IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-ICA-337

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BARRY BARR,

Petitioner herein;
Plaintiff below;

v.

Appeal from Order of June 29, 2023 by the Circuit Court of Berkeley County CIVIL ACTION NO. CC-02-2022-C-169 Honorable Michael D. Lorensen

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

Respondents herein:
Defendants below.

BRIEF OF RESPONDENT VIP GENTLEMEN'S CLUB, LLC

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I. ASSIGNMENT OF ERROR

The Circuit Court for Berkeley County properly applied the choice of law doctrine, *lex loci delicti,* in this negligence action that arose from a Maryland accident and dismissed the suit because that State does not recognize a cause of action for dram shop liability. The trial court also correctly ruled that the public policy exception to *lex loci delicti* did not apply as Maryland and West Virgina share prohibitions against drunk driving. This court should affirm the dismissal by the trial court.

II. STATEMENT OF THE CASE

A. BACKGROUND

1. Factual Background

The case arises out a motor vehicle accident that occurred on March 6, 2022 in Washington County, Maryland, involving a vehicle owned and operated by Defendant Michael Maydian and the vehicle in which Alexandra Barr, the Petitioner's decedent was a passenger. [Appendix Record at 13, 18-19, ¶¶38-39, 41] Petitioner alleges that Maydian had been over-served alcoholic beverages at an event in Berkeley County, West Virginia sponsored by Respondent West Virginia Sports Promotions, Inc. and later at Respondent VIP Gentlemen's Club, LLC, which is also located in Berkeley County. [A.R. at 15-17, ¶¶19-37] Ms. Barr sustained injuries in the subject accident that resulted in her death. [A.R. 19, ¶43]

In his First Amended Complaint, Petitioner asserted a claim of "Dram Shop/Negligence" against Brent Jackson, Lynn Perkins, Hedgesville Real Estate, LLC., and VIP Gentlemen's Club, LLC (the "Jackson Defendants") and West Virginia Sports Promotions, Inc, for allegedly serving Michael Maydian[1] to the point of intoxication and then when he was visibly intoxicated. [A.R.

[1] Mr. Maydian is a defendant in the suit but not a party to this appeal.

at 23-24, ¶¶79-86] Petitioner also asserted additional claims derivative of Count One: Negligent Training and Supervision (Count Two) [A.R. 25, ¶¶88-92], Civil Conspiracy (Count Four)[A.R. 27, ¶¶101-103] Joint Venture (Count Five) [A.R. 27-28, ¶¶105-106], Joint Enterprise (Count Six) [A.R.28, ¶¶108-09], and Piercing the Corporate Veil (Count Seven). [A.R. 28-29, ¶¶111-113]

This matter is before the court for review of a legal issue - the trial court's dismissal order based on choice of law. The dramatization of results of drunk driving serves no purpose other than to prey on the sympathies of the court. To that end, the citation of news headlines regarding accidents occurring on Interstate 81 and a 2015 article quoting a West Virginia State Police trooper are sensationalist, misleading and irrelevant to this appeal. In fact, the article cited by the amicus discusses nearly decade old DUI statistics from 2014 for Jefferson, not Berkeley County, West Virginia and a review of the Annual Reports of the West Virginia State Police reveals that combined total of DUI arrests in the three Eastern Panhandle counties has fallen dramatically from 459 in 2014 to 173 in 2022.[2]

2. Procedural History

Petitioner filed his Complaint in the Circuit Court of Berkeley County on June 9, 2022.[3] The case was assigned to Circuit Judge Laura Faircloth. On September 30, 2022, Respondents VIP Gentlemen's Club, LLC, Brent Jackson, Lynn Perkins and Hedgesville Real Estate, LLC filed motions to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure contending that the Complaint failed to state a claim upon which relief could be granted based on the application of Maryland law pursuant to the doctrine of *lex loci delicti*. After the motions were fully briefed, the court set a hearing for oral argument to be held on February 7, 2023.

[2] *See: htt*ps://www.wvsp.gov/about/Pages/Publications.aspx
[3] This discussion is limited to procedural developments in the case pertinent to this appeal.

After the Respondents filed Notices of Non-Party Fault, Petitioner sought leave of court to amend his complaint to add additional defendants on February 16 and the motion was granted that same day. Respondent West Virginia Sports Promotion, Inc. and Special Services Bureau, Inc. (which is not a party to the appeal) were added as defendants in the Plaintiff's First Amended Complaint.

Respondents VIP Gentlemen's Club, LLC, Brent Jackson, Lynn Perkins and Hedgesville Real Estate, LLC renewed their motions to dismiss and Respondent West Virginia Sports Promotions also filed a motion stating the same grounds. The motions were briefed, and oral argument was set for May 30, 2023. The parties appeared for the hearing and were advised by Judge Faircloth that she had a conflict which prevented her from considering the motions. Judge Faircloth was recused, and the matter transferred to the docket of Judge Michael D. Lorensen.

On June 29, 2023, Judge Lorensen entered an order granting the Respondents' motions to dismiss. Although the case remains pending as to Michael Maydian and Special Services Bureau, Inc., Petitioner filed his Notice of Appeal on July 28, 2023. This court denied the Respondents' motion to dismiss this appeal as premature.

III. SUMMARY OF ARGUMENT

West Virginia has long employed the doctrine of *lex loci delicti* in determining the choice of law in tort actions and the State's continued commitment to its application was recently reaffirmed in 2022. The circuit court correctly held that the Plaintiff's Complaint failed to state a claim on which relief can be granted as to any of the claims against Respondents VIP Gentlemen's Club, LLC, Brent Jackson, Lynn Perkins, Hedgesville Real Estate, LLC and West Virginia Sports Promotion, Inc. based on the application of that principle. The public policy

exception to the rule does not apply as Maryland law does not violate the public policy of this State, nor is it the public policy of West Virginia to maximize the recovery of litigants.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there was no prejudicial error committed below.

V. ARGUMENT

A. STANDARD OF REVIEW

"Appellate review of circuit court's order granting a motion to dismiss a complaint is *de novo.* Syllabus Point 2, *State ex rel McGraw v. Scott Runyan Pontiac-Buick, Inc.,* 194 W. Va. 770, 461 S.E.2d 516 (1995). At Syllabus Point 2 of *Roth v. Defelicecare, Inc*., 226 W. Va. 214, 700 S.E.2d 183 (2910), the Court noted that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (citing Syl. Pt. 3*, Chapman v. Kane Transfer Co*., 160 W.Va. 530, 236 S.E.2d 207 (1977)).

B. DISCUSSION

1. The Circuit Court correctly dismissed the Plaintiff's claims against this Respondent based on the application of doctrine of lex loci delicti

The West Virginia Supreme Court of Appeals has consistently considered and maintained that choice of law doctrine of *lex loci delicti* applies where a cause of action arose outside the

State and has determined that the law of the site of the last event giving rise to the cause of action governs. *Paul v. National Life*, 177 W. Va. 427, 433; 352 S.E.2d 550, 556 (1986). The *Paul* court noted that the "consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly … We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today." *Id*., 177 W.Va. at 433, 352 S.E.2d at 555 & 556. *See also,* Syl. Pt. 2, *State ex rel. Chemtall v. Madden,* 216 W. Va. 443; 607 S.E.2d 772 (2004). "2. 'In general, this State adheres to the conflicts of law doctrine of *lex loci delicti.'* Syllabus Point 1 *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986)."

The doctrine was applied as early as 1938 in *Keesee v. Atlantic Greyhound Corp*., 120 W. Va. 201, 197 S.E. 522 (1938), where the court held that Virginia law applied to claims of estate of West Virginia resident killed in a motor vehicle accident in Virgnia. West Virginia's adherence to the principle was most recently affirmed by the West Virginia Supreme Court of Appeals in 2022 in *Caudill v. EAN Holdings, LLC*, 2022 WL 1223938 (April 6, 2022). The *Caudill* case arose out of a motor vehicle accident in West Virginia. The factual predicate for the negligent entrustment claims against the lessor of the vehicle and its employees, however, occurred in Kentucky and Tennessee. The trial court applied Kentucky and Tennessee law to those claims, as the situs of the vehicle rental transactions and granted summary judgment to those defendants. On appeal, the *Caudill* court ruled that the trial court had erred in applying Kentucky and Tennessee law and declared that "[i]n tort cases, West Virginia courts apply the traditional choice-of-law rule, *lex loci delicti;* that is "the substantive rights between the parties are determined by the law of the place of injury." Id. at *6 (quoting *Vest v. St. Albans Psychiatric Hosp., Inc*. 182 W. Va. 228, 2229, 387 S.E.2d 282, 283 (1989). The rule of *lex loci delicti* is also

followed in Maryland. See *Hauch v. Connor*, 295 Md. 120, 123-25, 453 A.2d 1207, 1209-10 (1983).

This court has seemingly been invited by Petitioner and the West Virginia Association for Justice ("WVAJ") as an amicus curiae, to abandon this approach in favor of one that would always favor West Virgnia residents, despite the fact that it has steadfastly rejected those forays in favor of following the principle of *lex loc delicti.* The result of the choice of law analysis has not and should not be determinative.

Because Maryland law must be applied, the circuit court properly determined that the Petitioner did not state a claim against Respondent VIP Gentlemen's Club, LLC. There is no dispute that the Maryland courts have consistently declined to recognize a cause of action for dram shop liability. The issue was last before the Maryland Court of Appeals in *Warr v. JMGM Group, LLC,* 433, Md. 170, 70 A.3d 347 (2013), and the high court again refused to overturn forty years of precedent. The *Warr* court rejected the plaintiff's argument that a tavern owner owes a duty to protect the general public from the actions of a patron and that it is foreseeable to the tavern owner that an intoxicated patron would drive and cause harm to a third party, absent the existence of a special relationship. Once again, the judiciary deferred to the Maryland legislature to make the determination of whether to impose liability on tavern owners for injuries to third parties caused by intoxicated patrons.

The result mandated by the application of this State's long-standing choice of law principle warrants a finding by this Court that the trial court correctly dismissed the petitioner's claims as failing to state a claim under the law of the situs of the accident.

2. The public policy exception does not bar the application of the Maryland law under doctrine of lex loci delicti.

West Virginia does recognize a public policy exception in circumstances where the law of the other jurisdiction conflicts with the principles of law of this State, however, the West Virginia Supreme Court of Appeals has cautioned that "[t]he mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of law principles is contrary to the public policy of the forum state." Syllabus point 3, *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W.Va. 329, 424 S.E.2d 256 (1992).

In *Woodcock v. Mylan, Inc*., 661 F.Supp.2d 602 (2009), the United States District Court observed:

> Not every conflicting foreign law, however, offends West Virginia public policy. The mere fact that "the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of laws principles is contrary to the public policy of the forum state." *Howe v. Howe*, 218 W.Va. 638, 625 S.E.2d 716 (2005) (internal quotation marks omitted). Indeed, the Supreme Court of Appeals has emphasized that it "does not take a request to invoke our public policy to avoid application of otherwise valid foreign law lightly." Id. at 724–25.

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Maryland's definition of public policy parallels that of West Virgnia. See *Assanah-Carroll Law Offices of Edward J. Maher, P.C*., 480 Md. 394, 432, 281 A.3d 72, 94: "[p]ublic Policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." (Internal citation omitted). Maryland also sparingly applies public policy exception, employing it in a tort case for the first time in *Laboratory Corp. of America v. Hood*, 395 Md. 608, 911 A.2d 841 (2006)(refusing to apply North Carolina law which barred wrongful life suit).

The Petitioner and the WVAJ seek to sway this Court by appeals to its sympathies by arguing that the public policy exception applies. Their arguments, however, miss the mark. It is not the public policy of this State to maximize the recovery of litigants. The Petitioner's citation of *Paul v. National Life*, 177 W.Va. 427, 352 S.E.2d 550 (1986) in advocating that public policy of this state is to permit recovery by injured parties is both misplaced and the language of that case is misquoted. In fact, the *Paul* court opinion provides:

> "Today we declare that automobile guest passenger statutes violate the strong public policy of this State in favor of compensating persons injured by the negligence of others. Accordingly, we will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts.

Moreover, this is not a case in which the Petitioner does not have an avenue for recovery of damages. In fact, the desired result of the Petitioner is to hold in the parties perceived to have deeper pockets than the party whose negligent driving caused the subject accident.

The application of the public policy exception is not and should not be outcome-oriented, thus Petitioner's assertion that choice of law decision in this case is a "high-stakes issue" has no place in the analysis. Petitioner's argument that "it is the policy of West Virginia to provide an avenue of recovery to victims of negligence" is an oversimplification of the law. Of course, negligence is a cause of action in this state in which a party can seek damages. Respondent VIP does not argue otherwise. However, the rule of law does not always provide a civil remedy to all injured parties as this State recognizes immunities for government entities and others. For example, see West Virginia Code §§29-12A-1, et seq (Governmental Torts Claim and Insurance Reform Act) and West Virginia Code §23-4-2 (immunizing employers from suits by injured except in cases of deliberate intent).

Petitioner and the WVAJ misconstrue the public policy exception and offer that the Maryland's prohibition of the overservice of alcohol is "apples and oranges" as to West

Virginia's recognition of civil liability. Criminal and civil liability both serve to deter undesirable conduct. In this State, as well as others, damages may be recoverable in cases where no criminal liability lies and for certain offenses, a criminal penalty may not also support a civil claim for damages. In situations in which someone is over-served, and no one is injured, establishments can face criminal penalties in both states. Imposing civil liability does not necessarily promote justice, it promotes recovery. The fact is that the two States share the goal of barring the service of intoxicated individuals and driving while intoxicated. See Maryland Alcoholic Beverage Code Annotated at §6-307; Maryland Criminal Code Annotated §2-503. Maryland laws are even more stringent in that, unlike West Virginia, Maryland mandates that applicants for a license for alcohol service complete approved alcohol awareness training. See, e.g., Md. Alcoholic Beverage Code Annotated, §31-1903. Maryland's criminal penalties for violation of the law prohibiting service of intoxicated individuals are also more stringent than those in West Virginia. See Id. at §6-402 versus W. Va. Code §60-7-12(a)(4)(c).

The refusal of Maryland courts to impose civil liability on establishments that serve alcohol for damages to patrons and third parties injured as a result of the over-service of patrons does not equate to a lack of public policy against over-service and drunk driving. The decisions of the Maryland courts are consistent in the declaration that over-service is not condoned and also steadfast in holding that a cause of action for those injured as a result must be created by the state's legislature. See *Fisher v. O'Connor's Inc*., 53 Md. App. 338, 452 A.2d 1313, cert. denied, 1983 WL 217405 (1982); *Moran v. Foodmaker, Inc*., 88 Md. App. 151, 594 A.2d 587, cert denied., 325 Md. 17, 599 A.2d 90 (1991).

Maryland's rejection of civil dram shop liability is not a declaration of a public policy in favor of drunk driving or tavern owners and social hosts. In *Kiriakos v. Phillips*, 448 Md. 440,

139 A.3d 1006 (2016), the Maryland Court of Appeals addressed the state's stance, focusing on underage consumption of alcohol, in overruling past precedence and holding that social hosts may be held liable for providing or allowing minors to consume alcohol. "…we hold that there exists a limited form of social host liability sounding in negligence—based on the strong public policy reflected in [Maryland Annotated Code, Criminal Article § 10–117(b)], but that it only exists when the adults in question act knowingly and willfully, as required by the statute." Id at 455, 139 A.2d at 1015. The *Kiriakos* court contrasted the fact that minors are a protected class as opposed to the general class protected under criminal statute prohibiting the service of intoxicated persons in addressed *Warr* and that the prohibition of service of minors serves as a bright line versus that of the point at which an adult becomes "visibly intoxicated." Id. at 491, 139 A.3d at 1036-37.

Maryland's stance is not unique. Seven other states also do not recognize dram shop liability, Delaware, Kansas, Louisiana, Nebraska, Nevada, South Dakota, and Virginia, while four others substantially restrict civil liability. See *Shea v. Matassa*, 918 A.2d 1090 (Del. 2006); *Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731 (1985); *Noone v. Chalet of Wichita, LLC*, 32 Kan.App.2d 1230, 96 P.3d 674 (2004); *Edson v. Walker*, 573 So.2d 545, writ denied 576 So.2d 34 (La. 1991)(civil liability for service of minor); La. R. S. 9:2800.1 (statute limiting liability for sale or service of alcoholic beverages); *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976)(no civil liability involving service of adults); Neb. Revised Statutes 53-404 (suit permitted for injuries for service of minors); Nevada Revised Statutes §41.1305 (no liability for service of person over 21, limited liability for service under persons 21); *Weigleitner v. Sattler*, 1998 S.D. 88, 582 N.W. 2d 688 (1998); South Dakota Codified Laws §35-4-78 (criminalizing over service of adults and barring civil liability); Id. §35-9-1 (criminalizing service of minor and

barring civil liability); *Williamson v. Old Brogue, Inc*., 232 Va 350, 350 S.E.2d (1986)(lack of proximate cause); *Robinson v. Matt Mary Moran, Inc*., 259 Va. 412, 5325 S.E.2d 559 (2000)(no claim for service of underage patron) California Business and Professions Code §25602 (criminalizing overservice but barring civil liability); Id. §25602.1 (allowing suit based on service of visibly intoxicated minor and declaring it proximate cause of person injury or death); Tennessee Code §57-10-102 (requiring unanimous twelve person jury finding of proximate cause by clear and convincing evidence);Wisconsin Statutes Annotated §125.035 (exemption for civil liability except for service of minors with some exceptions); Oregon Revised Statutes §471.565 (allowing civil liability based on clear and convincing evidence and imposing pre-suit notice requirements of one year for wrongful death and 180 days for other injuries).

There is no dispute that the motor vehicle accident at issue, without the occurrence of which there would be no cause of action, took place in Maryland. As Maryland is the situs of the injuries sustained by the Petitioner's decedent, that state's law must be applied to the facts of the case under the choice of law provisions long followed in both West Virginia and Maryland. In *Wise v. C.R. Bard*, 2015 WL 502010 (S.D. W. Va. 2015), the court rejected the defendant manufacturer's argument that Ohio law should apply to the claims of an Ohio resident who was treated in Ohio, although her surgery took place in West Virginia. The court quoted the following language from *Quillen v. Int'l Playtex*, 789 F.2d 1041, 1044 (4th Circ. 1986): "[T]he place of the wrong for purposes of the *lex loci delicti* rule, however, is defined as the place where the last event necessary to make an act[or] liable for an alleged tort takes place." (Internal citations omitted). The court declared that "the injury—that is, the last event necessary to make an actor liable for an alleged tort—took place in West Virginia, where Ms. Wise was implanted with the allegedly defective device. The fact that Ms. Wise received treatment for that injury

elsewhere does not alter the lex loci delicti analysis…". *Wise* at *3.

While the public policy exception barred the application of the law of the situs of the injury in *Mills v. Quality Supplier Trucking,* 203 W. Va. 621, 510 S.E.2d 280 (1998), that case is also distinguishable. The limited scope of the *Mills* decision was confirmed by the U.S. District Court for the Southern District of West Virginia in *Vass v. Volvo Trucks North America, Inc*., 315 F. Supp.2d 815 (S.D. WV. Va. 2004). The plaintiff in *Vass* sought to avoid the application of Virginia law to her wrongful death claim filed in West Virginia for an accident that occurred in the Commonwealth of Virginia. Analyzing *Mills*, the *Vass* court observed that it was limited to the narrow issue of whether West Virginia courts should apply the doctrine of strict contributory negligence when it is part of the law of the state in which an accident occurred, but not the law in West Virginia:

> Therefore, although there is language in the *Mills* opinion that could be read to command the application of West Virginia law to the plaintiff's claims in their entirety, this language is appropriately regarded as dicta. The binding holding of *Mills* is that a foreign contributory negligence law will not be enforced, and this is especially apparent in light of the fact that the *Mills* court began its discussion by noting that the "operative distinction" between the two states' laws was the application of the contributory negligence rule. *See Mills*, 510 S.E.2d at 282. Although *Chase* was subsequently overturned as to its parent-child immunity holding, see *Lee v. Comer*, 159 W.Va. 585, 224 S.E.2d 721, 724 (1976), the portion of the decision providing that the law of the place of the wrong governs the plaintiff's right of recovery, subject to limitations drawing from this state's public policy, remains good law. When the two cases are read together, the result is that Virginia law should govern the plaintiff's wrongful death claim, but that Virginia's contributory negligence rule should not be applied in order to comport with West Virginia's public policy in favor of comparative fault.

Id. at 819-820. The application of Maryland's law of contributory negligence is not at issue in the case at bar.

The out-of-state public policy exception cases cited by the Petitioner offer no support to his position. In *San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F. Supp.2d 1122,

1172 (N.D. Ala 2012), the public policy exception was found to apply in large part because the Alabama legislature had adopted a statute on point, the preamble of which contained a statement as to its strong public policy "against the maintenance of common law tort actions against persons providing legal services in Alabama." Id. In contrast, West Virginia has not adopted specific dram shop legislation, but instead imposes liability by employing a general statute to incorporate criminal provisions on alcohol over-service. Notably, the Alabama court also declared that "the public policy exception is infrequently applied, because it is intended to be narrow and should be applied only in rare circumstances." Id. (internal citations omitted).

The application of the public policy exception in *Alexander v. General Motors Corporation*, 267 Ga. 339, 478 S.E.2d 123 (1996), also was based on a strongly-worded statute of the forum state. *Barbour v. Campbell*, 101 Kan. 616, 168 P. 879 (1917) is a dated case that simply demonstrates that Idaho adopted the concept of the statute of frauds later than the forum state of Kansas. Plaintiff's citation of *Hutzell v. Boyer*, 252 Md. 227, 249 A.2d 449 (1969) and *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983) is interesting, in that Maryland court refused to apply the law of Virginia and Delaware, respectively, as the laws (like those of West Virginia) which prohibited injured workers to sue fellow employees because they violate Maryland public policy. See W. Va. Code 23-4-2.

Public policy in West Virgnia, in fact, does not always mandate recovery by injured party. In *American National Property & Casualty Com. v. Clendenen*, 238 W. Va. 249, 793 S.E.2d 899 (2016), the court considered whether exclusions in two insurance policies blocked a claim for negligent supervision against the parents of two teenagers who had murdered a friend. In answering certified question from United State District Court for the Northern District of West Virgnia, the West Virginia Supreme Court of Appeals declared that public policy favors the

"application of unambiguous intentional criminal acts exclusion as written" and thus coverage was precluded. Id. at 216, 793 S.E.2d at 912; *see also Rich v. Allstate Insurance Co*., 191 W. Va. 308, 445 S.E.2d 249 (1994)(family exclusion provision of homeowner's policy did not violate public policy).

Justice Brotherton's dissent in *Paul v. National Life*, 177 W. Va. 427; 352 S.E.2d 550 (1986). *Paul* is instructive and squarely supports the rejection of position that the Petitioner and the WVAJ urge this court to take:

> I dissent to this case to draw a comparison between it and the recent case of *Perkins v. Doe*, 350 S.E.2d 711 (W.Va.1986). In the present case, two West Virginia residents were killed in a one-car collision in Indiana. The State of Indiana had a guest passenger statute which would appear to have blocked the suit. Nevertheless, this Court declared the guest passenger statute to be against this State's public policy, and therefore we declined to enforce it.
>
> In *Perkins v. Doe*, the plaintiff was injured in a one-car accident in Virginia. He claimed that his accident was caused because an unknown motorist forced him off the road. However, the applicable West Virginia statute required a touching between the vehicles before there could be a recovery under the uninsured motorist provision while Virginia law did not. To allow the plaintiff to recover, this Court twisted the law so that the plaintiff could bring an action under a West Virginia statute and use the non-touching portions of the Virginia uninsured motorist law.
>
> In the classic pose, Justice is blindfolded so that she can weigh the equities in a case equally without prejudice. We are peeking beneath the blindfold in conflict of law cases to see if an insurance company is involved. If they are, we appear to be manipulating our conflict of law rule so that the insurance company loses. I believe that even insurance companies are entitled to impartiality in the courts.

Id. at 434, 352 S.E.2d at 557.

In *Vest v. St. Albans Psychiatric Hosp., Inc*., 182 W. Va. 228, 387 S.E.2d 282 (1989), Justic Brotherton, again in dissent, addressed the majority's rejection of Virginia's substantive law to medical care rendered in Virginia which resulted in an outcome favorable to West Virginia residents:

> I must dissent in this case because I disagree with the majority's foray into "creative jurisdiction." I do not quibble with the majority's rather blithe assumption of the existence of West Virginia's personal jurisdiction over the defendant Virginia hospital, since the defendant is licensed to do business in West Virginia. What I do object to is the majority's farcical treatment of Virginia's substantive law.
>
> The majority admits that West Virginia adheres to the lex loci delicti theory of conflicts of law, thus applying the substantive law of the state where the injury took place. *Paul v. National Life*, 177 W.Va. 427, 352 S.E.2d 550 (1986). It is undisputed that the alleged injury took place in Radford, Virginia. It is also undisputed that the Fourth Circuit Court of Appeals has held that the Virginia statute requiring a medical review panel be convened to review medical malpractice suits is the substantive law of that state. *DiAntonio v. Northampton–Accomack Memorial Hospital*, 628 F.2d 287, 290 (4th Cir.1980). Consequently, the majority's decision to "part ways" with the Fourth Circuit's finding in DiAntonio is nothing short of blatant protectionism of West Virginia residents in direct contravention of the lex loci delicti theory of conflicts of law….
>
> The question is not controlling "access to the courts of sister states," as the majority so coyly phrases the issue. It is a question of maintaining the integrity and predictability of the internal laws of the sister state as well as avoiding the dreaded specter of "forum shopping" to obtain the most favorable law. In this case, the plaintiff voluntarily availed himself of the benefits of the Commonwealth of Virginia, much as if he was involved in an automobile accident on Virginia roads. It is not only fitting, but legally correct, that he be subjected to the substantive law of the state where the injury occurred.
>
> I would point out the majority's words in *Paul*: "we have long recognized that comity does not require the application of the substantive law of a foreign state when the law contravenes the public policy of this State." 177 W.Va. at 433, 352 S.E.2d at 556. Yet at no point in the *Vest* opinion does the majority actually find that the Virginia statute contravenes any public policy of this State. Their actions, however, do just that. Could it be that the contravened public policy is any law belonging to a foreign state that would affect the rights of a West Virginian to sue an entity in that foreign state? If that is so, then the majority has surreptitiously, but effectively, abrogated our adherence to the *lex loci delicti* theory of conflicts of law so steadfastly affirmed in *Paul*.

Id at 233-34, 387 S.E.2d at 287-88.

Respondent VIP respectfully requests that this Court reject the Petitioner's appeal for it to engage in an outcome-oriented analysis contrary to well-established choice of law precedent of West Virginia. The Circuit Court properly held that public policy exception does not apply in this case and therefore, its decision should be affirmed.

VI. CONCLUSION

The Circuit Court properly applied the law of the State of Maryland as the situs of the accident in dismissing the Petitioner's claims for failing to state a claim and declaring that the public policy exception did not apply. Accordingly, Respondent VIP Gentlemen's Club, LLC respectfully requests that the Intermediate Court of Appeals deny the Petitioner's appeal.

Dated this 14th day of December, 2023.

Respectfully submitted,

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BY COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2023, I filed the foregoing ***Brief of Respondent VIP Gentlemen's Club, LLC*** using File & ServeXpress, which will send notification of such filing to all counsel of record.

/s/ Tracey B. Eberling

_____

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