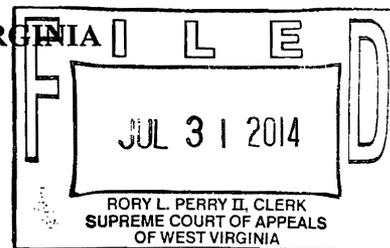


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**JANNELL WILLIAMS, as the Personal Representative of
the Estate of Kenneth Williams, Plaintiff Below, and
CHERYL RUTLEDGE, as the Personal Representative of
the Estate of Quentin Rutledge, Defendant and
Cross-Claimant Below,
Petitioners,**

v. **No. 14-0212 (Ohio County 09-C-419)**

**WERNER ENTERPRISES, INC., a Nebraska Corporation,
Defendant Below,
Respondent.**

PETITIONERS' BRIEF IN REPLY TO CROSS-ASSIGNMENT OF ERROR

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TABLE OF CONTENTS

Table of Authorities ii

Issue on Cross-Assignment of Error 1

Standard of Review 1

Summary of Argument 1

Statement Regarding Oral Argument and Decision..... 1

Statement of the Case..... 1

Argument 3

Conclusion 7

Certificate of Service 9

TABLE OF AUTHORITIES

<u>Gallapoo v. WalMart, Inc.</u> , 197 W.Va. 172, 475 S.E.2d 172 (1996).....	3,4
<u>Keesecker v. Bird</u> , 200 W.Va. 667, 490 S.E.2d 754 (W.Va., 1997), Syl. Pt. 6.....	4,5
<u>Oakes v. Oxygen Therapy Services</u> , 363 S.E.2d 130, 178 W.Va. 543 (W.Va., 1987)	4,6
<u>Paul v. National Life</u> , 352 S.E.2d, 550, 177 W.Va. 427 (W.Va., 1987)	5,7
<u>Perrine v. E. I. du Pont de Nemours & Co.</u> , 225 W.Va. 482, 694 S.E.2d 815 (W.Va., 2010)	1
Restatement (Second) of Conflicts of Law §6 (1971)	6
Restatement (Second) of Conflicts of Law §145 (1971)	4,5
Restatement (Second) of Conflicts of Law, §145-146 (1971)	6
West Virginia Code §23-2-1c(c) (1993)	4
West Virginia Code §23-4-2(c)(2)(ii)	4

ISSUE ON CROSS-ASSIGNMENT OF ERROR

Respondent asserts that the Circuit Court erred in ruling that, under principles of *lex loci delicti*, West Virginia Law and not Nebraska Law applies to the Petitioners' underlying claims for intentional spoliation of evidence.

STANDARD OF REVIEW

On appeal, questions of law are reviewed *de novo*. Perrine v. E.I. Du Pont De Nemours & Co., 225 W.Va. 482, 694 S.E.2d 815 (W.Va., 2010).

SUMMARY OF ARGUMENT

The Circuit Court correctly determined that under West Virginia Law, principles of *lex loci delicti* apply to the Petitioners' underlying claims for spoliation of evidence, since the subject evidence was destroyed in West Virginia. Even if the Court were to decide that the Restatement (Second) of Conflicts of Law applies, West Virginia has more interest in the issue than the State of Nebraska in this case, arising out of a fatal tractor trailer accident in West Virginia, also the forum state and the state in which the evidence was destroyed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary for reasons more fully explained in the Petitioners' *Appeal Brief*. This case involves issues of fundamental public importance.

STATEMENT OF THE CASE

The essential facts on this issue are that two Michigan residents, in the course of their employment with Respondent and Cross-Petitioner Werner Enterprises, Inc., (Werner), a Nebraska based employer, died in a single vehicle tractor-trailer crash in West Virginia. Within 48 hours of the crash the tractor trailer was disposed of by Werner. The destruction of the evidence occurred in West Virginia at the instruction of Werner, giving rise to Petitioners' claim below for intentional spoliation of evidence. Werner was granted summary judgment on the spoliation claims to which Petitioners' now appeal.

In granting summary judgment in favor of Werner, the Circuit Court held, *inter alia*, that West Virginia Law applies to spoliation of evidence where the destruction of the evidence occurs in West Virginia, where the evidence is destroyed in a case pending in West Virginia arising from a fatal collision occurring in West Virginia.

On the day of and in response to the tractor trailer accident, Werner hired Crawford and Company and its West Virginia claims adjustor to travel to and report from the scene. (App.212-215). This adjustor reported from the scene of the accident to Kenneth Dechant of Werner, and further provided a written report and photographs from the scene to Werner electronically on the date of the accident. (App.212-215, 217-218). Through this communication and report, Werner learned that there had been damage to the guardrail, the tractor-trailer had overturned, there had been a significant diesel fuel leak, and a subsequent fire which consumed the tractor and trailer. (App.212-214). Werner further learned that Quentin Rutledge was trapped in the vehicle and was killed when the fire spread. (App.212-214). Werner also learned that Kenneth Williams was a passenger in the vehicle at the time of the accident, and also died. (App.212-214). Werner further learned that the State of West Virginia would be making a claim for damage done to the guard rail, and that claims would be made for environmental remediation. (App.213).

Despite this knowledge, Werner chose to destroy and dispose of the tractor-trailer within 48 hours of the accident, or by January 14, 2009. (App.227). Pursuant to Werner's direction, the tractor-trailer was taken to a local landfill after being impounded by M & J Towing, the company which provided tow services for this accident. (App.259-262, 264-265). According to the environmental remediation response company hired by Werner to respond to this accident, the State of West Virginia does not allow immediate disposal of items such as the tractor-trailer and other materials gathered at the accident site, given the issue of contamination from diesel fuel.

Werner does not object to the Circuit Court's grant of summary judgment but objects to the Circuit Court's application of West Virginia Law to reach its conclusion on the issue of spoliation of

evidence. The Appellants contend that West Virginia Law applies to their claims of spoliation.

ARGUMENT

Under West Virginia Law applying the principal of *lex loci delicti*, West Virginia Law and not Nebraska Law control the issue Spoliation of Evidence.

Primarily Werner argues that the decision to destroy the truck was made in Nebraska not in West Virginia. The evidence at issue, the subject truck, was destroyed in West Virginia. West Virginia is the place of wrong. West Virginia is also the place of the underlying fatalities.

Werner has more than incidental contact with the state of West Virginia. It is doubtful that a day does not go by when a Werner truck is not on the highways of West Virginia. Werner utilizes West Virginia's highway to make its profits. In this case, Werner damaged public and private property; a toxic spill was created requiring clean up. West Virginia fireman, police, and emergency responders were called to the scene at night in the dead of a winter storm. Traffic would have been affected. The assets of the medical examiner, various inspectors and cleanup crews were utilized to the advantage of Werner. Werner claims it is exempt from others similarly situated because in their home state it is exempt from spoliation claims. It isn't just that the case is pending here – the crash giving rise to the case occurred here and, most importantly, the evidence was destroyed here.

In Gallapoo v. Wal-Mart, Inc., our Supreme Court of Appeals ruled that the statutory deliberate intent claim of a nonresident worker casually present in West Virginia and injured in West Virginia in the course of his employment was governed by his home state. However, Justice Maynard was clear to point out that principles of *lex loci delicti* remained applicable to common law claims. Gallapoo v. WalMart, Inc., 197 W.Va. 172, 475 S.E.2d 172 (1996). In the case at bar, the Personal Representatives' claims against Werner for Spoliation of Evidence are common law tort claims. Therefore the claims involved in this case are governed by West Virginia Law and not Nebraska Law. As Justice Maynard explained in Gallapoo:

...there is still a lingering question as to whether our deliberate intention cause of action is a common law tort remedy; whereby we would not be obligated to apply the principles of comity announced in *Pasquale* to the extent that the exclusive remedy language contained in W. Va. Code 23-2-1c(c) (1993) precludes a nonresident employee's right to bring a deliberate intention claim against an employer under W. Va. Code 23-4-2(c)(2)(ii); but rather, we would apply our traditional choice of law principle of *lex loci delicti* (the law of the place of the wrong), thereby allowing the plaintiff to proceed in his lawsuit because he was injured in West Virginia”. *Id* at 175.

Thus under Gallapoo, *lex loci delicti* applies to the tort of spoliation of evidence. Werner asks the Court to ignore our long-standing adherence to the principles of *lex loci*, citing Oakes v. Oxygen Therapy Services, 363 S.E.2d 130, 178 W.Va. 543 (W.Va., 1987). In Oakes the Court applied a Restatement (Second) analysis to determine the choice of law applicable to a wrongful discharge claim. Oakes is distinguishable from the case at bar; in Oakes, the Plaintiff brought a retaliatory discharge claim against his employer because he was terminated while receiving workers compensation benefits for injuries that he suffered in Maryland. He was a West Virginia resident employed by a Maryland employer operating under a written contract drafted and executed in the state of Maryland and, by its expressed terms, controlled by Maryland Law. The only thing that occurred in West Virginia was the employer’s notification of the employee’s termination; his personal injuries actually occurred in Maryland. Our Court held that Maryland Law, which did not recognize Oakes’ cause of action, controlled under a Restatement (Second) of Conflicts of Law §145 analysis.

Werner argues that the decision to destroy the evidence is the Tort, and thus West Virginia has no concern with Werner’s actions. This case does not just involve the decision to destroy the evidence; it involves the actual destruction of evidence, the tractor-trailer destroyed in West Virginia, in addition to the fact that the deaths occurred in here.

Under Keesecker v. Bird the choice of law doctrine of *lex loci rei sitae* controls as to property located in this State. “The doctrine of *lex loci rei sitae* exists because it is particularly important that

there be certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied concerning the transaction of property and the management of property.” , Syllabus Point 6, Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (W.Va., 1997).

Werner is suggesting the very approach Justice Neeley so artfully cautioned against in Paul v. National Life, namely, application of the Restatement Second approach producing inconsistent results.

The Circuit Court did not err by applying the principles of *lex loci delicti* to the issue of spoliation of evidence:

Lex loci delicti has long been the cornerstone of our conflict of laws doctrine. The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly, and we are not persuaded that we should discard them today. The appellant contends that the various exceptions that have been engrafted onto the traditional rule have made it manipulable and have undermined the predictability and uniformity that were considered its primary virtues. There is certainly some truth in this, and we generally eschew the more strained escape devices employed to avoid the sometimes harsh effects of the traditional rule.

Nevertheless, we remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. Having mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today. Paul v. National Life, 352 S.E.2d 550, 177 W.Va. 427 (W.Va., 1987) at 556,557.

Even if the Restatement (Second) Conflicts of Law §145 were applied to the spoliation of the evidence issue in this case, the Court would have reached the same result. West Virginia has much more interest in this case than the State of Nebraska. Werner is a trucking company incorporated in Delaware and operating all over the United States. Nebraska is the state of Werner’s home base. The only conduct that occurred in Nebraska in this case was the initiation of the phone call from Ken Dechant to the insurance adjuster. Had Mr. Dechant made the call from Connecticut or Alaska or some other state that recognizes spoliation of evidence as a separate tort, would Werner be conceding

that the law of spoliation of evidence from one of those states applies?

The source of the call is irrelevant. Such was, essentially, the holding in Oakes, *supra*. In Oakes, the plaintiff claimed that West Virginia Law applied to his wrongful termination case because he received the call from his employer terminating his employment while he was at home in West Virginia.

Our Court ruled that location of the call was not significant. “It is mere happenstance that the appellant was in a West Virginia hospital when he received news of the termination of his employment.” 363 S.E.2d at 132.

Restatement (Second) of Conflicts of Law, §145-146 (1971) provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principle stated in §6.

Section 6 of the Restatement lists the following factors as important choice of law considerations in all areas of law:

- (a) The needs of the interstate and international systems;
- (b) The relevant policies of the forum;
- (c) The relevant policies of other interested states and relative interest of those states in the determination of the particular issue;
- (d) The protection of justified expectations;
- (e) The basic policies underlying the particular field of law;
- (f) Certainty, predictability, and uniformity of results; and
- (g) Ease in the determination and application of the law to be applied.

There certainly is no question that West Virginia has a compelling interest in keeping its highways safe for citizens and property. There certainly is a need for an interstate and international system for regulation of out of state persons and companies rendering them subject to West Virginia

Law and not the state of their domicile or that of their employer. Nebraska has much less of an interest in the safety of out-of-state drivers and citizens in West Virginia. In this case, our State's resources were used by Werner. The State's property was damaged, traffic disrupted, a hazardous spill occurred, law enforcement and emergency responder's were utilized, property was destroyed – including evidence – and lives were lost.

Ruling one way for claimants of certain states and not providing the same applicable law to others would produce inconsistent results. And, as discussed in Paul, consistency and predictability and uniformity of results are also of paramount concern.

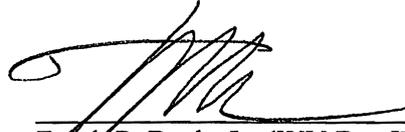
With respect to expectations of the Parties, companies and individuals regularly travelling the highways of West Virginia would have an expectancy that they are subject to the laws of this state and not of their home state. Law enforcement would expect to enforce the laws of West Virginia to anyone travelling the highways of West Virginia regardless of the state of domicile of the company or individual. And in the larger prospective one who travels in a foreign jurisdiction would expect to be subject to the laws of that jurisdiction.

When comparing the relative interests of the two states, Nebraska has little interest in claims arising in West Virginia being brought by Michigan residents. Nebraska would expect to apply its own laws if it were the forum for claims arising from the destruction of evidence in arising from an accident occurring within its boundaries, and not give deference to another state's laws if the call to destroy evidence came from a state where such a cause of action was recognized. Likewise, under any analysis, West Virginia law should apply to the claims of spoliation in this case.

CONCLUSION

For all of the foregoing reasons, the Court should find that the Circuit Court did not err in applying West Virginia Law to the issue of spoliation of evidence in the case at bar.

Respectfully submitted,



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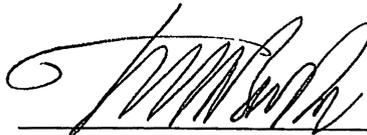
WERNER ENTERPRISES, INC., a Nebraska Corporation,
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Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "*Petitioners' Brief in Reply to Cross-Assignment of Error*" has been served on counsel as shown below, as required by Rules 10(c)(9) and 37, Revised Rules of Appellate Procedure, by depositing a true copy thereof in the United States Mail, first class postage prepaid, facsimile, electronic mail or in-hand delivery, addressed as follows:

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DATED at Elkins, West Virginia, this 30th day of July, 2014.



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