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 REPLY 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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INTRODUCTION

This is a case about West Virginia businesses violating West Virginia laws by overserving a clearly intoxicated individual at locations in Berkeley County that ultimately led to the death of a West Virginia resident. Although Maryland was the ultimate locus of the crash that killed Katie Barr, the location of the crash is irrelevant to the important public policy considerations that underpin this case. Maryland, which has no ties to parties other than the fact that the crash occurred on a stretch of interstate just over the border, has no interest in rejecting or opposing the public policy of West Virginia to subject commercial sellers of alcohol to civil liability when their patrons drunkenly injure a third party. Therefore, the public policy exception to the rule of *lex loci delicti* controls the choice of law in this case.

ARGUMENT

I. The public policy exception is triggered here because Maryland's failure to recognize a cause of action for dram shop negligence contravenes two intertwined areas of West Virginia's public policy.

The Respondents' public policy analysis begins and ends with the comparison of Maryland and West Virginia regulations regarding alcohol retailers.[1] This perfunctory analysis is devoid of critical context because it fails to recognize that this case implicates two separate strands of West Virginia's public policy. First, West Virginia's recognition of dram shop negligence takes place in the context of the State's strict control of the sale and service of alcohol. Maryland's corollary laws, and, accordingly, Maryland's public policy, developed differently from West Virginia's, which inescapably results in

[1] *See* W. Va. Code § 60-7-12 and Md. Code Ann., Alco. Bevs. § 6-307.

dissimilar public policies. Second, West Virginia's law of dram shop negligence exists in the framework of the "***strong*** public policy of this State that persons injured by the negligence of another should be able to recover in tort." *Paul v. National Life,* 177 W. Va. 427, 433-434, 352 S.E.2d 550, 555-556 (1986) (emphasis added). West Virginia's dedication to both the controlled sale and service of alcohol and the ability of tort victims to recover for injury inexorably require the application of the public policy exception here.

A. Dram shop liability is part of West Virginia's historically strict regulation of alcohol sales, which differs from Maryland.

West Virginia and Maryland have not followed the same path when it comes to the regulation of alcohol. Each point of difference the two states' approaches to the regulation of alcohol and alcohol service is beyond the scope of this brief. For the purposes of this appeal, the most important point of difference is that West Virginia gives victims of dram shop negligence a chance to recover for subsequent injuries while Maryland protects its vendors from civil liability for overservice of patrons.

However, it is worth noting that West Virginia and Maryland's approaches to alcohol regulation have developed along divergent paths. Take, for instance the states' enforcement of the 18th Amendment to the Constitution of the United States. Ratified in 1919, the 18th Amendment prohibited the manufacture, sale, and transportation of alcoholic beverages in the United States. At least 5 years before ratification, West Virginia had legislated a statewide prohibition against the production, sale, and service of alcohol. *See* Buseman, Michael J., *Vending Vice: The Rise and Fall of West Virginia*

State Prohibition, 1852-1954, West Virginia University (2012).[2] West Virginia was on-board with the prohibition of alcohol. In contrast, Maryland was the *only* state to refuse to even enforce the 18th Amendment. Maryland Association of Alcoholic Beverage License Association, *How We Got Here*[3]. Then Governor Albert Ritchie stated, "It is not my purpose in this connection today to complain of an unwarranted invasion by the Federal Government of the liberties of the Maryland people." Maryland Center for History and Culture, *"Home-made wines made of dandelions": Prohibition in Maryland.*[4]

After the repeal of the 18th Amendment, the two states continued to regulate alcohol in significantly different ways. The two dominant models for post-prohibition regulation were suggested in *Toward Liquor Control,* a study commissioned by abstinence proponent John D. Rockefeller Jr. Regulation of the Alcoholic Beverages in Maryland, Maryland Department of Legislative Services, p. 2 (Nov. 2017).[5] The study proposed two methods of alcohol regulation, the control model and the licensing model. West Virginia uses a control model of regulation under which the state controls the wholesale and retail sale of alcohol. Regulation of the Alcoholic Beverages Industry in

[2] https://researchrepository.wvu.edu/etd/324/
[3] https://mdalcohollaws.org/how-we-got-here#:~:text=Speakeasies%20%26%20Organized%20Crime-,Prohibition's%20Impact,the%20Maryland%20People...%22 (last accessed December 27, 2023).
[4] https://www.mdhistory.org/home-made-wines-made-of-dandelions-prohibition-in-maryland/ (last accessed December 27, 2023).
[5] https://dls.maryland.gov/pubs/prod/BusTech/Alcoholic-Beverages-Report-2017.pdf (last accessed December 27, 2023).

Maryland, Maryland Department of Legislative Services, pp. 4-7.[6] West Virginia "uses the bailment system of supply for liquor distribution. The West Virginia Alcoholic Beverage Control Administration [("WVABCA")] is the only entity licensed to warehouse alcoholic liquor in the State of West Virginia. All shipments of alcoholic liquor into West Virginia must be delivered to the [WVABCA] Distribution Center by licensed carriers." West Virginia Alcohol Beverage Control Administration, Products, Liquor.[7] Conversely, Maryland uses a licensing model under which private parties purchase licenses from the state to sell alcohol, but the alcohol is not controlled by the state. Regulation of the Alcoholic Beverages Industry in Maryland, Maryland Department of Legislative Services, pp. 4-7.[8]

The divergent approaches of West Virginia and Maryland to alcohol regulation are mirrored in the states' divergent approaches to civil liability for the negligent service of alcohol that results in injury to a third party. West Virginia provides a cause of action in tort "against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is 'physically incapacitated' from drinking." Syl. Pt. 1, *Bailey v. Black,* 183 W. Va. 74, 394 S.E.2d 58 (1990). Maryland does not. In the context of this history, it

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[6] https://dls.maryland.gov/pubs/prod/BusTech/Alcoholic-Beverages-Report-2017.pdf (last accessed January 3, 2024)

[7]https://abca.wv.gov/Products/liquor/Pages/default.aspx#:~:text=West%20Virginia%20is%20a%20control,of%20supply%20for%20liquor%20distribution. Although the West Virginia Legislature declared during the 2016 session that "the sale of alcohol should no longer be by the state, but rather by retail licensees" (*See* W. Va. Code § 60-3A-2) West Virginia remains a control state.

[8] Although Maryland uses a licensing model at the state level, some local jurisdictions use a control model. https://dls.maryland.gov/pubs/prod/BusTech/Alcoholic-Beverages-Report-2017.pdf

makes little sense for the Respondents to argue that "while West Virginia recognizes dram shop liability, no statute, regulation, or case law exists which declares lack of dram shop liability to violate the public policy of West Virginia."[9] It is plain as day that in *Bailey v. Black,* the WVSCA clearly recognized a cause of action for dram shop negligence. West Virginia's recognition of a cause of action for dram shop negligence is, in and of itself, a statement of the public policy that West Virginia licensees have a duty to protect private citizens from obviously intoxicated patrons.

This Court should acknowledge that the divergent approaches of West Virginia and Maryland are legislative and executive expressions of their conflicting public policies when it comes to alcohol regulation and liability related to alcohol regulation.

B. Dram shop negligence furthers West Virginia's public policy of providing tort victims with a chance to recover for their injuries.

1. The operative distinction between Maryland substantive law and West Virginia's public policy is that Maryland does not recognize dram shop negligence as a cause of action.

The cause of action for dram shop negligence is an example of West Virginia's "strong public policy" of giving tort victims a possible path to recovery. *See Paul,* 177 W. Va. at 433, 352 S.E.2d at 555. The Respondents simply cannot argue their way around the fact that West Virginia has a public policy of providing a civil cause of action to victims of dram shop negligence by trying to turn this into a subcategory of the uncontroversial proposition that "Maryland and West Virginia share prohibitions against

[9] Brent Jackson, Lynn Perkins, and Hedgesville Real Estate, LLC's Response to Petitioner's Brief, p. 7.

drunk driving."[10] The reality that Maryland has no corollary cause of action for dram shop negligence sets up "the operative distinction" that calls for the application of the public policy exception here. *See Vass v. Volvo Trucks North America, Inc.,* 315 F. Supp. 2d 815 (S.D. W. Va. 2004).

The controlling principle on this issue is iterated in *Mills v. Quality Supplier Trucking, Inc.,* 203 W. Va. 621, 510 S.E.2d 280 (1998) where the WVSCA states that "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 the 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).

The Respondents attack *Mills* because the federal court in *Vass* suggested that "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. Vass,* 315 F. Supp. 2d at 820. The Respondents misunderstand *Vass*. In that case, the plaintiff's decedent drove from his home in West Virginia and drove into Virginia to pick where defendant's employees loaded a cargo of parts at one of the defendant's facilities. *Vass*, 315 F. Supp. at 816. Plaintiff's decedent

[10] Brief of Respondent VIP Gentlemen's Club, LLC, p.1. It is an uncontroverted fact that all 50 states now have some form of prohibition against drunk driving. However, that is not at issue in this case. Instead, this cause of action is related to the rights of a West Virginia citizen to recover damages from West Virginia businesses for wrongful acts that they perpetuated in West Virginia. By attempting to conflate and contort this into a run of the mill drunk driving case, Respondents ignore the actual issue that lies at the heart of this matter: whether the policy of enabling a cause of action that could hold West Virginia businesses accountable for wrongdoing perpetuated in West Virginia is actually the public policy of this state, as the West Virginia Supreme Court of Appeals has stated. *See Paul*, 177 W. Va. at 433, 352 S.E.2d at 555.

drove the parts from that location one of defendant's storage facilities in Virginia. *Id.* When the decedent arrived at the storage facility and opened the back of his truck, the negligently loaded parts fell and fatally injured him. *Id.*

The plaintiff brought a wrongful death action under W. Va. Code § 55-7-5. *Id.* The defendant moved for dismissal under Fed. R. Civ. P. 12(b)(6) because both the negligent loading of the truck and the decedent's fatal injury occurred in Virginia, precluding application of the West Virginia statute. *Id.* The plaintiff argued that the public policy exception to *lex loc delicti* applied because Virginia's contributory negligence rule contradicted West Virginia's comparative negligence rule. *Id.,* at 817.

In moving for dismissal, the defendants in *Vass* did not ask the court to make a choice of law that would foreclose recovery. Instead, defendant argued that *lex loci delicti* required the application of Virginia law, but that West Virginia's public policy required "only that Virginia's contributory negligence rule not be applied to foreclose recovery by the plaintiff, not that the plaintiff be permitted to proceed under the West Virginia statute." *Id.,* at 816. The federal district court agreed, stating that, "The court thus concludes that the correct application of West Virginia choice-of-law principles is that the law of the place of the wrong (Virginia) controls the plaintiff's claim, subject to West Virginia's comparative fault rule." *Vass,* 315 F. Supp. at 820. In other words, the Court recognized Virginia's substantive law except it required the use of West Virginia's

public policy exception for comparative fault rather than Virginia's harsh contributory negligence law.[11] The rule is clear:

> In general, West Virginia 'adheres to the conflicts of law doctrine of *lex loci delicti*' to apply the substantive law of the place of injury in tort cases. Syl. Pt. 1, [*Paul,* 177 W. Va. 427, 352 S.E.2d 550]. **Where the substantive law of another state 'contravenes the public policy' of West Virginia, though, courts in West Virginia do not apply that law.** *Id.* at 556; *Vass v. Volvo Trucks N. Am., Inc.,* 315 F. Supp. 2d 815, 817 (S.D. W. Va. 2004)

*Walters v. Siemens Indu*s., 2017 U.S. Dist. LEXIS 180858 (S.D. W. Va. November 1, 2017) (emphasis added).

Mills and its progeny, like *Vass,* are instructive in this case because those cases start from the proposition that West Virginia choice of law analysis begins with the question: What is the "operative distinction" between the laws of the forum state and the place of the wrong? *See Vass,* 315 F, Supp, 2d at 815 (citing *Mills*, 203 W. Va. at 282; 510 S.E.2d at 623). In the instant case, that "operative distinction" is that West Virginia allows civil dram shop liability and Maryland *prohibits it.*

Moreover, *Mills* and *Vass* illustrate the reason that neither *Caudill v. EAN Holdings, LLC*, 2022 W. Va. LEXIS 315 (W. Va. April 26, 2022) nor *Wise v. C.R. Bard, Inc.,* 2015 U.S. Dist. LEXIS 13661 (S.D. W. Va. Feb. 5, 2015), both cited by the Respondents, control in this case. Neither *Caudill* nor *Wise* involved the public policy exception. *Caudill* examined whether West Virginia law or Kentucky law should apply

[11] "The *Vass* court cited to West Virginia Supreme Court of Appeals decisions in along with decisions from other courts around the country to support its holding. See *Vass,* 315 F. Supp. 2d at 819-20; *accord Wallis v. Mrs. Smith's Pie Co.,* 261 Ark. 622, 550 S.W.2d 453, 455 (Ark. 1977); *Judge Trucking Co. v. Estate of Cooper,* 1994 Del. Super. LEXIS 180 (Del. Super. Ct. Apr. 14, 1994).

on a negligent entrustment claim against a Kentucky car rental company for a crash that occurred in West Virginia. *Caudill,* 2022 W. Va. Lexis 315, at 2-4. The WVSCA held that the principal of *lex loci delicti* required the court apply West Virginia's law since the crash occurred in this State. *Id.* at 16.

In *Wise*, the plaintiff claimed that the implantation of surgical mesh manufactured by the defendant caused her physical injury. *Wise,* 2015 U.S. Dist. LEXIS 13661, at 2-3. The Plaintiff was an Ohio resident treated for the condition that caused her use of the mesh in Ohio, but the surgery was performed in West Virginia. *Id.,* at 6-7. Because the mesh was actually implanted in West Virginia, the federal district court for the Southern District of West Virginia held that the injury occurred in West Virginia. *Id.* As in *Caudill*, the choice of law analysis in *Wise* did not require consideration of the public policy exception. Where, as here, the issue is whether the substantive law of one jurisdiction contravenes the public policy of West Virginia, a different analysis is required.

2. The Respondents mischaracterize the Petitioner's request that the Court not foreclose its opportunity to pursue dram shop negligence as an attempt to maximize the Petitioner's potential recovery.

By relying on *Caudill* and *Wise,* Respondents again misapprehend or misconstrue the fundamental tenet underlying the claim against them: that a West Virginia resident should have a potential path to recovery for harm caused by the tortious conduct of West Virginia businesses in West Virginia. Because application of Maryland law would foreclose the Petitioner's chance of recovery for dram shop negligence, the public policy exception to *lex loci delicti* requires the application of West Virginia law.

Once again, "[i]t is the strong public policy of 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 (emphasis added). Katie Barr was killed because of the negligence of the dramshop Respondents whose reckless disregard for alcohol service regulations led to her death. Unsurprisingly, the Respondents suggest that as long as there is a cause of action against anyone else, then they should be able to escape liability. However, the Respondents' argument ignores the applicable public policy framework.

West Virginia wants victims of tortious conduct to have the chance to recover against the tortfeasors who cause them injury. *See Paul,* 177 W. Va. at 433, 352 S.E.2d at 556. This is not to say that a court should apply laws so as to maximize a Plaintiff's recovery, but that a court should not apply the law of a forum that forecloses any opportunity for recovery against a tortfeasor who caused them injury. *See* Syl. Pt. 3*, Nadler v. Liberty Mut. Fire Ins. Co.,* 188 W. Va. 329, 424 S.E.2d 256 (1992) ("mere fact that the substantive law of another jurisdiction . . . 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").[12] Consistent with this overarching policy, West Virginia public policy seeks to provide victims of alcohol-related injury to have a chance to hold those serving the

[12] The court in *Nadler* did not consider the public policy exception to *lex loci delicti.* Instead, the court considered whether set-off provisions in an insurance policy issued in Ohio were void for violation of West Virginia public policy. *Nadler.* 188 W. Va. at 333, 424 S.E.2d at 260,.

alcohol liable when they proximately cause injury. *See* Syl. Pt. 1, *Bailey v. Black,* 183 W. Va. 74, 394 S.E.2d 58.

Here, the Petitioner proceeds against multiple defendants under two distinctly different theories of liability. Count One of the First Amended Complaint is founded on claims of dram shop negligence of the dram shop defendants. Count One turns on the rule announced in *Bailey v. Black* that West Virginia recognizes "**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 (emphasis added). Count Three is a completely different claim. Count Three is a claim of negligence and gross negligence against Maydian for driving while intoxicated.

While *lex loci delicti* does not foreclose the Petitioner's claims against Maydian, it is inarguable that application of *lex loci delicti* without the public policy exception to the Petitioner's dram shop negligence claims will bar the Petitioner from any recovery against the dram shop Respondents and limit the Petitioner from recovering from defendants who proximately caused the injuries.

The Respondents urge this Court not to engage in a public policy analysis here because the Petitioner may have some recovery against the driver, Maydian. But this case is about the loss of a twenty-year-old's life. Foreclosing the Petitioner's ability to sue the dram shop defendants for the injuries they cause runs counter to the principles of both *Paul* and *Bailey* as well as to the concept of fundamental fairness in holding tortfeasors accountable.

What the Petitioner is asking of this Court is not the opportunity to maximize his recovery, but to recover from all the parties who are a cause of Katie Barr's tragic death. No amount of money can begin to compensate for the loss of a young person's life, but refusal to recognize West Virginia's public policy would allow the Respondents to avoid any accountability for the death that they have proximately caused. Applying the public policy exception to allow a claim against the dram shops does not maximize the Petitioner's recovery in this case as there is no guarantee that the Petitioner will receive a maximum recovery – whatever that means. Instead, application of the public policy doctrine here will give the Petitioner a chance to recover from all the persons he can prove are a cause of Katie's death.

Relying on *American National Property & Casualty Com. v. Clendenen,* 238 W. Va. 249, 793 S.E.2d 899 (2016) and *Rich v. Allstate Insurance Co.,* 191 W. Va. 308, 445 S.E.2d 249 (1994), Respondent Lust tells this Court that "[p]ublic policy in West Virginia, in fact, does not always mandate recovery by [sic] injured party."[13] These cases are simply inapposite. The courts in both *American National* and *Rich* examined coverage exclusions in insurance policies, not choice of law issues. A court's consideration of the validity of a bargained-for exclusion in an insurance contract simply does not compare to the question of whether a cause of action exists in tort.

In the instant case, application of Maryland law would foreclose any recovery for the Plaintiff against the Respondents, and that is contrary to West Virginia's law and

[13] Brief of Respondent VIP Gentlemen's Club, LLC, p. 13

public policy. In creating a cause of action for dram shop negligence, the WVSCA implicitly but strongly endorsed recovery for victims separate from that to be had from drunk drivers. *See Bailey v. Black, supra*. If this Court applies Maryland law to the Plaintiff's claims here, the West Virginia dram shop Respondents go scot-free despite flagrantly flouting the laws of West Virginia in such a manner as to cause Katie's death because of sheer luck in where the crash occurred.

Here, the tortious conduct of the businesses occurred in West Virginia and killed a West Virginia resident. These businesses are on notice and as licensed alcohol sellers, specifically agreed to comply with the laws of West Virginia regarding the sale of alcohol, specifically to a clearly intoxicated individual. State of West Virginia Department of Revenue Alcohol Beverage Control Administration Application for Retail Class A License.[14] They cannot now claim surprise or fundamental unfairness for holding that the law and underlying public policy, to which by their agreement and by the law, they must adhere at all times, is being applied to them in this case.

Indeed, as the Supreme Court of Appeals has held, West Virginia public policy requires "that the law of the State should be administered in such a way as to insure that corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representation to the State, its subdivisions, or its regulatory bodies." Syl. Pt. 2, *Joy Tech. v. Liberty Mut. Ins. Co.,* 187 W. Va. 742, 421 S.E.2d 493 (1992).

[14] https://abca.wv.gov/Documents/ABC%20Forms/Private-Clubs-Frat-catering-retail-license-on-premises-application-672023-FINAL.pdf (last accessed January 2, 2024).

II. The public policy exception applies when, as here, West Virginia, has the most significant contacts with the conduct that results in the underlying action.

Contrary to the Respondents protestations,[15] West Virginia's adherence to the traditional *lex loci delicti* approach does not prevent this Court from considering which state has the most significant and compelling contacts with the facts of the underlying action. Importantly, the WVSCA has also held that "[e]ven when another State's law offends the public policy of West Virginia, this State must have sufficient contacts to the conduct underlying the suit before it will use the public policy exception as a means to disregard the other State's law." *State ex rel. Am. Elec. Power Co. v. Swope,* 239 W. Va. 470, 436, 801 S.E.2d 485, 491 (2017). In every case where the public policy exception was applied by the Supreme Court of Appeals, there were significant connections to West Virginia.[16]

In *Swope*, 12 of 79 plaintiffs — none of whom were residents of West Virginia at the time of a toxic exposure — claimed injury resulting from take-home exposure to toxic material brought into their homes on the clothing and shoes of family members who worked at Ohio facilities where the toxic material was handled.[17] *Swope,* 239 W. Va. at 476, 801 S.E.2d at 491. Because the exposures, whether direct or "take-home," all occurred in Ohio, the MLP found that Ohio law applied. *Id.,* 239 W. Va. at 474, 801

[15] *See* Brent Jackson, Lynn Perkins, and Hedgesville Real Estate, LLC's Response to Petitioner's Brief, pp. 3 and 7; Brief of Respondent West Virginia Sports Promotions, Inc., p. 8 n. 1.
[16] *See* Amicus Curiae Brief on Behalf of the West Virginia Association for Justice in Support of Petitioner Barry Barr at pp. 6-9 (citing cases).
[17] *Swope* involved twelve plaintiffs whose claims were before West Virginia's Mass Litigation Panel ("MLP").

S.E.2d at 189. However, Ohio has a "mixed dust statute" that "provides that premises owners are not liable for alleged off-premises mixed dust exposure." *Id.,* 239 W. Va. at 474, 801 S.E.2d at 488. West Virginia does not have a corollary to Ohio's statute. The MLP therefore held that the public policy exception to *lex loci delicti* required application of West Virginia law. *Id.,* 239 at 476-477, 801 S.E.2d at 491-492.

The WVSCA reversed, stating that,

> although West Virginia has a strong public policy that persons injured by the negligence of another should be able to recover in tort, in this particular case, **where these twelve plaintiffs lack a sufficient connection with the state of West Virginia,** we are not strongly compelled to resist application of Ohio's Mixed Dust Statute.

Id., 239 at 479, 801 S.E.2d at 494 (emphasis added).

Where a cause of action lacks sufficient contacts with a jurisdiction, choice of law questions present "false conflicts." A false conflict "occurs when the policy of one state would be advanced by application of its law, while that of the other state would not be advanced by application of its law."[18] *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.,* 534 A.2d 1268, 1270 (D.C. 1987). In a false conflict situation, the law of the interested jurisdiction controls. *Zhou,* 534 A.2d at 1271. In *Zhou,* residents of the District of Columbia sued a District of Columbia bar for injuries resulting from a drunk driving crash that occurred in Maryland. *Id.,* at 1269. Although the crash occurred in Maryland, the court applied D.C.'s dram shop negligence law, reasoning that Maryland had no

[18] *Amicus Curiae* Brief on Behalf of the West Virginia Association for Justice in Support of Petitioner Barry Barr, p. 12.

interest in either regulating the conduct of a D.C. bar or in insulating them from liability. *Id.,* at 1271.

Although D.C. uses a governmental interest analysis for choice of law questions, not the *lex loci delicti* rule, the rationale in *Zhou* is consistent with the sufficient contacts analysis in *Swope.* Far from calling on this Court to abandon the doctrine of *lex loci delicti* — or even asking the Court to carve out a special exception to the rule for dram shop cases — the Petitioner here simply asks that this Court apply established law. The law is clear: *lex loci delicti* governs choice of law in torts cases in West Virginia, but where the substantive law of the place of the injury contravenes the public policy of this State, the public policy exception operates. *Paul,* 177 W. Va. at 433-434, 352 S.E.2d at 555-556.

The Respondents want the choice of law question to begin and end with the sheer happenstance that the crash that killed Katie Barr occurred just over the Maryland state line and suggest that the attendant facts are irrelevant.[19] But the facts surrounding the crash form an important part of the *Swope* sufficient contact analysis. The proximity of the crash to the state line – just two miles over – emphasizes the gravamen of this case. All of the alcohol Maydian consumed was served to him by West Virginia alcohol licensees within the bounds of West Virginia. The proximity of the crash to the West Virginia state line suggests that it is highly unlikely that Maydian stopped to become

[19] Brent Jackson, Lynn Perkins, and Hedgesville Real Estate, LLC's Response to Petitioner's Brief, p. 7. As Petitioner and the WVAJ point out, numerous West Virginia interests support the application here, including 1) the proximity of the crash to the West Virginia state line, 2) other accidents that have occurred in the area, and 3) the residence of the Petitioner and his decedent.

intoxicated at a bar in Maryland. The facts show that an obviously intoxicated Maydian got drunk **within the State of West Virginia**. The dram shop Respondents operate subject to the laws of West Virginia and should therefore be held accountable under the public policy of West Virginia.

Further, that the Petitioner and his decedent, Katie, are West Virginia residents shows precisely why Petitioner is not asking the Court to craft a "bulge rule" with a slippery slope as the Respondents warn.[20] It was a West Virginia resident who was injured as a direct result of the West Virginia dram shop Respondents' tortious conduct. This element of foreseeability is an underpinning of the public policy behind dram shop negligence. *Bailey v. Black* relied heavily on cases from other jurisdictions that explicitly recognized the foreseeability element:

> 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.

Lopez v. Maez, 651 P.2d 1269, 1276 (N.M. 1982); *see also Ono v. Applegate,* 612 P.2d 533 (1980); *Adamian v. Three Sons, Inc.,* 233 N.E.2d 18 (Mass. 1968) (all cited in *Bailey v. Black,* 183 W. Va. at 73-75, 394 S.E.2d at 59-60). As a West Virginia resident, Katie was a foreseeable victim of the Respondents' tortious conduct.

[20] Brent Jackson, Lynn Perkins, and Hedgesville Real Estate, LLC's Response to Petitioner's Brief, p. 7.

Respondents' analysis contorts the facts. The simple facts of this matter are that West Virginia businesses overserved a visibly drunk individual in West Virginia who then killed a West Virginia resident. It is simply counterintuitive, and wrong, to question whether the public policy and law of West Virginia should control the avenues of recovery available to Petitioner.

This Court should not allow the Respondents to turn the location of this crash into a "get out of jail free card." Maryland has no interest in regulating the conduct of a West Virginia bar. Maryland has no interest in insulating a West Virginia bar from liability. Maryland lacks sufficient contacts with the facts of this case to justify application of Maryland law.

CONCLUSION

The circumstances of this case trigger the public policy exception to the rule of *lex loci delicti*. No matter how the dram shop Respondents try to spin it, Maryland's refusal to recognize dram shop negligence is in direct conflict with West Virginia's strong public policy of giving tort victims the chance to recover. Maryland has affirmatively rejected dram shop negligence, creating a conflict of law that this Court must resolve. The Respondents sold and served alcohol to Michael Maydian under licenses granted by the WVABC. The Respondents continued to serve alcohol to Maydian even after he became visibly intoxicated, and the Respondents' overservice of Maydian proximately caused Katie Barr's death. A strict application of *lex loci delicti* here would shield the West Virginia Respondents from the foreseeable consequences of violating West Virginia law causing the worst injury Petitioner can imagine – the death of his daughter. Allowing

Maryland law to go against West Virginia public policy by serving as an absolute bar to Petitioner's recovery for dram shop negligence does not comport with the Supreme Court's articulation of the public policy exception and case law elsewhere.

The circuit court's ruling is undesirable, inequitable, and wrong as a matter of law. This Court should reverse the order dismissing Petitioner's claims against the Respondents and remand the case for discovery and trial.

Barry Barr, as
Personal Representative of the Estate of
Alexandra Barr
BY COUNSEL

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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.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Petitioner, does hereby certify that on January 3, 2024, a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** was served via the File & ServeXpress to:

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