No. 103135-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs-Petitioners,

v.

PHARMACIA LLC, a Delaware Limited Liability Company, f/k/a Pharmacia Corporation,

Defendant-Respondent.

BRIEF OF *AMICI CURIAE* LAW PROFESSORS

Blythe H. Chandler
bchandler@terrellmarshall.com
Elizabeth A. Adams
eadams@terrellmarshall.com
TERRELL MARSHALL LAW GROUP
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

I. IDENTITY AND INTEREST OF *AMICI*..... 1

II. ISSUE TO BE ADDRESSED BY *AMICI*..... 6

III. SUMMARY OF ARGUMENT 7

IV. ARGUMENT 8

A. Issue-by-issue analysis is the most common method for resolving choice-of-law questions in the United States 10

B. Washington courts apply the Restatement (Second) of Conflict of Laws to issues in tort..... 18

C. Applying Washington's established issue-by-issue framework results in the application of Missouri law to the issues of punitive damages and repose..... 20

1. Statutory claims are treated the same as common law claims for purposes of issue-by-issue choice-of-law analysis 22

2. Punitive damages are a separate issue from liability 28

3. Repose is a separate issue from liability 30

4. The application of issue-by-issue analysis here is fully consistent with constitutional principles of federalism and state sovereignty 33

V. CONCLUSION 35

VI. RAP 18.17(b) CERTIFICATION 36

TABLE OF AUTHORITIES

Page

STATE CASES

Babcock v Jackson,
12 N.Y. 2d 473 (1963)..... 20

Calabotta v. Phibro Animal Health Corp.,
460 N.J. Super. 38 (App. Div. 2019)..... 24

Dabbs v. Silver Eagle Mfg. Co.,
779 P.2d 1104 (Or. Ct. App. 1989) 32

Dearinger v. Eli Lilly & Co.,
199 Wn.2d 569 (2022) 9, 19, 20

Davis v. Baugh Indus. Contractors, Inc.,
159 Wn.2d 413 (2007) 19

Erickson v. Pharmacia LLC,
31 Wn. App. 2d 100 (2024)..... 28

FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.,
180 Wn.2d 954 (2014) 18, 19

Hunker v. Royal Indem. Co.,
57 Wis.2d 588, 204 N.W.2d 897 (1973) 15

Johnson v. Spider Staging,
87 Wn.2d 577 (1976) .....*passim*

Kammerer v. Western Gear Corp.,
96 Wn.2d 416 (1981) 28

McCann v. Foster Wheeler LLC,
225 P.3d 516 (Cal. 2010) 24

Seizer v. Sessions,
132 Wn.2d 642 (1997) 35

Singh v. Edwards Lifesciences Corp.,
151 Wn. App. 137 (2009) 28, 30

State Farm Mut. Auto. Ins. Co. v. ANC Rental Corp.,
2008 WL 4149006 (Ariz. Ct. App. Apr. 3, 2008) 24

Zenaida-Garcia v. Recovery Sys. Tech., Inc.,
128 Wn. App. 256 (2005) 22, 31

FEDERAL CASES

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 34

Brewer v. Dodson Aviation,
447 F. Supp. 2d 1166 (W.D. Wash. 2006) 29

Bryant v. Wyeth,
879 F. Supp. 2d 1214 (W.D. Wash. 2012) 29

Ewing v. St. Louis-Clayton Orthopedic Grp., Inc.,
790 F.2d 682 (8th Cir. 1986) 16

Experience Hendrix, LLC v. HendrixLicensing.com, LTD,
766 F. Supp. 2d 1122 (W.D. Wash. 2011) 18

Johnson v. Continental Airlines Corp.,
964 F.2d 1059 (10th Cir. 1992) 17

Lazard Freres & Co. v. Protective Life Ins. Co.,
108 F.3d 1531 (2d Cir. 1997) 27

Mahne v. Ford Motor Co.,
900 F.2d 83 (6th. Cir. 1990),
cert. denied, 498 U.S. 941 (1990) 31

Marchesani v. Pellerin-Milnor Corp.,
269 F.3d 481 (5th Cir. 2001) 32

Miller v. Ford Motor Co.,
419 P.3d 392 (Or. 2018) 32

Mitchell v. Lone Star Ammunition, Inc.,
913 F.2d 242 (5th Cir. 1990) 31

Nazar v. Harbor Freight Tools USA Inc.,
2019 WL 2066127 (E.D. Wash. Mar. 8, 2019) 29

Ruiz v. Blentech Corp.,
89 F.3d 320 (7th Cir. 1996) 16

Simon v. Philip Morris Inc.,
124 F. Supp. 2d 46 (E.D.N.Y. 2000) 21, 22, 23

STATE STATUTES

RCW 7.72.020(1)) 9, 20

RCW 11.98.005 23

RCW 25.05.030 23

RCW 26.26A.040 23

RCW 62A.8-110 23

OTHER AUTHORITIES

Restatement (Second) of Conflict of Laws § 5, cmt. b 9

Restatement (Second) of Conflict of Laws § 6, cmt. b 26

Brainerd Currie,
Comments on Babcock v. Jackson*, a Recent Development in Conflict of Laws*,
63 Colum. L. Rev. 1233 (1963) 11

C.L. Wilde,
Dépeçage in the Choice of Tort Law,
41 So. Cal. L. Rev. 329 (1967)..... 16, 17

Scalia & Garner,
Reading Law: The Interpretation of Legal Texts
318 (2011) 19

Caleb Nelson,
State and Federal Models of the Interaction Between Statutes and Unwritten Law,
80 U. Chi. L. Rev. 657 (2013) .....*passim*

Willis L.M. Reese,
Dépeçage: A Common Phenomenon in Choice of Law,
73 Colum. L. Rev. 58 (1973) 13, 17

Christopher G. Stevenson,
Note, *Dépeçage: Embracing Complexity to Solve Choice-of-Law Issues*,
37 Ind. L. Rev. 303 (2003)..... 10, 34

Symeon C. Symeonides,
The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons,
82 Tul. L. Rev. 1741 (2008)..... 11

Symeon C. Symeonides,
The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning,
2015 U. Ill. L. Rev. 1847 (2015)..... 11, 18, 33

Symeon C. Symeonides,
Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect,
45 U. Tol. L. Rev. 751 (2014) .....*passim*

Symeon C. Symeonides,
Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey,
69 Am. J. Comp. L. 177 (2021) 14

I. IDENTITY AND INTEREST OF *AMICI*

Amici are law professors who teach or publish in the fields of conflict of laws, complex litigation, products liability, and torts. Because of their teaching and research interests, the amici have an interest in ensuring that courts properly utilize issue-by-issue analysis in cases involving cross-border products liability and torts cases where, as here, it is appropriate for them to do so.

Professor Symeon C. Symeonides is the Alex L. Parks Distinguished Professor of Law and Dean Emeritus at Willamette University College of Law. Because of his stature in the field of choice of law, Professor Symeonides has been called "the conflicts giant" (H. Levin 2006, O. Lando 2015), "the father of choice of law in the twenty-first century" (J. Singer 2021), and "the world's leading expert on U.S. and comparative conflicts law" (M. Reimann 2006, R. Michaels 2021). His

books include *Conflict of Laws: American, Comparative, International* (2019); *Conflict of Laws* (2018); *Choice of Law in the American Courts* (2011-2015); *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014 and 2017); and *Oxford Commentaries on American Law: Choice of Law* (2016). He holds two law degrees *summa cum laude* from Aristotle University of Thessaloniki, Greece, an LL.M. and an S.J.D. from Harvard, and three honorary doctorates.

Andrew Bradt is the Shannon Cecil Turner Professor of Jurisprudence at the University of California, Berkeley School of Law, where is also the Faculty Director of the Civil Justice Research Initiative. Professor Bradt writes and teaches in the areas of conflict of laws, civil procedure, and civil remedies, and his current research focuses on the adaptation of

procedural and choice-of-law systems to large-scale multijurisdictional litigation. Prior to joining the Berkeley Law faculty, he was a Climenko Fellow and Lecturer on Law at Harvard Law School. He also served as a law clerk to the Honorable Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit and the Honorable Patti B. Saris of the U.S. District Court for the District of Massachusetts. Bradt graduated *magna cum laude* from Harvard Law School, where he received the Joseph H. Beale Prize for Conflict of Laws, and *summa cum laude* from Harvard College.

Professor Peter Nicolas holds the William L. Dwyer Endowed Chair in Law at the University of Washington School of Law. Among other things, his teaching and research interests include conflict of laws and international civil litigation. He joined the UW law school faculty in 2000 following a clerkship with Judge

Michael Boudin on the U.S. Court of Appeals for the First Circuit. He graduated *magna cum laude* from Harvard Law School, where he served on the editorial board of the *Harvard Law Review*.

Professor Steve Calandrillo is the Jeffrey & Susan Brotman Professor of Law at the University of Washington School of Law. He teaches Advanced Torts, Contracts, and Law and Economics. He joined the UW law school faculty in 2000 following a clerkship with Judge Alfred Goodwin on the Ninth Circuit. He graduated *magna cum laude* from Harvard Law School where he was a John M. Olin Fellow in Law & Economics and a member of the *Harvard Journal on Legislation*. He served as UW's Associate Dean for Faculty from 2009-10.

Professor Olawale Olumodimu is an Assistant Professor at Gonzaga University Law School who specializes in conflict of laws, comparative law, and U.S.

foreign relations, among other subjects, and whose scholarly work includes research and writing on the rights of internally displaced persons, stateless persons, and refugees. In addition to his law degrees from Nigeria, he also earned two advanced law degrees, an LL.M and S.J.D, in International and Comparative Law at Tulane University Law School.

Professor Daniel Wilf-Towsend is an Associate Professor at Georgetown University Law Center, where he studies questions of consumer protection and civil procedure. His scholarship has been published in the *Harvard Law Review*, *Fordham Law Review*, *Yale Law Journal Forum*, and *Stanford Law Review Online*, and has been cited by trial and appellate courts. Prior to joining the faculty at Georgetown, Professor Wilf-Townsend was a Bigelow Fellow at the University of Chicago and served as a law clerk to Judge Marsha

Berzon on the U.S. Court of Appeals for the Ninth Circuit and Judge Jeffrey Meyer on the U.S. District Court for the District of Connecticut. He is a graduate of Yale Law School.

II. ISSUE TO BE ADDRESSED BY *AMICI*

Amici law professors submit this brief to explain that the application of the laws of different states to different issues relating to the same cause of action is a widely accepted method for resolving choice-of-law questions that was adopted as part of Washington's common law nearly 50 years ago. Amici submit this brief to explain the history and purpose of the doctrine of dépeçage in order to demonstrate the legitimacy and correctness of using such method to analyze the choice-of-law questions presented—including in cases like this one that arise under product liability statutes that do not override established common-law choice-of-law

principles. Amici further submit this brief to support Petitioners' argument that issue-by-issue analysis and the doctrine of dépeçage apply to the issues of punitive damages and repose.

III. SUMMARY OF ARGUMENT

Issue-by-issue analysis of choice-of-law problems—which can result in the potential application of the laws of different states to different issues relating to the same claim ("dépeçage")—is not only proper but is generally the preferred method for resolving choice-of-law problems in the modern era. For at least 50 years, both courts and scholars have adopted this method as preferred to the older ways of approaching choice-of-law problems, which were inflexible and ignored the possibility that multiple states might have different interests in having their laws applied to different issues. Washington has followed the Restatement (Second) of Conflict of Laws, which

formalized this approach, since the 1970s. As a result, Amici agree that Petitioners' brief adopts the correct framework for the choice-of-law questions raised in this case. The fact that this case arises under a statute does not alter that framework because common-law principles apply to questions of choice of law unless the legislature acts to override them. Amici further support Petitioners' application of issue-by-issue analysis to punitive damages and repose, both of which are distinct "issues" in tort.

IV. ARGUMENT

Nearly fifty years ago, this Court in *Johnson v. Spider Staging* adopted the choice-of-law test set forth in the Restatement (Second) of Conflict of Laws, which requires courts to apply the law of the state with the "most significant relationship" to each "particular issue" in tort. 87 Wn.2d 577, 581 (1976). That issue-by-issue

test is as much a "part of the common law … as any other branch of the state's law." Restatement (Second) of Conflict of Laws § 5, cmt. b. If the legislature wants a different choice-of-law rule to apply, it can do so with a "statutory directive" that is "expressly directed to choice of law." *Id.* § 6, cmt. a. This is consistent with the ordinary rule that the background common law is presumed to apply unless the legislature abrogates it. As this Court recently noted, the "WPLA itself recognizes this principle, stating, 'The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.'" *Dearinger v. Eli Lilly & Co.*, 199 Wn.2d 569, 575 (2022) (quoting RCW 7.72.020(1)).

In the decades since this Court decided *Spider Staging*, the legislature has not overridden it with another choice-of-law rule for products liability cases.

The Court of Appeals was thus correct in applying *Spider Staging*'s rule to the issue of punitive damages. As explained below, however, it erred in holding that the rule was not the "appropriate" test on the issue of repose. Op. 12.

A. Issue-by-issue analysis is the most common method for resolving choice-of-law questions in the United States.

The original choice-of-law rule for torts in most American jurisdictions was *lex loci delicti*. Under this doctrine, endorsed by the Restatement (First) of Conflict of Laws in 1934 and followed by most American jurisdictions until the middle of the twentieth century, courts looked solely at the place where the tort was committed and applied the law of that place to all issues relating to that tort. *See* Christopher G. Stevenson, Note, *Dépeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 Ind. L. Rev. 303, 305 (2003).

In the 1950s, scholars began what is widely regarded as a "revolution" in American conflicts law. *See* Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 Tul. L. Rev. 1741, 1745-46 (2008); Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. Ill. L. Rev. 1847, 1867 (2015). The key change effected by this revolution was to replace the inflexible *lex loci delicti* rule with a methodology that produces outcomes that serve "the policies and interests of the respective states." Brainerd Currie, *Comments on* Babcock v. Jackson*, a Recent Development in Conflict of Laws*, 63 Colum. L. Rev. 1233, 1234 (1963).

The new rule, often referred to as "issue-by-issue" analysis, was "based on the elementary realization that, in many cases, the conflict is confined to only one issue

(or less than all issues) in a case, and that the involved states may be interested in different issues." Symeon C. Symeonides, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect*, 45 U. Tol. L. Rev. 751, 754 (2014).

As scholars began to recognize the benefits of issue-by-issue analysis and the limitations of rigid rules for resolving choice-of-law questions, work began on drafting the Restatement (Second) of Conflict of Laws to embody this sea change. After nearly two decades of work, it was finally published in 1971 and was quickly adopted by many states. *See* Restatement (Second) of Conflict of Laws, Introduction (1971) (describing the circulation of multiple tentative drafts from 1953 to 1965 and three proposed official drafts from 1967 to 1969). By 1973, issue-by-issue analysis based on the state interests and policies involved was generally accepted as the correct

methodology for resolving choice-of-law questions:

> Amidst the chaos and tumult of choice of law there is at least one point on which there seems to be general agreement in the United States. This is that choice of the applicable law should frequently depend upon the issue involved. The search in these instances is not for the state whose law will be applied to govern all issues in a case; rather it is for the rule of law that can most appropriately be applied to govern the particular issue.

Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 58 (1973).

Issue-by-issue analysis "is more likely than the traditional wholesale analysis to yield more nuanced and individualized solutions to conflicts cases." Symeonides, *Issue-by-Issue Analysis and Dépeçage*, 45 U. Tol. L. Rev. at 772. Recognizing the advantages of this changed approach, by 2020, twenty-five states had adopted the Restatement (Second) of Conflict of Laws for tort law. Symeon C. Symeonides, *Choice of Law in the American*

Courts in 2020: Thirty-Fourth Annual Survey, 69 Am. J. Comp. L. 177, 194-95 (2021). Another sixteen states have abandoned *lex loci delicti* in favor of some other method of analysis, most of which involve at least some level of issue-by-issue analysis. *Id.* Indeed, "issue-by-issue analysis[] has become an integral feature of all the approaches produced by the choice-of-law revolution and followed in the more than 40 states that have abandoned the first Restatement." Symeonides, *Issue-by-Issue Analysis and Dépeçage*, 45 U. Tol. L. Rev. at 752. Only nine states still follow the *lex loci delicti* rule, the majority of which are in the southeastern part of the country. *See* Symeonides, *Choice of Law in the American Courts in 2020*, 69 Am. J. Comp. L. at 194-95. No western state follows that original approach today. *See id.*

When an issue-by-issue analysis results in application of the laws of different states to different

issues, it is referred to as "dépeçage." *See* Dépeçage, *Black's Law Dictionary* (11th ed. 2019) (defining "dépeçage" as "[t]he process whereby different issues in a single case arising out of a single set of facts are decided according to the laws of different states"); *see also* Symeonides, *Issue-by-Issue Analysis and Dépeçage*, 45 U. Tol. L. Rev. at 755. Issue-by-issue analysis sometimes, but not always, results in dépeçage. *See id.* at 755-58. The first available usage of the word "dépeçage" in a published case occurred in 1973. The Supreme Court of Wisconsin, citing Professor Reese's law review article, performed a choice-of-law analysis and acknowledged the possibility that different issues in the case could be decided by the laws of different states. *See Hunker v. Royal Indem. Co.*, 57 Wis.2d 588, 603 n.1, 204 N.W.2d 897 (1973). Since that time, dépeçage has become widely

recognized. A Westlaw search now yields over 500 cases using the word "dépeçage."[1]

Issue-by-issue consideration, as well as the dépeçage that may result, has been recognized as the norm in the modern era by courts and scholars alike. *See, e g.*, *Ewing v. St. Louis-Clayton Orthopedic Grp., Inc.*, 790 F.2d 682, 687 (8th Cir. 1986) ("Whatever may be the methodological differences between the approaches of legal writers, the American Law Institute's second *Restatement* and the practice of the courts, all agree that choice of law must be made on an issue-by-issue basis and that such choice need not be the same as to every issue in a case.") (quoting C.L. Wilde, *Dépeçage in the*

[1] This figure undercounts the number of cases that have adopted or acknowledged the concept of issue-by-issue analysis or that utilize the Restatement (Second) as the basis for that analysis, as not every such case uses the word dépeçage. *See* Symeonides, *Issue-by-Issue Analysis and Dépeçage*, 45 U. Tol. L. Rev. at 761.

Choice of Tort Law, 41 So. Cal. L. Rev. 329, 347 (1967)); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1062 n.4 (10th Cir. 1992) ("Dépeçage is the widely approved process whereby the rules of different states are applied on the basis of the precise issue involved."); *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir. 1996) (dépeçage "has been long applied" in deciding choice of law issues).

In short, issue-by-issue analysis (and the concomitant possibility of dépeçage) is widely accepted as the preferred method for resolving modern choice-of-law problems. *See* Reese, *Dépeçage: A Common Phenomenon*, 73 Colum. L. Rev. at 75 ("Use of [dépeçage] would seem to be an integral part of the modern approach to choice of law which frequently requires that choice of the applicable law should depend upon the precise issue involved.").

B. Washington courts apply the Restatement (Second) of Conflict of Laws to issues in tort.

Washington long ago adopted the Restatement (Second) of Conflict of Laws for analysis of tort claims. *Spider Staging*, 87 Wn.2d at 580 (adopting Restatement (Second) and explaining that "contacts are to be evaluated according to their relative importance with respect to the particular issue") (emphasis added); *see also Experience Hendrix, LLC v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1136 (W.D. Wash. 2011) ("Although some states do not follow the rule of dépeçage, Washington does."); Symeonides, *Choice-of-Law Revolution*, at 1873 (Washington adopted Restatement (Second) for tort claims in 1974). The analysis requires courts to apply the law of the state with the "most significant relationship" to an "issue in tort." *Spider Staging*, 87 Wn.2d at 580; *see also FutureSelect Portfolio*

Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 967 (2014).

"The legislature is presumed to know" this Court's established common-law rule on choice of law. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 427 (2007). To "abrogate the common law, there must be clear evidence of the legislature's intent." *Dearinger*, 199 Wn.2d at 575. Otherwise, courts "presume that the statute leaves the state's ordinary choice-of-law principles untouched." Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 668 (2013); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2011) ("Statutes will not be interpreted as changing the common law unless they effect the change with clarity.").

But rather than expressly overriding the common law for products liability cases in the WPLA, the legislature expressly preserved it. The WPLA provides that "[t]he previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter." RCW 7.72.020(1); *see Dearinger*, 199 Wn.2d at 575. Because nothing in the WPLA speaks to choice-of-law rules, let alone displaces them, Washington's well-established *Spider Staging* test governs the issues in this case.

C. Applying Washington's established issue-by-issue framework results in the application of Missouri law to the issues of punitive damages and repose.

"[T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction." *Babcock v Jackson*, 12 N.Y. 2d 473, 484 (1963). The Restatement (Second)'s approach thus

"permits severance of statutes of limitations, questions of individual causation, damages, and affirmative defenses in accordance with different states' law." *Simon v. Philip Morris Inc.*, 124 F. Supp. 2d 46, 75 (E.D.N.Y. 2000).

With respect to the issue of punitive damages, the Court of Appeals recognized these principles in applying Missouri law. On the issue of repose, however, the court held that *Spider Staging*'s issue-by-issue analysis was not the "appropriate" test because "the legislature integrated the statute of repose's limitation on liability into WPLA." Op. 12. As explained below, that was error. This Court's common-law rule for choice of law continues to apply under the WPLA, and it mandates application of Missouri law to both punitive damages and repose.

1. Statutory claims are treated the same as common law claims for purposes of issue-by-issue choice-of-law analysis.

It makes no difference whether the underlying claims are statutory versus common-law tort claims. Both types of claims in Washington are analyzed under the Restatement (Second), unless a particular statute explicitly overrides general choice-of-law principles as to that statute. *See Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 259-66 (2005) (analyzing proper statute of repose for application to statutory products liability claim under Restatement (Second) framework). This rule is not unique to Washington. "The normal presumption, which has been around for years, is that statutes are not intended to alter principles of conflict of laws." Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. at 667 (citation omitted); *see also Simon v.*

Philip Morris Inc., 124 F. Supp. 2d at 53-54 ("Choice of law rules apply equally to claims brought under common law and statutory law.").

The Restatement instructs that a "statutory directive" on choice of law must be "expressly directed to choice of law." Restatement (Second) of Conflict of Laws § 6, cmt. A. That is a direction that the Legislature has had no trouble following when it wants; it has often adopted express choice-of-law rules for specific statutes. *See, e.g.*, RCW 25.05.030 (adopting express choice-of-law rule for business partnerships); RCW 26.26A.040 (parentage cases); RCW 62A.8-110 (securities); RCW 11.98.005 (trusts).

In other words, unless a statute clearly includes language intended to replace the normal choice-of-law framework for claims under that statute, the choice-of-law analysis will follow the state's general choice-of-law

framework. *See, e.g., McCann v. Foster Wheeler LLC*, 225 P.3d 516, 527-37 & n 10 (Cal. 2010) (rejecting attempt to use a California statute of limitations that seemed, on its face, to govern "any civil action for injury or illness based upon exposure to asbestos," and using California's ordinary choice-of-law analysis to determine that the plaintiff's claim was governed instead by Oklahoma's stricter statute of repose); *see also Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38, 66 (App. Div. 2019) (If the legislature "wishes to issue a 'statutory directive' on choice-of-law, it knows how to do it."); *State Farm Mut. Auto. Ins. Co. v. ANC Rental Corp.*, 2008 WL 4149006, at *2 (Ariz. Ct. App. Apr. 3, 2008) (holding that the presumption can be overcome "only where we can clearly determine that the Legislature" intended to "supersede choice of law principles"); Nelson, *State and Federal Models of the Interaction Between Statutes and*

Unwritten Law, 80 U. Chi. L. Rev. at 666 ("In the absence of contrary directions from Congress or the state legislature, the state's courts will use the state's normal choice-of-law rules to determine which issues are governed by the law of their own state and which issues are governed instead by the law of some other sovereign.").

Monsanto's briefing in the Court of Appeals (at 44-45) pointed to the WPLA's language providing that "a product seller shall not be subject to liability" after the repose period. That language, however, does not say anything about choice of law. It simply establishes the repose period as a substantive rule of Washington law. It uses the word "shall," as nearly all statutes do, to establish mandatory rules of law. But that is not enough to constitute a "statutory directive" on choice of law because it does not mandate that this law apply in every

case filed in the state's courts—even against an out-of-state defendant who committed the tort in its home state. Indeed, that language says nothing explicitly about choice of law at all.

Were such generic language enough, virtually every statute could be misconstrued as a choice-of-law directive. But the Restatement makes clear that a "court will rarely find that a question of choice of law is explicitly covered by statute." Restatement (Second) of Conflict of Laws § 6, cmt. b. Such statutes are "few in number." *Id.*; *see* Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. at 668 ("[I]ndividual state statutes usually do not address, let alone override, the state's ordinary choice-of-law principles.").

Monsanto's supplemental brief in this Court also suggests (at 48), even more broadly, that the law

governing liability *always* governs defenses. As support, it points to the draft Restatement (Third) of Conflict of Law § 5.02's illustration stating that, "It would be inappropriate dépeçage to use state Y law to give Belle a claim but to use state X law for the issue of the defense, thereby negating Alex's defense under State Y law." But Monsanto conveniently leaves out that, in the illustration, "state X has no contacts"—both parties live in state Y and the injury occurred in state Y. The Restatement, in other words, does not offer the *per se* rule that Monsanto claims.[2] In fact, an illustration in the same section provides an example of when using one state's law to govern the law of negligence while not applying a defense under that state's law "is

[2] Nor does Monsanto's only other authority. *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1541 (2d Cir. 1997). It simply said that, in adjudicating a *contract* claim, choice of law principles do not allow the borrowing of another state's *tort* defense.

appropriate." Restatement (Third) of Conflict of Law § 5.02, illus. 3.

2. Punitive damages are a separate issue from liability.

Washington courts (including the Court of Appeals below in this case) have made clear that the question of which state's law applies to punitive damages is separate from the question of which state's law governs liability. *See, e.g.*, *Erickson v. Pharmacia LLC*, 31 Wn. App. 2d 100, 137 (2024) (applying Missouri law to issue of punitive damages for claims under WPLA); *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 423 (1981) (concluding that "a Washington court can award punitive damages under the law of California"); *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 143 (2009) (applying California law to punitive damages and

applying Washington law to liability and compensatory damages in a products liability case).

Federal courts in Washington applying Washington choice-of-law principles have similarly recognized that the state whose law is applied to punitive damages may differ from the law applied to other issues in the case. *See, e.g.*, *Bryant v. Wyeth*, 879 F. Supp. 2d 1214 (W.D. Wash. 2012) (applying Pennsylvania law to issue of punitive damages for WPLA claims); *Nazar v. Harbor Freight Tools USA Inc.*, 2019 WL 2066127, at *1 (E.D. Wash. Mar. 8, 2019) (explaining that "the Court may apply the laws of one state to a plaintiff's request for compensatory damages and apply the laws of another for punitive damages"); *Brewer v. Dodson Aviation*, 447 F. Supp. 2d 1166, 1175 (W.D. Wash. 2006) (explaining that "the measure of damages" is "an 'important issue[]' that should receive separate consideration in a choice of law

analysis"). Thus, this Court should follow Washington's well-established precedent and find that the issue of punitive damages should be governed by Missouri law. *See Singh*, 151 Wn. App. at 147-48 ("Washington has no interest in protecting [out-of-state] companies who commit fraud" while the state where the conduct occurred "has an interest in deterring its corporations from engaging in such fraudulent conduct").

3. Repose is a separate issue from liability.

The Court of Appeals concluded that the applicable statute of repose, in contrast to the issue of punitive damages, could not be separated from the WPLA. But just like for punitive damages, the law applicable to a statute of repose is a separate issue for purposes of choice of law than liability. As at least one Washington court has explained, for the same reasons that punitive damages can be governed by the laws of a different state

than the one governing liability, so too can the applicable statute of repose. *See Zenaida-Garcia*, 128 Wash. App. at 266 (explaining that a state has "strong policy interests in deterring the design, manufacture and sale of unsafe products within its borders" but has "no strong interest in applying its statute of repose to protect an [out-of-state] corporation.").

Multiple other courts have similarly explained that states have no interest in allowing out-of-state corporations to take advantage of another state's statute of repose. *See Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990) (finding that there is no "compelling reason" to apply the law of the place of injury to eliminate claims against out-of-state manufacturers); *Mahne v. Ford Motor Co.*, 900 F.2d 83, 88 (6th. Cir. 1990), cert. denied, 498 U.S. 941 (1990) (finding that there was "no reason" to extend the benefits of one state's

statute of repose to an out-of-state defendant); *Miller v. Ford Motor Co.*, 419 P.3d 392, 397 (Or. 2018) ("[W]hen an Oregon product liability action involves a product that was manufactured in a state that has no statute of repose for an equivalent civil action, then the action in Oregon also is not subject to a statute of repose."); *Marchesani v. Pellerin-Milnor Corp.*, 269 F.3d 481, 484, 493 (5th Cir. 2001) (applying Louisiana law and allowing a products liability action that was barred by Tennessee's statute of repose to proceed with claims under Tennessee law); *Dabbs v. Silver Eagle Mfg. Co.*, 779 P.2d 1104 (Or. Ct. App. 1989) (hearing an action by a Tennessee resident injured in Tennessee by a product acquired there and manufactured in Oregon by an Oregon-based defendant; concluding that Tennessee had no interest in applying its statute barring the action, because no Tennessee defendant was involved in this case; and applying

Oregon's statute, permitting the action); Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 Tul. L. Rev. 1247, 1279 (March 2004) (explaining that there are numerous cases in which "courts allowed claims against a forum manufacturer that were barred by the statute of repose of the other, plaintiff-affiliated, state").

This Court should follow the guidance of these cases and the reasoning of prior Washington court precedent to find that Missouri has the most significant interest in policing the conduct of its corporate citizens and holding them accountable. As a result, it is Missouri law that applies to the issue of repose.

4. The application of issue-by-issue analysis here is fully consistent with constitutional principles of federalism and state sovereignty.

Monsanto's supplemental brief (at 32-33) suggests in passing (at 32-33) that applying Missouri law to

govern punitive damages here would unconstitutionally discriminate against interstate commerce. To the contrary, issue-by-issue analysis and the doctrine of dépeçage are rooted in the same principles of federalism and state sovereignty protected by the dormant Commerce Clause. *See* Stevenson, *Dépeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 Ind. L. Rev. at 309-10. There is therefore no merit to Monsanto's suggestion that the application of issue-by-issue analysis and dépeçage somehow raises potential constitutional problems. As the U.S. Supreme Court has explained, to avoid "infringing on the policy choices of other States," a sovereign state's limit on remedies "must be supported by the State's interest in protecting its own consumers and its own economy." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). Issue-by-issue analysis and dépeçage safeguard the right of states to develop and enforce their

own laws, while preventing states from regulating beyond their own borders. Far from interfering with interstate commerce or federalism, dépeçage ensures that choice-of-law decisions "further harmonious relations between states" and "facilitate commercial intercourse between them." Restatement (Second) of Conflict of Laws § 6, cmt. d; *see Seizer v. Sessions*, 132 Wn.2d 642, 652 (1997).

V. CONCLUSION

Amici urge this Court to analyze the choice-of-law questions regarding punitive damages and the statute of repose on an issue-by-issue basis. This method of analysis is both widely accepted and specifically applicable in Washington and is the proper mode of analysis where, as here, a case arises under a statute and the legislature has given no contrary directive on choice of law.

VI. RAP 18.17(b) CERTIFICATION

I hereby certify that this brief contains 4,962 words in compliance with RAP 18.17(b) and RAP 18.17(c)(6).

RESPECTFULLY SUBMITTED AND DATED this 27th day of December, 2024.

By: /s/ Elizabeth A. Adams
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
Elizabeth A. Adams, WSBA #49175
Email: eadams@terrellmarshall.com
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on December 27, 2024, I caused a true and correct copy of the foregoing to be served via the Court of Appeals Electronic Filing Notification System.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of December, 2024.

By: /s/ Elizabeth A. Adams
Elizabeth A. Adams, WSBA #49175

TERRELL MARSHALL LAW GROUP PLLC

December 27, 2024 - 1:49 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,135-1
Appellate Court Case Title:	Kerry L. Erickson, et al. v. Pharmacia LLC.

The following documents have been uploaded:

- 1031351_Briefs_20241227132448SC691906_3607.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Amici Brief.pdf
- 1031351_Motion_20241227132448SC691906_9372.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Mtn for Leave to File Amici Brief.pdf

A copy of the uploaded files will be sent to:

- adavis@wcllp.com
- allison.krashan@bclplaw.com
- andrienne@washingtonappeals.com
- bchandler@terrellmarshall.com
- bgould@kellerrohrback.com
- carolea.casas@bclplaw.com
- cate@washingtonappeals.com
- danhuntington@richter-wimberley.com
- deepak@guptawessler.com
- docketrequests@terrellmarshall.com
- dwatkins@friedmanrubin.com
- farron.curry@bclplaw.com
- feve.retonio@bclplaw.com
- filing@terrellmarshall.com
- greg@guptawessler.com
- hjones@friedmanrubin.com
- howard@washingtonappeals.com
- hrota@terrellmarshall.com
- jcandre@bclplaw.com
- jenn.campbell@bclplaw.com
- jhertz@friedmanrubin.com
- jon@guptawessler.com
- jvick@friedmanrubin.com
- lgoldman@gibsondunn.com
- mblackledge@friedmanrubin.com
- rbalikian@gibsondunn.com
- rfriedman@friedmanrubin.com

- robert@guptawessler.com
- rpark@friedmanrubin.com
- sgamble@friedmanrubin.com
- tadegregorio@bclplaw.com
- tribe@carneylaw.com
- valeriemcomie@gmail.com

Comments:

Sender Name: Holly Rota - Email: hrota@terrellmarshall.com
Filing on Behalf of: Elizabeth Anne Adams - Email: eadams@terrellmarshall.com (Alternate Email:)

Address:
936 N. 34th Street
Suite 300
Seattle, WA, 98103
Phone: (206) 816-6603

Note: The Filing Id is 20241227132448SC691906