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Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980)

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Torts—CONFLICT OF LAWS—FLORIDA ABANDONS LEX LOCI DELICTI, AGAIN—*Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980).

When a tort action has elements involving Florida, but also other elements significantly relating to at least one other jurisdiction, Florida chose to follow the doctrine of lex loci delicti.[1] This choice of law doctrine provides that "the rights of parties to a tort action are governed by the law of the place where the tort was committed."[2] Lex loci delicti is the traditional choice of law doctrine and is the foundation of the RESTATEMENT OF CONFLICT OF LAWS[3] as well as the works of numerous other early theorists.[4] The doctrine is a product of a territorial conception of vested rights in which no recovery may be obtained in one state for injuries to a person sustained in another state, "unless the infliction of the injuries is actionable under the law of the state in which they were received."[5] "[A] right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law."[6] Lex loci delicti has enjoyed wide support because of its virtues of uniformity, consistency, and predictability, all resulting in rules simple in form and administration.[7]

Beginning in earnest in 1959, however, with the Wisconsin decision of *Haumschild v. Continental Casualty Co.*,[8] the doctrine began to suffer disintegration[9] as more and more states abandoned it in favor of alternative theories less rooted in territoriality or vested rights and grounded instead in flexible policy-oriented approaches.[10] Criticism of lex loci delicti has centered on the haphaz-

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1. Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18 (Fla. 1972); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967); Astor Elec. Serv. Inc. v. Cabrera, 62 So. 2d 759 (Fla. 1952).

2. Astor Elec. Serv. Inc. v. Cabrera, 62 So. 2d 759, 761 (Fla. 1952).

3. Sections 377-97 (1934).

4. *E.g.*, 2 J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed. 1841).

5. Alabama G.S.R. Co. v. Carroll, 11 So. 803, 805 (Ala. 1892).

6. Babcock v. Jackson, 191 N.E.2d 279, 281; 240 N.Y.S.2d 743, 746 (1963).

7. R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 13 (2d ed. 1975).

8. 95 N.W.2d 814, 7 Wis. 2d 130 (1959). The academic work generally credited with inaugurating the realist revolt against the RESTATEMENT'S principles is W. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942). It was not until *Haumschild* in 1959, though, that the reaction movement gained major strength in the courts.

9. Bayitch, *Conflict of Laws: Florida 1968-69*, 24 U. MIAMI L. REV. 433, 476 (1970).

10. For a listing of states abandoning lex loci delicti, see Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 n.2 (Fla. 1980).

ard and unjust results reached in many cases when the purely arbitrary circumstance of *where* a tort occurred controlled all questions of substantive law in that case.[11] As one influential decision noted,

> An air traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous.[12]

The 1967 case of *Hopkins v. Lockheed Aircraft Corp.*[13] presented the Florida Supreme Court with the question of whether to abandon the lex loci delicti rule. The court acted in response to a question certified to it by the U.S. Fifth Circuit Court of Appeals. Hopkins, a Florida citizen, had purchased a roundtrip ticket in Tampa for a flight aboard Northwest Airlines from Tampa to Chicago. The airplane crashed in Illinois killing all aboard. The plaintiff, Hopkins's widow, brought suit in Florida against both the airline and Lockheed. Northwest settled out of court for $32,500 and Lockheed then moved for summary judgment on the ground that the Illinois statutory limitation of damages which set a $30,000 cap on recovery for wrongful death, precluded any cause of action by the plaintiff against it. The trial judge granted the motion and plaintiff appealed to the court of appeals, which certified to the Florida Supreme Court the question of whether Florida or Illinois law would control.[14] By a 5-2 decision, the Florida Supreme Court abandoned lex loci delicti in favor of a more flexible approach that took into account the competing policies of each state involved. The court relied upon the then new RESTATEMENT (SECOND) OF CONFLICT OF LAWS (hereinafter the SECOND RESTATEMENT) significant relationship test[15] in holding that Florida law would control over Illinois law.

The significant relationship test adopted by the court is premised upon the idea that the rights and liabilities of litigants are

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11. 19 UNIV. FLA. L. REV. 730, 731 (1967).
12. Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 527; 211 N.Y.S.2d 133, 135 (1961).
13. 201 So. 2d 743 (Fla. 1967).
14. *Id.* at 749-50.
15. *Id.* at 747.

based upon the local law of the state having the most significant relationship to the occurrence and the parties.[16] In most cases, this would be the state where the injury occurred unless outweighed by other factors.[17] These elements include the needs of the interstate and international systems; the relevant policies of the forum state; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied.[18] All these components would somehow be measured, balanced and juxtaposed to determine which state's law would apply.

Florida's abnegation of lex loci delicti lasted but five months. The Florida Supreme Court reversed itself on a rehearing of the case and reinstated the doctrine in Florida. The court noted the "obvious virtues" of the rule since it was based on "objective and stable standards."[19] More importantly, though, the 4-3 majority appeared hesitant to overrule lex loci delicti because, first, the question had been certified by a federal court and the supreme court wished that interpretation of Florida's conflict of law rules develop from the proven method of judicial case disposition;[20] second, the case sounded in warranty not tort and hence lex loci delicti may not be implicated at all;[21] and, third, the plaintiff was not deprived of any cause of action in Illinois, only part of a recovery, since she had been able to sue under the Illinois Wrongful Death Act.[22] Finally, the court warned that "[w]e are not persuaded that *this* case presents any necessity or justification for abandonment of guiding principles [of lex loci delicti]."[23]

The case that did persuade the Florida Supreme Court to abandon, again, the doctrine of lex loci delicti in tort actions is *Bishop v. Florida Specialty Paint Company*.[24] Like *Hopkins*, this case involved an airplane crash. But there the similarity ends. In *Bishop*, both the plaintiffs and the defendant pilot of the Florida-based

16. SECOND RESTATEMENT § 145.
17. *Id.*, § 146.
18. *Id.*, § 6.
19. *Hopkins*, 201 So. 2d at 752.
20. *Id.*
21. *Id.* at 751.
22. *Id.*
23. *Id.* at 752 (emphasis added).
24. 389 So. 2d 999 (Fla. 1980).

Cessna were Florida residents. The plane was leased to the defendant Florida corporation, and the July 4, 1975 weekend trip began in Florida and was to end in Florida after a stay in the North Carolina mountains. En route, the plane crashed in South Carolina.[25]

At the time of the crash, South Carolina had an airplane guest statute that limited actions by a non-paying aircraft guest to intentional misconduct or those accidents caused by heedless or reckless disregard for the rights of others.[26] Florida law, on the other hand, required only a showing of ordinary negligence since it had no aircraft guest statute and its related automobile guest statute had been repealed years earlier.[27] In Duval County Circuit Court, summary judgment was entered in favor of the defendant pilot and aircraft owner since plaintiffs conceded that the negligence charged was only ordinary and would not rise to the level necessary to show a cause of action in South Carolina. South Carolina law, of course, was said to control due to the Florida lex loci delicti doctrine.[28]

On appeal, the First District Court of Appeal affirmed,[29] "[d]espite the uncertainties created by the court's actions in *Hopkins* of first receding from the lex loci delicti rule (by a vote of 4 to 3) [*sic*] and then, on rehearing granted, reversing its original opinion (by a vote of 4 to 3). . . ."[30] The district court, though, did certify to the Florida Supreme Court the following question:

> Does the lex loci delicti rule govern the rights and liabilities of the parties in tort actions, precluding consideration by the Florida courts of other relevant considerations, such as the policies and purposes underlying the conflicting laws of a foreign jurisdiction where the tort occurred, and the relationship of the occurrence and of the parties to such policies and purposes?[31]

It is this question that the Florida Supreme Court answered in the negative in an opinion by Justice England with only Justice Boyd dissenting.[32] The court's opinion provides scant authority and no coherent justification for its decision to rejoin the SECOND

25. Brief for Petitioner at 4-5.

26. *S.C. Code* § 55-1-10 (1976).

27. The Florida Automobile Guest Statute, ch. 18033, 1937 Fla. Laws 671, repealed by ch. 72-1, 1972 Fla. Laws 113.

28. Bishop v. Florida Specialty Paint Co., 377 So. 2d 767 (Fla. 1st Dist. Ct. App. 1979).

29. *Id.*

30. *Id.* at 768. The *Hopkins* opinion was actually 5-2 on first hearing and 4-3 on rehearing. *See* Hopkins v. Lockheed Aircraft Corp., 201 So. 2d at 744, 748, 749, 752.

31. 389 So. 2d at 1000.

32. *Id.* at 999.

RESTATEMENT on the lex loci delicti issue. Referring only to sections 145 and 146 of the SECOND RESTATEMENT, the *Hopkins* opinion, and the opinion of the district court below, the *Bishop* court simply announced in per curiam fashion that the new rule will not treat lex loci delicti as dispositive. What appears to emanate from the opinion is that the court decried the lack of flexibility of the lex loci delicti rule "particularly in the case of aviation accidents."[33] The court signaled its new position by applauding rational, over mechanical standards.[34] In addition, the court wished to join those other states that had adopted the "more flexible, modern approach to this aspect of conflicts of law."[35]

The opinion appears to be a scaled-down version of the recent opinion of the Supreme Court of Texas in *Gutierrez v. Collins*,[36] making Texas the Twenty-fifth state in addition to the District of Columbia to reject lex loci delicti in favor of some alternative approach.[37] The *Gutierrez* case involved a car accident between two Texas residents that occurred in Mexico. After a lengthy review of Texas statutory and common law on lex loci delicti, the court discussed major arguments in favor of the retention of the rule and attempted to demonstrate how those arguments were no longer tenable.[38] The court then concluded that a new rule was needed that was more in tune with modern society.

Not surprisingly, Texas chose the SECOND RESTATEMENT'S most significant relationship test after comparing it with other choice-oriented approaches. The Florida Supreme Court seems to have taken the skeleton of the Texas court decision and adopted it for

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33. *Id.* at 1000.

34. *Id.* at 1001.

35. *Id.*.

36. 583 S.W.2d 312 (Tex. 1979).

37. *See* note 9 *supra.*

38. 583 S.W.2d at 317. The court discussed three arguments in favor of lex loci delicti and each argument's rebuttal. First, the rule provides uniformity, consistency, and predictability; however, results reached were "most often arbitrary and unjust." In response, judges formulated exceptions to the rule or withheld its application by "strained characterizations of the facts." This then undercut the purported virtues of the rule. Second, the alternatives to the lex loci rule all lead to inconsistent and unpredictable results, with public and professional confusion about the outcome; however, it may be true that other theories have "growing pains" but the added flexibility of the alternative theories are worth the burden. In addition, ease of administration "is a wholly inadequate reason for retention of an unjust rule." Finally stare decisis blocks any attempt to abandon the historic rule of lex loci delicti; however, stare decisis creates only a rebuttable presumption in favor of an established law. "Stare decisis prevents change for the sake of change; it does not prevent any change at all." Modern transportation requires a law that recognizes its complex character; when a "time-worn rule" is no longer useful, it should be changed. *Id.*

its own, leaving out all other parts of the body of the decision. A more principled decision by the Florida court would have been more structurally sound.

The *Bishop* decision replaces the lex loci delicti doctrine in Florida with the significant relationship test of the SECOND RESTATEMENT, sections 6, 145, and 146. Taken together, those sections state the general principle that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. . ."[39] viewed in light of contacts with each state of each participant. Concerning the three sections, the court's only supplied emphasis in the decision was its accentuation of the following language from section 146: ". . . *the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship* . . .".[40]

It is unclear from the *Bishop* opinion whether the court wished to stress the first or the last clause of the emphasized portion. Both are given support in the opinion. If the court wished to stress the first clause, then its statement that "[t]he state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law,"[41] is most instructive. Yet the opposite is seen in the court's statement that "[o]ther factors may combine to outweigh the place of injury as a controlling consideration. . . ."[42] What one is left with, then, is this: the doctrine of lex loci delicti is no longer applicable in Florida; the most significant relationship test as presented in the SECOND RESTATEMENT is the norm, but the application of the most significant relationship test is unclear in its details.

The court supplied no guidelines by which to apply the new significant relationship test. The difficulty encountered by courts in applying this test has been recognized. As one commentator noted on the first abandonment of lex loci delicti in *Hopkins*,

> New York, the first state to adopt the new standard, has had some difficulty applying it to more complex fact situations. Fu-

39. SECOND RESTATEMENT § 145.

40. Bishop v. Florida Speciality Paint Co., 389 So.2d at 1001, citing SECOND RESTATEMENT (Emphasis supplied by court).

41. *Id.*

42. *Id.* at 1001.

> ture difficulty will stem not only from more complex fact situations but also from a lack of agreement among scholars as to the relevance of specific contacts, whether contacts should be weighed quantitatively or qualitatively, and as to which state's law should apply when the contacts are evenly balanced.[43]

There has been much criticism of the methodology of the SECOND RESTATEMENT'S position. Most of this criticism centers upon the inherent subjectivity of the approach on the one hand and the fear of a degeneration into mere contact counting on the other.[44] The Florida Supreme Court in *Bishop* addressed none of these problems, and the opinion seemed blithely unaware of the necessary uncertainties of using the significant relationship test.

It is worth speculating why the court decided to abandon lex loci delicti at this time, when in fact it could have retained the rule and still ended up with the same result. Petitioner in her brief states that she is not asking the court to abandon the lex loci delicti doctrine; instead she would have the court apply a public policy exception and have Florida refuse application of South Carolina law since its use would deprive a Florida citizen of access to the courts for redress of her injuries.[45] But even this exceptional approach, savoring of the untidy and the *ad hoc,* would have been unnecessary in *Bishop* due to the fact that the reason for the plaintiff's failure to state a cause of action, i.e., South Carolina's airplane guest statute, had already been impliedly overruled by South Carolina in *Ramey v. Ramey.*[46] That case was an equal protection attack on the South Carolina automobile guest statute. The South Carolina court found the statute to be unconstitutional under both the United States and South Carolina Constitutions. Of importance to *Bishop* is the fact that the auto guest statute invalidated in *Ramey* is identical to the airplane guest statute, with the word *motor vehicle* subsituted for *aircraft* being the only difference.[47]

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43. 19 UNIV. OF FLA. L. REV. 730, 733 (1967) (footnotes omitted).

44. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal,* 113 U. PA. L. REV. 1230 (1965).

45. Brief of Petitioner at 21-22.

46. 258 S.E.2d 883, 885-86 (S.C. 1979).

47. South Carolina Statute § 55-1-10 (1976), entitled "Liability of owners and operators generally to guests", stated:

> No person transported by the owner or operator of an aircraft as his guest without payment for such transportation shall have a cause of action for damages against such aircraft, its owner or operator for injury, death or loss in case of accident unless such accident shall have been intentional on the part of such owner or op-

The South Carolina Supreme Court noted the similarities of the two statutes in a footnote[48] which cited an Idaho case[49] overruling that state's aircraft guest statute. In this regard, then, *Wheeler v. State*[50] becomes instructive. There, the Florida Supreme Court noted that "[t]he decisional law in effect at the time appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial."[51] Consequently, the court could have held under lex loci delicti that the Bishops did indeed have a cause of action under South Carolina law for simple negligence. Lex loci delicti did not need to be overturned at all.

No matter how intuitive the *Bishop* decision may be, this much is clear: Florida has abandoned the lex loci delicti rule in tort cases and replaced it with the significant relationship test. While weak in its rationale, the *Bishop* decision is even weaker in its understanding of the intricacies of the new test and will be of little help in guiding Florida's lower courts in balancing significant contacts and relationships in any meaningful way. Much remains to be done in order to achieve a workable standard and avoid gross subjectivism. The future seems to promise that more cases will be litigated in Florida in an attempt to flesh out the details of this new test. True, the adoption of the SECOND RESTATEMENT'S test does invite consultation with a now large and quite sophisticated body of case law from other states as well as academic literature putting "flesh" on the all too rubbery skeleton of sections 145 and 146.[52] In the

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erator or caused by his heedlessness or his reckless disregard of the rights of others.

South Carolina Statute § 15-1-290 (1976), entitled "Liability for injury to guests in car", stated:

> No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

48. 258 S.E.2d at 885 n.5.

49. Messmer v. Ker, 524 P.2d 536 (Idaho 1974).

50. 344 So. 2d 244 (Fla. 1977).

51. *Id.* at 245.

52. *See*, for example, Schwartz v. Schwartz, 447 P.2d 254 (Ariz. 1968); First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973); Ingersoll v. Klein, 262 N.E.2d 593 (Ill. 1970); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Mellk v. Sarahson, 229 A.2d 625 (N.J. 1967); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Casey v. Manson Constr. and Eng'r Co., 428 P.2d 898 (Or. 1967); and Johnson v. Spider Staging Corp., 555 P.2d 997 (Wash. 1976).

meantime, the court's decision in *Bishop* voiding lex loci delicti and substituting the significant relationship test is reminiscent of the predicament of Lewis Carroll's Alice: "It sounded an excellent plan, no doubt, and very neatly and simply arranged; the only difficulty was, that she had not the smallest idea how to set about it."[53]

JERRY J. WAXMAN

Torts—WRONGFUL DEATH OF A MINOR CHILD—CONTRIBUTORY NEGLIGENCE OF DECEDENT SPOUSE DOES NOT BAR RECOVERY BY NON-NEGLIGENT SPOUSE IN THE WRONGFUL DEATH OF A MINOR CHILD, *Singletary v. National Railroad Passenger Corp.*, 376 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1979).

The plaintiff father in *Singletary v. National Railroad Passenger Corp.*[1] brought a wrongful death action when his wife and two minor children were killed in an accident at a railroad crossing in Avon Park. The accident occurred when a train owned by the defendant Amtrack collided with a vehicle operated by the wife of the plaintiff and occupied by their two children.[2] The wife and children died as a result of injuries sustained in the accident.[3] The plaintiff father brought the action on behalf of each of the decedents' estates and on his own behalf as survivor of each to recover damages for the alleged negligence of the railroad in causing the deaths.[4]

The jury found the railroad sixty-five percent negligent and Singletary's wife thirty-five percent negligent.[5] In entering the final judgment for awards for the wrongful deaths, the plaintiff argued that the court should only reduce the amounts awarded to the wife's estate and the husband as her survivor in proportion to the percentage of the wife's negligence, and that no reduction should be made in the amounts awarded to the father as survivor of the

53. Shapira, *"Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 251 (1977), citing L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND.

1. 376 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1979).
2. Brief for Appellant at 1.
3. 376 So. 2d at 1192.
4. Brief for Appellant at 1.
5. 376 So. 2d at 1192.