No. 10-1234

IN THE

SUPREME COURT OF THE UNITED STATES

April Term 2010

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 RESPONDENT

Team 8

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. Given that the Restatement (Second) of Conflict of Laws directs courts to apply the law of the state with the most significant relationship to the parties and the issue, does the State of Grace's products liability law control in this case?

II. Given that Grace applies Restatement (Second) of Torts § 402A strict products liability law holding manufacturers strictly liable for injuries their defective products cause, has Washburne stated a claim for strict products liability based upon manufacturing, design and warning defects upon which relief may be granted?

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STATEMENT OF THE CASE

Zoe Washburne ("Washburne") taught at River Middle School in Whitefall, Grace. (R. at 2.) At the age of five she and her parents discovered her allergy to penicillin. (R. at 2.) For twenty-one years she and her parents took active steps to avoid her exposure to penicillin, including notifying all doctors of her penicillin allergy. (R. at 2.) However, in 2008 at the age of twenty-six, Washburne died as a result of her well-documented allergy being omitted from her electronic medical record created by Firefly Systems, Inc. ("Firefly"). (R. at 2, 4.) This appeal focuses on her ability to bring a strict products liability action under Grace law pursuant to Restatement (Second) of Torts § 402A against Firefly for her defectively manufactured electronic medical records, the design defect in Firefly's software, and Firefly's failure to warn of known inherent dangers in its software.

The Move to Electronic Recordkeeping. In the latter part of 2008, Washburne's primary physician, Dr. Frye, sent a letter indicating her practice intended to convert to an electronic medical record keeping system designed by Firefly. (R. at 2.) The letter further explained that Washburne could pay $25 to Firefly and receive a copy of her electronic medical record on a USB flash drive. (R. at 2.) Washburne wrote a personal check for $25 to Firefly and Dr. Frye provided a paper copy of Washburne's medical records for Firefly to digitize. (R. at 2, 3.) Once they were transferred by Firefly, the software was shipped to Dr. Frye. (R. at 3.)

Firefly's System. Firefly aggressively advertised its mass-produced software's ability to convert a patient's paper medical records to an electronic format that would allow for easy and instant transmission of medical records between local and out of town physicians. (R. at 2.) The way this system works is by Firefly employees gathering all of a patient's records, including personal and family past medical history, notes charts and records of procedures from doctors and hospitals. (R. at 2.) Firefly employees are instructed to enter this information exactly as it appears in the paper records into the Firefly system, at which point the patient's data is stored on Firefly's servers. (R. at 2.) Those doctors and hospitals that participate in converting medical records are able to access Firefly's servers directly, while non-participating healthcare providers are able to access the records via Firefly's web portal. (R. at 2.)

Firefly's Competition. IBM, Firefly's biggest competitor, created a similar product that, unlike Firefly's software, incorporates a" final check flag system" to check for errors. (R. at 3.) IBM's product cost only ten percent more and additional training is required because of its more complex operation. (R. at 3.) The flag system warns of the potential errors or omissions that could occur during the conversion of the patient's paper medical record to the electronic format by reviewing the operator's input of data. (R. at 3.) For minor omissions like patient's hair or eye color, there is a yellow flag. (R. at 3.) A red flag appears when there are serious admissions like family history or known allergies and a user is not able to continue until confirmation the red flag information was correctly entered.

Washburne's Death. On Wednesday September 10, 2008, Washburne experienced abdominal pain while she was chaperoning a field trip to Capitol City, Haven. (R. at 3.) Later, she felt sick to her stomach and feverish and had to be taken to the emergency room at University Medical Center where she became unconscious and non-responsive due to the

severity of the pain. (R. at 3.) Washburne's long-time friend, Gordon, accompanied her to the hospital to provide her identification, but he was unaware of her penicillin allergy or past medical history. (R. at 3.)

Using the Firefly web portal, the hospital staff accessed Washburne's electronic medical file. (R. at 3.) Unknown to the hospital, Washburne's chart was accurate in every area except the known allergy field. (R. at 4.) The Firefly software, as a default, inserts "NONE" into the known allergy field if no allergies are input for a patient. (R. at 4.) Although, the paper record submitted by Dr. Frye and the locally stored copy on Firefly's server contained the Washburne's penicillin allergy, it is unclear why the known allergy field was blank in the record used by Dr. Tam. (R. at 4.)

With only the electronic version of Washburne's medical record, which contained nothing in the known allergy field, a preliminary diagnosis of appendicitis was verified by Dr. Tam. Immediate surgery was required to remove the appendix. (R. at 3.) Dr. Tam and the surgical assistants administered penicillin to Washburne after surgery to avoid any post-surgical infection. (R. at 4.) Washburne experienced respiratory problems five minutes after the penicillin was administered and she was given epinephrine to alleviate her symptoms. (R. at 4.) Washburne recovered quickly and developed no further issues during her stay at the hospital. (R. at 4.)

On Friday, September 12, Washburne was discharged from the hospital and went back home to Grace with her parents. (R. at 4.) Shortly after crossing into Grace, Washburne collapsed and was not able to be revived. (R. at 4.) Washburne's collapse was due to a biphasic anaphylaxis reaction, a rare reaction linked directly to the initial anaphylaxis reaction in which symptoms can reoccur up to 72 hours following initial reaction. (R. at 4.) Washburne was

pronounced dead at the scene due to damage caused by the reaction coupled with delay waiting for help to arrive. (R. at 4.)

The District Court. Estate representatives brought suit against Firefly seeking recovery for the wrongful death of Zoe Washburne. (R. at 4.) Washburne's complaint set for three claims against Firefly: (1) breach of express warranty by Firefly; (2) breach of implied warranty of merchantability; and (3) strict product liability based upon a manufacturing, design and warning defect. (R. at 4.) Firefly removed the case to the Haven United States District Court based upon diversity of citizenship and filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. (R. at 5.) The district court, finding Haven products liability law applied in the case, granted Firefly's motion to dismiss. (R. at 7, 9.)

The Court of Appeals. Washburne appealed to the United States Court of Appeals for the Thirteenth Circuit, arguing Grace law should have been applied in the case. (R. at 10.) The court of appeals agreed and found based upon Grace law, Washburne had a claim for implied warranty of merchantability and a claim for manufacturing, design and warning defects upon which relief may be granted. (R. at 11, 13.) The court did dismiss the breach of express warranty claim. (R. at 13.)

SUMMARY OF THE ARGUMENT

I.

The United States Court of Appeals for the Thirteenth Circuit was correct in applying the most significant relationship test from the Restatement (Second) of Conflict of Laws and holding Grace law controls because the State of Grace has the most significant relationship with the parties and the issue in this case. (R. at 11.) The court was correct in denying Firefly's request

to apply the doctrine of *lex loci delicti*, in lieu of the most significant relationship test, because the State of Haven, the forum state, has rejected *lex loci delicti* and adopted the most significant relationship test.

After applying the most significant relationship test, the court was correct in finding Grace has the most significant relationship to this case. First, pursuant to Restatement (Second) of Conflict of Laws § 175, it is presumed the law of the state where the injury occurred will be applied, unless some other state has a more significant relationship. In this case, contrary to Firefly's argument, the injury ultimately suffered was Washburne's death in Grace, therefore Grace law should apply. (R. at 4.) Although Washburne was given penicillin in Haven, she did not die until the biphasic anaphylaxis reaction occurred, at which point Washburne was in Grace. (R. at 4.) The injury did not occur when she was given the penicillin because the doctors were able to counteract the allergy by administering epinephrine. (R. at 4.) The injury occurred two days later when Washburne died as the result of the subsequent reaction. (R. at 4.)

Second, even without applying this presumption, Grace still has the most significant qualitative contacts to the parties and issues in this case. Grace has the most significant contacts because not only did Washburne die in Grace, but she suffered pain in Grace when she began to experience respiratory problems. (R. at 4.) Moreover, Washburne was a resident of Grace at the time of her death, she was employed in Grace, and her representatives are domiciled in Grace. (R. at 2.)

Third, the relationship between Washburne and Firefly was formed in Grace because Washburne's medical records were located in Grace with her primary physician, Dr. Frye, who subsequently provided the records to Firefly. (R. at 2.) In addition, after being informed of the conversion to electronic medical recordkeeping, Washburne wrote a personal check payable to

Firefly. (R. at 2–3.) In exchange, she received for a USB flash-drive containing a copy of her records. (R. at 2–3.) Moreover, Firefly aggressively advertised its product in Grace. (R. at 2.) By doing business in Grace, Firefly should have expected it would be subjected to Grace law. Therefore, looking at these contacts qualitatively, Grace has the most significant interest in apply its own products liability law to ensure that companies advertising in the state are adequately regulated and to provide redress for any injuries that result from defective products.

Fourth, Grace has the predominant interest in applying its own products liability law for a wrongful death that occurred within its boundaries. If Haven law is applied, Washburne might not have a cause of action. Grace is therefore strongly interested in applying its products liability law to ensure Washburne, a resident of the state, is compensated for her injuries. Grace also has a strong, vested interest in allowing recovery for its domiciliaries to deter the kind of conduct within its borders which wrongfully takes a life. In this case, Firefly was advertising aggressively in Grace and selling to Grace doctors and hospitals. (R. at 2.) Grace therefore has a strong interest in applying its own products liability law to deter tortious conduct and encourage all manufacturers, both in and out of state, to make safe products for consumers.

Fifth, applying Grace law to Firefly, a company doing business in Grace, a company that has availed itself of the state's consumers, should not only be expected, but helps to provide predictability in the products liability law that will be applied when an injury occurs as a result of a company's defective product. Therefore, the United States Court of Appeals for the Thirteenth Circuit was correct in holding under the Restatement (Second) of Conflict of Laws, Grace has the most significant relationship with the parties and issue in this case.

II.

Having determined that Grace law applies, the United States Court of Appeals for the Thirteenth Circuit was correct in concluding Washburne has stated a strict products liability claim under Restatement (Second) of Torts § 402A (1965) upon which relief may be granted for manufacturing, design and warning defects. (R. at 11.) Because a product has to be in a defective condition unreasonably dangerous to hold a manufacturer of the product strictly liable under Restatement (Second) of Torts § 402A, the court was correct in following the scheme of trifurcating products defects into the separate categories of (1) manufacturing defects, (2) design defects, and (3) warning defects and analyzing each claim independently.

The court of appeals was correct in finding Washburne's medical records were defectively manufactured. (R. at 12–13.) A defectively manufactured product is one that is flawed as a result of something that went wrong during the manufacturing process, which is exactly what happened in this case. Firefly did not intend for Washburne's electronic medical record to deviate from the paper copy if was given by Dr. Frye, yet at some point in the process of converting Washburne's information, the electronic record omitted vital medical history. (R. at 4.)

In addition to this record being manufactured defectively, it was unreasonably dangerous because consumers expect the products they buy to live up to their intended purpose. Yet in this case, Washburne did not receive an accurate electronic medical record that doctors could rely upon because her record omitted the crucial field of her known allergies. (R. at 4.) Therefore, the court of appeals was correct in holding Washburne has stated a strict liability claim of a manufacturing defect upon which relief may be granted.

Contrary to a manufacturing defect, a design defect is a defect in the actual underlying conception/design of the product. The product is made as the manufacturer intended it to be, but the entire line of the product must be scrapped because the products were designed in a manner that renders them unreasonably dangerous. In this case, the court of appeals was correct in finding Firefly's software is defectively designed. (R. at 13.) First, consumers presume that when they use a product, it will *safely* do the job for which it was built. Yet in this case, Firefly's software did not safely complete the job as it was supposed to; the known allergy that Washburne had twenty-one years of documented medical history was somehow omitted in her electronic record created by Firefly. (R. at 2, 4.)

Second, as the court of appeals found, it is foreseeable that when an employee is inputting medical history into Firefly's software, an entry field will be overlooked. (R. at 13.) Given that this error in producing medical records is foreseeable, Firefly should have incorporated a warning system to alert the employee of potential omissions. Because Firefly's software lacks this necessary warning device, its software is defectively designed. In turn, the faulty design renders the converted medical records unreasonably dangerous because incomplete medical records can lead to misdiagnosis, mistreatment and death. Therefore, the United States Court of Appeals for the Thirteenth Circuit was correct in holding Washburne has a stated a claim for the defective design of Firefly's software upon which relief may be granted.

In addition to manufacturing and design defects, the third area in strict products liability is warning defects. A claim premised upon a warning defect means that the manufacturer gave an inadequate warning or failed to warn which created an unreasonable risk to the consumer. The court of appeals was correct in holding Firefly's software was defective in its warnings because Firefly knew of the inherent danger of employees omitting information when converting medical

records. (R. at 3.) Because this error was foreseen by Firefly, it should have incorporated warnings to alert employees of the missing information. Yet, knowing of the potential serious omissions by is employees, Firefly did not give its employees warnings, it did not impress upon them the potential consequences of what would happen if medical history was omitted. (R. at 3.) Instead, it merely instructed them to enter the data from the paper record into the system. (R. at 3.) Because Firefly did not give an adequate warning to its employees, its software is defective and the resulting medical records cannot be relied upon. Therefore, the United States Court of Appeals for the Thirteenth Circuit was correct in holding Washburne has stated a claim for a warning defect upon which relief may be granted.

ARGUMENT AND AUTHORITIES

I. UNDER THE CONFLICT OF LAWS ANALYSIS, GRACE PRODUCTS LIABILITY LAW APPLIES IN THIS CASE BECAUSE GRACE HAS THE MOST SIGNIFICANT RELATIONSHIP WITH THE PARTIES AND STRICT PRODUCTS LIABILITY ISSUE.

A court faces a choice of laws analysis whenever two or more states have a connection to a case and an issue arises where their respective laws differ. *Brewer v. Dodson Aviation*, 447 F. Supp. 2d 1166, 1175 (W.D. Wash. 2006). When this arises, a court must choose which states law to apply. *Id.* In this case, the Court must determine whether to apply the law of Haven or of Grace because the two states' laws differ on the substantive law that is applied in product liability actions.[1] (R. at 6.)

When a federal court's jurisdiction is based on diversity of citizenship, as in this case (R. at 4), the court must deem itself another state court and apply substantive law, including choice of law rules, of the state in which it sits. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Klaxon*

[1] Haven uses the Restatement (Third) of Torts: Products Liability, while Grace applies the Restatement (Second) of Torts. (R. at 6.)

Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495–96 (1941). In this case, because the forum state, Haven, uses the most significant relationship test from the Restatement (Second) of Conflict of Laws § 145 (1971) when confronted with a conflict of laws issue in a tort action, *Booker v. InGen, Inc.*, 241 Haven 17, 24 (2007), this Court must apply the most significant relationship test to determine whether the law of Haven or Grace will control this product liability action.

Firefly contends that Haven products liability law should apply to this case and thereby argues that under Haven law, Washburne's claims fail as a matter of law. (R. at 5.) While Haven choice of law principles do apply in determining which states' law will apply to Washburne's claims, Firefly's analysis on conflict of laws is misguided. Washburne asks this Court to affirm the court of appeals' decision and find that under the most significant relationship test, Grace law applies.

A. The Lower Court Was Correct in Finding that *Lex Loci Delicti* Is No Longer Good Law in the State of Haven.

Firefly has asked this Court to apply the doctrine of *lex loci delicti* in analyzing whether to apply the laws of Haven or Grace. (R. at 5.) However, this Court must apply the choice of law rules of the Haven because Haven is the forum state. *Klaxon Co.*, 313 U.S. at 495–96. Haven law mandates that choice of law analysis is to be determined by applying the Restatement (Second) of Conflict of Laws ("Conflicts Restatement §__"). *Booker*, 241 Haven at 24.[2] Therefore, the lower court was correct in rejecting the doctrine of *lex loci delicti* and instead applying the Restatement's most significant relationship test.

[2] Haven used to apply *lex loci delicti* but in 2007 the Supreme Court of Haven decided *Booker v. InGen, Inc.* and now uses the most significant relationship test. 241 Haven at 17, 24.

Lex loci delicti was the traditional choice of law rule when more than one state was involved in tort litigation.[3] *Gutierrez v. Collins*, 583 S.W.2d 312, 313 (Tex. 1979). This doctrine says to apply the substantive law of the place where the injury occurred. *Id.* Although in 1843 the rule seemed to be fairly straightforward in deciding which states law to apply, since the 1950s and the advent of mobility across state lines, courts have increasingly abandoned the doctrine in favor of more modern, flexible approaches.[4] *Id.* at 317. In fact, a survey from 2009 found that only 10 states still follow *lex loci delicti* in tort law, and even those states have made exceptions to the rule, including not applying the rule when public policy would not be served. *Id.*;[5] Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 Am. J. Comp. L. 227, 231 (2010).

Lex loci delicti has been rejected by many courts, including Haven and the Restatement (Second) of Conflict of Laws because its rigidity does not always provide a reasonable result. *Booker*, 241 Haven at 24. For example, in *Alabama Great Southern Railroad Co. v. Carroll*, the outcome was unreasonable when the plaintiff was unable to recover for his injuries because the court adhered to *lex loci delicti*. 11 So. 803, 805 (Ala. 1892).

Carroll, a train brakeman, was injured in Mississippi because of inspections that were not performed on the train in Alabama. *Id.* at 804. All parties involved were from Alabama, the wrong doing (failure to inspect the train) took place in Alabama, but because the injury to Carroll

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[3] *Lex loci delicti* is based on the vested rights theory found in Restatement (First) of Conflict of Laws § 311 (1934).

[4] There are three main theories courts use to determine which law to apply: (1) *lex loci delicti* from the vested rights approach in the First Restatement of Conflicts; (2) the governmental interest analysis developed by Professor Currie; (3) the most significant relationship theory of the Restatement (Second) of Conflicts.

[5] The 10 states are: Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming.

occurred in Mississippi, Mississippi law had to be applied. *Id.* Unfortunately, Carroll was unable to recover because the cause of action was barred pursuant to Mississippi law. *Id.* at 805. However, if *lex loci delicti* had not been applied, Alabama law would have provided redress for Carroll's injuries. *Id.*

Because of cases like *Carroll*, many courts have deemed *lex loci delicti* an overly simple rule that cannot solve the complex problems which arise in modern litigation, and have found it leads to" harsh, unnecessary and unjust results." *Ingersoll v. Klein*, 262 N.E.2d 593, 596 (Ill. 1970). In this case, *lex loci delicti* is not a good rule to apply because both Have and Grace have a relationship with the case and locating *the* place where the injury occurred is hotly contested.[6] (R. at 5–6.)

Given that the Conflicts Restatement allows courts flexibility in looking at a multitude of factors for a particular issue in a case, it truly is the best method to apply when deciding which states law to apply. *Gutierrez*, 583 S.W.2d at 318. Further, because the State of Haven has rejected the doctrine of *lex loci delicti*, *Booker*, 241 Haven at 24, the lower court was correct in applying the modern, most significant relationship test from the Conflicts Restatement. After applying the most significant relationship test, the Court should thereby conclude that Grace law applies to Washburne's claims.

B. Using the Most Significant Relationship Test, the Lower Court Was Correct in Finding Grace Has the Most Significant Relationship to This Case.

As criticism of the rigid rule of *lex loci delicti* grew, in 1953 the American Law Institute began working on the Restatement (Second) of Conflict of Laws, which attempted to provide a much more flexible case-by-case approach for deciding choice of law questions. Michael Ena,

[6] Respondent states that the injury occurred when Washburne died (R. at 6), while Firefly claims the injury occurred when Washburne was given penicillin (R. at 5).

Comment, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 Fordham Urb. L.J. 1417, 1428–29 (2007). Pursuant to Conflicts Restatement § 175, in an action for wrongful death the general rule is that courts are to apply the "law of the state where the injury occurred," unless some other state has a more significant relationship under the § 6 principles. Restatement (Second) of Conflict of Laws § 175. However, this presumption may be rebutted. *Id.*

To rebut the § 175 presumption, it must be proved that another state has a more significant interest than the state where the injury occurred. In analyzing this question, courts may look to Conflicts Restatement § 145 and § 6 for guidance on how to resolve the choice of law quandary. However, some courts chose to focus solely on the § 145 contacts. *See Brewer*, 447 F. Supp. 2d at 1176.

Conflicts Restatement § 145 identifies four contacts that may be consider in determining which state does in fact have the most significant relationship. Conflicts Restatement § 145(2). These contacts include:

(a) The place where the injury occurred

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

(c) The domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) The place where the relationship, if any, between the parties is centered.

Id. "These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* These are not the sole factors to consider, but are to be taken into account in applying the principles of Conflicts Restatement § 6 to determine the law applicable to the issue. *Id.* § 145(2); *see also Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 26 (Mo. Ct. App. 2004).

Because Conflicts Restatement § 145 does not stand alone, Conflicts Restatement § 6 lists principles courts may consider in determining which of the § 145 contacts are most important to the issue at hand:

(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). By applying these § 6 principles to the § 145 contacts, it allows courts to not merely just count the contacts that side with each respective state, but instead evaluate them based on their relative importance to the issue at hand. Restatement (Second) of Conflict of Laws § 145 cmt. b; *see also Goede*, 143 S.W.3d at 26. In the context of this case, an examination of the four contacts set forth in § 145 vis-à-vis the § 6 principles compels the application of Grace law.

1. Because the injury ultimately suffered was Washburne's death in Grace, it is presumed that Grace has the most significant contact in this case; therefore, Grace law should apply.

The choice of law analysis in this case is controlled by the Restatement (Second) of Conflict of Laws pursuant to the Supreme Court of Haven. *Booker*, 241 Haven at 24. Per Conflicts Restatement § 175, the court of appeals was correct in finding that Grace has the most significant relationship to this case because of the general rule that courts are to apply the law of the state in which the injury occurred. Restatement (Second) of Conflict of Laws § 175. Here,

the ultimate injury occurred in Grace when Washburne collapsed and subsequently died. (R. at 4.) Therefore, the presumption is that Grace has the most significant contact, and therefore Grace law applies in this case.[7]

Conflicts Restatement § 175 says it is presumed that the law of the state where the injury occurred controls, unless another state has a more significant relationship.[8] In this case, Firefly proposes Haven as the state of the injury, in an effort to come within the realm of the rule recognizing the importance of the location of the injury in determining which state has the predominant relationship.[9] (R. at 5.) However, contrary to Firefly's claim, in this case the injury ultimately suffered was Washburne's death in Grace. (R. at 4); *see Goede*, 143 S.W.3d at 26.

In *Goede*, Robert Foster worked as a machinist for a company in California that was producing missiles for the United States Defense Department. 143 S.W.3d at 16. While machining the parts, substantial quantities of asbestos-containing dust particles permeated his clothing. *Id.* As a result, Robert's daughter, Stephanie Goede, was exposed daily to the asbestos dust. Years later, Stephanie moved to Missouri and began experiencing chest pains and was subsequently diagnosed with mesothelioma and died within one year. *Id.* at 17.

The defendant argued that California law should apply because California was the state Stephanie was exposed to the asbestos, the company was headquartered in California and because all contacts between Stephanie and the company were in California. *Id.* at 25–26.

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[7] Section 175 is a rebuttable presumption.

[8] Even though in this case the injury causing conduct and the ultimate injury occurred in different states, the Restatement continues to favor the application of law from the state where the injury occurred as the more predominant interest. Conflicts Restatement § 146 cmt. e.

[9] Using *lex loci delicti*, Firefly claims the injury occurred when Washburne was administered penicillin in Haven, and alternatively that Haven has the most significant relationship to the litigation. (R. at 5.)

However, the court found that Missouri law should apply because the injury ultimately suffered was Stephanie's death in Missouri. *Id.* at 26. Furthermore, the court found Stephanie suffered immense pain in Missouri, she and her representatives were domiciled in Missouri, and she died in Missouri; therefore, giving Missouri the most significant contact with the injury and the parties. *Id.* at 26–27.

Similarly, in this case Washburne was exposed to penicillin in Haven, but she did not die until the drug re-manifested itself when she was in Grace. (R. at 4.) Contrary to Firefly's claim, the injury did not occur when Washburne was administered penicillin because the doctors were able to counteract the reaction by administering epinephrine. (R. at 4.) The injury occurred two days later when Washburne died as a result of the manifestation, just as the court in *Goede* found the injury occurred when Stephanie died as a result of asbestos manifesting itself in Stephanie's lungs. 143 S.W.3d at 26. Therefore, because the ultimate injury was Washburne's death in Grace, under Conflicts Restatement § 175 Grace law should be applied in this case.

Furthermore, injury to the plaintiff is an essential element of a ripe cause of action in strict liability. *Sinai Temple v. Kaplan*, 127 Cal. Rptr. 80, 87 (Ct. App. 1976). Because Washburne's estate filed a wrongful death claim, there is no injury and no cause of action until death occurs. *McMillan v. Puckett*, 678 So. 2d 652, 654 (Miss. 1996). Therefore, the last element essential in this wrongful death claim was Washburne's death, which occurred in Grace.

In sum, Grace has the most significant contact because not only did Washburne die in Grace and therefore Grace is presumed to have the most significant contact, but also because this wrongful death action ripened in Grace when Washburne died.

2. In addition to the presumptive rule, Grace has the most significant qualitative contacts with this case; therefore, Grace law should apply.

In the context of this case, an examination of the four contacts set forth in Conflicts Restatement § 145 vis-à-vis the Conflicts Restatement § 6 principles compels the application of Grace law. Grace has the most significant contacts because not only did Washburne die in Grace, but she suffered pain in Grace when she began to experience respiratory problems. (R. at 4); *see* Restatement (Second) of Conflict of Laws § 145(a). Moreover, as a resident of Grace, Grace law should control Washburne's product liability action. *See* Restatement (Second) of Conflict of Laws § 145(c); *see also Normann v. Johns-Manville Corp.*, 593 A.2d 890, 893–94 (Pa. Super. Ct. 1991) (applying New York law to a product liability claim because the decedent resided and worked in New York during the time he was exposed to asbestos).

Not only was Washburne domiciled in Grace, but she was employed as a teacher in Grace, and her representatives are domiciled in Grace. (R. at 2.) As a domiciliary and taxpaying citizen of the state, it is expected that when tragedy strikes, plaintiffs will be able to avail themselves of the state's physical and legal protections.

Furthermore, the relationship between Washburne and Firefly was formed in Grace. *See* Restatement (Second) of Conflict of Laws § 145(d). First, Washburne's primary care physician, Dr. Frye, was located in Grace. (R. at 2.) Dr. Frye had Washburne's medical records physically in Grace, and those records were subsequently provided to Firefly. (R. at 2, 3.) Second, after being informed of her doctor converting to an electronic medical recordkeeping system, Washburne wrote a personal check payable to Firefly. (R. at 2.) In return, she received a USB flash-drive from Firefly containing a copy of her electronic medical record. (R. at 2.)

Third, Firefly aggressively advertised its product in Grace. (R. at 2.) By doing business in Grace, Firefly should have expected to be subject to Grace law. *See* Conflicts Restatement § 6.

Looking at all of these contacts qualitatively, Grace has the most significant interest in applying its law to ensure that companies advertising products in the state are adequately regulated and to provide redress for injuries that result. *See* Restatement (Second) of Conflict of Laws § 145 cmt. d.

3. Grace has the predominant interest in applying its own products liability law for a wrongful death occurring within its boundaries; therefore, Grace law applies in this case.

Turning to the interests and public policies of the concerned states, the extent of interests should be determined by the purpose sought to be achieved by applying local law to the issue. *Brewer*, 447 F. Supp. 2d at 1176. In this case, if Grace law is not applied, Washburne might not have a cause of action under Haven law. Grace therefore has a strong interest in applying its products liability law to ensure Washburne, a resident of Grace, is compensated for her injuries. *See id.* (acknowledging that compensating residents for injuries is a real interest). Because of Grace's interest in compensating its domiciliaries, Grace adopted Restatement (Second) of Torts § 402A (1965) to ensure that when its citizens where harmed by a defective product sold in Grace, the seller of that product would be held strictly liable for those injuries.[10] *Turner v. Smith Bros.*, 30 Grace 144 (2006). Therefore, because Washburne was a domiciliary of Grace and died within Grace boundaries, Grace has a significant interest in applying its own products liability law to ensure sellers of defective products are held liable for injuries they cause and to ensure its domiciliaries are adequately compensated.

Grace also has a strong, vested interest in allowing recovery for its domiciliaries to deter the kind of conduct within its borders which wrongfully takes a life. *Brewer*, 447 F. Supp. 2d at 1180–81. Although in this case the product was designed in Haven, Firefly advertised its

[10] Whether the product in question was defective will be discussed below.

product aggressively in Grace. (R. at 2.) As a result of this effort, its computer software was sold in Grace to hospitals and doctors located in Grace. (R. at 2.) Grace therefore has a strong interest in deterring tortious conduct and encouraging all manufacturers, both in and out of state, to make safe products for Grace consumers. *Brewer*, 447 F. Supp. 2d at 1181.

In addition, applying Grace law to Firefly, a company doing business in Grace, a company that has availed itself of the state's consumers, should not only be expected but helps to provide predictability in the products liability law that will be applied when injury occurs as a result of that company's defective product. *See* Restatement (Second) of Conflict of Laws § 6(d), (f).

In sum, because the injury ultimately suffered was Washburne's death in Grace, it is presumed that Grace has the most significant contact. Restatement (Second) of Conflict of Laws § 175. Furthermore, Grace has the most significant qualitative § 145 contacts because Washburne was domiciled and worked in Grace, her medical records were provided to Firefly from Dr. Frye in Grace, the relationship between Washburne and Firefly was centered in Grace and because Firefly aggressively advertised its product in Grace. (R. at 2–4.) Grace also has strong policy interests in deterring the sale of unsafe products within its borders, as well as a predominant interest in ensuring that its residents are adequately compensated for a wrongful death occurring within its boundaries. Therefore, Grace has the most significant contacts with this case and this Court should apply Grace law.

II. BECAUSE GRACE LAW APPLIES, WASHBURNE HAS STATED A STRICT PRODUCTS LIABILITY CLAIM UNDER RESTATEMENT (SECOND) OF TORTS § 402A UPON WHICH RELIEF CAN BE GRANTED FOR MANUFACTURING, DESIGN AND WARNING DEFECTS.

Having determined that Grace law applies, the court of appeals was correct in holding Washburne has a strict products liability claim premised on the Restatement (Second) of Torts

§ 402A (1965) ("Restatement § 402A") upon which relief may be granted.[11] (R. at 11.) Restatement § 402A creates strict liability for manufacturers and sellers of defective products, even though they exercised all possible care in the preparation and sale of the product. Restatement (Second) of Torts § 402A cmt. a. The justification for holding manufacturers and sellers strictly liable in tort for injuries their defective products cause is premised upon protecting consumers. Restatement (Second) of Torts § 402A cmt. c.

By a seller "marketing his product for use and consumption," he "has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it."[12] Restatement (Second) of Torts § 402A cmt. c. The public has the right to and expects that reputable sellers will stand behind their goods. *Id.* In this case, the product at issue is digitized medical records that result from use of Firefly's mass-produced software.[13] (R. at 2, 12.) Under Restatement § 402A, Firefly is liable to Washburne, a consumer, who was injured and ultimately died as a result of its defective software.[14]

In order for a plaintiff to prevail on a Restatement § 402A claim, she must prove that the product was in a "defective condition unreasonably dangerous" at the time it left the seller's hands. Restatement (Second) of Torts § 402A cmt. g. A product is in a "defective condition unreasonably dangerous" if it is "in a condition not contemplated by the ultimate consumer,

[11] Grace courts have adopted § 402A of the Restatement (Second) of Torts in its entirety. *Turner*, 30 Grace 144.

[12] Although the rule states that a person engaged in the business of selling products for use or consumption is subject to § 402A strict liability, it applies to any manufacturer of the product, and to any wholesale or retail dealer or distributor. § 402A cmt. f.

[13] The record reflects there are no concerns about the software as a service; further, it is the resulting product (medical records) at issue and not the incidental service of transferring the records. (R. at 12.)

[14] Section 402A does not require privity of contract between the seller and the consumer.

which will be unreasonably dangerous to him" because the danger is "beyond that which would be contemplated by the ordinary consumer. Restatement (Second) of Torts § 402A cmt. g; Restatement (Second) of Torts § 402A cmt. i.

In order to determine whether a product is in a "defective condition unreasonably dangerous," courts have established the scheme of trifurcating product defects into the separate categories of (1) manufacturing defects, (2) design defects, and (3) warning defects. *See* Aaron Arnold, Note, *Rethinking Design Defect Law: Should Arizona Adopt the Restatement (Third) of Torts: Products Liability?*, 45 Ariz. L. Rev. 173, 177 (2003). Although Restatement § 402A does not differentiate between these three products defects, many courts, including Grace, have adopted this judicially created distinction. *See Turner*, 30 Grace at 153.

In this case, Washburne's strict products liability claim is based upon manufacturing, design and warning defects. (R. at 4.) It is therefore Washburne's burden to prove that Firefly's software was "defective" when manufactured, designed and in its warnings. Restatement (Second) of Torts § 402A cmt. g. Because different tests have been created to determine when a product is defective as to each theory, they will be examined accordingly.

A. Washburne's Electronic Medical Record Was the Product of a Manufacturing Defect Because It Not Only Failed to Meet Firefly's Own Advertised Specifications, but Because the Flawed Medical Record Did Not Live Up to the Consumer's Expectations of Having a Reliable Electronic Medical History.

As noted above, there are three strict liability categories and each has a different theory for determining if a product is defective; one of those categories is premised upon a product containing a manufacturing defect. A defectively manufactured product is one that is flawed as a result of something that went wrong during the manufacturing process. *Gomulka v. Yavapai Mach. & Auto Parts, Inc.*, 745 P.2d 986, 989 (Ariz. Ct. App. 1987). In this case, Washburne's

electronic medical record was the result of a manufacturing defect because Firefly did not intend for the record to deviate from the paper copy it was given. (R. at 4.) However, because Restatement § 402A does not call for absolute liability—it does not make sellers insurers of their goods—Washburne must prove that the manufacturing defect was unreasonably dangerous. *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. 1986).

As outlined in Restatement § 402A, the primary test for determining whether a product is in a "defective condition unreasonably dangerous" is whether the product is in a "condition not contemplated by the ultimate consumer." *Dart v. Wibe Mfg.*, 709 P.2d 876, 878 (Ariz. 1985). According to this standard, courts have created the "consumer expectations test" and apply it in manufacturing defect cases. *Id.* The consumer expectations test asks what an ordinary consumer would expect when using the product in its intended or reasonably foreseeable manner. *Id.* If a product is more dangerous than what the ordinary consumer would expect, it is unreasonably dangerous and therefore defective. *Id.*

When a manufacturing defect arises, Grace courts apply the consumer expectations test to determine if the product in question is unreasonably dangerous. *Turner*, 30 Grace at 153. Applying the consumer expectations test to this case, the question is: did Washburne's electronic medical records (the product of Firefly) meet the reasonable expectations of the ordinary consumer? As the court of appeals found, the answer to this question is no. (R. at 12.)

To determine what the ordinary consumer would expect when converting a paper medical record to an electronic record, this Court should consider the purpose of Firefly's software. Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning that Should Never Meet*, 35 Akron L. Rev. 31, 46 (2001). In this

case, the purpose of Firefly's software was to produce an electronic copy of a patient's medical record to allow for easy and instant transmission between local and out of town physicians. (R. at 2.) It therefore follows that consumers expect Firefly's product to live up to its intended purpose of providing an electronic medical record that doctors can rely on; not only are consumers entitled to this expectation, but they rely on it. *See Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1029 (7th Cir. 1997) (stating that consumers expect the products they purchase to not be defective).

Firefly's consumers expect that not only will their records be available electronically, but that it will be an accurate copy of their medical history that doctors can depend on. However, in this case, Firefly provided an electronic medical record that was seriously flawed—the electronic record was not an exact copy of Washburne's medical records. (R. at 4.) The crucial field in Washburne's medical records, her known allergies, contained the word "NONE." As a result of this missing field, Washburne died. (R. at 4.)

In this case, because Washburne's electronic medical record substantially deviated from the paper copy Firefly was given and did not meet Firefly's own advertised specifications, Washburne's flawed medical records were defectively manufactured. In addition, because this defective product failed the consumer expectations test, it was not a medical history doctors could rely upon, Washburne's records were unreasonably dangerous. Therefore, the court of appeals was correct in holding that Washburne has stated a strict liability claim of a manufacturing defect upon which relief can be granted. (R. at 12.)

B. Firefly's Software Is Defectively Designed Because It Did Not Safely Perform Its Job as the Consumer Expected and Because the Defective Design Proximately Caused Washburne's Death.

Contrary to a manufacturing defect (a defect when the product is not manufactured according to its intended design), a design defect is a defect in the actual underlying conception/design of the product. *Gomulka*, 745 P.2d at 989. The product is made as the manufacturer intended it to be, but the entire line of the product must be scrapped because the products are unreasonably dangerous. *Id.* To establish a defect in the design of a product, a plaintiff has two alternative tests that can be used.[15] *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 446 (Cal. 1978).

First, a plaintiff may show a product is defective in its design if the product "failed to perform as safely as an ordinary consumer would expect" when the product was "used in an intended or reasonably foreseeable manner." *Id.* at 454. Courts have used this standard because the purpose of imposing strict liability on manufacturers is to ensure only safe products reach consumers. Restatement (Second) of Torts § 402A cmt. f. Moreover, when products are placed on the market, it is implied that the product will safely do the job for which it was built. *Barker*, 573 P.2d at 454. So, when a product fails to satisfy the ordinary consumer's expectations as to safety in its intended operation—when it does not *safely* do the job it was built for—the manufacturer is strictly liable for the resulting injuries. *Id.*

However, this consumer expectations test derived from Restatement § 402A "cannot be viewed as the exclusive yardstick" for evaluating the defectiveness of a design. *Id.* In the alternative, a defect in design can be found if the plaintiff shows that the product's design was

[15] In California, courts not longer require a plaintiff prove a defective product was unreasonably dangerous, but plaintiffs must prove there was a defect in the product's design. *Barker*, 573 P.2d at 451.

the proximate cause of her injuries, and the defendant fails to establish that the benefits of the design outweigh the risk of danger inherent in the design. *Id.* at 455. Therefore, once the plaintiff shows her injury was proximately caused by the product's design, the burden of proof shifts to the manufacturer to prove, in light of the risk/utility factors, that the product is not defective. *Id.* This alternative method of establishing a design defect has the jury look through hindsight to determine if the product's design embodies an "excessive preventable danger," or, in other words, does the inherent danger of using the design outweigh the benefits. *Id.* at 454.

In this case, the court of appeals was correct in finding that under both analyses, there is a design defect in Firefly's software. (R. at 13.) Firefly designed software that would make a person's medical history electronically available to doctors and hospitals. (R. at 3.) The way this system works is that a Firefly employee inputs a patient's medical history into Firefly's software. (R. at 3.) This data is then stored on Firefly's servers and hospitals that have signed up with Firefly can access the server directly. (R. at 3.) In addition, the data is made available on-line for all other doctors and hospitals to access via a web portal. (R. at 3.) The problem in this case is that somewhere along the line of inputting Washburne's data and making the record available online, the field containing her known allergies was omitted. (R. at 3.)

Turning first to the consumer expectation test, Firefly's software failed to perform as safely as the ordinary consumer would expect because consumers presume that when they use a product, it will *safely* do the job for which it was built. *Barker*, 573 P.2d at 454. If, while using the product in a foreseeable manner, it is not as safe as the consumer expected, the manufacturer will be held strictly liable for any injury. *Id.* In this case, Firefly's software did not *safely* complete the job as it was supposed to. The known allergy that Washburne had twenty-one

years of documented medical history was somehow omitted in her electronic record Firefly created. (R. at 2, 4.)

As the court of appeals found, it is foreseeable that when a Firefly employee is inputting a person's medical history into the software, an entry field, such as known allergies, will be overlooked. (R. at 13.) Given that this error is foreseeable, Firefly should have incorporated a warning system to alert the employee of potential errors or omissions in converting the patient's record from paper to electronic format. *Barker*, 573 P.2d at 454. Because Firefly's software lacks this necessary safety device, it is defective. *See Garcia v. Halsett*, 82 Cal. Rptr. 420, 423 (Ct. App. 1970).

In *Garcia*, the court found a product was defective because it lacked a necessary safety device. *Id.* There, Garcia sued the owner of a laundry mat for injuries he sustained while using one of the washing machines. *Id.* Several minutes after the machine had stopped its spin cycle, Garcia opened the door to unload his clothes. *Id.* at 421. After unloading one handful of clothes, he reached into the washer a second time when the machine suddenly started running. *Id.* His arm became entangled in the clothes and it was twisted around while the washer went into spin cycle. *Id.* The evidence indicated that the accident could have been avoided by installing a micro switch that would have automatically shut off the electricity in the machine when the door was open. *Id.* The court found the washing machine was defective in its design because it lacked the micro switch safety device and held the laundry mat owner strictly liable in tort. *Id.* at 421–22.

Similarly in this case, Firefly's software is defective in its design because it lacks a necessary safety device. Just as in *Garcia* where the safety device would stop a washing machine from running when the door was open, in this case the use of a warning system in

Firefly's program would alert a user that a field in the medical record was empty. The faulty design of Firefly's software renders the product unreasonably dangerous because incomplete medical records can lead to misdiagnosis, mistreatment and death.

Further, under the alternative test for establishing design defect, Washburne's death was proximately caused by the defective design in Firefly's software because the lack of a safety device contributed to Washburne's incomplete medical record which was relied upon by Dr. Tam. (R. at 4.) To establish proximate cause, the plaintiff must show the defective design constituted either the sole, concurrent or contributing cause of the injury. *Soler v. Castmaster, Div. of H.P.M. Corp.*, 484 A.2d 1225, 1231 (N.J. 1984). Therefore, in design defect cases, establishing proximate cause does not mean the plaintiff has to show the design was the sole reason for her injury, but that the manner in which the product was designed contributed to her injuries. *Id.*

In this case, the record shows that because there is no warning device to alert a user that an entry field is empty, Washburne's electronic medical record did not contain her known allergies. (R. at 3–4.) As a result of this missing field, when Washburne was rushed to the emergency room to have her appendix removed, Dr. Tam reviewed her electronic medical history, which said Washburne had no allergies. (R. at 4.) Dr. Tam then administered penicillin, which led to the reaction, biphasic anaphylaxis, and Washburne's death. (R. at 4.) Therefore, because finding proximate cause does not mean that the defective design had to be the sole cause of injury, but must have contributed to the accident, in this case the defective design of Firefly's software was at least a substantial factor in causing Washburne's death.

Because Washburne's has made a prima facie showing that her death was proximately caused by Firefly's defective design, the burden shifts to Firefly to apply the risk/utility analysis

to demonstrate that its product is not defective.[16] *Barker*, 573 P.2d at 455. However, Firefly will not be able to prove that the utility in having medical records available electronically outweighs the fatal risk of using its software without incorporating a warning system to ensure the medical records are complete.[17] *See id.* (stating that the burden is on the defendant to apply the risk/utility factors and prove its product is not defective).

In sum, under the dual standard for design defects, Firefly's software is defectively designed. Given that it is foreseeable an employee will overlook an entry field, Firefly should have incorporated a warning system to alert the employee of omissions in converting the patient's medical record from paper to electronic format. Because Firefly's software lacks this necessary safety device, it is defective. In addition, the lack of this safety device contributed to Washburne's death because Dr. Tam relied upon the electronic record that indicated Washburne had no allergies. Therefore, Washburne has stated a claim for the defective design of Firefly's software upon which relief may be granted.

C. Because Firefly Knew of the Inherent Dangerousness in Its Product and Did Not Give an Adequate Warning of the Specific Dangers that Could Occur if Information Was Omitted from a Patient's Electronic Medical Record, Washburne Has Stated a Claim for Failure to Warn upon Which Relief May Be Granted.

In addition to manufacturing and design defects, the third area in strict products liability is for warning defects. *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 553 (Cal.

[16] The risk/utility factors are: "(1) the gravity of the danger posed by the challenged design; (2) the likelihood that such danger would occur; (3) the mechanical feasibility of a safer alternative design; (4) the financial cost of an improved design; and (5) the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker*, 573 P.2d at 445.

[17] The record shows incorporating this warning would only cost 10% more and would require a little more employee training. (R. at 3.)

1991). A strict liability claim premised upon a warning defect means that the manufacturer gave an inadequate warning or failed to warn which created an unreasonable risk to the consumer. *Id.* Determining whether a product is defective because of inadequate warnings is analyzed under the same consumer expectations test courts use for determining design defects. *Cavers v. Cushman Motor Sales, Inc.*, 157 Cal. Rptr. 142, 145 (Ct. App. 1979). The additional question to ask in failure to warn cases is whether the manufacturer knew or should have known of the danger, therefore making it necessary to give an *adequate warning* to ensure the product is used safely. *Anderson*, 810 P.2d at 553.

In this case, the record is silent as to any warnings Firefly gave to consumers who purchased its product. In fact, the only instruction Firefly gave was to its employees: make sure the electronic data you input matches the exact paper copy. (R. at 3.) Based on this record, the court of appeals was correct in finding Firefly's product was defective in its warnings. (R. at 13.)

Under the consumer expectations test, a plaintiff may show a product is defective in its warnings if the product "failed to perform as safely as an ordinary consumer would expect" when the product was "used in an intended or reasonably foreseeable manner." *Cavers*, 157 Cal. Rptr. at 145 (stating that the same principles used to determine design defects are applied to failure to warn cases). Because consumers expect a product will safely do the job for which it was built, *Barker*, 573 P.2d at 454, when it comes to failure to warn defects, the question to focus on is whether the manufacturer knew or should have known of the product's danger, *Anderson*, 810 P.2d at 554. If there was knowledge of danger, the next question to ask is was the warning given adequate. *Barth v. B.F. Goodrich Tire Co.*, 71 Cal. Rptr. 306, 315 (Ct. App. 1968).

In this case, Firefly should have foreseen employees would overlook an entry field when converting medical records from paper to an electronic source. In fact, the record indicates Firefly knew of this potential danger. (R. at 3.) Because this error was in fact foreseen by Firefly, it should have incorporated warnings to alert employees when a field was blank. But with this knowledge of a potential serious omission, the only instruction Firefly gave was for employees to make sure the data they entered into the system matched the paper record. (R. at 3.) Even though Firefly did give its employees this instruction, that does not equate to a warning. *Palmer v. Hobart Corp.*, 849 S.W.2d 135, 141 (Mo. Ct. App. 1993).

The distinction between giving a warning and instruction is that warnings signal danger, while instructions serve principally to provide the user with information necessary to use the product. *Id.* In this case, the record reflects that Firefly instructed its employees to take the medical data from the paper record and match it exactly to the electronic record. (R. at 3.) This was merely an instruction to the employees in using the software; it was not a warning of the potential consequences of what would happen if some of the data was omitted.

However, even if this instruction could be viewed as a warning, the "warning" given was inadequate. Firefly employees were told to make the electronic medical records an exact copy of the paper record (R. at 3), but this "warning" was inadequate because it did not impress upon the employees the dangers associated with missing information, *Palmer*, 849 S.W.2d at 141. In *Palmer*, the court found the lack of an adequate warning rendered a meat grinder defective. *Id.*

Palmer was hired to clean the meat grinder in a meat market. *Id.* at 137. When hired, he was instructed by another employee on how to clean the grinder and was given a demonstration. *Id.* Although Palmer was told to turn off the power switch before dismantling the grinder to clean it, he forgot and ended up getting his hand caught in the machine and had two fingers cut

off. *Id.* The court found that the instructions Palmer was given did not equate to a warning of the specific danger of amputation that could occur if the power source remained connected to the grinder during cleaning; he was merely given instructions on how to clean the grinder. *Id.* at 141. Although Palmer had a general knowledge of the machine's dangerousness, that general awareness would not relieve the manufacturer of giving an adequate warning of the machine's specific dangers. *Id.* Therefore, the court found the manufacturer failed to provide an adequate warning, resulting in strict liability for the warning defect. *Id.*

Similarly in this case, Firefly instructed its employees to make sure the electronic data they entered into the software exactly matched the paper record. (R. at 3.) This instruction did not equate to the warning of what could happen if a patient's medical history was not copied exactly. Although the employees might have had general knowledge that the electronic record needed to contain the patient's entire information, that general awareness did not alleviate Firefly from having to give an adequate warning of the specific dangers that could occur if information was omitted. Therefore, Firefly failed to provide an adequate warning and should be held strictly liable for the warning defect.

In sum, it is established Firefly knew of the danger inherent in its product because the record reflects Firefly told its employees to make sure they put in all of the patient's medical history into the software. (R. at 3.) Because Firefly knew of the inherent dangers, it was required to given an adequate warning to its employees of the specific dangers that could occur if medical information was omitted. *Palmer*, 849 S.W.2d at 141. However, because Firefly merely gave its employees instructions in using the software, and not specific warnings, the lack of adequate warnings renders its software defective. *See id.* Therefore, the court of appeals was

correct in holding Washburne has stated a claim for warning defect upon which relief may be granted.

CONCLUSION

This Court should AFFIRM the ruling by the United States Court of Appeals for the Thirteenth Circuit holding the estate of Zoe Washburne has stated claims for strict products liability for manufacturing, design and warning defects upon which relief may be granted.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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APPENDIX A

Restatement (Second) of Conflict of Laws § 6 (1971)

§ 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.

APPENDIX B

Restatement (Second) of Conflict of Laws § 145 (1971)

§ 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 C

Restatement (Second) of Conflict of Laws § 175 (1971)

§ 175 Right of Action for Death

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

APPENDIX D

Restatement (Second) of Torts § 402A (1965)

§ 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.