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,

Plaintiffs-Appellants,

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-Defendants.

UNPUBLISHED
October 23, 2012

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

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

PER CURIAM.

Plaintiff[1] appeals by right from the order of the trial court holding that Ohio law applied to plaintiff's claim, that Ohio's statute of repose, Ohio Rev Code § 2305.10(c), barred plaintiff's claim, and that therefore defendant was entitled to summary disposition pursuant to MCR 2.116(C)(7). Because we find that the trial court correctly determined that Ohio law applied to plaintiff's claims, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of an accident that occurred in Perrysburg, Ohio. Plaintiff, an Ohio resident, was employed by Allied Waste Industries, Inc. ("Allied") as a refuse driver. Allied's facility was located in Erie, Michigan, approximately one-half mile from the Ohio border. A majority of Allied's residential customers are located in Ohio. Testimony was taken that 90% of the customers on plaintiff's route were located in Ohio.

Plaintiff was severely injured while he was operating a garbage truck equipped with a "rear XC loader," which is a device for picking up and emptying dumpsters into the back of the truck. Plaintiff alleged that a dumpster swung around the side of the truck while he was attempting to secure it, causing severe injury.

McNeilus Trucking, Inc. ("McNeilus") is a corporation domiciled in Minnesota. McNeilus designed the rear XC loader and sold loaders and trucks, among other products, nationwide. McNeilus sold the truck and loader at issue to Browning Ferris Industries ("BFI") (Allied's predecessor) in 1995. McNeilus is a wholly-owned subsidiary of Oshkosh Specialty Vehicles ("Oshkosh"), a Wisconsin Corporation.[2]

Plaintiff, in his individual capacity and in his capacity as next friend for his minor daughter, originally filed suit in Lucas County, Ohio, in 2009, naming as defendants McNeilus, Oshkosh, Mack Trucks, Inc, BFI, Allied, and Republic Services, Inc. (Allied's successor in interest) as well as various unnamed agents and officers of those companies. Plaintiff alleged products liability, employer intentional tort, and negligence claims against the various defendants. Plaintiff's case was removed to the Federal District Court for the Northern District of Ohio, Western Division; according to the parties, plaintiff's case against BFI/Allied/Republic was then resolved and these entities are not parties to the instant case. Plaintiff then stipulated to the dismissal of the remaining claims without prejudice. Plaintiff then filed suit in the trial court on February 12, 2010, naming as defendants McNeilus, Oshkosh, and Illinois National Insurance Company ("Illinois National"), the Michigan worker's compensation carrier for plaintiff's employer. Plaintiff alleged a products liability claim against the first two defendants and sought a declaratory judgment concerning the validity and value, if any, of Illinois National's

[1] For simplicity, this opinion will refer to "plaintiff" when discussing both Larry Mitchell and Allison Mitchell, as Allison's claim for loss of consortium is derivative of her father's claim.

[2] Defendants McNeilus and Oshkosh were represented by the same counsel in the trial court. Defendant Oshkosh has not filed an appellee's brief or appearance in this matter.

subrogation lien, as Illinois National had paid worker's compensation benefits and alleged a lien over plaintiff's recovery from third parties.

Defendants McNeilus and Oshkosh moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that Ohio's statute of repose, Ohio Rev Code § 2305.10(c),[3] barred plaintiff's claims, and that there was no genuine issue of material fact.[4] The trial court denied defendants' motion under MCR 2.116(C)(10), finding that McNeilus and Oshkosh had not established that there was no genuine issue of material fact regarding their liability for the accident. The trial court then found that plaintiff was a resident of Ohio, and that no defendant was a Michigan corporation or Michigan resident. The trial court further found that the injury occurred in Ohio, and that McNeilus conducted a significant portion of its business in Ohio. The trial court stated that "[t]he only connections here with Michigan are the—the registration and plating of the truck, and the worker—worker's compensation claim . . . ." The trial court concluded that Ohio had the greater interest in having its law applied, and ordered that the Ohio statute of repose applied to bar plaintiff's claims against McNeilus and Oshkosh. From that order, plaintiff appeals.

II. STANDARD OF REVIEW

This Court reviews questions regarding conflicts of law de novo. *Burney v PV Holding Corp (On Remand)*, 218 Mich App 167, 171; 533 NW2d 657 (1996). A trial court's decision to grant summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

III. THE TRIAL COURT'S CHOICE OF OHIO LAW WAS CORRECT

For many years, the Michigan choice-of-law rule for tort claims provided simply that when an injury was sustained in a foreign jurisdiction, the substantive rights of the parties were governed by the law of the location where the injury occurred (the *lex loci delicti*). *Sexton v Ryder Truck Rental, Inc.*, 413 Mich 406, 419-422; 320 NW2d 843 (1982) (Williams, J.) (footnote omitted). This rule had the virtue of predictability, but "often produced obvious rather than just results through its failure to consider the interests of other jurisdictions in the litigated matter." *Farrell v Ford Motor Co*, 199 Mich App 81, 85; 501 NW2d 567 (1993).

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[3] The statute provides in relevant part that "no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product." The Ohio Supreme Court upheld the constitutionality of the statute in *Groch v General Motors Corp*, 117 Ohio St 3d 192, 230-231; 883 NE2d 377 (2008).

[4] Illinois National opposed the motion for substantially the same reasons as plaintiff.

Michigan began to retreat from the *lex loci delicti* approach in 1978, when our Supreme Court established an exception to the rule for public policy reasons and applied Michigan's law of intra-family immunity to Michigan residents injured in a car accident in Ohio. *Sweeney v Sweeney*, 402 Mich 234, 242; 262 NW2d 625 (1978). Subsequently, in *Sexton*, a majority of the justices opted to abrogate the rule of *lex loci delicti*, although *Sexton* did not establish a new rule of law to replace it. *Farrell*, 199 Mich App at 86, citing *Sexton*, 413 Mich at 419-423. In *Olmstead v Anderson*, 428 Mich 1, 29-30; 400 NW2d 292 (1987) our Supreme Court affirmed the move away from *lex loci delicti*, opting instead to apply the law of the forum unless a "rational reason to displace Michigan law" existed.

Olmstead involved a two-car accident that took place in Wisconsin, in which plaintiff's decedents, Minnesota residents, were killed. *Id.* at 3. The defendant was a Michigan resident who registered and insured his automobile in Michigan. *Id.* at 4. Plaintiff (the administratrix of her parents' estates) initially filed suit in Minnesota; however, her case was dismissed for improper venue and lack of jurisdiction. *Id.* Plaintiff then filed her wrongful death action in Michigan and moved for declaratory judgment regarding which law would be applied to the substantive issues of the case. *Id.* The laws of Minnesota and Michigan did not provide for damages limitations in wrongful death actions, however the state of Wisconsin did limit such recoverable damages. *Id.* at 4.

Our Supreme Court noted that, post *Sexton*, Michigan courts will generally apply Michigan law when all parties are Michigan residents but the injury occurred in a foreign jurisdiction. *Id.* at 21. This is because Michigan has a strong interest in having its laws applied to its residents, and the state of injury normally has no interest in the litigation. *Id.* at 25. However, when one or both parties do not claim Michigan citizenship, the interests of Michigan and the foreign jurisdiction must be weighed to determine if the foreign state's interest is sufficient to displace Michigan law. *Id.* at 29-30. The *Olmstead* Court found that Wisconsin did not have an interest in the litigation, because "the place of injury may only be described as fortuitous" in that neither party had any contact with the state of Wisconsin outside of the accident. *Id.* at 23. Although "[t]he injury state always has an interest in conduct within its borders" it does not have an interest in limiting the compensation of parties when none of the parties were residents. *Id.* at 29-30.

The current analytical framework for choice-of-law issues in tort cases was provided in *Sutherland v Kennington Truck Service, Ltd*, 454 Mich 274, 286; 562 NW2d 466 (1997). In *Sutherland*, our Supreme Court stated:

> . . . we will apply Michigan law unless a "rational reason" to do otherwise exists. In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests. [454 Mich at 286.]

Sutherland involved an accident on a Michigan freeway between an Ohio resident and an Ontario, Canada resident. *Id.* at 276. Plaintiff (the Ohio resident) brought suit in Michigan more than two years after the accident; both Ohio and Ontario barred negligence actions filed more than two years after the cause of action arose, while Michigan had (and has) a three-year statute of limitations for negligence actions. *Id.* The trial court granted the defendant's motion for summary disposition, finding that Ontario's two-year statute of limitations would apply. *Id.* at 277. This Court affirmed in an unpublished opinion. *Id.*

Our Supreme Court reversed. *Id.* at 289. Conducting the analysis described above, the Court found that neither Ohio nor Ontario had an interest in the litigation. *Id.* The Court first noted that Ohio law could not be applied without violating defendant's due process rights, because, "in order for a court to choose a state's law, '[the] State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Id.* at 287, quoting *Allstate Ins v Hague*, 449 US 302, 313; 101 S Ct 633, 640, 66 L Ed 2d 521 (1981). The Court noted that the mere fact of residency by the plaintiffs, absent other contacts, was insufficient to support the choice of Ohio law. *Id.*

As for Ontario law, and while agreeing that "one purpose of a statute of limitations is to protect defendants from stale claims," the Court declined to find that Ontario had an interest in protecting defendants from stale claims in this situation. *Id.* at 288. The Court noted that Ontario law indicated that Ontario had an interest in having *Michigan's* statute of limitations applied, because the Supreme Court of Canada had adopted a strict *lex loci delicti* rule for choice of law issues. *Id.* Thus, an Ontario court would apply Michigan's statute of limitations to an accident that occurred in Michigan, unless application of the law of a foreign country "could give rise to [an] injustice." *Id.*, quoting *Tolofson v Jensen*, 120 DLR4th 289 (1994). The Court found no such injustice in this case, given other instances where Ontario courts had applied American statutes of limitations. *Id.*

The Court thus concluded that neither foreign state had an interest in having its law applied to the case. *Id.* Therefore "[t]he lex fori presumption is not overcome, and we need not evaluate Michigan's interests." *Id.*

Two previous decisions of this Court dealing with accidents in foreign jurisdictions involving a foreign statute of repose are especially applicable here and guide our inquiry. In *Farrell*, this Court applied the *Olmstead* interest-analysis approach in determining that North Carolina law applied to the case before it. 199 Mich App at 93-94. *Farrell* was a products liability action brought by a North Carolina resident against Ford Motor Company for an allegedly defective automobile purchased and registered in North Carolina. *Id.* at 82. Ford Motor Company is a Delaware corporation whose world headquarters are located in Michigan. *Id.* Application of North Carolina law would bar plaintiff's claim due to a six year statute of repose applicable to products liability actions. *Id.* at 83. This Court determined that the trial court erred in basing its decision to apply Michigan law on the premise that North Carolina's statute of repose was intended solely to protect in-state manufacturers and designers. *Id.* at 92.

This Court found that North Carolina had "an obvious and substantial interest in shielding Ford from open-ended products liability claims" because "Ford unquestionably generates substantial commerce within the State of North Carolina." *Id.* at 93. This Court noted

that Ford employed 70 employees at its North Carolina facility, purchased nearly $591 million worth of materials from North Carolina suppliers in 1989, and that Ford and Lincoln-Mercury sales accounted for almost 30 percent of new car and truck sales in North Carolina that same year. *Id.* Thus, this Court concluded that North Carolina had an interest in encouraging manufacturers such as Ford to do business in North Carolina, regardless of whether they operated manufacturing plants within the state's borders. *Id.* This Court agreed with the defendant that "its substantial business dealings with the citizens of North Carolina gives North Carolina a substantial interest in encouraging more commercial activity and in affording defendant the protection provided by that state's statute of repose." *Id.*

At the same time, this Court found that Michigan's interest in having its law applied was minimal. "Michigan has little or no interest in this North Carolina accident involving a North Carolina resident. Michigan has no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by North Carolina." *Id.* at 94. This Court concluded that "Michigan is merely the forum state and situs of defendant's headquarters. Such minimal interests are insufficient to justify the result-oriented forum shopping that has been attempted." *Id.* (footnote omitted).

In *Hall v General Motors*, 229 Mich App 580; 582 NW2d 866 (1998), this Court was faced with a similar situation as *Farrell*. The plaintiff resided and was injured in North Carolina by an allegedly defective General Motors automobile, but resided in Michigan at the time he brought suit. *Id.* at 582. This Court held, as a matter of first impression, that the plaintiff's residency *at the time of the injury*, rather than at the time of filing suit, controlled the analysis. *Id.* at 591. This Court found that to hold otherwise would present a "grave danger" by permitting "postinjury events, exclusively within the control of one party, to determine which state's law will apply." *Id.* Having concluded that plaintiff was not a Michigan resident at the time of the injury, this Court then applied *Farrell* in determining that North Carolina law applied, for the same reasons noted in *Farrell. Id.* at 591-592.

In the instant case, plaintiff argues that the place of the accident was "fortuitous" as used in *Olmstead*, and that Ohio therefore has no interest in having its law applied. Plaintiff is incorrect. Contrary to plaintiff's position, the place of the accident is not merely "fortuitous" because that phrase, as used by the *Olmstead* Court, describes a situation where two out-of-staters happen to have an accident in a state with which they have no other contacts. 428 Mich at 23. Here, Ohio has an interest in an accident that occurred within its borders and injured one of its citizens. See *Burney*, 218 Mich App at 174 ("Alabama has an interest in a car accident that occurs within its borders and claims the life of one of its residents."); see also *Olmstead*, 428 Mich at 29-30.

Further, pursuant to *Hall* and *Farrell*, Ohio has an interest in having its statute of repose apply to plaintiff's claim. This Court in *Farrell* rejected the notion that a state's statute of repose for products liability actions was designed to protect only in-state manufacturers and found that North Carolina had a "substantial interest in shielding Ford from "open-ended products liability claims" because Ford generated "substantial commerce" within the state. While there is no claim that McNeilus has the kind of impact on Ohio's economy that Ford Motor Company may have had in North Carolina, McNeilus offered uncontradicted documentary evidence that McNeilus has two branch offices in Ohio, and in 2010 employed 15 people in Ohio and paid

over $700,000 in wages to Ohio employees; these offices also purchased $11,235,402 worth of goods and paid $17,464 in property taxes in 2010. Although perhaps not as "substantial" as the interest in *Farrell*, we conclude that Ohio has an interest in encouraging commercial activity by McNeilus and affording McNeilus the protection of its statute of repose. *Farrell*, 199 Mich App at 93.

Having found an interest by a foreign state, we must then determine whether Michigan's interests mandate that Michigan law be applied, despite the foreign interest. *Sutherland*, 454 Mich at 286. At the outset, we reject plaintiff's contention that McNeilus should be treated the same as a resident of Michigan in our analysis. In support of this claim, plaintiff cites Justice Williams' plurality opinion in *Sexton*, which stated that "where Michigan residents or corporations doing business in Michigan are involved in accidents in another state and appear as plaintiffs and defendants in Michigan courts, the courts will apply the *lex fori*, not the *lex loci delicti* . . . ." 413 Mich at 433 (Williams, J.). However, as stated above, the *Sexton* Court merely abolished the rule of *lex loci delicti* in such cases. There was no majority opinion adopting any other particular rule of law. In fact, Justice Williams went on to say "[w]e do not here adopt the law of dominant contracts or any other particular methodology, although any such reasoning may, of course, be argued where persuasive and appropriate." *Id.* Further, his plurality opinion limits its abrogation of "the doctrine of *lex loci delicti* . . . to cases where *all* of the parties are either Michigan residents or doing business within this state." *Id.* at 434 (emphasis added). That is not the case here. Nor is McNeilus in the same position as were the defendant vehicle and aircraft owners in *Sexton*; unlike those defendants, McNeilus was not "involved in" the accident in Ohio, but instead had manufactured and sold the rear XC loader that was equipped on the garbage truck that was owned by plaintiff's employer (Allied) when it was involved in the accident with plaintiff.

We therefore analyze whether Michigan has an interest in this litigation between non-residents. Plaintiff argues that Michigan has an interest in having its law apply because the rear XC loader and truck were owned by a Michigan employer, and was garaged, licensed, plated, and insured in Michigan. Plaintiff further argues that Michigan has an interest because Illinois National, a Michigan worker's compensation carrier, paid medical bills and indemnity benefits to plaintiff and has a subrogation interest in plaintiff's suit against defendant.

Plaintiff asserts that the *Hall* Court's statement that the vehicle in question was "owned, registered, licensed, and insured in North Carolina" means that these factors controlled the Court's determination that North Carolina law applied. 229 Mich App at 585. We disagree. Although the *Hall* Court did note these factors in discussing North Carolina's interests, it was part of an overall recitation of the facts that included the plaintiff's North Carolina residency and the fact that the injury occurred in North Carolina. *Id.* at 585. Plaintiff has provided no authority for the proposition that ownership, registration, licensure, and insurance in Michigan are sufficient to provide Michigan with an interest in having its law apply that overbears the interest of the state where the accident occurred and plaintiff resides.

Nor do we find convincing plaintiff's argument that *Hall* and *Farrell* do not control our analysis because McNeilus "purposefully sold and supplied products to Allied Waste in Erie, Michigan for use in Michigan." In *Farrell*, the Court did state, in its recitation of the facts, that the action involved "an allegedly defective Ford automobile purchased and registered in North

Carolina." 190 Mich App at 82. However, in *Hall*, the vehicle was described as a "1975 Chevrolet Camaro manufactured by GM" that was manufactured at a GM plant in Ohio. 229 Mich App at 583. Thus the *Hall* Court did not explicitly state that the vehicle was sold in North Carolina or not sold in Michigan. Where the allegedly defective product entered the stream of commerce is not dispositive of our choice-of-law analysis. Further, we note that, contrary to plaintiff's position, there is little evidence that McNeilus "purposefully sold products for use in Michigan." McNeilus sold a product to a Texas corporation and shipped it to Michigan; that product was subsequently used primarily in Ohio. In any event, we decline to adopt plaintiff's reasoning and conclude that Michigan's interests do not mandate that Michigan law be applied despite Ohio's interest.

Michigan's interest in this matter is minimal.[5] As the *Farrell* and *Hall* Courts noted, Michigan has no interest in providing greater rights of tort recovery to a nonresident than those afforded to that resident by his or her home state. 199 Mich App at 93; 229 Mich App at 591-592.[6] Further, plaintiff's arguments on behalf of Illinois National are unpersuasive. Illinois National, as subrogee of the plaintiff, stands in shoes of plaintiff and acquires no greater rights than those possessed by the subrogor. *Yerkovich v AAA*, 461 Mich 732, 737; 610 NW2d 542 (2000). The fact that the law of the jurisdiction where the accident occurred and the plaintiff resides forecloses one possible avenue of recovery for a Michigan worker's compensation carrier is not sufficient reason to apply Michigan law despite the foreign state's interest, especially in light of Michigan's lack of interest in providing greater recovery to nonresident tort plaintiffs than their home jurisdictions provide. *Farrell*, 199 Mich App at 93; *Hall*, 229 Mich App at 591-592.

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[5] The dissent attaches significance to the fact that Michigan does not have a statute of repose in product liability actions, and asserts that this absence is "particularly significant in light of our Legislature's 1996 enactment of comprehensive product liability reform statutes." While the dissent does not elaborate on the precise inference to be drawn from this absence, we note that our Supreme Court has made it clear that "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not its silence." *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999) (emphasis in original); see also see also *People v Gardner*, 482 Mich 41, 59; 753 NW2d 78 (2008); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 209 n 8; 731 NW2d 41 (2007). We therefore decline to attach import to the Legislature's lack of enactment of a general statute of repose for products liability.

[6] We reiterate, in response to the dissent, that Ohio law denies plaintiff and similarly situated persons recovery against product manufacturers under these circumstances. It is thus somewhat puzzling that the dissent makes reference to Ohio's interest in "seeing that its resident is compensated for his injuries." Although Ohio may have a general interest in having injured residents receive compensation where appropriate, it clearly has no interest in having *this* plaintiff receive compensation for his injuries, since its own laws, if applied, would bar that compensation. If Ohio truly possesses a substantial interest in having persons in the instant plaintiff's position compensated, it has failed to express that interest through its laws.

The trial court correctly determined that Ohio law applies to the instant action. The only contacts Michigan had with the accident were the registration, licensing, plating, and garaging of the truck that was involved in an accident in Ohio involving an Ohio resident and an allegedly defective rear loader designed and manufactured in Minnesota. Michigan's interest in having its own law apply to plaintiff's product liability action is minimal, and Ohio's interest is strong. We therefore affirm the trial court's holding.

IV. MCNEILUS DID NOT CONSENT TO THE APPLICATION OF MICHIGAN LAW

Plaintiff appears to argue that because McNeilus did not raise the affirmative defenses of lack of personal jurisdiction or forum non conveniens, McNeilus has therefore consented to the application of Michigan law to plaintiff's claim. Plaintiff provides no authority for this novel proposition. Plaintiff is correct in citing *Hague* for the proposition that in order to choose a state's law, a state must have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or fundamentally unfair." 449 US at 313. Plaintiff also is correct that if certain affirmative defenses are not raised by the answering party, they are waived. MCR 2.111(F)(2). McNeilus has thus waived the right to assert the defenses of forum non conveniens and lack of personal jurisdiction, and indeed does not assert these defenses. However, McNeilus did raise the defense that Ohio law applied to this action, and that Ohio's statute of repose barred plaintiff's claim.

Plaintiff incorrectly asserts that McNeilus somehow "waived" or "consented" to the application of Michigan law because it did not contest personal jurisdiction, or because Michigan in fact possesses sufficient minimal contacts with the case to avoid due process concerns. Our Supreme Court has stated that

> The "significant contacts" required for choice of law purposes is similar to the "minimum contacts" required for jurisdictional purposes. That is, *Int'l Shoe Co v Washington*, 326 US 310, 316, 66 S Ct 154, 158, 90 L Ed 95 (1945) holds that a state may not exercise jurisdiction over a defendant unless the defendant and state have "minimum contacts" so that "traditional notions of fair play and substantial justice" are not offended.
>
> The United States Supreme Court has never determined the relationship between the "significant" contacts required for choice of law and "minimum" contacts required for jurisdiction. . . . Intuitively, at least as many contacts should be required for choice of law purpose than for jurisdictional purposes. It would make little sense to say that state X does not have enough contacts to exercise jurisdiction, but yet allow state Y to apply state X's law. [*Sutherland*, 454 Mich at 287 n 22.]

This reasoning is consistent with *Hague*'s rationale that application of a state's law requires a minimum amount of contact between a defendant and the state. However, plaintiff seeks turn a necessary prerequisite into a per se rule, *i.e.*, that because application of Michigan law would not offend due process, it must therefore be proper, or that in any event McNeilus was required to assert personal jurisdiction and forum non conveniens or else be found to have consented to the application of Michigan law. This argument has no support in the case law, and

indeed would render the analysis demanded by *Sutherland* a nullity, as a court would always apply the law of the forum if it had personal jurisdiction over McNeilus. We decline to adopt such a rule.

Further, plaintiff's argument that McNeilus somehow consented to the application of Michigan law by failing to move for a more convenient forum is without merit. Both parties are aware that Michigan law contains choice-of-law rules and that a Michigan court can apply the law of another jurisdiction. McNeilus has not challenged the trial court's exercise of that jurisdiction over it and was not required to do so in order to raise the issue of the application of Ohio law to plaintiff's claim.

Affirmed.

/s/ Donald S. Owens
/s/ Mark T. Boonstra