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

University of Cincinnati College of Law
&
Rendigs, Fry, Kiely & Dennis, LLP
Attorneys at Law
Cincinnati, OH

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAVEN

In re Estate of Zoe Washburne,

Plaintiff

-V-

Firefly Systems, Inc.,

Defendant

No. XX-XX-XXXXX

March 20, 2009, Decided

OPINION

PARKER, *District Judge*

Presently before the Court is Defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, the Court holds that Plaintiff has failed to show a reasonable alternative design for her strict product liability claim. Accordingly, Defendant's Motion will be **GRANTED.**

I. Background

A. Factual Background

Zoe Washburne was born August 21, 1982. Prior to the events that gave rise to this suit, she was a middle school teacher at River Middle School, located in Whitefall, a small town in the state of Grace. Around age five, it was discovered by her parents that she suffered from an allergy to the common antibiotic penicillin. Since that discovery, Washburne and her parents have taken active steps to avoid exposure to penicillin, including notifying new doctors and educating themselves about the allergy.

At some point during late 2008, Washburne received a letter in the mail from her local primary care physician, Dr. Kaylee Frye, stating that Dr. Frye's practice would be converting to an electronic medical recordkeeping system; one that digitizes a patient's medical record to allow for easy and instant transmission between local physicians as well as out of town physicians in the event of an emergency while traveling. The letter stated that Washburne could receive a USB flash-drive containing a copy of her electronic medical record for a twenty-five dollar fee. Dr. Frye's letter further stated that several companies offered such services, but that her practice would be using a system designed by Firefly Systems, Inc., a Delaware corporation with its principle place of business in Haven. Firefly offered a lower cost for the product and had been advertising aggressively in recent months with hospitals nationwide. Firefly's software is mass-produced and they do not customize the program or individually tailor it to different hospitals. According to Washburne's complaint, Washburne wrote a personal check

payable for twenty-five dollars to Firefly. Dr. Frye then provided the paper copy of Washburne's medical record to Firefly in order to digitize her health records. After the records were transferred by Firefly, Firefly securely shipped the software directly to Dr. Frye with delivery confirmation. Washburne subsequently received her USB flash-drive copy of her records, but she never had the opportunity to review them and has since misplaced the USB drive.

The premise of Firefly's business was simple: employees of Firefly would work with hospitals to record and digitize a patient's medical record, including personal and family past medical histories, as well as notes, charts, and records of procedures both past and present. This record would then be securely stored on Firefly's servers, which were integrated both directly with participating hospital systems as well as through a secure web portal to provide access to physicians and healthcare providers that did not have a direct relationship with Firefly. When entering a patient's data, Firefly employees are instructed to make sure that the electronic data they input matches the exact paper record. In addition, Firefly customers are instructed to verify the electronic records, once returned, before disposing of the original paper copies.

Electronic medical records storage is a booming industry. Firefly's largest competitor, IBM, had developed a similar system. IBM was the first-to-market with their system. The IBM system is ten percent more costly; however, the IBM system has several technical advantages. Most noticeably, the IBM system has what it calls, "final check flag system." The flag system reviews the operator's inputs and warns of any potential errors or omissions in converting the patient's record from paper to electronic format. For example, the flag system uses a yellow flag warning for minor omissions such as a patient's hair color or eye color. On the other hand, a red flag appears for more serious omissions such as family history or known allergies. The user cannot continue with a red flag warning until he or she confirms that the red flag data field was entered correctly. The IBM system is somewhat more difficult to operate than Firefly's and requires additional training.

On Wednesday, September 10, 2008, Washburne, while acting as a chaperone on a school-sponsored field trip to Capitol City, Haven, began experiencing acute abdominal pain. At first, Washburne dismissed the pain as mere indigestion, but shortly after she began feeling feverish and sick to her stomach. Washburne notified the fellow teachers on the trip and was shortly thereafter taken to University Medical Center, a hospital serving the greater Capitol City Metropolitan area.

Upon arriving at the hospital, Washburne was rushed to the emergency room, during which time the pain she was experiencing had grown so severe that she was non-responsive and unconscious. Washburne's fellow teacher and longtime friend, Vince Gordon, was present on the field trip and he accompanied Washburne to the hospital. Gordon provided the hospital's staff with Washburne's identification, but he had no knowledge of any of Washburne's allergies or family medical history. Using Washburne's driver's license information, the hospital staff was able to access and retrieve Washburne's electronic medical file via the web portal access from Firefly. With the medical record in hand, the staff on call made a preliminary diagnosis of appendicitis.

At some point after the emergency room staff had retrieved the medical record, Dr. Simon Tam, the surgeon on call, arrived and proceeded to verify the emergency room staff's diagnosis of appendicitis. Dr. Tam concluded that immediate surgery was required to remove Washburne's appendix.

Dr. Tam, possessing only the electronic version of Washburne's chart provided by Firefly, proceeded with the operation. Unfortunately, the electronic medical chart, while accurate in all other respects, was missing any reference to Washburne's penicillin allergy. As shown in the record, the static copy of Washburne's file that was relied upon by Dr. Tam and the hospital staff contained nothing in the "Known Allergies" field. As a default, Firefly's software is designed to insert the word "NONE" in the "Known Allergies" field if no allergies are input for a patient. While it is unclear why the known allergies field of Washburne's record as obtained by University Medical Center is blank, it is undisputed that the information on the paper record that Dr. Frye submitted to Firefly *did* contain the proper penicillin allergy warning, as does the copy of the record stored locally on Firefly's servers.

Following the surgery, Dr. Tam and his surgical assistants administered penicillin as common practice to avoid the risk of post-surgical infection. Approximately five minutes after the penicillin was administered, Washburne began to experience respiratory problems that were common for those with a penicillin allergy. The hospital's on-call staff responded to the situation and quickly administered epinephrine, which alleviated Washburne's symptoms. At this point, the hospital became aware of Washburne's penicillin allergy for the first time due to her reaction, but no other issues arose during her stay at the hospital.

Washburne recovered quickly and was discharged from the hospital on Friday, September 12. By this time Washburne's school was fully informed of her experience. While Washburne had undergone surgery and recovery in the hospital, the school had sent a substitute chaperone to meet the field trip class and bring them back home. With her responsibilities to her students no longer present, Washburne decided to meet with her parents upon her discharge from the hospital and travel back with them to their home in Grace.

The majority of the Washburne family's drive home passed without incident. However, at some point after the family had crossed into Grace, Washburne collapsed and was unable to be revived by her parents. Emergency medical technicians, responding to the 9-1-1 call placed by her parents, arrived on the scene but were unable to revive Washburne. The damage caused by the reaction, coupled with the delay before help could arrive was too great to overcome; Washburne was pronounced dead at the scene.

It was later determined that Washburne's second reaction was the result of biphasic anaphylaxis, a relatively rare form of reaction linked directly to the initial anaphylaxis reaction, in which symptoms can reoccur up to 72 hours following the initial reaction, despite the lack of further exposure to the allergen.

B. Procedural Background

Plaintiff's estate subsequently brought the instant suit against Firefly seeking recovery for the wrongful death of Zoe Washburne and damages for the pain and suffering as a result. Washburne's complaint set forth three claims against Firefly Systems: (1) breach of express warranty by Firefly; (2) breach of implied warranty of merchantability; and (3) strict product liability based upon a manufacturing, design, and warning defect.

Plaintiffs initially filed their Complaint in the Peterson County Court of Common Pleas located in Haven. Defendant removed the case to this Court based on diversity of citizenship, pursuant to 28 U.S.C. § 1332.

On March 18, 2009, the Defendant, Firefly Systems, Inc. filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The Plaintiff filed a response the following day.

II. Parties Contentions

A. Defendant

Defendant filed a Motion to Dismiss Plaintiff's claims on the alternative grounds that (1) Haven law should apply to this case under *lex loci delicti*, and (2) even if *lex loci delicti* does not apply, Haven substantive law applies under the most significant relationship test of § 145(2) of the Restatement (Second) Conflict of Laws. Defendant asserts that under Haven law, The Restatement (Third) of Torts: Products Liability applies, and Plaintiff must show a reasonable alternative design as a prerequisite of a products liability claim. Further, the Defendant argues that under the Restatement (Third) of Products Liability, an implied warranty of merchantability claim is duplicative of a products liability claim. Additionally, Defendant draws the Courts attention to the public policy benefits of having electronic medical records storage systems. Lastly, as Defendant states, a claim of a breach of express warranty is meritless because Plaintiff had no expectation or promise from the Defendant.

Central to the Defendant's argument is the premise that Haven Law applies. Defendant argues that because Plaintiff was administered penicillin in Haven, under *lex loci delicti* this is where the injury occurred; therefore, Haven law should apply. Alternatively, Defendant contends that even if *lex loci delicti* does not apply, Haven law should still apply under the modern "most significant relationship" test. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971). Under this test, according to the Defendant, the state with the "most significant relationship" to the litigation is the state of Haven. Thus, according to Plaintiff, under either *lex loci delicti* or the most significant relationship test, Haven law should apply to this case.

B. Plaintiff

Plaintiff opposes Defendant's Motion to Dismiss on the grounds that (1) *lex loci delicti* is no longer good law in the state of Haven, and (2) Grace substantive law applies under the most significant relationship test of § 145(2) of the Restatement (Second) Conflict of Laws (1971). Plaintiff asserts that under the most significant relationship test, Grace law and the Restatement (Second) of Torts § 402A (1977) governs the resolution of this case. Plaintiff argues that the Restatement (Second) does not require proof of a reasonable alternative design, nor does it prohibit an implied warranty of merchantability claim from being brought separately. As the Plaintiff puts it, the Uniform Commercial Code (UCC) has been adopted by forty-nine states (excluding Louisiana), while the Restatement (Third) has only been adopted by only a limited number of jurisdictions. Plaintiff argues that there has been no affirmative act by the Grace legislature to restrict an independent claim from being brought under the UCC; moreover, the Restatement (Second) does not prohibit independent claims. Further, personal injury damages are recoverable as consequential damages in a breach of implied warranty case. Therefore, the Plaintiff argues that because Grace has not adopted the Restatement (Third) of Products Liability, there is no limitation on bringing an implied warranty claim under the UCC. Moreover, Plaintiff asserts that even if

the Restatement (Third) applies, it does not prohibit bringing separate claims of strict product liability and a breach of the implied warranty of merchantability.

The crux of Plaintiff's argument is that Grace law should govern this case. Plaintiff contends that the injury suffered was the death that eventually occurred in Grace. According to Plaintiff, Grace is the state with the most significant relationship to this litigation. Plaintiff is domiciled in Grace, Plaintiff is employed in Grace, the Plaintiff's primary care physician is located in Grace, the Plaintiff's records were provided to the Defendant from Dr. Frye in the state of Grace, and the Plaintiff perished in Grace. Therefore, according the Plaintiff, Grace law and the Restatement (Second) should govern this case.

III. Standard for Rule 12(b)(6) Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(B)(6). When ruling on a defendant's 12(b)(6) motion to dismiss, a Judge must accept all the factual allegations in a complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). A Court will view the facts alleged in the light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A complaint in the pleading stage does not need to allege detailed factual allegations; however, the Court is not required to accept legal conclusions that are couched as factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A well-pleaded complaint may proceed even if it appears that recovery is remote and unlikely. *Id*.

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). In deciding such a motion, a court must first be mindful of the liberal pleading standards under Rule 8, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8. A court must take "the material allegations of the complaint" as admitted and liberally construe the complaint in favor of a plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

IV. Discussion

A. Conflict of Laws

In an action based upon diversity of citizenship, as is this case, a district court must apply the substantive law, including choice of law rules, of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495-96, (1941); *Day & Zimmerman*, *Inc. v. Challoner*, 423 U.S. 3, 4 (1975). In this case, those are the laws of the state of Haven. Before a conflict of laws issues arises, there must actually be a conflict between the laws of the interested states. *Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik Ve Ticaret A.S.*, 10 F.3d 1015, 1018 (3d Cir. 1993). If the laws of the forum state and those of the other interested state do not differ, there is a "false conflict" and the court need not decide the choice-of-law issue. *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984).

Here, there is a true conflict. The conflict exists between the substantive law of the states of Haven and Grace; Haven uses the Restatement (Third) of Torts: Product Liability, while Grace adheres to the Restatement (Second). Under these differing approaches, the result of the case is likely to be inconsistent.

Haven law is the applicable law of the forum state. Although once a strong proponent of *lex loci delicti*, Haven state courts have in recent years shifted to an interest-weighing approach. *See inter alia*, *Booker v. InGen*, *Inc.*, 241 Haven 17, 24 (2007). The Supreme Court of Haven, in *Booker*, joined many other states in applying the principles of the Restatement (Second) of Conflict of Laws, which calls on courts to apply the law of the state which, with respect to the issue, has the "most significant relationship" to the occurrence and the parties. *Id.* at 26. Under well-settled Haven law, when confronted with a conflict of laws issue in a tort action, analysis must begin with Section 146 of the Restatement (Second) Conflict of Laws (1971). Pursuant to this section, a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit. To determine the state with the most significant relationship, a court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (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 the 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).

In the instant case, the Court holds that Haven has the most significant relationship to the litigation. The injury occurred in Haven, the conduct that caused the injury occurred in Haven, the place where the relationship between the parties is centered, *for this particular issue*, was Haven, and the Defendant's principal place of business is Haven. The Court acknowledges that, although the domicile of the Plaintiff is Grace and the initial relationship between the parties was created in Grace, these two factors are insufficient to outweigh the remaining factors that call for application of Haven law. Accordingly, we hold that under the choice-of-law rules of Haven, Haven substantive law applies to the adjudication of the issues.

B. Strict Product Liability

Haven law, which therefore controls the resolution of this case, has expressly adopted the Restatement (Third) of Torts: Products Liability (1998). Accordingly, a plaintiff may bring suit against a manufacturer or seller of a defective product under the theories of (1) manufacturing defect, (2) defective design, or (3) inadequate warning or failure to warn. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 2. Further, under either a design or warning defect claim, a Plaintiff must show that a reasonable alternative design was available. *Id.* In addition, under Haven products liability law, a Plaintiff must show that the Defendant's product was the "but for" cause and the proximate cause of the Plaintiff's harm. *Id.* § 2 cmt. q (1998); *see also* HAVEN REV. CODE § 1018.11.

To prevail under a manufacturing defect theory, a plaintiff must show that the product departs from its intended design even though all possible care was exercised in preparing and marketing the product. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 2(A) (1998). The plaintiff bears the burden of proving the defect's existence; that the product was not manufactured according to its design specifications. *Toms v. J.C. Penney Co.*, 304 Fed. Appx. 121 (3d Cir. 2008). The Haven Supreme Court has set forth guiding criteria by which a plaintiff could 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, in order to further an inference that the defect was attributable to the manufacturer. *Marcus v. Valley Hill, Inc.*, 301 Haven 197 (2006).

In the present case we find no manufacturing defect. Firefly's product was intended to passively accept inserted information, including the term "NONE", and it did no more or no less than its designers intended. Under a "but for" causation test, this injury likely would have still occurred even with a warning system that could have alerted the Firefly company's anonymous transcriber of the Plaintiff's paper medical record about this omitted fact when the electronic version was being produced. Furthermore, it cannot be said that the Defendant's product was the proximate cause of Plaintiff's harm. Reliance on the electronic record was a choice made by the treating hospital, in lieu of searching for Plaintiff's physician to check that doctor's records or memory concerning the Plaintiff. It is foreseeable that there will be some limited level of error. That is the case even with a paper record being utilized in a hospital emergency room under urgent care conditions. We find Defendant's public policy arguments in favor of its electronic medical records product particularly persuasive. This Court observes that both the Haven legislature and Congress have appropriated funds to encourage medical records cost savings through conversion to health information technology. The legislators having decided upon the need for a health care system that operates with lower costs, so it is a matter of public policy in this state and nation that reasonable measures to reduce health care costs should be fostered.

To prevail on a theory of defective design, a plaintiff must demonstrate that the foreseeable risks of harm by the product could have been reduced by implementing a reasonable alternative design. In addition, the omission of a reasonable alternative design renders the product unsafe. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 2(B) (1998). In the case of a design defect, the consumer is not usually knowledgeable enough to form an opinion on a reasonable expectation as to how safe the design of a product should be. Consequently, a risk-utility balancing is necessary; society benefits not when products are excessively safe at a higher cost to the manufacturer, but when the optimal amount of product safety is achieved. *Id*. cmt a.

Here, Plaintiff has not alleged or shown a reasonable alternative design in their complaint. Accordingly, the Plaintiffs have failed to state a claim under Rule 12(b)(6).

To establish a claim for a warning defect, a plaintiff must show 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(C) (1998). Subsection (c) adopts a reasonableness test for warning defects. *Id*. cmt. i. Generally, a seller is not liable for failing to warn of risks and risk-avoidance measures that should be obvious to the foreseeable product user. *Id*. cmt. j.

In the instant case, Plaintiff has not alleged a reasonable warning alternative in their complaint. Moreover, "but for" causation considers what the proper action during records conversion should have achieved. The lack of an alternative warning system informing the records transcriber that the allergy field was listed as "NONE" likely would not have changed the tragic result of this case. While an alternative warning system would decrease the likelihood that the allergy column was left in its default "NONE," we cannot say that under a risk-utility balancing that the additional software design,

installation, and validation costs that would have been imposed upon the Defendant-manufacturer outweighs the risk.

A. Implied Warranty of Merchantability

We now address whether Plaintiff can bring an independent claim based upon a breach of the implied warranty of merchantability. We hold that Plaintiff may not. Under the Restatement (Third), Two or more factually identical design defect or warning defect claims may not be submitted to the trier of fact in the same case under different doctrinal labels. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 2 CMT. N (1998). These claims are based on the same risk-utility analysis and would result in confusion or inconsistent verdicts. *Id.* Furthermore, this analysis applies to manufacturing defects. A Restatement (Third) § 2(a) manufacturing defect claim and an implied warranty of merchantability claim rest on the same factual predicate; therefore, the claims are duplicative and may not be brought together. *Id*. cmt. n.

B. Express Warranty

Plaintiff's express warranty claim fails. As a result, the express warranty claim is dismissed. Express warranty is defined in the UCC § 2-213 as a promise from the seller to the buyer that the goods shall conform to that promise or description of the goods. Plaintiff's claim fails due to the fact that she was not promised anything, nor did the Defendant represent anything to her. It was Dr. Frye, and not the Defendant, who informed the Plaintiff about converting her medical records to an electronic system.

V. Conclusion

For the reasons discussed above, the Defendant's motion to dismiss is granted.

ORDER

AND NOW, this 20th day of March, 2009, upon consideration of all motions filed, and all responses thereto, it is hereby **ORDERED:**

Defendant Firefly Systems' motion to dismiss is **GRANTED**.

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

In re Estate of Zoe Washburne,

Appellant

-V-

Firefly Systems, Inc.,

Appellee

No. XX-XX-XXXXX

August 26, 2010, Decided

Before SAFF, NIA, and EARLY, Circuit Judges

EARLY, *Circuit Judge*

Plaintiff-Appellant appeals from the district court's decision granting Defendant-Appellee's motion to dismiss. For the following reasons, we **AFFIRM IN PART, REVERSE IN PART**.

I. Introduction

The Appellant, the estate of Zoe Washburne, brought suit against the Appellee, Firefly Systems, Inc., alleging three claims: (1) breach of express warranty; (2) breach of implied warranty of merchantability; and (3) strict product liability alleging a manufacturing, design, and warning defect. It is undisputed that Zoe Washburne died following an allergic reaction to penicillin. Appellant argues that Firefly's electronic medical records system incorrectly displayed Washburne's allergy to penicillin resulting in Washburne's allergic reaction and subsequent death.

The district court granted the Defendant's motion to dismiss, ruling that Haven substantive law applied under Haven's conflict of laws rules and that Plaintiff had failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). FED. R. CIV. P. 12(B)(6). Appellants filed a timely notice of appeal.

II. Jurisdiction

This Court has jurisdiction of Appellant's appeal pursuant to 28 U.S.C. § 1291. The district court's order granting Defendant's motion to dismiss is an appealable final order.

II. Standard of Review

A dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12, is reviewed de novo. It is a ruling on a question of law. *Pencil St. Soap Co. v. United States*, 787 F.3d 547, 549 (13th Cir. 1990). "Review is limited to the contents of the complaint." *Id.*

III. Discussion

A. Conflict-of-Laws

In an action based upon diversity of citizenship, as is this case, a district court must apply the substantive law, including choice of law rules, of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495-96 (1941); *Day & Zimmermann*, *Inc. v. Challoner*, 423 U.S. 3, 4 (1975). In this case, those are the laws of the state of Haven. The state of Haven applies the most significant relationship test of the Restatement (Second) Conflict of Laws (1971). *Booker v. InGen*, *Inc.*, 241 Haven 17, 24 (2007).

The Second Restatement of Conflict of Laws, published in 1971, forcefully rejected the rigid rule of *lex loci delicti* as tending to produce arbitrary and unjust results in certain cases. Under *lex loci delicti*, the outcome in cases could be harsh and oftentimes depended on entirely random and fortuitous events. The doctrine of *lex loci delicti* has often been criticized for being a harsh and mechanical territorial rule. Ena, Michael, Note, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 Fordham Urb. L.J. 1417, 1424 n.50 (2007).

In its brief, Appellant argues that *lex loci delicti*, the traditional rule governing conflict of laws issues in Haven, is no longer good law. We agree. According to the Haven Supreme Court in *Booker*, the "most significant relationship" test is the appropriate standard to be applied in conflict of laws issues. *Booker*, 241 Haven at 24. We hold that the balancing of state interests and contacts with the competing states weighs in favor of applying Grace law in this case. As such, we reverse the District Court's decision that Haven law is the applicable substantive law in this case.

The state of Grace has the most significant relationship to the parties and the events of this litigation. The Appellant is domiciled in Grace, works in Grace, her primary care physician is located in Grace, and the relationship between the parties was formed in Grace. As a result of these factors, Grace law applies to the resolution of this case.

C. Section 402A of the Restatement (Second) of Torts

Having determined that Grace law is the applicable law, we hold that Appellant's strict product liability claims are sufficient to present claims for manufacturing, design, and warning defect under Grace state law. Grace courts have adopted Section 402A of the Restatement (Second) of Torts in its entirety. *Turner v. Smith Bros.*, *Inc.*, 30 Grace 144 (2006). The rule creates strict liability for sellers of a defective product even though they exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS § 402A CMT. A (1965). In other words, under a strict product liability theory, it is the product at issue and not the conduct of the manufacturer. *Barker v. Lull Eng'g*, 20 Cal.3d 413 (Cal. 1978). Section 402A in its entirety provides:

> (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.

This section applies to sellers of products. RESTATEMENT (SECOND) TORTS § 402A CMT. A (1965). In the present case, there are no concerns about the software as a service. The software is mass-produced with no product differentiation. It is the medical records, a product, at issue and not the incidental service of transferring the records.

Section 402A applies to a seller of a product *in a defective condition unreasonably dangerous* to the user or consumer. (*emphasis added*); RESTATEMENT (SECOND) TORTS § 402A(1) (1965). Comment G of Section 402A defines defective condition as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id*. cmt. g (1965). The burden that the product was in a defective condition at the time it left the seller's hands is on the Plaintiff. *Id*. If the seller has reason to anticipate danger from the product, then the seller may be required to give warning. *Id*. cmt. h (1965). In addition to being defective, a product must be unreasonably dangerous, or "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." *Id*. cmt. i (1965).

While the Restatement (Second) does not differentiate between manufacturing, design, and warning defect, the state of Haven analyzes the claims differently. *Turner*, 30 Grace at 153. In a case of a manufacturing defect, the Court applies a consumer expectations test. The consumer expectations test is similar to Section 402A's definition of unreasonably dangerous. Consumer expectations consist of what an ordinary consumer would expect when using the product in an intended or reasonably foreseeable manner. Liability is phrased in terms of whether the product in question deviated from other identical units in the same product line. *See e.g. Barker*, 20 Cal3d at 429; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 458-60 (Cal. 1944). On the other hand, in analyzing design defect and warning defect claims, Haven Courts use a combination of the consumer expectations test and a risk-benefit analysis. *See Barker*, 20 Cal.3d at 413. When analyzing a design or warning defect, the product may conform perfectly to all others in the product line, however, the product may be inherently unsafe due to an absence of a safety device or warning in its design. *Id.* at 428.

In applying these rules, the Court holds that Washburne's strict product liability claims of a manufacturing, design, and warning defect may state a claim upon which relief can be granted. First, a manufacturing defect likely occurred. It is unclear whether the defect was a result of an error on the part of the Firefly employee inputting the data, or whether a malfunction in the software caused an error that failed to display Washburne's allergy to Dr. Tam at University Medical Center. Moreover, using the consumer expectations test, consumers have an expectation that the electronic medical record will be an

exact copy of the patient's paper record; here it was not. The paper record contained Washburne's allergy to penicillin; on the other hand, the allergy was absent from the electronic copy displayed to Dr. Tam.

Similarly, we reverse the lower courts determination that Washburne's design and warning defect claims fail. In designing the software, Firefly failed to incorporate a warning system for errors. Under a consumer expectations analysis, it is foreseeable that a user will overlook an entry field. Having a warning to alert the user to double-check the allergy omission would reduce the possibility of overlooking the default "NONE" entry. Further, using a risk-benefit analysis, the risk of not having a design incorporating a warning system regarding medical record omissions is high; in this case fatal. An incorrect input may result in future misdiagnosis or mistreatment. Accordingly, Appellants have stated a valid claim for a design and warning defect.

D. Implied Warranty of Merchantability

Under the Uniform Commercial Code (UCC) § 2-314, the merchant seller of goods warrants that its goods will be merchantable, or fit for the ordinary purposes for which such goods are intended to be used. The UCC provides that personal injury damages are available for a breach of the implied warranty of merchantability. UCC § 2-715(2)(B) (2003). As is the case here, when an implied warranty claim and a tort claim clash, whether goods are merchantable is to be determined by applicable state products liability law. UCC § 2-314 cmt. 7 (2003).

Applying these rules, the Court holds that Appellants have made a valid claim of a breach of the implied warranty of merchantability. Whether the goods are merchantable is to be determined using Grace products liability law as discussed in Part B. Accordingly, as the Court held there were sufficient facts to make out a product defectiveness claim under Grace law, there are sufficient facts to allege that Firefly's product is not merchantable. It should be noted that there are no concerns of privity raised by either party; Plaintiff paid twenty-five dollars directly to the manufacturer-defendant.

E. Express Warranty

We affirm the district court's dismissal of an express warranty claim. There was no promise made to the Plaintiff from the Defendant-manufacturer; accordingly, the UCC § 2-213 is not implicated here.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's dismissal of the express warranty claim and REVERSE and REMAND the strict product liability claims and implied warranty of merchantability claims for a determination consistent with this opinion.

THE SUPREME COURT OF
THE UNITED STATES

Firefly Systems, Inc.,

Petitioners

-V-

In re Estate of Zoe Washburne,

Respondent

No. XX-XX-XXXXX

This petition for writ of certiorari to the United States Court of Appeals for the Thirteenth Circuit is hereby granted that this Court may hear and consider the following issues:

1. Under the state of Haven's conflict of laws analysis, does the state of Haven or the State of Grace's substantive law govern the resolution of this case?

2. Depending upon the answer to question one, has the Respondent stated a claim for strict products liability upon which relief can be granted, or does the claim require an additional showing?