INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

BARRY BARR

Plaintiff Below, Petitioner,

v.

CASE NO. 23-ICA-337
(Berkeley Co. Civil Action No. 22-C-169)

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

Defendants Below, Respondents.

PETITIONER'S BRIEF

Appeal Arising from Order Entered on
June 29, 2023 in Civil Action No. 22-C-169 in
the Circuit Court of Berkeley County, West Virginia

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ASSIGNMENT OF ERROR

The circuit court erred when it misapplied the *lex loci delicti* choice of law principle and its public policy exception to deny the Petitioner a dram shop wrongful death cause of action against Respondents.

STATEMENT OF THE CASE

The Petitioner, a West Virginia resident, sued the Respondents under a dram shop theory of liability. Petitioner's daughter, 20-year-old West Virginia resident Katie-Barr, was the victim of a fatal drunk driving crash that occurred in Maryland within sight of the West Virginia state line. Although the crash happened in Maryland, the drunk driver – a Virginia resident – had spent the hours preceding the crash being overserved alcoholic beverages in Berkeley County, West Virginia, by the Respondents, all licensees or agents or alter egos of a licensee, of the West Virginia Alcoholic Beverage Control Association ("WVABCA"). Appx. 13, p. 3, ¶ 18, 26, 52.

West Virginia's courts have long held that licensees who keep serving drink after drink to visibly drunk people can be held liability for serious injuries and deaths; West Virginia courts recognize a "tort action against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is physically incapacitated from drinking." *See* Syl. Pt. 1, *Bailey v. Black,* 183 W. Va. 74, 394 S.E.2d 58 (1990); *see also Anderson v. Moulder,* 183 W. Va. 77, 83-84, 394 S.E.2d 6, 67 (1990).

In contrast, Maryland does not recognize dram shop liability and does not provide a cause of action to victims of dram shop negligence. *Warr v. JMGM Group, LLC,* 70

A.3d 347, 363 n. 1 (Md. 2013). Both states have enacted laws making it illegal for state alcohol licensees to serve alcohol to a patron who is visibly or noticeably intoxicated. *See* W. Va. Code § 11-16-18, W. Va. Code § 60-3-22; Md. Code Ann., Alco. Bevs. § 6-307.

On March 5, 2022, Michael Maydian – the drunk driver who killed the Petitioner's daughter – attended an event in Martinsburg, West Virginia, organized by West Virginia Sports Promotions ("WVSP"). At the event, WVSP provided alcohol, of which Maydian partook. Despite Maydian's showing signs of intoxication, WVSP continued serving him. Upon leaving the event, Maydian was intoxicated. Maydian's next stop was Lust Gentleman's Club in Martinsburg. Despite Maydian's visible intoxication, the club's security, managed by Special Services Bureau, Inc. ("SSB"), allowed him entry. [1] Appx. 13, p. 5, ¶ 30-33. Inside the club, Maydian was served additional alcoholic beverages, despite being visibly intoxicated. He departed the club in an intoxicated state and began driving north on I-81. Appx. 13, p. 5-6, ¶ 35-37. Just after crossing from West Virginia into Maryland, Maydian's vehicle collided with a car carrying Petitioner's daughter, Katie Barr, a young West Virginia resident. Katie Barr died from her injuries on March 6, 2022. Appx. 13, p. 7, ¶ 43.

[1] SSD is not a party to this appeal as the Plaintiff's claims against it are still pending in the Circuit Court for Berkeley County. After the circuit court entered the order granting Rule 12(b)(6) dismissal to WVSP, Lust, and the Jackson Defendants, SSD filed a Motion for Judgment on the Pleadings on the same grounds as those stated in its Co-Defendants' Motions to Dismiss.

Post-crash assessments confirmed that more than an hour after the crash, Maydian's breath alcohol concentration was 0.17, well over the legal limit for drivers.[2] Maydian ultimately pleaded guilty to negligent manslaughter for the death of Katie.[3]

In response to these events, Barry Barr, Katie's father, initiated legal proceedings against Maydian, WVSP, Lust, SSD, Brent Jackson, Lynn Perkins, and Hedgesville Real Estate, LLC ("HRE"). The action against WVSP and Lust is based on the dram shop liability theory, as they are licensed to serve alcohol by the WVABCA The claims against Jackson, Perkins, and HRE, referred to as "the Jackson Defendants," are grounded in alter ego and joint venture theories of liability.

Although Maydian had been drinking all night in West Virginia, the fatal crash occurred just after he crossed into Maryland. Appx. 13, p. 7, ¶ 41. WVSP, Lust, and the Jackson Defendants, the Respondents here, all moved to dismiss the Petitioner's Complaint on the grounds that West Virginia's choice of law rule, *lex loci delicti,* barred dram shop liability because the place of injury was Maryland, which does not recognize a cause of action for dram shop liability. Appx. 31, 36, 87, 95, 155. The Petitioner argued that Maryland's refusal to provide a recovery in tort for the victims of dram shop negligence triggered the public policy exception to *lex loci delicti* and required the application of West Virginia law to the Petitioner's claims. Appx. 41, 110, 159.

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[2] Maryland Code Ann., Transportation § 11-174.1 sets the legal limit at .08 measured by grams of alcohol per 100 milliliters of blood. West Virginia has the same legal limit. W. Va. Code § 17C-5-2.

[3] https://www.heraldmailmedia.com/story/news/local/2023/03/21/drunken-driver-gets-5-years-in-fatal-crash-on-i-81-near-williamsport-maryland/70029640007/

The circuit court erroneously held that, "There is no conflict between the substantive law of Maryland and the public policy of West Virginia that warrants application of the public policy exception to *lex loci delicti*." Appx. 180, p. 4, ¶ 8.

SUMMARY OF THE ARGUMENT

In West Virginia, the guiding principle for choice of law decisions in tort cases is *lex loci delicti,* a doctrine that holds "the substantive rights between the parties are determined by the place of the injury." *Caudill v. EAN Holdings, LLC,* 2022 W. Va. LEXIS 315, 16 (W. Va. April 26, 2022). However, application of the doctrine is not absolute. When the substantive law of the place of injury conflicts with the public policy of this State, *lex loci delicti* does not apply. *Paul v. National Life,* 177 W. Va. 427, 433, 424 S.E.2d 550, 556 (1986).

Choice of law in this case is a high-stakes issue. It is the policy of West Virginia Courts to provide an avenue of recovery for victims of negligence. *See Paul,* 177 W. Va. at 433, 424 S.E.2d at 556 (1986); *Mills v. Quality Supplier Trucking, Inc.,* 203 W. Va. 621, 623, 510 S.E.2d 280, 282 (1998).

If *lex loci delicti* applies here, the Petitioner cannot hold the Respondents liable for Katie's death even though West Virginia law is clear and unambiguous: "someone licensed to sell alcohol in this state, who sells to an intoxicated person in violation of law is liable in tort for damages suffered by others as a result of the legal sale." Syl. Pt. 1, *Bailey v. Black, supra.* Application of Maryland law here means that WVABCA licensees who overserved an obviously drunk patron in West Virginia will have no

liability for the death of a West Virginia resident. This result is contrary to the clearly established public policy of this state to hold those West Virginia bars who overserve patrons accountable for the damage their actions cause.

In determining that no conflict necessitated application of the public policy exception to the doctrine of *lex loci delicti*, the circuit court relied on the fact that both West Virginia and Maryland legislate against the service of alcohol to obviously intoxicated patrons. Appx. 180, p. 4-5, ¶ 9-12. But the substantive law at the center of this case is dram shop negligence, not alcoholic beverage regulation. This is the circuit court's error, and as a result, the circuit court misidentified the relevant public policy for consideration. Rather than the generalized prohibition of conduct for overservice, the Court should have focused on West Virginia's cause of action for dramshop liability as opposed to Maryland's foreclosure of a cause of action.

On appeal this Court should reverse the dismissal and hold that when considering the public policy exceptions for *lex loci delicti*, 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, 424 S.E.2d at 556; *see also Mills,* 203 W. Va. at 623, 510 S.E.2d at 282.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for oral argument under W. Va. R. App. P. 19(a) which states oral argument is suitable in a case involving an assignment of error in the application for settled law. Here, the Petitioner appeals the circuit court's rejection of the public policy in

determining the choice of law for disposition of this wrongful death dram shop case. West Virginia law in each of these areas is settled. Courts make choice of law determinations in tort cases using the principle of *lex loci delicti* unless the law of the place of injury directly contravenes the public policy of this State. Where this case becomes complicated is in identifying the public policy that the court must consider in making the choice of law determination. Oral argument will aid the Court in making this determination.

ARGUMENT

The Petitioner here appeals the circuit court's choice of law decision, specifically, the refusal to apply the public policy exception to hold WVABCA licensees liable for service to visibly intoxicated individuals who then cause the death of another. Generally, courts in this jurisdiction make choice of law decisions in tort cases by applying the rule of *lex loci delicti,* the principle that "the substantive rights between the parties are determined by the law of the place of injury." *Caudill,* 2022 W. Va. LEXIS 315 at 16. However, "West Virginia has long 'adhered to the rule that the doctrine of *lex loci delicti* will not be invoked where 'the application of the substantive law of a foreign state . . . contravenes the public policy of this state.'" *Mills,* 203 W. Va. at 623, 510 S.E.2d at 282 (quoting *Paul,* 177 W. Va. at 433, 352 S.E.2d at 556).

I. This Court reviews this choice of law issue *de novo*.

Reviewing the issue *de novo,* this Court should reverse the Rule 12(b)(6) dismissal of this case. *See Doe v. Logan Cty. Bd. of Educ.,* 242 W. Va. 45, 48, 829 S.E.2d 45, 48

(2019) (quoting Sy. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,* 194 W. Va. 770, 461 S.E.2d 516 (1995)). The WVSCA has explained the extent of a *de novo* review as follows:

> The term "*de novo*" means "Anew; afresh; a second time." We have often used the term "*de novo*" in connection with the term "plenary." . . . Perhaps more instructive for our present purposes is the definition of the term "plenary," which means "[f]ull, entire, complete, absolute, perfect, unqualified." We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court.

Doe, 194 W. Va. at 48, 829 S.E.2d at 48 (quoting *Gastar Exploration, Inc. v. Rine,* 239 W. Va. 792, 806 S.E.2d 448 (2017)). By giving a "new, complete, and unqualified" review to the law, the arguments, and the record, this Court should reverse the circuit court's determination that there exists no conflict between Maryland law and West Virginia public policy and remand this case for further proceedings.

II. It is the public policy of West Virginia to offer a path to recovery for victims of negligence.

"It is the strong public policy [West Virginia] 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. The WVSCA has acknowledged this policy of allowing recovery for another's negligence in a number of instances. *See Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978) (abolishing doctrine of inter-spousal immunity to permit recovery in tort); *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979) (adopting doctrine of comparative negligence over contributory negligence to permit recovery in tort); *Adkins v. St. Francis Hosp*., 149 W. Va. 705, 143 S.E.2d 154 (1965) (abolishing charitable immunity for hospitals to permit recovery in

tort); *Higginbotham v. City of Charleston*, 157 W. Va. 724, 204 S.E.2d 1 (1974) (finding no common law governmental immunity for municipal corporations to permit recovery in tort); *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976) (abrogating doctrine of parental immunity to permit unemancipated minor child to recover in tort).

Other jurisdictions that still apply the rule of *lex loci delicti* have used the public policy exception in matters such as legal malpractice claims (*S.F. Residence Club*, *Inc. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1172 (N.D. Ala. 2012)), strict liability (*Alexander v. General Motors Corporation*, 478 S.E.2d 123, 124 (Ga. 1996)), statute of frauds (*Barbour v. Campbell*, 168 P. 879 (Kan. 1917)), wrongful death and liability of governmental officers (*Torres v. State*, 894 P.2d 386, 390 (N.M.S.C. 1995)), interspousal immunity (*Boone v. Boone*, 456 S.E.2d 191 (S.C. 2001)), and workers' compensation (*Hutzell v. Boyer*, 252 Md. 227, 249 A.2d 449 (1969); *Hauch v. Connor*, 453 A.2d 1207 (Md. 1983)).

The public policy exception should be invoked in this circumstance because the lower court misidentified substantive law at issue and thus considered the wrong public policy. The public policy at issue is the law of negligence and the availability of a civil remedy for drunk driving victims against the licensed sellers of alcohol. Instead, in analyzing the public policy exception, the lower court held that Maryland's substantive law regarding the regulation of alcoholic beverages is not in conflict with West Virginia's public policy because "Maryland, like West Virginia, has laws forbidding the service of alcoholic beverages to intoxicated individuals and has heightened criminal penalties

associated with the same." Appx. 180, p. 4-5, ¶ 9. This analysis was fundamentally flawed because it compared apples to oranges.

Criminal liability is not the same as civil liability. *See Charleston v. Beller,* 45 W. Va. 44, 45-46, 30 S.E.2d 152, 152 (1898). As one court has explained, "[a] person's conduct may result in criminal liability, civil liability, neither, or both. . . . **[**i]t is not the victim's interests that are being represented in a criminal case, but rather those of the people of the [state]." *City of Kettering v. Mosher,* 2019 Ohio App. LEXIS 1648, 17 (2nd Dist. Ohio, April 26, 2019). Conversely, the basic goal in awarding damages in tort "is to fairly and adequately compensate a plaintiff for the injuries and losses sustained." *Cook v. Cook,* 216 W. Va. 353, 356, 607 S.E.2d 459, 463 (2004) (quoting *Flannery v. U.S.,* 171 W. Va. 27, 297 S.E.2d 433, 435 (1982)).

In this case, the substantive law at issue is not the criminal penalties contained in the regulation of establishments that serve alcoholic beverages. Instead, the substantive law at issue is the availability of a civil remedy for dram shop negligence.

III. The substantive law at the center of this case is dram shop negligence, not alcohol beverage regulation.

Consideration of the public policy exception requires a court to identify the applicable substantive law and then to examine the public policy underlying each competing jurisdiction's treatment of that law. Where the substantive law of another state "contravenes the public policy" of West Virginia, though, courts in West Virginia do not apply that law." *Paul,* 177 at 433, 352 S.E.2d at 556; *see also Walters v. Siemens Indus.,* 2017 U.S. Dist. LEXIS 180858, 8 (S.D. W. Va. Nov. 1, 2017).

The circuit court here misidentified the applicable substantive law and consequently examined wrong public policy. Both West Virginia and Maryland criminalize the sale of alcohol to visibly drunk patrons. *See* W. Va. Code § 60-7-12[4] and Md. Code Ann., Alco. Bevs. § 6-307.[5] In West Virginia, violation of the statute constitutes a misdemeanor and is punishable by a fine up to $500, up to a year in jail, or both. W. Va. Code § 60-7-12(a)(4)(c). Violation of Maryland's statute is also a misdemeanor, but carries a fine of up to $1,000, 2 years in prison, or both. Md. Code Ann., Alco. Bevs. § 6-402. But these penalties are simply not relevant to this choice of law analysis.

At common law, "the sale of liquor to ordinary able-bodied men did not give rise to any civil liability against the vendor for injuries caused by intoxication, the reason being that the drinking of the liquor, and not the selling of it, was viewed as the proximate cause of any subsequent injury." *Anderson,* 183 W. Va. at 82, 349 S.E.2d at 66 (citing *Carr v. Turner,* 385 S.W.2d 656 (Ark. 1965); *Ling v. Jan's Liquors,* 703 P.2d 731

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[4] (a) It shall be unlawful for any Licensee, or agent, employee or member thereof, on such licensee's premises to:

> . . .(4) Sell, give away, or permit the sale of, gift to, or the procurement of any alcoholic Liquors, for or to any mental incompetent, or for a person who is physically incapacitated due to consumption of alcoholic liquor or the use of drugs . . .

W. Va. Code § 60-7-12(a)(4).

[5] A license holder or an employee of the license holder may not sell or provide alcoholic beverages to an individual who, at the time of the sale or delivery, is visibly under the influence of an alcoholic beverage. Md. Code, Alco. Bevs. § 6-307.

(Kan. 1985); *Holmes v. Circo,* 244 N.W.2d 65 (Minn. 1976); *Hamm v. Carson City Nugget, Inc.,* 450 P.2d 358 (Nev. 1969)).

In *Bailey v. Black,* West Virginia recognized dram shop liability by reading W. Va. Code § 55-7-9 in *pari materia* with W. Va. Code §60-7-12. *Bailey,* 183 W. Va. at 75, 394 S.E.2d at 60. In that case, the respondent driver spent about five hours drinking at a Raleigh County tavern before being ejected for arguing with other patrons. *Id.* As she drove home, the respondent driver hit and killed the petitioner's decedent. *Id.* The respondent driver's blood alcohol content was later determined to be .187 percent, well above the legal limit. *Id.* The petitioner filed suit against both the respondent driver and the owners of the tavern. *Id.* The court granted a motion for summary judgment in favor of the tavern owners finding that they were not liable to the petitioner as a matter of law. *Id.*

The court in *Bailey* began its analysis with W. Va. Code § 55-7-9, which states that, "[a]ny person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of damages." *Id.*

The court then turned to W. Va. Code § 60-7-12, a section of the legislation concerning State Control of Alcoholic Liquors that states:

> (a) It shall be unlawful for any Licensee, or agent, employee or member thereof on such licensee's premises to:
>
> . . .

> (4) Sell, give away, or permit the sale of, gift to, or the procurement of any mental incompetent or for a person who is physically incapacitated due to consumption or alcoholic liquor or the use of drugs;
>
> . . .
>
> (c) Any person who violates any of the foregoing provisions shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period not to exceed one year; or by both fine and imprisonment.

Id.

The court held, "reading these statutes together, giving plain meaning to the language, we must conclude that there exists a civil cause of action against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is 'physically incapacitated' by drinking." *Id.* Having recognized the cause of action for dram shop liability, the court remanded to the circuit court for consideration of whether the respondent driver was "physically incapacitated" so as to render that condition obvious to the respondent. *Id.*

Unlike West Virginia, Maryland has no dram shop liability. *See, e.g., Warr,* 70 A.3d at 349; *Moran v. Foodmaker, Inc.,* 594 A.2d 587, 590 (Md. Ct. Spec. App. 1990). As the Maryland Court of Special Appeals stated in *Moran,* "Unfortunately for Ms. Moran and other victims of drunken driving, Maryland remains aligned with the small minority of states which take a rigid and unenlightened approach to the issue of civil liability for commercial vendors of alcoholic beverages." *Moran,* 594 A.2d at 590-591. Maryland continues to impose "only criminal sanctions upon a licensed vendor of

alcoholic beverages who sold or furnished intoxicant to minors or persons visibly under the influence of alcohol." *Felder v. Butler*, 438 A.2d 494, 499 (Md. 1981).

The only logical conclusion from this is that the substantive law of the State of Maryland is in direct conflict with the public policy of the State of West Virginia because West Virginia allows a civil cause of action for dram shop liability while Maryland does not.

IV. West Virginia's well-established remedy for dram shop negligence stands in direct conflict with Maryland's refusal to provide such a remedy.

The public policy exception applies where, as here, the identified policy involves "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 202 (N.Y. 1918). Since tort law, not alcoholic beverage law, is the substantive law at issue here, it is the public policy underlying creation of dram shop negligence that the Court must examine.

The WVSCA's recognition of civil dram shop liability is grounded first and foremost in the public policy of holding liable those who create a dangerous situation for the public.

In *Bailey,* the court did not spend significant time discussing the public policy underlying that decision, stating only:

> Many states have specific statutes, known as Dram Shop Acts, providing for civil liability of negligent sellers of alcohol. In some states, civil liability has been based on common-law negligence principles. *See, e.g.*, *Kelly v. Gwinnell,* [476 A.2d 1219] (N.J. 1984). In yet other states, the violation of alcoholic beverage control statutes has been held to be *prima facie* negligence. Two cases on all fours with this one are *Lopez v. Maez,*

> [651 P.2d 1269 (N.M. 1982)], and *Ono v. Applegate,* [12 P.2d 533 (Haw. 1980)]. *See generally* Comment, "Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated," 19 *Wake Forest L. Rev.* 1013 (1983).

Bailey, 183 W. Va. at 75-76, 394 S.E.2d at 59-60. The Bailey decision showed that dram shop liability is consistent with West Virginia's clear directive that "[i]t 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.

Further, the two cases the WVSCA relied on in *Bailey* include explicit discussions of the public policy underlying the rule, recognizing that the realities of modern life require a reformulation of dram shop negligence.

First, in *Lopez v. Maez,* New Mexico's Supreme Court of Appeals followed recognized principles of negligence to hold that "when a tavernkeeper sells liquor to an intoxicated patron in violation of a statute that forbids such, he then becomes responsible for the foreseeable harm to others caused by the actions of that patron. *Lopez*, 651 P.2d at 1274. The court stated that a tavernkeeper's duty arose from New Mexico Liquor Laws and Regulations, No. 30 (1976) which stated that, "[n]o licensee, agent, or employee shall sell, serve or deliver alcoholic beverages to any person who is obviously intoxicated" and that violation of the statute constituted a breach of duty *Id.* at 1275. Of course, the breach of duty alone does not constitute a case of negligence. Still framing dram shop liability according to the recognized principles of negligence, the *Lopez* court held that, "[a] tavern owner is not responsible for every injury caused by a person to whom he serves

liquor, only those which are reasonably foreseeable." *Id.* at 1276. And then the court makes a clear statement of the public policy underlying its decision:

> In light of the use of automobiles and the increasing frequency of accidents involving drunk drivers, we hold that the consequences of serving liquor to an intoxicated person whom the server knows or could have known is driving a car, is reasonably foreseeable. *Deeds v. United States,* [306 F.Supp. 348 (D. Mont. 1969)]; *Ono v. Applegate,* [612 P.2d 533 (1980)]; *Adamian v. Three Sons, Inc.,* [233 N.E.2d 18 (Mass. 1968)]. A person who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof, although the act of a third person contributes to the final result.

Id.

In *Bailey,* the WVSCA relied on *Ono v. Applegate* as support for creating a dram shop cause of action in West Virginia. *Bailey,* 183 W. Va. at 75-76, 394 S.E.2d at 59-60. *Ono* is another case in which a court established dram shop liability by inferring duty from an alcohol control statute. *See Ono,* 612 P.2d at 536 ("Such a sale of alcohol is prohibited by HRS § 281-78(a)(2)(B) (1976), which states that no licensee under that chapter shall sell or furnish liquor to any person who is at that time under the influence of liquor.") To explain its creation of dram shop liability, the Supreme Court of Hawaii stated,

> the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers are foreseeable to a tavern owner. *Deeds v. United States,* [*supra*]*; Adamian v. Three Sons, Inc.,* [*supra*]; *Berkeley v. Park*, 262 N.Y.S.2d 290, 293 [N.Y. 1965]. The consumption, resulting inebriation and injuries conduct are therefore foreseeable intervening acts which will not relieve the tavern of liability.

Id., 612 P.2d at 540-541.

Dram shop liability is consistent with the public policy underlying the legislature's prohibition against the service of alcohol to intoxicated persons. Because *Bailey* predicated tort liability for tavern keepers on violation of West Virginia's alcohol control statutes, the public policy underlying those prohibitions is relevant to the choice of law analysis here, but it is not determinative.

The West Virginia Legislature states that it regulates the service of alcohol:

> to regulate and control the manufacture, sale, distribution, transportation, storage, and consumption of the beverages regulated by this article within this state and that, therefore, the provisions of this article are a necessary, proper, and valid exercise of the police powers of this state and are intended for the protection of the public safety, welfare, health, peace and morals . . .

W. Va. Code § 60-1-21.

The Maryland General Assembly states that "the restrictions, regulations, provisions, and penalties contained in [the alcoholic beverages control statutes] are for the protection, health, welfare, and safety of the people of the State." Md. Code, Alco. Bevs. § 1-201.

Maryland has not bridged the gap between regulating the service of alcoholic beverages and providing a remedy to victims of dram shop negligence. West Virginia has bridged that gap. The relevant public policy is therefore not the policy underlying the criminalization of service of alcohol to intoxicated persons, but the policy underlying the creation of a path to civil recovery for victims of the act of serving alcohol to intoxicated persons.

V. West Virginia's Supreme Court of Appeals has already determined that the application of certain aspects of Maryland tort law are violative of West Virginia's public policy.

The best illustration of the analysis utilized in invoking the public policy exception to *lex loci delicti* is the WVSCA's analysis on a related issue: the application of Maryland's contributory negligence law versus West Virginia's comparative negligence law. In *Mills,* 203 W. Va. at 623, 510 S.E.2d at 282, the issue before the court was whether to apply Maryland's contributory negligence rule or West Virginia's modified comparative negligence rule applied in a wrongful death action that occurred in Maryland. *Mills,* 203 W. Va. at 622, 510 S.E.2d at 281. The WVSCA began its analysis by acknowledging that *lex loci delicti* rule would require the application of the laws of Maryland, the place of the injury. *Id.,* 203 W. Va. at 623, 510 S.E.2d at 282.

However, that court then recognized that Maryland's adherence to the contributory negligence rule could work a complete bar to the plaintiff's recovery. *Id.* West Virginia's comparative fault rule stood in sharp contrast. *Id.* The court held, "[a]pplication of the doctrine of contributory negligence, barring a plaintiff's recovery if that plaintiff is guilty of any negligence, violates the public policy of this State; accordingly, contributory negligence laws of foreign jurisdictions will not be enforced in the courts of this State." *Id.,* 203 W. Va. at 624, 510 S.E.2d at 283.

In deciding the issue, the court reiterated West Virginia's commitment to lex *loci delicti*, but also reiterated the public policy that those injured by the negligence of another should be able to recover in tort. *Id.,* 203 W. Va. at 623, 510 S.E.2d at 282. That same

logic applies to this circumstance: to apply the law of Maryland would be to bar recovery that is enabled under the applicable West Virginia law.

The public policy import of the doctrine of comparative negligence in West Virginia is evident in its development. In West Virginia, comparative negligence originated as a judicially created doctrine. *See Bradley v. Appalachian Power Co*., *supra*. In *Bradley,* the WVSCA declared that "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident." *Bradley*, 163 W. Va. at 342, 256 S.E.2d at 885. In adopting this rule, the court stated, "While it can be conceded that there is an obvious injustice in the current contributory negligence rule which bars recovery no matter how slight the plaintiff's negligence, nevertheless, the pure comparative negligence rule seems equally extreme at the other end of the spectrum." *Id.,* 163 W. Va. at 339, 256 S.E.2d at 884. The judicial rule of modified comparative negligence remained the operative rule until 2015 when the legislature codified comparative negligence in W. Va. Code § 55-7-13a. It is uncontroverted that the public policy of West Virginia, as announced by both the courts and the Legislature, is to facilitate recovery in tort.

By contrast, Maryland jurisprudence retains the rule of contributory negligence as a bar to recovery in tort. *See Coleman v. Soccer Ass'n of Columbia,* 69 A.3d 1149 (Md. 2013) (citing *Harrison v. Montgomery County Bd. of Educ.,* 456 A.2d 894 (Md. 1983)). When presented with the opportunity to abrogate the doctrine in favor of comparative negligence, which was the rule in the majority of the American states, Maryland's courts

refused. *Coleman,* 69 A.3d at 1154 (citing *Harrison,* 456 A.2d at 899). The court stated that, "In the final analysis, whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature." *Harrison*, 456 A.2d at 905; *see also Coleman,* 69 A.3d at 1158. Maryland's General Assembly remains in lockstep with the state's courts. Between 1966 and 1982, the legislature declined to enact twenty-one bills that would have adopted comparative negligence. *See Gaver v. Harrant*, 557 A.2d 210, 219 (Md. 1989). Courts interpret these failed bills as "an indication of the legislature's intention to retain the contributory negligence doctrine." *Gaver,* 557 A.2d at 219.

VI. The inherent conflict between the civil remedy available for victims of dram shop liability under West Virginia and Maryland's law requires the application of the public policy exception to *lex loci delicti*.

West Virginia has a stringently enforced public policy allowing a civil remedy to persons injured because an establishment served alcohol to someone who was visibly intoxicated. Maryland, on the other hand, has decided not to allow a civil remedy for that act. This conflict requires the application of the public policy exception to render *lex loci delicti* inapplicable as its application is injurious to the rights of the citizens of West Virginia.

The issue before the Court is not whether Maryland and West Virginia both criminally disapprove of the practice of selling alcohol to intoxicated persons. Instead, the question is whether West Virginia and Maryland have similar public policy on the issue of a civil remedy through tort law. When utilizing the same analytical approach as

the West Virginia Supreme Court of Appeals did in *Mills*, Plaintiff respectfully submits that the only conclusion that comports with West Virginia's goal of remunerating those injured by the actions of others is to apply the public policy exception and decline to follow Maryland's bar on tort recovery for the overserving of visibly intoxicated patrons who then harm others.

West Virginia and Maryland's diametrically opposed approaches to contributory negligence demonstrate that the states have radically dissimilar public policy regarding recovery in tort. In *Warr v. JMGM Group, LLC, supra,* Maryland's highest court refused to recognize civil dram shop liability, stating,

> "The essential rationale underlying this line of cases is that the determination of whether to impose liability on tavern owners for injuries caused by intoxicated patrons involves significant public policy considerations and is best left to the General Assembly." *Shea v. Matassa*, 918 A.2d 1090, 1094 (Del. 2007). The Legislature, as the Delaware court noted, "is in a far better position that this Court to gather the empirical data and to make the fact finding necessary to determine what the public policy should be. . . ." *Id*., (quoting *Wright v. Moffitt*, 437 A.2d 554 (Vt. 1981)).

Warr, 70 A.3d at 364. Maryland's adherence to contributory negligence as a matter of public policy is analogous to its refusal to judicially impose dram shop liability. Like Maryland's adherence to contributory negligence, its refusal to recognize civil dram shop liability is at significant odds with West Virginia's policy of facilitating recovery in tort by victims of negligence.

The imposition of dram shop liability allows West Virginia to promote two, not-inconsistent public policy objectives. First, dram shop liability protects the public from drunk drivers by deterring WVABCA licensees from serving alcohol to intoxicated

patrons. Second, dram shop liability allows the State to protect the physical and financial well-being of its residents. By placing liability on a resident tavern for negligently contributing to injury, dram shop liability promotes justice between the parties and helps to redress a wrong.

To fail to apply forum law here would actually discriminate against the Petitioner by treating him differently than similarly situated victims injured here in West Virginia. Petitioner respectfully requests this Court determine that *lex loci delicti* is contrary to the public policy of West Virginia and, therefore, inapplicable in this case. This would further the clearly stated public policy of allowing a recovery in tort for dram shop negligence.

CONCLUSION

The application of the public policy exception requires the Court to examine the substantive law of Maryland in light of the public policy of West Virginia. Maryland's refusal to recognize a civil right to recover for the victims of dram shop negligence is inapposite with West Virginia's commitment to providing an avenue of civil recovery to victims. Petitioner respectfully submits that to apply the substantive law of Maryland, barring recovery for dram shop negligence, is contrary to the clearly expressed public policy of the State of West Virginia. This is precisely the circumstance which was contemplated when the public policy exception to *lex loci delicti* was created. Wherefore, Petitioner asks this Court to follow the public policy of West Virginia, refuse to follow Maryland's draconian prohibition, and allow recovery in tort for dram shop negligence.

Barry Barr, as
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