

No. A08-2124

STATE OF MINNESOTA
IN SUPREME COURT

In re: Prempro Products Liability Litigation

Rachel Fleeger,

Plaintiff,

vs.

Wyeth, et al.,

Defendants.

**BRIEF OF AMICUS CURIAE MINNESOTA ASSOCIATION OF JUSTICE
IN SUPPORT OF PLAINTIFF FLEEGER**

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LEGAL 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?

INTRODUCTION

The Court must answer the certified question “Yes” in order to comply with the Legislature’s mandate and fulfill recognized interests of the State Minnesota. It is the Legislature’s province to establish the rules on limitations of actions. *Hermeling v. Minnesota Fire & Casualty Co.*, 548 N.W.2d 270, 276 (Minn. 1996) (“Statutes of limitations are within the legislative domain and ‘courts have no authority to extend or modify the statutory limitation periods.’”) (citations omitted). Minnesota has a strong interest in ensuring that corporations who choose to benefit economically from doing business in Minnesota are subject to Minnesota’s laws. *See* Minn. Stat. § 303.03 (1990) (Defendants decision to do business in Minnesota implies their consent to the courts and laws of this state). This is true even if those laws are invoked by a non-resident. *See Kennecott Holdings Corp. v. Liberty Mutual Insur.*, 578 N.W.2d 358, 361 (Minn. 1998). For thirty years, Minnesota courts have applied our State’s statute of limitations to claims filed in our courts, and there have been none of the horrible consequences about which defendants and their amici speculate. A “Yes” answer to the certified question in this case particularly poses no undue burden on the Minnesota court system since the cases at

issue are largely consolidated and will likely resolve in the Arkansas federal court. *See* FEDERAL JUDICIAL CENTER, *Manual for Complex Litigation*, 4th ed., § 20.131, p. 223 (“Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.”).

INTEREST OF AMICUS CURIAE

Minnesota Association for Justice is a nonprofit Minnesota corporation whose members are trial lawyers who devote a substantial portion of their efforts to representation of injured people. One mission of Minnesota Association for Justice is to ensure that the halls of justice are open to all. The undersigned certifies that no counsel for any party authored any part of this brief and no person or entity made a monetary contribution to the preparation or submission of it.

ARGUMENT

I. The Court Should Defer To The Legislature’s Prerogative And Answer The Certified Question “Yes.”

Were the Court to answer the certified question with a “NO,” it would invade the province of the Legislature. The determination of the length of a statute of limitations is generally a matter for legislative, not judicial, determination. 30 DUNNELL MINN. DIGEST, *Limitation of Actions*, § 1.01 (5th ed. 2008). Courts do not second-guess the legislative wisdom except in the rare example where the period set is so short as to be unfair. *Id.* Here, the Legislature has spoken. In 1977, the Legislature repealed the borrowing statute that would likely have given defendants their hoped-for answer to the certified question. 1977 Minn. Laws, ch. 187, § 1. In 2004, the Legislature made another

choice. It determined that the Minnesota courts will, in certain cases, borrow a statute of limitation from the state where the action arose – again, the result for which defendants wish – but only for those cases where the incident leading to the cause of action occurred after August 2004. Minn. Stat. § 541.30, et seq. (2008). For the time period between 1997 and 2004, the time period at issue in this case, the Legislature deliberately eliminated any concept of borrowing from the statutory rules governing limitations of actions.

Defendants in essence argue for a retroactive application of the rule the Legislature decided would be in effect only for cases whose underlying incident occurred after late 2004. Any statute, whether applying to procedure or substance, must be given solely prospective application unless it is clear the Legislature intended it to be retroactive. Minn. Stat. § 645.21. The rule of prospective application applies to statutes of limitation (*Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002)) and especially, where, like here, retroactive application would cut off pre-existing rights. *Wichelman v. Messner*, 250 Minn. 88, 91, 83 N.W.2d 800, 816 (1957). By providing that the 2004 borrowing statute applies only to “claims arising from incidents” occurring on or after August 1, 2004, the Legislature clearly intended that limitations periods be borrowed from other states only on a prospective basis. *La Van v. Community Clinic of Wabasha*, 425 N.W.2d 842, 845 (Minn. Ct. App. 1988).

In the interim between the 1977 repeal and the 2004 enactment of the various borrowing statutes, the Legislature left the common law rule in place. Absent a borrowing statute, the traditional common law rule that a forum applies its own statute of

limitations is in force. *See* Leflar, AMERICAN CONFLICTS LAW (3RD) § 128, p. 256, (Defendants' Appendix, Vol. 2, 583). This Court has endorsed this common law rule. *Am. Mut. Liab. Ins. Co. v. Reed Cleaners*, 122 N.W.2d 178, 180, n.1 (Minn. 1963) ("Limitation of time relates to the remedy and is governed by the law of the forum (here Minnesota).") Part of this common law rule, according to Professor Leflar, is that "it has usually been held that action may be maintained if the statute of limitations at the forum has not run, even though the period set by the statute of the place where the cause of action arose has already past." Leflar, § 127, p. 252 (Defendants' Appendix, Vol. 2, p. 579).

II. A "Yes" Answer Imposes No Unfair Burden On Minnesota

Defendants' and their Amici's repeated references to the financial strain facing the Minnesota state court system are not really relevant. The cases at issue in this appeal are 1) largely venued in federal court and 2) have been transferred, via the federal law procedures meant to handle large product liability cases, out of Minnesota courts, to the federal Multi-District Litigation proceeding in federal court in Arkansas. *See* "Distribution of Pending MDL Dockets (as of January 9, 2009), <http://www.jpml.uscourts.gov/PendingMDL>. Technically, the cases could be remanded to Minnesota for trial, though this seldom happens in product liability cases consolidated in Multi-District Litigation proceedings. "Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court." *Federal Judicial Center*, MANUAL FOR COMPLEX LITIGATION, 4TH, § 20.131, p. 223. The MDL process usually resolves state court cases as well. *Id.*

Defendants cannot show a tangible harm to Minnesota caused by the approach put in place by the Minnesota Legislature. Amici Bayer alleges “so much harm to the state” (Bayer Amicus Brief, p. 2) yet goes on to allege mainly harm to its own interests, describing the \$1.16 billion it has been forced to pay to compensate victims of its drug Baycol, which Bayer itself pulled from the market for safety reasons. *Id.* at 3-4. Bayer is correct that many product liability cases filed by residents of other states are pending in the Minnesota courts. For the most part, these cases do not implicate the certified question. Minnesota’s federal courts have been recognized as a competent forum for resolving nation-wide tort litigation. Because of the District’s reputation, the Judicial Panel on Multi-District Litigation has repeatedly selected Minnesota as the forum to best centralize such litigation, especially pharmaceutical liability litigation. Minnesota is the “transferee forum” for product liability cases for injuries caused by the pharmaceutical products Baycol, Mirapex, Viagra and Levaquin, as well as for several consolidated MDL’s involving medical devices. *See* “Distribution of Pending MDL Dockets (as of January 9, 2009). As even Bayer must concede, the caseload statistics it cites reflect Minnesota’s heralded reputation with the Judicial Panel on Multi-District Litigation, and are not necessarily a consequence of Minnesota’s statutes of limitation. *See* Bayer Brief at p. 6.

The Product Liability Advisory Council paints a dire picture of Minnesota as a “haven” of mounting litigation and skyrocketing insurance rates. Amici addresses the wrong audience as “it is the legislature’s province to assess the burden on the state’s business climate of the assertion of jurisdiction by Minnesota courts.” *Rykoff-Sexton v.*

American Appraisal Associates, 469 N.W.2d 88, 91 (Minn. 1991). The Legislature struck a balance that eliminated the borrowing of foreign statutes of limitation in the period relevant to this case. In any event, by answering the certified question “Yes,” the Court does not introduce a new, less business-friendly legal regime into state law. Rather, it will simply be business as usual. The pharmaceutical industry has gotten along fine since 1977 and the intervening years during which Minnesota courts have applied Minnesota’s own statute of limitations. There is less than two years before the current borrowing statute will apply to most claims. The sky will not fall during that short period, thus the Court should respect the Legislature’s judgment.

III. Minnesota’s Interest Is Best Served By A “Yes” Answer To The Certified Question.

Minnesota has a governmental interest in applying its law to plaintiff’s claim. While a state may not impose its laws on a defendant with only insignificant contacts, these defendants chose to market and sell their products in Minnesota and thereby established significant state contact. Defendants, no doubt, profit handsomely from the sale of their products in Minnesota. In doing so, they have purposefully availed themselves of this forum and the laws of this State. *Ashahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Rykoff-Sexton*, 469 N.W.2d at 88. By choosing to do business in Minnesota, Wyeth has consented to the jurisdiction and laws of Minnesota. Minn. Stat. § 303.03 (1990). Indeed, defendant Wyeth has filed suit in the Minnesota courts, in a dispute involving the very same drug at issue here, and taken advantage of Minnesota’s longer statute of

limitations. *Wyeth v. Natural Biologics, Inc.*, 395 F.3d 897, 901 (8th Cir. 2005) (applying Minnesota's limitations period for misappropriation).

Minnesota and its citizens have an interest in the safety of pharmaceutical and medical devices sold within the state, an interest that will be furthered by a "Yes" answer to the certified question. Minnesota courts have long recognized that Minnesota has a strong interest in both compensating tort victims and promoting responsibility for corporations committing wrongful acts. This Court "has often said that it is in the interest of this state to see that tort victims are fully compensated." *Bigelow v. Halloran*, 313 N.W.2d 10, 12-13 (Minn. 1981), *see also Danielson v. National Supply Co.*, 670 N.W.2d 1, 8-9 (Minn. Ct. App. 2003) ("The overriding Minnesota interest is compensating tort victims.) This interest in fully compensating tort victims is not limited to Minnesota residents. *See e.g. Gimmestad v. Gimmestad*, 451 N.W.2d 662, 666 (Minn. Ct. App. 1990) (extending Minnesota's interest in tort compensation to Texas resident.)

This Court has long accepted the obligation that persons from other states are afforded the protections of Minnesota law. *See e.g. Kennecott Holdings Corp.* 578 N.W.2d at 361-62 (allowing a corporate Delaware residence full access to Minnesota forum because to discriminate "because the plaintiff is not a resident of Minnesota simply defies fairness and logic."). The Minnesota courts are open to all, not just Minnesota residents, as long as jurisdiction can be established. *Schwartz v. Consolidated Freightways Corp. of Del.*, 221 N.W.2d 665, 669 (Minn. 1974) ("Suffice it to say that the courts of this state are open to those residents and nonresidents alike who properly invoke, within constitutional limitations, the jurisdiction of these courts."). Defendants'

harsh allegations of forum-shopping aside, there is nothing inherently wrong with a plaintiff seeking his or her best options from various available jurisdictions. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990) (allowing Pennsylvania plaintiff injured in Pennsylvania the benefit of Mississippi’s 6-year statute of limitations because “. . . a plaintiff already has the option of shopping for a forum with the most favorable law.”); *see also*, 23 ALAN CHARLES WRIGHT & KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. EVID. R. 501 (West 2008) (“A large measure of forum shopping is recognized as legitimate in the American judicial system Subject to the limitations of jurisdiction and the relatively modest controls imposed by venue provisions and the doctrine of forum non conveniens, plaintiffs are allowed in general a free choice of forum.”).

Indeed, this Court has always ensured that non-Minnesota plaintiffs who file cases in our courts are afforded the procedural rights they obtain by filing in Minnesota. Even if there is a more convenient forum elsewhere, this Court has demanded that “we are forcefully instructed by the policy we enunciated in *Bergquist* that at a minimum plaintiff’s procedural rights accruing as a result of have chosen Minnesota as its filing forum should not be lost by dismissal on the basis of forum non convenience.” *Kennecott*, 578 N.W.2d at 361. There is a long-settled precedent that statutes of limitations are among these protected procedural rights. *See Weston v. McWilliams & Assoc.*, 716 N.W.2d 634, 641 (Minn. 2006) (stating that “a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit)” and that “statutes of limitations are procedural in nature”); *Kennecott Holdings Corp.*, 578 N.W.2d at 361 n.7 (explaining that the Supreme Court of Minnesota has “consistently

regarded statutes of limitations as primary procedural laws.”); Even the authorities relied upon by defendants and their amici accept that statutes of limitations are procedural. Professor Leflar himself stated that “[b]y legal tradition, most statutes of limitation are deemed procedural rather than substantive.” Leflar, *AMERICAN CONFLICTS LAW* (3RD) § 127, p. 252) (citing *Myers vs. Government Employees Insurance Co.*, 225 N.W.2d 238 (Minn.1974); *See also* Hansen, *Lawsuits Travel Up North*, ABA Journal, Vol. 92, pp. 16-17, cited in Bayer Amicus Brief, p. 4.) (In Davis, “Minnesota’s high court, . . . held that *Milkovitch* didn’t apply to conflicts involving statutes of limitations.”).

Minnesota law is settled that, absent an applicable borrowing statute, Minnesota courts extend the benefit of its procedural laws, including statutes of limitations, to residents of our sister states. *Kennecott*, 578 N.W.2d at 361 (“with respect to the statutes of limitations and other procedural law,” benefits of Minnesota law must be preserved for non-resident plaintiff). Such “long settled precedent should and does give us pause before overruling these cases. . .” *See Davis v. Furlong*, 328 N.W.2d 150, 152 (Minn. 1983) (refusing to extend the five-factor analysis to questions of procedural law). In this case, fairness especially requires that Minnesota’s policy of extending procedural rights to residents of other states remain in force. Plaintiffs came to Minnesota because the prevailing legal rules extended to them a longer statute of limitations. It would be wrong for this Court to turn this reliance on our State’s laws into the reason that the plaintiffs’ cases are dismissed.

CONCLUSION

For the reasons stated above, the Court should answer "Yes."

Dated: March 26, 2009

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with proportional font. The length of this brief is ~~3337~~ words. This brief was prepared using Microsoft Word 2003.



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