P.2d 218 (Utah 1989) (Both spouses were from California. Wife injured as auto passenger while husband driving in Utah. *Forsman* applies California law of no interspousal immunity, but is silent on whether California or Utah law applies on other issues.)
  
2. *Gollnick v. Gollnick*, 517 N.E.2d 1257 (Ind. App. 1988) (Parties were California residents. *Gollnick* applies California law of no parental immunity, but applies Indiana law on tort principles.)
  
3. *Brown v. Church of Holy Name of Jesus*, 105 R.I. 322, 252 A.2d 176 (1969) (Both parties resided in R.I. After adopting Rhode Island law of no immunity, applies Mass. law on all tort issues.)
  
4. *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968) (After adopting Alaska law of no immunity, applies Alaska law on all issues.)
  
5. *Melik v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967) (Both parties were residents of New Jersey. *Melik* refuses to apply the immunity statute of Ohio, the state of the accident site. However, *Melik* still applies Ohio's rules of the road.)
  
6. *Kopp v. Rehtigel*, 273 Minn. 441, 141 N.W.2d 526 (1966) (After declining to adopt South Dakota law of immunity, *Kopp* applies Minnesota law of no immunity because both parties resided in Minnesota. However, case applies rules of road of South Dakota, site of accident.)

7. *Emery v. Emery*, 45 Cal.2d 421, 289 P.2d 218 (1955) (Both parties were from California but Idaho was location of accident. *Emery* applies the California law of no immunity, but law of Idaho on negligence.)

B. Cases from Williams' 2011 Second Supplemental Authorities

8. *Robidoux v. Muholland*, 642 F.3d 20 (1<sup>st</sup> Cir. 2011) (Plaintiff was from Massachusetts and was hired in R.I., but accident was in R.I. Case applies Massachusetts law of no immunity, but applies Rhode Island law on standards of conduct.)

9. *Liberty Mut. Ins. Co. v. Goode Construction Co.*, 97 F. Supp. 316 (E.D. Va. 1951) (After adopting D.C. law of no immunity, applies D.C. law on all issues.)

10. *Hutzell v. Boyer*, 252 Md. 227, 249 A.2d 449 (Md. App. 1969) (After adopting Maryland law of no immunity, applies Maryland law on all issues.)

11. *Miller v. Yellow Cab Co.*, 308 Ill. App. 217, 31 N.E.2d 406 (1941) (After adopting Texas law of no immunity, applies Texas law on all issues.)

C. Cases from Williams' 2011 Third Supplemental Authorities

12. *Kubasko v. Pfizer, Inc.*, 2000 WL 1211219 (Del. Supr. Ct. 2000) (After adopting Delaware law of no immunity, applies Delaware law on all issues.)

D. Cases referenced in Williams' 2011 Fourth Supplemental Authorities

13. *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984) (District of Columbia not obligated to enforce Virginia sovereign immunity for a tort committed by Virginia official in

D.C. Instead, D.C. may decline to enforce Virginia immunity under doctrine of comity when Virginia immunity is contrary to policy of D.C.)

14. *Streubin v. State*, 322 N.W.2d 84 (Iowa 1982) (Under doctrine of comity Iowa rejected Illinois claim of sovereign immunity. Iowa also rejected statutory damages caps, a separate doctrine of Illinois law.) (*Streubin* cited in *Biscoe*.)

E. Cases referenced in Williams' 2011 Seventh Supplemental Authorities.

15. *O'Connor v. O'Connor*, 21 Conn. 632, 519 A.2d 13 (1986) (Both parties resided in Connecticut. After adopting Connecticut law of no immunity, applies Connecticut law on all issues even though accident and injury occurred in Quebec.)

F. Newly cited cases.

16. *Beaulieu v. Beaulieu*, 265 A.2d 610 (Maine 1970) (Massachusetts accident, but both parties lived in Maine. Maine declined to apply Mass. host-guest law, but instead applied Maine law on all issues.)

17. *Wilcox v. Wilcox*, 26 Wis.2d 617, 133 N.W.2d 408 (1965) (applies law of ordinary negligence of parties' common domicile, Wisconsin, rather than law of site of accident, Nebraska, which required gross negligence)

18. *Pittman v. Deiter*, 10 Pa. D. & C.2d 360 (Court of Common Pleas 1957)

19. *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963)

20. ***Gutierrez v. Collins***, 22 Tex. Supp. J. 417, 583 S.W.2d 312 (1979) (Two Texans were in MVA in Mexico which greatly limited damages. Applies law of Texas on all issues.)
21. ***Paul v. National Life***, 177 W. Va. 427, 352 S.E.2d 550 (1986) (Not enforce host-guest immunity of another state when both parties to action were from West Virginia.)
22. ***Tooker v. Lopez***, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (Ct. App. 1969) (Parties from New York whose law permitted recovery. Accident in Michigan which had host statute not permitting recovery. Court applies law of common domicile, N.Y.)
23. ***Owen v. Owen***, 444 N.W.2d 710 (South Dakota 1989) (S.D. residents in accident in Indiana which had a willful or wanton requirement for host-guest liability. S.D. applied its own host-guest standard as the parties were both residents of that state. The Court distinguished Indiana's host-guest statute from Indiana rules of the road which are enforceable in Indiana.)
24. ***Wessling v. Paris***, 417 S.W.2d 259 (Ky. App. 1967) (Two Kentucky residents were in accident in Indiana which had no host-guest liability. Applies Kentucky law which imposes no increased burden on host-guest accidents and all other issues.)
25. ***Sexton v. Ryder Truck Rental, Inc.***, 413 Mich. 406, 320 N.W.2d 843 (1982) (categorical rule that when Michigan residents or corporations are involved in out of state accident, Michigan law applies on all issues.)

## APPENDIX 2

States which protect the defendant with statutory immunity if the state of the parties' common domicile establishes the immunity

A. Cases from Appendix of Williams' 2011 brief.

1. *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007)
2. *Levy v. Jackson*, 612 So. 2d 894 (La. App. 1993)
3. *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 480 N.E.2d 679 (1985)
4. *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966)

B. Cases from Williams' 2011 Second Supplemental Authorities

5. *Hunker v. Royal Indem. Co.*, 57 Wis.2d 588, 204 N.W.2d 897 (1973)

C. Cases from Williams' Seventh Supplemental Authorities

6. *Le Blanc v. Stuart*, 342 F. Supp. 773 (D. Vt. 1972) (applies law of interspousal immunity of Rhode Island, state of spouses' common domicile)

D. New Authority

7. *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968)

### APPENDIX 3

Law of common domicile of the parties for comparative negligence or contributory negligence. (in addition to the nine cases referenced on p. 15 of this brief).

10. ***Mills v. Quality Supplier Trucking, Inc.***, 203 W. Va. 621, 510 S.E.2d 280 (1998)
11. ***Blazer v. Barrett***, 10 Ill. App.3d 837, 295 N.E.2d 89 (Ill. App. 1973)
12. ***Judge Trucking Co., Inc. v. Estate of Cooper***, 1994 WL 164519 (Del. Supr. Ct. 1994)
13. ***First National Bank v. Rostek***, 182 Colo. 437, 514 P.2d 314 (1973) (Plane accident in S.D. which had a gross negligence standard for liability. Colorado instead applied its own law of simple negligence because both parties were from Colorado.)

Applied Comparative or Contributory Negligence Law of Plaintiff's Residence

14. ***Meyer v. Chicago, Rock Island & Pac. R. Co.***, 508 F.2d 1395 (8<sup>th</sup> Cir. 1975) (Minnesota resident injured in Iowa. Railroad defendant was not domiciled in Iowa. Minnesota had comparative negligence, but Iowa had contributory negligence. Applies Minnesota law.)
15. ***Wallace v. Mrs. Smith's Pie Co.***, 261 Ark. 622, 550 S.W.2d 453 (1977) (Court explicitly applies rules of road of Missouri, site of accident. However, court applies comparative negligence law of state of plaintiff's residence, implicitly holding that comparative negligence is not a rule of the road.)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

DELBERT WILLIAMS,

Appellant,

v.

LEONE & KEEBLE, INC.,

Respondent.

COURT OF APPEALS NO. 277011

DECLARATION PURSUANT TO  
GR17 RE: FAX

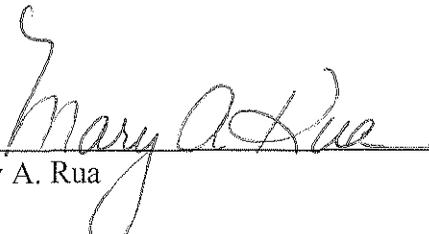
Mary Rua makes the following Declaration under penalty of perjury under the laws of the State of Washington.

I am over the age of eighteen years and competent to testify to the matters stated herein, which are based on personal knowledge.

My place of business is the Law Office of Richard McKinney, 201 W. North River Drive, Suite 520, Spokane, Washington 99201; 509/327-2539; fax: 509/327-2504.

I have examined the signature page of Appellant's Supplemental Brief which is page 41 of this document totaling 49 pages including this Declaration, and determine it to be complete and legible and have confirmed the accuracy thereof telephonically.

EXECUTED in Spokane, Washington this 20<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
Mary A. Rua

**CERTIFICATE OF SERVICE**

I hereby certify that on February 22<sup>nd</sup>, 2012, the original and six (6) copies of the **Appellant's Supplemental Brief** were filed with the Court of Appeals of the State of Washington, Division III, at the following address:

COURT OF APPEALS, DIVISION III  
*Office of the Clerk*  
500 N. Cedar Street  
Spokane, Washington 99201-1905

In addition, I served one (1) copy of the **Appellant's Supplemental Brief**, via 1<sup>st</sup> class postage paid U.S. mail, to the following:

Andrew C. Bohrsen  
505 West Riverside, Suite 400  
Spokane, Washington 99201

I certify under penalty of perjury, according to the laws of the State of Washington, that the foregoing is true and correct.

  
\_\_\_\_\_  
Mary A. Rua