STATE OF MICHIGAN

COURT OF APPEALS

LARRY A. MITCHELL and ALLISON MITCHELL, a minor by and through her father and next friend Larry A. Mitchell,

Plaintiff-Appellant,

v

MCNEILUS TRUCK AND MANUFACTURING, INC, a/k/a McNEILUS COMPANIES, INC.,

Defendant-Appellee,

and

OSHKOSH SPECIALTY VEHICLES, INC, a/k/a OSHKOSH CORPORATION and ILLINOIS NATIONAL INSURANCE COMPANY,

Defendants,

and

ILLINOIS NATIONAL INSURANCE COMPANY,

Counter-Plaintiff,

and

LARRY A. MITCHELL and ALLISON MITCHELL, a minor by and through her father and next friend Larry A. Mitchell,

Counter-Defendant.

UNPUBLISHED
October 23, 2012

No. 304124
Monroe Circuit Court
LC No. 10-28531-NP

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

GLEICHER, P.J. (*dissenting*).

In product liability cases, Michigan's conflict of law jurisprudence mandates application of Michigan law unless a foreign state's interest exceeds that of Michigan. Two interests potentially conflict in this case: Ohio's interest in protecting manufacturers against stale claims, and Michigan's policy of allocating the risk of dangerous and unsafe products to the manufacturer rather than the user. In my view, Ohio has no legitimate interest in protecting a Minnesota manufacturer who delivered its product to a Michigan purchaser, while Michigan has a substantial interest in the enforcement of its product liability laws. Accordingly, I respectfully dissent.

I. UNDERLYING FACTS

The product at issue is a garbage truck equipped with a rear-loading device. Defendant McNeilus Truck and Manufacturing, Inc., a Minnesota corporation, designed and manufactured the truck and its rear-loader. In 1995, McNeilus sold the truck to Browning Ferris Industries (BFI), a national waste management company headquartered in Texas. BFI arranged to take delivery of the garbage truck at its Erie, Michigan facility. BFI licensed and insured the truck in Michigan. BFI employees drove the truck in Michigan and Ohio.

Allied Industries subsequently purchased BFI. Plaintiff, an Ohio resident, was hired by Allied's Erie, Michigan division in 2006. On February 22, 2007, plaintiff sustained serious injury while operating the truck on his regular garbage collection route in Ohio. After voluntarily dismissing an Ohio lawsuit involving several additional parties, plaintiff filed this action in the Monroe circuit court.

Application of Ohio's statute of repose, Ohio Rev Code 2305.10(c), would bar plaintiff's claim. In Ohio, product liability claims must be brought within 10 years of the date of a product's delivery. Under Michigan law, a product liability claim is timely if it is brought within three years of the date of the plaintiff's injury. MCL 600.5805(13). Notably, Michigan has a statute of repose applicable in cases "arising out of the defective and unsafe condition of an improvement to real property," MCL 600.5839(1), but our Legislature has not seen fit to enact a statute of repose in product liability actions.[1]

II. INTEREST ANALYSIS

In *Sutherland v Kennington Truck Serv, Ltd*, 454 Mich 274; 562 NW2d 466 (1997), our Supreme Court set forth the principles governing the conflict of law analysis applicable to tort claims. *Sutherland* instructs that in a tort case brought in Michigan, Michigan law applies unless a "rational reason" exists to displace Michigan law. *Id.* at 286. The Supreme Court directed that courts employ a two-step analysis. First, a court must determine whether another state possesses an interest in having its law applied. If no state has an interest, Michigan law prevails. *Id.* If a foreign state does have an interest, a court must decide whether "Michigan's interests mandate

[1] The absence of a Michigan statute of repose in product liability actions is particularly significant in light of our Legislature's 1996 enactment of comprehensive product liability reform statutes. See MCL 600.2945 *et seq.*

that Michigan law be applied, despite the foreign interests." *Id.* Thus, the Supreme Court in *Sutherland* expressed a clear preference for forum law. That preference may be displaced only when a foreign jurisdiction has a weightier interest in the litigation than Michigan's. Because the policies underlying Ohio's statute of repose are not implicated under the circumstances presented in this case, Michigan law applies.

The majority posits three reasons that Ohio has an interest in this product liability action: (1) the accident occurred within Ohio's borders, (2) plaintiff is a citizen of Ohio, and (3) "Ohio has an interest in encouraging commercial activity by McNeilus and affording McNeilus the protection of its statute of repose." I submit that reasons (1) and (2) conflate mere contacts with cognizable legal interests. By focusing on contacts rather than interests, the majority ignores that contacts become meaningful only when examined in a relevant context: the policies embodied by the conflicting laws. Those policies support that Ohio has no interest in imposing its statute of repose on a Minnesota manufacturer that sold a product in Michigan. The majority's third rationale, premised on Ohio's interest in protecting manufacturers whose national product market may include the state of Ohio, sweeps so broadly that it altogether displaces the careful analysis required under *Sutherland*.

Before considering whether Ohio possesses an interest in having its law applied to this product liability case, it is important to understand that an interest is not simply a contact. Contacts may give rise to interests. Similarly, an interest may render a contact more or less relevant. But the conflict of law analysis set forth in *Sutherland* focuses on evaluating interests, not tallying contacts. The contacts with one state or another become meaningful only when viewed through the lens "of the policies sought to be vindicated by the conflicting laws." *Townsend v Sears, Roebuck & Co*, 227 Ill 2d 147, 168; 879 NE2d 893 (2007). Thus, the majority's "counting contacts" methodology misses the point, which is to determine a state's legal interest in a controversy.

The facts of this case potentially implicate two legal interests. The majority recognizes Ohio's possible interest in applying its statute of repose. The majority fails to acknowledge Michigan's interest in applying its product liability laws to a manufacturer that sold a product in Michigan to a Michigan business that licensed and insured the product under Michigan law, and now pays Michigan workers compensation benefits to its injured employee. *Sutherland* requires an analysis and comparison of the policies underlying the laws of both Michigan and Ohio.[2]

Ohio's statute of repose was enacted to protect Ohio product manufacturers from an indefinite period of liability. In *Groch v General Motors Corp*, 117 Ohio St 3d 192, 221; 883 NE2d 377 (2008), the Ohio Supreme Court quoted at length the Ohio General Assembly's

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[2] Ohio has an additional legal interest that the majority fails to mention: seeing that its resident is compensated for his injuries. Notwithstanding Ohio's statute of repose, Ohio law also has an interest in ensuring product safety and holding accountable manufacturers who place defective products in the stream of commerce. *Temple v Wean United, Inc*, 50 Ohio St 2d 317, 321; 364 NE2d 267 (1977). Indeed, Ohio imposes strict liability on manufacturers of defective products, while Michigan does not.

"statement of findings and intent" regarding the bill containing the statute of repose, which described one of the primary intended purposes of the law as follows:

> To recognize that a statute of repose for product liability claims would enhance the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their control, by increasing finality in commercial transactions, and by allowing manufacturers to conduct their affairs with increased certainty[.]

None of the stated purposes of Ohio's statute of repose include protection of foreign manufacturers.[3] In my view, the policies animating Ohio's statute of repose lack relevance in this case, because the product was manufactured in Minnesota and sold in Michigan.

The majority also emphasizes that the accident occurred in Ohio. But the central lesson of *Sutherland* and the case providing its analytical framework, *Olmstead v Anderson*, 428 Mich 1; 400 NW2d 292 (1987), is that the lex loci deliciti doctrine is dead. "*Sexton* marked the end of the lex loci delicti doctrine in Michigan[.]" *Sutherland*, 454 Mich at 284, referring to *Sexton v Ryder Truck Rentals, Inc*, 413 Mich 406; 320 NW2d 843 (1982). In my view, the majority's focus on the Ohio accident venue is misplaced as the accident location bears no relationship to the purposes of Ohio's statute of repose. Because plaintiff's product liability claim centers on whether the rear loader was defectively designed, the place of injury is not an important consideration. McNeilus delivered a garbage truck in Michigan to a Michigan employer. The truck bore a Michigan license plate and had to meet Michigan's road requirements. That the truck was also used in Ohio does not give rise to a legal interest relevant to a product liability action, which involves design, manufacture and sale.

Moreover, it is not altogether clear that even an Ohio court would apply Ohio's statute of repose under these circumstances. In resolving conflict of law questions, Ohio courts look to the Restatement (Second) of Conflict of Laws, beginning with section 146. *Morgan v Biro Mfg Co, Inc*, 15 Ohio St 3d 339, 341-342; 474 NE2d 286 (1984). Although Ohio law presumes that the law of the place of the injury will be applied in a tort action, the presumption may be overcome when another state has a more significant relationship to the action. *Muncie Power Prods, Inc v United Technologies Auto, Inc*, 328 F3d 870, 873-874 (CA 6, 2003). In *Muncie*, a contribution action arising from a product liability case, the Sixth Circuit applied Ohio choice of law rules to determine that the conduct giving rise to the case occurred where the product was designed and manufactured and where "any appropriate warnings would have been discussed and implemented[,]" despite that the accident itself occurred in Ohio. *Id.* at 876. In *Nationwide Mut Fire Ins Co v General Motors Corp*, 415 F Supp 2d 769 (ND Ohio, 2006), an Ohio federal district court applying Ohio choice of law rules concluded that in a product liability action, the state with the most significant interest was the state of the product's sale:

> This is a product liability action founded on theories of strict liability, negligence, and breach of implied and express warranties. "In product liability claims, the

[3] Minnesota, the state of manufacture, has no statute of repose.

> primary interest of a state is to deter the sale and/or manufacture of negligently or defectively manufactured goods to that state's citizens." *Cheatham* [*v Thurston Motor Lines*, 654 F Supp 211, 214 (SD Ohio 1986)]. "Because the central event upon which a products liability claim is normally based is the sale of the goods, injured parties would expect that the law of the place of sale should govern with respect to injuries caused by those defects." *Id.* [*Nationwide*, 415 F Supp 2d at 775.]

Michigan's interest is that of deterring the sale of unsafe products to consumers within its boundaries. This state possesses an important interest in encouraging manufacturers to design and sell safe products. In Michigan, "the individual consumer's tort remedy for products liability . . . derives either from a duty imposed by law or from policy considerations which allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the consumer. Such a policy serves to encourage the design and production of safe products." *Neibarger v Universal Coops, Inc*, 439 Mich 512, 523; 486 NW2d 612 (1992). Our Supreme Court has expressed that "encouraging tortfeasors to adopt corrective measures is one of the purposes of the tort law, another purpose is to compensate injured persons." *Holloway v General Motors Corp (On Rehearing)*, 403 Mich 614, 626; 271 NW2d 777 (1978). In *Prentis v Yale Mfg Co*, 421 Mich 670, 682; 365 NW2d 176 (1984), the Supreme Court acknowledged "the social policy rationale that those injured by defective products should be compensated for their injuries[,]" and that "manufacturers can most effectively distribute the costs of injuries."

Sutherland instructs that when a foreign state has an interest in having its law applied, a court must evaluate whether "Michigan's interests mandate that Michigan law be applied, despite the foreign interests." *Sutherland*, 454 Mich at 286. I respectfully disagree with the majority's conclusion that Ohio possesses a "strong" interest in this case. No Ohio manufacturer is at risk of bearing liability in this case. Ohio played no role in regulating the safety of the garbage truck or the manner in which it was used. At best, Ohio's statute of repose creates a generalized interest potentially applicable to every product liability case involving either an Ohio plaintiff or an Ohio injury. By reflexively elevating the protection of all product manufacturers over all other interests, the majority simply cancels Michigan's preference for forum law.[4] Moreover, Ohio's interest in compensation for one of its citizens supersedes any interest in benefitting a Minnesota manufacturer through Michigan's enforcement of its statute of repose.

Michigan has a direct and compelling interest in discouraging manufacturers from selling unsafe products in this state. This interest is starkly demonstrated by the fact that the Michigan purchaser of the garbage truck now pays plaintiff's workers compensation benefits. Because

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[4] Fundamentally, the majority has abandoned any pretense of applying a choice of law analysis governed by *Sutherland*. Plaintiff has an interest, even under Ohio law, in compensation for his injuries. No rational basis exists for ignoring this interest and instead weighting heavily that Ohio's statute of repose protects product manufacturers. Given Ohio's equally genuine yet competing interests, no rational basis exists to displace Michigan law.

Ohio has no meaningful interest in applying its statute of repose to this action, the presumption favoring Michigan law should apply.

/s/ Elizabeth L. Gleicher