IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOSHIA DANIELS BURTON, *et al.,*	*	
Plaintiffs	*	
v.	*	**Civil Action No. 05-2214 (RCL)**
UNITED STATES OF AMERICA	*	
Defendants	*	

PLAINTIFF'S TRIAL BRIEF ON CHOICE OF LAW

The plaintiffs file this trial brief to show the court that in this tort action that spans both the District of Columbia and Maryland, the court should apply Maryland law on damages.

This medical malpractice case concerns allegations of negligent treatment of plaintiff's decedent at Walter Reed Army Medical Center in the District of Columbia, that led to his death at home in Lutherville, Maryland, from an undiagnosed blood clot that traveled from his casted leg to his heart.

A. Pursuant to the Federal Tort Claims Act, District of Columbia's Choice of Law Rules Apply in this Case

The Federal Tort Claims Act ("FTCA") states that FTCA claims are to be determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1982). As this Court has observed, the Supreme Court "has interpreted this language to mean that in multistate FTCA actions, courts must apply the 'whole' law of the state where the negligent or wrongful acts occurred." *Raflo v. United*

States, 157 F. Supp. 2d 1, 8 (D.D.C. 2001) (*citing Richards v. United States*, 369 U.S. 1, 6-7, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962)). The "whole" law of the state includes that state's choice of law rules. *Id.* Thus, this Court uses the choice of law rules of the state where the "negligent or wrongful acts occurred." *Id.*

Complications sometimes arise when it is unclear in which jurisdiction the "negligent or wrongful acts occurred," but in this case it is apparent that the negligent acts and omissions in question took place in the orthopedic clinic and the emergency room at the Walter Reed Army Medical Center, which is located in the District of Columbia. Accordingly, District of Columbia's choice of law rules apply to determine any conflict of laws that arise in the instant case.

B. The Application of District of Columbia's Choice of Law Rules Leads to the Conclusion that Maryland Substantive Law Applies to Damages.

The District of Columbia's choice of law methodology employs a modified "governmental interest analysis," which includes inquiry into which jurisdiction has the "most significant relationship" with the specific legal issue to be decided. Based on this analysis, Maryland law should apply to determine damages for the plaintiff Doshia Burton's loss of her husband's companionship, care and support, and her grief at his sudden and premature death. (Together, these damages are often referred to in a death case as loss of "solatium.")

1. District of Columbia Choice of Law Rules Employ a "Modified Government Interest Analysis" to Resolve Conflicts of Law.

The D.C. choice of law test has been described as a "modified 'governmental interest analysis,' under which the court must evaluate the governmental policies underlying the applicable laws and then determine which jurisdiction's policy would be

most advanced by having its law applied to the facts in the case." *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 10 (D.D.C. 1995). The D.C. Circuit has referred to the test as a "constructive blending" of the "governmental interests analysis" and the "most significant relationship" test. *Stephen A. Goldberg Co. v. Remsen Partners, Ltd.*, 170 F.3d 191, 194 (D.C. Cir. 1999); *accord Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 41 n.18 (D.C. 1989).

Accordingly, beyond weighing the competing governmental policies and interests, the court's analysis further includes examining which jurisdiction has the "most significant relationship" to the specific legal issue. To make that determination in a tort case, the court looks to the factors set forth in Section 145 of the Restatement (Second) of Conflict of Laws: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the residence, domicile, place of incorporation or place of business of the parties, and (4) the place where the parties relationship, if any, is centered. *See* Restatement (Second) of Conflict of Laws § 145.

Notwithstanding these four factors, this Court stated in *Long*, "The most important factors the Court should consider in a tort action are the relevant policies of the forum and of other interested states and the relative interests of those states in the determination of the particular issues," though the Court did observe that "[t]he state with the most significant relationship will usually coincide with the state whose policy would be most advanced by application of its law." 877 F. Supp at 11 & 11 n.1.

2. District of Columbia Choice of Law Rules Use Principles of Decepage to Analyze What Law Should Apply on an Issue-by-Issue Basis.

Pursuant to the District of Columbia's choice of law rules, a court must analyze separately which state's law applies to distinct issues or claims within a given dispute.

Bucci v. Kaiser Permanente Found. Health Plan, 278 F. Supp. 2d 34, 35 (D.D.C. 2003); *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 11 (D.D.C. 1995); *Keene Corp. v. Insurance Co. of N. Amer.*, 597 F. Supp. 934, 941 (D.D.C. 1984) ("Courts have long recognized that they are not bound to decide all issues under the local law of a single State. Each issue must receive separate consideration because of the varying interests involved"); *In re Air Crash Disaster at Washington, D.C. on Jan. 13, 1982*, 559 F. Supp. 333, 341 (D.D.C. 1983).

Thus, depending upon the facts of a tort case, it is entirely possible that one state's law will be applied to determine liability, while another state's law will be used to decide compensatory damages and, and perhaps yet another to decide punitive damages, where the relevant public policies and relationships vary accordingly with the substantive legal principle at issue. *See Long*, 877 F. Supp. at 14-15 (applying District of Columbia law to negligence, strict liability, breach of warranty, and punitive damages claims, but Maryland law to loss of consortium claim); *Keene Corp.*, 597 F. Supp. at 941, 945 (applying Pennsylvania law to an insurer whose principal place of business was in Pennsylvania to determine punitive damages and law of New York to resolve issue of liability for misrepresentation); *In re Air Crash Disaster*, 559 F. Supp. at 351-52 & 358 (applying District of Columbia law to issues of liability and punitive damages, but apportionment of liability and contribution was to be determined by the laws of the states where various defendants were located); *see also Schoeberle v. United States*, Nos. 99 C 0352, 99 C 2599, 99 C 2292, 2000 WL 1868130, at *9, 12 &14 (N.D. Ill. Dec. 18, 2000) (in FTCA case, the court applied Indiana's choice of law rules, which are similar to the District of Columbia's, to conclude that Illinois law would apply to plaintiffs' liability

claims, Wisconsin law would apply to the compensatory damages claims, and Iowa law would apply to punitive damages determination)

This concept, which has been referred to as *decepage*, *see In re Air Crash Disaster*, 559 F. Supp. at 341, has been adopted by courts faced with multiple possibilities when examining which jurisdiction has the most significant relationship or greater policy interest. *See* Willis L. M. Reese, *Decepage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 59-60 (1973), *cited with approval in Keene Corp.*, 596 F. Supp. at 941. Indeed, this Court has used decepage principles when applying District of Columbia choice of law rules, as in the cases of *Long*, *Keene Corp.*, and *In re Air Crash Disaster*, cited above.

In *Bucci v. Kaiser Permanente Foundation Health Plan*, 278 F. Supp. 2d 34 (D.D.C. 2003), a medical malpractice case, this Court denied a motion to reduce an *ad damnum* clause pursuant to Virginia's statutory damages cap. Although a magistrate judge had previously determined that Virginia law applied to discovery issues in the case, the Court stated that this ruling did not necessarily mean that Virginia law would apply to the damages issue, as argued by defendants, stating: "This argument misconstrues choice of law principles, which require the court to conduct a choice of law analysis for each distinct issue that it adjudicates." *Id.* at 35. Under the facts and circumstances of *Bucci*, the Court decided that District of Columbia, and not Virginia, law would apply to the issue of whether to cap damages.

2. With Respect to the Issue of Damages in this Case, Maryland Has the Overriding "Governmental Interest" and "Most Significant Relationship."

As to Mrs. Burton's loss of consortium damages, Maryland law applies. Mr. Burton received negligent medical treatment while at Walter Reed, in the District of Columbia, and this fact would make it appropriate to apply District of Columbia law to determine whether the conduct at issue was negligent. Maryland has no interest in applying its medical "standard of care" rules to physician conduct outside Maryland's borders. However, an analysis of the competing governmental policies and interests, as well as the "most significant relationship" factors set forth in the Restatement (Second) of Conflict of Laws, reveals that Maryland's public policies and relationships vis-a-vis the damages question far outweigh the District of Columbia's, as we now show.

a. Maryland's policy of allowing damages for loss of consortium and solatium would be undermined by the application of District of Columbia law in this case.

Both Mr. and Mrs. Burton were domiciled in Maryland at the time of Mr. Burton's death. As this Court has observed, "Given the strong and recognized interest of the domicile state in ensuring that its citizens are compensated for harm, the law of the forum state . . . must give way to the law of the domicile of the plaintiff." *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1 (D.D.C. 2005); *see also Keene Corp. v. Insurance Co. of N. Amer.*, 597 F. Supp. 934 (D.D.C. 1984) ("'The legitimate interests of [plaintiffs' domiciliary] states, after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries . . . . Once the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled under the law of their domiciles, the interests of those States are satisfied'") (*quoting In re Air Crash Disaster Near Chicago, IL*, 644 F.2d 594, 613 (7th Cir. 1981)). Indeed, the District of Columbia's policy of fully and fairly compensating victims of negligence is

reflected by its lack of a cap on such damages. *See Raflo*, 157 F. Supp. 2d at 7. In addition, it has been recognized that the District of Columbia has a "public policy interest to hold negligent" parties "fully liable" for conduct within its borders. *See Raflo v. United States*, 157 F. Supp. 2d 1, 7 (D.D.C. 2001); *see also Kaiser-Georgetown Comm. v. Stutsman*, 491 A.2d 502, 509-10 (D.C. 1985) (recognizing interest "in holding its corporations liable for the full extent of the negligence attributable to them").

If District of Columbia law were to apply to the damages issue in this case, the result would be that the United States would pay nothing to compensate Mrs. Burton for her loss of solatium resulting from the death of her husband due to negligent medical treatment by Walter Reed employees in the District of Columbia. That is because the District of Columbia Wrongful Death Act provides only for pecuniary losses and does not recognize loss of solatium (also referred to as consortium). *See Joy v. Bell Helicopter Textron Inc.,* 999 F.2d 549, 564-65, 303 U.S. App. D.C. 1 (1993). This would lead to an anomalous result in this case, because application of D.C. law would allow the United States, which is akin to a private corporation for purposes of the FTCA, to escape liability for the full extent of the harm caused by the negligence attributable to it, a result that runs contrary to the District of Columbia's own public policy.

In contrast, if Maryland law were to apply, Mrs. Burton would be permitted to collect damages for loss of consortium and solatium. See Md. Code, Cts. & Jud. Proc. § 3-904(a), which provides that the spouse of a decedent may recover damages for loss of financial support, replacement value of lost services, and noneconomic losses including "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, attention, advice or counsel…" *Maryland Civil Pattern Jury*

Instructions No. 10:22 (4th ed. 2008). Those damages are capped under Maryland law at $620,000. See Md. Code, Cts. & Jud. Proc. § 11-108(b).[1] But if D.C. law were to apply, the cap, in effect, on Mrs. Burton's noneconomic damages would be zero, since D.C. does not recognize any noneconomic losses for a surviving spouse. Maryland's interest in providing compensation to its citizens, at least up to a point, for damages flowing from negligent medical treatment would thus be furthered by application of its damages law.[2] On the other hand, the District of Columbia's recognized public policies of compensating victims of negligence and holding its corporations fully responsible for its conduct would not be undermined. In fact, in a twist of irony, the District of Columbia's policies would be better served in this case by application of *Maryland's* law, than by its own substantive law.

Finally, this Court has observed that under a refined government interest analysis, the test "typically *leads* to the application of the law of plaintiff's domicile, as the state with the greatest interest in providing redress to its citizens." *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200, 210 (D.D.C. 2008) (emphasis in original); *accord Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006). Thus, in the case of a devastating mass tort—the terrorist bombing at issue in *Heiser* where the plaintiffs were domiciled in many different states—the Court reached the decision to apply the law of the plaintiff's domicile, although it resulted in the additional

[1] In addition, Mr. Burton's estate has a right to recover for his conscious pain and suffering under the law of either Maryland or the District of Columbia. Under Maryland, that claim has its own separate cap of $620,000.

[2] This Court analyzed the governmental interest and purpose of Virginia's damages cap and determined that it strikes a compromise of allowing for compensation to injured plaintiffs while protecting its health care providers from excessive liability and residents from excessive insurance premiums. *See Raflo*, 157 F. Supp. 2d at 5-6.

complication of examining the substantive law of thirteen jurisdictions. *See Heiser*, 466 F. Supp. 2d at 266.

For all these reasons, Maryland law should apply here to allow recovery to a Maryland domiciliary—Mrs. Burton—for her noneconomic but very real losses that she suffered by losing her husband.

b. An analysis of the "most significant relationship" factors confirms that Maryland law should apply.

An analysis of the four factors set forth in the Restatement (Second) of Conflict of Laws likewise points to the conclusion that Maryland law should apply to the compensatory damages issue in this case because Maryland has the most significant relationship with that issue.

First, Maryland is the place where the underlying injury occurred; Mr. Burton died at his home in Maryland. Second, the negligent conduct causing the injury occurred in the District of Columbia. Third, at the time of death, the permanent residence and, thus, domicile of both Mr. and Mrs. Burton, was Maryland. Fourth, the place where the relationship is centered may be either the District of Columbia or Maryland depending how "relationship" is defined. For example, in a loss of consortium claim, the relevant relationship is the "marital relationship," which in this case was located in Maryland. *See Felch v. Air Florida, Inc.*, 562 F. Supp. 383, 385 (D.D.C. 1983). Moreover, when utilizing the most significant relationship test, this Court has expressly found that in claims for loss of consortium or solatium, the law of the domicile of the surviving spouse prevails. According to the *Holland* Court, the claims of a decedent's estate are "'traditionally governed by the laws of the decedent's domicile' because such an approach 'respects the decedent's deliberate choice to make his or her home in a state and

be governed by the laws of that state." *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, (D.D.C. 2005) (*quoting Dammarell v. Islamic Republic of Iran*, Civ. No. 01-2224(JDB), 2005 WL 756090, *21 (D.D.C. Mar. 29, 2005)). However, "'[i]n the case of survivors, the dominant rule is that the law of the state of the survivor (rather than the decedent) should provide the rule of decision, on the theory that the survivor is usually the injured party in these claims, asserting his or her own claims for economic losses, loss of solatium, intentional infliction of emotion distress, and the like.'" *Id.* (citing cases decided under Ohio, Oklahoma, and Pennsylvania law); *see also Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 13 (D.D.C. 1995) ("With respect to the loss of consortium claim, the District of Columbia applies the law of the state where the marriage is domiciled"); *Felch v. Air Florida*, 562 F. Supp. 383, 386 (D.D.C. 1983) ("Courts in jurisdictions following the governmental interest analysis choice of law principle have typically ruled that an action for loss of consortium is governed by the law of the state where the marriage is domiciled rather than that of the state where the wrong occurred").

Mr. Burton and Mrs. Burton, and thus their marriage, were domiciled in Maryland at all relevant times. Accordingly, Maryland is clearly the state with the "most significant relationship," as that question has been considered and resolved by this Court.

Conclusion

For all of these reasons, the plaintiffs request that the Court apply Maryland law in determining damages in this case.

Respectfully submitted,

/s/ Patrick A. Malone

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5, I certify that on this 20th day of February, 2009, a true and exact copy of the foregoing was sent by electronic case filing to:

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