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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

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DELBERT WILLIAMS, an unmarried man,

Plaintiff / Appellant

v.

LEONE & KEEBLE, INC., a Washington Corporation,

Defendant / Respondent.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The plaintiff tritely complains that “justice delayed is justice denied”.<sup>1</sup> The defendant initially must take issue with the plaintiff’s inference that justice was not done by the trial court. Furthermore, any ongoing delay in this litigation is solely the plaintiff’s own creation because Judge Sypolt’s Order did nothing more than require a change of venue from Spokane County to Kootenai County. Instead of re-filing suit in Idaho and proceeding expeditiously toward his stated goal of pursuing “justice”, however, the plaintiff has instead chosen to avail himself of the temporary stay in all trial-level proceedings by engaging in the appellate process. The plaintiff is certainly entitled to proceed in this manner but any delay caused by his choice to appeal should be of no concern to this Court.

As another preliminary matter, it must not be lost on this Court that Judge Sypolt’s Order granting the defendant’s motion to dismiss for want of jurisdiction effectively mooted the Washington-Idaho choice of law issue which explains why the Judge merely referenced it in *arguendo*. (CP 307; CP 264). Notwithstanding, the plaintiff has devoted a substantial portion of his appellate brief to the choice of law

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<sup>1</sup> Brief of Appellant, at 42.

analysis. A very cursory review of the plaintiff's table of authorities<sup>2</sup> identifies a total of 81 cases cited with 46 citations from jurisdictions other than Washington or Idaho. One may rightly ask why the plaintiff relies so heavily on non-binding authority when the body of Washington case law is so well-established on this issue. The answer is simple – Washington case law does not support the plaintiff's conclusions thereby compelling him to look elsewhere.

The decision by the trial court was soundly based on a proper understanding of Idaho's jurisdiction in a worker's compensation setting as well as a proper application of Washington law to the undisputed facts of this case and should not be disturbed on appeal.

## II. ASSIGNMENT OF ERROR

The plaintiff's Assignments of Error contain no citation to the court record. It is understood, however, that the plaintiff assigns error to the trial court's Order Granting Defendants' Motion to Dismiss. Notice of Appeal (CP 316); Order (CP 306-307). The Order on appeal effectively did three things: (1) it denied the plaintiff's Motion for Summary Judgment seeking application of Washington substantive law; (2) it granted the Defendant's Motion to Dismiss for

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<sup>2</sup> The plaintiff has chosen to identify his Table of Authorities as "Cases" at ii-v.

Want of Jurisdiction; and (3) in *arguendo*, it advised that Idaho substantive law would have been applied if jurisdiction had been retained in Washington.

The plaintiff has alleged four (4) separate errors were committed by the trial court.<sup>3</sup> The first two assigned errors concern facets of the same issue – Idaho jurisdiction. The third assigned error concerns application of Washington law so that the plaintiff may sue L&K in tort – an issue which has been repeatedly conceded by the defendant so there is no justiciable controversy to be decided by this or any other Court. The fourth assigned error alleged by the plaintiff is not based on Judge Sypolt's Order but rather concerns the trial court's reference to the Ellis v. Barto decision in its letter opinion dated November 20, 2008. (Compare Order, CP 264).

### III. STATEMENT OF THE CASE

#### **A. The Following Are Undisputed Facts Relevant to this Court's Consideration of the Plaintiff's Appeal.**

Other facts relevant to particular applications of the law may be identified at various stages throughout this brief and citation to the record will be made therein as appropriate. In an effort to avoid

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<sup>3</sup> Brief of Appellant, at 4-5.

redundancy, however, the seminal facts of this case are undisputed and are set forth as follows.

On August 3, 2007, the plaintiff 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 (L&K) was the general contractor on the job site at issue. (CP 104, 121). L&K'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 for Lakeland High School in Rathdrum, Idaho), the defendant general contractor was obliged to comply with innumerable Idaho laws, rules, and regulations which govern 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 121-22).

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).

**B. The Following Are the Procedural Facts Relevant to this Appeal.**

The trial court's Order did the following: (1) it denied the plaintiff's Motion for Summary Judgment seeking application of Washington substantive law; (2) it granted the defendant's Motion to Dismiss for Want of Jurisdiction; and (3) 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).

**IV. STANDARD OF REVIEW**

The defendant's Motion to Dismiss for Want of Jurisdiction was based on CR 12, Washington case law, and the defendant's Memoranda of Authorities. (CP 225). Dismissal for lack of jurisdiction presents a question of law that is reviewed *de novo*. In re Estate of Kordon, 157 Wn.2d 206, 209, 137 P.3d 16 (2006); Kinney v. Cook,

130 Wn. App. 436, 440, 127 P.3d 722 (Div. 3, 2005), *review granted* 157 Wn.2d 1021, 142 P.3d 608, *reversed* 159 Wn.2d 837, 154 P.3d 206 (2007); Port of Seattle v. Lexington Ins. Co., 111 Wn. App. 901, 905, 48 P.3d 334 (Div. 1, 2002); In re Estate of Peterson, 102 Wn. App. 456, 462, 9 P.3d 845 (Div. 2, 2000), *publication ordered, review denied* 142 Wn.2d 1021, 16 P.3d 1266 (2001).

Judge Sypolt's Order also denied the plaintiff's summary judgment motion seeking application of Washington substantive law. When reviewing an order granting summary judgment, an appellate court engages in the same inquiry as did the trial court. Barr v. Day, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). The summary judgment must be affirmed if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed *de novo*. Caritas Servs., Inc. v. Department of Social & Health Servs., 123 Wn.2d 391, 402, 869 P.2d 28 (1994). Under RAP 9.12, only the evidence and issues called to the attention of the trial

court may be considered on appeal of a summary judgment.

#### V. ARGUMENT OF COUNSEL

**A. The plaintiff's first assignment of error conveniently overlooks the fact that jurisdiction had already been decided in Idaho by the time he filed suit in Washington.**

Washington courts have recognized that the term *res judicata* encompasses two very different but related doctrines: (1) claim preclusion, often referred to as *res judicata*, and (2) issue preclusion, also known as collateral estoppel. Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). In an attempt to mitigate the potential confusion caused in practice by using the same term interchangeably to mean two different things, there has been a shift in practice over time to use more definitive terms as the following provides:

["]Professor Allan Vestal has long argued for the use of the names 'claim preclusion' and 'issue preclusion' for these two doctrines [Vestal, Rationale of Preclusion, 9 St. Louis U. L.J. 29 (1964)], and this usage is increasingly employed by the courts as it is by RESTATEMENT SECOND OF JUDGMENTS." Charles Alan Wright, *The Law of Federal Courts* § 100A, at 722- 23 (5th ed. 1994).

BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004), *res judicata*.

In the case on appeal, it is apparent that the parties have gone

down an erroneous path of legal discourse on the subject of *res judicata* (i.e. claim preclusion) when the more appropriate discussion should have been collateral estoppel (i.e. issue preclusion). Jurisdiction was the relevant issue presented by the plaintiff in his claim to the Idaho Industrial Commission, and was brought to the fore by the defendant's motion at the trial level and is now the basis of the plaintiff's appeal. The root of this apparent confusion was the defendant's reliance on the following quote:

Accordingly, we hold that if the notice of injury was filed with the Industrial Commission before the plaintiffs filed their original complaint with the district court, then the Industrial Commission has the first right to determine the jurisdictional issue, and **its determination is res judicata upon the question of jurisdiction** and the factual questions upon which the determination of jurisdiction must necessarily turn.

Anderson v. Gailey, 97 Idaho 813, 825, 555 P.2d 144 (1976)(emphasis added). Because the Anderson court used the term "res judicata", the defendant continued down that path of analysis in its Memorandum of Authorities. (CP 108-109). It is clear from the above quote, however, that the Anderson court was referencing a singular issue – jurisdiction – and therefore the more appropriate legal description and subsequent analysis should have been "collateral

estoppel” instead of “res judicata”. As part of this Court’s *de novo* review of the underlying decision, however, we now have an opportunity to correct the errant discourse below but the defendant would like to emphasize at the outset that the end result is the same – jurisdiction is appropriate in Idaho.

Collateral estoppel, or issue preclusion, is the applicable preclusive principle when “the subsequent suit involves a different claim but the same issue.” Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV. 805 (1985). There is no question that the plaintiff’s claim for Idaho worker’s compensation benefits is different from the third-party tort claim being pursued against L&K. Furthermore, Idaho’s jurisdiction (and in the obverse, Washington’s lack of jurisdiction) was the very limited question previously decided by the Idaho Industrial Commission and made an issue by the defendant on its motion which was correctly decided by Judge Sypolt. Our case, therefore, meets the definition requirements for collateral estoppel because we have a subsequent suit involving a different claim but the same issue.

The relevant facts with respect to the issue of Idaho’s jurisdiction are undisputed. At all times relevant to this litigation, the

plaintiff was employed by Paycheck which is an Idaho corporation and hires laborers such as the plaintiff. Pro-Set Erectors hired the plaintiff through Paycheck. (CP 104-106; Ex. 5 to Defendant's Memorandum of Authorities in Support of Motion to Dismiss for Want of Jurisdiction or, in the Alternative, for the Application of Idaho Law). The plaintiff's injury occurred in Rathdrum, Idaho while he was working for Pro-Set Erectors. (CP 21). Pro-Set's principal place of business is Hayden Lake, Idaho and is an Idaho corporation. (CP 26; CP 90). Pursuant to the sub-contract with Leone & Keeble, Pro-Set Erectors "has the status of employer as defined by Industrial Insurance". (CP 32, heading "M. EMPLOYEE-RELATED PAYMENTS", ¶1.). The record before this Court further provides that:

Delbert Williams filed a First Report of Injury for a work related injury that occurred on August 3, 2007, which the State Insurance Fund accepted as compensable under the policy of insurance issued to his employer and, as such, the Idaho State Insurance Fund has been paying worker's compensation benefits to Mr. Williams for the workplace injury.

Becky Coble Declaration, CP 287.

In the case at bar, the plaintiff has voluntarily submitted the threshold jurisdictional question to the Idaho Industrial Commission and that issue was resolved in his favor when the agency accepted

jurisdiction and paid his injury claim. Since the plaintiff has already prevailed on the jurisdictional issue in Idaho and has willingly accepted the pecuniary benefits of that administrative decision he should not now be allowed to argue an inconsistent position in subsequent litigation filed against L&K in Washington. The claim is obviously not the same but the issue made relevant by the defendant's motion is the same (*i.e.* jurisdiction). The collateral estoppel doctrine, not to mention over-arching principles of equity, do not permit such an incongruous result. Washington's Supreme Court has previously advised that

the party seeking application of the [collateral estoppel] doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of [the doctrine] does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

All four<sup>4</sup> preliminary collateral estoppel elements have been

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<sup>4</sup> In actuality, Washington requires consideration of a total of seven (7) collateral estoppel elements if an administrative agency's findings are at issue. As will be demonstrated in this section hereinafter, an objective evaluation of all seven

met in our case. First, jurisdiction was the issue decided with respect to the plaintiff's worker's compensation claim in Idaho and was the same issue presented to Judge Sypolt on the defendant's motion to dismiss. Second, we know that the Idaho State Insurance Fund determined the threshold question of jurisdiction because they accepted the plaintiff's worker's compensation injury claim and paid benefits on his behalf. (A/so see Becky Coble Declaration, ¶12, CP 287). It is difficult to conceive of any decision – administrative or otherwise – which could be more final than monetary payment not to mention the fact that there has certainly been no effort on the plaintiff's part to previously dispute the Idaho agency's assertion of jurisdiction or for him to return the money he received. Idaho courts have further instructed, in the worker's compensation context, as follows with respect to the "final judgment" element of collateral estoppel:

It may be answered that initially both tribunals [*i.e.* courts and the administrative agency] have jurisdiction to determine jurisdiction, and that if ultimate jurisdiction were to depend on the first final judgment, then we should still have the footrace but it would be a marathon rather than a sprint. **With the law as it is, a race may**

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elements requires application of collateral estoppel in this case as to the issue of Idaho's jurisdiction.

**be inevitable, but if it is, we prefer that it be a sprint.”**

Anderson v. Gailey, 97 Idaho 813, 825, 555 P.2d 144 (1976)(emphasis added) *quoting* Scott v. Industrial Accident Commission, 46 Cal.2d 76, 293 P.2d 18, 25 (1956). As far as Idaho courts are concerned, with rationale set forth in the Anderson opinion favoring a quick end to the jurisdictional question as opposed to a protracted one, the Industrial Commission’s decision on the issue of jurisdiction was final. Third, the plaintiff is the same party who presented the jurisdictional question to the worker’s compensation administration in Idaho and is the same party who now, after receiving Idaho benefits, takes the opposite position alleging that jurisdiction in Washington is proper. Fourth, the plaintiff can hardly be heard to complain that application of Idaho law is now improper and would cause him a supposed injustice when it previously served as the basis for his pecuniary worker’s compensation benefit.

Washington common law has added three more collateral estoppel factors which should be considered by this Court because L&K seeks to apply the doctrine to the Idaho Industrial Commission’s decision concerning jurisdiction. Our Supreme Court has instructed

that

[t]hree additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations.

Christensen, 152 Wn.2d at 308 (internal citations omitted). First, there can be no legitimate debate that Idaho's legislature granted the State Industrial Commission authority to decide the threshold question of jurisdiction (*i.e.* whether or not to compensate worker injury claims) and that Idaho courts have acknowledged the same. See Anderson v. Gailey, above. Second, while there are no doubt differences between administrative procedures and court procedures they could hardly be determined as germane for determining the relevant threshold issue of jurisdiction. Furthermore, the plaintiff should not be permitted to subsequently defeat Idaho jurisdiction on the facts presented by this case especially when the previous administrative decision was resolved in his favor. Third, Idaho public policy considerations are adequately and succinctly set forth in the Anderson opinion which prefers the sprint over the marathon and which held that the administrative decision on the jurisdiction issue is

final and will not be re-visited by the Idaho Courts.

Based on the foregoing argument and authority, the defendant respectfully submits that the issue of jurisdiction was previously decided in favor of Idaho and that the doctrine of collateral estoppel should preclude the plaintiff from now taking the contrary position that jurisdiction in Washington is proper. Notwithstanding the errant discourse below on principles of *res judicata* instead of collateral estoppel, the trial court correctly decided the issue of jurisdiction in favor of Idaho and its Order should not be disturbed by this Court on appeal.

**B. The plaintiff's second assignment of error perpetuates an erroneous discussion of claim preclusion when the proper focus of this appeal should be issue preclusion.**

The argument presented by the plaintiff beginning at page 12 of his latest brief is an almost verbatim re-statement of the arguments presented in his briefs previously filed at the trial court level and which were correctly rejected by the Honorable Judge Sypolt. (*compare Brief of Appellant*, p. 12-18 with CP 271-274 and CP 230). Furthermore, the error of plaintiff's *res judicata* analysis has been highlighted in the immediately preceding section wherein the proper legal analysis was focused on principles of collateral estoppel (*i.e.*

issue preclusion) as opposed to claim preclusion.

Because the plaintiff's "same claim" argument (beginning at p. 12), "implied terms" argument (beginning at p. 15), and "privity" argument (beginning at p. 16) are all elemental factors related to *res judicata* (or claim preclusion) they have no direct application to the jurisdictional issue presented to and resolved by the trial court and therefore deserve no attention from this tribunal. To the extent necessary, the undersigned re-directs this Court's attention to the preceding argument section for a proper application of collateral estoppel to the undisputed facts of this case.

**C. The plaintiff's third assignment of error presents two issues: one is moot and the other mis-applies Washington's two-part choice-of-law analysis.**

As part of his third assignment of error, the plaintiff continues to make the quixotic argument that the defendant is immune from tort liability under Idaho law. In an effort to be as candid toward the trial court and opposing counsel as the rules of professional conduct mandate, the defendant has repeatedly advised that Idaho law does not provide the shelter Mr. Williams claims given the undisputed facts of our case. And even if the defendant has mis-construed Idaho law regarding general contractor immunity (to its obvious detriment),

principles of collateral estoppel should prevent it from arguing a position to the contrary in any subsequent proceeding involving these parties – see collateral estoppel argument above. The plaintiff thereafter demonstrates, beginning at page 24 of his brief, an inability or unwillingness to acknowledge that Washington’s choice-of-law analysis is a two-part process only if significant contacts are found evenly balanced between the respective states. In other words, the trial court correctly weighed the significant contacts of Washington versus Idaho on our facts and decided correctly that Washington’s contacts were minimal because all Restatement factors favored Idaho as the only Washington contact was the residence of the parties. Residential status alone has never been enough to tip the balance in a proper choice-of-law analysis. The trial court’s decision should not be disturbed by this Court on appeal.

***1. General Contractor Immunity under Idaho law is not an issue in controversy.***

The relevant portion of the plaintiff’s heading provides: “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’ right to sue L&K in tort.” This Court has previously held that:

[a]n appeal must be dismissed if the questions are moot or abstract, or where the substantial questions considered at the trial level are no longer at issue. A case is moot when “a court can no longer provide effective relief.”

State v. Enlow, 143 Wn. App. 463, 470, 178 P.3d 366 (Div. 3, 2008)(internal citations omitted). The plaintiff's third assignment of error regarding his inability to sue L&K as a third-party under Idaho law is misplaced and overlooks the obvious and repeated concessions to the contrary which have been previously made by the defendant in this case.

The plaintiff has devoted a significant amount of time, effort, and emotion toward his argument that applying Idaho law would work an injustice against him in this case because the defendant would be statutorily immune as a general contractor. I.C. § 72-223 entitled “Third party liability” serves as the basis for the plaintiff's contrived immunity argument. For purposes of this appeal, however, there is no need to re-visit the entirety of arguments and authorities presented by the parties because ultimately there is no dispute. The defendant previously briefed this issue more fully at CP 257 and CP 302 and therefore will refrain from adopting the plaintiff's proclivity for “cut and paste” briefing but will rather re-direct this Court's attention to those

pages in the record (to the extent this tribunal thinks review is warranted) and hereby incorporates them as though fully set forth.

In short, however, the record before this Court should be abundantly clear that L&K has never disputed the plaintiff's right to sue L&K as a third-party. (See CP 257-258<sup>5</sup>; CP 302-304<sup>6</sup>). The plaintiff has acknowledged L&K's position but nonetheless continues to waste this Court's time on argument concerning an uncontested issue. At page 22 of his brief, the plaintiff correctly states: "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."

Notwithstanding the defendant's repeated concessions, the plaintiff has continued to joust at this legal windmill by repeatedly raising the issue of L&K's supposed immunity from suit under Idaho's worker's compensation law and has further attempted to invoke sympathies by stating that he is "facing the immediate prospect of dire poverty, homelessness, and lack of means to support himself" (Brief

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<sup>5</sup> Defendant's Reply, argument section "C" entitled "Plaintiff's so-called 'blanket immunity' argument is without merit". (CP 257).

<sup>6</sup> Defendant's Response, argument section "C" entitled "The plaintiff is wrong that Idaho law provides immunity to L&K". (CP 302).

of Appellant at 3; CP 5); and is “faced with financial ruin” (CP 17). The foregoing may be ample reason for the plaintiff to pursue his relief in Idaho but his sympathetic pleas find no support from Washington case law. Our State Supreme Court has previously acknowledged that Washington’s interest in fully compensating its residents for their injuries is “a real interest,” but is not “an overriding concern” and further instructed that “residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law.” Rice v. Dow Chemical Co., 124 Wn.2d 205, 216, 875 P.2d 1213 (1994).

This Court should also be cognizant of the fact that, irrespective of the ultimate determination of which state’s court has jurisdiction over this matter, the doctrine of collateral estoppel (*i.e.* issue preclusion) discussed at length above would preclude L&K from raising the affirmative defense of immunity pursuant to Idaho Code § 72-223 in any subsequent proceeding involving these parties.

In summary, the defendant contends that there is simply no appealable issue as to statutory immunity for general contractors under Idaho law as it is applied to our undisputed facts. It is a moot issue because the defendant has repeatedly conceded the point.

There is no statutory obstacle under Idaho law which prevents the plaintiff from pursuing his third-party tort claim against L&K and if the defendant is wrong, it should be collaterally estopped from subsequently raising the defense against this plaintiff.

***2. The plaintiff misconstrues Washington's two-part choice of law analysis.***

Without any citation to Washington authority, the plaintiff self-servingly and erroneously proclaims that "Washington courts require a distinct analysis for each legal issue where the law of the relevant states is different." Brief of Appellant at 18. The plaintiff also wrongly argues that "L&K repeatedly urged the trial court to count the contacts referenced in §145 of the RESTATEMENT." Brief of Appellant at 25. In reality, the only thing L&K urged the trial court to do was to properly apply Washington law to the facts of this case. Judge Sypolt's decisions below are supported by Washington authority and should not be disturbed by this Court on appeal.

The citations provided by the defendant in response to the plaintiff's motion for reconsideration below are equally instructive on appeal.

Application of the most significant relationship rule is two-fold. A court must first evaluate the contacts with

each potential state, and then, only if evenly balanced, will a court “evaluat[e] ... the interests and public policies of the concerned states, to determine which state has the greater interest in determination of the particular issue.”

Payne v. Saberhagen Holdings, Inc., 147 Wn. App. 17, 28-29, 109 P.3d 102 (Div. 1, 2008) (emphasis added) *quoting* Zenaida-Garcia v. Recovery Systems Technology, Inc., 128 Wn. App. 256, 260-61, 115 P.3d 1017 (Div. 1, 2005). The Zenaida decision relied on the Johnson v. Spider Staging<sup>7</sup> case and its progeny and emphasized the point further.

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

Zenaida at 260-61 (emphasis added), *citing* Myers v. Boeing Co., 115 Wn.2d 123, 133, 794 P.2d 1272 (1990). Because the Honorable Judge Sypolt determined that the state contacts in our case were not evenly balanced but were heavily in favor of Idaho, the second step of examining the competing state’s interests and public policies were properly given no consideration. Notwithstanding the plaintiff’s protestations to the contrary, the decisions below were the result of

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<sup>7</sup> Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997 (1976).

a proper application of our facts to Washington's choice of law principles.

The plaintiff wrongly claims that the three cases<sup>8</sup> he cites "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." Brief of Appellant at 27. The cases do not enunciate a bright line rule as the plaintiff suggests, but rather the common thread in all three cases is merely their citation to the same RESTATEMENT section which in its entirety provides:

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

RESTATEMENT (SECOND) CONFLICT OF LAWS § 146 (entitled "Personal Injuries") (emphasis added).

As applied to the facts of our case, there can be no dispute that the defendant's alleged wrongdoing, if any, and the plaintiff's

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<sup>8</sup> The plaintiff cites the following cases in support of his erroneous conclusion: (1) Zenaida-Garcia v. Recovery Systems Technology, Inc., 128 Wn. App. 256, 115 P.3d 1017 (Div. 1, 2005); (2) Martin v. Goodyear Tire & Rubber Co., 114 Wn. App. 823, 51 P.3d 1190 (Div. 1, 2003); and (2) Bush v. O'Connor, 58 Wn. App. 138, 791 P.2d 915 (Div. 3, 1990).

bodily injuries occurred in the state of Idaho. The RESTATEMENT provides further comment explaining why this general rule of applying the local law of the state of injury is appropriate.

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

RESTATEMENT (SECOND) CONFLICT OF LAWS § 146, cmt d (emphasis added) (parenthetical reference to other RESTATEMENT sections omitted).

The foregoing merely illustrates the RESTATEMENT's tendency to apply the local law of the state where the injury occurred – which in this case is Idaho. See RESTATEMENT (SECOND) CONFLICT OF LAWS §156(2) (entitled "Tortious Character of Conduct"); §157(2) (entitled "Standard of Care"); §159(2) (entitled "Duty Owed to Plaintiff"); and §160(2)(entitled "Legal Cause") in which all RESTATEMENT sections provide: **"The applicable law will usually be the local law of the state where the injury occurred."** (Emphasis added). It must be emphasized, that Washington courts do not mechanically apply the

RESTATEMENT general rule which is really nothing more than the doctrine of *lex loci delicti*<sup>9</sup> but rather engage in a “most significant contacts” analysis.

The plaintiff's tort claim against L&K will necessarily involve proof of all elements of negligence (duty, breach, causation, and damages). In every instance implicating the relevant negligence elements, Idaho is the jurisdiction with the most significant contacts. The plaintiff claims that Washington has the greater interest in applying its law but apparently confuses competing state's interests with his personal pecuniary interests. It is difficult to conceive of any legitimate basis for application of Washington substantive law on our facts where the only commonality is the residential status of the parties.

The error of the plaintiff's legal proposition becomes glaringly obvious when one hypothetically applies Washington substantive law to our undisputed facts – an Idaho construction site injury. In this hypothetical, the trial judge would necessarily instruct a jury as to a general contractor's duties owed to workers on the job site. A general

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<sup>9</sup> “[Latin] The law of the place where the tort or other wrong was committed.” BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004), *lex loci delicti*.

contractor's statutory obligations are set forth in Washington's Industrial Safety and Health Act (WISHA) and common law obligations are identified in our Supreme Court's Stute v. P.B.M.C., Inc. opinion. The problem arises when one looks to the relevant statute or the case law which succinctly state that the protections they afford are intended to protect workers in Washington and are not determined by a party's residential status for application wherever the Washington resident may end up working. WISHA's stated purpose is set forth as follows:

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

RCW 49.17.010 (emphasis added). Not coincidentally, the Stute opinion similarly limits its application to Washington job sites. The Supreme Court has previously held as follows

[t]hus, to further the purposes of WISHA to assure safe and healthful working conditions **for every person working in Washington**, RCW 49.17.010, we hold the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.

Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 463-4, 788 P.2d 545 (1990).

In short, the protections afforded to workers by our legislature and our courts are rightly limited to workplace injuries in the state of Washington. The plaintiff would have Washington substantive law follow parties across state borders simply because of their residential status. Under the plaintiff's theory, it is possible that a general contractor whose negligence is implicated due to an injury which occurred in one state could be subject to the laws of any number of different jurisdictions limited only by the different residences of parties on the construction site. There is no authoritative support for the plaintiff's untenable position and this Court should not extend WISHA and/or Stute beyond Washington's borders. On our undisputed facts, Idaho is the state with the most significant contacts and it is Idaho substantive law on the issue of negligence (and any defenses or apportionment thereto) which should be applied. Such a result is consistent with the RESTATEMENT as well as Washington's choice of law protocol.

**D. The plaintiff's fourth assignment of error is merely an academic exercise which finds no support in Washington law and does not warrant this Court's consideration on appeal.**

It is a common writing technique to reserve one's weakest

argument for last. Plaintiff's fourth assignment of error<sup>10</sup> is certainly no exception to this general rule. The defendant would like to emphasize for this Court that there is no need to take the plaintiff's bait and engage in a comparative legal analysis of the disparate aspects of Idaho's versus Washington's negligence statutes, worker's compensation laws, lien reimbursement, and the like. All these factors would be an appropriate part of a choice-of-law analysis if the first step of the process -- significant contacts -- were deemed equivalent. In our case, the significant contacts were so heavily in favor of Idaho that there was no need to consider the second step of the Restatement -- state's comparative interests.

The plaintiff devotes the last 14 pages of his brief to argument which is really nothing more than an academic exercise that does not deserve this Court's time or attention. In truth, the plaintiff's discussion is not necessary for purposes of this appeal because the Ellis v. Barto decision was merely referenced in *arguendo* by Judge Sypolt (CP 264) and therefore was not a material (read not

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<sup>10</sup> The plaintiff's fourth assignment of error presents two arguments based on the Ellis opinion: (1) Ellis is inconsistent with the common law of other jurisdictions (Brief of Appellant at 28-40), and (2) Ellis does not mandate application of the *lex loci delicti* doctrine (Brief of Appellant at 40-41).

appealable<sup>11</sup>) part of the trial court's Order. Even the plaintiff admits that his last assignment of error is mere surplusage when he states "[o]f course, the trial court did not rule on which state's law applies ... because the trial court decision relied upon res judicata." Brief of Appellant at 27. The plaintiff eventually reveals his true motivation for this appeal and it is not justice but rather monetary recovery as he advises all readers in his closing paragraph as follows: "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.**" Brief of Appellant at 41 (emphasis added). Therefore, the entirety of the plaintiff's appeal is not an application of choice-of-law principles to the facts of this case but rather is skewed toward identifying which state's laws provide a greater potential for tort recovery.

***1. There is no need for this Court to expand Washington law or to engage in the academic exercise of a comparative legal analysis as the plaintiff suggests.***

Beginning at page 28 of his brief, the plaintiff argues that the legal underpinnings of the Ellis decision are inconsistent with changes in the law as evidenced in other jurisdictions around the country.

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<sup>11</sup> See RAP 2.2 "Decisions of the Superior Court That May Be Appealed".

There is no need to engage in a state-by-state comparative analysis of the law because the plaintiff's result-oriented argument overlooks the obvious counter-point which is that Ellis may be inconsistent with the law of other jurisdictions but it is entirely consistent with the law of Washington and that is where this Court's query should end.

In an attempt to minimize the impact of this Court's Ellis decision and its application to the facts of our case, the plaintiff has labeled it "dicta"<sup>12</sup>. The term is defined as follows:

[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).

BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004), obiter dictum. The end result in Ellis was to apply Idaho's statute of limitation period but the plaintiff oversimplifies matters when he argues that the place where the accident occurred was this Court's only consideration. Relevant portions of the Ellis opinion clearly illustrate why the plaintiff's "dicta" argument is erroneous:

Based on the relevant factors [enumerated by the RESTATEMENT (SECOND) CONFLICT OF LAWS § 6], we find that Washington did not have a more significant

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<sup>12</sup> See Brief of Appellant at 27, 28 and CP 238.

relationship to the accident at issue than Idaho.

...  
As to the issue of contributory fault, the general rule is that the local law of the state where the conduct and injury occurred determine whether the plaintiff's conduct amounted to contributory fault and whether the effect of the fault precludes recovery in whole or in part. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 164 (1971). **Here, both the alleged conduct and injury occurred in Idaho.** Based on a consideration of the facts presented, the Idaho rule governing fault applies.

...  
We hold that pursuant to RCW 4.18.020(1)(a) [entitled "Conflict of laws – Limitation periods"] and the most significant relationship rule, the limitation period of the state of Idaho applies to this lawsuit because **the substance of [the plaintiff's] claim is governed by Idaho law.**

Ellis v. Barto, 82 Wn. App. 454, 458-459, 918 P.2d 540 (Div. 3, 1996) (emphasis added). The relevant analysis set forth by this Court in the Ellis decision was not dicta as the plaintiff contends, but rather was a substantive and illustrative application of Washington's significant relationship rule to the facts presented in that choice-of-law case. While the facts will always be different from case to case, as Ellis involved Washington residents in an Idaho motor vehicle collision, the analysis is directly applicable to the facts of our case and the result should be the same – application of Idaho substantive law.

With only one citation as an exception, the plaintiff's brief from page 29 to 40 as well as a list of cases in his Appendix beginning at 44 is a canvass of opinions from jurisdictions other than Washington or Idaho. The plaintiff has urged this court to turn its back on Washington's significant relationship rule in favor of the law of the common domicile approach adopted by other jurisdictions. While the volume of cases cited by the plaintiff is no doubt meant to persuade, it is analogous to a child's pleading which is universally met with the parents' response: "Just because your friends are doing it, doesn't mean you should." The plaintiff's fourth assignment of error deserves as little attention from this Court as the child's pleadings deserve from the parent. A brief response from the defendant is warranted, however, if for no other reason than the plaintiff devotes so much of his appeal to these authorities which are merely persuasive or do not support his untenable conclusions in any event.

Workman is the only Washington case cited by the plaintiff in his fourth assignment of error. The plaintiff claims that the Workman case "applied Washington law because Idaho had no interest in applying its 'cap' on malpractice damages in order to protect a Washington resident." The plaintiff's conclusions must be met with

immediate skepticism because he has failed to ascertain the most basic of facts in that case. The plaintiff states, at 40 of his brief, that Workman was “a Washington resident” when the opinion clearly provides that “[t]he plaintiffs are residents of Moscow, Idaho.” Workman v. Chinchinian, 807 F. Supp. 634, 637, 24 Fed.R.Serv.3d 1328 (E.D. Wash. 1992). While it is true the Workman Court ultimately ordered that Washington substantive law “shall govern all issues relating to liability and damages”<sup>13</sup> the residential status of the parties or “law of common domicile” was not the determining factor as the plaintiff would have this Court believe. In fact, the relevant part of the opinion provides:

When the above contacts<sup>14</sup> are considered in the abstract, without reference to the laws of either state, **it is evident that both Idaho and Washington have significant contacts with the parties involved herein. Consequently, it is necessary to evaluate the states’ conflicting local laws** and make the choice of law determination on the basis of the weightier policy interests of those states.

Workman, 807 F. Supp. at 639. It should be clear from the foregoing

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<sup>13</sup> Workman at 649.

<sup>14</sup> The RESTATEMENT § 145 contacts evaluated by the court were: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. See Workman at 637-39.

quote that the court in Workman engaged in Washington's requisite two-part choice-of-law analysis and only after finding the state's contacts essentially equal did it engage in the second part of the analysis – weighing the competing state's policy interests.

The plaintiff in our case has repeatedly overlooked the undisputed facts of our case which can result in only one factual conclusion – the only connection Washington has to the facts of this case is that both parties “reside” in this State. The plaintiff's argument that Washington substantive law should apply in this case necessarily infers that residential status is the most significant contact among the RESTATEMENT factors but residential status alone has never been enough to warrant application of Washington's laws across state borders. In fact, our Supreme Court has consistently held that “residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law.” Rice v. Dow Chemical Co., 124 Wn.2d 205, 216, 875 P.2d 1213 (1994). The plaintiff's briefs have been so heavily weighted on the second part of the two-part choice-of-law analysis because any objective comparison of the Idaho versus Washington contacts reveals that Washington's contacts are *de minimis* at best. There is

simply never a need to engage in a weighing of the states' interests and public policies because the contacts aren't even close – Idaho prevails. The plaintiff's conclusions find no support from Washington law. Furthermore, the cases relied upon by the plaintiff from other jurisdictions would not result in application of Washington substantive law based on the undisputed facts presented to the trial Court.

As an example, the plaintiff cites New York cases Calla, Huston, and Viera as construction site cases standing for the proposition that “[l]oss allocation rules should be governed by party’s domicile, not place of wrong.”<sup>15</sup> It takes nothing more than a cursory review of those opinions to quickly reveal that they do not stand for the conclusions espoused by the plaintiff in our case. The Calla court summarized the issue presented to it as follows:

At issue on this appeal is whether this case is to be governed by the *lex loci delicti* or the law of the common domicile of plaintiffs and the principal defendants.

Calla v. Shulsky, 148 A.D.2d 60, 62, 543 N.Y.S.2d 666 (N.Y.A.D. 1989). Such an issue would never be considered by a Washington court because our common law has not adopted either choice-of-law analysis, but at the risk of being redundant our Courts must engage

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<sup>15</sup> Brief of Appellant at 33.

in a two-part significant relationship test. Not only does the plaintiff's argument require that this Court expand Washington jurisprudence by adopting the "law of the common domicile", a closer look at the other New York cases relied upon by the plaintiff reveals that they provide no support for his arguments. The Viera court advised

[w]here a defendant is subject to the jurisdiction of many states, forum shopping is best discouraged by applying both the loss allocating and the standard-of-conduct law of the place of the tort.

Viera v. Uniroyal, Inc., 541 N.Y.S.2d 668, 672 (Sup. Ct. 1988).

Following the Viera model and applying it to the undisputed facts of our case, Idaho's loss allocating and standard-of-conduct laws would apply because that was the place of the alleged tort and because L&K is a Washington corporation conducting business in both Washington and Idaho is therefore arguably subject to the jurisdiction of both states.

The final New York case relied upon by the plaintiff is Huston and it too does not support the plaintiff's argument that Washington substantive law should be applied to our case. In that opinion, the New York court advised that:

each section of Labor Law must be looked at as a single unitary whole, and is properly to be considered a

conduct-regulating statute and which is **not applicable to accidents occurring out of this State.**

Huston v. Hayden Bldg. Maintenance Corp., 205 A.D.2d 68, 617 N.Y.S.2d 335 (N.Y.A.D. 2 Dept., 1994). In direct contravention to express language of the very case he cites, the plaintiff would have our Courts apply Washington standard of conduct laws (*i.e.* WISHA regulations and/or our Stute decision) and Washington's loss allocation statutes across state borders to an Idaho accident. There is absolutely no authoritative support for such a result-oriented contrivance under the laws of the State of Washington or even from the cases cited by the plaintiff.

**2. Neither the Trial Court Nor Has this Court in Ellis Adopted a Lex Loci Delicti Rule in Choice-of-law Cases.**

The last substantive argument presented by the plaintiff is that: "[t]he 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." Brief of Appellant at 40. The plaintiff's *lex loci delicti*<sup>16</sup> argument is interesting on many different levels but it is not based in reality. First, and most obvious, is that Judge Sypolt's Order

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<sup>16</sup> "The law of the place where the tort or other wrong was committed." BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004), *lex loci delicti*.

(CP 306-07) makes no reference to the Ellis opinion so any inferences drawn therefrom by the plaintiff have gone beyond reading between the lines and have entered into the realm of pure fabrication. Second, the trial court did reference the Ellis opinion and other Washington choice-of-law cases but only did so in *arguendo* as part of its letter opinion. (CP 263-64). The defendant contends, as has been set forth previously, that Judge Sypolt's commentary regarding application of Idaho substantive law – while correct – was merely a hypothetical “if the court were to find that it has jurisdiction to proceed with this matter” and do not comprise an appealable issue. (CP 264); *also see* RAP 2.2 entitled “Decisions of the Superior Court That May Be Appealed”. The only appealable issue in this case is the trial court's determination of jurisdiction. Finally, even if we assume that Judge Sypolt's commentary regarding Ellis does comprise an appealable issue, there is no legitimate basis for the plaintiff's contention that the trial court based its choice of law comments on *lex loci delicti* principles. In short, the defense believes that the plaintiff has read too much into the court's comments. A very brief response is warranted here.

Judge Sypolt made the following commentary in his "Letter Opinion" dated November 20, 2008 and placed it under the heading "Choice of Law":

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

(CP 264). The foregoing comprises the entirety of the trial court's comments on the issue now being raised by the plaintiff. While the trial court did clearly state in *arguendo* that Idaho substantive law would apply if jurisdiction had been retained, that statement was not predicated upon *lex loci delicti* principles as the plaintiff suggests. An objective reading of Judge Sypolt's comments reveals that they were squarely based upon Washington's choice-of-law analysis including the RESTATEMENT "significant relationship" test and our State's long-standing authority which instructs that residential status of the parties alone should not dictate which state's substantive laws to apply.

There is nothing in the Ellis decision or in the entirety of Judge Sypolt's comments as found in his letter opinion which could lead any objective reader to the same conclusions presented by the plaintiff in our case. Neither Ellis nor Judge Sypolt have indicated that *lex loci delicti* governs a proper choice-of-law analysis under Washington law. The trial court's decision was proper and should not be disturbed by this Court on appeal.

#### VI. COSTS

Without presuming the outcome of this appeal, the defendant hereby requests an award of costs and statutory attorney's fees in accordance with and pursuant to the court rules which provide, in relevant part, that "the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2; *see also Kirby v. City of Tacoma*, 124 Wn. App. 454, 475-6, 98 P.3d 827 (Div. 2, 2004), *review denied*, 154 Wn.2d 1007 (2005). The defendant reserves the opportunity to file a cost bill to recover statutory attorney's fees and those costs incurred and allowed by the Rules of Appellate Procedure.

## VII. CONCLUSION

The plaintiff has asked this Court to turn away from long-standing Washington jurisprudence governing choice-of-law questions. First, he would have this Court skip over the first part of the Restatement analysis (significant contacts) and go directly to the second step (comparative analysis of states' interests, public policies, etc.). Second, he would have this Court deviate from Washington's jurisprudence by adopting various doctrines (e.g. "law of the common domicile" or *lex loci delicti*) which have been adopted or found persuasive in other jurisdictions but should have no authority with this Court as none of these have been adopted by a Washington court.

Based on the foregoing argument and authority, the defendant respectfully requests that it be deemed the prevailing party on appeal, and that the trial court's Order Granting Defendant's Motion to Dismiss (CP 306-307) be affirmed in all respects without remand or modification.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of April, 2009.

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

By:   
ANDREW C. BOHRNSEN, WSBA # 5549  
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INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing BRIEF OF RESPONDENTS was served on the following, by the method indicated on the 24<sup>th</sup> day of April, 2009:

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