

**FILED**

OCT 10 2011

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

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DELBERT WILLIAMS, an unmarried man,

Plaintiff / Appellant

v.

LEONE & KEEBLE, INC., a Washington Corporation,

Defendant / Respondent.

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BRIEF OF RESPONDENT IN  
SUPPORT OF THE APPLICATION  
OF IDAHO LAW

---

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

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## I. INTRODUCTION

A. Procedural History. This case comes before this Court for the second time pursuant to a remand from the Washington State Supreme Court. It initially arose out of cross-motions for summary judgment pursuant to which the appellant moved for summary judgment seeking the application of Washington law, while the respondent moved for dismissal on the grounds that Washington did not have jurisdiction or, in the alternative, that the law of the state of Idaho should be applied.

The Honorable Judge Greg Sypolt denied the appellant's motion to apply Idaho law, granted the respondent's motion to dismiss for lack of jurisdiction, and, in doing so, noted that had he been required to reach the conflict of law issue, he would have applied Idaho law. In doing so, he noted that this opinion was based on the criteria set forth in Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997 (1976) (CP 264, 307).

On review, this Court affirmed the trial court on the issue of lack of jurisdiction, not ruling on the question of choice of law since it was moot. The appellant filed a motion for discretionary review to the Washington State Supreme Court, which granted the petition and

ultimately reversed both the trial court and this Honorable Court, holding that Washington did have jurisdiction over the respondent. That court remanded the case to this Court with direction that the choice of law issue be addressed and, by way of footnote, stated that the choice of law issue should be resolved in accordance with the criteria set forth in Johnson v. Spider Staging Corp., *supra*; the case relied upon by Judge Sypolt initially.

This Court has afforded the parties an opportunity to file supplemental briefing on this specific issue. This Brief of Respondent is respectfully presented to this Honorable Court pursuant to that opportunity.

## **II. STATEMENT OF THE CASE**

General Statements of the Case were contained in the original briefs filed by the respective parties in the initial appeal. Therefore, respondent's Statement herein shall focus on those facts that are relevant to the conflict of law analysis that this Court will undertake.

Leone & Keeble is a general contractor with its principal office being located in Spokane, Washington (CP 104, 121). However, 30 to 40 percent of its work is performed in the state of Idaho (CP 105, 121). On February 6, 2007, the respondent entered into an Idaho

public works contract with the Lakeland School District located in Rathdrum, Idaho, for the purpose of construction of additions to that facility (CP 121-122). Given the volume of work performed in Idaho, together with the fact that this was an Idaho “public works” contract, Leone & Keeble was required to comply with innumerable Idaho laws, rules, and regulations that governed the project (CP 121-122). Additionally, the respondent was required to be fully licensed as a general contractor in the state of Idaho in order to be awarded this contract, as well as comply with multiple tax laws. Id. These included, but were not limited to, the following:

1. The respondent was required to make payments to the Idaho Insurance Fund for worker’s compensation for its employees;
2. The respondent was required to file a contractor’s registration with the Idaho Bureau of Occupational Licenses;
3. The respondent had contact with, and made payments to, the Idaho State Tax Commission for Idaho SWH, Idaho corporate tax, and Idaho sales and use tax;
4. The respondent was required to file with the Idaho Secretary of State’s office;

5. The respondent was required to obtain a Public Works Contractor License from the state of Idaho, Division of Public Safety;

6. The respondent was required to make payments for unemployment taxes to the Idaho Department of Labor; and

7. The respondent was required to make payments for personal property taxes to Kootenai County, Idaho, the jurisdiction within which this project was carried out.

(CP 121-122.)

The appellant, while a resident of Washington, was at all times employed by an Idaho corporation by the name of PayCheck Connection, which assembled Idaho workers in one group in order to obtain a lower worker's compensation rate under the Idaho Fund (CP 185-199). PayCheck Connection would then "lease" its employees to contractors doing work in Idaho. Id. One of those contractors was Pro-Set Erectors, who was a subcontractor of respondent on this public works project. Id. For years, the appellant had performed work for only Pro-Set pursuant to this arrangement, received his paycheck from PayCheck, who was required to file proof of Idaho worker's compensation coverage naming the respondent and Pro-Set as additional insureds (CP 206-212). After paying the

appellant, PayCheck was reimbursed by Pro-Set for all charges, including worker's compensation (CP 184-199). In addition, and of particular relevance to the issue before this Court, the appellant, while domiciled in Spokane County, at all times paid Idaho state income tax for his work carried out on this and other Pro-Set projects in Idaho (CP 207).

Finally, and significant in terms of the Johnson v. Spider Staging Corp. analysis as it pertains to safety rules and regulations, this project fell under the jurisdiction of Idaho federal OSHA which governs Idaho safety standards for all workplaces within the state of Idaho, and particularly this public works project (CP 123-129). Contrarily, Washington has opted to enact its own regulatory law designated as WISHA, whose very language limits it to work performed in the state of Washington. Id.

### **III. ARGUMENT OF COUNSEL**

A. Analytical Criteria For Resolution of Conflict of Law Issues Under Johnson v. Spider Staging Corp. It would be incorrect for this Court to proceed under the belief that the trial court failed to analyze the choice of law issues presented pursuant to the criteria mandated by the Washington Supreme Court. Conversely, in the

court's "Letter Opinion" dated November 20, 2008, and placed under the heading "Choice of Law," Judge Sypolt specifically stated:

Assuming *arguendo* that even if the court were to find that it has jurisdiction to proceed with this matter, the court would require that Idaho substantive law be applied, Ellis v. Barto, 82 Wn. App. 454, 918 P.2d 540, (1996). Washington has adopted the "most significant relationship" test as set out in the Restatement (Second) of Conflict of Laws § 145 (1971). Johnson v. Spider Staging Corp. 87 Wn.2d 577, 555 P.2d 997, (1996). See also, Rice v. Dow Chemical Co. 124 Wash.2d 205, 875 P.2d 1213 (1994), (Residency alone is generally not a significant factor in Washington's choice-of-law jurisprudence) See Rice, at 216.

What was not set forth in writing was the analysis, conclusions, and basis for the ultimate decision to apply Idaho law pursuant to the requisite criteria. Therefore, respondent will address this issue in accordance with that identified by the trial court and mandated by the Supreme Court.

The Johnson case was decided in 1976 and since that time has been the gold standard for resolution of conflict of law issues in the state of Washington. Respondent's research has identified approximately 108 cases that cite Johnson, although a significant number of those address the issue of *forum non conveniens* and therefore are not relevant to the issue before this Court. In its most

simplistic sense, Johnson sets forth a step-by-step road map for courts to implement when choice of law questions are raised.

The first question to be answered is whether there is a true difference between the law of the state of Washington and another state. Williams v. State, 76 Wn. App. 237, 240, 885 P.2d 845 (1994). An actual conflict exists where the results of an issue are different under the separate laws of the two states. Williams, *supra* at 240; Seizer v. Sessions, 132 Wn.2d 642, 649, 940 P.2d 261 (1997). If the laws or interest of the concerned state do not conflict, there is a “false” conflict and the local law where the court sits will be applied. Id. at 649. In this case, there are real and significant differences between Washington’s and Idaho’s substantive laws on which the jury will have to be instructed. Therefore, the threshold question for the application of Johnson v. Spider Staging Corp. has been met.

Having determined the existence of a conflict of law, Johnson and its progeny outline a two-step analysis. The first step acts as a condition precedent to step two and involves an analysis pursuant to which the court must determine which state has the most significant contacts or relationship to the cause of action. Johnson, at 580. This analytical process is to be accomplished pursuant to the criteria set

forth in Restatement (Second) of Conflict of Laws, Section 6 (1971) and section 145 which articulate the general principles which apply to a tort choice-of-law problem. Johnson, at 580. This step is not a process of merely counting the contacts pursuant to those subjects identified in the Restatement (Second) Section 145, but rather the undertaking of both a quantitative and qualitative evaluation involving a consideration of which contacts are most significant and a determination of where those contacts are found. Johnson, *supra*, at 581; Workman v. Chinchinian, 807 F. Supp. 634 (U.S.D.C. E.D. Wash. 1992, 636-637); Kelly v. Microsoft Corporation, 251 F.R.D. 544 (W. D. Wash.) In doing so, the Johnson court, and those courts that subsequently applied this principle, rejected the *lex loci delecti* choice of law rule. Johnson, at 580.

Pursuant to this doctrine of law, the court's analysis stops at this point and does not move on to step two unless the court determines that the contacts "are evenly balanced" between the two states. In Zenaida-Garcia v. Recovery Systems Technology, Inc., 128 Wn. App. 256, 260-261, 115 P.3d 1017 (2005), the court specifically stated:

If the contracts are evenly balanced, the second step of the analysis involves an evaluation of the interests and public policies of the concerned states to determine which state has the greater interests in determination of the particular issue.

See also, Myers v. Boeing Co., 115 Wn.2d 123, 133, 794 P.2d 1272 (1990). It is noteworthy that all of these cases cite Johnson and the Restatement as authority for this mandatory methodology in the resolution of choice of law issues.

Therefore, what Johnson and the Restatement identified as step two may or may not be required based on the resolution of step one. Put differently, the court only considers the interests and policies of each state when step one fails to resolve the issue based on the factors set forth in the Restatement (Second) Conflict of Laws, Section 145.

In those instances where the contacts are evenly balanced and the court is compelled to move on to step two, there is one general rule to be considered when addressing choice of law within a tort setting. In Johnson and the cases that followed, our courts have continually acknowledged the “general rule” that there is a presumption that in cases involving personal injury, the law of the place of the injury applies. However, this presumption is overcome if

another state has a greater interest in the determination of a particular issue. Myers v. Boeing Co., *supra*, at 133; Zenaida-Garcia v. Recovery Systems Technology, Inc., *supra*, at 261-262; Ellis v. Barto, 82 Wn. App. 454, 458, 918 P.2d 540 (Div. 3, 1996), *citing* Bush v. O'Connor, 58 Wn. App. 138, 144, 791 P.2d 915 (*citing* Restatement (Second) Conflict of Laws, Section 146 (1971), *review denied* 115 Wn.2d 1020, 802 P.2d 125 (1990)).

B. Real Differences Exist Between Washington and Idaho Law Compelling a Choice of Law Analysis. Idaho, the place of injury, differs significantly from Washington as to its laws that govern workplace injuries. These differences are largely found in the law governing allocation of fault, the application of worker's compensation law, set-offs reducing medical specials to the amount paid to health care providers as opposed to the amount charged by the provider, and Idaho's cap on general damages.

In terms of allocation of fault, under Idaho law, the jury is instructed to allocate fault to all potentially negligent parties, and most specifically the injured worker's employer. I.C. Sections 6-801, 802 and 803. Under Washington law, a jury is prohibited from allocating fault to the plaintiff's employer. In addition, under Idaho law:

Contributory negligence or comparative responsibility shall not bar recovery . . . if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought.

I.C. Section 6-801. Under this law, a plaintiff must be less than 50 percent responsible. Applied to the facts of the case at bar, there is the potential under Idaho law for the plaintiff's damage claim against Leone & Keeble to be barred completely if a jury determines that he was equally or more negligent than the defendant. Comparatively, 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.

Yet another difference arises in terms of work site standards pursuant to which Idaho applies the federally enacted OSHA standards, whereas Washington has adopted its own safe workplace standards under the title WISHA. In this regard, Washington follows what has become known as the Stute standard for accidents occurring within its borders (Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 463-4, 788 P.2d 545 (1990)), whereas Idaho does not have a similar

rule for construction site standards, choosing to rely on general negligence principles and the standards set forth in OSHA.

Finally, true differences exist between Idaho and Washington as it relates to the immunities granted pursuant to their respective worker compensation laws as evidenced by Idaho extending immunity to certain statutory employers and contractors performing work on public works contracts; neither of which are found in the laws of the state of Washington. I.C. Section 72-223.

C. Step One: An Evaluation of the Contacts Set Forth in the Restatement, Sections 6 and 145, Strongly Favor Idaho. In adopting the Restatement (Second), Conflict of Laws, Section 6, the Johnson court likewise adopted the four areas of evaluation identified herein which are:

- (a) The place where the injury occurred;
- (b) The place where the conduct causing the injury occurred;
- (c) The domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (d) The place where the relationship, if any, between the parties is centered.

See, Johnson v. Spider Staging Corp., *supra*, at 581.

The application of step one under Johnson is best served by charting these contacts which must be considered. Adopting the method found in Johnson, the undisputed facts of this case reveal the following:

<b>CONTACTS TO BE EVALUATED</b>	<b>WA</b>	<b>ID</b>
Place where injury occurred		<b>X</b>
Place where conduct causing injury occurred		<b>X</b>
Domicile, residence of parties	<b>X</b>	<b>X<sup>1</sup></b>
Place where relationship was centered		<b>X</b>

As the foregoing table overwhelmingly illustrates, both quantitatively and qualitatively the significant contacts lie with Idaho and not Washington. The only contact Washington has with the parties in this case is that they are both Washington residents, yet even this component must be strongly tempered by virtue of the fact

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<sup>1</sup> L&K, as a corporation, technically resides in both WA and ID. As for its Idaho status, L&K filed with the Idaho Secretary of State to do business in Idaho, filed a contractor's registration with the Idaho Bureau of Occupational Licenses, obtained a Public Works Contractor License from the Idaho Division of Public Safety, paid unemployment taxes to the Idaho Department of Labor, paid property taxes to Kootenai County, and made payments to the Idaho State Insurance Fund for worker's compensation. See Letty Misner Affidavit, CP 121-122.

that the respondent lawfully enjoys dual residence. Unlike the defendant in Johnson, the respondent was a resident of Idaho in every respect as it applies to this project. The facts are undisputed that it was performing work in the state of Idaho and that this work was being performed as an Idaho public works project. As noted and outlined under the Statement of the Case, it is undisputed that the respondent performs 30 to 40 percent of its work in Idaho, is fully licensed and registered as both a general contractor and public works contractor in Idaho, pays all Idaho taxes the same as a company that is incorporated in Idaho, and pays Idaho worker compensation premiums for work site injuries on the project.

This leaves the appellant's personal residence as the only pure contact with the state of Washington. However, even this must be tempered by the facts that the appellant's primary employer is exclusively an Idaho corporation (PayCheck Connection) and that his secondary, yet practical employer is also an Idaho corporation (Pro-Set). In addition, the appellant's employment required him to pay Idaho state income tax, and perhaps most importantly, the appellant filed a claim for worker's compensation benefits with the Idaho State

Fund and has received benefits for the cost of his medical treatment and wage loss from the Idaho State Fund.

Since residence of the appellant is the “sole” contact with Washington, it is imperative that this Court remain cognizant of the legal fact that our courts have consistently held that “residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law.” Rice v. Dow Chemical Co., 124 Wn.2d 205, 216, 875 P.2d 1213 (1994). See also, Bush v. O’Connor, *supra*.

One final factor that is uniquely applicable when discussing what weight should be given the appellant’s residence, standing literally alone as the only contact with Washington, is the reasonable expectation of the parties. As noted by the United States Supreme Court in Phillips Petroleum Co. v. Shutts, 472 U.S. 979, 822, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), as quoted in Kelly v. Microsoft Corporation, *supra*:

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 a forum’s law can also be gauged by examining the expectations of the parties.

(Emphasis added.)

Applying this to the facts of the instant case, it goes beyond one's ability to stretch their imagination to suggest that either the appellant or the respondent expected a claim for personal injuries on this Idaho public works project to be governed by Washington law. It is inconceivable that one could objectively argue that the appellant expected this claim to be governed by Washington law when he had long been an employee of an Idaho corporation which had continuously "leased" him out to yet another Idaho corporation to perform work in Idaho. While he woke up each morning in Washington, he immediately got into his vehicle and drove to the state of Idaho where he performed his job. Every two weeks he received a paycheck from an Idaho corporation and had a deduction for his Idaho state income tax. Finally, the first thing he did upon being injured was to lawfully look to the Idaho State Insurance Fund for payment of his medical bills and lost wages.

Next consider 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 any objective standard, had the right to reasonably expect its conduct would be evaluated under the laws of the state of Idaho.

In conclusion, under step one, the contacts favoring the application of Washington law are so insignificant that they can only be characterized as *de minimis* at best. In summary, (a) the injury took place in Idaho; (b) the alleged negligent conduct, both on the part of the respondent and the appellant, took place in Idaho; (c) the appellant was domiciled in Washington while the respondent was domiciled in both Washington and Idaho; and (d) the relationship between the appellant, a leased employee of Pro-Set through PayCheck, and Leone & Keeble was centered exclusively in Rathdrum, Idaho, at the site of the construction project overseen by the state of Idaho as a public works project.

Under these circumstances, the Johnson court, and all those which have followed that decision, hold that the conflict of law analysis stops at this point without further consideration of any conflicting interests and policies of the two states. This is not a matter of discretion or even a gray area; it is a matter of clear and

unambiguous legal precedent. For these reasons, the respondent would respectfully submit that this Court must apply Idaho law to all conflicting issues.

In the interest of being thorough, and solely for the purpose of argument, the respondent will address each of the conflicting issues under the second step of the Johnson and Restatement criteria. As will be demonstrated, this analysis results in the same conclusion that it is the law of the state of Idaho which should be applied across-the-board on all issues where the laws between Washington and Idaho differ.

D. Step Two: The Public Policies and Interests of the Concerned States Favor The Application of Idaho Law.

1. General Rules Pursuant to Johnson and the Restatement (Second), Conflict of Laws, Section 146. In adopting the Restatement's significant contacts doctrine for the resolution of choice of law issues, our state also adopted and follows Section 146 entitled "Personal Injuries." That section 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 principles stated**

in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

As a starting point, the location of this accident and the injuries arising therefrom clearly occurred in the state of Idaho. Furthermore, any wrongdoing on the part of the respondent occurred exclusively in the state of Idaho. With this in mind, the respondent would direct this Court to comment d to Section 146, which provides:

*When conduct and injury occur in same state.* In the majority of instances, the actor's conduct, which may consist either of action or non-action, and the personal injury will occur in the same state. In such instances, **the local law of the state will usually be applied to determine most issues involving the tort. This state will usually be the state of dominant interest, since the two principal elements of the tort, namely, conduct and injury, occurred within its territory.**

Clearly, in actions for personal injuries, there is a stated preference or tendency favoring the state where the injury occurs. This partiality finds even further support in the Restatement (Second) Conflict of Laws, Section 156(2) (entitled "Tortious Character of Conduct"); Section 157(2) (entitled "Standard of Care"); Section 159(2) (entitled "Duty Owed to Plaintiff"); and Section 160(2) (entitled "Legal Cause"); all of which specifically provide, "The applicable law will usually be the local law of the state where the injury occurred." [Emphasis added.]

Therefore, not only must the court determine under step one that the “Contacts” are evenly balanced, but in addition thereto, that as to any specific issue, a balancing of the interests and policies of Washington override those of the state of Idaho and compel the application of Washington law. Under the facts of the instant case, not only does an objective consideration of the contacts under step one compel the application of Idaho law to all issues in conflict, the record does not provide a basis under step two for not adhering to the general rule set forth above. In support of this proposition, the respondent will now analyze those interests and policies on an issue-by-issue basis.

2. The Application of Idaho’s Tort Law. This case involves an Idaho construction site injury where all work was being carried out under the supervision of the state of Idaho as a public works project. More specifically, it involved a fall occurring as a result of the appellant not being tied off and his supervising employer (Pro-Set) implementing a “Safety Monitor” fall protection method as opposed to being tied off. The work was performed pursuant to OSHA as accepted by the state of Idaho, the appellant was employed by an Idaho corporation and 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. The respondent was in every respect an Idaho contractor having complied with all that state's rules, regulations, and laws and paying all Idaho fees and taxes. Therefore, not only did the respondent have every right to believe that a legal claim for injuries would be governed by Idaho tort law, but equally important, the appellant would have had no reason to expect otherwise. This is evidenced by his immediate application for benefits under the Idaho worker compensation program.

As it relates to the Idaho rules governing the percentage of fault allocation, Section 6-802 of the Idaho Code directs that "[t]he court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and percentage of negligence attributable to each party." Id. Blome v. Truska, 130 Idaho 669, 946 P.2d 631, 634 (1997). I.C. Sections 6-801 through 803, when read together, reveal a logical and comprehensive treatment of the rights of parties involved in a negligence action. As set forth in the 1971 session laws, those sections provide:

SECTION 1: Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence or gross negligence or *the person* against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to *the person* receiving.

SECTION 2: The court may, and when requested by *any party shall*, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering.

SECTION 3: (1) The right of contribution exists among joint tortfeasors but a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

Act of July 1, 1987, ch. 186, §§ 1-3(1), 1971 Idaho Sess. Laws 863-64 (emphasis added); Id. at 635, 946 P.2d 632.

These sections evidence a 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).

The Idaho policy calling for the apportionment of fault to an otherwise immune employer is the same as that discussed in Blome v. Truska, *supra*. Given the Idaho policy of not permitting any form of double recovery, and the state's privately funded worker compensation program pursuant to which an employer and/or its private insurer are reimbursed for allowable medical payments and lost wages, it is its strong policy that any fault attributed to the employer must be applied to the amount of the lien which is reduced accordingly. Blome v. Truska, *supra*. See also, McBride v. Ford Motor Co., 105 Idaho 753, 673 P.2d 55 (1983), in which the court held that the inclusion of the plaintiff's employer on the verdict form permitting apportionment of fault to him was "proper and necessary for a complete determination of the rights and obligations of the parties in this action." *Id.* at 764, citing McDrummond v. Montgomery Elevator Co. 97 Idaho 679, 551 P.2d 966 (1976).

As to these issues, this Court would also do well to consider the appellant's complaint against the respondent. His cause of action is founded upon the general allegation that the respondent was negligent in failing to provide a safe workplace by failing to enforce the use of "tie off" as opposed to a "safety monitor" system at all

times. While this contention is disputed, it nonetheless identifies the tort doctrine relied upon by the appellant.

The appellant would have this Court apply Washington construction site negligence law based solely on the fact that he goes to bed in the state of Washington. In setting forth this proposition, the appellant would ask this Court to hold that the case should be governed by the provisions of WISHA and the duties espoused in the case of Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 788 P.2d 545 (1990). However, both of these authorities, on their face, and within their individual stated scope, clearly are limited to accidents occurring within the state of Washington.

WISHA specifically provides that its purpose is to further the following state interest:

in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman **working in the state of Washington**[.]

RCW 49.17.010 (emphasis added). Likewise, the Stute court established the same parameters of its holding when it held:

[t]hus, to further the purposes of WISHA to assure safe and healthful working conditions **for every person working in Washington**, RCW 49.17.010, we hold the

general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.

Stute v. P.B.M.C., Inc., *supra*, at 463-464 (emphasis added). It goes beyond the realm of reason, given these stated purposes, that either the Washington Legislature or the Supreme Court of the state of Washington ever conceived that a court should take Washington work site standards and compel their enforcement upon a sister state where a construction site accident occurred. The appellant would have Washington follow its residents to any state where they chose to work without regard to their decision to perform that work outside of Washington. Such a suggestion is even more incredulous when one considers the fact that all acts related to liability occurred in the sister state. In short, Washington has no interest or policy that would support such a transgression of the rules governing choice of law. This must be weighed against Idaho's interests and policies for the resolution of personal injury claims arising out of a construction site accident in Idaho being resolved under its tort law. This applies to the sub-issues of comparative negligence law, the cap on general damages and employer liability laws, the latter of which is tied directly

to its worker compensation reimbursement system and the premiums paid for that protection.

The state of Idaho succinctly set forth its underlying rationale and purpose of its comparative negligence and worker compensation laws in the case of Schneider v. Farmers Merchant, Inc., 106 Idaho 241, 243, 678 P.2d 33 (1983) as follows:

If an employee brings a suit against a third party in addition to receiving workmen's compensation benefits, **this Court has established a system of apportioning the employee's damages between the employer and third party.** The focus of this Court in apportionment is two-fold: (1) to achieve an equitable distribution of liability for the employee's injuries **as between the employer and the third party**, based on the facts of each case, and (2) to prevent the overcompensation of an employee, *i.e.*, to prevent the employee from retaining both the workmen's compensation benefits and the full tort recovery. [Emphasis added.]

There can be no credible argument presented in deference to the legal fact that Idaho has a strong interest and policy of restricting this recovery to those instances where his fault is less than 50 percent and not permitting an Idaho employer (PayCheck and Pro-Set) to be reimbursed if a jury concludes that the employer itself proximately caused any percentage of the worker's injury. Idaho explained its policy and purpose as follows:

The reimbursement of workmen's compensation benefits to a negligent employer has been denied largely because it is contrary to the policy of the law for an employer (or his insurer) to profit from his own wrong.

Schneider, 106 Idaho at 244.

In addition, and consistent with the above law governing negligence in general and work site injuries in particular, Idaho, in furtherance of its policy to not permit unjustified double recovery, has adopted I.C. Section 41-1840, which compels the court, subsequent to entry of a verdict, to reduce the medical lien to the 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. Beale v. Speck, 127 Idaho 521, 903 P.2d 110 (1995), in which the court held that the statute compels that prepayments must be credited upon any settlement with respect to the same damage, expense or loss or judgment entered for such losses. Id. at 538. In accord with the statutory language, the amounts credited must be for the same damages as those recovered by the plaintiff at trial. Id. The Beale court went on to state that to hold otherwise would interfere with the jury's ability to award what it deemed appropriate damages for 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).

There is nothing contained in either the Johnson case or any of the cases that followed that would subordinate the interests and policies of the state of Idaho to a differing law in the state of Washington. This is found in the examination of the facts of each case and the purpose espoused for the application of a particular state's laws. The common thread found in Johnson and the other cases is the interests and policy of Washington to employ its laws, where applicable, to act as a deterrent to negligent conduct **committed in the state of Washington resulting in injury to a Washington resident in another state.**

In Johnson, *supra*, the plaintiff was a resident of Kansas and was killed when he fell from scaffolding that his heirs contended was negligently designed. The scaffolding was designed and manufactured by the defendant in the state of Washington. In addition, the defendant advertised and sold its products in all 50 states. Kansas law provided a cap on general damages whereas Washington did not. Herein lies the conflict of law issue. In applying Washington law, the Johnson court, having determined that the

contacts were equal, went on to step two. Under the facts presented, the court held that the purpose of a cap on general damages was to “deter the kind of conduct within its borders, which wrongfully takes life.” Johnson, *supra* at 583. That court correctly reasoned that Kansas had no interest in deterring conduct in Washington, whereas the latter most clearly did. Therefore, since the cap would not protect a Kansas company, and all of the conduct giving rise to the plaintiff’s death occurred in Washington by a Washington corporation, this state’s policy was overriding calling for the application of Washington law, holding at page 583: “Unlimited recovery will deter tortious conduct and will encourage respondents (defendant) to make safe products for its customers.”

Clearly, the result would have been different under the facts of the instant case where the **deterrence** factor compels the application of Idaho law. Unlike Johnson, all acts complained of by the appellant occurred in the state of Idaho under its rules and regulations and its compensation laws. It is Idaho who has a vested interest in deterring negligent conduct within its borders and compensating workers injured within its borders under its compensation laws. Again, the only basis offered by the appellant herein is his residence, which standing

alone, has never been held sufficient to warrant the application of the forum law. Rice v. Dow Chemical Co., *supra*.

As it relates to the choice of law related to the cap on general damages, it is imperative to focus on the justification given for applying Washington law, to wit: deterrence against Washington corporations whose negligence committed in Washington injures individuals in another state and compare that to the interests and policy of Idaho in mandating a cap. The factor identified by Washington is nonexistent under the undisputed facts before this Court in this case. In fact, the contrary is true. More specifically, Idaho has a strong interest in limiting general damages which affords an incentive to corporations like the respondent to perform work in Idaho. Kirkland v. Blaine County Medical Center, 134 Idaho 464, 4 P.3d 1115 (2000). This is consistent with the fact that respondent performs 30 to 40 percent of its work in Idaho with the expectation that its laws will govern all claims arising out of that work. What was present in Johnson and is lacking under the facts of this case is the nexus between the alleged acts of negligence and the state where those acts were performed. If the appellant were alleging that the respondent had committed a negligent act in Washington and the

consequences of that conduct came to fruition in Idaho, then the Johnson reasoning might be worth consideration, although it would still fail for the other reasons set forth above under step one. However, absent those facts that act as a condition precedent to the justifications set forth in Johnson, the appellant's argument is unsupported.

For a comprehensive understanding of the underlying policy for Idaho as it relates to a cap on general damages, as codified at I.C. Section 6-1603, the lead case is Kirkland v. Blaine County Medical Center, *supra*. That court held that the cap did not violate the right to a jury trial since the statute does not infringe upon the jury's right to decide cases. *Id.* at 469. The jury was still allowed to act as the fact finder, and the statute simply limits the legal consequences of the jury's finding. *Id.* at 469. That court went on to hold that the legal consequences and effect of a jury's verdict were matters to be addressed by the legislature. *Id.*

In the comparative analysis, it is noteworthy that the legislative history behind I.C. Section 1603 reveals that the statute was passed as part of a larger legislative package aimed at addressing concerns that large civil jury verdicts were driving up the cost of liability

insurance. Kirkland, *supra* at 470. As part of the bill which included the cap, the legislature also included reforms to the liability insurance business so Idaho policyholders would have more control over the prices and conditions of liability insurance. Id. An additional policy supporting the cap in the mind of the legislature was that its enactment would provide individuals and corporations doing business in Idaho more control over the prices and conditions of liability insurance, it would encourage settlements by giving defendants additional incentive to settle and by giving courts greater latitude to impose sanctions on those bringing frivolous lawsuits as well as their contemporaneous abandonment of joint and several liability. Id. at 470. By striking this balance between a tort victim's right to recover non-economic damages and society's interests in preserving the availability of affordable liability insurance, the legislature "is engaging in its fundamental and legitimate role of 'structur[ing] and accomodat[ing] the burdens and benefits of economic life.'" Id., *citing Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10th Cir. 1996). Finally, and in accord with the Idaho legislature's intent to enact a statutory scheme that provided balance, it excluded tortfeasors who

are found to have acted recklessly or feloniously from the limitation on general damages. Id. at 470; I.C. Section 6-1603.

An objective review of Washington cases quickly documents that the respondent's position favoring the application of Idaho law is well supported. In the case of Ellis v. Barto, 82 Wn. App. 454, 918 P.2d 540 (Div. 3, 1996), after applying the Johnson criteria and the Restatement, concluded that Idaho negligence law applied to a motor vehicle accident involving Washington residents while operating a motor vehicle in the state of Idaho. In Ellis, the issue presented was a conflict in the rules of the road of the respective states as well as which statute of limitations would govern. An application of the Idaho law would result in the plaintiff's claim being barred. In holding that Idaho law applied, this Court stated at page 459:

Although a forum state has an interest in protecting its residents generally, as well as establishing requirements for licensing, registering and insuring motor vehicles and drivers domiciled within the state, such interest does not extend so far as to require application of the forum state's rules of the road to an accident not occurring within its boundaries.

Likewise, under the facts of this case, any interest in Washington in providing the benefits of its laws in total derogation of the laws of Idaho is not legally supportable.

In Workman v. Chinchinian, 807 F. Supp. 634 (E.D. Wash. 1992), the court was confronted with a professional negligence claim against a physician licensed to practice in both Washington and Idaho. The plaintiff was an Idaho resident who alleged that the defendant negligently failed to identify a tissue sample as a phylloides-type tumor resulting in the plaintiff suffering severe injuries including a mastectomy. The tissue was examined by the defendant in his clinic in the state of Washington. The Workman court concluded that the “significant contacts” were evenly balance and therefore proceeded to step two of the Johnson criteria. Id. at 639. Again, the driving issue was whether the Idaho cap would apply. The Workman court applied Washington law on the following basis:

Washington allows a tort victim full recovery without limitation on damages. The primary purpose of this ‘no-cap’ policy is to **deter wrongful conduct**. Johnson, 87 Wn.2d at 583, 555 P.2d 997 (**‘the sting of unlimited recovery . . . more effectively penalize[s] the culpable defendant and deter[s] it and others similarly situated from such future conduct’**) [Emphasis added.]

Workman, *supra*, at 640. Again, the facts finding the negligent act was committed in Washington and the defendant was practicing in Washington when he committed those acts afforded the basis for the

implementation of the deterrent effect as a basis for choosing Washington law. It is also noteworthy that under the facts of Workman, Idaho had no similar interest given the location of the conduct giving rise to the claim. Again, those factors are not only absent in the present case, but in fact the opposite is true which compels the choice of Idaho over Washington.

In Zenaida-Garcia v. Recovery Systems Technology, Inc., *supra*, Division I of the Washington State Court of Appeals was faced with determining whether the Oregon or Washington statutes of repose should apply to a personal injury accident which occurred in Oregon. The product had been manufactured in Washington by the defendant, a Washington corporation. After determining that the contacts were evenly balanced under step one, the court went on to step two. The conflict arose due to Oregon's statute of repose being eight years, whereas Washington's was twelve years. The Zenaida-Garcia court once again looked to the purpose of the Washington State Tort Reform Act, the preamble for which states: "It is the further intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increased product liability insurance costs and unwarranted exposure to product

liability litigation.” *Id.* at 1022. The court then adopted the Johnson court’s “deterrence” argument holding that when another state has no interest in the application of its law and by adopting Washington law the court can act to encourage the proper design and manufacturing of safe products **in Washington by Washington manufacturers**, Washington had a greater interest, and applied the Washington statute of repose. That court did so noting that Oregon had no interest in how long a Washington company would be protected from suit under the statute of repose. The significance is that the policy relied upon once again was the interests of the sister state in the law in question **coupled with the deterrent effect on future tortious conduct by Washington manufacturers thereby encouraging them to produce safe products**. These overriding circumstances are not present in the instant case since Idaho does have an overriding interest in these issues and there is not any deterrent effect on any conduct within Washington since all acts (by analogy, the manufacturing process) took place in Idaho.

The respondent would also respectfully direct this Court to the case of Brewer v. Dodson Aviation, 447 F. Supp.2d 1166 (W.D. Wash. 2006). In Brewer, the estates of a pilot and his passenger filed

a products liability action against a manufacturer of dry air vacuum pumps, and a company that installed used pumps in aircraft. While the decedents were both residents of the state of Washington, neither corporate defendant resided in Washington and more importantly, all of the conduct alleged to have been committed by the defendants occurred in North Carolina and Ohio (as well as a division office in Kansas), both of which had statutes “capping” general damages and the applicable statute of repose. The plane had lifted off within the boundaries of the state of Washington and the actual crash occurred in Oregon. The court characterized the location of the injury as fortuitous and did not consider this as having any significance to the determination of choice of law.

Applying the Johnson case, the court took pains in its analysis of the factors identified in step one. As to the Ohio and Kansas corporation, the only contact was a warning letter sent by Parker Hannfin to the plaintiff-decedent. The court held this did not support a relationship centered in Washington, but rather held that the relationship, to the extent there was one, occurred where this defendant designed and manufactured the subject pump which found its way into the plaintiff’s aircraft which was Ohio. This was the state

wherein the conduct causing injury occurred. Adopting the language and holding in Zenaida-Garcia, *supra*, the court held that “the conduct causing the injury, and the place where the relationship is centered is . . . where the defendant designed and manufactured the trammels.” In Zenaida-Garcia, that location was Washington, whereas in Brewer, it was Kansas, and in the case at bar, it is Idaho. The Brewer court held as to all defendants, step one resulted in a finding that the most significant contacts were in the foreign jurisdictions and that their law must be applied; not Washington’s. Interestingly, the court then went on to discuss step two on the sole premise that “[a]ssuming, *arguendo*, that the Court considers the contacts ‘evenly balanced’ between Ohio and Washington, the Court turns to the second step of the choice of law analysis to determine which state has the stronger policy interests.” Note that the court acknowledged that for purposes of its final holding, the analysis stopped at step one.

In discussing the step two factors, and specifically the issue related to whether a cap on general damages should be applied, the court stated:

The Washington Supreme Court has acknowledged that compensating its residents for personal injuries ‘is a real interest,’ **but is not ‘an overriding concern.’**

Rice, 124 Wn.2d at 215-216, 875 P.2d 1213; see also Restatement (Second) Conflict of Laws, section 145, cmt 3 (1971) ('the fact . . . that one of the parties is domiciled or does business in a given state usually carries little weight of itself.'). The Washington Supreme Court in Rice further stated that 'residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law.' Rice at 216. The Rice court rejected the position that Washington law should be applied 'in all cases involving any Washington resident, regardless of where all the activity related to the tort occurred.' Id.

Here, Washington's interest is minimal because the injury-causing conduct did not occur within its borders. Cf. Johnson, 87 Wn.2d at 583, 555 P.2d 997 (concluding that Washington's interest is strong where **Washington manufacturers' conduct is at issue**). To the extent Washington has an interest in deterring tortious conduct and encouraging all manufacturers to make safe products for consumers, see Zenaida-Garcia, 128 Wn. App. at 263-65, 115 P.2d 1007, Rice makes it clear that a plaintiff's residency in Washington is not enough in a products liability action to elevate Washington's interests above another state's interests where the injury-causing conduct occurred in the other state. [Emphasis added.]

Id. at 1180-81.

While the instant case is a construction site injury as opposed to a products liability action, the same reasoning is equally applicable. It is Idaho that has an interest in deterring specific conduct within its borders and has the exclusive right to set the scope and parameters

of that deterrence as well as how it will be applied to conduct within its borders.

3. The Application of Idaho Worker Compensation Law. Again, only for purposes of argument, respondent will address those issues falling under the heading of worker compensation laws. These would include set-offs for actual amounts paid by the Idaho State Insurance Fund and any immunities extended under I.C. Section 72, et al.

Literally all of the arguments and authorities set forth immediately above are equally applicable to the application of Idaho worker compensation law. However, as to these issues, the respondent's position finds even more justification given the appellant's employment by an Idaho corporation, to perform work for an Idaho corporation, to be covered by Idaho's worker compensation laws, to exercise his right to make a claim and accept benefits under Idaho worker compensation law, and the fact that Washington Labor and Industries has absolutely no interest in the lien or any immunities granted under Idaho law.

In addition, and at the risk of being redundant, it is particularly important that we remain mindful that every court, including Johnson,

has made note of the importance of what law the parties to the action “**reasonably expected**” as governing their relationship and rights in the event a claim was made.

It defies all logic to even suggest that the appellant ever thought a claim arising out of an injury would be governed by Washington law having made the decision to be employed by PayCheck, having worked for years for Pro-Set in Idaho, having paid Idaho income tax and having relied upon Idaho worker compensation insurance to pay the cost of medical treatment and lost wages should he be injured. Equally compelling is all of the steps taken by the respondent to qualify as a bidder for this Idaho public works project, to be granted that contract, and to carry out that work in Idaho including being licensed in Idaho both as a general contractor and as a public works contractor, paying all fees, paying all Idaho taxes to do business and paying all worker compensation premiums for its employees.

In conclusion, it is Idaho and only Idaho that has an interest and policies that are significant to those issues governed by this body of law.

#### IV. CONCLUSION

The respondent has never suggested that the choice of law issues were not controlled by this state's longstanding reliance on the applicable provisions of Restatement (Second) Conflict of Law, the Supreme Court decision in Johnson, and all of the cases that have followed and applied Johnson since its inception. The record clearly documents that the respondent has relied upon Johnson, its progeny and the Restatement from the inception of this case. The record further documents that the Honorable Judge Greg Sypolt clearly applied Johnson in reaching his conclusion that Idaho law governed the issues of conflict. Therefore, the issue is whether the trial court properly applied that authority to the facts before it and this Honorable Court.

The respondent would respectfully submit that all choice of law issues are resolved at the conclusion of step one and the determination that the significant contacts identified in the Restatement overwhelmingly favor Idaho. Absent a finding that the contacts are "evenly balanced," Idaho law must be applied.

Finally, the appellant gains nothing by an analysis under step two given the fact that as to each and every issue in which the laws

of Idaho differ from Washington, it is Idaho and only Idaho that has the controlling interests and is vested in its policies being adhered to and governing the rights of these parties.

For these reasons, respondent submits that the only law that can be applied to each issue raised is that of Idaho and this Court should so hold.

RESPECTFULLY SUBMITTED this 10 day of October, 2011.

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

By:



ANDREW C. BOHRNSEN  
WSBA No. 5549  
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN SUPPORT OF THE APPLICATION OF IDAHO LAW was served on the following, by the method indicated on the 10 day of October, 2011:

Richard 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