

**STATE OF MINNESOTA
IN SUPREME COURT**

A08-2124

RACHEL FLEEGER

Plaintiff,

v.

**WYETH and its division WYETH PHARMACEUTICALS INC.,
and GREENSTONE LTD.,**

Defendants

**BRIEF ON CERTIFIED QUESTION OF PLAINTIFF
RACHEL FLEEGER**

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ABBREVIATIONS

For ease of reference, the following abbreviations concerning briefs and appendices are used:

| | | |
|---------|---|---|
| PB | = | Plaintiff's Brief |
| PA | = | Plaintiff's Appendix |
| DB | = | Defendants' Brief |
| DA | = | Defendants' Appendices (volume nos. included) |
| BAB | = | Brief of <i>Amicus Curiae</i> Bayer Corporation in Support of Defendants |
| PLACAB | = | Brief of <i>Amicus Curiae</i> of Product Liability Advisory Council, Inc. in Support of Defendants |
| PhRMAAB | = | Brief and Appendix of Pharmaceutical Research and Manufacturers of America as <i>Amicus Curiae</i> in Support of Defendants |
| NovAB | = | Brief of <i>Amici</i> Novartis Pharmaceuticals, et al |

This list of abbreviations has been included in Plaintiff's compilation of words used.

STATEMENT OF THE ISSUE
(“The Certified Question”)

In a case commenced in Minnesota, does the Minnesota statute of limitations apply to the personal injury claims of a non-Minnesota resident against a defendant not a resident of Minnesota, where the events giving rise to the claims did not occur in Minnesota and took place before August 1, 2004?

STATEMENT OF THE FACTS AND CASE

Rachel Fleegeer is one of the more than 200,000 breast cancer victims of defendants' carcinogenic drugs, of whom only 10,000 - fewer than five percent – have filed suit.¹ She is 66 years old and has been married to her husband, William, for almost 39 years (DA-I-44, 48). She is a mother of five who never smoked and does not drink alcohol (DA-I-58, 59). Rachel's doctor prescribed hormone therapy for her from 1995 to early 2001 (DA-I-15, 76-77). As a result, Rachel developed breast cancer, was forced to have part of one of her breasts surgically removed and underwent medical treatment (DA-I-52). Like more than 4,000 other women, she asks this Court not to change longstanding Minnesota conflicts law and deny her the opportunity to seek redress for this painful and emotionally debilitating injury.

¹ See text at Statement of Facts (“SOF”) at “B,” *infra*.

A. The Hormone Therapy Litigation

There are only five hormone therapy lawsuits pending in state courts in Minnesota.² More than 700,000 cases of all types are filed annually in Hennepin County (PA-002), with over 1,000 of those being personal injury cases (PA-009). These five cases reflect less than 1/1000th of one percent of the cases filed annually in Hennepin County (PA-002). Despite defendants' arguments to the contrary, five cases do not translate into "an added burden on the already-burdened Minnesota courts." (DB-13). Nor do these five cases, "by their sheer numbers, obstruct the access of Minnesota's citizens to their own court system" (DB-43).

The remaining hormone therapy cases filed in this state, including Plaintiff, Rachel Fleeger's, are in federal district court, either because they were initially filed there or because defendants removed them under federal diversity jurisdiction.³ The Minnesota federal court hormone therapy cases, along with all other federal cases from around the country, have been transferred to the Eastern District of Arkansas, pursuant to multidistrict litigation ("MDL") consolidation. While much of defendants' brief involves public policy arguments based on the need to protect the overburdened

² These cases, collectively involving nine injured women, are *Allen v. Wyeth, et al*, No. 27-CV-08-18620 (Henn. Co. Dist. Ct.); *Jasperson v. Wyeth, et al*, No. 27-CV-08-18311 (Hennepin Co. Dist. Ct.); *Kirkland v. Wyeth, et al*, No. 27-CV-08-18624 (Hennepin Co. Dist. Ct.); *Zandi v. Wyeth, et al*, No. 27-CV-06-6744 (Henn. Co. Dist. Ct.), *on appeal*, A08-1455 (Minn. Ct. App.); *Kelly v. Wyeth, et al* (Ramsey Co.—cause number unknown).

³ The MDL court has ordered that any motions to remand that a party wishes to urge, upon transfer, must be re-filed (PA-255). To Ms. Fleeger's knowledge, no such motions are presently pending.

Minnesota state judiciary, these federal cases do not affect the Minnesota state court system (DB-44). These cases do, however, involve substantial medical bills that these women or, more likely, American taxpayers (including Minnesotans) through federal entitlement programs must pay, if the tortfeasors are not held accountable.

Defendants acknowledge that most, if not all, of the federal cases will likely be settled during the MDL process (DB-13, 41). 2002 U.S. Cts. Ann. Rpt. 26 (cited in Oakley, *supra*, at 496) ("As a practical matter, however, remand to the originating district court is often unnecessary. Most cases consolidated in multidistrict litigation terminate during the pretrial phase."). Even if this particular litigation is uniquely not resolved through settlement, the cases involving out-of-state plaintiffs would likely never be tried in Minnesota federal courts anyway. The federal statute embodying the *forum non conveniens* doctrine mandates transfer to the most convenient federal venue upon the motion of any party. See 28 U.S.C. § 1404(a). Defendants have already made clear, in multiple MDL hearings, that they intend to move for precisely such transfer (to other venues with greater connections to the parties) if the MDL judge ever returns cases for trial. (Transcript, *In re Prempro Prods. Liab. Litig.*, ("MDLs Procs.") Aug. 30, 2004 at 56 (PA-019-029); Transcript (MDL Procs) (Apr. 7, 2004) at 32-33 (PA-022); Transcript ("MDL Procs") (Oct. 21, 2004) at 35-37 (PA-026-029)). The out-of-state hormone therapy cases would thus be transferred - on convenience grounds - to federal district courts sitting in the women's home states and would never burden the Minnesota federal courts.

But even if some did return to Minnesota because defendants chose not to file transfer motions, those numbers would not overburden the Minnesota federal court system, which has a history of handling large numbers of consolidated cases. As amicus Bayer acknowledges, over 22,000 claims were consolidated before the Minnesota district court during the Baycol MDL (Judge Davis) (BAB-3). Furthermore, the Minnesota district has handled (and continues to oversee) the lion's share of pharmaceutical product liability MDLs. At a minimum, the federal district court sitting in this state is handling all cases involving Baycol (Judge Davis), Guidant heart devices (Judge Frank), Medtronic ICD (Judge Rosenbaum), Medtronic Sprint Fidelis Leads (Judge Kyle), St. Jude Silzone Heart Valves (Judge Tunheim), Viagra (Judge Magnuson), Mirapex (Judge Rosenbaum), TMJ (Judge Magnuson), Levaquin (Judge Tunheim)...and the list goes on. Single federal districts - in fact, single federal judges - routinely handle tens of thousands of cases, particularly in the same litigation, and Minnesota's federal district has always handled its fair share of that work.

In sum, (a) all of the hormone therapy cases but five are in federal court and thus cannot burden Minnesota's judiciary, (b) the federal hormone therapy cases involving out-of-state Plaintiffs will likely settle before they return to Minnesota, as virtually all pharmaceutical MDL cases do, and thus will not likely burden the Minnesota citizenry, and (c) any remaining out-of-state cases that do not settle will undoubtedly be transferred to courts in the women's home states, again not burdening Minnesota.

B. The Breast Cancer Victims

Well over 200,000 women have suffered from breast cancer as a result of ingesting defendants' hormone therapy medications. Fewer than one in 25 of those women have filed suit, in Minnesota or elsewhere. Defendants acknowledge that the results published in July of 2002 from the Women's Health Initiative Study ("WHI"), the largest women's health clinical trial ever undertaken, showed an increased breast cancer risk from hormone therapy from use of Defendants' drugs. (DB-5-6&fns.5-8). While defendants attempt to dismiss the risk as "small," the entire combination hormone therapy arm of the WHI was abruptly - and prematurely - halted precisely because breast cancer rates were unacceptably high and crossed the study's safety index.

Just six weeks ago, another article from the WHI investigators -- published in the New England Journal of Medicine -- confirmed that the link between breast cancer and combination hormone therapy is now so strong that it has reached the level of confirmed scientific causality (Cheblowski at 573, PA-048). While the initial WHI study, published in July of 2002, showed a general breast cancer risk number of only 1.26 for combination therapy users (DB-5-6; DA-I-279, 284), the WHI investigators have spent the last several years conducting further evaluation of the study data generated before the study was prematurely stopped. That analysis led to published risk statistics of a doubling of the risk for five years of combination use, like the use by Rachel Fleeger (Cheblowski '08)(PA-232) and a three-fold increased risk for women who used combination hormone therapy for longer (Cheblowski '06 p. 8)(PA-037). These risk statistics were first published in 2006.

As a result, many plaintiffs did not realize they had viable claims until recently. As defendants note, the initial WHI results published in July, 2002, when the study was halted prematurely, reported only 26 percent increase in risk (a 1.26 relative risk (“RR”) of breast cancer) (DB-5-6; DA-I-279, 284). Many plaintiffs were worried that such a risk would be insufficient to overcome expert admissibility standards in their home states, given the unfortunate tendency of some courts to establish a bright line test of a doubling of the risk (2.0 RR) for general causation. *See, e.g.,* Bernard G. Goldstein, M.D., *Toxic Torts: The Devil Is in the Dose*, 16 J.L. & POL’Y 551, 569 (2008).⁴ WHI data did not confirm the tripling of the risk (3.56 RR) we now know to be associated with durations of use in excess of five years (like Rachel Fleeger’s) until 2006 (Anderson at 9, PA-038). To be sure, other epidemiological studies found more than a doubling of the risk before 2006, but none was a clinical trial the size of the WHI. Hence, these may not have been perceived as reliable. In reliance on their ability to file in Minnesota, many plaintiffs waited until after the 2006 WHI results were released before filing suit.

Further, some plaintiffs, undertaking diligent investigation, refrained from filing suit until they determined which manufacturers produced the drugs that injured them. Premarin has been marketed since 1942. Provera, the name brand of synthetic progestin, has been sold since 1959. There were thus numerous generic versions of both products on the market when Rachel Fleeger (and, frankly, when all plaintiffs) consumed E+P. In

⁴ Indeed, Wyeth has argued in this litigation that less than a 2.0 relative risk is insufficient to establish causation (Excerpts of Transcript, MDL Science Day, April 7, 2004 at 94-95 (PA-023-024)).

fact, as defendants concede, the Greenstone product Ms. Fleegeer ingested was a generic progestin (DB-2). A plaintiff typically had no way of knowing which product she consumed before she obtained her pharmacy records. While the physician may have written a prescription for the name brand product, the pharmacy often filled the prescription with a generic equivalent. Many states permitted, and some actually required, such substitution unless the physician specified otherwise. *See, e.g.,* W. VA. CODE § 30-5-12b (substitution mandatory); GA. CODE § 26-4-81 (substitution permitted). Some states required substitution as a condition of Medicaid reimbursement.⁵ Obtaining pharmacy records has been an arduous, time-consuming undertaking, particularly given that many pharmacies microfiche their records after a brief period. Of course, some plaintiffs were not able to obtain complete records in time and thus were compelled to sue a panoply of manufacturers before this state's statute expired, as Novartis observes (NovAB-12). But others were able to isolate the correct defendants and file suit against a limited group of defendants in Minnesota.

After the initial WHI findings were announced, sales of defendants' hormone therapy drugs plummeted. In lock-step with this drop in use of combination hormone therapy, over the next few years, breast cancer rates in this country experienced their largest decline in history. This decline was limited to hormone receptor positive breast cancer and was seen primarily in older (post-menopausal) women. Hormone positive cancer is a specific type of cancer caused by combination hormone therapy. The consensus of leading epidemiologists and the WHI investigators is that discontinuation of

⁵ *See* <http://www.ncsl.org/PROGRAMS/HEALTH/medicaidrx.htm>.

the combination drugs caused this the sudden drop in hormone-dependent breast cancers. [R. Chlebowski, *Breast Cancer after Use of Estrogen plus Progestin in Postmenopausal Women*, 360(6) N. ENG. J. MEDICINE 573, 584-85 (Feb. 5, 2009) (PA-048, 059-069). (Rachel Fleeger's breast cancer was hormone-positive.) This drop in breast cancers allowed epidemiologists to calculate that use of combination hormone therapy caused as many as 17,500 additional breast cancer cases each year. (Kerlikowski at 5, PA-047). Thus, since the mid-1970s, when combination therapy became popular, these drugs have caused more than 200,000 women to develop breast cancer. With only 10,000 claims pending in the MDL, fewer than five percent of those injured by defendants' drugs have sought legal redress.

C. The Current Statute

In 2004, Minnesota enacted the Uniform Conflict of Laws Limitations Act, which requires trial courts to apply the limitations law of the state whose substantive law will govern the dispute unless equitable considerations dictate otherwise. MINN. STAT. § 541.31. By its express terms, the 2004 act "appl[ies] to incidents occurring on or after August 1, 2004." *Id.* at § 541.34.

While the bill as a whole was drafted to prevent out-of-state Plaintiffs from availing themselves of Minnesota's more generous limitations periods, the bill was amended to protect plaintiffs with current claims. As originally drafted, HF 2444 (the Act's precursor) would have prevented application of Minnesota's statute of limitations to claims filed more than a year after the Act's effective date, no matter when those claims accrued. (Minnesota House Legislative Floor Session – HF 2444 – Sess Law 21.pdf, p.

7170, 7189-7190.) (PA-257-259). During floor debate on the bill, Rep. Joe Atkins expressed concern that the provisions for existing and future claims would "change the rules in the middle of the game" for those people who were in the process of litigating their claims in Minnesota. He proposed an amendment to prevent the effective date of the statute from retroactively harming people already injured.

In response to Rep. Atkins's proposed amendment, Rep. Paul Kohls suggested that the bill be modified to replace "incidents occurring on or after August 1, 2004" with "causes of action filed on or after August 1, 2004." Representative Atkins objected to Rep. Kohls's proposed modification, emphasizing that the claims of individuals whose injuries occurred before the effective date of the statute should be subject to the current law (i.e., he called for the application of Minnesota's statute of limitations to cases described in the Certified Question), not the new law. Representative Atkins's amendment passed the House without the modification proposed by Rep. Kohls. The final bill, incorporating Rep. Atkins's amendment, passed by a vote of 91-39.

On May 11, 2004, the Senate passed the amended version of HF 2444. During the floor session, Senator Rest, the Senate President, explained that the amendment provided more flexibility and was more generous to plaintiffs than the original version. The House amendment specifically provided that out-of-state claimants whose causes of action arose before the effective date of the statute could still benefit from the Minnesota limitations period. There was no opposition on the floor to this provision. The bill passed on a vote of 50-11. The Governor signed the bill on May 18, 2004. (Minnesota Senate Floor Session – 5-11-04.pdf, p. 4554, 4563-4564.) (PA-261-263).

Within a year, this law will accomplish the exact goals that defendants request -- without hurting any existing claimants. Indeed, under the new law, virtually all of the out-of-state plaintiffs' claims have already expired since any claims based on injuries arising after August of 2004 now fall under the new Act. The filing of out-of-state cases will completely dry up in just over a year.

D. The National Landscape

Despite defendants' suggestion that applying the Minnesota statute would delay settlement of multidistrict mass torts, the majority of pharmaceutical MDLs to date have settled in far fewer than six years notwithstanding Minnesota's limitations period for negligence. By way of example only, the Vioxx litigation settled in less than three years, the Bextra and Celebrex litigation settled in just over three years, the Guidant litigation settled in just over two years and the Ortho-Evra litigation settled in less than two years.⁶

Furthermore, claims for fraud, which many mass tort victims make due to defendants' nondisclosure or concealment of negative information about their drugs (including many victims in this case) are often subject to statutes of limitations as long or longer than Minnesota's six-year limitation on negligence claims. More than 31 states have fraud statutes that exceed two years, and almost one-fourth of the nation - 12 states - have fraud statutes that equal or exceed Minnesota's six-year negligence statute.

Richard A. Leiter, 50 STATE SURVEYS: CIVIL STATUTES OF LIMITATION, 0020 Surveys 1 (Westlaw) (Thomson Reuters/West 2005, PA-063). The master complaint in this

⁶ The Ortho-Evra settlement involves pre-label change cases only. A more complete list of pharmaceutical MDL cases settling in far fewer than six years is provided in Addendum 1.

litigation alleges fraud in extensive terms. *In re Prempro Prods. Liab. Litig.*, Cause No. 03-1507, Document No. 1917 (Nov. 24, 2008) at para. 169-83 (PA-121-125). Whether the fraud claims will succeed is an open question, but the existence of the claims is not. While the MDL judge dismissed fraud claims in two of the bellwether trials to date, other judges may side with several state judges who have found such claims viable. As one judge wrote, in affirming a Nevada jury verdict of compensatory and punitive damages in a hormone therapy case based on an affirmative finding of fraud:

Here, there was substantial evidence from which the jury could conclude that Wyeth knew that its product could cause breast cancer, that it intentionally failed to conduct adequate tests, that it financed and manipulated scientific studies, and sponsored articles in professional and scientific journals that deliberately minimized the risk of cancer while over-promoting certain benefits and citing others which it knew to be unsubstantiated. The evidence also supported the conclusion that Wyeth intentionally made similar misstatements and misleading assertions in its marketing to physicians and its advertising directed to the public.

(Order, *Rowatt, et al v. Wyeth*, Case No. CV04-01699, in the Second Judicial District, Washoe Cnty, NV (Feb. 9, 2008) (PA-140). There are, as yet, no appellate decisions addressing the fraud question. If the defendants truly needed closure in terms of numbers to settle (which they do not), the prevalence of fraud claims would prevent that, regardless of how this Court answers the Certified Question.

SUMMARY OF ARGUMENT

For six decades, this Court has consistently held that disputes over statutes of limitations are matters of procedure for which forum law governs. That conclusion is consistent with those of most courts throughout the nation. To be sure, borrowing

statutes – mandating application of another state’s laws – have been adopted in most states. But in Minnesota, there was no such law during the time in which the causes of action at issue accrued. Indeed, the 2004 Uniform Conflicts of Laws Limitations Act expressly excludes precisely the claims at issue in the Certified Question. Given that there are only five hormone therapy cases pending in any Minnesota state courts, and the legislature has already acted in the manner defendants advocate, there is no reason to change decades of common law. For the narrow group of claims at issue, this state’s longstanding common law should govern, the law of the forum should apply, and the answer to the Certified Question should be “Yes.”

ARGUMENT

I. Minnesota Common Law Has Consistently and Without Exception Treated Statute of Limitations Disputes as Matters of Procedure for which the Law of the Forum Governs.

For six decades, this Court has steadfastly maintained that, under the common law, (a) matters of procedure are governed by the law of the forum, and (b) statutes of limitations are procedural because they limit the remedy sought but not the right sued upon. The only exception is when the very statute that creates the right also limits the time during which suit may be filed (as is the case with certain wrongful death statutes). In that circumstance, the statute’s time limit partially defines the right since the time limit is contained within the same law that created the right. But when the cause of action

exists at common law, statutes of limitations limit the remedy only, hence the law of the forum applies.

The legislature certainly has the power to trump a common law principle, as it did with the borrowing statute defendants cite, though solely for the claims of non-residents (DB-11).⁷ But such a statute does not change the common law; it supersedes it. Repeal of the statute reinstates the common law principle it supplanted, notwithstanding what the sponsor of the bill advocating repeal may have said. When Minnesota's borrowing statute was repealed in 1977, the longstanding common law recognition of statutes of limitation as procedural was restored for all plaintiffs, no longer applying solely to residents. And whether the 2004 Act is deemed a borrowing statute of sorts, its express mandates exclude causes of action that accrued before August 1, 2004. Thus, the answer to the certified question – a question that is expressly limited to claims accruing before August 1, 2004 -- should be “Yes.”

A. This Court Has Consistently and Unequivocally Held that Conflicts over Statutes of Limitations Are Procedural Disputes for which Forum Law Governs.

This Court has never waived in such a holding, despite defendants' tortured reading of *Myers v. Gov't Employees Ins. Co.*, 225 N.W.2d 238 (Minn. 1974) (discussed in Argument(I)(B), *infra*). The Court first confirmed this longstanding principle of state law in 1940. See *In re Daniel's Estate*, 294 N.W. 465 (Minn. 1940). The issue in *Daniel's Estate* was whether the Minnesota statute of limitations governed a claim

⁷ The Minnesota borrowing statute has always exempted the claims of Minnesota residents, no matter where their causes of action accrued, as defendants concede (DB-14).

brought under Iowa's wrongful death act. The Iowa act contained no limitations provision. Rather, the defendant relied on Iowa's general limitations provision for torts. The Court thus held that the limitations issue was a matter of procedure, therefore Minnesota's law should apply. "A general statute of limitations does not condition rights. It simply prescribes the time within which rights may be enforced. Hence it relates to the remedy only." *Id.* at 470 (citations omitted).

Defendants erroneously claim that Ms. Fleegeer cannot rely on *Daniel's Estate* and its progeny because many of those cases did not involve a non-resident plaintiff whose claims did not accrue in this state (DB-12). But this is a distinction without meaning. First, as a practical matter, the Court could not have considered such a case before 1977 because Minnesota's borrowing statute mandated that the law of the state where the cause of action accrued governed any lawsuits filed by non-resident plaintiffs (DB-14). This Court, like all lower courts, was obliged to follow the statute.

But defendants' argument has no bearing on the instant dispute. The issue of whether a law is substantive or procedural has everything to do with the contents of the law and nothing to do with the domicile of the individual invoking it. This Court explained the difference between substantive and procedural law some 50 years ago:

It has long been recognized that substantive law is that part of the law which creates, defines, and regulates rights, as opposed to "adjective or remedial" law, which prescribes method of enforcing rights or obtaining redress for their invasion.

Meagher v. Kavli, 88 N.W.2d 871, 879-80 (Minn. 1958) (cited in *Bannister v. Bernis Co.*, 2008 WL 2002087, at *3 (D. Minn. May 6, 2008)). Statutes of limitations regulate the

remedy rather than the right regardless of whether the plaintiff resides in Minnesota, Pennsylvania or Timbuktu.

This Court has affirmed its holding in *Daniel's Estate* often, without deviation and recently. In 1956, the Court wrote: "The limitation of time within which an action may be brought relates to the remedy and is governed by the law of the forum." *Allen v. Nessler*, 76 N.W.2d 793, 799 (Minn. 1956) (citation omitted). In 1963, this Court held: "Limitation of time relates to the remedy and is governed by the law of the forum (here Minnesota)." *American Mut. Liab. Ins. Co. v. Reed Cleaners*, 122 N.W.2d 178, 181 n. 1 (Minn. 1963) (parenthetical in original).

In *City of Willmar v. Short-Elliot-Hendrickson, Inc.*, 512 N.W.2d 872 (Minn. 1994), the Court determined that a claim for indemnity was not barred by limitations because "a statute of limitations defense does not negate liability; it is only a procedural device that is raised after the events giving rise to liability have occurred." *Id.* at 875.

Particularly significantly, in 1998, the Court considered whether dismissal on *forum non conveniens* grounds should be conditioned on the defendant not asserting a limitations defense in the new forum, even though neither of the litigants resided in Minnesota. The court concluded that it should because reliance on Minnesota's statute of limitations involves a litigant's procedural right and not an issue of substantive law. *Kennecott Holdings Corp. v. Liberty Mut. Ins. Co.*, 578 N.W.2d 358, 361-62 (Minn. 1998).

Although application of the *forum non conveniens* doctrine will rarely be conditioned on protecting a plaintiff from a change in the substantive law where those rights might be different in the alternative forum, with respect

to the statute of limitations and other procedural law, we hold that a dismissal based on *forum non conveniens* must be conditioned on preservation of the benefits of those laws as were applicable in Minnesota. Procedural rights of a party should not yield to convenience.

Id.

This holding is uniquely important because it involved a non-resident plaintiff whom this Court held was entitled to invoke the Minnesota statute of limitations based on the procedural nature of such statutes simply by virtue of his filing a suit in this state (even though that suit was dismissed based on his miniscule activity within the state). Thus, this Court held explicitly in *Kennecott Holdings* that the procedural nature of statutes of limitations is not dependent on the residence of the plaintiff.

As recently as 2006 – just three years ago – this Court emphasized yet again its conclusion that statutes of limitations are matters of procedure. The issue in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006), was whether another state’s statute of repose barred a contractor’s claims against its subcontractors. The court held that it did because a statute of repose actually extinguishes rights whereas a statute of limitations deals with rights that have already vested. Because a statute of limitations addresses the remedy rather than the right, the court reiterated, yet again, that a statute of limitations is procedural.

With regard to the constitutional arguments, we think it important to differentiate between statutes of repose and statutes of limitations. The constitutional legitimacy of statutes of repose stems from their substantive, rather than procedural, nature; a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit).

Id. at 641 (parentheticals in original).

Defendants claim this Court has come to acknowledge that statutes of limitations have both procedural and substantive aspects given the potentially dispositive nature such statutes may have (DB-23). Defendants then leap to the conclusion that statutes of limitation should be deemed substantive for choice of law purposes. The sole support Defendants offer are two criminal cases, *State v. Johnson* 415 N.W.2d 551, 555 (Minn. 1994) and *State v. Lemmer*, 736 N.W.2d 650, 658 (Minn. 2007) (DB-23-24). Interpreting these cases as reflecting a change in the Court's choice of law analysis would require a strained interpretation of both holdings that neither their text nor reason allows. Initially, neither case was a choice of law case and neither case involved consideration of a statute of limitations. The decisions' brief references to statutes of limitations are thus pure *dicta*.

Lemmer addressed solely whether collateral estoppel in a criminal case is a procedural or substantive matter. In a single passage of *dicta*, the court noted that, unlike statutes of limitations, which can be outcome determinative, collateral estoppel merely prevents re-litigation of issues and not claims. *Id.* at 658. *Johnson* was a case addressing the certification process for treating a misdemeanor as a petty misdemeanor. In a single sentence of *dicta*, the court stated that statutes of limitation can be both procedural and substantive. Yet, in a footnote to that very sentence, the Court wrote:

The Supreme Court "adopted * * *, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Johnson, 415 N.W.2d at 555 & n. 7 (ellipsis/asterisks in original).

This Court has expressly rejected any interpretation of *Johnson* that would mean statutes of limitations are substantive for choice of law purposes. As shown above, in *Kennecott Holdings*, the Court found that a non-Minnesota resident's case could be dismissed on *forum non conveniens* grounds only on the condition that the plaintiff is allowed to rely on Minnesota's statute of limitations in a subsequent suit elsewhere. The Court concluded that while a plaintiff cannot transfer the substantive rights of Minnesota law to his new forum, he is entitled to maintain the procedural protections afforded by Minnesota law. In reaching that determination, the Court explicitly distinguished

Johnson:

Although we have recognized that statutes of limitation have both substantive and procedural aspects, *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994), we have consistently regarded statutes of limitation as **primarily procedural laws**. See *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 875 (Minn. 1994); *Calder v. City of Crystal*, 318 N.W.2d 838, 844 (Minn. 1982); *Klimmek v. Independent School District No. 487*, 299 N.W.2d 501, 502 (Minn. 1980).

Kennecott Holdings, 578 N.W.2d at 361 n. 7 (emphasis added).

The Minnesota court of appeals has likewise rejected any notion that *Johnson* signaled a retreat from the high Court's view on this issue. See *Commandeur, LLC v. Howard Hartry, Inc.*, 2007 WL 4564168 (Minn. Ct. App. Dec. 21, 2007). *Commandeur*, decided fewer than two years ago, first noted that the longstanding rule that limitations issues are procedural in nature, thus invoking the law of the forum, remains the law of this state. *Id.* at *2 (citations omitted). The court then distinguished *Johnson*, on which the defendant in *Commandeur* had relied, by noting that (1) *Johnson* was a criminal not a

civil case, (2) *Johnson*'s characterization of statutes of limitations as partially substantive was pure *dicta*, and (3) *Johnson* did not even involve a choice-of-law question. *Id.* at *4.⁸

Even criminal cases have rejected defendants' reliance on *Johnson*. *See, e.g., State v. Burns*, 524 N.W.2d 516, 520 (Minn. Ct. App. 1994) (notwithstanding *Johnson*, statutes of limitations govern the remedy and not the right); *accord State v. Lenear*, 2004 WL 1878770, at *2 (Minn. Ct. App. Dec. 6, 1994).

Defendants further claim this Court has adopted substantive choice of law principles for resolving disputes over non-limitations issues that are "quintessentially" procedural in nature (DB-25-26). In actuality, neither of the cases cited involved issues even arguably procedural. In *State v. Heaney*, 689 N.W.2d 168 (Minn. 2004), the issue was whether blood-alcohol evidence obtained without a patient's consent was admissible given conflicting state laws. This Court's decision hinged solely on the issue of physician-patient privilege. While plain vanilla evidentiary issues are procedural (which is undoubtedly the basis of defendants' claim), issues of privilege, which seek to shield certain evidence based on substantial social relationships, are clear matters of substantive law. The Court cited a plethora of authority in support of this conclusion. *Id.* at 174 (citations omitted).

The issue in *State v. Schmidt*, 712 N.W.2d 530 (Minn. 2006) involved whether out-of-state DWI convictions can enhance the category of offense for which a defendant is charged in Minnesota. While the substance/procedure issue was not even discussed,

⁸ The court in *Commandeur* did note that it, too, had, on occasion, characterized limitations issues as substantive, but only when the limitations period was contained in the very statute creating the right being sued upon, a finding not disputed here. *Id.* at *3.

the facts of the case established that the dispute did not involve a procedural issue at all. Perhaps it might have, had the out-of-state convictions been used merely to enhance the defendant's punishment for a particular crime. Instead, the convictions were being used to enhance the actual offense charged. In other words, the case involved a classic issue of substantive law – the requirements of a criminal offense (or, stated concomitantly, the level of criminal offense established by a given set of facts). *Id.* at 532. Further, similar to *Healey*, a key issue in *Schmidt* was the attorney-client privilege (an issue of substance) given that the state where the out-of-state convictions occurred did not require that the arrestee be allowed to consult with an attorney before submitting to chemical testing, as required in Minnesota. *Id.* at 533.

These four inapposite cases are as close as defendants come (or could come) to supporting their claim that this Court has ever wavered in its commitment to the fundamental common law principle that statutes of limitations, because they govern the remedy and not the right, are matters of procedure governed by forum law.

Significantly, every court other than the federal hormone therapy MDL court that has been faced with motions to certify this issue to this Court has denied such motions, concluding the law is so clear that certification is unwarranted. For instance, in this very litigation, the court presiding over one of the five hormone therapy cases pending in state courts – a judge with far more knowledge on Minnesota procedure than MDL Judge Wilson would undoubtedly admit he has -- wrote:

Minnesota courts have consistently concluded that statutes of limitations are procedural and that Minnesota statutes of limitations apply to cases venued in Minnesota....Because there is controlling precedent indicating

that the Minnesota statute of limitations should be applied, the questions presented by Defendants are not doubtful.

Zandi v. Wyeth, 2007 WL 536871 (Minn. Dist. Ct. Mar. 16, 2007) (slip opinion) (2d page) (PA-148); *accord Starford v. Showa Denko, K.K.*, File No. C9-93-10051, 4 (Minn. Dist. Ct. – 1st Jud. Dist. Oct. 6, 1994) (PA-151).

Several thousand non-Minnesota breast cancer victims have relied on this Court's definitive holdings in filing suit based on the state's prescriptive periods. The public has a right to rely on decisions of the judiciary, particularly when they have spanned six decades without deviation. The doctrine of *stare decisis* is certainly not absolute, but this Court has always been "extremely reluctant" to overrule its own precedent unless there is a "compelling reason" to do so. *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005). Indeed, in *Davis*, in which this Court rejected application of the choice-influencing factors to procedural disputes, the Court cited its longstanding precedent as one basis for its decision:

The existence of such long-settled precedent should and does give us pause before overruling these cases by extending the five-factor analysis to procedural matters.

Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983). The presence of a handful of state mass tort cases in state courts does not come close to a "compelling reason" that would justify abandoning 60 years of unaltered precedent.

B. The *Myers* Decision Did NOT Apply Substantive Choice of Law Principles to the Statute of Limitations Issue.

In 1973, this Court determined that a case-by-case analysis involving various choice-influencing factors would determine which substantive law governs cases

involving multi-state conflicts. See *Milkovich v. Saari*, 203 N.W.2d 408, 413-14 (1973). The Court has never applied that doctrine to procedural disputes. In fact, it has expressly declined to do so.

Defendants erroneously contend this Court applied the *Milkovich* approach to statutes of limitations in *Myers v. Gov't Employees Ins. Co.*, 225 N.W.2d 238 (Minn. 1974) (DB-17-18). Defendants' error mimics that made by several courts and commentators over the years. In fact, most of the non-Supreme Court decisions that defendants cite in favor of their position are based on this erroneous view of *Myers*. See, e.g., *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 5-6 (Minn. App. 2003);⁹ *Hernandez v. Crown Equipment Corp.*, No. PI 03-15846, slip op. at 6-8 (Henn. Cnty., Minn. May 5, 2004) (PA-163-165); *Fee v. Great Bear Lodge*, 2004 WL 898916, at *2 (D. Minn. Apr. 9, 2004) (cited in DB-41-42).

In *Myers*, several Minnesota residents were injured by a car accident in Louisiana. The sole issue on appeal was whether the plaintiffs could sue in Minnesota under a Louisiana statute allowing direct actions against insurers despite the fact that Minnesota

⁹ The *Danielson* court analyzed the limitations issue, first, under the traditional approach and then under the *Milkovich* principles. But before looking at the *Milkovich* factors, the court concluded:

“Under the cases of *American Mutual* and *In re Daniel's Estate*, the statutes of limitation are procedural. And since the law of the forum governs procedural issues, we would apply the Minnesota statute of limitations in this case. Pursuant to this analysis, appellant's claim is timely because it was filed before the end of Minnesota's six-year statute of limitations. 670 N.W.2d at 6. Thus, the *Danielson* court's ensuing choice of law analysis under *Milkovich* is pure dicta.

law did not allow such suits. The only connection *Myers* had to limitations issues is that Louisiana's general statute of limitations for tort actions of one year had expired whereas the Minnesota statute of limitations had not. The court engaged in a choice of law analysis under *Milkovich* solely to determine which substantive law should apply -- Louisiana's direct action statute or Minnesota's prohibition of direct actions against insurers. During the course of that analysis, the court noted, in two short sentences, that Louisiana had little interest in barring the plaintiff's claims with its shorter limitations period since the plaintiffs were Minnesota residents. *Myers*, 225 N.W.2d at 242-43. That was the only reference to limitations issues the court made. But it was enough to cause an era of confusion about the decision.

The lone issue in *Myers* was whether Louisiana substantive law on direct actions against insurers would apply as opposed to Minnesota's prohibition on such actions. In fact, the court could NOT have engaged in a *Milkovich* analysis of the limitations issue, even if it were inclined to do so (which it was not). At the time, the court was bound to enforce Minnesota's borrowing statute which had not yet been repealed. As shown above, while the statute generally borrowed the limitations law of the state where the misconduct occurred, the law mandated that Minnesota's statute of limitations would govern any suit filed by Minnesota residents (like the plaintiffs in *Myers*) no matter where the cause of action accrued. See MINN. STAT. § 514.14.

Nine years after *Myers*, this Court expressly rejected the misinterpretation of *Myers* perpetuated in defendants' brief. In *Davis*, this Court held that Minnesota's procedural rules precluded joinder of a party by the plaintiff in that case. In so holding,

the court reaffirmed its commitment to applying the law of the forum to procedural disputes without application of the *Milkovich* factors. In the process, this Court approved of the holding in *Cuthbertson v. Uhley*, 509 F.2d 225, 226 (8th Cir. 1975). *Cuthbertson* was an Eighth Circuit decision finding that, under Minnesota law, statutes of limitations are procedural issues for which the law of the forum applies. See *Davis*, 328 N.W.2d at 153 n. 2. In addition to agreeing with the Eighth Circuit findings, this Court also denied that *Myers* had anything to do with limitations issues.

A federal court applying Minnesota law in a diversity action has held that the *Milkovich* analysis is not applicable to conflicts in procedural laws. *Cuthbertson v. Uhley*, 509 F.2d 255 (8th Cir. 1975). Since at that time we had not yet considered the issue, the *Cuthbertson* court was undoubtedly correct, but that decision is without precedential value here. One year after *Milkovich*, we applied the choice-influencing considerations to a case involving the direct action statute of Louisiana. *Myers v. Gov't Employees Insurance Co.*, 302 Minn. 359, 225 N.S.2d 238 (1974). Preliminary to our application of the *Milkovich* analysis we examined whether the Louisiana direct action statute creates substantive or procedural rights. Because we concluded that the rights were substantive, we did not have reason to extend the *Milkovich* analysis into the realm of procedural rules.

* * *

This court has for many years followed the almost universal rule that matters of procedure and remedies were governed by the law of the forum state. The existence of such long-settled precedent should and does give us pause before overruling these cases by extending the five-factor analysis to procedural matters.... We hold that when conflicts of procedure arise, the *lex fori* is to be applied.

Id. at 153 & n. 2.¹⁰ The Minnesota Supreme Court expressly held that *Myers* was limited to determining whether the substantive law, the direct action statute of Louisiana, would

¹⁰ Defendants all but concede that their interpretation of *Myers* is incorrect, in light of this Court's holding in *Davis* (DB-19 & n. 23).

apply to the plaintiff's claim and reaffirmed that procedural matters, like statutes of limitations (the matter in dispute in *Cuthbertson*), are governed by the law of the forum.

The MDL court in the PPA litigation expressly rejected the interpretation of *Myers* made by defendants and the decisions upon which defendants rely.

The case cited by defendants does not evince a "trend" toward treating a statute of limitation conflict as substantive. . . . *Myers* involved an interpretation of a Louisiana statute that created a cause of action against a tortfeasor's liability insurance carrier, and a Minnesota statute putting certain limitations, including a time bar, on such actions brought in Minnesota. The Minnesota court in which the case was brought found -- relying in part on a ruling by the high court of Louisiana -- that the Louisiana statute created in a plaintiff certain substantive rights. The court did not find that straightforward statutes of limitations are substantive for choice-of-law purposes, and certainly did not hold that there was a "trend" towards finding such statutes substantive.

In re: PPA Prods. Liab. Litig., 2005 WL 1528946 at *3 (W.D. Wash. June 24, 2005).

The state court of appeals decision upon which Wyeth relies acknowledged that this Court does not share defendants' interpretation of *Myers*. See *Danielson*, 670 N.W.2d at 6 (DB-17 n. 20).

Although the Minnesota Supreme Court has not directly revisited the statute of limitations issue since the decision in *Myers*, in 1983 it referenced the *Myers* decision in a footnote. *Davis*, 328 N.W.2d at 152 n. 2. The *Davis* court declined to recognize any exception to the rule that matters of procedure are governed by the law of the forum. *Id.* at 153. The *Myers* decision is also called into question by a more recent case, which, in the context of forum non conveniens, characterized statutes of limitation as procedural. *Kennecott Holdings Corp. v. Liberty Mut. Ins. Co.*, 578 N.W.2d 358, 361 n. 7 (Minn. 1998).

Id.

In 1997, four years after *Danielson*, the same court found that statutes of limitations, under longstanding state supreme court precedent, are procedural and

automatically invoke the law of the forum, without application of the choice-influencing factors of *Milkovich*, notwithstanding the holding in *Myers*. See *Commandeur LLC v. Howard Hartry, Inc.*, 2007 WL 456186, at *4 (Minn. App. Dec. 21, 2007).

Myers “did not cite, much less purport to overrule” earlier cases such as *Daniel’s Estate* and *Reed Cleaners*, in which the supreme court had described statutes of limitations as procedural. *Danielson*, 670 N.W.2d at 5. And nine years after *Myers*, the supreme court, in affirming the rule that the law of the forum governs procedural matters, discussed *Myers* in a footnote, but did not acknowledge that *Myers* involved a statute-of-limitations question. See *Davis*, 328 N.W.2d at 152 n. 2 (stating that the court in *Myers* had examined only “whether the Louisiana direct action statute creates substantive or procedural rights”). And *Davis*, although not itself involving a statute-of-limitations issue, cited with approval a federal case, *Cuthbertson v. Uhley*, 509 F.2d 225, 226 (8th Cir. 1975), in which the Eighth Circuit characterized a statute of limitations as procedural under Minnesota law and applied the law of the forum. See *id.* (stating that *Cuthbertson*, although not precedential, was “undoubtedly correct”). For all of the above reasons, we reject Hartry’s argument that *Myers* tacitly overruled the long-standing rule in Minnesota that statutes of limitations are procedural for purposes of a conflicts-of-law analysis.

Id.

And, as the federal district court of Minnesota has held:

Myers, however, did not cite, nor overrule, the traditional rule that statutes of limitations are procedural. Then, in 1998, the Minnesota Supreme Court again characterized statutes of limitation as procedural. *Kennecott Holdings Corp. v. Liberty Mutual Ins. Co.*, 578 N.W.2d 358, 361 n. 7 (Minn. 1998).

Grewe v. Southwestern Co., 2005 WL 1593048, at *2 (D. Minn. July 5, 2005).

Perhaps Laura Cooper, a professor of law at the University of Minnesota Law School, best characterized the misinterpretation of *Myers*:

Some scholarly writings on choice of law have erroneously cited *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974) as a case in which the Minnesota Supreme Court applied its conflicts

methodology to a statute of limitations question. When the Minnesota Supreme Court decided *Myers*, however, the state borrowing statute was still in effect. Therefore, the application of the Minnesota limitations period was compelled by the language of the statute and was not the result of applying common law conflict methodology to the issue. The conflicts discussion in the majority opinion in *Myers* is addressed entirely to the separate issue of applicability of a Louisiana direct action statute.

Laura Cooper, *Statutes of Limitation in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363, 369 & n. 29 (1986) (emphasis added).

The bottom line is that this Court has always found that disputes involving statutes of limitations are matters of procedure for which the law of the forum governs, without exception. Many breast cancer victims relied on that consistency in waiting to file their lawsuits in Minnesota.

C. Other Courts Recognize and Respect This Court's Unequivocal Holding that Limitations Disputes Are Procedural and thus Governed by the Law of the Forum.

There is hardly a dearth of Supreme Court precedent on this issue. But neither has the Court routinely confronted the matter. Though obviously not binding on this body, the fact that the overwhelming majority of courts to interpret this Court's jurisprudence agree that the law of the forum governs limitations disputes at least constitutes persuasive authority of what everyone understood the law in Minnesota to be. This authority includes multiple Eighth Circuit decisions interpreting Minnesota law. *See, e.g., Schwan's Sales Enterprises, Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 596 (8th Cir. 2007); *see also Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736-37 (8th Cir. 1995) ("Under Minnesota law, statutes of limitations relate to remedy and therefore are procedural, so

that the period of time after accrual within which a party may bring an action is controlled by Minnesota law if the forum is in Minnesota.”), *cert. denied*, 516 U.S. 814 (1995); *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 616 n. 4 (8th Cir. 1994) (“Because statutes of limitations are considered procedural, the present action would not be time-barred under the law of the forum, that is, Minnesota.”) (citation omitted); *Cuthbertson*, 509 F.2d at 226 (“When the conflict is between the procedural law, Minnesota law follows the general rule that procedural law of the forum applies and that statutes of limitations are procedural.”).

This authority includes multiple federal district courts interpreting Minnesota law. *See, e.g. Donatelle Plastics Inc. v. Stonhard, Inc.*, 2002 WL31002847, at *5 n. 4 (D. Minn. Sept. 5, 2002) (“It is also, however, the rule of law in Minnesota that statutes of limitation relate to the remedy and are therefore governed by the law of the forum.”) (citation omitted); *Netwig v. Georgia-Pacific Corp.*, 2002 WL 391354, at *2 (D. Minn. Mar. 11, 2002) (“Minnesota courts consider statutes of limitations to be procedural laws because they relate to remedy....the Court will not engage in a choice of laws analysis, and, applying the Minnesota statute, the Court finds Plaintiff’s current action to be within the Minnesota statute of limitations.”) (citation omitted); *Fredin v. Sharp*, 176 F.R.D. 304, 308 (D. Minn. 1997) (“Since, under Minnesota law, statute[s] of limitations relate to remedy and therefore are procedural, the period of time after accrual within which a party may bring an action is controlled by Minnesota law if the forum is in Minnesota.”) (citations omitted).

This authority includes numerous state appellate court decisions. *See, e.g., Commandeur* 2007 WL 4564186, at *4-5; *see also Brett v. Watts*, 601 N.W.2d 199, 203 (Minn. Ct. App. 1999) (“A general statute of limitation does not condition rights but simply prescribes the time within which rights may be enforced.”) (citation omitted); *Reinke v. Boden*, 1992 WL 43306, at *2 (Minn. Ct. App. Mar. 20, 1992) (“The limitation of time within which an action may be brought relates to the remedy and is governed by the law of the forum.”) (citations omitted); *Diversified Business Investments, Inc. v. Fisher*, 1991 WL 162984, at *4 (Minn. Ct. App. Aug. 27, 1991) (“the limitation of time within which an action may be brought relates to the remedy and is governed by the law of the forum”) (citations omitted); *U.S. Leasing Corp. v. Biba Info. Processing Svcs, Inc.*, 436 N.W.2d 823, 825-26 (Minn. Ct. App. 1989) (“It is the law of Minnesota that the limitation of the time within which an action may be brought relates to the remedy and is governed by the law of the forum.”) (citations omitted).

The authority includes state district court opinions (only some of which Ms. Fleeger could locate). *See, e.g., Zandi v. Wyeth*, 2006 WL 5962871 (Minn. Dist. Ct. Dec. 18, 2006) (slip op.) (PA-169); *Graham v. Knutson Mortg. Corp.*, 1996 WL 407491, at *8 (Minn. Dist. Ct. June 18, 1996) (“The statute of limitations is generally a matter of procedure and governed by Minnesota law.”).

The cases defendants cite are inapposite and, with due respect, misrepresented. *Schmelzle v. Alza Corp.*, 561 F. Supp. 2d 1046 (D. Minn. 2008), considered which limitations period in different wrongful death statutes should be applied. *Id.* at 1048. Ms. Fleeger has always acknowledged that if the right being sued upon is statutory (like a

wrongful death statute), and the statute creating the right has a limitations period, the limitations period partially defines the right and is therefore substantive. The result in *Schmelzle* was thus expected.

But there are at least two disconcerting omissions in defendants' citation to this case. First, defendants fail to note that both sides in *Schmelzle* had stipulated that the rule of law at issue was substantive (for precisely the reason just stated), therefore mandating that Minnesota's substantive choice of law principles be applied. *Id.* at 1048. In other words, it was a given in *Schmelzle* that a substantive choice of law analysis would be undertaken because the parties agreed to that. Second, defendants fail to point out that *Schmelzle* begins by noting that, under Minnesota law, the first question is whether the issue is procedural or substantive, and implies that no analysis would have been necessary had the dispute been deemed procedural. *Id.* at 1048.

Another case defendants cited is *Hernandez*, 2004 WL 5326627, *supra*. *Hernandez* was based on the incorrect notion that *Myers* signified this Court's adoption of substantive choice of law factors to evaluating statute of limitations conflicts disputes. It thus erroneously found a conflict between *Myers* and *Daniel's Estate* and sided with a nonexistent interpretation of *Myers*. *Id.* (slip op.--no page nos. assigned).

Two of the other cases defendants cite are wholly inapplicable. *See Fee v. Great Bear Lodge of Wisconsin Dells, LLC*, 2004 WL 898916, at *2 (D. Minn. Apr. 9, 2004); *Lutheran Ass'n of Missionaries & Pilots, Inc. v. Luthern Ass'n of Missionaries & Pilots, Inc.*, 2004 WL 1212083, at *1 (D. Minn. May 20, 2004) (DB-41-42&fn64). While both decisions deviate from the rule regarding the application of a forum state's choice of law

principles (based on their conclusions that the states where the torts took place viewed their statutes as substantive), the plaintiff's home state -- Pennsylvania -- like Minnesota, has always viewed limitations as a matter of procedure. *See, e.g., Westinghouse Elec. Corp./CBS v. W.C.A.B. (Korach)*, 883 A.2d 579, 588 n. 11 (Pa. 2005) ("A statute of limitations is procedural and extinguishes the remedy rather than the cause of action."); *Morrissey v. Morrissey*, 713 A.2d 614, 618 (Pa. 1998) ("Statutes of limitations affecting personal actions are procedural in nature."); *Bible v. Com, Dep't of Labor & Industry*, 696 A.2d 1149, 1152 (Pa. 1997) ("No one has a vested right in a statute of limitations or other procedural matters. The legislature may at any time alter, amend or repeal such provisions without offending constitutional restraints."¹¹).

As the court wrote in *Wilson v. Transport Ins. Co.*, 889 A.2d 563 (Pa. Super. 2005):

Historically, Pennsylvania treats the question of which statute of limitations applies not as a matter of substantive law but as a matter of procedural law; that is, how and when a claim can be judicially enforced. In the instant case, the dispute regarding the appropriate statute of limitations is a question of procedural law. Therefore, we reject Appellant's contention that the case calls for a "choice of law" analysis.

Id. at 571; *see also McDonald v. Redevelopment Authority of Allegheny Cnty*, 952 A.2d 713, 717-18 (Pa. Cmwlth. 2008) ("no one has a vested right in a statute of limitations or other procedural matters").

Pennsylvania recognizes the same distinction between statutes of repose and statutes of limitation as Minnesota. Whereas the former extinguish rights and are

¹¹ In Pennsylvania, for choice of law disputes, the legislature adopted a statute that applies the shorter of the limitations periods at issue. *See* 42 P.S.C. § 5521(b).

therefore matters of substantive law, statutes of limitations affect only the enforcement of the remedy of a right already vested and are thus procedural.

The difference between statutes of repose and statutes of limitations is that statutes of limitations are procedural--devices which bar recovery on a viable cause of action, where statutes of repose are substantive in nature because they extinguish a cause of action and preclude its revival.

City of Philadelphia v. Tax Rev. Bd. of City of Philadelphia, 945 A.2d 802, 804 (Pa. Cmwlth. 2008).

D. The Overwhelming Consensus of Courts Nationwide Concurs with this Court's Judgment.

Defendants' assertion that most states no longer follow *lex fori* as a matter of common law is simply wrong. Few courts have actually changed their common law – as defendants suggest this Court should do. Rather, those courts were bound by and applied borrowing statutes of the sort that has applied to claims accruing after August 1, 2004 that have been brought in this state (as distinct from the claims covered by the certified question). As a matter of common law, the vast majority of states continue to reject defendants' positions. In fact, as defendants concede, at most, nine jurisdictions have adopted some variation of their proposed common law view (DB-37&fn54, 38&fn58).

In fact, the vast majority of states have rejected defendants' position on the common law concerning statutes of limitations. *See, e.g.,* Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: an Exigesis*, 44 WILLAMETTE L. REV. 205, 229 (2007) (“most American states continue to characterize [statutes of limitations] as procedural”); Dana Patrick Karam, *Conflict of Laws-Liberative Prescription*, 47 LA. L REV. 1153, 1167 (1987) (“the majority of states still adhere to the

lex fori rule for issues of prescription”). Even the defense bar acknowledges the prevailing view.

The repose/limitation distinction also bears potential significance in the area of choice of law analysis because limitations statutes are “procedural;” they limit a plaintiff’s right to seek remedy for a defendant’s breach of a legal duty. In contrast, repose statutes are deemed “substantive” because they “limit the duty itself.” Under choice/conflict of law principles, a given state’s repose statute may bind a state court in another jurisdiction, whereas the limitation statute would not.

J. Alex Bruggenschmidt, *Asbestos for the Rest of Us: The Continued Viability of Statutes of Repose in Product Liability*, 76 DEF. COUNSEL J. 54, 58 (2009).

Most states that are not governed by borrowing states share Minnesota’s *lex fori* view. As one of the many articles defendants cite states:

Other states have refused to depart from the traditional procedural characterization of limitations, even when they have adopted modern approaches to the choice-of-law process in general. This still appears to be the rule in those states without borrowing statutes.

Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS § 3.12 (West, 1994) (DA-II-681); see also Charles R. Schwartz, *Conflicts of Law-Shopping for a Statute of Limitation-Sun Oil Co. v. Wortman*, 37 U. Kan. L. Rev. 423, 427 (1989) (“Far more prevalent than the judicially created exceptions, borrowing statutes represent the most significant curtailment of the traditional rule.”).

In fact, at least 26 jurisdictions have held that, in the absence of a statute changing the traditional common law rule, the law of the forum governs. See, e.g., *Wilson v. Transport Insurance Co.*, 889 A.2d 563, 571 (Pa. Super. 2005); *Jones v. Prince Georges County*, 835 A.2d 632, 644 (Md. 2003); *Beall v. Beall*, 577 S.E.2d 356, 359 (N.C. Ct.

App. 2003); *Reynolds v. Reynolds*, 2002 WL 31946133, * 2 (Va. Cir. 2002); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177, 194 (Ill. 2002); *Johanson v. Dunnington*, 785 A.2d 1244, 1246 (Me. 2001); *Juran v. Bron*, 2000 WL 1521478, at *10 (Del. Ch. Oct. 6, 2000); *Alvarado v. H&R Block, Inc.*, 24 S.W.2d 236, 241 (Mo. Ct. App. 2000); *Potomac Leasing Co. v. Dasco Technology Corp.*, 10 P.3d 972, 975 (Utah 2000); *Tanges v. Heidelberg North America, Inc.*, 710 N.E.2d 250, 253 (N.Y. 1999); *Goldsmith v. Learjet, Inc.*, 917 P.2d 810, 817 (Kan. 1996); *Whitten v. Whitten*, 548 N.W.2d 338, 340 (Neb. 1996); *Hollander v. Capon*, 853 S.W.2d 723, 727 (Tex. App. 1993, writ denied); *Oakley v. Wagner*, 431 S.E.2d 676, 681 (W.Va. 1993); *Lawson v. Valve-Trol Co.*, 610 N.E.2d 425, 427 (Oh. Ct. App. 1991); *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100 (Conn. 1989); *Nez v. Forney*, 783 P.2d 471, 472 (N.M. 1989); *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1191 (N.H. 1988); *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987); *Miller v. Stauffer Chemical Co.*, 581 P.2d 345, 347-48 (Idaho 1978)¹²; *Casselman v. Denver Tramway Corp.*, 577 P.2d 293, 295 (Col. 1978); *Taylor v. Murray*, 204 S.E.2d 747, 748 (Ga. 1974); *Fowler v. A & A Co.*, 262 A.2d 344, 347 (D.C.1970); *Horvath v. Davidson*, 264 N.E.2d 328, 351 (Ind. Ct. App. 1970); *Hogevoll v. Hogevoll*, 162 P.2d 218, 221 (Mont. 1945); *Sherwin-Williams Co. v. Morris*, 156 S.W.2d 350, 352 (Tenn. 1941); *Coral Gables, Inc. v. Christopher*, 189 A.

¹² *Dillon v. Dillon*, 886 P.2d 777 (Idaho 1994), does not support a contrary rule. *Dillon*, like the case it relied upon, was a wrongful death case. As shown above, in wrongful death claims, a time limit is viewed as part and parcel of a statutorily created right that did not exist at common law. *See Messner v. American Union Ins. Co.*, 119 S.W.3d 642 (Mo.App. 2003).

147, 149 (Vt. 1937). Defendants' claim that the "weight of authority" supports their position is simply untrue.

E. The Repeal of the Former Borrowing Statute Merely Restored Application of the Longstanding Common Law Rule that the Law of the Forum Applies to Non-Residents' Claims in Minnesota Courts.

Defendant's reliance on the former Minnesota borrowing statute and its repeal (DB-11) does not change the common law principle applicable to this case – that the law of the forum applies. Once the former borrowing statute was repealed in 1977, the restriction that the repealed law placed on the application of the common law doctrine to foreign claimants was repealed with it. As defendants concede, the legislature cannot dictate what the common law is, for that would violate the province of the judiciary (DB-16). Thus, before the borrowing statute was passed, and after it was repealed, the common law principle of *lex fori* governed the statute of limitations on all claims brought in Minnesota courts, including those of nonresident plaintiffs.

Minnesota has long recognized that the repeal of a statute restores the common law rules governing the particular subject matter, a principle known as the "common law revival" doctrine. *See Whitcomb v. Lockerby*, 58 Minn. 277-78, 59 N.W. 1015, 1016 (1894). In essence, the repeal of a statute effectively revives the previously abrogated common law. *See Hutchins v. Murphy Motor Freight Lines, Inc.*, 331 N.W.2d 761, 763-64 (Minn. 1983); *see also* 82 C.J.S. *Statutes* § 414 ("After the repeal of a statute, all rights, liabilities, penalties, forfeitures, and offenses which would derive from it and were unknown at the common law are eliminated."). Once a statute has been repealed, it is considered "blott[ed]...out as completely as if it had never existed." *Id.* Accordingly,

once the old borrowing statute was repealed, the common law rule applied, notwithstanding what the sponsor of the repeal had to say. If the legislature had enacted a new regulation or restriction – a choice of law statute, for instance -- the testimony of the person supporting that mandate might have been relevant. But, again, as defendants acknowledge, neither a single legislator nor a legislative body as a whole can dictate the common law (DB-16). So, regardless of why it did so, when legislature repealed the old law, it reinstated the common law.

The bottom line is that while the legislature is free to abrogate the common law, the legislature is not free to announce what the common law is. Accordingly, statements by a single legislator – Senator Davies – on his reason for proposing repeal of the former borrowing statute are of no help in answering the controlling common law question. Indeed, the legislature ultimately acted again in 2004, with the expressed intent not to cover the claims at issue, confirming its understanding that the common law rule was restored by the repeal of the earlier statute, as shown in the next section. *See also* text at SOF(C).

II. This Court Should Defer to the Minnesota Legislature’s Judgment that the Claims at Issue Should Be Governed by Minnesota Statutes of Limitations.

In 2004, the legislature expressly limited its passage of the Uniform Conflict of Laws Limitations Act to only those claims accruing after August 1, 2004. MINN. STAT. § 541.34. The certified question deals solely with those claims that the legislature express excepted from operation of the new statute. The legislature’s intent (indeed, the only

plausible explanation for the time-based statutory provision) was that such claims, because they had already accrued at the time the act was passed, should enjoy the benefit of Minnesota's prescriptive period. Otherwise, the "saving" provision in the new statute has no meaning at all and absolutely no legal effect. It is black-letter law that a court should construe a statute so that all of its parts are given effect. *See, e.g., Harris v. County of Hennepin*, 679 N.W.2d 728, 732 (Minn. 2004). The certified question should therefore be answered "Yes."

III. Continued Application of the Established Common Law Rule Will Protect the Claims of Thousands of Breast Cancer Victims While Creating No Substantial Burdens on the Judiciary or Barriers to Prompt Settlement.

Continuing to apply decades of precedent will facilitate redress to the 4,000-plus breast cancer victims who have relied on Minnesota's statute of limitations in this litigation. On the other side of the scale, the burden to the Minnesota judiciary caused by five state court hormone therapy cases is miniscule, at worst. Nor do Defendants' claims of rampant forum shopping and the supposed inability to settle cases promptly justify jettisoning established Minnesota common law.

A. Minnesota's Strong Interest in Compensating Tort Victims and Deterring Wrongdoing by Tortfeasors Justifies a Refusal to Change the Law to Extinguish the Claims of Several Thousand Breast Cancer Victims.

Minnesota courts have always followed the policy of ensuring that tort victims are sufficiently compensated and tortfeasors are held accountable. That interest includes compensating tort victims from other states. For instance, in *Bigelow v. Halloran*, 313

N.W.2d 10 (Minn. 1981), a substantive law conflict case in which this Court ultimately applied Iowa's wrongful death statute to claims involving a murdered Iowan woman, this Court acknowledged, without equivocation, that "it is in the interest of this state to see that tort victims are fully compensated." *Id.* at 12 (citation omitted). Minnesota's jurisprudence establishes clearly that this is not a state that would lightly dismiss the claims of thousands of breast cancer victims injured by defendants' reprehensible conduct.

That is particularly true given that these same defendants have extensive contacts with this state. The significance of the defendants' contacts to this state should not be underestimated. The parties have stipulated to personal jurisdiction and venue (DA-I-2 at ¶ 4). Yet, the certified question acknowledges that none of the events giving rise to Ms. Fleegeer's claims occurred in Minnesota. The juxtaposition of these facts means that personal jurisdiction (and venue) over the defendants is based on "general jurisdiction" rather than specific jurisdiction. General jurisdiction requires that the defendant maintain such continuous, systematic and substantial contacts with Minnesota that jurisdiction exists for all purposes, notwithstanding where the cause of action accrued. *See, e.g., Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n. 9 (1984). Such substantial contacts exceed those that even a resident (i.e. incorporated) defendant might have. In one of her treatises attacking the notion that there is anything sinister about applying forum limitations law, Professor Louise Weinberg wrote:

At this point it would be helpful to pause to consider what we mean by "the uninterested forum." The most likely case, of course, is one in which nonresident parties try out-of-state facts. But can we really say that the

forum has no connection even with that case? In every case, after all, there will be jurisdiction over the defendant, under the requirements of the Due Process Clause. There will be “minimum contacts.” The defendant, then, is at least to be found at the forum. Possibly it is doing business there, but at least it is to be found there. The defendant, then, doing business there, its connection with the forum may be even more intimate than if it is incorporated there in a merely formal way.

Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 717 (1991).

B. Defendant’s Erroneous Claims of Harm to the State Judiciary Are without Merit and, at the Very Least, Exaggerated.

This litigation involves only five hormone therapy Minnesota state court cases. Further, there do not appear to be substantially more Minnesota state court cases in other litigations. If there were, one would expect one of the many *amici* to mention this. Yet, like defendants, the *amici* provide figures regarding federal court filings only (BAB-1-6; PhRMAAB-3-8; NovAB-9-10, 15)).

Hormone therapy lawsuits pose no threat to this judiciary or its citizenry. The state can obviously handle five lawsuits involving the claims of nine women. And even the defendants acknowledge -- in a footnote on the last page of the argument of their brief -- that most of the hormone therapy cases in Minnesota are in federal court (DB-55-fn69). But the defendants then argue it would be “cynical” to believe this Court should not “concern” itself with the federal judiciary’s workload (EB-44-fn-69). But what is actually “cynical” is that a brief replete with purported public policy arguments based on the need to protect the overburdened Minnesota judiciary never acknowledges that one can count the number of Minnesota state court hormone therapy cases on one hand.

What is “cynical” is that the brief alleges that unfilled judicial vacancies, reduced staffing and overworked judges (DB-44) are legitimate reasons for this Court to deny redress to over 4,000 victims of breast cancer whose claims are not even part of the state judicial system.

What is “cynical” is that the brief fails to acknowledge that almost all of these cases will be settled, and the few (if any) that are not settled will likely be transferred (upon remand) to the judicial districts where the women reside. What is “cynical” is that defendants (and their *amici*) have declined to describe anything even close to what actually transpires in MDL litigation, instead citing a parade of horrors that has never materialized and never will.

Minnesota citizens do not pay special taxes based on the number of federal court cases here, much less the number of MDLs for which their federal judges have volunteered. In contrast, they do pay in taxes when the victims of potentially terminal illness are denied compensation from those who caused their ailments, particularly when the victims are of Medicare age.

Attacks on forum shopping are also exaggerated because every plaintiff chooses what she perceives to be the most favorable forum. That is the nature of the system. In this very litigation, a number of plaintiffs decided to re-file suit here after seeking to dismiss their Pennsylvania cases.¹³ Wyeth moved to dismiss the lawsuits. In granting the

¹³ Judge Tereschko, who has since been removed from the position, had issued a number of summary judgment orders on the statute of limitations, despite the fact that his predecessor, Judge Panepinto, had denied every similar motion, as has every other judge throughout America who has considered the matter, including the MDL judge.

plaintiffs' motion for a stay on the proceedings, the Minnesota federal district court wrote:

Defendants further assert that this Court should consider, as they claim many other courts do, an additional factor—that is, “forum-shopping” -- Plaintiffs are “forum-shopping” to take advantage of Minnesota’s six-year limitations period. But there is nothing inherently wrong with a plaintiff seeking out its best options in terms of various jurisdictions. As the Minnesota Supreme Court has clarified, the Minnesota courts are open to all, not just Minnesota residents, as long as jurisdiction can be established.

Manalo v. Wyeth, Civil No. 07-4557 (D. Minn. Apr. 21, 2008) (PA-242).

Minnesota federal courts are less concerned with forum shopping, particularly since our state’s federal judges have shown a penchant for volunteering to oversee MDLs.

Finally, forum shopping (particularly where it does not adversely affect the judiciary at issue, as here) should not be this Court’s principal concern. After all, there is nothing inherently sinister about a litigant filing suit in the venue she believes most favorable. Whether the plaintiff is a victim filing suit for compensation, or a corporation filing suit for a declaration that it owes no compensation, forum shopping occurs every time a suit is filed. As one commentator wrote, in the context of choice of laws over statutes of limitation:

[T]he forum shopping problem is really overstated. Conflict of laws is replete with concerns about forum shopping, although the case against forum shopping is never convincingly made. Undoubtedly, there is an inequity in any situation where independent sovereigns co-exist, and each of them exercises its prerogative to adopt laws that reflects its own preferences. When these laws contradict, litigants will shop around for the most favorable. To the extent that we accept individuals as rational beings who conduct their activities in a rational manner, they will choose what is most beneficial for them.

Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681, 691 (1989).

Again, this is particularly true in the federal system, with its liberal venue rules.

As the Fourth Circuit Court of Appeals has held:

There is nothing inherently evil about forum-shopping. The statutes giving effect to the diversity jurisdiction under the Constitution, 28 U.S.C. § 2332 (jurisdiction) and § 1391 (venue) are certainly implicit, if not explicit, approval for alternate forums for plaintiffs. For example, § 1391(a) provides a suit may be brought in the district where all of the plaintiffs or all of the defendants reside, or where the cause of action arose, and § 1391(c) provides that a corporation may be sued in any district in which incorporated, or is licensed to do business, or is doing business. Thus, complaints about forum shopping expressly made possible by statute are properly addressed to Congress, not the court.

Goad v. Celotex Corp., 831 F.2d 508, 510-11 (4th Cir. 1987).¹⁴

C. The Defense and Amici Claims that They Are Unable to Settle in a Timely Fashion Due to Minnesota's Statutes of Limitations Have No Merit.

Defendants' and other parties' claims that they cannot settle promptly because Minnesota's statutes of limitations are available nationwide are, quite simply, belied by the facts. First, MDL pharmaceutical litigation typically settles within just a few years. It rarely (if ever) extends to the length of Minnesota's negligence statute of limitations. See SOF(D), *supra*. Furthermore, the limitations period for fraud in at least a quarter of American states equals or exceeds Minnesota's longest limitations period. *Id.*

¹⁴ One of the *amici* actually suggests there may be a constitutional violation of the principles of federalism here (PhRMAAB-9-11). The Supreme Court has expressly held that application of forum law on limitations issues is Constitutional. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988).

Defendants' argument is a complete red herring. Mass tort litigation settlements are not now and have never been based on Minnesota's prescriptive periods.

D. Were this Court to Apply the *Milkovich* Factors, It Would Find that Minnesota's Statute of Limitations Should Apply.

Of course, given that statutes of limitations are matters of procedure, this issue is purely academic.

For substantive law issues only, this Court adopted a case-by-case choice of law procedure in *Milkovich v. Saari*, 2003 N.W.2d 408 (1973). The factors in substantive choice of law analyses are (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests and (5) application of the better rule of law. *Id.* at 412 (citation omitted). In tort cases, like this one, only the latter two factors are relevant. *See, e.g., Schwartz v. Consolidated Freight Ways Corp. of Delaware*, 221 N.W.2d 665, 668 (Minn. 1974).

Undeniably, Minnesota's legislature has determined that its law is superior (Factor No. 5). The only relevant issue, then, is whether application of this state's law advances the forum's interest. It does. The principal goal of statutes of limitations is to avoid stale claims. That is primarily an interest of the forum and not of some other state.

Statutes of limitation represent a public policy judgment by a State as to the time at which an action becomes too stale to proceed in its courts...[s]tatues of limitation, then, are primarily instruments of public policy and court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.

Goad, 831 F.2d at 510-11.

This state has determined that its statutes of limitation are superior. Since the principal purpose of such laws is forum-related, in tort cases, Minnesota courts should apply its own law, even under a *Milkovich* analysis. But such an analysis should never be made, because this Court should maintain its longstanding holding that statutes of limitations are matters of procedure, meaning forum law should govern any disputes over their application.

IV. Solely in the Alternative, in the Unlikely Event the Court Decides to Modify Longstanding Minnesota Common Law, It Should Specify that Its Decision Is for Purely Prospective Application Only.

If this Court exercises its power to change the common law, it can and should protect the claims of breast cancer victims who have already filed their cases. Although the general rule is that court decisions have retroactive effect, *e.g.*, *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 767 (Minn. 2006), this Court can decide, as a policy matter, that a particular decision should have prospective effect only.¹⁵ The doctrine emanates from the United States Supreme Court decision in *Chevron v. Huson*, 404 U.S. 97 (1971). There, the Court announced three criteria it would consider in deciding whether application should be prospective only. Using the precise words of the Court:

First, the decision to be applied nonretroactively must establish a new principle of law, either to overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether

¹⁵ Though restrained in the federal system, Minnesota continues to respect this doctrine. *See, e.g. Bendorf v. Comm'r of Pub. Sfty*, 727 N.W.2d 410, 414 (Minn. 2007).

retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id. at 106-07 (citations omitted). This Court has adopted the doctrine and the specific factors employed by the U.S. Supreme Court. *Hoff v. Kempton*, 317 N.W.2d 361, 363-64 (Minn. 1982) (citing *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971)).

This Court applied the rule (though without naming it) in *State v. Scales*, 581 N.W. 587, 592-93 (Minn. 1994). In *Scales*, the Court held that the police must record all custodial interrogations and, should they not, the trial judge has discretion to exclude evidence obtained from the interrogations. The Court expressly made its ruling prospective only. *Id.*

In *Summers v. R & D Agency, Inc.*, 593 N.W.2d 241 (Minn. Ct. App. 1999), the Minnesota court of appeals upheld a claim for invasion of privacy based on a recent decision of this Court recognizing such a tort for the first time. In a brief but strongly worded opinion, Judge Short concurred in part but dissented based on his view that the *Chevron Oil* factors had been satisfied and purely prospective application only was warranted. *Id.* at 247.

Until July 1998, Minnesota refused to recognize, either by legislature or court action, a cause of action for invasion of privacy. As the affidavits suggest, citizens, attorneys, and businesses relied on the state's rejection of such claims. Retroactive application would penalize licensed private investigators who have performed their legally authorized duties, including surveillance. Thus, for reasons of judicial restraint, respect for the principle of stare decisis, and avoidance of unjust and arbitrary adjudications, the holding in *Lake* should be interpreted prospectively.

Id. (Short, J., concurring in part, dissenting in part) (*referring to Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998)).

Though the prospective application doctrine is not often invoked by this Court (perhaps because it is rarely argued to or considered by the Court), if ever there were a case for its invocation, it is this case. Thousands of women relied on the Minnesota common law that this Court affirmed, time and again, for decades, and that lower courts likewise recognized. Defendants are asking for a ruling that completely changes the common law established by the many cases on the issue. With only five hormone therapy state level cases, retroactive application of the new rule is unnecessary to serve its primary purpose, that is, avoiding clogging Minnesota courts with out-of-state claims. And the third *Chevron-Hoff* factor – equitable results – favors the thousands of women whose breast cancer the defendants caused, and who will lose all hope of compensation, justice and accountability by defendants if this Court changes the law to bar their claims.

This case is clearly distinct from those in which the doctrine has been denied. In *Kmart*, the only precedent at issue was that of an administrative agency, not the state Supreme Court. *Kmart*, 710 N.W.2d at 769-71. In *Bendorf v. Comm'r of Pub. Sfty*, 727 N.W.2d 410 (Minn. 2007), the sole issue was whether immediate repeal of a 2003 law on driver's license revocation that simply had the effect of reinstating the law that had existed since 1982 constituted the overruling of existing precedent. Understandably, it did not. *Id.* at 414. And in *B.M.B. v. State Farm Fire & Casualty Co.*, 664 N.W.2d 817 (Minn. 2003), the only issue was whether applying a mental health exception to the

general rule that intent is inferred in sexual abuse cases changed existing law given that the Court had never ruled on the issue. *Id* at 826.

Here, the Court has ruled on the issue, precisely opposite to the way in which defendants claim it should have ruled. Countless breast cancer victims have relied on these numerous rulings. They deserve their day in court, regardless of which court they may ultimately wind up in.

CONCLUSION

For the reasons stated, Plaintiff, Rachel Fleeger respectfully requests that the Court answer the certified question “Yes,” or limit any decision overruling longstanding Minnesota common law to prospective application only.

Dated: March 23, 2009

Respectfully submitted,

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**STATE OF MINNESOTA
IN SUPREME COURT**

A08-2124

RACHEL FLEEGER

Plaintiff,

v.

**WYETH and its division WYETH PHARMACEUTICALS INC.,
and GREENSTONE LTD.,**

Defendants

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,901 words. This brief was prepared using Microsoft Office Word 2003.

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