2011 AUGUST A. RENDIGS, JR.
NATIONAL PRODUCTS LIABILITY MOOT COURT COMPETITION

No. XX-XXXX

IN THE SUPREME COURT OF THE UNITED STATES

April Term 2010

Firefly Systems, Inc.,

Petitioners

-V-

In re Estate of Zoe Washburne,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team No. 13

Counsel for Petitioner

QUESTIONS PRESENTED

I. Under the Restatement (Second) Conflict of Laws does Haven law apply when the state of Haven is the place of the injury which gives rise to a presumption created in §146, as well as the state with the most significant relationships to the parties and the occurrence as defined in §145?

II. Under Restatement (Second) and Restatement (Third) of Torts, does a strict product liability claim fail when the Plaintiff's claim does not adhere to the pleadings standards as set forth in the Federal Rules of Civil Procedure and as heightened by *Twombly*?

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The opinion for the United States Court of Appeals for the Fourteenth Circuit is reproduced at R. 9-12. The Decision and order of the United States District Court for the District of Haven is reproduced at R. 1-8.

JURISDICTION

A formal statement of jurisdiction is omitted pursuant to Rule 2 (c) of the Twenty-Fourth Annual August A. Rendigs, Jr. National Products Liability Moot Court Competition.

STANDARD OF REVIEW

The standard of review for a district court's dismissal for failure to state a claim is de novo. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010). The fundamental issue on this is appeal is whether or not the plaintiff stated a claim upon which relief can be granted. Therefore, this Court must conduct a de novo review of the case at hand.

STATEMENT OF THE CASE

Procedural Background

Respondent, The Estate of Zoe Washburn (The Estate), brought suit against Petitioners, Firefly Systems, Inc. (Firefly), on the grounds of breach of express warranty by Firefly, breach of implied warranty of merchantability, and strict product liability based upon a manufacturing, design, and warning defect. (R. 3.) The Estate filed the suit seeking recovery for the wrongful death of Zoe Washburn as well as damages for the pain and suffering that resulted. (R. 3.)

The Estate filed the complaint in the Peterson County Court of Common Pleas, which is located in Haven. (R. 3.) Pursuant to 28 U.S.C. § 1332, Firefly removed the case to Federal District Court for the District of Haven based on diversity jurisdiction. (R. 3.) On March 18, 2009, Firefly filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) for

failure to state a claim on which relief can be granted. (R. 4.) The Estate filed a response the next day. (R. 4.) Firefly's Motion to Dismiss was based on the application of Haven law which recognizes the Restatement (Third) of Torts. (R. 4.) The Estate's response was based on the application of Grace law which recognizes the Restatement (Second) of Torts. (R. 4.) On March 20, 2009, after reviewing the Firefly's Motion to Dismiss and the The Estate's response, the United States District Court for the District of Haven applied Haven law and dismissed the case for failure to state a claim upon which relief can be granted based on Federal Rule of Civil Procedure 12(b)(6). (R. 8.)

The Estate appealed the district court's decision to the United States Court of Appeals for the Thirteenth Circuit. (R. 9.) After reviewing the arguments presented in district court The Thirteenth Circuit found that Grace law should apply. (R. 9-12.) The Thirteenth Circuit affirmed the dismissal of the express warranty claim, but reversed the dismissal of the strict product liability claim and the implied warranty of merchantability claim. (R. 12.)

Firefly filed a petition for writ of certiorari to the United States Supreme Court on the grounds that Haven law should be applied to this case. (R. 13.)

Facts

In 2008 Zoe Washburn (Washburn) paid twenty-five dollars to have her medical records digitized by Firefly Systems, Inc. (Firefly). (R. 2.) Firefly sent Washburn a USB drive containing her medical records along with instructions to review the files. (R. 2.) Washburn did not review the files and subsequently lost the USB drive. (R. 2.)

On September 10, 2008, Washburn had an emergency surgery to remove her appendix. (R. 2.) The surgery took place at University Medical Center located within the state of Haven. (R. 2.) University Medical Center used Washburn's digital medical records to determine what

allergies she had. (R. 3.) Washburn's digital medical records showed the word "NONE" in the field "Known Allergies". (R. 3.) It is not known why the "Known Allergies" field showed "NONE" on the records at University Medical Center. (R. 3.) However, It is undisputed the both the paper records from Dr. Frye as well as the digital records stored locally on Firefly's servers did contain a penicillin allergy warning. (R. 3.)

As a result of the "NONE" in the "Known Allergies" field, Washburn was given a shot of penicillin following her surgery. (R. 3.) She soon began to show signs of an allergic reaction and was given a shot of epinephrine which alleviated Washburn's symptoms. (R. 3.) Washburn quickly recovered and was discharged on September 12, 2008. (R. 3.) She decided to travel with her parents back to their home in Grace. (R. 3.)

Some time after passing into Grace Washburn collapsed and was unable to be revived. (R. 3.) Medical personnel arrived on the scene, but pronounced her dead. (R. 3.) It was later determined that Washburn's collapse was a result of biphasic anaphylaxis, a rare form of allergic reaction in which symptoms occur up to seventy-two hours after the initial reaction. (R. 3.)

SUMMARY OF THE ARGUMENT

The district court was correct in dismissing all claims against Firefly based on its application of Haven law. Haven law should govern this case based on the presumption created by §146 of The Restatement (Second) Conflict of Laws, which states that the place of injury governs. Also, based on the most significant relationships test, found in §145 of The Restatement (Second) of Conflict of Laws, Haven has the most significant relationship to this case.

Restatement (Second) Conflict of Laws analysis for torts cases like this must begin in §146. §146 creates a presumption that is created when certain events occur in certain places.

§146 states that when both the injury and the conduct causing the injury occur in the same place that the laws of that place must govern. This presumption carries with it a high standard that must be met in order to overcome the burden. The standard for overcoming the presumption is found in §145 of the Restatement (Second) of Conflict of Laws. §145 lays out the grounds for overcoming this presumption through what is known as the most significant relationships test.

The most significant relationships test is a list of factors that are to be considered when deciding whether or not a state has the most significant relationship to a certain matter. This is not a simple balancing analysis. This is the analysis that must be used to overcome the burden created by the presumption found in §146. Since Haven has the factors necessary to establish the presumption found in §146, Grace must show clearly that it has the most significant relationship to the matter. It is not just enough to show that Grace has a significant relationship to the matter, but Grace must show that it is clearly the state with the most significant relationship to the matter. Grace must show this clearly enough to overcome the burden created by the presumption for in §146.

Because Grace does not have the most significant relationship they fail to overcome the burden created in §146. This is a burden put on Washburn. Once Firefly has established the presumption, it is the burden of Washburn to overcome the presumption. And because Washburn cannot overcome the presumption created in §146, the substantive laws of Haven must govern this case.

When applying Haven substantive law to this case, Washburn failed to state a claim on which relief can be granted. Washburn brought claims for breach of express warranty, breach of implied warranty of merchantability, and strict product liability based on a manufacturing, design

or warning defect. The district court was correct in dismissing all three for failing to state a claim on which relief can be granted.

Both the district court and the court of appeals correctly dismissed the claim for breach express warranty because there was never any promise made to Washburn regarding her purchase of Firefly's product. Without an express warranty in some form there can be no breach of express warranty. This claim fails for lack of an express warranty.

Likewise, the district court was also correct in dismissing the claim for breach of implied warranty of merchantability. Under The Restatement (Third) of Torts two or more factually identical design defect or warning defect claims may not be submitted to a trier of fact. Since this claim is factually identical to the product liability claim for manufacturing, design or warning claim it must also be dismissed.

The only claim left to be discussed is the strict product liability based on manufacturing, design or warning defect. This can be proven though manufacturing defect, a design defect, or a failure to warn.

In order for there to be a manufacturing defect is if the product departs from its intended design despite all possible care taken by the manufacturer. Washburn has failed to allege any facts establishing that the product departed from its intended design. Washburn can only allege that there was some defect after the product left the control of the manufacturer.

In order for there to be a design defect Washburn must allege that the design itself is defective. In order to prove the design is defective Washburn must allege that the risks inherent to this product outweigh the benefits of having it in the market. There is no such allegation in this case. The benefits of having electronic medical records far outweigh the risks of incidents like this which very rarely happen.

The last theory Washburn could allege is a warning defect. Under this theory Washburn would have to allege that there was some warning that would not be obvious and forseeable that should have been included with this product. Washburn fails to allege this in any way. Furthermore, Washburn failed to check her medical records when she was sent the USB drive containing them. It is arguable that even if there was a warning she would not have heeded it since she failed to follow the instructions that came with the USB drive. Also, it is disputed as to who is at fault for the records being incorrect. Since this is most likely a mistake made on the part of the hospital in retrieving the records there is no way that Firefly could have warned Washburn. Since the records stored locally on Firefly's servers correctly show the penicillin allergy, it is unlikely that Firefly caused the error in this case.

In addition to these reasons, it is in the best interest and general welfare of the citizens of Haven to have Firefly subject to the laws of Haven in this case. The benefits to the public welfare of having medical records far outweigh the risks of potential accidents in the future, but only if companies like Firefly do not have to worry about being open to unlimited liability from a plaintiff who wants to impose the laws of a state in which Firefly has not availed itself.

For the reasons set out above the decision of the court of appeals should be affirmed in part and reversed in part consistent with the opinion of the district court.

ARGUMENT

I. UNDER THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS, THE APPELLATE COURT ERRED IN FINDING THAT GRACE LAW GOVERNS.

Traditionally, Haven courts have applied the doctrine of *lex loci delicti*, where the tort occurred, to conflicts of law questions. However, after the ruling in *Booker v. InGen, Inc.*, 241 Haven 17, 24 (2007), they have since adopted the Restatement (Second) of Conflict of Laws. The Restatement (Second) of Conflict of Laws approach allows courts to apply the law of the state which, with respect to each individual issue, has the "most significant relationship" to the occurrence and the parties under the principles set forth in § 6. Restatement (Second) Conflict of Laws § 145 (1971). In order to determine the state with the most significant relationship, a court will begin by applying § 146; this section creates a presumption that the laws of the state where the tort occurred will govern. Next, in order to determine if the presumption can be overcome, a court will apply the factors set forth in § 145: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 which a court may deem relevant to the litigation. All of these factors are to be evaluated according to their relative importance to the case. Restatement (Second) Conflict of Laws § 145 (2)(1971). These factors, once weighed properly and applied to the facts of the case, will tell a court which state's laws to apply.

A. Applying Haven law is the best way to further the goal of the Restatement (Second) of Conflict of Laws and the principles of § 6.

A complete understanding of § 6 is vital in order to appropriately complete a conflict of laws analysis. The Restatement (Second) of Conflict of Laws took the American Law Institute

(ALI) over seventeen years to draft, as they were methodical in addressing the problems courts were facing when applying older conflict of laws analysis. Restatement (Second) Conflict of Laws Introduction (1971). The drafters believed that the way courts were approaching conflict of laws analysis was too strict and needed to be changed by the "jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored." *Id.* In tort actions, many courts at that time were applying the rigid doctrine of *lex loci delicti*, which stated that the law to be applied was the law of the state in which the tort was committed. Many people believed this doctrine, and others similarly worded, ignored important values of the parties involved in litigation. The Texas Supreme Court stated, "In today's highly mobile society… [*lex loci delicti*] continued application most commonly produces harsh and inequitable results." *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979). *See Alabama G.S.R. v. Carroll*, 11 So. 803, 806 (Ala. 1892) (holding that Mississippi law applies because the injury occurred in Mississippi, regardless of the fact that it was the only contact with any party and the state of Mississippi). The drafters understood that the facts and circumstances of each case facing the courts were unique, and thus conflicts of law analysis must be able to accommodate a variety of situations. They believed that the big-picture was being missed, and that while the courts wanted something resembling a "black-letter" formulation, the formulation needed to be flexible and open-ended. Restatement (Second) Conflict of Laws Introduction (1971). This flexibility would allow the principles of § 6 to have a significant role as to what State's law will apply.

In an effort adopt the principle of flexibility and stray from the unbending doctrines, such as *lex loci delicti*, the Restatement (Second) replaced the old rigid rules with "… the broad principle that rights and liabilities with respect to a particular issue are determined by the local

law of the State which, as to that issue, has the 'most significant relationship' to the occurrence and parties. *Id*. In *Gutierrez,* which was the first Texas case to adopt the Restatement (Second) of Conflict of Laws , the court noted that the new way "offers a rational yet flexible approach to conflicts problems." *Gutierrez* 583 S.W.2d at 318. This flexible approach allows the court to use more discretion as it applies numerous factors to determine what state has the "most significant relationship" to the parties involved and to the occurrence giving rise to the action.

In order to clarify the necessary factors to be applied, the ALI created a list which it set forth in § 6 "Choice-Of-Law-Principles." The Institution stated that the principles in § 6 are the "relevant factors" to the ideology and goals of the Restatement (Second) of Conflict of Laws and are "enumerated generally" to include: a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws Introduction (1971). Two important inferences emerge from this section. First, the drafters not only believed § 6 to be essential, but rather thought of it as the heart of the new conflict of law analysis. Not only did they specify that these are the principles which control how a court will analyze conflict of laws, but these principles are the first concept discussed. The § 6 factors are located in numerical order just as every other section, but unlike all the others § 6 is the focal point of the "Introduction" section in the Restatement (Second) of Conflict of Laws. The second inference to be drawn is that § 6 is non-exhaustive; otherwise, the drafters would not have used the phrase "enumerated generally" when referencing the factors. The point of this, once again, was to

promote the flexibility of the new Restatement. The ALI warns that "this mode of treatment leaves the answer to specific problems very much at large." *Id*. Therefore, the original rigid system, which gave the answer to specific problems, was replaced by implementing a more flexible system that allows the courts to acknowledge the rights and interests of all those involved when applying conflict of laws analysis.

Although the principles set forth in § 6 are controlling, they are not the factors that courts will apply directly to a conflict of laws situation. Because § 6 must address a multitude of facts and circumstances, "There is, wherever possible, a secondary statement in black letter setting forth the choice of law the courts will 'usually' make in given situations." *Id*. For tort law, the secondary statements used to support the principles of § 6 are § 145 and § 146. While the principles of § 6 are broad and open to interpretation, the black letter law of § 146 coupled with even more specific factors of § 145 use a direct approach to conflict of laws. When applied, these secondary factors make it easier for both the litigants and the court to analyze the situation. To summarize the steps of analysis, § 6 sets out the principles to be achieved in conflict of laws analysis, while § 145 and § 146 use specific rules in order to achieve those principles. This Court must be cognizant of the fact that § 145 and § 146 must always be used to support the principles of § 6.

When applying the principles in § 6 The Court should look at the interest of each state as it relates to the actors and occurrence's of this case. However, this case is not to be analyzed in a vacuum of this instance, it should be analyzed with regards to the best interest of the general welfare of the citizens who live in the states involved. The state of Haven has the best interest of its citizens in mind when applying It's substantive laws. It is in the best interest of the general welfare of the citizens of Haven to have electronic medical records. The more electronic medical

records companies there are the more likely an average citizen is to get their records digitized. If electronic medical record companies, such as Firefly, are subjected to the laws of any state in which a customer may travel to, then they will essentially be opened to unlimited liability. It is in the interest of predictability and stability that Firefly, as well as other electronic medical record companies, should be subject to the laws of Haven when all significant relationship factors happened in the State of Haven. In order to promote the increased use of electronic medical records, as well as the creation of electronic medical record companies, this Court should find that the substantive law of the State of Haven governs this case.

B. Pursuant to the presumption created by § 146, Haven law applies because it is the place of the tort.

In personal injury cases, analysis of a conflict of laws situation begins with § 146:

> "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

Restatement (Second) of Conflict of Laws §146 (1971).

Under this section, "there is a practical presumption that the law of the place where the tort occurred governs the substantive questions in the suit." *Abad v. Bayer Corp*. 563 F.3d 663. 669 (7th Cir. 2009). This presumption assigns the burden to any party wishing to apply a foreign state's law. The presumption is particularly "difficult to overcome where the conduct causing the injury occurred in the same state where the injury occurred." *Miller v. Long-Airdox*, 914 F.2d 976, 978 (7th Cir. 1990). "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 applicable law with respect to most issues involving the tort." Restatement (Second) of Conflict of Law § 145 cmt. e (1971).

In this case, the injury occurred in Haven; therefore, it is presumed that Haven law will apply. The only way to adopt Grace law in this situation, is to find that the state of Grace has a more significant relationship to the parties and the occurrence under § 145 analysis. Furthermore, this presumption is bolstered by the fact that the conduct causing the injury occurred in Haven as well.

C. Regardless of the § 146 presumption, Haven law applies because once the appropriate weight is given to the § 145 factors, Haven has the most significant relationship to the parties and the occurrence.

Throughout the Restatement are comments by the ALI and notes by the Reporter. The comments, specifically, are not to be taken lightly; they carry nearly as much weight as the rules themselves. The drafters state, "The comments, it should be noted, no less than the black letter carry the approval of the Institute." Restatement (Second) of Conflict of Laws Introduction (1971). When Haven adopted the Restatement (Second) of Conflict of Laws, it not only adopted the black letter law of the rules, but the comments that help us to understand them. Therefore, anything stated in the "Comment" section is to be given the nearly the same respect and deference as the rule itself. These comments help distribute the appropriate weight to the individual factors. Furthermore, the drafters believed that some factors inherently carry more weight than others in certain circumstances.

When balancing the principles put forth in § 6 and the factors in § 145, some factors will carry more weight than others. § 145(2) states, "These contacts are to be evaluated according to their relative importance with respect to the particular issue. Restatement (Second) of Conflict of Laws § 145 (2) (1971). Because not all factors are given the same amount of weight, the

balancing scale tips in favor of the most significant relationship, not simply to the side with the most contacts. *See O'Connor v. O'Connor*¸ 519 A.2d 13, 23 (Conn. 1986) (*stating* "…it is the significance, and not the number, of § 145(2) contacts that determines the outcome of the choice of law inquiry"). In order to determine which factors carry more weight, the drafters of the Restatement left some discretion to the judge, as each factor's weight will vary from case to case; however, they still created some guidelines as to what weight to apply to certain factors, which are listed in the Comment sections of the rules.

The drafters state, "[T]he protection of the justified expectations of the parties… is of lesser importance in the field of torts…" Additionally, the drafters believe that the values of certainty, predictability and uniformity of result also carry less weight when applying them to the field of torts. Restatement (Second) of Conflict of Laws §6 cmt. 1 (b) (1971). This does not mean that these factors should be disregarded in a tort case, but that they should be given less weight compared to the other remaining factors. "Because of the relative insignificance of the above-mentioned factors in the tort area of choice of law, the remaining factors listed in § 6 assume greater importance." *Id.* Therefore, when applying the secondary statements, such as § 145 and § 146, the weight given to each factor must be in alignment with the § 6 principles that are to be supported.

1. Because both the injury and the conduct causing the injury occurred in Haven, these two factors deserve the most weight under § 145(2).

a. The injury occurred in Haven.

There is an important distinction to be made between the *lex loci delicti* approach in the first Restatement, and the flexible most significant relationship test in the second Restatement. *Lex loci delicti* applied "the place of the wrong," but § 145 of the second Restatement applies "the place of the injury." Restatement (Second) of Conflict of Laws Chapter 7 Topic 1 Introductory

Note (1971). In the first Restatement the place of the wrong was defined in § 377 as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Restatement (First) of Conflict of Laws § 377 (1934). Therefore, in a wrongful death suit, such as this one, the last event to give rise to the claim would be the death of Ms. Washburne. However, the Restatement (Second) abolished this rule when it created § 145. Now the place of the injury controls rather than the place of the last event that gives rise to the cause of action. Therefore, it is not important where Ms. Washburne died, but rather where she was injured that matters.

The injury Ms. Washburne received occurred in the state of Haven. "Personal injury," as used by the Restatement (Second) "may involve either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another." Restatement (Second) of Conflict of Laws § 146 cmt. b (1971). Here, the physical harm (*i.e.* the injury) occurred when Ms. Washburne had her first allergic reaction to the penicillin. The Supreme Court of Tennessee stated that, "... [When] the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' when the harmful effect first manifests itself and becomes physically ascertainable." *Teeters v. Currey*, 518 S.W.2d 512, 516 (Tenn. 1974). Therefore, the injury is said to have occurred the moment the injury first manifests itself to the point where it is physically evident. Ms. Washburne first experienced the manifestations of her injury when the allergic reaction caused her to have respiratory problems. This first manifestation occurred in Haven.

One issue that arises in personal injury cases is that of latency. A latent injury is when the injury occurs at one point in time, but continues to have an adverse effect on the party for an indefinite period of time. In order to approach the latency issue, the Third Circuit applies the

same "discovery" rule. In *Ross v. Johns-Manville Corporation,* Urban F. Ross, worked as an on-again off-again shipfitter from 1942 to 1963. *Ross v. Johns-Manville Corporation* , 766 F.2d 823, 827-28 (3d Cir. 1985). During those years, he was exposed to asbestos, and in 1963, he learned that he had asbestosis. Sixteen years later he was diagnosed with colon cancer. Twelve years after being diagnosed with colon cancer, Ross learned that he had lung cancer. He passed away in December of 1982. *Id.* at 25. When his wife tried to file suit after his death, the Third Circuit said that the statutes of limitations had already run. The court stated that the cancer was a result of the asbestosis, which he knew about it in 1963. Because his symptoms were present in 1963, that is when the court ruled the injury existed and the statutes of limitations began to accrue. Therefore, once he had knowledge of the injury, any subsequent injury that stemmed from it was still considered to be a part of the initial injury. *Id.* at 28.

Applying the analogous "discovery" rule laid out in *Ross* to the facts of this case, the injury occurred at the moment the deceased experienced her first allergic reaction to the penicillin. The first allergic reaction occurred in Haven. The fact that the hospital stabilized her by administering epinephrine before discharging her is irrelevant and is not enough to cut the causal connection and allow for a new injury to occur. Just as in *Ross*, any subsequent effect which stems from the same tortious action is considered a single injury. Therefore, both the secondary reaction and death which stemmed from the penicillin is to be considered to have stemmed from a single injury which occurred in Haven.

The Ninth Circuit takes a different line of approach when analyzing the location of the injury. In *Fields v. Legacy Health System*, Laura Fields had a pap smear at the Legacy Good Samaritan Hospital in Portland, Oregon on August 4, 1994. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 948 (9th Cir. 2005). The doctor concluded that the Pap smear showed no signs of

cancer. Unfortunately, two years later Fields was diagnosed with cervical cancer. She died on January 16, 2000. *Id*. At the time of her diagnosis and death, Fields and her husband had moved from Oregon to Washington. Her husband brought a wrongful death suit in federal court in Washington under diversity jurisdiction. Despite his best argument, the court held that Oregon had the most significant contacts. *Id*. at 952. In regard to the issue of the injury, the court stated, "The injury in this case was Laura Fields' misdiagnosis and inability to seek treatment, not her resulting death." *Id*. Although the court did not necessarily adopt the "discovery" rule, it was still not willing to allow the death to be defined as the injury. The court determined that the death was a result of the injury and not the injury itself. Applying the Ninth Circuit's reasoning, Washburn's injury occurred before her respiratory problems were evident. The injury occurred when Dr. Tam "misdiagnosed" Washburne as not being allergic to penicillin. Therefore, regardless of whether this Court adopts the Eighth Circuit's approach, or the "discovery" approach, the injury occurred in Haven.

b. The conduct causing the injury occurred in Haven.

The conduct that caused Washburne's death was the failure of the University Medical Center's computer to accurately reflect Washburne's medical records. "The words 'legal cause' denote the fact that the manner in which the actor's tortious conduct has resulted in another's injury is such that the law holds the actor responsible…" Restatement (Second) of Conflict of Laws § 160 cmt. a (1971). The alleged tortious conduct in this case, is the failure of the Firefly system to accurately show Washburn's penicillin allergy. Although the medical records, which were stored in Haven, accurately showed the penicillin allergy, there was an error between Firefly's servers and the hospital's computer. Regardless of whether the error occurred on

Firefly's server in Haven or on the hospital's computer in Haven, the conduct causing the injury occurred in Haven.

c. The place of the injury and the location of the conduct causing the injury deserve the most weight of the § 145(2) factors.

In regards to the weight to be given to §145 factors Judge Posner states, "… [T]he highest scorer on the 'most significant relationship' test is the place where the tort occurred. For that is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844-45 (7th Cir. 1999).

In the majority of instances, the actor's conduct, which may consist either of action or non-action, and the personal injury, will occur in the same state. In such instances, the local law of this state will usually be applied to determine most issues involving the tort. This state will usually be the state of dominant interest, since the two principal elements of the tort, namely, conduct and injury, occurred within its territory. The state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character. Similarly, the state where the injury occurs will, usually at least, have the dominant interest in determining whether the interest affected is entitled to legal protection." Restatement (Second) of Conflict of Laws § 146 cmt. d (1971).

Following the drafters instructions, many courts have declared that if these two factors are together, the remaining factors are irrelevant. *See In re Derailment Cases*, 416 F.3d 787, 795 (8th Cir. 2005) (*stating* "None of these principles raises concerns sufficient to overcome the § 146 presumption, buttressed by the application of the section 145 contacts"). The court in *Scherr v. Marriot Intern* determined that with the injury and the conduct causing the injury both having occurred in the same jurisdiction, that jurisdiction's laws would apply. *Scherr v. Marriot Intern*,

2010 WL 4167487 (N.D. Ill 2010). Scherr was staying in a Marriot Hotel in Kansas when she was injured by a door when its spring caused it to close too fast. Scherr filed suit in Illinois, and the Marriot removed it to federal court under diversity of jurisdiction. *Id*. The court held that the laws of Kansas applied. It stated, "The governing factors point to application of Kansas substantive law in this case. Both the injury and the alleged cause of the injury-installation and maintenance of the spring hinge-occurred in Kansas, raising a presumption that Kansas law applies." *Id.* at 3. Scherr attempted to claim that because she was a resident of Illinois, she reserved the hotel room while in Illinois, she is covered by her insurance in Illinois, and she went home to Illinois for medical treatment, that Illinois law should apply. The court, however, reasoned that despite all of the contacts with Illinois it "did not constitute the 'unusual circumstances' required to overcome the presumption." *Id.* In this case, Washburn has only a few of the factors that Ms. Scherr had. Washburn was domiciled in Grace, her doctor was in Grace, and she worked in Grace. Unlike Scherr, however, Washburne received very little medical treatment in Grace. In fact, the majority of her medical treatment for this injury occurred in the hospital in Haven. When looking at the facts of this case, Washburn has failed to show significant contacts with Grace and this court should find the presumption that Haven law applies has not been rebutted.

D. The domicile, residence, nationality, place of incorporation, and place of business of the parties weigh in support of Haven law.

The factors of § 145(2)(c) can have an enormous impact on choice of law analysis, given the right circumstances. In regard to domicile, residence and nationality, the circumstances entail a personal interest, such as one's reputation, right to privacy, or affections of a spouse. Restatement (Second) of Conflict of Laws § 145 cmt. 2 (e) (1971). If those circumstances are present, then domicile, residence and nationality can carry more weight. *Id*. However, that is

not the case here, as the issue at hand is a business interest. Domicile, residence and nationality carry little weight in the current situation. The only way any significance can be added to these factors above, is if the factors can be grouped with other contacts. *Id.* This is not possible given the facts of this case; the only § 145 factors the plaintiff has in this case, are Washburn's domicile and residence. There are no other outside contacts to group these two factors with, because all of the other factors favor Haven.

The plaintiff did attempt to bolster its position by showing that the deceased's doctor was in Grace and that Washburn was employed in Grace. However, both of these additional factors are entirely irrelevant to the issue at hand. Dr. Frye may work in Grace, but his employment status has no bearing in the suit between the deceased and Firefly. He introduced Washburn to the Firefly system, but after the initial setup Dr. Frye's relevance to this case seized to exist. He did not administer the shot of penicillin nor did he attempt to treat any symptoms of the Washburn's reaction. Because the issue presented in this case is a business interest, and there are no other contacts to group domicile and residency with, the plaintiff's domicile and residence should receive little to no weight.

The drafters of the Restatement not only expressed what factors receive more or less weight in personal interests, but they did so as well in regards to considering business interests. They believed that in the case of a business interest, "the place of the business is the more important contact." *Id.* Furthermore, they stated that "[A] corporation's principle place of business is a more important contact than the place of incorporation." *Id.* Because the interest before the Court is a business interest, this Court should follow the secondary statement, which is nearly as strong as the black letter law itself. The Court should give more weight to Firefly's

principle place of business. Because this case involves a business interest, and Firefly's principle place of business is in Haven, the factors of § 145(2)(c) favor the state of Haven.

E. The place where the relationship between the parties is centered is Haven.

The relationship between Washburn and Firefly is centered in Haven. The plaintiff alleges that because Washburn first heard about the Firefly system from her doctor, who is located in Grace, that their relationship began, and therefore, is centered in Grace. This is an improper application of this factor. In order to determine where the relationship is centered, the Court must consider all of the contacts that exist between the two parties as well as the intent of the parties forming the relationship. *Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L.*, 422 F.Supp 405, 407 (N.D. Ill. 1976). Pancotto brought a diversity action against the defendant for injuries she suffered while on a safari in Mozambique. The safari had been planned between Pancotto, who was domiciled in Illinois, and the defendant, who was domiciled in Mozambique, through a number of international phone calls. Additionally, on three separate occasions, an employee of the defendant's met with Pancotto in Illinois during the planning of the trip. *Id*. at 407. The court held that "In short, although the relationship had international aspects, it can fairly be characterized as centering in Mozambique." *Id.* The court reasoned that "Regardless of the nature of the Illinois contacts, they obviously were preparatory to an extended, well-planned interaction in Mozambique." *Id*. at 408. While the court acknowledged that the parties met multiple times in Illinois, it discarded those contacts because they were made in the preparation of performance and were not the center of the parties' relationship.

Applying the reasoning of *Pancotto* to this case, The Court should rule that the relationship between the parties is centered in Haven. The Court should first look at why the parties entered into a relationship. In *Pancotto*, the purpose was a safari trip. Here, the deceased

wanted to digitize her medical records so that any doctor treating her anywhere in the country could quickly pull up her medical history. Before she could to that, however, she had to first send a twenty-five dollar check to fireflyas well as get Dr. Frye to send her medical records to Firefly. Therefore, all of the action that took place in Grace only amounts to preparation for performance, which took place in Haven. Just as in *Pancotto*, which held that preparation does not constitute the center of the relationship, this Court should hold that the place of the performance should be the deciding factor as to where the relationship is centered.

Another reason to not only discard Grace as the formation of the relationship, but as the center of the relationship as well is simple contract analysis. This analysis reveals the fact that the contract between the deceased and Firefly was initially formed in Haven. In order to create a contract, there must be an offer and acceptance as well as consideration. *Lonergan v. Scolnick*, 276 P.2d 8 (Cal. Dist. Ct. App. 1954). The offer, which sparked the relationship between the parties, was given by Washburne when she promised to pay Firefly twenty-five dollars, if in return they promised to digitize her medical records. Firefly, which has its principle place of business in Haven, then accepted by cashing the check and digitizing Washburne's records. It is this acceptance, along with the twenty-five dollar consideration, which formed the relationship between the two parties. Because the acceptance of Washburne's offer was executed in the state of Haven, the relationship between the parties was created in Haven. Therefore, regardless if this Court wishes to adopt the place of formation or place of performance of the contract, the relationship was created and is centered in Haven.

It could be argued that Firefly made the initial offer to Washburne through its advertisement. This argument fails for many reasons. First, an advertisement is not an offer unless it "calls for performance of a specific act without further communication and leaves

nothing for further negotiation." *Harris v. Time, Inc.*, 191 Cal.App.3d 449, 455 (Cal. Dist. Ct. App. 1987). Here, there is no specific act requested by Firefly for Washburne to perform. Also, Washburne only heard about Firefly through Dr. Frye. There was no communication from Firefly directly to Washburne. Based on these facts, there is a lot of room for negotiations to take place. Thus, the advertisement cannot constitute an offer because the advertisement was directed towards Dr. Frye, not Washburne.

II. THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS, AS THE PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In the case at hand, the plaintiffs set forth claims against the Defendant for breach of express warranty, breach of implied warranty of merchantability and a strict product liability claim. The strict product liability claim is based upon a manufacturing, design and warning defect. Plaintiffs assert that the Defendant's actions led to the death of their daughter. In considering the plaintiff's claims and Defendant's subsequent motion to dismiss, the court of appeals correctly considered the underlying goals and objectives of the Federal Rules of Civil Procedure ("The Federal Rules").

Additionally, the court correctly employed the current pleading standard as established in *Bell Atlantic v. Twombly*. The *Twombly* standard requires that in order to survive a motion to dismiss, a complaint must contain sufficient factual matter, that when accepted as true, states a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is defined as having facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that is necessary to find the defendant liable for the alleged misconduct. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1959 (2009). The plausibility standard asks for more than a mere possibility that a defendant acted unlawfully yet does not rise

to the level of probability either. *Id*. at 1960. In this case, the plaintiffs' pleadings were insufficient as they failed to state a claim upon which relief can be granted by failing to establish causation. Further, plaintiffs pleading failed to state facts establishing that Defendant's product was the proximate cause of the plaintiff's harm. Under Haven product liability law, there must be a showing of causation for the plaintiff's claim to survive. Accordingly, this Court should affirm in part and reverse in part the Fourteenth's Circuit's judgment.

A. The plaintiff's complaint fails to comply with the Federal Rules of Civil Procedure and fails to follow the development of pleadings and standards set forth in *Bell Atlantic v. Twombly.*

There has been a metamorphosis within the American justice system, as it has moved from pleading to Field Codes to Federal Rules of Civil Procedure. Essentially, there has been a movement in what constitutes pleadings compliance. Complaints moved from forms to narratives to notice pleading and motions to dismiss moved from attacks on form compliance to attacks on the factual sufficiency of the complaint. Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards Onto Unconstitutional Shores,* 88 Neb. L. Rev. 260, 264 (2009).

The Federal Rules of Civil Procedure were drafted in 1938 and purposed to be uniform and straightforward. Following the adoption of The Federal Rules and during the fifty years prior to Twombly, the only considerable change in American pleading standards was the move from form pleading to fact pleading to notice pleading. *Id*.

Ultimately, notice pleading became codified in The Federal Rules of Civil Procedure, which set forth the minimum requirements for a claim to be sufficient. Pursuant to Rule 8 of the Federal Rules of Civil Procedure a plaintiff need only make "a short and plain statement of the grounds for a court's jurisdiction, . . .a short and plain statement of the claim showing the pleader is entitled to relief, and a demand for the relief sought…." Fed. R. Civ. P. 8(a)(1)-(3).

The Federal Rules of Civil Procedure established sufficiency requirements for pleadings; however, Twombly increased the standards in order for a statement to meet the provisions of Rule 8(a)(2). *Ashcroft,* 129 S.Ct. at 1955; *see also Twombly*, 550 U.S. at 557. The Twombly decision simply expounded on the pleading standards for "all civil actions." *Id.* at 556.

The Court held that under *Twombly,* Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Twombly,* 550 U.S. at 556. A complaint must have "facial plausibility," meaning "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1937. The Court held that a trial court was not required to accept such allegations as true for purposes of a Rule 12(b)(6) motion. *Id.* at 1949-1950. In fact, as the Court put it, trial courts should engage in a "two-pronged approach." *Id*. at 1950. A "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. As to these "conclusory" allegations, the trial court could "draw on its judicial experience and common sense" to evaluate whether the allegations "nudged" "across the line from conceivable to plausible." *Id*. at 1950-1951.

In reviewing motions to dismiss made pursuant to Federal Rule Of Civil Procedure 12(b)(6), the court must read the facts in the light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403 (2002); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). First, the court must assume that all facts in the pleading are true. However, the court is not obligated to accept as true "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Id.* Second, a court

deciding a motion to dismiss must "draw on its experience and common sense" when reaching a decision as to whether a claim for relief is "plausible." *Id.*

Even assuming all facts alleged as true, a court, for the purposes of deciding a motion to dismiss, must determine if the plaintiff has met the standard of "plausibility". This requires "the plaintiff [to] plead *factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1959. While this does not inject a "probability requirement" into the pleadings, it demands "more than a *mere possibility* that a defendant has acted unlawfully." *Id.* Thus, a complaint will not pass the compliance test if it "pleads facts that are 'merely consistent with' a defendant's liability," particularly where there are "more likely explanations" for the harm complained of than unlawful conduct by the defendant. *Id.* The plaintiffs in this case have made several bases for the claims against the Defendants. When reviewed under compliance with the Federal Rules of Civil Procedure and compliance with the advanced pleadings standards, the plaintiff's complaint if insufficient.

To survive a motion to dismiss and proceed to the discovery stage under the current heightened standard of pleadings, a plaintiff must state sufficient facts to raise a reasonable expectation that discovery will reveal evidence of the elements necessary to the claims. *Twombly*, 550 U.S. at 562. Even if all the facts in the claims are assumed to be true, plaintiffs have failed to make fact specific allegations to establish the causation on the part of the Defendant. It has not been established that plaintiff's death was caused by the Defendant; thus, plaintiff has failed to satisfy the "but for" causation test. As such, the plaintiffs have failed to state a claim upon which relief can be granted, and as such the civil suit is due to be dismissed.

B. The court of appeals was correct in holding that the plaintiff's complaint was due to be dismissed pursuant to Haven law.

The State of Haven has adopted the Restatement Third of Torts, which supersedes the

Restatement Second and covers the complex field of products liability. The Restatement (Third) of Torts outlines three categories under which products defect claims can be brought, while also outlining the legal standards for each. In this case, plaintiffs have asserted claims under the three categories recognized in the Restatement (Third) of Torts, which are claims for breach of express warranty, breach of implied warranty of merchantability and strict product liability based on a manufacturing, design or warning defect. The court of appeals was correct in dismissing plaintiff's complaint, as it failed to satisfy the standard for such claims, as set forth in Restatement (Third) of Torts §2.

1. The plaintiff's pleading fail to satisfy the standard for claims of strict product liability as set forth in Restatement Third of Torts.

The plaintiffs asserted a claim against Defendant for strict product liability based upon a manufacturing, design, and warning defect. Claims for product liability are analyzed under the Restatement (Third) of Torts, as adopted by the state of Haven. The plaintiffs have alleged injury due to a manufacturing defect, yet failed to offer facts to support the claim of such a defect. When asserting a claim for manufacturing defect, a party must show the product departs from the intended design, despite all possible care taken during the preparation and marketing of the product at issue. Restatement (Third) of Torts § 2 (a) (1998). Plaintiffs fail to offer facts establishing such departure from the original design.

In *Myrlak v. Port Authority of New York and New Jersey*, the New Jersey Supreme Court, applying the Restatement Third of Torts, held that while a plaintiff is not required to prove fault in a strict products liability case, the plaintiff must nonetheless prove the product at issue was defective. *Myrlak v. Port Authority of N. Y. and N. J.*, 723 A.2d 45, (N.J. 1999). In this case, other than an allegation of injury, plaintiff has failed to offer any basis for alleging that the product of Firefly was defective.

Under the Restatement (Third) of Torts, §3(a) and (b), a plaintiff must establish that the incident that caused the harm or injury is one that ordinarily occurs as a result of a product defect and that the incident did not result from causes other than the product defect which must have existed when the product left the manufacturers control. Here, plaintiff cannot establish if the product at issue caused harm due to a defect present when it left the manufacturer or if such harm is due to negligence or failure occurring after it left the manufacturers control. As plaintiff cannot satisfy these requirements, plaintiffs have failed to make a plausible showing for relief when claiming a manufacturing defect. Accordingly, the plaintiff's claims for strict product liability under the theory of manufacturing defect are due to be denied.

The second theory under which a strict product liability claim can be brought is design defect. While a claim of manufacturing defect alleges a departure from the intended design, a claim of design defect asserts that the design itself may not be reasonably safe. Plaintiffs have brought the claim of defective design under a larger claim of strict product liability. This means that plaintiffs' claim of design defect is not one based upon a negligence claim and does not focus on the manufacturer but on the product. As this claim is premised on strict liability rather than negligence, there is a requirement of proof that the benefits of the design do not outweigh the inherent risks and danger. Further proof is required that the alternative design would have prevented such injury and would be feasible in practicality, cost and technology. *Blue v. Envtl. Engineering, Inc.*, 828 N.E.2d 1128, 1136 (Ill. 2005).

Plaintiffs in this case must satisfy the requirements by offering proof that the benefit of Firefly's product does not outweigh the inherent risks and danger. Further, plaintiffs are required to provide an alternative design that would be feasible in practicality, cost and technology and would have prevented the injury at the heart of the case. In order for the plaintiff's complaint to

survive a motion to dismiss, it must contain sufficient evidence from which a reasonable person could conclude that a reasonable alternative design could have been practically adopted. *Id* at 1138. A risk-utility balancing test is then necessary to determine if the benefits of the design in question outweigh any risks or danger.

Comment d of Restatement (Third) of Torts: Products Liability § 2, states the risk-utility test used for claims of defective design in strict product liability cases requires a comparison between an alternative design and the product design that caused the injury, as viewed by a reasonable person. Restatement (Third) of Torts § 2 Cmt. d (1998). Comment *f* notes that to establish a prima facie case of defect, a plaintiff must prove the availability of a practical and technologically feasible alternative design, which would have prevented or reduced the harm. Restatement (Third) of Torts § 2 Cmt. f (1998).

A plaintiff must "prove either that the product's risks outweighed its utility or that the product could have been designed in an alternative manner so as to minimize or eliminate the risk of harm." *Lewis v. Am. Cyanamid Co.,* 715 A.2d 967, 980 (N.J. 1998); *see also Smith v. Keller Ladder Co.,* 645 A.2d 1269, 1271 (N.J. Super. 1994). In this case, plaintiffs have failed to show or offer any such reasonable alternative design in the complaint and have failed to satisfy the requirements for a prima facie case of strict product liability under the theory of design defect. Accordingly plaintiff's claim of strict product liability based on design defect is due to be denied.

The third theory under which a strict product liability claim can be brought is warning defect. When a claim is brought under the theory of a failure to warn, a product seller is not liable when such risks or need for risk avoidance should be obvious or foreseeable to product users. Restatement (Third) of Torts § 2 Cmt. j (1998). In this case, the records of Washburne

were retrieved by the hospital from the web portal access of Firefly. It was during the retrieval that the information regarding the plaintiff's medical allergy was not communicated. There seems to be limited action, on the part of Firefly or any manufacturer or seller that can be taken to warn of all possible dangers when considering the rate at which the medical information is transmitted. The incorrect medical information could have been caused not by the Defendant, but rather by an outside third party in the administration of the hospital, web service or independent computer server or system manager.

Under the Restatement (Third), a product seller is not liable when such risks should be foreseeable or obvious. Thus, in cases such as this one, there is no way to positively determine how many computers, servers, or portals through which the electronic medical information will pass. Therefore, such risks of misinformation or incomplete transmission should be foreseeable and obvious to those opting for such medical record storage and usage.

In *Gray v. Badger Mining Corp*., the Minnesota District Court established that a warning must (1) attract the attention of the individuals that the product could harm; (2) explain the potential causes of injury; and (3) provide instructions that explain ways to safely use the product to avoid injury. *Thompson v. Hirano Tecseed Co., Ltd*, 371 F. Supp. 2d 1049 (D. Minn. 2005) citing *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn.2004). In this case, Firefly instructed each of its employees to take time and instruct each customer to review and verify the electronic records. Firefly, acting to prevent foreseeable harm, provided instructions to the employees, who then provided warnings and instructions to such customers as Washburne. Thus, there was an adequate warning given and plaintiffs have failed to set forth facts in the Complaint that provide otherwise. Accordingly, plaintiffs' claims for strict product liability based upon warning defect are due to be denied.

2. The court was correct in dismissing plaintiff's claim for breach of implied warranty of merchantability.

In this case, plaintiff has made a claim for breach of implied warranty of merchantability. Under the adopted Restatement (Third) of Torts, this is a duplicate claim as it is factually identical to claims submitted under strict product liability. More specifically, it is premised on the same facts and analysis under the plaintiff's claim of strict product liability of manufacturers defect. Under the Restatement (Third) of Torts § 2 cmt. n, two or more factually identical design defect or warning defect claims may not be submitted to the trier of fact, even if presented in the same case under different doctrinal labels. Restatement Third of Torts § 2cmt. n (1998). Since plaintiffs brought claims for manufacturer defects, it would prove duplicative and would be improper to allow a claim of breach of implied warranty of merchantability to move forward. Accordingly, plaintiff's claim is due to be dismissed.

3. The court was correct in dismissing plaintiff's express warranty claim as it is not in conformity with the Uniform Commercial Code.

Plaintiffs assert specific claims of breach of express warranty against the defendants. The district court correctly dismissed this claim as well as the court of appeals. Express warranty is defined in the UCC Section 2-313 as a promise from the sellers of goods to the buyer of goods that such goods shall conform to the promise or purpose and description for the goods. U.C.C. § 2-313 (2003). Here, there was no such promise or agreement made or entered into between the plaintiff and defendant. While there was communication and a meeting of the minds between the plaintiff and her treating physician, plaintiff has failed to plead or make any showing that there existed a relationship between Washburne and the defendants. Due to the failure of plaintiffs to show there existed an express warranty, there can be no such claim for breach. Allowing plaintiffs to move forward with a claim for breach of express warranty, without sufficiently

pleading and establishing such relationship would be improper. Accordingly, the court of appeals correctly dismissed plaintiffs' claim for breach of express warranty.

C. Alternatively, should this court rule that Grace law governs, plaintiff's claims are still due to be dismissed.

Should this Court determine that this case is governed by the laws of the state of Grace, plaintiffs' claims are still due to be dismissed. Grace has adopted the Restatement (Second) of Torts. Plaintiffs incorrectly argue that the claims put forth in the complaint would survive if analyzed under the Restatement (Second). The Restatement (Second) and Restatement (Third) have differing standards for the claims asserted by the plaintiffs. Under Haven law and the Restatement Third, plaintiffs' complaint fails to survive defendant's motion to dismiss but this is also true under Grace Law. Therefore, no matter which governing body of law this Court adopts, the plaintiffs' complaint is due to be dismissed.

1. Plaintiffs' claims fail even when analyzed under *Restatement (Second) of Torts,* §402a, and are due to be dismissed.

The state of Grace applies Restatement (Second) of Torts to claims arising under strict product liability. Plaintiffs have correctly argued that Restatement (Second) does not require the showing of a reasonable alternative design, when a claim is made under the theory of strict product liability. While this outlines the premise upon which a seller of goods can be held responsible for damages or injuries resulting from the use of, purchase of, or involvement with such goods, the Restatement Second still required that there be a causal connection between the goods at issue and the injury or damages suffered by the plaintiff.

When no warning is necessary for the safe use of a product, numerous cases have recognized that this does not rise to the level of a product being defective. *Brown v. Superior Court* , 44 Cal.3d 1049, 1065 (Cal. 1988). In this case, there was no such absence of instruction

or warning, as the plaintiff was aware of her obligation to review the electronic records upon receipt of the USB drive. There could have been no more succinct yet encompassing warnings or instructions, as the product at issue contained and transmitted Washburne's medical history, records and documents and Washburne was aware of the necessity for her to review such information.

Comment j to §402(a) of Restatement (Second) of Torts confines the duty to warn to a situation in which the seller "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of ... the danger." *Id.* at 1066. In this case, the manufacturer, defendant, acted with the foresight to warn and instruct based on all reasonably foreseeable dangers. Thus, defendant instructed all those who received its products including the plaintiff, to review the medial information contained on the drive she received.

The plaintiffs fail to satisfy the burden set out for strict products liability and the requirements of § 402 (a) Restatement (Second) Torts. To prove a case involving strict liability in tort, the chief elements that a plaintiff must prove are that the defective and dangerous condition of the defendant product and the causal connection between such condition and the plaintiff's injuries. Robert D. Hursh et al., *American Law of Products Liability* 347-348 (2d. ed. 1974). In this case the plaintiffs fail to overcome the threshold requirement, which is that there was a causal connection between such product and the injuries sustained. Plaintiffs have failed to structure the pleadings and put forth factual allegations such that there can be a causal connection established between the defendant's product and the plaintiffs' injuries. The product at issue left the control of the manufacturer, or seller, and was then sent to the plaintiff. At that time there was cast upon the plaintiff, an obligation to adhere to the instructions and/or warnings as issued by the defendant. Plaintiffs failed to adhere to such instructions and warnings.

Accordingly, this failure to adhere coupled with the insufficiency of the Complaint make all claims of plaintiffs due to be dismissed. Regardless of which body of product liability law this Court should adopt, plaintiff has failed to overcome dismissal under either the Restatement (Second) of Torts or Restatement (Third) of Torts. Therefore, this Court should affirm in part and reverse in part the decision of the court of appeals.

CONCLUSION

The court of appeals erred by not dismissing all claims against Firefly in the case. In deciding which states laws applied, the court of appeals erred in finding that Grace law governed. §146 clearly creates a presumption that when the place of the injury and the place of the conduct causing the injury are the same place. That was Haven in this case. In addition to the presumption created in §146, Haven is also the state with the most significant relationship to the current matter. The court of appeals erred in finding that Grace law governs this case.

Because the court of appeals erred in applying Grace substantive law, they incorrectly applied the Restatement (Second) of Torts to the facts in this case. When correctly applying the Restatement (Third) of Torts it becomes clear that the court of appeals erred in finding that Washburn stated a claim upon which relief can be granted.

Washburn failed to allege the necessary facts under all three theories of tort liability. First she failed to show that there was any express warranty to support her theory of breach of express warranty. Second she alleged breach of implied warranty of merchantability which is factually identical to her claim for strict products liability for manufacturing, design or warning defect.

Under her theory of strict product liability for manufacturing, design or warning defect, she failed to allege the facts necessary to support any of the three theories. She failed to allege a

reasonable alternative design or that the inherent risks outweighed the benefits or that a warning would have prevented this accident.

For the reasons set out above this Court should Affirm the dismissal of the breach of express warranty claim and reverse and remand the decision of the court of appeals in regards to all other claims.

APPENDIX A

Restatement (First) of Conflict of Laws § 377 (1934)

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

APPENDIX B

Restatement (Second) of Conflict of Laws § 6 (1971)

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Law § 145 (1971)

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Law § 146 (1971)

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

APPENDIX C

Fed. R. Civ. Pro. 8(a)

(a) Claims for Relief.

A pleading that states a claim for relief must contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. Pro. 12(b)

(b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

> (1) lack of subject-matter jurisdiction;
>
> (2) lack of personal jurisdiction;
>
> (3) improper venue;
>
> (4) insufficient process;
>
> (5) insufficient service of process;
>
> (6) failure to state a claim upon which relief can be granted; and
>
> (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

APPENDIX D

Restatement (Second) Torts §402(a) (1965)

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

APPENDIX E

Restatement (Third) of Torts §2 (1998)

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement (Third) of Torts §3(1998)

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

APPENDIX F

U.C.C. §2-313 (2003)

(1) Express warranties by the seller are created as follows:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.