SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LAURA BRIEST and ROBERT BRIEST, her husband, Plaintiffs/Respondents, v. Wyeth Inc. and Wyeth Pharmaceuticals, Inc., Defendants/Petitioners.	:	CIVIL ACTION On Appeal from the Superior Court of New Jersey, Law Division, Middlesex County Docket No. MID-L-1045-06 MT Sat Below: HON. Jamie D. Happas, J.S.C.

BRIEF OF THE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION; THE HEALTHCARE INSTITUTE OF NEW JERSEY; AND NEW JERSEY LAWSUIT REFORM ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER DENYING SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

INTERESTS OF *AMICUS CURIAE*

The New Jersey Business & Industry Association; HealthCare Institute of New Jersey; and New Jersey Lawsuit Reform Alliance submit this brief jointly as amicus curiae in support of Defendants-Appellants Wyeth, Inc. and Wyeth Pharmaceuticals, Inc.'s (collectively "Wyeth") appeal of the interlocutory order dated November 2, 2007, denying summary judgment based on Plaintiffs' failure to file suit within the applicable statute of limitations period. The trial court erroneously found that because Wyeth's corporate headquarters are located in New Jersey, New Jersey's interest in deterring the manufacture and distribution of unsafe products outweighs Virginia's interests in the litigation. Briest v. Wyeth, Inc., MID-L-1045-06, slip op. at 2 and 11 (N.J. Super. Ct. Law. Div. May 21, 2007).

Founded in 1910, New Jersey Business & Industry Association ("NJBIA") is the nation's largest state-level employer organization with more than 23,600 member companies. The businesses and employers represented by NJBIA include companies from every sector of New Jersey's economy, including most of the top 100 employers in the State, as well as thousands of small to medium-sized employers. NJBIA's mission is to provide information, services and advocacy for its member companies to build a more prosperous New Jersey. As part of this mission, one of NJBIA's objectives is to promote the lowering of the cost

of doing business in New Jersey, in an effort to benefit all of New Jersey.

The HealthCare Institute of New Jersey (“HINJ”) is a trade association for the research-based pharmaceutical and medical technology industry in New Jersey. Founded in 1997, HINJ serves as a unified voice for the major pharmaceutical and medical device companies headquartered and based in New Jersey. The organization seeks to raise awareness, understanding and public support for the impact of the research-based pharmaceutical and medical technology industry on New Jersey’s quality of life and economic well-being. HINJ seeks to advance the development and implementation of sound public health and business policies that support the interests of New Jersey, its people and the industry.

The New Jersey Lawsuit Reform Alliance (“NJLRA”) is a statewide, bipartisan group of individuals, businesses and organizations dedicated to improving the state's civil justice system. NJLRA believes that a balanced civil justice system fosters public trust and motivates professionals, sole proprietors and businesses to provide safe and reliable products and services, while ensuring that truly injured people are compensated fairly for their losses. Such a system is critical to ensuring fair and open courts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

Collectively, amicus curiae represent the experiences of corporate executives, small business entrepreneurs, and concerned individuals from across the State. They share a common interest in the fair application of New Jersey tort and product liability law.

The trial court's choice of law analysis is contrary to the teachings of the New Jersey Supreme Court, which has stated that in cases involving out-of-state plaintiffs with injuries that occurred outside New Jersey, comity, the interest in predictability and uniformity of result, and the interests of the parties preclude applying New Jersey law unless the competing interests of the states in question weigh heavily in favor of applying New Jersey law. Rowe v. Hoffmann-La Roche, 189 N.J. 615, 629-30 (2007). Furthermore, in cases involving drugs approved by the FDA brought by out-of-state plaintiffs with no causes of action in their home states, New Jersey's interest in deterring the manufacture of unsafe products is limited and cannot be used as a justification for by-passing another state's law. Id. Moreover, applying the law of the state where the defendant is headquartered, in derogation of the law where the plaintiff resides, where the product was purchased and used, and where the injury occurred, has the following negative consequences.

1. A choice of law rule that places predominant emphasis on where a company is headquartered disrespects the legitimate interests of New Jersey's sister states in regulating commerce within their borders. In the current case, Virginia has by far the greater interest in determining whether a Virginia citizen is entitled to recover on a tort claim where the Virginia citizen was prescribed the product and used the product in Virginia, and the alleged injury occurred in Virginia. New Jersey's interest in deterrence is fully vindicated by applying New Jersey law to the claims of New Jersey citizens. New Jersey should not overrule the Virginia legislature’s choice not to enact the discovery rule.

2. A choice of law rule that places predominant emphasis on where a company is headquartered encourages forum shopping by permitting plaintiffs to change the law applicable to their claims by suing in New Jersey rather than in their home state. In a rational choice of law system, the law should not change because of the venue in which the case is filed. Such a rational choice of law system is implemented where each state applies the law of the state where the plaintiff resides, the product was purchased and used, and the injury occurred. A system that gives one party the unilateral choice of which law should apply to her claims is neither fair nor balanced.

3. A choice of law rule that places predominant emphasis on where a company is headquartered has adverse consequences for both our judicial system and for New Jersey plaintiffs seeking to vindicate their rights. The prospect of obtaining more favorable law in New Jersey through the misapplication of the state's choice of law rules has made New Jersey a magnet for mass tort litigation involving out-of-state plaintiffs, which overburdens our courts and harms New Jersey residents by clogging up the system so that their claims cannot be timely heard.

4. A choice of law rule that places predominant emphasis on where a company is headquartered places New Jersey businesses at a disadvantage in comparison to their out-of-state and foreign competitors. A rational choice of law system would ensure that all companies competing for the same business would be governed by the same law regardless of where they operate. Applying the law of the state where plaintiff resides, where the product was purchased and used, and where the injury occurs puts all companies on an equal footing. A choice of law rule that applies the law of the defendants' headquarters would mean that companies competing for the same customer, and engaging in identical conduct, would be governed by different rules, such that it would be legal for one company to take a course of action with respect to a customer and illegal for another

company to engage in identical conduct with respect to that very same customer.

Moreover, New Jersey businesses would be severely disadvantaged, because out-of-state customers will be given the unilateral option to apply the least favorable law to New Jersey businesses, by suing either in their home states or in New Jersey, whichever provides the more certain or greater recovery. Non-New Jersey businesses, however, will not be subject to this disadvantage because the states of their headquarters almost always apply the traditional rule that the law of the plaintiff's home state governs.

5. A choice of law rule that places predominant emphasis on where a company is headquartered also deprives New Jersey residents of the protections of New Jersey law when dealing with out-of-state or foreign companies. If, as plaintiffs posit, the state of a company's headquarters is paramount when dealing with a non-New Jersey resident plaintiff, then it must also be paramount when dealing with a New Jersey resident plaintiff. Affirming the decision below would, in the words of the U.S. Court of Appeals for the Seventh Circuit, condemn New Jersey residents to suing under Korean law when suing Hyundai or French law when suing Michelin, a result clearly not justifiable under any choice of law analysis. In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002).

ARGUMENT

I. THE RULING BELOW IS BASED ON A MISREADING OF THE SUPREME COURT'S DECISION IN ROWE AND IMPROPERLY WEIGHS THE IMPORTANCE OF NEW JERSEY'S INTEREST IN DETERRING THE MANUFACTURE AND DISTRIBUTION OF UNSAFE PRODUCTS

The trial court's ruling is contrary to the Supreme Court's recent decision in Rowe, applying New Jersey choice-of-law jurisprudence in a product liability context. By focusing solely on New Jersey's interest in deterring the manufacture of unsafe products by New Jersey-based corporations and ignoring New Jersey's other substantial interests and the interests of New Jersey's sister states, the trial court's ruling materially expands the liability of New Jersey corporations to out-of-state plaintiffs, in derogation of New Jersey's strong public policy and governmental interest not to encourage tort recoveries by plaintiffs without valid claims. Rowe, 189 N.J. at 623-25. Moreover, this misapplication of New Jersey law will have a serious adverse impact on New Jersey's economy in light of the vast number of out-of-state plaintiffs in this and other New Jersey mass tort litigations.

The trial court misapplied New Jersey choice-of-law rules to conclude that New Jersey law should apply to this Virginia resident's product liability claim. The trial court not only ignored our Supreme Court's decision in Rowe, but failed properly to weigh the competing governmental interests

articulated in Pfizer, Inc. v. Employers Ins. of Wausau, 154 N.J. 187, 198 (1998).

As in Rowe, this case involves a plaintiff with no connection to New Jersey. Mrs. Briest, a Virginia resident, was prescribed and ingested hormone therapy medication in Virginia and, was diagnosed and treated in Virginia. Moreover, as the court below noted, the medication was neither developed nor tested in New Jersey. Briest, slip op. at 11. The trial court nevertheless found that New Jersey law should apply simply because the defendant was a New Jersey-based company.

The trial court's proposition that New Jersey's interest in deterring the local manufacture of allegedly unsafe products demands the application of New Jersey law to this mass tort is unfounded. It ignores both the realities of modern mass tort litigation and New Jersey jurisprudence. There are currently 169 separate plaintiffs alleging injury from the ingestion of menopausal hormone replacement therapy products ("HRT").[1] Of the 169 cases, only 49 have been brought by residents of New Jersey, while 120 have been brought by out-of-state plaintiffs. New Jersey's inherent interest in deterrence is more than satisfied by the filing and continued prosecution of the 49 New Jersey

[1] See http://www.judiciary.state.nj.us/mass-tort/hrt/case_list.htm, last updated January 14, 2008.

residents' claims under New Jersey law. The Appellate Division acknowledged this fact in their recent dismissal of foreign Vioxx plaintiffs, stating:

> "Whether the [foreign] plaintiffs remain in this court or not, the New Jersey court system will have plenty of opportunity to deter Defendant from future unsavory conduct if Defendant is found to be liable regarding the allegations against it. The number of foreign plaintiffs that would be dismissed will not affect this."

In re Vioxx Litigation, 395 N.J. Super. 358, 378 (App. Div. 2007). Additionally, as the New Jersey Supreme Court noted in Rowe, FDA regulations also deter New Jersey pharmaceutical companies from manufacturing unsafe products. 189 N.J. at 625-26.

The 120 non-resident HRT plaintiffs hail from 26 separate states, each having an interest in the application of its own law to one or more of the issues that typically present in a product liability case. The New Jersey Products Liability Act, N.J.S.A. 2A:58C-1 *et seq.* ("NJPLA") was never intended for New Jersey courts to entertain nationally ambitious litigations. The NJPLA, as the court noted in Rowe, was enacted to limit "the liability of manufacturers of FDA-approved products by reducing the burden placed on them by product liability litigation." 189 N.J. at 626. Similarly, in Shackil v. Lederle Laboratories, the New Jersey Supreme Court indicated that the NJPLA evidenced "an intent to limit the expansion of products-liability law." 116

N.J. 155, 187 (1989). However, because of decisions like the one below, New Jersey is now, as Justice Garibaldi warned in her dissent in Gantes v. Kason Corp., awash in out-of-state mass tort plaintiffs. 145 N.J. 478, 507 (1996).

In Rowe, the Supreme Court majority took note of this problem, calculating that more than 90% percent of the active mass tort claims in New Jersey had been filed by out-of-state residents. 189 N.J. at 621. Today, the share of New Jersey claims brought by "mass tort carpetbaggers" is at 93% percent.

MASS TORT LAWSUITS FILED IN NEW JERSEY BY NON-NEW JERSEY RESIDENTS			
Litigation	**Number of Cases Filed by New Jersey Residents**	**Number of Cases Filed by Non-New Jersey Residents**	**Percentage of Cases Filed by Non-New Jersey Residents**
Diet Drug[2]	540	5,828	92%
Rezulin	115	269	70%
PPA	32	376	92%
Vioxx	1,088	16,782	94%
Accutane	26	287	92%
Bextra/Celebrex	67	1,455	96%
HRT	49	120	71%
Ortho-Evra	15	372	96%
Risperdal/Seroquel/ Zyprexa	50	2,071	98%
DPCI (Depo-Provera Contraceptive Injection)	3	157	98%
TOTAL	**1,985**	**27,718**	**93%**

[2] The Diet Drug litigation has been designated as a New Jersey mass tort on two occasions, in 1997 and again in 2003.

As the chart above demonstrates, New Jersey has become a national center for "litigation tourism." Unlike New Jersey's traditional forms of tourism, this activity burdens our State's economy and strains its judicial system. See Gantes, 145 N.J. at 507 (Garibaldi, J., dissenting). These non-residents are attracted to New Jersey for its widely acknowledged plaintiff-friendly legal environment. Beth S. Rose & Steven R. Rowland, Preference for New Jersey Law in Products Liability Claims Draws Out-of-State Plaintiffs, 184 N.J.L.J. 363 (May 1, 2006). Indeed, New Jersey jurisprudence and laws have afforded plaintiffs accommodations that do not exist in many other states, including but not limited to the rulings below:

- Lopez v. Swyer, 62 N.J. 267 (1973) (establishing a "discovery rule" that tolls the statute of limitation in injury cases);
- Perez v. Wyeth Lab. Inc., 161 N.J. 1 (1999) (declining to apply the learned intermediary doctrine in cases where prescription drugs are marketed directly to consumers);
- Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191 (1982) (holding that a state-of-the-art defense is not available to asbestos defendants);
- Anderson v. Somberg, 67 N.J. 291 (1975) (noting that the burden of proof shifts to defendants in cases where an unconscious or helpless patient suffers an injury);
- New Jersey Products Liability Act, N.J.S.A. 2A:58C-4, (establishing that FDA approval creates only a rebuttable, rather than an irrebuttable, presumption of adequacy);
- Kemp ex rel. Wright v. State, 174 N.J. 412 (2002) (recognizing that New Jersey has not explicitly adopted Daubert standards for the analysis of scientific evidence);

- Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150 (1979) (finding, as a matter of law, that the defenses of comparative fault and assumption of risk cannot be asserted in a products liability case involving equipment in the workplace).

These and other decisions have made New Jersey popular with plaintiffs' lawyers. This popularity is particularly acute in Atlantic County, which was recently noted for its particularly unfavorable tort climate and for "inviting out-of-state plaintiffs to sue New Jersey companies." American Tort Reform Foundation, Judicial Hellholes 2007, at 16 (2007).

Moreover, a recent survey conducted by the Eagleton Institute of Politics found that tort litigation is making New Jersey a hostile environment for New Jersey corporations and that the vast majority of New Jersey corporations think this state is on the "wrong track." Rutgers University Eagleton Institute of Politics, Attitudes Towards Litigation Climate in New Jersey, A Representative Survey Among Business in New Jersey (December 2007). Furthermore, the survey noted that eighty-nine percent of respondents believed that lawsuits are driving up the cost of doing business in New Jersey, and nearly twenty-five percent have considered relocating outside of New Jersey. Id.

In Rowe, the New Jersey Supreme Court sent a clear message that the public policy of New Jersey "is not to encourage tort recoveries," especially with respect to out-of-state plaintiffs. Rowe, 189 N.J. at 626. The Court declared that deterring New

Jersey corporations from producing unsafe drugs "is not paramount" in a situation were a "drug was approved by the FDA and suit was brought by an out-of-state plaintiff who has no cause of action in his home state." Id. at 629-30. Here, to allow a life-long Virginia resident who received an FDA-approved drug in Virginia, who alleges injuries sustained in Virginia, and who would be barred from recovery in Virginia, to obtain compensation for her injuries in a New Jersey court would be, in the words of the Rowe court, "overvaluing [New Jersey's] true interest in this litigation." Id. at 629.

Moreover, the court below undervalued the interest of New Jersey's sister states in regulating commerce and businesses within their borders. States can and do enact legislation reflecting a policy that the overall public interest is better served by product liability statutes with lesser or different avenues of recovery, which – in their legislators' view – encourage economic activity in the State and make products more readily available at lower prices to their consumers. In the area of prescription medications, in particular, courts in other States have long recognized that consumer protection may require curtailment rather than expansion of civil remedies. For example, the California Supreme Court rejected the imposition of a strict liability standard with respect to prescription medications, holding that "the broader public interest in the

availability of drugs at an affordable price must be considered in deciding the appropriate standard of liability for injuries resulting from their use." Brown v. Superior Court, 751 P.2d 470, 478-79 (Cal. 1988). See also, Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961, 967 (6th Cir. 2004) (addressing a statute that provides a defense to pharmaceutical manufacturers in product liability actions for FDA-approved medications, the Court stated that "it appears that the Michigan legislature was concerned that unlimited liability for drug manufacturers would threaten the financial viability of many enterprises and could add substantially to the cost and unavailability of many drugs"); O'Brien v. Medtronic, Inc., 439 N.W.2d 151, 154 (Wis. Ct. App. 1989) (finding that "imposing liability under these facts could discourage companies like Medtronic from developing certain kinds of medical devices").

In sum, determining the scope and elements of its product liability law is quintessentially a legislative judgment, to be made separately by each State according to its own normative view of what is the "better" law to safeguard that State's interests. Such decisions are the stuff of politics and elections, and should be made by State legislatures, and not in court decisions under the guise of a conflict-of-laws analysis that have "no guide but the Court's own discretion." Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

In this case, plaintiff's home state of Virginia has explicitly refused to authorize a discovery rule, for fear of encroaching upon the legislature's policy-making authority. Locke v. Johns-Manville Corp., 275 S.E.2d 900, 905-06 (Va. 1981) (emphasizing that "the rule we have just articulated is not a so-called 'discovery' rule . . . . We adhere to our belief . . . that adoption of a discovery rule, which triggers the running of the statute only when the injury is discovered or should have been discovered in the exercise of reasonable diligence, must be accomplished by the General Assembly.") (internal citation omitted) (emphasis added). In Virginia's balancing of the interests of plaintiffs and defendants, the legislature has determined that a discovery rule does not further equitable results. The Virginia legislature has been fully capable of implementing legislation that authorizes the discovery rule in certain personal injury actions as the legislature saw fit. See, e.g., Va. Code Ann. § 8.01-249(4) (changing direct result in Locke by providing discovery rule in asbestos-related claims); Va. Code Ann. § 8.01-249(7) (allowing discovery rule for breast implant products liability actions against non-health care providers). New Jersey courts should not provide a forum for out-of-state plaintiffs actively looking to by-pass their own state's laws and regulations.

Finally, because of the vast number of non-resident plaintiffs currently seeking compensation in New Jersey courts, the lower court's misapplication of New Jersey's choice-of-law jurisprudence will have broad implications for the thousands of pending mass tort cases in New Jersey, further burdening New Jersey businesses, courts, and citizens. As Justice Garibaldi stated in Gantes, the "effect of holding New Jersey law to be applicable in a matter of this kind is to subject any corporation conducting manufacturing activities in this state against whom a product liability claim is asserted to suit in New Jersey under New Jersey law. Such a holding would have the undesirable consequence of deterring the conduct of manufacturing operations in this state and would likely result in an unreasonable increase in litigation and thereby unduly burden our courts." 145 N.J. at 507 (Garibaldi, J., dissenting) (citation omitted).

II. THE DECISION BELOW, IF PERMITTED TO STAND, WILL IRREPARABLY INJURE NEW JERSEY BUSINESSES

If the decision below is permitted to stand, New Jersey businesses will not be able to compete on an even plane with businesses headquartered outside this State. This is because out-of-state business are generally governed by the law of the consumer's home state, while New Jersey businesses will be governed by the least favorable of New Jersey law or the consumer's home state. This result arises because the consumers can always choose where to sue. If New Jersey law is more favorable to the claim, the consumer will choose New Jersey as the venue in which to bring the claim. As a result, New Jersey businesses will always be on the short end. Thus, the trial court's choice-of-law ruling inexplicably favors out-of-state businesses. The court's decision creates a hostile legal environment that threatens to weaken New Jersey's economy and runs afoul of New Jersey public policy.

A. The Consequences of the Trial Court's Choice-of-law Analysis Will Consistently Subject New Jersey Corporations to the Least Favorable Law.

In addition to its legal infirmities, the trial court's choice-of-law analysis creates a situation in which New Jersey-based companies will always be at a disadvantage in conflict-of-laws determinations, simply by virtue of selecting New Jersey as their home base. By ignoring that the primary "object of the

[NJPLA] is not to encourage tort recoveries . . . in order to deter this State's drug manufacturers," the trial court's decision encourages plaintiffs to file suit in New Jersey – because plaintiffs will always control which state's law applies, and that law will always be the least favorable to New Jersey's businesses. Rowe, 189 N.J. at 626. Indeed, under the trial court's ruling, in each and every product liability case involving a New Jersey-based defendant, one of two scenarios would occur:

(1) an out-of-state resident (e.g., a resident of Virginia) will sue a New Jersey corporate defendant in New Jersey to take advantage of New Jersey's more favorable product liability law; or

(2) a resident of a state with more favorable product liability law than New Jersey's will sue in his or her home state so the law of the plaintiff's home state will apply.

The practical result of the trial court's decision is that in virtually every case, a New Jersey-based defendant will have the least favorable law applied to it. The law, of course, does not operate in a vacuum. A hostile legal environment that exposes to maximum liability national and international corporations headquartered in New Jersey presents these companies with significant competitive drawbacks and discourages companies from locating or expanding existing operations in the State. This bodes poorly for the State's economy. While New

Jersey has come to be known as the country's "medicine chest" because of the number of pharmaceutical companies that have located their American – and sometimes global – operations here, New Jersey has been losing valuable ground to other states.

New Jersey's share of pharmaceutical and medical technology industry jobs in the nation has shrunk from 20% to 13.8%, below the share enjoyed by California. James W. Hughes and Joseph J. Seneca, An Economy at Risk: The Imperative for a Science and Technology Policy for New Jersey, Edward J. Bloustein School of Planning and Public Policy, Rutgers, The State University of New Jersey, New Jersey Commission on Science and Technology (Nov. 2005); see also, New Jersey economy lagging in key areas, State House seminar told – But core is strong, Rutgers experts say, The Record (Hackensack, N.J.), Jan. 13, 2006. In 2003, New Jersey experienced the first no-growth year in pharmaceutical and medical technology industry jobs in more than a decade. Susan Warner, As Businesses Wander, New Jersey Fights Back, The New York Times, July 4, 2004, Section 14 at 1. The following year actually saw a five percent decline in the number of people employed by New Jersey's pharmaceutical and medical device companies. Ed Silverman, State Pharma Industry Loses 5 Percent of Workers, The Star-Ledger (Newark), June 10, 2005 at 30.

Unfortunately for New Jersey and its residents, the commercial consequences of adverse treatment under the law

provides yet another incentive for pharmaceutical and medical device companies (as well as other manufacturers of consumer products) to re-locate their businesses, or at a minimum, not to locate new facilities in this state. The fact that the trial court has employed a choice-of-law analysis that leaves the fate of these companies in the hands of forum-shopping plaintiffs from all over the United States, makes the decision that much easier. Plainly stated, the misapplication of New Jersey choice-of-law rules – particularly in the mass tort context – places yet another burden on a pharmaceutical and medical device industry that has an overall economic impact of $22 billion in this State. Challenges and Opportunities: How the State of New Jersey Can Nurture New Jersey's Pharmaceutical and Medical Technology Industry, 2005 Annual Economic Report, Executive Summary of Economic Study for the HealthCare Institute of New Jersey, available at http://www.hinj.org. It is not hyperbolic to suggest that further weakening of this New Jersey-based industry would have serious repercussions on the economic health of New Jersey and the quality of life of its residents.

B. The trial court's decision tips the playing field against New Jersey Corporations.

The trial court's choice-of-law ruling also inexplicably disfavors New Jersey businesses and consumers by permitting a dilatory plaintiff from another state to bring an action against

a New Jersey-based company that would have been barred by the statute of limitations of plaintiff's home state. Meanwhile, non-New Jersey corporate defendants would be subject to the law of the state where they are headquartered, and not to New Jersey laws, even against New Jersey plaintiffs. The result is a perverse home-state disadvantage for New Jersey corporations and consumers. For example, if the state where the non-New Jersey business is headquartered has not adopted a discovery rule, suit could not proceed against the business, by consumers from New Jersey or any other state. At the same time, the suit could proceed against a New Jersey corporate defendant by a non-New Jersey plaintiff. Therefore, New Jersey companies and consumers would always be subject to the most adverse application of the choice of law.

Logically, if a New Jersey company and an out-of-state competitor engage in identical conduct with respect to the same personal injury plaintiff, their actions should be governed by the same law and subject to the same statute of limitations. That result would obtain if suit were filed in one of the many states in which relevant contacts are not marginalized, and instead are examined as part of the comparative governmental interest analysis. See, e.g., Kasel v. Remington Arms Co., 101 Cal. Rptr. 314 (Cal. Ct. App. 1972). However, the trial court in Briest determined that New Jersey has the paramount interest

without examining the actual contacts of the parties with Virginia.

The consequences of this disparate treatment extend far beyond application of the rule in a single case. As the caseload demonstrates, non-resident plaintiffs, many of them too late to sue in their home states, flock to New Jersey to take advantage of rules designed to protect New Jersey consumers. The adverse economic impact of this migration on New Jersey businesses and the operation of the New Jersey judiciary is self-evident.

C. The trial court's ruling is palpably at odds with New Jersey's established public policy of protecting its important pharmaceutical and medical technology industry.

The New Jersey Legislature and Judiciary have long recognized that the pharmaceutical and medical device industry is unique, and that it requires greater protection than the manufacturers and sellers of other products. For example, in the NJPLA, which was enacted to limit the liability of manufacturers so as to "balanc[e] the interests of the public and the individual with a view towards economic reality," Schackil v. Lederle Labs., 219 N.J. Super. 601, 643 (App. Div. 1987) (Shebell, J., dissenting), rev'd on other grounds, 116 N.J. 155 (1989), the Legislature provided specific safeguards for pharmaceutical and medical device companies. See, e.g.,

N.J.S.A. 2A:58C-4 (codifying the learned intermediary doctrine and providing that compliance with the FDA creates a presumption of adequacy of product warning); N.J.S.A. 2A:58C-5 (providing for a defense to a punitive damages claim if drug at issue received premarket approval from FDA); see also, Perez v. Wyeth Labs., 161 N.J. 1, 10-11 (1999) (discussing well-established learned intermediary doctrine in New Jersey jurisprudence); Shackil v. Lederle Labs., 116 N.J. 155, 158 (1989) (declining to create broadened causation rules that would expand liability of pharmaceutical manufacturers).

Likewise, New Jersey's executive branch has expressed a commitment to encouraging pharmaceutical and medical device companies to continue calling New Jersey their home. In 2004, acting State Treasurer John E. McCormac aptly summarized the State's policy: "Drug companies are our No. 1 industry. We've got to make the extra effort to, first and foremost, keep them here and, second, make sure they consider New Jersey when they are thinking about expansion." Susan Warner, As Businesses Wander, New Jersey Fights Back, The New York Times, July 4, 2004, Section 14 at 2.

Finally, in Rowe, the New Jersey Supreme Court also noted that the NJPLA was enacted to "re-balance" the law in favor of manufactures with a view towards economic reality. 189 N.J. at 623. Furthermore, the court recognized that "the NJPLA was

intended to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty." Id. at 624 (citations omitted). The trial court's ruling, however, abrogates this purpose by creating great uncertainty with respect to the application of New Jersey choice-of-law jurisprudence to important products liability issues.

III. THE DECISION BELOW, IF PERMITTED TO STAND, WILL IRREPARABLY INJURE NEW JERSEY CONSUMERS AND UNNECESSARILY BURDEN NEW JERSEY CITIZENS AND TAXPAYERS.

As noted, the vast majority of plaintiffs currently involved in mass tort litigations are not New Jersey residents. This influx of foreign plaintiffs delays this State's own residents from obtaining speed trials and frustrates their access to New Jersey courts. The flood of non-resident mass tort plaintiffs forces courts to engage in protracted choice-of-law examinations in virtually every case, and in each case, with respect to multiple issues, often impacting multiple defendants. In addition to the Virginia law issue raised by the Briest case, the court managing the New Jersey HRT litigation has already been asked to decide issues involving conflicts of law between New Jersey and New York, Pennsylvania, Kentucky, and Texas.[3]

[3] The conflicts of law between New Jersey and the following states are currently pending in the HRT litigation:

> New York (Plaintiff Reinhardt): Differences in law regarding required warnings in a pharmaceutical products liability context, including

(continued...)

With plaintiffs hailing from 26 different states, more examinations are inevitable. New Jersey's judicial resources should be focused on ensuring that New Jersey residents are efficiently compensated, and New Jersey taxpayers should not be burdened unnecessarily with the costs of compensating plaintiffs who come to the state for the sole purpose of suing New Jersey companies.

The decision below, if permitted to stand, also would have the perverse effect of depriving New Jersey consumers of the protections of New Jersey case. If, as the trial court concluded, the "ultimate" factor in the choice-of-law analysis is the headquarters of the corporate defendant, the less favorable law of the corporate defendant's state would apply to transactions with New Jersey residents.

---

factors such as the heeding presumption, direct-to-consumer advertising and the learned intermediary doctrine. There are also differences in the states' Products Liability Acts regarding the availability of punitive damages and separate claim maintainable for breach of implied warranty.

Pennsylvania (Plaintiff Kositsky): Determining the applicable standard (negligence or strict liability) for inadequate warnings claims regarding prescription drugs. The Pennsylvania learned intermediary doctrine conflicts with the NJLPA, as applied by the courts. There are also conflicts regarding the availability of punitive damages and the application of the discovery rule to statutes of limitations.

Kentucky (Plaintiff DeBoard): Kentucky law materially conflicts with the NJPLA in areas such as statues of limitations, punitive damages, learned intermediary doctrine and standard for inadequate warning claims.

Texas (Plaintiff Bailey): Texas law conflicts with the NJPLA in areas including application of the learned intermediary doctrine, limitations on punitive damages and proofs of causation.

The perversity of this result is precisely the reason that the vast majority of other courts (including courts in New Jersey) have rejected the proposition that the location of the corporate defendant controls the choice-of-law analysis. The Seventh Circuit, for example, rejected the contention that Michigan law should apply nationally to sales of cars by Ford, and that Indiana law should apply nationally to sales of tires by Firestone, simply because the defendants were located in those States. In re Bridgestone/Firestone, Inc., 288 F.3d at 1012. As the Court observed, such a rule would require a state to apply Korean law "to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana, or French law to the sale of cars equipped with Michelin tires." Id. at 1018.

Such a result would be absurd, and is clearly not what the New Jersey Legislature intended; yet this is the consequence of the trial court's decision. It also is inconsistent with this Court's recognition of "New Jersey's strongly declared policy favoring compensation of its domiciliaries for tortious conduct of others, regardless of where that conduct occurs." Fu v. Fu, 160 N.J. 108, 132 (1999) (citation omitted).

The result the amici seek is consistent with New Jersey Supreme Court choice-of-law jurisprudence. The trial court's decision is contrary to Supreme Court precedent in Rowe, and to New Jersey public policy. To correct this error, the court need

only give proper weight to the place where the events giving rise to the injury occurred – which, in the overwhelming number of mass tort cases pending in this State – was not New Jersey. When appropriate emphasis is given to the interests of the state where the drug was prescribed and taken, or the product was purchased and used, New Jersey plaintiffs, New Jersey companies and New Jersey taxpayers will receive the fair treatment of the law they deserve.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in Wyeth's Brief in Support of [Fill in when they file their brief], the decision below should be reversed.

Dated: February __, 2008

Respectfully submitted,