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STATE OF VERMONT
WINDSOR COUNTY, SS

Margaret Parker, Administrator of
the Estate of Carol Dunn
Plaintiff

v.

Weathervane Seafoods, Inc., d/b/a
Weathervane Seafood Restaurant
of West Lebanon, New Hampshire
Defendant

SUPERIOR COURT
Docket No. 48-1-09 Wrcv

OPINION AND ORDER RE: SUMMARY JUDGMENT

This wrongful death action is before the court on Plaintiff Margaret Parker's motion for partial summary judgment on the issue of choice of law. She is represented by Thomas Rounds, Esq. Defendant Weathervane Seafoods, Inc. is represented by Robin Freeman, Esq. For the reasons below, the motion is GRANTED in part and DENIED in part.

FACTS

The following facts are undisputed. On February 1, 2007, at about 1:00 p.m. Edward Ruggeri entered Defendant's restaurant in West Lebanon, New Hampshire, where he was a regular customer. Over the course of the next hour he ordered three alcoholic drinks, but it is unclear whether he drank them all. At 1:55 p.m. Ruggeri paid his tab and left the restaurant. After he left the restaurant, he drove his 2003 Ford SUV south on Route 12A in Plainfield, New Hampshire. At 2:10 p.m. his vehicle crossed the centerline and struck a delivery truck driven by Carol Dunn head-on. Dunn, Ruggeri, and Ruggeri's passenger all died as a result of the crash.

Thirty-eight year-old Dunn was returning to her employer, Upper Valley Pellet Stove Company of Lebanon, New Hampshire, when the crash occurred. Earlier that day, Dunn had delivered pellets for her employer to a customer in Lebanon, New Hampshire. At the time of the crash, she was returning from another delivery to a customer in Hartland, Vermont. The crash occurred in Plainfield, New Hampshire, approximately 3.7 miles away from Defendant's restaurant.

Dunn, a resident of Perkinsville, Vermont, had a very close relationship with her mother. Dunn's mother is Margaret Parker of Springfield, Vermont. Parker is the administrator of Dunn's estate, and Plaintiff in this case. Although insufficient admissible evidence has been submitted on this point, it would appear that Plaintiff is also Dunn's next of kin.

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Ruggeri had a history of drug and alcohol problems. He had no fixed address. At the time of his death, he held a New Hampshire driver's license, and his vehicle was registered in New Hampshire. His last-known address was in Enfield, New Hampshire, but according to Ruggeri's stepmother, Ruggeri had not lived there in several months. It appears that Ruggeri was staying with friends in different locations or staying at a storage facility in Enfield prior to his death.

On the day before the accident, Ruggeri and his girlfriend, Shirlann Carr, visited Carr's mother in White River Junction, Vermont. Carr, who also died in the crash, stayed with Ruggeri at friends' places or at the storage facility in Enfield. Carr's last-known address was at her mother's place in White River Junction.

The New Hampshire accident report concludes that the cause of the collision was a centerline encroachment and unreasonable speed by the vehicle driven by Ruggeri. Ruggeri's alcohol and drug impairment contributed to the collision. According to the medical examiner's report, Ruggeri had a blood alcohol content of .10 at the time of his death. Ruggeri's blood also tested positive for Benzodiazepines: Diazepam and Nordiazepam.

Plaintiff is suing Defendant for wrongful death as a result of Defendant's alleged violation of the dram shop statute. Defendant is a Maine corporation that does business in Vermont and New Hampshire. The dispositive issue on this motion is which state's law applies.

STANDARD OF REVIEW

Plaintiff moves for partial summary judgment on the choice of law. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment "has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." *Price v. Leland*, 149 Vt. 518, 521 (1988). However, "[s]ummary judgment is mandated . . . where, after an adequate time for discovery, a party 'fails to make a showing sufficient to establish the existence of an element' essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. See *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

DISCUSSION

The dispositive issue on this motion for partial summary judgment is which state's law applies to this wrongful death action: Vermont's or New Hampshire's. There is also a dispute

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about whether one state's law should apply to liability and another state's law should apply to damages. Each issue is address below.

A. Liability

Vermont has "adopt[ed] the Restatement (Second) approach that choice of law in a tort action that implicates states or countries beyond Vermont will be determined by which state or country has the most significant relationship to the occurrence and the parties." *Amiot v. Ames*, 166 Vt. 288, 292 (1997). The judge, and not the jury, is the one who decides which state has the most significant relationship. See *id.* at 294-95. "Thus, under this approach, the first step is to ascertain whether a specific section of the Restatement governs what law should ordinarily apply to the particular action or legal issue." *Martineau v. Guertin*, 170 Vt. 415, 417 (2000).

The present case is a wrongful death action. Section 175 of the Restatement provides that the "law of the state where the injury occurred determines the rights and liabilities of the parties" in an action for wrongful death unless some other state has a more significant relationship to the occurrence and the parties under the principles stated in § 6.

Id. (quoting Restatement (Second) of Conflicts § 175 (1971)).

In this case, it is clear that Dunn's injury and death occurred in New Hampshire. Therefore, New Hampshire law is presumed to apply in this case unless Plaintiff demonstrates that Vermont's interests in the litigation override the place-of-injury presumption contained in § 175. See *McKinnon v. F.H. Morgan & Co.*, 170 Vt. 422, 424 (2000).

Plaintiff argues that Vermont has a more significant relationship to the occurrence and the parties in this case. In order to determine which state has the most significant relationship in this action under the Restatement, the court must look to § 6. Under § 6 of the Restatement, the following factors are to be considered when determining the applicable rule of law.

- (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 relative interests of those states in the determination of the particular issue,
- (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.

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Restatement (Second) of Conflicts § 6(2), quoted in *Martineau*, 170 Vt. at 417-18. “The first three (or perhaps four) of these general guidelines carry the greatest weight in the field of tort law.” *Martineau*, 170 Vt. at 418.

When applying the principles of § 6, the following contacts should be taken into account: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, 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.” *Id.* (quoting Restatement (Second) of Conflicts § 145(2)).

In this case, the guidelines established in § 6 do not clearly mandate a finding that Vermont has a more significant relationship to the occurrences and parties in this action. If anything, New Hampshire has a more significant relationship because (a) it is where the injury occurred; (b) it is where both the alcohol was served and where the allegedly negligent driving occurred; and (c) it is Defendant’s place of business, though not the primary place, and it was Ruggeri’s domicile. There appears to be no relationship between the parties other than the accident, and the relationship between Ruggeri and Defendant was centered in New Hampshire. Furthermore, Dunn had a significant contact with New Hampshire due to her employment there.

Although Vermont has an interest in protecting its residents, even when they leave the state, applying New Hampshire law in this case would not harm the interstate system and would “further harmonious relations between states and . . . facilitate commercial intercourse between them.” Restatement (Second) of Conflicts § 6 cmt. d. New Hampshire has a significant interest in ensuring that (a) businesses that operate in New Hampshire serve alcohol responsibly, (b) drivers on New Hampshire’s roads drive carefully, and (c) workers in New Hampshire are protected on New Hampshire’s highways. Applying New Hampshire liability law in this situation enhances certainty, predictability and uniformity of result because it is consistent with the Restatement’s default rule which applies the law of the place where the injury occurred in difficult cases when no state has an overriding interest in the litigation. See *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992), cited in *Martineau*, 170 Vt. at 421. Therefore, New Hampshire liability law is applicable in this case.

B. Damages

Defendant argues that, although New Hampshire’s standard of care applies in this action, Vermont’s law on damages should control. “There are two common types of wrongful death actions. One type awards damages to surviving beneficiaries based on their loss.” *Calhoun v. Blakely*, 152 Vt. 113, 116 (1989). Vermont follows this type. See *id.*; 14 V.S.A. § 1492. “The other type of statute measures damages by the loss occasioned to decedent’s estate by the death. New Hampshire’s is such a statute. See N.H. Rev. Stat. Ann. 556:12.” *Calhoun*, 152 Vt. at 117 (quotations and citation omitted).

Furthermore, Vermont law “permits a plaintiff to pursue all, or any part, of his recovery from either joint tortfeasor.” *Zaleskie v. Joyce*, 133 Vt. 150, 158 (1975). By contrast, New Hampshire’s award reallocation statute provides that tortfeasors judged to be less than 50% at fault are liable severally but not jointly, and liable only for damages attributable to them. See

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Rodgers v. Colby's Ol' Place, Inc., 802 A.2d 1159, 1160-61 (N.H. 2002) (interpreting N.H. Rev. Stat. Ann. 507:7-e).

[I]t is possible that within one case, the law of one jurisdiction will apply to one issue and the law of another jurisdiction to another issue. For example, in a negligence action, the standard of care is normally determined by the local law of the state where the injury occurred. On the other hand, issues of damages are usually determined by the law of the parties' domicile, so long as the parties are both domiciled in the same state and there is a particular relationship between them which is centered in that state.

Miller v. White, 167 Vt. 45, 49 (1997) (quotations and citations omitted).

Under the Restatement, "[t]he law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death." Restatement (Second) of Conflicts § 178.

The law selected by application of the rule of this Section determines, for example, whether any limitations shall be imposed upon the amount of recovery or whether the amount of recovery shall depend, at least in part, upon *the degree of the defendant's fault*. This law also determines whether exemplary or punitive damages should be allowed and whether there can be recovery for particular elements of damage, such as the pain and suffering of the decedent and the mental anguish suffered by the beneficiaries as a result of the decedent's death.

Id. § 178 cmt. a (emphasis added).

The choice-of-law principles stated in § 6 should be applied in determining the state whose local law will be applied to determine the measure of damages in a wrongful death action. In general, this should be the state which has the dominant interest in the determination of this issue. *The state of conduct and injury will not, by reason of these contacts alone, be the state which is primarily concerned with the measure of damages in a wrongful death action.* The local law of this state will, however, be applied unless some other state has a greater interest in the determination of this issue. In a situation where one state is the state of domicile of the defendant, the decedent and the beneficiaries, it would seem that, ordinarily at least, the wrongful death statute of this state should be applied to determine the measure of damages.

Id. § 178 cmt. b (emphasis added).

With regard to joint torts, comment d of § 178 directs us to look to § 171 (Damages), which states: "The law selected by application of the rule of § 145 determines whether damages resulting from a harm caused by two or more defendants should be apportioned between them or whether each should be held liable for the entire loss." *Id.* § 171 cmt. e. Both § 145 and § 175

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direct the court to look to § 6 to determine which state has the most significant relationship to the occurrence and the parties.

Thus, both the issue of damages generally and joint and several liability specifically are lumped together by the Restatement into a “damages” section. The law relating to all damages is determined by application of § 6. Therefore, under the Restatement, there is no merit to Defendant’s argument that the court should apply Vermont’s wrongful death statute and New Hampshire’s joint and several liability statute. “An allegation of joint and several liability *relates to the apportionment of damages* once a party has been found liable.” *Staefa Control-Sys. v. St. Paul Fire & Marine Ins. Co.*, 847 F. Supp. 1460, 1471 (N.D. Cal. 1994) (emphasis added). It makes no sense to sever one state’s general damages law from the same state’s apportionment of damages statute. Only one state’s law controls for all aspects of damages.

As noted above, the liability law selected by application of §§ 6, 145, and 175 is New Hampshire law. This law should be used to determine damages unless Vermont is shown to have a more significant relationship with respect to this issue. Under *Miller* and the Restatement, Vermont would have a greater interest in applying its damages law if it were the state of domicile of the defendant, the decedent and the beneficiaries. In this case, Defendant is domiciled in Maine, where it is incorporated and has principal offices,¹ and the decedent was domiciled in Vermont. It is unclear from the record who Dunn’s beneficiaries are or where they are domiciled. However, Plaintiff suggests that she, a Vermont domiciliary, is a beneficiary and that Dunn’s father, a New Hampshire domiciliary, is also a beneficiary.

Although New Hampshire has a significant interest in seeing that its liability laws are followed in that state, it has less interest in seeing that its damages law is applied to parties domiciled out of state. By contrast, Vermont has a greater interest in seeing its damages laws applied to its domiciliaries. Furthermore, Defendant, with the closest connections to New Hampshire, is the one advocating for application of Vermont damages law.²

Although the Vermont Supreme Court has noted that a court may apply one state’s liability law and another state’s damages law, it has not ruled on a case where this has occurred. *Miller*, citing to Restatement (Second) of Conflicts § 171 cmt. b, notes that a state’s damages law should apply when the parties are both domiciled in the same state and there is a particular relationship between them which is centered in that state. See *Miller*, 167 Vt. at 49. This is not the case here.

¹ Although Defendant has a wholly owned subsidiary in Vermont, that subsidiary’s principal place of business is also Maine, and there is no allegation that Weathervane Seafoods of Vermont, Inc. is liable to Plaintiff. Therefore, Defendant is domiciled in Maine because “[a] corporation has its residence and domicil in the state in which it is incorporated” *Blanchette v. New England Tel. & Tel. Co.*, 6 A.2d 161, 162 (N.H. 1939).

² The damages law of Defendant’s state of incorporation, Maine, is more consistent with Vermont law than New Hampshire law, further supporting application of Vermont damages law in this case. Like Vermont’s wrongful death statute, 14 V.S.A. § 1492, Maine’s wrongful death statute provides that the amount recovered is for the benefit of the decedent’s survivors and not the estate. See Me. Rev. Stat. Ann. tit. 18-A, § 2-804 (2009). Furthermore, Maine, like Vermont, allows for joint and several liability among joint tortfeasors. See Me. Rev. Stat. Ann. tit. 14, § 156 (2009).

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The Supreme Court of Texas, which follows the Restatement, has held that in “[c]onsidering the purpose of compensatory damages, contacts such as the site of the injury or where the tortious behavior occurred, which are important in determining which state’s laws govern liability, are less important.” *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 849 (Tex. 2000). “Rather, the most important contacts in determining which state’s law governs compensatory damages will usually be the ones with the most direct interest in the plaintiff’s monetary recovery and/or the most direct in protecting the defendant against financial hardship.”³ *Id.* (quotation omitted).

This view that a plaintiff-decedent’s domicile is one of the most important factors in determining which state’s damages law to apply has been echoed in courts around the country. See *La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 743 (1st Cir. 1994) (“Domiciliary states have a strong interest in the welfare of their plaintiffs, and in seeing that their plaintiffs are adequately compensated for their injuries.”); *In re Air Crash Disaster Near Chicago, Ill., on May 25, 1979*, 480 F. Supp. 1280, 1283 (N.D. Ill. 1979); *In re Air Crash Disaster at Boston, Mass. on July 31, 1973*, 399 F. Supp. 1106, 1122 (D. Mass. 1975).

A court may also consider the generosity of the remedy in determining choice of law for damages. “[T]he law of that state with the more effective remedy should be chosen, provided that remedy provided by that state’s law is not so disproportionate as to exaggerate the consequences of violation to the point of substantial distortion of the impact of the regulatory statute.” *Platano v. Norm’s Castle, Inc.*, 830 F. Supp. 796, 799 (S.D.N.Y. 1993) (applying New York’s Dram Shop law but Connecticut’s damages law in a case where a Connecticut decedent was killed in Connecticut by a driver who was served alcohol at defendant’s New York bar because Connecticut’s “law provides more generous recovery”).

In this case, it would appear that Vermont damages law provides a more effective remedy. Under Vermont’s wrongful death statute, Plaintiff, as Dunn’s next of kin, is entitled to the full amount of her damages. Under New Hampshire’s law, she would not be guaranteed damages if Dunn’s estate has significant debt that requires the money awarded for repayment.⁴ Furthermore, Defendant may escape liability for the full amount of the damages under New Hampshire law if the jury finds it less negligent than Ruggeri. Under Vermont law, Defendant would be liable to Plaintiff for the full amount of damages even if Ruggeri is the more negligent

³ As Defendant notes, New Hampshire’s damages apportionment statute clearly demonstrates that state’s interest in protecting defendants against financial hardships. However, Defendant is not a New Hampshire company, and New Hampshire has less interest in protecting foreign defendants against financial hardships. See *Camp v. Forwarders Transport, Inc.*, 537 F. Supp. 636, 640 (C.D. Cal. 1982) (applying Oklahoma liability law and California damages law to California plaintiff injured by New Jersey defendant in Oklahoma; California law of joint and several liability would apply since Oklahoma had no interest in whether New Jersey defendant was held jointly liable for entire amount of damage because its law of several liability was adopted for benefit of Oklahoma defendants, and California had interest in ensuring that resident plaintiffs received all damages to which they were entitled since economic impact of any shortfall would be felt in California).

⁴ Recently, New Hampshire has allowed certain survivors to collect in wrongful death actions in addition to the decedent’s estate. See N.H. Rev. Stat. Ann. 556:12(II) & (III) (2009). However, Plaintiff is not a statutorily defined survivor, and it is unclear whether Dunn left a surviving spouse or minor children. Even if she had, Vermont’s law is more generous and would still be applied because New Hampshire’s statute caps damages at \$150,000. Vermont law has no cap. See 14 V.S.A. § 1492.

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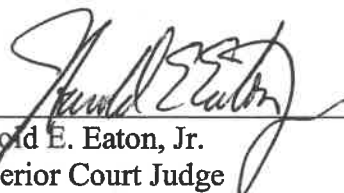
party. Because Vermont has a greater interest in applying its damages law since it provides the Vermont plaintiff with a more adequate remedy, Vermont law, and not New Hampshire law, will be applied to the damages portion of this case.

In sum, while application of New Hampshire liability law is required because New Hampshire was the *situs* of the allegedly negligent conduct, Vermont damages law is applicable here because (1) there appears to be no dispute among the parties that it is, at least partially, applicable; (2) New Hampshire has no significant interest in seeing its damages law apply when the parties are not domiciled there; (3) Vermont has a significant interest in seeing its domiciliary (Plaintiff) fairly compensated; (4) there is no significant conflict between the damages law of Plaintiff's home state of Vermont and Defendant's home state of Maine; and (5) Vermont law provides a more adequate remedy.

ORDER

For the reasons given above, Plaintiff's motion for partial summary judgment is GRANTED in part and DENIED in part. New Hampshire law controls on the issue of liability, and Vermont law governs on the issue of damages, including joint and several liability.

Dated at Woodstock, Vermont this 30 day of June, 2010.


Harold E. Eaton, Jr.
Superior Court Judge

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