No. XX-XXXX

IN THE SUPREME COURT OF THE UNITED STATES
April Term 2010

Firefly Systems, Inc.,
Petitioners

-V-

In re Estate of Zoe Washburne,
Respondent

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

BRIEF FOR RESPONDENTS

Team #10
Counsel for Respondent

QUESTIONS PRESENTED

I. The Restatement (Second) Conflict of Law's "most significant relationship" test ensures the state substantive law with the most logical connection to the parties and litigation is applied. Respondent, Zoe Washburne's, death occurred in Grace, it is where she was domiciled, and where her relationship with Petitioner was centered. Should the state of Grace's substantive law govern the outcome of this litigation as the location with the "most significant relationship?"

II. Grace law employs a combination consumer expectation test and risk-benefit analysis to analyze a design and warning defect claim. A Firefly, Inc. product with Zoe Washburne's incorrect electronic medical records fatally injured her when the product was utilized in its intended purpose. Should the Court find Respondent stated a valid claim for strict products liability under the Restatement (Second) Torts §402A as it is the test that protects consumers from dangerously designed products by placing liability on the manufacturer?

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STATEMENT OF THE CASE

Zoe Washburne ("Washburne") discovered her allergy to penicillin at age five. (R. 2). After this diagnosis, she took precautions her entire life to avoid exposure to the drug. (R. 2). As a middle-school teacher in 2008, Washburne accompanied her class to the state of Haven on a field trip. (R. 2). During this trip, Washburne was rendered unconscious and after a routine surgery was given penicillin because her electronic medical records incorrectly stated "NONE" in the "Known Allergies" field. (R. 3, 4).

Prior to the field trip in 2008, Washburne's primary care physician, Dr. Kaylee Frye, informed her that she would be converting all of her medical records to electronic files. (R. 2). Dr. Frye chose Firefly Systems, Inc. ("Firefly") to digitize the medical records. (R. 2, 3). Washburne provided a twenty-five dollar check to Firefly for a USB copy of the electronic medical records. (R. 2, 3).

The Conversion to Electronic Medical Record

The premise of Firefly's system was to work with hospitals nationwide to record and digitize medical records. (R. 2, 3). Firefly employees would input health records including personal and family past medical histories, notes, charts, and records of procedures. (R. 3). The record, once digitized, would be stored on Firefly's severs and available to both user and non-user physicians and healthcare providers. (R. 3). Firefly's software is mass-produced and not customized for each user. (R. 2). Employees are instructed to ensure the data entered is identical

to the paper record. (R. 3). In this case, Washburne's electronic medical record was not identical to her paper record. (R. 4). Even though her paper medical records clearly stated her allergy to penicillin, the term "NONE" was listed in the field "Known Allergies" in the Firefly systems. (R. 4).

Firefly's largest competitor, IBM, also had a similar system for transferring medical records to the electronic form. (R. 3). IBM, while more expensive than Firefly's, includes a flag warning system that alerts operators of any potential errors or omissions when inputting medical information. (R. 3). This "final check flag system" reviews the data and has two levels of warnings: a yellow flag appears for minor omissions such as patient's eye or hair color, and a red flag appears for serious omissions like known allergies. (R. 3).

The Firefly system includes no such check or warning system. (R. 3). The only safeguard to ensure the data is input correctly is instructions for the employees to make sure the data input is identical to the paper form. (R. 3). Additionally, the Firefly software default is to insert the word "NONE" in the "Known Allergies" field if no allergies are input by the operator of the system. (R. 4). In Washburne's electronic medical records the word "NONE" was inserted in this field even though the paper record submitted by Dr. Frye did contain the proper penicillin allergy warning. (R. 4). This allergy is also found on the copy of the record stored locally on Firefly's servers. (R. 4).

Washburne's Emergency Surgery

On Wednesday, September 10, 2008, during a school field trip in Capitol City, Haven Washburne suffered acute abdominal pain and was rushed to University Medical Center in Haven. (R. 3). Once at the hospital, the pain rendered Washburne non-responsive and unconscious. (R. 3). Since Washburne was unable to identify herself or provide her medical

records, a fellow teacher provided the hospital with her driver's license which allowed the hospital to access Washburne's electronic medical records from Firefly. (R. 3).

After the medical records were retrieved, the surgeon on-call, Dr. Simon Tam, confirmed that Washburne was suffering from appendicitis. (R. 3). With her electronic medical records accessed from Firefly's server, Dr. Tam performed an emergency surgery to remove Washburne's appendix. (R. 3). In reliance on the accuracy of the electronic records, the staff administered penicillin as common practice to prevent post-surgical infection. (R. 4). About five minutes after the penicillin was administered to Washburne, she began suffering respiratory problems. (R. 4). These symptoms are common for people who have a penicillin allergy. (R. 4). The hospital staff gave Washburne epinephrine, which alleviated her symptoms. (R. 4).

A few days passed without incident, and Washburne was discharged from University Medical Center on Friday, September 12, 2008. (R. 4). Washburne and her parents left the hospital to return home to Grace. (R. 4).

At some point after Washburne and her parents traveled into their home state of Grace, Washburne collapsed. (R. 4). Unfortunately, Washburne could not be revived. (R. 4). Her parents called 9-1-1, but even the emergency medical technicians could not revive her. (R. 4). Washburne was pronounced dead at the scene due to the damage caused by the reaction to the penicillin and the delay before help could arrive at the scene. (R. 4).

Procedural History

Washburne's estate brought this suit against Firefly seeking to recover for the wrongful death of Washburne and damages for the pain and suffering as a result of her death. (R. 4). The complaint set forth the following 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. 4). Washburne's estate filed initially in the Peterson County Court of Common Pleas in Haven before Firefly removed to the United States District Court for the District of Haven based on diversity of citizenship, 28 U.S.C. § 1332. (R. 4).

Firefly filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (R. 5). The District Court agreed and dismissed the claims. (R. 5).

The District Court found that because there was a true conflict between Haven and Grace substantive law it had to determine which law should apply. (R. 6). The District Court applied under the Restatement (Second) Conflict of Laws "most significant relationship" test and concluded that Haven law should apply. (R. 7). The court held Washburne's estate could not prevail on the design defect claim because they failed to allege or show a reasonable alternative design in their complaint and its warning defect claim because they did not allege a reasonable warning alternative in their complaint. (R. 8). The District Court also rejected the theories of implied warranty of merchantability and express warranty claims. (R. 9).

The Thirteenth Circuit affirmed in part and reversed in part. (R. 10). The Thirteenth Circuit first found that Grace, not Haven, had the most significant relationship to the parties and the litigation. (R. 11). Application of Grace law resulted in the reversal of the District Court's dismissal of the strict product liability claims for manufacturing, design, and warning defect. (R. 11). The Court of Appeals also reversed the dismissal of the claim of a breach of the implied warranty of merchantability. (R. 13). The Thirteenth Circuit affirmed the dismissal of the claim for breach of an express warranty claim. (R. 13.)

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly applied the Restatement (Second) Conflict of Laws' "most significant relationship" test holding Grace substantive law determines the adjudication of this litigation. The purpose of this test is to provide courts with a flexible approach at determining which state law should govern the outcome of a case. The "most significant relationship" test rejects the traditional theory of *lex loci delecti* that finds the applicable law is determined solely where the injury occurred. Under that rule, courts often had to apply laws of states with no meaningful relationship to the parties or the litigation. This test was discounted by Haven, the forum state below, and it now applies the "most significant relationship" test to determine choice of law questions. As such, this Court should apply the "most significant relationship test" as the rule of the forum state of Haven.

The "most significant relationship" test sets forth four contacts for courts to consider when faced with a choice of law question. Application of the contacts listed by this test support the finding that Grace has the most significant relationship with this litigation. Grace has an interest in protecting its citizens as consumers from defective and dangerous products. Here, Washburne lived and, unfortunately, died in Grace. She lived in Grace, worked in Grace, and her local physician was located in Grace. Additionally, her relationship with Firefly was centered in Grace. Firefly advertised its electronic medical records system in Grace. Washburne's doctor provided Firefly with Washburne's medical records in Grace. She was informed of Firefly's services in Grace, she paid for those services in Grace, and she received the product from Firefly in Grace. And as a result of Firefly's product, she suffered injury in Grace.

The only other state that has any relationship to this issue is Haven. While Firefly's principle place of business is located in Haven and Washburne's medical records were digitized

there, those contacts do not create a strong enough relationship to overcome Grace's contacts with this litigation. Even though the conduct causing Washburne's death occurred in Haven, this Court should consider this factor's relative importance in light of the strong contacts and policy benefits of applying Grace substantive law.

Grace substantive law, as the state with the strongest connection with this litigation, should be applied in this case. Grace utilizes the Restatement (Second) Torts §402A combination consumer expectation and risk/utility analysis test. This test should govern the adjudication of this litigation.

The Thirteenth Circuit also correctly reversed the District Court's dismissal of Washburne's claim because she sufficiently stated a claim for strict product liability upon which relief may be granted under the standards established for a Federal Rule of Civil Procedure12(b)(6) motion. Washburne alleged a set of facts, which the court must accept as true at this stage of the litigation, which demonstrate Firefly designed a defective product and failed to warn consumers of its inherent dangers. A physician administered penicillin to Washburne because her electronic medical records failed to provide the correct information in the allergy field due to the presence of the default term "NONE." The inherently dangerous design and the failure of Firefly to warn consumers of the high risks associated with its product proximately caused Washburne's wrongful and untimely death. Under the combination test employed by Grace law, Washburne has sufficiently stated a claim in her complaint to survive Firefly's Federal Rule of Civil Procedure 12(b)(6) motion.

While Firefly asserts that this Court should adopt the pure Risk/Utility test to assess products liability cases, this Court should not accept this test because it eliminates manufacturer liability and places an undue burden on all plaintiffs seeking to bring a products liability claim.

The only factor assessed by courts under this test is whether a reasonable alternative design exists. It is improper to interpret this test to require a plaintiff to proffer a reasonable alternative design at the pleading stage. This test should not be employed because it allows manufacturers to be shielded from liability due to the high burden placed on the plaintiff at the initial stages of pleading. In many cases, a plaintiff cannot show a reasonable alternative design without the knowledge of experts. A plaintiff does not have the knowledge or resources to determine the reasonableness of other designs in the market at the outset of litigation. This burden will reduce the number of claims brought against manufacturers because it requires the high costs of discovery to take place before the complaint is even filed. Essentially, Firefly requests this Court to change the well-established standard of review for Rule 12(b)(6) motions for product liability claims to the evidentiary standard of a Rule 56 Summary Judgment motion.

However, if this Court accepts Firefly's test, which is ungrounded in the history of products liability, then, Washburne has still satisfied her burden to state a claim upon which relief can be granted. Washburne has demonstrated that the design was the "but for" and proximate cause of her fatal injury. The utility of malfunctioning electronic medical software does not outweigh the fatal risks certain to occur when the product is poorly designed. The gravity and likelihood of the danger in regards to a person's health and wellbeing are too severe for this Court to ignore. A manufacturer should not be allowed to avoid liability because of a judicial bar set inappropriately too high for a plaintiff to hurdle.

ARGUMENT

I. Application of the Restatement (Second) Conflict of Laws "Most Significant Relationship" test reveals that the state of Grace has the most significant relationship with this litigation and its substantive law should adjudicate this matter.

The Thirteenth Circuit Court of Appeals correctly applied the Restatement (Second) Conflict of Laws Section 145(2) finding first, the theory of *lex loci delicti* is no longer good law in the State of Haven and second, the State of Grace has the most significant relationship to the parties and events of this litigation.

A federal court exercising diversity jurisdiction must apply the substantive law in which it sits. *Klaxon Co. v. Stentor Elec. Mft. Co., Inc.*, 313 U.S. 487, 494 (1941). In *Klaxon*, this Court held that *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) extended to conflict of laws questions and required federal courts to apply state substantive law to determine which state law should apply in diversity jurisdiction cases. *Id.* at 496. The State of Haven, in which the district court below sits, applies the Restatement (Second) Conflict of Laws most significant relationship test. *Booker v. InGen, Inc.*, 241 Haven 17, 24 (2007); (R. 11). "Choice of law questions involving undisputed facts are reviewed de novo." *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1143 (10th Cir. 2009).

Choice of law questions are often present in products liability cases "because the product in question was produced in one state, purchased in another state, and caused an injury in yet another state." Ena, Michael, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 Fordham Urban L. J. 1417, 1417 (2007).

Grace substantive law should be used in the adjudication of this lawsuit under the most significant relationship test for two reasons: first, the Haven Supreme Court has abandoned the *lex loci delecti* doctrine and second, under the most significant relationship test Grace substantive

law applies because the injury that gave rise to this cause of action occurred in Grace, Washburne was domiciled in Grace, worked in Grace, her primary care physician was located in Grace, and the relationship between the parties was centered in Grace.

A. The theory of l*ex loci delecti* should not apply because it was rejected by the Haven Supreme Court.

The law of the forum state, including choice-of-law rules, applies in this diversity action. *Montgomery v. Wyeth*, 580 F.3d 455, 458 (6th Cir. 2009). Haven, as the forum state, is the applicable law for evaluating choice-of-law rules. (R. 7).

Haven, until recently, followed the theory of *lex loci delecti*. (R. 6). This theory was traditionally applied in tort cases rendering the law where the tort was committed the applicable law. Ena, *Choice of Law and Predictability*, 34 Fordham Urban L. J. at 1420. This approach, however, has largely been rejected in recent years and has been categorized as "rigid" and dependent on "entirely fortuitous events." *Id.* at 1422, 1424. In its place, courts now apply the Restatement (Second) Conflict of Laws "most significant relationship" test. This approach "added extra flexibility in accommodating interests of several states by allowing courts to make choice of laws decisions on an issue-by-issue basis." *Id.* at 1430.

Lex loci delecti should not be applied in the instant case because the Haven Supreme Court has expressly adopted the most significant relationship test in *Booker v. InGen, Inc*, 241 Haven at 24. Haven has recently joined other states in applying the principles of the Restatement (Second) Conflict of Laws, which requires courts to apply the "most significant relationship" test. *See Id.* at 24; (R. 7).

Iowa, like Haven, also moved away from the doctrine of *lex loci delecti* and adopted the Restatement (Second) Conflict of Laws' most significant relationship test for choice of law issues. *Estate of Pigorsch ex rel Martin v. York Coll.*, 2010 WL 3328284 *4 (N.D. Iowa August

18, 2010) *citing Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896, 897 (Iowa 1996). The Iowa Supreme Court found the theory of this test was to focus not on a single factor, but instead "apply the policy of the state with the most interest in the litigants and the outcome of the litigation." *Id. quoting Fuerste v. Bemis*, 156 N.W. 2d 831, 834 (Iowa 1968).

The most significant relationship test creates a presumption that the applicable law is that "of the jurisdiction in which the tort occurred." *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 865 (7th Cir. 2010). Under this test, which demotes *lex loci delicti* to a presumption, a plaintiff can argue that the applicable state law is the state "in which the greatest costs of the injury were occurred." *Id.* at 866.

Haven, when confronted with a conflict of laws issue in a tort action begins its analysis with Section 146 of the Restatement (Second) Conflict of Laws. (R. 7). The general rule from section 146 is that the "state's law where the injury occurred governs the rights and liabilities of the parties." *Wyeth v. Rowatt*, 244 P.3d 765 (Nev. 2010). However, if a party presents evidence that another state's law applies based on the parties and the tortious conduct, the court should apply the "most significant relationship" test. *Gen. Motors Corp. v. Eighth Judicial Dist. Ct.of State of Nev. ex rel County of Clark*, 134 P.3d 111, 117 (Nev. 2006). A proper analysis requires a court to determine if a state, other than the forum state, has "a more significant relationship with the alleged tortious conduct and the parties." *Wyeth*, 244 P.3d 765.

Accordingly, this Court should not apply the theory of *lex loci delecti* and instead apply the "most significant relationship" test. Washburne was domiciled in Grace, worked in Grace, formed her relationship with Firefly in Grace, and died in Grace as a result of Firefly's product. Washburne presented evidence that the relationship with the State of Grace was more substantial

than the State of Haven, and the Thirteenth Circuit correctly evaluated the Section 145(2) factors in finding Grace substantive law should apply.

B. The Factors set forth in the Restatement (Second) Conflict of Laws Section 145(2) support the Thirteenth Circuit's holding that Grace Substantive Law Applies.

The Thirteenth Circuit correctly evaluated the Restatement (Second) Conflict of Laws and found Grace substantive law applies. Section 145(1) states that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which … has the most significant relationship to the occurrence and the parties…" Section 145(2) sets for the contacts courts should consider in determining which law to apply:

> (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.

Restatement (Second) Conflict of Laws §145(2)(a)-(d). These contacts "are to be evaluated according to their relative importance with respect to the particular issue." *Id.* These contacts are also to be considered in light of the principles set forth in the Restatement (Second) Conflict of Laws § 6. *Id.* at 145(1). Courts "must now consider the § 6 principles, at least to the extent that the court finds that they are implicated … in light of the pertinent § 145(2) contacts." *Estate of Pigorsch*, 2010 WL 3328284 at *7. The principles set forth in section 6 are:

> (a) the needs of the interstate and international system;
> (b) the relevant policies and governmental interests of the forum;
> (c) the relevant policies of other interested states and the relative interests of those states;
> (d) the need to protect justified expectations;
> (e) the basic policies underlying the particular field of law;
> (f) the need for certainty, predictability and uniformity of result; and
> (g) the ease in the determination and application of the law to be applied

Restatement (Second) Conflict of Laws § 6(a)-(g). Courts have determined however all the listed principles will not be implicated in cases of personal injury or wrongful death. *See Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1359 (8th Cir. 1994); *Estate of Pigorsch*, 2010 WL 3328284 at *7. The Comments to this section explain the factors of "relatively greater importance for a tort action" are §6(2)(b), §6(2)(c). *Estate of Pigorsch,* 2010 WL 3328284 at *7. Section (d) and (f) are implicated "only minimally where personal injury claims arising from accidents are involved [because] persons who unintentionally cause injury usually act without contemplating the law that may be applied to determine the legal consequences of their conduct." *Dorman*, 23 F.3d at 1359. Additionally, (a) is "not ordinarily implicated by actions to recover for personal injuries." *Id. citing Kenna v. So-Fro Fabrics, Inc.*, 18 F.3d 623, 626-27 (8th Cir. 1994). Finally, (g) is of little importance because the "defendant would either be held liable or it would not." *Estate of Pigorsch*, 2010 WL 3328284 at *7.

Grace law should be applied in adjudicating this lawsuit. The injury complained of in this litigation, Washburne's death, occurred in Grace, the relationship between Washburne and Firefly occurred in Grace, and Washburne was domiciled in Grace. While Firefly's principle place of business is in Haven and the conduct causing the injury occurred in Haven, these contacts are not significant enough to find Haven as the state with the most significant relationship. Additionally, the applicable Section 6 principles demonstrate that Grace substantive law should apply.

1. Washburne's injury, the reaction to penicillin resulting in her death, occurred in Grace.

Washburne's death occurred in the state of Grace and that, therefore, is where she suffered the injury caused by Firefly which was the reason for this wrongful death action.

Section 146 defines "personal injury" as "either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another. Restatement (Second) Conflict of Laws § 146 cmt. b. The harm causing Washburne's death was the injury resulting from Firefly's actions in this case. The Restatement comments also state "the place of injury is of particular importance in the case of personal injuries." *Id.* cmt. f. Here, Washburne's death occurred in her home state of Grace. (R. 4). The current cause of action did not exist when Washburne was present in Haven. When she was discharged from University Medical Center in Haven, she was not injured, and the elements required for the cause of action brought forth by her estate did not exist until she suffered the injury in Grace.

This Court should adopt the analysis that the place of injury is the "state where injury is first ascertainable, which is the last event necessary for a claim against a tortfeasor." *Wyeth*, 244 P.3d at 765. Courts have recently discussed choice of law principles regarding the place of injury when there is a latency period between the first appearance of symptoms followed by a latent period and then an actionable injury. *Robinson*, 615 F.3d at 866. In *Robinson*, the Seventh Circuit acknowledged there would not be a concern of forum shopping if the latency period between initial symptoms and injury was short in time. *Id.* That is exactly the situation here. Washburne had initial symptoms to the administration of penicillin followed by two days without incident. (R. 4). The injury then manifested itself in her death two days after the initial reaction. (R. 4).

In *Wyeth*, plaintiffs took a prescription medication and subsequently developed breast cancer. 244 P.3d at 769. The plaintiffs were all prescribed the same medication manufactured by Defendant, Wyeth. *Id.* at 770. They lived in various states when prescribed the medication.

They both then moved to Nevada, while still taking the medicine. *Id.* They were then diagnosed with breast cancer. *Id.* Plaintiffs filed a personal injury and strict products liability claim. *Id.* On appeal, Wyeth argued the district court erred in determining Nevada law applied since plaintiffs were living in other states when they began taking the medication. *Id.* at 775. Plaintiffs opposed this argument claiming that Nevada was the "legal" place of injury "because the final event necessary to assert a claim against Wyeth did not exist" until the diagnosis of cancer. *Id.*

Applying the Restatement (Second) Conflict of Laws § 146, the court found Nevada law applied. *Id.* The court rejected Wyeth's argument that the place of injury for a "slow moving disease" is the state where the "disease process begins." *Id.* at 776. Instead, it adopted the Eighth Circuit's test from *Renfroe v. Eli Lilly & Co.*, 686 F.2d 642, 645 (8th Cir. 1982), in which the court found the injuries occur in the state where they are ascertainable. *Id.* at 776. In that case, the court found that the plaintiffs were exposed to a drug in Missouri and diagnosed with cancer in California. *Id. citing Renfroe*, 686 F.2d at 644-645. The court found that the claims did not originate in Missouri where they were exposed to the drug, but where plaintiffs' damages "were sustained and capable of determination." *Id.* at 776 *citing Renfroe*, 686 F.2d at 647. Importantly, the court emphasized that even though the cancer may have existed prior to the plaintiffs' arrival in Nevada – it was first ascertainable in Nevada. *Id.* at 777.

Similarly, Washburne's cause of action against Firefly was not complete until she suffered injury from their services. She did not suffer an ascertainable injury until her death in Grace. Her first reaction to the penicillin was minor and immediately corrected by the hospital staff in Haven. (R. 4). Additionally, that reaction had ended and two days passed without incident. (R. 4). Her initial symptoms were then followed by a period of latency, which

ultimately led to the injury she suffered: the severe reaction three days later that caused her death. (R. 4). Like the plaintiffs in *Wyeth* and *Renfroe*, even if the reaction was happening while she was still in Haven, since it did not manifest until she was in the car on the way home in Grace, her injury occurred in Grace.

Another court in *Northview Christian Church, Inc. v. J&J Group, Inc.*, 2010 WL 4641661 *4 (D. Idaho Nov. 8, 2010) also rejected the defendants' argument that the injury occurred in Idaho because the product was designed in Idaho and the work occurred in Idaho. The court also rejected defendants' alternate argument that the injury was in Utah because the designs were delivered and implemented in Utah. *Id.* Instead, the court applied Alabama law because the "ultimate injury" resulting from the Defendants' actions was the financial injury suffered in Alabama. *Id.* This is analogous because even though the penicillin was administered in Haven, the injury was the death, which occurred in Grace.

Because Washburne's injury was her death, the presumption applied by Haven courts in Restatement (Second) Conflict of Laws § 146 should apply and this factor should weigh heavily in favor of finding Grace as the state with the most significant relationship with the parties and this litigation.

2. Firefly's Conduct Causing the Injury to Washburne Occurred in Haven.

In claims for strict products liability, "courts generally consider the place where the conduct causing the injury occurred to be the place where the product was designed and manufactured." *Black v. Toys R Us-Delaware, Inc.*, 2010 WL 4702344 *10 (S.D. Tex. Nov. 10, 2010) *citing Norwood v. Raytheon Co.*, 237 F.R.D. 581, 595 (W.D. Tex. 2006). Here the design and manufacture of Firefly's electronic medical record system was presumably in Haven where its principle place of business is located. (R. 2).

However, this contact is not significant enough to consider Haven as the state with the most significant relationship with the litigation. Accordingly, this factor must "be evaluated according to [its] relative importance with respect to the particular issue." Restatement (Second) Conflict of Laws § 145. This factor should not be weighed heavily in favor of Haven especially in light of the fact that her injury and the relationship between the parties occurred in Grace. While the input of the data occurred in Haven, the mistake was accessible from any hospital nationwide. (R. 3). Therefore, the fact that University Medical Center staff accessed it in Haven is fortuitous. Washburne's illness rendered her unconscious, unable to warn doctors about her allergy. (R. 3). This could have happened in any state. The administration of penicillin following a necessary surgery – one that she would have had that day regardless of what state she was in – would have occurred. The fact that it was in Haven is inconsequential to the determination of which state has the most significant relationship with the litigation.

3. The location of the parties favors Grace because all of Washburne's significant contacts were with the state of Grace.

The location of the parties is undisputed. Washburne was a resident of Grace. (R. 2). She was also a middle school teacher at River Middle School in the small town of Whitefall, Grace. (R. 2). Her primary care physician, Dr. Kaylee Frye was also located in Grace. (R. 2). Every significant contact relevant to Washburne was in Grace – she lived in Grace and died in Grace.

On the other hand, Firefly is a Delaware corporation with its principle place of business in Haven. (R. 2). The principle place of business is the contact that receives more focus on the location of the parties contact. *See* Restatement (Second) Conflict of Laws §145 cmt. e. Even though its principle place of business is in Haven, it had "aggressively" advertised its software

nationwide, including in Grace. (R. 2). It had, in fact, reached potential customers in Grace, as Washburne's physician in Grace had purchased its electronic medical record services. (R. 2).

The domicile of Washburne is significant in finding Grace to have the most significant relationship. The Restatement encourages courts to consider the policies of the laws of the states in determining which state law should apply. Restatement (Second) Conflict of Laws § 6 (1971). Here, Grace follows the Restatement (Second) Torts § 402A. (R. 6). Products liability "developed in response to changing societal concerns over the relationship between the consumer and the seller of a product." *Berkebile*, 337 A.2d at 898. "The increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence, where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his products." *Id citing* Restatement (Second) Torts § 402A, cmt c. By applying the Restatement (Second) Torts § 402A, Grace has demonstrated a strong policy of protecting its citizens as consumers. Grace's policy in applying that test is relevant for this Court's consideration in light of Restatement (Second) Conflict of Laws § 6(c).

4. The Relationship between Washburne and Firefly was centered in the state of Grace.

The fourth contact to consider is the location of the relationship between the parties. Restatement (Second) Conflict of Laws § 145(2)(d). "When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered. *Id.* cmt. e.

As correctly discussed by the Court of Appeals below, the relationship between Washburne and Firefly is centered in Grace. (R. 7; 11). Firefly advertised its electronic medical

record services nationally to doctors and hospitals. (R. 2). Dr. Frye purchased these services while working in Grace. (R. 2). Her patients living in Grace, including Washburne, had their medical records converted to an electronic form. (R. 2). Washburne wrote a personal check to Firefly to receive a USB drive with a copy of her electronic medical records. (R. 2-3). The product was purchased in Grace by Dr. Frye for her practice and by Washburne for her personal use. (R. 2-3). The purchase of the product and transaction between the parties should determine in which state their relationship is centered. *See Gen. Motors Corp.*, 134 P.3d at 118. And, finally, she was provided that USB drive completed by Firefly from Dr. Frye, in Grace. (R. 3).

Every contact between Washburne and Firefly occurred in Grace with the exception of one. That was when Washburne was rendered unconscious and the doctors at University Medical Center accessed the Firefly system from Haven to retrieve her medical records. However, even this was not truly a contact or relationship between Washburne and Firefly. Washburne was unconscious when this interaction occurred. For these reasons, this factor should be weighed heavily in favor of Grace. The Thirteenth Circuit did not err when it found Grace had the most significant relationship with the parties and litigation.

II. The United States Court of Appeals for the Thirteenth Circuit correctly applied Grace law determining Washburne sufficiently stated a claim for strict products liability for which relief may be granted due to her fatal injury that directly resulted from Firefly's flawed design and failure to warn consumers of the inherent danger.

The standard of review for a motion to dismiss for failure to state a claim under Rule 12(b)(6) is de novo. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). When reviewing a Rule 12(b)(6) motion, the court is required to accept all factual allegations in a complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); (R. 6). In addition, the court will view the facts in the light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); (R. 6). A complaint in the pleading stage does not need to allege detailed

factual allegations; however, the Court is not required to accept legal conclusions that are couched as factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); (R. 6). Pursuant to the Federal Rules of Civil Procedure, a plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8.; (R. 6). In reviewing the sufficiency of plaintiffs' complaint, the issue is not whether plaintiffs will prevail, but whether they are entitled to offer evidence to support their claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In this case before the Court, Washburne sufficiently plead factual allegations upon which relief could be granted and should be entitled to offer evidence to support her claim. Washburne's fatality was directly attributable to unreasonably dangerous design of the electronic medical record software produced by Firefly, Inc. The electronic medical record (EMR) failed to contain a listing of Washburne's known allergies. (R. 4). The records transcriber failed to notice the error due to the lack of a warning system in place in the system. (R. 3). Firefly's flawed design produced an unreasonably dangerous product. Due to the allegations in the complaint and the legal theories set forth, the Thirteenth Circuit correctly determined that the complaint sufficiently showed Washburne is entitled to relief on the basis of strict products liability.

The plaintiff has the burden to establish a prima facie case showing the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove that the product was not defective. *Barker v. Lull Eng'g Co., Inc.*, 573 P.2d 443, 446 (Cal.1978). The burden on the plaintiff to establish a prima facie case is an incredibly low burden, and in the present case, Washburne more than exceeds meeting her burden. In the Record, the facts are undisputed that the paper records sent to Firefly correctly contained the information regarding the allergy information. The default field fill, "NONE," did not cause alert

to the transcriber that the relevant information was omitted. When Washburne arrived in serious condition to University Medical center, the doctors acted reasonably to rely on the EMR found when the doctors searched Washburne's driver license number. The doctor treating Washburne in her distressed state had no reason to believe that the records would be incorrect. The failure of the product to contain the allergy information due to a flawed design proximately caused the death of Washburne.

Once the plaintiff has made a prima facie case that the product proximately caused the injury, the burden shifts to the defendant to prove that the product was not defective. *Barker*, 573 P.2d at 431. In this case, the Thirteenth Circuit correctly determined Washburne's strict product liability claims are sufficient to present claims for manufacturing, design, and warning defect under Grace state law. At the stage of the proceedings, Washburne met her burden of proof. The burden shifted to Firefly to prove that the product was not defective.

Given that Grace law applies in the matter before the Court, Washburne has sufficiently presented the court with a valid claim for strict product liability based on design defect and failure to warn. The combination of the consumer expectation test and risk-benefit analysis demonstrate that Washburne's fatal injury occurred directly from Firefly's incorrect electronic medical records when the unreasonable software design was utilized in its intended manner, and Firefly failed to warn Washburne of the risks inherent in the product. Therefore, Washburne sufficiently states a claim for strict product liability under the Restatement (Second) Torts § 402A. The Thirteenth Circuit correctly reversed the district's court dismissal of the claim.

A. The Thirteenth Circuit correctly applied the Restatement (Second) Torts § 402A consumer expectation test and risk-benefit analysis which creates strict liability for sellers of a defective product even when all possible care is exercised in the preparation and sale of the product because the product is unreasonably dangerous for the consumer.

Since 1944 in Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co. of Fresno*, courts have fixed liability on the manufacturer by strict liability and tort rather than in the context of sales and negligence. 150 P.2d 436 (Cal. 1944). Justice Traynor argued "public policy demands, regardless of the presence of negligence, liability be fixed where it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id*. at 440. Soon after Traynor's concurrence became the majority opinion in *Greenman v. Yuba Power Prod., Inc.*, the Restatement (Second) Torts § 402A came into existence and laid out the consumer expectation test to determine whether a product is defective. 377 P.2d 897 (Cal. 1963). Since that time, a majority of states, including the state of Grace, have adopted Section 402A of the Restatement (Second) Torts in its entirety. *Turner v. Smith Bros., Inc.*, 20 Grace 144 (2006). The Restatement (Second) Torts § 402A (1965) provides:

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 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 relationship.

The Restatement (Second) applies to a seller of a product in a *defective condition unreasonably dangerous* to the user or consumer. "A defective condition is condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) Torts § 402A, cmt. g. (1965). It does not limit a defective condition to

design or manufacture. *Berkebile*, 337 A.2d at 902. "The seller must provide with the product every necessary element to make it safe for use." *Id*.

In *Barker v. Lull Eng'g Co. Inc.*, the court set out the consumer expectation test and risk-benefit analysis in order to determine if a product is defective. 573 P.2d 443 (Cal. 1978). In *Barker*, the court concluded that a product is defective in design if either (1) the product has failed to perform as safely as the ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the benefits of the challenged design do not outweigh the risk of danger inherent in such a design. *Id*. at 446. According to Grace law, the court analyzes a design and defect claim, such as Washburne's claim, by utilizing a combination of the consumer expectation test and a risk-benefit analysis. (R. 12).

1. The Consumer Expectation Test should be applied because it appropriately places liability on manufacturers when a product fails to perform safely when used in its intended manner.

The first test looks at whether the product has failed to perform "as safely as the ordinary consumer would expect it to when used in an intended or reasonably foreseeable manner." *Barker*, 573 P.2d at 446. Under this test, a manufacturer is strictly liable for any condition found in the product that was not contemplated by the ultimate consumer that will be unreasonably dangerous to the consumer. *Potter v. Chicago Pneumatic Tool Co.,* 694 A.2d 1319 (Conn. 1997).

Here, Washburne reasonably expected her electronic medical records to be an exact match to her paper medical records. (R. 13). Further, it is foreseeable, based on that reasonable belief, for consumers to expect the product to have a system in place that would alert transcribers to an omission such as allergy information. It would not be contemplated by the consumer of this product that a condition of the product is that it does not utilize any check or safety

mechanism to ensure the correctness of the data. Providing "NONE" as the default setting in the system is inherently dangerous, especially in a field entitled "Known Allergies." Electronic medical records are likely used in an emergency situation or when the patient is incapacitated. This system allows any doctor at any hospital, whether or not that doctor or hospital personally uses Firefly, to access a database with the patient's complete medical record. (R. 2). The situation presented below is exactly that contemplated by Firefly: a patient's medical record was easily accessible and available in the event of an emergency that rendered her unconscious while traveling and the doctor's relied on the accuracy of those records. (R. 2). It was more than reasonably foreseeable; it was the intended purpose of the system. The product was unreasonably dangerous in a condition not contemplated by the consumer. The product, due to its design, failed to perform properly when used in the intended and reasonably foreseeable manner for which it was created.

"Liability is not premised on manufacturer negligence, but rather strict liability in the presence of product defect." *Greenman*, 377 P.2d at 901. The consumer expectation test reflects "the principle that, in a product liability action, the trier of fact should focus on the product, not on the manufacturer's conduct, not require the plaintiff to prove the manufacturer acted unreasonably or negligently in order to prevail in the action." *Barker*, 573 P.2d at 447. "There are products which are 'perfectly' manufactured, but are unsafe because of the absence of a safety device." *Brown v. Superior Ct.*, 751 P.2d 470, 474 (Cal. 1988).

Firefly's electronic medical record software is precisely the product that this standard is meant to encompass. Although employees were instructed to make sure that the electronic data they input matches the exact paper record, a final check system did not exist in the software. (R. 3). The IBM system that similarly transcribed patient data into electronic medical records had a

final check system in place and did not allow the transcriber to complete the record if vital data such as allergy information had been omitted. (R. 3). The omission of the system's warning device makes the product dangerously unsafe, regardless of the perfection in the manufacturing. The very design fails to meet basic consumer expectations as to safety because of the flawed system. The lack of warning system proximately caused the fatal injury to Zoe Washburne.

2. The Risk/Benefit Analysis demonstrates to the Court that the Firefly product is unreasonably dangerous because of the inherently fatal risks.

Under the second test utilized by Grace to determine if a product is unreasonably dangerous, the court examines whether the benefits of the challenged design outweigh the risks. *Bartholic v. Scripto-Tokai Corp.*, 140 F.Supp.2d 1098, 1108 (D. Colo. 2000). Although electronic medical records provide doctors with information at the stroke of a computer key, the records are only valuable if reliable and accurate. In the creation of the system, the benefits of the Firefly design do not outweigh the risks. The default "NONE" in the "Known Allergy" field and absence of a warning system in place to alert the transcriber to an omission is inherently dangerous. Allergies in many cases are severe and physicians routinely ask whether a patient has any known allergies before administering a medication.

The use of electronic medical record system when a patient is incapacitated and unable to provide pertinent medical information is not only foreseeable, but an intended function of the system. (R. 2). However, if the information retrieved from a system that has neither checks for data accuracy nor alert to the omission of crucial information, then the system's benefits do not outweigh the inherent dangers.

A patient's sensitivity to medication can lead to injury and, in this case, death. The risk-benefit analysis requires consideration of the normal public expectation of danger. *Jennings v. BIC Corp.*, 181 F.3d 1250, 1255 (11th Cir. 1999). Applying this standard for expectation,

Washburne adequately demonstrated that Firefly failed to warn the consumer of the unreasonably dangerous product under the risk-benefit test; and therefore, stated a claim for strict product liability upon which relief can be granted.

3. Firefly failed to adequately warn consumers of the product's dangers.

A product may be faultlessly manufactured but still be dangerously defective because the manufacturer failed to warn the consumer of its inherent danger. *In re Haw. Fed. Asbestos Cases*, 665 F.Supp. 1454, 1458 (D. Hawaii 1986). The nature of the Firefly software was inherently dangerous to the consumer, and Firefly indicated no warning to the consumer regarding the input system. The nature of the product required that an individual transcribe mass amounts of data into a computer program. Errors not only were possible to occur, but highly likely considering that the program had no check system or error alert in place besides a bare minimum cursory proofreading by the original transcriber. It is highly likely that human error would occur, and the risks involved with error are serious, in this case fatal. The product contained an unreasonable danger and would be used in a manner that exposed the consumer to high risks. Firefly, Inc. gambled that human error could be avoided without any safety checks in place. Not only was this unreasonable and dangerous, but Firefly's gamble caused the death of Washburne.

Firefly did not adequately warn the consumer of the danger inherent in the product. Accordingly, Washburne has a product liability claim against Firefly for failure to warn. Under the combination test for determining the defective condition of a product within the meaning of the Restatement (Second) Torts § 402A, Washburne has sufficiently plead a claim for strict product liability based on design defect, as well as failure to warn. The Thirteenth Circuit correctly applied Grace substantive law, and Washburne has met her burden to show that

the product proximately caused her injuries under the two tests. Because Grace law applies Washburne may assert a separate claim for breach of implied warranty of merchantability under the Uniform Commercial Code. The Thirteenth Circuit was correct in determining that Washburne correctly plead a valid claim under the substantive law.

B. Even if this Court applies the Restatement (Third) Torts under Haven law, Washburne has sufficiently pled a claim against Firefly for manufacturing a defective product because the defective product was the "but for" and proximate cause of Washburne's fatal injury under the exclusive Risk/Utility test.

In the alternative, if this Court finds Haven substantive law should apply, Washburne has still sufficiently pled a claim under the standard set out by the Restatement (Third) Torts. Firefly argues that under the Restatement (Third) Torts § 2b Washburne has failed to state a claim upon which relief may be granted. However, by asserting this argument, Firefly asks this Court to alter the very standard of a Rule 12(b)(6) motion. Granting Firefly's motion to dismiss would be inappropriate and in contrast to the rationale of our judicial system. At this beginning stage of proceedings, the court cannot require the plaintiff to prove their case. Requiring a complaint to contain a reasonable alternative design would require courts to determine the legal merits of the claim, rather than taking all of the facts alleged as true. Firefly's argument calls for all 12(b)(6) motions to be assessed as motions for summary judgment in the context of products liability claims.

1. The Exclusive Risk/Utility Test should not be applied because it is not supported by the policy and history of products liability law.

The American Law Institute dismantled strict liability through the drafting of the Third Restatement. Vandall, Frank, Vandall, Joshua, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. Mem. L. Rev. 909, 922 (2003). Section 2b places the burden on plaintiffs to prove "the foreseeable risks of harm posed by the product could have been reduced

or avoided by the adoption of a reasonable alternative design." *Adams v. U.S.*, 622 F.Supp.2d 996, 1008 (D. Idaho 2009). Through this provision, "section 402A [was] so far restated that one could say it had been repealed." *Id*. c*iting* Conk, George W., *Punctured Equilibrium: Why Section 402A Flourished and the Third Restatement Languished*, 26 Rev. Litig. 799, 836 (2007). The Restatement (Third) definition of a defective product will trigger a reduction in accepted cases because it increases the cost of due to plaintiffs' burden to show a reasonable alternative design. Vandall, 33 U. Mem. L. Rev. at 910. Before any claim may proceed to court, an expert must be hired in order to set forth a reasonable alternative design in the complaint. Essentially, in order to file a complaint, a plaintiff must be ready to withstand the weighing of evidence, which is the standard for summary judgment rather than a motion to dismiss.

Further, the district court found in this case that Washburne did not have a product liability claim because the product functioned according to its intended design. (R. 8). However, this standard to determine the presence of product defect does not produce safe products or incentive for the production of safe products. The Massachusetts Supreme Court declined to adopt the very rule suggested by the district court. *Uloth v. City Tank Corp.*, 384 N.E. 2d 1188 (Mass. 1978). That court reasoned that "there would be no liability for negligent design of a product, which functioned as intended, but which was designed in a fashion more dangerous than need be; however, liability would be imposed on a designer who tried to reduce the risk by designing and using safety features which for some reason did not function as intended." *Id*. at 1191. Accordingly, this rule does not encourage safer products and leads to an arbitrary result of liability.

2. The Restatement (Third) Risk/Utility Test creates a limited view of the product's defect because of the elimination of consumer expectations.

"The presence of an alternative design is relevant in any product liability case; however, the proof of an alternative design should be neither the controlling factor nor an essential element proved in every case." *Bartlett v. Mut. Pharm. Co., Inc.*, 2010 WL 3239247 *2 (D. N.H. July 30, 2010). The Restatement (Third) Torts § 2b exclusively adopts the risk/utility test, rather than a combination test, and provides as follows:

> 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:
>
> (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.

Restatement (Third) Torts § 2b (1997). For a plaintiff to prevail under a manufacturing theory, a plaintiff must show that the product departs from its intended design even though all possible care was exercised in preparing and marketing the product. *Id*. at §2A; (R. 7). Further, a plaintiff must show that a reasonable alternative design was available. *Id.*; (R. 7).

There are two main factors under the Risk/Utility test. First, is the gravity of the danger posed by the challenged design. *Lawrence v. Gen. Motors Corp.*, 73 F.3d 587, 590 (5th Cir. 1996). Second, the court looks at the likelihood that such danger would occur. *Id*. Under both factors, the factual claim by Washburne amply demonstrates that the risks outweigh the utility, and the product was defective in its design. In regards to the gravity of the danger, Washburne's case demonstrates that failure of electronic medical record software to be properly designed and provide safe and accurate information can certainly lead to serious or fatal injuries. A person's safety and health is arguably one of the highest concerns regarding the gravity of danger. Electronic Medical Records have the ability to save lives; however, if poorly designed, like

Firefly's product, can act as a double-edged deadly sword. Under the first step of the Risk/Utility test, Washburne has more than adequately showed the gravity of the danger.

Not only is the gravity of the situation notable, the likelihood of an occurring injury is also unreasonably high. The Firefly system relied solely on the transcription of paper records by humans into an electronic system. The possibility for human error reasonably causes a high risk for incorrect or omitted data entry. The magnitude of importance of accurate medical records hardly needs to be stated. The default input of "NONE" is careless and leads to serious danger, as demonstrated by Washburne's death, if left uncorrected. Zoe Washburne is not the first person to be a victim of errors in electronic medical records. Unfortunately due to the current regulations of electronic medical record software, her death is not likely to be the last.

> The Food & Drug Administration has received 260 reports of health IT-related malfunctions with the potential for patient harm in the past two years, including 44 reported injuries and six reported deaths. Vendors, patients, clinicians and facilities voluntarily reported the problems but, because of that they may represent only the tip of the iceberg in terms of the HIT-related problems that exist. Because there is no legal requirement for providers or manufacturers to report patient deaths or injury (or "near misses") due to EMR and related software, many believe these numbers represent the tip of the iceberg.

Dr. Jeffery Shuren, Director of FDA's Center of Devices and Radiological Health. Tim Gee, *Impact of Potential FDA Regulation of EMRs*, last visited Feb. 10, 2011, http://medical connectivity.com/2010/10/08/impact-of-potential-fda-regulation-of-emrs. This Court should not ignore the gravity of the danger, and the likelihood of its reoccurrence. Washburne's claim satisfies the Risk/Utility test under the Restatement (Third) Torts, and the claim should not be dismissed.

3. The Restatement (Third) inappropriately shifts the burden solely to the plaintiff.

Primarily, this Court should not adopt the district court's holding that under the Restatement (Third) Torts § 2b the plaintiff failed to state a claim entitled for relief because of the undue burden this standard would place on all plaintiffs. The plaintiff bears the burden of proving the design defect's existence; that the product was not manufactured according to its own design specifications. *Toms v. J.C. Penney Co.*, 304 Fed. Appx. 121 (3d Cir. 2008); (R. 7). The feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration. Such a rule, especially at this stage in the litigation process, would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence. *Potter*, 694 A.2d at 1331.

Under this standard, defendants will hold plaintiffs to their burden of showing the alternative design to be reasonable considering the 'overall safety of the entire product.' Corboy, Philip H., *The Not-So-Quiet Revolution: Rebuilding Barriers To Jury Trial In The Proposed Restatement (Third) Of Torts: Products Liability*, 61 Tenn.L.Rev. 1043, 1095-96 (1994). In order to meet this burden, a plaintiff would need to defend a product that is not an issue in the case. *Id*. The consumer is not in the position to determine the safety standards of all products on the market. Further, before a complaint could be filed, a plaintiff would need to present enough evidence to a judge to survive summary judgment. *Id*. The amount of detailed evidence necessary to adequately determine a reasonable alternative design requires expert testimony. Thus, the cost of litigation would skyrocket if expert discovery became vital before a complaint could even be filed.

The standard requested by the petitioner is not only unreasonable but against the purpose of the litigation process. Courts exist to determine cases based on the merits, rather than the artful pleas of attorneys. Due to the added cost and risk of a directed verdict, some plaintiffs

with meritorious claims will not reach the jury, and others may not find representation at all. Washburne met her burden in showing a sufficient claim. It is unclear whether the defect was a result of an error by an employee in the data input, or whether a malfunction of software caused the error. (R. 12). The question of the defect though is sufficient for pleading and created a valid claim. A grant of defendant's motion to dismiss would be inappropriate. Accordingly, the test suggested in the Restatement (Third) Torts § 2b should not be adopted by this Court.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM the decision of the Thirteenth Circuit.

Respectfully Submitted

_____

Team #10

Appendix "A"

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

(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.

Restatement (Second) Conflict of Laws § 146 (1971)

In an action for a personal injury, 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 "B"

Restatement (Second) Torts §402A (1965)

(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 "C"

Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331, n. 11 (Conn. 1997).

Our research reveals that, of the jurisdictions that have considered the role of feasible alternative designs in design defect cases:

(1) six jurisdictions affirmatively state that a plaintiff need not show a feasible alternative design in order to establish a manufacturer's liability for design defect;

see Karns v. Emerson Electric Co., 817 F.2d 1452, 1457 (10th Cir.1987) (applying Oklahoma law); French v. Grove Mfg. Co., 656 F.2d 295, 297 (8th Cir.1981) (applying Arkansas law); Kallio v. Ford Motor Co., 407 N.W.2d 92, 94-97 (Minn.1987);Rahmig v. Mosley Machinery Co., 226 Neb. 423, 441, 412 N.W.2d 56 (1987);Couch v. Mine Safety Appliances Co., 107 Wash.2d 232, 239, 728 P.2d 585 (1986); Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 121 Wis.2d 338, 370-71, 360 N.W.2d 2 (1984);

(2) sixteen jurisdictions hold that a feasible alternative design is merely one of several factors that the jury may consider in determining whether a product design is defective;

see Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 245, 709 P.2d 876 (1985); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240, 1247-48 (Colo.1987), cert. dismissed, 485 U.S. 901, 108 S.Ct. 1067, 99 L.Ed.2d 229 (1988); Warner Fruehauf Trailer Co. v. Boston, 654 A.2d 1272, 1277 (D.C.App.1995); Radiation Technology, Inc. v. Ware Construction Co., supra, 445 So.2d at 331; Banks v. ICI Americas, Inc., 264 Ga. 732, 736, 450 S.E.2d 671 (1994); Chown v. USM Corp., 297 N.W.2d 218, 220-21 (Iowa 1980); Jenkins v. Amchem Products, Inc., 256 Kan. 602, 636, 886 P.2d 869 (1994), cert. denied, 516 U.S. 820, 116 S.Ct. 80, 133 L.Ed.2d 38 (1995); Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 780-81 (Ky.1984); McCourt v. J.C. Penney Co., 103 Nev. 101, 104, 734 P.2d 696 (1987); Thibault v. Sears, Roebuck & Co., supra, 118 N.H. at 807, 395 A.2d 843; Cepeda v. Cumberland Engineering Co., 76 N.J. 152, 174-75, 386 A.2d 816 (1978); Brooks v. Beech Aircraft Corp., 120 N.M. 372, 902 P.2d 54, 61 (1995); Wilson v. Piper Aircraft Corp., 282 Or. 61, 71 n. 5, 577 P.2d 1322 (1978); Claytor v. General Motors Corp., 277 S.C. 259, 265, 286 S.E.2d 129 (1982); Peterson v. Safway Steel Scaffolds Co., 400 N.W.2d 909, 913 (S.D.1987); Morningstar v. Black & Decker Mfg. Co., supra, 162 W.Va. at 887, 253 S.E.2d 666;

(3) three jurisdictions require the defendant, not the plaintiff, to prove that the product was not defective;

see Caterpillar Tractor Co. v. Beck, supra, 593 P.2d at 884; Barker v. Lull Engineering Co., supra, 20 Cal.3d at 431-32, 143 Cal.Rptr. 225, 573 P.2d 443; Ontai v. Straub Clinic & Hospital, Inc., supra, 66 Haw. at 242-43, 659 P.2d 734; and

(4) eight jurisdictions require that the plaintiff prove a feasible alternative design in order to establish a prima facie case of design defect;

see General Motors Corp. v. Edwards, 482 So.2d 1176, 1191 (Ala.1985); Owens v. Allis-Chalmers Corp.,414 Mich. 413, 426-27, 326 N.W.2d 372 (1982); Voss v. Black &

Decker Mfg. Co., 59 N.Y.2d 102, 108, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983); see alsoIll.Comp.Stat.Ann. c. 735, 5/2-2104 (West Sup.1996); La.Rev.Stat.Ann. § 9:2800.56 (West 1991); Miss.Code Ann. § 11-1-63(f)(ii) (Cum.Sup.1996); Ohio Rev.Code Ann. § 2307.75(F) (Banks-Baldwin 1994); Tex.Civ.Prac. & Rem.Code Ann. § 82.005 (West Sup.1997).