No. XX-XXXX

IN THE SUPREME COURT OF THE UNITED STATES

April Term 2010

Firefly Systems, Inc.,

Petitioners

-V-

In re Estate of Zoe Washburne,

Respondent

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

BRIEF FOR RESPONDENT

Team #12
Counsel for the Respondent

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED FOR REVIEW

I. Whether, under Haven's conflict of laws analysis, Grace substantive law should apply under the most significant relationship test because Ms. Washburne was domiciled in Grace, employed in Grace, purchased her electronic medical record from the manufacturer in Grace, and her presence in Haven at the time of injury was merely fortuitous.

II. Whether Ms. Washburne's estate has stated a claim for which relief can be granted under strict products liability when neither the Restatement (Second) of Torts nor the Restatement (Third) of Torts requires that a reasonable alternative design be pled and a court is to construe a complaint in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences.

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Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*,
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Heather Bessinger & Nathaniel Cade, Jr., *Who's Afraid of the Restatement (Third) of Torts?*,
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STATEMENT OF THE CASE

Zoe Washburne was only in her twenties when she died from an allergic reaction to penicillin. Record ("R.") at 3–4. Before her death, Ms. Washburne lived in Grace and worked as a middle school teacher in a small town there. *Id.* at 2. At some point in 2008, Ms. Washburne received a letter from her primary care physician, Dr. Frye, stating that her medical records were going to be converted to an electronic format. *Id.* The letter further stated Dr. Frye would be using a system designed by the Firefly Systems, Inc. ("Firefly"), which has its principal place of business in Haven. *Id.* Dr. Frye also stated that Ms. Washburne could obtain a copy of her electronic medical records directly from Firefly by paying twenty-five dollars. *Id.* Accordingly, Ms. Washburne wrote a personal check directly to Firefly, which then converted her medical records from paper to an electronic format and mailed her a USB drive that contained a copy of the records. *Id.* at 3.

On September 10, 2008, Ms. Washburne was acting as a chaperone on a school-sponsored field trip in Haven when she began experiencing abdominal pain. *Id.* Her pain became so unbearable that she went to the emergency room at University Medical Center in Haven. *Id.* At the hospital, Ms. Washburne's pain was so severe that she lost consciousness. *Id.* Using Ms. Washburne's driver's license, the hospital staff was able to access her electronic medical record via Firefly's web portal. *Id.* The surgeon at the hospital, possessing only Ms. Washburne's electronic medical record, diagnosed her with appendicitis and operated immediately. *Id.* Unfortunately, the electronic medical chart the surgeon used, while an exact copy of Ms. Washburne's paper record in all other respects, had absolutely no reference to Ms. Washburne's allergy to penicillin. *Id.* Although it is not clear why her allergy to penicillin did not appear on the electronic medical record that the surgeon used, it is undisputed that the paper record

submitted to Firefly *did* contain Ms. Washburne's allergy to penicillin, as did the copy stored on Firefly's servers. *Id.*

After the surgery, the hospital staff administered penicillin to Ms. Washburne to prevent infection. *Id.* Because Ms. Washburne's electronic record from Firefly did not contain her allergy, five minutes later she began experiencing respiratory problems. *Id.* The hospital staff responded quickly and, for the first time, realized that Ms. Washburne was allergic to penicillin. *Id.* Ms. Washburne recovered and was then discharged on September 12, 2008, three days after being taken to the hospital. *Id.*

Because the field trip had ended while she was in the hospital, Ms. Washburne traveled back home to Grace with her parents. *Id.* Shortly after crossing into Grace, Ms. Washburne collapsed and was unable to be revived by either her parents or EMTs. *Id.* Ms. Washburne was pronounced dead on the side of the road in Grace. *Id.* She died as a result of biphasic anaphylaxis, where symptoms of her prior allergic reaction reoccurred even though she had not been exposed to any more penicillin. *Id.*

Firefly converts paper medical records to an electronic version and stores them on its servers, where they can then be accessed by doctors and hospitals nationwide. *Id.* Firefly is not the only manufacturer that sells electronic medical records. *Id.* IBM, Firefly's largest competitor and the first to market such a product, also designed an electronic recordkeeping system. *Id.* To stay competitive with IBM, Firefly sold their product at a lower cost and advertised aggressively nationwide, including in the state of Grace. *Id.* While IBM's system is minimally more costly and requires more training, its system is designed to review medical information as it is entered and warn of any potential errors or omissions. *Id.* If there is a possible mistake, such as an omission of a known allergy, a warning flag appears and the operator cannot continue until he or

she verifies that the information has been entered correctly. *Id.* Firefly's employees, on the other hand, are merely instructed to make sure that the electronic version matches the paper record exactly. *Id.* Firefly's system contains no safety system to warn of possible mistakes. *Id.* If an entry, such as "Known Allergies," is left blank, Firefly's system automatically inserts the word "NONE." *Id.* at 4.

Based on these facts, Ms. Washburne's estate ("the Estate") brought suit against Firefly for the wrongful death of Ms. Washburne, seeking damages for causing her death and for pain and suffering. *Id.* The complaint set forth claims against Firefly for (1) breach of express warranty by Firefly; (2) breach of implied warranty of merchantability; and (3) strict product liability based upon manufacturing, design, and warning defects. *Id.* The United States District Court for the District of Haven concluded that, despite the fact that Ms. Washburne was domiciled in Grace and the parties' relationship was centered in Grace, the state of Haven had the most significant relationship to the parties and the occurrence under the Restatement (Second) Conflict of Laws. *Id.* at 7. The district court then applied Haven's products liability law, the Restatement (Third) of Torts: Products Liability § 2. *Id.* at 7-8. The district court proceeded to grant Firefly's 12(b)(6) motion to dismiss for failure to state a claim, finding that the Estate failed to allege or show a reasonable alternative design ("RAD") or reasonable alternative warning in its complaint, therefore failing to state a valid claim. *Id.*

On appeal, the United States Court of Appeals for the Thirteenth Circuit reversed the district court's decision, holding that, under the most significant relationship test, Grace law should govern the resolution of the case. *Id.* at 11. The court determined that Grace law should apply because Ms. Washburne was domiciled in Grace, she worked in Grace, her primary care physician was located in Grace, and the relationship between her and Firefly was formed in

Grace. *Id.* Applying Grace law, the Thirteenth Circuit held that the Estate's strict products liability allegations stated a valid claim for which relief could be granted under the Restatement (Second) of Torts § 402A. *Id.* at 12–13.

This Court subsequently granted Firefly's petition for a writ of certiorari. *Id.* at 14. The Estate now asks this Court to affirm the Thirteenth Circuit's decision that the state of Grace has the most significant relationship to the parties and the occurrence and, thus, Grace law controls. Additionally, the Estate asks this Court to affirm the Thirteenth Circuit's decision denying Firefly's 12(b)(6) motion to dismiss and allowing the Estate's claim for strict products liability to continue to discovery and trial.

SUMMARY OF THE ARGUMENT

This Court should apply Grace substantive law because Grace has the most significant contacts to the parties and occurrence. Both states have expressly adopted the Restatement (Second) Conflict of Laws, which uses a "most significant relationship" test, to determine which state's substantive laws should be applied to a particular issue. First, § 146 creates a presumption that the laws of the state where the injury occurred should be applied unless another state has a more significant interest. But, if the place of injury is merely fortuitous, then the presumption is inapplicable. Next, § 145 lists factors, such as the place where the injury occurred, the place where the conduct which caused the injury occurred, the domicile and place of business of the parties, and the place where the parties' relationship is located, which help to guide a court in determining which state has the most relevant contacts and interests in the particular case. Finally, when weighing the contacts of each state, courts are to consider them in context with the relevant factors of § 6. In a products liability action, the relevant factors include the policies of the interested states and the policies underlying the particular field of law.

In this case, Ms. Washburne's presence in Haven at the time of her injury was fortuitous. Ms. Washburne was in Haven when she became ill because she was chaperoning a school field trip. She did not regularly travel to there, she did not regularly conduct business there, and she had absolutely zero intention of staying there for longer than her chaperoning duties required. Thus, because Ms. Washburne's injury in Haven was mere fortuity, the presumption in favor of applying Haven's law is inapplicable.

Even if this Court finds that Ms. Washburne's presence in Haven was not fortuitous, Grace still has the most significant relationship with the parties and the occurrence under a qualitative § 145 analysis. When analyzing the § 145 factors, a court must determine which

factors are most relevant with regard to the particular type of action. In a products liability action, the most significant factors are the plaintiff's place of domicile and the location of the parties' relationship.

Here, Ms. Washburne was a lifelong resident of Grace, her job was located in Grace, and her primary physician was located in Grace. As many courts have stated, the domicile of the plaintiff is a significant factor in a products liability action because the plaintiff's home state has a strong interest in applying its laws to compensate its residents for injuries. Additionally, Ms. Washburne's relationship with Firefly was centered in Grace. Firefly advertised its product aggressively on a national level, including in Grace, and Ms. Washburne's physician decided to purchase Firefly's product in Grace. Ms. Washburne also directly purchased a copy of her medical record from Firefly, which sent it directly to her home in Grace. Because Firefly sold its products in Grace and Ms. Washburne was a resident of Grace, Grace law applies.

Additionally, when weighing the contacts of each state, courts are to consider them in context with the relevant § 6 factors. In a products liability action, the relevant factors include the policies of the interested states and the underlying policies of the particular field of law. States create products liability laws for several reasons: to protect their residents from injury caused by defective products, to provide compensation for residents if they are injured by a defective product, and to deter manufacturers from selling defective products within their borders.

Here, based on the relevant policies of Grace and Haven, and the underlying policy of products liability law, Grace has the most significant relationship to the Estate's products liability claim. Both Grace and Haven recognize a cause of action for products liability; the states merely analyze those claims differently. Additionally, Haven's products liability laws are not meant to insulate manufacturers from liability. Because products liability laws are meant to

protect a state's *residents* from injury caused by defective products, to provide compensation for its *residents* when they are injured, and to deter manufacturers from selling defective products that injure *residents,* this Court should apply Grace law.

Because Grace law applies, the Estate has stated a products liability claim upon which relief can be granted. Federal courts adhere to a notice pleading standard; thus, as long as the Estate provides plausible facts to support its claim, a 12(b)(6) motion to dismiss should not be granted. Grace follows the Restatement (Second) of Torts, which creates strict liability for sellers of defective products even if they exercised all possible care in the sale of the product. As the Thirteenth Circuit held, the Estate is not required to plead a RAD under the Restatement (Second). Therefore, the Estate pled sufficient facts to state a claim and this case should proceed to discovery.

Even if Haven law applies, the Estate has still stated a claim upon which relief can be granted. Haven follows the Restatement (Third) of Torts: Products Liability § 2, which generally requires a plaintiff to prove that a RAD was available to the defendant at the time of sale in order to prevail on the merits. The Restatement (Third), however, expressly states that it takes no position on pleading requirements for a products liability claim. The Restatement (Third) also assumes that a plaintiff will have a reasonable opportunity to conduct discovery. In addition, no Haven law or statute explicitly requires a plaintiff to plead a RAD. Furthermore, requiring a plaintiff to plead a RAD would undermine the goals of a liberal pleading standard. Therefore, under either state's law, the Estate has stated a claim upon which relief can be granted and this Court should affirm the decision of the appellate court dismissing Firefly's 12(b)(6) motion for failure to state a claim upon which relief can be granted.

ARGUMENT

I. THE RELEVANT FACTORS AND POLICIES ANALYZED IN A PRODUCTS LIABILITY ACTION SHOW THAT GRACE HAS THE "MOST SIGNIFICANT RELATIONSHIP" TO THE PARTIES AND OCCURRENCE.

This Court should apply Grace law because the relevant §§ 146, 145, and 6 factors show that Grace has the most significant relationship to the parties and the occurrence. Under Haven's choice of law approach, a court must determine which state has the "most significant relationship" to the occurrence and the parties as stated in the Restatement (Second) Conflict of Laws § 145. *Booker v. Ingen, Inc.*, 241 Haven 17, 24 (2007). The presumption under § 146 that the law of the state where the injury occurred governs is inapplicable because Ms. Washburne's presence in Haven merely fortuitous when she became ill. Grace has the most significant relationship to the parties and the occurrence because Ms. Washburne was domiciled in Grace before her death and because her relationship with Firefly was both formed and centered in Grace. The contacts that connect Haven to the parties and occurrence are not particularly important in a products liability claim; therefore, this Court should not apply Haven law. Additionally, this Court should apply Grace law because the underlying policies of products liability law — to protect residents from injury, provide for their recovery if they are injured, and deter manufacturers from selling defective products — support the use of Grace law in this case.

In a suit where a federal court sits in diversity, state substantive law is applied to the cause of action. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). A federal court sitting in diversity must follow the forum state's choice-of-law rules. *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (*citing Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941)). The court must also determine the nature of the cause of action because a state may apply different choice of law principles to different areas of law. *Drinkall Used Car Rentals v. Emerson Elec.*

Co., 32 F.3d 329, 331 (8th Cir. 1994). A court must then decide whether an actual conflict exists between the laws of the interested states regarding the claims at issue. *See Barron v. Ford Motor Co. of Can., Ltd.*, 965 F.2d 195, 197 (7th Cir. 1992) (*citing Int'l Adm'rs. v. Life Ins. Co.*, 753 F.2d 1373, 1376 n.4 (7th Cir. 1985) ("[B]efore entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.")). If a court finds that a conflict exists, it must identify the choice of law rules used by the forum state and apply them to determine which state's law applies to the claim. *Klaxon*, 313 U.S. at 496-97; *Grupo Televisa, S.A. v. Telemundo Commc'ns Group, Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007).

In the current case, the Estate filed suit in the Peterson County Court of Common Pleas, which is located in Haven. R. at 4. Firefly then removed this case to the United States District Court for the District of Haven based on diversity of citizenship. *Id.* Because the original action was filed in Haven, this Court must follow Haven's choice of law provisions. *Klaxon*, 313 U.S. at 496-97. The Estate's wrongful death complaint raised three specific claims against Firefly: (1) breach of express warranty, (2) breach of implied warranty of merchantability, and (3) strict product liability for manufacturing, design, and warning defects. *Id.* The Estate's claims relate to Ms. Washburne being improperly administered penicillin after she had an appendectomy at a hospital located in Haven, and which led to her eventual death in Grace. *Id.* at 3-4. In choosing to administer penicillin to Ms. Washburne, the hospital staff relied exclusively on the electronic version of her medical record that Firefly had stored on its servers. *Id.* at 4. It is undisputed that the paper copy of Ms. Washburne's medical record that Dr. Frye submitted to Firefly showed she was allergic to penicillin. *Id.* The electronic version of her medical record that the administering doctor relied on, however, contained no information about Ms. Washburne's penicillin allergy.

Id. The Estate alleged that Firefly's electronic version of Ms. Washburne's medical record was defective and the defect led to her being administered penicillin, which caused her eventual death.

Under Haven law, the Estate's claims for wrongful death based on products liability sound in tort and are therefore governed by the Restatement (Second) Conflict of Laws §§ 146, 175, 145, and 6. A conflict exists between the substantive products liability laws of Grace and Haven. Grace relies on the Restatement (Second) of Torts § 402A for products liability claims. *Turner v. Smith Bros.*, 30 Grace 144 (2006). Section 402A creates strict liability for a seller of a defective product even if the seller exercised all possible care when manufacturing and selling the product. Restatement (Second) Torts § 402A(2)(a) (1965). Haven, on the other hand, has adopted the Restatement (Third) of Torts: Products Liability § 2. Haven Rev. Code § 1018.11. Under § 2(a) of the Restatement (Third), a plaintiff must show that the product does not perform as designed even though the seller exercised all possible care when manufacturing and selling the product. Restatement (Third) of Torts: Prod. Liab. § 2(a) (1998). Additionally, a plaintiff must generally prove that a RAD or a reasonable warning were available in order to succeed on the merits of a design defect or warning defect claim. *Id.* at 2(b), 2(c).

Because the Estate's claims present a conflict between the laws of Grace and Haven, this Court must apply the Restatement (Second) Conflict of Laws §§ 146, 145, and factors it deems relevant under § 6, in order to determine which law applies in a tort action. *Morgan v. Biro Mfg. Co.*, 474 F.3d 286 (Ohio 1984). Section 175 of the Restatement (Second) is also applicable in an action for wrongful death. *Price v. Litton Sys., Inc.*, 784 F.2d 600, 602-03 (5th Cir. 1986). Choice of law questions are legal issues and are therefore reviewed *de novo*. *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354 (8th Cir. 1994).

A. Ms. Washburne's presence in Haven when she suffered from appendicitis was merely fortuitous; therefore, the § 146 presumption that the law of the place of injury applies in a personal injury claim is inapplicable.

Ms. Washburne's presence in Haven when she became ill was merely fortuitous because she lacked of enduring contacts in Haven, she was in the state for a short period of time, and she could have become ill anywhere at any time; therefore, the § 146 presumption that the law of the place where the injury occurred governs does not apply. In an action for personal injury, § 146 creates a presumption that the law of the state where the injury occurred will apply unless a different state has a more significant relationship to the occurrence and the parties involved. Restatement (Second) Conflict of Laws § 146; *see also Price*, 784 F.2d at 602-03 (*citing* Restatement (Second) Conflict of Laws § 175) (same analysis used in both wrongful death and personal injury actions). When analyzing a conflict under § 175, the place of injury is defined as "where the force set in motion by the actor first takes effect on the person." Restatement (Second) Conflict of Laws § 175 cmt. b. If the place where an injury occurred is fortuitous, the place of injury "'should not play an important role in the selection of the state of the applicable law.'" *Brewer v. Dodson Aviation Corp.*, 447 F. Supp. 2d 1166, 1179 (W.D. Wash. 2006) (*quoting* Restatement (Second) Conflict of Laws § 145 cmt. e); *Hitchcock v. United States*, 665 F.2d 354, 360 (D.C. Cir. 1981). "Fortuitous" means "occurring by chance." *Black's Law Dictionary* 680 (8th Deluxe ed. 2004). Factors that indicate whether the place of injury was fortuitous include: whether the person had an "enduring relationship" with the state where the injury occurred, how long the person had been in the state where the injury occurred, and whether the same injury could have happened in a different state. *Hitchcock*, 665 F.2d at 360; *Baroldy v. Ortho Pharm. Co.*, 760 P.2d 573, 578-79 (Ariz. Ct. App. 1988). An individual's presence in a state is not fortuitous if he regularly engages in his occupation and transacts

business there. *Amoroso v. Burdette Tomlin Mem'l. Hosp.*, 901 F. Supp. 900, 905 (D.N.J. 1995) (*citing Moye v. Palma*, 622 A.2d 935, 938 (N.J. Super. Ct. App. Div. 1993).

In *Hitchcock*, the United States Court of Appeals for the District of Columbia Circuit, held that the plaintiff's place of injury was fortuitous because she had no enduring relationship to the state where the injury occurred and she was only in that state on a temporary basis. 665 F.2d at 355-56, 360. The plaintiff received several rounds of rabies vaccinations in Virginia because the federal government recommended she do so while she and her husband, a government employee, were temporarily relocated to Virginia. *Id.* at 355.After the couple moved to Argentina, the plaintiff had a such a severe reaction to the vaccine that she became "permanently and totally" disabled. *Id.* at 355-56 (*citing Hitchcock v. United States*, 479 F. Supp. 65, 67 (D.D.C. 1979)). The plaintiff filed suit against the United States under the Federal Tort Claims Act for negligence and prevailed in the district court. *Hitchcock*, 665 F.2d at 357.

One issue in *Hitchcock* was whether the court should have applied Virginia's or the District of Columbia's substantive law. *Id.* at 359. Under the Federal Tort Claims Act's choice of law provision, the law of the state where the act or omission occurred determines which state's substantive law applies. *Id.* (*citing* 28 U.S.C. § 1346(b) (1976)); *Richards v. United States*, 369 U.S. 1, 11 (1962). The court determined that the "locus of the negligent acts and omissions" was in the District of Columbia because that is where the government made the decision to recommend receiving the vaccinations despite the associated risks. *Hitchcock*, 665 F.2d at 359. The court applied the District of Columbia's choice of laws analysis, the Restatement (Second) Conflicts of Laws § 145. *Id.* at 359-60. The court determined that the place where the plaintiff was given the vaccinations, Virginia, was of little weight in its § 145 analysis because the plaintiff's residency there when she was vaccinated was "incidental," "temporary," "fortuitous

and short-term" and the plaintiff "did not have an 'enduring relationship'" with Virginia. *Id.* at 360–61 (*citing* Restatement (Second) Conflict of Laws § 145(2), cmt. e). The court further held that, if the Virginia clinic that administered the plaintiff's vaccination was located in a different state, the government would have used the same procedures. *Hitchcock*, 665 F.2d at 360.

Similarly, in *Baroldy*, the Arizona Court of Appeals held that the plaintiff's injury in North Carolina was "mere happenstance" because she was only there due to her husband's temporary military assignment. 760 P.2d at 579-80. The plaintiff was diagnosed with toxic shock syndrome after wearing a diaphragm even though she followed the directions of her obstetrician and the patient information booklet that came with the device. *Id.* at 577. The trial court applied Arizona products liability law, which followed §402A of the Restatement (Second) of Torts. *Id.* The defendant manufacturer appealed, arguing that the trial court should have applied North Carolina's products liability laws, which did not recognize strict products liability claimed. *Id.* at 577-78. The defendant manufacturer argued that North Carolina had more contacts with the parties and the occurrence when compared with Arizona. *Id.* at 577-78. The appellate court disagreed and affirmed the trial court's ruling, finding that the plaintiff 's injury could have happened to her no matter where she lived at the time in which the injury occurred. *Id.* at 578-79. The court ultimately held that the plaintiff's presence in North Carolina when she was injured was fortuitous. *Id.* at 578-79. *See also*, *e.g.*, *Brewer*, 447 F. Supp. 2d at 1179 (holding that a Washington resident's plane crash in Oregon was fortuitous because the allegedly defective air pump that caused the accident could have failed in a different state during the same flight).

In contrast, in *LeJeune v. Bliss-Salem, Inc.*, the Third Circuit held that a Pennsylvania resident's injury that occurred while he was cleaning a piece of heavy machinery at the Delaware

steel mill where he worked was not fortuitous because the plaintiff had several enduring contacts with Delaware. 85 F.3d 1069, 1071–72 (3d Cir. 1996). The employee brought suit in the U.S. District Court for the Eastern District of Pennsylvania against a company that refurbished the mill's machinery, alleging negligence and strict products liability. *Id.* at 1071. The district court, however, granted summary judgment to the defendants. *Id.* at 1070. In affirming the district court's decision, the Third Circuit determined that there was a conflict of laws between Pennsylvania, which recognized strict products liability actions, and Delaware, which did not. *Id.* at 1071.

When applying Pennsylvania's choice of law rules — which utilized a "greater interest" test similar to § 145 — the Third Circuit held that the accident was not fortuitous because the plaintiff regularly traveled to Delaware to work, the steel mill was permanently located in Delaware, and the majority of the alleged wrongful conduct took place in Delaware. *Id.* at 1071–72. The Third Circuit ultimately held that Pennsylvania's contacts with the litigation arose from the employee's residence rather than from any substantive matters and applying Pennsylvania law would undermine Delaware's interests in applying its own laws to the case. *Id.*; *see also Calhoun v. Yamaha Motor. Corp.*, 216 F.3d 338, 353-54 (3d Cir. 2000) (stating that the "cornerstone" of the *LeJeune* decision's conclusion that Delaware was not a fortuitous place of injury "was the fixed location of the plaintiff's workplace, the regularity of his presence there, and the fact that the majority of the wrongful conduct occurred [there].").

Similarly, in *Amoroso*, the U.S. District Court for the District of New Jersey found that a Pennsylvania resident's presence in New Jersey when he was stabbed and killed was not fortuitous because he "purposefully" chose to travel there on vacation. 901 F. Supp. at 905. A conflict arose because New Jersey did not permit recovery of damages for a deceased's

prospective earning capacity, which Pennsylvania permitted. *Id.* at 903. The court found that New Jersey's substantive law regarding lost future earnings applied because all of the "major actions" of the occurrence took place in New Jersey: the deceased chose to attend a party in New Jersey while on vacation at a house owned by a New Jersey resident, which had been leased to someone through a New Jersey real estate agent, and all of the medical care the deceased received took place in New Jersey. *Id.* at 904-05.

In this case, Ms. Washburne's death occurred in Grace, but the place where she was first impacted by Firefly's defective product was Haven because that is where she was administered penicillin. R. at 4; *see* Restatement (Second) § 175 cmt. b (defining the place of injury as "where the force set in motion by the actor first takes effect on the person."). Therefore, the injury occurred in Haven, which, initially, raises the presumption that Haven's substantive tort law should apply. *See* Restatement (Second) Conflicts of Laws §§ 146, 175 (law of the place where the injury occurred presumptively applies in personal injury and wrongful death cases). The facts of this case, however, show that Ms. Washburne's presence in Haven was merely fortuitous, making the presumption that Haven's substantive law should govern inapplicable. Ms. Washburne was in Haven only because of her teaching job in Grace. Similar to the plaintiff in *Hitchcock*, who was only in Virginia temporarily before she moved to Argentina, Ms. Washburne was in Haven for a short period of time and for the sole purpose of chaperoning a school-sponsored field trip when she was diagnosed and treated for appendicitis. *Hitchcock*, 665 F.2d at 555; R. at 3. Much like the plaintiff in *Baroldy*, who could have contracted toxic shock syndrome anywhere, Ms. Washburne was stricken with appendicitis in Haven by chance and chance alone. *Baroldy*, 760 P.2d at 578-79. As stated on the Mayo Clinic's website, appendicitis generally occurs when the appendix becomes blocked, infected, or inflamed and can often occur

rapidly and without warning. Mayo Clinic Staff, *Appendicitis: Causes*, http://www.mayoclinic.com/health/appendicitis/DS00274/DSECTION=causes (last updated Aug. 15, 2009). Because many different things can cause appendicitis, Ms. Washburne's appendicitis could easily have occurred in Grace, her place of domicile, had she not chaperoned the field trip to Haven or it could even have occurred on a date earlier or later than September 10, 2008.

Furthermore, there is no indication that Ms. Washburne intended to be in Haven for longer than the field trip's duration. Therefore, unlike the plaintiffs in *LeJeune* and *Amoroso*, who worked in or were vacationing in the state where they were injured, Ms. Washburne did not have an enduring relationship with Haven. *LeJeune*, 85 F.3d at 1072; *Amoroso*, 901 F. Supp. at 905. Although she was in Haven for work purposes, Ms. Washburne did not regularly work in Haven, she did not go there on vacation, and she did not regularly do any business there. The facts surrounding Ms. Washburne's presence in Haven are much more similar to the facts described in *Hitchcock* and *Baroldy* than the facts of *LeJeune* or *Amoroso*. Therefore, this Court should find that Ms. Washburne's presence in Haven when she became ill was merely fortuitous.

B. Application of the § 145 factors shows that Grace law should apply because the most significant factors in this case favor using Grace's substantive law.

A qualitative analysis of the § 145 factors shows that Grace has the most significant relationship to the parties and the occurrence. When resolving a conflict of laws, a court must follow the forum state's statutory choice of law provisions, if any exist. *Jackson v. Travelers Insurance Co.*, 26 F. Supp. 2d 1153, 1160 (S.D. Iowa 1998); Restatement (Second) Conflict of Laws § 6(1). If no statutory directives exist, a court applies the general choice of law factors laid out in § 145. *Jackson*, 26 F. Supp. 2d at 1160. Those factors include: (a) the place where the injury occurred; (b) the place where the conduct which caused the injury occurred; (c) the

domicile and place of business of the parties; and (d) the place where the parties' relationship is located. *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992) (*citing* Restatement (Second) Conflict of Laws § 145(2)).

In this case, the two most significant § 145 factors are the place of Ms. Washburne's domicile and the center of the parties' relationship. The other § 145 factors, such as the place where the conduct which caused the injury occurred and Firefly's place of business, are relatively insignificant factors in a products liability action; thus, they should not weigh heavily in the Court's analysis. Additionally, Ms. Washburne's presence in Haven, the place where the injury occurred, was merely fortuitous. Even if this Court finds that Ms. Washburne's presence in Haven was not fortuitous, Grace still has a more significant interest in having its laws applied because Ms. Washburne's domicile and the center of the parties' relationship, both in Grace, rebut the § 146 presumption that the law of the state where the injury occurred applies.

1. The most significant § 145 factors in a products liability claims, a plaintiff's domicile and where the center of the parties' relationship is located, show that this Court should apply Grace law.

Ms. Washburne's domicile in Grace and the sale of Firefly's electronic medical records in Grace show that Grace has the most significant interest to the parties and occurrence. A court's job is not to count contacts under a § 145 analysis, but to determine which contacts are most relevant and apply those contacts to the cause of action. *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1000-01 (Wash. 1976) (internal citation omitted). In applying the § 145 factors, the plaintiff's domicile often carries the greatest weight because compensation of an injured person is the concern of the state where that person is domiciled. *Baroldy*, 760 P.2d at 579 (*citing Bryant v. Silverman*, 703 P.2d 1190, 1194 (Ariz. 1985)). Additionally, states create product liability laws to prevent defective products from causing injuries to residents and to adequately

compensate those residents when they are injured by a defective product. *Cheatham v. Thurston Motor Lines*, 654 F. Supp. 211, 214 (S.D. Ohio 1986); *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1009, 1012 (Mont. 2000). The central event in a products liability claim is the sale of goods, so the law where the sale of a product occurred should govern in a products liability action. *Cheatham*, 654 F. Supp. at 214.

In *Phillips*, the Montana Supreme Court held that Montana law applied in a products liability action that arose from a two-vehicle collision in Kansas because Montana had an interest in applying its products liability laws when its residents were injured. 995 P.2d at 1005, 1015. After three family members died in the crash and ensuing fire, the guardian of the sole eleven-year-old survivor brought suit against General Motors on his behalf, seeking compensatory and punitive damages. *Id.* at 1005. The District Court for the District of Montana certified the case to the Montana Supreme Court to determine which choice of laws analysis the state used and how it would resolve the case based on its choice of laws principles. *Id.* at 1004. After expressly adopting the Restatement (Second) Conflict of Laws, the court found a conflict between the laws of Kansas, which limited the amount of noneconomic damages and punitive damages available to a plaintiff, and Montana, which permitted "full compensation" to victims injured by defective products. *Id.* at 1004, 1010, 1012.

After analyzing the § 145 factors, the court held that Montana had a "direct interest" in applying its products liability laws because its residents were injured in the accident and General Motors did business in Montana. *Id.* at 1015. The court further held that Montana had interests in preventing defective products from injuring its residents, punishing manufacturers whose products injured its residents, and fully compensating those injured residents. *Id.* at 1012, 1015. By applying Montana's products liability laws, the court believed it would be furthering the

Montana's policies by holding responsible parties accountable, deterring the sale of defective products within its borders, and encouraging manufacturers to warn residents of defective products "quickly and as thoroughly as possible." *Id.* at 1015.

The court determined that Kansas did not have an interest in applying its products liability law because the sale of the product did not occur in Kansas and the injured party was not a resident of Kansas. *Id.* at 1009. The court further stated that Kansas did not have an interest in applying its laws because products liability laws are designed to protect residents. *Id.* General Motors argued that if Kansas law did not apply, the laws of North Carolina, where the vehicle was purchased, or Michigan, where the vehicle was manufactured, should apply. *Id.* at 1011. The court rejected both arguments and stated that North Carolina law did not apply because it followed *lex loci delicti* and would therefore have applied the Kansas law. *Id.* Additionally, North Carolina did not otherwise have an interest in applying its laws because it did not recognize products liability claims for the type of event that occurred. *Id.*

The court also stated that Michigan law did not apply because products liability laws are designed to regulate in-state sales to residents and to create the compensation structure for residents who are injured by defective products. *See id.* (*citing Crisman v. Cooper Indus.*, 748 S.W.2d 273, 277 (Tex. App. 1988) (holding that the mere design or manufacture of a defective product is not actionable under strict liability until it enters the stream of commerce)). After analyzing the contacts and policies of the states that had a potential interest, the court held that Montana had the "most significant relationship" to the parties and the cause of action. *Phillips*, 995 P.2d at 1015.

In *Cheatham*, the U.S. District Court for the Southern District of Ohio found that Ohio had the most significant relationship to a products liability claim that arose from a car accident in

Tennessee because the sale of the vehicle took place in Ohio. 654 F. Supp. at 214. The court found that the sale and modification of the plaintiffs' vehicle occurred in Ohio and that the plaintiffs were Ohio residents. *Id.* at 215. Although the court did not state the place of business of the four defendants, at least one defendant, Chrysler, was incorporated in Delaware and had its principal place of business in Michigan when *Cheatham* was decided. *See D.B.C. Corp v. Chrysler Corp.*, No. 86-4994, 1986 WL 8059, *1 (July 17, 1986) (stating that Chrysler's principal place of business is in Michigan). The court ruled that Ohio's relationship to the products liability claim overcame the § 146 presumption that Tennessee law should apply because the "central event" in a products liability action is the place of sale, and injured parties would therefore "expect" that the law of the state where they purchased the defective product should be applied in a products liability claim. *Cheatham*, 654 F. Supp. at 214; *accord Nationwide Mut. Fire Ins. Co. v. Gen. Motors, Corp.*, 415 F. Supp. 2d 769, 774-75 (N.D Ohio 2006) (choosing to apply Florida law in a products liability action because the product was purchased in Florida instead of applying Ohio law, where the allegedly defective RV was manufactured, or Connecticut law, where the RV caught fire).

In *Johnson*, the Washington Supreme Court held that Washington law should apply as a deterrent in a wrongful death case where all of the defendants were Washington corporations but where Kansas was the place of injury and the deceased was domiciled in Kansas. 555 P.2d at 1002. The plaintiff's estate brought wrongful death and defective design claims in Washington against several defendants after the deceased, a resident of Kansas, fell sixty feet to his death when a scaffold he was working on collapsed. *Id.* at 999. The court chose to apply Washington's substantive law because all of the manufacturers were Washington corporations and applying Kansas law would not protect the plaintiffs, who were Kansas residents. *Id.* at 1002. The court

held that Kansas had "no interest" in applying its statutory limitations on recovery for wrongful death to nonresident defendants, while Washington had a "legitimate" interest in applying its "deterrent policy of full compensation" for people injured by defective products. *Id.* at 1002. The court held that, while a state has an interest in protecting defendants from "excessive financial burdens" by limiting wrongful death damages, other states have an interest in deterring wrongful conduct within their own borders. *Id.* at 1002 (*citing Hurtado v. Superior Court*, 522 P.2d 666, 672 (Cal. 1974)).

The facts of this case closely reflect the principles laid out in *Phillips* and *Cheatham*. Because states create products liability laws to protect residents, the domicile of the plaintiff in a products liability action is the most significant factor in a § 145 choice of laws analysis. *Phillips*, 995 P.2d at 1010. The *Johnson* decision indicates that the place of manufacture may be a significant factor in a § 145 products liability analysis. 555 P.2d at 1002. The *Johnson* case is distinguishable from this case, however, because the ultimate issue in that case was whether a state which limited recovery for wrongful death actions had a greater interest in applying its laws than a state which permitted unlimited recovery. *Id.* Here, the issue is which state's products liability law applies when both states recognize a cause of action for products liability: the ability to be fully compensated is not an issue here.

The state where Ms. Washburne was domiciled, Grace, has a more significant interest in having its products liability law applied to protect her rights and the rights of her survivors. *See, e.g.*, *Bryant*, 703 P.2d at 1194 ("[T]he state where the injury occurs does not have a strong interest in compensation if the injured plaintiff is a non-resident.") (citations omitted). As the *Phillips* decision strongly emphasized, that principal function of a state's products liability laws

is to protect and compensate its own residents. 995 P.2d at 1010 (*citing Thornton v. Sea Quest Inc.*, 999 F. Supp. 1219, 1223-24 (N.D. Ind. 1998).

The sale of Firefly's services occurred in Grace or, at the very least, resulted from Firefly's aggressive advertising there. R. at 2-3. Ms. Washburne wrote a personal check to Firefly so that she could receive a copy of her medical record on a USB drive. *Id.* at 3.The central event in a products liability action is where the sale occurred, and a state has an interest in deterring the sale of defective products within its borders. *Cheatham*, 654 F. Supp. at 214. The place where the sale occurred and, therefore, where the parties' relationship was centered, is Grace. Because the two most significant § 145 factors, the place where Ms. Washburne was domiciled and the place where the parties' relationship was centered, favor applying Grace law, this Court should affirm the appellate court and hold that Grace has the most significant relationship to the parties and the occurrence.

2. Although there are § 145 factors that favor applying Haven law, those factors are relatively unimportant in a products liability claim.

Although the place where the conduct that caused the injury occurred, the place where Firefly's principle place of business is located, and where the injury occurred favor applying Haven law, these factors are relatively insignificant in a products liability case. In a products liability action, the place where the defendant designed or manufactured the product in question is the place where the conduct causing the injury occurred. *Brewer*, 447 F. Supp. 2d. at 1179. The place of manufacture, however, is relatively insignificant in a products liability suit because a defective product must enter into the stream of commerce before it can cause an injury. *Phillips*, 995 P.2d at 1012. Additionally, the default rule of § 146 — to use the law of the state where the injury occurred — only applies if another state does not have a more significant

relationship to the cause of action. *Hataway*, 830 S.W.2d at 59; Restatement (Second) Conflict of Laws § 146.

In *White v. Crown Equipment Corp.*, the Ohio Court of Appeals applied Georgia's statute of repose to a products liability action because Ohio's contacts with the litigation were not as significant when compared with Georgia's contacts. 827 N.E.2d 859, 859-60 (Ohio Ct. App. 2005). The sale appears to have taken place in Ohio, but the decision is unclear. *See id.* at 860 (the defendant's subsidy, which was located in Ohio, sold a lift truck to White's employer for use in its warehouse in Atlanta). The plaintiff's right leg was partially amputated below the knee after the brake system on a forklift his employer purchased from the defendant failed and struck him. *Id.* The court concluded that the plaintiff was injured in Georgia, he was a resident of Georgia, he was eligible to receive worker's compensation in Georgia, and the standards governing the forklift's inspection were governed by Georgia law. *Id.* The court held that the only significant contacts Ohio had with the case were that the defendant manufacturer was incorporated in Ohio and that the forklift was manufactured there. *Id.* at 863. Although Ohio had an interest in deterring the sale of negligently manufactured products within its borders, the court stated that the plaintiff's employer never contacted the defendant manufacturer to inspect the brake system or to perform maintenance after it purchased the forklift; thus, Ohio had a diminished interest in applying its laws. *Id.*

In *Thornton v. Sea Quest, Inc.*, the U.S. District Court for the Northern District of Indiana seems to have discounted the defendant manufacturer's state of incorporation and principal place of business because the company transacted business throughout the United States, including Indiana, where the deceased was domiciled. 999 F. Supp. at 1226. The court found that the center of the parties' relationship was located in Indiana because the deceased purchased a scuba

diving regulator there before the regulator allegedly malfunctioned in Arkansas. *Id.* at 1220, 1227. The regulator had been manufactured in France. *Id.* at 1226. The court stated that Arkansas was "an insignificant contact" for the choice-of-laws analysis because it had no other contact with the case other than being the place of injury. *Id.* While the court did not expressly discount the fact that the manufacturer did business throughout the United States, it did find that Indiana had the most significant tie to the parties with regard to "residence or place of business" because the deceased was from Indiana and the manufacturer sold its products in Indiana through authorized dealers. *Id.* (emphasis added).

Here, the conduct which caused Ms. Washburne's death took place in Haven. R. at 4. Additionally, Firefly's principle place of business is located in Haven. R. at 2-3. As stated in the *Cheatham* case, the place where the parties' relationship is centered, i.e., where the sale occurred in a products liability action, is one of the most significant factors in a products liability suit. 654 F. Supp. at 214. In contrast, the place where the allegedly defective product was manufactured is much less significant because a product is not defective until it is placed in the stream of commerce and injures somebody. *Phillips*, 995 P.2d at 1012 (*citing Crisman*, 748 S.W.2d at 277). Therefore, the fact that the conduct which caused the injury took place in Haven is not a significant factor in the choice of laws analysis before the Court.

While no case expressly states that a manufacturer's place of business is completely insignificant in a choice-of-law analysis for a products liability action, several products liability cases are illustrative. The *Thornton* decision glossed over the fact that the manufacturer's place of incorporation and principal place of business was California. 999 F. Supp. at 1226. Furthermore, the *Thornton* decision stated that the manufacturer was transacting business nationwide, including in Indiana, the state where the deceased had been domiciled. *Id.*

The *White* decision further illustrates the point that a manufacturer's place of business or state of incorporation is an insignificant factor in a § 145 analysis. *See* 827 N.E.2d at 859 (stating that the defendant manufacturer was incorporated in Ohio but not analyzing the importance of this factor). The manufacturer's principal place of business was in Ohio, the conduct that caused the plaintiff's injury occurred in Ohio, and the sale of the forklift appears to have taken place in Ohio, but the court still applied Georgia law because Georgia had a more significant interest in applying its statute of repose for products liability. *Id.* at 863. The *White* case is somewhat distinguishable from this case because the injury in *White* took place in Georgia and the court applied the law of the place where the injury occurred. *Id.* The court, however, only looked at that factor as part of its § 145 analysis and did not find it to be the determining factor. *Id.*

Here, Ms. Washburne's presence in Haven at the time in which she was injured was completely fortuitous: her appendicitis could have occurred anywhere at any time and any doctor who would have treated her would likely have relied exclusively on Firefly's medical records in treating her. Therefore, the only significant contacts Haven has to this case are that Firefly's principle place of business is located in Haven and that the conduct which caused the injury occurred there, much like in the *White* case. R. at 2, 4. Because Haven's contacts are far less significant than Grace's, this Court should apply Grace's substantive law.

C. Grace's significant interests in protecting and compensating its citizens and in deterring sellers of defective products favor applying Grace law.

Grace's interests in applying its products liability laws and the policies of products liability laws favor applying Grace law. The relevant § 6 factors in a products liability action include the relevant policies of the forum and other interested states as well as the basic policies underlying the particular field of law. *See Phillips*, 995 P.2d at 1008-09,1013-14 (stating, in a products liability case, that the needs of the interstate and international systems, the protection of

justified expectations, the need for certainty, predictability, and uniformity of result, and the ease in determination and application of the law to be applied did not help the court determine which state's law to apply). When the place of injury and the place where the conduct which caused the injury are the same, that state's law will generally apply unless a different state has a "demonstrably dominant interest." *Lebegern v. Forman*, 471 F.3d 424, 429 (3d Cir. 2006) (*citing Erny v. Estate of Merola*, 792 A.2d 1208, 1217-18 (N.J. 2002)).

In both the *Phillips* and *Cheatham* decisions, the Montana Supreme Court and the U.S. District Court for the Southern District of Ohio, respectively, explained that states have several interests regarding application of their laws to products liability actions. Each court held that states have interests in deterring the sale of defectively manufactured products within their borders, preventing injuries to their residents caused by defective products, and compensating citizens who have been injured by defective products. *Phillips*, 995 P.2d at 1009 (*citing Thornton*, 999 F. Supp. at 1223-24); *Cheatham*, 654 F. Supp. at 214.

In contrast, in *Lebegern*, the Third Circuit Court of Appeals held that New Jersey law applied in a wrongful death action brought by a Pennsylvania resident's family because the § 145 factors and policy considerations favored applying New Jersey law. 471 F.3d at 427, 431–32, 435. The court came to that conclusion because New Jersey's law, which limited recovery in wrongful death actions, would have been frustrated by applying Pennsylvania's law, which permitted full recovery. *Id.* at 431–32. The court held that the only contact that Pennsylvania had with the parties and occurrence for § 145 purposes was that the deceased had been domiciled there. *Id.* at 431. The court stated that Pennsylvania had a "strong and clear interest in providing full recovery" to the deceased's family, but also stated that New Jersey had an interest in limiting its residents' "exposure to damage awards." *Id.* at 431–32. The court ultimately held that New

Jersey law applied because the injury and the conduct which caused the injury both occurred in New Jersey and, if it applied Pennsylvania law, it would frustrate New Jersey's policy of insulating its residents from excessive judgments. *Id.* at 431, 433 (*citing* Restatement (Second) Conflict of Laws § 145 cmt. e; § 146 cmts. c and d).

The *Lebegern* decision is distinguishable from this case because it was a wrongful death action that did not arise from a defective product. *See Lebegern*, 471 F.3d at 427 (explaining that the deceased's estate brought suit against motorist, owner of motorist's vehicle and other previous owners of the vehicle after the deceased died in a car accident). The court held that New Jersey had more significant contacts to the parties and occurrence and applying Pennsylvania law would have frustrated New Jersey's policy of limiting damages in wrongful death cases. *Id.* at 435. In a products liability case, the state where the injured party is domiciled has a strong interest in ensuring that injured residents can recover for their injuries. *Phillips*, 995 P.2d at 1015. Here, Ms. Washburne was domiciled in Grace prior to her untimely death. R. at 2.

In this case, both states recognize causes of action for products liability. Grace has a demonstrably dominant interest in applying its product liability laws when compared with Haven and applying Grace's law would not frustrate Haven's law. The differences between the products liability laws of Haven and Grace relate to how a plaintiff must establish a *prima facie* case. Grace follows the Restatement (Second) of Torts § 402A, which creates strict liability for manufacturers that sell products that have a manufacturing defect, design defect, or if the manufacture fails to warn consumers about certain risks and dangers. *Turner*, 30 Grace at 144; Restatement (Second) of Torts § 402A. Haven, on the other hand, has adopted the Restatement (Third) of Torts: Products Liability § 2, which recognizes causes of action for manufacturing defects, design defects, and inadequate warnings or failure to warn but uses negligence principles

rather than strict liability. Haven Rev. Code § 1018.11; *see* Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 Nev. L.J. 609, 612–14 (2004) (arguing that the Restatement (Third)'s RAD requirement resembles a negligence analysis); Heather Bessinger & Nathaniel Cade, Jr., *Who's Afraid of the Restatement (Third) of Torts?*, Wis. L.J. (Sept. 17, 2010), http://wislawjournal.com/blog/2010/09/17/whos-afraid-of-the-restatement-third-of-torts/ (same). Therefore, unlike in *Legebern*, where the court was forced to choose between opposing state laws where one state capped damages in a wrongful death case and the other provided for full recovery, this Court must only choose between states which both recognize products liability claims, but have different requirements for establishing a *prima facie* case.

States create products liability laws to protect residents from injury caused by defective products, to provide compensation for residents if they are injured by a defective product, and to deter manufacturers from selling defective products within state borders. *Phillips*, 995 P.2d at 1015. Here, Grace has the most significant interest to the parties and occurrence because Ms. Washburne was a resident of Grace, and Firefly sold a product to her in Grace. R. at 2–4. Grace has a substantial interest in applying its product liability laws when one of its residents is injured by a product sold within its borders. After applying the relevant §§ 146, 175, 145, and 6 factors, this Court should find that Grace has the most significant relationship to the parties and occurrence and apply Grace's products liability laws.

II. THE ESTATE'S PRODUCTS LIABILITY ACTION SHOULD PROCEED REGARDLESS OF WHICH LAW THIS COURT APPLIES.

When faced with a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a court must view all factual allegations in a complaint in the light most favorable to the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 572 (2007) (*citing Overstreet v. North Shore Corp.,* 318 U.S. 125,

127 (1943)). The federal notice pleading standard applies to products liability claims; as long as a complaint alleges facts that meet the *Iqbal* and *Twombly* "plausibility" standard, it should proceed past the pleading stage. *Bausch v. Stryker Corp*., No. 09-3434, 2010 WL 5186062, at * 10 (7th Cir. Dec. 23, 2010) (*citing Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). To survive a motion to dismiss, a plaintiff need only include factual matter that states a claim that is plausible on its face. *Irwin v. Belimed*, *Inc.*, No. 1:10-364, 2011 WL 124761, at *2 (N.D. Ind. Jan. 14, 2011) (*citing Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 570). A products liability complaint is valid if it gives the defendant manufacturer fair notice of the plaintiff's claim. *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1146 (Ohio 2002). Pleading requirements are designed to focus litigation on the merits of a claim and not on technicalities that could be grounds for dismissal. *Stryker*, 2010 WL 5186062 at *11.

Grace courts follow the Restatement (Second) of Torts § 402A when they analyze products liability claims. *Turner*, 30 Grace at 144. Section 402A imposes strict liability on manufacturers, which subjects sellers of products to liability even though they have "exercised all possible care in the preparation and sale of the product." Restatement (Second) of Torts § 402A cmt. a. Under § 402A, a plaintiff is not required to prove that a manufacturer could have implemented a RAD or alternative warning when bringing a products liability action. *Compare* Restatement (Second) or Torts § 402A (no mention or discussion of a requirement that plaintiff must prove that that manufacturer could have used a RAD or alternative warning when developing and selling a product), *with* Restatement (Third) of Torts: Prod. Liab. § 2 cmts. b., i. (stating that in most cases a plaintiff must prove the availability of a RAD in a defective design claim and must prove that a seller provided inadequate instructions or warnings in a failure to warn claim). Because Grace law applies to this case, the Estate is neither required to plead nor

prove that Firefly could have implemented a RAD or that Firefly provided an inadequate warning to Ms. Washburne regarding the sale and use of its electronic medical records.

If this Court finds that Haven has the most significant relationship to the parties and occurrence, the Estate's claim still survives Firefly's motion to dismiss. Under the Restatement (Third) of Torts: Products Liability § 2, a plaintiff must prove that a seller could have implemented a RAD and that a seller provided inadequate warning to the buyer. Restatement (Third) of Torts: Prod. Liab. § 2(a), (b), (c). Haven, however, has not expressly required that a plaintiff must make or prove up these allegations at the pleading stage. *Id.* at cmts. b., i.; Haven Rev. Code § 1018.11.

A. When applying Grace's Products Liability Law, the Estate has stated a claim upon which relief can be granted.

Section 402A does not require a plaintiff to plead that the seller of a product could have implemented a RAD or issued a reasonable alternative warning to proceed to discovery. Section 402A applies to a seller of a product that is in a defective condition and is unreasonably dangerous to a user or consumer. Restatement (Second) Torts § 402A(1). A defective condition is one that is "not contemplated by the ultimate consumer, which will be unreasonably dangerous," or more dangerous than an ordinary purchaser would contemplate, for a seller to be liable in a products liability claim. *Id.* at cmt. g, i. The plaintiff has the burden of showing that the defect existed when the seller relinquished control. *Id.* If a seller has reason to believe a product may be dangerous, the seller may be required to warn the purchaser. *Id.* at cmt. h. Whether a seller had access to a RAD is a factor the jury may consider, but a plaintiff is generally not required to prove that factor under § 402A. *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1334 (Conn. 1997) (internal citations omitted); *see id.* at. 1331, n.11 (stating that some states require the plaintiff to prove a RAD to establish a *prima facie* case, but that most

states either consider RAD as a factor, or not at all ,when considering the validity of a § 402A products liability claim).

In *Potter*, the Connecticut Supreme Court held that, absent a requirement imposed by a state, § 402A does not require a plaintiff to prove that a RAD was available in order to make a *prima facie* showing that a product's design was defective. *Id.* at 1334. In *Potter*, a group of shipyard workers prevailed on defective design and failure to warn claims against several pneumatic hand tool manufacturers. *Id.* at 1324. Although the court ordered a new trial on other grounds, it noted that proving the existence of a RAD was merely a factor that a plaintiff may show as part of a risk-utility analysis. *See id.* at 1333–34 (holding that, under Connecticut law, a plaintiff is not required to prove that a RAD existed).

Under notice pleading standards, the Estate has stated a valid claim against Firefly for a manufacturing defect under Grace's consumer expectations test. While there is not a copy of the complaint in the record, Firefly clearly has fair notice of the claims against it. Either an error occurred when an employee was entering Ms. Washburne's medical records into Firefly's system or there was a software malfunction that failed to display Ms. Washburne's penicillin allergy when the hospital staff searched Firefly's database for her medical records. Any consumer would expect that an electronic medical record completely and accurately reflects all information contained in a paper copy of a medical record, especially allergies.

The Estate has also stated valid claims for design defect and failure to warn under Grace's modified risk-benefit analysis. The complaint alleged a defect, which is sufficient to state a claim under § 402A. *See Irwin*, 2011 WL 124761, at *3 (finding that a plaintiff was not required to specify the precise defect to survive a 12(b)(6) motion to dismiss in a products liability suit); *Ayr-Way Stores, Inc. v. Chitwood*, 300 N.E.2d 335, 339-40 (Ind. 1973) (expressly

adopting the Restatement (Second) of Torts § 402A). Firefly failed to create a warning system that would alert employees of possible errors made when transcribing a client's medical records. Under Grace's modified risk-benefit analysis, the risk of not implementing a failsafe for entry errors is extremely high; in this case, it was fatal. Entering incorrect data or failing to enter the correct data in the future could lead to a similar result. Because the Estate has stated valid claims for manufacturing, design, and failure to warn defects under § 402A, this Court should hold that the Estate's claims survive Firefly's motion to dismiss.

B. Even if Haven law applies, the Estate has stated a claim upon which relief can be granted because Haven law does not require a plaintiff to plead a reasonable alternative design.

Haven law requires a plaintiff to prove that a manufacturer should have used an alternative reasonable design to prevail in a products liability claim, but it does not require a plaintiff to plead an alternative reasonable design to survive a motion to dismiss under 12(b)(6). Under Haven law, a plaintiff must prove that a product departs from its intended design even though the seller exercised all possible care when creating and marketing a product. *Toms v. J.C. Penney Co.*, 304 Fed. Appx. 121, 124 (3d Cir. 2008). A plaintiff may prove a manufacturing defect by showing (1) direct evidence that the defect arose when the manufacturer possessed it; (2) circumstantial evidence which creates an inference that the defect was present before the manufacturer sold the product; or (3) by showing that other possible causes of the failure did not cause the failure, which would create an inference that the manufacturer caused the defect. *Marcus v. Valley Hill, Inc.*, 301 Haven 197 (2006). In order to prevail on a defective design claim, a plaintiff must prove that a product's "foreseeable risks" could have been reduced if the manufacturer implemented a RAD. Restatement (Third) of Torts: Prod. Liab. § 2(b). This risk-utility balancing is necessary in defective design cases because an average consumer is not knowledgeable enough to form an opinion as to how safe a product's design should be. *Id.* cmt.

a. In a design defect claim, a plaintiff must prove that the manufacturer could have reduced a product's foreseeable risks if it had created reasonable instructions or warnings. *Id.* at § 2(c); cmts. i, j.

In *Guilbeault v. R.J. Reynolds Tobacco Co.*, the District Court for the District of Rhode Island stated, in dicta, that a design defect claim is valid under the Restatement (Third) of Torts: Products Laibility § 2 if a plaintiff alleges that there was something wrong with a product. 84 F. Supp. 2d 263, 280 (D. R.I. 2000). The court reasoned that merely alleging that a product had some kind of defect would be sufficient to give notice to a defendant because comment f of the Restatement (Third) explicitly states:

> The Restatement expressly 'takes no position regarding the requirements of local law concerning the adequacy of pleadings or pretrial demonstrations of genuine issues of fact. It does, however, assume that the plaintiff will have the opportunity to conduct reasonable discovery so as to ascertain whether an alternative design is practical.'

Id. (*quoting* Restatement (Third) of Torts: Prod. Liab. § 2 cmt. f). The court also stated that the defendant was unable to cite to a single case where a motion to dismiss for failure to state a claim was granted when a plaintiff failed to plead that a RAD was available. *Id.* at 279.

Comment b of the Restatement (Third) is also illustrative with regard to whether a plaintiff must plead a RAD. Comment b states that a plaintiff may not even need to *prove* that a manufacturer could have implemented a RAD in every design defect case. *See* Restatement (Third) of Torts: Prod. Liab. § 2 cmt. b (stating that a plaintiff may sometimes show circumstantial evidence, a government standard, or a "manifestly unreasonable" design to establish a *prima facie* showing that the manufacturer used a defective design in creating a product) (emphasis added).

No Haven decision has been cited in the record that expressly required a plaintiff to plead an alternative reasonable design in a complaint to survive a motion to dismiss. All of the

Restatement (Third)'s rules Haven has expressly adopted require a plaintiff to "show" or "demonstrate" an element under a products liability theory to prevail. *See* Restatement (Third) Torts: Prod. Liab. § 2(a) (requiring a plaintiff to "show" that the product departs from its intended design to prevail under a manufacturing defect theory); *id.* at § 2(b) (requiring a plaintiff to "demonstrate" that the product's foreseeable risks could have been reduced by implementing a RAD); *id.* at § 2(c) (requiring a plaintiff to "show" that the manufacturer could have avoided or reduced the product's foreseeable risks of harm if it had created reasonable instructions or warnings). None of the sections of the Restatement (Third) that Haven has adopted even mention the words "plead" or "pleading."

Furthermore, while *Guilbeault*'s Restatement (Third) analysis was dicta, the District of Rhode Island's analysis of the Restatement (Third)'s pleading requirements and its reference to comment f are illustrative. 84 F. Supp. 2d at 280. In order to present a valid claim to survive the defendant tobacco company's motion to dismiss, the plaintiff was only required to allege that something was wrong with the product. *Id.* at 279. The plaintiff was not required, as the defendant argued, to plead a reasonable adequate design. *Id.* at 279-80; Restatement (Third) of Torts: Prod. Liab. §2, cmt. f. There are no Haven decisions or statutes that require a plaintiff to plead a RAD to survive a motion to dismiss. Furthermore, the Restatement (Third) of Torts: Products Liability § 2 indicates that a plaintiff only needs to prove that a RAD was available to survive a motion to dismiss, this Court should dismiss Firefly's motion to dismiss.

A plaintiff should be given the opportunity to conduct some discovery to determine whether a RAD exists for an allegedly defective product. *Id.* It would be unjust for this Court to reinstate the District of Haven's decision in this case. The Estate cannot reasonably be expected to make a *prima facie* showing through pleadings that a RAD existed when no discovery has

been conducted, much less a reasonable amount. Furthermore, granting Firefly's motion to dismiss would undermine the policies of notice pleading because the record contains sufficient facts to create a plausible claim against Firefly. R. at 4.

The District Court was particularly persuaded by Firefly's policy argument that saving costs through health information technology should be fostered. R. at 8. The District Court, however, could not have reasonably believed that the cost saving benefits of creating electronic medical records outweighed the costs of losing human lives caused by a defective product. This would defeat the very purpose of creating medical records in the first place: to ensure that sick people are administered care that does not place their health further in jeopardy.

CONCLUSION

For the aforementioned reasons, the Estate respectfully requests that this Court affirm the Thirteenth Circuit's decision that Grace has the most significant relationship with the parties and the occurrence and that the Estate has stated a claim upon which relief can be granted under the Restatement (Second) of Torts § 402A.

Respectfully Submitted,

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