IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Dec 14 2023
04:01PM EST
Transaction ID 71628187

CASE NO. 23-ICA-337

BARRY BARR

***Plaintiff Below/Petitioner*,**

v.

BRENT JACKSON, LYNN PERKINS, and HEDGESVILLE REAL ESTATE, LLC, VIP GENTLEMEN'S CLUB, WEST VIRGINIA SPORTS PROMOTIONS, INC.

Defendants Below/Respondents.

BRIEF OF RESPONDENT WEST VIRGINIA SPORTS PROMOTIONS, INC.

In Opposition to the Appeal of the Order Entered on June 29, 2023 in Civil Action No. 22-C-169 in the Circuit Court of Berkeley County, West Virginia Granting Respondents' Motion to Dismiss

Submitted by:

Kyle T. McGee, Esquire
WV Bar No. 11000
Margolis Edelstein
535 Smithfield Street
Suite 1100
Pittsburgh, PA 15222
Phone: 412-355-4971
Fax: 412-642-2380
kmcgee@margolisedelstein.com
Counsel for Respondent, West Virginia Sports Promotions, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes and Rules

Secondary Sources

STATEMENT OF THE CASE

The instant case arises out of a motor vehicle accident that took place on March 6, 2022 in Washington County, Maryland, involving a vehicle owned and operated by Respondent Michael Maydian and a vehicle in which Petitioner's Decedent, Alexandra Barr, was a passenger. Petitioner alleged in their First Amended Complaint that, on March 6, 2022, Maydian attended a "Toughman" contest in Martinsburg, West Virginia produced by Respondent West Virginia Sports Promotions, Inc. (hereinafter "WVSP") where he was over-served alcoholic beverages and permitted to leave while intoxicated. After leaving the "Toughman" contest, Petitioner alleges that Maydian went to at Lust Gentleman's Club, also in Martinsburg, where he continued to drink and was again overserved while visibly intoxicated. Appx. at 15-17.

After leaving Lust in the early morning hours of March 6, 2022, Petitioner alleges that Maydian drove on Interstate 81 into Washington County, Maryland, where he collided with the vehicle carrying Ms. Barr, allegedly causing Ms. Barr to sustain injuries that ultimately resulted in her death. Id. at 17-18.

In his First Amended Complaint, Petitioner asserted a claim of "Dram Shop/Negligence" against multiple entities, including Respondent WVSP, alleging that employees/agents served Maydian alcoholic beverage to the point of incapacitation and intoxication in violation of West Virginia law. Id. at 23-24. Petitioner also asserts claims against Respondent WVSP and others for "Negligent Training and Supervision" in Count Two of the First Amended Complaint. Id. at 25-26.

SUMMARY OF ARGUMENT

West Virginia follows the doctrine of *lex loci delicti*, described as "the cornerstone of [the] conflict of laws doctrine." Paul v. National Life, 177 W. Va. 427, 433, 352 S.E.2d 550, 555 (W.Va. 1986). Time and again, the Supreme Court of Appeals has elected to maintain this "traditional rule" finding it "superior to any of its modern competitors." Id. at 556. *See also* McKinney v. Fairchild Intern., Inc., 199 W. Va. 718, 487 S.E.2d 913 (W.Va. 1997); Blais v. Allied Exterminating Co., 198 W. Va. 674, 482 S.E.2d 659 (W.Va. 1996). While the Supreme Court of Appeals has utilized the "public policy exception" in some isolated cases, the controlling view is that "the substantive rights between the parties are determined by the law of the place of injury." Vest v. St. Albans Psychiatric Hosp., 182 W. Va. 228, 229, 387 S.E.2d 282, 283 (W.Va. 1989). The fact that the substantive law of another jurisdiction "differs from or is less favorable than the law of the forum state" does not establish that the application of this law is contrary to public policy. Nadler v. Liberty Mut.Fire Ins. Co., 188 W. Va. 329 Syl. 3, 424 S.E.2d 256 Syl. 3 (W.Va. 1992).

In this case, Petitioner alleges Respondent Maydian consumed alcohol at a "Toughman" contest and at Lush Gentleman's Club, both in Martinsburg, West Virginia. Petitioner alleges that Maydian was overserved to the point of incapacitation and intoxication at these establishments. Maydian then drove across state lines into the state of Maryland, where he ultimately collided with the vehicle carrying Decedent. Decedent sustained injuries and ultimately died as a result of those injuries in the state of Maryland. Appx. 15-19.

Petitioner argues that public policy considerations should allow for an exception to *lex loci delicti*, contending that "persons injured by negligence of another should be able to recover in tort." Petitioner's Brief at 5, 7, 14, 17. Petitioner essentially states that he will be foreclosed from any redress in this matter if the laws of Maryland were to apply. Petitioner further argues that,

although Maryland has laws forbidding the sale of alcoholic beverages to intoxicated patrons and imposing penalties upon those who choose to do so, the public policies of West Virginia and Maryland in this regard are at odds. Respondent WVSP disagrees.

Respondent's position is that the public policy exception to *lex loci delicti* should not apply in this matter. West Virginia recognizes a civil cause of action in dram shop liability, whereas Maryland does not. The simple fact that the substantive law of Maryland differs from that of West Virginia is not enough to invoke the public policy exception. Nadler at Syl. 3. In similar matters involving out-of-state physical injuries, West Virginia courts have followed *lex loci delicti* and applied the law of the state where the injury took place. The body of case law where the court has elected to utilize the public policy exception typically involves matters where the out of state law would completely preclude recovery. This is not the case here, as Petitioner is not foreclosed from pursuing his negligence claim against Mr. Maydian. Where, as here, the injury took place in the state of Maryland, under West Virginia's *lex loci delicti* doctrine, the substantive law of Maryland must control and Petitioner should be precluded from pursuing its dram shop claims against Respondents.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent leaves oral argument to this Honorable Court's discretion, but disputes Petitioner's statement to the extent it mischaracterizes West Virginia law. Contrary to Petitioner's assertion, this case does not involve an assignment of error in the application of settled law. W. Va. R.A.P. 19(a)(1).Rather, for the reasons set forth herein, the decision of the Circuit Court should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss is *de novo*. Southern Envtl., Inc. v. Bell, 244 W. Va. 465, 470, 854 S.E.2d 285, 290 (W.Va. 2020). In reviewing the sufficiency of a complaint, a court should "presume all of the plaintiff's factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff." Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of West Virginia, 244 W. Va. 508, 854 S.E.2d 197 (W. Va. 2020). Motions to dismiss under W.Va.R.Civ.P. 12(b)(6) should only be granted "when it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." Riffle v. C.J. Hughes Constr. Co., 226 W. Va. 581, 586, 703 S.E.2d 552, 557-58 (W.Va. 2010).

II. *Lex loci delicti* is the applicable choice of law rule in West Virginia when residents are physically injured out of state.

The sole issue on appeal is whether or not West Virginia's long-standing doctrine of *lex loci delicti* should apply when a resident is injured in a motor vehicle accident out of state. When applied pursuant to well-settled case law, it is clear that the site of the injury is the controlling factor for choice of law purposes. As a result, the laws of the state of Maryland should apply in this matter.

In "clear-cut cases of physical injury," the rule of *lex loci delicti* has generally been applied in the state of West Virginia. Oakes v. Oxygen Therapy Servs., 178 W. Va. 543, 363 S.E.2d 130 (W.Va. 1987). This choice-of-law rule can be summarized as "the substantive rights between the parties are determined by the law of the place of injury." McKinney 199 W. Va. at 727, 487 S.E.2d at 922. The West Virginia Supreme Court of Appeals has described *lex loci delicti* as "the cornerstone of our conflict of laws doctrine." Paul, *supra*, 177 W. Va. at 433, 352 S.E.2d at 555.

See also, Syl. Pt. 2, State ex rel. Chemtall Inc. v Madden, 216 W. Va. 443, 607 S.E.2d 772 (W. Va. 2004) ("In general, this State adheres to the conflicts of law doctrine of *lex loci delicti*.").

The Supreme Court of Appeals recently affirmed the state's continued adherence to *lex loci delicti* in Caudill v. EAN Holdings, LLC, 2022 W.Va. LEXIS 315*, 2022 WL 1223938 (W.Va. 2022). In Caudill, two men rented vehicles from the defendant in the states of Tennessee and Kentucky. Ultimately, the driver of the vehicles was involved in a fatal crash in Beckley, West Virginia after consuming narcotics and not sleeping. Defendant was sued for negligence and negligent entrustment and the trial court applied Tennessee and Kentucky law to these negligence-based claims, reasoning that these states were the sites where the defendant negligently rented the vehicles to the at-fault driver. The Supreme Court of Appeals reversed, stating that the application of Tennessee and Kentucky law was in error and that "[i]n tort cases, West Virginia courts apply the traditional choice-of-law rule, *lex loci delicti*." Id. at *16.

In the instant matter, the crux of Petitioner's claims are that Defendant WSVP engaged in negligent conduct by allegedly overserving alcohol to Mr. Maydian in West Virginia who then drove his car to Maryland, where the accident occurred. These facts are similar to those in Caudill: a defendant purportedly engaged in a negligent act in one state, an intoxicated driver then drove into another state, and an accident occurred. Our Supreme Court of Appeals found that *lex loci delicti* required that the laws of the state where the injury occurred applied in Caudill. For the same reasons, *lex loci delicti* requires that Maryland law should apply in this matter as well.

A similar decision was also reached by the U.S. District Court for the Southern District of West Virginia in Wise v. C.R. Bard, Inc., Civ. No. 12-1378, 2015 WL 502010, 2015 U.S. Dist. LEXIS 13661 (S.D.W.Va. 2015). In Wise, a plaintiff underwent a procedure to implant surgical mesh in West Virginia and ultimately experienced multiple subsequent complications. The

plaintiff resided in Ohio at the time of the surgery and also received treatment for her alleged injuries in Ohio. Plaintiff argued that West Virginia law should control, whereas the defendant argued that the matter should be considered under Ohio law. The court stated agreed that West Virginia law should apply, citing to Quillen v. Int'l Playtex, Inc., 789 F.2d 1041, 1044 (4th Cir. 1986): "The place of the wrong for purposes of the *lex loci delicti* rule . . . is defined as the place where the last event necessary to make an act[or] liable for an alleged tort takes place." The court reasoned that, since the last event necessary to make the defendant liable for the alleged tort, i.e., the surgical implantation, took place in West Virginia, the laws of West Virginia should apply.

In the case *sub judice,* it is undisputed that the location of the accident, and hence Petitioner's harm, occurred in Maryland. Appx. 19. Although Mr. Maydian allegedly consumed alcohol in West Virginia and made the decision to drive into Maryland, it is Maryland where the tragic accident with Petitioner's Decedent occurred. Id. Mr. Maydian's decision to drive into Maryland and the subsequent collision constitute the "last event" that caused potential liability to attach. Quillen, 789 F.2d at 1044. Since the collision took place in Maryland, Maryland law should apply. As a result, since Maryland does not recognize dram shop liability, dismissal of this case by the Circuit Court was appropriate as to Defendant WSVP.

III. Petitioner's reliance on the public policy exception to *lex loci delicti* is misplaced.

Petitioner and amicus curiae both argue that the "public policy exception" should apply in this matter because applying Maryland law would be a "complete bar to recovery" where Maryland does not recognize dram shop liability. This argument is misplaced.

The West Virginia Court of Appeals has made it clear that *lex loci delecti* is the governing choice of law rule in the state of West Virginia and that public policy exceptions need to be carefully considered based upon the individual facts of each case. *See generally* Paul, *supra*;

Nadler, *supra*. In Paul, *supra*, the court declined to abandon *lex loci delecti* in most conflicts of law situations, stating that approach "creates confusion, uncertainty, and inconsistency, as well as complication of the judicial task." 177 W. Va at 431, 352 S.E.2d at 553. This position was confirmed several years later in Nadler v. Liberty Mut. Fire. Ins. Co., 188 W. Va. 329, 424 S.E.2d 256 (W.Va. 1992), when it was stated, "[w]e adhere to the general principle that a court should not refuse to apply foreign law, in otherwise proper circumstances, on public policy grounds unless the foreign law 'is contrary to pure morals or abstract justice, or unless enforcement would be of evil example and harmful to its own people.'" Nadler 188 W. Va. 338, 424 S.E.2d at 265 (citing 16 Am. Jur. 2d Conflicts of Laws § 18).

Petitioner is advocating for the application of the public policy exception in this matter, stating that Maryland law yields a complete bar to recovery in this matter. This argument is inapposite. Contrary to Petitioner's and the amicus curiae's argument, applying Maryland law in this matter would not be a complete bar to recovery. While Maryland does not recognize dram shop liability, Petitioner has named Mr. Maydian as a defendant and Maryland, like West Virginia, does recognize general principles of motor vehicle negligence. As a result, Petitioner is not barred from recovery and the lower court's application of Maryland law is not "evil" or "harmful"; it simply limits from whom Petitioner can seek recovery.

Unlike in the instant case, matters where the court has elected to apply the public policy exception typically involve situations where the law of the foreign jurisdiction would completely bar recovery if applied. For example, in Paul, *supra*, the Supreme Court of Appeals determined that West Virginia law should apply where plaintiff's decedent sustained fatal injuries as a passenger in a one-car auto accident in Indiana. Plaintiff instituted a wrongful death action in West Virginia as both the driver and passenger were West Virginia residents. The lower court, applying

lex loci delicti, determined that Indiana law should apply as the situs of the injury. Plaintiff appealed because Indiana's guest statute barred recovery when applied to the facts of the case, whereas West Virginia did not have such a statute. The court utilized the public policy exception, stating that "It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort." Paul 177 W. Va at 433, 352 S.E.2d at 556.

In other situations, courts have chosen to apply West Virginia law through the public policy exception to *lex loci delecti* only where plaintiffs would otherwise be completely barred from recovery for the claims at issue. *See* Vass v. Volvo Trucks North America, Inc., 315 F. Supp. 2d 815 (S.D. W.Va 2004) (finding that public policy supports applying the West Virginia law of comparative negligence to an action stemming from an injury in Virginia where Virginia's law of contributory negligence would have barred recovery); Mills v. Quality Supplier Trucking, Inc., 203 W. Va. 621, 510 S.E.2d 280 (W.Va. 1998) ("Concluding that the contributory negligence doctrine of Maryland contravenes the public policy of this State, we hold that West Virginia law should govern the resolution of the wrongful death issues . . . barring a plaintiff's recovery if that plaintiff is guilty of any negligence violates the public policy of this State).

Unlike those situations, Petitioner here would not be precluded from recovery in tort if Maryland law applied; he would still have the cause of action against Mr. Maydian, the driver of the vehicle that caused the subject motor vehicle accident. As a result, Petitioner's argument that the decision of the Circuit Court completely bars recovery is incorrect and, therefore, the decision does not contravene West Virginia public policy.[1]

[1] It should additionally be noted that the cited examples in the Petitioner and amicus curiae briefs of out of state applications of "lex loci delicti" in dram shop cases do not comport with the traditional *lex loci delicti* approach observed by West Virginia. In fact, the entire premise of the Paul case was founded on preserving the traditional structure and application of *lex loci delicti* and rejecting the more "modern" approaches to choice of law adopted by most states, which look

IV. The public policies of Maryland and West Virginia concerning service of intoxicated patrons are not in conflict.

As discussed above, the Supreme Court of Appeals has held that the mere fact that two states have different laws does not mean that the less favorable law constitutes a violation of public policy. *See* Nadler, *supra*. Although Maryland does not recognize a cause of action in dram shop liability, it still has a mechanism to address and enforce a strong policy against vendors serving intoxicated individuals. *See* Md. Alcoholic Beverages Code § 6-307 and §6-402 (prohibiting service of intoxicated individuals and providing a framework of criminal penalties for vendors in violation).

West Virginia, similarly, has a framework for criminal penalties for establishments that serve intoxicated individuals. *See* W. Va. Code § 60-7-12. Injuries caused by drunk drivers is one of the hazards the legislature sought to prevent by enacting this framework. *See generally*, Bailey v. Black, 183 W. Va. 74, 394 S.E.2d 58 (W.Va. 1990).[2]

---

towards "dominant contacts," the state with the "most significant relationship," "government interests," and the "choice-influencing considerations" approach. *See generally*, Paul *supra*; Vernon A. Melton Jr., Paul v. National Life, Lex Loci Delicti and the Modern Rule: A Difference without Distinction, 90 W. Va. L. Rev. (1988). *Available at: https://researchrepository.wvu.edu/wvlr/vol90/iss2/12.*

The public policy exception itself was the solution that the Supreme Court of Appeals came up with in Paul to preserve the "consistency, predictability, and ease of application provided by the traditional doctrine" because they found these other approaches to be too "radical," "cumbersome," and "unwieldy." Paul 177 W.Va. at 431, 352 S.E.2d at 553, 555. Petitioner and amicus curiae attempt to shore up their arguments with examples of cases from the District of Columbia, Minnesota, Rhode Island, Minnesota, Illinois, and Connecticut; these are all states that utilize some form of these alternative, non-traditional approaches and are therefore neither instructive nor persuasive. *See* Symeon C. Symeonides, The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing, 56 Md. L. Rev. 1248, 1265 (1997) *Available at: http://digitalcommons.law.umaryland.edu/mlr/vol56/iss4/6*

[2] Notably, under this framework, criminal penalties can be enforced against a vendor for serving an intoxicated patron regardless of whether they are also civilly liable for their actions. As a result, Petitioner's and amicus curiae's argument that utilizing Maryland law allows vendors to escape

Maryland's legislature, in enacting similar laws, has also discussed the state's strong stance against intoxicated drivers:

> We have consistently recognized that the statutory provisions enacted to enforce the State's fight against drunken driving . . . were enacted for the protection of the public and not primarily for the protection of the accused. The General Assembly's goal in enacting the drunk driving laws . . . is to meet the considerable challenge created by this problem by enacting a series of measures to rid our highways of the drunk driver menace. These measures . . . are primarily designed to enhance the ability of prosecutors to deal effectively with the drunk driver problem.

Motor Vehicle Admin v. Gaddy, 643 A.2d 442 (Md. 1994).

The fact that Maryland does not recognize dram shop liability does not mean that the state does not have a public policy against service of intoxicated individuals or drunk driving. Both West Virginia and Maryland clearly recognize the dangers of this behavior and have strong policies regarding the same. Simply because Maryland does not handle these issues in the same manner or in a way that Petitioner finds to be more favorable does not constitute a violation of public policy. As such, the public policy exception to *lex loci delicti* should not apply in this matter.

V. Conclusion

West Virginia law is clear: the traditional application of *lex loci delicti* is "superior to any of its modern competitors" and is the controlling conflicts of law approach in the state. Paul, 177 W. Va at 433, 352 S.E.2d at 556. When out-of-state physical injuries are involved, the courts in West Virginia have, therefore, applied the laws of the state of injury unless recovery is completely precluded. The facts of the instant case align with those in Caudill and Wise, where courts affirmed this preference. Simply because the substantive law of the state of Maryland is different than the

consequences for the sale of alcohol to intoxicated individuals is disingenuous. Petitioner's Brief at 20-21; Amicus Brief at 11.

substantive law of the state of West Virginia is not enough to trigger the public policy exception in this matter. Maryland law does not completely preclude Petitioner from recovery in tort and, as such, the decision of the Circuit Court of Berkeley County should be AFFIRMED.

Respectfully submitted,

WEST VIRIGINA SPORTS PROMOTIONS, INC.

By Counsel:

/s/ Kyle T. McGee

Kyle T. McGee (W. Va. Bar No. 11000)
Margolis Edelstein
535 Smithfield Street
Suite 1100
Pittsburgh, PA 15222
Phone: 412-355-4971
Fax: 412-642-2380
kmcgee@margolisedelstein.com

CERTIFICATE OF SERVICE

I, Kyle T. McGee, Esquire, hereby certify that a true and correct copy of the foregoing was served on December 14, 2023 via File & ServeXpress or by depositing the same in the U.S. mail, postage paid to counsel below:

Stephen G. Skinner, Esq.
SKINNER LAW FIRM
115 East Washington Street
Charles Town, WV 25414
Counsel for Petitioner

Austin James Longnecker, Esq.
Michael Dwayne Dunham, Esq.
Shuman McCuskey Slicer PLLC
116 South Stewart Street
Winchester, Virginia 22601
Counsel for Michael Maydian (via U.S. Mail)

Susan L. Loughran, Esq.
HARDIN THOMPSON, PC
The Frick Building
437 Grant Street, Suite 620
Pittsburgh, Pennsylvania 15219
Counsel for Special Services Bureau, Inc (via U.S. Mail)

Lee Murray Hall, Esquire
Jason D. Bowles, Esquire
Kevin H. Stryker, Esquire
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, WV 25726-2688
Counsel for Brent Jackson, Lynn Perkins and Hedgesville Real Estate, LLC

Jace Goins, Esquire
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326
Counsel for VIP Gentlemen's Club, LLC

Tracey Eberling, Esquire
Steptoe & Johnson, PLLC
1250 Edwin Miller Blvd., Suite 300
Martinsburg, WV 25404
Counsel for VIP Gentlemen's Club, LLC

/s/ Kyle T. McGee

Kyle T. McGee (W. Va. Bar No. 11000)
Margolis Edelstein
535 Smithfield Street
Suite 1100
Pittsburgh, PA 15222
Phone: 412-355-4971
Fax: 412-642-2380
kmcgee@margolisedelstein.com
Counsel for West Virginia Sports Promotions, Inc.