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

Mark E. Vainisi, as personal representative of the estate of Samuel Vainisi, deceased,	)	
Plaintiff,	)	
v.	)	No. 13 L 5979
Michael D. Tissing, and Clifford Law Offices, P.C.,	)	
Defendants.	)	

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 Wisconsin law, while the plaintiff wants Illinois law to apply. Since the relevant factors and policies used in a choice-of-law analysis favor applying Illinois law, the defendants' motion to apply Wisconsin law must be denied.

FACTS

Jerome Vainisi and Clifford Law Offices, P.C. own adjoining properties in Walworth County, Wisconsin.[1] In July 13, 2011, Vainisi's grandson, six-year-old Samuel, and members of his family arrived for a one-night stay at the Wisconsin property. In the afternoon of July 14, as the rest of the family prepared to leave and return home, Samuel and one of his brothers were going to or were returning from a pond located on the Clifford Law Offices property.

At the same time, Michael Tissing was driving a pickup truck owned by Clifford Law Offices. Tissing worked for Clifford Law Offices primarily as a property caretaker. Earlier on July 14, 2011, Tissing had been working at a Clifford Law Offices property in Illinois. He then drove to the Walworth County property to assist in preparing for a charity fundraiser for a Chicago arts organization to be held later that day. As Tissing rounded a curve on his way to the Clifford Law Offices property, he felt a bump, looked in the mirror, and saw Samuel lying on the driveway.

[1] Robert Clifford heads Clifford Law Offices, P.C. Clifford is not a defendant to this suit.

Tissing got out of the truck, and Samuel's mother, Jennifer ran to the scene. Multiple calls were made to 9-1-1, and paramedics arrived 13 minutes later. The paramedics transported Samuel to a hospital where he died soon after his arrival.

Mark Vainisi filed a three-count, first-amended complaint against Tissing and Clifford Law Offices. Count one is brought against both defendants under the Wrongful Death Act, 740 ILCS 180/1, on behalf of Samuel's surviving family – his father, mother, and two brothers. Count two is brought against both defendants under the Survival Act, 755 ILCS 5/27-6. Mark alleges that each defendant owed Samuel a duty of care and caution in operating, maintaining, managing, and controlling the pickup truck. Mark claims that the defendants negligently failed to exercise reasonable care, operated the pickup in such a way as to endanger Samuel, drove too fast under the conditions, failed to slow down, operated the pickup without adequate brakes, failed to warn, operated a vehicle too large to permit a clear view, and failed to maintain a lookout for children. Count three is brought against both defendants under a theory of negligent infliction of emotional distress based on the same conduct.

Samuel lived, and his family continues to live in Illinois. Clifford Law Offices is an Illinois professional corporation based in Chicago. Tissing was at the time and continues to be an Illinois resident. Tissing held a valid Illinois driver's license. The pickup truck was registered, licensed, and kept in Illinois.

The defendants filed a motion to apply Wisconsin law to Count one, the Wrongful Death Act cause of action. The motion does not seek to apply Wisconsin law to the other counts. Mark responded to the motion, and the defendants replied.

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.

The parties agree that the choice of applicable law will affect the outcome of this case. Illinois and Wisconsin each has a wrongful death statute, 740 ILCS 180/1 & Wis. Stat. § 895.04, and a survival statute, 755 ILCS 5/27-6 & Wis. Stat. §§

895.01 & 895.03. Illinois does not limit damages awards in these actions. In contrast, Wisconsin's wrongful death statute provides that:

> Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.

Wis. Stat. § 895.04(4).

Illinois and Wisconsin'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 Wisconsin law were to apply, Mark would be limited to $500,000 in non-pecuniary damages. Such a limitation on total recovery 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 has been adopted both by Illinois, *see Esser v. McIntyre*, 169 Ill. 2d 292, 297-98 (1996), and Wisconsin, *see Wilcox v. Wilcox*, 26 Wis. 617 (1965).

The parties in this case have not presented this court with divisible legal issues, such as a tort remedy as well as injunctive relief. Rather, the relevant legal issue focuses solely on one defendant allegedly acting negligently while serving as an agent of the other defendant. This singular set of acts and omissions makes depecage unnecessary. This conclusion is important because the defendants are asking this court to apply Wisconsin law only to count one. Since there exists but one issue in this case, Wisconsin law or Illinois law should apply to each of the three counts, not just count one.

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's Sales*, 227 Ill. 2d at 62 (starting with § 6 factors); *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

Samuel was struck and killed in Wisconsin. Regardless of whether this court identifies the tort as the initial vehicle-pedestrian impact or Samuel's subsequent death, the inexorable conclusion is that Wisconsin is the place of injury. Mark's argument that the tort's location is unimportant is simply wrong. His faulty conclusion is the result of improperly conflating the location of injury – a section

145 factor – with the availability of a remedy – a section six factor. Mark's reliance on *Murphy v. Mancari's Chrysler Plymouth, Inc.*, is, therefore, misplaced because the language he cites comes from the court's discussion of a remedy, not the tort's location. 408 Ill. App. 3d 722, 731-32 (1st Dist. 2011). Indeed, *Murphy* explicitly recognizes that the parties had previously agreed that the tort occurred in Michigan. *Id.* at 725. In short, this factor favors applying Wisconsin law.

2. Place Where The Conduct Causing The Injury Occurred

One of the shortcomings of the Second Restatement's analysis is that the first two factors are duplicative. As to the first factor, the Second Restatement defines the "place of injury" as "the place where the force set in motion by the actor first takes effect on the person." Restatement (Second) § 175 cmt. *b*. It is unexplained how the second factor – the place where the conduct causing the injury occurred – is any different than the first. In effect, the Second Restatement calls for a double counting of causation.

The Second Restatement's shortcoming is not a concern in this case since each causative factor leading to Samuel's death occurred in Wisconsin. Mark makes two errors concerning causation in this case. First, he attempts to minimize this factor by focusing on the physical characteristics of where the tort occurred – a curve in a road, a bridge, a driveway – rather than where the tort occurred – Wisconsin. This discussion is misplaced because the causation Mark alleged in his first-amended complaint – that Tissing failed to keep a proper lookout, slow down, control the pickup, and honk the horn – is not site specific.

Mark's second error is that he interprets causation so broadly that it encompasses irrelevant issues. Solely for purposes of causation, it makes no difference whether Tissing drove the pickup from Illinois to Wisconsin, worked for Clifford Law Offices, traveled to Wisconsin in advance of a charity event benefitting a Chicago arts organization, or kept and maintained the pickup in Illinois. The first-amended complaint does not identify any of those factors as causing Tissing's alleged negligent driving immediately before the pickup struck Samuel. In sum, this factor also favors applying Wisconsin law.

3. Parties' Domicile

Each person involved in this case is an Illinois resident. Clifford Law Offices chooses to avoid the obvious by arguing that the parties' residence cannot overcome the strong presumption that another jurisdiction's law applies if the tort occurred in a jurisdiction other than the forum state. Presumptions can, however, be overcome; that is why Illinois courts have adopted the analytical framework this court is undertaking. Mark overreaches as well. He, once again, conflates section-six policies with the narrow focus of the parties' domicile. One of the cases on which

Mark relies also makes that error. *See Schulze v. Illinois Highway Trans. Co.*, 97 Ill. App. 3d 508, 511 (3d Dist. 1981). Citations to cases from the Sixth Circuit Court of Appeals and the Florida appellate court are unhelpful given the numerous cases interpreting Illinois' choice-of-law procedures. The unavoidable conclusion is that this factor favors applying Illinois law.

4. Place Where The Parties' Relationship Is Centered

Three relationships must be examined in this case. The first two are between Samuel and his family and the two defendants. Jennifer testified that she had never met Tissing or Clifford before the accident. Clifford testified that he met Jerry, Samuel's grandfather and adjoining property owner, years before in Chicago. A mere social connection between a party and a non-party is not a relationship within the meaning of the Second Restatement because such a chance meeting had nothing to do with the July 21, 2011 events. Thus, the relationships, or lack of relationships, between Samuel and his family and the defendants is neutral.

The third relationship is between the two defendants. Clifford Law Offices does not address this relationship, which is not surprising. Tissing worked for Clifford Law Offices, an Illinois professional corporation. Tissing went to Wisconsin at Clifford's request to prepare for a charity fundraiser to be held at the Clifford Law Office's Wisconsin property. This principal-agent relationship transforms what would otherwise have been a wholly fortuitous tort between two Illinois residents that could have taken place anywhere. Rather, Tissing worked for Clifford Law Offices and drove to Wisconsin in the Clifford Law Offices pickup within the scope of his employment. In other words, the preexisting principal-agent relationship between the two Illinois defendants animated the events that are the focus of this lawsuit. Since the relationships between the Vainisis and the defendants are neutral, but the relationship between the defendants is centered in Illinois, this factor favors applying Illinois law.

B. Section Six Factors

The section-six factors do not focus on the facts and elements of a cause of action but on each state's policies relating to the particular conduct in dispute. The first is Wisconsin's policy concerning the use of its roadways. Unquestionably, Wisconsin has an interest in enforcing its vehicle registration, licensure, and insurance laws, as well as its rules of the road. Wis. Stat. chs. 341, 343, 344 & 346. Those laws go to the safety of all persons who drive on Wisconsin's streets and roads. The filing of this lawsuit did not, however, prevent Wisconsin officials from enforcing those laws either by charging or prosecuting Tissing for any violations.[2]

[2] The record does not indicate if, in fact, Wisconsin charged or prosecuted Tissing. Even if it had, such information would be irrelevant to a choice-of-law analysis.

Beyond that, Wisconsin has no definable interest in this dispute. If, as the Second Restatement recognizes, the purposes of nearly all tort rules are to deter future wrongdoers and to compensate current victims, Restatement (Second) at § 146 cmt. *e*, then Wisconsin's damages cap defeats both purposes. First, by imposing a limitation on damages, Wisconsin has effectively expressed its lack of interest in imposing a disincentive to deter potential tortfeasors whose conduct could result in substantial non-pecuniary damages. Rather, Wisconsin has affirmatively chosen to limit tort victims' recoveries. Based on this policy choice, it can reasonably be inferred that Wisconsin wishes to deter future tortfeasors' conduct solely by enforcing its rules of the road.

It is equally evident that Wisconsin has no interest in compensating tort victims those whose non-pecuniary damages are greater than $500,000. The Wisconsin Supreme Court has effectively recognized that damages caps are arbitrary yet constitutional. *See Maurin v. Hall*, 2004 WI 100, *rev'd on other grounds*, *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74. In other words, Wisconsin's policy is not to compensate tort victims but to limit their compensation. With this dichotomy, the defendants' legal analysis breaks down. They continue to rely on *Townsend*, despite the court plainly writing that Michigan law applied because the plaintiffs lived there and the tort occurred there. 227 Ill. 2d at 175. Here, in sharp contrast, the plaintiff and the defendants are each Illinois residents.

From this discussion, it is reasonable to infer that since Wisconsin does not care about compensating tort victims whose potential damages are greater than $500,000, Wisconsin would not care if another state would permit that level of compensation. In other words, except for the presumption that Wisconsin law applies because the tort occurred there, Wisconsin has no other policy interest.

In contrast, Illinois has an interest in Mark's recovery. Illinois law does not limit non-pecuniary recovery. Moreover, this case implicates Illinois' policy interests because this state formulated its tort and compensation policies with Illinois residents in mind. *See Gregory*, 384 Ill. App. 3d at 200, *citing* cases. It is the state that will most clearly feel the social and economic impact of any recovery, *id.*, and damages, if any, would be distributed according to Illinois law. *Id.* The Vainisis lived in Illinois at the time of Samuel's death and continue to live here. It is inequitable to impose a damages cap on their recovery and then require Illinois courts to carry out a foreign judgment that could not be rendered in this state. In sum, Illinois' tort and compensation policies are plainly directed in favor of providing just and equitable compensation to tort victims. For that reasons, the section six factors favor applying Illinois law.

CONCLUSION

Apart from Wisconsin being the site of the tort and its causative factors, Wisconsin has no discernable interest in this case. Those two factors do not outweigh all of the others factors favoring the application of Illinois law; consequently, this court concludes that the presumption of applying the law of the state where the tort occurred has been overcome. Given that conclusion, this court orders that:

1. The defendants' motion to apply Wisconsin law is denied;
2. Illinois law shall be applied to all issues in this case; and
3. The 23 September 2014 ruling scheduled for 11:00 a.m. shall serve as a case management conference.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075