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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 27701-1-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DELBERT WILLIAMS, an unmarried man,
Plaintiff / Appellant

v.

LEONE & KEEBLE, INC., a Washington Corporation,
Defendant / Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

ANDREW C. BOHRNSEN
WSBA No. 5549
AIMEE N. MAURER
WSBA No. 39827
Law Office of Andrew C. Bohrsen, P.S.
505 Riverside, Suite 400
Spokane, WA 99201
(509) 838-2688
Attorneys for Respondent

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I. CONFLICTS OF LAW

The law governing choice of law conflicts has been exhaustively briefed by both sides and will not be reargued in depth. Based on this Court's express request for supplemental briefing related to (1) identification of each conflict of law, and (2) an interest analysis for each conflict of law identified, Respondent has outlined and will argue the following choice of law conflicts with accompanying interest analysis. In analyzing the choice of law issue, the Washington State Supreme Court has specifically directed the Court of Appeals to give application to both the *Restatement (Second) of Conflicts of Laws* § 146 (1971) and the policy considerations discussed in Johnson v. Spider Staging Corp., 87 Wn.2d 577, 580, 583, 555 P.2d 997 (1976).¹ Therefore, the methodology outlined in Johnson is the proper analytical framework.

A. **TORT LAW**

In personal injury cases, the law of the state where the injury occurred applies unless another state has a **greater** interest in determination of that particular issue. Martin v. Goodyear Tire & Rubber Co., 114 Wn.2d 823, 829-30, 61 P.3d 1196, 1199 (2003),

¹ See, Supreme Court Opinion, Williams v. Leone & Keeble, Inc., No. 83743-1, fn. 6 (2011).

citing, Bush v. O'Connor, 58 Wn. App. 138, 791 P.2d 915, 918, 919 (1990). The *Restatement (Second) Conflicts of Laws* § 146 (1971) mirrors this principal when it provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principals stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) Conflicts of Laws § 146 (cited in *Bush*, 58 Wn. App. at 144, 791 P.2d 915).

Additionally, this Court must consider that in *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 583, 555 P.2d 997 (1976), the Washington State Supreme Court articulated a two-step analysis to be employed to determine the appropriate choice of law. The court must first evaluate the contacts with each potentially interested state and **then if balanced** evaluate the public policies and governmental interest of the concerned states. *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 210 P.3d 337 (2009). Thus, the public policies and governmental interests of the states are only implicated *if* the contacts are found to be balanced. These contacts must also be evaluated both quantitatively and qualitatively, based upon the location of the most significant contacts as they relate to the particular

issue at hand. Martin at 830, 61 P.3d 1196 (*citing, Johnson*, 87 Wn.2d at 581, 555 P.2d 997). And the extent of the interests of each potentially interested state should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and particular issue involved. Singh, at 146, 210 P.3d 337; see also, Johnson, at 582, 555 P.2d 997. Thus, a state may be found to have little interest in the application of a statute designed to regulate or to deter a certain business practice if the conduct complained of is to take place in another state. Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 811, 459 P.2d 32 (1969). Thus, a conflict of law analysis in Washington is a hybrid of the *Restatement (Second) of Conflicts of Laws* and a governmental interest analysis. However, under both common law and the *Restatement (Second) Conflicts of Law* § 146, a presumption is created that the law of the state where the injury occurred will be the law which is applied. Only when the law of some other state has a **more significant** relationship under the principals stated in § 6 to the occurrence and the parties will the law of the other state be applied. Idaho is also in accord with this analytical framework. Seubert Excavators, Inc. v. Anderson Logging Company, 126 Idaho 648, 889 P.2d 82 (1995); see also, Grover v. Isom, 137 Idaho 770, 53 P.3d 821

(2002). Likewise, under Idaho law a presumption is created that the law of the place of injury is the law which should be applied. Barringer v. State, 111 Idaho 794, 799, 727 P.2d 1222, 1227 (1986) (of these contacts, the most important in guiding this Court's past decisions in tort cases has been the place where the injury occurred). Ironically, there is no conflict of law between Washington and Idaho in regard to the presumption applying the law of the state of injury. Both states agree that this presumption controls unless and/or until it can be demonstrated that some other state has a *more significant* relationship. It is with these principals in mind that we turn to the specific areas in which Washington and Idaho have a conflict of laws and the resulting policy interests of each state in having their law applied.

a. **OSHA v. WISHA.** As articulated in respondent's prior briefing, there are significant differences between the statutory laws of Washington and Idaho as to work site standards. Idaho applies the federally enacted OSHA standard, whereas Washington has adopted its own safe workplace standards under WISHA. Washington follows what has become known as the "Stute" standard for accidents which occur within its borders. Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 463-4, 788 P.2d 545 (1990). Idaho does not have a similar rule for

construction site standard, instead choosing to rely upon general negligence principals and the standards set forth in OSHA. Additionally, on its face, WISHA does not apply as it is statutorily limited to “work performed in the state of Washington.”

It would be incredulous to apply the statutory provisions of WISHA to an accident that occurred in Idaho. The Respondent, working in its capacity as an Idaho licensed general contractor and Idaho public works contractor, was required to perform all its work pursuant to OSHA. The Appellant was employed by an Idaho corporation working under the direct supervision of an Idaho lessor/employer who had submitted its own fall protection plan in accordance with the prevailing standards and regulations of the state of Idaho. Here, Washington has little interest in the application of a statute designed to regulate or to deter a certain business practice where the conduct complained of takes place in another state. Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 811, 459 P.2d 32 (1969).

b. Statutory Immunity And The Worker’s Compensation Scheme. Under Idaho’s worker’s compensation scheme, the Idaho legislature removed – with few exceptions – all work place injuries from “private controversy.” I.C. § 72-201. To that end, the legislature

crafted a system whereby “sure and certain relief” would be provided to injured workers regardless of fault. *Id.* This “sure and certain relief” would be provided “to the exclusion of every other remedy, proceeding, or compensation, except as is otherwise provided in the worker’s compensation scheme.” *Id.*; *see also*, I.C. § 72-209(1); I.C. § 72-211. Counterbalancing the employer’s burden of providing “sure and certain relief” to injured workers, the Act limits the employer’s exposure to tort liability through I.C. §§ 72-209(1) and 72-211. Venters v. Sorrento Delaware, Inc., 141 Idaho 245, 249, 108 P.3d 392, 396 (2004). These limitations on the scope of employee remedies are together referred to as the “exclusive remedy rule.” *Id.* at 249, 108 P.3d 396. The exception to this rule is found at I.C. § 72-223 which allows an injured worker to sue a so-called “third party” who may be liable for damages stemming from the injury. I.C. § 72-223(1)(2).

However, the Act also clearly excludes certain parties known as statutory employers from third-party liability. Pursuant to I.C. § 72-223, such third parties shall not include: (1) “those employers described in section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of section 72-301, Idaho Code” and (2) “the owner or

lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed.” When a worker is faced with injuries arising from the alleged tortious conduct of these immune third parties, worker’s compensation benefits are the exclusive remedy available to them. Id. at 249, 108 P.3d 392. Thus, if the Respondent meets either of these categories, it is the Appellant’s statutory employer and cannot be sued.

Under the Idaho Code an “employer” is defined as “any person who has expressly or impliedly hired or contracted the services of another.” I.C. § 72-102(12)(a). This definition includes contractors and subcontractors. Id. For at least 60 years, the Idaho Supreme Court has interpreted this statutory definition and developed significant case law to help give meaning to the term. And the Court has explained that the statutory definition of employer is “an expanded definition designed to prevent an employer from avoiding liability under the workmen’s compensation statutes by subcontracting the work to others who may be irresponsible and not insure their employees.” Harpole v. State, 131 Idaho 437, 440, 958 P.2d 594, 597 (1998). Thus, I.C. § 72-216 imposes liability on employers, such as

the Respondent, “for compensation to an employee of a contractor or subcontractor under him who has complied with the provisions of section 72-301 in any case where such employer would have been liable for such compensation if such employee had been working directly for such employee.” In other words, if the Appellant’s direct employer has not complied with § 72-301, the party who contracted the services of the injured employee’s employer (in this case the Respondent) is liable for the payment of compensation to the non-compliant employer’s employee. This provision demonstrates Idaho’s strong legislative policies and interests in providing (1) that “sure and certain relief” be provided to injured workers regardless of fault [I.C. § 72-201; I.C. § 72-209(1); I.C. § 72-211]; (2) preventing an employer from avoiding liability under the worker’s compensation statutes by subcontracting the work to others [Adam v. Titan Equip. Supply Corp., 93 Idaho 644, 646, 470 P.2d 409, 411 (1970)]; and (3) limiting the liability of employers who do comply with the Act. § 72-223(1).

Idaho Legislature used the identical language from the statutory definition for employer when crafting third-party immunity under I.C. § 72-223, the Idaho Supreme Court determined that the statutory employer analysis is a necessary tool in determining the meaning and scope of I.C. § 72-233. Robinson v. Bateman-Hall, Inc.,

139 Idaho 207, 211, 76 P.3d 951, 955 (2003). This remains true even where the direct employer has complied with the Act and actually provided the worker's compensation coverage to an injured worker, thereby obviating the need for another statutory employer's worker's compensation to come into play; both statutory employers are immune. Venters v. Sorrento Delaware, Inc., 141 Idaho 245, 251, 108 P.3d 392, 398 (2005).

The result of such a definition is logical symmetry: Those parties deemed employers for the purpose of being liable for worker's compensation benefits under I.C. § 72-102 are the same parties deemed immune from third-party tort liability under I.C. § 72-233. Id. at 211, 76 P.3d 955. To hold otherwise would result in two different interpretations of the same terms in two different provisions of the Act. Id. at 211, 76 P.3d 955. Such a result would be incongruous and nonsensical. Id. at 211, 76 P.3d 955.

Here, had Appellant's direct employer failed to pay into the Idaho Insurance Fund for worker's compensation, then, pursuant to § 72-301, Appellant would have been entitled to seek compensation from Respondent. Thus, Idaho's policy and interests provided the Appellant an additional layer of protection to ensure him of "sure and certain relief." Appellant took advantage of this protection when he

filed for and received benefits under the Idaho worker's compensation scheme. However, this additional layer of protection for the Appellant was provided via the creation of liability to Respondent under I.C. § 72-216 who was liable for the payment of compensation if the direct employer was non-compliant. Appellant cannot have it both ways; he cannot take advantage of Idaho's statutory scheme which provides him ample protection via its worker's compensation scheme and then argue that the statutory scheme is not applicable. Respondent has strong interests and policies for Idaho law applying. Appellant was provided benefits under the Idaho worker's compensation scheme and the Respondent was statutorily liable to pay Appellant's compensation had his direct employer not been in compliance with the Act. Appellant's application and acceptance of compensation under the Idaho worker's compensation scheme is a strong indicator that Appellant accepted that the entire body of Idaho Labor and Industries law would control. The interests of justice, fairness, and interstate comity are not served by allowing L & I claimants to piecemeal which provisions of a state's statutory scheme they will accept and which provisions they will not through forum shopping.

Washington has little to no interest in its law being applied. Washington did not pay benefits under its worker's compensation act;

therefore, Washington is not entitled to any sort of right of reimbursement. Additionally, Appellant's interests are also limited. Appellant has received his benefits via Idaho's worker's compensation act; he has been paid. Thus, Appellant's only interests relate to maintaining a cause of action which can only exist under Washington law. Idaho law, which provided the protection and compensation Appellant has benefitted from thus far, could also statutorily extinguish this claim. However, this is not one of the appropriately listed contacts, nor is it a basis for consideration in determining a conflict of laws question. Washington and the Appellant have no real interest in applying the laws of the state of Washington to this issue. The Respondent's interests and Idaho's policies and interests far outweigh those of the Appellant in terms of both quantity and quality.

c. Apportionment of Fault and Right to Reimbursement. There is a clear choice of law conflict concerning whether and to what degree the amount of worker's compensation benefits previously received from the insurer of the direct employer are recoverable. This issue encompasses another choice of law conflict, namely, whether the fault of ***all contributing parties*** shall be presented to the trier of fact for apportionment. Yet another choice of law conflict implicated by this discussion relates to Idaho's

requirement that a plaintiff be less than 50 percent at fault to recover. This rule necessarily entails a system allowing the trier of fact to consider the fault of all possible contributing parties, including the employee and the employer. On these issues the law of Idaho is in conflict with the law of Washington.

The difference in law stems from different statutory schemes balancing the exclusive liability/worker's compensation statutes with the comparative negligence/contribution statutes. Several different statutory approaches to this issue have developed in the United States. One statutory scheme, such as enacted in Illinois, places higher priority on contribution, infringing upon exclusive liability, by allowing a third party sued as the result of an industrial accident to hold the employer liable for the full percentage of the employer's comparative negligence or for common law indemnification. See, Skinner v. Reed-Prentice Division, etc., 70 Ill.2d 1, 15 Ill.Dec. 829, 374 N.E.2d 437 (1978). At the other end of the spectrum is the scheme adopted by Washington, which allows absolutely no liability or negligence to be attributed to the employer in any action. A third party cannot defend on the ground that the employer was jointly negligent, and regardless of the employer's negligence the employer or its insurer has an automatic lien or subrogation right to the third-

party recovery for the amount of the compensation benefits paid. Glass v. Stahl Specialty Co., 97 Wn.2d 880, 652 P.2d 948 (1982); Kelley v. Howard S. Wright Construction Co., 90 Wn.2d 323, 582 P.2d 500 (1978); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 588 P.2d 1308 (1978). The Washington court concedes that "requiring one wrongdoer to shoulder all the damages when the other wrongdoer is an employer may be unfair." Glass v. Stahl Specialty Co., 652 P.2d at 953, and that "it might very well be that it would be wiser to provide by legislation for the result" that the automatic lien on third-party recoveries be reduced in appropriate cases, Courtright v. Sahlberg Equipment, Inc., 88 Wn.2d 541, 563 P.2d 1257, 1260 (1977), but in the absence of legislation the court refuses to change its position. Glass v. Stahl Specialty Co., *supra*.

Idaho, by statute, has adopted a position between those two extreme views. The Idaho statutes take a compromise position setting up a scheme whereby the injured employee and/or subrogated employer may hold a third party liable in tort for damages. I.C. § 72-223. A third party who has paid damages for an injury arising out the employment of the injured person may hold the employer liable if the injury was concurrently "caused by the breach of any duty or obligation owed by the employer to such other person," but the

employer's liability "shall be limited to the amount of compensation for which the employer is liable under" worker's compensation. I.C. § 72-209(2). Idaho case law implementing I.C. § 72-209 and -233 has held that the insurer of an employer who is jointly negligent with the third party is not allowed the statutory subrogation rights or reimbursement for worker's compensation benefits paid to the injured employee allowed by I.C. § 72-223(3). Tucker v. Union Oil Co. of California, 100 Idaho 590, 603 P.2d 156 (1979); Liberty Mutual Ins. Co. v. Adams, 91 Idaho 151, 417 P.2d 417 (1966).

Thus, the third party may defend on the basis that the employer and/or employee was negligent whether or not the employer is a party to the action. A special verdict form allows the jury to assign the appropriate percentage of liability to the employer in addition to the injured party and the third party. Blome v. Tuska, 130 Idaho 669, 946 P.2d 631, 634 (1997); *see also*, I.C. § 6-801, 802 and 803. The third party is then allowed a reduction in damages by the percentage of liability attributed to the employer and/or employee not to exceed the amount of worker's compensation benefits paid, and the insurer's right to reimbursement by that same amount is forfeited. *See*, Schneider v. Farmers Merchant, Inc., 106 Idaho 241, 678 P.2d 33 (1983); Pocatello Industrial Park Co. v. Steel West, Inc., 101 Idaho

783, 621 P.2d 399 (1980); Tucker v. Union Oil Co. of California, *supra*. The fault allocation provisions of I.C. § 6-801 through 803, when read together, reveal a logical and comprehensive treatment of the rights of the parties involved in a negligence action. These sections provide further evidence of Idaho's strong public policy and intent on the part of Idaho that, in the case of personal injury claims, the fault of ***all contributing parties*** shall be presented to the trier of fact for apportionment. See, Dohl v. PFA Indus., Inc., 127 Idaho 232, 237, 899 P.2d 445 (1995); J. R. Simplot Co. v. Idaho Tax Comm'n, 120 Idaho 849, 854, 820 P.2d 1206 (1991). Additionally, under Idaho law a plaintiff must be less than 50 percent responsible to recover. I.C. § 6-801. Thus, there is a potential under Idaho law for a plaintiff's damage claim to be barred completely if a jury determines that he was equally or more negligent than the defendant. In comparison, Washington applies a pure comparative negligence standard and the percentage of the plaintiff's negligence, regardless of the amount, merely reduces the recovery; it does not ever bar recovery. RCW 4.22.070.

However, the Idaho scheme just described balances and substantially serves the sometimes competing interests of: (1) the exclusive liability of the employer under the worker's compensation

statutes; (2) the policy against double recovery by an injured victim; (3) the policy against allowing an employer or its insurer to profit from the employer's own wrong; and (4) the third party's right of contribution for the comparative negligence of others, *i.e.*, the employer and/or employee.

Here, the policies and interests which underlie the different approaches of the Washington and Idaho statutes concern Washington employer's right of limited immunity and the right of a plaintiff to recover versus a third party's right in Idaho of contribution from concurrent tortfeasors. Washington's concerns are substantially protected under Idaho law since the employer cannot be held liable beyond the amount already paid to the injured employee in worker's compensation benefits. Therefore, neither a Washington employer nor the employee is affected by the application of Idaho law.

However, Idaho has strong interests and policies which would be undermined by the application of the less equitable law of Washington. Here, there is no argument that the place of injury was in Idaho. Appellant's worker's compensation benefits were paid out of the Idaho State worker's compensation scheme. The Respondent entered into an Idaho public works contract with an Idaho school district which required the Respondent to comply with innumerable

Idaho laws, rules and regulations.² The Respondent was required to submit to these laws, rules and regulations to be awarded the Idaho public works contract. The Appellant's direct employer, Paycheck Connection, and Pro-Set Erectors are both Idaho businesses. The Appellant paid Idaho State income tax on all monies received as related to this incident and the Appellant claimed worker's compensation benefits from the state of Idaho. Idaho has established a strong policy allowing a third party to defend on the basis that the employer was negligent whether or not the employer is a party to the action. Equally strong is Idaho's policy restricting recovery to those instances where a plaintiff is less than 50 percent at fault. Respondent should not be robbed of this defense. This is especially true under our facts, where all parties effectively consented to the application of Idaho law by volitionally seeking to perform work in the state of Idaho.

² Including, but not limited to the following: Respondent was required to be fully licensed as a general contractor in Idaho, comply with Idaho tax laws, make payments to the Idaho Insurance Fund for worker's compensation, file a contractor's registration with the Idaho Bureau of Occupational Licenses, payments to the Idaho State Tax Commission for Idaho SWH, Idaho Corporate Tax, and Idaho Sales and Use Tax, file with the Idaho Secretary of State's Office, Obtain an Idaho Public Works Contractor License from the Idaho Division of Public Safety, make payments for unemployment taxes to the Idaho Department of Labor, and was required to make payments for personal property taxes to Kootenai County, Idaho, the jurisdiction where the project was carried out.

Additionally, application of Idaho law enhances the predictability and certainty of law. Other states such as Illinois, as noted above, and New York take the opposite extreme from Washington. In those states an employer is allowed to be sued for complete indemnity and contribution with no limited liability. Doyle v. Rhodes, 101 Ill.2d 1, 77 Ill.Dec. 759, 461 N.E.2d 382 (1984); Doyle v. Dow Chemical Co., 30 N.Y.2d 143, 331, N.Y.S.2d 382 N.E.2d 288 (1972). If this Court concludes that Washington law should apply to these facts, the Court would also have to apply the laws of Illinois and New York or another jurisdiction's law in the next case, depending on the employer's and employee's domicile. Such a choice of law would result in one third-party tortfeasor's right of contribution being unlimited while another's would be at the mercy of other jurisdictions' less equitable approaches to the problem, and the outcomes of each case would vacillate between extremes, depending on the happenstance of where the employer and employee are domiciled. Therefore, certainty and predictability are better served with Idaho's law being applied.

Respondent's and Idaho's significant contacts in the present case are that Idaho was the place where the injury occurred, the place where the alleged negligence and any alleged contributory

negligence of the third party, the employer, and the employee allegedly occurred. As stated above, “of the contacts to be considered, ‘none has a *more* significant relationship to the issue before us than Idaho, the place of injury.’” Johnson v. Pischke, 108 Idaho 397, 402, 700 P.2d 19, 24 (1985). Flowing from these contacts are Idaho’s significant and important interest that third-party tortfeasors, such as the respondent, be allowed a limited right of contribution through an offset reflecting the employer’s and/or employee’s concurrent negligence, if any. Idaho has further interests that out-of-state employers do not negligently operate their businesses in Idaho and that those employers through their own sureties should not profit from their own negligence.

Washington’s contacts are that it is the domicile of the employer and employee. Flowing from these contacts is the interest that the employers have no liability and be completely immune except to provide worker’s compensation benefits to injured employees. Washington also has an interest in having injured employees adequately compensated and further having safe working conditions.

However, application of Washington’s laws would result in Washington’s interests being enhanced; while Idaho’s interests would be completely undermined, subrogated and unrecognized. The third-

party tortfeasor would get no contribution whatsoever for the employer's alleged negligence, and the employer through its surety would be allowed to profit from its own negligence by complete reimbursement for the worker's compensation benefits paid. On the other hand, the application of Idaho law would result in Idaho's interests being served and Washington's interests being substantially although not totally protected. Any Washington employer will still be accorded substantial immunity since it will not be held liable for any additional amount beyond that already paid in worker's compensation benefits.

d. Idaho's Policy Against Double Recovery – Medical Liens. As further evidence of Idaho's strong public policy to not permit unjustified double recovery, Idaho has adopted I.C. § 41-1840, which compels the court, subsequent to entry of a verdict, to reduce the medical liens to the actual amount *paid* by the State Fund to the injured worker so as to avoid the receipt of illusory damages in the form of medical payments never made. In Beale v. Speck, 127 Idaho 521, 903 P.2d 110 (1995), the court was very clear that to hold otherwise would interfere with the jury's ability to award what it deemed appropriate damages for the particular injuries and amount to a double recovery, which the **legislature intended to forbid**. Id. at

538. See also, Schaffer v. Curtis-Perrin, 141 Idaho 356, 109 P.3d 1098 (2005). Here, the State Fund which paid the medical liens was the state of Idaho. Washington has no real interest in this matter. Additionally, Appellant can have no real interest other than to essentially effectuate a double recovery.

e. Idaho's Statutory Cap on Damages is Appropriate Where the Injury Occurred in the State of Idaho. In considering the choice of law conflict as it relates to the cap on general damages, it is imperative to focus on the justification given for applying Washington law; deterrence against Washington corporations whose negligence committed in Washington injures individuals in another state. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 580, 583, 555 P.2d 997 (1976). However, this must be compared against the interests and policy of Idaho in mandating a cap. The forgoing argument will demonstrate the necessity of applying Idaho law, *i.e.*, the statutory cap in instances such as this where the accident and majority of contacts all occurred within the state of Idaho.

To begin it must be conceded that this Court is undertaking a review of the legislature's enactments, both the legislatures of Washington and Idaho, in deciding which state's law will apply. Thus, the most fundamental principal underlying judicial review of a

legislative enactment must be respected; namely, the court must assume that the legislature means what it said. Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect. Worley v. Highway Dist. v. Kootenai County, 98 Idaho 925, 576 P.2d 206 (1978); Moon v. Investment Board, 97 Idaho 595, 548 P.2d 861 (1976); Herndon v. West, 87 Idaho 335, 393 P.2d 35 (1964). This principal is reflected by consistent adherence to the primary canon of statutory construction that where the language of a statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction. Worley, at 928, 576 P.2d 206.

Thus, a court charged with following an unambiguous statute “must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial.” Herndon, at 339, 393 P.2d 35. This is because the “wisdom, justice, policy, or expediency of a statute are questions for the legislature alone.” Berry v. Koehler, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962). As such, “the public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced.” State v. Village of Garden City, 74 Idaho 513, 525, 265 P.2d 328, 334 (1953).

Here, Idaho has exercised its legislative authority to limit the remedies available for a cause of action. Kirkland v. Blaine County Medical Center, 134 Idaho 464, 468, 4 P.3d 1115, 1120 (2000). As previously briefed by Respondent, Idaho has strong interests and policies behind I.C. § 6-1603 which limits general damages. Specifically, in relation to I.C. § 6-1603 the state of Idaho has sought a “balance between a tort victim’s right to recover noneconomic damages and society’s interest in preserving the availability of affordable liability insurance.” Kirkland, at 470, 4 P.3d 1115. Thus, by enacting I.C. § 6-1603 the legislature “is engaging in its fundamental and legitimate role of ‘structur[ing] and accommodate[ing] the burdens and benefits of economic life.’” Kirkland, *Id.*, *citing*, Patton v. TIC United Corp., 77 F.3d 1235, 1247 (10th Cir.1996) (citations omitted). Idaho has a legitimate interest in protecting the availability of liability insurance for those doing business in Idaho and I.C. § 6-1603 is not unreasonable in addressing this legitimate societal concern. Kirkland, at 470, 4 P.3d 1115.

The public policy announced in Kirkland cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced. Application of Washington law in this regard would be in total derogation of the law of Idaho and is

not legally supportable. Pursuant to the above stated law, Appellant would be foreclosed in Idaho from making his argument which in effect is asking for judicial legislation. The Idaho Supreme Court has spoken the “wisdom, justice, policy, or expediency of a statute are questions for the legislature alone.” Thus, Appellant has resorted to forum shopping in an effort to get around the clear dictates of Idaho’s interests and policies.

Here, Respondent submitted itself to the policies and interests of Idaho when it conducted business in Idaho. Respondent cannot apply the laws of Washington even if they are more favorable to its business practices when it is conducting his business in Idaho. Rather, Respondent is charged with following the regulations and laws of Idaho; these laws and regulations both created Respondent’s liability and also provided for its protection as an entity doing business within the state of Idaho.

f. The Reasonable Expectations of the Parties. The final factor that must be considered is the reasonable expectations of the parties. As noted in Respondent’s prior briefing, “in order to ensure that the choice of . . . law is not arbitrary or unfair, there must be sufficient contacts supporting the state’s interest in applying its law. (Citation omitted.) The fairness of applying the forum’s law can

also be gauged by examining the expectations of the parties.” Kelly v. Microsoft Corp., 251 F.R.D. 544 (W.D. Wash.) *citing*, Phillips Petroleum Co. v. Shutts, 472 U.S. 979, 822, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). This principal is also recognized in the *Restatement (Second) of Conflict of Law* § 6(2)(d) which provides: “(2) When there is no (statutory) directive, the factors relevant to choice of the applicable rule of law include . . . (d) the protection of justified expectations.”

Here, Appellant points to no evidence, nor is there any, indicating that Appellant had any expectation that a claim for personal injuries as related to an Idaho public works project would be governed by Washington law. To the contrary, the evidence would suggest that Appellant’s reasonable expectations would conclude that Idaho’s law would govern such a claim. Appellant had long been an Idaho employee of an Idaho corporation which had continuously leased him out to another Idaho corporation to perform work in Idaho. Appellant was paid from an Idaho corporation and had deductions taken under Idaho income tax law. More importantly, the first thing Appellant did upon being injured was to lawfully look to the state of Idaho’s insurance fund for payment of his medical bills and lost wages. This demonstrates on the part of the Appellant an

understanding that it was the state of Idaho to whom the Appellant looked for and depended on for his livelihood and protection as related to this incident.

Looking next to the reasonable expectations of the Respondent that regularly performed work in the state of Idaho, successfully bid an Idaho public works project, complied with every single law governing Idaho corporations doing work in the state of Idaho, and employed Idaho subcontractors to perform work on this project. Certainly, the Respondent, from an objective standard, had the right to reasonably expect that its conduct would be evaluated under the laws of the state of Idaho. As noted and argued above, it was the law of Idaho which created and defined the liability of the Respondent as a licensed Idaho contractor and Idaho public works contractor. It was the law of Idaho, not the law of Washington, which the Respondent had to comply with to be awarded the public works contract. To first require the Respondent to comply with Idaho law but then apply Washington law is nonsensical and clearly cannot be within the reasonable expectations of either of the parties in this action.

II. CONCLUSION

In conclusion, the choice of law conflicts referenced above and the policies and interests articulated support the application of Idaho

law. Further, the needs of interstate and international systems are not likely implicated in this case. In considering the relevant policies of the states, it is clear that Idaho has an interest in making certain that contractors working on an Idaho public works contract are subject to the laws of Idaho and Idaho's standard of care. The Respondent justifiably expected that Idaho law would govern and it tailored its business practices to conform not only to the mandates necessary to be awarded the Idaho public works contract, but also the regulations and rules established by OSHA which oversaw and regulated this particular project. Respondent did not have a choice in which law it was subject to when working in Idaho. Rather, it was mandated to follow the standards established under Idaho law. It would offend the basic principals of justice to apply Washington law to this action simply because Idaho's law, which governed this project and regulated the conduct of all the involved parties, is now less favorable to the Appellant. Appellant chose to seek employment with an Idaho corporation, to perform work on an Idaho public works site in the state of Idaho, to claim and receive tax deductions under the Idaho income tax scheme, and to collect benefits from the Idaho worker's compensation scheme. These actions show a clear understanding on the part of the Appellant that Idaho law governed.

As a general rule and a point in which both the laws of Idaho and Washington are in agreement, a presumption exists that a victim should recover under the system in place where the injury occurred. Predictability and ease in determining and applying the law are also better served by applying Idaho law. Idaho law is the law of the place of injury and where the most significant contacts took place, both in terms of quantity and quality.

Respectfully submitted:

LAW OFFICE OF ANDREW C. BOHRNSEN,
P.S.

By: 
ANDREW C. BOHRNSEN
WSBA No. 5549

By: 
AIMEE N. MAURER
WSBA No. ~~30827~~
38957

Attorneys for Respondent
Leone & Keeble, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT was served on the following, by the method indicated on the 22nd day of February, 2012:

Richard L. McKinney
Attorney for Appellant
LAW OFFICES OF RICHARD MCKINNEY
201 W. North River Drive, Suite 520
Spokane, WA 99201

- US Mail, First class
- Fax: (509) 327-2504
- Messenger Service


ANDREW C. BOHRNSEN