

NO. A08-2124

State of Minnesota
In Supreme Court

RACHEL FLEEGER,

Plaintiff,

vs.

WYETH, and its division WYETH PHARMACEUTICALS, INC.,

Defendants,

GREENSTONE, LTD.,

Defendant.

**BRIEF OF AMICUS CURIAE
PRODUCT LIABILITY ADVISORY COUNCIL, INC. (PLAC)
IN SUPPORT OF DEFENDANTS**

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INTRODUCTION

The certified question accepted by this Court on January 12, 2009, is as follows:

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?

The Product Liability Advisory Council, Inc. submits to this Court that the answer to the certified question should be “no.”

INTEREST OF AMICUS CURIAE¹

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 110 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 800 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law

¹ Pursuant to Minnesota Rule of Appellate Procedure 129.03, counsel for the Product Liability Advisory Council, Inc. (“PLAC”) certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than PLAC made a monetary contribution to the preparation or submission of the brief.

as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC submits this amicus brief pursuant to Minn. R. Civ. App. P. 129 and 132 to address the certified question accepted by this Court. These companies seek to contribute to the improvement and reform of the law governing the liability of product manufacturers. While a number of these corporate members are pharmaceutical manufacturers, all corporate members of PLAC have an interest in the application of Minnesota's statute of limitations as it affects all potential product liability claims.

SUMMARY OF ARGUMENT

The certified question before this Court has immense implications for product manufacturers. The scope of potential liability for all product manufacturers, regardless of their connection to Minnesota, hinges on the Court's answer to this important issue. This Court has an opportunity to clarify that Minnesota is not out of step with the modern approach to choice-of-law analysis, and to reject the rigid application of the statute of limitations as a procedural rule as a matter of legal and public policy, not to mention as a matter of logic and fairness.

The Court should answer the certified question "no." Adherence to the outdated procedural approach contradicts the development and application of modern choice-of-law analysis, and undermines meaningful interest analysis. The old rule unnecessarily affects an entire industry's scope of liability and essentially creates a litigation haven in the state of Minnesota.

ARGUMENT

I. APPLYING MINNESOTA'S SIX-YEAR STATUTE OF LIMITATIONS AS A PROCEDURAL RULE CONTRADICTS THE DEVELOPMENT AND APPLICATION OF MODERN CHOICE-OF-LAW ANALYSIS.

Applying Minnesota's six-year statute of limitations as a procedural rule is not only at odds with previous Minnesota case law,² but severely strays from the modern development of choice-of-law principles to limitations issues. The Restatement (Second) of Conflict of Laws § 142 (1988) underscores the policy shift recognized by both the courts and legal scholars on the application of choice-of-law principles to limitations issues.

The Restatement (Second) of Conflict of Laws not only provides a roadmap for choice of law analysis where the statute of limitations is at issue, but also reflects the evolution of the modern rule. The original 1971 version of section 142 provided:

(1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.

(2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in § 143.

In recognition of the outdated view represented by the 1971 version, the Restatement was revised in 1988 to read as follows:

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated

² See Brief of Defendants Wyeth and Greenstone ("Wyeth Br.") at 15-19.

in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:

(1) The forum will apply its own statute of limitations barring the claim.

(2) The forum will apply its own statute of limitations permitting the claim unless:

(a) maintenance of the claim would serve no substantial interest of the forum; and

(b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

The revised version reflected the apparent abandonment by courts of the issue of limitations “as ipso facto procedural.” § 142 cmt. e. The Restatement drafters recognized that the developing case law represented “the emerging trend” in limitations law and “stands for the proposition that a claim will not be maintained if it is barred by the statute of limitations of the state which, with respect to the issue of limitations, is the state of most significant relationship to the occurrence and the parties.” *Id.*

The revised Restatement also underscores the importance of some connection between the claim and the forum state. When a connection is lacking, what or whose interests are being advanced? As the numerous examples in the Restatement reflect, even in the most exceptional situations, a forum should not entertain a claim simply because a claim would be barred in all other states.

The modern approach to the issue of limitations has been acknowledged and addressed by the U.S. Supreme Court. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984), the Court noted the “considerable academic criticism” of the rule that

does not consider contacts between the forum and the claim. A forum's lack of contact with the case could lead to egregious examples of forum shopping. *See id.*

The choice-of-law principles in Restatement (Second) of Conflict of Laws § 6 (1971) provide several relevant factors to be considered in a choice-of-law analysis:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

These factors are a clear embodiment of the factors used by courts in conducting meaningful choice-of-law analysis.³ This list also “recognizes the complexity of choice of law decisionmaking” and gives the court an opportunity to “consider fully the implications of alternative outcomes before reaching a conclusion.” Laura Cooper, *Statutes of Limitation in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L. Rev. 363, 371-72 (1986).

³ Of course, Minnesota is no stranger to the choice-of-law analysis in other contexts. Minnesota has clearly adopted modern choice-of-law analysis to “substantive” issues of law. *See Wyeth Br.* at 19-22.

The academic commentary is abundant with criticism of the procedural characterization of statutes of limitations.⁴ The procedural label “ignores the very real fact that the statute of limitations is outcome determinative and also encourages forum shopping.” *Jackson v. Chandler*, 61 P.3d 17, 19 n.1 (Ariz. 2003). “It is not apparent why a statute of limitation should be regarded as a procedural rule, and it is generally conceded that the characterization lacks concrete meaning.” Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. Rev. 681 (1989). “[T]he mechanical simplicity of the lex fori rule, based on the fiction that the statute of limitations is a procedural matter, undermines the principal aims of conflicts doctrine and frustrates the legislative purposes which underlie statutes of limitations.” Note: *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U.L. Rev. 299, 302-03 (1974).

If Minnesota courts apply the current, modern approach to choice-of-law issues in other areas of law, then it only seems appropriate for the court to take the next step and apply the modern approach to the issue of statute of limitations. Following the Restatement, this approach allows for more meaningful interest analysis.

II. APPLYING THE STATUTE OF LIMITATIONS AS A PROCEDURAL RULE DISPENSES WITH ANY MEANINGFUL INTEREST ANALYSIS AND OPENS THE DOOR FOR ABUSE.

As commentator Louise Weinberg aptly points out: “The application of legal rules should depend on a rational appreciation of their reach, given their purposes. So sound

⁴ See *Wyeth Br.* at 33 for an extensive list of academic criticism. See also *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 549 A.2d 1187, 1199-1200 (1988).

legal reasoning requires objective thinking about the reasons for the rules for which the parties are arguing. In conflicts cases we call this process ‘interest analysis,’ but it is still ordinary purposive reasoning. Nothing justifies treating the issue of limitation of actions as somehow exempt from this necessary process.” Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 U. Ill. L. Rev. 683, 723. The modern approach provides this Court with an opportunity to engage in sound legal reasoning about why a rule should or should not apply in a given situation.

Without this meaningful analysis, application of the traditional rule may lead to abuse in the form of forum shopping. This in turn affects the liability of product manufacturers nation-wide. This is one unintended consequence of the procedural rule. Potential claimants around the country who are non-Minnesota residents and whose claims would otherwise be extinguished will line up at Minnesota’s door step to take advantage of a statute that unarguably exists to protect the interests of Minnesota residents.

What interest does the Minnesota court have in this case? Minnesota’s laws are designed to protect the interests of its citizens and businesses, while the laws of other jurisdictions are designed to protect the interests of their citizens and businesses. Minnesota has a significant interest in regulating the conduct of its citizens and applying its laws to injuries sustained by its citizens, but has little or no interest in compensating non-Minnesota residents who may be injured by the conduct of non-Minnesota businesses. Similarly, Minnesota has an interest in regulating the conduct of its businesses and protecting its businesses from the prosecution of stale legal claims.

Minnesota, like other jurisdictions, has an interest in striking a balance between the protections afforded to product users and those afforded to product manufacturers. The laws of other states are undermined when an action is allowed to survive in Minnesota when neither the parties nor the injury has a connection to Minnesota.

Concluding “no” to the certified question in this case in no way infringes on Minnesota’s interests in other cases. If a party or injury has any connection to Minnesota, then it is proper to consider whether the laws of Minnesota apply. This analysis allows the court to determine whether the interests of Minnesota are being advanced and to properly regulate and protect the interests of its citizens.

Legal scholars have voiced concern that Minnesota has lost its way by recognizing a procedural-substance dichotomy. “[R]eintroducing the substance-procedure distinction seriously undermine[s] the integrity of Minnesota’s choice of law process.” Laura Cooper, *Statutes of Limitation in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L. Rev. 363, 371 (1986).

When the forum state has no relationship to the parties or to the injury, application of the foreign jurisdiction’s statute of limitations does not burden or hinder the interests of the forum. “Unlike the situation, for example, of pleading rules, the judicial process of the forum would not be disturbed by application of a foreign statute of limitations. . . . [A]scertaining and applying a foreign limitation period presents no greater difficulty than that involved in applying other aspects of foreign law.” Margaret Rosso Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L. J. 1, 17.

The significance of a state having a substantial interest was understood by this Court long before the Restatement was revised to reflect the modern approach. “[I]n the absence of any substantial interest by this state in the subject of the litigation, our intrusion into the rights of those who have transacted business in good faith else-where verges on meddling in the judicial policy of a sister state if we deny the legitimate expectations of [the affected parties] by applying Minnesota law on the fragile grounds here asserted.” *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 54 (1979) (dissent).

III. APPLICATION OF THE SIX YEAR STATUTE OF LIMITATIONS AS A MATTER OF PROCEDURE CREATES A VERITABLE LITIGATION HAVEN IN MINNESOTA.

The decision by this Court will affect the liability of manufacturers of all products – from pharmaceuticals to automobiles to lawn equipment.

The current Restatement is a recognition of each state’s freedom to determine the laws that affect its citizens and businesses. As one commentator points out, differences among state laws “are what a federal system is all about.” Larry Kramer, *Choice of Law In Complex Litigation*, 71 N.Y.U. L. Rev. 547, 579 (Apr. 1996). Where a manufacturer purposefully conducts its activities in one jurisdiction and not in another, that manufacturer can predict the scope of its liability. “[I]t would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.” § 6 cmt. g. Where a claim has no contact with the forum state, “[e]ntertainment of the claim under such circumstances would disserve the forum’s general policy against the prosecution of stale claims and would not serve any other forum interest.” § 142 cmt. g. “Likewise, entertainment of the

claim would frustrate the policy of all other states having a substantial interest in the case and under whose statute of limitations the claim would be barred.” *Id.*

The modern approach provides an opportunity to ensure that the laws of one state do not unfairly and unjustly trump the laws of another state. In formulating its rules, “a state should have regard for the needs and policies of other states and the community of states.” § 6 cmt. d.

A departure from the modern rule would result in plaintiffs flocking to the Minnesota courts to litigate claims that have expired in their home state. “The [procedural] rule is clearly inappropriate when the rule leads the forum to entertain a claim that the other jurisdiction would not since such a result increases, rather than decreases, the burden on the forum’s judicial system.” James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L. J. 405, 420 (1980).

Not only does the mechanical application of the procedural label promote forum shopping, it also has other unintended and harmful effects. The procedural rule may affect how product manufacturers obtain liability insurance. Insurance coverage and premiums are based on an insured’s level of risk in the market where they conduct business. If product manufacturers’ risk is in part based on Minnesota law, insurers would have to consider this increased risk and adjust coverage and premiums accordingly. It is highly doubtful that Minnesota would intend for this type of nationwide effect on product manufacturers and insurance companies.

As a matter of legal and public policy, this Court should answer the certified question “no” because not only does Minnesota have no substantial interest in the

outcome of this case, but to conclude otherwise would lead to egregious forum shopping and have serious detrimental effects on all product manufacturers around our nation.

CONCLUSION

This Court should conclude that the Minnesota statute of limitations does not apply to the personal injury claims of a non-Minnesota resident against a defendant not a resident of Minnesota. This Court should not now abandon the modern approach that in the past the Court has clearly sought to embrace. The implications of falling back on an archaic procedural label are real and the decision in this case affects the state of all products liability litigation.

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