

NO. A08-2124

State of Minnesota  
 In Supreme Court

RACHEL FLEEGER,

*Plaintiff,*

vs.

WYETH, and its division WYETH PHARMACEUTICALS, INC.,

*Defendants,*

GREENSTONE, LTD.,

*Defendant.*

REPLY BRIEF AND SUPPLEMENTAL APPENDIX ON CERTIFIED  
 QUESTION OF DEFENDANTS WYETH, and its division  
 WYETH PHARMACEUTICALS, INC. AND GREENSTONE, LTD.

Edward F. Fox (#003132X)  
 Charles E. Lundberg (#6502X)  
 Carrie L. Hund (#277149)  
 BASSFORD REMELE  
 33 South Sixth Street, Suite 3800  
 Minneapolis, MN 55402  
 (612) 333-3000

Gary Hansen (#0040617)  
 David P. Graham (#185462)  
 OPPENHEIMER, WOLFF & DONNELLY LLP  
 3300 Plaza VII Building  
 45 South Seventh Street  
 Minneapolis, MN 55402  
 (612) 607-7000

Jack W. Vardaman, Jr.  
 Steven L. Urbanczyk  
 F. Lane Heard III  
 WILLIAMS & CONNOLLY, LLP  
 725 12th Street, N.W.  
 Washington, DC 20005  
 (202) 434-5000

Steven Glickstein  
 William Hoffman  
 Alan Rothman  
 KAYE SCHOLER LLP  
 425 Park Avenue  
 New York, NY 10022  
 (212) 836-8000

*Attorneys for Defendants Wyeth**Attorneys for Defendant Greenstone Ltd.**(Additional counsel listed on following page)*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

David M. Langevin  
Rhett McSweeney  
McSWEENEY & FAY, PLLP  
2116 2nd Avenue S.  
Minneapolis, MN 55404  
(612) 333-6900

Martin D. Crump  
DAVIS AND FEDER, P.A.  
Fifteenth Place  
1712 15th Street, Third Floor  
P.O. Drawer 6829  
Gulfport, MS 39506

Erik Walker (#0345192)  
HISSEY, KIENZ & HERRON, P.L.L.C.  
16800 Imperial Valley Drive, Suite 130  
Houston, TX 77060  
(888) 237-5798

*Attorneys for Plaintiff*

**AMICI**

John P. Borger (#0009878)  
James A. O'Neal (#8428X)  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 766-7000

*Attorneys for Amici Curiae Novartis  
Pharmaceuticals Corporation, Aventis  
Pharmaceuticals, Barr Laboratories, Inc.,  
Duramed Pharmaceuticals, Inc., King  
Pharmaceuticals, Inc., Ortho-McNeil-Janssen  
Pharmaceuticals, Inc., Warner-Chilcott, and  
Watson Laboratories, Inc.*

Peter W. Sipkins (#101540)  
DORSEY & WHITNEY LLP  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55042  
(612) 340-2600

Susan A. Weber  
Catherine Valerio Barrad  
SIDLEY AUSTIN LLP  
One South Dearborn Street  
Chicago, IL 60603  
(312) 853-7000

Philip S. Beck  
Adam Hoefflich  
BARLIT BECK HERMAN  
PALENCHAR & SCOTT LLP  
54 W. Hubbard Street  
Chicago, IL 60603  
(312) 494-4400

*Attorneys for Amicus Curiae Bayer Corporation*

Tara D. Sutton (#23199X)  
Gary L. Wilson (#179012)  
ROBINS, KAPLAN, MILLER  
& CIRESI L.L.P.  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, MN 55402-2015  
(612) 349-8500

*Attorneys for Amicus Curiae Minnesota  
Association For Justice*

*(Additional Amici counsel continued on following page)*

Sarah L. Brew (#209958)  
GREENE ESPEL, P.L.L.P.  
200 South Sixth Street, Suite 1200  
Minneapolis, MN 55402  
(612) 373-0830

John H. Beisner  
Jessica D. Miller  
Geoffrey M. Wyatt  
O'MELVENY & MYERS LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006  
(202) 383-5300

*Attorneys for Amicus Curiae Pharmaceutical  
Research and Manufacturers of America  
(PbRMA)*

Shushanie E. Kindseth (#334819)  
Melissa J. Lauritch (*Of Counsel*)  
Jeffrey S. Fertl (*Of Counsel*)  
HINSHAW & CULBERTSON LLP  
333 South Seventh Street, Suite 2000  
Minneapolis, MN 55402  
(612) 333-3434

*Attorneys for Amicus Curiae Product Liability Advisory  
Counsel, Inc. (PLAC)*

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
I. FLEEGER PROVIDES NO PRINCIPLED, POLICY-GROUNDED JUSTIFICATION FOR APPLYING THE MINNESOTA STATUTE OF LIMITATIONS TO NON-RESIDENT CLAIMS. ....	1
II. MINNESOTA’S LONGSTANDING ENDORSEMENT OF THE MODERN CHOICE-OF-LAW RULE SHOULD INCLUDE STATUTES OF LIMITATION. ....	4
A. The Court Has Endorsed Modern Choice-of-Law Analysis and Recognized That Statutes of Limitation Are Both Substantive and Procedural.....	4
B. The <i>Milkovich</i> Factors Require the Application of the Pennsylvania Statute of Limitations.....	12
III. MINNESOTA’S STATUTE OF LIMITATIONS SHOULD NOT APPLY TO CLAIMS THAT HAVE NO CONNECTION TO THE STATE AND WILL NOT BE TRIED IN THE STATE. ....	14
IV. FLEEGER’S CLAIM OF RELIANCE IS UNREASONABLE.....	19
A. Why Reliance Was Unreasonable.....	19
B. Why the Statute of Limitations Began to Run No Later Than 2002.....	22
V. THE COURT’S ANSWER TO THE CERTIFIED QUESTION SHOULD NOT BE GIVEN LIMITED EFFECT.....	24
CONCLUSION.....	25

**TABLE OF AUTHORITIES**

**Page**

**Cases:**

**FEDERAL CASES**

*Carver v. Knox County, Tenn.*, 887 F.2d 1287 (6th Cir. 1989) ..... 16

*Ferens v. John Deere Co.*, 494 U.S. 516 (1990)..... 16

*Inman v. America Home Furniture Placement, Inc.*, 120 F.3d 117 (8th Cir. 1997)..... 24

*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) ..... 16

*Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)..... 8

*Schmelzle v. Alza Corp.*, 561 F. Supp. 2d 1046 (D. Minn. 2008)..... 12, 13, 14

*Twin Lakes Sales, LLC v. Hunter’s Specialties, Inc.*, No. Civ. 05-555ADMAJB, 2005 WL. 1593361 (D. Minn. July 6, 2005) ..... 13

**STATE CASES**

*Christian v. Birch*, -- N.W.2d --, No. A08-0312, 2009 WL 749427 (Minn. Ct. App. Mar. 24, 2009) ..... 6

*Commandeur, LLC v. Howard Hartry, Inc.*, No. A05-2014, 2007 WL 4564186 (Minn. Ct. App. Dec. 21, 2007)..... 6

*Hernandez v. Crown Equip. Corp.*, File No. PI 03-15846, 2004 WL 5326627 (Minn. Dist. Ct. May 5, 2004)..... 6, 12

*In re Daniel’s Estate*, 294 N.W. 465 (Minn. 1940) ..... 5

*Danielson v. National Supply Co.*, 670 N.W.2d 1 (Minn. Ct. App. 2003).. 6, 19, 20, 21

*Davis v. Furlong*, 328 N.W.2d 150 (Minn. 1983) ..... 3

*Jepson v. General Casualty Co. of Wisconsin*, 513 N.W.2d 467 (Minn. 1994)..... 12, 13

*Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998)..... 24, 25

<i>Kennecott Holdings Corp. v. Liberty Mut. Ins. Co.</i> , 378 N.W.2d 358 (Minn. 1998).....	7, 8, 9
<i>Meagher v. Kavli</i> , 88 N.W.2d 871 (Minn. 1958).....	11
<i>Milkovich v. Saari</i> , 203 N.W.2d 408 (Minn. 1973).....	2, 7
<i>Myers v. GEICO</i> , 225 N.W.2d 238 (Minn. 1974) .....	2, 13, 18
<i>Nodak Mutual Insurance Co. v. American Family Mutual Insurance Co.</i> , 604 N.W.2d 91 (Minn. 2000).....	13
<i>Richie v. Paramount Pictures Corp.</i> , 544 N.W.2d 21 (Minn. 1996).....	24
<i>State v. Heaney</i> , 689 N.W.2d 168 (Minn. 2004).....	11
<i>State v. Johnson</i> , 514 N.W.2d 551 (Minn. 1994). .....	3
<i>State v. Lemmer</i> , 736 N.W.2d 650 (Minn. 2007).....	3, 5
<i>State v. Schmidt</i> , 712 N.W.2d 530 (Minn. 2006).....	4, 11
<i>Summers v. R &amp; D Agency, Inc.</i> , 593 N.W.2d 241 (Minn. Ct. App. 1999).....	24
<i>Zandi v. Wyeth</i> , No. 27-C-V06-6744, 2006 WL 5962871 (Minn. Dist. Ct. Dec. 18, 2006) .....	6

**DOCKETED CASES**

<i>In re Prempro Products Liability Litigation</i> , MDL No. 4:03-CV-1507.....	15
--	----

**FEDERAL STATUTES**

28 U.S.C. § 1404(a) .....	15, 16
---------------------------	--------

**STATE STATUTES**

Minn. Stat. § 541.34.....	9
---------------------------	---

**MISCELLANEOUS**

Charles A. Wright, Arthur R. Miller & Edward H. Cooper, <i>Federal Practice and Procedure</i> (3d ed. 2007).....	8, 16
Laura Cooper, <i>Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction</i> , 71 Minn. L. Rev. 363 (1986).....	3, 21

Pierre N. Leval, <i>Judging Under the Constitution: Dicta About Dicta</i> , 81 N.Y.U. L. Rev. 1249 (2006).....	7
Robert A. Leflar, <i>Choice-Influencing Considerations in Conflict Law</i> , 41 N.Y.U. L. Rev. 267 (1966).....	7
Robert A. Leflar, <i>et al.</i> , <i>American Conflicts Law</i> (4th ed. 1986) .....	7, 18
Roger B. Phillips, <i>Dunnell Minnesota Digest</i> (5th ed. 2005).....	21
Restatement (Second) of Conflict of Laws.....	8, 21

## INTRODUCTION

Fleeger argues that, if her case does not settle, the Minnesota federal court will transfer it for trial to Pennsylvania – where she resides, where Wyeth Pharmaceuticals is located, where her claim arose, and where presumably all the witnesses can be found. If she is correct, then her trial would proceed subject to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and Pennsylvania substantive law, with one, outcome-determinative exception – the six-year, Minnesota statute of limitations would apply. If she is correct, moreover, the thousands of other cases filed in Minnesota by non-residents will be tried in federal courts throughout the country, also subject to the federal procedural rules and the substantive law of the home states, but with the same exception. Thus, solely by reason of paying a filing fee in Minnesota, these plaintiffs will have transformed the six-year, Minnesota statute of limitations into a national limitations period.

Fleeger makes this argument to deflect the objection that application of this State's statute of limitations would burden the Minnesota courts. But the argument serves to reveal how extreme Fleeger's position is, how far removed it is from the genuine interests of Minnesota, and how at odds it is with modern choice-of-law analysis.

### **I. FLEEGER PROVIDES NO PRINCIPLED, POLICY-GROUNDED JUSTIFICATION FOR APPLYING THE MINNESOTA STATUTE OF LIMITATIONS TO NON-RESIDENT CLAIMS.**

Fleeger acknowledges that this Court has never before directly addressed the Certified Question. But Fleeger conspicuously omits any principled, policy-grounded justification for a common law rule that the forum state must always apply its own statute

of limitations in all cases, even where the parties and events have no connection to the state. Instead, she offers an argument based solely on the formulaic application of a label – because statutes of limitation were traditionally labeled “procedural,” and because the forum typically applies its own procedural rules, Minnesota should automatically and always apply its statute of limitations, regardless of the circumstances and the consequences of doing so.

But just as this Court in *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973), rejected mechanical rules for choice-of-law, a remarkable consensus of scholars, commentators, legislatures and courts have rejected a label-based approach to conflicts of law involving statutes of limitation. The scholars who have rejected this approach include Professor Robert Leflar, whose “choice-influencing considerations” the Court expressly embraced in *Milkovich*, *id.* at 414, and whose treatise the Court cited with approval in *Davis v. Furlong*.<sup>1</sup> Defendants’ Brief (“DB”) cites 25 scholarly articles that explain why the same choice-of-law analysis that is used to select the substantive law should also be used to select the statutes of limitation. DB-22, 31-33. Fleegeer’s Brief (“FB”) does not consider, much less refute, this scholarship – and never even mentions Professor Leflar. Her Brief refers only to one of the 25 articles, quoting Professor Cooper’s reading of *Myers v. GEICO*, 225 N.W.2d 238 (Minn. 1974), but ignoring what she says about the label-based rule proposed by Fleegeer:

The use of the traditional method to characterize questions as substantive or procedural is . . . entirely at odds with the

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<sup>1</sup> 328 N.W.2d 150, 153 (Minn. 1983).

philosophical basis of the Leflar method, which eschews technical substance-procedure distinctions . . . .

[P]ermitting a procedural characterization to assure the application of forum law is likely to encourage parties having few contacts with Minnesota to engage in forum shopping to obtain the benefit of its laws.

[Introduction] of the substance-procedure distinction into conflicts law undermines some of the most basic values of [the] choice of law system but affords no discernable benefits.

Contemporary choice of law scholars . . . have uniformly advocated abandonment of the traditional substance-procedure distinction.<sup>2</sup>

Just as Fleegeer never mentions Professor Leflar, she never mentions the 1988 revision to the Restatement (Second) of Conflict of Laws, which also rejects a label-based rule. Nor does she come to grips with, let alone dispute, this Court's statements: (i) first, in *State v. Johnson*, that statutes of limitation are inherently hybrid rules -- "procedural in that they regulate when a party may file a lawsuit and . . . substantive in that they are outcome determinative," 514 N.W.2d 551, 555 (Minn. 1994); and (ii) more recently, in *State v. Lemmer*, that "a rule may be both procedural and substantive in nature." 736 N.W.2d 650, 657-58 (Minn. 2007). These statements are the Court's latest word on the nature and operation of statutes of limitation. Fleegeer seeks to dismiss the Court's commentary as *dicta*, but stopping at that, she tacitly concedes that *Johnson* and *Lemmer* correctly characterize the dual nature of statutes of limitation.

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<sup>2</sup> Laura Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L. Rev. 363, 378 (1986).

This Reply will not restate the rationale underlying the Restatement (Second) of Conflict of Laws nor the reasons given by Professor Leflar (and others) for rejecting the traditional *lex fori* rule for limitations. It suffices to say that Fleeger’s Brief does not take issue with Defendants’ claim that sound legal reasoning and public policy support using a multi-factor analysis appropriate to the issue to decide between conflicting limitations periods. As this Court said in 2006, “the guidance that we take from those cases is that we need to consider various conflict of laws approaches and select the one that is most relevant to the issue presented.” *State v. Schmidt*, 712 N.W.2d 530, 535 (Minn. 2006). Because the statute of limitations is outcome-determinative – and therefore inherently has a substantive aspect – an automatic rule based on labeling statutes of limitation as “procedural” cannot be “relevant to the issue presented” here, nor can it be reconciled with the nuanced choice-of-law analysis adopted by the Court in its most recent decisions.

## **II. MINNESOTA’S LONGSTANDING ENDORSEMENT OF THE MODERN CHOICE-OF-LAW RULE SHOULD INCLUDE STATUTES OF LIMITATION.**

### **A. The Court Has Endorsed Modern Choice-of-Law Analysis and Recognized That Statutes of Limitation Are Both Substantive and Procedural.**

Fleeger’s Brief says that this Court has “steadfastly maintained” that statutes of limitation are procedural, that it has done so “consistently and without exception,” “without deviation,” that it has “consistently and unequivocally [so] held,” that it has “never wavered,” and more. FB-12, 13, 15. Yet the Court explained as recently as 2007 that the statute of limitations is not purely procedural, nor primarily procedural, but both

substantive *and* procedural and that “a key consideration in determining that the statute of limitations is substantive is that the statute of limitations will always bar claims if the statute has tolled.” *Lemmer*, 736 N.W.2d at 658. The Brief exaggerates because it suggests that the Court is hemmed in by holdings that preclude making explicit that the modern rule extends to statutes of limitation. Fleeger is wrong for three reasons.

First, Fleeger is wrong that *In re Daniel's Estate*, 294 N.W. 465 (Minn. 1940), decided 69 years ago, establishes a rule that governs the Certified Question. The plaintiff there, unlike Fleeger, was a Minnesota resident. *Id.* at 466. Fleeger says that “this is a distinction without meaning,” because “as a practical matter, the Court could not have considered such a case [i.e., like Fleeger’s] 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.” FB-14. But that is precisely the point. When the Court said in *Daniel's Estate* that statutes of limitation are “procedural,” it did not have to consider *as a practical matter* the implication of that ruling for non-resident plaintiffs. The Court did not have to shape its ruling to take into account whether, were there no borrowing statute, treating statutes of limitation as “procedural” (and, therefore, automatically governed by *lex fori*) would effectively create a national, six-year statute of limitations for personal injury claims. (And just as the Court in 1940 had no reason to consider a legal world without a borrowing statute, it had no basis to foresee a legal world with “mass tort” cases, multidistrict litigation, lawyer advertising, and plaintiffs by the thousands filing cases far from home.)

Second, Fleegeer misapprehends the (in)significance of many cases cited in her brief. The decisions of the federal courts cannot answer the Certified Question; in the absence of a definitive holding, the federal courts have been obligated to make an “*Erie* guess” about Minnesota law. Equally obvious, the Minnesota lower courts have also guessed what this Court would do, reaching different conclusions. In the space of two years, two judges in the Hennepin County district court reached different conclusions.<sup>3</sup> Similarly, the court of appeals applied the *Milkovich* factors in *Danielson v. National Supply Co.*, 670 N.W.2d 1 (Minn. Ct. App. 2003), then declared them inapplicable in a later unpublished opinion.<sup>4</sup> Only two weeks ago, in *Christian v. Birch*, -- N.W.2d --, No. A08-0312, 2009 WL 749427, at \*1 (Minn. Ct. App. Mar. 24, 2009),<sup>5</sup> two judges on the panel stated that “statutes of limitations are procedural,” *id.* at \*4, while the third judge stated that “Minnesota caselaw on the subject is not uniform” and would have applied the modern approach, *id.* at \*8.

What matters are the decisions of this Court, beginning with *Milkovich* in 1973 and ending with *Lemmer* in 2007. In *Milkovich*, the Court spoke of its determination to replace a mechanical choice-of-law analysis with a “more rational choice-of-law

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<sup>3</sup> Compare *Hernandez v. Crown Equip. Corp.*, File No. PI 03-15846, 2004 WL 5326627, at Part III.A.2, ¶ 3 (Minn. Dist. Ct. May 5, 2004) [DA-II-445]; with *Zandi v. Wyeth*, No. 27-C-V06-6744, 2006 WL 5962871, at Part 2.b, ¶ 4 (Minn. Dist. Ct. Dec. 18, 2006) [DA-II-459].

<sup>4</sup> *Commandeur, LLC v. Howard Hartry, Inc.*, No. A05-2014, 2007 WL 4564186, at \*3 (Minn. Ct. App. Dec. 21, 2007) [DA-II-481-82].

<sup>5</sup> Defendants’ Supplemental Appendix (“DSA”) at 1.

methodology” and adopted the choice-influencing considerations “proposed by Professor Leflar,” citing his analysis more than ten times. 203 N.W.2d at 413. The Court was clear that it was adopting a methodology, not a rule; that the methodology was based on Leflar’s writings; and that it found his “reasoning relevant and persuasive.” *Id.* at 416. *Milkovich* did not concern conflicting statutes of limitation, but Leflar – then and since – has consistently stated that the reasons supporting the use of choice-influencing considerations apply to conflicting statutes of limitation as well as to other conflicts of law.<sup>6</sup> Fleeger argues, in effect, that the Court adopted Leflar’s reasoning, but subject to a *sub silentio* exception; Defendants submit that the Court adopted the reasoning, but until now has never had occasion to apply it to conflicting statutes of limitation.

About *Lemmer* and *Johnson* – which, for purposes of illustration, placed statutes of limitation “under the microscope,” examined how they function, and judged them to be substantive *and* procedural – Fleeger rejoins that what the Court said was *dicta* and did not arise in a choice-of-law context. FB-17-19. To be sure, it is important to distinguish holdings from *dictum*.<sup>7</sup> But the Court’s analysis in *Lemmer* and *Johnson* cannot be put aside as *dicta* in favor of the decisions cited by Fleeger, for the language she cites from *Allen v. Nessler*, *American Mutual Liability Insurance Co. v. Reed Cleaners*, *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, and *Kennecott Holdings*

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<sup>6</sup> See, e.g., Robert A. Leflar, *Choice-Influencing Considerations in Conflict Law*, 41 N.Y.U. L. Rev. 267, 300-02, 325 (1966) [DA-II-528-530, 553]; Robert A. Leflar, *et al.*, *American Conflicts Law* § 127, at 348-49 (4th ed. 1986) [DA-II-490-91].

<sup>7</sup> Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1255 (2006).

*Corp. v. Liberty Mutual Insurance Co.* is dicta, too. Notably, Fleeger does not argue that the Court's analysis in *Lemmer* and *Johnson* was flawed.

The one-sentence *dictum* in *Kennecott*, 158 N.W.2d 358 (Minn. 1998), warrants special comment, for Fleeger refers to the “holding” of the case as “[p]articularly significant[.]” FB-15. *Kennecott* filed an environmental-coverage action against several insurers in Minnesota, where this State faced \$4,000,000 in clean-up costs (a Minnesota connection not contemplated by the Certified Question). In moving to dismiss on *forum non conveniens* grounds, the defendants did not dispute that the case was properly pending in Minnesota nor, importantly, that the Minnesota statute of limitations applied to *Kennecott*'s claim, if the case proceeded in Minnesota. The defendants argued only that Utah would be a more convenient forum. Where dismissal is sought on *forum non conveniens* grounds, however, the threshold inquiry is whether “there exists an alternative forum,”<sup>8</sup> i.e., one in which the plaintiff can, in fact, bring her claim. And where the statute of limitations in the more convenient, alternative forum would bar the claim, the courts have consistently held that they have inherent authority to condition dismissal on the defendant's waiver of the limitations defense in the alternative forum.

In *Kennecott*, the Court merely affirmed an order conditioning dismissal in that way. It did not engage in a choice-of-law analysis and did not hold that the Minnesota statute of limitations governed the case. Fleeger is wrong in claiming that “this Court held [that *Kennecott*] was entitled to invoke the Minnesota statute of limitations based on

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<sup>8</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

the procedural nature of such statutes, simply by virtue of [its] filing a suit in this state.”

FB-16. The *forum non conveniens* motion did not address whether the Minnesota statute properly applied to the Minnesota claim, and so the issue was not presented, and the Court did not so “hold.” Putting the defendant to the choice of waiving the *Utah* statute of limitations or foregoing dismissal had nothing to do with whether limitations are substantive or procedural.<sup>9</sup>

Third, Fleegeer misunderstands the provision of the 2004 borrowing statute that limits its application to “incidents occurring on or after August 1, 2004.” Minn. Stat. § 541.34. She argues that “the only plausible explanation” for the provision is that claims arising out of incidents occurring before August 1, 2004 “should enjoy the benefits of Minnesota’s prescriptive period.” FB-36-37. But this argument ignores what Fleegeer said in the previous paragraph – that “the legislature is not free to announce what the common law is” and that when the legislature repealed the old borrowing statute in 1977 “it reinstated the common law.” FB-36. The legislature in 2004 could not – and did not purport to – define the common law conflicts rule for non-resident parties and claims (i) that has awaited articulation since 1977 and (ii) that would govern claims arising out of

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<sup>9</sup> Courts condition dismissal on waiver of the limitations defense without any reference to the defense as substantive or procedural. See 14D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828, at 631 n.34 (3d ed. 2007) (cases cited therein); Restatement (Second) of Conflict of Laws § 84, cmt. c (same).

Taken literally, the Court’s reference to “preservation” of the benefits of Minnesota’s procedural laws would have meant that dismissal should have been conditioned on the defendants’ agreement to accept other Minnesota procedures regarding jury selection, evidentiary rules, form of jury instructions, etc.

incidents before August 1, 2004. Whatever the rule was – whether that foreseen by Senator Davies in 1977 or that assumed by Representative Atkins in 2004 – the legislature let it be.

The legislative history is telling in one respect, however, for it strongly suggests that the legislature did not believe that the borrowing statute would not apply to claims that are still being filed. Fleegeer argues that the legislature was concerned not to “‘change the rules in the middle of the game’ for those people who were *in the process of litigating those claims* in Minnesota.” FB-9.<sup>10</sup> But Fleegeer herself and the thousands of other non-resident plaintiffs who filed lawsuits on the eve of the sixth anniversary of WHI in July 2008 were not “in the process of litigating” any claims as of August 1, 2004. DB-9. Nor were the untold number of plaintiffs who may argue that they could not have discovered their claims until (Fleegeer suggests) they learned of a 2006 WHI publication.<sup>11</sup> Nor were the additional plaintiffs who still have yet to file lawsuits as of 2009, but will surely argue that the “incident” giving rise to their claims was their use of the drugs before 2004.

In sum, on the one hand, Fleegeer points to five cases in which the Court has referred in passing to statutes of limitation as procedural. On the other hand, the Court adopted a choice-of-law methodology in *Milkovich* based on reasoning that applies equally to conflicting statutes of limitation and conflicting laws that are purely

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<sup>10</sup> Unless otherwise indicated, all emphases in this brief are added.

<sup>11</sup> See p. 22-23, *infra*.

substantive. In its most recent explanation of how limitations function, the Court recognized (along with Professor Lefflar) that they are outcome-determinative and, therefore, operate substantively. This recognition comports with the longstanding definition of substantive law as “that part of [the] law which creates, defines, and *regulates* rights.” *Meagher v. Kavli*, 88 N.W.2d 871, 879-80 (Minn. 1958).<sup>12</sup> In two other recent cases, the Court resisted a black-or-white, substance-or-procedure dichotomy, holding that questions of law with both substantive and procedural aspects required an approach other than an automatic, *lex fori* rule. *State v. Heaney*, 689 N.W.2d 168 (Minn. 2004); *State v. Schmidt*, 712 N.W.2d 530 (Minn. 2006).<sup>13</sup>

To answer the Certified Question “Yes” is to repudiate the reasoning adopted in *Milkovich*, to abandon the accurate characterization of statutes of limitation made in *Lemmer/Johnson* and, 36 years after the Court committed Minnesota to a more rational choice-of-law methodology, to regress to label-based analysis that serves no interest of the State or its citizens. To answer the Certified Question “No,” however, is to be true to

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<sup>12</sup> “Remedial” law, in contrast, is defined as that “which prescribes [the] method of enforcing the rights or obtaining redress for their invasion.” *Id.* at 880. Statutes of limitation cannot easily be described as a “method of enforcing rights.”

<sup>13</sup> Fleeger mistakenly argues that “neither of the cases involved issues even arguably procedural” and, thus, that there is no significance to the Court’s rejection of *lex fori*. FB-19 (emphasis in original). In *Heaney*, whereas the court of appeals applied *lex fori* because “patient privilege statutes are evidentiary rules, *and evidentiary rules are matters of procedure*,” this Court held that “[a] question of privilege is an evidentiary question, but it has a substantive component.” 689 N.W.2d at 174 (citation omitted). Similarly, in *State v. Schmidt*, the underlying conflict involved a procedural right: Minnesota law entitles an individual to consult counsel before submitting to chemical testing, but South Dakota law does not. 712 N.W.2d at 535-36.

these cases without repudiating the others that have spoken of limitations as procedural – for to recognize in the conflict-of-laws context that statutes of limitation are both procedural *and* substantive is only to refine and add nuance to the prior statements.

**B. The *Milkovich* Factors Require the Application of the Pennsylvania Statute of Limitations.**

Two Minnesota courts (one federal and one state) have applied the modern test to cases with similar facts (non-resident plaintiffs bringing product liability claims for wrongful conduct and injuries that occurred elsewhere) and determined that it requires application of the other state’s statute of limitations. *Schmelzle v. Alza Corp.*, 561 F. Supp. 2d 1046 (D. Minn. 2008); *Hernandez*, 2004 WL 5326627, at Part III.B [DA-II-447]. Fleeger does not address the analysis by either court.<sup>14</sup>

“Undeniably,” Fleeger asserts without citing any authority, “Minnesota’s legislature has determined that its law is superior.” FB-43.<sup>15</sup> But this, the fifth *Milkovich* factor, “is to be exercised only when other choice-influencing considerations leave the

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<sup>14</sup> Fleeger mentions *Schmelzle* only to level the charge “with due respect” that Defendants “misrepresented” the case. FB-29. Contrary to her assumption, Defendants did not cite *Schmelzle* as authority for the proposition that the *Milkovich* factors apply, but for the proposition that, *if* the factors apply, they favor the application of Pennsylvania law. *See* DB-28-29. (Fleeger makes the same misrepresentation charge about three other cases cited by Defendants, FB-29-30, but then argues only that the cases were wrongly decided, not that Defendants misstated the holdings.)

<sup>15</sup> This Court cautioned against this line of argument in *Jepson v. General Casualty Co. of Wisconsin*, rejecting the view that a legislative enactment is *ipso facto* the superior rule: “If that were true, forum law would always be the better [rule of] law and this step in our choice of law analysis would be meaningless.” 513 N.W.2d 467, 473 (Minn. 1994).

choice of law uncertain.” *Myers*, 225 N.W.2d at 244. The other factors, however, do not leave the choice uncertain.

First, the “maintenance of interstate order” factor favors the state with “the most significant contacts with the facts relevant to the litigation” – here, Pennsylvania, the state with *all* the contacts. This factor also seeks to “maintain a coherent legal system in which the courts of different states strive to sustain rather than subvert each other’s interests” and thereby keep forum shopping “within reasonable bounds.” *Jepson*, 513 N.W.2d at 971. Although Fleeger shrugs off forum shopping as merely “the nature of the system,” FB-40, this Court has said in the choice-of-law context that “Minnesota does not have an interest in encouraging forum shopping.” *Id.* at 471; *Nodak Mut. Ins. Co v Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 94 (Minn. 2000); *see also Twin Lakes Sales, LLC v. Hunter’s Specialties, Inc.*, No. Civ. 05-555ADMAJB, 2005 WL 1593361, at \*2 (D. Minn. July 6, 2005) [DSA-18] (“[T]his case presents a strong suggestion of forum shopping. . . . Minnesota courts have repeatedly indicated their disdain for forum shopping.”). Permitting a Pennsylvania plaintiff to evade the Pennsylvania statute of limitations by filing here, only to seek transfer to Pennsylvania for trial, would surely subvert Pennsylvania’s interests. *Schmelzle*, 561 F. Supp. 2d at 1049.

Second, consideration of the forum’s interest favors Pennsylvania law. Fleeger mentions only one interest of the forum – the prevention of stale claims. The *Schmelzle* court also considered Minnesota’s interest in compensating tort victims, ensuring the payment of medical providers, and promoting responsibility by sellers. When all those interests are taken into account, the fact is that “Minnesota’s interest in compensating tort

victims is lessened where the injury occurred in another state, the injured party is not a Minnesota resident and did not receive medical care here,” while the state where the injury occurred and the injured party resides “has a strong interest in the application of . . . its limitation period in order to prevent the prosecution of stale claims.” *Id.* at 1049-50 (citing Restatement (Second) of Conflict of Laws § 145 cmt. c). This factor strongly favors Pennsylvania.

Third, consideration of what simplifies the judicial task also favors Pennsylvania. While a Minnesota court can just as easily apply the Pennsylvania statute of limitations as the Minnesota statute, it cannot as easily apply the entire body of Pennsylvania law (for Pennsylvania substantive law will apply to the rest of Fleeger’s case).<sup>16</sup>

If, as Fleeger argues, the *Milkovich* factors lead to the selection of Minnesota’s limitations period in her case – which has no connection with the State – then there could be no practical difference between the modern, choice-influencing factors approach and the *lex fori* rule, and one might well ask what all the fuss has been about.

### **III. MINNESOTA’S STATUTE OF LIMITATIONS SHOULD NOT APPLY TO CLAIMS THAT HAVE NO CONNECTION TO THE STATE AND WILL NOT BE TRIED IN THE STATE.**

Defendants’ Brief explained that Fleeger’s argument has the practical effect of transforming the Minnesota statute of limitations into a “national” limitations period for pharmaceutical and products liability litigation. DB-10. Fleeger’s Brief does not dispute that fact and, indeed, now reveals that her argument is that the Court should adopt a rule

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<sup>16</sup> The predictability factor is considered neutral in tort cases.

that not only renders Minnesota limitations national in scope, but does so even when the burden of trying the non-resident's case falls on a court *in another state*. Fleeger's position disregards the federal structure of government and the considerations of comity that should guide choice-of-law analysis. It amounts to a procedural gambit to secure the benefit of Minnesota's statute of limitations without any real intention of pursuing the claims here.

Regarding the burden placed on the Minnesota courts, never mind that the cases filed by non-Minnesotans number in the thousands, Fleeger says, because only a handful remain in state court. Never mind, too, the burden that will be placed upon the Minnesota federal courts and juries, because the cases can be counted on to settle, and even if they do not, "the cases involving out-of-state plaintiffs would likely never be tried in Minnesota federal courts anyway." FB-3.<sup>17</sup> That will happen, Fleeger predicts, because the cases will be transferred to each plaintiff's home state pursuant to 28 U.S.C. § 1404(a), based on the convenience of the parties and witnesses. Defendants have not

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<sup>17</sup> Defendants did not state that most "federal cases will likely settle during the MDL process," FB-3. To the contrary, Defendants explained that there is little prospect of settlement, in no small part because the universe of plaintiffs cannot be determined so long as non-Minnesota plaintiffs can continue to claim the benefit of Minnesota's statute of limitations for claims that are time-barred elsewhere. DB-44. When the MDL Plaintiffs' Steering Committee asked Judge Wilson in 2008 to convene a global settlement conference, he refused. Discovery Plan Order, *In re Prempro Prods. Liab Litig.*, MDL No. 4:03-CV-1507 WRW (Jan. 27, 2009), at 3 [DSA-23].

Many MDL litigations do result in settlement, and some settlements are reached within a few years. One reason there was a settlement in the Vioxx litigation in three years was that Merck had withdrawn Vioxx from the market and thus did not face continuing litigation. Defendants' products remain on the market, and hormone therapy plaintiffs continue to file new cases.

stated an intention to file such motions for transfer,<sup>18</sup> but transfer does not depend on a motion by Defendants. Section 1404(a) permits Fleeger and other non-resident plaintiffs to seek the transfer of the cases to their home states. Fleeger's assurance that "the cases involving out-of-state plaintiffs will likely never be tried in Minnesota federal courts" makes sense only if that is plaintiffs' plan.<sup>19</sup> FB-3. Thus, while Fleeger says that forum-shopping is innocuous and "there is nothing inherently sinister about a litigant filing suit in the venue she believes most favorable," she really has no interest in Minnesota as a venue. FB-41.<sup>20</sup>

Laid bare, what Fleeger's argument means is that, by filing her case in Minnesota, a plaintiff automatically secures the benefit of the Minnesota statute of limitations *even*

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<sup>18</sup> In asserting otherwise, FB-3, Fleeger misreads the transcripts from two early MDL hearings, which concerned the special problem of cases filed directly in the MDL court by non-Arkansans. Because MDL judges may not try the cases transferred to them, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998), Wyeth recognized that, were non-Arkansans permitted to file cases directly in the MDL court, there was the prospect that plaintiffs would cherry-pick the cases filed there in order to skew the bellwether trial process. Wyeth therefore indicated its intention to seek the transfer of non-Arkansas plaintiffs who filed suit in the MDL court.

<sup>19</sup> In any event, "a district judge can order transfer on his or her own initiative." 15 Wright and Miller, *Federal Practice and Procedure*, § 3844, at 27 (3d ed. 2007); *Carver v. Knox County, Tenn.*, 887 F.2d 1287, 1291 (6th Cir. 1989). And where the "systemic costs" are severe, as they would be here, "the district judge can be expected to order it *sua sponte*." *Ferens v. John Deere Co.*, 494 U.S. 516, 537 (1990) (Scalia, J., dissenting).

<sup>20</sup> This consequence is inherent in an automatic rule that treats the statute of limitations as "procedural," for claims by out-of-state plaintiffs against out-of-state defendants concerning out-of-state incidents are inherently subject to transfer under 28 U.S.C. § 1404(a), or dismissal and subsequent re-filing under the *forum non conveniens* doctrine.

*though* (1) she is not a resident of Minnesota, (2) the defendant is not from Minnesota, (3) the claims did not arise in, and have no connection with, Minnesota, (4) the pretrial proceedings will take place in the MDL court, not Minnesota, and (5) the trial will occur in a court sitting in her home state, not Minnesota, and will apply the substantive law of her home state. Fleeger asks the Court to sanction the legal equivalent of a game of playground tag, in which her fleeting touch of Minnesota makes this State's statute of limitations "it" for choice-of-law purposes. And she asks the Court to sanction this game when there is no benefit to Minnesota.

This game also stands the rationale for the traditional *lex fori* rule on its head. The forum applies its own procedural law because "[p]rocedure has to do with judicial machinery and its mode of operation, and it would be unthinkable for New York, *in the trial of a set of facts* arising from Louisiana, or California, or Ontario, to have to set up judicial machinery such as exists in the other legal entity, and operate it in the other state's fashion."<sup>21</sup> But Minnesota has no more interest in applying its statute of limitations to cases that likely will *not* be tried in its own courts than it does in applying its jury selection procedures or evidentiary rules to out-of-state trials.

Just as the rationale for the traditional rule is absent, so too is any policy justification. Fleeger's Brief provides no authority that public policy favors opening the State's courts to out-of-state plaintiffs in pursuit of claims that arose, and are time-barred, elsewhere. The borrowing statute in effect from 1850 to 1977 expressed a contrary

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<sup>21</sup> Leflar *et al.*, *American Conflicts Law* § 121 at 331 [DSA-26].

policy, as does the current borrowing statute. Repeal of the borrowing statute in 1977 did not signal a change in policy, but only an expectation that the same policy objective would be achieved by a different analytical approach. Fleegeer does not dispute that the purpose of repeal was to enable the courts to employ a modern choice-of-law analysis.<sup>22</sup> Even apart from that legislative expectation, this Court emphasized in *Myers* that Minnesota's governmental interest is in "providing access to its courts *for its citizens*." 225 N.W.2d at 243. About the plaintiff in that case, the Court said: he "should be entitled to come into the courts of *his own state* for redress of legal wrongs when jurisdiction may be acquired." *Id.* The Court has never recognized a comparable interest, however, in providing access to the State's courts for non-residents suing on claims that have no connection to this State.

Thus, either the cases will be transferred, in which event the non-resident plaintiffs are treating Minnesota like a drive-thru to pick up the State's statute of limitations, or the cases will remain here, imposing a burden that is real. Even now, before the close of generic discovery in the *Prempro* MDL, the Plaintiffs' Steering Committee is urging Judge Wilson to remand more than 100 cases to the transferor courts for trial, including 16 non-resident plaintiffs who filed in Minnesota.

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<sup>22</sup> She says only that repeal "reinstate[ed] the common law principle [the borrowing statute] supplanted, notwithstanding what the sponsor of the bill advocating repeal may have said." FB-13.

#### **IV. FLEEGER'S CLAIM OF RELIANCE IS UNREASONABLE.**

Fleeger has stipulated that she did not timely file her lawsuit in Pennsylvania.

[DA-I-3] Why she (and the other non-resident plaintiffs) did not do so is irrelevant for purposes of answering the Certified Question, yet Fleeger seeks to persuade the Court that there were good reasons for letting the home state statutes of limitation lapse. Her purported reasons do not withstand scrutiny.

##### **A. Why Reliance Was Unreasonable.**

For Fleeger to say that she and other plaintiffs relied “on their ability to file in Minnesota” means, not simply that they believed they could file their lawsuits in Minnesota and secure the benefit of the Minnesota limitations statute, but that they *knowingly* allowed the statutes of limitation to lapse in their home states in that belief. If they or their counsel let the statutes run in the home states by reason of carelessness or neglect, then they did not truly *rely* on the ability to file in Minnesota, but are resorting to that lawyer-made argument after-the-fact to resurrect a claim they allowed to expire. Any true reliance was unreasonable from either of two perspectives.

First, from the perspective of 2002 to 2005 – the period during which the statutes of limitation in the great majority of home states were running – plaintiffs would have had particular reason to question whether the Minnesota courts would automatically apply the Minnesota statute, should they wait to file their lawsuits here. In December 2003 – eighteen months after publication of the WHI findings, nine months after creation of the federal MDL proceeding, and two months after creation of a similar proceeding in Philadelphia – the court of appeals decided *Danielson*, 670 N.W.2d at 1. The question

was: “Does Minnesota’s statute of limitations apply to a product-liability claim brought in Minnesota by a Minnesota resident for injuries occurring in a second state for a product purchased in a third state?” *Id.* at 4.

Even though the plaintiff was a Minnesota resident, the opinion began by saying, “[t]here is some ambiguity as to what approach Minnesota follows.” *Id.* at 5. The court first considered what it called the “Statutes of Limitation as Procedural Approach” and determined that Minnesota would apply its own six-year statute of limitations under that approach. *Id.* But the court then proceeded to consider the “Choice-Influencing Consideration Approach,” noting that “courts are increasingly recognizing that the statute of limitations is outcome determinative, that it may be inappropriate to use the procedural classification, and that determining what statute of limitations is to be applied should be decided the same as substantive law conflicts generally.” *Id.* at 6. Significantly, the court added, “[b]ecause Minnesota has shown some inclination to apply the choice-influencing considerations analysis, *we will also apply that analysis to this case.*” *Id.* In doing so, the court emphasized Minnesota’s interest in “permitting its citizens access to [its] courts,” and of “reduc[ing] the risk that Minnesota medical providers will go unpaid.” *Id.* at 8-9.

This ambivalent approach to the choice-of-law analysis, and the *Danielson* court’s reference to the State’s governmental interest in affording access to *its* courts for *its* citizens, should have cautioned any reasonably prudent attorney against advising his client that she could safely let the statute of limitations run in her home state, confident that she could maintain her lawsuit in Minnesota. It is no answer for Fleegeer to say that

*Danielson* was “based on an erroneous view of *Myers*,” FB-22, for erroneous or not, *Danielson* was the “last word” during the period from 2002 to 2005 (when home state limitations periods were lapsing) on what approach the Minnesota courts would take to conflicting limitations.

Furthermore, Minnesota hornbook law advised that, if the claim is barred by the law of the state where it arose, it is barred in Minnesota.<sup>23</sup> Professor Cooper’s article, *Statutes of Limitations in Minnesota Choice of Law*, begins with this observation: “Assume that you are an attorney seeking to determine the statute of limitations applicable in Minnesota to a case with multistate aspects. Perhaps you consult the *Dunnell Minnesota Digest 2d*, which states succinctly: ‘If a cause of action not arising in this state or accruing to a citizen thereof is barred by the law of another state it is barred here.’”<sup>24</sup>

Such an attorney also should have consulted the Restatement (Second) of Conflict of Laws, which would have advised him (rightly or wrongly) that, based on *Myers*, Minnesota was one of the states “espousing the modern view” regarding conflicting statutes of limitation.<sup>25</sup>

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<sup>23</sup> Roger B. Phillips, *Dunnell Minnesota Digest* § 2.05e at 445 (5th ed. 2005) [DSA-31].

<sup>24</sup> Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 Minn. L. Rev. at 363.

<sup>25</sup> Restatement (Second) of Conflict of Laws § 142 (cases cited in support of comment e).

In the face of *Danielson*, the *Dunnell Minnesota Digest*, the Restatement, this Court's adoption of Leflar's analysis in *Milkovich*, and Leflar's treatment of limitations as substantive for choice-of-law purposes – not to mention the absence of a controlling decision from this Court – no reasonable plaintiff would have let her state's limitations period lapse.

**B. Why the Statute of Limitations Began to Run No Later Than 2002.**

There is no evidence in the record that Fleeger, or any other plaintiff, waited to file her lawsuit until the publication of a 2006 paper by one of the WHI investigators. There is certainly no ground for claiming that it was reasonable to do so.

Fleeger's complaint alleges that the absence of public knowledge about the risk of breast cancer "tolled the commencement of the statute of limitations" "until July, 2002," not 2006. [DA-I-32] That same or similar allegation is found in thousands of complaints filed in Minnesota on behalf of non-residents. The complaint's allegation squares with her counsel's statements that publication of the WHI findings in 2002 was a "landmark" event, "paradigm-shifting," and the "biggest bombshell in the history of hormone replacement therapy"; that it "shocked women around the world"; and that it was "the equivalent of the Loch Ness monster surfacing during daylight." [DA-II-385, 401-03] Fleeger's bald assertion now that "many plaintiffs did not realize they had viable claims until recently," FB-6, cannot be squared with those statements to the MDL court.<sup>26</sup>

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<sup>26</sup> In any event, plaintiffs are confusing the trigger for the statute of limitations with choice-of-law. In Fleeger's case, she has stipulated in her complaint that July 2002 is the trigger.

Plaintiffs' prior statements also belie the argument now that the "WHI data did not confirm the tripling of the risk (3.56 RR) . . . until 2006." FB-6. The 3.56 number in the 2006 paper is taken directly – with citation and attribution – from a 2003 paper by another WHI investigator,<sup>27</sup> and plaintiffs' experts have relied on the 2003 paper at the bellwether trials to claim that the "true" relative risk of breast cancer was 3.56.<sup>28</sup> If that number is important, it was known well before the statutes of limitation ran in the plaintiffs' home states.

One must also question that the thousands of non-residents who filed their claims were "undertaking diligent investigation" to identify the proper defendants. FB-6. It does not take six years to ask one's doctor or pharmacist for medical records. The record here strongly suggests that it was not a prolonged and diligent investigation that delayed the filing of the non-resident plaintiffs' cases, for various manufacturer defendants have been dismissed in thousands of cases pursuant to the MDL's summary dismissal procedures because there was a failure by the plaintiffs to provide any product identification whatsoever.<sup>29</sup> In any event, plaintiffs' argument begs the choice-of-law question. Pennsylvania provides two years to complete an investigation – more than sufficient time to ask one's doctor or pharmacist for medical records – and there is no

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<sup>27</sup> See PA-038 at Fig. 2 (stating that the information in the figure was "[a]dapted from Chlebowski et al."). The Chlebowski paper lists the same relative risk number in Figure 2 of his 2003 paper [DSA-39].

<sup>28</sup> See, e.g., *Rush v. Wyeth*, Testimony of Dr. Austin (Jan. 31, 2007) [DSA-46-47].

<sup>29</sup> Brief of *Amici Novartis, et al.*, at 12.

reason for Minnesota to extend that time for non-residents who are suing non-residents about conduct that occurred in another state.

Thus, after the “bombshell” dropped by the WHI findings in 2002, it is not asking their doctors and pharmacists for medical records or waiting to read about a relative risk of 3.56 that explains why these non-Minnesota plaintiffs let the statutes of limitation in their home states lapse. Whatever the explanation – whether it be a lack of diligence on the part of individual plaintiffs, or a calculated decision by plaintiffs’ lawyers to purposefully delay – the consequences of plaintiffs’ and/or counsel’s misjudgment should be borne by them, not by defendants.<sup>30</sup>

**V. THE COURT’S ANSWER TO THE CERTIFIED QUESTION SHOULD NOT BE GIVEN LIMITED EFFECT.**

This Court’s answer to the Certified Question should not be limited to prospective application. On this issue, Fleeger invokes only the *dissent* of Judge Short in *Summers v. R & D Agency, Inc.*, 593 N.W.2d 241, 247 (Minn. Ct. App. 1999). FB-45-46. The majority opinion, however, gave full effect to this Court’s recognition in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998), of a claim for invasion of privacy. The *Lake* Court recognized the tort of invasion of privacy only two years after signaling its rejection of such claims in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28

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<sup>30</sup> *Siems v. City of Minneapolis*, -- F.3d --, No. 08-1456, 2009 WL 764297, at \*3 (8th Cir. Mar. 25, 2009) [DSA-52]; *Inman v. Am. Home Furniture Placement, Inc.*, 120 F.3d 117, 118-19 (8th Cir. 1997) (“Litigants choose counsel at their peril. While it may seem harsh to make defendants answer for their attorney’s behavior, any other result would punish Inman for the inaction of her opponents’ lawyer. . . . If they were truly diligent litigants who were misled and victimized by their attorney, they have recourse in a malpractice action.”).

(Minn. 1996). The Court changed course based upon its power to adapt the common law to changes in society, the position taken in the Restatement, and the approach taken by the “vast majority of jurisdictions” that had addressed the issue. *Lake*, 582 N.W.2d at 233-35.

Here, answering “No” to the Certified Question does not involve reversing the Court’s position or even adjusting course. An answer of “No” follows from the Court’s adoption of Professor Leflar’s methodology and reasoning in *Milkovich* – reasoning that extended to the statute of limitations – and from the characterization of statutes of limitation given in *Lemmer* and *Johnson*. Accordingly, the circumstances here provide even more compelling reason to give full effect to the Court’s answer to the Certified Question.

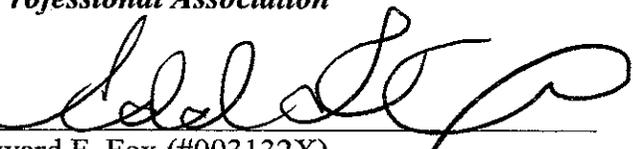
### CONCLUSION

For the reasons stated above, the Court should answer the Certified Question “No.”

Dated: April 8, 2009

Respectfully submitted,

**BASSFORD REMELE**  
*A Professional Association*

By   
Edward F. Fox (#003132X)  
Charles E. Lundberg (License #6502X)  
Carrie L. Hund (#277149)  
33 South Sixth Street, Suite 3800  
Minneapolis, Minnesota 55402-3707  
Tel: (612) 333-3000  
Fax: (612) 333-8829

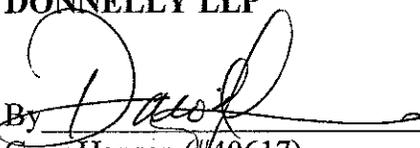
**WILLIAMS & CONNOLLY, LLP**

Jack W. Vardaman, Jr.  
Stephen L. Urbanczyk  
F. Lane Heard III  
725 12th Street, N.W.  
Washington, DC 20005  
Tel: (202) 434-5000  
Fax: (202) 434-5029

*ATTORNEYS FOR DEFENDANT WYETH*

Dated: April 8, 2009

**OPPENHEIMER, WOLFF &  
DONNELLY LLP**

By 

Gary Hansen (#40617)  
David P. Graham (#185462)  
3300 Plaza VII Building  
Minneapolis, Minnesota 55402  
Tel: (612) 607-7000

**KAYE SCHOLER LLP**

Steven Glickstein  
William Hoffman  
Robert Grass  
Alan Rothman  
425 Park Avenue  
New York, NY 10022  
Tel: (212) 836-8000

*ATTORNEYS FOR DEFENDANT  
GREENSTONE LTD.*

**STATE OF MINNESOTA  
IN SUPREME COURT**

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**A08-2124**

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RACHEL FLEEGER,

Plaintiff,

v.

WYETH and its division WYETH PHARMACEUTICALS, INC., and

GREENSTONE, LTD.

Defendants.

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**CERTIFICATION OF BRIEF LENGTH**

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I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(b), for a Brief produced with a proportional font. The length of this Brief is 6,998 words. The Brief was prepared using Microsoft Office Word 2003.

**WILLIAMS & CONNOLLY LLP**

Dated: April 8, 2009

  
Matthew V. Johnson (#0324875)

WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
(202) 434-5000

*Attorneys for Wyeth Defendants*