

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR  
HILLSBOROUGH COUNTY, FLORIDA  
CIVIL DIVISION

PLAINTIFF, AS PARENT AND GUARDIAN  
OF PLAINTIFF, a minor

Plaintiff,

vs.

CASE NO.: 06-008772  
DIVISION: J

THE DEFENDANT

Defendant.

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**PLAINTIFF MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE  
AFFIRMATIVE DEFENSE OR IN THE ALTERNATIVE MOTION FOR SUMMARY  
JUDGMENT**

The Defendant has recently amended its affirmative defenses to include the following:

The defendant affirmatively states the plaintiff violated N.C. Gen. Stat. 99-C-2 and is therefore responsible for all damages and injuries which resulted from the activities alleged in the Amended Complaint.

N.C.Gen. Stat. 99-C-2 states the following:

(b) A skier... shall have the following responsibilities:

(1) To know the range of his own abilities to negotiate any ski slope or trail and to ski within the limits of such ability;

(2) To maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and visible objects;

...

(4) To heed all posted information and other warnings and to refrain from acting in a manner which may cause or contribute to the injury of the skier or others;

The above affirmative defense should be stricken because it inappropriately attempts to hold a Florida minor plaintiff responsible for following North Carolina Law when:

The plaintiff and defendant are all Florida residents;

The relationship between the parties was centered in Florida;

Much of the conduct in poorly planning the trip occurred in Florida;

The trip was to begin and end in Florida; and

Much of the plaintiff's medical treatment from his injuries occurred in Florida.

### **FACTS**

At the time of the events in this case, Plaintiff was a 14 year old minor living in Tampa Florida with his mother the Plaintiff. The Defendant is a Florida corporation located in Tampa, Florida. In 2003 the Jones's were members of Defendant and The Defendant was a member of the Defendant's youth group.

Sometime before October of 2003 the Defendant, the Youth Pastor, began planning a ski trip to Ski Beech, North Carolina for the members of the youth group. The trip was to begin in Tampa, Florida with a bus ride to North Carolina on December 29, 2003 and end with a bus ride back to Tampa Florida from North Carolina on January 1, 2003. (Affidavit of The Plaintiff). The trip included one chaperone for approximately every 10 children. (Affidavit of The Plaintiff). Although the Defendant had never skied before, The Plaintiff signed her son up for the ski trip based on her belief that the children would be supervised on the ski mountain by the chaperones. (Affidavit of The Plaintiff).

As part of the planning process that occurred in Florida, The Defendant chartered buses to pick the group up at the church in Tampa on December 29, 2003, drive them to North Carolina for the trip and return them to Tampa after the trip. (Defendant depo p. 35). While in Tampa,

The defendant failed to identify the skiing abilities of the youth on the trip, failed to recommend ski lessons to novice skiers, failed to properly instruct the trip chaperones that they should supervise the novice skiers while on the mountain, and left The Plaintiff with the impression her son would be supervised by the chaperones while skiing.

After loading everyone on the buses in Tampa, they drove the remainder of the day and through the night, until they arrived at the hotel outside of Ski Beech, North Carolina the next morning. (The Defendant depo p. 37, 38). After checking into the hotel, the children were loaded back on the buses and driven to Ski Beech Mountain in time to ski starting at 11:30 am. (the Defendant depo p. 38).

The Defendant has testified he was not instructed on how to read the informational and directional signs on the mountain, was not assigned anyone to ski with, was not supervised by a chaperone, and was not offered a ski lesson. (Defendant Depo p. 8). After being provided with ski equipment he was simply let loose to his own devices on the ski mountain. (Defendant depo p. 12-15). After skiing for a couple of hours in the beginner area, The Defendant decided he was ready to try an intermediate slope. (The Defendant depo p. 12-15). He therefore got on a chairlift marked for intermediate ski runs. (The Defendant depo p. 15) Once at the top, he interpreted the ski mountain signs as indicating the ski run he was about to go down was intermediate. (The Defendant depo p. 15). Unfortunately, the run was actually an expert slope. (The Defendant depo p. 15)

Because The Defendant was not properly instructed on how to ski, was not provided with a lesson, and was not supervised on a slope he should have never been allowed to ski on, he began gathering too much speed and could not stop. He either fell or ran into another skier. His injuries from the trauma included burst fractures to the vertebra in his spine and damage to the

nerve that enervates his foot. (depo). Defendant chaperones did not even know THE DEFENDANT was injured until he did not show up for the bus trip back to the hotel at the end of the day. (The Defendant depo p. 52). He underwent spinal surgery in North Carolina and was transferred to Tampa General to complete his recovery about 8 days later. (The Defendant depo).

The Plaintiff filed this lawsuit in Tampa Florida on behalf of The Defendant alleging negligence in planning the ski trip and failing to properly supervise The Defendant on the trip. Defendant has alleged North Carolina law regarding responsibility of skiers should apply to this case. Plaintiff asserts that Florida Comparative negligence law should apply.

**THE LEGAL STANDARD TO BE USED TO DETERMINE WHICH STATES LAWS APPLY**

The legal standard to determine which states laws apply depends on whether or not a true conflict of laws exists. If a true conflict does not exist there is a false conflict and the law of the forum state should be applied. If a true conflict does exist then the substantial relationship test of the Restatement (Second) of Conflict of Laws is used to determine which states laws apply. In this case, a true conflict of laws does not exist. Because there is a false conflict, the laws of Florida as the forum state should apply. Even if a true conflict does exist, the substantial relationship test leads to the conclusion that Florida law applies.

**THIS CASE INVOLVES A FALSE CONFLICT**

As a threshold issue, the court must determine if a “true” conflict of laws exists between two states. *Tune v. Philip Morris Incorporated*, 766 So.2d 350, 352 (Fla. 2d DCA 2000). A true conflict is defined as one in which two states have conflicting interests. *Id.* A false conflict exists when:

- (1) The laws of different states are the same;

- (2) The laws of different states are different but would provide the same outcome under the facts of the case; or
- (3) When the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by the application of its laws.

*Id.* Citing *Greaves v. State Farm Ins. Co.*, 984 F.Supp. 12, 14 (D.D.C.1997), *aff'd*, 172 F.3d 919 (D.C.Cir.1998).

In this case like in *Tune* the third type of false conflict exists. The Policies of one state (Florida) would be furthered by the application of its laws while the policies of the other state (North Carolina) would not be advanced by the application of its laws. The facts and reasoning of *Tune* apply to this case.

In *Tune*, the plaintiff smoked heavily for years in New Jersey then moved to Florida. *Id.* at 351. While in Florida, the plaintiff continued to smoke and was diagnosed with lung cancer. *Id.* at 352. He received much of his treatment related to the injury in Florida. *Id.* He sued Philip Morris in Florida. *Id.* Philip Morris asserted that New Jersey's statute of limitations law, which barred the claim and New Jersey's Product liability law, which eliminated the plaintiff's cause of action if the plaintiff new of the dangers of smoking, should be applied. *Id.* Florida had no such limitations. In concluding that a false conflict existed, the *Tune* court reasoned that:

New Jersey would appear to have no interest in advancing the policies expressed in its shorter statute of limitations or its more restrictive product liability law. No New Jersey retailer, resident, or other defendant is involved in this suit or would appear to have any plausible risk of being held responsible for the claims made in this lawsuit....Simply put, New Jersey has little or no stake in this case; it has nothing to gain or lose through this lawsuit. There is no reason why a Florida court should feel constrained to obey New Jersey laws that would limit or restrict this Florida citizen's access to a Florida court or to the remedies that a Florida court would otherwise provide.

Similarly, North Carolina would appear to have no interest in advancing the policies expressed in its more restrictive comparative negligence law. No North Carolina defendant is involved in this suit or would appear to have any plausible risk of being held responsible for the claims made in this lawsuit. North Carolina has little or no stake in this case. It has nothing to gain or lose through this lawsuit. All of the parties are from Florida, the relationship between the parties is centered in Florida, much of the defendants conduct in poorly planning the trip occurred in Florida, the trip was to begin and end in Florida, and The Defendant had much of his medical treatment related to the injury in Florida. There is no reason why a Florida court should feel constrained to obey North Carolina laws that would limit or restrict this Florida citizen's access to Florida court or to the remedies that a Florida court would otherwise provide.

THE SUBSTANTIAL RELATIONSHIP TEST OF THE RESTATEMENT (SECOND) OF CONFLICTS OF LAWS TEST DEMONSTRATES FLORIDA LAW SHOULD APPLY

As described above, a false conflict of laws exists and Florida law applies. However, even if a conflict of laws analysis occurs, Florida law still applies.

Before 1980 Florida applied the law of the state where the accident occurred to all conflict of laws issues in personal injury lawsuits brought in Florida. In *Bishop v. Florida Specialty Paint Company*, 389 So.2d 999 (Fla. 1980), the Florida Supreme court recognized the harshness of this rule and therefore adopted the substantial relationship test outlined in sections 145, 6, and 146 of the Restatement (Second) of Conflicts of Laws for all tort cases.

**SECTION 145 FACTORS DEMONSTRATE FLORIDA LAW SHOULD APPLY**

Section 145 states:

- (1) The 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 under the principles stated in section 6.

- (2) Contacts to be taken into account in applying the principles of section 6
  - (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 was centered.

In this case the only contact above that occurred completely in North Carolina was the place of injury. Of the other three contacts, one occurred both in North Carolina and Florida while the other two occurred solely in Florida. For example, the place where the conduct causing injury occurred was both North Carolina and Florida because the failure to supervise The Defendant on the slopes occurred in North Carolina while the failure to properly plan the trip occurred in Florida. Even more importantly, the domicile of all the parties is Florida and the place the relationship was centered is Florida. As the Second District stated in *Tune*, “if anything, the Florida court has greater reason to apply its own substantive tort law to protect its citizens....”. *Tune* at 355.

#### SECTION 6 FACTORS DEMONSTRATE FLORIDA LAW SHOULD APPLY

Section 6 lists the following factors as important choice of law considerations in all areas of law:

- (a) the needs of the interstate and international systems;
- (b) the relevant policies of the forum;
- (c) the relevant policies of the 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.

*Id.*

With regard to part (a), applying Florida law would not interfere with the needs of the interstate and international systems because all the parties are Florida citizens. See ex. *Beatty v. College Centre of Finger Lakes Inc.* 613 So.2d 52, 53 (Fla. 4<sup>th</sup> DCA 1992)(concluding all the parties were American citizens with expectations of being protected by American laws as opposed to Bahamian laws where the injury occurred); *Harris v. Berkowitz* 433 So.2d 613, 615 (Fla. 3<sup>rd</sup> DCA 1983)(when all parties are permanent residents of Florida, it is impossible to ascertain any policy Maine may have in limiting the parties' rights which would outweigh Florida's interest). Just like the courts description in the *Harris* case of a lack of interest of the state of Maine, in this case, applying North Carolina's laws when all parties are Florida citizens would interfere with the needs of the interstate system because it would infringe on Florida's rights to protect its citizens.

With regard to (b), the forum state is Florida. The relevant policy of Florida is to ensure that its comparative negligence laws are applied to its citizens when all parties are Florida citizens, the relationship of the parties is centered in Florida, much of the conduct causing injury occurred in Florida, the trip was to begin and end in Florida, and The Defendant had much of his medical treatment from his injuries in Florida.

With regard to (c), the defendants are claiming based on their desire to apply North Carolina law that North Carolina potentially has an interest in applying its policies to this case. However, the fact that no North Carolina citizen was involved in the alleged negligence demonstrates that North Carolina really has no interest. See ex. *Mezrub v. Capella*, 702 So.2d

562, 566 (Fla. 2<sup>nd</sup> DCA 1997)(concluding that Georgia can fulfill its interest in enforcement of its traffic regulations in its own traffic courts instead of in Florida courts in disputes between Florida citizens). The courts description of the lack of interest of Georgia in the *Mezrub* case is directly on point in this case with regard to North Carolina skiing regulation laws. North Carolina can fulfill its interest in the enforcement of its skiing regulations in its own courts. See also, *Crowell v. Clay Hyder Trucking Lines*, 700 So.2d 120,124 (Fla. 2<sup>nd</sup> DCA 1997)(Concluding Georgia has no interest in limiting the vicarious liability of a defendant who is not a Georgia citizen). Like *Crowell's* description of Georgia's lack of interest in that case, North Carolina has no interest in this case in limiting direct liability of a defendant who is not a North Carolina citizen.

With regard to (d), a party to a tort action does not have a justified expectation that a particular states laws would apply because torts involve an unexpected occurrence. *Beattey* at 54. Therefore, the defendant could not have had a justified expectation that North Carolina law would apply. To the extent that any expectation of the parties existed it would appear the expectation would be that Florida law applies because the parties are Florida residents, their relationship was centered in Florida, and the trip was to begin and end in Florida. Certainly The Defendant, a minor living in Florida, could have no way of knowing the substance of North Carolina law let alone the fact it would apply to him.

With regard to (e), the particular field of law is comparative negligence law. The policy behind Florida's general comparative negligence law is to compensate the plaintiff to the extent he was not responsible for his injuries. The public policy of North Carolina's skiing regulation is to limit a plaintiff's recovery if engaged in conduct described in the statute. Generally, the jurisdiction most interested in the application of its comparative negligence laws is the state in

which the defendants are located. *Beattey* at 54; citing *Wal-Mart Stores, v. Budget Rent-A-Car*, 567 So.2d 918, 921 (Fla. 1<sup>st</sup> DCA 1990); citing *In re Air Crash Disaster at Washington D.C.*, 559 F.Supp. 333, 352 (D.D.C. 1983) *aff'd*, 886 F12d 1521, 1524 (D.C.Cir. 1989). Once again that state is Florida.

With regard to (f), there is certainty, predictability, and uniformity of result in applying the forum states laws when the plaintiff and defendant are residents of the forum state. Similarly, with regard to (g) there is also ease in the determination and application of the law to be applied.

#### SECTION 146 FACTORS DEMONSTRATE THE LAW OF FLORIDA SHOULD APPLY

Section 146 states:

In an action for a personal injury, 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 under the principles stated in section 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Defendant may try to suggest that section 146 demands that the state where the injury occurred controls. However, in *Bishop*, the Florida Supreme court adopted the Restatement (Second) of Conflict of Laws to ensure that courts **do not** enforce a strict requirement of using the law of the place where the injury occurred. In fact Florida courts have gone out of their way to make sure it is clear that the presumption of using the law of the place of injury disappears in circumstances like this case where the parties are all from Florida, the relationship is centered in Florida, much of the conduct causing injury occurred in Florida, the trip was to begin and end in Florida, and The Defendant received much of his medical care treatment from his injuries in Florida. See ex. *McNeil v. CSX Transportation*, 832 So.2d 227 (Fla. 2<sup>nd</sup> DCA 2002)(holding that Florida statute of limitations applies to train accident occurring in South Carolina when both parties are from

Florida, trip began and ended in Florida, and relationship between parties was centered in Florida); *Crowell* supra (holding Florida vicarious liability law applies to Florida parties involved in an auto accident in Georgia); *Mezrub* supra (holding Florida statute of limitations law applies to Florida parties involved in a car accident in Georgia); *Stallworth v. Hospitality Rentals*, 515 So.2d 413 (Fla. 1<sup>st</sup> DCA 1987)(holding Florida vicarious liability law applied to Florida parties involved in auto accident in Louisiana); *Krasnosky v. Meredith*, 447 So.2d 232 (Fla. 1<sup>st</sup> DCA 1983)(holding that Florida Guest law applied to Florida residents involved in auto accident in Georgia); *Harris* supra (holding Florida wrongful death statute applies to Florida residents involved in auto accident in Maine); and *Proprietors Insurance Company v. Valsecchi*, 435 So.2d 290 (Fla. 3<sup>rd</sup> DCA 1983)(holding Florida dangerous instrumentality law applied to airplane crash in North Carolina involving Florida residents).

In *Crowell*, the Second District pointed out that “in personal injury actions the law of the state where the injury occurred applies only when there is no other state with a more significant relationship. *Crowell* at 123. As describe above Florida clearly has a more significant relationship than the place where the injury occurred. In *Tune*, the Second District was clear to point out that “the court must determine which state or states have a true interest in the application of their law, by examining the various factual contacts in light of the rather malleable principles set forth in section 6”. *Tune* at 354. If only one state is interested in the tort issue, the court should apply the law of that state”. *Id.* As describe above, only Florida has an interest in the tort issue in this case. Therefore the court should apply the law of Florida.

### **CONCLUSION**

There is no conflict of laws in this case because Florida is the only state with a policy interest in applying its laws to its citizens. To the extent a court concludes that a conflict of laws exists, the

significant relationship test of the Restatement (Second) of conflict of Laws demonstrates that Florida law should apply. Therefore, N.C.Gen. Stat. 99-C-2, a law of the state of North Carolina should not apply to this case involving only Florida citizens.