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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 277011

83743-1

COURT OF APPEALS, DIVISION III
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

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Petitioner, Delbert Williams, was at all material times, a resident of the State of Washington. **CP 90.** Respondent, Leone & Keeble, Inc., (L&K) was at all material times a corporation which was incorporated in Washington and maintained its principal place of business in Washington. **CP 24.**

Williams was hired by an Idaho labor service providing company, Paycheck Connection, LLC, which had for years sent him on a regular basis to work for Pro-Set Erectors, also an Idaho corporation. **CP 185-199, CP 206-212.**

Williams was injured on August 3, 2007, after being sent by Paycheck Connection to work for Pro-Set Erectors on a school remodeling job in Rathdrum, Idaho. **CP 21-23.** Pro-Set Erectors was a subcontractor of L&K. **CP 153-181.**

The following facts are relevant to the choice of law analysis inherent in this case.

1. L&K did considerable work in both Washington and Idaho. **CP 47-49.**
2. At the time of Plaintiff's accident, L&K had liability insurance. The President of L&K is not aware that its liability insurance

company ever inquired as to the number of construction projects which L&K undertook in Idaho and the number which it performed in Washington. **CP 50-53.**

3. L&K imposed the same safety standards on construction projects for which it was general contractor in Washington as it imposed on construction projects for which it was general contractor in Idaho. The potential immunity of L&K in Idaho from liability to a subcontractor's employee did not cause L&K to utilize different safety standards in Idaho. **CP 54-60.**
4. L&K applied the Washington Administrative Code to many of its job activities on construction projects performed in Idaho. **CP 61-66.**
5. Idaho applied Federal OSHA standards for safety protection of its workers. Washington applied WISHA standards for workers performing jobs in Washington. Yet Jim Hocter, the safety inspector for L&K on the Lakeland High School project, testified that he is aware of no specific safety standard which was designed to protect against Plaintiff's fall on August 3, 2007, and which was different in Idaho from what it would have been in Washington. **CP 67-89.** Thus, L&K cannot demonstrate that safety standards relating to the causative

factors of Plaintiff's injury were any different in Idaho than they would have been in Washington.

6. Plaintiff, a long time Washington resident, is facing the immediate prospect of dire poverty, homelessness, and lack of means to support himself and his family because of the accident which is the subject of this litigation. **CP 90-92.**
7. L&K had no office in the state of Idaho and was not a resident of Idaho. **CP 251-253.** Therefore, L&K is not a resident of Idaho. I.C. §5-404 states, "...the action must be tried in the county in which the defendants, or some of them, reside." *Pintlar Corp. v. Bunker Ltd. Partnership*, 786 P.2d 543 (Idaho 1990) and *Banning v. Minitoka Irr. Dist.*, 406 P.2d 802 (Idaho 1965) both hold that a foreign corporation must be sued in Idaho in the county in which it has its principal place of business if it is going to be sued in the Idaho county where it resides. Therefore, L&K was not a resident of Idaho as it had no principal place of business within Idaho.
8. As a result of his accident, Williams received Worker's Compensation ("WC") benefits from the Idaho Industrial Insurance Commission ("IIC"), but there has been no "adjudication" of Williams' rights to receive such benefits. The

IIC has simply paid benefits to Williams administratively. CP 287-288.

9. Idaho does not permit an employee of a subcontractor on a construction project to sue the prime contractor. I.C. §72-223(1). (This issue is discussed in greater detail, *infra* in section 3.a).
10. On cross-Motions by the parties, the trial Court dismissed Williams' claims against L&K under authority of the doctrine of res judicata. CP 306-307.

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Williams' case based upon res judicata when there was no prior Idaho decision adjudicating any of Williams' rights.
2. The trial court erred in dismissing Williams' case based upon res judicata because even a hypothetical adjudication of Williams' Worker's Compensation ("WC") rights by the IIC (an adjudication which never occurred), does not constitute an adjudication of Williams' rights to sue a third party in tort.

3. The trial court erred in failing to apply Washington law at least to the issue of whether Idaho's statutory immunity is a bar to Williams' rights to sue L&K in tort. This error by the trial court is due to two separate legal principles:
 - a. Washington disapproves the application of the law of a state which provides no available right to sue when Washington permits such a right.
 - b. In a personal injury case, the law of Washington requires application of the law of the state with the greater interest in applying its law. In the present case, that state is Washington.
4. The trial court erred in relying upon *Ellis v. Barto* for two separate reasons:
 - a. *Ellis* is now out of harmony with the weight of national authority regarding treatment of comparative negligence in a conflict of law setting.
 - b. Contrary to the apparent ruling of the trial court, *Ellis* does not mandate application of "lex loci delicti" as to all legal issues arising out of a personal injury claim.

ARGUMENT

1. There was no Idaho Worker's Compensation (hereinafter "WC") adjudication. Therefore, res judicata is inapplicable. The lack of adjudication is established in CP 287-288.

The application of the doctrine of res judicata in the second proceeding (i.e. the present case) requires a final judgment upon the merits in the first proceeding which is the basis for establishing res judicata. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986); *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000); RESTATEMENT (SECOND) JUDGMENTS, §13 (1982).

As further authority for this elemental proposition see *C.I.R. v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 98 L. Ed. 898 (1948) which is cited with approval by *Riblet v. Ideal Cement Co.*, 54 Wn.2d 779, 345 P.2d 173 (1959). *Sunnen* states:

“The rule [of res judicata] provides that when a court of competent jurisdiction has entered a **final judgment** on the merits of a cause of action, the parties to the suit and their privies are thereafter bound ‘not only

as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.” (emphasis supplied)

The final authority offered herein for the same proposition is C.J.S. *Judgments* §698 (updated 2008) which states:

“Res judicata is sometimes used in a broad or generic sense to encompass or describe a group of related concepts concerning the conclusive effect given final judgment (emphasis supplied).

A judgment is final at the beginning of the appellate process. *City of Des Moines v. Personal Property of \$81,200*, 87 Wn. App. 689, 702, 943 P.2d 669 (1997).

The burden of proving a valid prior judgment is on the party asserting the judgment. *Large v. Shively*, 186 Wash. 490, 498, 58 P.2d 808 (1936); *Meder v. CCME Corp.*, 7 Wn. App. 801, 807, 502 P.2d 1252 (1972). There is not a scrap of evidence of a prior judgment presented to the trial court.

It is not enough to argue, as the defense apparently does, that the first case was submitted to a tribunal. *Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 253 (1955) (res judicata does not apply if issue were merely submitted to a jury in prior proceedings, but not decided by jury.) Thus, the submission of Plaintiff's WC claim to the IIC is not an adjudication for res judicata purposes.

Moreover, Washington recognizes that the first case must have been a judgment which involves the right to appeal from that judgment. *U.S. v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968), *affirmed* 435 F.2d 561 (9th Cir. 1970). It is interesting to note that there is a variety of WC decisions made by the IIC which do not involve the right to appeal. *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122, 1124 (2000). If such a decision as described in *Simpson* were ever made in connection with Plaintiff's WC claim (which has not occurred to date), that decision would therefore not have a res judicata effect as to anything.

The present case does not even involve a final adjudication, let alone involve the right to appeal (which does not always exist in Idaho Industrial Insurance proceedings).

SUMMARY RE: ASSIGNMENT OF ERROR NO. 1

Petitioner will now answer the misapprehension of the law urged by L&K and apparently adopted in the Order of the trial court.

L&K urged that Idaho law invokes res judicata to bar any consideration by a second tribunal of a legal issue after a prior tribunal has had that legal issue before it.

At the trial court level L&K erroneously cited *Anderson v. Gailey*, 97 Idaho 813, 825, 55 P.2d 144 (1976) for this proposition (**CP 108**).

Anderson does not stand for the proposition that once a tribunal has an issue before it, there is an automatic res judicata bar to a second tribunal considering the same issue.

L&K misapprehended the ruling in *Anderson* and cited *Anderson* for the proposition set forth in the preceding paragraph. The reading of *Anderson* is critical to the analysis of res judicata because the IIC definitely opened its file on the Williams case prior to filing of the tort action in Spokane County Superior Court in the present case. However, *Anderson* at 824 merely holds that if two tribunals have concurrent jurisdiction to determine a legal issue, the first tribunal to have that issue before it gets to decide the issue. *Anderson* states at 824, "The determinations of the commission, like those of the superior court, are res judicata in all subsequent proceedings, including court actions, between

the same parties or those privy to them. (Citations omitted). Thus, if there is a *final determination* as to the matter of coverage (i.e., of jurisdiction) in either the commission or the superior court proceedings, such determination will be res judicata in subsequent proceedings before the other tribunal between the same parties or those privy to them.” (emphasis supplied)

The *Anderson* court specifically states that it was unclear whether the trial court or the IIC was the first tribunal to have before it the question whether the employee (Anderson) was acting within or without its scope of employment.¹ Yet, the *Anderson* court emphasizes that whichever

¹ If acting outside the scope of employment, Anderson could bring a tort claim, but not receive WC benefits. If acting inside the scope of employment, Anderson could receive WC benefits but not bring a tort claim. Either way, *Anderson* specifically requires a final adjudication by the first tribunal for res judicata to apply.

Unlike the present case, there was in *Anderson* an undetermined fact (whether the employee was within or without the scope of his employment) which affected the decision of both the IIC and the tort claim filed in a court of general jurisdiction. Therefore, the “priority of filing” rule applied. Washington and virtually every other jurisdiction have adopted the same “priority of filing” rule. See e.g. *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 913 P.2d 375 (1996); *American Mobile Homes of Washington, Inc. v. Seattle-First National Bank*, 115 Wn.2d 307, 316, 796 P.2d 1276 (1990).

In the present case, an award of WC benefits involves no factual finding which affects the right to bring a tort claim against L&K. Therefore, the “priority of filing” rule is inapplicable because the IIC will not be issuing a final adjudication as to anything, particularly any factual issue which precludes or permits a tort claim. *Anderson* specifically relied on the California case of *Scott v. Industrial Acc. Commission*, 46 Cal.2d 76, 293 P.2d 18 (1956). At least two subsequent California cases have held that *Scott* simply states the “priority of filing” rule. *Loftis v. Superior Court for San Diego County*, 205 Cal. App.2d 148, 23 Cal. Rptr. 125, 126 (1962); *Robinson v. Superior Court for Kings County*, 203 Cal. App.2d 263, 21 Cal. Rptr. 475, 478 (1975).

tribunal first had jurisdiction, that tribunal must make a final decision before res judicata applies.

To have res judicata effect there must be a binding judgment which involved adjudication of the same right sought to be adjudicated by a second tribunal. *Rains v. State*, 100 Wn.2d 660, 664 P.2d 165 (1983).

The IIC is handling the entire Williams case administratively and will never make any final adjudication in a contested proceeding. Even if it were to make a final adjudication, it has no authority to resolve the conflict of law issue before the Spokane County Superior Court. Not only does the IIC not have any authority to rule on that issue, it will never have a reason to rule on that issue.

Therefore, the *Anderson* case is totally inapposite and is merely a red herring.

It is anomalous to the point of absurdity that this Court is reviewing a dismissal with prejudice, based on res judicata, where there never has been a prior adjudication by the IIC and never will be an adjudication by the IIC touching on the central issues before the Superior

Once again, at the risk of being redundant, the "priority of filing" rule has no applicability in the present case because:

1. There was no final adjudication.
2. There is no common fact in the IIC proceeding and the tort claim which affects the viability of the other action.
3. The IIC has no power to rule on the legal efficacy of a tort claim brought in Washington.

Court. If this Court were to affirm such a singular ruling, that affirmance would surely place this esteemed court at the instructional forefront of every conflict of law and civil procedure class in every law school in America. A decision based upon res judicata when there was no prior adjudication flies in the face of 800 years of Anglo-American jurisprudence. Clearly, the trial court should be reversed for this reason alone as it relied upon res judicata as the basis for its ruling. The other issues in this case are raised simply to clarify rulings that were implicitly decided in favor of L&K by virtue of the Order of Dismissal.

2. **Even if the Idaho payment of WC benefits were construed as an adjudication, the WC claim and Plaintiff's tort claim in the present case are not the "same claim" as required by res judicata.** There is no question that Idaho law provides that one who makes a worker's compensation claim is exercising his exclusive remedy against his employer. I.C. §72-211.

As plaintiff previously urged, the exclusive Idaho remedy of plaintiff against L&K is Worker's Compensation (WC). I.C. §72-216, I.C. §72-223.

2.1. **WC and the tort claim in the present action are not the "same claim."** Petitioner urges that the ruling below blurred the

Idaho statutory law with the doctrine of res judicata. In short, the fact that Plaintiff's only Idaho remedy against L&K is WC is unrelated to the elements of res judicata. Philip A. Trautman, *Claim And Issue Preclusion In Civil Litigation In Washington*, 60 WASH. L. REV. 805 (1985) discusses the elements of res judicata. Without recapitulating the entire article (which in fact negates the applicability of res judicata on bases not mentioned in this Motion for Reconsideration), it is sufficient to note that res judicata requires proof that the same claim is involved in both the first and second cases.

Trautman discusses the test for "same claim" at pp. 814-19 of the above article. The text of the article at n. 75 cites *Rains v. State*, 100 Wn.2d 660, 664 (1983) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir. 1979)) to establish the test as to whether the first and second cases involve the "same claim."

The four criteria necessary to demonstrate the "same claim" for res judicata are:

1. Whether rights established in the prior action [Idaho WC claim] would be destroyed by prosecuting the second action.

2. Whether substantially the same evidence is presented in the two actions.
3. Whether the two suits involve infringement of the same rights.
4. Whether the two suits arise out of the same transactional nucleus of facts.

The outcome in the present case of applying the above test for “same claim” is obvious.

In applying the *Rains* test to the present case, one concludes as follows:

1. There is no reason to believe that Plaintiff in pursuing his tort claim against L&K in Washington would destroy his rights to WC in Idaho (the nub of item number 1 in the *Rains* test). Therefore, the first element of the *Rains* test is not met satisfied so as to establish res judicata in the present case.

2. Item number 2 in that *Rains* (same evidence in both cases) is inapplicable. WC in Idaho, as in Washington, requires no evidence of fault, but merely evidence of being hurt on the job. The tort claim brought by Plaintiff in the present case would require evidence of fault of L&K.

3. Item number 3 in the *Rains* test is clearly inapplicable in the present case. The right to WC is entirely different than the right to sue

in tort. For example, a tort claim does not involve a schedule of benefits that is prescribed in advance. WC does not permit recovery of general damages. Therefore, the two rights are distinct.

4. Plaintiff concedes that item number 4 in the *Rains* test is met in the present case. Both the Idaho WC claim and the tort claim in the present case grew out of the “same transactional nucleus of facts.” However, passing muster under one of the four elements of the *Rains* test does not establish “same claim.” Without establishing same claim, there is no res judicata under Washington law.

2.2 No implied terms in WC proceeding. Moreover, the basis for res judicata may not simply be Idaho statutory law which specifies that Plaintiff’s only remedy against L&K is WC. Trautman, *supra*, text at n. 10 states that res judicata applies to judicial-type decisions rather than legislative decisions. Once again, the statutes that provide for Plaintiff’s exclusive Idaho remedy against L&K are IC §72-216 and I.C. §72-223. These statutes do not become “implied terms” of a WC Order (an Order which does not even exist, but which this Memorandum is assuming to exist for the sake of argument). There is an “implied term” doctrine in contract interpretation. RICHARD H. LORD, 23 WILLISTON ON CONTRACTS, §63.21 (4th ed. updated 2008). The “implied term” or “implied covenant” doctrine incorporates certain statutory provisions into

contracts and makes those statutory provisions an enforceable part of the contract. However, Plaintiff knows of no similar “implied term” doctrine which makes a statutory provision a part of a court order (or in this case, a hypothetical WC Order) upon which to establish res judicata.

2.3. No Privity Between Paycheck and L&K.

Defendant blithely asserted to the trial court that L&K was in privity with Plaintiff’s employer, and therefore, due to the Idaho WC proceedings, L&K enjoys the same res judicata preclusion as would the direct employer of Plaintiff.(CP 108.) It is inconceivable to the point of incredulity that Defendant has successfully argued the following two propositions to the Court: 1) L&K is not sufficiently close to Plaintiff’s employment so as to be an employer under I.C. §§72-216 and 72-223. (**See CP 257 for L&K’s rendition of this argument made to the trial court.**) Yet, 2) L&K is sufficiently close to a [non-existent] WC adjudication that L&K is in privity with Paycheck, Inc. (or in privity with Pro-Set Erectors) so as to enjoy a res judicata benefit from the WC proceedings.

Just as Defendant did not analyze the doctrine of res judicata in its briefing, it also did not analyze the doctrine of privity. Yet the trial Court accepted the applicability of these doctrines, even though the defense has the burden of proving their applicability. Because the burden of demonstrating privity rests with the Defendant (a burden never remotely

met), Plaintiff will provide only limited authorities on the issue of privity of judgment.

KARL B. TEGLAND, CIVIL PROCEDURE, 14A WASHINGTON PRACTICE, §35 (2008) discusses this issue. There is no Washington case with facts similar to the present case. However, TEGLAND n.19 cites *Taylor v. Sturgell*, 76 USLW 4453, 128 S. Ct. 2161, 171 L. Ed.2d 152 (2008) which disapproves a broad definition of privity of judgment which would include a wide range of persons. As is demonstrated in the TEGLAND discussion, privity of judgment normally involves binding a person who contracted to be bound to the judgment or who played a role in the original judgment. Because of the considerable length of this brief, Plaintiff will not discuss this issue further except to say that Defendant did not meet the burden of demonstrating privity of judgment (totally apart from the fact there has been no judgment).

There never was any litigation before the IIC as to Plaintiff's rights to bring a third party claim. Res judicata is inapplicable unless an issue has been, or could have been, specifically made part of the prior adjudication and there was a full and fair opportunity to litigate the issue in the previous proceeding. This principle is so basic that it should require no citation of authority. Nonetheless, *Waller v. State, Dep't. of Health and Welfare*, 146 Idaho 234, 192 P.3d 1058 (2008) reiterates this rule.

Plaintiff had no full and fair opportunity to litigate the issue of preclusion of his third party claim when he never received notice that the issue would be adjudicated and there was no hearing on that issue, and there was no judgment.

3. **The trial court erred in failing to apply Washington law at least to the issue of whether Idaho's statutory immunity is a bar to Williams' rights to sue L&K in tort. This error by the trial court is due to two separate legal principles.** In performing a conflict of law analysis, Washington courts require a distinct analysis for each legal issue where the law of the relevant states is different. In other words, there is not a single generic conflict of law analysis which applies to all the differing legal doctrines in the relevant states. *Williams v. State*, 76 Wn. App. 237, 293, 885 P.2d 845 (1994); *West American Insurance Co. v. MacDonald*, 68 Wn. App. 191, 194, 841 P.2d 1313 (1992); *Brewer v. Dodson Aviation*, 447 F.Supp.2d 1166, 1175 (W.D. Wash. 2006); RESTATEMENT (SECOND) CONFLICTS OF LAW, §145 comment d (updated 2008) (first sentence).

Counsel in the present case have identified numerous differences in the relevant law between Washington and Idaho. Some of those differences are:

- Caps on general damages. Idaho has such caps. I.C. §6-1605. Washington has no such caps.
- Negligence per se. Idaho still applies this standard. *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1986), approved in *Juarez v. Aardema*, 128 Idaho 687, 918 P.2d 271 (1996). Washington no longer has negligence per se. RCW 5.40.050.
- In Idaho the employer is only entitled to subrogation if it is fault free. Otherwise, the amount of workmen's compensation is deducted from the third party recovery. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983) (discussed in CP 111-112).
- Bar of Plaintiff's claim in Idaho if his fault is equal or greater than Defendant's. I.C. §6-801 compare with pure comparative negligence in Washington. RCW 4.22.070.

The trial court did not rule on the methodology for determining the appropriate state law on each relevant issue because the trial court decided

this case based upon res judicata. Yet, at the trial court level, the parties extensively briefed the methodology for determining the state law on each relevant issue affecting this case. Williams requests this ruling at this time because Williams regards res judicata as an unlikely basis upon which to affirm the trial judge. If this Court declines to rule on issues not yet decided by the trial judge, Williams requests that this Court maintain jurisdiction of this case and refer to the trial judge those legal issues which need to be decided in order to clarify the imbroglio of unresolved conflict of law doctrines. See e.g. *Gitter v. Gitter*, 396 F.3d 124, 136 (2d Cir. 2005); *Gulliver v. Dalsheim*, 739 F.2d 104 and cases cited at 106 (2d Cir. 1984); *Royal Bank of Canada v. Trentham Corp.*, 665 F.2d 515 (5th Cir. 1981); Wright, Miller & Kane, Fed. Prac. & Procedure §3937.1, text at n. 12 (2006).

Williams separates the unresolved conflict of law issues into two broad categories relevant to this case. This brief discusses each category separately.

3.(a) The trial court erred in failing to apply Washington law at least to the issue of whether Idaho's statutory immunity is a bar to Williams' rights to sue L&K in tort. This error by the trial court is due to two separate legal principles.

Washington law is clear that there should not be a transfer of a case to a state which provides no remedy for a wrong for which Washington courts provide a remedy. *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 228, 156 P.3d 303 (2007); *Hill v. Jawanda Transport, Ltd.*, 96 Wn. App. 537, 541 text at n.5, 983 P.2d 666 (1999). *See also Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978) (U.S. court will not transfer case to Ecuador where no remedy is granted.)

Strictly speaking, the foregoing Washington cases are forum non conveniens cases but §145 of the RESTATEMENT states the same principle in a conflict of law context. Washington has adopted §145 of the RESTATEMENT on numerous occasions.²

Moreover, there is no rational distinction between applying both a forum non conveniens and a conflict of law context of rule against transferring a case or applying the law of a jurisdiction which provides no remedy. The following cases have applied this rule in a conflict of law context. *Biscoe v. Arlington County*, 738 F.2d 1352, 1359 (D.C. Cir. 1984) cites many cases which have refused to extend sovereign immunity to a jurisdiction being sued outside the borders of the state granting

² Numerous Washington personal injury cases specifically adopt §145 of the RESTATEMENT. This brief will cite just a few. *Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn. App. 256, 115 P.3d 1017 (2005); *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 61 P.3d 1196 (2003); *Bush v. O'Connor*, 58 Wn. App. 138, 791 P.2d 915 (1990).

sovereign immunity. To the same effect as *Biscoe* are *Streubin v. State*, 322 N.W.2d 84 (Iowa 1982) and *Hall v. University of Nevada*, 8 Cal.3d 522, 503 P.2d 1363 (1972), *aff'd. Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed.2d (1979). Like *Biscoe*, these additional decisions permit a forum state to ignore the law of sovereign immunity of a different state, but these latter decisions rely on analysis of comity or full faith and credit rather than a conflict of law analysis relied upon by *Biscoe*. Thus courts generally, and Washington specifically, do not send a case to a forum which provides no remedy nor do they apply a conflict of law analysis to invoke the law of another state which provides no remedy.

The question is whether Idaho bars a suit by Plaintiff against L&K, an issue upon which the parties sharply disagree. Paradoxically, Williams has asserted that he has no right against L&K in Idaho but L&K has claimed that Plaintiff has rights to recover against L&K in a tort action asserted under Idaho law.

Of course, in Washington, an employee of a construction site subcontractor may bring an action against the general contractor. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990).

It is well established in Idaho that there may be generally be third party claims brought by injured workman against tortfeasors who are neither employers nor fellow employees of the worker. I.C. §72-223(2).

Yet a workman may not bring claims against their employer or the general contractor of a construction project. I.C. §72-223(1) bars suit against those “employers described in §72-216, having under them contractors or subcontractors...” Thus, a workman may not bring a third party suit against a general contractor of the subcontractor who hired the workman. *Adams v. Titan Equipment Supply Corp.*, 93 Idaho 644, 470 P.2d 409 (1970).

Williams is barred from suing L&K in Idaho on two bases. First, Williams is a borrowed servant (borrowed by Pro-Set from Paycheck Connection), and therefore, counts as an employee of Pro-Set Erectors. *Cordova v. Bonneville County Joint School Dist. No. 93*, 144 Idaho 637, 167 P.3d 774, 779 (2007); *Lines v. Idaho Forest Indus.*, 125 Idaho 462, 872 P.2d 725, 727 (1994).

Second, even if Williams is considered only as an employee of Paycheck Connection and not as a borrowed servant of Pro-Set, he is barred from suing L&K. Paycheck is a subcontractor of Pro-Set. Pro-Set is a contractor with L&K. I.C. §223(1) and §216 bar suits by any employee of a subcontractor of the entity being sued. In positing that Williams was an employee only of Paycheck, he was nonetheless an employee of a subcontractor of L&K and therefore, barred from suing L&K.

Of course, Paycheck was a sub-subcontractor of the School District which owned the construction project where the accident occurred. Yet, in determining statutory immunity, the Idaho statute asks whether the worker was employed by a subcontractor of the defendant being sued in a third party action (L&K). Since Williams worked for subcontractor of L&K, Williams is barred under Idaho law from bringing a tort action against L&K.

Accordingly, under Idaho law L&K enjoys complete immunity from any tort action brought against it by Williams. Therefore, Washington should neither transfer Williams' case to Idaho nor invoke the Idaho law on immunity of L&K.

There remains the issue of what conflict of law standard Washington should apply on the legal issues other than the applicability of Idaho's tort immunity statute.

3.(b) **In a personal injury case, the law of Washington requires application of the law of the state with the greater interest in applying its law. In the present case, that state is Washington.** This portion of Williams' brief does not pretend to anticipate the correct conflict of law ruling on each of the remaining legal issues where the laws of Washington and Idaho differ. However, L&K has asserted a framework

of analysis of the conflict of law conundrum that is very different than Williams is asserting.

Basically, L&K has asserted that there is a four part test determining which state's law applies in this case. *See* CP 113-114 which takes the four factors listed in §145 of the RESTATEMENT (SECOND) CONFLICTS OF LAW. L&K interprets the following cases as some of those requiring the application of those four factors: *Johnson v. Spider Staging Co.*, 87 Wn.2d 577, 581, 555 P.2d 997 (1976); *Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn.App. 256 (2005).

L&K repeatedly urged the trial court to count the contacts referenced in §145 of the RESTATEMENT. CP 113-14. L&K urged this position even though our courts have consistently ruled that simply counting contacts is erroneous. *Johnson, supra*; *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 190 P.3d 102 (2008).

Williams, on the other hand, asserts that in a personal injury case, the law of the state where the accident occurred should apply unless another state has a greater interest in applying its law. *Zenaida-Garcia, supra*, at 262; *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 51 P.3d 1190 (2003); *Bush v. O'Connor*, 58 Wn. App. 138, 144, 791 Pl.2d 915 (1990). In effect, this test is a convoluted way of saying that in a personal injury case the law of the state with the greater interest should

apply. In a personal injury context, the *Martin* and *Bush* cases modify the confusing four part test of §145 of the RESTATEMENT which cross references to the seven part test contained in §6 of the RESTATEMENT. Notably, one court has likened the application of the eleven combined factors in §6 and §145 of the RESTATEMENT TO BE like “skeet shooting with a bow and arrow; a direct hit is likely to be rare if not pure luck.” *Fisher v. Huck*, 50 Or. App. 635, 624 P.2d 177, 178 (Or. App. 1981).

At the trial court level, the parties hereto wrangled about the application of §6 and §145 (compare CP 9-14, CP 276-277 with CP 113-114). L&K urged a vastly oversimplified approach in applying these two sections of the RESTATEMENT (CP 301) which urged capitulation of §145 factors with no stopover for application of §6 factors. All seven of the §6 factors are mentioned in *Martin* at n.1 and some of those factors are mentioned in *Bush* at 143. Yet L&K substitutes for the seven part test enumerated in §6 as required by §145(sic) the interest analysis required by §146(sic). In this way L&K can skip from the 4 part test of §145 and move to the interest analysis of §146 without even tarrying to consider the 7 part test of §6 which §145 requires.)

At least one court has amalgamated all the factors of §§6 and 145 for a combined analysis. *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del. 1991). However, despite their reference to these same RESTATEMENT

sections (§§6 and 145), *Zenaida-Garcia, Martin* and *Bush* contain a black letter rule for conflict of law analysis in personal injury cases – the law of the state of the forum adheres unless another state has a greater interest in applying its law. Williams asks this Court to reaffirm the applicability of that test in this personal injury case.

4. The trial court erred in relying upon *Ellis v. Barto* for two separate reasons. In its Memorandum decision, the trial court specifically cited *Ellis v. Barto*, 82 Wn. App. 454, 918 P.2d 540 (1996).

The trial court did not rely upon *Ellis* for a determination as to which state’s law should apply in determining the rule for contributory or comparative negligence. However, *Ellis* states in dicta that the law of contributory negligence is “a rule of the road” which is determined by the law where the accident occurred.

Of course, the trial court did not rule on which state’s law applies on the issue of comparative negligence because the trial court decision relied upon res judicata. Yet, it is fully foreseeable that the application of *Ellis* with reference to the comparative negligence issue will emerge if this Court reverses the trial judge on the res judicata issue.

If this Court feels that the application of *Ellis* to comparative negligence is not yet ripe for review, Williams once again asks this Court

to maintain jurisdiction over this appeal and to remand this case to the trial judge for a ruling on the application of *Ellis* to the comparative negligence issue. All of this, of course, assumes that this Court shall properly rule that res judicata does not apply when there has never been a prior judgment issued by another tribunal.

Anticipating that this Court may rule on the applicability of *Ellis* to the comparative negligence issue, Williams will reformulate the legal authorities urged to the trial court with reference to this issue.

4.(a). ***Ellis is now out of harmony with the weight of national authority regarding treatment of comparative negligence in a conflict of law setting.*** Despite dicta in *Ellis*, the modern trend is to regard comparative negligence rules as loss allocation rather than a rule of fault (sometimes called a rule of the road). *Ellis* refers to RESTATEMENT (SECOND) CONFLICTS §164, for the proposition that issues regarding contributory or comparative negligence are determined by the law of the state where the accident occurred.

It is true that §164 does state that the applicable law regarding contributory fault will usually be the law of the state where the injury occurred. However, virtually all of the cases cited in the original notes to §164 are from time periods between the 1930s and the 1950s.

The most recent case dealing with choice of law on contributory fault contained in the original notes to §164 is *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968). In *Mitchell*, 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.

Most of the cases decided after *Mitchell* and involving this issue have parted from the rule stated in §164 which *Ellis* cites in dicta. For a summary of the modern cases, see JOHN S. HERBRAND, ANNOT., CHOICE OF LAW AS TO APPLICATION OF COMPARATIVE NEGLIGENCE DOCTRINE, 86 A.L.R.3d 1206 (1978). This annotation cites all of the following cases which consider contributory negligence to be a rule of loss allocation rather than a rule of the road. This is a rational outcome because a plaintiff's conduct is not differently regulated if his tort recovery is barred under contributory negligence rather than reduced under comparative negligence. More germane to the present case, plaintiff's conduct is not differently regulated if he gets the benefit of pure comparative negligence

(Washington rule) or loses all rights of recovery if his fault equals or surpasses the defendant (Idaho rule). These distinctions relate to loss allocation, not promulgation of different standards of conduct which a plaintiff can identify and to which he can conform himself in advance. Under this analysis, the applicable law for contributory or comparative fault would not automatically be the law of the state where the injury occurred, contrary to §164. For additional authority which distinguishes the conflict of law analysis in a loss allocation case rather than a “rule of the road” case *see* Cross, The Conduct Regulating Exception In Modern United States Choice-of-Law, 36 CREIGHTON L. REV. 425 (2003) with special focus on text at nn.125, 127; Baxter, 16 STAN. L. REV. 1 text at n. 29, *infra*; RESTATEMENT (SECOND) CONFLICTS OF LAW §145 comment c (updated 2008). Numerous cases make this same distinction. *See e.g. Calla and Viera, infra*. The question is whether *Ellis* is still consistent with current thinking as to whether a conflict of law analysis concerning the competing laws of comparative negligence is a rule of the road or a loss allocation rule.

The following cases are some of those from the above cited A.L.R. annotation and illustrative of the modern approach. *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, as comparative negligence does not relate directly to the duties of drivers within Iowa); *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) *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); *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). For a similar case outside of the Annotation, see *Chambers v. Dakotah Charter Co.*, 488 N.W.2d 63 (S.D. 1992) where 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.

Likewise *Patten v. GMC, Chevrolet Motor Div.*, 699 F. Supp 1500 (W.D. Okla. 1987) applies the law of domicile where the legal issue relates to the extent of recoverable damages in a wrongful death claim. Plaintiff was from Oklahoma, bought the allegedly defective vehicle in Oklahoma, but was injured in Colorado. *Patten* utilizes the law of Oklahoma in determining the recoverable damages in a wrongful death case. This case is not altogether a common domicile case because the car manufacturer sold the vehicle in Oklahoma, but was not incorporated or headquartered in Oklahoma. However, *Patten* demonstrates that the old rule of *lex loci delicti* does not automatically adhere in determining loss apportionment issues connected with an accident where parties come from a state different than the state where the accident occurred.

The cases in the A.L.R. Annotation are consistent with *Emery v. Emery*, 289 P.2d 218 (Cal. 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 party's common

domicile, a holding which is directly instructive in the present case where L&K seeks to cloak itself behind the Idaho statutory immunity.

See also Garcia v. General Motors, 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.

The willingness to extend this analysis to construction site cases appears in at least two New York cases. *Calla v. Shulsky*, 148 A.D. 60, 543 N.Y.S.2d 666, 668 (1989) (Loss allocation rules should be governed by party's domicile, not place of wrong. Therefore, New York law applies to construction site injury in New Jersey.); *Viera v. Uniroyal, Inc.*, 142 Misc.2d 1099, 541 N.Y.S.2d 668 (Sup. Ct. 1988), *affirmed* 148 A.D.2d 349, 538 N.Y.S.2d 986 (1989). Here a New York worker, injured in Missouri, sued a New York corporation in New York. Once again, the courts in both these decisions applied the law of New York, the law of the parties' common domicile, and found that the state where the accident

occurred had no interest in the determination of loss allocation between parties with a common domicile in a different state.

The *Viera* case was affirmed by the First Department of the New York Appellate Division, but not followed by *Huston v. Hayden Bldg. Maintenance Corp.*, 205 A.D.2d 68, 617 N.Y.S.2d 335 (1994). *Viera* applies the standards for New York construction sites to a construction site accident in Connecticut.

Adoption of the law of common domicile of the parties is validated in Baxter, Choice of Law and the Federal Court System, 16 STAN. L. REV. 1 text at n. 29 (1963) which states that where both parties are commonly domiciled, the law of their common domicile often determines the choice of law rather than the law of the accident site. Under this approach, the rules of Washington should apply in determining whether Plaintiff is barred if his comparative negligence exceeds the negligence of the Defendant (issue discussed in detail on pages 9-10 of Defendant's Memorandum). A crucial factor in determining in a loss allocation conflict of law analysis is whether the law of a state other than the accident site involves a common domicile for both parties to the case.

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.

Similarly, *Slawek v. Stroh*, 215 N.W.2d 9 (Wis. 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 was deemed subordinate.

Williams cites two additional cases which apply the law of comparative negligence of the state of common domicile of the parties to the action. Both of these cases appear in the annotations to §145 of the RESTATEMENT. *Hicks v. Groves Truck Lines, Inc.*, 707 S.W.2d 439 (Mo. App. 1986) involves facts virtually, if not 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 60% 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.

To the same effect is *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.

There is no known Washington personal injury case which applies the interest analysis where both plaintiff and defendant reside in State A (Washington in this case) but the accident occurred in State B (Idaho). However, Oregon has at least one reported case with that fact pattern wherein Oregon applies the interest analysis of §146 of the RESTATEMENT.

DeFoor v. Lematta, 437 P.2d 107 (Or. 1969) 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.

Under the above authorities, this Court should apply the comparative negligence standard of Washington, the forum state, because the Idaho rule of imposing a penalty if the comparative negligence is too great is simply a loss allocation rule. See p. 19 of this brief for a summary of Idaho comparative negligence rule which bars a plaintiff's recovery if his fault is equal or greater than the fault of the defendant. Loss allocation rules are governed by the law of common domicile. RESTATEMENT §145 comment d which states that issues of a "higher standard of care" should be determined by the law of the common domicile of both parties. Other RESTATEMENT sections which apply the law of common domicile of the parties are §156 comment f, §159 comment b, §161 comment e, §169(2).

Applying the law of the parties' common domicile finds support in these five RESTATEMENT sections and in at least 13 jurisdictions cited in the text of this brief. Additionally, Williams has included in an Appendix to this brief an additional 14 jurisdictions which determine damages or immunity issues according to the law of the common domicile of the

parties rather than the law of the accident site (the ancient *lex loci delicti* formulation called out in the dicta in *Ellis*).

Some of those cases favor the plaintiff in applying the law of common domicile (e.g. *Melik* and *Forsman*), and others applying the law of common domicile favor the defendant (e.g. *McSwain* and *Hataway*). In other words, despite Washington's silence to date in applying the law of the parties' common domicile, this test has been approved by a majority of U.S. jurisdictions and by 5 discreet sections of the RESTATEMENT including §145 which the courts of Washington have approved on more than a dozen occasions relating to at least one issue discussed in that section.

The law of Washington, the state of the parties' common domicile, should apply to the issue of comparative negligence because no other state has an interest in applying its law. The interest analysis is pivotal in analyzing conflict of law issues in personal injury cases according to *Bush* and *Martin, supra. Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 137 P.3d 914, 45 Cal. Rptr.3d 730, 743 (2006) makes it clear that determination of relative impairment of a state's interest is not simply "weighing" of conflicting government interests in order to determine which is "worthier." The recent case of *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App.4th 1436, 63 Cal. Rptr.3d 816, 831 (2007) provides a

clear, succinct guideline for applying the interest analysis. There are three successive steps:

1. Determine whether the laws of the states being considered are different.
2. Determine which state has an interest in applying its law.
3. If the interests of two or more states conflict, determine which state will suffer less impairment of its interest if its law is not applied.

Applying this test, Washington law should apply under the interest analysis.

Idaho has no interest in applying its law of comparative negligence because both Plaintiff and Defendant are Washington residents, and no Idaho resident will have its interests advanced by the application of Idaho's rule of denying recovery if plaintiff's fault equals or exceeds the fault of L&K. By analogy, *Johnson, supra*, utilizes the interest analysis in disregarding the statutory damages limitation of Kansas because that limitation did not advance the interests of any Kansas entity. Therefore, *Johnson* applies the law of Washington which had an interest in regulating corporations incorporated in Washington with their principal

place of business in Washington. *Johnson* is a case relating only to the law of loss allocation.

In the same way Washington has an interest in regulating L&K which is incorporated in Washington and has its principal place of business in Washington. This is precisely the approach taken in *Workman v. Chinchian*, 807 F. Supp. 634 (E.D. Wash. 1992). Plaintiff, a Washington resident, went to the Idaho office of defendant, a physician who lived in Washington. The U.S. District Court applied Washington law because Idaho had no interest in applying its "cap" on malpractice damages in order to protect a Washington resident. *Workman* is similar to the present case in that Idaho has no interest in the case at bar in protecting a Washington corporation with its rule of denying all recovery under the doctrine of comparative negligence if Plaintiff's fault is equal or greater than the fault of L&K.

4.(b). **Contrary to the apparent ruling of the trial court, *Ellis* does not mandate application of "lex loci delicti" as to all legal issues arising out of a personal injury claim.** The Order of the trial judge seems to imply that *Ellis* mandates that all conflict of law issues must be resolved according to the law of the place of the harm. This is simply a

repackaging of the *lex loci delicti* rule which Washington has long since rejected.

Moreover, this ruling by the trial judge ignores *Williams, supra*, and *West American Ins. Co., supra* which require that each conflict of law issue be separately analyzed according to the principles discussed herein.

This brief has not even attempted to inventory all the conflict of law issues involved in this case between these parties. For example, another previously unmentioned difference in the relevant law of Idaho and Washington is that Idaho deducts collateral source payments from the jury award prior to entry of the judgment. I.C. §6-1605. Except in medical malpractice cases, Washington includes collateral source payments as part of the judgment.

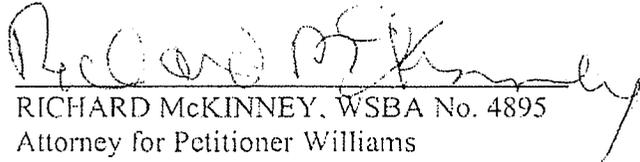
The point of this section is to urge the Court of Appeals to admonish the trial judge not to utilize a broad ax in disposing of all the conflict issues with a single crude stroke. Clearly, the issues of res judicata, Idaho statutory immunity, and comparative negligence are salient because they most affect whether Plaintiff Williams will have any tort remedy whatsoever.

SUMMARY

Williams concedes that there was below only a binding ruling on the quizzical issue of res judicata. The first relief requested is that this Court reverse the trial judge on the issue of res judicata. Second, because justice delayed is justice denied, Williams requests that this Court direct the trial judge regarding the correct standard for conflict of law analysis in a personal injury case. That standard is that, pursuant to the *Zenaida-Garcia*, *Martin*, and *Bush* cases, the interest analysis is the approved methodology for conflict of law analysis in a personal injury case. Alternatively, Williams' second request for relief is that this Court maintain jurisdiction over this case while the trial judge rules on the applicable law pertaining to Idaho statutory immunity, comparative negligence and perhaps all other issues requiring a conflict of law analysis. Third, Williams requests that this Court direct the trial judge to reconsider the dicta in *Ellis v. Barto* to the extent that it mandates that the law of the state of injury should automatically apply to the issue of comparative negligence. Instead, Williams requests that the trial judge be directed to consider whether comparative negligence is a loss allocation rule which should be guided by principles other than the automatic application of the law of the state of the injury. If this Court maintains continuing

jurisdiction after remanding the case to the trial judge, this Court could then expeditiously review the trial court's ruling. Such a procedure would greatly accelerate the final resolution of this case. Otherwise, both parties will be consigned to a second, or even a third, appeal on the real issue which has thus far eluded the trial judge- a conflict of law analysis.

RESPECTFULLY SUBMITTED this 27th day of March, 2009.


RICHARD MCKINNEY, WSBA No. 4895
Attorney for Petitioner Williams

APPENDIX CONTAINING CASE LAW FROM JURISDICTIONS
WHICH APPLY LAW OF COMMON DOMICILE FOR LOSS
ALLOCATION ISSUES

1. *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.)
2. *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.)
3. *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.)
4. *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.)
5. *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.)
6. *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.)

7. ***Hataway v. McKinley***, 830 S.W.2d 53 (Tenn. 1992) (Tennessee plaintiff and 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.)
8. ***Heinz v. Heinz***, 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.)
9. ***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.)
10. ***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.)
11. ***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.)
12. ***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.)

13. *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.)
14. *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967) (Kentucky domiciliaries traveling in Indiana which had a host-guest statute. Kentucky court applies Kentucky law which did not have host-guest statute.)

CERTIFICATE OF SERVICE

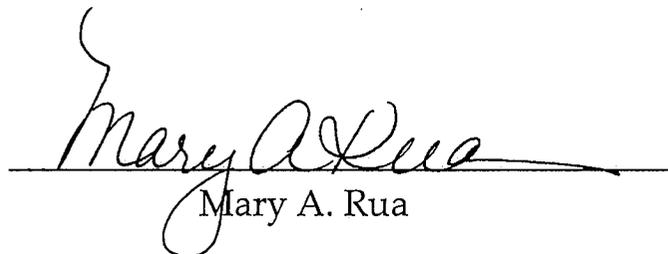
I hereby certify that on March 27, 2009, the original and one (1) copy of the **Brief of Appellant** were filed with the Court of Appeals of the State of Washington, Division III, at the following address:

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 **Brief of Appellant**, via hand delivery, to the following:

Andrew C. Bohrsen
9 South Washington, Suite 300
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