ISSN 1936-5349 (print)
ISSN 1936-5357 (online)

HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS

LAW MATTERS—LESS THAN WE THOUGHT

Daniel Klerman
Holger Spamann

Discussion Paper No. 1015
Revision

01/2021

Harvard Law School
Cambridge, MA 02138

Law Matters – Less Than We Thought

Daniel Klerman[♠] **Holger Spamann**[♣]

Abstract: In a pre-registered 2×2×2 factorial between-subject randomized lab experiment with 61 federal judges, we test if the law influences judicial decisions, if it does so more under a rule than under a standard, and how its influence compares to that of legally irrelevant sympathies. The judges were given realistic materials and a relatively long period of time (50 minutes) to decide a run-of-the-mill auto accident case. We find weak evidence that the law matters, stronger evidence that rules constrain more than standards, and no evidence of a sympathy effect. Unexpectedly, we find that many judges opted for full compensation even when the law would seem to require a cap on damages.

January 4, 2021

[♠] Edward G Lewis Professor of Law and History, University of Southern California Gould School of Law. dklerman@law.usc.edu.

[♣] Lawrence R. Grove Professor of law, Harvard Law School. hspamann@law.harvard.edu.

We thank Scott Altman, Oren Bar-Gill, Iavor Bojinov, Nancy Gertner, Dan Kahan, Chris Robertson, Dan Simon, Alex Stremitzer, Symeon Symeonides, and participants in the Bolch Judicial Institute (Duke), Peking University Law School faculty workshop, Hong Kong University law and economics seminar, and at CELS 2018 (University of Michigan), ALEA 2019 (NYU), and QuantLaw 2020 (University of Arizona) for their advice and suggestions, Brooke Stanley and Colby Wilkinson for outstanding research assistance, John Goldberg and Denise Neary for facilitating the conduct of the experiment at the FJC/HLS Seminar, and especially the participating judges for their time. This research was approved by Harvard University's Committee on the Use of Human Subjects (#17-0428), and pre-registered on aspredicted.org (#3686). All data and code of this paper are available at https://doi.org/10.7910/DVN/KXXA5C.

1 Introduction

The extent to which legal rules bind judges, and, conversely, the extent to which judges can and do make decisions based on their preferences, ideology, and/or biases, has been vigorously debated in academia since at least the legal realists (e.g., Kantorowicz 1906; Frank 1930; Llewellyn 1940) and regularly features in popular discussions of the judiciary, particularly around judicial appointments. While judicial decisions exhibit regularity and claim to be based on authoritative legal sources and principles, the extent to which these authorities matter and induce that regularity is very much an open question. To date, however, much of this debate has remained anecdotal, based primarily on unsystematic observation of published judicial decisions. To the extent the literature has been systematically empirical, it has been divided into two main strands.[1] One strand analyzes published decisions to detect correlations with judges' political preferences (e.g., Segal and Spaeth 2002). Another strand performs vignette experiments with judges to investigate if judges are subject to standard psychological and/or ideological biases (e.g., Wistrich et al. 2014; Kahan et al. 2015). That is, the empirical literature on judicial decision-making to date has been focused on the effects of *non-law*. The only experiment with judicial subjects that directly tested the effect of *law* found no effect (Spamann and Klöhn 2016). Nevertheless, the legal variation in Spamann and Klöhn (2016) (a precedent) was mild, and the experimental setting (international law) was unfamiliar to most of the participants (U.S. federal judges). What if the legal variation were more powerful and the subject matter more familiar? In addition, to the extent the law does have an effect, does it matter whether it is framed as a rule or a standard (see Kaplow 1992; Schauer 2009)? Finally, even if there is a law effect, is it stronger than other effects that should be legally irrelevant?

In this paper, we present the results of a pre-registered experiment that suggests a tentative "yes" to all three questions. We find evidence, albeit weak, that the law matters, stronger evidence that rules constrain more than standards, and no evidence that the pre-registered non-legal factor we tested for (sympathy) matters. On the other hand, the effect of the law is far from determinative even under a clear rule, and judges appear to be influenced by a preference for full compensation, a non-legal consideration we did not anticipate in our pre-registration. At the outset, we emphasize that, like any experiment, ours can only make statements about effect sizes for the particular variations we study. For example, there might be other legal rules and fact patterns that induce a stronger law effect. That said, we believe that our legal variation is quite powerful, so our finding of a muted law effect is revealing and perhaps concerning.

We conducted a pre-registered 2×2×2 factorial between-subject randomized lab experiment in which 61 federal judges decided a run-of-the-mill auto accident case. The judges had (first recruitment wave, *N*=39) or were advised to spend (second recruitment wave, *N*=22) up to 50 minutes on the task. Judges were given realistic materials, including opposing legal briefs and the full text of all cases, statutes and other sources cited in the briefs. Fifty minutes is much longer, and the materials are much fuller, than comparable vignette experiments, which makes the experiment more realistic.

We randomized the location (U.S. state) of the accident, the forum (U.S. state) of the litigation, and sympathy (legally irrelevant characteristics of the plaintiff and defendant that make one more appealing than the other); we performed no other, unreported manipulations. In the pre-registered interpretation

[1] For an excellent recent survey, see Rachlinski and Wistrich (2017). For a more extensive discussion of the literature's relation to this paper's basic experimental design, see Spamann and Klöhn (2016)

of our experimental treatments, the accident location treatment varies legally relevant facts (and thus allows us to measure the law effect), the forum treatment varies the law from rule to standard, and the sympathy treatment is legally irrelevant. In this interpretation, we find that the law effect is significantly stronger under the rule than the standard. Varying the location of the accident has virtually no effect under the standard, but even the very clear rule is not followed 23% of the time. This pre-registered interpretation is valid only if judges do not have choice-of-law preferences. If they have such preferences (e.g. if they prefer the *lex loci delici* rule to the Restatement 2nd standard), only the interaction of accident location and forum identifies a law effect (which we find, albeit of small magnitude), and we cannot test whether judges are more likely to follow the law under a rule or standard.

We find no evidence for a sympathy effect. Judges were no more likely to cap damages when the defendant was a caring paramedic than when he was a racist and convicted criminal (see Table 2 below for a full list of the differences between the two defendant/plaintiff pairs).

Nevertheless, in a test that we did not pre-register—and that should therefore be considered exploratory—, we find that judges were much more likely to choose the law that fully compensates injured plaintiffs. That is, our judges' decisions did not favor the more sympathetic party but rather favored a particular legal rule (full compensation). This suggests the hypothesis that they acted out of preference for that policy. At the same time, the fact that judges were not influenced by legally irrelevant characteristics of the parties provides some evidence that judicial training, selection, or norms induces judges to act in ways consistent with the idea that justice should be "blind" and treat all persons equally. That said, we repeat the caveats that the full compensation preference finding is post hoc, that we only tested "blindness" to one particular set of legally irrelevant characteristics, and that we would not have been able to detect small effects (See section 2.6).

The key strengths of our design are its relatively high degree of realism and our manipulation of forum and accident location to induce legal variation. The latter overcomes potential problems with other ways of inducing legal variation. For example, the use of openly fictitious law would undermine the realism rationale that motivated us to employ real judges as our experimental subjects. Another alternative approach, the use of international law (as in Spamann and Klöhn (2016)), may not lead to accurate measurements of law following because American judges may not be familiar with international law or may not view it as "real" law. Finally, judges, as legal experts, might see through attempts by experimenters to manipulate the law by making legal assertions that judges may suspect or know to be false. By randomizing the forum and accident location, we can vary the "correct" legal result while still giving judges accurate legal materials in a familiar domestic context. Even though judges in our experiment are asked to decide the case under the law of states that they are not likely to be familiar with – Wyoming, South Dakota, Kansas, and Nebraska – that is not an unusual task for federal judges, who are often required as part of their diversity jurisdiction to decide cases under the law of various U.S. states.[2]

A relatively high degree of realism is important because judges are highly trained, experienced, and selected individuals who operate in a uniquely structured and solemn environment with strong professional norms about judicial neutrality and adherence to the law. In particular, judges are especially trained, selected, and expected to discern legal commands from complex legal materials, and to ignore

[2] Even if federal judges knew the state law of the states within their jurisdiction, only one of the eligible seminar participants in 2017 and 2018 sits in a court whose jurisdiction encompasses one of the four states (WY, SD, KS, NE) featured in our experiment.

non-legal factors. At the same time, judges could also use their command of legal arguments to evade what to a layperson might appear to be a clear legal rule (Kennedy 1998).[3] Indeed, the interesting question is not whether judges formally follow the law in the sense of citing legal sources to support their decisions (they do). Rather, the question is whether the overabundance of plausible legal arguments from statutes, precedents, regulations, and general principles allows the judge to reach whatever decision he or she wants while formally paying homage to the law. To capture this crucial aspect of judicial decision-making requires embedding the experimental task in rich facts and legal materials and giving judges sufficient time to weigh the facts and legal arguments. Alternatively, it may be precisely the legal materials and the parties' prompts in the briefs that trigger the judges' professional norms of rule-following and impartiality. Similarly, ample time may be necessary for judges to "think slow," distinguish weak from strong legal arguments, and set aside their prejudices and sympathies.

Whether the realistic features of our experiment – active federal judges, full briefs, access to cases and other legal materials, and ample time – increase or decrease law following, they enhance the experiment's external validity. Future experiments may show that a valid experimental design can abstract from some or all of these features of our experiment because judges behave identically in the more abstract environment, because judges are not different from lay people, or because time does not affect this kind of decisionmaking. Or psychology may advance to a point where we can decompose judicial behavior into various building blocks from general psychology. For the time being, however, we have to treat judicial decision-making largely as a black box, so it is helpful for experimental purposes to recreate a realistic decision-making context.

Of course, while we think our design has many advantages, no experiment is perfect. In particular, our judges knew the case was fictitious, and the anonymity of the experiment is the exact opposite of the transparency that is a hallmark of most actual judicial decisions. These will be inevitable features of any experiment with judges unless a court authorizes randomization in the field, which is unlikely. Paying judges for effort or performance in the experiment would not compensate for these weaknesses but only make matters worse: financial incentives are *not* realistic for judges. We are less concerned about the fact that some judges were not familiar with this type of case because even in the real world, some judges will have to face similar issues without prior experience. And, of course, the usual experimental caveat applies: until others replicate our findings using different legal and factual scenarios, we cannot be sure whether our results are specific to features of our hypothetical case or generalize to judicial decisionmaking more broadly.

The rest of this paper is structured as follows. Section 2 describes our experimental design, including an explanation of special features that gave us sufficient power even with only 61 observations. Section 3 reports the results. Section 4 concludes. Our invitations and other pre-session materials for participants are reproduced in Appendices 1-4, our main experimental materials in Appendices 5-7, our exit survey in Appendix 8, our pre-registration statement in Appendix 9, and the judges' written reasons in Appendix 10. A complete set of our experimental materials, data, randomization code, and analysis code is available at https://doi.org/10.7910/DVN/KXXA5C.

[3] *Cf.* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, available at https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html (https://perma.cc/2NP4-B6JM) (quoting Judge Posner: "When you have a Supreme Court case or something similar, they're often extremely easy to get around.").

2 Design

2.1 Setting and Subjects

We conducted the experiment at (2017) or in connection with (2018) the annual three-day Law & Society Program organized jointly by the Federal Judicial Conference (FJC) and Harvard Law School (HLS). The Program involves lectures by Harvard faculty and is open to all judges of the federal judiciary, subject to space constraints. Participants at the workshop and thus in the experiment included circuit, district, bankruptcy, and magistrate judges, and one judge from the Court of Federal Claims, whom we grouped with magistrate judges in our analysis to preserve anonymity. Spamann and Klöhn (2016) conducted their experiment in 2015 at the same program.

As pre-registered, we collected data at the 2017 and 2018 editions of the Program. Our pre-registration had stipulated repetition of the data collection at the 2018 edition or a similar seminar if we obtained fewer than 40 participations in 2017 (we obtained 39).

In 2017, we conducted the experiment in the classroom as part of a session on "Theories and Empirics of Judicial Decision-Making" offered by one of us (Spamann). Two weeks before the event, the judges received a letter from Spamann through the FJC informing them that 50 minutes of the session would be dedicated to an "experimental study of judicial decision-making," and inviting them to participate (Appendix 1). Four registered judges had participated in the Spamann and Klöhn (2016) experiment or a presentation of its results. To minimize the possibility of contamination, we sent the email reproduced as Appendix 2 to these four judges in advance of the session asking them not to talk to other Program participants ahead of the session. We also asked about prior participation in the exit survey and excluded the two judges indicating prior participation in robustness checks, without influence on our results.[4] Shortly before the beginning of the session, we distributed the paper materials according to our randomization scheme (See section 2.4 below). When the judges arrived for the class, Spamann read opening remarks (Appendix 3) that invited them to participate in the study by perusing the paper materials placed on their desks. Of the 43 registered participants, all but 4 accepted the invitation.

In 2018, the FJC asked us to conduct the experiment remotely in advance of the session in order to preserve classroom time. The FJC gave us the mailing addresses of anticipated participants four weeks before the program. We mailed each judge a cover letter inviting them to participate in a "study" in preparation for the session on "Empirical Studies of Judicial Decision-Making in the U.S. and Abroad" (Appendix 4). Along with the invitation, we sent a packet of materials, with treatments assigned according to the randomization scheme described below (See section 2.4). The cover letter and instructions informed judges that they could submit their answers either online at their convenience or on paper at the start of the program, and asked them to "spend no more than 50 minutes on this task." A little more than half the judges to whom materials were sent participated in the study (See section 2.4). Although the procedure for the 2018 session was different from that in 2017, it was not inconsistent with our pre-registration, because the pre-registration, which was written before we knew what the FJC or another

[4] There are several possible reasons why only two experiment participants indicated prior participation even though four registered Program participants had participated in the prior experiment or its presentation. The most likely reason is that at least two of the registered judges who received the letter mentioned in the previous sentence of the main text ultimately did not attend the Program, or attended but refrained from participating in the experiment.

organizer of a possible second round would permit, by necessity did not specify any particular collection method.

The first document the potential participants saw in 2017 was the consent form. In 2018, participants first saw the cover letter (described above) and then the consent form. The next document was the instructions, followed by the parties' briefs and a decision form. In addition, participants received a binder with all the legal sources cited in the briefs, including cases, statutes, and secondary materials. These materials are described in greater depth in section 2.2 below. In 2017, we distributed the exit survey (Appendix 8) to participants only after they returned the main study materials including the decision form, and we linked the decision form and the exit survey by noting a number on both forms when receiving one and handing out the other. In 2018, the exit survey was on the back of the decision form.

We pool the data from both years because participants from both years applied the correct law in virtually identical proportions and applied the damage cap in statistically indistinguishable proportions. In addition, we have no a priori reason to think that judges in different years were different from one another in relevant respects. On average, the 2018 participants were presumably either more motivated to participate or were less busy because they had to do the task in their spare time, but we have no reason to think this characteristic is related in any way to our treatments or to judicial decisions. In any event, we account for the separate randomization (see section 2.4) in our randomization tests (see section 3.2 and 3.3), and the inclusion of year dummies does not affect our regression results (see section 3.4).

2.2 The Case and Experimental Instructions

All participants were given facts relating to the same fictitious tort damages case and decided the same legal question – which state's substantive law should apply. If Kansas law applied, non-economic damages were capped at $250,000. If Nebraska law applied, non-economic damages were not capped, and the defendant was liable for the full $750,000 of non-economic damages, about half of which was not covered by his insurance.

Plaintiff Beatrice Parker and defendant Gary Rogers were friends. Parker was severely injured in a car accident in which Rogers was driving and Parker was a passenger in his car. Depending on the treatment, Rogers and Parker either met and lived in Nebraska and the accident occurred in Kansas, or vice versa. Because the parties did not live where the accident took place, there was a choice-of-law question: whether Kansas or Nebraska law should apply (See section 2.3 for more details).

As discussed further below, judges were assigned randomly to one of two fora – Wyoming or South Dakota – in order to vary the applicable choice-of-law principle, the traditional *lex loci delicti* rule in Wyoming or the modern Restatement 2nd standard in South Dakota. The instructions (Appendix 5) asked participants to:

> imagine you are sitting by designation in the District of [Wyoming / South Dakota]. One of the judges in the District of [Wyoming / South Dakota], Judge Frederick Simmons, had a stroke and is on disability leave. You have been assigned his cases. One of Judge Simmons's cases is *Parker v. Rogers*. Judge Simmons held a bench trial in that case and drafted Findings of Fact and Conclusions of Law. Damages, however, depended on whether Kansas's statutory cap on non-economic damages applied. Judge Simmons, therefore, ordered both parties to brief whether Kansas or Nebraska law should apply.

> Unlike Kansas, Nebraska does not cap non-economic damages. Judge Simmons asked both parties to submit their briefs simultaneously, without response or reply.

Participants were instructed to spend no more than 50 minutes on the task. The decision form asked them to indicate the "law that should apply," and provided several lines for "Reasoning." More details about the case and the legal question involved can be found in Judge Simmons's Findings of Fact and Conclusions of Law, which are reproduced in Appendix 6.

In addition to Judge Simmons's Findings of Fact and Conclusions of Law, the main materials furnished to participants were the two briefs that Judge Simmons requested and a binder of all the legal sources cited in the briefs. All materials were distributed in paper form because we thought that better reflected how most judges usually work, improving in this respect on Spamann and Klöhn (2016). We wrote the briefs ourselves. Each brief is about 3 pages long, with half of the first page consisting of the caption. The binder contains every legal source referenced in the briefs, including sources that the judges would be very unlikely to consult because their content is obvious or tangential. We produced a separate binder for each forum (Wyoming or South Dakota), adding filler pages to the South Dakota binder to make the two binders equal in thickness (about an inch). Each binder contained a table of contents and tabs for ease of access to the materials. The briefs also differed by forum because the legal argument was different, see section 2.3 below, but were otherwise identical for each treatment except that the arguments of plaintiff and defendant were swapped depending on where the accident took place and whose interest it was to argue for application of the law of the place of the accident. One half-sentence mentioning the circumstances of the accident when the defendant was not sympathetic also differed by treatment (see section 2.3 below). Sample briefs from one experimental condition can be found in Appendix 7; briefs for all conditions are available at https://doi.org/10.7910/DVN/KXXA5C.

2.3 Treatments

Our 2×2×2 factorial design cross-randomizes three treatment factors with two levels[5] each: (1) the forum (the state where the case is litigated), (2) the accident location, and (3) the sympathetic party (plaintiff or defendant). We first describe the three factors and then explain how to interpret them as identifying our causal effects of interest; we offer an alternative interpretation in section 3.3.

By way of background, applicable substantive law in our experimental scenario (Kansas law capping damages or Nebraska law providing full compensation) depends on choice-of-law principles. Each state chooses its choice-of-law principles (see next paragraph), and a federal court is required to apply the choice-of-law principles of the state where it is located.[6] Depending on applicable choice of law, a court in one state (e.g. Wyoming) may be required to apply the substantive law of another state (e.g. Kansas). In general, which state's substantive law applies depends on factors such as where the accident occurred and where the parties reside.

[5] The term "levels" here does not imply that one alternative (e.g. Wyoming or South Dakota) is higher or lower than another, but is just a way of referring to an element in the set of alternatives, where a treatment factor is a set of alternatives. See Mead et al. (2012), section 3.2.

[6] *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). This issue was clearly set out in the first sentences of both the plaintiff's and defendant's briefs. See Appendix 7. The judges do not seem to have been confused on this point. They understood which choice-of-law principles they were supposed to apply, but applied them differently than we expected. See Appendix 10.

To begin with **treatment factor 1 (forum)**, Parker sues Rogers in the state where Rogers moved after the accident, which is either Wyoming (level WY) or South Dakota (level SD).[7] Wyoming employs a choice-of-law *rule* to determine the applicable law in tort cases, the so-called *lex loci delicti* rule.[8] Under this rule, judges are instructed to apply the law of the state where the accident occurred. By contrast, South Dakota employs a choice-of-law *standard*, the "most significant relationship" standard of the Restatement (Second) of Conflict of Laws.[9] When both parties reside in the same state, South Dakota case law and the official commentary to the Restatement instruct judges to choose the law of the place where both parties reside, even if the accident occurred elsewhere.

While any rule or standard has exceptions, and the party disadvantaged by the rule or standard will always argue for these exceptions, none is plausible in our case, even under South Dakota's Restatement 2nd standard. In particular, application of the law of the state of the parties' "common domicile" to traffic accidents is the most widely accepted situation in which the Restatement 2nd and other modern choice of law approaches differ from older methods. Every American jurisdiction that has abandoned the traditional lex loci rule applies the law of the state where both parties reside, not the law of the state where the accident occurred, when—as in our case—the legal issue involves "loss distribution" (e.g. damages) rather than "conduct regulation" (e.g. rules of the road) (Symeonides 2006). The common domicile choice is one of the leading examples in the Restatement 2nd's official commentary, probably its most celebrated deviation from the first Restatement, and clearly acknowledged in South Dakota case law. That is, one might say that in South Dakota's application of the Restatement 2nd's standard, "common domicile" has morphed into a rule (See Kaplow 1992), even while the Restatement 2nd's open-ended language offers more wiggle room for a judge inclined not to follow it.

As to **treatment factor 2 (accident location / common domicile)**, Parker and Rogers either met and lived in Kansas but had the accident in Nebraska (level NE), or, in the other level of the factor, place of accident and residence are reversed (level KS). The location of the accident and parties' domicile determines applicable law, although how it does so depends on the relevant choice-of-law principle, which, in turn, as explained above, is determined by the forum (factor 1). For example, if suit was in Wyoming, then Kansas's damage cap should apply if and only if the accident was in Kansas, because Wyoming's choice-of-law principle (*lex loci delicti*) instructs judges to apply the substantive law of the place where the accident occurred. Conversely, if suit was in South Dakota, then Kansas's damage cap should apply if and only if parties resided in Kansas (and thus if the accident was in Nebraska), because South Dakota's Supreme Court has chosen the Restatement 2nd approach to choice of law, which instructs judges to apply the substantive law of the state of common domicile.

[7] Under well-established jurisdictional law, it is always permissible for the plaintiff to sue the defendant in the state where the defendant resides at the time of the lawsuit. That will often be a poor strategic choice for the plaintiff, as that state may be biased in favor of its own residents. Nevertheless, in reality, judges seldom second-guess plaintiff's choice of forum, and, in response to our question about whether the materials were realistic, an overwhelming majority of participating judges answered "yes" (see Section 2.5), and none mentioned suit in the defendant's residence as an unrealistic feature.

[8] *Ball v. Ball*, 269 P.2d 302, 304 (Wyo. 1954); *Duke v. Housen*, 589 P.2d 334, 342 (Wyo. 1979); *Archuleta v. Valencia*, 871 P.2d 198, 200 (Wyo. 1994); *Boutelle v. Boutelle*, 2014 WY 147, ¶ 12, 337 P.3d 1148, 1153 (Wyo. 2014).

[9] *Andrews v. Ridco, Inc.*, 863 N.W.2d 540, 554 (S.D. 2015); *Chambers v. Dakotah Charter*, 488 N.W.2d 63, 67 (S.D. 1992). The Restatements for this and other areas of law purport to summarize the law prevailing in most American states and are compiled by the American Law Institute.

The legal implications of forum (factor 1) and accident location / common domicile (factor 2) are summarized in the table below:

Table 1. Legal Implications of Treatment Factors 1 & 2 (Forum & Accident Location / Domicile)

		Factor 2 Accident location / common domicile	
		Accident in NE / Common Domicile in KS	Accident in KS / Common Domicile in NE
Factor 1 Forum (place of adjudication)	WY (Traditional, place-of-accident rule)	NE law applies (→ **no cap**)	KS law applies (→ **cap** on damages)
	SD (Restatement 2nd, common-domicile standard)	KS law applies (→ **cap** on damages)	NE law applies (→ **no cap**)

As to **treatment factor 3 (sympathy)**, we make either the plaintiff (P) or the defendant (D) sympathetic, and the other unsympathetic or at least much less sympathetic. To make this manipulation strong without containing anything so drastic as to tip our hand to participants (which mostly succeeded, see Section 2.5), we bundle multiple small to medium factual differences. It is not necessary for our design that all individual differences contribute to the sympathy manipulation, nor is it necessary that levels P and D are exactly symmetric. All that is required is that the differences collectively amount to making the plaintiff relatively more sympathetic in level P than in level D. Table 2 summarizes the differences between the two sympathy levels. The most important differences are that the unsympathetic party gets into an argument with the manager of the rental car agency and uses a racial slur, and that the sympathetic party is a nurse or paramedic whereas the unsympathetic party is a real estate agent or a convicted drug dealer recently released from prison.[10] These and other tidbits of information are interspersed in the case facts in a way that we believe to be realistic and non-intrusive. In particular, the racial slur finds its way into the case facts because it triggers a delay in the pair's travel plans that plays a role in the accident, and the conviction and recent release from prison is mentioned to explain why the other party offered her car.

Table 2. The Sympathy Treatment Factor

	Level D (Sympathetic Defendant & Unsympathetic Plaintiff)	**Level P (Sympathetic Plaintiff & Unsympathetic Defendant)**
Defendant is	Paramedic	Convicted drug dealer, recently released from prison
Defendant inherited	Small house	Large estate
Defendant moves	To take care of ailing aunt	To be a bouncer in cousin's bar
Plaintiff is	Real estate agent	Nurse

[10] Nurses are consistently ranked the most trusted profession in the United States, with doctors close behind, whereas real estate agents rank below average. See, e.g., https://news.gallup.com/poll/245597/nurses-again-outpace-professions-honesty-ethics.aspx (https://perma.cc/E6MU-S4WZ).

Plaintiff owns a(n)	SUV	Car
Plaintiff offered to drive Defendant in her vehicle because	Defendant's roommate needed the car defendant usually used	Defendant had not yet bought a car since his release from prison
Defendant rents	Chevrolet Cruze	Chevrolet Camaro
Who utters racial slur?	Plaintiff	Defendant

In our pre-registered interpretation, treatment factors 1-3 identify the difference between rule and standard, the effect of law, and the effect of legally irrelevant factors, respectively. To begin with factor 3, the sympathy factors listed in table 2 are obviously legally irrelevant and should not have an effect on a judge's decision. The only elements of the case that legally should matter in a given forum are the levels of factor 2 (accident location / domicile); factor 2's effect is thus a gauge of the effect of law. Finally, factor 1 determines whether the law takes the form of a rule (Wyoming) or a standard (South Dakota), by which we mean whether the law expresses its command in language that is clear (rule) or open-ended (standard), thus being more or less open to arguments of all sorts. The latter is a difficult difference to test because the difference in the language tends to entail a difference in the content in as much as the open-ended language tends to induce doubt about the intended meaning of the law. In other words, a standard tends not only to increase the law's flexibility but also to change its starting point (its "expected value"): in the case of a binary choice, a rule's starting point will be one of the two choices (with virtually no flexibility to depart from it), whereas the standard's starting point will be some probability of each of the two extremes. In this respect, the "most significant relationship" standard represents a rare example of a standard with a starting point that is at least extremely close to one of the binary choices (here, the law of the state of common domicile). As we explained above, the "most significant relationship" standard was conceived for the very purpose of choosing the law of the state of common domicile in cases such as ours. That is, for cases such as ours the standard is rule-like in as much as its starting point is the law of the state of common domicile—as opposed to some probability of the law of the state of common domicile or accident location—yet its form remains that of a standard, which is exactly what we want to test. (Nevertheless, factor 1 also "flips" the legal meaning of factor 2—i.e., the binary value taken by the legal command—, which creates a possible confound that we discuss in section 3.3.)

2.4 Treatment Assignment

We performed separate stratified permuted block randomizations for the 2017 and 2018 waves of the experiment. We stratified by type of judge (circuit, district, bankruptcy, or magistrate) to ensure approximate balance of judge types across treatment groups. Within strata, randomization was blocked to ensure approximate balance in the size of treatment groups, except, as discussed below, we underweighted Wyoming in 2017. Perfect balance was not achievable because judge strata sizes were not usually divisible by 8. To the extent there were "leftover" judges from different strata, we formed a separate block from those "leftovers" and permuted the 8 treatment combinations in a way that minimized differences in the number of participants – overall and from each stratum – assigned to each of the two levels of each factor.

Our final sample is more unbalanced, however, because logistical considerations forced us to assign potential participants to treatment conditions before obtaining participants' consent.[11] Potential participants could, and did, decline to participate after our randomization. Non-participation is unsurprisingly higher in 2018 (21 out of 43, pre-class) than in 2017 (4 out of 43, in-class) and surprisingly higher in the WY level of factor 1 (16 out of 29) than in its SD level (9 out of 57). Nevertheless, we treat "missing" judges as random and hence ignorable in our analysis because differential attrition by year is orthogonal to our treatments, and differential treatment by level of factor 1 is not plausibly systematic given the identical appearance and comparable complexity of the materials.[12]

Another problem stemming from the paper-based distribution of randomly assigned packages was that some packages must have been misdirected during distribution in 2017 because we ended up with one more participant in the SD-KS-D treatment arm than foreseen by our randomization (see discussion of table 3 below). We treat this as an accidental additional randomization and thus include this observation in our analysis, except in the randomization-based inference because it requires knowledge of the explicit assignment mechanism.

As pre-registered, we initially (i.e., in 2017) underweighted the Wyoming forum treatment level (WY) in an attempt to maximize power (See section 2.6 below), randomizing only 2 judges of each type (stratum)—8 in total—into the WY level of factor 1 in a way that ensured that two judges were assigned to each combination of the levels of the other two main factors. Alas, out of the four judges who were present in 2017 but did not complete the experiment, three happened to be assigned the WY level. In addition, there were three judges who completed the experiment but did not provide his/her judge type and for whom we could not infer judge type from treatment, and one of these three was in the WY level.[13] To avoid such problems in 2018, we abandoned the underweighting we practiced in 2017 and assigned the WY and SD levels with equal probability. This equal weighting was consistent with our pre-registration because we had not pre-registered any particular weighting scheme for a potential second round of data collection.

The first number in each cell of Table 3 below shows the number of each type of participant that we assigned to each of the 2×2×2=8 treatment combinations. The next number in each cell, in parentheses, shows the number who actually participated, and finally, in square brackets, the last number in each cell shows the number who chose Kansas law (the cap on damages). While we will discuss this last number (our results) in detail later, it may be helpful for the reader to remember from Section 2.3 that when the forum is Wyoming (South Dakota), judges are legally supposed to choose Kansas law if and only if the accident was in Kansas (Nebraska). When there were zero participants in a cell, we indicate the number choosing Kansas law as "[-]" because "[0]" might be misinterpreted as application of Nebraska law.

[11] In 2018, this was inevitable as we had to mail treatment-specific packages to judges before knowing whether they would participate. In 2017, the tight schedule in the classroom and our inability to obtain binding participation promises did not allow us to determine participation before performing the randomization.

[12] The WY materials were arguably a little simpler because the rule applicable in Wyoming is easier to describe than the standard under SD's Restatement 2nd approach. However, this seems a minor variation of the overall task complexity, which also required absorbing the facts, legal arguments in the briefs, and the basic structure of the legal problem.

[13] While the randomization had been stratified by judge type, for logistical reasons, we did not have an ability to note judge type on the materials we handed to each participant, relying instead on the exit survey.

Table 3: Number of judges assigned (participated) [chose Kansas law] by treatment and judge type

	Treatment combinations							
Forum	WY	WY	WY	WY	SD	SD	SD	SD
Accident location	KS	KS	NE	NE	KS	KS	NE	NE
Sympathy	P	D	P	D	P	D	P	D
2017								
Circuit	1 (0)[–]			1 (0)[–]	2 (2)[0]	2 (2)[1]	2 (2)[0]	2 (2)[1]
District		1 (1)[1]	1 (0)[–]		3 (3)[1]	4 (2)[0]	3 (3)[1]	4 (4)[1]
Bankruptcy		1 (1)[1]		1 (1)[1]	2 (2)[2]	1 (1)[0]	3 (2)[0]	1 (1)[1]
Magistrate	1 (1)[1]		1 (0)[–]		2 (2)[1]	1 (1)[0][14]	1 (1)[1]	2 (2)[0]
(missing)			(1)[0]			(2)[1]		
2018								
Circuit	1 (0)[–]	1 (0)[–]	1 (0)[–]			1 (1)[0]	1 (0)[–]	1 (0)[–]
District	2 (1)[0]	1 (0)[–]	1 (1)[0]	1 (0)[–]	1 (1)[0]	1 (0)[–]	1 (0)[–]	2 (1)[0]
Bankruptcy	2 (0)[–]	2 (0)[–]	2 (2)[0]	3 (2)[0]	3 (2)[1]	2 (2)[1]	3 (3)[0]	2 (2)[1]
Magistrate	1 (1)[0]	1 (0)[–]	1 (0)[–]	1 (1)[0]	1 (1)[1]	1 (1)[0]	1 (0)[–]	1 (0)[–]
(missing)								
Total	8 (3)[1]	7 (2)[2]	7 (4)[0]	7 (4)[1]	14(13)[6]	13(12)[3]	15(11)[2]	15(12)[4]

Judge type is "missing" for three participants in 2017 because four participants did not answer the corresponding question in the exit survey, and we did not have an ability to mark the judges' type directly on their decision form. For one of these four, we could infer the type from a comparison of treatment assignments and the decision forms that we received (which contained a coded reference to the treatment assignment); this judge's type is not listed as "missing" in Table 3. Of the three remaining participants whose type is "missing" in Table 3, the one in forum-location-sympathy combination WY-NE-P must be district or magistrate, given our assignment list, and we use both possibilities in our randomization-based tests (section 3.2 and 3.3) with identical results. The two participants in the SD-KS-D condition with irretrievable judge type are omitted from the randomization-based tests.[15]

2.5 Realism and Awareness Checks

To ensure that the task was realistic and feasible in the 50 minutes allotted, we performed several checks before and after the experiment.

Before the experiment, we pre-tested the case with several advanced law students and two former judges. All reported that the case seemed realistic and was entirely feasible – most reported spending far less than 50 minutes.

After the experiment, we asked our participants several questions in the exit questionnaire reproduced in Appendix 8. First, we asked "Did the case seem realistic to you? If not, why not?" All but five participants

[14] We erroneously labeled this judge a district judge during randomization. For consistency, we also treat this judge as a district judge for inference. This ensures that the assignment mechanism in our randomization inference is exactly the same as that used in the experiment, as it should.

[15] While a glance at the table might suggest that the latter two judges must be district judges because only two district judges did not complete the study in the SD-KS-D treatment, that inference is erroneous because there was also a judge assigned to SD-KS-D who identified as a district judge and who explicitly did not finish the study. This means that we must have distributed SD-KS-D materials to one more judge by accident.

answered this question. All answered "yes," except one answered "No," two remarked that real facts tended to be messier, and two noted that time was too short (although in discussion after the 2018 session, the consensus in the room seemed to be that the time was unrealistically short only if a full opinion were expected). Second, the exit questionnaire also asked specifically if the participant had "ever had to choose between the law of the place of the accident or of the parties' common domicile, as in *Parker v. Rogers*," which 17 participants answered in the affirmative.

To check if participants guessed what we were trying to test, we also asked in the exit questionnaire: "What do you think this study was about?" Six participants answered that they thought we were testing for a sympathy effect, and three of them even mentioned Rogers by name (all of them were in the D condition where Rogers was unsympathetic). Four more gave a perhaps related, more abstract answer such as "Heart vs. application of the law." Some judges answered we were testing the effect of the law, and very few even mentioned the effect of precedent. Most, however, either explicitly stated that they did not know what we were testing, or mentioned unrelated issues such as the order of documents presented as their guess about our research question. To our surprise, many seemed to think that the case was a close one. Consistent with this, in response to another exit question, the judges expressed low certainty that other judges decided the case as they did: the modal 5% bin was 50%, the median 60%, and the mean 65%.

Due to the close relationship of our design to Spamann and Klöhn (2016), we also asked "I administered a similar experiment at this workshop two years ago, and talked about it last year. Did you take part in this workshop last year or the year before, or did you otherwise hear or read about my prior experiment?" 54 participants answered this question. One participant answered "yes," another "yes – forgotten what we decided," and a third "I did go to this workshop before, but did not participate in a study or recall any discussion;" everyone else answered "No."

As we pre-registered, we exclude in robustness checks either or both of the participant who answered "yes" to the last question and the participant who answered "no" to the question whether the case seemed realistic. As our results are unaffected, we do not report these checks individually below.

2.6 Power

With our minimum pre-registered number of 40 participants, our power to detect our hypothesized law effects at α=0.05 (two-sided) would have been 100% under the rule (WY) and 60%-81% under the standard (SD), and our power to detect a difference between them at α=0.10 (one-sided) would have been 57%-79%. Power would have been even higher if all 47 registered judges had attended the 2017 FJC/HLS Program and agreed to participate in the study, and it was higher when, as pre-registered, we proceeded to a second round of data collection after the first round fell just short of the minimum 40 and ultimately collected 61 observations.

We will first explain the unusual features of our hypotheses and design that yielded such decent power in spite of our comparatively low minimum sample size distributed over 2×2×2=8 treatment cells, and then comment on why a larger sample size, while desirable, was neither realistically achievable nor required to learn from the data. In all our power calculations, we ignore stratification because we could not know in advance how many judges of each type would participate but stratification would ensure that any type effects are orthogonal to treatment. As in our analysis of the test data, we also ignore any interaction between sympathy and law effects, which are orthogonal thanks to randomization.

In a nutshell, small cell sizes still gave us decent power for law effects because we could reasonably expect these effects to be very strong, and because we mostly ignored interaction effects that would have required much larger cell sizes. Most experiments in law, psychology, and social science are concerned with small, heterogeneous, and/or noisily measured effects, often subtle tendencies in decisions determined by a confluence of factors, most of which are uncontrolled. By contrast, the legal variation that we study ought to be the primary or even exclusive determinant of all judges' decisions, and we observe them without error. In particular, it was reasonable to expect that Wyoming's clear rule would perfectly determine each judge's decision. A deterministic law-effect hypothesis has 100% power even with only 8 judges and even at α=0.01 (two-sided) against any null hypothesis of no law effect because $2\times2^{-8}<0.01$. Even if one in ten judges deviated from the rule in expectation, power with 8 judges would still be 81% at α=0.10 in a two-sided Boschloo test (or at α=0.05 one-sided). To be sure, one cannot, and we did not, expect such a strong law effect under South Dakota's standard. This is why we attempted to maximize power by randomizing all but 8 judges into SD. With 32=40-8 observations in SD, the two-sided Boschloo test had 81% (60%) power at α=0.05 against a no-law-effect null if judges followed the law with 75% (70%) probability (which is not particularly high given that a coin flip would follow the law with 50% probability). Power for the sympathy effect in SD would be comparable to the law effect's if one hypothesized comparable effect sizes, which may seem aggressive but does correspond to the estimated sympathy effect in Spamann & Klöhn (2016) (which found a 0.46 difference in affirmance rates between the two levels of its sympathy factor). The sympathy effect in WY was obviously going to be exactly zero if the law effect in WY was deterministic.

A larger sample size would have given us more power. In particular, a considerably larger sample would have given us power to test interaction effects, which we generally lacked and hence did not attempt. The only interaction effect we pre-registered to test was the difference in law effect between levels WY and SD of factor 1 (i.e., between rule and standard, see section 2.3). The pre-registered Fisher exact permutation test had 57% (79%) power at α=0.10 (one-sided) against a null of no difference if judges followed the law perfectly under the rule and with 75% (70%) probability under the standard. While this is less than ideal, it is not so low that the data would not be informative. In particular, confidence intervals can be used to update views on plausible effect sizes, as we demonstrate in the next section.[16] Committing to collect more data was not an option given the uncertain outlook on our ability to recruit more judges for an hour-long experiment, which nobody else has managed to do thus far.

3 Results

We first discuss our results informally using simple graphs (section 3.1). Then we analyze the data more rigorously using three kinds of statistical tests: pre-registered exact tests (section 3.2); exact tests under an alternative interpretation (section 3.3); and regressions (section 3.4). The results are largely the same, but we cannot determine whether law effects are larger under a rule or standard under the alternative interpretation.

As a preliminary matter, we note that, in principle, exact randomization-based tests are preferable—at least in a sample as small as ours—because they do not rely on large-sample approximations or functional form assumptions (Ernst 2004; Athey & Imbens 2016; Young 2019). That said, in a factorial design,

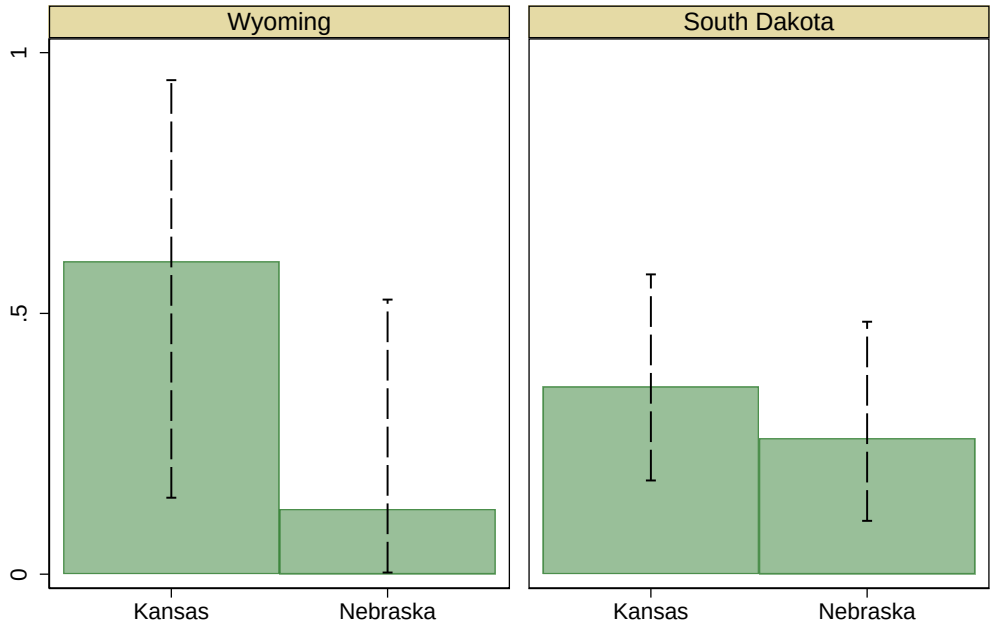
[16] For reasons of space and prevailing reporting conventions, we do not perform explicit Bayesian analyses in this paper.

randomization-based tests for individual factors still require specifying a null for interactions with the other factors unless the sample is balanced and factorial effects are additive (Dasgupta et al. 2015), neither of which is the case in our design: our sample is unbalanced and factor effects can hardly be additive with binary outcomes.

3.1 Informal and graphical analysis

Our basic results can be gleaned by looking at Figure 1, which summarizes most of the last row of Table 3. The law appears to matter only under a rule (Wyoming), and even then it far from completely determines outcomes. In reading the graphs, the reader should bear in mind that the confidence intervals for individual groups are misleadingly wide for purposes of comparison of groups because they do not impose the restrictions of the null hypothesis. We discuss rigorous tests in the next sections.

Fig. 1: Fraction choosing Kansas law (cap), by Forum and Accident state



Spikes indicate exact 95% c.i.

The left panel of Figure 1 shows the results when the forum was Wyoming, which applies the traditional, *lex loci delicti rule*, pooling together the two sympathy levels. Kansas law is clearly chosen much more often when the accident was in Kansas (60%) than when it was in Nebraska (12.5%). This is as it should be under the *lex loci delicti* rule, and hence evidence of a law effect. In the next subsection, we show that this difference is almost statistically significant at conventional levels, notwithstanding the large overlap in the confidence intervals. At the same time, the law effect is not nearly as strong as we expected it to be. Given that the rule is clear and no exceptions plausibly apply to the experimental fact pattern, the left bar should extend to one, and the right bar should be at zero. That is, when the accident was in Kansas, Kansas law should always apply in Wyoming. Conversely, when the accident was in Nebraska, Nebraska law should always apply, so Kansas law should never apply. This is the view that we stressed in our power calculations. It is soundly rejected by the data: the existence of even a single deviation shows that judges'

probability of following Wyoming's rule does not equal 1, and with three observed deviations the exact upper 95% confidence bound of law-following is less than 0.95. (Note, however, that this test should only be seen as exploratory, as it was not pre-registered because, as noted above, we did not expect deviations from law-following, at least none of this magnitude.)

The right panel of Figure 1 shows the results when the forum was South Dakota, which applies the Restatement 2nd's "most significant relationship" *standard*. We again pool together the two sympathy levels. The evidence of a law effect here is much weaker because the bars are of almost equal height and the difference between them, in fact, goes in the wrong direction. The right bar should be higher under South Dakota law, because the standard has been interpreted by the South Dakota Supreme Court to require application of the law of the place of common domicile (See Section 2.3). So the left bar should be at zero and the right bar should be at one. That is, when the accident was in Kansas, the judges should have applied Nebraska law because the fact pattern always had the parties reside in Nebraska when the accident was in Kansas. Conversely, the right bar should be at one, because when the accident was in Nebraska, the judges should apply Kansas law because the fact pattern had the parties reside in Kansas when the accident was in Nebraska. In fact, the judges applied Kansas law more often when the accident was in Kansas than when the accident was in Nebraska. It is clear that the judges did not apply the Restatement 2nd in accordance with South Dakota Supreme Court precedent. The exact 95% confidence interval for judges' probability to follow the law under South Dakota's standard is [0.31,0.61] and thus excludes the possibility that judges followed the law much more than 50%, i.e., a coin flip (again, however, this analysis was not pre-registered because we did not expect such low law-following; it should be viewed as exploratory.)

The fact that, when the forum was South Dakota, judges applied Kansas law more often when the accident was in Kansas might suggest that judges ignored the instruction to apply the Restatement 2nd and instead applied the traditional *lex loci delicti* (place of accident) rule. This implies an alternative way of testing the law effect: do judges make different decisions under the Restatement 2nd than under the *lex loci delicti* rule? That is, instead of asking whether judges make different decisions based on where the accident was (the pre-registered question we explore in Section 3.2), we can ask whether judges make different decisions based on the forum's choice-of-law approach. We explore that question rigorously in Section 3.3.

One could, of course, argue that the Restatement 2nd's "most significant relationship" test gives judges lots of discretion and that even two South Dakota Supreme Court cases holding that the place of common domicile was the place with the most significant relationship still gave the judges some wiggle room. Perhaps, for example, it was legitimate that some judges, in the reasoning they submitted, took into account the fact that the defendant changed his domicile after the accident, so, at the time of adjudication, the parties no longer had a common domicile. Or perhaps, it was within the discretion afforded by the Restatement 2nd that some judges asserted that renting the car in the accident state tipped the balance toward that state being the one with "the most significant relationship." Or perhaps it was reasonable that some judges simply thought the accident location was the "most significant relationship" in spite of South Dakota Supreme Court precedent to the contrary (see, e.g., the first two reasons for decision reproduced in Appendix 10). Nevertheless, under those interpretations one would still expect that, given random assignment of accident location, whatever factors induced judges to apply Nebraska law 74% of the time when the accident was in Nebraska should have similarly induced them to apply Kansas law 74% of the time when the accident was in Kansas, subject to sampling variation. Yet the

judges applied Kansas law only 36% of the time when the accident was in Kansas. A Fisher exact test would reject equality of these two rates with p=0.011 (not pre-registered). So the judges' choices are not consistent with even this looser interpretation of law-following under the Restatement 2nd's most significant relationship standard.

It is notable that, whether Wyoming or South Dakota was the forum, most deviations from the "correct" legal result were in the direction of *not* applying Kansas law. That is, judges had a tendency to award full compensation (Nebraska law) and *not* to apply the cap (Kansas law). If one looks at the left panel for Wyoming, the judges nearly always applied Nebraska law when they were supposed to (right bar), but refused to apply Kansas law 40% of the time when that was what the rule required. Similarly, when South Dakota was the forum (right panel), judges applied Kansas law less than half of the time they were supposed to (left bar), but applied Nebraska law most of the time they were supposed to (see the right bar showing that judges applied Kansas law only 26% of the time and thus applied Nebraska law 74% of the time). As analyzed more rigorously in Section 3.4, this unanticipated pattern suggests that judges may have acted in accordance with a preference for full compensation.

Figure 1 does not differentiate by sympathy. The reader can verify in table 3, however, that judges applied Kansas's cap approximately as often when the plaintiff was sympathetic (9 out of 31 participants) as when the defendant was sympathetic (10 out of 30 participants). Thus, as analyzed more rigorously in the next subsection, there is no evidence supporting the idea that judges were influenced by sympathy.

3.2 Pre-Registered Exact Tests

We now report our pre-registered exact statistical tests of the effects discussed in the preceding discussion of figure 1.[17]

We begin with simple effects of location and sympathy separately within each forum (ignoring possible interactions between location and sympathy). For these effects, we pre-registered the unconditional Boschloo exact test, a conceptually superior generalization of the better-known conditional Fisher exact test (Mehrotra et al. 2003). The Boschloo test is uniformly more powerful than the Fisher test.

Nevertheless, neither the location test for Wyoming nor for South Dakota rejects the null hypothesis that judges were equally likely to apply Kansas law and its damages cap regardless of accident location.[18] As noted above, these are the primary tests of the law effect. If judges applied choice-of-law principles in a legalistic way, varying the accident location should have changed whether Kansas's cap on damages applied. Nevertheless, even the accident location (law) effect in the Wyoming forum attains only a p-value of 0.11, which is not significant at conventional levels, and the p-value for South Dakota is much larger (0.48). While the large p-value for the Wyoming treatment may appear unsurprising given the small sample of 13 observations in that arm of the experiment, we note again that, if the effect of Wyoming's clear rule had been as strong as we expected and one arguably should expect, then we would have had power to detect it (see section 2.6). In other words, the lack of conventional statistical significance of the

[17] In addition to the two sets of tests discussed in the main text, we also pre-registered that we would compare the residual variance between the rule and the standard, but this test is redundant where the outcome variable is binary, as here.

[18] In our pre-registration (point 2.1), we wrote that we would code the outcome variable for the location effect test as whether the judge applied the "correct" law. This is obviously nonsensical, however, because the test would then show no effect of the treatment precisely when the law has the strongest effect.

location treatment even in Wyoming reflects our observation above that even a clear rule is disregarded with non-trivial frequency. In addition, the number of observations for the South Dakota treatments is much larger (48), so the inability to detect a statistically significant location (law) effect in that arm of the experiment is notable (see the discussion of confidence intervals in the preceding subsection 3.1).

Similarly, neither the sympathy test for Wyoming nor for South Dakota rejects the null hypothesis that judges were equally likely to apply Kansas law and its damage cap regardless of sympathy. That is, there is no evidence that judges were more likely to apply Kansas's cap on damages when the defendant's behaviors and characteristics were more sympathetic than the plaintiff's. The *p*-values are very large – 0.20 for Wyoming and 1.00 for South Dakota.

The second set of exact tests we pre-registered are randomization-based Fisher tests[19] of the *difference* between fora in the sizes of the effects we just tested separately by fora, namely of accident location and sympathy.

For accident location (the strength of the law effect), the test is thus a comparison between the left and the right panel of figure 1, and in particular a comparison of the *difference* between the two bars in each

[19] The idea of these tests is simple: sample from the randomization distribution of the chosen test statistic by repeatedly (1) re-randomizing the participants to treatments using our assignment mechanism (i.e., the assignment mechanism we actually used in the experiment), (2) imputing for each participant the outcome that we would expect in the re-randomized treatment condition under the sharp null hypothesis; and (3) calculating the test statistic (see generally, e.g., Athey & Imbens 2016). We take 1,000,000 draws by re-running the actual random assignment script used in the experiment 100,000 times and associating the resulting assignments with 10 independent random shufflings of the list of participating judges. In this process, we treat one magistrate judge as district judge because that is what we had accidentally done with this judge in the actual experiment as well. As mentioned in section 2.4, we must omit two participants with missing judge type from the randomization-based tests, and we get identical results whether we treat a third judge with missing judge type as district judge or a magistrate judge (the only two possibilities given this judge's treatment assignment).
In our pre-registration, we failed to attend to two important details regarding points (2) and (3) that arise from sample unbalance in a factorial structure. With a balanced sample, one can calculate and then average effects for one factor cell-pair by cell-pair while remaining completely agnostic about other factorial effects and interactions (e.g., Dasgupta et al. 2015). With sample unbalance, however, any other factorial effects do not automatically cancel out, and different cell weightings are plausible and outcome-relevant. One could assume that all factorial effects are zero, that the factorial effects are additive and equal to the observed effects except for the factor being tested, or that the remaining factorial effects are equal to some externally imposed null. (It is not possible to limit the re-randomization to one factor, i.e., only among participants assigned to a particular combination of the levels of the other two factors, because the randomization protocol in the actual experiment by necessity combined randomization for all three factors. The randomization was also stratified, i.e., performed separately for different types of judges, so the only re-randomization possible would be within judge type, of which there are always very few and sometimes only one or none in each cell.) Similarly, one could calculate averages for each of the 2×2×2=8 cells separately and then weight each cell equally, or one could first pool observations for each of the 2×2=4 factor combinations relevant for each of the two interaction tests discussed in the text. With respect to the first point, for lack of a better alternative, we take as the null that neither factor 2 nor 3 has any effect, and in particular that each judge would always choose *the same state's law* regardless of accident location and sympathy (See next subsection). With respect to the second point, we employ the second option (pool observations for each of the 2×2=4 factor combinations) because the small cell sizes for some treatment combinations would add a lot of noise to the statistic. That said, our reported results would be qualitatively similar—and for the law effect, slightly stronger—if we instead calculated separate effect sizes for each level of the other factors and then averaged over them. Finally, we assume that judges' participation decisions as well as the missing judge type information were independent of treatment assignments and hence ignorable.

panel. To be more precise, since we are interested in comparing law-following under a rule and a standard, we compare left bar minus right bar in the left panel to right bar minus left bar in the right panel (because, as explained above, under the law, the left bar should have been high in Wyoming and the right bar in South Dakota). This difference of Wyoming (3/5 – 1/8 = 0.47) minus South Dakota (6/23 – 8/23 = -0.09) equals 0.56.[20] A difference of this magnitude would arise by random chance with a probability less than 0.03, i.e., $p<0.03$, under the sharp null hypothesis that each judge would have applied the same law regardless of forum and accident location (and sympathy). This suggests that the law effect is stronger under the rule (Wyoming) than under the standard (South Dakota), in accordance with our expectation and most of the literature.[21]

The estimated difference in any sympathy effect (i.e., the tendency to apply the cap more often when the defendant is sympathetic) between the rule (Wyoming: 3/6 – 1/7 = 0.36) and the standard (South Dakota: 6/22 – 8/24 = -0.06) is 0.42. If anything, according to this estimate, sympathy matters *more* under the rule than the standard, unlike what one would expect if the rule constrained judicial discretion and bias more effectively. Nevertheless, the difference is statistically insignificant, with a two-sided randomization-based *p*-value of 0.11.

To account for the multiple hypotheses testing, we employ the false discovery rate (FDR) control method of Benjamini and Hochberg (1995) (BH). For m tests, the method consists of ranking the m p-values from lowest to highest with ranks i from 1 through m, finding the highest i (if any) such that $p_i \leq i\alpha/m$ (where α is the desired FDR), and rejecting only the hypotheses corresponding to ranks i and below. (For i=1, the adjustment is identical to the Bonferroni adjustment and hence also controls the familywise error rate of falsely rejecting *any* true null hypothesis (FWER) if the procedure stops there, as in our case.) Setting α=10%, our rule-vs.-standard result ($p<0.03$) passes the BH threshold if we think of our program as involving three tests (law, sympathy, rule-vs.-standard) but not if we think of it involving four or more tests (e.g., because we test rule-vs.-standard separately for law and sympathy).

3.3 An Alternative Interpretation of Our Design

The interpretation of our design underlying the pre-registered tests just reported is not the only possible one. To recapitulate, the interpretation that we pre-registered and that was assumed in the previous subsection is that:

1) accident location identifies an effect of the law within each forum because each forum's choice-of-law principles require choosing the law by reference to the accident location: in Wyoming, the *lex loci delicti* rule requires choosing the law of the place of accident, and in South Dakota, given our experimental design, the Restatement 2nd's most significant relationship standard requires choosing Kansas law when the accident was in Nebraska and vice versa, and

[20] As explained in section 2.4, these numbers and the randomization tests ignore the two participants with unknown judge type because the re-randomization requires stratification by judge type.

[21] The reason why the *difference* can be significant even though the individual effects are not significant is that the South Dakota effect goes in the opposite direction (its sign is negative). That is, when the forum was South Dakota, judges chose Kansas law more often when the accident was in Kansas, even though authoritative interpretation of South Dakota law would suggest the opposite. So it is easier to reject equality of the two effects than to reject that either is different from zero.

2) forum identifies the effect of rules vs. standards: the difference in accident location effect between the two forums can be understood as measuring the difference in "bindingness" between Wyoming's rule and South Dakota's standard. See discussion at the end of section 2.3.

The null hypothesis generating this first interpretation is that, if the law (concretely, applicable choice-of-law principles) did not matter, each judge would always apply a state's law with the same judge-specific probability, be it the law of Kansas or Nebraska, regardless of accident location.[22] It does not matter why a judge would do this. The judge might just choose applicable law randomly. Or the judge might prefer one of the states in general, or might prefer one state's substantive law (caps or no caps on damages), although, of course, such preferences are legally irrelevant. Against this null, any effect of accident location identifies an effect of the law because, by the null hypothesis, accident location would not matter if the law did not matter. Similarly, the only relevant change between the two fora is that one has a choice-of-law rule (Wyoming) while the other has a standard (South Dakota). The change in content of choice-of-law approach (*lex loci delicti* vs. common domicile) flips the expected direction of any law effect but is otherwise orthogonal to judicial behavior.

We have come to think, however, that this interpretation is not the only plausible one because the underlying null hypothesis is not the only plausible description of what all judges would do but for the effect of the law (i.e., but for the applicable choice-of-law principle). Even when given full discretion, at least some judges might be expected to adjust their choice of substantive law to the geographic facts of the case. That is, it is plausible that at least some judges have choice-of-law preferences, i.e., that they prefer applying either the law of the accident state or the law of common domicile. For such judges, law matters if they are willing to disregard their personal choice-of-law preference when instructed to do so by the forum's law. More to the point, for such judges, a change in location confounds a law effect with an effect of the judge's own preferences (e.g. their preference to apply the law of the place of accident, a normative preference, but a preference nonetheless). For such judges, only a change in the applicable choice-of-law principle itself (the forum treatment) cleanly identifies a law effect, and the change in legal form (rules vs. standards) is not separately identified.

In this alternative, not pre-registered interpretation of our design, the right test of a law effect is the comparison of the fraction of judges applying the *lex loci* in Wyoming, where it is required by the applicable rule, and in South Dakota, where the applicable choice of law principle applied to our facts demands *not* applying the *lex loci*. The null hypothesis is that the applicable choice of law principle has no effect, i.e., that judges are equally likely to apply the *lex loci* in Wyoming and South Dakota. The one-sided alternative hypothesis of law-following is that deciding the case under Wyoming's *lex loci* rule increases application of the *lex loci* relative to South Dakota's standard favoring the opposite, common domicile. We do indeed find that the fraction of judges applying *lex loci* is higher in Wyoming (10/13=77%) than in South Dakota (26/48=54%).[23] The difference is 23%, and Boschloo exact and randomization-based one-

[22] The sharp null hypothesis necessary for the randomization inference in the previous subsection is slightly more restrictive in that it assumes each judge would always choose the same law, ruling out random choice. But standard inference would be possible against the random choice null.

[23] These calculations include the two judges with missing judge type, both of whom are in South Dakota and who are not used in the randomization based tests. However, up to rounding error, excluding these two judges yields an identical percentage of application of lex loci in South Dakota (25/46=54%) and an identical difference to Wyoming (23%).

sided *p*-values against the null of no difference are 0.08 and 0.05, respectively.[24] That is, the law effect is small in absolute size—certainly far from 1, which would be implied by perfect law-following—, albeit statistically distinguishable from zero at conventional levels. This finding under the alternative interpretation of our design is consistent with that under the pre-registered interpretation in as much as the latter also found (weak) evidence against the null hypothesis of no law effect (*p*=0.11).

3.4 Regressions

Finally, we show the full set of factorial effects in a linear probability regression framework. These regressions were not pre-registered, nor, for the most part, do they show anything new. However, we present them to help readers accustomed to regression results, to show robustness of our pre-registered univariate exact test results to controls for other factors and for sample imbalance, and to explore effects that we did not preregister, in particular the preference for full compensation. In line with modern econometric practice, we estimate a linear probability model rather than the less robust probit or logit (e.g. Angrist & Pischke 2009, ch. 4.6.3). The linear model has the added advantage that its coefficient and standard error estimates are invariant to the enlightening change of factor coordinate system explained immediately below, provided that no additional regressors are included. We have verified that including dummies for judge type and the 2017/2018 rounds does not change the results and that the dummies do not themselves have statistically significant coefficients.[25] In any event, the standard errors are necessarily of dubious reliability in this small sample. Although the errors are necessarily heteroskedastic given the data's binary nature, we present standard OLS *t*-statistics to be conservative because the larger heteroskedasticity-robust *t*-statistics rely on unjustified large-sample approximations.

The dependent variables and all three factors are contrast coded (-1 or 1), which means that (a) the estimated main effects (for F (forum), A (accident location), and S (sympathy)) represent ½ the difference in means between the respective groups, and (b) each regression equation results from the other by a mere change of the coordinate system.[26] The latter point means that, as is appropriate, all three regressions show the *same* result in a different perspective, i.e., they are one test reported in three ways, not three tests.[27] In particular, with respect to the effect of law, models 1-3 correspond to the perspectives taken in the preceding subsections 3.1-3.3, respectively: model 1 considers application of Kansas's cap as in section 3.1 and figure 1; model 2 considers law following defined by a combination of the applicable choice of law principle and the accident location as in our pre-registered interpretation and section 3.2; and model 3 considers application of *lex loci*, where a difference between fora identifies a law effect under

[24] The randomization tests recalculate the difference in the rate of applying lex loci between Wyoming and South Dakota for 1,000,000 re-randomizations of our participants under the sharp null that each participant would have applied or not applied, as the case may be, lex loci regardless of treatment assignment. This also imposes the null of no interaction with sympathy. See generally supra footnote 19.

[25] With bankruptcy or federal claims judges and 2017 as the omitted categories, of the 12 coefficients for three judge categories (circuit, district, or magistrate) and one year (2018) for three dependent variables, only the coefficients on district judge and 2018 with Kansas law as the dependent variables have *t*-statistics large enough that they would attain 10% significance in a single-coefficient test, but this is insignificant if one adjusts for the multi-testing involved.

[26] Specifically, with contrast coding, K = FAC = -AL, C = FAK = -FL, L = -AK = -FC, and each variable multiplied with itself yields 1. (For the meanings of K, C, L, F, A, and S, see Table 4 row and column headings.) This means that one can move from one estimated equation to the next by multiplying by one of the factors, which will associate each coefficient with a different independent variable but leave their magnitude unchanged.

[27] This means that no multi-testing adjustment is necessary or appropriate.

the alternative interpretation offered in section 3.3. Model 1 also corresponds to the analysis of sympathy in sections 3.1 and 3.2.

Table 4: Regressions

	(1) Kansas law (cap) (K)	(2) Correct law (C)	(3) *Lex loci* (L)
Forum (F) (SD = 1, WY = -1)	-0.09 (-0.60)	-0.32** (-2.16)	-0.22 (-1.49)
Accident location (A) (NE = 1, KS = -1)	-0.32** (-2.16)	-0.09 (-0.60)	0.30* (2.00)
Sympathy (S) (D = 1, P = -1)	0.21 (1.44)	0.19 (1.31)	0.01 (0.09)
F x A	0.22 (1.49)	-0.30* (-2.00)	0.09 (0.60)
F x S	-0.24 (-1.65)	-0.01 (-0.09)	-0.19 (-1.31)
A x S	-0.01 (-0.09)	-0.24 (-1.65)	-0.21 (-1.44)
F x A x S	0.19 (1.31)	0.21 (1.44)	0.24 (1.65)
Constant	-0.30* (-2.00)	0.22 (1.49)	0.32** (2.16)
N	61	61	61

OLS *t* statistics in parentheses. * $p<0.10$, ** $p<0.05$

The results are consistent with our univariate exact tests. To begin with the perspective taken in section 3.2 and model 2, judges are more likely to misapply the law under the standard than under the rule, as indicated by the statistically significant coefficient estimate of -0.32 on Forum in model 2. Also as in section 3.2, we can find an effect differential but no statistically significant main effect of law in this perspective: the constant coefficient of 0.22 in model 2 is statistically insignificant.

However, if we take the perspective of section 3.3 and model 3, that same coefficient of 0.22 is now, after rotation, the coefficient for Forum and tests the law effect of Wyoming's and South Dakota's choice of law principles. While the coefficient in the regression table is not statistically significant, that is because the regression implicitly performs a two-sided test. As explained in section 3.3, it is appropriate to perform

a one-sided test, in which case the *p*-value is 0.07 ($\Pr(t_{53}<-1.49)=0.07$), almost exactly the same as in the univariate tests reported there.[28]

Lastly, like the univariate tests, none of the regressions provide substantial evidence of a sympathy effect, whether in the main effect or in any interactions.

Beyond our primary tests, one finding that emerges from the regressions is that the judges seem repelled by Kansas's cap, as can be seen, for example, in the negative and (marginally) statistically significantly constant when application of Kansas's cap on noneconomic damages is the dependent variable. That is, our experimental subjects seem to have a preference for full compensation. While we had not considered this in designing the experiment, it is consistent with judicial attitudes more broadly. Damage caps are always legislative in origin and never originate in judicial decisions. In fact, judges in ten states were so hostile to damage caps that they invalidated them on constitutional grounds that seem rather weak, such as equal protection and the right to jury trial (Stein 2019, vol. 3, sections 19:4-10).[29]

4 Discussion

The experiment provides some support for the idea that application of a rule is more predictable than application of a standard and that judges under a rule feel more bound to reach the correct results. The law effect, however, is weak at best. The standard in our experiment seems to have little influence on decisions even though it was authoritatively interpreted by the relevant state supreme court: the upper 95% confidence bound for the probability of law following under this standard is 61%, not far above a coin flip. Even the clear *lex loci delicti* rule did not bind judges completely, and we cannot reject at conventional levels the hypothesis that judges under the rule decided randomly, while we can reject that they followed the rule perfectly. We also can only weakly reject the hypothesis that judges ignored the applicable choice of law entirely. A mini meta-analysis of these findings and Spamann and Klöhn (2016) suggests that notwithstanding rhetorical nods to weaker legal authorities, judges are only moved by very clear and binding legal authority, if at all, at least in the lab. Unlike in Spamann and Klöhn (2016), there is no evidence that judges were motivated by sympathy based on legally irrelevant factors, which is reassuring. An unanticipated finding suggests, however, that judges may act upon a preference of full compensation.

The results of this experiment leave at least two questions. First, why, unlike Wistrich et al. (2014) and Spamann and Klöhn (2016), did we not find a sympathy effect? Second, why did judges follow the law, especially the clear *lex loci delicti* rule, so much less often than we expected? A possible answer to the first question—apart from the ever present sampling noise—is that the sympathy variation we study here is the relatively minor type of personal difference that judges are trained to ignore, whereas Spamann and Klöhn (2016) studied much more morally charged war crimes and the defendant's attitudes to those crimes. One possible answer to the second question is that our experiment, while realistic, was still not realistic enough. Our participants were less familiar with choice of law than we had expected (see Section 2.5), and, unlike in the real world, received no assistance from their law clerks, recent law school graduates who may be more legalistic in their orientation, and who tend to be particularly involved when their judge has to decide novel legal issues. We plan to investigate this possibility in future research. The other

[28] When we include judge-type and year dummies, the one-sided *p*-value rises to 0.13, reflecting the loss of 10 degrees of freedom (whereas the point estimate of -0.19 barely changes).

[29] The potential unconstitutionality of damage caps was not briefed, and no judges referred to it in their reasoning.

possible answer to the second question is at least somewhat disconcerting: judges may simply be less guided by law than outsiders and perhaps they themselves believe.

Reference List

Angrist, Joshua D., and Jörn-Steffen Pischke. 2009. Mostly Harmless Econometrics. Princeton University Press.

Athey, Susan, and Guido Imbens. 2016. The Econometrics of Randomized Experiments. Working paper. http://arxiv.org/abs/1607.00698v1.

Benjamini, Yoav, and Yosef Hochberg. 1995. Controlling the False Discovery Rate: A Practical and Powerful Approach to Multiple Testing. Journal of the Royal Statistical Society B 57:289–300.

Dasgupta, Tirthankar, Natesh S. Pillai, and Donald B. Rubin. 2015. Causal inference from 2^K factorial designs by using potential outcomes. Journal of the Royal Statistical Society B 77:727–753.

Ernst, Michael D. 2004. Permutation Methods: A Basis for Exact Inference. Statistical Science 19:676-685.

Frank, Jerome. 1930 [2009]. Law & The Modern Mind. New Brunswick, NJ: Transaction Publishers.

Kahan, Dan M., David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci, and Katherine Cheng. 2015. "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment. University of Pennsylvania Law Review 164:349-439.

Kantorowicz, Hermann [Gnaeus Flavius]. 1906. Der Kampf um die Rechtswissenschaft. Carl Winter's Universitätsbuchhandlung.

Kaplow, Louis. 1992. Rules versus Standards: An Economic Analysis. Duke Law Journal 42: 557-629.

Kennedy, Duncan. 1998. A Critique of Adjudication (fin de siècle). Harvard University Press.

Llewellyn, Karl N. 1940. On Reading and Using the Newer Jurisprudence. Columbia Law Review 40:581-614.

Mead, R., Gilmour, S.G., and A. Mead. 2012. Statistical Principles for the Design of Experiments. Cambridge University Press.

Mehrotra, Devan V., Ivan S. F. Chan, and Roger L. Berger. 2003. A Cautionary Note on Exact Unconditional Inference for a Difference between Two Independent Binomial Proportions. Biometrics 59:441-450.

Rachlinski, Jeffrey J., and Andrew J. Wistrich. 2017. Judging the Judiciary by the Numbers: Empirical Research on Judges. Annual Review of Law and Social Science 13:203-229.

Schauer, Frederick. 2009. Thinking Like a Lawyer. Harvard University Press.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. The Supreme Court and the Attitudinal Model Revisited. Cambridge University Press.

Spamann, Holger, and Lars Klöhn. 2016. Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges. Journal of Legal Studies 45:255-280.

Stein, Jacob. 2019. Stein on Personal Injury (3d. ed, April 2019 update).

Symeonides, Symeon C. 2006. The American Choice-of-Law Revolution: Past, Present and Future. Leiden: Martinus Nijhoff.

Wistrich, Andrew J., Jeffrey J. Rachlinski, and Chris Guthrie. 2014. Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings? Texas Law Review 93:855-923.

Young, Alwyn. 2019. Channeling Fisher: Randomization Tests and the Statistical Insignificance of Seemingly Significant Experimental Results. Quarterly Journal of Economics 134:557-598.

Appendix 1: 2017 Invitation Letter

Re: Invitation to Participate in an Experiment at the Harvard/FJC Law & Society Program

Dear Judge:

I look forward to welcoming you to the session on "Theories and Empirics of Judicial Decision-Making" at the Harvard/FJC Law & Society program on April 10 at 10:45am.

In agreement with the FJC, I will use the first 50 minutes of my session for an experimental study of judicial decision-making. I hope you will participate in the study, but participation is entirely voluntary.

If you do participate, you will be asked to judge a fictitious case, and provide brief reasons for your decision on a piece of paper. The goal of the study is to learn about legal reasoning and the role of various factors therein. I am not testing your knowledge of, or opinions about, particular legal issues.

Your answers will be anonymous. All relevant legal materials will be provided to you.

The attached form describes the study as required by Harvard's Institutional Review Board (IRB). If you choose to participate, the IRB also requires that I obtain your signature on this form to document your consent. I will distribute paper copies of the form at the event, but if you wish, you may also bring a signed form with you. Your name and signature will be kept entirely separate from the study document, and will not be linked to your study answers in any way.

If you have any questions about the study, please do not hesitate to contact me. I look forward to meeting you on April 10.

Appendix 2: 2017 Email to Repeat Participants

[Subject: FJC/HLS Seminar, April 10]

Dear Judge ___:

Denise Neary (FJC) told me you were planning to attend the FJC/Harvard Law & Society Seminar again on April 10. I look forward to welcoming you back.

I am reaching out to you because I will again offer a study as I did two years ago, and discussed last year. If you were in attendance at those sessions, you are still very welcome to participate in this year's study, which is different from the last one. That said, to minimize interference of the two studies with one another, it would be great if you did not discuss the last study with other seminar participants until after my session. I would really appreciate your cooperation.

Sincerely yours,

Holger Spamann

Appendix 3: 2017 Opening Remarks

Good morning, your honors.

My name is Holger Spamann, and I am a professor here at the law school.

It is truly a great pleasure and a privilege to be able to talk to you today.

As you know from Denise and from my letter, I have prepared an exercise for you, and I suggest we get started on that right away so that we have enough time for discussion later.

You will find in front of you a binder and an envelope with your name on it. If the name is not yours, please let my assistants know and we will change it.

The name is on the envelope only so that we could keep track of the materials as we distributed them. Your name is not on any other document and will not be linked to your answers in any way. Your answers will be completely anonymous.

The only document that is not anonymous is the consent form, which is the first document you will find in the envelope. The form is required by Harvard's rules for research. Please sign the consent form if you want to participate. When we collect the materials, we will separate the consent form from the other materials, so that your name will not be linked to your answers.

Everything else is explained in the instructions in the envelope. You have up to 50 minutes to complete the exercise. When you are done, please return the full stack of materials to me or one of my two assistants, Brooke and Jeremy. We will then give you an exit survey to complete. Once everyone is done, I will debrief.

Please begin. I hope you will find this interesting and educational.

Appendix 4: 2018 Invitation Letter

Re: Invitation to Participate in a Study in Preparation for the Harvard/FJC Law & Society Program

Dear Judge X:

I look forward to welcoming you to the session on "Empirical Studies of Judicial Decision-Making in the U.S. and Abroad" at the Harvard/FJC Law & Society Program on April 25.

The most interesting data are those that we generate ourselves. I invite you to participate in the enclosed study so that we can discuss it at the session. The maximum time you should spend on the study is 50 minutes, and you can do it at any time before you arrive at Harvard. You can submit your answers online at [link specific to treatment condition], or write them on the enclosed form [which contained a file number that encoded the treatment condition] and hand the form to me on the first morning of the workshop (April 23).

Your answers will be anonymous. The study is designed to generate information about judicial decision-making in general. I am not testing your knowledge of, or opinions about, particular legal issues.

I hope you will participate in the study, but participation is entirely voluntary. The attached form describes the study as required by Harvard's Institutional Review Board (IRB).

If you have previously participated in a session that I offered at the Harvard/FJC Program or read about it, you may still participate in the study if you wish, but you should know that I will not use your answers in analyzing and discussing the results.

If you have any questions about the study, please do not hesitate to contact me. I look forward to meeting you on April 25.

Appendix 5: Instructions for Participants

Instructions

Please imagine you are sitting by designation in the District of [Wyoming / South Dakota]. One of the judges in the District of [Wyoming / South Dakota], Judge Frederick Simmons, had a stroke and is on disability leave. You have been assigned his cases.

One of Judge Simmons's cases is Parker v. Rogers. Judge Simmons held a bench trial in that case and drafted Findings of Fact and Conclusions of Law. Damages, however, depended on whether Kansas's statutory cap on non-economic damages applied. Judge Simmons, therefore, ordered both parties to brief whether Kansas or Nebraska law should apply. Unlike Kansas, Nebraska does not cap non-economic damages. Judge Simmons asked both parties to submit their briefs simultaneously, without response or reply.

Your packet of materials includes:

- *Judge Simmons's Findings of Fact and Conclusions of Law*
- *Defendant's Memorandum for Application of Kansas Law*
- *Plaintiff's Memorandum for Application of Nebraska Law*
- *Full texts of all cases, statutes, and other materials cited in the parties' memoranda*
- *A form for recording your decision and reasoning*

Your task is to decide whether Kansas or Nebraska law applies to the calculation of damages.

[2017 version:]

> *Please do NOT access any information other than the information in your packet, and please do NOT talk to your neighbors until the study is completed.*
>
> *You have 50 minutes to reach a decision and submit a brief summary of your reasoning on the paper provided.*

[2018 version:]

> *While working on the task, please do NOT access any information other than the information in your packet, and please do NOT discuss the task or issues it raises with anyone until you have finished.*
>
> *In your own interest and that of the study, please spend no more than 50 minutes on this task, including time reading the materials and writing the brief summary of the reasons for your decision.*

Please write and submit your decision and the brief summary of your reasoning either

online at [treatment specific link]

or

on the paper provided and hand it to me the first morning of the Program (April 23).

Appendix 6: Judge Simmons's Findings of Fact and Conclusions of Law

[NB: Words in square brackets indicate words, phrases, or sentences that differ by treatment condition, as explained in section 2.3. Some formatting and spacing has been removed for brevity.]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF [FORUM STATE]

BEATRICE PARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV 14-4149-[3-letter treatment code]
	)	
GARY ROGERS,	)	
	)	
Defendant	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a non-jury trial in the above captioned matter, and review of the pleadings filed by the parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Beatrice Parker ("Parker") is a citizen of [Domicile state]. She has lived in [City in domicile state, Domicile state] all her life, works there as a [Parker's job], and plans to reside there indefinitely.
2. Defendant Gary Rogers ("Rogers") is a citizen of [Forum state]. Before the accident, he lived all his life in [City in domicile state, Domicile state], but, after the accident, he moved to [City in forum state, Forum state, reason Rogers moved to Forum state]. He plans to reside in [Forum state] indefinitely.
3. The amount in controversy between Parker and Rogers exceeds $75,000.
4. Parker and Rogers grew up in [City in domicile state, Domicile state]. They met in high school. [Description of post-high school lives]
5. In April 2014, Rogers's grandfather Edwin Rogers died. He left Rogers [description of inheritance] in [Accident state]. Rogers wanted to inspect the property but [reason he didn't have a car]. Parker offered to drive him in her [Parker's vehicle].
6. Parker and Rogers started to drive to [Accident state] in the early afternoon of May 16, 2014. They planned to reach their destination by 9 p.m. Near [City in accident state], however, the engine of the [Parker's vehicle] overheated. Parker and Rogers had to interrupt their drive and leave the [Parker's vehicle] in a garage in [City in accident state].
7. Parker and Rogers attempted to rent a replacement vehicle from Avis Car Rental in downtown [City in accident state]. However, [Parker/Rogers] got into an argument with the manager, Arjun Gupta, about the price, which [Parker/Rogers] found abusively high. When [Parker/Rogers] used a racial slur, Gupta refused to rent to Parker and Rogers. As it was then already 6 p.m., other car rentals in downtown [City in accident state] were closed, and Parker and Rogers had to go to the airport to find an open car rental. Rogers ultimately rented a [rental car type] from Hertz Rent a Car. As part of the rental, he purchased the Liability Insurance Supplement (LIS), which provides liability coverage up to $1,000,000.
8. Parker and Rogers finally continued their drive at around 8 p.m. Rogers's inheritance was located in [Small city in accident state], a small town about four hours away from [City in accident state]. Rogers drove the rented [rental car type]. Parker sat in the front passenger seat.
9. Around 11:30 p.m., Parker noticed that Rogers was tired and suggested that he pull over and take a nap. Rogers declined. After driving a little longer, he fell asleep. The car veered off the

road and hit a telephone pole while traveling approximately sixty miles per hour. The car struck the pole near the right front corner of the car such that the biggest impact was on the passenger side.

10. Rogers suffered minor injuries.

11. Parker suffered major injuries to her head, back, and right leg, including a shattered jaw and fracture-dislocated vertebrae that compressed her spinal cord.

12. Parker was trapped in the car for several hours. Emergency workers did not remove her immediately, because they thought moving her would aggravate her spinal injury. During this period, Parker endured enormous pain in her jaw, and her lower body was numb from the spinal injury.

13. Parker was hospitalized for ten weeks at the University of [Accident state] Medical Center. The injuries to her jaw, spine, and leg required multiple surgeries, including reconstructive surgery for her shattered jaw. She subsequently required extensive physical therapy to regain partial use of her leg. Her medical expenses from the surgeries, hospitalization, and subsequent treatment, including physical therapy, were $624,257.34. The treatments were successful in that she regained sufficient use of her legs to perform ordinary tasks of daily living and to pursue her chosen career as a [Parker's job].

14. Parker's injuries made it impossible for her to work for five months, until October 22, 2014. Her [salary or average commission] is $3000 per month. So the injury caused her to lose five months of income or $15,000.

15. In the weeks after the accident, Parker suffered from considerable pain in her back, legs and face. The face and leg pain has been cured and the back pain has lessened, but her doctors predict that she will continue to endure mild back pain for the rest of her life.

16. As a result of the accident, Parker has a large scar across her right cheek, in spite of extensive reconstructive surgery. Her doctors predict that the scar will remain visible for the rest of her life.

17. Although the surgeries and physical therapy allowed her to regain sufficient use of her right leg to work and to perform ordinary tasks of daily living, Parker was not able to regain full motion in her right leg, and doctors predict she never will. As a result, Parker walks with a limp, and she is unable to perform strenuous activities or play most sports. Prior to the accident, she went on eight-mile runs several nights a week and spent virtually all her vacations hiking. She is no longer able to hike or run.

Conclusions of Law

1. The court has jurisdiction over the case pursuant to 28 U.S.C. § 1332.

2. Rogers's conduct, falling asleep while driving, constitutes negligence under both Nebraska and Kansas law.

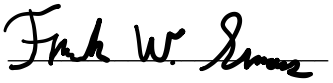
3. Damages depend on whether Nebraska or Kansas law applies. The plaintiff and defendant shall each, therefore, submit to the court, with a copy to the other party, no later than 21 days from the date of this ruling, a memorandum of points and authorities on whether Nebraska or Kansas law applies. Neither party shall file a response, opposition, or reply memorandum unless the court so orders.

4. **If Nebraska law applies to damages**, Rogers is liable to Parker for the full amount of both the economic and non-economic damages. Economic damages are $639,257.34, which is $624,257.34 in medical costs plus $15,000 in lost income. The Court finds the following amounts in non-economic damages to be fair and just considering the nature and extent of Parker's injuries: $300,000 for past pain and suffering, $200,000 for future pain and suffering, $50,000 for scarring and disfigurement, and $200,000 for loss of enjoyment of life. Non-economic damages, therefore, total $750,000. Therefore, total damages are $1,389,257.34.

5. **If Kansas law applies to damages,** Rogers is liable to Parker for the entirety of the economic damages, but non-economic damages are capped at $250,000. Kan. Stat. Ann. § 60-19a02 (2014). As noted in the preceding paragraph, economic damages are $639,257.34 and uncapped non-economic damages would be $750,000. With Kansas's cap on non-economic damages, total damages are, therefore, $889,257.34.

DATED this 3rd day of March, 2018.

BY THE COURT



FREDERICK W. SIMMONS
United State District Judge

Jeffrey G. Klosterman
P. O. Box 10701
Casper, WY 82602
(307) 265-0732
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

BEATRICE PARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV 14-4149-SKS
	)	
GARY ROGERS,	)	
	)	
Defendant	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION OF NEBRASKA LAW

Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), this Court must apply South Dakota's choice of law rules. The South Dakota Supreme Court has made clear on numerous occasions that South Dakota employs the *Restatement (Second)* approach to choice-of-law issues. *See Andrews v. Ridco, Inc.*, 863 N.W.2d 540, 554 (S.D. 2015); *Chambers v. Dakotah Charter*, 488 N.W.2d 63, 67 (S.D. 1992). In tort cases, the *Restatement (Second) of Conflict of Laws* § 145(1) states that the law of the state with "the most significant relationship to the occurrence and the parties" applies. "Contacts to be taken into account … include (a) the place where the injury occurred, (b) the place where conduct causing the injury occurred, (c) the domicile [and] residence … of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Id* at § 145(2). These provisions govern "the measure of damages," *id* at § 171, including "what limitations, if any, are imposed upon the amount of recovery." *Id* at § 171 cmt. a.

Contacts (c) and (d) mentioned in *Restatement (Second) of Conflict of Laws* § 145(2) both suggest that Nebraska is the state with "the most significant relationship" to the dispute. As to contact (c), both Beatrice Parker and Gary Rogers resided and were domiciled in Nebraska at the time of the accident, for most of their lives, and immediately after the accident. Beatrice Parker continues to live in Nebraska. Although Gary Rogers moved sometime after the accident, his unilateral, post-accident actions should not influence applicable law. As to contact (d), Nebraska is clearly where the relationship between the parties was centered. Nebraska is where Beatrice Parker

and Gary Rogers met, where they planned their trip to Kansas, and where they returned after the accident.

Contacts (a) and (b) mentioned in *Restatement (Second) Conflict of Laws* § 145(2) both point to Kansas, because that is where the accident took place. Nevertheless, the *Restatement (Second)* makes clear that in "common domicile" cases like this one, the state where both parties were domiciled and where their relationship was centered is the state with the most significant relationships:

> When the plaintiff and defendant are domiciled in the same state, and particularly if in addition there is a special relationship between them which is centered in this state, it would seem that this state is likely to be the state with the most significant relationship with respect to the issue of damages.

Restatement (Second) Conflict of Laws § 171 cmt. b.

The Supreme Court of South Dakota has decided two common domicile tort cases since adopting the *Restatement (Second)* in 1992. In both cases, the Court decided that the state where plaintiff and most defendants resided was the state with the most significant relationship and applied the law of that state, even though it was not the state where the injury took place.

Chambers v. Dakotah Charter, 488 N.W.2d 63, 67 (S.D. 1992) is the case in which the South Dakota Supreme Court adopted the *Restatement (Second)*'s most significant relationship approach to choice of law. The suit involved a South Dakota plaintiff who sued a South Dakota corporation for injuries the plaintiff sustained in Missouri while falling from the steps of defendant's bus. Although Missouri was the place of injury, the Supreme Court of South Dakota applied South Dakota's law of comparative negligence. The court emphasized that "South Dakota was the domicile, residence, place of incorporation, and place of business of the parties, as well as the place where the relationship of the parties was centered." *Id.* at 68.

In *Selle v. Pierce*, 494 N.W.2d 634 (S.D. 1993), a Nebraska resident filed a defamation action against another Nebraska resident regarding a defamatory letter mailed to South Dakota. Even though the plaintiff's business and social reputation in South Dakota was injured by the defamation, the Court applied Nebraska law, which barred punitive damages, because the parties resided in Nebraska and the relationship between plaintiff and defendant was "centered" in Nebraska. *Id.* at 637.

South Dakota's application of the law of the place of common domicile is in accord with the decisions of nearly all states that have adopted the *Restatement (Second)* and other modern choice-of-law methods. So, for example, Symeon Symeonides, a leading choice-of-law scholar, concluded:

> When both the tortfeasor and the injured party are domiciled in the same state, judicial opinions converge on the proposition that the state of common domicile has a better claim to apply its law… All together, a total of 50 common-domicile cases have reached 34 state supreme courts with, and since, the abandonment of the *lex loci delicti* rule. Forty-four of these cases (or 88%) applied the law of the common domicile, and six cases (12%) did not.... Of the latter cases, two were factually exceptional, one was overruled, and the remaining three are probably discredited.

Symeon Symeonides, *The American Choice of Law Revolution: Past, Present and Future* 155 (2006).

Symeonides does mention one case that is superficially similar to this case and which applied the law of the place of accident. *Peters v. Peters*, 634 P.2d 586 (Haw. 1981); Symeonides, *supra* at 155. In that case, a husband and wife, who resided in New York, rented a car in Hawaii and got into an accident there. The wife sued the husband, and the court applied Hawaii law, which barred suit between spouses. The court applied Hawaii law because the defendant had purchased insurance from the rental car agency, and the court thought the rental car agency would have calculated premiums based on the assumption that Hawaii law would apply. The court therefore concluded that it would be improper for the rental car agency to have to pay a claim that would have been barred by Hawaii law. *Peters* does not provide justification to deviate from the law of the place of common domicile for several reasons. First, *Peters* was decided by the Hawaii Supreme Court, and so, unlike *Chambers* and *Selle*, the South Dakota cases discussed above, it is not binding authority. Second, unlike South Dakota, Hawaii does not apply the *Restatement (Second)*'s "most significant relationship test," but instead performs "an assessment of the interests and policy factors involved." *Peters*, 634 P.2d at 593. Third, when a car is rented in Hawaii, it is absolutely clear that the car will only be driven in Hawaii, because Hawaii is an island. It thus makes sense that both the rental car agency and renter would expect Hawaii law to apply. In contrast, when, as in this case, a car is rented in Wichita, which is less than 60 miles from the border with Oklahoma and easy driving distance to Nebraska and Missouri, neither the rental car agency nor the renter has a reasonable expectation that Kansas law will apply.

Thus, the overwhelming weight of authority, both in South Dakota and elsewhere, supports the application of Nebraska law, because both plaintiff and defendant were domiciled in Nebraska before and after the accident, and because their relationship was centered there.

Respectfully submitted, March 24, 2017.

By: / s / Jeffrey G. Klosterman

Eric K. Rutledge
P. O. Box 4086
Cheyenne, WY 82003
(307) 632-0545
ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

BEATRICE PARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV 14-4149-SKS
	)	
GARY ROGERS,	)	
	)	
Defendant	)	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION OF KANSAS LAW

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) requires a district court to apply the same choice-of-law methods as the state in which the district court is sitting. In resolving choice-of-law issues in tort cases, South Dakota applies the *Restatement*'s "most significant relationship test." *Burhenn v. Dennis Supply Co.*, 2004 S.D. 91, ¶ 24, 685 N.W.2d 778, 784 (S.D. 2004); *Selle v. Pierce*, 494 N.W.2d 634, 635-36 (S.D. 1993); *Restatement (Second) of Conflict of Laws* § 145(1).

Kansas is the state with the most significant relationship to this dispute, because that is where the accident took place. In addition, Kansas was the place where Gary Rogers rented the car, where Beatrice Parker and Gary Rogers's journey in the rental car began, where they planned to inspect Rogers's inheritance, and where their journey in the rental car was anticipated to end.

Under the *Restatement (Second)* there are four contacts that courts analyze: "(a) the place where the injury occurred, (b) the place where conduct causing the injury occurred, (c) the domicile [and] residence … of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Restatement (Second) of Conflict of Laws* § 145(2). The first two contacts point unambiguously toward Kansas, because that is where the accident occurred. The third contact, the parties' residence and domicile, is unhelpful, because it does not point to a single state. While Beatrice Parker resides and is domiciled in Nebraska, Gary Rogers resides and is domiciled in South Dakota.

While it is true that the South Dakota Supreme Court has twice decided cases in favor of the law of the place of common domicile, *Chambers v. Dakotah Charter*, 488 N.W.2d 63 (S.D. 1992); *Selle v. Pierce*, 494 N.W.2d 634 (S.D. 1993), those cases do not support application of Nebraska law in this case for two reasons. First, as noted above, this is not a "common domicile" case, because Beatrice Parker is domiciled in Kansas, and Gary Rogers is domiciled in South Dakota. Second, neither *Chambers* nor *Selle* involved a situation, like that presented here, in which

the injury and injurious conduct were both entirely in a single state that was different from the state where the parties resided or were domiciled. When injury and injurious conduct are in the same state, as in this case, the first two of the *Restatement (Second)* factors point toward the same state, and that state has a powerful interest in applying its own law. Neither of the South Dakota Supreme Court cases was of this kind.

Chambers v. Dakotah Charter, 488 N.W.2d 63 (S.D. 1992), is very different from this case. First, as noted above, "the principal conduct which allegedly caused the injury" (the distribution of candy on the bus) and the injury (slipping on candy and falling off a step of the bus) did not happen in the same state. It is unknown where the wrongful conduct occurred, but the court is clear that it did not happen in Missouri, where the injury occurred. *Chambers*, 488 N.W.2d at 68. This bifurcation of wrongful act and injury between two states made it less plausible that either would be the state with "the most significant relationship" and heightened the significance of the common domicile. Second, the Court in *Chambers* noted that the bus involved in the accident was "on an interstate journey from South Dakota to Arkansas. It was merely fortuitous that [the plaintiff] slipped while the bus was passing through Missouri." *Id.* In contrast, the fateful journey in this case took place entirely in Kansas. Gary Rogers rented the car in Wichita, and Beatrice Parker and Gary Rogers intended to drive from there to a place in Kansas and then back again to Wichita, where they would have to return their rental car.

Selle v. Pierce, 494 N.W.2d 634 (S.D. 1993) also points towards application of Kansas rather than Nebraska law. In *Selle*, the injury was spread over several states. The plaintiff's reputation was injured in his home state, Nebraska, as well as in South Dakota. In fact, because the defamatory words primarily concerned the plaintiff's activities in Nebraska, that state was not only the state of common domicile, but also the place where the brunt of the injury occurred. *Id.* at 637. In contrast, in this case, the injury to Beatrice Parker, as well as Gary Rogers's conduct, both occurred entirely in Kansas.

Cases from outside South Dakota support the application of Kansas law in this case. A Hawaii Supreme Court case, *Peters v. Peters*, 634 P.2d 586 (Haw. 1981), is very similar to this case. In that case, the plaintiff and defendant, Mr. and Mrs. Peters, both resided in New York. They flew to Hawaii, where they rented a car. While Mr. Peters was driving, their car collided with a truck and Mrs. Peters was injured. The issue was whether the court should apply Hawaii law, which barred suits between spouses, or New York law, which did not. The Court held that Hawaii law should apply because the journey that resulted in the accident took place exclusively in Hawaii, even though both Mr. and Mrs. Peters were domiciled in New York and even though their relationship was centered there. The Court emphasized the importance of the purchase of insurance in Hawaii for the rental car. It noted that the "the insurance policies covering them undoubtedly were written with the laws of Hawaii in mind. To have New York law govern a tort action arising from the operation of such a vehicle would, of course, contravene the expectations of both insurer and lessor." *Id.* at 594. Similarly, in this case, Gary Rogers purchased insurance for the rental car in Kansas, so it was the expectation of both the rental car agency and Gary Rogers that Kansas law would apply.

A leading authority on choice of law, Symeon Symeonides, acknowledges that *Peters*, *supra*, makes a justified departure from the pattern of common domicile cases. Unlike other cases deviating from that pattern, which he describes as "overruled" or "probably discredited," Symeonides classifies *Peters* as "factually exceptional." Symeon Symeonides, *The American Choice of Law Revolution: Past, Present and Future* 155 (2006). See also non-critical discussion of *Peters* in Symeonides, *supra* at 145 n. 10. This case, like *Peters*, differs factually from the common

domicile cases decided by the South Dakota Supreme Court in that both injury and injurious act occurred in the same state (Kansas). In addition, as noted above, this case is not really a common domicile case at all, because Gary Rogers is domiciled in South Dakota.

The state with the most significant relationship with the dispute is therefore Kansas, where Gary Rogers's injurious conduct occurred, where Beatrice Parker suffered injury, where Gary Rogers rented the car and purchased insurance, and where their entire journey in the rental car both occurred and was intended to occur. As a result, Kansas law, which caps noneconomic damages, should apply.

Respectfully submitted, March 24, 2017.

By: / s / Eric K. Rutledge

Appendix 8: Exit Survey (differences between 2017 and 2018 versions in square brackets)

Thank you very much for completing the main study! Please answer the following six short follow-up questions:

1. *What proportion of your colleagues do you think decided the case as you did?*

2. *What type of judge are you: circuit, district, bankruptcy,* [2018 only: *federal claims,*] *or magistrate?*

3. *In the cases you have decided as a judge, have you ever had to choose between the law of the place of the accident or of the parties' common domicile, as in Parker v. Rogers?*

4. *Did the case seem realistic to you? If not, why not?*

5. *What do you think this study was about?*

6. *I administered a similar* [2017: *experiment*; 2018: *study*] *at this workshop* [2017: *two*; 2018: *one and three*] *years ago, and talked about it* [2017: *last year*; 2018: *two years ago*]*. Did you take part in* [2017: *this workshop last year or the year before*; 2018: *those workshops*]*, or did you otherwise hear or read about my prior* [2017: *experiment*; 2018: *studies*]*?*

Appendix 9: Pre-Registration

[Insert high-quality pdf page]

Appendix 10: Judgment Reasons

Judge types: B- Bankruptcy, C- Circuit, D- District, M- Magistrate.

treatment	law chosen	Judge type	reasons
			2017
SD-KS-D	KS	C	Applying the 4 factors, I think Kansas law must apply. (1) the injury happened in Kansas. (2) the conduct which led to the injury happened in Kansas, including the purchase of insurance. (3) the domicile of the parties does not require an outcome either way, because Ms. Parker lives in Nebraska and Mr. Rogers lives in South Dakota. (4) the place where the relationship is centered is Nebraska, but this is the only factor that weighs in favor of Nebraska.
SD-KS-D	KS		In the case sub judice the conflict of laws determination is controlled by the application of the forum state, South Dakota. South Dakota has adopted the Restatement (Second) of Conflict of Laws §145(1). Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Andrews v. Ridco, Inc., 863 N.W.2d 540, 554 (S.D. 2015). This court rules that the substantive law of Kansas controls. In reaching this conclusion, the court finds that the most significant relationship to the occurrence and the parties applies. The injury occurred in Kansas, the conduct causing the injury occurred in Kansas. Burhenn v. Dennis Supply Co. 2004 S.D. 91, 685 N.W.2d 778 (S.D. 2004). In so ruling the court notes that plaintiff Parker is a resident of Nebraska, and defendant is a resident of South Dakota. The auto was rented in Kansas, the auto was driven in Kansas, and the injury occurred in Kansas. This court finds that the most significant contacts were in Kansas.
SD-KS-D	NE	C	• The parties agree that South Dakota choice of law rules control, and that South Dakota law follows the Restatement most significant relationship test. • At the time of the relevant event, both parties were residents of Nebraska with intentions to return to Nebraska after the accident • The specific rule here does not directly regulate conduct (like for example speeding law, etc.), but rather regulates the shifting of costs that occur as a result of any type of negligent behavior. • Nebraska policy is to shift entirely the cost to the tortfeasor (as much as one can). • Kansas' policy choice of not shift[ing] full costs (and thus protecting [defendant]) not really implicate[d] here because no party is a Kansas resident who would bear cost in either instance. • We don't know what South Dakota law is, but since a cap is likely a defense + defendant does not argue for South Dakota law, we can ignore that and perhaps even assume South Dakota law is normal tort rule (although best perhaps simply to deem whole South Dakota-based argument waived) • P.S. post-accident move of domicile—not determinative in this analysis because defendant did not point to South Dakota law, but if it were posed more directly, need to avoid creating incentive to change residence to avoid large damages.

treatment	law chosen	Judge type	reasons
SD-KS-D	NE	D	Under Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the court must apply South Dakota's choice of law rules. The South Dakota Supreme Court holds that South Dakota employs the Restatement (Second) approach to its choice-of-law issues which, for tort cases, states that the law of the state with the "most significant relationship to the occurrence and the parties" applies. In the instant matter, the contacts to be taken into account — "(a) the place where the injury occurred, (b) the place where conduct causing the injury occurred, (c) the domicile [and] residence…of the parties, and (d) the place where the relationship, if any, between the parties is centered…" — are split equally between Nebraska and Kansas. Thus a closer examination must be made as to which of these contacts should be accorded more weight. Given the facts of this particular case, it appears that the events leading up to accident were determined largely because of the relationship of the parties; that is, their longstanding friendship and relationship or knowledge of one another. Therefore where (as here) the parties' relationship is significant to the reason why the accident took place. The place where the relationship is centered takes on more significance than the place where the injury occurred or where the conduct causing the injury occurred. Especially since, in the instant matter, the location was of a temporary nature. The reliance on Peters v. Peters is misplaced as the Hawaii Supreme Court's choice of law analysis differs vastly from that of South Dakota as it takes into account the expectations of the insurer and insured which are factors not to be necessarily considered under the Restatement approach.
SD-KS-D	NE	D	Nebraska has a greater interest in the outcome. Kansas is the location where the accident occurred; but that is all. The Restatement does not address whether the domicile of which it speaks is to be considered at the time of the injury or filing. I am inclined to believe it refers to the time of injury. Thus, the test outlined at Restatement Second Conflict of Laws is resolved in favor of Nebraska
SD-KS-D	NE	D	Domicile at time of the injury appears to be the most significant factor. The parties travel to and through Kansas does not advance the relative rights and protection afforded to the plaintiff incidental to occurrences or related to injury. Choice of law to be applied the Restatement (Second) of Conflict of Laws §145 (1). Contacts (c) and (d) point to Nebraska. Both lived in Nebraska at the time of accident -- Most significant relationship Place of common domicile is in accord with the decisions of nearly all states. Hawaii case is distinguishable on intent to rent a car in Hawaii in [unintelligible] of rental that intent not present here.
SD-KS-D	NE	B	Restatement 171* – damages issue – domicile of both parties at time of injury + defendant's post-accident change should not have an impact on the analysis. South Dakota has no more interest than Alaska. Additionally, much of the damage suffered by plaintiff – the consequences will occur in Nebraska – the effect on her income, future pain + suffering, etc. *And Burhenn v. Dennis Supply- South Dakota Supreme Court would likely so decide.

treatment	law chosen	Judge type	reasons
SD-KS-D	NE		I NORMALLY TYPE. THIS IS AWKWARD AND UNCOMFORTABLE. Using the most significant relationship test Nebraska has the most significant relationship to the occurrence + the parties. The conduct causing the injury centered around the journey to inspect the property. This journey began in Nebraska and clearly the parties intended to return. They planned the journey in Nebraska. Their relationship was centered in Nebraska and they were both residents of Nebraska. The fact that Rogers later moved is not particularly relevant. South Dakota law controls choice of law and clearly has abandoned lex loci. The choice of Nebraska law seems more in keeping with the policy + principles set forth in my brief review of its case law.
SD-KS-P	KS	D	I accept, and do not feel at liberty to disturb, Judge Simmons's factual finding that Rogers is a citizen of South Dakota, even though I might have decided the question differently. This deprives Parker's argument of much of its force. Under Restatement §145(2), factors (a) and (b) point to Kansas. Factor (d) points to Nebraska. Factor (c) is indeterminate. The comments to §145 state that "the fact…that [only] one of the parties is domiciled or does business in a given state will usually carry little weight itself." So Parker's residence carries little weight. It is true that the parties' relationship was centered in Nebraska, but the same comments state that this factor would be "the most important contact of all" only "on rare occasions." Of course, Nebraska has a strong interest in providing full compensation to its citizens, but Kansas presumably has an equally strong interest in limiting the exposure of defendants, so this is a push. I say this even though I give little weight to the Peters decision, which appears not to have given the Restatement factors adequate consideration; to have adopted a lex domicilii test when insurance is at stake; and to have recognized that it was departing from the Restatement. I don't like this result but I think it is what the law compels.
SD-KS-P	KS	B	Many of the factors applied literally could have led to a conclusion for Kansas or Nebraska. However, for me the change in rental cars breaks the close tie. All of a sudden there is a new contract for the car in Kansas, the insurance taken would certainly portend that Kansas law would apply to any dispute over coverage. This added to the fact that the inherited property is in Kansas + the accident took place in Kansas due to defendant's negligence tips the scale. As a non-legal, but still a possible thought on the sympathy scale ("I know, I know) the difference in the total award between the states is not enormous. The fact that the defendant moved after the accident does not really factor into my decision. It is more important as of the time the accident happened.
SD-KS-P	KS	B	South Dakota's choice of law rules in accordance with Klaxon and §§145 and 147 of the Restatement of the Law. In considering that South Dakota employs the Restatement (Second) approach with its most significant relationship analysis, the court finds that the Kansas cap is applicable. The place of the injury, the place where conduct causing the injury occurred is Kansas. The domicile of the parties is not a common domicile, contrary to defendant's contention, and the place where the relationship between the parties is not centered in Nebraska since Rogers moved. Therefore, Kansas law controls.

treatment	law chosen	Judge type	reasons
SD-KS-P	KS	M	While the action was commenced in South Dakota, plaintiff resided in Nebraska, defendant after the accident relocated to South Dakota, + accident occurred in Kansas. Car rented in Kansas, insurance contract entered in Kansas, subject inherited property from his decedent grandfather in Kansas, accident in Kansas, trip expected to end and indeed did end in Kansas. Parties, although domiciled at the time of the accident in Nebraska, did not share a special relationship such as husband and wife, + defendant subsequently changed domicile. His time of residence in Nebraska may have been fluid + accidental, on account of his incarceration. Plaintiff was hospitalized in Kansas for an extended period, + received rehabilitative treatment in Kansas. Rental insurance contract which provided $1 million coverage, anticipated that Kansas law would be applied, although this is not evident from the evidence presented in any event since the balance of contacts seems to weigh in favor of Kansas, it seems apparent that since the car was rented in Kansas, the inherited property is in Kansas, + the accident was in Kansas, that Kansas law should apply. All medical + rehabilitative treatment was received in Kansas, + presumably the Kansas facilities would seek reimbursement from the tortfeasor through subrogation. The shared domicile argument seems trivial in view of the number of Kansas contacts, + is insubstantial as a basis for application of Nebraska law to the circumstances.
SD-KS-P	NE	C	1. Disregard Rogers' post-accident move to South Dakota. Later, unilateral acts like that should not change applicable legal rules & consequences. [Query, what if Nebraska still followed lex loci delicti!] 2. That leaves factors under §145 split 2-2: Kansas is location of injury and wrongdoing. Nebraska was shared domicile of parties and center of relationship between them. 3. Relative importance on interstate trip? Seems artificial to confine "journey" to just rental-car trip in Kansas. Kansas has minimal interest in applying its damages rules here. See Restatement (2d) §171, comment (b). 4. South Dakota cases can be distinguished factually, but overall thrust emphasizes common location of center of relationship in Chambers. 5. Peters from Hawaii seems to be literally an outlier based on island status. The insurance contract may be the economic reality here, but rules as between plaintiff and defendant should not be affected by that insurance contract. 6. The ugly episode in this, as well as Rogers' troubled history and Parker's more virtuous life, also should not matter. 7. Bottom line — for me, center of parties' relationship trumps the more fortuitous location of the accident.

treatment	law chosen	Judge type	reasons
SD-KS-P	NE	C	The parties agree on choice of law principles/ governing cases. The two parties both lived in Nebraska at the time of the harm/the accident—the relevant events for purposes of choice of law. The factors seem strongly to favor Nebraska law. 3) domicile + 4) the center of the parties' relationship favor Nebraska. The rental car company, Hertz, whose product by its nature travels, must have an expectation that it may be subject to liability in various states and prices its insurance accordingly.* Yes, the 1) injury and 2) conduct causing it occurred in Kansas, tending to favor Kansas choice of law, at least under Peters; but Peters is "a departure from the pattern," distinctive in view of Hawaii's geographic isolation, (and perhaps unpersuasive in any event given the New York situs of the marriage, relevant to the marital-centric rule at issue in Peters.) *not sure where/how that is even pertinent, given the four relevant factors; and Hertz isn't the defendant, (but we assume stands for its insured?) I suppose the insurance/business planning re: risk issue figures into factors about the law governing the situs of the injury. But the expectations of the natural persons, as illustrated by GR's purchase of $1 million insurance coverage, seem primary. And shows he thought his exposure was high.
SD-KS-P	NE	D	The application of either state's laws would find equal support when applying the four contacts analysis of Restatement (Second) of Conflict of Laws. Nebraska is the place where the injury occurred and where the conduct causing injury occurred. Kansas is domicile of parties and the place of relationship at the time of incident. Normally domicile is controlling when applying South Dakota law, but there is support for considering the parties' relationship with the insurance company issuing a policy on a car that is not subject to a cap. Because the parties have a reasonable expectation that the policy will cover an amount of damages when driving in Nebraska, Kansas cap does not apply.
SD-KS-P	NE	D	At the time of the accident, the relationship of the parties was "centered" in Nebraska, where both parties resided. Thus, contacts (c) and (d) of the most significant relationship test point to Nebraska law as the applicable law. Most courts applying this test in similar circumstances have found (c) and (d) to be more important than either the place where the injury occurred or the negligence took place. This is true of South Dakota decisions and decisions from other jurisdictions. The exception cited by defendant, a case from Hawaii, is unique. The Hawaii Supreme Court was concerned with a particular policy—Hawaii's prohibition against interspousal suits and that expansion of the law for nonresidents would impact insurance rates for residents as well. The court noted that Hawaii has enacted its particular no-fault compulsory insurance law "to address problems related to motor vehicle liability insurance, including costs." Peters v. Peters, 634 P.2d 586, 595 (Hawaii S. Ct. 1981). No such findings have been noted with respect to Kansas insurance law, and of course, in the ordinary case, unless in Hawaii, it may be expected that cars are rented in Kansas and driven to other locations.

treatment	law chosen	Judge type	reasons
SD-KS-P	NE	M	1. more significant contacts; accident in Kansas purely fortuitous; only meaningful events were the accident and medical care (+ this finding will enable payment for medical care) — similar to Chambers (except clear accident occurring in Kansas) 2. weight of opinions seems to support this result (see Symeonides) (although not clear "common domicile case). 3. Carries out defendant's intention (perhaps plaintiff's as well) in purchasing $1M "LIS"). 4. Will do the most good in compensating the innocent victim + using insurance money to do so—insurer factors in risk of liability payment + will record its payments. 5. To rule otherwise would impose an added burden on Nebraska which would be providing care + benefits to its resident victim.
SD-	KS	C	Majority of contacts in Kansas—parties are from there. Travel began there. Restatement says it is the majority rule. Seems to follow prior South Dakota cases.
SD-NE-D	KS	D	The common domicile applies here because that was the status of the parties prior to the accident. Applying that factor as controlling the determination of choice of law here seems most consistent with the South Dakota Supreme Court's case law. The Hawaii case is not controlling and is most distinguishable by the fact that the vehicle there was rented on the islands, and clearly only would be driven there. As such reasonable expectations would warrant application of Hawaii law. [Note— in fairness to the research project— I am influenced by the fact that the damages would be higher for the severely injured plaintiff if I were to apply Nebraska law— but no insofar as to disregard the controlling authority (which is NOT pro-plaintiff in either Chambers or Selle).
SD-NE-D	KS	B	The court must apply the significant relationship test. While the conduct causing the injury + the injury itself occurred in Nebraska, the parties had a longstanding relationship centered in Kansas, both were Kansas residents when the accident occurred, and the fact that the injury occurred in Nebraska was a matter of timing, which neither party intentionally controlled.
SD-NE-D	NE	C	Both parties agree that South Dakota's choice of law rules apply. South Dakota, they agree, applies the Restatement's "most significant relationship test." That test requires the analysis of this issue in this matter under four contacts. The first two point without doubt to Nebraska—the injury occurred there and the conduct causing the injury (sleeping) occurred there. The third contact factor does not help because the parties are domiciled in two different states —Kansas and South Dakota. The fourth factor's influence is unclear here—regarding the relationship, are we looking at how the parties are personally related, i.e. how they know each other, or do we look to where the nature of the relationship that caused them to be together for this matter is centered. Perhaps in both instances, it would be Kansas, but there is an agreement that the relationship regarding the car rental is centered in Nebraska. Bottom line: in weighing the factors, I would apply the totality of the circumstances test and rule "Nebraska."

treatment	law chosen	Judge type	reasons
SD-NE-D	NE	D	Accident happened in Nebraska, car was rented in Nebraska, endpoint of trip was in Nebraska, insurance bought in Nebraska, defendant has assets in Nebraska. These factors outweigh citizenship at time of accident + location of prior relationship of parties
SD-NE-D	NE	D	I find the fact that both the insurance contract, the negligent act, and the resulting damages all occurred in Nebraska leads one to apply Nebraska law as "the most significant relationship" test requires. I am also pleased that it will possibly lead to full recovery for this injured plaintiff, but it alone is neither the underlying reason nor a factor in applying the law.
SD-NE-D	NE	D	NE Restatement (a) + (b) + insurance contract KA (c)+(d)
SD-NE-D	NE	M	Contacts: a) place of injury -> Nebraska b) per Chambers v. Dakotah Charter, because the law issue does not determine what is negligent, but only what damages are recoverable, place where conduct causing injury is important -> Nebraska c) domicile/residence -> Kansas, except Rogers at the time of action resident of South Dakota, so less important factor d) place where relationship centered -> Kansas. Also, economic consequences of injury not exclusively in Kansas
SD-NE-D	NE	M	South Dakota applies the Restatement Second approach to choice of law. Under this approach Nebraska law applies. The Restatement states that in cases of personal injury, the place where the injury occurred is a contact that plays an important role in the selection of the applicable law. It further states that where the injury occurred in a single clearly ascertainable state and when the conduct also occurred there that state will usually be the state of the applicable law. These 2 factors clearly apply here: plaintiff's injury occurred in a car accident in Nebraska. The restatement 2 has additional factors but on balance most of them lean toward applying Nebraska law. For instance our defendant no longer resides in South Dakota where plaintiff resides. Finally, as a policy matter, Nebraska has a significant interest in ensuring the damage award to those injured in its state are enforced. The accident + injury occurred entirely in Nebraska. South Dakota has no significant interest in this case or this accident, a one time event. The accident did not involve recurring business or transport between the 2 states. Hence consistent with Chambers v. Dakotah Charter, as Nebraska would be deeply affected, and South Dakota would not, the court concludes that Nebraska law governs application of damages in this case.

treatment	law chosen	Judge type	reasons
SD-NE-P	KS	D	Whereas balancing factors a and b against factors c and d could lead one to either decision, and there certainly is an argument for holding that the place of the injury should be able to regulate conduct there, that place is fortuitous, and the driver is unlikely to be influenced by its laws. In my view, it is better to apply the more predictable laws of Kansas, which the parties are more likely to be familiar with. The Hawaii case is factually exceptional, and the driver's post-accident move should not have a major impact.
SD-NE-P	KS	M	Most significant relationship test from Restatement (Second) Conflict of Laws requires four contacts to be analyzed: a) the place where the injury occurred; b) the place where conduct causing injury occurred, c) domicile and residence of the parties, d) the place, if any, where the parties' relationship was centered. Here, the injuries and conduct causing injury occurred in Nebraska. The parties' relationship was centered in Kansas (they grew up in Kansas, met in high school there, and lived there all their lives up to the time of the accident, forming the basis of the suit). The domicile and residence of the parties at the relevant time is also in Kansas. Two factors then weigh in favor of applying Kansas law, and two factors weigh in favor of applying Nebraska law. The accident occurred in Nebraska on a road trip that began and was to end in Kansas. It was fortuitous that the accident occurred in Nebraska, which militates against application of Nebraska law. Additionally Kansas law has a compelling interest in having its state's law applied where a tort occurs between individuals that share Kansas as their common domicile. For these reasons, the court will apply Kansas law to the issue of damages.
SD-NE-P	NE	C	Plaintiff's reasoning and arguments distinguishing the cases relied on by defendant are persuasive. Also, the argument of the expectations of the insurance company is persuasive.
SD-NE-P	NE	C	Very close case. The place where the conduct occurred that caused the injury in Nebraska. But both parties were domiciled in Kansas. Arguably, though their relationship was centered in Kansas, they no longer have a relationship at all. However, Nebraska has a greater interest in its choice of law because the car was rented in Nebraska, the car was presumably damaged (& Nebraska law should govern liability for that), the liability insurance was issued in Nebraska, and the premiums presumably were calculated in relationship to Nebraska. Moreover, the entire purpose of the trip was to visit Rogers' land that he owned in Nebraska, which he inherited under Nebraska probate law and for which he will pay Nebraska property taxes, even though he now lives in South Dakota. Judgment for Parker in the amount of $1,389,257.34. Applied Restatement significant relationship test, Peters— dist[inguish] the two SD cases.
SD-NE-P	NE	D	Nebraska is the state with the most significant relationship. Nebraska is where the negligent conduct occurred, that is where the serious injury occurred, and that is where the parties intended to travel to inspect property there. The state or states of the parties' residencies do not have the most significant relationship to or impact on the dispute.

treatment	law chosen	Judge type	reasons
SD-NE-P	NE	D	1. The doctrine of lex loci delicti prevails in this dispute. Unlike the facts in Chambers the facts here do not present the kind of "multi state tort actions" addressed in the Restatement of Conflict of Laws. In Chambers, the bus traveled through several states during its journey before the incident occurred. Here, all of the material facts leading to the incident occurred solely in the state of Nebraska, to wit: the car was rented in Nebraska only, it traveled through Nebraska only, the insurance coverage, presumably, covered accidents in Nebraska only (customary usage), the driver, Parker, was warned of his risks of driving in an impaired state in Nebraska only, and the injuries were sustained in Nebraska only. These compelling facts render it difficult to strip away Nebraska's greater interest in the application of its own laws to the incident. 2. To the extent a balancing of contacts is desired under the "most significant relationship" test, the court would still find that Nebraska law must apply. The common circumstances of domicile among the parties at least at the time of the accident, fails to overcome factors noted when applying the law of the location of the incident.
SD-NE-P	NE	B	The court incorporates by reference the findings of fact contained in the March 3, 2017, order by Judge Simmons. The court uses the factors found under §145(2) of the Restatement Second on Conflict of Laws. First, the place of injury and the conduct giving rise thereto is, without any question, Nebraska. There appears to be no ground for disagreement on that point. Respecting the third and fourth factors, a bright line analysis is difficult. Concerning domicile, Mr. Rogers has spent a veritable lifetime in Kansas. At least the most recent two years of his residency, however, were at the sovereign's selection given his incarceration. Further, he became a South Dakota resident immediately following the accident, thus diminishing any significant reliance on the third factor in adjudicating the choice of law controversy. These same concerns reduce the weight of the fourth factor as well. Mr. Rogers' imprisonment doubtless interfered with the usual course of his relationship with Ms. Parker as well. The analysis thus results in a strong connection to Nebraska and a much more tenuous connection to Kansas. As noted in the commentary to §145, "when the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, the state 'will usually supply the governing law' to most issues involving tort."* *The common domicile cases are distinguishable for reasons to be provided in a forthcoming supplemental opinion.
SD-NE-P	NE	B	Burhenn is dispositive that "most significant relationship test applies" in a SD state. In a federal diversity case, Klaxon makes it clear that SD's test applies. Place of car rental, destination place of insurance contract, place of accident, place of injury, place of emergency treatment, place of hospitalization, place of extended treatment, place of residences of plaintiff (including for economic and noneconomic loss) all in Nebraska. Meeting in Kansas is immaterial. Post-accident residence of defendant is immaterial.

treatment	law chosen	Judge type	reasons
WY-KS-D	KS	D	Accident occurred in Kansas. Wyoming, like most states, applies the law of the jurisdiction where the tort or wrong was committed. While some states recognize a distinction in applying the rule between liability and damages, Wyoming has not thus far. It would be up to the Wyoming Supreme Court to carve out exceptions to the general rule, and it has not. Wyoming "borrows" law from the jurisdiction in which the action took place, here Kansas. Absent a definitive statement from the Wyoming Supreme Court adopting a public policy exception to the general rule, Kansas law in its entirety should apply.
WY-KS-D	KS	B	1. Wyoming applies lex loci delicti = Kansas law 2. No Wyoming court has deviated from LLD — on account of public policy 3. Fed court — diversity = must apply state law as propounded by the forum's highest court 4. Common domicile doesn't seem to be enough to deviate from the rule — no guiding law on this
WY-KS-P	KS	M	Wyoming applies the rule of lexi loci delicti—the cause of action here took place in Kansas and Kansas law applies. Under Kansas law, noneconomic damages are capped at $250k. The public policy exception does not apply to the facts of this case because, as the defendant points out, the Wyoming Supreme Court has never deviated from the lex loci delicti rule on grounds of public policy. And under Wyoming law, damage caps do not violate fundamental principles of Wyoming law. The court rejects plaintiff's argument that, under the Second Restatement of Conflict of Laws, the law of the state where both parties resided should apply. And the court finds that applying the lex loci delicti rule does not violate public policy in this case. The cases cited by plaintiff are distinguishable.
WY-NE-D	KS	B	Adopt defendant's briefing on issue primarily since both were citizens of/domiciled in Kansas at the time, the emerging view applying the common domicile law should apply. Thus the Kansas cap should apply.
WY-NE-P	NE		A federal court sitting in diversity jurisdiction must apply state law of the forum state. Applying Wyoming law, the Wyoming Supreme Court held in Boutelle that the lex loci delicti rule remains the law. Here, the negligent operation of the vehicle occurred in Nebraska, the accident occurred in Nebraska, and the injuries were sustained in Nebraska that gave rise to damages. Moreover the Wyoming Supreme Court declined to adopt an interest analysis in determining where the action arose. Under such an analysis, Kansas has a significant interest in seeing that its law is applied to its citizens. But Wyoming has rejected such an approach even in cases of common domicile. Accordingly, Nebraska law applies.

treatment	law chosen	Judge type	reasons
			2018
SD-KS-D	KS	B	Informed by the Restatement (Second) on choice-of-law in tort cases, I considered the nature of the contacts comprising the most significant relationship to the occurrence-i.e., the negligent conduct and the resulting injury-and to the parties. Based on the facts relevant to this inquiry, South Dakota would look to Kansas law. The injury and the negligent conduct leading to the injury occurred in Kansas (a & b). The domicile, residence and place of work of the parties are, respectively, in Nebraska and South Dakota, making the third element a non-factor. In applying the fourth factor, the court discounted the early history of the parties-i.e., growing up together and attending the same high school-as not being relevant to the incident at issue. Were the facts slightly altered, such that Parker's car was involved and Rogers' domicile remained in Nebraska, such that he was only temporarily caring for his ailing aunt, there would be a stronger basis for the application of Nebraska law.
SD-KS-D	NE	C	If you are driving through Kansas, you reasonably expect that Kansas Law governs your conduct and as relevant here, specifies what is negligent and what you are liable for if your actions are negligent and you injure someone as a result of your negligence. So if Kansas caps your liability why should not that limit apply? What give the court the right to pick and choose what features of Kansas Law should give way just because the parties are from a different state? These two friends were from Nebraska, they planned their trip in Nebraska, and at the time of the accident intended to return to Nebraska. The driver has a basic duty not to be negligent to his passenger. In terms of the passenger's ability to recover from her injuries, why should it matter where the accident happened to occur? The basic duty not to be a careless driver does not vary from state to state. Why should the passenger's ability to be made whole for her injuries depend on the [locality?] of where the driver happened to fall asleep? If the two states do not really define negligence differently, and the only material difference is the cap on recovery, then the fact that the parties were both domiciled in Nebraska and their relationship was [created?] there arguably takes on more importance. Especially if Nebraska's public policy vis-a-vis recovery [? ?] differs from that of Kansas. No double there is an argument that if Nebraska has expressed a public policy in favor of full recovery for tortious conduct that should shift the balance in favor of applying Nebraska Law given the limits that Kansas imposes on damages, especially if the negligence law of Kansas and Nebraska is otherwise comparable.

treatment	law chosen	Judge type	reasons
SD-KS-D	NE	B	The district court, sitting in South Dakota, is required to apply the choice of law rules adopted by the South Dakota state courts. The South Dakota Supreme Court, following the majority of other courts, adopted the Restatement (Second) most significant relationship approach (rejecting the place of injury approach) in resolving multi-state torts conflicts of law. In Burhenn, a case mentioned only in passing by the defendant, the South Dakota Supreme Court focused on the center of the relationship between the parties, in applying the most significant relationship test in a wrongful death case. Restatement Section 145, Comment (d) suggests that the local law of the parties' common domicile should control if that was both the state from which the trip started and the state to which the parties intended to return. Here, Nebraska was the state where the trip began and where the trip was intended to end. Nebraska was also, at the time of the crash, the state of domicile of both parties. Restatement Section 145, Comment (e), Illustration 1 further supports the conclusion that, applying South Dakota's choice of law principles, the factors mentioned lead to the conclusion that the center of the relationship between these parties was Nebraska.
SD-KS-D	NE	M	Per Klaxon Co v. Stentor Electricity, the Court applies South Dakota's choice-of-law rules which apply the Restatement (2d) of Conflict of Laws. The parties raise Section 145(1) as four factors to consider, which the Court does. The Court also considers the principles stated in Section 6. For the reasons that follow, applying these legal factors to the facts as previously determined, Nebraska law applies as the law of the state with the most significant relationship. It is undisputed that the injury was caused and resulted in Kansas, but the domicile and residence at the time of the event (not at the time of the filing of this suit) was Nebraska, where the parties knew each other for years and set off with the intention of traveling to Kansas. Restatement Section 6 slightly tips the balance in that the relative intent of Nebraska where the injured party committed to the unfortunate trip (factor c), her justified expectation of recovery from any injury with her friend (factor a), the basic policies of full recovery for injury (factor c), uniformity of result between two parties near to each other and committed to the enterprise (factor b) and use of application (factor g) favor that.

treatment	law chosen	Judge type	reasons
SD-KS-P	KS	B	Review of the Restatement leads me to conclude that the "particular issue" involved for the "most significant relationship test" has more to do with the place where the conduct and the injury occurred and less to do with the relationship between the parties and their common domicile (accepted the plaintiff's position that the parties are commonly domiciled notwithstanding the defendant's current residence in South Dakota). Restatement § 145: "These contacts are to be evaluated according to their relative importance with respect to the particular issue." The remaining factors under § 6 are more significant than common domicile: needs of the interstate systems, relevant policies of the forum, relevant policies of other interested states (esp. Kansas limits damages and the insurance policy that covers this accident was sold in connection with a rental in Kansas). Comment e on Subsection (2): "When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the application law with respect to most issues involving the tort." As for cases, the most comparable case is Peters v. Peters, in which similar policy considerations existed for the state in which the conduct and injury occurred.
SD-KS-P	KS	M	Applying "most significant relationship" test - car rental, car rental usage and car accident occurred in Kansas.

SD-KS-P NE D I misunderstood the assignment and drafted an order. Here it is:

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

BEATRICE PARKER,)
)
Plaintiff,)
)
v.) No. 14-4149-SKN
)
GARY ROGERS,) Judge [judge name omitted for anonymity]
)
Defendant.)

ORDER

Plaintiff Beatrice Parker was injured in single-car accident in a car driven by Defendant Gary Rogers. Judge Frederick W. Simmons of this court conducted a bench trial on Parker's negligence claims against Rogers and issued Findings of Fact and Conclusions of Law in her favor, concluding that Rogers' conduct was negligent, and that Rogers suffered substantial economic and non-economic injuries. Parker was a resident of Nebrask, as was Rogers at the time of the accident. But the accident occurred in Kansas. Judge Simmons reserved ruling on the issue of whether Kansas or Nebraska law applies here—a significant question because Kansas, but not Nebraska, caps recovery for non-economic damages. The case has been reassigned to this court and, as explained below, the court concludes that Nebraska law applies. The court therefore awards Ms. Parker $1,389,257.34.

DISCUSSION

A federal judge sitting in diversity applies the choice of law principles of the state in which it sits, see Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)—in this case, South Dakota. More than twenty years ago, South Dakota moved away from the traditional "lex loci delicti" standard "in favor of an approach which gives flexibility and addresses conflicts of laws issues in a responsible and equitable manner." Owen v. Owen, 444 N.W. 2d 710, 715 (S.D. 1989) (Miller, J., concurring specially). In Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63 (S.D. 1992), the South Dakota Supreme Court formally adopted the "most significant relationship" approach, under which the Court applies the law the state "which, with respect to [an issue in tort] has the most significant relationship to the occurrence and the parties. . . ." 488 N.W.2d at 68, citing Restatement (Second) of Conflict of Laws § 145 (1971). That determinination will govern not only liability determinations, but the measure of damages as well. Restatement (Second) of Conflict of Laws § 171. In determining which state has the most significant relationship, the court considers the place where the injury occurred, the place where the conduct causing the injury occurred, the places of 4residence and domicile of the parties, and the "place where the relationship, if any, between the parties is centered." Chambers, 488 N.W.2d at 68.

At first blush, the four factors appear evenly balanced. As Judge Simmons explained in his ruling, the injury occurred in Kansas, and the negligence resulting in the injury (Parker's falling asleep at the wheel) occurred there, as well. Parker and Rogers met in

treatment	law chosen	Judge type	reasons

Nebraska, however, and it was in Nebraska that they formed the plan to drive to Kansas to examine Rogers' property. Rogers notes that he is no longer a Nebraska resident, but his post-accident move is not relevant to the question of what state has the most significant interest in the injury at issue.

As the Restatement explains, however, the contacts that the court takes into account "are to be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) § 145. This court concludes in this case that the parties' place of residence and the location where their relationship is centered has greater relative importance than the location of the injury. Parker is a lifelong resident of Nebraska, which state has an interest in the financial wellbeing of its residents. Rogers lived all his life in Nebraska, as well, up to the time of the accident. The two have known each other since high school, and that relationship is significant because without Parker, Rogers could not have taken the road trip at all. Case law cited by the parties, as well as scholarship cited by both sides, confirms that when the parties share a common domicile, the state of domicile "has a better claim to apply its law." Symeon Symeonides, The American Choice of Law Revolution: Past, Present and Future 155 (2006).

Rogers cites Peters v. Peters, 634, P.2d 586 (Haw. 1981), where a husband and wife domiciled in New York had an accident in Hawaii. Despite their common domicile thousands of miles away, the Hawaii Supreme Court applied its own state's law to a tort action between the spousesThe court there applied Hawaii law in part because the parties had purchased insurance from a rental car agency, presumably at rates set with an eye toward damages standards of Hawaii. Rogers, similarly, purchased insurance from a rental agency in Kansas. . It is not clear that Hawaii utilizes the same "most significant relationship" test that prevails in South Dakota. And, as Parker points out, cars rented in Hawaii can only be driven there; rental car agencies in Nebraska presumably recognize cars rented there may well be driven across state borders. In any event, to the extent the insurer's expectations are relevant at all, they ought not control the question of what damages award is appropriate as a matter of law for a tort claim between two private parties. Had Rogers been driving without insurance of any kind, he may not have assets to pay the judgment, but the choice of law analysis should be the same.

The court concludes that South Dakota law applies and awards Plaintiff damages of $1,389,257.34.

ENTER:

April 23, 2018 _____
[judge name omitted for anonymity]

treatment	law chosen	Judge type	reasons
SD-KS-P	NE	B	Under the "most significant relationship" test that So. Dakota law applies in conflict of law cases, the court is to consider certain factors, but uses the words "includes," which means other factors may be considered. The first two factors favor Kansas law, the law two favor Nebraska, but other considerations include the facts that the parties were Nebraska residents before and after the accident; that Nebraska would have a vested interest in how the parties who were NE residents when the agreement to travel was made and to where the parties returned after the accident would be impacted; that similar to the bus injury case, it is happenstance that plaintiff's car broke down in KS (the car could have broken down in NE); that the parties do not cite any law to suggest that KS has some vested interest or policy in having its law apply to non-KS residents. If plaintiff has filed suit immediately, both parties would have been in NE and there would have been no question that NE law should apply.
SD-NE-D	KS	B	"The SD Supreme Ct has clearly adopted the Restatement (2d) approach to choice of law issues. Both sides agree. Thus, 4 factors are to be considered. 1. Place of injury. 2. Place where conduct causing injury occurred. 3. Domicile of parties. 4. Place of relationship between the parties. There is no question that the injury occurred in NE. The is no question that at all relevant times, the parties were domiciled in KS (the fact that one moved after the accident is not relevant as that would be a strange and artificial way to determine domicile). Their relationship was in KS. The conduct was mostly in NE (the accident, ?hat? tiredness is attributable to the entire trip beginning in KS.) The case is very similar to Chambes where the trip started in SD, the parties were domiciled in SD and the accident (admittedly perhaps not as definitive occurred in MO) The Ct applied SD law. Further a review of the Restatement shows that: (i) §171 (p. 171) that domicile is important :(2) p. 418 in discussion shows a preference for domicile in ?comment? at end of 1st full ¶ and middle of 2nd ¶; (3) again on p. 421. Illustration 1 is also very similar to this one and notes a trip starting in State X ending in X with accident in Y should use X's laws. Y is a fortuituous place of accident. Finally, although not determinate Symeonidis shows not one use of domicile. p.197&151. The Hawaii case is non-hurting and there significantly the trip was solely in Hawaii (starts and ends) whereas this case was KS to KS with a stop in NE. The rental car situation does not change the analysis"
SD-NE-D	NE	D	"Nebraska is the state of both conduct and injury and when considered relative to factors under restatement Kansas can not be considered to have a greater interest in the application of its law, to with: injury in Nebraska; negligence in Nebraska; domicile and residence variable depending on time measured; the relationship of driver/passenger is more relevant than mere friendship given issues material to controversy and accordingly relationship at time of conduct/injury is "centered" in Nebraska. Facts of contrary authority distinguishable: domicile/residence not variable and where relationship was centered was different"

treatment	law chosen	Judge type	reasons
SD-NE-D	NE	B	"S.D.'s choice of law rules apply. SD adopts Restatement (2d) approach to Choice of Law in torts cases. Restatement sets out a 4-part test. Here, the first two factors, place of injury and place of conduct, are entirely and unambiguously in Nebraska as are place of car rental and insurance contracts. The remaining two factors are murkier. While Parker's domicile has continuously been in Kansas, Rogers has moved from Kansas to S.D. Even though he moved after the accident, it is not self-evident that his current S.D. residence bears no relevance in applying the Restatement's third criterion. As for the fourth criterion, the place where the parties' relationship is centered, even though Kansas appears to have been that place, there was nothing about the relationship between these two high school acquaintances that would create the type of special relationship that would elevate this criterion to significance in directing the choice of law. For these reasons Nebraska law shall govern the assessment of damages against Rogers."

treatment	law chosen	Judge type	reasons
SD-NE-P	NE	B	This Court must apply South Dakota's choice of law rules. Klaxon. South Dakota Supreme Court employs the Restatement (Second) approach to choice-of-law matters. In tort cases, the Restatement (Second) of Conflict of Laws states that the law of the state with ''the most significant relationship to the occurrence and the parties applies." "Contact to be taken into account...include (a) the place where the injury occurred, (b) the place where conduct causing the injury occurred, (c) the domicile [and] residence ... of the parties, and (d) the place where the relationship, if any, between the parties is centered." In applying this standard, the injury and the conduct causing the injury occurred in Nebraska, under prongs (a) and (b) of the Restatement provision. The domicile and residence of the parties at the time of the accident was Kansas, although Defendant moved to South Dakota after the accident, under prong (c) of the Restatement provision. As to prong (d) of the Restatement provision, the court must consider the place where the relationship is centered. Both parties grew up in Kansas and met in high school in Kansas. At the time of the accident, they were residing in Kansas. Although the defendant argues that Kansas under the theory of "common domicile" cases the state where both parties were domiciled and where their relationship was centered is the state with the most significant relationship. Defendant quotes from Section 171 of the Restatement (Second) Conflict of Laws: "When the plaintiff and defendant are domiciled in the same state, and particularly if in addition there is a special relationship between them which centered in this state, it would seem that this state is likely to be the state with the most significant relationship with respect to the issue of damages." Although the plaintiff and defendant were domiciled in the same state at the time of the accident, the most significant relationship with respect to the issue of damages is Nebraska. Nebraska is where the accident occurred. It is the place where the plaintiff was injured by the conduct of the defendant. Plaintiff spent ten weeks at a Nebraska medical center. Nebraska is the state with the "most significant relationship to the occurrence and the parties." Therefore, defendant is liable to plaintiff for the full amount of both the economic ($639,257.34) and non-economic damages ($750,000), for a total of $1,389,257.34.
SD-NE-P	NE	B	Both the conduct and the injury took place in "a single, clearly ascertainable state": Nebraska. While it is true that the journey began in Kansas, and both were living in Kansas at the time, the journey in the rental car was entirely in Nebraska, and the Defendant has since moved to South Dakota, thus lessening the interest that Kansas has in the matter. Finally, the findings on the parties actual relationship are pretty skimpy, and there is no aspect of the relationship (so far as we can tell) that bears on the tort in question, or defenses or claims related to the tort. So Restatement Section 145(2) factors (a) and (b) strongly support Nebraska law, while factor (c) weakly supports Kansas law, while factor (c) is immaterial.

treatment	law chosen	Judge type	reasons
SD-NE-P	NE	B	1) Place injury occurred - Nebraska; 2) Place of conduct - Nebraska; 3) Domkicile < SD - cannot find anything in materials that says domicile is based @ time of event; 4) Relationship - cases relying on this element often refer to "special relationship". The materials do not appear to define this term. While the parties were not strangers, they don't have a relationship like husband and wife. Nebraska contract - gives Nebraska greater interest than other states. Restatement references cases that "the local law of the state where conduct and injury occurred has usually been applied to determine what itens are INCLUDIBLE IN THE DAMAGES" (emphasis added)
WY-KS-P	NE	D	The law of Kansas, where the accident took place, governs the issues of liability and punitive damages. However, on the facts of this case, the public policy exception to the lex loci delicti rule must be applied on the issue of noneconomic damages. The plaintiff was injured and initially treated in Kansas. She is a lifelong resident of Nebraska. After she was treated in Kansas, she returned to Nebraska. At the time of the accident, her future pain and suffering, including disability, scars, disfigurement and loss of the enjoyment of life was in Nebraska. Neither Wyoming nor Kansas has any economic stake in her future health and happiness. Therefore, pursuant to Nebraska law, no cap should be placed on her noneconomic damages.
WY-KS-P	NE	M	Wyoming's choice of law applies the lex loci delicti rule only to the substantive law of the state where a cause of action arose. Because damages caps are not substantive rules regulating tortious conduct, the default application of lex loci delicti to damages caps is not compelled by any Wyoming precedent. Here, the parties were both domiciled in Nebraska at the time of the accident. In that case, the overwhelming majority of courts apply the law of the common domiciliary state for purposes of awarding damages. Nothing stops Wyoming from following that majority rule, and it should do so here because both Wyoming and Nebraska favor full compensation to victims.
WY-NE-D	NE	B	Wyoming law, as it is right now appears to favor lex loci delicti. While the state Supreme Court may not have visited this issue in some time, that is the law as we find it. I also did not agree with D's argument that C'Hair applies - I think damages are a substantive part of a case. The argument that Wyoming Supreme Court has used the Second Restatement on occasion also seemed to be asking this court to change Wyoming law, when that is the job of the Wyoming Supreme Court. Finally, I did not agree with the public policy argument because the statute that D cited related to public entities and the purpose is to protect the government entity from exorbitant damages.

treatment	law chosen	Judge type	reasons
WY-NE-D	NE	B	"The choice of law in Whoming is lex loci delicti, apply the law of the place where the tort occurred. There is no good argument to ignore Wyoming law. There are no cases saying that the damages determination should not be subject to the rule. Damages are not procedural determination and to apply the rule to some elements of the tort but not all makes no sense to me. The existence of public policy exception without a rationale to apply it here is unpersuasive. While the common domicile rule is the apparent majority view, it isn't the rule in Wyoming. Nebraska law applies. No damage cap."
WY-NE-D	NE	M	"This is a diversity action. The court applies substantive law of Wyoming. Wyoming is the forum. It applies the rule of lex loci delicti and First Restatement of Conflict of Laws. Nebraska is where the accident occurred. This is a tort case. Damages are an element of a negligence claim. Wyoming law and the Restatement First Conflict of Laws provides that the measure of damages for a tort is determined by the law of the place of the wrong."
WY-NE-P	NE	D	"Because (1) this is a post-injury issue, and parties now live in different states, so that factor is less clear. If were a liability issue, then Kansas law applies. (2) Nebraska is place of injury, place of rental (not a big issue) (3) justice weighs in and plaintiff has significant injuries"
WY-NE-P	NE	B	"The action was filed in WYOMING. On a conflict of laws issue, the Court looks to the law of that State. WYOMING Law has adopted the lex loci delicti rule as to substantive (but NOT procedural) matters. Damages should be deemed to be a substantive, NOT procedural matter. Since the action accrued in Nebraska, the applicable damages law should apply to this case unless WYOMING recognizes an applicable exception to lex loci delicti. While Wyoming does have a statute that limits damages in actions against certain medical care providers, this does NOT suggest Wyoming has a strong inclination to cap damages. I see no public policy concern which should cause the Court to disregard the lex loci delicti rule. While I see strong merit to the common domicile doctrine, no WYOMING cases to date seem to suggest Wyoming would recognize this doctrine. It is not for me to fashion NEW WYOMING Law but, rather, to follow existing WYOMING Law. It occurred to me that this legal question could be certified to the WYOMING Supreme Court but I concluded I should make my legal findings and leave it to an appellate court to refer the question to the WYOMING Supreme Court if they so choose. As a side note & not as a part of my rationale, it occurred to me that the insurance carrier will be covering up to $1 million of the damages in this case. The policy was issued in Nebraska, presumably priced IN VIEW of NEBRASKA law and the carrier should not be surprised that Nebraska laws would apply to this case."

treatment	law chosen	Judge type	reasons
WY-NE-P	NE	B	The court shall apply Nebraska law because a federal court sitting in diversity is to apply the choice of law principles of the state in which it sits. Wyoming choice of law principles are thus controlling. Under those principles and as established by the Wyoming Supreme Court, the law of the place where the tort occurred should be applied. Because the tort occurred in Nebraska, the law of the state of Nebraska, including the lack of any cap on non-economic damages should apply. The Defendant's policy arguments are unavailing, and the decisions cited in the Defendant's brief are either inapplicable or distinguishable.