No. 103135-1

SUPREME COURT
OF THE STATE OF WASHINGTON

KERRY L. ERICKSON; MICHELLE M. LEAHY; RICHARD A. LEAHY; and JOYCE E. MARQUARDT,

Petitioners,

v.

PHARMACIA LLC, Delaware limited liability company, f/k/a Pharmacia Corporation,

Respondent.

BRIEF OF *AMICUS CURIAE* PROFESSOR KERMIT ROOSEVELT III IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Kermit Roosevelt III is a professor of law at the University of Pennsylvania Carey Law School, where he teaches conflict of laws. He is the Reporter for the American Law Institute's Third Restatement of Conflict of Laws. In each capacity he has an interest in the development and clarification of the law of conflict of laws. The views expressed in this brief are not an official statement of the American Law Institute.

II. INTRODUCTION

This case presents important questions about choice-of-law methodology. Modern approaches agree that courts should conduct a separate analysis for each issue on which state laws differ. They have little to say, however, about when it is appropriate for courts to engage in dépeçage —that is, the selection of different states' laws to govern different issues. Issue-by-issue analysis runs the risk of inappropriate dépeçage, especially when it is conducted under the relatively unpredictable

multifactor balancing of the Second Restatement of Conflict of Laws.

The Third Restatement of Conflict of Laws addresses dépeçage more explicitly, which should help courts avoid inappropriate dépeçage. More important, it provides rules that direct courts not to engage in dépeçage for certain issues. Statutes of repose and punitive damages are two such issues: a statute of repose should not be severed from the underlying liability, and punitive damages should be governed by the same law that governs the underlying claim.

The clear and narrow rules of the Third Restatement capture the outcomes of modern choice-of-law analysis and offer courts a simple way to obtain the benefits of the choice-of-law revolution while maintaining predictability and ease of application.

III. STATEMENT OF THE CASE

Amicus adopts the statement of Respondents.

IV. SUMMARY OF ARGUMENT

This case provides an opportunity to advance choice of law in Washington by applying the rules of the Third Restatement of Conflict of Laws. Washington initially followed a territorial approach, then rejected it in favor of the Second Restatement's "most significant relationship" test. Second Restatement analysis avoids arbitrary results, but it is labor-intensive and unpredictable. The Third Restatement offers narrow, policy-sensitive rules that incorporate the insights of modern analysis while retaining a simple and user-friendly form.

The Third Restatement both discusses dépeçage more explicitly than did the Second Restatement and provides rules that guard against inappropriate dépeçage. As applied to this case, the rules of the Third Restatement provide that Washington law should govern the products liability claim, that the Washington statute of repose should not be severed from the products liability statute, and that punitive damages should be governed by the same law that governs liability.

V. ARGUMENT

A. The History of Choice of Law in Washington State

Like most States of the United States, Washington initially followed a territorialist approach to choice of law. This approach, embodied in the American Law Institute's first Restatement of Conflict of Laws, prescribed that the law governing a legal occurrence such as a tort was the law of the state where the tort occurred. See, e.g., *Richardson v. Pacific Power & Light Co.,* 11 Wn.2d 288, 299, 118 P.2d 985 (1941) ("It is the universal rule that the existence and nature of a cause of action for tort are governed by the law of the place where the alleged wrong was committed") (citing first Restatement). A similar rule provided that, in the absence of effective choice by the parties, the law governing a contract was the law of the state where the contract was formed. See, e.g., *Norm Advertising v. Monroe Street Lumber Co.,* 25 Wn.2d 391, 396; 171 P.2d 177 (1946).

Because torts have multiple elements, and those elements may occur in different states, the territorialist approach required a rule that would locate a tort in a single state. The first Restatement provided that a tort occurs in the place of injury. That state's law would govern essentially all issues related to a tort claim.

The rule of the first Restatement was relatively simple and usually easy to apply, which was its virtue. Its defects were that it placed decisive weight on a single connecting factor and used that factor to select the law governing every issue related to a tort claim. As courts and scholars began to move beyond the territorialist dogma, however, they realized two things. First, other connecting factors—the place of conduct, or the parties' domiciles—were also relevant. That meant that sole reliance on the place of injury was a mistake. Second, some of these factors might have more significance for some issues than others. That meant that using the same state's law to govern every issue was not necessarily correct.

Academics proposed various theories to accommodate these insights. In 1952, the American Law Institute began work on a Second Restatement of Conflict of Laws. See Willis L.M. Reese, Conflict of Laws and the Restatement Second, 28 Law & Contemp. Probs. 679 (1963). As finally promulgated in 1971, the Second Restatement submitted most choice-of-law questions to the multifactor balancing test of § 6. Restatement (Second) of Conflict of Laws § 6. Courts were instructed to analyze different issues separately, and for most issues to choose the law of the state with the "most significant relationship" to the issue. Generally, this meant identifying "the state whose interests are most deeply affected," also known as "the state of dominant interest." *Id.* comment f.

This approach solved the main problems of the first Restatement: it allowed courts to select different states' laws for different issues, and it allowed them to give appropriate weight to multiple connecting factors in the analysis of those issues. For instance, the Second Restatement noted, the question of whether

conduct was wrongful should usually be governed by the law of the place of conduct and injury, if they coincided. See *id.* An intrafamily immunity, on the other hand, should usually be governed by the law of the parties' domicile, if they shared a domicile. See *id.*

This Court began to follow the new approach even before the Second Restatement was finalized. In 1967, this Court abandoned the territorialist rule for contracts, pronouncing that "[t]he absurdity of placing the choice of law necessarily on one fortuitous event—the place of execution—seems to be patent." *Baffin Land Corp. v. Monticello Motor Inn, Inc.,* 70 Wn.2d 893, 897-98, 425 P.2d 623 (1967). It adopted instead the "most significant relationship" test, citing a tentative draft of the Second Restatement and an article by Willis Reese, the Reporter for the Second Restatement. *Id.* at 897, 899 (citing Second Restatement, Tentative Draft 6, § 332 and Reese, Conflict of Laws and the Restatement Second, 28 L. & Contemp. Probs, 679 (1963)). In 1974, this Court announced that it had "adopted the

'most significant contacts' approach of the Restatement (Second) of Conflict of Laws" more generally. *Werner v. Werner,* 84 Wn.2d 360, 368, 526 P.2d 370 (1974) (en banc). For almost sixty years, Washington courts have followed the Second Restatement.

B. The Third Restatement of Conflict of Laws

1. Origins and Aspirations

As noted above, the Second Restatement ameliorated the main defects of the first Restatement. It was not, however, a perfect system. The multifactor balancing analysis of §6 imposed a significant workload on judges and lawyers. Its indeterminate nature reduced predictability and made it hard for state courts of last resort to create a body of precedent to guide parties and lower courts. And while the Second Restatement instructed courts to engage in issue-by-issue analysis, it said almost nothing about when selecting the laws of different states would be a mistake. It has been criticized on all these grounds. See, e.g., Larry Kramer, Rethinking Choice of Law, 90 Colum.

L. Rev. 277, 321 n.149 (1990) (noting that § 6 "includes just about everything anyone ever suggested might be meaningful to choice of law analysis—though with no explanations of why any of these factors are in fact relevant.").

But Willis Reese was not ignorant of these facts. He created a multifactor balancing test not because he preferred standards to rules but because he lacked the information necessary to write good rules. "[C]hoice of law," he explained in 1963, "is too vast and complicated an area to be governed by a relatively small number of simple rules of general application." Willis L.M. Reese, Conflict of Laws and the Restatement Second, 28 Law & Contemp. Probs. 679, (1963). Instead, "[w]e must have narrower and more numerous choice-of-law rules. The task of constructing such rules will not be easy and, in many instances, must be based on greater experience than we presently have." *Id.* at 692. "That," he concluded, "will be the task of future Restatements." *Id.* at 699.

In short, the Second Restatement was not supposed to last forever. "Properly viewed," Reese wrote, "it is a transitional document." Reese, American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases, 33 Vad. L. Rev. 717, 734 (1980). Reese understood the Second Restatement as essentially a way of generating the information necessary to write a third. Courts considering all the relevant factors and giving each one its appropriate weight would, he hoped, produce patterns of decisions that could be captured in narrow rules that reflected state policies and interests.

That hope was fulfilled. As Symeon Symeonides put it, "the case law has gradually converged into uniform and, indeed, sensible results in several patterns of tort conflicts." Symeon C. Symeonides, The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning, 2015 U. Ill. L. Rev. 1847, 1904. The Third Restatement, begun in 2014, attempts to provide the rules Reese could not: it uses cases decided under modern

approaches as data from which to derive rules that identify the state of dominant interest for particular issues. See Tentative Draft 4, § 6.01. It also attempts to restate the methodology of modern choice of law and to provide a fuller explanation of some of the recurring puzzles of choice of law, including dépeçage. See Tentative Draft 3, § 5.01 (discussing nature and development of choice of law); *id.* § 5.02 comment g (discussing dépeçage).

2. Torts

For torts, the Third Restatement divides issues into two categories, issues of loss allocation and issues of conduct regulation. See Tentative Draft 4, § 6.01.[1] The significance of this distinction is that for issues of loss allocation, personal connecting factors such as the parties' domicile are of paramount importance, whereas for issues of conduct regulation, territorial connecting factors such as the location of conduct and injury are of paramount importance. See *id.* § 6.03. The Third Restatement

[1]Tentative Draft 4 refers to these categories as "issues relating to persons" and "issues relating to conduct." In the discussion of Tentative Draft 4, a motion to restore the more widelyaccepted labels "loss allocation" and "conduct regulation" passed, meaning that the final draft will use "conduct regulation" and "loss allocation."

then sorts choice-of-law questions into categories based on the type of issue under consideration and the distribution of connecting factors. See *id.* §§ 6.06-6.09. It also has rules for specific torts and issues for which the general rules do not adequately account for the interests at stake.

3. Dépeçage

Issue-by-issue analysis is common in modern choice-of-law systems. But it rarely leads to dépeçage —the application of different states' laws to different issues. See Symeon C. Symeonides, Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect, 45 U. Tol. L. Rev. 751, 761 (2014) (noting that issue-by-issue analysis is routine under modern approaches but seldom results in dépeçage). The Third Restatement directs issue-by-issue analysis, but its rules lead to dépeçage in essentially one situation: if the parties share a domicile, and conduct and injury occur in a different state, then the law of the state of injury will govern an issue of conduct regulation, while the law of shared domicile will govern an issue

of loss allocation. This pattern of cases, often involving car accidents, is the pattern that led most States to abandon lex loci delicti. See Tentative Draft 4. § 6.07, Reporters' Notes b & c; see also Reese, Dépeçage: A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58, 59 (1973) (describing this fact pattern). "There is general agreement," the Supreme Judicial Court of Maine has said, "that the one incontestably valuable contribution of the choice-of-law revolution in the tort conflict field is the line of decisions applying common-domicile law in cases where the parties are codomiciliaries of the same state." *Collins v. Trius*, Inc., 663 A.2d 570, 573 (Me. 1995).

In most other cases, issue-by-issue analysis under the Third Restatement will not produce dépeçage. Generally speaking, all conduct-regulating issues will be governed by a single law. All loss-allocating issues will be governed by a single law. And unless the parties share a domicile while conduct and injury occur in a different state, the governing law will usually be the same for both types of issues. Here, as elsewhere, the

Third Restatement reproduces the outcomes reached under modern choice-of-law analysis.

Dépeçage is rare for two reasons. First, as noted above, for any particular distribution of connecting factors, the same state will tend to have the dominant interest in all conduct-regulating issues, and the same state will tend to have the dominant interest in all loss-allocating issues. And unless the connecting factors are distributed in a particular way—common domicile, with conduct and injury occurring in a different state—the state of dominant interest will be the same for both conduct-regulating and loss-allocating issues. With respect to punitive damages, for instance, the selection of a state's law to govern the cause of action means that the chosen state has the dominant interest in determining whether conduct is wrongful. Punitive damages are justified by the extreme wrongfulness of conduct—they are a conduct-regulating issue "par excellence." Symeon C. Symeonides, The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts), 75 Ind. L. J. 437, 471 (2000). It

would therefore be unusual to decide that a different state has the dominant interest in deciding whether the conduct is sufficiently wrongful to warrant punitive damages.

Second, even when interest-balancing analysis suggests the use of different states' laws to govern different issues, dépeçage poses the risk of distorting the states' laws or policies. See Third Restatement, Tentative Draft 3 § 5.03 Comment g (Limitation on dépeçage). Deciding two issues of conduct regulation under different states' laws can produce decisions that are not consistent with either state's policy. The trial court here, for example, allowed the jury to award punitive damages for post-sale failure to warn. But neither state's law reflects a policy in favor of such damages: Washington does not allow punitive damages, and Missouri does not recognize a post-sale failure to warn claim. The consequence was to treat conduct as exceptionally wrongful when neither state's law did so.

VI. APPLICATION OF THE THIRD RESTATEMENT TO THIS CASE

Consistent with its goals, the Third Restatement provides rules that identify results on which modern approaches converge for the issues presented in this case. For products liability claims, § 6.11 provides that the governing law is the law of the state where the product was delivered to the initial end user, if the product was available in that state through ordinary commercial channels and that state is also the plaintiff's domicile or the place of injury. That rule selects Washington law.

Section 6.11, comment h, notes that a statute of repose relates to liability and that choice of law for a statute of repose for products liability should be performed under § 6.11. The Washington statute of repose should govern. The reason for this is that a statute of repose does not present an issue distinct from the underlying claim; it is part of the definition of the claim in much the same way as an element of a tort. The court of appeals was correct to say that "[a] plaintiff who cannot satisfy the WPLA statute of repose does not have a WPLA claim. Due to

its claim-defining nature, WPLA's statute of repose is inextricably linked to the cause of action." See *Erickson v. Pharmacia LLC,* 31 Wn. App. 2d 100, 123, 548 P.3d 226*, review granted sub nom. Erickson v. Pharmacia LLC.,* 3 Wn.3d 1018, 556 P.3d 1098 (2024).

Section 6.12 provides that the law governing punitive damages is the law selected under the general tort rules of the Third Restatement, or the specific rules if the specific tort is listed. Tentative Draft 4, § 6.12. The reason for this rule is to avoid the distortion that can result from selecting different states' laws to govern liability and punitive damages: it reflects a judgment that dépeçage for punitive damages is inappropriate. Because products liability is listed as a specific tort in § 6.11, the rule of § 6.11 should be applied to select the law that governs punitive damages. As noted above, that is Washington law.

VII. CONCLUSION

This case provides a good illustration of the benefits of the Third Restatement. First, its rules are clear and easy to follow.

Unlike the fact-intensive analysis of the Second Restatement, they will generate precedents that provide meaningful guidance to lower courts and parties. Second, the Third Restatement offers both general and specific instruction about inappropriate dépeçage. The general instruction is that courts should not separate issues that are closely related in purpose, as conduct-regulating issues tend to be. The specific instruction is that § 6.11 and § 6.12 identify issues that should not be governed by different states' laws. A products liability claim and its statute of repose should not be separated. Punitive damages should not be separated from the underlying liability. If this Court applies the rules of the Third Restatement, it will resolve this case easily and correctly while providing clear guidance for the future.

This document contains 2,972 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 24th day of December, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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December 24, 2024 - 8:58 AM

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