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OCT 10 2011

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DIVISION III
STATE OF WASHINGTON
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NO. 277011

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STATE OF WASHINGTON**

DELBERT WILLIAMS, APPELLANT

v.

LEONE & KEEBLE, INC., RESPONDENT

Appeal from the Superior Court of Spokane County
The Honorable Gregory D. Sypolt
No. 08-2-03318-4

SUPPLEMENTAL BRIEF OF APPELLANT

LAW OFFICES OF RICHARD McKINNEY

By: Richard McKinney, WSBA No. 4895
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Spokane, Washington 99201
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1. As defined in the cases there is a “false conflict” between Washington and Idaho law.

Ellis v. Barto, 82 Wn. App. 454, 918 P.2d 540 (1996) is the case cited by the trial judge to justify application of Idaho law as to all conflict of law issues in the present case. Yet, ironically *Ellis* is one of the cases which in dicta cites authority that there is no conflict of law in the present case.

Ellis at 457 states, “A choice of law determination is made only if there is an actual conflict between the laws or interests of Washington and the laws or interests of another state.” (emphasis supplied) As precedent for this rule *Ellis* cites *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01, 864 P.2d 93(1994). For this same principle see *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 230 P.3d 625 (2010) (false conflict if there is no conflict in the laws or interests of more than one state whose laws might apply); *International Tracers v. Hard*, 89 Wn.2d 140, 570 P.2d 131 (1977).

Simpson, *supra*, is an example of a false conflict because the laws of two states (Washington and California) did not conflict despite differences in

wording of the laws. Yet there may also be a false conflict if the interests of Washington and another relevant state do not conflict.

A Washington case which does not consider the law of a state which has no interest in applying its law is *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 618 P.2d 1330 (1980), *aff'd*. 96 Wn.2d 416, 635 P.2d 708 (1981). *Kammerer* holds that California's punitive damages law applies to a Washington corporation which allegedly committed fraud in California. *Kammerer* holds that Washington had no interest in providing a lighter sanction than California for fraudulent conduct.

Therefore, *Kammerer* applied California punitive damages law.¹

¹ *Kammerer* at 519-20 was based upon an analysis of RESTATEMENT (SECOND) CONFLICT OF LAWS §148(1) (1971). This section relating to damage awards presumes application of the law of the place of injury, but permits application of another state's law if it has a greater interest. In *Kammerer* neither the Supreme Court nor the Court of Appeals bothered to "count contacts." In fact, the Court of Appeals at 520 stated that "the Court is not simply to count contacts, but must consider the competing policies and interests of the two states..." (citing *Johnson v. Spider Staging*).

Similarly, in the present case the Supreme Court directed the Court of Appeals to follow RESTATEMENT (SECOND) CONFLICT OF LAWS §146 (1971). This section requires that the law of the place of injury apply unless another state has a greater interest in applying its law. §146 does not mandate the intermediate step of counting contacts just as §148(1) does not mandate that intermediate step.

In considering the interests of a state, the analysis must be limited to the interests of each relevant state in protecting the parties to the litigation. *Mentry v. Smith*, 18 Wn. App. 668, 571 P.2d 589 (1977) involves an Oregon car wreck involving parties who were all Washington residents. In resolving the conflict of law issue in favor of Washington law *Mentry* specifically gives little or no weight to the interests of the Oregon driver of another vehicle in the accident who was not a party in the *Mentry* case.

In the same way *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 830, 51 P.3d 1190 (2003) disregards, for purposes of conflict of law analysis, the interests of a non-party Oregon company which owned, operated, maintained and installed the vehicle wheel assembly which failed. Both *Mentry* and *Martin* only consider the interests of parties to the litigation when conducting an interest analysis for conflict of law purposes. Accordingly, in the present case, the interests of such entities as Pro-Set (Williams' immediate Idaho employer) or the Idaho Insurance Fund should not be considered for purposes of an interest analysis.

Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997 (1976) is one of the authorities which the Supreme Court specifically directed the Court of Appeals to follow in the present case. *Johnson* involved statutory

caps in Kansas where an accident occurred. The Washington Supreme Court holds that the statutory caps were designed to protect Kansas defendants. Since the defendant in *Johnson* was a Washington corporation, the Washington Supreme Court in *Johnson* holds that there was no conflict between the interests of the Washington law requiring no statutory caps and the interests of the Kansas law imposing statutory caps.²

Secondary authorities agree that there is a “false conflict” if one relevant state has no interest in applying its law. *Potlatch No. 1 Credit Union v. Kennedy*, 76 Wn.2d 806, 809, 459 P.2d 32 (1969) cites as authoritative a classic law review article by California Chief Justice Roger Traynor. Traynor, Is This Conflict Really Necessary? 37 TEX. L. REV. 657, 668-75 (1959) states that there is a “false conflict” if only one state has an interest in applying its law.

Note, False Conflicts, 55 CAL. L. REV. 74, 77 (1967) reaches the same conclusion as Justice Traynor. When only one state has an interest in

² Admittedly, *Johnson* concludes that there were no competing interests in the laws of the two states after evaluating all the contacts in Washington and Kansas as prescribed in RESTATEMENT (SECOND) CONFLICT OF LAWS §145 (1971). However, *Johnson* would have been decided the same way, but in a more succinct and straightforward manner, if the Supreme Court had merely found a false conflict between the laws of Washington and Kansas. Williams suggests that the false conflict methodology is the appropriate one in the present case based upon the Supreme Court’s specific reference to §146 of the RESTATEMENT (SECOND). See pp. 6-12, *infra* for discussion of §146.

applying its law, there is a false conflict. This California Law Review article is cited with approval in *Hurtado v. Superior Court*, 11 Cal.3d 574, 114 Cal. Rptr. 1066 (1974). *Johnson v. Spider Staging* cites *Hurtado* with approval.³

The two cited secondary sources and *Hurtado* lead to the conclusion that there is no conflict of law in this case. Only Washington has an interest in applying its law. Therefore, Washington law should apply. There is no party in the litigation that Idaho has an interest in protecting by applying its law.

This conclusion contradicts the holding of *Ellis*. However, *Ellis* does not involve a fact pattern where the plaintiff has no right of action in Idaho (as is confirmed in footnote 3 of the Supreme Court opinion in the present case). Therefore *Ellis* cannot apply in the present case because Idaho has no “rules of the road” to apply in the present case. Other than an interest

³ The facts of *Hurtado*, involving a car crash are instructive. Hurtado resided in Mexico which had statutory caps. Hurtado died in a California car wreck caused by defendants who resided in California. *Hurtado* finds this to be a false conflict because Mexico had no interest in imposing its statutory caps to protect California defendants. In finding that this was a false conflict, *Hurtado* cited Currie, Selected Essays on Conflict of Laws (1963) at 189. Both *Burnside* and *International Tracers*, *supra*, provide Washington authority for adoption of Professor Currie’s treatise.

in applying its “rules of the road,” Idaho has no interest in applying its law when both parties to the present litigation are Washington residents.

Note: Williams raised the issue of false conflict on p. 9 of his initial Memorandum to the trial court. **CP 12**. Williams also discussed false conflict on pages 10-11 of his Response to L&K’s Motion to Dismiss. **CP 236-37**. Williams discussed the lack of interest of Idaho in applying its law on pp. 10-12, 17-20, of his Response to L&K’s Motion to Dismiss. **CP 236-38, CP 243-45**. Therefore, the trial judge was apprised of all of the issues raised in this section of the brief.

2. §146 of the RESTATEMENT requires an interest analysis to resolve any conflict of law issue which exists.

The Supreme Court in n.6 of its decision in the present case asks the Court of Appeals to consider two authorities in resolving any conflict of laws issue: RESTATEMENT (SECOND) CONFLICT OF LAWS §146 (1971) and policy considerations found in *Johnson v. Spider Staging, supra* (emphasis supplied). §146 states that in personal injury cases the law of

the state of injury applies unless another state has a greater interest in applying its law.

In applying §146 a court should not consider actions of entities that are not parties to the litigation at hand. See *Mentry* and *Martin* discussed on pp. 3-4 of this brief. It is noteworthy that *Martin* disregards any interests of non-parties while conducting an interest analysis under §146 of the RESTATEMENT.

On its face §146 is simply a statement of the interest analysis in personal injury cases involving one or more conflicts of law. §146 does not incorporate §145 which involves a counting of four specific contacts mentioned in §145.

The first known Washington case which relies upon §146 is *Bush v. O'Connor*, 58 Wn. App. 138, 144, 791 P.2d 915 (1990). *Bush* states at 144,

“In large part the answer to the [choice of law] question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred (quoting comment c to §146 of RESTATEMENT).”

This language is consistent with the following language from *Potlatch Fed. Credit Union, supra* at 810 which states:

“Certainly an identification of contacts is meaningless without consideration of the interests and public policies of potentially concerned states and a regard as to the manner and extent of such policies as they relate to the transaction at issue.”

Potlatch further states on the same page,

“Application of this principle does not involve merely counting the contacts...Rather these contacts are guidelines indicating where the interests of particular states may touch the transaction in question.”

Potlatch involves a conflict of law analysis in a contract dispute, but the relevance of its holding to “counting of contacts” applies in the present case. *See also Warriner v. Stanton*, 475 F.3d 497 (3d Cir. 2007) which confirms that the contacts recited in § 145 of the RESTATEMENT are merely tools to determine which state has the greater interest in applying its law.

Warriner states:

“Factors drawn from §145 of the Restatement (Second) of Conflicts of Law (1971) guide New Jersey courts in

applying the governmental interest test in tort cases. See *Fu v. Fu*, 730 A.2d 1133, 1140-41 (N.J. 1999). Those factors [from comment b of §145] are grouped as follows:

(1) the interests of the interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states. *Id.* The most important of those factors in the context of a tort claim is the competing interests of the states. *Id.* at 1141. As discussed by the New Jersey Supreme Court in *Fu*, the initial focus ‘should be on what policies the legislature or court intended to protect by having that law apply...’”

Warriner confirms the accuracy above quoted sections from *Bush* and *Potlatch*, i.e. that the contacts enumerated in §145 are simply guides in determining which state has the greater interest. *Fu*, upon which *Warriner* relies, refers to the above quoted comment b of §145 and confirms that the most significant factor in analyzing contacts is the competing interests of the states. *Fu* virtually mirrors the above-quoted language from *Potlatch* when *Fu* states, “the qualitative, not the quantitative, nature of a state’s contacts ultimately determines whether its law should apply.”

That the interest analysis outweighs “contact counting” is reaffirmed in *Martin, supra*, at 831 which interpreted §146 of the RESTATEMENT. In *Martin* the parties had numerous contacts with Oregon. These included

the residence of plaintiff and defendant, place where trip began, and state of origin of truck which later failed. Oregon was also the place where the truck was improperly maintained and inspected.

Yet *Martin* holds that only one contact was qualitatively significant with respect to the issue of whether the Oregon statute of repose applied. Even though *Martin* ultimately applies the law of Washington, the state of injury and the “default state” under §146, *Martin* is authority that counting contacts is not the way to resolve a conflict of law question in a personal injury case.

Mentry, supra, is also authority that limited contacts can override the law of the state of injury. In *Mentry* the relationship between the parties, who were family members, centered in Washington, their residence. However, the wrongful conduct and the injury occurred in Oregon. *Mentry* applies Washington law.

The trial court in the present case relied upon *Ellis*. *Ellis* distinguishes *Mentry* which, like *Ellis* and like Williams’ case, involved all parties being Washington residents, but being involved in an accident in a different state. *Ellis* relies upon only one factor in distinguishing itself

from *Mentry*. That factor was that the relationship of the parties in *Mentry* centered in Washington.

It is true that usually the state where tortious conduct occurred has an independent interest in enforcing its safety rules (“rules of the road”) within its borders. Therefore the rules of that state ordinarily determine whether the defendant is liable, regardless of other contacts of the parties with other states. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971). (Despite the holding in *Ellis*, however, the overwhelming majority position in the United States is that the law of comparative negligence is a rule of loss allocation and not a rule of the road. See section 4.2 of this brief and Appendix to this brief.)

However, Williams strenuously urges that the present case contains a distinction from *Ellis* that is even more significant than the “center of the parties’ relationship” which *Ellis* states makes *Mentry* different. In the present case the “rules of the road,” referenced in *Ellis*, would lead to a denial of all third party tort recovery by Williams under Idaho law. See Supreme Court opinion fn. 3 in Williams' case. Yet § 145 of the RESTATEMENT comment d states:

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

Thus the very section of the RESTATEMENT (§ 145), upon which L&K relied for its “counting contacts” (pp.21-27 of L&K’s original brief to Court of Appeals) is the same RESTATEMENT section which directs that the law of the common domicile of the parties be applied when one of the relevant states grants immunity.

Therefore even § 145 would not impose Idaho law (“rules of the road”) for determining liability of L&K, given that Idaho law extends immunity to L&K. See cases no. 9 through no.28 in Appendix to this brief for confirmation of this conclusion. In short *Ellis* is not precedent for the present case because *Ellis* did not involve Idaho statutory immunity for the defendant in that case.

Furthermore Williams adheres to his position in part 1 of this brief that this is not even a conflict of laws case because Idaho has no interest in enforcing its law with regard to the critical issues where Washington and Idaho law are different (issues itemized in parts 4-7 of this brief). Yet,

aside from the false conflict issue, even under §146 of the RESTATEMENT, Washington law should apply for the same reason. Washington has many interests in applying its law and Idaho has none. The interests of Washington in applying its law are the following:

(1) Washington has an interest in regulating a corporation, L&K, which is domiciled and incorporated in Washington. *Johnson* finds that regulation of Washington corporations is a legitimate Washington interest. For the same holding see *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 266, 115 P.3d 1017 (2005).

(2) Washington has an interest in providing financial recovery to its resident, Williams. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 215, 875 P.2d 1213 (1994). (A state has an overriding interest in seeing that its resident is not uncompensated after suffering tortious conduct, but this interest is not by itself determinative.)

(3) Washington has an interest in risk allocation between its two residents, Williams and L&K. See pp. 22-24, 28-35 of this brief for discussion of this issue.

(4) Washington has an interest in avoiding the application of Idaho law which provides no remedy in this case.

Despite L&K's prior protests that Williams has a remedy under Idaho law, the Supreme Court in n.3 of its opinion ruled that Williams has no remedy against L&K under Idaho law. Cases which demonstrate the unwillingness of Washington and other jurisdictions to apply the law of another state which provides immunity are found on pp. 21-22 of Williams' initial brief to the Court of Appeals. *See also* the following cases which hold that Washington will not apply the law of a state which violates Washington's public policy: ***Kammerer*** (Supreme Court opinion) *supra*; ***Mirgon v. Sherk***, 196 Wash. 690, 84 P.2d 362 (1938).

Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 788 P.2d 545 (1990) establishes a Washington policy of permitting recovery against a general contractor by a sub-contractor's employee. The Idaho statute referenced in n.3 of the Supreme Court opinion in the present case permits no recovery at all by Williams, and is accordingly contrary to Washington policy.

CONCLUSION RE §146

Once again, this Court should view this case as one involving a false conflict as Idaho has no interest in applying its law. However, if this Court strictly follows §146 of the RESTATEMENT (as directed by the Supreme Court), then a conflict of law analysis under § 146 mandates that Washington law should apply for the same reason.

That reasons are that only Washington has an interest in applying its law⁴ and Idaho grants immunity to L&K, thus contradicting Washington public policy.

Note: Williams discussed and quoted from §146 of the Restatement in his Memorandum for Reconsideration to the trial court. **CP 279**. Note at the end of Section 1 of the brief herein recites the previous arguments of

⁴ RESTATEMENT (SECOND) CONFLICT OF LAWS §175 comment d (1971) also focuses on the interest analysis. This comment states:

“Whether there is such another state [which is “potentially concerned”] should be determined in the light of the choice-of-law principles stated in §6. In large part the answer to this question will depend on whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose to be achieved by the relevant local law rules and of the particular issue involved.” (language quoted with approval in *Johnson v. Spider Staging Corp.*).

Williams to the trial judge regarding the interest analysis discussed in Section 2 of the instant brief. Therefore, the trial judge was apprised of the issues raised in this Section 2 of the current brief.

3. Despite supporting language in some decisions, L&K is wrong in contending that a court should only utilize the interest analysis if there is an even balance of the contacts set forth in §145 of the RESTATEMENT (SECOND) CONFLICT OF LAWS (1971). For this argument, see pp. 21-27 of L&K's original brief to the Court of Appeals.

L&K was correct on pp. 21-27 of L&K's original brief to the Court of Appeals that three cases state that an even balance of contacts is prerequisite to utilizing an interest analysis. Two of these cases are *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 28-29, 109 P.3d 102 (2008) and *Zenaida-Garcia, supra*.⁵

⁵ L&K in its brief to this Court of April 24, 2009, also cited *Myers v. Boeing Co.*, 115 Wn.2d 123, 133, 794 P.2d 1272 (1990) for the proposition that contacts must be evenly balanced before applying the interest analysis required in §146 of the Restatement. However, *Myers* imports from *Johnson v. Spider Staging* the analysis for conflict of law resolution into a forum non-convenience issue. *Myers*' interpretation that *Johnson* required an even balance of contacts was dicta because *Myers* made a dispositive ruling on forum non-convenience by sending the case to Japan for a determination of damages. *Myers*' interpretation of *Johnson's* conflict of law test was gratuitous and non-binding.

Despite the above language in *Payne* and *Zenaida* which requires “even balancing of contacts” before applying an interest analysis, *Johnson* itself contains no such requirement. Admittedly, *Johnson* noted at 582 that the contacts [referenced in §145] are “evenly balanced.” *Johnson* then says “However *Potlatch Fed. No. 1 Credit Union*...directs us to a consideration of the interests and public policies of potentially concerned states...”

The dictionary definition of the word “however” is an adverb “used to introduce a statement that contrasts with or seems to contradict something that has been said previously.” Oxford English Dictionary, 2011.

Thus, *Johnson* says that despite the even balancing of contacts, Washington courts should be guided by *Potlatch*. As quoted on page 8, *supra*, *Potlatch* disapproved the counting of contacts, but emphasized the interests of the state being considered. As set forth on pp. 7-8 of this brief, *Potlatch* states that the various “contacts” under §145 are merely guides in determining which state has a greater interest. *Martin supra* also disapproves of counting contacts as does *Baffin Land Corp. v. Monticello Motor Inn*, 70 Wn.2d 893, 900, 425 P.2d 623 (1967). *Potlatch* specifically relies on *Baffin Land*.

In summary, the prerequisite of evenly balanced contacts before applying the interest analysis is a virus which crept into the reported decisions in *Payne*, *Zenaida-Garcia*, and dicta in *Myers*. The “evenly balanced” prerequisite should be rejected because it involves a bastardization of *Johnson*. In this way the so called “evenly balanced rule” is being used by L&K so that it directly contradicts the teaching of *Johnson* which focuses on the interests of the states rather than counting contacts. Even *Zenaida-Garcia* purports to require an “even balance” of contacts before turning to the interest analysis, yet at the same time *Zenaida-Garcia* at 256 rotely approves *Johnson* which states, “our approach is not merely to count contacts, but rather to consider which contacts are most significant...” The stark contradiction within a single case of requiring an “even balance” of contacts (before invoking the interest analysis) while professing not “merely to count contacts” betrays the irreconcilability of the two strands of the case law. Obviously a court cannot find an even balance except by counting contacts.

Moreover, the “counting of contacts” is such a parlous process that it inherently removes the predictability which the law should foster.

Johnson itself tried to count the contacts referenced in §145 and referenced separately in §175 of the RESTATEMENT. These contacts are:

- a. Place where injury occurred
- b. Place where conduct causing injury occurred
- c. Domicile, residence, nationality, place of incorporation and place of business of the parties
- d. Place where the relationship between the parties, if any, is centered.

L&K has argued that item nos. a, b and d occurred in Idaho; item no. c occurred in Washington.⁶ Therefore, L&K urges that Idaho law should apply. **CP 113-114.** However, Williams advised the trial court that the safety standards promulgated by L&K came out of Spokane and applied equally in Washington and Idaho. **CP 54-60 (deposition extract from Paul Keeble, officer of L&K).**

⁶ At another point L&K argued to the trial court that it was a resident of Washington and Idaho. Williams refuted that contention on page 3 of his original brief to the Court of Appeals.

This exchange merely illustrates the elusiveness in defining a particular “contact.” For example is the place of wrongdoing (one of the “contacts” referenced in § 145 of the RESTATEMENT) the place where the safety standards originated, the place where enforcement directions emanated, or the site of the accident itself?

L&K seeks mechanically to count contacts precisely in opposition to *Potlatch, Martin and Baffin Land, supra*. Most importantly the mindless counting of contacts defies *Johnson*, the sole case which the Supreme Court directed the Court of Appeals to follow in the present case.

Furthermore the cases which appear to count the contacts do not do so in such a simplistic way as L&K has advocated. For example, *Johnson* considers countable contacts beyond those four listed in §145 of the RESTATEMENT. *Johnson* considers one contact to be where defendant’s advertising originated. *Johnson* also considers a contact to be the state which set the safety regulations for the scaffolding. *Johnson* counts the location of the distributor of the scaffolding as a contact. None of these contacts are specifically referenced in §145 of the RESTATEMENT.

Similarly *Mentry v. Smith, supra*, contain its own idiosyncratic way of counting contacts. *Mentry* counted as a contact the fact that the parties left from Washington to go to Oregon where the accident occurred. Yet that is not listed in §145 as a countable contact. If it is a countable contact then both Williams' and L&K's inspector left from Washington to go to the Idaho jobsite on the day of the accident at issue.

Mentry also counts as a contact the fact that the car in which the accident occurred was registered and insured in Washington. *Mentry* counts this as a contact separate from the parties' residence. Using *Mentry's* methodology Williams could reference L&K's corporate registration in Washington as a separate contact from Williams' domicile in Washington. §145 of the RESTATEMENT combines into a single contact the state of the parties' residence with the state of incorporation, but *Mentry* counts them as separate contacts.

Using the example of these and other cases Williams could easily assert the following with reference to counting contacts.

Washington:

1. All parties in litigation are domiciled in Washington.

2. Both the safety inspector of L&K and Williams left from Washington to go to Idaho where the injury occurred.

3. L&K's state of registered incorporation is in Washington and L&K was insured in Washington.

4. Safety standards applicable to this job were generated in Washington. **CP 54-60**

Arguably, Williams could assert that Idaho only has three contacts.

1. Injury occurred in Idaho.
2. Relationship between parties centered in Idaho.
3. Some of the wrongful conduct of L&K occurred in Idaho.

The futility of this approach is clear because the definition of the "contacts" would determine the outcome of the conflict of law issue. More importantly the simplistic process of counting contacts violates the

teachings of *Johnson* itself and *Martin, Baffin Land, Potlatch*, as well as §146 and §6 of the RESTATEMENT.⁷

Note: Williams cited *Baffin Land* and the Washington policy against merely adding up contacts on the last page of his Memorandum in Support of Motion for Reconsideration submitted to the trial court. CP 284. Williams had previously made this same argument in his initial Memorandum to the trial court. CP 14-15. Therefore, the trial judge was apprised of the issues in this section of the brief.

4. Idaho's law of comparative negligence must not be applied in the present case.

Judge Sypolt invoked *Ellis v. Barto, supra*, as the basis to apply Idaho law on all issues. *Ellis* specifically holds that Idaho's rule of comparative negligence should apply when an accident occurred in Idaho.

⁷ Pages 15-24 of Williams' Initial Reply to the Court of Appeals (May, 2009) analyzes all of the factors of § 6 of the RESTATEMENT. These factors were cited with approval in *Johnson* and §146 of the RESTATEMENT, the two authorities which the Supreme Court ordered that the Court of Appeals utilize in resolving the conflict of laws issue in this case.

The differences between Idaho and Washington's law on comparative negligence are set forth on page 19 of Williams' Initial Brief to the Court of Appeals. Despite *Ellis*, there are three reasons why Idaho comparative negligence should not apply in the present case.

4.1 Idaho comparative negligence cannot exist without first finding negligence of L&K. Yet Idaho law permits no finding of negligence by L&K as was confirmed in footnote 3 of the Supreme Court opinion in this case.

Prybysz v. City of Spokane, 24 Wn. App. 452, 460, 601 P.2d 1297 (1979) states, "Plaintiff's possible contributory negligence will not come into operation until the first hurdle has been overcome, namely that the City was negligent." *Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138 (1977) also supports the proposition that comparative negligence will be evaluated by comparing it to the underlying negligence of the defendant. Because L&K cannot be negligent toward Williams under Idaho law, Williams is not bound by the Idaho law of comparative negligence.

For confirmation of this position, Idaho Jury Special Verdict Form 1.43.1 permits no inquiry into a plaintiff's negligence unless there is first a finding of negligence of the defendant.

4.2 The original brief of Williams to the Court of Appeals contained 14 decisions from other jurisdictions which departed from *Ellis* which itself is based upon §164 of the RESTATEMENT. (See pp. 44-46 of Williams' original brief to the Court of Appeals). Williams now submits cases from a total of 28 American jurisdictions which follow the rule that the law of the state of common domicile of the plaintiff and defendant should be utilized in applying comparative negligence and/or in determining whether immunity protects the defendant. These decisions contradict the teaching of §164 of the RESTATEMENT upon which *Ellis* is based. These decisions state that comparative negligence and immunity are rules of loss allocation. As such, the state where both parties live has the overriding interest in applying its rules of comparative negligence and immunity. See page 37 of original brief of Williams to Court of Appeals which cites four separate sections of the RESTATEMENT (SECOND) which require that issues of loss allocation should be determined by the law of common domicile of the parties.

The domicile of the parties is admittedly only one of the four contacts recited in §145 of the RESTATEMENT. Yet four previously cited sections of the RESTATEMENT and twenty-eight jurisdictions in the United States state that the single contact of common domicile is sufficient to determine which state has the greater interest in applying its law. Such an approach reflects the teachings of *Baffin Land*, *Potlatch*, and *Johnson* itself which states that the contacts of §145 are merely guides in determining which state has the greater interest in applying its law.

4.3 *Chavez v. Chavez*, 148 Wn. App. 580, 201 P.3d 340 (2009) is the culmination of two recent decisions which contradict the rule cited by Judge Sypolt in *Ellis v. Barto*. The 2009 opinion in *Chavez* followed a Supreme Court review of a previous unpublished opinion in *Chavez v. Chavez*, 138 Wn. App. 1053 (2007). This unpublished *Chavez* opinion is specifically referenced in the 2009 published *Chavez* opinion.

The original unpublished decision recited that all parties involved in the Arizona car wreck were from Washington. The 2007 *Chavez* opinion ignored Arizona comparative negligence law and applied Washington

comparative negligence law. The Supreme Court upheld this, but remanded back to the Court of Appeals on another issue.

Chavez, decided after Judge Sypolt's decision, demonstrates at the very least that *Ellis* is not the unquestioned law of Washington. Had *Chavez* followed *Ellis*, the Arizona law of comparative negligence would have applied.

In summary, Washington has four interests in applying its rule of comparative negligence, particularly given that Idaho permits no recovery at all under its statutes. Those four interests were set forth in Issue 2 (pp. 9-10) of this brief. Idaho has no interest in imposing its rule of comparative negligence on two Washington residents. For this reason the overwhelming majority rule in the United States should be followed and *Ellis* should be modified.

Note: Footnote 1 of Williams' Memorandum in Support of Reconsideration to the trial court (CP 284) and page 9 of the Memorandum in Support of Application of Washington Law which quotes comment d to §145 of the Restatement (CP 12) both urged to the trial court that the *Ellis* rule should not apply in this case with regard to

comparative negligence. See pp. 5-7 and 9-10 of Plaintiff's Response to Motion to Dismiss for cases on the immunity issue. **CP 231-33** and **CP 235-36** and Plaintiff's Memorandum in Support of Reconsideration. **CP 282-83**. See pages 12-15 of Response to Motion to Dismiss for authorities that the *Ellis* holding regarding conflict of the law analysis for comparative negligence contradicts the clear trend of the law to follow the law of the parties' common domicile for comparative negligence. **CP 238-41**. Therefore, the trial judge was apprised of the issues in this section of the Brief.

5. The Idaho rule of law which apportions some percentage liability to Pro-Set should not be followed in this case. Williams discussed this rule on page 19 of his initial brief to the Court of Appeals.

Williams requested the trial court not to apply indiscriminately the rule of the law of one state to all the differences of relevant law between Washington and Idaho. **CP 278**. Williams cited Washington authority that each difference in law between the relevant states must be analyzed separately with reference to state interest. However, the trial judge ruled that Idaho law applied on all issues involving a conflict of law

Williams discussed on page 19 of his initial brief to the Court of Appeals the Idaho rule which apportions fault to Pro-Set, one of Williams' employers. This rule is in contrast to the rule in Washington which forbids allocation of fault to Pro-Set, the employer of Williams. R.C.W. 51.04.010 and 4.22.070. There are three reasons why the Idaho rule should not apply in the present case.

5.1 A logical extension of *Prybysz* would deny allocation of any fault to Pro-Set. Once again, our Supreme Court in n. 3 of its opinion in the present case has interpreted Idaho Code §72-223 as denying any right of recovery by Williams against L&K under Idaho law. Therefore, under Idaho law L&K cannot be negligent toward Williams. *Prybysz* states that there can be no comparative negligence of the plaintiff if there is no underlying negligence of the defendant. By logical extension there should be no third-party allocation of negligence pursuant to Idaho law if under Idaho law L&K, the defendant, cannot be negligent toward Williams in the first place.

5.2 As stated repeatedly throughout this brief, Idaho has no interest in applying its law for either L&K or Williams. Therefore, the Idaho law which allocates fault to Pro-Set should not be applied.

5.3 The Idaho Insurance Fund (which is the subrogee of the rights of Pro-Set) has contractually resolved its claim to some of the money which Williams might recover in this case. Such a contractual resolution is a permissible way to bypass a court imposed conflict of law analysis. *Erwin v. Cotter Health Center*, 161 Wn.2d 676, 167 P.3d 1112 (2007). If, inexplicably, the Court of Appeals wishes to consider the interests of the Idaho Insurance Fund, then the contract between Williams and the Fund should be before this Court. In the event that the Court of Appeals deems that contract necessary for resolution of the issues before it, Williams makes a Motion in his brief as permitted under RAP 17.4(d). Williams moves under RAP 9.11 for the taking of additional evidence relating to the contract between Williams and the Fund. As the evidence is merely the exchange of two emails, Williams moves in the first instance that the Court of Appeals accept these emails, properly authenticated, without a remand to the trial court. If that procedure is unsatisfactory to the Court of Appeals, Williams requests that the trial court be directed to take evidence of the Williams-Insurance Fund subrogation contract.

Note: PP. 17-18 of Williams' Reply to Motion to Dismiss (**CP 243-44**) urged that Idaho had no interest in pursuing subrogation by Williams' immediate employer, Pro-Set. The contract between Williams and Pro-Set is new information which arose since the previous briefing. However, if the Court of Appeals determines that fact finding regarding this contract will by itself sufficiently justify a remand of all issues in this case to the trial court, then Williams will stipulate to remove from further consideration the issue of his contract with the Insurance Fund at this point in time. Except for issues relating to the contract, the trial judge was apprised of the issues in this section of the Brief.

6. Idaho's statutory caps on general damages should not apply.

Idaho Code §6-1605 is the statute promulgating statutory caps. Washington has no statutory caps on damages.

Johnson and ***Hurtado*** (which was approved in ***Johnson***) are the two prior cases which refuse to apply out of state damages caps to a case filed in the forum. In both these cases the forum state said that the foreign state

(where the plaintiffs in *Johnson* and *Hurtado* resided) had no interest in applying its caps to protect a defendant who was a non-resident of the foreign state (i.e. the Washington defendant in *Johnson* and the California defendants in *Hurtado*).

Both California and Washington applied an interest analysis in determining that the foreign state (Kansas in *Johnson* and Mexico in *Hurtado*) had no interest in protecting one of its residents from paying full compensation. Both opinions and §146 of the RESTATEMENT focus on strictly an interest analysis.

Both opinions, applied to the present case, would require that Washington law without statutory caps be determinative in the present case. This is because there is no interest in Idaho applying its statutory caps to protect the Washington defendant (L&K). Washington has numerous interests in applying its law as set forth on pp. 12-13 of this brief. Accordingly, Washington law should apply on the issue of statutory caps and the Idaho law imposing caps should not limit Williams' recovery.

If for some reason this Court wished to consider the contacts under §145, once again the only relevant contact is the common domicile of the

parties. No other contact has relevance when Idaho does not even permit Williams to have any relief for the tortious activity of L&K.

Note: Williams discussed the inapplicability in the present case of Idaho damages caps on pp. 11, 15 of his Memorandum for Reconsideration. **CP 278, CP 281-82.** See also pp. 5, 11-12 of Response to Motion to Dismiss. **CP 231, CP 237-38.** All of these pages discuss the inapplicability of Idaho damages caps in the present case. Therefore, the trial court was apprised of the issues in this section of the Brief.

7. The usual rule applying the law of the state of wrongdoing should not apply in this case.

Admittedly, the usual rule is to apply the law of the state of wrongdoing to establish the standards of expected conduct for the defendant. In this limited respect *Ellis v. Barto*, 82 Wn. App. 454, 918 P.2d 540 (1996) is correct. As noted in section 4 and the Appendix of the current brief, most states are now departing from application of the law of the state of wrongdoing with respect to comparative negligence. *See also*, authorities cited on pp. 29-30 of Williams initial Brief to the Court of Appeals.

Additionally, *Ellis* should not even apply in the present case in determining which state's law establishes the wrongdoing of L&K. The first reason that Idaho law should not apply in the present case is that Idaho extends complete immunity to L&K. Because the Supreme Court in the present case has ruled that Williams has a cause of action against L&K, it would be contradictory of that ruling to apply the law of Idaho which denies any cause of action to Williams because of statutory immunity of L&K. Once again, n.3 of the Supreme Court opinion recognizes the Idaho rule on statutory immunity.

The second reason not to apply Idaho law in establishing the standards of conduct for L&K is that there is no conflict between Idaho and Washington with regard to the standard of conduct required of L&K. James Hctor, the safety inspector for L&K for the construction job at issue in this case, testified that there is no conflict between Washington and Idaho regarding the rules for L&K's prescribed conduct with reference to the injuries submitted by Williams in the present case. **CP 67, 79, 80, 83-87.**

In the absence of any conflict between the laws of Washington and Idaho, then the forum may apply its own law. *Burnside, supra; International Tracers, supra.*

In summary:

1. Idaho's grant of immunity to L&K is reason enough not to follow *Ellis* in the present case in determining which state law establishes the prescribed conduct for L&K.

2. There is no conflict between Washington and Idaho regarding the precise standards which L&K was to follow in this case. Thus, Washington law should apply because the laws of Washington and Idaho do not conflict. This is a separate issue from Issue no. 1 in this Brief stating that the interests of Washington and Idaho do not conflict.

Note: Once again, Williams refers to the trial court brief discussing the immunity issue: pp. 5-7, 9-10, of Plaintiff's Response to Motion to Dismiss (CP 231-33, CP 235-36); pp 9-10 of Williams Motion in Support of Application of Washington law (CP 12-13), and p. 15 of Plaintiff's Memorandum in Support of Reconsideration. (CP 282-83). The following

trial briefs recite Hctor's testimony that standards for wrongdoing were the same for Washington and Idaho: Memorandum in Support of Application of Washington Law, page 2, (CP 5) including Exhibit 8 provided to trial court (CP 68-88); Response to Motion to Dismiss, page 10 (CP 236). Therefore, the trial judge was apprised of the issues in this section of the Brief.

CONCLUSION

Despite the happenstance of the accident in this case occurring in Idaho, Idaho is totally disinterested in imposing its law with regard to the issues where its law differs from Washington law. Therefore, there is merely a "false conflict" between Washington and Idaho law. To the extent that there is an actual conflict between the law of the two states, Washington law should still apply because only Washington has an interest in applying its law. The counting of contacts is not required under §146 of the RESTATEMENT, one of the two sources of authority to which the Supreme Court directed the Court of Appeals in this case. Even if the contacts under §145 of the RESTATEMENT must be capitulated, this Court should only look at §145 contacts which provide guidelines on the ultimate issue of whether Washington and Idaho has a greater interest in applying its law. The generalized lack of interest in Idaho applying its law is accentuated by

virtue of Idaho providing statutory immunity to L&K at the same time as the Supreme Court has ruled that Williams is entitled to a cause of action against L&K. For all of these reasons, Washington is the only state which has an interest in applying its law, and that conclusion should not be derogated because of the forbidden practice of deciding a conflict of law issue simply by toting the number of contacts which each state has. The RESTATEMENT clearly mandates that the interest analysis is generally the ultimate arbiter of conflict of law issues, particularly where one state (Idaho) has little or no interest in applying its law. §8 of the RESTATEMENT (SECOND) comment k states:

“The state with the dominant interest should usually have its local law applied. On the other hand, there will ordinarily be little justification for applying the local law of a state which has little or no interest in the matter at hand.”

There can be no pithier or more eloquent summary of Williams' generalized position with respect to the issues in this supplemental brief.

RESPECTFULLY SUBMITTED this 6th day of October, 2011.


RICHARD MCKINNEY, WSBA No. 4895
Attorney for Petitioner Williams

Appendix Containing Case Law from Jurisdictions Which Follow the Rule that the Law of the State of Common Domicile Should be utilized in Applying Comparative Negligence and/or in Determining Whether Immunity Protects the Defendant

CASES APPLYING THE LAW OF COMPARATIVE NEGLIGENCE OF THE COMMON DOMICILE OF THE PARTIES. All of these cases apply the “most significant relationship” test which is the same as the Washington test. All cases applied the law of common domicile of the plaintiff and the defendant.

1. ***Chambers v. Dakota Charter Co.***, 488 N.W.2d 63 (S.D. 1992) (South Dakotans, while riding in a charter bus owned by a South Dakota corporation, had an accident in Missouri. ***Chambers*** holds that the rules of fault of Missouri apply, but the comparative negligence rules of South Dakota apply because the parties are all domiciled in South Dakota. South Dakota’s rule of comparative negligence barred recovery if the plaintiff were more than slightly at fault, thus demonstrating once again that the rule of common domicile is invoked regardless whether it helps or hurts the plaintiff.)
2. ***Hataway v. McKinley***, 830 S.W.2d 53 (Tenn. 1992) (Tennessee plaintiff and Tennessee defendant went on Arkansas scuba diving outing where plaintiff died. Court

applies law of common domicile thereby barring claim of plaintiff under contributory negligence doctrine which barred plaintiff's claim. Arkansas had comparative negligence.)

3. ***Hicks v. Graves Truck Lines, Inc.***, 707 S.W.2d 439 (Mo. App. 1986) (Involves facts virtually identical to the present case. Plaintiff and defendant were both residents of Missouri, but involved in a Kansas accident. Kansas forbade any recovery by plaintiff if he were 50% at fault; Missouri did not. The court applies the law of common domicile, finding the law of comparative negligence to be a rule of loss allocation.)
4. ***Sabell v. Pacific Intermountain Express Co.***, 36 Colo. App. 60, 536 P.2d 1160 (1975) (Plaintiff and defendant were from Colorado which had greater interest in applying its rules of comparative negligence, which is not directly related to the interest of the accident site state, Iowa. Comparative negligence does not relate directly to the duties of drivers within Iowa.)
5. ***Blazer v. Barrett***, 10 Ill. App.3d 837, 295 N.E.2d 89 (1973) (Both parties to accident from Illinois which invoked its law on comparative negligence rather than the law of the state where accident occurred)
6. ***Fuerste v. Bemis***, 156 N.W.2d 831 (Iowa 1968) (Contributory fault is determined by the law of the residence of both parties rather than the place of the accident)

7. ***Issendorf v. Olson***, 194 N.W.2d 750 (N.D. 1972) (Applied law of comparative negligence of North Dakota where all parties are residents rather than law of contributory negligence of Minnesota where accident occurred)

8. ***Mitchell v. Craft***, 211 So. 2d 509 (Miss. 1968) (Both parties to the motor vehicle collision were from Mississippi, but the accident occurred in Louisiana. The Supreme Court of Mississippi applied its own law which contained comparative negligence rather than the absolute bar of contributory negligence which was then the law of Louisiana. Thus, ***Mitchell*** did not apply the law of the state where the accident occurred in analyzing comparative negligence.)

CASES APPLYING THE LAW OF IMMUNITY OF COMMON DOMICILE OF THE PARTIES.

9. ***Heinze v. Heinze***, 274 Neb. 595, 742 N.W.2d 465 (2007) (Husband and wife who lived in Nebraska were traveling in Colorado which did not have host-guest immunity. When husband sued wife in Nebraska for injuries suffered in Colorado, Nebraska invoked its host-guest immunity because it was the state of common domicile)

10. ***Garcia v. General Motor Corp.***, 195 Ariz. 510, 990 P.2d 1069 (Ariz. App. 1999). (Arizona residents traveled to Idaho without seatbelt, and suffered injuries in Idaho. At that time, Idaho did not permit evidence of a party failing to wear a seatbelt as evidence of negligence, but Arizona did permit such evidence. Arizona applied its law and admitted evidence of plaintiff failing to wear a seatbelt). ***Garcia*** is instructive because the state of all the parties' domicile determined the rule relating to comparative negligence.
11. ***Levy v. Jackson***, 612 So. 2d 894 (La. App. 1993) (All parties involved in accident were from Alabama, but accident occurred in Louisiana. The Louisiana court applies Alabama law which only permitted recovery by a guest against a host if the host acted willfully and wantonly. Louisiana permitted recovery upon a showing of ordinary negligence.)
12. ***Calla v. Shulsky***, 148 A.D.2d 60, 543 N.Y.S.2d 666, 668 (1989) (Loss allocation rules should be governed by the parties' common domicile, not place of wrong. Therefore, New York law applies to construction site injury in New Jersey.)
13. ***Forsman v. Forsman***, 779 P.2d 218 (Utah 1989) (Californians injured in Utah which had interspousal immunity. Utah court applies law of California, state of parties' common domicile.)
14. ***Gollnick v. Gollnick***, 517 N.E.2d 1257 (Ind. App. 1988) (Father and son were Californian, but son was injured while

father was driving in Indiana. The Indiana court applies the law of California, the state of common domicile, which had no parental immunity even though Indiana did have parental immunity.)

15. ***Wall v. Noble***, 705 S.W.2d 727 (Texas. App. 1986) (Texan went to Texas office of doctor who performed negligent surgery in his Louisiana office. Texas law applies.)

16. ***Schultz v. Boy Scouts of America, Inc.***, 65 N.Y.2d 189, 480 N.E. 2d 679 (N.Y. 1985) (Decided whether to extend the doctrine of charitable immunity under the law of common domicile of the parties- not the law of the place of the wrong. In ***Schultz*** the defendant successfully claimed charitable immunity under New Jersey law where both plaintiff and the culpable defendants resided. This result adhered even though the wrongful sexual assault occurred in New York which did not recognize the defense of charitable immunity.)

17. ***Futch v. Ryder Truck Rental, Inc.***, 391 So. 2d 808. 809 (Fla. App. 1981) (In this case plaintiff, a Floridian, rented a truck from a Florida business, but had an accident in Maryland which he attributed to poor vehicle maintenance. Maryland had contributory negligence, but Florida had comparative negligence. The court applied Florida law, finding that the mere fact that the accident occurred in Maryland did not outweigh the other significant contacts with Florida.)

18. ***Slawek v. Stroh***, 64 Wis. 2d 295, 215 N.W.2d 9 (1974)
(Permits an action for seduction against father in counterclaim by mother of illegitimate child when mother and child lived in Wisconsin which permitted an action for seduction. The Wisconsin court ignored the fact that the seduction allegedly occurred in Pennsylvania and New Jersey which disallowed any claims for seduction. Father had voluntarily submitted to jurisdiction in Wisconsin and mother lived there. The law of the place of alleged wrong is deemed subordinate.)
19. ***Beaulieu v. Beaulieu***, 265 A.2d 610 (Me. 1970) (Two Maine residents were traveling in Massachusetts. Maine law of ordinary negligence applies in host-guest case, not Massachusetts law of gross negligence as both parties lived in Maine.)
20. ***Brown v. Church of Holy Name of Jesus***, 105 R.I. 322, 252 A.2d 176 (1969) (Victim and church which sponsored outing were both from Rhode Island, but accident occurred in Massachusetts which had charitable immunity. Court applies law of common domicile, Rhode Island, which did not have charitable immunity.)
21. ***DeFoor v. Lematta***, 249 Or. 116, 437 P.2d 107 (1968)
(Involves an Oregon plaintiff and Oregon defendant who were traveling in a helicopter in California when it crashed. ***DeFoor*** applies then-existing Oregon caps on wrongful death claims even though the accident occurred in California which had no

caps on damages. *DeFoor* reasons that two Oregon residents should expect that their common domicile state should adjust the extent of financial obligations between them. The Oregon Supreme Court applied the law of Oregon, stating that the State where the injury occurred has no interest in adjudicating the financial circumstances of two Oregon residents.)

22. *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968) (Law of parties' domicile took precedence over law of place of injury, Yukon Territory, in determining interspousal immunity.)
23. *Melik v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967) (New Jersey residents were in motor vehicle accident in Ohio. The New Jersey court applies Ohio rules of the road, but the New Jersey host-guest law, which did not prevent recovery. Ohio guest statute would have defeated recovery.)
24. *Wessling v. Paris*, 417 S.W.2d 259 (Ky. App. 1967) (Kentucky domiciliaries traveling in Indiana which had a host-guest statute. Kentucky court applies Kentucky law which did not have host-guest statute.)
25. *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966) (Husband and wife, New Hampshire residents, were traveling in Vermont which had host-guest statute. Court applies law of New Hampshire, state of common domicile which did not have host-guest statute.)

26. ***Kopp v. Rechtzigel***, 273 Minn. 441, 141 N.W.2d 526 (1966) (Minnesotans were traveling in South Dakota where accident occurred. Plaintiff was not barred from suit by South Dakota host-guest statute which barred such suits among South Dakotans. Minnesota law applies to permit plaintiff's suit.)

27. ***McSwain v. McSwain***, 420 Pa. 86, 215 A.2d 677 (1966) (Wife, husband and daughter were traveling in Colorado, but all were residents of Pennsylvania. Wife sued husband in Pennsylvania in connection with daughter's death caused in Colorado motor vehicle collision. Court applies Pennsylvania law which prevents suit by wife against husband even though Colorado law would have permitted such a suit.)

28. ***Emery v. Emery***, 45 Cal.2d 421, 289 P.2d 218 (1955) (One of the first conflict of law cases applying the interest analysis. California family members were vacationing in Idaho which then had family tort immunity. ***Emery*** applies California law which did not have family tort immunity because Idaho had no interest in applying its loss allocation rule. ***Emery*** holds that immunity from suit should be determined by the law of the parties' common domicile, a holding which is directly instructive in the present case where L&K seeks to cloak itself behind the Idaho statutory immunity.)

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

DELBERT WILLIAMS,

Appellant,

v.

LEONE & KEEBLE, INC.,

Respondent.

COURT OF APPEALS NO.
277011

DECLARATION PURSUANT TO
GR17 RE: FAX

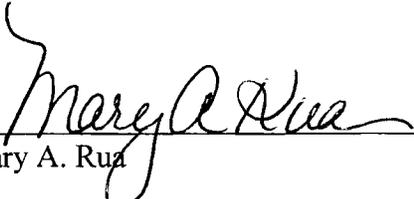
Mary Rua makes the following Declaration under penalty of perjury under the laws of the State of Washington.

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

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

I have examined the signature page of Supplemental Brief of Appellant which is page 37 of this document totaling 47 pages including this Declaration, and determine it to be complete and legible and have confirmed the accuracy thereof telephonically.

EXECUTED in Spokane, Washington this 7th day of October, 2011.



Mary A. Rua

CERTIFICATE OF SERVICE

I hereby certify that on October 70th, 2011, the original and one (1) copy of the **Supplemental Brief of Appellant** were filed with the Court of Appeals of the State of Washington, Division III, at the following address:

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

In addition, I served one (1) copy of the **Supplemental Brief of Appellant**, via hand delivery, to the following:

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

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



Mary A. Rua

FILED

OCT 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 277011

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

DELBERT WILLIAMS, APPELLANT

v.

LEONE & KEEBLE, INC., RESPONDENT

STATEMENT OF ADDITIONAL AUTHORITIES

LAW OFFICES OF RICHARD MCKINNEY

By: Richard McKinney, WSBA No. 4895
201 W. North River Drive, Suite 520
Spokane, Washington 99201
509/327-2539; Fax: 509/327-2504

1. ***Kelley v. Howard F. Wright Construction***, 90 Wn.2d 323, 582 P.2d 500 (1978) (common law duty of general contractor to maintain safe workplace, emphasizing avoidance of falls from high locations without proper safety equipment.)

2. RESTATEMENT (SECOND) CONFLICTS OF LAW comment g (1971) (no test of expectation of the parties in a conflict of law analysis in a negligence case)(CP 13)

3. ***Banning v. Minidoka Irr. Dist., et al.***, 89 Idaho 506, 406 P.2d 802 (1965) (cited at CP 233-34- interprets I. C. §5-404 to rule that a corporation foreign to Idaho only resides in Idaho where it has its principal place of business in Idaho.)

RESPECTFULLY SUBMITTED THIS 11th day of October, 2011.


RICHARD MCKINNEY, WSBA No. 4895

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

DELBERT WILLIAMS,

Appellant,

COURT OF APPEALS NO. 277011

v.

DECLARATION PURSUANT TO
GR17 RE: FAX

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Respondent.

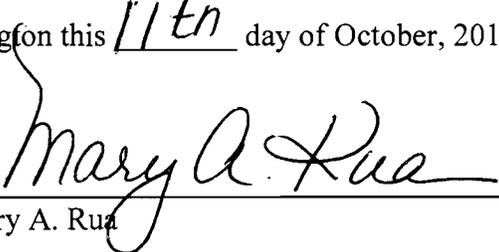
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I am over the age of eighteen years and competent to testify to the matters stated herein, which are based on personal knowledge.

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I have examined the signature page of Statement of Additional Authorities which is page 2 of this document totaling 4 pages including this Declaration, and determine it to be complete and legible and have confirmed the accuracy thereof telephonically.

EXECUTED in Spokane, Washington this 11th day of October, 2011.



Mary A. Rua

CERTIFICATE OF SERVICE

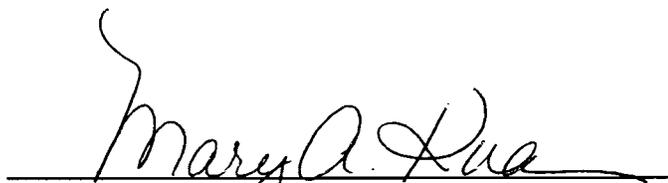
I hereby certify that on October 12th, 2011, the original and one (1) copy of the **Statement of Additional Authorities** were filed with the Court of Appeals of the State of Washington, Division III, at the following address:

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

In addition, I served one (1) copy of the **Statement of Additional Authorities**, via hand delivery, to the following:

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

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



Mary A. Rua