IN THE SUPREME COURT OF THE UNITED STATES

FIREFLY SYSTEMS, INC.,
Petitioners

v. No. XX-XXXX

IN RE ESTATE OF ZOE WASHBURNE,
Respondent

On Appeal from the United States Court of Appeals
For the Thirteenth Circuit

BRIEF OF PETITIONERS

ORAL ARGUMENT REQUESTED

Team #9
Counselors for Petitioners

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v. No. XX-XX-XXXXX

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Respondent

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These requirements are made in order that the justices of The Supreme Court of the United States may evaluate disqualification or recusal.

1. Judge Parker
   District Court Judge
   U.S. District Court for the District of Haven
   289 Main Street
   Capitol City, Haven 55567

2. Judge Saff
   Judge Nia
   Judge Early
   Circuit Judges
   United States Court of Appeals for the Thirteenth Circuit
   2000 North State Street
   Capitol City, Haven 55565

3. Firefly Systems, Inc.
   Petitioners
   151 Firefly Way
   North Shore, Haven 55587

4. Estate of Zoe Washburne
   Respondent
   212 Nelson Avenue
   Jamestown, Grace 33874

5. Team ID# **??????**
Attorneys for the Petitioners
100 Winners Way
Capitol City, Haven 55565

6. Stephen T. Spencer
Attorney for the Respondent
1556 Broadway St.
New York, NY 10108

Respectfully Submitted,

Team # 9
Counselors for the Petitioners

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

A. Nature of the Case

The Petitioner, Firefly Systems, Inc. appeals the decision of the United States Court of Appeals for the Thirteenth Circuit finding that Grace law applied to this cause of action and that as such, the plaintiff's pleading was sufficient to state a cause of action under Grace products liability law upon which relief could be granted.

Firefly contends that Court of Appeals erred in its determination that Grace law should apply to this dispute. Under the most significant relationship test of the Restatement (Second) of Conflict of Laws, Haven had the most significant relationship to both the parties and the occurrence. Firefly's principal place of business is located in Haven and the relationship between the parties was centered in Haven. Because all of the foregoing contacts of significance are centered in Haven, Haven substantive law should have been applied to this dispute.

Because Haven Law applies, the Respondent failed to sufficiently plead a cause of action under Haven's products liability law. In order to establish a claim for strict product liability, a plaintiff must show that the defendant was at fault under either a manufacturing defect, defective design, or failure to warn theory. Petitioners will show that under a defective design and failure to warn analysis, Respondent failed to establish the existence of a reasonable alternative design. Finally, the Petitioner will show that Respondent is barred from bringing the breach of implied warranty of merchantability claim because it is factually identical to the manufacturing design and uses the same risk-utility assessment as the defective design claim under Haven law.

Thus the Petitioner request that this Court reverse the decision of the Court of Appeals for the Thirteen Circuit and find Haven law governs this dispute and that as such, Respondent has failed to state a claim upon which relief could be granted under Haven law.

B. Course of Proceedings and Disposition of the Court Below

On or about September 10, 2008, the Respondent was injured in the State of Haven as a result of the administration of penicillin to her by Haven doctors. Subsequently, after the Respondent's death, her estate filed a complaint in the Peterson County Court of Common Pleas in Haven alleging three claims against the Petitioner: (1) breach of express warranty; (2) breach of implied warranty of merchantability; and (3) strict product liability based upon a manufacturing, design and warning defect. (R. at 4). The action was removed to the United States District Court for the District of Haven by the Petitioner based on diversity of citizenship. (R. at 4-5).

The Petitioner then filed a motion to dismiss the Respondent's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) alleging that the Respondent failed to state a claim upon which relief could be granted. (R. at 5). The following day, Respondent filed a written response to this motion. (R. at 5). After considering the parties' arguments, the district court, on March 20, 2009, granted the Petitioner's motion to dismiss the claims. (R. at 9). From this ruling, the Respondent appealed to the United States Court of Appeals for the Thirteenth Circuit. (R. at 10).

The Court of Appeals affirmed in part and reversed and remanded in part. (R at 13). The court affirmed the district court's dismissal of the express warranty claim, and reversed and remanded the strict product's liability claim and the implied warranty of merchantability claim. (R. at 13). This Court subsequently accepted this cause of action on a writ of certiorari filed by the Petitioner. (R. at 14). Comes now the Petitioner and appeals the decision of the Court of Appeals for the Thirteenth Circuit pursuant to the Rules of the Supreme Court of the United States rule 10.

C. Statement of the Facts

On or about August 21, 1982, the Respondent, Ms. Zoe Washburne was born. (R. at 2). At the age of five, her parents discovered that she possessed an allergy to the common antibiotic penicillin. (R. at 2). In recent years, Ms. Washburne was employed as a middle school teacher at a small middle school in the State of Grace. (R. at 2). Her doctor in Grace, Dr. Kaylee Frye, informed her in 2008 that she would be contracting with Firefly Systems, Inc. to have her entire recordkeeping system digitized. (R. at 2). Once Firefly received the paper copy of the medical records from Dr. Frye, its employees would then place these records on Firefly's secured servers so that physicians and healthcare providers could access them if the need arose. (R. at 3). Firefly sought to ensure a proper transcription of a patient's medical records by instructing its employees to take the proper safeguards in ensuring that a customer's electronic data matches their exact paper record. (R. at 3). After the medical records are input into Firefly's software, an electronic copy of those medical records is then sent to the customer who is instructed to examine and verify that the contents. (R. at 3). IBM, Firefly's largest competitor in this area, employs what it calls a "final check flag system" which warns of any potential errors or omissions during the transfer of a customer's medical records from paper to electronic. (R. at 3). This safeguard, however, is more costly and more difficulty to operate. (R. at 3).

Firefly mailed Washburne and Dr. Frye a copy of the electronic record contained on a USB flash-drive. (R. at 3). Ms. Washburne failed to heed the warning by Firefly and did not review the electronic copy sent to them. (R. at 3).

On September 10, 2008, Ms. Washburne accompanied a group from the school at which she was employed on a field trip to Capitol City, Haven. (R. at 3). Shortly after arriving in Haven, Ms. Washburne was taken to the University Medical Center in Capitol City complainting of abdominal pain. (R. at 3). Doctors diagnosed Ms. Washburne with appendicitis and proceeded

with surgery to remove her appendix. (R. at 3). The doctors received Ms. Washburne's driver's license information, which they subsequently used to access the electronic copy of her medical records. (R. at 3). These records received by the doctors did not contain Ms. Washburne's allergy to penicillin. (R. at 4). At the conclusion of the surgery, when the emergency had ceased to exist, the doctors administered a dose of penicillin (R. at 4). Shortly after the penicillin was administered, Ms. Washburne began to experience respiratory problems. (R. at 4). After being stabilized, Ms. Washburne left the hospital two days later and began the journey back to Grace with her parents. (R. at 4). After crossing the state line into Grace, however, Ms. Washburne began to experience another reaction to the penicillin: biphasic anaphylaxis, a 72-hour delayed reaction. (R. at 4). Ms. Washburne died from the complication (R. at 4).

As a result of Ms. Washburne's death, her estate brought a lawsuit against Firefly Systems, Inc. alleging multiple claims of strict products liability. (R. at 4). Firefly moved to dismiss the claims, alleging that the law of Haven should be applied to this dispute and as such, Ms. Washburne had failed to satisfy the pleading requirements of Federal Rule of Civil Procedure rule 8. (R. at 5). The district court granted Firefly's motion and dismissed the action. (R. at 9). The court found first that Haven law should be applied to the dispute, as it had the most significant relationship to the parties and occurrence under the principles of the Restatement (Second) of Conflict of Laws. (R. at 7). The court further held that because Haven substantive law applied, Ms. Washburne's pleading failed to state a claim upon which relief could be granted. (R. at 7-9).

The court held that no manufacturing defect existed, as Firefly's software, by including the phrase "NONE" in the known allergies field, was only doing what it was designed to do. (R. at 8). On the defective design claim, the district court held that Ms. Washburne failed to allege

or show a reasonable alternative design to Firefly's currently used software. (R. at 8). On the warning defect claim, the district court, applying the risk-utility analysis, held that the added costs which would be imposed upon Firefly to integrate the extra warning system outweighs the risk of error. (R. at 8-9). The district court dismissed Ms. Washburne's implied warranty of merchantability claim, stating that it may not be brought independently under Haven law. (R. at 9). Finally, the court dismissed the express warranty claim, stating that Firefly never made any promise or representation to Ms. Washburne. (R. at 9).

The Thirteenth Circuit Court of Appeals reversed and remanded a large part of the district court's decision. First, the court stated that Grace law should apply to this dispute, as it had the most significant relationship to the parties and the dispute. (R. at 11). Subsequent to the finding, the court ruled that Ms. Washburne's strict product liability claims were sufficient to present claims for manufacturing, design and warning defect under Grace law. (R. at 11). In essence, the court found that Ms. Washburne's claims, under Grace law, were sufficient to survive a Federal Rule of Civil Procedure 12(b)(6) motion. (R. at 12). The court stated that a manufacturing defect likely occurred at some point, although it was unclear as to whether it was a defect with the software itself or simple human error during the transcription of the medical records. (R. at 12). Additionally, the court stated, under a consumer expectation test, a consumer expects to receive a complete and accurate copy of their medical record from Firefly, and this test was not met here. (R. at 12-13). The court also reversed the district court's ruling on the warning defect claim, stating that Firefly should have integrated the advanced warning system and that the added costs of this system did not outweigh the potential risks of error. (R. at 13). Finally, the court reversed the district court's dismissal of the implied warranty of merchantability claim, stating that under Grace law, Ms. Washburne had laid out sufficient facts to allege that Firefly's products were not

merchantable. (R. 13). The court affirmed the district court's dismissal of the express warranty claim, recognizing that there was no promise made by Firefly to Ms. Washburne. (R. 13). This case was then appealed on writ of certiorari by Firefly Systems, Inc. to this Court, the Supreme Court of the United States. (R. 14).

SUMMARY OF THE ARGUMENT

The substantive law of the State of Haven should apply to this cause of action. Haven, the forum state in this action, applies the choice of law rules found in the Restatement (Second) of Conflict of Laws. The Restatement (Second) provides that in the case of a tort, the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the parties and the occurrence. Sections 145 and 6 of the Restatement (Second) set forth a number of factors to determine whether another state has a more significant relationship to the parties and the occurrence. Applying these factors, the presumption that the law of the state where the injury occurred will apply is not overcome, and Haven, the state where the injury occurred, is the state with the most significant relationship to this cause of action.

The injury, the conduct causing injury, the principal place of business of Haven and place where the parties' relationship is centered are all Haven contacts. Because each of these factors points to the application of Haven law, such law should apply. Thus, because Haven has the most significant relationship to both the parties involved and the occurrence giving rise to this cause of action, its law must be applied to this case.

Under Haven substantive law, Respondents have failed to state a claim sufficient to survive F.R.C.P 12(b)(6). The State of Haven follows the Third Restatement of torts which states that plaintiffs may bring a product's liability claim against a defendant under three theories: (1) manufacturing defect, (2) defective design, or (3) warning defect. In addition under

design defect and failure to warn, plaintiff must show that a reasonable alternative existed at the time the injury occurred. Furthermore, the Restatement (Third) of Torts bars factually identical claims from being pursued together.

Respondent has failed to sufficiently plead enough information in the complaint that will rise above the speculative level. Respondent has failed to establish a claim under either manufacturing defect, defective design, or warning defect. Furthermore, a reasonable alternative has not been pleaded or established in the complaint. Finally, because the manufacturing claim and the breach of implied warranty of merchantability claim rest up the same facts, they are barred from being brought together.

ARGUMENT

I. APPLYING THE PRINCIPLES OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS, THE STATE WITH THE MOST SIGNIFICANT RELATIONSHIP TO THE PARTIES AND THE OCCURRENCE WAS THE STATE OF HAVEN AS ALL THE SIGNIFICANT CONTACTS WITH THIS CAUSE OF ACTION ARE CENTERED IN HAVEN

In this case, the law of the State of Haven should apply. This case came before the federal district court based on diversity of citizenship. In any federal action involving diversity of citizenship, the federal court is required to apply the 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). Thus, because this action was commenced in the U.S. District Court sitting in the State of Haven, the proper choice of law rules to apply would be those of Haven.

Having considered which state's choice of law rules will apply, we now must apply the appropriate rules. While in previous years Haven applied the rule of *lex loci delicti*, the Haven Supreme Court in *Booker v. InGen, Inc.* abandoned this rule and replaced it with the principles found in the Restatement (Second) of Conflict of Laws. 241 Haven 17, 24-26 (2007). Under

these principles, the state with the "most significant relationship" to the occurrence and the parties will apply its own substantive law. *Id*. To determine which state has the most significant relationship, one must apply the principles found in the Restatement (Second) of Conflict of Laws Section 6 (1971).

Prior to an analysis of the Section 6 factors, however, the Restatement (Second) directs us to examine the applicable guidelines for a tort cause of action. In a tort action, the Restatement (Second) directs us to begin with Section 146. This section provides that unless another state has a more significant relationship with the particular issue, the substantive law of the state where the injury occurred will be applied. Rest.2d Conflict of Laws § 146 (1971). To determine whether another state has a more significant relationship with the issue, one must conduct the choice of law analysis found in Section 145. These factors found in Section 145 are to be applied in accordance with their relative importance to the particular issue. *Id.* Generally, in a tort case, the two most important Section 145 factors are the place where the injury occurred and the place where the conduct causing injury occurred. An analysis of these factors leads one to the inescapable conclusion that the law of the State of Haven must apply in this matter.

A. Analysis of the Restatement (Second) of Conflict of Laws Section 145 factors indicates that Haven has the most contact with and thus the most significant relationship to the parties and the dispute

1. The Place Where the Injury Occurred

Zoe Washburne's injury occurred in the State of Haven, as this is where her initial reaction to the penicillin occurred; the reaction which ultimately and directly resulted in her death shortly thereafter.

In any tort cause of action, the place where the injury occurred is of great importance in determining which state's substantive law should apply. *Huddy v. Fruehauf Corp.*, 953 F.2d 955, 957 (5th Cir. 1992). This contact is of significant importance in a choice of law analysis, for the

simple reason that "persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury." Rest.2d Conflict of Laws § 145 cmt. e (1971).

Ms. Washburne's injury occurred in the State of Haven. Haven is where Ms. Washburne's initial injury took place: her negative and severe reaction to the penicillin administered by the doctors at University Medical Center. (R. at 3). The injury itself, known as anaphylaxis, caused Ms. Washburne to experience respiratory problems consistent with a penicillin reaction. (R. at 4). Symptoms of anaphylaxis can occur up to seventy-two hours following the initial reaction. (R. at 4). As the district court correctly found, Ms. Washburne's death was caused by biphasic anaphylaxis, a reaction directly linked to the initial anaphylaxis reaction in Haven. (R. at 4). Thus, Ms. Washburne's death was a direct consequence of the injuries she suffered in Haven. Her injury occurred at the moment of her initial reaction to the penicillin. *See Spence v. Glock*, 227 F.2d 308, 312 (5th Cir. 2000)(the plaintiff's injury occurred when and where the defectively designed guns were purchased by the plaintiff); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 (9th Cir. 2005)(the tortuous act was the plaintiff's misdiagnosis and inability to seek treatment, not her resulting death). Had it not been for the administration of the penicillin and the resulting anaphylaxis reaction, Ms. Washburne would still be alive today.

In any tort cause of action, there must first be an injury, for no tort is complete until the victim is injured. *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 915-16 (7th Cir. 1994). The event giving rise to a tort cause of action is the event which caused the victim's injury, as "there can be no tort liability without damage to persons or property." *Cremona v. R.S. Bacon Veneer Co.*, 433 F.3d 617, 621 (8th Cir. 2006). Likewise, in order to give rise to a product liability action, there must first have been some injury to persons or property as a result of the allegedly defective

product. *Id*. (*citing Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 885 (Iowa 1983)). The event which caused Ms. Washburne's injury and gave rise to her subsequent products liability action occurred in Haven. This cause of action did not accrue when Ms. Washburne lost her life in Grace. It accrued at the time the doctors injected her with the penicillin which caused her initial anaphylaxis reaction and ultimately her death.

Furthermore, the Restatement (Second) of Confliucts of laws Section 175 comment b (1998) provides that in a wrongful death cause of action, the place of the injury is "where the force set in motion by the actor first takes effect on the person." *Brewer v. Dodson Aviation*, 447 F.Supp.2d 1166, 1178 (W.D. Wash. 2006). Thus, it is possible for the victim's injury and the resulting death to occur in two different places. *Id*. This suit was brought by Ms. Washburne's estate to recover for her wrongful death. (R. at 4). Applying this analysis, the place of her injury would be Haven, where the reaction to the penicillin first took effect upon Ms. Washburne. This initial reaction set the stage for the later reaction in Grace which ultimately led to Ms. Washburne's death. Although her death occurred across the state lines in Grace, the injuries which set in motion the events leading to her death were suffered in Haven.

If this Court were to determine that the place of the injury was Grace, this contact would then be of little importance as Grace does not bear a strong relationship to the occurrence and the parties other than the fact that Ms. Washburne was domiciled there at the time of her death. Every other significant contact with this cause of action is centered in Haven. When determining the level of significance to be given the place of the injury, the court should consider what relationship such place has with the occurrence and the parties based on the other Section 145(2) contacts. *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1360 (8th Cir. 1994); Restatement (Second) of Conflict of Laws § 145 cmt e (1971). Grace has no significant relationship to the

occurrence or the parties other than the fact that the deceased was domiciled there. Furthermore, when the place of the victim's injury has no strong relationship to the cause of action, the place where the conduct causing the injury occurred will assume greater significance. *Linden v. CNH Am., LLC*., 2010 WL 4840435 at *7 (S.D. Iowa 2010).

It is well settled that the law of the place of the injury will apply unless some other state has a more significant relationship. *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 342 (6th Cir. 1997). Grace does not have a more significant relationship than Haven to this cause of action. Therefore, as the place of the injury is of utmost importance in a tort cause of action, and because Ms. Washburne's injury without doubt occurred in Haven, Haven law should apply.

2. The Place Where the Conduct Causing Injury Occurred

The State of Haven is where the conduct causing Ms. Washburne's injury occurred. It is where Firefly's allegedly defective software was designed and put into use, where Ms. Washburne's medical records were sent to be digitized, and was also the state where UMC accessed the medical records for the purposes of Ms. Washburne's medical care. (R. at 4).

In a products liability action, the place where the conduct causing injury occurred is the place where the defendant "manufactured, designed or marketed the allegedly defective product." *McLennan v. Am. Eurocopter Corp. Inc.*, 245 F.3d 403, 426 (5th Cir. 2001); *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 342 (6th Cir. 1997); *Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc.*, 24 F.3d 125, 128 (10th Cir. 1994). In *Spence,* 227 F.3d at 312, the Court of Appeals held that the conduct causing the injury, in an action based on defectively designed guns, occurred where the guns were designed and manufactured.

Firefly's allegedly defective software was designed and manufactured in Haven, as that is where Firefly maintains its principal place of business. Thus, had there been any defects in Firefly's software, those defects would have arisen in Haven. Additionally, Haven is where this

software is utilized for the purpose of digitizing customers' medical records. When a customer purchases Firefly's services, they send paper copies of their medical records to Firefly's offices in Haven where the records are scanned into Firefly's software. If there was a defect in the software, it would have resulted in an error in Ms. Washburne's medical records in Haven.

Ms. Washburne's injury was caused in Haven by the failure of the doctors at UMC to learn of Ms. Washburne's allergy to penicillin. When the doctors accessed Ms. Washburne's online medical record, they saw the word "NONE" in the space provided for a known allergies. (R. at 4). Had the allergy been listed in the space and had the doctors sought out the paper copy of Ms. Washburne's medical records, her injury would likely not have occurred. Thus, because Ms. Washburne's medical records were scanned into and stored in Firefly's servers in Haven, the doctors at University Medical Center accessed her electronic medical records in Haven and, in reliance on these records, administered the penicillin in Haven, it is quite apparent that the conduct which ultimately caused Ms. Washburne's injury occurred in Haven.

Because both the injury and the conduct causing the injury occurred in Haven, the principles of the Restatement (Second) of Conflict of Laws are easy to apply. *See Dorman*, 23 F.3d at 1358 (noting that, subject only to rare exceptions, the local law of the state where both the conduct and the injury occurred will be applied); *Edwardsville Nat'l Bank and Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 652 (7th Cir. 1987)(Indiana law applied where both the defendant's conduct and the plaintiff's injury occurred there, and the only contact with Illinois was the plaintiff's domicile). Because Ms. Washburne's injury occurred in haven and the conduct causing her injury occurred in Haven, it is apparent that the law of Haven should be apply

3. The Domicile, Residence, Nationality, Place of Incorporation and Place of Business of the Parties

In the case sub judice, each of the parties is located in a different state. Ms. Washburne is domiciled in Grace, while Firefly Systems, Inc. is incorporated in Delaware with its principal place of business in Haven.

Restatement (Second) of Conflict of Laws Section 145 comment e provides that the weight accorded to domicile, residence, place of incorporation and place of business of the parties depends upon the extent to which they are grouped with other contacts. *Johnson v. Am. Leather Specialties Corp.*, 578 F.Supp.2d 1154, 1167 (N.D. Iowa 2008). That one of the parties is domiciled or does business in a given state will usually carry little weight of itself. *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1042 (4th Cir. 1983). However, when these contacts are grouped together in a single state, that state's law should apply if either the defendant's conduct or the plaintiff's injury occurred there. *Id.*

Ms. Washburne's domicile in Grace is of little significance, as it is not grouped with any other contacts. Conversely, Firefly maintains its principal place of business in Haven. The Restatement (Second) of Conflict of law Section 145 comment e provides that a corporation's principal place of business is of more importance than its place of incorporation. *Linden,* 2010 WL 4840435 *7. Every contact with this cause of action, except for Ms. Washburne's domicile, is centered in Haven. The injury, the conduct causing the injury and the relationship between the parties are all significant contacts with Haven. Firefly's principal place of business is indeed grouped with these other contacts. Because these contacts are all grouped in Haven, the fact that Firefly maintains its principal place of business there further suggests the application of Haven law. *See Barnes Group,* 716 F.2d at 1042.

4. The Place Where the Relationship Between the Parties, if any, is Centered

The relationship between Ms. Washburne and Firefly was centered in Haven. Ms. Washburne sent her medical records to be digitized by Firefly in Haven, mailed a check to

Firefly's office in Haven, her records were stored on Firefly's servers in Haven and the first time she used Firefly's software was in Haven.

In a products liability action, the parties' relationship is centered where the "design, manufacture and sale" of the allegedly defective product occurs. *Brewer*, 447 F.Supp.2d at 1179 (*citing Perry v. Aggregate Plant Prods.*, 786 S.W.2d 21, 25 (Tex. App. 1990)); *Big Rivers Elec. Corp. v. Gen. Elec. Co.*, 820 F.Supp. 1123, 1125 (S.D. Ind. 1992).

The Sixth Circuit has held that the relationship between a consumer and a seller is deemed to be centered in the state where the tortuous conduct and safety of the product are regulated. *In re Bendectin Litigation*, 857 F.2d 290, 305 (6th Cir. 1988)(holding that Ohio was the place where the parties' relationship was centered because Ohio was responsible for regulating the marketing, manufacture and distribution of the allegedly defective drug). Some courts have suggested that the parties' relationship is centered in the state where the conduct causing injury occurred. *Brewer*, 447 F.Supp.2d at 1179 (*citing Perry*, 786 S.W.2d at 25).. One court has even suggested that "perhaps the relationship between the parties in a products liability case is centered in the state where the victim came in contact with the products of the defendant." *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 140 (5th Cir. 1991). That analysis, the *Allison* court stated, is to be used in situations where the product is mobile in its use. *Id*. at 142.

The Tenth Circuit found that the parties' relationship in a products liability action was centered in Texas "because the plaintiff ordered products from the defendant in Texas, and sent those products to Texas for repair." *Rocky Mountain Helicopters*, 24 F.3d at 128. Similarly, Ms. Washburne purchased Firefly's services from Firefly's office in Haven. She sent her medical records to Firefly in Haven, and when she required medical care, her doctor accessed the

electronic medical records from Firefly's server in Haven. (R. at 3-4). Thus, everything about the parties' relationship was centered in Haven.

As stated earlier, Firefly's software at issue was surely designed and manufactured in Haven, the location of its principal place of business. Additionally, the sale of its software to Ms. Washburne was also centered in Haven. Ms. Washburne's doctor sent the paper copy of her medical records to Firefly's offices in Haven, and Ms. Washburne herself mailed a check to Firefly's office in Haven in order to purchase a USB drive containing her digitized medical records. While Firefly did market its services to Ms. Washburne's doctor in Grace, this is insufficient in and of itself to suggest that the relationship was centered in Grace.

Additionally, Haven is where Ms. Washburne first came into contact with the software she purchased from Firefly. Haven is also the state which regulates Firefly's marketing, manufacture and distribution of its software. The specialized software provided by Firefly was indeed mobile in that the electronic medical records could be accessed and used anywhere that Ms. Washburne might travel. Had she required medical attention in some other state, her electronic medical records could have been accessed and used just as they were by the doctors in Haven. Thus, the analysis in *Allison* is applicable here. Because Ms. Washburne first came into contact with Firefly's services in Haven., it is the place where their relationship was centered.

It is evident that not just some, but all of the Section 145 factors weigh in favor of applying Haven substantive law. Ms. Washburne's injury occurred in Haven, the conduct which caused her injuries occurred in Haven, Firefly's principal place of business is in Haven and the parties' relationship was centered in Haven. The only contact Grace has with this cause of action is that Ms. Washburne was domiciled there. However, this contact is of little significance as all the relevant contacts surrounding this cause of action are centered in Haven. Having analyzed the

Section 145 factors, we now apply this analysis to the Section 6 factors to determine which state's substantive law will apply. Because the justified expectations of the parties and the certainty, predictability and uniformity of result are not of much importance in the case of personal injuries, the remaining Section 6 factors will assume more significance. Rest.2d Conflict of Laws § 145 comment. b (1971).

B. Analysis of the Restatement (Second) of Conflict of Laws Section 6 Factors shows that the State of Haven possesses the most significant relationship to the parties and the occurrence such that its law should be applied to this dispute

1. Needs of the Interstate and International System

Of great importance in applying choice of law rules is the furtherance of harmonious relations between the states and the facilitation of commercial intercourse between them. Rest.2d Conflict of Laws § 145 comment. d (1971). This factor, however, is not usually applied to for personal injury action. *Dorman,* 23 F.3d at 1359. Nevertheless, courts have held that the needs of the interstate and international system are respected when a state seeking to apply its law to the dispute has a "substantive connection" with the issue. *Johnson,* 578 F.Supp.2d at 1169. In *Estate of Pigorsch v. York Coll.*, 2010 WL 3328284 (N.D. Iowa 2010), the court held that the application of Iowa law would not disrupt interstate order, as the state had a substantive connection with the cause of action and Iowa's laws were not so abnormal as to disrupt the harmonious relations between the states.

Likewise, the application of Haven law would not be so abnormal as to disrupt the harmonious relations between the states or disrupt interstate commerce. Haven would apply the Restatement (Third) of Products Liability to this cause of action, and such law is by no means abnormal. Furthermore, Haven does have a "substantive connection" to this cause of action.

Every meaningful contact in Section 145 is centered in Haven. There could be no more a substantial connection than this.

2. Relevant Policies of the Forum

Another significant factor to take into consideration when determining which state's law to apply is the policy sought to be advanced by the law of the forum state. Prior to the application of one state's law over another, one must consider the policies sought to be advanced by the law of the forum state. Rest.2d Conflict of Laws § 6 cmt. e (1971). Every tort law, in essence, embodies a dual purpose: to both compensate the victim for his injuries and deter or punish misconduct. Rest.2d Conflict of Laws § 145 cmt. c (1971). The comments to Section 145 indicate that what is of particular concern with regard to this factor is the policy of "the state with the dominant interest in the determination of the particular issue." *Johnson*, 578 F.Supp.2d at 1170. The court in *Johnson* stated that Iowa's interest was not solely in compensating the victim of a tort, but also in having its law applied to tortuous conduct which occurs within Iowa's borders. *Id*.

Haven, having adopted the Restatement (Third) of Products Liability, would be seen as having a policy of protecting manufacturers within its state by requiring plaintiffs to plead additional facts in products liability actions. One possible reason for such a policy would be to encourage business investment within the state by offering these protections. This Restatement (Third) requires more proof of a product defect than does the Restatement (Second), thereby protecting companies within the state from excessive and potentially frivolous claims.

Additionally, Haven has an interest in furthering the use and development of health information technology. (R. at 8). To further this policy, both the Haven legislature and Congress have allocated funding to encourage its use. (R. at 8). The public policy goal is to lower the cost of health care to consumers. (R. at 8). Thus, by adopting the Restatement (Third) of Products

Liability, Haven is seeking to foster the development and use of this technology within its state by offering protections to companies which design and develop such technology. Electronic devices and systems are never completely flawless; there is always a risk of error. If a products liability claim could be brought every time there was an alleged error, very few if any companies would enter into the health information technology field, thereby frustrating Haven's public policy goals.

Haven would have a strong interest in applying its own tort law to disputes over alleged torts which occur within its own borders. *See Miller v. Long-Airdox Co.*, 914 F.2d 976, 978 (7th Cir. 1990)(holding that Indiana had a strong interest in applying its own law to a dispute that concerns the consequences of torts committed within its borders); *McLennan,* 245 F.3d at 426 (Texas possessed a strong interest in enforcing its products liability laws against manufacturers operating in the state). The allegedly tortuous conduct in this case occurred in Haven. This action involves a corporation with its principal place of business in Haven; a corporation which designed and manufactured its software in accordance with Haven law. Haven would have a strong interest in applying its own law to disputes over products designed manufactured within its borders as well as to torts which occur within its borders. Tort law, in general, seeks to compensate the victim for his injuries and induce parties to take care. *Edwardsville Nat'l Bank and Trust Co.,* 808 F.2d at 652. Haven indeed has a strong interest in regulating the level of care to be applied to manufacturers within its state and to regulate at what cost this care will come.

3. Relevant Policies of Other Interested States and the Relative Interests of Those States in the Determination of the Particular Issue

Not only should the court consider the policies sought to be achieved by the forum state's law, but also the policies of any other potentially interested states. Rest.2d Conflict of Laws § 6(c). The ultimate goal here is to apply the law which is most likely to further each state's

interests. *Guillory v. U.S.*, 699 F.2d 781, 785 (5th Cir. 1983). The state whose interests will be most affected by the cause of action should have its law applied. *Id.*

The purpose of Grace's law is most likely to compensate injured plaintiffs. Its products liability laws allows a plaintiff to proceed on a products liability claim with a much lower burden of proof than is required by Haven. However, Grace's interest in compensating tort victims does not override Haven's interest in protecting health information technology companies. The interests of the non-forum state in seeing its residents compensated for injuries is not overriding where other contacts with the state are minimal. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 953 (9th Cir. 2005). Allowing Haven companies to be subject to the products liability laws of Grace would result in fewer health care information technology companies and thus increased health care costs for Haven citizens.

Grace does not have a significant connection with this cause of action. The overwhelming majority of the relevant contacts are centered in Haven, which clearly has an interest in applying its own law to alleged torts committed within its borders by companies who operate within its borders, and which also has a strong interest in furthering its public policy of lower health care costs. Thus, because of Grace's minimal contacts, its interest in compensating injured residents of the state is not an overriding interest, especially when the injury itself occurred outside of Grace's border.

4. Protection of Justified Expectations

The general purpose of this factor is to ensure that a person is not held liable for his actions in one state when he tailors his conduct to conform to another state's requirements. Rest.2d Conflict of Laws Section 6 comt. g (1971). This contact is of little value in a products liability case, as no one plans to have an accident. *Johnson*, 578 F.Supp.2d at 1171.

However, if one of the parties has conformed his conduct to the requirements of one state's law, he should not be held liable in another state. *See Edwardsville Nat'l Bank and Trust Co.*, 808 F.2d at 651 (the physicians and hospital defendants all practice in Indiana and attempt to conform their conduct to demands of the law of that state, so it would be unfair to subject them to liability elsewhere).

Firefly designed and manufactured its software and services from the State of Haven, and attempted to conform its products and conduct to the mandates of Haven law. Haven is the location where Firefly receives a customer's medical records, scans the records into their system and stores the records in their servers for anyone with authorization to access. Because every aspect of Firefly's conduct occurred in Haven, it would be severely unfair to subject them to the law of another state, such as Grace, whose product liabilities law is significantly more favorable to a plaintiff.

5. The Basic Policies Underlying the Particular Field of Law

In any cause of action, there are certain policies which underlie the particular field of law under which a lawsuit is brought. Thus, in choosing which state's law to apply to a given dispute, the court should choose the law which will best achieve the policy underlying the particular field of law involved. *Hoiles v. Alioto*, 461 F.3d 1224, 1232 (10th Cir. 2006); Rest.2d Conflict of Laws § 6 cmt. h (1971). When the policy of the law involved is to deter misconduct, the place where the conduct occurred may have the dominant interest in having its law applied. Rest.2d Conflict of Laws § 6 cmt. h (1971). On the other hand, if the purpose of the law is to compensate injured victims, then the law of the place of the injury will likely be applied. *Id*.

In this case, both the conduct causing the injury and the injury itself occurred in Haven. Most, if not all tort rules are designed to both compensate the injured plaintiff as well as regulate and punish misconduct. *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*, 485

F.3d 1233, 1241-42 (11th Cir. 2007). Haven's law would likely be seen as furthering this dual purpose, as it allows for injured plaintiff to recover even though additional proof is required. Even so, because the conduct causing injury and the injury itself both occurred in Haven, Haven is the only state whose law would further these policies.

6. Certainty, Predictability and Uniformity of Results

As stated previously, this factor is of little importance in tort causes of action. Parties normally do not plan for accidents to occur, and as such, the parties are unlikely to give much advance thought as to the appropriate choice of law to apply. *Grupo Televisa*, 485 F.3d at 1245; Rest.2d Conflict of Laws § 145 cmt. b (1971).

Again, however, it would be unfair to subject Firefly to the laws of Grace. Every substantive connection to this cause of action rests in Haven, and Firefly sought to conform its products and conduct to the laws of Haven. Under Haven law, Firefly would not be liable for the injuries suffered by Ms. Washburne. Under Grace law, Firefly might be liable under a variety of products liability theories. In order to further the principle that results should be uniform and predictable, this Court should apply Haven law. The application of Grace law would do nothing more than impede this goal, as Firefly would be subject to the laws of a state which had no significant connection with this cause of action.

7. Ease in Determination and Application of the Law to be Applied

The goal here is to ensure that the substantive law to be applied can be applied both simply and easily. Rest.2d Conflict of Laws § 145 cmt. c (1971). Indeed, Haven's law can be applied in a simple and easy manner, as no or complex laws are involved. There is nothing so complex in the Restatement (Third) of Products Liability that the federal district court sitting in Haven would have difficulty applying it. In fact, because this cause of action was brought in a Haven court, there is no court more qualified to apply laws of Haven.

In summary, the presumption found in Restatement (Second) of Conflict of Laws Section 146 has not been overcome. Haven, the state where the injury occurred, has the most significant relationship to the parties and the occurrence, and analysis and the Section 145 of Section 6 factors solidifies this finding. Therefore, because Haven has the most significant relationship to the parties and the occurrence, its law should be applied to this dispute.

II. THE RESPONDENT'S CLAIM DOES NOT SURVIVE A FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) MOTION TO DISMISS AS SHE HAS FAILED TO STATE A CLAIM BASED UPON WHICH RELIEF CAN BE GRANTED

Because Haven law governs this dispute, Ms Washburne has failed to state a claim of strict product liability. The Federal Rules of Civil Procedure only require that a plaintiff provide a short and plain statement of the facts showing that she is entitled to relief. FED. R. CIV. P. 8(a). The Supreme Court has stated that labels and conclusions and a formulaic recitation of that fact are not enough to survive in the pleading stages. *Bell. Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true). If a plaintiff's claims do not rise beyond the speculative level then the court will dismiss the action. FED. R. CIV. P. 12(B)(6). As Haven law is the applicable standard, Ms. Washburne's complaint does not survive the pleading stages.

In a strict products liability claim, a plaintiff carries the burden of proof. *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 358 (N.J. 1988). Under the Restatement (Third) of Torts, respondent may bring a claim for strict product liability under three theories: (1) manufacturing defect, (2) defective design, and (3) warning defect. Rest. (Third): Products Liab. § 2. In addition, under either design or warning defect, the plaintiff must prove that a reasonable alternative design was available at the time of the injury. *Id.* Furthermore, the plaintiff must

prove that the defendant's product was the "but for cause" and "proximate cause" of the injury. Rest. (Third) of Torts: Product Liab. § 2 Cmt. q (1998). Finally, the Restatement (Third) of Torts states that if two or more claims are asserted which are factually identical, those claims cannot be brought together. Restatement (Third) of Torts: Product Liab. § 2 Cmt. N (1998).

Ms. Washburne failed to sufficiently plead a claim under any of the three theories. Furthermore, she has failed to identify that any reasonable alternative design existed at the time of injury or that Firefly was the "but for cause" and "proximate cause" of her injury. She is subsequently barred from bringing a claim for breach of implied warranty of merchantability, because the manufacturing defect claims and implied warranty claim rest upon the same identical facts, which is impermissible under Haven law. In addition, the implied warranty claim and defective design claim both require the same risk-utility assessment, which could cause jury confusion and lead to inconsistent jury verdicts. Ms. Washburne's claims have risen only to the level of mere speculation, and fall severely short of the inference standard established under *Twombly*.

A. The Respondent has failed to sufficient plead a claim for strict products liability under Haven law

Because Haven law requires a showing of more, Ms. Washburne failed to establish a claim for relief that goes beyond mere speculation. Though many states follow the second restatement of torts, Haven has adopted the Restatement (Third) of Torts which governs product liability suits. Similar to the second restatement of torts, the third restatement that states a plaintiff may bring a claim against a manufacturer or seller for a defective product under three separate theories: (1) manufacturing defect, (2) defective design, or (3) inadequate warning or failure to warn. Rest. (Third): Products Liab. § 2 (1998). However, the Restatement (Third) differs in that it requires additional showing than that of the second restatement. To successfully

plead either a design or warning defect, a plaintiff must show that a reasonable alternative design was available. Finally, a plaintiff must show that the product was the "but for cause" and the "proximate cause" of the injury. Rest. (Third): Product Liab. § 2 cmt. q (1998).

In the case at bar, Ms. Washburne failed to state a claim for sufficient showing of a manufacturing defect, defective design or warning defect to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. She also failed to establish that a reasonable alternative design was available, or that Firefly's software was the "but for cause" and "proximate cause" of her injury. She merely claims that Firefly was the company that created the software accessed by Dr. Tam at UMC in Haven. Furthermore, she alleges that the electronic version which Dr. Tam accessed listed the word "NONE" in the known allergies field. (R. at 4). However, it is undisputed that the paper copy provided by Ms. Washburne's doctor and the records stored on Firefly's servers listed her allergy to penicillin. (R. at 4). In addition, Ms. Washburne not alleged that the more expensive system used by IBM would have been a reasonable alternative to Firefly's system nor do they show that it would have detected the absence of Washburne's allergy in the appropriate field. Finally, Firefly's warning included advising customers to review the information for error before the paper copy is discarded. (R. at 3). Firefly's customer was Dr. Frye, Ms. Washburne's physician. He was mailed a copy of the software to ensure its accuracy and to make changes and modifications as necessary. In addition, Ms. Washburne herself was mailed a copy of the electronic records on a USB flash-drive for her to review. (R. at 4). However, Ms. Washburne failed to do so and has since lost the USB flash-drive which she was provided. (R. at 4). For these reasons, her claim simply does not survive the pleading stage.

B. The Respondent failed to allege facts sufficient to bring a claim under the three theories of Haven's strict products liability law

1. Respondent has failed to establish a claim under a theory of manufacturing defect

Ms. Washburne failed to show that a manufacturing defect existed in Firefly's software. In order to succeed on a manufacturing defect claim, a plaintiff must prove the product departed from its intended function even though all possible care was taken by the manufacturer. *Dambacher v. Mallis*, 485 A.2d 408, 426 (Pa. Super. Crt. 1984). The mere occurrence of an accident and the mere fact that someone was injured is insufficient to show a manufacturing defect. *Zara v. Marquess and Nell*, Inc., 675 A.2d 620, 620 (N.J. 1970). Haven law requires that a plaintiff prove that a defendant was the "but for cause" and "proximate cause" of the plaintiff's injury. (R. at 7). Proximate cause is the legal cause of one's injury. *Coffman v. Keene Corp*., 628 A.2d 710, 712 (N.J. 1993). To show that a defendant was the proximate cause of the injury, the plaintiff must show that it was owed a duty by the defendant which was breached. *Van Buskirk v. Casey Canadian Mines*, Ltd., 760 F.2 481, 492 (3d Cir. 1985). Proximate cause is a necessary element in proving a strict liability claim. *Chelcher v. Spider Staging Corp*., 892 F.Supp 710, 715 (D. V.I. 1995)(holding that proximate cause and liability relies on responsibility not physics). Furthermore, in determining whether Firefly's software was the "but for" or actual cause of Ms. Washburne's injury, she must show that "but for" Firefly's breach its duty owed to her, her injury would not have occurred. *Menne v. Celotex Corp*, 861 F.2d 1453, 1468 (10th Cir. 1989). Ms. Washburne has failed to establish that the alleged defect was the cause in fact of her injury. Her claim merely states that she was injured as a result of the word "NONE" in the allergy field. However, this is insufficient to establish an inference that Firefly was the "proximate cause" or the "but for cause" of her injury.

Firefly's electronic software was intended to passively accept information, and its software served that purpose. (R. at 8). Firefly sold a software program that allows physicians to

upload medical records electronically. This software was securely shipped to Dr. Frye for him to review and to update as needed. Ms. Washburne has not sufficiently presented a claim that rises beyond mere speculation that a defect existed prior to sale. She bears the burden of proof in demonstrating that the defect existed and that the product failed to adhere to its design specifications. *Toms v. J.C. Penny Co*., 121 C.A.3 124, 124 (3d Cir. 2008). In order to demonstrate the existence of a manufacturing defect under Haven law, a plaintiff must: (1) show direct evidence the defect arose in the hands of the manufacturer, (2) show circumstantial evidence which would create an inference that the defect existed prior to sale or (3) negate other causes for the failure of the product for which the defendant would not be responsible in order to create an inference that the defect was attributable to the manufacturer. *Scanlon v. General Motors Corp*., 326 A.2d 673, 678 (N.J. 1974)(in addition to showing that the product was defective, a plaintiff must also show that the defect formed in the hands of the manufacturer).

In this case, Ms. Washburne offers no direct evidence whatsoever that a defect arose while the software was in the possession of Firefly. On the contrary, it is undisputed that the paper copy of Ms. Washburne's records and the record stored on Firefly's server reflect Ms. Washburne's penicillin allergy. (R. at 4). Firefly securely shipped its electronic version of the medical records to Dr. Frye for his review. (R. at 4). Furthermore, Ms. Washburne misplaced the flash drive that she was provided by Firefly to review. (R. at 3). The reflection of "none" listed in the allergy field was only discovered when Dr. Tam accessed them via electronic web portal. (R. at 4). This is by no means direct evidence that a manufacturing defect existed in Firefly's software. Thus, Ms. Washburne fails to establish a claim under manufacturing defect.

In addition, Ms. Washburne failed to provide any circumstantial evidence which would infer that the alleged defect existed prior to sale. Circumstantial evidence can be shown by

providing proof of proper use, handling, operation of the product, or the nature of the malfunction. *Scanlon*, 65 N.J. At 591. The age and prior usage of the product in relation to its expected life span are also factors to consider in conjunction with circumstantial evidence. Id. at 593. However, Ms. Washburne has failed to provide any circumstantial evidence in her complaint. The simple fact that the word "NONE" appeared in the known allergies field is by no means evidence, circumstantial or direct, of a manufacturing defect. There could be a million and one different reasons why it was listed there. A glitch could have occurred in University Medical Center's computer system or, more likely, the Firefly employee responsible for the input of the information from the medical records into Firefly's software could have mistakenly overlooked the allergy. If no allergy existed, the software was designed to enter "NONE." (R. at 4). This is exactly what the software did. No more, no less.

Finally, Ms. Washburne failed to negate any other possible causes of failure for which Firefly would be responsible, and thus she failed to create an inference that a defect resulted from Firefly. The electronic software was securely shipped from Firefly to Dr. Frye. (R. at 4). The paper record and the electronic copy located on Firefly's servers indicate the allergy. (R. at 3). It was only when Dr. Tam accessed her electronic history that the allergies field indicated "NONE." (R. at 4). Ms. Washburne does not negate this fact. (R. at 4). She also does not negate that fact the defect could have occurred in the hands of Dr. Frye after Firefly mailed the software to him, that the computer systems at University Medical Center could have caused a glitch or that a Firefly employee may have overlooked the allergy in the transcription process. Because Ms. Washburne has failed to establish a claim under any of the three elements of a manufacturing defect claim, her strict liability claim for a manufacturing defect fails.

2. Respondent has failed to show that a reasonable alternative design existed at the time of her injury

Ms. Washburne failed to state a claim under a strict liabilit for defective design sufficient to survive a motion to dismiss. Fed. R. Civ. P. 12(b)(6). To succeed under a defective design theory, a plaintiff must not only prove that the foreseeable risks of harm could have been eliminated or reduced by implementing a reasonable alternative design, but also that the omission of the alternative design renders the product unsafe. Rest. (Third) of Torts: Products Liab. §2(B) (1998). To determine whether benefits outweigh the cost, a risk-utility analysis must be conducted. Id. Cmt. A. A judge will make this determination under a weighted view of evidence, considering the facts in the light most favorable to the plaintiff. *Moyer v. United Dominion Indus. Inc*., 473 F.3d 532, 538 (3rd Cir. 2007)(holding that if a judge finds as a matter of law that the product was unreasonably dangerous, the claim does not go to a jury). *Id*. In analyzing the risk-utility of a product, the third circuit has established a seven factor test which weighs the risks and utility of a product: (1) the usefulness and desirability of the product, (2) the safety aspects of the product, (3) the availability of a substitute product which would meet the same need and not be as unsafe, (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility, (5) the user's ability to avoid danger by the exercise of care in the use of the product, (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability and (7) the feasibility, on the part of the manufacturer of spreading the loss, of setting the price of the product or carrying liability insurance. *Robinson v. Midwest Folding Products Corp*., 2009 WL 928503, at *6 (E.D.P.a. April 7, 2009).

In analyzing the first prong of the risk-utility test above, the usefulness and desirability of Firefly's software to its users and to the public as a whole must be assessed. *Id*. Health information technology is both useful and desirable. (R. at 8). It provides easier access to

medical records and reduces health care costs. Electronic medical records can be maintained and updated easier than paper records and provides a more cost-efficient benefit to consumers. (R. at 8). Firefly's medical records storage software is beneficial because it can be accessed quickly and efficiently, and operates to lower health costs altogether for its consumers.

The second prong of the risk-utility test assesses the safety aspects of the product. *Id.* A product is not defective simply because an accident occurred. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975). The actual rate of injuries caused by the product is extremely important when evaluating safety. *Monahan v. Toro Co.*, 856 F. Supp 955, 958 (E.D. Pa., 1994). Firefly's employees are instructed to ensure that the information they upload into the software matches the information in the paper record. (R. at 3). Dr. Frye, as a Firefly customer, had a duty to review the information for inconsistencies. Furthermore, Ms. Washburne was given a USB copy to check for any inconsistencies, which she did not do. (R. at 3). Firefly's system has never been deemed unsafe and Ms. Washburne pled no evidence which would change that fact. She merely claims because she was injured, Firefly's software must have been defective. Ms. Wasburne had the burden of proving that Firefly's software was inherently unsafe, and she failed meet this burden.

The availability of a substitute product which would meet the same need and not be as unsafe is the next prong on the risk-utility test. *Robinson*, 2009 WL 928503 at *6. Ms. Washburne alleges that IBM, Firefly's competitor, has a superior warning system for its software. (R. at 3). IBM incorporated a final check feature in its product which signals a red flag if major inconsistencies arise between the paper record and the electronic one. (R. at 3). The user is not allowed to move on until that field has been corrected. (R. at 3). Ms. Washburne fails to show that this system is better suited than Firefly's to catch inconsistencies or that the alleged

defect would not have arisen had Firefly implemented the IBM system. Furthermore, if the omission of her penicillin allergy arose outside of Firefly's control, IBM's final check feature would not have caught such an omission.

The fourth prong is the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. *Id*. Ms. Washburne relies on IBM's final check flag feature as a way to catch problems during the transcription phase. However, because she has not established causation in the complaint, there is no evidence to suggest that this feature would effectively eliminate the problem type of problem which occurred here. In addition, IBM's checking system is ten percent more costly than Firefly's system. (R. at 3). Their system is more difficult to operate and requires additional training, which thus increases its manufacturing cost. (R. at 3). Ms. Washburne does not allege that this feature's possible effectiveness would outweigh the additional costs which would be passed on to consumers. Because she does not plead this in her complaint, she fails to meet her burden in showing that IBM's system would eliminate problems of this kind or that the cost of the feature's utility will outweigh the feature's additional costs to consumers.

The fifth prong of the utility-risk test is the user's ability to avoid danger by exercising care in the use of the product. The proper focus when analyzing this prong is an inquiry into whether the class of ordinary purchasers of the product could avoid injury through the exercise of care in use of the product. *Surace v. Caterpillar Inc*., 111 F.3d 1039, 1052 (3d Cir. 1997). Firefly asks all customers to review the electronic software for inaccuracies before discarding the paper record. (R. at 3). Evidence shows that Ms. Washburne's allergy was reflected on the paper copy and on the copy stored on Firefly's servers. (R. at 4). Dr. Frye, as a Firefly customer, had a duty to ensure that the information was correctly entered into Firefly's software. In addition, Ms.

Washburne was mailed a USB flash-drive containing the electronic record, and could have reviewed the information herself. (R. at 3). She failed to do so, and has since lost or misplaced the USB flash-drive. (R. at 3). Ms. Washburne has offered no evidence that the software system was correctly used by Dr. Tam when he accessed her electronic record through University Medical Center's computer system. Furthermore doctors are fully aware of the problems of keeping and maintaining accurate medical records, whether paper or electronic. It is reasonable to expect that electronic software might have some problems, yet Dr. Tam chose to rely solely on the electronic records rather than check the paper record. As no emergency existed at the time the penicillin was administered, Dr. Tam should have conducted a more thorough check for allergies.

The sixth prong of the utility-risk test is the user's anticipated awareness of the dangers inherent in the product and their avoidability. *Robinson,* 2009 WL 928503, at *6. In determining the importance of this prong, it is assumed that the general public has some knowledge of the products they use and the existence of suitable warnings or instructions. *Landenese v. Vanderlans and Sons, Inc*., 2007 WL 1521121 at *4 (E.D.P.a. May 21, 2007). Customers should expect that electronic devices will have some defects or problems. Therefore, customers should take measures to avoid preventable problems. (R. at 8). Dr. Frye's responsibility was to check the software to make sure the information correct. Ms. Washburne should have checked her USB copy of the records for inaccuracies. Finally, Dr. Tam could have sought out the paper copy of Ms. Washburne's record or contacted Dr. Frye prior to administering the penicillin.

The seventh and final prong is the feasibility on the part of the manufacturer of spreading the loss by setting the price of the product or carrying liability insurance. *Robinson,* 2009 WL 928503 at *6. Ms. Washburne did not provide enough evidence to form a sufficient basis to

analyzing this prong. There is no evidence to suggest that the utility of the additional protective measures would work or that their utility would outweigh the added cost that will be placed upon consumers.

3. Respondent failed to adhere to the warning issued by Firefly Systems, Inc.

Ms. Washburne failed to establish that the software defect was foreseeable by Firefly or that they even had a duty to warn customers of potential inaccuracies. To establish a claim for warning defect, a plaintiff must demonstrate that the foreseeable risks of harm could have been avoided or reduced by reasonable instructions or warnings. Rest. (Third) of Torts: Products Liability § 2(C) (1998). In addition, a plaintiff must prove that the omission of the warning renders the product unsafe. *Id*. However, before reaching a question of whether the product contained an adequate warning, a plaintiff must show that there was a latent danger of which the manufacturer had a duty to warn. *Matthews v. Univ. of Loft Co*., 903 A2d 1120, 1125 (N.J. 2006). In essence, the manufacturer must foresee the danger and must provide adequate warnings to its users in order avoid liability on a strict liability claim. *Brochu v. Ortho Pharm. Corp,* 642 F.2d 652, 657 (1st Cir. 1981)(holding that a warning can be foregone if the risk of using the product is obvious to the user). Furthermore, the failure to read or adhere to warning by the manufacturer bars recovery. *Rhodes v. Interstate Battery Sys. of Am.,* 722 F.2d 1517, 1519 (11th Cir. 1984)(citing *Stapleton v. Kawaski Heavy Indus*. *Ltd*., 608 F.2d 571, 573 (5th Cir. 1979)). Therefore, if the manufacturer has provided an adequate warning if consumer does adhere to these warning they are barred from recovery on a strict product liability issue. *Id*.

In the case at bar, Firefly software system was not inherently dangerous and adequate warning to check the electronic copy were given to its customers. Firefly's system was created to upload medical data electronically and this purpose was fulfilled in this case. (R. at 2). Firefly

directs all of its customers to verify the information on the software before disposing of their paper copy. Dr. Frye did not adhere to these instructions nor did Ms. Washburne, as she failed to examine the USB flash-drive. (R. at 3). The USB would have served as a warning that the information was not correctly input. In addition, Firefly's servers list the allergy in the correct field and, as the USB flash-drive was not reviewed and has since been misplaced, there is no proof that any defect existed prior to sale. (R. at 4). Finally, Ms. Washburne and Dr. Tam could have reasonably expected there to be some complications with electronic software. Rather than procuring a paper copy of the records or contacting Dr. Frye, Dr. Tam chose to rely only upon the electronic version when verifying Ms. Washburne's allergies. (R. at 4). Therefore, Firefly's warning was adequate, and Ms. Washburne is therefore barred from recovery on a failure to warn claim.

C. Under Haven law, the Respondent is barred from bringing two factually identical claims and therefore cannot bring a claim for breach of implied warranty

Ms. Washburne failed to establish a claim for breach of implied warranty of merchantability against Firefly and thus does not survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. An implied warranty of merchantability is a guarantee to the buyer that goods purchased from the seller will be fit for the purpose in which they were intended to be used. U.C.C. § 2-314. This implied guarantee need not be written or spoken; it is assumed that the goods will be merchantable upon purchase of the produce. U.C.C. § 2-314. The Uniform Commercial Code (U.C.C.) has been adopted by most states and provides that courts may imply a warranty of merchantability when: (1) the seller is a merchant of such goods, and (2) the buyer of such goods uses the goods for the ordinary purposes for which the goods are sold. U.C.C. § 2-314. In addition, the U.C.C. states that sellers will be liable for injuries arising from the breach of an implied warranty of merchantability. U.C.C. § 2-715(2)(B) (2003). However, if there is a

conflict between an implied warranty claim and a tort claim as to whether the goods will be considered to be merchantable, the applicable state law for products liability will apply. U.C.C. § 2-314 cmt. 7 (2003). This warranty is not intended to guarantee high quality or even perfection of the product. *Tracy v. Vinton*, 130 Vt. 512, 516, 296 A.2d 269, 272 (Vt. 1972). The establishment of a breach an implied warranty of merchantability requires a showing of a defect in the product and causal connection to the seller. *Vt. Food Indus., Inc. v. Ralston Purina Co*., 514 F.2d 456, 462 (2d Cir. 1975)(holding that plaintiff must show sufficient evidence of causation and defect to sustain a verdict for breach of implied warranty of merchantability).

Because Haven law governs this dispute, Ms. Washburne is barred from pleading two or more factually identical claims. Restatement (Third) of Torts: Product Liab. § 2 Cmt. N (1998). Because the claims of defective design, failure to warn, and implied warranty of merchantability all depend upon a risk-utility analysis, allowing them all to go to the jury under a different label would cause jury confusion and could result in inconsistent verdicts. *Id*. Restatement (Third) of Torts: Product Liab. § 2(a) specifically provides that manufacturing defect and implied warranty of merchantability claims rest on the same factual predicate and therefore cannot be pursued simultaneously. Because Haven law bars factually identical claims, Ms. Washburne has failed to state a claim upon which relief can be granted on the breach of implied warranty of merchantability claim.

CONCLUSION

The substantive law of the State of Haven should apply to this cause of action. Haven has the most significant relationship to both the parties involved and the events which gave rise to the cause of action. Under the Restatement (Second) of Conflict of Laws, the state which has the most significant relationship to the parties and occurrence should have its law applied.

Conducting the appropriate analysis, it is clear that Haven has the most significant relationship. Haven is the state where the injury occurred, where the conduct causing the injury occurred, where Firefly maintains its principal place of business and where the relationship between Respondent and Petitioner is centered. Because the analysis of each of these factors points to the application of Haven law, it is clear that Haven substantive law should apply.

Because Haven substantive law applies, the strict liability claim will be governed under the Restatement (Third) of Torts: Products Liability. In analyzing the Restatement (Third) of Torts, Respondent has failed to establish a claim under manufacturing defect, defective design, or failure to warn. In addition, Respondent has failed to produce evidence that a reasonable alternative existed at the time of the injury as required under Haven Law. Furthermore, neither Dr. Frye nor Ms. Washburne heeded the warning by Firefly to review the information uploaded on Firefly's servers, and thus Respondent is barred from bringing a failure to warn claim. Finally, under Haven law, Respondent is barred from bring two factually identical claims together. Because Respondent's pleadings do not rise beyond the level of mere speculation, Respondent has failed to state a claim upon which relief can be granted.

For the foregoing reasons, the Petitioner respectfully asks that this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.

CERTIFICATE OF SERVICE

We, the undersigned counselors for Petitioners, do hereby certify that we have this day caused to be served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

The Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

The United States Court of Appeals for the Thirteenth Circuit
2000 North State Street
Capitol City, Haven 55565

United States District Court for the District of Haven
289 Main Street
Capitol City, Haven 55567

Stephen T. Spencer
Attorney for the Respondent
1556 Broadway St.
New York, NY 10108

THIS the 11th day of February, 2011.

Team #9

Counselors for the Petitioners