NO. 10-9999

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM 2010

FIREFLY SYSTEMS, INC.,

Petitioner,

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 7

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the substantive laws of Haven or Grace govern the resolution of this case when the decedent was located in Haven when she was subjected to the alleged wrongful conduct?

II. Whether a strict product liability claim requires proof of a reasonable alternative as required by the Restatement (Third) of Torts?

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STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

For years, the health care industry has depended on static paper documents to inform local and out of town physicians of a patient's medical record in the event of an emergency. (R. at 3.) Firefly Systems, Inc. is a part of a booming new industry that digitizes medical records for easy and instant transmission of a patient's medical history. (R. at 3.) In late 2008, Dr. Kaylee Frye, a local physician in the State of Grace, invested in this new technology and hired Firefly Systems to update her medical records. (R. at 2.) Firefly is a company with its principal place of business in Haven, but that has been advertising aggressively nationwide. (R. at 2.) Several companies provide such services, but Firefly's system offered several advantages. (R. at 3.) Firefly's system is less complicated and does not require investment in additional training. (R. at 3.) Additionally, Firefly is ten percent more cost efficient than its leading competitor. (R. at 3.)

Before Dr. Frye converted to an electronic storage system, she notified all her patients of the change, including Zoe Washburne. (R. at 2.) From an early age, Washburne was made aware that she was allergic to penicillin and took active steps to avoid exposure to the drug. (R. at 2.) After reading Dr. Frye's letter, Respondent wrote a personal check to Firefly and later received a USB flash-drive copy of her records from Firefly. (R. at 3.) Firefly instructed Washburne to verify the electronic records, but for unknown reasons Respondent never reviewed her file and subsequently misplaced the USB drive. (R. at 3.) Meanwhile, Firefly converted Dr.

Frye's paper copy of Washburne's medical records into a digitized record, which made the record available to all participating hospitals as well as to any other healthcare providers and physicians through an Internet database. (R. at 3.)

On September 10, 2008, Washburne traveled to the State of Haven as part of her employment. (R. at 3.) Respondent began to suffer from severe abdominal pains which required her to be hospitalized at a local Haven medical center. (R. at 3.) Doctors quickly diagnosed Washburne with appendicitis and suggested immediate surgery to remove her appendix. (R. at 3.) However, at the time of diagnosis she was unconscious and could not advise the hospital staff of who was her primary physician or any other relevant medical information. (R. at 3.) Nonetheless, the hospital staff was able to successfully retrieve the electronic medical file via the Firefly web portal. (R. at 3.) This medical record, although correct in all other respects, was missing any mention of Washburne's allergy information. (R. at 4.) Firefly's software is designed to insert the word "NONE" if no allergies are input for a patient. (R. at 4.) This is exactly what it did in this instance. (R. at 4.)

Following the surgery, the hospital staff administered penicillin to avoid any post-surgical infection. (R. at 4.) Shortly thereafter, Washburne began to exhibit common allergic reactions to the penicillin and the hospital staff quickly administered epinephrine to alleviate the symptoms. (R. at 4.) No further complications arose during her stay in Haven. (R. at 4.) Three days after the surgery, Washburne was discharged and subsequently drove back to her home in Grace with her parents. (R. at 4.) Not long after crossing into Grace, Washburne had another anaphylaxis reaction. (R. at 4.) Emergency medical technicians responded to the scene but were unable to revive her. (R. at 4.)

II. NATURE OF THE PROCEEDINGS

The District Court. Washburne's estate ("the Estate') brought a products liability suit against Firefly for her wrongful death in the United States District Court for the District of Haven. (R. at 4.) On March 18, 2009, Firefly filed a motion to dismiss for failure to state a claim upon which relief can be granted claiming: (1) that Haven law applies in this case and (2) that under Haven law the Estate was required to show a reasonable alternative design as a prerequisite of a products liability claim. (R. at 5.) The district court ruled in favor of Firefly on both claims and granted Firefly's motion to dismiss. (R. at 9.) In ruling on the first claim, the district court found that Haven law applied under the most significant relationship test of the Restatement (Second) of Conflicts of Laws. (R. at 7.) In ruling on the second claim, the district court ruled in favor of Defendant under the Restatement (Third) of Torts on all claims. The court held that the Estate did not state claim for a manufacturing defect because the product did exactly what was intended and that Plaintiff did not state claim for a design or warning defect because the Estate did not allege or show a reasonable alternative design in its complaint. (R. at 8.) It further concluded the Estate did not state claim for an implied warranty of merchantability because it is duplicative of a claim for manufacturing defect and the Estate did not state a claim for an express warranty because Washburne was not promised anything, nor represented anything by Firefly. (R. at 9.)

The Court of Appeals. The Thirteenth Circuit Court of Appeals ultimately affirmed in part and reversed in part. (R. at 13.) The court held that Grace law applied under the most significant relationship test despite its omission of any analysis regarding Plaintiff's injury. (R. at 11.) It further concluded that the Estate stated a claim for every contention except for an express warranty. (R. at 11–13.)

SUMMARY OF THE ARGUMENT

This case presents this Court with two issues involving the determination of which state law applies and the application of the relevant product liability law. Because the court of appeals misapplied tests, misinterpreted standards, and came to incorrect conclusions, this Court should reverse.

I.

This Court should find that Haven law applies in this case under *lex loci delicti*. *Lex loci* has been the traditional choice-of-law rule in Haven for years and has never expressly been overruled by the Haven state courts. Moreover, *lex loci* is a superior choice-of-law rule when compared to the most significant relationship test of the Restatement (Second) of Conflict of Laws.

Lex loci provides courts with consistent, uniform, and predictable results, while at the same time preventing forum shopping. *Lex loci* provides attorneys with a better opportunity for case evaluations and permits judges to come to quick, easy, consistent holdings. Moreover, traditional rules should not be discarded unless there is a better alternative, which the most significant relationship test does not provide. Unquestionably, the most significant relationship test muddles the area of conflict of laws. It is a discretionary test that varies from jurisdiction to jurisdiction. It encourages forum shopping and leads to unpredictable results. Citizens are encouraged to research which law is the most beneficial and argue whatever arbitrary contacts the citizen has with that state. Thus, *lex loci delicti* is clearly a superior choice-of-law doctrine.

Under *lex loci*, this Court should apply the law of Haven to this dispute. *Lex loci* applies the law of the state where to the tort occurred. Specifically, the tort is deemed to have occurred when the last event necessary to establish liability for the alleged wrongful conduct occurred.

For years in wrongful death cases, courts have consistently come to the result that the tort is deemed to have occurred when the plaintiff is subjected to the alleged wrongful conduct. Meaning, the last event necessary to establish liability is not when the plaintiff dies. In this case the alleged wrongful conduct indisputably occurred when Washburne was injected with penicillin in Haven. But for the injection of penicillin, Washburne would not have suffered any allergic reactions and would not have passed away. Therefore, because Washburne was injected with penicillin in Haven, and because this is the last event necessary to establish liability, Haven law applies under *lex loci delicti*.

Even if this Court applies the most significant relationship test, Haven law still applies. The court of appeals erroneously examined only a few contacts relevant to Washburne. The court of appeals' misapplication of the most significant relationship analysis led to its conclusion that the substantive laws of Grace apply in this case. The most significant relationship test requires an analysis of the contacts of both Washburne and Firefly and requires an analysis of many more factors than the court of appeals chose to apply. Thus, a correct analysis of these other factors indicate Haven has the most significant relationship to this litigation and its laws should apply.

The court of appeals' departure from Haven Supreme Court precedent and misapplication of the most significant relationship test was error. Thus, this Court should reverse the court of appeals' judgment and rule that Haven law applies in this case.

II.

The Restatement (Third) of Torts has been expressly adopted by Haven courts and requires the Estate to show evidence of a reasonable alternative design to establish a prima facie case. The requirement of a reasonable alternative design allows the court to determine whether the

product at issue is indeed unreasonable. Requiring the Estate to bring forth evidence of a reasonable alternative design permits the court to determine if the manufacturer could have designed the product in a way that avoided the risk of harm. If the alternative design is not established, then the Estate has not established a prima facie case for strict liability under the Third Restatement. However, the existence of an alternative design, by itself, is not sufficient to maintain a cause of action. The Estate must also show that the alternative design not only would have reduced or prevented the plaintiff's injury, but also that it would have made the product safer overall. Finally, if the proposed alternative design would dispossess the product of its function, utility, economy, and/or convenience than the Restatement finds it to be an unreasonable alternative. In short, the Restatement does not require the product to prevent all harm.

Under the Third Restatement, this Court should find that the Estate has not stated a claim upon which relief can be granted. The Estate has not brought forth any evidence of a reasonable alternative design to the Firefly design. Furthermore, the existence of other competing designs in the marketplace would not in and of itself establish those competing products as reasonable alternatives. Forcing Firefly to adopt the technical nuances that other products apply would deprive the Firefly design of its function, utility, economy and convenience.

The Estate has also not stated a claim for manufacturing and warning defect. There is no evidence that the Firefly system deviated from its intended design. On the contrary, the Firefly system did no more and no less than it was designed to do. Finally, the Estate has not presented any evidence of a reasonable alternative warning that could have eliminated the risk of harm alleged. Therefore, this Court should affirm the district court's holding and rule that the Estate has not stated a claim upon which relief can be granted.

ARGUMENT AND AUTHORITIES

I. THE SUBSTANTIVE LAWS OF HAVEN APPLY TO THIS CASE.

A choice-of-law question is extremely important in product liability actions. Specifically, these decisions are important because products can be manufactured in one state, purchased in another state, and cause injury in yet another state. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The unpredictability of the product should lead courts to apply a rule that is consistent, uniform, and predictable. *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004). Otherwise, an uncertain rule may "force manufacturers to forgo development, production, and marketing of otherwise valuable products that might expose them to unpredictable risk. This risk, in turn, may negatively affect the variety of products available to consumers." Michael Ena, Comment, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 Fordham Urb. L.J. 1417, 1419 (2007).

Two doctrines have emerged as the preeminent doctrines courts apply in conflict of law situations. These doctrines are (1) the *lex loci delicti* doctrine and (2) the "most significant relationship test" of the Restatement (Second) of Conflict of Laws. The *lex loci delicti* doctrine applies the laws of the state where the injury occurred. In contrast, the most significant relationship test provides courts with a number of factors to weigh in determining which state law applies.

Although the Supreme Court of Haven criticized the *lex loci delicti* doctrine in a recent case, its reasoning and precedent has been the traditional rule in Haven for years and has never expressly been overruled. Moreover, the prerogative of Haven has long been to apply the laws of the state where the injury occurred and come to a predictable, uniform, and consistent result. Therefore, this Court should apply *lex loci delicti* and find that Haven law applies in this case.

A. This Court Should Apply the Doctrine of *Lex Loci Delicti* to Determine Which State's Laws Govern the Dispute.

Lex loci delicti stands for the "law of the state in which the tort was committed." *Simon v. United States*, 805 N.E.2d 798, 802 (Ind. 2004). It is the traditional American rule that dates back to Justice Joseph Story's 1834 treatise Commentaries on the Conflict of Laws. Ena, *supra*, at 1420–21. Justice Story's treatise provided a comprehensive view on the subject and guided many courts on the issue of conflict of laws. *Id.* Subsequent to Justice Story's treatise, *lex loci delicti* was so popular it was expressly adopted by the Restatement (First) of Conflicts of Laws. The Restatement (First) of Conflict of Laws explains tort actions are governed by law of "the place of the wrong," which was defined as "the state where the last event necessary to make an actor liable for an alleged tort takes place." § 377 (1934).

Although modern jurisdictions have relegated *lex loci delicti* to a presumption, it is clearly the better choice-of-law doctrine. The jurisdiction in which the accident occurs is the place with the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of justice. When wrongful acts occur in a state, they pose a direct threat to the person and property in that state, and the citizens of that state should be the ones "to determine, through their tort law, whether particular conduct is tortious and the extent of the monetary sanction." *Hauch v. Connor*, 453 A.2d 1207, 1210 (Md. 1983). Traditional courts routinely apply *lex loci delicti* because (1) it has led to convenient, uniform, and predictable results, and (2) it prevents forum shopping. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L.J. 1277, 1282–83 (1989). As *lex loci delicti* is superior to the most significant relationship test, and because it is the traditional rule in Haven, *lex loci delicti* should apply in this case.

1. *Lex loci delicti* provides a convenient, uniform, and predictable rule.

Lex loci delicti is a doctrine of certainty. It applies a clear cut, bright line rule that implements the substantive laws of the state where the tort is committed. There is no doubt that "[s]tability and certainty in the law are desirable." *Hall v. Hopper*, 216 S.E.2d 839, 843 (Ga. 1975). Likewise, because it is simple to determine within which jurisdiction a particular event occurred, "*lex loci delicti* has the virtues of consistency, predictability, and relative ease of application" that the most significant relationship test does not offer. *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 416 (Ga. 2005). This predictability may encourage settlement for attorneys; it certainly authorizes an accurate case evaluation. For judges, it simplifies choice-of-law analysis and provides uniformity.

Moreover, just because there is a new choice-of-law doctrine it does not mean that courts should automatically adopt it. Courts should objectively look at both doctrines and determined which is appropriate. Traditional courts have consistently come to "[t]he inescapable conclusion . . . that the approach of the Restatement (Second) of Conflict of Laws is not superior to the traditional rule of *lex loci delicti* . . . ." *Id.* at 418. For example, the Supreme Court of Alabama has recently said that "[t]he newer approaches to choice of law problems are neither less confusing nor more certain than the traditional approach. 'Until it becomes clear that a better rule exists, we will adhere to our traditional approach.'" *Fitts v. Minn. Mining & Mfg. Co.*, 581 So. 2d 819, 823 (Ala. 1991). Likewise, the West Virginia Supreme Court said, "The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly, and we are not persuaded that we should discard them today." *Paul v. Nat'l Life*, 352 S.E.2d 550, 555 (W. Va. 1986).

Although the most significant relationship test represents the modern trend, the test is merely a balancing test that provides virtually unlimited discretion to judges to "decide conflicts cases any which way they wish." Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 Ind. L.J. 403, 405 (2000). Most proponents of the most significant relationship test say this increased flexibility for judges is a good thing. However, it is clear that "[t]he result is a set of choice-of-law decisions so lacking in uniformity that the Second Restatement's balancing test has become chimeric, taking on vastly different forms in different courts." James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 Rev. Litig. 489, 491–92 (2004). The Seventh Circuit Court of Appeals calls this approach "the maddeningly indefinite 'interest-balancing' approach to conflicts issues." *Carter v. United States*, 333 F.3d 791, 794 (7th Cir. 2003).

Furthermore, the Second Restatement of Conflicts of Laws "fail[s] to provide enough guidance to courts to produce even a semblance of uniformity . . . ." *Fitts*, 581 So. 2d at 823. "[T]he components of the formula can be viewed differently from case to case thereby creating uncertainty and confusion in application of the theory." *McMillan v. McMillan*, 253 S.E.2d 662, 664 (Va. 1979). This gives judges the flexibility to rationalize almost any decision and no doubt leads to extra litigation, an increased burden on the judicial system, an increased inconsistency in decisions, and an unfair advantage to some litigants. Finally, because these decisions are highly dependent on the court's policy preferences, this approach is "plagued by excessive forum favoritism." *Dowis*, 621 S.E.2d at 415 n.7. The courts that have adopted the Second Restatement approach are now "saddled with a cumbersome and unwieldy body of conflicts of law that creates confusion, uncertainty and inconsistency, as well as complication of the judicial task." *Paul*, 352 S.E.2d at 553. Although the modern trend is finding that the most significant

relationship test applies, such a finding is clearly erroneous and inextricably muddles the area of conflict of laws. As such, *lex loci delicti* is clearly superior to the most significant relationship test because it provides a consistent, uniform, and predictable result.

2. *Lex loci delicti* prevents forum shopping.

In the United States, a plaintiff frequently has a choice of bringing a case in one of many jurisdictions. This typically includes the ability to bring a case in more than one state court. With this choice, the plaintiff may engage in forum shopping, which exists "when a litigant selects a forum with only a slight connection to the factual circumstances of [the] action or when the forum shopping alone motivated [the] choice." *Riviera Trading Corp. v. Oakley, Inc.*, 944 F. Supp. 1150, 1158 (S.D.N.Y. 1996)

For many reasons, courts have consistently attempted to prevent litigants from forum shopping. For instance,

> [t]he concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit, . . . raising the fear that applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails).

Sheldon v. PHH Corp., 135 F.3d 848, 855 (2d Cir. 1998). Moreover, judges may feel that their courts are overburdened and fear that a reputation of a forum favorable to certain types of plaintiffs will increase their work load, thus delaying the timely dispensation of justice. More importantly, it offends the sense of justice if the fair resolution of a case hinges on technical differences from one jurisdiction to the next.

Lex loci delicti unequivocally prevents forum shopping as it consistently applies the law of the place where the injury occurred. With such a straightforward rule, litigants and judges undoubtedly have a clear understanding of which law applies and are able appropriately evaluate

cases before they are filed. *See In re Disaster at Detroit Metropolitan Airport on Aug. 16, 1987*, 750 F. Supp. 793, 803 (E.D. Mich. 1989) ("Such a uniform result would also discourage and minimize forum shopping.").

Contrarily, under the most significant relationship test parties are encouraged to argue arbitrary contracts with the state that possesses the most advantageous laws, including contacts that happened after the injury. "[N]ormally the argument should fail because of the encouragement that accepting it would give to forum shopping." *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 866 (7th Cir. 2010). Furthermore, "if choice of law were made to turn on events happening after the accident, forum shopping would be encouraged." *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967). This is particularly relevant in this case because the accident occurred in Haven and the subsequent death occurred in Grace. (R. at 4.)

Concededly, *lex loci delicti* may appear to be a rigid, fortuitous rule. However, "[h]ardship may result in a particular case, but that, unfortunately, is true under any general legal principle." *Hauch*, 453 A.2d at 1209. "The relative certainty, predictability, and ease of application of *lex loci delicti*, even though sometimes leading to results that may appear harsh, are preferable to the inconsistency and capriciousness that the replacement choice-of-law approaches have wrought." *Dowis*, 621 S.E.2d at 419. As the New York Court of Appeals recognized, "we should not depart from sound precedent simply for the sake of change or merely because other courts have arrived at a result different from that which we have espoused." *Endresz v. Friedberg*, 248 N.E.2d 901, 906 (N.Y. 1969). Because *lex loci delicti* leads to uniform, predictable, and consistent results and prevents forum shopping, it is clearly the appropriate doctrine for choice-of-law issues. Moreover, to prevent injustice and further confuse the choice-of-law field, this Court should find that *lex loci delicti* is the appropriate doctrine under Haven law.

B. Haven Law Applies Under the *Lex Loci Delicti* Doctrine Because Washburne's Allergic Reaction to the Penicillin Occurred in Haven.

An injury is deemed to have occurred when "the last event necessary to make an actor liable for the alleged wrong takes place." *Allen v. Great Am. Reserve Ins. Co.*, 765 N.E.2d 1157, 1164 (Ind. 2002). Therefore, because the last event necessary to establish liability in this case was Plaintiff being injected with penicillin, and because Plaintiff was injected while in Haven, Haven law applies. (R. at 4.)

Courts have consistently held in wrongful death cases the last event necessary to establish liability occurs when the plaintiff is subject to the alleged wrongful conduct, not when the plaintiff dies. For instance, in *Sacra v. Sacra*, a man was driving his car in Delaware when he negligently failed to stop at a stop sign. 426 A.2d 7, 8 (Md. Ct. Spec. App. 1981). *Id.* Another driver struck his vehicle and caused him to be pushed across the Maryland State line. While in Maryland his vehicle struck a utility pole, overturned, exploded, and the driver died. *Id.* Subsequently, the decedent's estate brought a wrongful death claim and the court had to address whether the injury occurred when the decedent got into the accident in Delaware or when he died in Maryland. *Id.* The court focused on the accident happening in Delaware, saying "it was only because of the harm in Delaware that the appellant ha[d] any claim." *Id.* at 9. Furthermore, the court pointed out that no damage or injury would have occurred if it was not for the original negligence of the driver when he was in Delaware. *Id.*

This case is remarkably similar to *Sacra* because Plaintiff was administered the penicillin in Haven but subsequently died in Grace. (R. at 4.) No one disputes that she died because she had an allergic reaction to penicillin. (R. at 4.) No one disputes that she was administered the penicillin while she was a patient in Haven. (R. at 4.) There would not be a claim and none of the damages or injuries would have occurred if it was not for the penicillin being administered to

Plaintiff. The injection of the penicillin was the injury to Plaintiff because it caused Plaintiff to have the allergic reactions that eventually led to her death. Moreover, the district court specifically said, "The injury occurred in Haven" and was not disputed by the circuit court. (R. at 7.) The circuit court enumerated contacts Plaintiff had with Grace but never disputed that the injury occurred in Haven. (R. at 11.) Inevitably, these undisputed facts prove that Haven is the place where the last event necessary to establish alleged liability occurred. Therefore, because Plaintiff was administered penicillin in Haven, the injury was caused in Haven and under *lex loci delicti* Haven law should apply.

The fact that Washburne died in Grace does not mean that Grace law should govern this dispute. In cases where courts have applied the law of the state where the death occurred, the injury and death occur in the same state. However, these cases clearly distinguish that the injury occurs when the plaintiff is subjected to the alleged wrongful conduct and the fact that the death occurs in the same state is mere happenstance. For instance, in *Judge v. Pilot Oil Corp.*, a truck driver was shot and killed in Indiana. 205 F.3d 335, 335 (7th Cir. 2000). The court noted that "under the doctrine of *lex loci* the fact that [the plaintiff] was shot in Indiana (the last act necessary to make the defendants liable) would mandate that Indiana law be applied." *Id.* at 336. Furthermore, later in the opinion the court said the "facts of this wrongful death case demonstrate that the last act necessary to make the defendant liable[] [was] *the shooting* of David." *Id.* at 337 (emphasis added). The court unequivocally demonstrated that the injury occurs when the plaintiff is subjected to the alleged wrongful act, not when the plaintiff dies.

C. Alternatively, Even if This Court Chooses Not to Use *Lex Loci Delicti*, Haven Law Still Applies Under the Most Significant Relationship Test.

If this Court chooses to apply the most significant relationship test, the substantive laws of Haven law should apply. In applying the most significant relationship test, the court of appeals

erred by examining only a few of the relevant factors pertinent to a thorough examination required by the test. (R. at 11.) The court of appeals merely considered where the Estate was domiciled, where Washburne worked, where her primary care physician was located, and where the relationship between the Washburne and Firefly was formed. (R. at 11.) Based on the evaluation of these insufficient factors, the court of appeals reached an erroneous conclusion that Grace law should apply in this case. (R. at 11.)

The court of appeals ignored a host of relevant factors that are material to the most significant relationship test. In personal injury actions,

> 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. "This formulation essentially establishes a presumption that the state with the most significant relationship is that state where the injury occurred, absent an overriding interest of another state based on the factors articulated in § 6." *Wolfley v. Solectron USA, Inc.*, 541 F.3d 819, 823 (8th Cir. 2008). The factors stated in § 6 are:

(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 § 6(2). "To determine if another state has a more significant relationship than the state of injury, the section 6 factors must be evaluated with the contacts listed in Restatement (Second) of Conflict of Laws § 145." *Wolfley*, 541 F.3d at 823.

The section 145 factors include: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and principal place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. The court of appeals examined only a fraction of these factors. After thoroughly examining the relevant factors, it is clear that the district court was correct in holding "that Haven has the most significant relationship to the litigation." (R. at 7.)

1. Washburne's injury occurred in Haven.

The first factor enumerated in § 145 is the place where the injury occurred. "[I]n absence of unusual circumstances, the highest scorer on the 'most significant relationship' test is—the place where the tort occurred." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7th Cir. 1999). This is illustrated by the fact that a presumption favors the law of the state where the injury occurred. *Boomsma v. Star Transp., Inc.*, 202 F. Supp. 2d 869, 873 (E.D. Wis. 2002). Under this factor, the analysis is the same as it was under *lex loci delicti*. Therefore, because the injury occurred when Washburne was injected with penicillin, and because Washburne was injected while in Haven, this factor weighs in favor of Haven law applying.

2. The events alleged as the underlying cause of Washburne's injury occurred in Haven.

The second contact to be considered is the place where the conduct causing the injury occurred. As here, when there are a lot of factors to be considered courts have held that "the most important relevant factor is where the conduct causing the injury occurred because an individual's actions and the recovery available to others as a result of those actions should be governed by the law of the state *in which he acts*." *Simon*, 805 N.E.2d at 806–07 (emphasis added). For instance, in *Judge*, the court held that "the parties conduct in Indiana that resulted in

[the decedent's] death will be the key element to determine if the defendants should be held accountable for [the decedent's] death." 205 F.3d at 337. In this case, the district court articulated that "the conduct that caused the injury occurred in Haven." (R. at 7.) The district court unquestionably based this finding on the undisputed fact that Plaintiff was injected with penicillin in Haven. (R. at 4.) This is clear because approximately five minutes after Plaintiff was administered penicillin she had a reaction common to those with a penicillin allergy. (R. at 4.) Furthermore, Plaintiff's second reaction was a direct result of her injection of penicillin. (R. at 4.) Therefore, not only does this factor unequivocally weigh in favor of applying Haven law, this factor should be accorded substantial weight in the overall scheme of the most significant relationship test.

3. The relationship between Firefly and Washburne was centered in Haven.[1]

The final contact to be considered under § 145 is the place that the relationship, if any, between the parties was centered. The court of appeals came to the unjustified conclusion that this factor weighs in favor of Grace because the relationship between the parties was formed in Grace. (R. at 11.) However, this factor is only relevant "[w]hen there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done *in the course of the relationship*." Restatement (Second) of Conflict of Laws § 145 cmt. e (emphasis added). Therefore, the rationale of the court of appeals is both incorrect and irrelevant.

[1] No analysis was given to factor three of § 145—the domicile, residence, nationality, place of incorporation, and principal place of business of the parties—because courts have consistently held when a factor is equal the weight should be given to the other factors. *See Nicholson v. Marine Corps. Fed. Credit Union*, 953 F. Supp. 1012 (N.D. Ill. 1997). In this case, this factor comes out equal because Plaintiff resided in Grace and Firefly's principal place of business is in Haven. (R. at 2.)

Conversely, under a correct application this factor clearly weighs in favor of Haven. Comment (e) requires a relationship between the plaintiff and the defendant and an injury that was caused by an act done in the course of that relationship. There is clearly a relationship between Plaintiff and Firefly in this case because Firefly converted Plaintiff's medical records to an electronic medical recording system. (R. at 2.) Also, there was clearly an act that caused an injury during the relationship because Dr. Tam was relying on those medical records when he injected Plaintiff with penicillin. (R. at 4.) Moreover, this factor weighs in favor of Haven because these occurrences must be determined "at the time of the accident . . . ." *Foster v. United States*, 768 F.2d 1278, 1283 (11th Cir. 1985). At the time of this accident, everything related to Haven. Washburne was located in Haven. (R. at 4.) Firefly was located in Haven (R. at 4.) Washburne was taken to a hospital in Haven. (R. at 4.) She had surgery in Haven. (R. at 4.) The doctors were located in Haven. (R. at 4.) The medical records the doctors relied on were located in Haven. (R. at 4.) Finally, Washburne was injected with penicillin in Haven. (R. at 4.) Therefore, the relationship between the parties is undeniably centered in Haven and this factor weighs in favor of Haven law applying in this case.

4. The relevant policies of Haven outweigh any policies of Grace.[2]

Courts have routinely held that it "must balance" the policies of the relevant states. *Halstead v. United States*, 535 F. Supp. 782, 788 (D. Conn. 1982), *aff'd sub nom. Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983). The relevant polices of Haven unquestionably

[2] No analysis was given to factor (a) of § 6—the needs of the interstate and international systems—because the comments to § 6 clearly show that this factor provides little insight in a products liability situation such as the one before the Court today. The comments are concerned with what choice-of-law rules further the needs of the interstate and international systems rather than with what forum's substantive law furthers the needs of the interstate and international systems. *See* Restatement (Second) of Conflict of Laws § 6 cmt. d.

outweigh any policies of Grace. Undeniably, Grace has an interest in seeing its citizens compensated for their injuries. However, in product liability cases courts have consistently held that the state where the accident occurred has a stronger interest. For instance, in *Halstead*, a Connecticut domiciliary died in a plane crash in West Virginia and when the court evaluated the public policy of West Virginia the first thing it noted was "that the tortious conduct occurred elsewhere." *Id.* This is particularly relevant in products liability actions because the forum is strongly interested in seeing that product-liability plaintiffs are not overcompensated, resulting in higher insurance premiums for forum manufacturers, higher costs, and lost jobs. Additionally, the public policy benefits of having electronic medical records storage systems unquestionably tip the scale in favor of Haven. These storage systems provide straightforward, effortless access to important information that can save lives in a cinch. As such, the public policy benefits of Haven compared to Grace emphatically guide this Court to find that Haven law applies in this case.

5. Haven affords a protection for justified expectations of its citizens as well as a certainty, predictability, and uniformity that Grace simply cannot provide.[3]

Another factor relevant to a choice-of-law analysis is the protection of justified expectations. As previously stated, the relationship between Washburne and Firefly was centered in Haven when the injury occurred. Moreover, Washburne was not in Haven by accident. (R. at 3.) Washburne knowingly and voluntarily chaperoned a school trip into Haven. (R. at 3.) Thus, Washburne deliberately and willingly subjected herself to the laws of Haven. (R. at 3.) Furthermore, Washburne unquestionably subjected herself to the laws of Haven when

[3] No analysis was given to factor (e) of § 6—the basic policies underlying the particular field of law—because tort law generally, and product liability law in particular, is concerned with the compensation of victims, whether under Haven law or Grace law.

she decided to file her Complaint in the Peterson County Court of Common Pleas located in Haven. (R. at 4.)[4] Undoubtedly, this led Firefly to justifiably expect Haven law would apply in the case. Finally, when a court protects this justified expectation it undeniably furthers the considerations of certainty, predictability, and uniformity of result. Thus, the protection of both parties' justified expectations, along with the considerations of certainty, predictability, and uniformity of results, weigh in favor of applying Haven law.[5]

When performing a most significant relationship test analysis, "[i]t is not the number of contacts, but the qualitative nature of those contacts that controls." *Gauthier v. Union Pac. R.R. Co.*, 644 F. Supp. 2d 824, 839 (E.D. Tex. 2009). In this case, both the quality and quantity of contacts point to Haven law applying. To begin, Plaintiff will not be able to meet its burden and rebut the presumption that the law of the injury, which is Haven, applies in this case. Alternatively, even if this presumption is rebutted, the majority of factors and certainly the significant factors all weigh in favor of applying Haven law. Thus, under the most significant relationship test of the Restatement (Second) of Conflict of Laws this Court should unquestionably hold that Haven law applies in this case.

[4] Inextricably, Plaintiff filed her Complaint in Haven and is now arguing that the laws of Haven should not apply to this case.

[5] No analysis was given to factor (g) of § 6—ease in the determination and application of the law to be applied—because this Court will find no impediment in applying either Haven or Grace law under the most significant relationship test.

II. RESPONDENT FAILED TO STATE A CLAIM FOR STRICT PRODUCTS LIABILITY UNDER HAVEN LAW.

Haven law is the applicable law to determine the Estate's claims of strict products liability against Firefly Systems, Inc.[6] The State of Haven has expressly adopted the Restatement (Third) of Torts: Products Liability (1998) ("Third Restatement'). (R. at 4–6.) This Court must now determine whether the Estate has stated a claim under Haven law for strict products liability upon which relief can be granted.

Under the Third Restatement, the Estate may bring suit against Firefly for strict products liability under the theories of (1) manufacturing defect, (2) design defect, or (3) warning defect. Restatement (Third) of Torts: Products Liab. § 2. A design or warning defect claim must be accompanied by a showing of a reasonable alternative design. *Id.* Under Haven law, the Estate must additionally prove that the Firefly's product was the "but for" cause and the proximate cause of Washburne's harm. *Id.* § 2 cmt. q (1998); *see also* Haven Rev. Code § 1018.11.

The Estate has failed to state a claim upon which relief can be granted under Haven law. (R. at 9.) First, the Estate did not establish a prima facie case for design or warning defect, as she could not establish proof of a reasonable alternative design. The addition of an alternative design to the Firefly product would deprive it of the advantages it holds over its competitors, including price and technical simplicity. Furthermore, no proof has been offered that the alternative design would have eliminated the alleged risk of harm. Finally, the Estate has not stated a claim for manufacturing defect as the Firefly product in question did not deviate from its

[6] The only certified issue before this Court is for strict products liability. However, both the district court and court of appeals dismissed the Estate's express warranty claim because Washburne was not expressly promised anything nor did Firefly represent anything to her. Additionally, an independent claim based upon a breach of the implied warranty of merchantability is duplicative of a products liability claim because they are based on the same defect claims and analysis.

intended design. Thus, the ruling of the court of appeals should be reversed and the ruling of the district court should be reinstated.

A. The Design Defect Claim Fails as a Matter of Law Without Proof of a Reasonable Alternative Design that Could Have Reduced or Avoided the Risk of Harm Alleged.

To establish a prima facie case of defect, a plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm. Restatement (Third) of Torts: Products Liab. § 2 cmt. f (1998). Haven has adopted the staunch stance taken by the Restatement (Third) by holding that proof of a reasonable alternative design is a "necessity" and a "predicate towards establishing design defect." *Id.* The alternative safer design requirement reflects the reality that often it is not possible to determine whether a safer design would have averted a particular injury without considering whether an alternative design was feasible. *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 676 (Ga. 1994). Simply put, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller rendered the product not reasonably safe. *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1313 (11th Cir. 2005) (applying the Restatement (Third) of Torts: Product Liability § 2).

Proof of a reasonable alternative design has been recognized in several forms. In *General Motors Corp. v. Sanchez*, the plaintiff offered expert testimony to show that a reasonable alternative design existed. 997 S.W.2d 584, 587 (Tex. 1999). The expert testified that his alternative design of the General Motors transmission would prevent internal forces in the transmission from moving the gear selector into "reverse" rather than "park" when the driver inadvertently leaves the lever in a position between "reverse" and "park." *Id.* He further stated

that this alternative design would eliminate the inadvertent movement 99% of the time and thus eliminate the risk of harm. *Id.* The court recognized this testimony to be sufficient proof of a reasonable alternative design.

Unlike in *Sanchez*, the Estate has not utilized the testimony of an expert witness to establish the availability of a reasonable alternative design. No expert testimony was offered to corroborate the existence of a reasonable alternative design, which could eliminate the risk of the alleged harm in this case. The Estate has simply asserted that in designing the software, Firefly failed to incorporate a warning system for errors. (R. at 13.) However, unlike in *Sanchez*, the Estate has not established an alternative design that would have eliminated or reduced the risk of harm. As a result, the Estate has failed to meet its burden of showing how this design would eliminate the alleged risk of harm.

1. The Firefly system is not an inherently dangerous product and thus does not fall under the rarely recognized exception to the requirement of a reasonable alternative design.

Expert testimony, however, is not always needed in each case to prove reasonable alternative design. Restatement (Third) of Torts: Products Liab. § 2 cmt. f (1998). Where the feasibility of a reasonable alternative design is obvious and understandable to laypersons, expert testimony is unnecessary to show that the product should have been designed differently and more safely. *Id.* Additionally, some have suggested that in rare instances, where the case involves an inherently dangerous product with low social utility and a very high risk, the court may not require proof of a reasonable alternative design. *Id.* § 2 cmt. e (1998). This exception to the reasonable alternative design is only applicable when the product may be judged so unreasonably dangerous that it should be removed from the market all together rather than be redesigned. *Id.*; *see also Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 (Or. 1978)

(holding that in some cases, evidence of the dangerous nature of the design is sufficient to maintain a design defect case). In fact, these cases are so few and far between that only one American jurisdiction currently recognizes such a position other than by way of dictum. Restatement (Third) of Torts: Products Liab. § 2 cmt. e (1998). As a result of the infrequency of such cases, the possibility of such a holding has not been included in black letter law. *Id.*

An example of an exception to the requirement of a reasonable alternative design is found in the case of *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1272 (8th Cir. 1972). There a passenger on a motorcycle, which was involved in a collision with an automobile, was injured by the automobile's hubcap, which was made up of purely ornamental blades. *Id.* The ornamental blades protruded three inches from the base of the wheel cover and at 40 m.p.h. the blades revolved at 568 r.p.m. or nine and one-half revolutions per second. *Id.* The court found that the hubcaps possessed such a high risk with minimal social utility that it was willing to impose liability without proof of a reasonable alternative design. *Id.* The court held that the jury could find from that fact alone that it would have been reasonable to supply hubcaps of a safer design. *Id.*

Unlike in *Passwaters*, however, the Firefly system has a high degree of social utility. Firefly's program is not designed to be purely ornamental or for some other aesthetic reason. It is designed to digitize a patient's medical record to allow for easy and instant transmission between physicians in the event of an out of town emergency. (R. at. 1.) The services it offers has been recognized and encouraged by Haven legislature and Congress. (R. at 8.) Furthermore, the Firefly system is not an inherently dangerous product as are razor sharp ornamental blades. Thus, on a risk utility balancing test the Firefly system cannot be held to be unreasonably dangerous, and the Estate must offer proof of a reasonable alternative design.

2. A competing product in the marketplace does not establish the Firefly system as unreasonably dangerous and still requires proof of the reasonableness of that alternative design.

Section (2)b of the Restatement (Third) prescribes that a plaintiff alleging a design defect cannot establish a prima facie case without showing that a reasonable alternative design existed that not only would have reduced or prevented the plaintiff's injury but also that it would have made the product safer overall. Restatement (Third) of Torts: Products Liab. § 2 cmt. f (1998). Thus, proof of a reasonable alternative, although required to make a prima facie case, is not alone sufficient to establish liability under section 2(b). *Hull v. Eaton Corp.*, 825 F.2d 448, 451 (D.C. Cir. 1987). The alternative must also be shown to be a reasonable alternative by eliminating the risk of harm. Additionally, the availability of an alternative design, such as that of Firefly's existing competitor IBM, does not establish the alternative as a reasonable substitute for the actual design used by the Firefly. Restatement (Third) of Torts: Products Liab. § 2 cmt. f (1998).

For example, a competing alternative may deprive the product of important features such as price and efficiency, which make it desirable and attractive to users and consumers. *Id.* In short, the evidence must show not only that the design is technologically feasible, economically feasible, and safer overall, but also that it would not have substantially impaired the function, utility, economy, convenience, and other features that drive consumer demand for and acceptance of the product. *Id.* cmt. e.

The Supreme Court of Michigan in *Owens v. Allis Chalmers Corp.* held that in a plaintiff does not present a prima facie case where there is a lack of evidence as to the magnitude of the risks and the reasonableness of the proposed alternative design. 326 N.W.2d 372, 429 (Mich. 1982). *Owens* involved an alleged defective design of a forklift manufactured by the defendant

in which plaintiff's husband was killed. *Id.* To establish her prima facie case of design defect the plaintiff relied on the testimony of an expert witness who suggested four types of alternative designs that might have been effective. *Id.*

In a unanimous decision, the Supreme Court of Michigan held that the plaintiff did not present a prima facie case and affirmed the motion for directed verdict. *Id.* at 426. The decision was based on the lack of evidence concerning the reasonableness of the proposed alternative design. *Id.* at 429. The court ruled that it was not enough that other alternative designs were available. *Id.* The plaintiff did not meet her burden of establishing the utility or relative safety of the proposed alternative designs. *Id.* The plaintiff had failed to meet this burden because the court held there was no showing as to the effects or costs of the other designs proposed by the plaintiff. *Id.*

Owens reiterated the stance taken by the Third Restatement. In affirming the motion for directed verdict *Owens* emphasized that the availability of another design is not sufficient to establish a prima facie case for design defect. The plaintiff must also present evidence of the reasonableness of the proposed alternative designs. Presenting evidence on the effects of the alternative design on the products costs, functionality and ability to eliminate risk of harm demonstrates the reasonableness of the design. As in *Owens*, the Estate has failed to establish a prima facie case of design defect according to Haven law.

The Estate has put forth no evidence of how an alternative design to the Firefly system might affect the product's cost, functionality, or ability to eliminate risk of harm. Instead, the Estate has simply put forth the claim that Firefly's design was unreasonable for not incorporating a warning system for errors such as that of IBM's. (R. at 12.) However, the Estate has not substantiated that argument by showing how that warning system would affect the product's

cost, functionality or ability to eliminate risk of harm. At most, this evidence merely shows the technological availability of other electronic software. As the Third Restatement maintains, the availability of an alternative design does not mean that the alternative is a reasonable substitute for the actual design utilized by the manufacturer. Restatement (Third) of Torts: Products Liab. § 2 cmt. f (1998).

3. An alternative design is not practical and would eliminate the economic and operational benefits offered by the Firefly system.

The Third Restatement has stated that the availability of an alternative design does not mean that the alternative is a reasonable substitute for the actual design in question. *Id.* For example, while an alternative design may be feasible the implementation of it may also deprive a product of important features, such as operational efficiency and modest price, which make it more desirable than a competitor's product in the marketplace. *Id.* Herein lies the justification for the oft-repeated ruling that a manufacturer has no obligation to provide the safest design available or provide for the ultimate in safety. *See, e.g.*, *Linegar v. Armour of Am., Inc.*, 909 F.2d 1150 (8th Cir. 1990) (applying Missouri law); *Husky Indus. v. Black*, 434 So. 2d 988, 991 (Fla. Dist. Ct. App. 1983); *Hunt v. Blasius*, 384 N.E.2d 368, 372 (Ill. 1978); *Marchant v. Mitchell Distrib. Co.*, 240 S.E.2d 511, 514 (S.C. 1977).

Tran v. Toyota Motor Corp. discussed the factors to take into account when determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. 420 F.3d at 1313 (applying the Restatement (Third). *Tran* involved a manufacturing and design defect case against Toyota for injuries caused by its manual seat belt design. *Id.* In its analysis of the reasonableness of the alternative design, the court held that the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. *Id.* at 1313. Additionally, the court held that the

factors are *not exclusive* but rather *interact* with one another. *Id.* For example, evidence of the magnitude of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and utility of the product.

The Estate's entire design defect claim rests on the contention that Firefly should have incorporated a warning system such as that employed in IBM's higher priced product. (R. at 12.) The Estate notes that IBM has additional checks in its system. However, this does not even begin to prove the economic and operational feasibility of this alternative design as applied to the Firefly design.

IBM was the first to market its electronic medical recording system. (R. at 3.) It has also implemented several nuances in its program, which give it a technical advantage and separate it from the Firefly system. *Id.* However, the IBM system requires additional training to operate which consequently makes it more difficult to operate and ten percent more costly. *Id.* Having had the opportunity to market its product after IBM had already entered the market, it is no coincidence Firefly's system was designed in the manner it was.

As stated in *Tran*, evidence that the proposed alternative design would reduce the efficiency and utility of the product can offset the foreseeable risk of harm. By alleging that Firefly must implement the technical differences that IBM incorporates, the Estate would do away with the significant advantages Firefly has over IBM. While the Estate claims, without any evidence, that the additional programming that IBM employs would reduce the risk of harm, it would also simultaneously reduce the efficiency and utility of Firefly's design. The district court was correct in recognizing that the additional software design, installation and validation costs would not outweigh the risks. (R. at 9.)

The State of Haven has adopted the same objective as the rest of the nation with respect to health care: the electronic conversion of medical records through a cost efficient system. (R. at 7.) This is evidenced from the funds already appropriated by Haven legislature and Congress to encourage cost savings via conversion to health information technology. (R. at 7.)

B. The Manufacturing Defect Claim Fails as a Matter of Law Without Evidence that the Firefly System Deviated from Its Intended Design.

The Estate also has not stated a manufacturing defect claim upon which relief can be granted. Under subsection (a), a product contains a manufacturing defect: (1) "when the product departs from its intended design" (2) even if "all possible care was exercised in the preparation and marketing of the product." Restatement Third of Torts: Products Liab. § 2(A) (1998). The Haven Supreme Court has set out the following methods by which a plaintiff can demonstrate the existence of a manufacturing defect: (1) direct evidence that the defect arose in the hands of the manufacturer; (2) circumstantial evidence which would create an inference that a defect existed prior to sale; or (3) by negating other causes of the failure of the product for which the defendant would not be responsible, to further an inference that he defects was attributable to the manufacturer. *Marcus v. Valley Hill, Inc.*, 301 Haven 197 (2006). The Estate did not offer evidence under any of these approaches.

Common examples of manufacturing defects are products that are physically flawed, damaged, or incorrectly assembled. Restatement Third of Torts: Products Liab. § 2 cmt. c (1998). The plaintiff ordinarily bears the burden of establishing that such a defect existed in the product when it left the hands of the manufacturer. *Id.* The question is whether the Firefly product was manufactured in conformity with its intended design.

In the case of *Marcus v. Valley Hill, Inc.*, the Haven Supreme Court set out the following methods by which a plaintiff could establish the existence of a manufacturing defect: (1) direct

evidence that the defect arose in the hands of the manufacturer; (2) circumstantial evidence which would create an inference that a defect existed prior to sale; or (3) by negating other causes of the failure of the product for which the defendant would not be responsible, in order to further an inference that the defect was attributable to the manufacturer. 301 Haven 197.

Firefly's product did not possess a manufacturing defect. The Firefly product was designed to insert the term "NONE" in an unmarked column and the system did no more or no less than its intended design. (R. at 7.) Thus, it cannot be alleged that this was a manufacturing defect by this specific model as all other products are designed to do the same thing. The Estate does not rebut that the program was in conformity with the other standard units in Firefly's production line.

Additionally, the Estate has not offered any circumstantial evidence to create an inference that this defect existed prior to sale. The court of appeals unreasonably ignored the burden of proof when it admitted that it was unclear whether the defect was an error by a Firefly employee or a malfunction in the software. (R. at 11.) This is not sufficient to establish that a defect existed when it left the hands of the manufacturer.

C. The Warning Defect Claim Fails as a Matter of Law Without Evidence of a Reasonable Warning Alternative.

The Estate also has not stated a warning defect claim upon which relief can be granted. To establish a claim for a warning defect, a plaintiff bears the burden of proving that the foreseeable risks of harm could have been avoided or reduced by reasonable instructions or warnings, and that the omission of the warning renders the product not reasonably safe. Restatement Third of Torts: Products Liab. § 2(A) (1998). The Estate alleges that Firefly's system makes it liable under a theory for warning defect. (R. at 4.) To maintain a cause of action for warning defect, a plaintiff has the burden of proving that the foreseeable risks of harm could have been avoided or

reduced by adopting a reasonable alternative warning the omission of which renders the product not reasonably safe. Restatement (Third) of Torts: Products Liab. § 2(C) (1998). Under a warning defect claim, a plaintiff must prove that adequate warnings were not provided when a reasonable alternative warning was available. *Id.* The Third Restatement uses a reasonableness test for judging the adequacy of product warnings. *Id.* cmt. i. Except in certain limited instances, the courts have rejected efforts to make manufacturers absolute guarantors of product safety. David Owen, *Products Liability Law Restated*, 49 S.C. L. Rev. 273 (1998).

The Estate's claim is similar to that of the plaintiffs in *Bourelle v. Crown Equipment Corp.*, 220 F.3d 532, 533 (7th Cir. 2000). In *Bourelle*, the plaintiffs claimed that the injury they suffered from operating a forklift could have been avoided by the use of an appropriate warning. *Id.* In furtherance of their argument, plaintiffs hired an expert to testify as to the inadequacy of the warnings being employed. *Id.* at 535. However, the expert did not offer a proper warning that would have ameliorated the unsafe condition he believes existed. *Id.* at 538. The court noted that "it was just his opinion that common sense would say that a warning would be appropriate." *Id.* In affirming the dismissal of expert's opinion the court said that his opinion was akin to that of "talking off the cuff" and not acceptable methodology. *Id.* The court concluded that plaintiff's claim failed because the witness' testimony was unreliable. *Id.* In affirming this decision, the court of appeals relied on the fact that the witness failed to test an alternative warning for the product. *Id.*

As in *Bourelle*, the Estate has failed to offer proof of a reasonable alternative warning that could have eliminated the risks of harm. By not offering an alternative warning, the Estate cannot prove how this alternative could have avoided or reduced the risks of harm, as § 2(c) requires. Similar to *Bourelle*, the Estate's claims are akin to that of "talking off the cuff" and not

acceptable methodology. There is no evidence that the Estate has offered expert testimony outlining a better warning than that used by Firefly, and thus like *Bourelle* the court should find that relief cannot be granted for her claim of warning defect.

Furthermore, the district court rightfully held that the additional software design necessary to redesign the Firefly system is outweighed by the substantial costs. (R. at 9.) The Firefly system purposely fashioned a simple design that operates more cost efficiently than its competitors. (R. at 3.) Firefly's strategy to be more cost efficient is in line with Haven's policy to ensure reasonable measures to reduce health costs is a matter of public policy. (R. at 8.) Installing software safeguards or warnings such as those employed by IBM would unreasonably alter the Firefly system and cause it to endure extensive design costs. Furthermore, a revamping of the Firefly design to emulate that of IBM's would lead to a homogenization of the marketplace. It would diminish the consumer's choices in a free marketplace and also eliminate the competitive advantage Firefly maintains over its competitors.

CONCLUSION

This Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit and REINSTATE the judgment of the United States District Court for the District of Haven.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER