

K
FILED
OCT 29 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
ap

No. 83743-1

**SUPREME COURT
STATE OF WASHINGTON**

DELBERT WILLIAMS,
Appellant,

vs.

LEONE & KEEBLE, INC.,
Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 OCT 28 AM 7:51
BY RONALD R. CARPENTER
CLERK

**RESPONDENT'S REPLY TO APPELLANT'S
MOTION FOR DISCRETIONARY REVIEW**

Law Office of Andrew C. Bohrsen, P.S.

By: Andrew C. Bohrsen
WSBA No. 5549
9 South Washington, Suite 300
Spokane, WA 99201
Phone: (509) 838-2688
Fax: (509) 838-2693

TABLE OF CONTENTS

| | | |
|------|-----------------------------|---|
| I. | INTRODUCTION | 1 |
| II. | STATEMENT OF THE CASE | 1 |
| III. | ARGUMENT OF COUNSEL | 3 |
| IV. | CONCLUSION | 6 |

TABLE OF AUTHORITIES

Cases

| | |
|---|---|
| <u>Anderson v. Gailey</u> , 97 Idaho 813, 555 P.2d 144 (1976) | 4 |
| <u>Baker v. Sullivan</u> , 132 Idaho 746, 979 P.2d 619 (1999) | 4 |
| <u>Robinson v. Bateman-Hall, Inc.</u> , 139 Idaho 207, 211, 76 P.3d 951 (2003) | 6 |

Court Rules

| | |
|-------------------|---|
| RAP 13.4(b) | 4 |
|-------------------|---|

I. INTRODUCTION

The respondent filed not less than two Memorandums of Authority in support of its long-held contention that Washington did not have jurisdiction over the appellant's claim and that this cause of action had to be filed in the state of Idaho. In addition, the respondent again addressed all issues raised by the parties before the trial court in its brief filed with Division III of the Washington State Court of Appeals. These Memorandums of Authority and Respondent's Brief are now before this Honorable Court and no purpose would be served by simply restating them in this response. Rather, the respondent would respectfully incorporate the same herein by this reference.

In the interests of brevity, the respondent will limit its reply to a concise analysis of the failure of the appellant to demonstrate a basis for granting his Petition for Discretionary Review in accordance with Rule 13.4 of the Washington State Rules of Appellate Procedure.

II. STATEMENT OF THE CASE

On August 3, 2007, the appellant, Delbert Williams, sustained a work-related injury while working on a construction site in Idaho. He submitted his worker's compensation claim in Idaho and was paid by the Idaho State Insurance Fund (CP 287).

Leone & Keeble was the general contractor on the job site at issue (CP 104, 121). Leone & Keeble's principal office is located in Spokane, Washington, but 30-40 percent of its work is performed in the state of Idaho (CP 105, 203). When performing work in Idaho, and especially when that work involves an Idaho State public works contract (this contract was for Lakeland High School in Rathdrum, Idaho), the general contractor was obliged to comply with innumerable Idaho laws, rules, and regulations which governed work on the project. These include, but are not limited to, the following:

- (1) worker's compensation payments for its own employees;
- (2) various state of Idaho occupational licenses;
- (3) payment of various state taxes;
- (4) filings with the Idaho Secretary of State;
- (5) contractor licensing;
- (6) payment of unemployment taxes; and
- (7) payment of personal property taxes (CP 121-122). Therefore, Leone & Keeble enjoyed a status of dual citizenship.

As it pertains to safety rules and regulations, this project fell under the jurisdiction of OSHA, as the Idaho legislature has passed no state-specific workplace regulations or standards of conduct. Therefore, the construction processes in Idaho are governed by OSHA standards as compared to Washington, where WISHA regulations apply (CP 123-129).

The appellant filed a Motion for Summary Judgment seeking the court to hold, as a matter of law, that Washington substantive law governed this case. This motion was denied. The respondent filed its Motion to Dismiss for Want of Jurisdiction. This motion was granted. At the same time, respondent filed its Memorandum of Authorities in Opposition to Appellant's Motion for Summary Judgment, and in support of respondent's contention that should the court determine that it did, in fact, have jurisdiction, then and only then, should the court apply the governing law of the state of Idaho. As to whether Washington or Idaho law would apply, the trial court was not required to reach this issue having already determined that it did not have jurisdiction. Upon finding that Washington did not have jurisdiction, the trial court was not required to resolve the choice of law issue. However, in *arguendo*, it advised that even if jurisdiction had been retained, Idaho substantive law would apply to the facts of this case (CP 306-307).

III. ARGUMENT OF COUNSEL

Rule 13.4(b) specifically identifies those limited instances where the Supreme Court will exercise its discretion and accept review of a final decision handed down by the Washington State Court of Appeals. That rule provides:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This court need only look to the appellant's Issues Presented For Review to immediately take note of the fact that his Petition does not present an issue subject to discretionary review. The scope of Rule 13.4 is quite limited and the appellant has not made even a cursory attempt to demonstrate an issue falling within its parameters.

Both the trial court and the Court of Appeals resolved the issue of jurisdiction based on well-established law governing the doctrines of *res judicata*/collateral estoppel. The facts of the case caused it to be controlled by two Idaho cases relied upon by both courts, to wit: Baker v. Sullivan, 132 Idaho 746, 979 P.2d 619 (1999), and Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976). The analysis articulated by the Court of Appeals in its unanimous affirmation of the trial court was not inconsistent with any decision of the Washington State Supreme Court, and is not inconsistent with any decision of the Washington State Court of Appeals. In addition, at no time before

either the trial court, the Washington State Court of Appeals, or this Honorable Court has the appellant ever raised any question of law, let alone a significant one, under either the Washington State Constitution or that of the United States.

Finally, the appellant has failed to demonstrate that his case raises an issue of substantial public interest that compels the attention of the Supreme Court. The reason for the absence of this argument is simple; this case raises no such issue.

This case represents the application of a well-established doctrine of law governing the issue of jurisdiction. This fact was apparent from the commencement of the action in Washington as evidenced by the respondent's immediate pleading that this state lacked subject matter jurisdiction. Four judges have considered the issue fairly and comprehensively and have determined that only Idaho has jurisdiction over a third-party claim for personal injuries against the general contractor where the state of Idaho, acting through the Idaho Industrial Commission, had previously determined that it had jurisdiction and paid the appellant worker's compensation benefits pursuant thereto. This case does not present an issue of first impression. Rather, both the decision of the trial court and that of the Court of Appeals is based on longstanding case law governing the

issues of *res judicata*/collateral estoppel as applied to the law governing jurisdiction.

Finally, it should be noted that there was absolutely no reason why the appellant could not have filed his claim in Idaho where the right of an employee of a subcontractor to file claims sounding in negligence against a general contractor for personal injuries has always been recognized. In fact, the respondent repeatedly acknowledged that the appellant had every right to bring a third-party suit against it in Idaho, which was clearly the governing law. See, Robinson v. Bateman-Hall, Inc., 139 Idaho 207, 211, 76 P.3d 951 (2003) (CP 257-258, CP 302-304). One can only assume that the appellant's decision to file in Washington represented a misguided attempt to benefit from Washington's more favorable law governing comparative negligence, allocation of fault, and set-offs. However, none of these issue are relevant to the threshold issue of jurisdiction, which he chose to ignore.

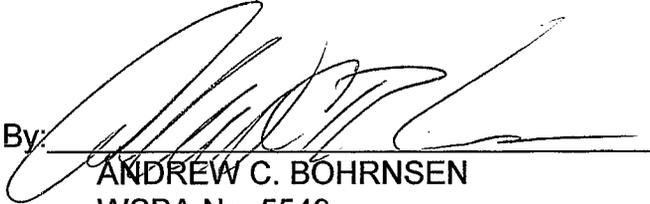
IV. CONCLUSION

Motions for Discretionary Review to the Supreme Court are not intended for parties who are simply dissatisfied with an adverse decision by a trial court and three judges sitting on the Washington State Court of Appeals. One does not find the "Taint Fair Doctrine"

within the criteria of Rule 13.4 of the Rules of Appellate Procedure.
For these reasons, the respondent's Motion For Discretionary Review
should be summarily denied.

Respectfully submitted:

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

By: 

ANDREW C. BOHRNSEN
WSBA No. 5549
Attorneys for Respondent
Leone & Keeble, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing RESPONDENT'S REPLY TO APPELLANT'S MOTION FOR DISCRETIONARY REVIEW was served on the following, by the method indicated on the 23rd day of October, 2009:

Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 99201 98504-0929

- US Mail, First class
 Fax: _____
 Messenger Service

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



LESLEE M. GREER