No. XX-XXXX

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 2011

FIREFLY SYSTEMS, INC.,

Petitioner,

v.

***In re* ESTATE OF ZOE WASHBURNE,**

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR THE RESPONDENT

Team No. 6
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether Haven or Grace law governs this case's resolution when Ms. Zoe Washburne lived and worked in Grace, purchased Firefly's defective product in Grace, and died in Grace.

II. Whether Ms. Zoe Washburne's estate stated strict products liability and implied warranty of merchantability claims upon which relief can be granted when Firefly's product had manufacturing, warning, and design defects under Grace law, or alternatively, under Haven law.

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The opinion of the United States District Court for the District of Haven and the opinion of the United States Court of Appeals for the Thirteenth Circuit are unpublished. A copy of the opinion of the United States District Court for the District of Haven appears in the record at pages 2-9 and a copy of the opinion of the United States Court of Appeals for the Thirteenth Circuit appears in the record at pages 10-13.

STATEMENT OF THE CASE

A. Statement of the Facts

Zoe Washburne ("Ms. Washburne") was a middle-school teacher in Whitefall, Grace. R. at 2. Around age five, Ms. Washburne's parents discovered that Ms. Washburne suffered from an allergy to the common antibiotic, penicillin. *Id.* After discovering the allergy, Ms. Washburne and her parents actively avoided exposure to penicillin, including notifying new doctors and educating themselves about the allergy. *Id.* Firefly Systems, Inc. ("Firefly") is a Delaware corporation with its principle place of business in Haven that aggressively advertises its product to hospitals nationwide. *Id.* Following Ms. Washburne's death, her estate brought claims against Firefly for its violations of the Uniform Commercial Code ("UCC") and strict products liability claims based on manufacturing, design, and warning defects. *Id.* at 4.

Firefly's product is an electronic medical record ("EMR") that allows physicians and healthcare providers to electronically access a patient's medical records. *Id.* at 3. Firefly mass-produces its product and does not customize or individually tailor it to different hospitals. *Id.* Firefly purports to ensure that the electronic health data inputs match the patient's paper medical record. *Id.* Unlike its competitor, IBM, Firefly does not have a "flag system" that reviews the

data inputs or warns of any potential errors or omissions during the conversion process because this system is ten-percent more costly. *Id.* Ms. Washburne paid Firefly twenty-five dollars and Ms. Washburne's primary care physician, Dr. Frye, then provided Ms. Washburne's paper medical record to Firefly so it could create her EMR. *Id.*

On September 10, 2008, while chaperoning a school-sponsored field trip in Haven, Ms. Washburne began experiencing acute abdominal pain. *Id.* at 3. A fellow teacher took Ms. Washburne to a hospital, where a surgeon removed Ms. Washburne's appendix. *Id.* After surgery, medical staff administered penicillin to Ms. Washburne, which is common practice to avoid the risk of post-surgical infection. *Id.* at 4. However, the medical staff relied on Firefly's inaccurate, electronic version of Ms. Washburne's medical records, which failed to include Ms. Washburne's penicillin allergy. *Id.* It is undisputed that the paper medical record that Ms. Washburne's physician provided to Firefly disclosed Ms. Washburne's penicillin allergy, as does the record stored locally on Firefly's servers. *Id.* As a result, five minutes after the medical staff administered penicillin, Ms. Washburne experienced severe respiratory problems common for those with a penicillin allergy. *Id.* Only then did the hospital realize Ms. Washburne's allergy and administer epinephrine, which temporarily alleviated Ms. Washburne's symptoms. *Id.*

Two days later the hospital discharged Ms. Washburne. *Id.* Upon discharge, Ms. Washburne met her parents and traveled with them to their home in Grace. *Id.* After they had crossed into Grace, Ms. Washburne collapsed. *Id.* An emergency response team was unable to revive Ms. Washburne because of the damage that the erroneously administered penicillin caused, coupled with the delay before help could arrive. *Id.* Ms. Washburne's initial anaphylaxis reaction caused a relatively rare biphasic anaphylaxis reaction, which caused Ms. Washburne's death. *Id.*

Subsequently, Ms. Washburne's estate brought suit against Firefly for Ms. Washburne's wrongful death. *Id.* The complaint sought recovery from Firefly based on its breach of an express warranty, breach of an implied warranty of merchantability, and strict products liability based on manufacturing, design, and warning defects. *Id.*

B. Course of Proceedings and Disposition in the Courts Below

After Ms. Washburne's death, her estate filed suit in the Peterson County Court of Common Pleas in Haven, asserting that Firefly was strictly liable based on manufacturing, design, and warning defects and that Firefly breached an express warranty and an implied warranty of merchantability. *Id.* Firefly removed the case to the United States District Court for the District of Haven based on diversity of citizenship, pursuant to 28 U.S.C. § 1332. *Id.* Firefly then filed a motion to dismiss pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). *Id.* at 5.

The district court incorrectly granted Firefly's motion to dismiss because the court determined that Haven's substantive law controlled the case under the Restatement (Second) of Conflict of Laws' most significant relationship test. *Id.* at 7. The district court also incorrectly determined that Ms. Washburne's estate failed to state a claim upon which relief can be granted regarding her strict products liability and UCC claims, reasoning that under the Restatement (Third) of Torts, Ms. Washburne's estate could not simultaneously bring a manufacturing defect and an implied warranty of merchantability claim; and no express warranty existed because the court found that Firefly did not make any representations to Ms. Washburne. *Id.* at 7-9.

Ms. Washburne's estate appealed the district court's judgment to the United States Court of Appeals for the Thirteenth Circuit. *Id.* at 10. The Court of Appeals reversed the district court's judgment in part, holding that Grace's substantive law controlled, and that Ms.

Washburne's strict products liability and implied warranty of merchantability claims upon which relief could be granted. *Id.* at 10-12. However, the appellate court affirmed the district court's judgment and dismissed the express warranty claim. *Id.* at 13.

The following two issues are relevant on appeal: (1) whether under Haven's conflict of laws analysis, does Haven's or Grace's substantive law govern this case's resolution; and (2) whether Ms. Washburne's estate stated claims for strict products liability and implied warranty of merchantability upon which relief can be granted. *Id.* at 14. Because Grace's substantive law governs this case's resolution and Ms. Washburne's estate stated strict products liability and implied warranty of merchantability claims upon which relief can be granted, this Court should affirm the Thirteenth Circuit's judgment.

C. Standard of Review

Two issues are relevant to the determination of this case: (1) whether under Haven's conflict of laws analysis, does Haven's or Grace's substantive law govern this case's resolution; and (2) whether Ms. Washburne stated strict products liability and implied warranty of merchantability claims upon which relief can be granted.

When reviewing both issues, this Court should apply the *de novo* standard of review because the lower court resolved the dispute on a motion to dismiss pursuant FRCP 12(b)(6). *United States v. Grenier*, 513 F.3d 632, 636 (6th Cir. 2008) (stating that courts review a motion to dismiss on legal grounds *de novo*). Therefore, this Court should view the complaint in the light most favorable to the plaintiff and affirm the Thirteenth Circuit's judgment.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit correctly held that Grace's substantive law governs this case's resolution. Further, the Thirteenth Circuit correctly held that Ms. Washburne's estate stated claims for manufacturing, design and warning defects and an implied warranty of merchantability claim upon which relief can be granted under section 402A of the Restatement (Second) of Torts. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

The place of the injury is not controlling in determining which state's laws apply because Haven rejected *lex loci delicti* and in this case the place of the injury was fortuitous. Haven instead adopted the Restatement (Second) of Conflict of Laws' (hereinafter "Restatement") most significant relationship test, which focuses on the policies and interests underlying each issue and applies the law of the state with the most significant relationship to the dispute. Here, the Restatement's most significant principles weigh in favor of applying Grace substantive law. Further, Restatement's remaining principles also favors applying Grace substantive law.

Here, Haven made a clear statement that the place of the injury is less important in determining which state's laws apply when it rejected *lex loci delicti* and adopted the Restatement's approach to conflict of laws. Further, the place of injury was fortuitous because Ms. Washburne lived in Grace and was only in Haven for one day when the injury occurred. An application of the Restatement's most significant factors to this case weighs in favor of applying Grace law. This case's outcome will not affect the needs of interstate and international systems and Grace's relevant policies in protecting its citizens and deterring out-of-state manufacturers from selling defective products in Grace outweigh Haven's interests. Further, the remaining

factors are of less importance to this case, but weigh in favor of applying Grace law. Accordingly, the Thirteenth Circuit correctly held that Grace law governs this case's resolution.

Further, the Thirteenth Circuit correctly held that Ms. Washburne's estate stated strict products liability and implied warranty of merchantability claims upon which relief can be granted. Under Grace law, Ms. Washburne's estate stated claims for manufacturing, design and warning defects and an implied warranty of merchantability. Under the consumer expectations test, Ms. Washburne's estate stated a manufacturing defect claim and stated design and warning defect claims under either prong of the *Barker* test. *Barker v. Lull Eng'g Co.*, 573 P.2d 423 (Cal. 1978). Further, Ms. Washburne's estate stated an implied warranty of merchantability claim because Firefly's product would not pass without objection in the trade.

If this Court applies Haven law, Ms. Washburne's estate still stated strict products liability claims upon which relief can be granted. Firefly's product deviated from its intended design, its risks outweighed its benefits, it failed to provide adequate warnings and public policy favors imposing liability on Firefly. Further, Firefly's defective product was the "but for" and proximate cause of Ms. Washburne's death.

The United States Court of Appeals for the Thirteenth Circuit correctly held that Grace substantive law governs this case's resolution and that Ms. Washburne's estate stated strict products liability and implied warranty of merchantability claims upon which relief can be granted. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

ARGUMENT

I. UNDER HAVEN'S CONFLICT OF LAWS ANALYSIS, GRACE SUBSTANTIVE LAW GOVERNS THIS CASE'S RESOLUTION

In an action based upon diversity of citizenship, a federal court must apply the substantive law, including 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). Haven applies the most significant relationship test under the Restatement (Second) of Conflict of Laws (1971). R. at 11. Under this test, the laws of the state with the most significant relationship to the dispute apply. *Id.*

This Court should discount the place of the injury because Haven rejected *lex loci delicti* and adopted the Restatement's test, *Booker v. InGen, Inc.*, 241 Haven 17, 24 (2007), which focuses on the underlying policies of all the interested states. Further, in this case the place of injury was fortuitous because Firefly's product injured Ms. Washburne while she happened to be in Haven for a one-day fieldtrip. R. at 4.

The most significant principles in determining which state's laws apply in a products liability case are the relevant policies of the forum, Restatement § 6(2)(b), and the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue. *Id.* at § 6(2)(c). Here, these principles weigh in favor of applying Grace law because this case involves the death of a Grace citizen in Grace, caused by a product sold in Grace. R. at 3-4.

Further, the Restatement's remaining principles in determining which state's laws apply also weigh in favor of applying Grace law. First, Firefly had no justified expectations, Restatement § 6(2)(d), that Haven law would apply because consumers can use its product nationwide. R. at 3. Conversely, Ms. Washburne had a justified expectation that Grace law would apply because she purchased Firefly's defective product in Grace. R. at 3. Additionally,

(e) the basic policies underlying the field of law, (g) the ease in the determination and application of the law to be applied, and (f) the certainty, predictability, and uniformity of result, Restatement § 6(2)(e), (g), (f), are insignificant here, but weigh in favor of applying Grace law.

A. The Place of Injury is Not Controlling because Haven Rejected *Lex Loci Delicti* and the Place of Injury was Fortuitous

In adopting the Restatement's most significant relationship test, Haven expressly rejected the unjust rule of *lex loci delicti*, under which the state's laws where the injury occurred apply. R. at 11 (citing *Booker*, 241 Haven at 24). *See also Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979) (rejecting *lex loci delicti* because it originated when travel across state lines was relatively rare, but in today's mobile society its continued application most commonly produces harsh and inequitable results). Instead, under the Restatement's more flexible approach, courts analyze the policies and interests underlying each issue and apply the law of the state with the most significant relationship to the dispute. *In re Air Crash Disaster at Boston, Mass. On July 31, 1973*, 399 F. Supp. 1106, 1110 (D. Mass. 1975).

The Restatement presumes that the law of the state where the injury occurred applies unless some other state has a more significant relationship under the principles in section 6. Restatement §§ 145, 175. Thus, the principles in section 6 are more important than the contacts in section 145. See *id.* § 145(2) (stating that the contacts in § 145 "are to be taken into account in applying the principles of § 6.").[1] More specifically, the place of injury contact is less important and courts that have rejected *lex loci delicti* should discount the place of injury and emphasize section 6's principles. *See Jelec USA, Inc. v. Safety Controls, Inc.*, 498 F. Supp. 2d

[1] *See also* Russell J. Weintraub, *At Least, To Do No Harm: Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 Md. L. Rev. 1284, 1289-90 (1997) (stating that the Restatement indicates that the states' policies are paramount and that courts should "stop sticking pins in maps and start paying attention to the content of the law chosen.").

945, 952 n.4 (S.D. Tex. 2007) (warning that placing too much importance on the place of injury would be a "silent return" to *lex loci delicti*).

Further, the most significant relationship test is not based on the number of contacts a state has in section 145, but rather on the qualitative nature and extent of those contacts applied to the principles in section 6. *Gutierrez*, 583 S.W.2d at 319. Thus, not all of the principles in section 6 are equally important in every case. *Id. at* 313. Here, in a products liability case, the place of injury is less important in determining which state's laws should apply. *See Rosenthal v. Ford Motor Co., Inc.*, 462 F. Supp. 2d 296, 304-05 (D. Conn. 2006) (stating that the place of injury is not important in products liability cases where the injury could have occurred anywhere). Further, the Restatement places less importance on the place of injury "when the place of injury can be said to be fortuitous. . . ." Restatement § 145(2) cmt. e.

Here, Ms. Washburne's injury occurred in Haven when the hospital staff relied on Firefly's product prior to administering penicillin, which triggered Ms. Washburne's allergic reaction. R. at 4. However, it is entirely fortuitous that Ms. Washburne needed medical attention in Haven, prompting the use of Firefly's product. In fact, Ms. Washburne was only on a one-day fieldtrip in Haven. R. at 3. Ms. Washburne lived and worked in Grace and the fieldtrip began and ended in Grace. See *id. See also In re Estate of Shirley Kramer v. Acton Toyota, Inc.*, No. 993733, 2004 WL 2697284, at * 3 (Mass. Nov. 2, 2004) (stating that the place of injury was "almost entirely fortuitous . . . [because the plaintiffs] were merely passing through Connecticut on a trip that began, and was intended to end, in Massachusetts.").

Further, Firefly intended that its customers use its product nationwide. R. at 3 (noting that consumers could access the medical records anywhere through a secure web portal). Therefore, under Firefly's place of injury argument, R. at 5, it is likely that Firefly would be

subject to suits across the country whenever its products injured a consumer. *See* Restatement § 145 cmt. e (stating that "such lack of foreseeability on the part of the defendant is a factor that will militate against selection of the state of injury as the state of the applicable law.").

Haven made a clear statement when it rejected *lex loci delicti* and adopted the Restatement's approach to conflict of laws, *Booker*, 241 Haven at 24, thus making the place of injury less important in determining which state's laws apply. Further, in this case, the place of injury was fortuitous because Ms. Washburne lived in Grace and was in Haven for less than one day when the injury occurred. Therefore, this Court should focus on the principles in section 6 and affirm the Thirteenth Circuit's judgment.

B. The Restatement's Most Significant Factors Weigh in Favor of Applying Grace's Substantive Law

Not all of the principles in section 6 are equally important in every case. *Rosenthal*, 462 F. Supp. 2d at 303. The principles (d), (e) and (f) in section 6 are "of lesser importance in the field of torts."[2] Restatement § 145(1) cmt. b. Thus, the remaining factors: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum and (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue "assume greater interest" in this case. Restatement § 6.

Here, the Restatement's most significant principles weigh in favor of applying Grace law. This case's outcome will not affect the needs of interstate and international systems and Grace's relevant interests in protecting its citizens and deterring out-of-state manufacturers from selling

[2] These factors are: (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result. Restatement § 6. Further, (g) the ease in the determination and application of the law to be applied is irrelevant to this case. These factors are discussed later in section I.C.

defective products in Grace outweigh Haven's interests. Further, the remaining principles are less important to this case, but nonetheless weigh in favor of applying Grace law.

1. This case's outcome will not affect the needs of the interstate and international systems

The first principle to apply is "(a) the needs of the interstate and international systems." Restatement § 6(2)(a). Although under the Restatement this principle "assumes greater importance" in tort cases, in practice the opposite is true. See Willis L. M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 Mercer L. Rev. 501, 509 (1983). In fact, one commentator stated "it is difficult to see in the ordinary case how these needs would be affected by a decision one way or the other." *Id. See also Krstich v. United States Servs. Auto Ass'n*, 776 F. Supp. 1225, 1232 (N.D. Ohio 1991) (stating that this principle does not offer much guidance because it is "doubtful that this court's choice of law decision will have any bearing on this goal."). Section 6's comment d states that "a state should have regard for the needs and policies of other states and of the community of states." Restatement § 6(2)(a) cmt. d. However, this case will not impact such a broad policy. One court clarified this principle when it stated "the Restatement approach fosters harmonious relationship[s] between states by respecting the substantive law of other states when those states have a greater interest in the determination of a particular issue litigated in a foreign jurisdiction." *Phillips v. Gen. Motors Corp.*, 298 Mont. 438, 448 (Mont. 2000). Thus, this principle only illustrates the Restatement's overall approach to conflict of laws and has no direct bearing on this case.

2. On balance, Grace's and Haven's relevant policies weigh in favor of applying Grace substantive law

The next two most significant principles to this case are "(b) the relevant policies of the forum and (c) the relevant policies of other interested states and the relative

interests of those states in the determination of the particular issue." Restatement § 6(2)(b), (c). These principles deserve the most weight in this case. *See Phillips*, 298 Mont. at 457 (stating that the relevant policies of the interested states are the most important in a case involving products liability and wrongful death).

The purpose of a state's products liability law is to regulate the sale of products *in that state* and to prevent injuries to *that state's residents* from defective products. *Phillips*, 298 Mont. at 449 (emphasis added). *See also In re Estate of Shirley Kramer*, 2004 WL 2697284, at *3 (noting that a state has a strong interest in how its residents are compensated for injuries resulting from defective products sold within its borders, "*regardless of where those products ultimately failed*") (emphasis added). Haven has no interest in ordering compensation to a Grace citizen injured by a product sold in Grace. This case does not implicate or further the policies that Haven attempted to regulate through its products liability laws because this case involves neither a sale in Haven nor an injury to a Haven resident. See *Phillips*, 298 Mont. at 449.

Applying Haven law would frustrate Grace's interest in deterring the sale of defective products because Grace adheres to the Restatement (Second) of Torts section 402A and Haven adheres to the Restatement (Third) of Torts: Products Liability. R at 7. *See also Richetta v. Stanley Fastening Sys.*, 661 F. Supp. 2d 500, 505 (E.D. Pa. 2009) (stating that the Second Restatement emphasizes whether an intended user used the product for its intended use and the Third Restatement emphasizes foreseeable risks of harm). Grace has indicated a strong interest in fully compensating its injured citizens by adopting Restatement 402A. See *Turner v. Smith Bros., Inc.*, 30 Grace 144 (2006). Grace has a stronger interest in applying its laws because this case involves a Grace citizen and a product sold in Grace. *See Esser v. McIntyre*, 661 N.E.2d 1138, 1142 (Ill. 1996) (holding that Illinois's interest in providing a remedy to its own citizen

outweighed Mexico's interest in limiting tort recovery). *See also Nationwide Mut. Fire Ins. Co. v. Gen. Motors Corp.*, 415 F. Supp. 2d 769, 775 (N.D. Ohio 2006) (holding that the place of sale had a "far superior" interest than the place where the injury occurred).

Grace's interest is paramount in this case because Firefly would have a special immunity under Haven law. Restatement § 146, cmt. e (stating that if the defendant would enjoy a special immunity for his conduct under the local law of the state of injury, "it is not clear that the interests of this state would be furthered by application of its rule."). Haven's adoption of the defendant-friendly Restatement (Third) of Torts: Products Liability does not technically create a special immunity, but it serves to insulate defendants from products liability claims. See *Rosenthal*, 462 F. Supp. 2d at 305.

The place of the conduct causing the injury, Restatement § 145(2)(b), warrants greater significance than other contacts in products liability claims and weighs in favor of applying Grace law. See *Phillips*, 298 Mont. at 452. Here, the place of conduct was Grace because the product entered the stream of commerce in Grace. R. at 3 (stating that Firefly shipped the software to Dr. Frye, Ms. Washburne's Grace physician). Firefly would not be subject to liability for its defective product if Firefly never released the product into the market. *See Phillips*, 298 Mont. at 452 (stating that the mere design or manufacture of a defective product is not actionable until the product enters the stream of commerce). *See also Maly v. Genmar Indus., Inc.*, No. 94-C-3611, 1996 WL 28473, at *2 (N.D. Ill. Jan. 23, 1996) (stating that the activity giving rise to liability is where the defective product entered the stream of commerce).

Conversely, determining that the place of the conduct is the place of manufacture would unjustly create a liability-shield for defendants that place defective products into other states' markets. *Phillips*, 298 Mont. at 452 (observing that this would tend to leave victims under-

compensated as states wishing to attract and retain manufacturing companies would raise the threshold of liability and reduce compensation). Here, Haven adopted the Restatement (Third) of Torts: Products Liability, expressing its policy to favor defendant-manufacturers by making it harder for plaintiffs to recover. *See Toms v. J.C. Penney Co.*, 304 Fed. Appx. 121 (3d. Cir. 2008) (holding that the plaintiff bears the burden of proving that the defendant manufactured the product contrary to its design specifications). It is inherently unjust for Haven to benefit from attracting manufacturers to its state and shifting the cost of injuries – tort compensation – caused by those manufacturers' defective products to nonresidents. See *Phillips*, 298 Mont. at 453. Here, that nonresident is Ms. Washburne, a Grace resident. R. at 1, 4. Therefore, this Court should hold that Grace was the place of the conduct, which weighs in favor of applying its law.

The residence of the parties, Restatement § 145(2)(c), supports the application of Grace law to this case. Grace has a strong interest in the application of its product liability laws because Firefly injured a Grace citizen. *Id.* at 4. Grace adopted Restatement section 402A, R. at 5, which protects consumers from unreasonably dangerous defective products and focuses on the product's condition, not the manufacturer's conduct. *Sternhagen v. Dow Co.*, 282 Mont. 168, 176 (Mont. 1997). Thus, the application of Grace's products liability laws would further Grace's policy of insuring that the responsible party, Firefly, bears the costs its defective products cause to Grace's citizens. *Phillips*, 298 Mont. at 454. Moreover, applying Grace law will deter future sales of defective products in Grace and encourage manufacturers like Firefly to warn Grace citizens about defects in their products. See *id.* Therefore, the residence of the parties weighs in favor of applying Grace law.

The place where the parties' relationship was centered, Restatement § 145(2)(a), was Grace and supports the application of Grace law to this case. The seller, Firefly, aggressively

advertises nationwide, including in Grace. R. at 2. Ms. Washburne, a Grace citizen, learned about the product through Firefly's relationship with Dr. Frye, her physician, also located in Grace. *Id.* Further, Ms. Washburne's medical records originated in Grace, Firefly shipped the software to Dr. Frye in Grace, and Ms. Washburne sent a check from Grace to Firefly for payment. R. at 3. *See also Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 12 n.7 (D.D.C. 1995) (holding that despite the injury occurring in Maryland, an important factor in applying the District of Columbia's laws was that the "seller-purchaser" relationship was established and consummated in the District of Columbia). *See also Muncie Power Prod. v. United Techs. Auto.*, 328 F.3d 870, 878 (6th. Cir. 2003) (holding that despite the place of injury and conduct was in Ohio, Indiana's interest in determining the rights of parties whose conduct was centered in its state was more important). Therefore, the place where the parties' relationship was centered was Grace and weighs in favor of applying Grace law.

C. The Restatement's Remaining Principles also Weigh in Favor of Applying Grace Substantive Law

In a torts case, the policy choices in section 6(d), (e), and (f) are "of lesser importance in the field of torts." Restatement § 145(1) cmt. b. These principles are: (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, and (f) certainty, predictability and uniformity of result. Further, (g) the ease in determination and application of the law to be applied is irrelevant to this case. Restatement § 6. Although these factors are less important, they still weigh in favor of applying Grace law.

The justified expectations of the parties, Restatement § 6(2)(d), weigh in favor of applying Grace law. This principle is more important in contracts where parties plan their transactions, Restatement § 145(1) cmt. b, as opposed to torts because of their unintentional nature. Here, Firefly had no justified expectation that Haven law would apply to this case

because Firefly's product is nationally advertised and designed for use wherever there is internet access. R. at 3. Due to its product's nature, Firefly's expectations as to which law will apply are analogous to that of an automobile manufacturer – none. *See Phillips*, 298 Mont. at 455-56 (explaining that General Motors had no justified expectations that North Carolina law would apply because of the "moveable" nature of automobiles).[3] Conversely, Ms. Washburne had a justified expectation that Grace law would apply because she purchased Firefly's product in Grace. *See Rosenthal*, 462 F. Supp. 2d at 305 (stating "because the central event upon which a products liability claim is normally based is the sale of goods, injured parties would expect that the law of the place of sale should govern with respect to injuries caused by those defects.").

Certainty, predictability, and uniformity, Restatement § 6(2)(f), like justified expectations, constitute an important principle in contracts because more planning occurs, but is less important in torts because of their unintentional nature. *Rosenthal*, 462 F. Supp. 2d at 305. Further, "[a]pplying the law of the place of injury would not increase certainty or predictability any more than applying the law of the plaintiff's residence at the time of accident." Restatement § 6(2) cmt. i. Thus, this principle weighs against applying Haven law because applying the laws of the plaintiff's residence, Grace, would equally increase certainty, predictability, and uniformity as an application of the law of the place of injury, Haven.

Factors (e) and (g) are irrelevant to this case. Comment h of Restatement section 6 states that (e) the basic policies underlying the particular field of law are most applicable where the policies of both states are the same. Haven and Grace take different approaches to products liability. R at 5. Thus, because this principle is less important in tort cases, it is irrelevant in this

[3] Firefly's positions are logically inconsistent. Assuming, *arguendo*, that this Court adopts Firefly's place of injury argument, R. at 5, in most cases Haven law would not apply because theoretically Ms. Washburne could have been injured in *any* state she travelled to and under Firefly's assertion, *that* state's laws would apply.

case. Further, (g) the ease in the determination and application of the law to be applied "should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results." Restatement § 6(2) cmt. j.

Haven rejected *lex loci delicti* and adopted the Restatement's most significant relationship test, which focuses on the policies of the interested states. Grace has the more significant relationship because its policies of protecting its citizens and deterring manufacturers like Firefly from selling defective products in Grace outweigh Haven's interests. Thus, this Court should affirm the Thirteenth Circuit's judgment.

II. UNDER EITHER GRACE OR HAVEN LAW, MS. WASHBURNE'S ESTATE STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED

The EMR in this case was defective under Grace or Haven law because it failed to include Ms. Washburne's penicillin allergy, did not warn users of the extent or probability of harm, and had little utility because it failed to accomplish its purpose of making medical treatment more efficient, portable and accurate. Additionally, public policy favors the imposition of liability on Firefly.

A. Under Grace Law, Ms. Washburne's Estate Stated Strict Products Liability Claims Upon Which Relief Can Be Granted

Grace applies the consumer expectations test to determine the existence of manufacturing defects. R. at 12. Under the consumer expectations test, Firefly's EMR had a manufacturing defect because it omitted Ms. Washburne's penicillin allergy. Therefore, it was in an unreasonably dangerous condition that an ordinary consumer would not expect. Grace uses a combination of the consumer expectations test and a risk-benefit analysis to analyze warning and design defect claims. *Id.* Under the risk-benefit prong of this test, Firefly's EMR had design and

warning defects because the inaccurate EMR's utility was very low, the risk and severity of harm was high and the risk of harm could have been eliminated with little additional cost.

1. Ms. Washburne's estate stated a manufacturing defect claim upon which relief can be granted

Under section 402A of the Restatement (Second) of Torts (hereinafter "Second Restatement"), a product has a defect when it is in "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Second Restatement cmt. g (1965). Here, the EMR fails the consumer expectations test because an ordinary consumer would expect Firefly's product to be a reliable, accurate copy of her paper medical record. *Id.* at 12-13. In this case, Firefly's digitized version of Ms. Washburne's paper medical record omitted vital medical information – her penicillin allergy. R. at 4. Firefly's failure to include this crucial information was unreasonably dangerous to Ms. Washburne because it misled University Medical Center staff to believe that Ms. Washburne would benefit from penicillin. R. at 4. In fact, this defective condition caused Ms. Washburne's death. *Id.* Therefore, the EMR was in a defective condition unreasonably dangerous to the consumer, Ms. Washburne, and was defective under Grace law.

In all manufacturing defect claims, Haven determines the existence of a defect with the consumer expectations test. *Turner*, 30 Grace at 153. The consumer expectations test is similar to the Second Restatement's definition of "unreasonably dangerous," R. at 12, which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." Second Restatement cmt. i. When a product is defective in a way that an ordinary consumer would not expect, and that defect causes a consumer harm, the defective product's seller is liable. *Id.* cmt. a.

"Consumer expectations consist of what an ordinary consumer would expect when using the product in an intended or reasonably foreseeable manner." R. at 12. An ordinary consumer would expect an EMR to inform doctors and medical staff of any pertinent medical information that a paper medical record would include. Here, Firefly's EMR was intended for use in the same medical diagnoses and treatments as paper medical records. R. at 3. It was reasonably foreseeable that doctors would rely on Ms. Washburne's EMR to choose a method of treatment, including surgery to remove her appendix. An ordinary consumer would not expect an EMR to omit vital health information because doctors rely on EMRs to diagnose patients and to choose reasonably foreseeable medical procedures. R. at 2.

The Second Restatement imposes liability on sellers of products in defective conditions. Second Restatement. Here, Firefly sold a defective product, the EMR, to Ms. Washburne. R. at 3. Firefly is engaged in the business of selling EMRs and in this case, Ms. Washburne's EMR was expected to and did reach Ms. Washburne, the consumer, without any substantial change in the condition in which it was sold. *Id. See e.g., Pulley v. Pac. Coca-Cola Bottling Co.*, 415 P.2d 636 (Wash. 1966) (affirming judgment for plaintiff injured by defendant's defective product that reached the market without substantial change); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) (suggesting liability should be imposed on the defendant because public policy favors strict liability for manufacturers who place goods on the market without inspection); *Greenman v. Yuba Power Prod., Inc.* 377 P.2d 897 (Cal. 1963) (holding that a plaintiff's proof of injury while using a product for its intended use was sufficient to impose liability when a manufacturing defect made the product unsafe for the intended use.).

The software Firefly uses to manufacture its EMRs is mass-produced with no product differentiation. R. at 12. The software is an incidental service for transferring the records. *Id.*

Firefly's EMR is the product at issue in this case, not the software nor Firefly's process of transferring the paper record into digital format. *Id.* Firefly is a seller, engaged in the business of selling a product, the EMR, which was in a defective condition. R. at 3-4. Therefore, Firefly is liable for the harm its defective product caused Ms. Washburne.

In this case, the EMR had a manufacturing defect because it was not an exact copy of Ms. Washburne's paper medical record and therefore deviated from other units in the same product line that were exact copies of consumers' paper medical records. R. at 3-4. The defect occurred because of either human error by a Firefly employee during the data input process or Firefly's software failure during its intended use. *Id.* at 12. The EMR was defective because its omission of Ms. Washburne's penicillin allergy made it dangerous to an extent beyond that which an ordinary consumer would expect. R. at 12.

Here, the EMR fails the consumer expectations test because an ordinary consumer would not expect the EMR to lack vital health information when a doctor needs to rely on the EMR to choose a proper course of care. An ordinary consumer would not expect the EMR to cause her death, which is exactly what happened to Ms. Washburne. Therefore, the EMR fails the consumer expectations test and this Court should affirm the Thirteenth Circuit's judgment.

2. Ms. Washburne's estate stated design and warning defect claims upon which relief can be granted

Grace applies a combination of the consumer expectations test and a risk-benefit analysis, as set forth in *Barker v. Lull Engineering Company*, to determine the existence of design and warning defects. R. at 12. Here, the EMR fails both prongs of the test because the EMR's omissions of vital health information and a warning of possible inaccuracies make it unreasonably dangerous to an extent that an ordinary consumer would not expect. Furthermore, balancing the factors under the risk-utility test show that the relevant factors in this case weigh in

favor of finding design and warning defects. Firefly could have easily implemented affordable steps to avoid the high probability and severity of the risk of harm that the EMR created. Thus, under both *Barker* test prongs, the EMR had warning and design defects.

a. The EMR had design and warning defects because it fails the *Barker* test's consumer expectations prong

Under the *Barker* test, Grace courts apply either the consumer expectations test or a risk-benefit analysis. *Id.* "This dual standard for . . . defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be." *Barker*, 20 Cal.3d 423, 428. Under Grace law, the *Barker* test allows a plaintiff to establish design and warning defects under either prong. R. at 12.

Under the consumer expectations prong, a court can find a product defective in design if the plaintiff demonstrates that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Barker*, 20 Cal.3d 423, 429. This test focuses on the reasonable safety expectations of a consumer with regard to the product rather than on the product itself or the defendant's conduct. *Id.*

The EMR in this case had a design defect because Firefly failed to use sufficient safety procedures to ensure the EMR's accuracy after Firefly transferred Ms. Washburne's paper medical record into digital form. R. at 13. Furthermore, the EMR had a warning defect because Firefly only instructed the original purchaser to check the EMR's accuracy and failed to warn the ultimate users, medical staff, of a possible defect. R. at 3. *See* Restatement Second (Imposing liability on sellers of defective products unreasonably dangerous to the ultimate user or consumer or his property).

Here, an ordinary consumer would expect that an EMR would be an exact copy of her paper medical record and that the EMR would be reliable for any medical procedures. R. at 12. Additionally, Firefly's failure to warn ultimate users of the possibility of inaccuracy constitutes a warning defect under the consumer expectations test because ordinary consumers would expect a product to warn of potential dangers it might cause. R. at 12.

Here, the EMR was not safe for its intended use because it omitted a penicillin allergy and led University Medical Center staff to administer penicillin post-surgery. R. at 4. The EMR failed to include Ms. Washburne's penicillin allergy or warn of possible inaccuracies and Ms. Washburne was given penicillin. R. at 4. Although University Medical Center staff attempted to remedy Ms. Washburne's allergic reaction and soothed the immediate side effects, Ms. Washburne later died from her penicillin allergy. R. at 4. It is undisputed that the paper record that Dr. Frye submitted to Firefly contained the penicillin allergy Firefly's EMR omitted the allergy with fatal results. R. at 4.

A ordinary consumer would not expect an EMR to omit any details present on the paper record. R. at 12. More importantly, an ordinary consumer would not expect an EMR to omit a lethal penicillin allergy. *Id.* As a basic principle, an ordinary consumer would not expect a product that purports to facilitate medical treatment to cause death. If the product poses a risk of harm, an ordinary consumer would expect a product to provide a warning. *Id.* Firefly's EMR disappoints all of these expectations. Therefore, this Court should find that Firefly's EMR fails the consumer expectations test and affirm the Thirteenth Circuit's judgment.

b. The EMR had design and warning defects because it fails the *Barker* test's risk-utility prong

If this Court finds that the EMR is not defective under the consumer expectations test, the EMR nonetheless fails the risk-utility prong and still had design

and warning defects that caused Ms. Washburne's death. R. at 4. In *Barker*, the California Supreme Court stated that in prior cases it had rejected the notion that a plaintiff could only recover in a products liability claim if a product was more dangerous than consumers expected and instead refused "to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's liability for injuries caused by the product." *Barker*, 573 P.2d at 451. Many courts have applied the risk-utility prong as an alternative to the consumer expectations prong in cases when the product in question is one that consumers expect to be dangerous or one that consumers are too unfamiliar with to develop reasonable safety expectations. Henderson & Twerski, *Product Design Liability in Oregon and the New Restatement*, 78 Or. L. Rev. 1, 10 (1999).

The risk-utility prong balances the probability and gravity of the harm against the burden that would have eliminated the risk of harm. *Barker*, 573 P.2d at 428-30. The test is similar to the formula Judge Learned Hand famously set forth in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). When balancing the risk against the utility of a product, courts consider a number of factors, including, but not limited to, the following:

1. The usefulness and desirability of the product, i.e., its utility to the user and to the public as a whole.
2. The safety aspect of the product, i.e. the likelihood that it will cause injury and the probable seriousness of the injury.
3. The availability of a substitute product which will meet the same need and not be 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 because of public general knowledge of the obvious condition of the product, or the exercise of suitable warnings or instructions.
7. The feasibility on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

John Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973). In this case, the degree and high probability of harm, *Wade* at 837, substantially outweigh the benefit that the EMR created. The EMR created a high probability of severe harm because it lacked any review mechanism to ensure that Firefly employees had accurately copied Ms.Washburne's paper medical record, R. at 3, and thus created a risk that was too high to justify its trivial benefit. Firefly's failure to accurately copy Ms. Washburne's paper medical record caused her death, R. at 4, and proves that Firefly's product is defectively designed. Firefly's product was designed to passively accept consumers' paper medical records, yet Ms. Washburne's EMR deviated from this design by omitting her penicillin allergy. R. at 4, 8.

Furthermore, the EMR had a warning defect because the EMR lacked a sufficient warning regarding its inaccuracy. R. at 12. Although Firefly encourages consumers to double check their files, R. at 3, the warning is defective because it does not inform the consumer of the severe consequences that might result if the consumer ignored the warning. To be sufficient, a warning must convey the risk and likelihood of injury if the product when the product is used. *Benjamin v. Wal-Mart Stores, Inc.*, 61 P.3d 257 (Or. Ct. App. 2002) (holding that the warning was defective because "it did not convey the 'consequences' – that is, the 'nature and the extent of the danger.'); *see also Mathis v. Harrel Co.*, 828 So.2d 248 (Ala. 2002) (holding that the warning was defective because "it failed to identify the risk and likelihood of injury . . . and failed to state the consequences of not following the instruction.").

Additionally, the EMR did not warn the ultimate users, the medical staff, of the probable severe injuries that might result from the EMR's omission. R. at 12. Manufacturers must provide warnings to all users of products, not just the original purchasers, to mitigate the risks that defective products pose. Restatement Second. Firefly's instructions to original consumers

were insufficient because they did not inform Ms. Washburne of the likelihood and severity of injury. Also, Firefly gave no warning to University Medical Center staff, R. at 12, to inform them of the risks that the EMR posed. Here, the degree and high probability of harm were high and weigh in favor of finding warning and design defects.

In analyzing the second factor, the "safety aspect," *Wade* at 838, Firefly's product is dangerous to consumers because an omission in a consumer's EMR creates a high likelihood of serious injury. Firefly failed to copy Ms. Washburne's penicillin allergy, defining aspect of her medical profile. R. at 4. The conversion process necessarily had a defect because it was unable to make a simple copy. R. at 3-4. Medical staff must be able to rely on patients' medical records for a complete medical profile, or if the profile might be inaccurate, at least be warned of that possibility. The omission of any detail in a medical report could easily result in severe injury or death. The EMR's safety aspect was very low in this case because of the omission and even lower because of Firefly's failure to warn. Therefore, the second factor of the *Barker* test weighs in favor of finding warning and design defects.

Firefly's omission of Ms. Washburne's penicillin allergy and failure to warn are remarkable when balanced against the third, fourth, and seventh factors: the availability of a safe substitute product, the manufacturer's ability to make the product safe without impairing utility or greatly increasing cost, and the manufacturer's ability to spread the cost of loss. *Wade* at 837-38. Here, a substitute product is available that would meet the same need the EMR fulfills, but not be unsafe. R at 3. For example, IBM's EMR design includes safety procedures to ensure the accuracy of its EMRs. *Id.* These safety procedures do not make IBM's EMR prohibitively expensive. *Id.* IBM's EMR is only 10% more expensive ($27.50) than Firefly's ($25). *Id.*

$2.50 ensures the accuracy of the vital health information on IBM's EMRs, while Firefly's EMR, although marginally cheaper, has no safety procedures. *Id.*

Firefly would not have to adopt the same procedure as IBM to ensure the EMR's accuracy. Here, Firefly has other options to eliminate the unsafe character of its product without making it too expensive. For example, Firefly could pay its employees to review the record once entered into electronic form or Firefly could upgrade its software. Further, Firefly could provide an inexpensive warning to medical personnel that the EMR might be inaccurate, which would reduce the EMR's risk of harm to consumers. Firefly has a number of options that a responsible manufacturer would exercise to improve the safety of its product design when the risk of death or serious injury to its consumers is so high.

Furthermore, Firefly's ability to spread the cost of loss by setting the price of the product or obtaining insurance is great. Firefly aggressively markets their products nationwide. R. at 2. The EMR industry is projected to grow substantially, R. at 3, and as a manufacturer in thst industry Firefly will have many opportunities to grow. Firefly can set the price of its products at a level that will allow them to spread the cost of loss from this case. Firefly can also purchase insurance to cover the cost of loss. Taken together, the third, fourth, and seventh factors weigh in favor of imposing liability on Firefly for warning and design defects.

The "usefulness and desirability of the product," *Wade* at 837, is potentially high, but only if the product is safe for its intended use. Accurate EMRs benefit the public by improving the accuracy and efficacy of medical diagnoses and treatments. R. at 3. However, the EMR in this case caused a death and did not benefit the user because its information was inaccurate. R. at 3-4. The EMR had almost no utility because it created a substantial probability that the Ms.

Washburne would be seriously injured or killed, and failed to warn medical personnel that it might have been inaccurate. R. at 3-4.

The "user's ability to exercise care and avoid danger while using the product" is low. Although Firefly encouraged consumers to check the EMRs's accuracy, R. at 3, a manufacturer cannot shift its responsibility to deliver safe products to other parties. *Escola*, 150 P.2d at 436 (Traynor, J., concurring). Furthermore, in practice, the primary users of Firefly's EMR are medical personnel, who despite exercising due care when using the EMR in an emergency, could not have known that the EMR was inaccurate because there was no warning. It is highly unlikely medical personnel could discover an EMR's omission without first reviewing the paper medical record, which defeats the purpose of the EMR. EMRs are designed to increase the mobility and accuracy of medical care. R. at 2. If the EMR is not reliable for use in emergency situations in hospitals throughout the country, and the EMR does not warn of possible inaccuracies, then users will not be able to avoid the danger that the EMR creates. Here, the users' (medical personnel's) awareness of the dangers of inaccuracy inherent in Firefly's EMR was nonexistent and the probability and severity of the risks that the EMR posed were high.

The gravity of the harm that Firefly's EMR created was high – Ms. Washburne died. R. at 4. The probability of the harm that Firefly's EMR creates was also high – Firefly recently began producing EMRs and one consumer, Ms. Washburne, has already died as a result of the EMR's warning and design defects. R. at 4. Furthermore, the burden to eliminate the risk of harm is low. IBM's substitute product eliminates the risk of error and costs only $2.50 more. Firefly could have adopted any number of cost efficient alternative methods to reduce the risk of errors on its EMR, including implementation of a final review stage or provision of effective warnings.

Firefly is the most appropriate party to bear the costs of Ms. Washburne's death because Firefly is a business in a rapidly growing industry. R. at 2. Thus, Firefly will have numerous opportunities to recoup the costs, incorporate the costs of preventing risks of harm into its product price, and obtain insurance to cover its losses. The substantial and probable risks that the EMR created were unjustifiable given the ease with which Firefly could have eliminated or reduced those risks. On balance, the factors show that the EMR had warning and design defects. Therefore this Court should affirm the judgment Thirteenth Circuit's judgment.

3. Ms. Washburne's estate stated an implied warranty of merchantability claim upon which relief can be granted

Section 2-314 of the UCC allows a Plaintiff to recover for breach of an implied warranty when that good would not pass without objection in the trade under the contract and is not fit for the ordinary purposes for which it is used. UCC § 2-314 (2005). When a Plaintiff brings implied warranty of merchantability and tort claims together, courts determine the good's merchantability through application of the state's products liability laws. UCC § 2-314 cmt. 7 (2003). Here, Grace applies the consumers expectations test to determine the existence of a defect. R. at 13. Firefly breached the implied warranty of merchantability because the EMR had a manufacturing defect under the consumer expectations test.

Here, "Firefly's product was intended to passively accept inserted information . . . ." R. at 8. Therefore, a reasonable consumer would expect an EMR to accurately reflect the crucial information in the paper medical record submitted to Firefly. Dr. Frye submitted Ms. Washburne's paper medical record to Firefly, R. at 3; however, the EMR was not an accurate copy of Ms. Washburne's paper medical record. R. at 4. As section IA detailed, the EMR fails the consumer expectations test and Firefly breached the implied warranty of merchantability. Therefore, this Court should affirm the Thirteenth Circuit's judgment.

B. Even if Haven Substantive Law Applies, Ms. Washburne's Estate Still Stated Claim Upon Which Relief Can Be Granted

In this case, the EMR had a manufacturing defect under Haven law because it was not an accurate copy of the consumer's paper medical record, and therefore deviated from its intended design. The EMR also had a design defect because there were reasonable alternative designs that would have reduced or eliminated the risk of harm to Ms. Washburne. Additionally, the EMR had a warning defect because it failed to provide a sufficient warning to users, Ms. Washburne and the University Medical Center staff, that would have reduced or eliminated the risk of harm. The EMR's manufacturing, design and warning defects were the "but for" and proximate causes of Ms. Washburne's death. Furthermore, public policy favors the imposition of liability on Firefly for Ms. Washburne's death.

1. Firefly's EMR was the "but for" and proximate cause of cause of Ms. Washburne's death

Under Haven law, to recover in a strict products liability claim a Plaintiff must prove that a Defendant's defective product was the "but for" cause (or factual cause) of injury and also the proximate (or legal) cause of injury. Restatement (Third) of Torts: Products Liability § 2 cmt. q. (1998); see also Haven Rev. Code § 1018.11. An act is a "but for" cause of an injury if, in the absence of the act, the outcome would not have occurred. Restatement (Third) of Torts: Liability for Physical Harm § 27b (Proposed Final Draft No.1) April 26, 2006. A "but for" cause (or "*sine qua non*") can be described as a necessary condition for an injury. *Id.*

Here, the EMR was the "but for" cause of Ms. Washburne's death because but for the EMR's omission of Ms. Washburne's penicillin allergy, University Medical Center staff would not have administered penicillin. R. at 4. If the medical staff had relied on a Ms. Washburne's

paper medical record, rather than the EMR, Ms. Washburne would not have died because "it is undisputed that the information on the paper record that Dr. Frye submitted to Firefly *did* contain the proper penicillin allergy warning, as does the copy of the record stored locally on Firefly's servers." R. at 4 (emphasis added). In this case, medical staff relied on the EMR before surgery. *Id.* Following the surgery, University Medical Center staff followed common practice and administered penicillin. *Id.* If the EMR had included Ms. Washburne's penicillin allergy, medical staff would have selected a different course of treatment that would not have jeopardized Ms. Washburne's safety. However, the EMR omitted the penicillin allergy and the medical staff was unaware of the need to avoid penicillin. *Id.* University Medical Center staff administered the penicillin that killed Ms. Washburne because the EMR did not contain Ms. Washburne's allergy. *Id.* Therefore, the EMR's defect is the single "but for" cause of injury in this case.

In addition to the "but for" cause, the EMR was also the proximate cause of Ms. Washburne's death. "Proximate cause is commonly defined as that cause which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred, the injury being the natural and probable consequence of the wrongful act." 63 Am. Jur. 2d Products Liability § 21 (2010) (citing *Govich v. North Am. Sys., Inc.*, 112 N.M. 226 (1991)). Here, Ms. Washburne's death was a natural and probable consequence of the EMR's defect because University Medical Center staff, relying on the EMR yet ignorant of Ms. Washburne's penicillin allergy, followed common practice and administered penicillin following surgery. R. at 4.

No intervening causes broke the chain of causation between the EMR's omission of Ms. Washburne's allergy and the administration of penicillin. Although the "[r]eliance on the electronic record was a choice made by the treating hospital," R. at 8, University Medical Center

staff did not have time to locate her paper medical record because of her injury's severity. R. at 3. Here, University Medical Center staff used the EMR as designed to treat Ms. Washburne when time was of the essence. *See* R. at 2-4 (stating that EMRs are designed "to allow for easy and instant transmission between local physicians as well as *out of town physicians in the event of an emergency while travelling*.") (emphasis added). . The EMR's omission of Ms. Washburne's penicillin allergy was the sole cause of the administration of penicillin to Ms. Washburne. Therefore, Firefly's EMR was the "but for" and proximate cause of Ms. Washburne's death.

2. Ms. Washburne's estate stated a manufacturing defect claim upon which relief can be granted

Haven has expressly adopted the Restatement (Third) of Torts: Products Liability (hereinafter "Third Restatement"), R. at 7, which states that "[a] product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in preparation and marketing of the product." Restatement (Third) of Torts: Products Liability § 2(a) (1998). Under Haven law, a Plaintiff can prove the existence of a manufacturing defect through direct evidence that the defect arose in the hands of the manufacturer . . . . in order to further an inference that the defect was attributable to the manufacturer." R. at 7-8 (citing *Marcus v. Valley Hill, Inc.*, 301 Haven 197 (2006)). Further, the Third Restatement establishes a separate standard for manufacturing defects, imposing liability whether a Defendant's quality control efforts satisfy standards of reasonableness. Third Restatement § 2 cmt. a. Thus, no proof of a reasonable alternative design is necessary to prevail on a manufacturing defect claim.

Here, the EMR had a manufacturing defect because "Firefly's product was intended to passively accept inserted information . . . ." R. at 8, and it is undisputed that the paper medical

record that Dr. Frye submitted to Firefly and the copy of the record stored on Firefly's servers contained the penicillin allergy warning, while the EMR did not. R. at 4. Therefore, the EMR departed from its intended design because it failed to passively accept the information in Ms. Washburne's paper medical record. University Medical Center staff accessed the EMR via Firefly's web portal, R. at 3, which shows that although Firefly's servers had an accurate copy of Ms. Washburne's paper medical record, the only accessible record was inaccurate. Therefore, the EMR had a defect because the EMR deviated from its intended design. *Id.* This is direct evidence that a manufacturing defect arose while the EMR was in Firefly's hands. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

3. Ms. Washburne's estate stated a design defect claim up on which relief can be granted

Under the Third Restatement, "a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor . . . and the omission of the alternative design renders the product not reasonably safe." Third Restatement § 2(b). Here, the EMR's omission of Ms. Washburne's penicillin allergy presented a foreseeable risk that medical staff would rely on the EMR and misdiagnose or mistreat Ms. Washburne.

In this case, Firefly could have avoided the risk through the adoption of a safety mechanism similar to IBM's "flag system," which ensures the accuracy of its EMRs. R. at 3. Additionally, Firefly could have avoided the risk through the adoption of a step of edit and review once Firefly employees entered consumers' paper medical records. The Third Restatement adopts a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. Third Restatement § 2(b). More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable

risks of harm posed by the product and, if so, whether the seller's omission of the alternative design rendered the product not reasonably safe. Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution. Third Restatement cmt. d.

IBM used its flag system at the time Firefly manufactured the EMR. R. at 3. The flag system makes IBM's EMR only 10% more costly than Firefly's EMR. *Id.* Firefly could have eliminated the risk to Ms. Washburne by using a similar safety procedure or by implementing a final review step to ensure the accuracy of the EMR at a reasonably modest cost. The omission of a safety procedure makes the EMR's design not reasonably safe and therefore, the EMR is defectively designed. Accordingly, this Court should affirm the Thirteenth Circuit's judgment.

4. Ms. Washburne's estate stated a warning defect claim upon which relief can be granted

Under the Third Restatement, "[a] product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . . and the omission of the instructions or warnings renders the product not reasonably safe." Third Restatement §2(c). Here, the EMR had a warning defect because Firefly could have avoided the risk of Ms. Washburne's death with a warning that the EMR might be inaccurate and that medical staff should locate the a patient's paper record before use.

Although Firefly encourages consumers to verify their EMRs once received, R. at 3, this is not an adequate warning. There are circumstances, like this case, in which the Third Restatement requires more than a warning to the original purchaser. Third Restatement cmt. i. When users other than the original purchaser will use a product, like medical staff use EMRs, the

Third Restatement requires the provision of warnings to other users that a reasonable seller should know will be in a position to reduce or avoid the risk of harm. *Id.*

Here, University Medical Center staff was in a good position to avoid the risk of harm that the EMR posed to Ms. Washburne. R. at 4. If Firefly had provided a warning that indicated the possible inaccuracy of the EMR, the staff would have been aware of the need to obtain Ms. Washburne's paper medical record. However, no warning was present on the EMR and this omission rendered the EMR not reasonably safe to Ms. Washburne. Therefore, the EMR had a warning defect and this Court should affirm the Thirteenth Circuit's judgment.

5. Public policy favors the imposition of liability on Firefly

A fundamental goal of strict products liability law is to create incentives for manufacturers to achieve optimal product safety levels. Third Restatement §2 cmt. a. Society benefits from products that strike a balance between affordability and safety. *Id.* Courts look to a number of competing interests and goals to determine the proper allocation of losses that defective products cause, including the benefits of the product, knowledge of risks and risk-avoidance techniques that were reasonably attainable at the time of distribution. *Id.* Here, EMRs can benefit society by increasing the efficiency, mobility, and accuracy of medical care. R. at 2.

Firefly's EMR failed to accomplish these goals and presented too great a risk to the consumer because there was too high a probability that Firefly's EMR was inaccurate and too grave a risk that Ms. Washburne would suffer injuries or death as a result. The potential benefits of EMR technology are only valuable if doctors and medical personnel can rely on EMRs in the same way that they rely on paper records.

CONCLUSION

The United States Court of Appeals for the Thirteenth Circuit correctly held that Grace substantive law governs this cases's resolution. Under the most significant relationship test, Grace's interest in protecting its citizens and deterring out-of-state manufacturers from selling defective products in Grace outweighs Haven's interest.

The Thirteen Circuit also correctly held that Ms. Washburne's estate stated claims for manufacturing, design and warning defects and an implied warranty of merchantability upon which relief can be granted. Under Grace law, Firefly's product fails the consumer expectations test and would not pass without objection in the trade. Alternatively, under Haven law, Firefly's product deviated from its intended design, its risks outweighed its benefits, and it failed to provide adequate warnings, and public policy favors imposing liability on Firefly. Further, Firefly's product was the "but for" and proximate cause of Ms. Washburne's death. Accordingly, Ms. Washburne's estate respectfully requests that this Court affirm the Thirteenth Circuit's judgment.

Respectfully submitted,

_____

Team No. 6
Counsel for Respondent

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APPENDIX A

In re Estate of Shirley Kramer v. Acton Toyota Inc.,
No. 993733, 2004 WL 2697284 (Mass. Nov. 2, 2004)

Superior Court of Massachusetts.
Ronald KRAMER, individually and as administrator [FN1]
FN1. Of the Estate of Shirley Kramer
v.
ACTON TOYOTA, INC. et al.[FN2]
FN2. Toyota Motor Sales, U.S.A., Inc.

No. 993733.
Nov. 2, 2004.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO APPLY CONNECTICUT LAW
STEPHEN E. NEEL, Justice of the Superior Court.

***1** This products liability action arises out of a motor vehicle accident which occurred on I-395 in Norwich, Connecticut. The plaintiff, Ronald Kramer, brings this action individually and as administrator of the estate of his wife, Shirley Kramer. On March 8, 1998, Shirley Kramer was behind the wheel of the couple's Toyota Camry when it left the road, crossed the highway's travel lanes, struck a tree and rolled over several times before coming to a stop. The plaintiff alleges that both of the Kramers were wearing seatbelts, and that Shirley Kramer was, nevertheless, partially ejected from the vehicle and sustained fatal injuries.

Ronald Kramer filed this lawsuit against Acton Toyota (Acton), from which he purchased the Camry, and Toyota Motor Sales, U.S.A., Inc. (TMS), the California-based Toyota distributor which provided the car to Acton. The complaint alleges negligence, breach of implied warranty, and violation of G.L.c. 93A, §§ 2 and 9. The defendants move to apply Connecticut law to the issue of Shirley Kramer's alleged contributory negligence in causing her own death.

If Connecticut law applies to this action, a verdict in favor of the plaintiff would be reduced by the percentage of any causal misconduct attributed to Shirley Kramer, regardless of how large or small that percentage is, and regardless of whether the verdict is based on negligence or on breach of warranty. See Conn. Gen.Stat. Ann. § 52-572o.

By contrast, if Massachusetts law applies, the effect of causal misconduct by Shirley Kramer would differ, depending on the particular legal theory involved. If the plaintiff proves negligence by defendants Acton and TMS, then G.L.c. 231, § 85 requires that a defense verdict shall be entered if Shirley Kramer's contributory negligence exceeds the combined negligence of the defendants. Conversely, if any negligence by Shirley Kramer is less than or equal to the combined negligence of Acton and TMS, the award will be reduced by whatever percentage of responsibility is allocated to her. If the plaintiff proves a breach of warranty, Massachusetts law requires entry of a defense verdict only if the jury finds that Shirley Kramer knew of an alleged defect in the Camry and the risk which that defect created, but nonetheless unreasonably

proceeded to encounter that risk. Absent such a finding, reasonably foreseeable misconduct by Shirley Kramer would have no effect of her breach of warranty claim. *Allen v. Chance Mfg. Co.*, 398 Mass, 32, 34-35 (1998); *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 352-57 (1983).

The plaintiff opposes the defendants' motion to apply Connecticut law.

For the reasons stated herein, the Court concludes that Massachusetts law applies in the circumstances of this case.

Discussion

Ordinarily, there is a presumption that the substantive law governing a tort action for physical injury is that of the place where the injury occurred. *Cosme v. Whitin Mach. Works, Inc* 417 Mass. 643, 644 (1994). However, Massachusetts does not strictly adhere to the doctrine of *lex loci delicti,* especially when "on the particular facts of a case another jurisdiction may be more concerned about and more involved with certain issues" than the jurisdiction where the injury was sustained. *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 333 (1983); *Pevoski v. Pevoski*, 371 Mass. 358, 359-60 (1976).

***2** In such choice of law questions, Massachusetts courts take a functional approach in determining which state's law is applicable, using established conflicts criteria and considerations. See *Bushkin Ass'n, Inc. v. Raytheon Co.*, 393 Mass. 622, 631 (1985) ("[We] seek instead a functional choice of law approach that responds to the interests of the parties, the State involved, and the interstate system as a whole"); *Clarendon Nat'l Ins. Co. v. Arbella Mut. Ins. Co.*, 60 Mass.App.Ct. 492, 495-96 (2004). The Massachusetts functional approach is explicitly guided by the Restatement (Second) of Conflicts of Laws (1971). *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. at 646; *Bushkin Ass'n, Inc. v. Raytheon Co.*, 393 Mass. at 632.

The relevant sections of the Restatement in this tort injury case are §§ 6 and 145-46. Section 6 outlines the general policy considerations as follows: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6 (1971). Section 145 provides that, in tort cases, the rights and liabilities of the respective parties are determined by the state which has the most significant relationship to the parties and to the underlying event. This section is to be read in tandem with the § 6 considerations, taking into account the following four factors: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. Restatement (Second) of Conflict of Laws § 145(1) and (2) (1971). Finally, § 146 provides that in matters of personal injury, the law of the state where the injury occurred applies unless another state has a more significant relationship to the occurrence under the policies enumerated in § 6. Restatement (Second) of Conflict of Laws § 146.

It is not necessary to evaluate all of the considerations, only those that are relevant. *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. at 647. With the foregoing as a guide, the Court will evaluate the contacts and general interests of the parties, and states, in light of all the policy considerations set forth in the Restatement. See *Bushkin Ass'n, Inc. v. Raytheon Co.*, 417 Mass. at 631.

In this case, the relevant contacts are as follows. Massachusetts is the forum state for this civil action. Ronald Kramer-the surviving spouse of decedent Shirley Kramer-is a resident of Massachusetts, and was at the time of the accident. The decedent was also a resident of Massachusetts at all times up to and including the date of her fatal injury. The vehicle was registered, used, garaged and maintained in Massachusetts. It was purchased at Acton Toyota in Acton, Massachusetts, and distributed to Acton by TMS. Acton is a Massachusetts corporation with its principal place of business in Massachusetts. TMS is a California corporation with its principal place of business in California. TMS is registered to do business throughout the continental United States, including Massachusetts and Connecticut. The accident occurred in Connecticut as the Kramers traveled together through that state on a round-trip visit from Massachusetts to New York.

***3** Under § 146 of the Restatement, the law of Connecticut, the place where the injury occurred, will presumptively apply unless Massachusetts has a "more significant relationship" to the parties and the underlying occurrence under the considerations provided in § 6. See also *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. at 647. However, comment *e* to § 145(2) of the Restatement notes that the importance of the place of injury is significantly diminished in cases where the location can be said to be fortuitous, where it bears little relation to the occurrence and the parties with respect to the particular issue, and where the parties have no settled relationship to that state. See Restatement (Second) of Conflict of Laws § 145, comment *e* to subsection (2) (1971); *Cohen v. McDonnell Douglas Corp.*, 389 Mass. at 336.

Based on the record before the Court, Connecticut's relationship to the underlying occurrence is almost entirely fortuitous. As noted above, the accident occurred when the Kramers were merely passing through Connecticut on their way to New York on a trip that began, and was intended to end, in Massachusetts.

To be sure, Connecticut has some interest in having its laws apply to a motor vehicle accident on a Connecticut roadway, particularly where Connecticut seeks to deter persons from their own misconduct and to hold them responsible by reducing their recovery in proportion to their own fault in causing an accident on Connecticut roads. However, Connecticut's interests are of a general nature, no greater and at least equally applicable to the interests of all fifty states in maintaining safe roadways. Furthermore, Connecticut has no significant interest in allocating responsibility for injuries, suffered by Massachusetts residents, allegedly caused by a product which those residents purchased in Massachusetts from a Massachusetts vendor and which was distributed to Massachusetts by a California corporation. In contrast, Massachusetts has a strong interest in the manner in which its residents are compensated for injuries sustained as a result of allegedly faulty products sold within its borders, regardless of where those products ultimately failed. See *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. at 649-50.

Here too, the relevant policy of Massachusetts as the forum state must be given significant weight. In *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342 (1983), the Supreme Judicial Court expressly limited the availability of the defense of contributory negligence in breach of warranty claims, noting that in such actions, "[t]he liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller." *Id.* at 355. Connecticut does not make this distinction for breach of warranty claims in either its statutory or common law. It would therefore offend "the relevant policies of the forum" to apply Connecticut law in this products liability case and potentially limit the plaintiff's recovery.

***4** The protection of justified expectations is a factor of minimal importance in this case. As the Restatement explains, "[t]here are occasions, particularly in the area of negligence, when the parties act without giving thought to their conduct or to the law that may be applied. In such a situation, the parties have no justified expectations to protect, and this factor can play no part in the decision of the choice-of-law question." Restatement (Second) of Conflicts of Laws § 6, comment *g* to Subsection 2 (1971).

The needs of the interstate system point, if at all, to Massachusetts. "Deference to sister state law in situations in which the sister state's substantial contacts with a problem give it a real interest in having its law applied ... will at times usefully further this part of the law's total task." *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. at 649, citing R.A. LeFlar, American Conflicts of Law § 104, at 293 (4th ed.1986).

The values of certainty, predictability, and uniformity of result favor the application of Massachusetts law, particularly in view of the fact that both sides have already agreed that Massachusetts law governs most of the substantive law in this case. Where Connecticut's only interest in this litigation arises because the accident fortuitously occurred there, certainty, predictability, and uniformity will best be achieved by applying the law of Massachusetts, where the parties' relationship is centered. Rigid adherence to the "place of injury" or *lex loci delicti* rule has been rejected by our courts. See *Bushkin Assoc., Inc. v. Raytheon Co.*, 393 Mass. at 632.

Because Massachusetts has a more significant relationship to the parties and the occurrence than does Connecticut, Massachusetts law will govern all aspects of this litigation.[FN3]

FN3. The Court notes that, in any event, if the jury finds contributory negligence, the jurors will be asked to allocate the total negligence among all parties. Thus the verdict slip will determine all facts necessary for a verdict under either Massachusetts or Connecticut law, and no re-trial of this issue would be necessary if a Massachusetts appellate court were to decide that Connecticut law applies.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' motion to apply Connecticut law is *DENIED.*

APPENDIX B

Maly v. Genmar Indus., Inc.,
No. 94-C-3611, 1996 WL 28473 (N.D. Ill. Jan. 23, 1996)

United States District Court, N.D. Illinois, Eastern Division.
Paul MALY, an Illinois citizen, Plaintiff,
v.
GENMAR INDUSTRIES, INC., a Florida corporation, successor to Wellcraft Marine Corp., and Reed's Marine, Inc., a Wisconsin corporation, Defendants.

No. 94 C 3611.
Jan. 23, 1996.

MEMORANDUM OPINION AND ORDER
LEINENWEBER, District Judge.

BACKGROUND

***1** This tort case, resulting from of an exploding boat, poses a choice of law question involving the Illinois statute of repose for strict liability in tort actions, *ILCS* §5/13-213(b). The parties agree that Illinois' choice of law rules apply and that Illinois uses the "most significant contacts" test for tort cases instead of the " *lex loci delicti*" rule. *Ingersol v. Klein*, 262 N.E.2d 593, 595 (1970). The parties further agree that plaintiff's accident occurred more than 15 years after he bought the boat manufactured by Genmar Industries, Inc. ("Genmar"). Therefore, if the Illinois statute of repose, which requires an action to be brought within 10 years of sale applies, plaintiff's strict liability count, Count 1, is doomed. Plaintiff contends that Wisconsin law applies and, since it has no statute of repose for strict liability cases, Count 1 may proceed.

DISCUSSION

Plaintiff, an Illinois citizen, filed suit on May 2, 1994, in the Circuit Court of Cook County. The case was removed to federal court because of diversity of citizenship. Plaintiff claims to have suffered personal injuries when his boat exploded and caught fire on July 10, 1992. The boat, a 21′ Nova (serial No. WEL00543 M77A-N21) was manufactured in Florida in August or September, 1976 by Wellcraft Marine Corp., a predecessor to Genmar. Genmar is incorporated in Florida and does business in both Illinois and Wisconsin. The boat was shipped to a Genmar distributor, American Marine, in Westmont, Illinois, sometime between August, 1976 and April 23, 1977. Plaintiff purchased the boat new from American Marine at its place of business in Westmont, Illinois, on the latter date.

The explosion and fire occurred at Lake Geneva, Williams Bay, Wisconsin, where plaintiff maintained a summer home. The boat was stored and maintained in Wisconsin by the co-defendant, Reed's Marine, Inc., and used exclusively in Wisconsin. Genmar has moved for summary judgment on Count I. The issue is whose law governs? If Wisconsin's, the motion must be denied; if Illinois', it must be granted.

Illinois abandoned the traditional *lex loci delicti* rule in favor of the American Law Institute's "most significant contacts test." This test starts with a presumption that the law of the place of

injury applies unless another state has a more significant relationship to the incident. *Ingersol v. Klein*, 262 N.E.2d 593 (1971). The contacts to be considered in evaluating significance of the relationship are:

(a) the place the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, 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.

Restatement of the Law 2d, Conflict of Laws 2d, §145 (1971).

Conflict analysis requires more than tallying of the contacts of the respective states because the contacts only become significant to the extent that they relate to the policies and purposes sought to be vindicated by the conflicting laws. *Mitchell v. United Asbestos Corp.*, 55 Ill. Dec. 375, 380 (5th Dist. 1981); *Estate of Barnes*, 88 Ill. Dec. 438, 442 (1st Dist. 1985). Illinois follows a three-step analysis: first, the issue is isolated and the conflict defined. Second, the policies embraced in the laws in conflict are identified. Finally, the contacts of the respective states are examined in order to determine which has a superior connection with the occurrence and thus would have a greater interest in having its policy or law applied. *Estate of Barnes* at 443.

***2** Applying the principles, the issue and conflict is of course easy to isolate and define: Illinois has a statute of repose; Wisconsin does not. The legislative purposes and policies in enacting the Illinois statute of repose are pro business: to reduce the cost to manufacturers and distributors of doing business in Illinois by cutting legal costs caused by old strict liability lawsuits which are particularly difficult to defend due to loss of witnesses, poor record keeping, and changes in legal and technical standards on products manufactured more than ten years previous. *Thornton v. Mono Mfg. co.*, 54 Ill. Dec. 657, 659 (2nd Dist. 1981). Accordingly, such an advantage to business has a cost to injured consumers of old products, but this is a policy decision for the Illinois policy makers, the legislature, to make. The Wisconsin legislature, on the other hand, favors consumers over manufacturers, and apparently does not view proliferating products liability litigation a sufficient reason to deny consumers a cause of action in strict liability for injuries resulting from defective old products. The policies are, therefore, directly contrary.

Since the defective boat was placed in the stream of commerce in Illinois, it is obvious that Illinois has an interest in seeing that its pro-business policy covers the transaction. However, since plaintiff's injury occurred in Wisconsin that state has an interest in seeing that its policy favoring consumers of a defective product applies.

To decide between competing policies, Illinois conflicts law requires that we examine the respective contacts that Illinois and Wisconsin have with the incident to see which one's policy

ought to govern these proceedings. We, therefore, turn to the four factors enumerated in *Ingersol v. Klein, supra.* First we start with the presumption in favor of Wisconsin because the injury happened there. Second, the place where the tortious conduct occurred was Illinois. The activity giving rise to liability, the placement of a defective product in the stream of commerce, occurred in Westmont, Illinois. *Suvada v. White Motor Co.*, 210 N.E.2d 182 (1965). Third, the plaintiff was a resident of and was domiciled in Illinois at all relevant times. Although Genmar was incorporated in Florida, it did business in Illinois by selling its products here. Lastly, the place where the relationship of the parties was centered was likewise Illinois: this is where plaintiff bought the defective boat from Genmar's retailer.

The domiciles of the parties are generally considered the most significant contacts for choice of law analysis in tort cases because a jurisdiction will normally formulate tort policies with reference to the competing interests of its citizens. *Estate of Barnes*, 88 Ill. Dec. at 443. While as we have seen it is inappropriate merely to count the contacts and decide the case numerically (*Mitchell supra*), it is apparent that Illinois has the most significant relationship with the parties and therefore its tort policy should govern. The conduct complained of happened in Illinois to an Illinois resident and the relationship of the parties occurred in Illinois. There is no reason to rank Illinois' pro-business tort policy as less significant than Wisconsin's pro-consumer policy. Suppose the situation were reversed: Wisconsin has a statute of repose and Illinois does not. There is no question that an Illinois court would declare that its policy of protecting consumers would trump a neighboring state's policy of protecting manufacturers of defective products in a suit by one of its residents.

***3** Therefore, the Illinois statute of repose applies to this suit.

CONCLUSION

Count I of plaintiff's suit is dismissed.

IT IS SO ORDERED.

N.D.Ill.,1996.
Maly v. Genmar Industries, Inc.
Not Reported in F.Supp., 1996 WL 28473 (N.D.Ill.)

APPENDIX C

Restatement (Second) of Conflict of Laws §§ 6, 145

Restatement of the Law — Conflict of Laws
Restatement (Second) of Conflict of Laws
Current through August 2010

Chapter 1. Introduction

§ 6. Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 145

Restatement of the Law — Conflict of Laws
Restatement (Second) of Conflict of Laws
Current through August 2010

Chapter 7. Wrongs
Topic 1. Torts
Title A. The General Principle

§ 145. The General Principle

(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 domicil, 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.

APPENDIX D

Restatement (Second) of Torts § 402A

Restatement of the Law — Torts
Restatement (Second) of Torts
Current through August 2010

Division 2. Negligence
Chapter 14. Liability Of Persons Supplying Chattels For The Use Of Others
Topic 5. Strict Liability

§ 402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller

APPENDIX E

Restatement (Third) of Torts: Products Liability § 2

Restatement of the Law — Torts
Restatement (Third) of Torts: Products Liability
Current through August 2010

Chapter 1. Liability Of Commercial Product Sellers Based On Product Defects At Time Of Sale
Topic 1. Liability Rules Applicable To Products Generally

§ 2. Categories Of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

APPENDIX F

UCC § 2-314

➡§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.