IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Cynthia L. Ready, as independent executor of the estate of Robert E. Ready, deceased, Plaintiff, v. Don Dumont, M.D., individually; Triumph Hospital Northwest Indiana, Inc., f/k/a/ Select Specialty Hospital, a foreign corporation; P. Hari Krishna, M.D., individually; Charity Powell, individually; Tom Fentress, individually; Prompt Medical Transportation, Inc., a/k/a Prompt Ambulance Service, a foreign corporation; Sema Hernandez, individually; Jason Greer, individually; Rhonda Maldonado, individually; Carolyn Jacks, a/k/a Carolyn Jackson, individually; and Terra Moore, individually, Defendants.	)	No. 11 L 670

MEMORANDUM OPINION AND ORDER

If the substantive laws of more than one state could apply in a case and those laws conflict, an Illinois court must undertake a choice-of-law analysis to determine which to apply. The defendants ask this court to apply Indiana law, while the plaintiff wants Illinois law to apply. Since the relevant factors and policies used in a choice-of-law analysis favor applying Indiana law, the defendants' motions to apply Indiana law are granted, but the motions for summary judgment and to strike an affidavit are stricken.

Facts

During a June 30, 2009 surgical procedure at the University of Illinois Medical Center (UIMC), Robert Ready experienced an intra-operative hemorrhage and cerebral edema. Those conditions resulted in significant neurological deficits and required doctors to place a tracheostomy in Robert's throat, install a percutaneous endoscopic gastrostomy feeding tube, and administer anticoagulant medications. Robert remained comatose for more than two weeks following the surgery.

On July 18, 2009, the medical staff noted minimal bleeding around the tracheostomy. The staff treated the condition, and the bleeding stopped within

two hours. On July 27, 2009, minimal bleeding was, again, noted around the tracheostomy, but stopped later in the day following treatment. Robert remained unconscious or semi-conscious until his July 31, 2009 discharge at approximately 1:00 p.m. Robert's tracheostomy was not bleeding at that time.

An ambulance transferred Robert directly from UIMC to Select Specialty Hospital for long-term, acute rehabilitation services. Select is located on the fifth floor of St. Margaret Mercy Hospital in Hammond, Indiana. Cynthia Ready chose to send Robert to Select because it was only 30 minutes from the Readys' home and because St. Margaret had an emergency room.

Robert arrived at Select sometime after 3:00 p.m. on July 31, at which time he was stable and his tracheostomy was not bleeding. At approximately 3:40 p.m., while conducting a patient assessment, the Select medical staff transferred Robert from his bed to a sling scale, causing him to bleed significantly at the tracheostomy site. By that time, nurses Sema Hernandez, Rhonda Maldonado, and Terra Moore were acting as Robert's nursing care providers.

Blood work completed at 4:12 p.m. indicated that Robert's hemoglobin and hematocrit scores were abnormal. At 4:15 p.m., Hernandez paged Dr. Don Dumont, Robert's pulmonologist and Select's medical director. Hernandez related what she had observed and informed Dumont that Robert was receiving anticoagulants. Dumont directed Hernandez to transfer Robert back to UIMC. Dumont never personally assessed Robert during his time at Select and neither did any other physician.

Hernandez later testified that she recalled seeing copious amounts of blood around Robert's tracheostomy with medium-sized clots. At 4:30 p.m., Cynthia saw her husband on his side, bleeding onto a towel. At some point, a respiratory therapist, Jason Greer, placed ice around the tracheostomy to stop the bleeding, the only intervention conducted by any Select medical staff while Robert was at the hospital. The medical staff did not supply any fluids to Robert during the entire period he remained at Select. Hernandez testified that there was never a discussion of transferring Robert to St. Margaret's first-floor emergency room.

Between 4:30 and 5:00 p.m., a member of the Select staff contacted UIMC and spoke with Dr. P. Hari Krishna. The nurse informed Krishna that Robert had been bleeding from his tracheostomy for more than one hour and of Dumont's decision to transfer Robert back to UIMC. Krishna did not ask whether a physician had examined Robert or whether he was sufficiently stable for a transfer. Krishna conferred with the chief resident as well as Dr. Michael Lemole, Robert's neurosurgeon, who approved Robert's transfer to the intensive-

care unit at UIMC. Maldonado later told Cynthia that Dumont had ordered Robert's transfer back to UIMC.

At approximately 5:15 p.m., Select staff contacted Prompt Ambulance Service to request a non-emergency ambulance transfer for Robert back to UIMC. While awaiting the ambulance, two Select nurses changed Robert's towels and noted a lot of blood. A Prompt ambulance arrived at approximately 6:30 p.m., at which time paramedics Charity Powell and Tom Fentress assessed Robert's condition. Powell noted that Robert was unconscious, pale, and diaphoretic. Blood covered his tracheostomy and there were blood-soaked towels near his left shoulder and on the floor. Blood and large clots had soaked the bed sheets. Powell said that she did not like Robert's color, which was gray, and that "we're going to go very fast." Immediately before departure, the paramedics noted that Robert was tachycardic and that his blood pressure had dropped to 102/50. The ambulance left St. Margaret at 6:47 p.m. with Robert still bleeding from his tracheostomy.

The ambulance reached the Indiana-Illinois state line – approximately one-third of a mile – in less than one minute. Thirteen minutes into the trip and while in Illinois, Robert acceded to full hypovolemic shock while he continued to bleed. Neither Powell nor Fentress contacted UIMC, their medical director, or the telemetry base station to report Robert's condition or receive orders. The ambulance arrived at UIMC at 7:11 p.m. The transfer took 24 minutes, 23 of which were in Illinois.

The ambulance arrived at UIMC at approximately 7:10 – 7:15 p.m. The first medical entry at 7:30 p.m. recorded Robert in a pool of blood, profoundly hypotensive, tachycardic, pale, and with agonal breathing. By this time, Robert had stopped bleeding. The UIMC staff noted that Powell and Fentress had not attached Robert to a cardiac monitor and that the peripherally inserted central catheter had only one of two ports functioning, not allowing adequate volume replacement. Robert soon went into cardiopulmonary arrest. Despite two attempts at resuscitation, doctors pronounced Robert dead at 9:10 p.m.

On January 19, 2011, Cynthia filed suit. On May 7, 2012, Judge Randye A. Kogan granted, in part, a motion to dismiss for lack of jurisdiction in favor of Select's individually named employee-defendants – Dumont, Hernandez, Greer, Maldonado, and Moore. On June 26, 2013, Judge Kogan granted Cynthia's motion to dismiss Jackson voluntarily without prejudice.

What remains of Cynthia's 50-count, fifth-amended complaint is as follows:

- Counts 3-4 are against Select under the wrongful-death act, 740 ILCS 180/0.01, *et seq.*, and the survival act, 755 ILCS 5/27-6, based on Dumont's actual agency, and counts 5-6 are against Select under the same two statutes based on Dumont's apparent agency. These counts claim that Select was negligent through Dumont by failing to perform adequate and appropriate physical examinations, refusing to admit Robert, ordering his transfer back to UIMC, failing to provide appropriate care and treatment to stabilize his condition, and failing to transfer Robert to St. Margaret's emergency room.

- Counts 7-8 are against Krishna for wrongful death and survival. These counts claim that Krishna was negligent by failing to direct the Select staff to perform appropriate and adequate examinations, failing to direct the Select staff to stabilize Robert adequately and appropriately, failing to tell the Select staff that Robert had been administered anticoagulant medications, failing to direct the Select staff to transport Robert to the nearest acute-care facility, authorizing Robert's transfer back to UIMC, failing to consult with and notify any other UIMC physician who was familiar with Robert's medical condition, failing to notify and alert the UIMC intensive care unit of Robert's impending arrival, and failing to provide Robert's information to UIMC's pulmonary and critical care unit.

- Counts 9-10 are against Powell for wrongful death and survival. Counts 11-12 are against Prompt for wrongful death and survival based on Powell's actual agency, while counts 13-14 are the same against Prompt for Powell's apparent agency. Counts 15-16 are against Fentress for wrongful death and survival. Counts 17-18 are against Prompt for wrongful death and survival based on Fentress's actual agency, while counts 19-20 are the same against Prompt for Fentress's apparent agency. These counts claim that Prompt was willful and wanton through Powell and Fentress by failing to contact and communicate with UIMC, a base station, an emergency department, or a telemetry unit, failing to ensure that Robert's peripherally inserted central catheter was functioning, failing to recognize that Robert was clinically unstable secondary to a variety of factors, transporting Robert without a registered nurse on board, failing to provide emergency medical care on route, failing to initiate trauma protocols, failing to transport Robert to St. Margaret's emergency room, and failing to monitor Robert's vital signs.

- Counts 23-24 are against Select based on Hernandez's actual agency while counts 25-26 are the same against select for Hernandez's apparent agency. Counts 29-30 and 31-32 are directed against Select for Greer in the same manner. Counts 35-36 and 37-38 are directed against Select for Maldonado in the same manner. Counts 41-42 and 43-44 are directed against Select for Jackson in the same manner. Counts 47-48 and 49-50 are directed against Select for Moore in the same manner. These counts claim that Select is

negligent through its nursing staff by failing to perform various adequate and appropriate physical examinations and assessments, failing to observe and monitor Robert's condition, failing to notify and advise Dumont of the degree and severity of Robert's condition at various times, failing to take Robert's vital signs and oxygen levels, failing to provide adequate and appropriate nursing care to stabilize his condition, and failing to request Robert's transfer to the nearest emergency room.

Cynthia did not bring a malpractice claim against UIMC arising from either the June 30, 2009 surgery, Robert's follow-up care to that surgery, or the July 31, 2009 care and treatment after he had been transferred back to UIMC.

Robert was an Illinois resident, and Cynthia still is. Krishna lives, works, and is licensed in Illinois. Select is a Missouri corporation operating its hospital in Hammond. Dumont, Hernandez, Maldonado, Jackson, Moore, and Greer each live, work, and are licensed in Indiana. Prompt is a service provider based in Highland, Indiana. Powell and Fentress live in Indiana and are Indiana licensed paramedics. Their work can take them, as in this case, into Illinois.

The defendants filed three motions for this court's consideration. First, Select and Prompt each filed motions asking this court to rule that Indiana's substantive law should apply in this case. Those motions present similar arguments. Second, Prompt filed a summary judgment motion. Third, Prompt filed a motion to strike an affidavit that Cynthia had attached as an exhibit to her response to the summary judgment motion.

Analysis

I. Conflict of Law

A conflict must exist between the laws of more than one state before a court may embark on a choice-of-law analysis. *See Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 155 (2007); *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 58 (2007). Such an analysis is required, however, "only when a difference in law will make a difference in the outcome." *Townsend*, 227 Ill. 2d at 155. The burden is on the party asking the court to apply the law of another jurisdiction to establish the existence of a conflict. *Bridgeview Health Care Cntr., Ltd. v. State Farm Fire & Cas. Co.*, 2014 IL 116389, ¶ 14.

In this case, all parties agree that the choice of applicable law will affect the outcome. The difference between Illinois and Indiana substantive law extends both to the causes of action Cynthia may sustain as well as the amount of damages she may obtain. As to causes of action, Illinois permits a plaintiff to

bring causes of action under both the wrongful-death act, 740 ILCS 180/0.01, *et seq.*, and the survival act, 755 ILCS 5/27-6. *See Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 431 (1974). In contrast, Indiana permits a damage award under its survival statute, Ind. Code § 34-9-3 (permitting recovery for pain and suffering), or its wrongful death statute, Ind. Code § 34-23-1-2 (permitting recovery for medical and funeral expenses and pecuniary or other loss by survivors), but not both. *See Estate of Sears v. Griffin*, 771 N.E.2d 1136, 1138 (Ind. 2002). As to recovery, Illinois does not limit damages awards, while Indiana limits the total aggregate damages recoverable for a decedent's death to $1,250,000. Ind. Code § 34-18-14-3(a)(3).

Illinois and Indiana's wrongful death and survival acts would not necessarily lead a jury to reach a different liability finding, but this court is unaware of any case defining "difference in the outcome" based solely on liability. Here, if Indiana law governs, Cynthia would be permitted to proceed under both the wrongful death and survival statutes, but could submit jury instructions on only one cause of action. *See Cahoon v. Cummings*, 734 N.E.2d 535, 543 (Ind. 2000). Further, if Cynthia were to proceed under Indiana's wrongful death statute, she would be limited to $1.25 million in total recoverable damages. Such limitations on available causes of action and damages under Indiana law as opposed to Illinois law would, therefore, plainly result in a difference in the outcome within the meaning of *Townsend*.

II. Choice of Law

Once a conflict between various states' laws has been established, a court must determine which to apply. *Bridgeview*, 2014 IL 116389 at ¶ 14. To make this determination, Illinois courts are to follow the doctrine of depecage (originally, dépeçage), which refers to cutting up a case into individual issues, "each subject to a separate choice-of-law analysis." *Townsend*, 227 Ill. 2d at 161. This approach is consistent with the Restatement (Second) of Conflict of Laws section 145, which Illinois has adopted. *See Esser v. McIntyre*, 169 Ill. 2d 292, 297-98 (1996).

In this case, this court is not presented with divisible legal issues, such as a case seeking a tort remedy as well as injunctive relief. Rather, the relevant legal issue focuses solely on various defendants allegedly doing the same things – committing acts and omissions constituting medical, nursing, and paramedic malpractice. Those related causes of action drive the legal questions as to both liability and damages; consequently, depecage is unnecessary here.

Any choice-of-law analysis begins with the proposition that, "the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship. . . ."

Townsend, 227 Ill. 2d at 164, *quoting* Restatement (Second) of Conflict of Laws § 146 (1971). Illinois courts are directed to apply the most-significant-contacts test set out in the Second Restatement as a framework to resolve a choice-of-law question. Restatement (Second) §§ 6, 145; *see Ingersoll v. Klein*, 46 Ill. 2d 42, 47-48 (1970) (adopting the Second Restatement into Illinois common law). Section 6 presents elementary policies to be explored as part of a choice-of-law determination. As explained,

> (2) [T]he factors relevant to the choice of the applicable rule of law include
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue, [and]
> (e) the basic policies underlying the particular field of law. . . .

Restatement (Second) § 6(2); *see Townsend*, 227 Ill. 2d at 169-70 (analysis of all six factors unnecessary in personal injury actions). The Second Restatement also provides a list of "factual contacts" or "connecting factors" a court is to consider in determining the applicable law. *Id.* at 160. These include:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) § 145(2). The policies and factors may be considered in either order. *Barbara Sales*, 227 Ill. 2d at 62 (starting with § 6 principles); *Gregory v. Beazer East*, 384 Ill. App. 3d 178, 198 (1st Dist. 2008) (starting with § 145 factors).

A. Section 145 Factors

1. Place Where The Injury Occurred

The parties fundamentally disagree as to where Robert's injury occurred. The defendants argue that the locus of his injury was Indiana, and rely on the Second Restatement's definition of the "place of injury" as:

> the place where the force set in motion by the actor first takes effect on the person. This place is not necessarily that where the death occurs. Nor is it the place where the death results in pecuniary loss to the beneficiary named in the applicable death statute.

Restatement (Second) § 175 cmt. *b*. As one Illinois court has explained,

> there are situations in which the place of injury will not be an important contact, such as where the place of injury is 'fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue . . . or when . . . [the] injury occurred in two or more states.'

Gregory, 384 Ill. App. 3d at 198, *quoting* Restatement (Second) of Conflict of Laws § 145 cmt. *e*. According to the defendants, the originating force that led to Robert's death later the same day was his transfer from a bed to a sling scale because that movement caused his tracheostomy to bleed as well as other acts and omissions by Select personnel.

In its motion, Select cites to *Curtis v. Transcor Amer., LLC*, 877 F. Supp. 2d 578 (N.D. Ill. 2012), to support the defendants' argument. *Curtis* is of limited utility, however, for while it reaches the conclusion the defendants want – the application of the law of a state other than where the decedent died – the court incorrectly conflates symptomology with causation. While in Illinois, Curtis showed the first signs of asphyxiation, was foaming at the mouth, and had white mucous coming out of his nose. Based on the timing of those symptoms, the district court chose to apply Illinois law. *Id.* at 588. Yet those symptoms did not occur instantaneously, but developed only after Curtis had been placed in an unair-conditioned bus the size of a motor home with 28 other persons, mostly prisoners, and driven for more than five hours from Leavenworth Kansas, across Missouri, and into Illinois in late-June heat and humidity. As a result, Curtis had been complaining about feeling ill long before crossing the Missouri-Illinois state line. A more accurate conclusion is that the force animating Curtis's eventual death in Indiana was the transport company's decision in Kansas to use a bus with no air conditioning. In short, *Curtis* would be far more persuasive for Select's argument had the court applied Kansas law.

In contrast, Cynthia argues that Robert's injury occurred in Illinois when he went into hypovolemic shock. Before that occurrence, she argues, Robert had no injury on which to base a claim. Cynthia relies on the Arizona Supreme Court's decision in *Pounders v. Enserch E&C, Inc.*, 232 Ariz. 352 (2013), a case in which a New Mexico welder inhaled asbestos over a 30-year period before his

mesothelioma diagnosis in Arizona. As part of its choice-of-law analysis under the Second Restatement, the court concluded that, "the 'place of injury' is the state where 'the last event necessary' for liability occurs," reasoning that, "the last event occurs upon manifestation because manifestation provides the requisite compensable injury to support a personal injury cause of action." *Id.*, *citing* cases. Based on that principle, Pounders' tort accrued when he received his diagnosis. At that point he filed suit; his widow later amended the complaint to add a wrongful-death count. *Id.* at 353-54.

Pounders is as unhelpful as *Curtis* because the Arizona court, too, conflated symptomology with causation. Hypovolemic shock is caused by massive blood loss; it does not occur spontaneously. Were *Pounders* to apply here, it would remain unclear when Cynthia's cause of action would have been perfected. Cynthia fails to explain why Robert's compensable injury manifested when he acceded to hypovolemic shock as opposed to his enormous blood loss at Select or his at death at UIMC. Rather, the only conclusion to be drawn from *Pounders* and Cynthia's argument is that Robert's death in Illinois was fortuitous. Had Select and its medical staff delayed his transfer much longer, Robert would have acceded to hypovolemic shock and died in Indiana. It is also not lost on this court that, while *Pounders* found the place of injury to be Arizona, the court ultimately concluded that New Mexico law applied. *Pounders*, 232 Ariz. at 360.

Notwithstanding the parties' misdirected legal support, the record makes plain that the place where the forces initiating Robert's downward spiral and eventual death occurred was Indiana. Absent the alleged malpractice by Select's agents, Robert would not have continued bleeding, been transferred, acceded to hypovolemic shock, or died. This conclusion also conforms to Cynthia's claims that Select and Prompt committed malpractice in Indiana, which eventually led to his hypovolemic shock in Illinois. Had Cynthia sued UIMC for malpractice arising from Robert's surgery or his month-long follow-up care, there would have been a more substantial factual basis to conclude that Illinois was the place of the initiating factor. Cynthia did not, however, bring a cause of action based on that conduct. Since no other initiating acts or omissions occurred in Illinois, this court's conclusion is that the first factor favors the application of Indiana law.

2. Place Where The Conduct Causing The Injury Occurred

The second factor is repetitious of the first. By defining the place of injury as the force initiating it, the first factor focuses on causation, as does the second. And while this court's discussion of the first factor analyzed the parties' legal support for their positions, this court will focus the second factor on the various

causative factors that individually or in combination led to Robert's death and sort them by location.

The following is a list of the acts and omissions that occurred in Indiana are:

- the Select medical staff caused Robert's tracheostomy to bleed;
- no Select physician, including Dumont, examined Robert;
- the Select medical staff did nothing to stem Robert's exsanguination other than placing ice on the tracheostomy;
- Dumont failed to admit Robert;
- Dumont ordered a transfer back to UIMC;
- the medical staff did not consider transferring Robert to St. Margaret's emergency room;
- the medical staff delayed in requesting an ambulance transfer;
- the medical staff ordered a non-emergency transfer;
- Prompt's staff failed to attach Robert to a cardiac monitor; and
- Prompt's staff failed to ensure that both IV ports functioned properly.

The acts and omissions that occurred in Illinois are:

- Krishna failed to ask the Select nursing staff whether Robert had been examined by a physician and whether Robert was sufficiently stable for a transfer;
- Krishna failed to order the Select staff to examine and treat Robert;
- Krishna indicated that UIMC would accept Robert as a transfer;
- Prompt's staff failed to attach Robert to a cardiac monitor; and
- Prompt's staff failed to ensure that both IV ports functioned properly.

The acts and omissions of alleged malpractice that occurred in Indiana are both more numerous and substantively far more significant than those that occurred in Illinois. The first Illinois-related event – Krishna's phone conversation – occurred more than one hour after Robert had started to bleed. Moreover, Krishna's alleged malpractice consists of failing to direct the nursing staff in a state where he was not licensed and at a hospital where he did not practice, and failing to ask questions of what was occurring in Indiana. The claim that he approved Robert's transfer is belied by others' testimony and the claim that he failed to notify the intensive care unit or Roberts' arrival is insignificant in comparison to all of the other malpractice claims. The allegations against Prompt through its agents, Powell and Fentress, show them to be, in party, victims of circumstance – instructed to transport a severely compromised patient in an ambulance that has far fewer available services than

an emergency room five floors away. While Powell and Fentress did not attach Robert to a cardiac monitor or ensure that the IV functioned properly, those failures occurred first in Indiana, not Illinois. Based on these facts, this court concludes that the second factor also favors applying Indiana law.

3. Parties' Domicile

Robert was an Illinois resident and Cynthia still is. Krishna is also an Illinois resident and is licensed and practices here. Select is a Missouri corporation that operates the hospital in Indiana. Each of Select's agents – Dumont, Hernandez, Maldonado, Moore and Greer – live, work, and are licensed in Indiana. Prompt is an Indiana corporation and is based in Indiana. Powell and Fentress are both paramedics licensed under Indiana law who also live in Indiana. While counting residents versus non-residents is not, by itself, determinative, it is a factor the Second Restatement indicates should be considered. Given the number of Indiana residents and their substantial involvement in Robert's care, this court concludes that this factor favors the application of Indiana law.

4. Place Where The Parties Relationship Is Centered

The first three factors are indicative of the fourth. As the Second Restatement notes:

> The state where the *conduct* occurred is even more likely to be the state of most significant relationship . . . when, in addition to the injured person's being domiciled or residing or doing business in the state, the injury occurred in the course of an activity or of a relationship which was centered there.

Townsend, 227 Ill. 2d at 166, *quoting* Restatement (Second) of Conflict of Laws § 146 cmt. *e* (emphasis in *Townsend*). In this case, the parties' relationship is centered in Indiana. Cynthia presumably had a choice of care facilities from which to choose, and she chose to send Robert to Select because it was relatively close to their home and had an emergency room in the same building. While Cynthia did not select Prompt to transport Robert back to UIMC, it is not surprising that an Indiana hospital would choose an Indiana-based ambulance company to transport Robert. In short, the fourth factor also favors Indiana because the relationship between Robert and the defendants in this case is centered there.

The factual record analyzed through the lens of the Second Restatement's four factors indicates that Indiana law governs the substantive issues in this case. This conclusion could be altered were Cynthia able to demonstrate that

Indiana "bears little relation to the occurrence and the parties, or put another way, that Illinois has a more significant relationship to the occurrence and the parties with respect to a particular issue." *Townsend*, 227 Ill. 2d at 166. Cynthia has failed, however, to present facts supporting the proposition that Illinois has a more significant relationship to Robert's death than does Indiana. While Illinois certainly bears some relationship to the events leading to Robert's death, those acts or omissions are either not at issue because they concern non-party UIMC or are far more distant in time and significance.

B. Section 6 Policies

Under section six, an Illinois court is to consider the relevant policies of Illinois and the state with the conflicting law as well as basic tort law policies. 227 Ill. 2d 163-64. In contrast, Indiana is still primarily a *lex loci* state. *Simon v. United States*, 805 N.E.2d 798, 802 (Ind. 2004). As a result, Indiana courts are not required to undertake:

> the difficult and ultimately speculative task of identifying the policies underlying the laws of multiple states and weighing the potential advancement of each in the context of the case. Indiana courts, assuming they reach the second step of the *Hubbard* analysis, simply look at the contacts that exist between the action and the relevant states and determine which state has the most significant relationship with the action.

Id. at 803. Rather, Indiana views the Second Restatement's factors as matters that their courts have the discretion to consider. *See Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1073-74 (Ind. 1987). As explained:

> If the state of conduct has a law regulating how the tortfeasor or victim is supposed to act in the particular situation, courts will apply that standard rather than the law of the parties' residence. In fact, this preference for the conduct-regulating law of the conduct state is virtually absolute, winning out even over the law of other interested states. Courts as a practical matter recognize a 'conduct-regulating exception' to the normal interest-based choice-of-law methods.

Simon, 805 N.E.2d at 807.

An Indiana court would likely focus primarily on the *lex loci* presumption without much additional inquiry. In contrast, an Illinois court would be encouraged under the Second Restatement to determine how best to provide certainty and continuity in this and other malpractice cases. Since this case concerns licensed, professional doctors, nurses, and paramedics, an Illinois court

would recognize that either state has a strong interest in ensuring that its professional licensing and disciplinary policies are carried out. This concern is particularly relevant in this case because Select is located inside St. Margaret Mercy hospital, the western border of which lies on the east side of State Line Avenue separating Illinois and Indiana. Not surprisingly, the record indicates that Select accepts patients from both states. Thus, were Illinois courts to apply Illinois law to malpractice cases brought by Illinois residents who treated at Indiana care centers, those facilities would quickly refuse to admit Illinois patients to avoid Illinois law permitting unlimited tort damages. These sorts of decisions would defeat the interests of either state in protecting their citizens' health and would represent an unwise intrusion by the courts into medical care availability. In short, the burden of selecting a treatment facility, and the applicable law that goes with it, properly lies with the patient.

Both states also have an interest in carrying out their common law to produce consistent results that conform to an ordinary person's expectations. In essence, this is the same argument made above but from another angle. It is unreasonable for a person who purchases medical services in one state to expect that the law of the purchaser's home state would apply to a malpractice action. Indeed, such a policy would encourage forum shopping by citizens based on whom they could sue should something go wrong rather than on the procurement of services based on price, quality, convenience, and other relevant factors. Such conduct should not be encouraged.

This court is sensitive to the issue underlying this motion – that the application of Indiana law will limit Cynthia's causes of action and aggregate damages. The Illinois Supreme Court has recognized that states have an interest in compensating their residents for injuries under their laws. *Townsend*, 227 Ill. 2d at 171. The reasons for that policy are that the state of residency and injury are typically the same, a state formulates its policies with its residents in mind, a resident's state receives the social and economic impact of the injured resident's damages recovery, and a resident's state is responsible for administering a decedent's estate. *Gregory*, 384 Ill. App. 3d at 584, *citing* cases. This court also recognizes, however, that Illinois courts may enforce another state's statutes that impose limits on causes of action and damages recovery. *See Townsend*, 227 Ill. 2d at 174-75; *Gregory*, 384 Ill. App. 3d at 201. In a case in which each of the section 145 factors favors the application of Indiana law, it would be incongruous to disregard those factors in favor of policies that do not weigh any more in favor of Illinois than they do for Indiana. Indeed, comity compels the application of Indiana law because it would be equally incongruous for an Indiana resident who suffered malpractice at an Illinois health care facility to be limited by Indiana's statutes restricting causes of action and aggregate damages. In this case, although Robert was an Illinois resident and died here, each of the material acts and omissions of alleged

malpractice occurred in Indiana. For that reason, Illinois' interest in compensating one of its own residents under Illinois law must give way to the overriding factors and other policies discussed above.

III. Motions for Summary Judgment and to Strike the Mulroe Affidavit

As indicated above, this court has determined that Indiana's substantive law applies in this case. A court that has determined that another state's substantive law applies must apply that foreign law to a substantive motion, such as one for summary judgment. *See Gregory*, 384 Ill. App. 3d at 201 (affirming circuit court's application of Indiana law to determine summary judgment). *See also G.M. Sign, Inc. v. Pennswood Ptnrs., Inc.*, 2014 IL App (2d) 121276 ¶54 (applying Pennsylvania law to summary judgment motion). Prompt's motions for summary judgment and to strike the Mulroe affidavit cite exclusively to Illinois law and, therefore, are improper and must be stricken.

CONCLUSION

Based on the foregoing discussion, this court orders that:

1. The defendants' motions to apply Indiana law are granted;
2. Prompt's motion for summary judgment is denied without prejudice;
3. Prompt's motion to strike the Mulroe affidavit is denied without prejudice; and
4. The 25 August 2014 ruling scheduled for 11:00 a.m. will serve, instead, as a case management conference.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

AUG 22 2014

Circuit Court 2075