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

Kathleen Banwart and Leslie Banwart,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 18 L 11672
Larry J. Brown, Jr., individually and as an agent and/or employee of Kiswani National, Inc.; and Kiswani National, Inc., an Illinois corporation,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

If more than one state's substantive laws could apply in a case and those laws conflict, an Illinois court must undertake a choice-of-law analysis to determine which state's law to apply. The defendants ask this court to apply Indiana law, while the plaintiffs want Illinois law to apply. The relevant factors and policies used in a choice-of-law analysis favor applying Indiana law; consequently, the defendants' motion is granted.

Facts

On November 15, 2017, Leslie Banwart was driving north on Interstate 65 near Lafayette, Indiana. Leslie's wife, Kathleen, and her sister, Joan, were passengers. In front of the Banwarts' car were two semi tractors, one with a blue trailer in the left lane and one with a white trailer in the right lane. Leslie later testified the truck with the white trailer moved to the left, striking the blue trailer and causing sparks. The semi with the blue trailer then began wobbling. Leslie thought the semi might jackknife, so he decided to pass both semis on the left shoulder. The semi with the blue trailer struck the Banwarts' car, causing it and the semi to go into the center median.

The owner and operator of the semi with the white trailer are unknown because the driver failed to stop.

The collision injured both Leslie and Kathleen. Kathleen was hospitalized in Indiana for six days following the collision. Doctors then transferred her to the Shirley Ryan Ability Lab in Chicago where she remained an in-patient for 24 days, after which Kathleen underwent two months of outpatient physical therapy. Leslie was also injured, but less severely. During Kathleen's in-patient treatment at the Ability Lab, Leslie stayed at the couple's Chicago condominium. After Kathleen transitioned to outpatient treatment, she also stayed at the condominium. Leslie and Kathleen are both permanent residents of Iowa, but spend a lot of time in Chicago.

Larry Brown drove the tractor with the blue trailer. Brown is a Cook County resident and at the time of the accident worked as an independent contractor for Kiswani National, Inc. Kiswani is an Illinois corporation with an office and trucking facility in Cook County. Brown would sometimes drive a loaded trailer to Michigan, Indiana, or Wisconsin, but he always completed his trips in one day. Brown attended quarterly meetings held by Kiswani to review the rules of the road.

On November 15, 2017, Brown had delivered a load from Chicago to Pendleton, Indiana, and was returning to Chicago on Interstate 65 when the accident occurred. He testified that he felt something strike the rear side of his semi's trailer. The collision caused the tractor and trailer to jackknife 90 degrees, strike a bridge on the right side, and then travel back across the two northbound lanes and into the median.

On October 29, 2019, the Banwarts filed a two-count complaint, each bringing a negligence cause of action against Brown and Kiswani. Kathleen and Leslie allege both defendants owed the Banwarts a duty of care, breached their duty in various ways, and injured the Banwarts as a result. On April 23, 2019, the defendants answered the Banwarts' complaint and filed five affirmative defenses, the first three of which are directed against Leslie's cause

of action. The first is a comparative negligence claim under Indiana law based on Leslie's attempt to pass the semis when it was unsafe to do so. The second is a comparative negligence claim under Indiana law directed against the unknown driver of the semi with the white trailer. The third is a comparative negligence claim under Illinois law based on Leslie's unsafe driving. The last two affirmative defenses are directed against Kathleen's cause of action. The fourth is a comparative negligence claim under Indiana law based on the conduct of the unknown driver of the semi with the white trailer. The fifth affirmative defense is brought under Indiana law and is directed against Leslie for his unsafe driving.

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 Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.*, 2014 IL 116389, ¶ 14 (citing and quoting *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." *Bridgeview Health*, 2014 IL 116389, ¶ 14 (citing *Chicago Bd. Options Exch., Inc. v. International Sec. Exch., L.L.C.*, 2012 IL App (1st) 102228, ¶ 44). The burden is on the party asking the court to apply the law of another jurisdiction to establish the existence of a conflict. *Id.* at ¶ 14.

Illinois and Indiana have similar comparative negligence statutes. For example, both states bar recovery if a jury assesses the majority of comparative fault to the plaintiff. 735 ILCS 5/2-1116(c) (if "contributory fault on the part of the plaintiff is more than 50%"); Ind. Code § 34-51-2-6(a)(2) & (b) (if "contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages"). Both states' statutes also provide that, if a plaintiff is less than 50 percent at fault, the plaintiff's recovery is reduced by the plaintiff's comparative negligence. 735 ILCS 5/2-

1116(c) ("damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff"); Ind. Code § 34-51-2-5 ("any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages").

Illinois and Indiana both permit a jury to attribute fault to a non-party. Illinois law provides that "[c]onsideration of the negligence of both parties and non-parties to an action is essential for determining liability commensurate with degree of total fault." *Bofman v. Material Serv. Corp.*, 125 Ill. App. 3d 1053, 1064 (1st Dist. 1984). "[I]n cases where contributory negligence is involved, it is permissible to introduce evidence of the liability of a nonparty. The liability of nonparty tortfeasors may be considered in order to determine the extent of plaintiff's responsibility for his injuries." *Smith v. Central Ill. Pub. Serv. Co.*, 176 Ill. App. 3d 482, 496 (4th Dist. 1988). Illinois' pattern jury instructions explicitly provide for "the possible inclusion on the verdict form of tortfeasors who are not parties." Ill. Pattern Jury Instructions, Civil, No. B45.03.A, notes on use & cmts.

Indiana law goes further. "Indiana's comparative fault system . . . permit[s] the assertion of a nonparty defense, allowing a defendant to prove the negligence of an absent or settling tortfeasor. Thus the jury's apportionment of fault now provides a more complete picture of the relative responsibility for the plaintiff's injuries." *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d 987, 990 (Ind. 2002) (citing Ind. Code § 34-51-2-15). Under Indiana law, therefore, a defendant may introduce evidence that a non-party was "entirely" or "overwhelmingly responsible" if its negligence "seems to have set everything else into motion." *Denton v. Universal Am-Can, Ltd.*, 2015 IL App (1st) 132905, ¶ 12.

The two states' statutes also differ as to the application of joint and several liability and contribution. In Illinois, defendants are jointly and severally liable for damages, 735 ILCS 5/2-1117 (exception for defendant less than 25 percent at fault), even after the adoption of comparative negligence. *See Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 82 (2002) (citing *Coney v. J.L.G.*,

Indus., Inc., 97 Ill. 2d 104, 121-24 (1983)). Illinois also provides for contribution among joint tortfeasors. *See* 740 ILCS 100/2(a). In Indiana, defendants are severally, but not jointly, liable for their own percentage of fault (unless the action sounds in medical malpractice). Ind. Code § 34-51-2-8; *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002). Further, in Indiana, "there is no right of contribution among tortfeasors." Ind. Code § 34-51-2-12; *Santelli v. Rahmatullah*, 993 N.E.2d 167, 178 (Ind. 2013). Indiana law also permits a defendant to prove the negligence of a non-party or settled defendant. *R.L. McCoy*, 772 N.E.2d at 990.

A plain reading of Illinois and Indiana statutes and case law leads to the inexorable conclusion that they conflict as to who is responsible for paying a judgment based on the comparative fault of party and non-party defendants. Although the defendants here do not state explicitly why they want Indiana law to apply, it is transparently inferred. A jury's finding of fault against the owner and operator of the elusive semi with the white trailer would, under Indiana's several liability statute, reduce the defendants' percentage of fault because they would not be responsible to pay any judgment other than their own. On the other hand, the Banwarts argue that applying Illinois' substantive law of joint and several liability is the only way they will be assured of receiving full compensation for their injuries. Under Illinois law, the defendants, if found to be more than 25 percent at fault, would be required to pay the entire judgment, including the jury's assessed percentage of fault against the driver and owner of the semi with the white trailer.

The defendants have met their burden of identifying a conflict between Illinois' and Indiana's substantive laws. Given that result, this court must now proceed to address the various factors and interests in a choice-of-law analysis.

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 first 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 contrast, Indiana does not employ depecage. *See Simon v. United States*, 805 N.E.2d 798, 805 (Ind. 2004).

In this case, this court is not presented with divisible legal issues, such as a case seeking a tort remedy as well as a contract remedy. *See Gregory v. Beazer East*, 384 Ill. App. 3d 178, 196 (1st Dist. 2008). Rather, the relevant legal issue focuses solely on the Banwarts and the party and non-party defendants allegedly involved in similar conduct–negligent driving. The Banwarts' related causes of action frame the legal questions as to both liability and damages; consequently, depecage is unnecessary to resolve the choice of law issue in this case.

To resolve a choice-of-law question, Illinois courts are directed to apply the most-significant-contacts test set out in the Second Restatement. Restatement (Second) of Conflict of Laws §§ 6, 145; *see Ingersoll v. Klein*, 46 Ill. 2d 42, 47-48 (1970) (adopting the Second Restatement into Illinois common law). Section six 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
>
> (a) the needs of the interstate and international systems,
>
> (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]
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Restatement (Second) § 6(2); *see Townsend*, 227 Ill. 2d at 169-70 (analysis of all factors unnecessary in personal injury actions). Section 145 of 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 section 6 principles); *Gregory*, 384 Ill. App. 3d at 198 (starting with section 145 factors); *Denton*, 2015 IL App (1st) 132905, ¶ 19 (same).

Section 145 Factors

(a) Place Where The Injury Occurred

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*. 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*).

As to the first scenario, there is no doubt the location of the collision at issue in this case was fortuitous. It just happened the events leading to this particular accident between the various vehicles and drivers occurred on Interstate 65 at a particular time. In other words, this accident could have occurred on any interstate at any time, such is the inherent danger of driving. As to the third scenario, there is no argument the collision occurred in more than one state.

This factor turns on the second consideration. In this case, the accident location bears considerably on the relationship between the occurrence and the parties. The Banwarts were in Indiana on their way to Chicago. Brown was driving from Pendleton, Indiana back to Chicago as part of his job with Kiswani. It is unknown where the semi with the white trailer was going, other than northbound on Interstate 65; however, it is fair to infer that the elusive semi, too, was being driven in Indiana for business purposes. In short, each party and non-party had a particular reason to be on Interstate 65 in Indiana on November 15, 2017 when the accident occurred. Absent the particular confluence of place, time, and drivers, the accident would not have occurred. This factor, therefore, favors application of Indiana law.

(b) Place Where The Conduct Causing The Injury Occurred

The parties' and non-party's individual and combined conduct occurred in Indiana. Leslie was in sole control of his vehicle until Brown's semi swept the car into the median. Brown and the driver of

the semi with the white trailer each controlled their vehicles. Each employer may have provided updates on safety and the rules of the road, as Kiswani did for Brown, but the employers had no control over their drivers' split-second actions and reactions to the events leading to the collision. The only conclusion is that the conduct causing the injury occurred in Indiana.

(c) Parties' Domicile

The Banwarts are Iowa residents. That they spend a great deal of time in Chicago and received medical treatment here does not alter their domicile. Brown is a Cook County resident while Kiswani is an Illinois corporation with an office and facility in Cook County. The domicile of the driver and owner of the semi with the white trailer is unknown.

The Banwarts' Iowa residency does not favor applying either Illinois' or Indiana's substantive law. Similarly, the defendants' ties to Illinois have everything to do with venue, *see* 735 ILCS 5/2-101, but nothing to do with the application of substantive law. This is particularly true since the defendants want Indiana, not Illinois law, to apply. In sum, this factor is neutral because the parties' domicile does not favor applying either state's substantive law.

(d) Place Where The Parties' Relationship Is Centered

The first three factors of section 145 presage the fourth. As the Second Restatement indicates:

> 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 and the non-party had no relationship in Illinois, Indiana, or any other state prior to the accident. Quite simply, their relationship *was* the Indiana accident. From a different vantage point, but for the events leading up to the collision, the Banwarts, Brown, and the semi with the white trailer would have continued traveling to their various destinations with no relationship other than, perhaps, passing each other on Interstate 65. This factor favors applying Indiana law.

Section Six Policies

Under section six, this court is to consider relevant Illinois and Indiana policies as well as basic tort law principles. *Townsend*, 227 Ill. 2d 163-64. As noted above, the Restatement Second identifies seven such policies and principles, not all of which may be relevant to a choice-of-law analysis. For the sake of completeness, however, this court will address each policy.

(a) The Needs Of The Interstate And International Systems

Neither the parties nor this court has identified any specific needs of interstate legal systems. The issue here does not involve the systems' needs, but appropriateness in the choice of law; consequently, this policy is neutral.

(b) The Relevant Policies Of The Forum

As indicated above, a choice-of-law analysis is founded on 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 (emphasis added) (quoting Restatement (Second) of Conflict of Laws § 146 (1971)). That principle drives other legal issues, such as contribution. As noted, "the question of contribution between joint tortfeasors is determined by the local law of the state of conduct and injury." *Burlington N. & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 703 (1st Dist. 2009) (citing Restatement (Second) of Conflict of Laws § 173, at 515 (1971)). Since contribution

among parties and non-parties is central to the current motion, and Illinois favors applying the contribution laws of the state where the conduct and injury occurred, this policy interest favors Indiana law.

(c) The Relevant Policies Of Other Interested States And The Relevant Interests Of Those States In The Determination Of The Particular Issue

In contrast to Illinois, Indiana is still a *lex loci* state. *Simon*, 805 N.E.2d at 802. Indiana courts are, therefore, 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 . . . 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. Indiana views the Second Restatement's factors, instead, as matters 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.

Indiana's *lex loci* policy would, by itself, not be a determinative factor in a choice-of-law analysis. That policy takes on far greater

significance, however, given Illinois' policy of deferring to the substantive contribution law of the state where the conduct and injury occurred. As a result, this policy favors applying Indiana law.

(d) The Protection Of Justified Expectations

The parties had no justified expectations of which state's substantive laws would govern this lawsuit. This is not a commercial dispute in which the parties entered into a written or oral agreement to apply a particular state's substantive law. Further, this is not a situation in which a party "justifiably molded his conduct to conform to the requirements of another state," in which case applying the law of another would be "unfair and improper." Restatement (Second) of Conflict of Laws § 6(2)(g), cmt. at 15. This policy is neutral.

(e) The Basic Policies Underlying The Particular Field of Law

This policy interest essentially duplicates the section 145 factors discussed above as well as Illinois' policy concerning contribution noted above in paragraph (b). This policy favors application of Indiana law.

(f) Certainty, Predictability And Uniformity Of Result

The application of Indiana's substantive law to this case is directed in large part by *Denton*, 2015 IL App (1st) 132905, a case the Banwarts address as an afterthought in their response brief. In *Denton*, the court addressed a multi-vehicle trucking accident that also occurred on Interstate 65 in Indiana. *Id.* at ¶ 2. Each of the defendant trucking companies was incorporated in other states, but some of them conducted business in Illinois. *Id.* at ¶ 4. The plaintiffs were Illinois residents as was one defendant truck driver. *Id.* at ¶¶ 4 & 26.

Justice Lavin outlined the differences between Illinois' and Indiana's laws governing liability and contribution and concluded they conflicted. *Id.* at ¶¶ 8-13. The court's choice-of-law analysis

began by recognizing the fundamental presumption that the substantive law of the state where the injury occurred applies unless another state has a more significant interest. *Id.* at ¶ 19 (citing *Townsend*, 227 Ill. 2d, at 164-65). The court concluded that three of the section six factors favored Indiana law, while the fourth factor was neutral. *Id.* at ¶¶ 20-28. As to the section 145 policy considerations, the court concluded that Illinois' interest in compensating its residents for injuries "does not outweigh that of Indiana to maintain safe highways or to protect individuals and businesses from being apportioned a greater cost in negligence actions." *Id.* at ¶ 30.

The facts and legal analysis in *Denton* make it highly persuasive here. Were this court to rule in favor of applying Illinois law, such a decision would run directly counter to *Denton* and would, therefore, bring uncertainty, unpredictability, and a lack of uniformity into Illinois' choice-of-law analysis. The holding in *Denton*, therefore, requires the application of Indiana law.

(g) The Ease In The Determination And Application Of The Law To Be Applied

Applying Indiana law to this case would not present an undue burden on an Illinois circuit court. Indiana law does not apply to oral or written discovery matters that might arise before this court since procedural issues, as opposed to substantive ones, are addressed under the law of the forum state. *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 351 (2002) (citing cases). If this case proceeds to trial, an Illinois judge will be able to refer to and instruct the jury based on Indiana's civil pattern jury instructions. *See* www.in. gov/judiciary/iocs. An Indiana judge would obviously do the same. As a result, this factor does not favor application of either state's substantive law.

Conclusion

Based on the foregoing discussion, it is ordered that:

1. The defendants' motion to apply Indiana law is granted; and
2. The defendants' third affirmative defense is stricken.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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