IN THE SUPREME COURT OF THE UNITED STATES

April Term 2010

DOCKET No. XX-XXXX

Firefly Products, Inc.,

Petitioners

-V-

In re Estate of Zoe Washburne,

Respondent

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

BRIEF FOR PETITIONER

Team #15

TABLE OF CONTENTS

TABLE OF AUTHORITY

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

State Court Cases

STATUTES & RULES

STATEMENT OF QUESTIONS PRESENTED

I. 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?

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

STATEMENT OF THE CASE

A. Firefly Systems, Inc. Digital Medical Record Keeping

Firefly Systems, Inc. ("Firefly") is a company specializing in electronic medical recordkeeping systems. (R. at 2.) The company is incorporated in Delaware with its principle place of business in Haven. (*Id*.) The electronic medical records Firefly manufactures, designs, and sells helps primary care and other medical professionals access patient's medical records to allow for easy and instant transmission between physicians. (*Id*.) Firefly digitizes client's medical records for twenty-five dollars and provides digitized medical records to its clients through a USB flash-drive. (*Id*.) A copy of the client's medical records is also uploaded directly to participating hospitals computers and to a web portal server operated by Firefly. (R. at 3.) The software used by Firefly is mass-produced and is not tailored to any one hospital. (R. at 2.)

In order to digitize medical records, clients provide Firefly with a paper copy of their medical records furnished through their primary care provider. (R. at 3.) Once Firefly digitizes the medical records, Firefly sends the USB flash-drive to the client's primary care physician to deliver to the client. (*Id*.) Firefly employees are instructed to ensure all information input into the digital record match the paper record exactly. (*Id*.) The medical records include personal and family medical history, in addition to notes, charts, and records of procedures in the past and present. (*Id*.) Further, clients are instructed to verify the digital records match the paper records supplied by the primary care physicians. (*Id*.)

Firefly's service differs slightly from other competitors in the medical records storage industry. (*Id*.) Firefly's chief competitor is IBM who was first to the market with their medical record technology. (*Id*.) Their technology is considerably more costly, around ten percent, than Firefly's product. (*Id*.) IBM's product differs from Firefly's in that it has instituted a "final check

flag system." (*Id*.) The flag system is designed to ensure errors are not made in inputting data from paper to digital form by requiring clients to confirm flagged data fields are correct before use. (*Id*.) This IBM system is more difficult to operate and requires greater costs to train personnel. (*Id*.)

B. Firefly's Contact with Appellee and Emergency Surgery

In late 2008, Firefly received an order from a Zoe Washburn ("Respondent") through her primary care physician Dr. Kaylee Frye. (R. at 2.) Respondent was born August 21, 1982 and worked at River Middle School in Whitefall, Grace. (*Id*.) From the age of five, Respondent had suffered from a penicillin allergy. (*Id*.) Upon receipt of Respondent's USB flash-drive from Firefly, Respondent never reviewed the digitized medical record and the flash-drive has since been misplaced. (R. at 3.)

On September 10, 2008, Respondent was on a school trip in Capitol City, Haven when she was rushed to the hospital complaining of acute abdominal pain. (*Id*.) Accompanied by fellow co-workers, Respondent eventually became unconscious and was diagnosed with appendicitis. (*Id*.) The hospital obtained Respondent's medical records through Firefly's web portal after acquiring her driver's license. (*Id*.) After obtaining the medical record, hospital on call surgeon Dr. Simon Tam, verified the initial diagnosis of appendicitis and initiated immediate surgery to remove Respondent's appendix. (*Id*.)

Unfortunately, the medical record used by Dr. Tam failed to disclose Respondent's penicillin allergy and she was given penicillin to avoid post-surgery infection. (R. at 4.) The paper copy given by Dr. Frye to Firefly did contain the penicillin allergy. (*Id*.) As a default, Firefly labels blank data fields as "NONE," which is what Respondent's digital medical record

showed. (*Id*.) It is unknown why the medical record procured by the hospital did not show Respondent's penicillin allergy. (*Id*.)

Following the hospitals administering of penicillin, Respondent began to experience respiratory problems associated with her penicillin allergy and was given epinephrine to alleviate her allergic reaction. (*Id*.) Respondent recovered and was discharged on September 12. (*Id*.) Respondent's work obligation in Grace had ceased and she returned home with her parents. (*Id*.)

During the drive home once Respondent and her family crossed over into the Grace state line, Respondent collapsed and could not be revived. (*Id*.) Emergency paramedics were called to the scene and were unable to revive Respondent and she passed away. (*Id*.) Supposedly, the reaction the penicillin allergy and the delay in emergency response caused Respondent's death. (*Id*.) It was determined Respondent's second reaction was caused by biphasic anaphylaxis brought on by Respondent's initial allergic reaction post-surgery. (*Id*.)

C. Respondent's Suit and Trial Court Finding

Following the passing of Respondent, her estate initiated a suit against Firefly seeking damages for wrongful death and pain and suffering. (*Id*.) Respondent's suit set forth claims against Firefly including breach of express warranty, breach of implied warranty of merchantability, and strict products liability based on manufacturing, design and warning defect. (*Id*.) Respondent initially filed suit in Haven, but Firefly removed the action to federal court pursuant to diversity jurisdiction under 28 U.S.C. § 1332. (*Id*.) Firefly then filed a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (R. at 4.)

The trial court entered into a conflict of law analysis and correctly found the forum state as Haven. (R. at 6.) The court recognized a true conflict of law existed between the substantive

law of Haven and Grace given Haven utilizes the Restatement (Third) of Torts: Product Liability and Grace utilizes the Restatement (Second) approach. (*Id*.) The trial court next applied the Restatement (Second) Conflict of law analysis which is the chosen method in settling conflict of law situations in the forum state of Haven. (R. at 7.)

The court recognized in choosing applicable substantive law, Haven recognizes a presumption under § 146 of the Restatement (Second) that the place of injury's substantive law controls unless another state has a more significant relationship. (*Id*.) Additionally in addressing the Restatement (Second) § 145 "most significant relationship" test, the court found Haven law applied because Haven was the place of injury, where the injury causing conduct occurred, where the relationship between the parties was centered, and Firefly's principle place of business was Haven. (*Id*.) Following that determination, the court recognized Haven's adoption of the Restatement (Third) of Torts: Products Liability and found Respondent's suit failed to state a valid claim under a manufacturing defect, defective design or warning defect. (R. at 7-8.) Additionally the court found Respondent could not bring a claim for implied warranty or merchantability or an express warranty claim. (R. at 9.) Therefore, the trial court correctly granted Firefly's motion to dismiss. (*Id*.)

D. Thirteenth Circuit's Decision and Current Appeal

Respondent appealed the trial court's decision to the United States Court of Appeals for the Thirteenth Circuit. (R. at 10.) In the Thirteenth Circuit's analysis, the court accurately found the forum state of Haven applied the Restatement (Second) "most significant relationship" test to determine which state's substantive law applies in the suit. (*Id*.) The Thirteenth Circuit did not acknowledge Haven's presumption under Restatement (Second) § 146 that the place of injury substantive law applies in the suit. (*Id*.) The Thirteenth Circuit found Grace substantive law

applied because Respondent was domiciled in Grace, worked in Grace, had a primary care physician in Grace, and deemed the relationship between the parties to have been formed in Grace. (*Id*.) The Thirteenth Circuit went on to acknowledge Grace law applied which recognizes the Restatement (Second) of Torts and found Respondent's claims for strict products liability under a manufacturing design and warning defect may state a claim for which relief can be granted. (R. at 12.) Additionally, the Thirteenth Circuit found Respondent could bring a claim under an implied warranty of merchantability. (R. at 13.) Following the Thirteenth Circuit's decision, Firefly appealed to the Supreme Court and a Writ of Certiorari was granted. (R. at 14).

SUMMARY OF THE ARGUMENT

The decision of the Thirteenth Circuit should be reversed and Firefly's Motion to Dismiss should be granted for two reasons. First, based on the "most significant relationship" test, the law of Haven should govern this case. Second, the Respondent has failed to make a sufficient showing for strict products liability under Haven Law. Similarly, the Respondent has failed to establish the essential elements for strict products liability under Grace Law. Therefore, the Thirteenth Circuit should be reversed and Firefly's Motion to Dismiss should be granted

The harm suffered by the Respondent occurred in Haven; therefore, Haven choice of law rules apply. Under Haven's choice of law rules, there is a presumption that Haven substantive law governs because the harm suffered occurred in the state of Haven. The other factors in the "most significant relationship" test are not strong enough for Grace to overcome this presumption. In fact, most of the factors reinforce the presumption that Haven substantive law should apply. Therefore, the substantive law of Haven should apply to this case.

Under Haven law the Respondent has failed to make a sufficient showing for strict products liability. The Respondent has failed to establish that Firefly's product contained a

manufacturing defect. The Respondent has failed to establish that Firefly's product contained design defect. The Respondent has failed to establish that Firefly's product contained a warning defect. The Respondent has failed to establish that Firefly's product was the "but for" and proximate cause of the harm suffered. Furthermore, even if the court were to find that Grace substantive law governed, the Respondent has failed to establish that Firefly's product was defective or unreasonably dangerous. Therefore, the Respondent has not made a sufficient showing for strict products liability under Have or Grace Law and Firefly's Motion to Dismiss should be granted.

ARGUMENT

I. THE FORUM STATE OF HAVEN PRESUMES THE SUBSTANTIVE LAW OF THE PLACE OF INJURY GOVERNS UNLESS AN INTERESTED STATE HAS A MORE SIGNIFICANT RELATIONSHIP WITH THE SUIT.

Haven substantive law governs in this suit. Because this action is based upon diversity of citizenship, a district court must apply the substantive law, including choice of law rules, of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495-96, (1941); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). The state of Haven is the forum state in this case. (R. at 4.) A conflict of laws between two interested states must arise before raising the conflict of law issue. *Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik Ve Ticaret A.S.*, 10 F.3d 1015, 1018 (3d Cir. 1993). If the forum state law does not differ with the other interested state law, then a "false conflict" is created and the choice of law analysis is unnecessary. *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984).

The forum state of Haven has traditionally favored the *lex loci delicti* approach for choice of law issues. *Booker v. InGen, Inc.*, 241 Haven 17, 24 (2007). However, Haven has recently shifted with the more national movement and now applies the Restatement (Second) "most

significant relationship" test in determining choice of law issues *Id.* at 26. Haven courts begin conflict of law analysis with §146 of the Restatement (Second). (R. at 7.) This section creates a presumption that the law of place of injury controls unless another state has a more significant relationship with the lawsuit. Restatement (Second) of Conflict of Laws § 146 (1971). The Restatement outlines the "most significant relationship" test as follows:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue. § 145.

Haven utilizes the Restatement (Third) of Torts: Products Liability while Grace utilizes the Restatement (Second), thus a "true conflict" in substantive law exists. (R. at 6.) Importantly, Haven utilizes the rebuttable presumption that the place of injury's substantive law applies in a choice of law analysis. (R. at 7.) Further, Haven uses the "most significant relationship test" to determine if another state has a greater interest in the suit than the place of injury. (*Id*.)

The United States District Court accurately and completely analyzed the "most significant relationship" test in its opinion concluding that Haven law applied in this case. (*Id*.) In its opinion recognizing Haven's adoption of the "most significant relationship" test, the court acknowledged each factor outlined in the Restatement. (*Id*.) In the court's analysis, the court recognized the injury occurred in Haven, the conduct that caused the injury occurred in Haven, the place where the relationship between the parties is centered was Haven, and the Firefly's

principle place of business is Haven. (*Id*.) Further, the court addressed the contacts weighing against applying Haven law in noting the domicile of Respondent is in Grace and the initial relationship between the parties was created in Grace. (*Id*.) Despite the minimal interests Grace may have in the matter, the court accurately and correctly applied the "most significant relationship" test as outlined in the Restatement (Second) and concluded Haven law clearly and properly governs in this suit. Despite this thorough and accurate analysis, the Thirteenth Circuit failed to properly administer the "most significant relationship" test and should be reversed.

II. THE THIRTEENTH CIRCUIT ERRED IN HOLDING GRACE SUBSTANTIVE LAW GOVERNED BECAUSE THE COURT OVERLOOKED THE PLACE OF INJURY PRESUMPTION AND MISAPPLIED THE "MOST SIGNIFICANT RELATIONSHIP TEST."

The Thirteenth Circuit overlooked the place of injury presumption and misapplied the "most significant relationship" test in holding Grace substantive law governed. The court gave a miniscule analysis to the presumption or factors in its opinion stating:

> "The state of Grace has the most significant relationship to the parties and the events of this litigation. The Appellant is domiciled in Grace, works in Grace, her primary care physician is located in Grace, and the relationship between the parties was formed in Grace. As a result of these factors, Grace law applies to the resolution of this case." (R. at 11.)

First, the court fails to acknowledge the presumption that the place of injury, the state of Haven, should apply its substantive law in strict liability tort actions. Second, the court fails to utilize the "most significant relationship" test by failing to utilize the pertinent and clear factors in the test including where the injury occurred, where the conduct causing the injury occurred, and misapplied where the relationship between the parties originated. Pursuant to the Restatement (Second) "most significant relationship" factors, Haven law governs and the Thirteenth Circuit should be reversed.

A. The injury occurred in Haven and Haven law is presumed to govern in this case.

The state of Haven is the place of injury in this case and Haven substantive law should govern. Haven courts begin conflict of law analysis with §146 of the Restatement (Second). (R. at 7.) This section creates a presumption that the law of place of injury controls unless another state has a more significant relationship with the lawsuit. § 146. The Thirteenth Circuit fails to acknowledge Haven was the place of injury in this case and does not acknowledge the presumption that the place of injury substantive law should govern. Because Haven was the place of injury, Haven substantive law should govern.

A "strong" presumption should be recognized that the place of injury substantive law governs. *See*, *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 904 (Ill. 2007). In *Townsend*, the plaintiff filed strict products liability and negligence claims against department store chain for selling a defective lawnmower that injured the plaintiff in Michigan. *Id.* at 896. The plaintiff was a citizen of Michigan, the tractor was purchased in Michigan, the store chain's principle place of business was Illinois, and the tractor was manufactured by a South Carolina company. *Id*. In applying the conflict of law analysis, the court found the place of injury created a presumption that Michigan substantive law would govern pursuant to Restatement (Second) §146. *Id*. at 904. The court not only recognized a presumption that Michigan law should govern, but emphasized a *"strong"* presumption that could only be overcome by Illinois demonstrating a more significant relationship with the suit. *Id*. (*See also*, *Robinson v*. *McNeil Consumer Healthcare*, 615 F.3d 861, 865 (7th Cir. 2010) recognizing the presumption that the place of injury substantive law governs in forum states recognizing Restatement (Second) conflict of law analysis).

The product being manufactured and designed in a different state fails to overcome the place of injury presumption. *See*, *Walters v. Maren Eng'g Corp.*, 617 N.E.2d 170, 174 (Ill. App. Ct. 1993). In *Walters*, a plaintiff asserted claims including strict liability after being injured by a cardboard shredding system. *Id*. The court used the Restatement (Second) "most significant relationship" test to determine which substantive law would apply. *Id*. at 171. In applying the test, the court recognized Kansas was the place of injury, giving rise to a presumption that Kansas law would apply in the case. *Id*. at 174. The court found despite Illinois having an interest in the case, their interest failed to overcome the presumption that Kansas law should govern. *Id*. Although the allegedly defective machine was designed, manufactured, and sold by an Illinois company, the plaintiff being injured in Kansas was the controlling factor in using Kansas substantive law. *Id*.

States have a greater interest in applying their laws to injuries which occur within the state. *See*, *Hardly Able Coal Co., Inc. v. Int'l Harvester Co.*, 494 F. Supp. 249, 250 (N.D. Ill. 1980). In *Hardly*, a plaintiff claimed negligent design of a bulldozer designed, manufactured, and sold in Illinois with a principle place of business in Illinois. *Id*. The court applied the "most significant relationship" test to determine whether Illinois or Kentucky substantive law governed, recognizing the place of injury was presumed to control which substantive law applied. *Id*. As Kentucky was the place of injury in this case, the court held the factors in favor of applying Illinois law failed to overcome the presumption that Kentucky law should apply to protect the interests of those hurt within the state. *Id*.

As Haven is the place of injury in this case, the substantive law of Haven is presumed to govern. Like *Townsend*, the forum state of Haven presumes the place of injury substantive law controls unless another state has more significant interest in the suit. (R. at 7.) Unlike the conflict

in *Walters*, where the company manufacturing the product was located in a state other than the place of injury, Firefly's principle place of business is located in Haven, the place of injury. (R. at 2.) This overlap removes a significant impediment in the court's choice of law analysis. Further, like *Hardly*, Haven has a substantial interest in applying its laws to a company located within the state as well as the injury occurring within the state. (R. at 4.) Like the presumption implies, Haven has sufficient interest in seeing its laws applied to its own companies and to injuries that occur in its own borders. While *lex loci delicti* has been replaced due to its tendency to produce unjust results, § 146 of the Restatement (Second) creates a presumption that the place of injury substantive law applies and can be overcome with the factors outlined in § 145. The Thirteenth Circuit has failed to even recognize Haven as the place of injury, which is a factor in both §145 and § 146. (R. at 11.) Because Haven recognizes the place of injury presumption and Grace's interests fail to overcome the presumption, Haven substantive law should govern in the case.

B. The Thirteenth Circuit misapplied the "most significant relationship" test by failing to address where the injury occurred, where the conduct causing injury occurred, and misapplying where the relationship between the parties originated.

Haven substantive law governs after using the "most significant relationship" test. Haven has recently shifted with the more national movement from *lex loci delicti* and now applies the Restatement (Second) "most significant relationship" test in determining choice of law issues. *Booker v. InGen, Inc.*, 241 Haven at 26. The "most significant relationship" test considers factors including the place where the injury occurred, the place of the injury causing conduct, the domicile or residence of the parties, and the place of relationship between the parties. § 145.

In order to overcome the presumption that the place of injury law applies, an interested state should first show significant contacts by examining the place where the injury occurred.

Second, the state should show significant contacts with the place of the injury causing conduct. Third, the state should show significant contacts with the domicile or residence of the parties. Finally, an interested state should show significant contacts with the place of relationship between the parties.

1. Haven is the place of injury in this suit.

The state of Haven is the place of injury in this suit. A factor in the "most significant relationship" test of the Restatement (Second) is the place of injury. § 145. Because Haven was the place of injury in this suit, this factor favors applying Haven substantive law.

In *Townsend*, the plaintiff filed strict products liability and negligence claims against department store chain for selling a defective lawnmower that injured the plaintiff in Michigan. *Townsend*, 879 N.E.2d at 896. The plaintiff was a citizen of Michigan, the tractor was purchased in Michigan, the store chain's principle place of business was Illinois, and the tractor was manufactured by a South Carolina company. *Id*. The court applied the Restatement (Second) "most significant relationship" test and recognized Michigan as the place of injury. *Id*. at 906. The court noted that although the Restatement (Second) warned in certain circumstances, such as an airplane crash, created a place of injury fortuitously, the injury in this situation was significant due to the plaintiff's action of purchasing the lawn mower and using it in the state of Michigan. *Id*. (*See also*, *Robinson*, 615 F.3d at 867, finding the initial place of injury is the place of injury for the "most significant relationship" test).

Alleged tortious activity should be factored into determining the place of injury. *See*, *Halstead v. United States*, 535 F. Supp. 782, 787 (D. Conn. 1982) In *Halstead*, plaintiff's estate brought wrongful death actions against a company claiming defective design of airplane navigational charts allegedly causing a plane crash. Id. at 784. The company designed and

manufactured its products and was incorporated in Colorado, the plaintiffs were from Connecticut, and the plane crash happened in West Virginia. *Id*. The court recognized the shift from *lex loci delicti* and applied the Restatement (Second) "most significant relationship" test. *Id*. at 787. The court found although the deaths occurred in West Virginia, the alleged tortuous activity occurred in Colorado and Colorado law should apply. *Id*. The court found Colorado had numerous contacts with the litigation and had a significant financial interest in regulating the companies that operate within the state. *Id*. at 789.

The record clearly indicates the place of injury in this suit is Haven. Like *Townsend*, the place of injury's substantive law should govern and more importantly the injury suffered by Respondent was not fortuitous. Respondent made a deliberate choice to engage in business with Firefly whose principle place of business is Haven. (R. at 3.) Further, Respondent was in Haven on her own accord while in the course of her work. (R. at 3.) Crucially, Respondent was administered the penicillin in Haven after recovering from emergency surgery which ultimately caused her death. (R. at 4.) Unlike *Halstead*, the place of injury suffered by Respondent was not fortuitous and Haven has a strong interest in applying its laws being Firefly operates within the state. (R. at 4.) Because the penicillin was administered in Haven, Firefly manufactured and designed its product in Haven, and Respondent's injury was not fortuitous, this factor favors application of Haven law.

2. Haven is the place of injury causing conduct in this suit.

The state of Haven is the place of injury causing conduct in this suit. A factor in the "most significant relationship" test of the Restatement (Second) is the place of the injury causing conduct. § 145. Because Haven is the place of injury causing conduct in this suit, this factor favors applying Haven substantive law.

The place of injury causing conduct is where the product was manufactured. See, *Jones ex rel. Jones v. Winnebago Indus., Inc.*, 460 F. Supp. 2d 953, 996 (N.D. Iowa 2006). In *Jones*, plaintiffs brought suit against an recreational vehicle (RV) manufacturer alleging design defect, manufacturing defect, and inadequate warnings after a child was killed while retracting a slide-out room in the RV. *Id*. at 957. The plaintiffs named as defendants the manufacturer of the RV, Winnebago Industries, Inc., an Iowa corporation with its principle place of business in Iowa; the designer and manufacturer of the "slide out room" on the RV, a Washington corporation with its principle place of business in Oregon; and the company that rented the RV to the grandparents, a Colorado corporation with its principle place of business in Colorado. *Id*. The court using the Restatement (Second) "most significant relationship" test found that although the actual injury occurred in Idaho, the conduct on the part of the RV manufacturer was more significant as to the injury causing conduct. *Id*. at 966. Therefore, because Winnebago operated out of Iowa, this factor favored applying Iowa law. *Id*.

Contributory negligence skews the place of injury causing conduct determination. *See*, *Townsend*, 879 N.E.2d at 906. In *Townsend*, the plaintiff filed strict products liability and negligence claims against department store chain for selling a defective lawnmower that injured the plaintiff in Michigan. *Id.* at 896. The plaintiff was a citizen of Michigan, the tractor was purchased in Michigan, the store chain's principle place of business was Illinois, and the tractor was manufactured by a South Carolina company. *Id*. The court using the Restatement (Second) "most significant relationship" test found the injury causing conduct was unclear because the lawnmower and store chain were likely contributory negligent. *Id*. at 906.

The state where the product was manufactured is the place of injury causing conduct. *See*, *Allison v. ITE Imperial Corp*., 928 F.2d 137, 142 (5th Cir. 1991). In *Allison*, Mississippi

plaintiffs brought a products liability suit against a Delaware manufacturer for a defective circuit breaker that exploded in an accident in Tennessee. *Id*. at 138. The court instituted the Restatement (Second) "most significant relationship" test and found the place of injury in Tennessee controlled the substantive law for the suit. *Id*. at 141. The court further found the conduct causing injury factor pointed to Pennsylvania, being the state that manufactured the circuit breakers in question. *Id*. at 142.

The state of Haven is the place of injury causing conduct. Like *Jones*, the court should look favorably on applying Haven law because Firefly's alleged injury causing conduct is the most significant in a products liability suit. Because Firefly is situated in Haven where they designed and manufactured their product, like the RV manufacturer, the court should find this a crucial factor in determining where the injury causing conduct occurred. (R. at 2.) Unlike *Townsend*, the injury causing conduct all occurred in Haven. (R. at 4.) Not only is Firefly's principle place of business in Haven, but also the doctor administered the penicillin in Haven and the Respondent's injury manifested in Haven. (R. at 2-4.) Even if contributory negligence were a factor in this suit, Haven would still be the place of the injury causing conduct given Firefly's manufacturing location and the emergency surgery. (*Id*.) Further, like *Allison*, the place of manufacture and design is a considerable element in deciding the place of injury causing conduct. As the record indicates, Firefly manufactures its products from its principle place of business in Haven. (R. at 2.) Because the penicillin was administered and Firefly manufactured and designed its product in Haven, this factor favors applying Haven substantive law.

3. Haven is the principle place of business for Firefly, Inc., while Respondent is a resident of Grace.

Firefly's principle place of business is Haven, while Respondent is a resident of Grace. A factor in applying the "most significant relationship" test of the Restatement (Second) is the domicile or residence of the parties. § 145. Because states have a greater interest in regulating businesses that operate within their borders, this factor favors applying Haven substantive law.

The principle place of business is a more significant contact than a plaintiff's residence. *See*, *Jones*, 460 F. Supp. 2d at 971. In *Jones*, plaintiffs brought suit against an recreational vehicle (RV) manufacturer alleging design defect, manufacturing defect, and inadequate warnings after a child was killed while retracting a slide-out room in the RV. *Id*. at 957. The plaintiffs named as defendants the manufacturer of the RV, Winnebago Industries, Inc., an Iowa corporation with its principle place of business in Iowa; the designer and manufacturer of the "slide out room" on the RV, a Washington corporation with its principle place of business in Oregon; and the company that rented the RV to the grandparents, a Colorado corporation with its principle place of business in Colorado. *Id*. The court found, although the plaintiff and RV manufacturer resided or were incorporated in different states, the incorporation of the manufacturer was more significant. *Id*. at 971. The court reasoned grouping the RV manufacturers other contacts with their place of business rendered it more significant than the plaintiff's place of residence. *Id*.

States have an interest in regulating businesses within their state. See, *Lewis-DeBoer v. Mooney Aircraft Corp.*, 728 F. Supp. 642, 645 (D. Colo. 1990). In *Lewis-DeBoer*, plaintiffs brought a products liability action against an airplane manufacturer to recover damages arising out of crash. *Id*. at 643. The plane was designed, manufactured, and promoted in Texas, with the

company's principle place of business in Texas. *Id*. The plaintiffs were Colorado citizens and the airplane crash occurred in Colorado. *Id*. In administering the "most significant relationship test," the court found the injury causing conduct factor favored applying Texas law. *Id* at 644. Further, the court found the company's principle place of business in Texas was crucial compared to plaintiffs merely living in Colorado and favored the application of Texas law. *Id* at 645. The court reasoned the products were designed and manufactured in Texas and Texas had a public policy interest in regulating business' that operate within the state. *Id*.

Firefly operating out of the state of Haven is the significant factor in this case which favors applying Haven law. Like *Jones*, Firefly and Respondent reside in different states. (R. at 2.) Crucially, the penicillin injury to Respondent as well as the design and manufacture of Firefly's product both occurred in Haven, which as the *Jones* court points out, significantly favors applying the state's law in which Firefly operates its principle place of business. (R. at 2-4.) Like the *Lewis-DeBoer* court illustrates, Haven has a significant interest in regulating the companies that design and manufacture products within the state. As Firefly's principle place of business is Haven, the state's interest in regulating this suit far outweighs Grace due to the fortuitous fact that Respondent resides there. (R. at 2.) The record makes clear Haven is the central point in most of the facts of this case, and the mere fact that Respondent resides in Grace is of no real relevance. Because Firefly's operation out of the state of Haven is more significant than Respondent being a resident of Grace, this factor favors applying Haven substantive law in this case.

4. Haven is the place of relationship between the parties in this suit.

The state of Haven is the place of relationship between the parties in this suit. A factor in the "most significant relationship" test of the Restatement (Second) is the place of relationship

between the parties. § 145. Because Haven is the place of relationship between the parties in this suit, this factor favors applying Haven substantive law.

Fortuitous accidents can occur without a relationship between the parties. *See*, *Jones*, 460 F. Supp. 2d at 971. In *Jones*, plaintiffs brought suit against an recreational vehicle (RV) manufacturer alleging design defect, manufacturing defect, and inadequate warnings after a child was killed while retracting a slide-out room in the RV. *Id*. at 957. The plaintiffs named as defendants the manufacturer of the RV, Winnebago Industries, Inc., an Iowa corporation with its principle place of business in Iowa; the designer and manufacturer of the "slide out room" on the RV, a Washington corporation with its principle place of business in Oregon; and the company that rented the RV to the grandparents, a Colorado corporation with its principle place of business in Colorado. *Id*. The court found using the Restatement (Second) "most significant relationship" test that there was no relationship between the parties in this case. *Id*. at 971. The court recognized that the Restatement (Second) indicates there may be no relationship established between the parties, and in this case the accident was fortuitous and lacked any sort of official relationship. *Id*.

The location from which a product is purchased is the place of relationship. *See*, *Townsend*, 879 N.E.2d at 906. In *Townsend*, the plaintiff filed strict products liability and negligence claims against department store chain for selling a defective lawnmower that injured the plaintiff in Michigan. *Id*. at 896. The plaintiff was a citizen of Michigan, the tractor was purchased in Michigan, the store chain's principle place of business was Illinois, and the tractor was manufactured by a South Carolina company. *Id*. The court found using the Restatement (Second) "most significant relationship" test that the relationship between the plaintiff and

defendant was centered in Michigan. *Id*. at 906. The court emphasized the plaintiffs purchased the lawnmower from Sears in one of their Michigan stores. *Id*.

The simple purchase of a product does not always constitute a relationship between the parties. *See*, *Rosenthal v. Ford Motor Co., Inc.*, 462 F. Supp. 2d 296, 302 (D. Conn. 2006). In *Rosenthal*, plaintiffs asserted claims including strict liability and breaches of express and implied warranties against an automobile manufacturer and a tire manufacturer. *Id*. at 300. The car and tires were purchased in Connecticut while the plaintiffs lived and the accident occurred in North Carolina. *Id*. at 299. The court found using the Restatement (Second) "most significant relationship" test that there was no conclusive relationship between the parties. *Id*. at 302. The court reasoned the purchase and installation of the tires were not enough to establish a relationship between the parties. *Id*.

While a place of relationship is hard to ascertain, Haven should be considered the place of relationship in this case. Unlike *Jones*, Respondent contacted and paid Firefly directly for their product through her doctor. (R. at 3.) While Respondent resided in Grace, she bought a product from a company in Haven (*Id*.) The court in *Townsend* concluded the state where the product was purchased qualified as the place of relationship, which in this case would be the state of Haven being where Firefly operates. (R. at 2.) Further, the court in *Rosenthal* was unwilling to determine a relationship existed between the parties when the plaintiffs actually purchased and had the defendant's install new tires on their automobile. While Respondent sent a check and received the USB drive from Firefly, a relationship was clearly established between a resident of Grace and a company from Haven. (*Id*.) Because Haven should be found the place of relationship in this case, this factor favors applying Haven substantive law. Haven law is presumed to govern in this case because the place of injury occurred in Haven and the

Restatement (Second) "most significant relationship" test favors applying Haven law; therefore the Thirteenth Circuit should be reversed and Haven law should govern this suit.

III. THE THIRTEENTH CIRCUIT'S JUDGMENT SHOULD BE REVERSED BECAUSE THE RESPONEDNT HAS NOT MADE A SUFFICIENT SHOWING THAT FIRFLY'S PRODUCT WAS DEFECTIVE.

Despite which law the court decides to use, Firefly is not liable for the harm suffered by the Respondent. The Respondent has failed to state a claim upon which relief can be granted. The Respondent must provide additional information to establish Firefly's product was defective and was the cause of the Respondent's injuries. Since the Respondent has failed to make a sufficient showing, Firefly should not be held liable and Firefly's Motion to Dismiss should be granted.

A. Firefly's product does not contain any type of defect; therefore, Firefly is not liable under Haven law governing products liability.

The Respondent has not been able to carry her burden under Haven law. Haven law has expressly adopted the Restatement (Third) of Torts: Products Liab. § 2 (1998). (R. at 8.) The Restatement (Third) of Torts: Products Liability (1998) provides that a plaintiff may bring suit against a manufacturer or seller of a defective product under the theories of (1) manufacturing defect, (2) defective design, or (3) inadequate warning or failure to warn. Restatement (Third) of Torts: Products Liab. § 2 (1998). Additionally, Haven law requires plaintiffs to show that the defendant's product was the "but for" cause and the proximate cause of the plaintiff's harm. *Id*. § 2 cmt. q (1998) (*See also*, Haven Rev. Code § 1018.11).

First, Firefly's product did not contain a manufacturing defect. Second, Firefly's product did not contain a design defect. Third, Firefly's product did not contain an inadequate warning. Fourth, even if a court were to find some sort of defect in Firefly's product, that defect was not

the cause of the Respondent's injuries. Therefore, the Respondent has not made sufficient showing of the necessary elements and Firefly's Motion to Dismiss should be granted.

1. Firefly's product did not deviate from its intended design and it operated as it was supposed to.

Firefly's product did not depart from its intended design, therefore the product did not contain a manufacturing defect. In order to establish that a manufacturing defect exist, the plaintiff must establish that the product departs from its intended design even thought all possible care was exercised in preparing and marketing the product. § 2(A). The plaintiff bears the burden of proving the defect's existence; that the product was not manufactured according to its design specifications. *Toms v. J.C. Penney Co.*, 304 Fed. Appx. 121 (3d Cir. 2008). The Haven Supreme Court, in *Marcus v. Valley Hill, Inc.*, stated that a plaintiff could demonstrate the existence of a manufacturing defect by showing: (1) direct evidence that the defect arose in the hands of the manufacturer; (2) circumstantial evidence which could create an inference that a defect existed prior to sale; or (3) by negating other causes of the failure of the product for which the defendant would not be responsible, in order to further the inference that the defect was attributable to the manufacturer. 301 Haven 197 (2006) (*See also, Toms*, 304 Fed. Appx. at 125 quoting, *Scanlon v. General Motors Corp.,* 326 A.2d 673, 678 (1974)). The mere occurrence of an accident is not sufficient to establish that the product was not fit for ordinary purposes. *Id*.

In *Toms*, the plaintiff brought a claim of strict liability against the retailer of a robe. *Toms*, 304 Fed. Appx. at 125. The plaintiff had stepped outside to smoke a cigarette when she dropped a match and the robe she was wearing burst into flame. *Id*. The only evidence offered by the plaintiff was her testimony and the testimony of a single witness. *Id*. The testimony of these parties merely established that the robe caught fire, the witnessed helped the plaintiff

remove the robe, the witness took the plaintiff inside and called 911, and that the witness went outside and helped the police put out the fire. *Id*. What remained of the robe and fabric from robes within the same product line were tested. *Id*. at 123. The test proved that the fabric was "not highly flammable" and was made of material "suitable for clothing. *Id*.

In regards to the claim of manufacturing defect, the New Jersey Supreme Court ruled that the plaintiff had failed to offer evidence sufficient to sustain her burden of proof. *Id*. at 125. The court reasoned that the plaintiff did not offer any direct evidence of a manufacturing defect. *Id*. The plaintiff also failed to negate other possible cause of the incident. *Id*. Lastly, the court stated that based on the circumstances of this case, lay testimony was not sufficient to establish a claim. *Id*.

The defendants were found liable in *Escola* because one of the defendant's bottles contained a manufacturing defect that caused the plaintiff to suffer harm. *Escola v. Coca Cola Bottling Co*., 24 Cal.2d 453, 454 (1994). The plaintiff was a waitress in the restaurant. *Id*. The defendant was a soft drink company that had bottled some of its soft drinks and had delivered the bottles to the restaurant where the plaintiff worked. *Id*. A day and a half after the bottles were delivered, the plaintiff was taking the bottles out of their case and placing the bottles into a refrigerator. *Id*. While the plaintiff was moving one of the bottles it exploded in her hand. *Id*. The court held that the defendant was liable because the bottle departed from its intended design when it exploded. *Id*.

Firefly's product did not deviate from its intended design. The product was designed to passively transmit patients' medical records. (R. at 4.) The system was designed to place the word "NONE" in the allergy field if nothing was submitted. (*Id*.) The product was manufactured as specified and did what it was supposed to do. Likewise, the robe in *Toms* did

not deviate from its intended design and was fit for its intended use. The court in *Toms* considered the same three ways that a plaintiff can establish a manufacturing defect as those laid out by the Haven Supreme Court in *Marcus*. Just like in *Toms*, the Respondent in this case has provided zero direct evidence that Firefly's product deviated from its intended design. (*Id*.) The Respondent has merely pointed out that the records received by the University Medical Center, via the web portal, were not identical to the original paper records. (*Id*.) Also, the Respondent has failed to disprove other possible causes for the allergy omission, such as the possibility that there was a malfunction with University Medical Center's computer system that caused the word "NONE" to appear in the allergy field. (*Id*.)

Firefly's product and the robe in *Toms* are drastically different from the bottle in *Escola*. The bottle in *Escola* deviated from its intended design. Soda bottles are designed to hold soda without exploding. Since Firefly's product did not deviate from its intended design, it cannot be said to have a manufacturing defect. Therefore the Respondent has not offered sufficient evidence to establish that there was a manufacturing defect in Firefly's product.

2. Firefly's product did not have a design defect.

Firefly's product did not have a design defect. In order to prevail on the theory of defective design, the plaintiff must establish that the foreseeable risk of harm by the product could have been reduced by implementing a reasonable alternative design. Restatement (Third) of Torts: Products Liab. § 2(B) (1998). Typically, consumers are not knowledgeable enough to form an opinion on a reasonable expectation as to how safe the design of a product is. *Id*. Thus, a risk-utility balancing is needed. *Id*. (*See also*, *Barker v. Lull Engineering Co., Inc*., 573 P.2d 443 (Cal. 1978)). Society benefits not when products are excessively safe at a higher cost to the manufacturer, but when the optimal amount of product safety is achieved. *Id*. cmt. a. The

plaintiff must not only prove that the reasonable alternative design exists, but that such alternative design was both technologically and economically feasible when the product left the control of the manufacturer. *Honda of American Mfg., Inc. v. Norman*, 104 S.W.3d 600 (Tex. 2003).

Furthermore, the plaintiff must also prove that the omission of a reasonable alternative design renders the product unsafe. Restatement (Third) of Torts: Products Liab.§ 2(B) (1998). The plaintiff must show that the reasonable alternative design would, at a reasonable cost, have reduced the foreseeability of harm posed by the product. *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006) (*See also*, *Hernandez v. Tokai Corp*., 2 S.W.3d 251, 258 (Tex. 1999), claimant must prove a condition of the product that renders it "unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.") The Respondent has failed to sufficiently establish that a reasonable alternative design existed. Even if the court finds that a reasonable alternative design existed, the Respondent has failed to establish that the omission of a reasonable alternative design rendered Firefly's product unsafe. Therefore, the Respondent has failed to establish that there was a design defect in Firefly's product.

The driver of a car died when she was unable to release her seatbelt and the court found that there seatbelt was not defectively designed. *Norman*, 104 S.W.3d at 602. In *Norman*, the injured party crashed her car into a body of water and drowned because she was unable to release the automatic seatbelt of the car. *Id*. The injured party's family brought suit alleging a defect in the design of the automatic seat belt. *Id*. at 603. The plaintiff presented expert testimony that established three potential alternative designs. *Id.* at 606. However, the plaintiff failed to establish that the three potential alternatives existed, were technologically feasible, and were

safer under relevant circumstance than the seatbelt release system present in the defendant's car. *Id*. at 608. Since the plaintiff was not able to provide sufficient evidence of a reasonably alternative design, the stated that there was no design defect. *Id*. at 609.

Despite the proof that a tire could be redesigned to increase its strength without significantly reducing the tire's utility, the court in *Martinez* found that the alternative design did not eliminate the risk of the tire exploding mounted on a mismatched wheel. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 347 (Tex. 1998). The court rationed that because the risk of explosion cannot be eliminated, omission of the alternative design my not make the tire no reasonably safe under comment I of the Restatement. *Id*.

Like *Norman*, the Respondent here has failed to establish that there is a reasonable alternative design to the Firefly system. The plaintiff in *Norman* was unable to present any reasonable alternative designs that were technologically feasible. (R. at 3.) Here, the Respondent has completely failed to show that any reasonable alternative design was even technologically feasible.

The Respondent will argue that the mere existence of the IBM medical records system is sufficient to establish that a reasonably alternative design existed and was feasible. However, the IBM system requires additional training and is far more complex than the Firefly system. (*Id*.) It also cost approximately 10% more than the Firefly system. (*Id*.) Again, like *Norman*, even if this were found to be a reasonable alternative design, it is still not feasible. The additional cost and complexity of the IBM system far outweigh the uncertain benefits. As stated in comment A of the Restatement (Third) of Torts: Products Liab. § 2(B), society benefits not when products are excessively safe at a higher cost to the manufacturer. Society benefits when the optimal amount of product safety is achieved. The additional cost and training expenses associated with

the IBM make it an unreasonable alternative due to the gross economic disadvantages. Such additional cost would defect the entire purpose Firefly had for manufacturing and marketing its product.

Firefly's goal in designing, manufacturing, and marketing their system was to make electronic medical records more affordable so that a great portion of society could benefit from the advantages of electronic medical records. (R. at 3.) The whole rationale behind storing medical records electronically is that they it will help doctors make more informed and efficient medical decisions, thus reducing medical cost. This objective has been supported by the Haven Legislature and Congress. (R. at 8.) Both have appropriated funds to encourage medical records cost savings through conversion to health information technology. (R. at 9.) These legislative bodies have allocated funds so that health care system that operates at lower cost, which is exactly what Firefly's system was designed to do. The imposition of more expensive and complex system defects the purpose of Firefly, the Haven Legislature, and Congress. (*Id*.)

Furthermore, even if the IBM system is considered to be a reasonable alternative design, the Respondent has failed to establish that Firefly's omission of the IBM's design renders Firefly's system unsafe. Like *Martinez*, the mere fact that another design existed does establish that design would have prevented the harm that occurred. The IBM system contains a flagging warning system that brings possible errors or omissions to the attention of the person submitting the medical information into the system. (R. at 9.) This system may have caught the mistake or it may not have. The Respondent has failed to establish IBM's system would have prevented the tragedy that took place. It is unclear as to why the records received by University Medical Center did not contain the Respondent's allergy. (R. at 4.) Since the Respondent has failed to

establish a reasonable alternative design and that the omission of such design rendered Firefly's system unsafe, Firefly's system did not contain a design defect.

3. Firefly's product did not contain a warning defect.

Firefly's product did not contain a warning defect. In order to establish a claim for a warning defect, a plaintiff must show that the foreseeable risks of harm could have been avoided or reduced by reasonable instructions or warnings, and that the omission of the warning renders the product not reasonably safe. Restatement (Third) of Torts: Products Liab. § 2(C) (1998). Generally, a seller is not liable for failing to warn of risk and risk-avoidance measures that should be obvious to the foreseeable product user. *Id*. cmt. j. (*See also*, *Mathews v. University Loft Co*., 903 A.2d 1120, 1126 (N.J. Super Ct. App. Div. 2006) (Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety). The Respondent has failed to show that this tragedy could have been avoided by additional warnings or that an omission of such addition warnings renders Firefly's product not reasonably safe. Therefore, the Respondent has failed to provide a sufficient showing of a warning defect in Firefly's product.

A college student brought suit against the manufacturer of his bed, alleging lack of a warning. *Mathews,* 903 A.2d at 1122. The student had fallen from his loft bed and sustained injuries. *Id*. at 1121. The court found that there was no warning defect because the danger of falling out of the bed was open and obvious. *Id.* at 1124.

The Respondent has no provided a sufficient showing that the tragedy that the Respondent suffered from could have been avoided by reasonable instructions or warnings. Nor, as with design defect, has the Respondent shown such omission of a warning or instructions renders Firefly's product not reasonably safe. The possibility that medical records that have

been converted into an electronic format may not be one hundred percent accurate should be obvious to everyone. Everyone knows doctors' handwriting is typically unreadable, just like everyone knows that when sleeping in a loft bed there is a possibility of falling out of it. Also, it is common knowledge that medical records can be extremely complex and extremely detailed. (R. at 4.) The medical records include personal and family medical history, in addition to notes, charts, and records of procedures in the past and present. (*Id*.) Based on these basic bits of common knowledge, it would is open and obvious that medical records that are converted over to an electronic format may contain some errors or omissions. Therefore, Firefly, like the defendant in *Mathews*, did not need to provide a warning. Since the Respondent has failed to make a sufficient showing that a reasonable warning would have led to the harm suffered being avoided, the Respondent has failed to establish that Firefly's product contained a warning defect.

4. Firefly's product was not the "but for" or proximate cause of the Respondent's injury.

Even if the court were to find that there was some sort of defect with Firefly's product, the Respondent has filed to establish that Firefly's product was the "but for" and proximate cause of said injuries. In order to recover under strict products liability, the plaintiff must show that the defendant's product was the "but for" cause and the proximate cause of the plaintiff's harm. Haven Rev. Code § 1018.11. The connection which proximate cause is to provide in order to impose liability must be between the defect of the product and the injury of the plaintiff. *Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995). The plaintiff must show that the defect in the product was a substantial factor in the causing of the plaintiff's injury. *Id*. If the manufacturer inflicts injuries on a plaintiff that are identical to what the plaintiff would have received notwithstanding some abstract defect in the involved product, the manufacturer may be

absolved of liability. *Id*. The "but for" test of causation states that "an act or omission is not regarded as a cause of an event if the particular event would have occurred without it. *Doupnik v. General Motors Corp*., 225 Cal.App.3d 849, 861 (Cal. Ct. App. 1990). In the case hand the Respondent has failed to establish a tie between the alleged defect in Firefly's product and the Respondent's injuries. The Respondent has also failed to show that her injuries would not have happened had the alleged defect not existed. Therefore the Firefly's product was not the cause of the Respondent's injuries.

The proximate cause of the Respondent's injury was not Firefly's product. The proximate cause was the administration of penicillin and the doctor's choice to do so. (R. at 4.) Ultimately it was the doctor at University Medical Center who made the decision to administrate the drug. (*Id*.) The doctor decided to do this without contacting the Respondent's primary care physician. (*Id*.) Furthermore, it was the administration of Penicillin and the Respondent's allergy to the drug that caused the injury. (*Id*.) Therefore, Firefly's product was not the proximate cause of the Respondent's injuries.

Likewise, Firefly's product is not the "but for" cause of the Respondent's injury. Had the Respondent decided that she did not want to use Firefly's product, the outcome would have been the same. Had Firefly used a different design, the omission of the Respondent's allergies would still be likely to happen and the outcome would be the same. (*Id*.) The reason the outcome would not change is because it was common practice at University Medical Center to administer penicillin to avoid post-surgical infection. (*Id*.) Firefly's product lessoned the chance of this tragedy happening, it did not cause it.

Respondent has failed to establish that Firefly's product contained a manufacturing defect, design defect, or warning defect. The Respondent has also failed to establish that

Firefly's product was the "but for" and proximate cause of the Respondent's injuries. Therefore, the Respondent has not sufficiently met her burden, and Firefly is no not liable under Haven law.

B. Firefly's product was not in a defective condition unreasonably dangerous to the Respondent; therefore, Firefly is not liable under the Grace Laws governing products liability.

The Respondent has failed to establish that the electronic medical records provided by Firefly were in a defective condition unreasonably dangerous to the Respondent**.** The state of Grace has adopted Section 402A of the Restatement (Second) of Torts in its entirety. Restatement (Second) of Torts § 402A (1977); *Turner v. Smith Bros., Inc.*, 30 Grace 144 (2006). The Restatement (Second) does not differentiate between manufacturing, design, and warning defect. *Id*. at 153. Liability is imposed upon sellers of a product that is in a defective condition unreasonably dangerous to the user or consumer. Section 402A(1) of the Restatement (Second) of Torts. The seller must be engaged in the business of selling such products. *Id*. at 402A(1)(a). Also, it must be expected and does reach the consumer without substantial change in the condition in which it is sold. *Id*. at 402A(1)(b). It does not matter that the seller may have exercised all possible care in the preparation and sale of the product. *Id*. at 402A(2)(a). It is not disputed that Firefly is in the business of producing electronic medical records. Nor is it disputed that records are issue were not altered. However, Firefly is not liable for the injuries suffered by the Respondent for two reasons. First, Firefly's product was not if a defective condition. Second, Firefly's product was not unreasonably dangerous. Therefore, Firefly is not strictly liable under Grace law.

1. Firefly's product was not in a defective condition when it left their possession.

Firefly's product was not in a defective condition when it left their possession. A product is defective condition if it is "in a condition not contemplated by the ultimate consumer." *Green v. Smith and Nephew*, 629 N.W.2d 727, 826 (Wis. 2001). Firefly's product was not in a condition that was contemplated by the Respondent. Therefore, Firefly's product was not in a defective condition when it left Firefly's possession.

After the plaintiff suffered from an allergic reaction to latex gloves, the manufacture in *Green* was found to be strictly liable for the injuries suffered. *Id*. at 753. The plaintiff worked in the medical field and was exposed to approximately 40 pairs of latex gloves per day. *Id*. at 732. The plaintiff began to develop rashes that ultimately became very severe. *Id*. The plaintiff also developed asthma. *Id*. It was later determined that people could be allergic to latex and that the plaintiff's exposure to the latex gloves at work was the cause of her injuries. *Id*. at 753. The court held that the latex gloves left the manufacturer in a defective condition. *Id*. The courts rationale was that when the plaintiff began suffering from her allergic reaction to the latex gloves, the health care community was unaware that persons could be allergic to latex; hence, the ordinary consumer of the latex gloves could not have contemplated at the time the plaintiff used the latex gloves that they could cause such injuries. *Id*.

Firefly's product was not in a defective condition when it left the possession of Firefly. This is in stark contrast of the situation in *Green*. The plaintiff in *Green* could not have contemplated that she would suffer an allergic reaction from using latex gloves, because at that point in time the medical community did not even know that latex gloves could cause such harm. However, the medical community and society as a whole know that doctors have atrocious

handing writing and that medical records are complex and cumbersome. Unlike the plaintiff in *Green*, the Respondent could have and should have contemplated that an electronic representation of her medical records may not be one hundred percent accurate. The reason the Respondent could have contemplated an error is because medical records contain personal and family medical history, in addition to notes, charts, and records of procedures. (R. at 3.) Since the ultimate consumer could have and should have contemplated that the product would be in the condition it was, the product is not defective. Therefore, Firefly's product was not in a defective condition.

2. Firefly's product was not unreasonably dangerous.

If a court were to find Firefly's product to be defective, the Respondent has still failed to show that such defect renders the product unreasonably dangerous. A product is unreasonably dangerous where it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer. *Green*, 230 N.W.2d at 826. Not every defect causes a product to be in a condition not reasonably contemplated by a user is an "unreasonably dangerous" one. *Brown v. Western Farmers Assoc*., 521 P.2d 537 (Or. 1974). A defective product presents an unreasonable danger when it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Restatement (Second) of Torts § 402A cmt i (1965); (*See also, Russell v. Deere & Co*., 61 P.3d 955, 958 (Or. Ct. App. 2002) (quoting *McCathern v. Toyota Motor Corp*., 23 P.3d 320 (Or. 2001)).

Despite being defective a used car was found not to be unreasonably dangerous. *Cornelius v. Bay Motors Inc*., 484 P.2d 299, 304 (Or. 1971). The plaintiff was injured in an auto accident when the brakes of the defendant's newly bought used car failed to work. *Id*. at 300.

The plaintiff claimed that the defendant was sold a car that was unreasonably dangerous and thus brought a claim for strict products liability against the car dealer. *Id*. Before purchasing the car, the buyer expected the car and found no defects. *Id*. at 301. The court said that even though the used car was defective it was not unreasonably dangerous. *Id* at 304. The court's rationale was that an ordinary purchaser of a used car might recognize, expect and accept that car may be defective and would not regard the car as being unreasonably dangerous do to the possibility of defects. *Id*. at 305.

Like the used car in *Cornelius*, Firefly's product is not unreasonably dangerous do to the possibility that defects may arise. The purchaser of a used car knows that something may go wrong and that the car may in some way be defective. Similarly, the ordinary purchaser of electronic medical records would recognize, expect and accept the fact that there is a possibility that the records are not one hundred percent accurate. The Respondent decided to have here medical records converted over to an electronic format and failed to even inspect and insure the accuracy of the electronic records (R. at 3.). The fact that the Respondent failed to inspect her records does not defeat the fact that the ordinary purchaser would recognize that such electronic records may not be completely accurate. (*Id*.) Therefore, Firefly's product was not unreasonably dangerous. The Respondent has failed to establish that Firefly's product contained a defect of that the product was unreasonably dangerous. Therefore, Firefly is not liable under Grace law.

CONCLUSION

Firefly's Motion to Dismiss should be grant because the injury occurred in Haven and Haven substantively law applies based on the "most significant relationship" test. Furthermore, the Respondent has failed to make a sufficient showing for strict products liability under Haven

or Grace law. Therefore, the decision of the Thirteenth Circuit should be reversed and Firefly's Motion to Dismiss should be granted.

Respectfully submitted,

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Team # 15