NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4481-12T1

ANDREW McCARRELL,

Plaintiff-Respondent,

v.

HOFFMANN-LA ROCHE, INC., and
ROCHE LABORATORIES, INC.,

Defendants-Appellants.

Argued March 9, 2015 – Decided August 11, 2015

Before Judges Sabatino, Simonelli, and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-1951-03.

Paul W. Schmidt (Covington & Burling LLP) of the Washington bar, admitted pro hac vice, argued the cause for appellants (Gibbons P.C., attorneys; Michelle M. Bufano, of counsel and on the brief; Michael X. Imbroscio (Covington & Burling LLP) of the Washington bar, admitted pro hac vice, and Mr. Schmidt, on the briefs).

David R. Buchanan argued the cause for respondents (Seeger Weiss LLP, attorneys; Michael D. Hook (Hook & Bolton, P.A.) of the Florida bar, admitted pro hac vice, and Mary Jane Bass (Beggs & Lane) of the Florida bar, admitted pro hac vice, and Mr. Buchanan, of counsel and on the brief).

PER CURIAM

In this products liability case involving the prescription drug Accutane, defendants Hoffmann-La Roche Inc. and Roche Laboratories Inc. (collectively "Roche" or "defendants") appeal from a final judgment entered following a jury verdict in favor of plaintiff Andrew McCarrell at a 2010 retrial. Defendants raise several points for reversal, principally arguing that the claims of plaintiff, a resident of Alabama, should have been dismissed as untimely. They contend in this regard that the trial court erred in applying New Jersey law, which allows for the equitable tolling of statutes of limitations under "discovery rule" principles, rather than Alabama law, which disallows such tolling except for fraud actions.

Adhering to the precedential guidance of the Supreme Court in P.V. v. Camp Jaycee, 197 N.J. 132 (2008), and this court and the Supreme Court in Cornett v. Johnson & Johnson, 414 N.J. Super. 365 (App. Div. 2010), aff'd as modified, 211 N.J. 362 (2012), we conclude that Alabama law, rather than New Jersey law, must apply to the timeliness of plaintiff's claims. For the reasons we shall discuss in this opinion, the pertinent choice-of-law factors explicated in P.V. and Cornett weigh in favor of the application of Alabama law, which has a strict two-year statute of limitations.

In Cornett, a products liability case likewise involving an out-of-state plaintiff and a New Jersey-based drug manufacturer and its Florida affiliate, this court held, and the Supreme Court agreed, that the law of plaintiff's home state dictated the applicable limitations period. Viewing the present case through the prism of Cornett, we similarly conclude that Alabama is the state with the "most significant relationship" to the litigation. Because plaintiff did not file his complaint in the Law Division until after the two-year Alabama limitations period expired, we reverse the judgment on retrial entered in plaintiff's favor and direct the dismissal of his lawsuit.

I.

The salient facts have already been set forth at considerable length in our unpublished March 2009 opinion addressing defendants' appeal from the first trial, McCarrell v. Hoffmann-La Roche, Inc., A-3280-07 (App. Div. Mar. 12, 2009) ("McCarrell I"), certif. denied, 199 N.J. 518 (2009), and only need to be summarized here. Moreover, the more general facts regarding defendants' manufacturing and labeling of Accutane, and the alleged harmful side effects of that drug, have been discussed in several opinions of our Supreme Court, most recently in Kendall v. Hoffmann-La Roche, Inc., 209 N.J. 173 (2012). Although the proofs and expert testimony at the second

trial in McCarrell differed in some respects from the first trial that took place in 2007, much of the basic chronology remains the same.

Accutane, Its Side Effects, and Its Labeling

Accutane, the brand name for isotretinoin, is a prescription drug that Roche developed and marketed. Kendall, supra, 209 N.J. at 180. The drug is a retinoid, derived from vitamin A, and it has been used to treat nodular acne that has not responded to other treatment regimens. Ibid. "Although much remains unknown about how Accutane treats acne, the drug appears to reduce the production of oil and waxy material in the sebaceous glands." Ibid.

As the Supreme Court noted in Kendall, it is well established that Accutane "has a number of known side effects, including dry lips, skin and eyes; conjunctivitis; decreased night vision; muscle and joint aches; elevated triglycerides; and a high risk of birth defects if a woman ingests the drug while pregnant." Ibid. Additionally, there is evidence that Accutane can produce adverse effects on a patient's gastrointestinal tract.

According to plaintiffs in many of the Accutane cases and their experts, Accutane has a propensity to cause inflammatory bowel disease ("IBD"). Id. at 180-81. IBD refers to "several

chronic incurable diseases characterized by inflammation of the intestine." Id. at 181. The disease occurs when a trigger sets off an abnormal or exaggerated immune reaction, that is, an ongoing inflammatory reaction.

IBD primarily manifests as one of two diseases: Crohn's disease or ulcerative colitis. Ibid. Ulcerative colitis, plaintiff McCarrell's initial diagnosis, "involves a chronic condition characterized by ulceration of the colon [large intestine] and rectum." Ibid. Crohn's disease, plaintiff's later diagnosis, is similar to ulcerative colitis, in that it causes inflammation and ulcers, but it can occur in any part of the digestive tract from the mouth to the anus, although it primarily manifests in the small intestine and the colon. Individuals suffering from IBD generally experience abdominal pain, and frequent and often-bloody bowel movements, resulting in fatigue, dehydration, anemia, fever, cramping and bloating. Ibid. The symptoms often wax and wane, but the condition is regarded as permanent, and there is no known cure. Ibid.

The causes of IBD remain largely unknown; however, several triggers are associated with a statistically increased rate of the disease, including family history, prior infections, frequent use of some antibiotics, smoking (Crohn's disease), and possibly the use of oral contraceptives and nonsteroidal anti-

inflammatory drugs. Ibid. The peak onset of IBD occurs in "young adulthood," which is generally the same period that patients with acne are prescribed Accutane. Ibid.

The Food and Drug Administration ("FDA") approved the use of Accutane in 1982, but did not then require a label warning of possible gastrointestinal side effects. Ibid. In 1983 defendants revised the "adverse reactions" section of the Accutane label provided to physicians, to indicate that "[t]he following reactions have been reported in less than 1% of patients and may bear no relationship to therapy . . . inflammatory bowel disease (including regional ileitis [inflammation of a portion of the small intestine]), [and] mild gastrointestinal bleeding." Id. at 181-82 (first and third alterations in original) (internal quotation marks omitted).

In 1984, defendants amended the warning section of the Accutane package insert supplied to physicians (the warning in effect when plaintiff took the drug), to provide:

> Inflammatory Bowel Disease: Accutane has been temporally associated with inflammatory bowel disease (including regional ileitis) in patients without a prior history of intestinal disorders. Patients experiencing abdominal pain, rectal bleeding or severe diarrhea should discontinue Accutane immediately.
>
> [Id. at 182.]

The 1984 warning, which was reprinted in the Physician's Desk Reference ("PDR"), remained in effect through the entire time that plaintiff took the drug.[1]

In 1984, defendants also issued a "Dear Doctor" letter to physicians who were prescribing Accutane, which explained that:

> The Accutane patients have experienced gastrointestinal disorders characteristic of inflammatory bowel disease (including 4 ileitis and 6 colitis). While these disorders have been temporally associated with Accutane administration, i.e., they occurred while patients were taking the drug, a precise cause and effect relationship has not been shown. [Defendants are] . . . continuing to monitor adverse experiences in an effort to determine the relationship between Accutane . . . and these disorders.
>
> [Id. at 182 (alterations in original) (second emphasis added).]

In June 1994, defendants issued an FDA-approved patient brochure, which plaintiff received, that did not specifically refer to IBD. However, the brochure did warn that "ACCUTANE MAY CAUSE SOME LESS COMMON, BUT MORE SERIOUS SIDE EFFECTS" and that patients should "BE ALERT FOR . . . SEVERE STOMACH PAIN,

---

[1] The warning was amended in 2000 to remove the term "temporally," and to add that symptoms of IBD "have been reported to persist after Accutane treatment has stopped." Kendall, supra, 209 N.J. at 183 (internal quotation marks omitted). Defendants withdrew Accutane from the market in 2009. However, generic makers continue to manufacture isotretinoin to supply the United States market.

DIARRHEA, [and] RECTAL BLEEDNG." "Patients who experienced any of those symptoms were advised to 'discontinue' Accutane and consult with a doctor." Id. at 182. The brochure also warned that those symptoms "MAY BE THE EARLY SIGNS OF MORE SERIOUS SIDE EFFECTS WHICH, IF LEFT UNTREATED, COULD POSSIBLY RESULT IN PERMANENT EFFECTS." Ibid.

The same warnings were printed on the blister packaging, containing the individual Accutane pills. Ibid. Defendants revised Accutane's labeling again in 1998, after McCarrell had ceased using the drug, to strengthen the warnings relating to gastrointestinal effects.

Plaintiff's Use of Accutane and His Injuries

1. Accutane treatment

In March 1995, plaintiff, who was then twenty-three years old, saw Dr. Ann Gerald, a dermatologist in Alabama, for treatment of his acne. Dr. Gerald prescribed Bactrim, an antibiotic that plaintiff, who had developed acne when he was fourteen years old, had taken in the past with no gastrointestinal side effects. During the initial consultation, Dr. Gerald also discussed Accutane and its side effects with plaintiff. Plaintiff testified that Dr. Gerald did not, however, discuss the risk of developing IBD. According to

plaintiff, if she had, he would not have taken the drug because his acne was not so severe as to risk permanent injury.

Dr. Gerald testified that she had read the package insert or label. Although she could not specifically recall her conversation with plaintiff, she stated that it was her practice to only discuss common side effects with her patients, including teratogenicity, elevated triglycerides and lipids, dry eyes and skin, chapped lips, vision problems, and headaches. According to Dr. Gerald, the information provided in the label did not indicate to her that IBD was a significant risk for plaintiff, because he did not have a family history of bowel disorders.

Dr. Gerald also gave plaintiff a copy of the Accutane patient brochure, which plaintiff "skimmed over." That brochure, issued by defendant in 1994, warned that patients should be alert for severe stomach pain, diarrhea and rectal bleeding, and advised that patients discontinue Accutane and consult with a doctor if they had those symptoms.

Dr. Gerald, who at the time of her deposition continued to prescribe Accutane to her patients, said she did not know if there was a causal relationship between Accutane and IBD, and noted that the package insert did not warn that Accutane caused permanent IBD. She understood the phrase "temporally

associated" to mean that the side effects occurred during Accutane use, not after the drug had been discontinued.

In June 1995, plaintiff started taking Accutane and stopped taking the antibiotics, which had not cured his acne or caused him any gastrointestinal upset. Over the next four months he received a dosage of forty milligrams (mg) of Accutane twice a day, or slightly over one mg per kilogram (kg) of body weight per day. During his treatment, which ran from June 22, to October 19, 1995, he experienced chapped lips, dry eyes, and achy knees, but no gastrointestinal effects.

In her final assessment of plaintiff on February 6, 1996, Dr. Gerald reported that his acne had cleared. She also noted that he was not then experiencing any side effects, including gastrointestinal effects.

2. IBD Diagnosis

In August 1996, approximately ten months after plaintiff stopped taking Accutane, he experienced severe stomach pain and diarrhea while on vacation in Florida with his then-fiancé and her family. Plaintiff's stomach pain resolved in a day or two, but he continued to experience some intermittent diarrhea and stomach discomfort.

On September 3, 1996, approximately three weeks after the Florida incident, plaintiff saw Dr. James Allen, a general

medical practitioner, complaining of flu-like symptoms, but not gastrointestinal problems. Plaintiff did not tell Dr. Allen about the stomach pain and diarrhea he had experienced in August 1996 because he thought they had resolved and were unrelated to his current symptoms. A blood test revealed that plaintiff was anemic. Dr. Allen diagnosed plaintiff as suffering from a virus, and testified that plaintiff's anemia was "most likely" caused by undetected blood loss through the stool or "GI tract."

In late October 1996, plaintiff returned to Dr. Allen, complaining of heartburn, "a burning stomach," and dizziness for the preceding two weeks. Plaintiff did not mention his intermittent bouts of diarrhea. Dr. Allen reported that plaintiff had denied suffering from blood in his stools, a change in bowel habits, or abdominal pain. Laboratory tests revealed that plaintiff was no longer anemic, but he did test positive for the presence of bacteria linked to the development of ulcers. Dr. Allen prescribed a "triple drug therapy," which was the standard treatment for an ulcer, consisting of Pepto Bismol and two antibiotics (Tetracycline and Flagyl). Plaintiff had previously taken these antibiotics with no gastrointestinal effects.

On November 18, 1996, plaintiff saw Dr. Allen for the last time, complaining of intermittent intense abdominal pain,

diarrhea, and blood in his stools. Dr. Allen thought that plaintiff's symptoms were probably side effects of taking antibiotics, but, because the symptoms were continuing, he referred plaintiff to a gastroenterologist.

On November 26, 1996, Dr. Mark Janich, a gastroenterologist in Alabama, diagnosed plaintiff as suffering from chronic ulcerative colitis, and treated him with steroids. In his narrative report from that day, Dr. Janich wrote that plaintiff had been "experiencing diarrhea for the past 3-4 weeks and this typically consists of 6-7 loose stools per day," but that in the past week plaintiff had a "marked increase in his diarrhea." Dr. Janich also noted that plaintiff had been "passing a large amount of blood per [his] rectum." Some of the side effects plaintiff had experienced while on Accutane also had re-emerged, including chapped lips and joint pain.

Plaintiff's symptoms rapidly worsened. On December 1, 1996, he was admitted to the hospital complaining of severe abdominal pain and bloody diarrhea. In his report dated December 4, 1996, Dr. Phillip Dean, a colorectal surgeon, wrote that plaintiff, who had been diagnosed with ulcerative colitis, had "a one month history of bloody diarrhea. No previous signs or symptoms."

Within a week, plaintiff was readmitted to the hospital, complaining of severe abdominal pain and excessive rectal bleeding. He was diagnosed with "toxic colitis secondary to ulcerative colitis."

On December 19, 1996, plaintiff's entire colon and rectum were surgically removed and replaced with a surgically constructed ileoanal "J-pouch." Upon discharge on December 30, 1996, plaintiff had lost fifty to sixty pounds. He continued to suffer from fatigue, chronic diarrhea and rectal bleeding.

By April 1998, plaintiff had developed chronic pouchitis, and suffered from excessive diarrhea, fever, blood and mucous discharge, abdominal cramping, incontinence, and fatigue. He travelled to Utah, where Dr. Dean was then practicing surgery, and underwent a diverting ileostomy. Through that surgery, in an effort to allow the J-pouch to heal, plaintiff's small intestine was brought through a hole in his abdominal wall to drain into an ileostomy bag.

In November 2002, after living with the ileostomy bag for approximately four-and-a-half years, plaintiff's J-pouch had finally sufficiently healed to permit removal of the bag. On November 3, 2002, he underwent surgery to reverse the ileostomy and reform the ileoanal pouch. The absence of the bag was an

improvement, although plaintiff continued to suffer a host of complications.

In December 2003, Dr. Leonard Ou-Tim, the gastroenterologist who had been treating plaintiff for two years, changed plaintiff's diagnosis from ulcerative colitis to Crohn's disease. The diagnosis was changed because, over the course of his condition, plaintiff had developed symptoms more closely associated with Crohn's disease, including perianal fistulae.

Plaintiff's Lawsuit

On July 23, 2003, plaintiff filed a complaint in the Law Division against defendants, whose principal place of business is in New Jersey. The complaint sought compensatory and punitive damages under the applicable products liability laws, as well as economic losses under the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -195. Defendants denied liability and interposed numerous defenses, including the statute of limitations. McCarrell I, supra, slip op. at 21.

The first trial was conducted before a jury in 2007. The litigants presented an abundance of competing factual and expert proofs, largely focused on issues of causation and the alleged inadequacy of defendants' product warnings. Prior to trial, the trial judge denied defendants' motion to dismiss plaintiff's

complaint as time-barred, finding that New Jersey's, not Alabama's, statute of limitations governed the case. Ibid.

At the close of the proofs, the first jury returned a verdict in plaintiff's favor on the products liability claim. That jury found that defendants had failed to provide an adequate warning to plaintiff's prescribing physician about the risks of IBD from Accutane, and that the failure was a proximate cause of his IBD. Id. at 42. Plaintiff's punitive damages claim, however, was dismissed, and the jury also found in defendants' favor on the CFA claim. Ibid. The jury from the first trial awarded plaintiff $119,000 for past medical expenses and $2.5 million in compensatory damages. Ibid.

On appeal from the first verdict, defendants challenged, among other things, the exclusion of certain defense proofs at trial about the number of Accutane users; the denial of their motions based on plaintiff's alleged failure to establish proximate cause; and the denial of their request to apply Alabama's statute of limitations. Id. at 2-3. On March 12, 2009, we issued a 113-page opinion affirming the trial judge on all issues, except the "exclusion of the Accutane usage data." Id. at 113. We vacated the judgment and remanded the case for a new trial. Ibid.

This case was retried before the same trial judge and another jury in 2010. Prior to retrial, defendants submitted, without new briefing or argument, a notice of preservation for appellate review of several motions, including their motion for summary judgment based on the alleged expiration of the statute of limitations.

At the conclusion of the retrial, the second jury found by a vote of seven-to-two that defendants failed to provide an adequate warning to plaintiff's prescribing physician about the risk of IBD from Accutane. The jury also found that defendants' failure to warn was the proximate cause of plaintiff's IBD. The jury awarded plaintiff $159,530.19 for past medical expenses and $25 million in compensatory damages.

In March 2010, defendants filed a motion for a new trial, judgment notwithstanding the verdict ("JNOV"), and remittitur. The judge conducted oral argument in May 2010, but defendants subsequently withdrew the motion, without prejudice, pending settlement discussions that proved to be unsuccessful.

In August 2010, defendants submitted to the trial judge a supplemental brief, arguing that under our court's then-recent published opinion in Cornett, supra, 414 N.J. Super. at 365, Alabama's statute of limitations applied to this case. Defendants did not, however, reinstate their dismissal motion

until June 2011. On September 12, 2011, the trial judge issued a forty-seven-page written decision denying defendants' outstanding JNOV motion without ruling on the statute-of-limitations issue.

In October 2012, the trial judge conducted oral argument on defendants' supplemental submissions addressing the Supreme Court's then-recent decision in Cornett, supra, 211 N.J. at 362. On December 11, 2012, the judge issued a second written decision denying defendants' motion to dismiss plaintiff's complaint as time-barred, deeming this court's 2009 decision on the first appeal to be the "law of the case." The judge added that, even if the new case law in Cornett was applicable, New Jersey's, not Alabama's, statute of limitations governed.

Thereafter, defendants submitted further briefs to the trial court, arguing that plaintiff had failed to establish proximate cause in light of a recent decision by the Alabama Supreme Court, and that the judge had erred in limiting their trial experts. On April 10, 2013, the trial judge issued a written decision denying the motion. On April 15, 2013, the court issued a final judgment in favor of plaintiff.

On appeal, defendants now argue that the trial judge: (1) erred and deviated from the precedential case law in Cornett, supra, by denying their motion for dismissal after the second

trial and by refusing to apply Alabama's statute of limitations; (2) unfairly limited the number of expert witnesses at the second trial; (3) improperly allowed the case to go to verdict because plaintiff had not established proximate cause under the requirements of Alabama law; and (4) should have granted their motion for a new trial or, in the alternative, remittitur.

Because we agree with defendants on the statute-of-limitations issue, which is case dispositive, we need not address the other points.

II.

A.

We begin our choice-of-law discussion by recognizing that there is an actual conflict between critical aspects of New Jersey law and Alabama law concerning statute-of-limitations issues. See Rowe v. Hoffman-LaRoche, Inc. 189 N.J. 615, 621 (2007) (instructing that in the absence of such an actual conflict, the forum state applies its own law). The choice-of-law principles of the forum state, here New Jersey, guide the analysis for resolving that actual conflict and in choosing which state's laws apply to the issue. Erny v. Estate of Merola, 171 N.J. 86, 94 (2002).

The pivotal conflict here between New Jersey law and Alabama law concerns principles of equitable tolling embodied in

the "discovery rule." In New Jersey, the limitations period for products liability actions is two years after the cause of action "shall have accrued." N.J.S.A. 2A:14-2(a). New Jersey observes a discovery rule for all tort-based claims, under which a cause of action does not accrue "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973). With respect to products liability claims against drug manufacturers based upon alleged inadequate warnings, the Supreme Court held in Kendall, supra, 209 N.J. at 179-80, that a judge may consider New Jersey's statutory presumption of adequacy of an FDA-approved warning, N.J.S.A. 2A:58C-4, in deciding whether to apply the equitable tolling principles.

Alabama similarly has a two-year limitations period. Ala. Code § 6-2-38(1) (LexisNexis 2015). However, the discovery rule in Alabama currently applies only to fraud actions, Ala. Code § 6-2-3 (LexisNexis 2015), asbestos claims, Ala. Code § 6-2-30(b) (LexisNexis 2015), and fraudulent concealment of a cause of action. Utils. Bd. of Opp v. Shuler Bros., 138 So. 3d 287, 293

(Ala. 2013).[2] Plaintiff's claims in this case do not involve causes of action for fraud or fraudulent concealment.

Hence, if the law of Alabama governs the timeliness of plaintiff's lawsuit, the discovery rule and principles of equitable tolling are inapplicable and cannot delay the commencement of the equitable two-year limitations period. The marked difference between New Jersey and Alabama in having or lacking a discovery rule — a rule which can postpone the running of a plaintiff's time to file suit for many years — represents a major rather than minor conflict in the laws of the two states. Cf. Cornett, supra, 211 N.J. at 374-78 (holding, by contrast, that a one-year difference between the statutes of limitations of New Jersey and Kentucky did not pose a "true conflict," since both states have a discovery rule).

Plaintiff was diagnosed with IBD on November 26, 1996. Defendants maintained that this November 26, 1996 diagnosis date is the accrual date under Alabama law. See Smith v. Medtronic,

[2] In 1979 the Alabama Legislature enacted a one-year statute of limitations for products liability actions that included a discovery rule. Ala. Code § 6-5-502(b) (LexisNexis 1979). However, Ala. Code §6-5-502(c) (LexisNexis 1979), which contained a ten-year statute of repose, was declared unconstitutional in Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982), as recognized in Daniel v. Heil Co., 418 So. 2d 96, 97 (Ala. 1982). Because Ala. Code § 6-5-504 provided that in the event any part of Act was declared invalid the entire Act would become inoperable, Ala. Code § 6-5-502(a) was declared unconstitutional.

Inc., 607 So. 2d 116, 159 (Ala. 1992) (noting that accrual occurs "[a]t the time of the first legal injury . . . whether or not the full amount of damages is apparent"). Consequently, plaintiff had to commence his lawsuit within two years, i.e., by November 26, 1998.

Plaintiff filed his complaint in the Law Division on July 23, 2003, over four years after the accrual date. The trial court found that "the complaint was filed over two years after he knew he was injured." As the court reasoned, "if Alabama law is now applied to his case, the statute of limitations would bar his action." Thus, as the court correctly recognized, plaintiff's claims are barred unless New Jersey's equitable tolling principles apply.

B.

Prior to November 2008, the choice-of-law analysis in New Jersey tort-based cases, including products liability actions, was accomplished by conducting what our case law had described as the "flexible governmental interest" test. See Fu v. Fu, 160 N.J. 108, 118 (1999); Veazey v. Doremus, 103 N.J. 244, 247 (1986). Under that test, the forum court "identif[ied] the governmental policies underlying the law of each state" whose conflicting laws were in question, and determined "how those policies [were] affected by each state's contacts to the

litigation and to the parties." Veazey, supra, 103 N.J. at 248. The court would then "apply the law of the state with the greatest interest in governing the specific issue in the underlying litigation." Fu, supra, 160 N.J. at 118; see also Gantes v. Kason Corp., 145 N.J. 478, 485 (1996) (applying the flexible governmental-interest analysis in electing to apply New Jersey's more generous statute-of-limitations, rather than that of Georgia law, in a products liability case arising out of a plaintiff injured in Georgia by a defective machine manufactured by the defendant in New Jersey).

In November 2008, the New Jersey Supreme Court in P.V., supra, 197 N.J. at 135-36, altered the choice-of-law framework by adopting the "most significant relationship" test set forth in Section 145 of the Restatement (Second) of Conflicts of Laws (1971) ("Restatement"). In that case, a mentally disabled New Jersey resident was sexually abused at a Pennsylvania summer camp operated by a New Jersey charity. Id. at 135. The child's parents filed suit against the charity for negligent supervision at the camp. Ibid. The camp argued in its defense that New Jersey's charitable immunity statute, which differs from Pennsylvania law, insulated it from liability. Id. at 137. The Court majority concluded in P.V. that Pennsylvania's substantive

state law governed the lawsuit, rather than New Jersey's charitable immunity provisions. Id. at 155-56.

As the Court in P.V. instructed, the "most significant relationship" test begins with the presumption, as set forth in Restatement, supra, § 146, that the law of the state where the injury occurred will apply, unless another state has a more significant relationship to the issue. Id. at 136. When performing that analysis, a court must consider the general principles set forth in Section 6 of the Restatement, as well as the contacts set forth in Section 145 of the Restatement. Ibid.

Specifically, the Court in P.V. explained that the considerations in Section 6 of the Restatement, "reduced to their essence," entail: "(1) the interests of interstate comity; (2) the interest of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." Id. at 147.

These Section 6 factors are to be considered when assessing the following four contacts in Section 145(2), in order to decide whether to overcome the starting presumption that the law of the state of injury controls. The four important contacts identified in Section 145 to examine are:

(a) the place where the injury occurred,

> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> [Id. at 141 (quoting Restatement, supra, § 145(2)(a)-(d).]

Taking all of these Section 145 contacts and Section 6 considerations into account, the Court majority in P.V. concluded that Pennsylvania, the state in which the youth had been injured, had a "more significant relationship" to her tort action than New Jersey, despite her residency in this state. P.V., supra, 197 N.J. at 155-56.

The choice-of-law issues in the present case regarding the statute of limitations initially were addressed by the trial court in 2007, the year before the Court's opinion in P.V. was issued. Separately, the trial court had found that Alabama's substantive products liability law, rather than the law of New Jersey, applied to plaintiff's claims, a ruling that has not been since contested by either party. See McCarrell I, supra, slip op. at 107-109. By contrast, as to the statute of limitations, the trial court determined in 2007 that the "governmental interests" of New Jersey in our equitable tolling rule outweighed Alabama's governmental interests, and thus

called for New Jersey law to control the timeliness of plaintiff's lawsuit. Id. at 106.

We affirmed that initial ruling of the trial court in a brief discussion of the limitations issue within our March 2009 unpublished opinion remanding the case for a new trial on other grounds. Id. at 105-07. We did not apply P.V., an opinion which had been issued only six days before the oral argument on appeal in McCarrell I and which had not been advocated to us by counsel.

Prior to the 2010 retrial, defendants did not file a renewed motion seeking dismissal under Alabama's statute of limitations. Nor did they argue that the "most significant relationship" test of P.V. and the Restatement applied. Instead, they submitted a "notice of preservation" of various issues for appellate review, without any new briefing or argument, including the summary judgment motion based on the statute of limitations.

The retrial was conducted over seven weeks in January and February 2010. Defendants filed a motion for a new trial in March 2010, but did not renew their statute-of-limitations argument at that time.

The choice-of-law precedential landscape in our State soon changed again. On July 23, 2010, this court issued its opinion

in Cornett, supra, 414 N.J. Super. at 376-82. Cornett was a products liability medical device action brought by a Kentucky plaintiff. Id. at 371. The panel applied the "most significant relationship" test recognized in P.V., in determining the appropriate choice of statute-of-limitations law. Id. at 378-83.

We identified in Cornett a conflict between Kentucky's (one-year) and New Jersey's (two-year) statutes of limitations. Id. at 377-78. Applying the multiple factors espoused in P.V., we held that New Jersey's nexus to the matter was insufficient to overcome the general presumption in favor of applying the law of the state of injury. Id. at 381-82. Consequently, the out-of-state plaintiff's products liability action in Cornett against a defendant drug manufacturer headquartered in New Jersey, and its Florida affiliate, was dismissed on appeal as untimely. Id. at 382-83.

In August 2010, defendants in this case submitted additional briefing and asserted plaintiff's claim was time-barred under the new precedent set forth in Cornett. They specifically argued, for the first time, that, under the "most significant relationship" test, Alabama's statute of limitations governed. They argued that Cornett "confirmed that, for statute of limitations disputes in drug . . . cases, New Jersey courts

no longer apply the 'governmental interests' test and now require a strong presumption in favor of plaintiff's home-state law." Defendants further advocated that, "[t]o the extent [P.V.] left an uncertainty as to whether the presumption of home state law applied to both 'substantive' and 'procedural' questions in pharmaceutical . . . cases brought in New Jersey, the Appellate Division definitively answered that question last week in Cornett."

On August 9, 2012, before the trial judge ruled on defendants' updated statute-of-limitations argument in this case, the Supreme Court affirmed, with some modification, our decision in Cornett. Cornett, supra, 211 N.J. at 372. The Court found no actual conflict of law between New Jersey, which has a two-year statute of limitations, and Kentucky, which has a one-year statute of limitations, observing that both states "apply the discovery rule." Id. at 377. Applying Kentucky law, the Court held that the plaintiff in Cornett should have discovered by December 2006 that the stent implanted in December 2004 might have caused his May 2005 thrombosis, and thus his complaint filed in September 2008 was not timely. Id. at 379.

After considering the potential impact of P.V. and Cornett, the trial judge in this case denied defendants' renewed motion to dismiss plaintiff's complaint under Alabama's statute of

limitations in December 2012. The judge found our decision in McCarrell I, ruling that the complaint was timely, was "the law of the case." Additionally, the trial judge found that Cornett did not change the result she had previously reached because, in her view, P.V. merely added other factors to the "governmental interest" conflict-of-law analysis, "many of which were already considered in practice by our courts and other courts before [P.V.]," and "were regularly part of the analysis used by this court and other courts before the label of the standard was changed."

C.

On their present appeal, defendants first argue that the trial judge improperly dispensed with their statute-of-limitations arguments procedurally under the "law of the case" doctrine. They further contend that, on the merits, the judge misapplied the pertinent "most significant relationship" considerations, as adopted in P.V. and later clarified in Cornett.

We agree with defendants that "law of the case" doctrine did not foreclose them from seeking to have the trial court reexamine the limitations issues, in light of the new precedent in P.V. and Cornett. Our March 2009 opinion did not address the Court's then-very recent opinion in P.V., nor did it anticipate

how the nexus factors in P.V. would be applied to statute-of-limitations issues as they ultimately were analyzed in Cornett.

The "law of the case" doctrine is a non-binding, discretionary principle designed to prevent litigation of a previously resolved issue. Lombardi v. Masso, 207 N.J. 517, 538 (2011). The doctrine essentially calls for "judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law." Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988). In general, "[p]rior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." Ibid. (emphasis added).

Importantly, the law of the case doctrine "should not be used to justify an incorrect substantive result." Hart v. City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998); see Toto v. Princeton Twp., 404 N.J. Super. 604, 617-18 (App. Div. 2009) (finding that the first trial judge's decision denying a motion to dismiss plaintiff's claims as time-barred was not deemed thereafter to be the controlling law of the case).

As the Supreme Court recently instructed in State v. K.P.S., 221 N.J. 266, 276-82 (2015), the law of the case

doctrine is not immutable. Judicial deference to prior rulings in the same or a related case must be balanced against "'factors that bear on the pursuit of justice.'" Id. at 276 (quoting Lombardi, supra, 207 N.J. at 538-39). Like the related concept of collateral estoppel, the law of the case principle should not tie a court's hands in reexamining an issue "'when it would be inequitable or contrary to the interests of fairness and justice.'" Id. at 278.

Notably, Cornett was the first application in a published New Jersey opinion of the "most significant relationship" test the Court adopted in P.V. in the specific context of statutes of limitations. It would be fundamentally unfair to defendants to treat our unpublished 2009 opinion as a rigid barrier to the application of the Supreme Court's clarified teachings in P.V. or the subsequent precedent issued in Cornett. Indeed, the first appeal did not produce finality because it did not uphold the judgment for plaintiff. Instead, it required that the trial court reopen the case and adjudicate it anew. Defendants are not too late to take advantage of new precedent issued while their own case remained in the litigation pipeline. See, e.g., Juarez v. J.A. Salerno & Sons, Inc., 185 N.J. 332 (2005) (applying pipeline retroactivity to an appeal pending when

substantive Supreme Court opinions involving the same legal question were issued).

We reject plaintiff's related contention that defendants waived the application of Alabama statute-of-limitations law. "Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). "A valid waiver requires not only that a party 'have full knowledge of his legal rights,' but also that the party 'clearly, unequivocally, and decisively' surrender those rights." Willingboro Mall, Ltd. v. 240/242 Franklin Ave. L.L.C., 215 N.J. 242, 258 (2013) (quoting Knorr, supra, 178 N.J. at 177).

Here, defendants pled the affirmative defense of the statute of limitations. R. 4:5-4. They invoked that defense before the first trial, in moving unsuccessfully to dismiss the lawsuit under Alabama's statute of limitations. Defendants also expressly preserved the issue for appeal before the second trial.

Although defendants were perhaps remiss in not raising the new legal standard from P.V. sooner with this court or the trial court, it was Cornett that clarified how that standard should apply in New Jersey to choice-of-law issues in a statute-of-limitations context. Defendants raised Cornett promptly after

we issued our decision. Defendants did not waive their right to have this court apply the now-prevailing law of our State.

D.

We thus turn to the application of the "most significant relationship" test, as clarified by precedential case law in P.V. and Cornett, to the circumstances of this case.[3] Before plunging into that application, we first look more closely at the factor-by-factor analysis conducted in Cornett, which resulted in the dismissal of that plaintiff's lawsuit.

Cornett was a Kentucky resident whose widow brought a products liability action against defendant Johnson & Johnson ("J&J"), a New Jersey corporation, and co-defendant Cordis, a wholly-owned J&J subsidiary incorporated in Florida having its principal place of business in that state. Cornett, supra, 414 N.J. Super. at 369, 373. Cornett alleged that her husband had been injured and his death caused by a coronary stent manufactured by defendants. Id. at 371. Her case was litigated in New Jersey along with multiple similar products liability cases concerning the stent, utilizing a master complaint. Id. at 372, 375. Cornett's decedent had been implanted with the

[3] In performing that analysis under the sections of the Restatement utilized in P.V. and Cornett, we do not consider in this portion of our opinion the potential implications of Section 142 of the Restatement. We discuss Section 142 separately, infra, in Part II(F).

stent in Kentucky, and he received his medical care in that state. Id. at 376.

The defendants moved to dismiss Cornett's lawsuit as time-barred because it was filed after Kentucky's one-year statute of limitations had expired, even taking into account equitable tolling principles. Id. at 376-77. The trial court granted the motion, and Cornett appealed. Id. at 372, 376. In addition, the trial court dismissed all of the related lawsuits brought under the master complaint on the separate basis that federal approval of the device preempted all state-law causes of action. Id. at 372. Those plaintiffs appealed as well, and the appeals were consolidated. Ibid.

Guided by the "most significant relationship" test adopted by the Supreme Court in P.V., the panel in Cornett concluded that "the factors of Section 145 of the Restatement, when assessed in terms of the standards of Section 6, show that Kentucky had the more significant relationship to [the] case." Id. at 379. Several noteworthy aspects we highlighted in Cornett parallel characteristics of the present case.

As we noted in Cornett, the decedent and his widow were "long-time Kentucky residents." Id. at 379. The decedent "received all medical care relating to his condition and the device there." Ibid. The stent was "purchased, implanted, and

allegedly became blocked" in Kentucky. Ibid. Given those facts, we reasoned that "[t]his particular plaintiff was neither operated on nor injured in Kentucky by pure 'happen-stance[,]' so the place of injury could not be discounted as a fortuity." Id. at 380 (second alteration in original) (quoting P.V., supra, 197 N.J. at 138, 145-46, and Fu, supra, 160 N.J. at 137).

We further reasoned in Cornett that Kentucky was "the locus of the parties' relationship." Ibid. Although defendant Cordis issued the stent's warnings and warranties from Florida, "[the decedent] and his healthcare providers received them or suffered from their omission in Kentucky." Ibid.

Our assessment of the dominant state in Cornett was not swayed by the fact that defendant J&J was headquartered and incorporated in New Jersey. Ibid. We deemed J&J's New Jersey residency "of tenuous relevance, absent any showing that the [J&J] subsidiary [Cordis] is merely its corporate parent's alter ego and lacks a separate corporate existence." Ibid. We also found it insufficient that Cordis, a Florida-based subsidiary, maintained one of its facilities in New Jersey, "without any demonstration that specific and identifiable activities in New Jersey operation contributed to [the] decedent's injuries." Ibid. The "only allegation even remotely related to New Jersey" was that Cordis' facility in this state in Warren was among five

others that had received warnings from the FDA about certain manufacturing processes after plant inspections. Ibid.

We expressly recognized in Cornett that "while New Jersey undoubtedly has an interest in regulating the safety of any activities in Cordis' Warren facility that might have contributed to the injury . . . that concern was in competition with Kentucky's differing view of how stringently to regulate." Ibid. (citation omitted). In that regard, we spotlighted certain differences between Kentucky's and New Jersey's products liability laws and the more difficult burden of proving negligence under the Kentucky statute. Id. at 380-81.

We determined in Cornett that the distinctions between Kentucky law and New Jersey law "imply a different balancing of, on the one hand, the need to regulate product safety and, on the other, the need to avoid undue inhibition of the availability of products to consumers." Id. at 381. "Consequently, [the States' differences] reflect different 'interests underlying the field of tort law.'" Ibid. (quoting P.V., supra, 197 N.J. at 147-50). We elaborated that "[t]he varying statutory standards also implicate the parties' interests and expectations, because they establish different substantive standards of conduct to be observed." Ibid. In that regard, "Kentucky's interest in its own weighing of those concerns applies to all in-state conduct

by manufacturers, regardless of whether they are residents." Ibid.

In summary, we concluded in Cornett that "[a]pplying New Jersey law would thus threaten 'the values of uniformity and predictability' that are the main interests of judicial administration, by impairing Kentucky's ability to regulate conduct within its borders according to its own standards." Ibid. (quoting P.V., supra, 197 N.J. at 153-54). "That ability is a right to which our courts 'have continuously deferred' notwithstanding the evolution of choice-of-law doctrines." Ibid. (quoting P.V., supra, 197 N.J. at 153). "Infringement on that ability would obviously impair comity" between the states. Ibid.

"By the same token," we determined in Cornett that the "application of Kentucky law [would] not frustrate the policies of New Jersey insofar as both States' statutes of limitations are designed to bar stale claims arising out of distant occurrences while providing compensation to residents who are unlawfully injured." Ibid. On that score, we specifically declared that "New Jersey has little interest in protecting the compensation rights of a Kentucky resident." Ibid. (emphasis added) (citing Deemer v. Silk City Textile Mach. Co., 193 N.J. Super. 643, 649 (App. Div. 1984)).

For these many reasons, we concluded in Cornett that "the relative strength of New Jersey's relationship with the parties and issues compared to Kentucky's was insufficient to overcome [Section 146's] presumption in favor of applying Kentucky law." Id. at 381-82. Applying Kentucky law, we determined that Cornett's lawsuit was untimely and properly dismissed. Id. at 382-83. In the remaining portion of our opinion not pertinent here, we concluded that some of the claims of the other plaintiffs were not preempted by federal law. Id. at 383-406.

Plaintiffs in Cornett petitioned for review by the Supreme Court. The Court affirmed the dismissal of Cornett's complaint as untimely, but modified our decision on preemption in certain respects. Cornett, supra, 211 N.J. at 362.

As we previously noted, in addressing the choice-of-law analysis as to the statutes of limitations, the Court differed with our predicate determination in Cornett that there is an actual conflict between the timeliness laws of Kentucky and New Jersey. The Court reasoned that, although New Jersey's baseline limitations period is two years, whereas Kentucky's period is only one year, that difference is inconsequential from a state-policy perspective. Id. at 377-78. That Court found the difference did not matter because both states have a discovery rule and permit the equitable tolling of the statutory deadline

in appropriate settings with latent product defects. Ibid. The Court therefore found no "true conflict of laws between [the two] states" because both states' limitations periods "assure that personal injury actions will be filed promptly, while simultaneously discouraging stale claims." Id. at 377-78.

Notably, the Supreme Court added the following important observation, citing to our own analysis in Cornett:

> Even if a true conflict between the laws of Kentucky and New Jersey existed on this issue, we have no quarrel with the application of Kentucky law in this case. See Cornett, supra, 414 N.J. Super. at 379-82.
>
> [Id. at 378 n.6 (emphasis added).]

Although this above-quoted observation appears in a footnote of the Court's opinion, the passage conveys agreement with not only the outcome we reached in Cornett, but also with the "most significant relationship" analysis set forth on pages 379-82 of our published opinion. If the Court had disagreed with our analysis, we presume it would not have stated, without qualification, that it had "no quarrel" with our conclusion, and would not have referred readers to the pages of our opinion where that analysis was published. The Court has not issued any subsequent opinion on the topic.

Accordingly, we consider this court's published opinion in Cornett, modified only by the Supreme Court's finding of a lack

of "actual conflict" in that case, as the guiding precedent for the present appeal, along with the Court's seminal opinion in P.V. first adopting the "most significant relationship" test in our State.

Plaintiff urges that we eschew reliance on Cornett, or distinguish that case factually, because, in this case, the allegedly defective product was apparently manufactured in New Jersey and there is no out-of-state subsidiary manufacturer like Cordis named as a co-defendant. Plaintiff urges that we instead follow this court's earlier opinion in Smith v. Alza Corp., 400 N.J. Super. 529 (App. Div. 2008), in which we ruled that New Jersey's statute of limitations and discovery rule governed a products liability case brought by an Alabama resident against a New Jersey manufacturer.

We decline at this juncture to follow Smith, an opinion that was issued in June 2008, five months before the Supreme Court changed the course of the law in P.V., in November 2008, and displaced the "flexible governmental-interest" test with the "most significant relationship" test. P.V. supra, 197 N.J. at 143. Because it utilized the now-repudiated, former test, Smith has been eclipsed by P.V. and Cornett, which applied the supplanting test.

Similarly, we decline to rely at this time on the portion of our opinion in McCarrell I, supra, slip. op. at 105-06, which applied the former test relied on in Smith. Instead, we must apply the current state of precedent, as set forth in P.V. and Cornett.

E.

Applying these controlling precedents, we are persuaded that Alabama has a more significant relationship to this lawsuit than New Jersey. Like the decedent and his wife in Cornett, plaintiff is a long-time resident of another state. He was prescribed the allegedly defective product in Alabama, purchased it there, and ingested it there. He suffered all of his injuries in that state. Thus, the place of injury's location in Alabama was no fortuity, and, viewed through the prism of current governing precedent, Alabama was the locus of the parties' relationship.

In Cornett, we concluded in similar circumstances that "New Jersey has little interest in protecting the compensation right of [an out-of-state] resident." Cornett, supra, 414 N.J. Super. at 381. Although plaintiff vigorously contests that assessment, Cornett is currently the binding law of our state, which has the imprimatur of the Supreme Court. It is not our prerogative to reconsider that proposition here. Instead, we defer that to the

Supreme Court as the ultimate arbiter of our state's choice-of-law rules.

The application of Alabama law here — including its chosen policy to not apply equitable tolling outside of fraud actions — is consistent with the Court's choice-of-law outcome in P.V. In P.V., the Court determined that the state in which the plaintiff was injured at camp, i.e., Pennsylvania, had a stronger nexus to the plaintiff's tort action than New Jersey, even though the plaintiff was a New Jersey resident and the camp was operated by a New Jersey charity.

We recognize that P.V. is dissimilar to the present case in that the plaintiff there was a New Jersey resident. Even so, the locus of the harm outside of our state's borders was a significant feature of the Court's analysis and its decision to not extend our state's charitable immunity provisions to the cause of action, and in holding that Section 146's presumption to apply the law of the state of injury was not overcome. Id. at 155-56. We recognize that P.V. is unlike the present case in that P.V. did not involve an allegedly defective product manufactured, with product warnings issued, outside the state of injury. However, Cornett applied P.V. to that context and found that the law of the state of injury still applied.

Turning specifically to the Restatement Section 6 factors, with the instructive guidance of P.V. and Cornett, we conclude that the presumption of applying the law of the place of injury in Section 146 is not overcome here. The "interests of interstate comity," see P.V., supra, 197 N.J. at 152-53, would not be offended by applying Alabama's statute-of-limitations law. Indeed, the law of Alabama is being applied to other substantive issues in this case. Further, it is Alabama's own limitations standard that is being applied to this Alabama resident.

If, hypothetically, the states' roles were reversed and Alabama had a more generous tolling doctrine, we doubt that New Jersey's interests in a shorter period would be unduly offended by applying those Alabama principles.

We recognize that the "interests of the parties" under Section 6, P.V., supra, 197 N.J. at 153-54, are diametrically at odds as to whether Alabama's statute-of-limitations law applies. Plaintiff, an Alabama resident, wants New Jersey's limitations law to salvage his lawsuit, while Roche, a New Jersey company, wants Alabama law to govern and deem it time-barred. Given this particular division of interests — in which both parties seek to take advantage of the law of a distant state — we discern no obvious tilt.

Under Section 6, we next consider the "interests underlying the field of tort law" and the related concept of "the competing interests of the states." See id. at 148-52. As we noted in Cornett, supra, 414 N.J. Super. at 380, "New Jersey undoubtedly has an interest in regulating the safety of any activities in [a New Jersey manufacturing facility] that might have contributed to [plaintiff's] injury." However, that interest was deemed insufficient in Cornett to mandate the application of New Jersey's statute of limitations. Moreover, New Jersey's Product Liability Act, N.J.S.A. 2A:58C-1 to -7, imposes a specific presumption of validity of a warning approved by the FDA, and thus limits any interest in imposing liability in such situations. See N.J.S.A. 2A:58C-4. Consequently, even if we were to agree with plaintiff that this particular Section 6 factor points in New Jersey's direction, the resultant outcome in Cornett, as endorsed by the Supreme Court, suggests that New Jersey's regulatory interest over Roche is not enough to trump the Section 146 "place of injury" presumption.

Lastly, the "interests of judicial administration," P.V., supra, 197 N.J. at 154-55, do not appear to make a material difference to the nexus analysis under Section 6. Applying the Alabama statute of limitations poses no administrative problems for the New Jersey courts. To be sure, applying New Jersey's

discovery rule to a case brought by an out-of-state plaintiff conceivably might attract more patients to sue New Jersey drug manufacturers in our state. Even so, the Supreme Court has yet to declare that the existence of such mass-tort filings in our civil courts is so administratively undesirable or burdensome as to affect choice-of-law dispositions.

We therefore conclude, in light of P.V. and Cornett, that the presumption mandated by Section 146 to apply the law of the place of injury has not been overcome here. Consequently, Alabama's two-year statute of limitations applies, and plaintiff is not entitled to equitable tolling. We therefore reverse the trial court's denial of defendants' renewed motion to dismiss the complaint as time-barred. That result is dictated by the binding precedents in P.V. and Cornett.

F.

In the trial court, and in the parties' initial briefs to this court, almost no mention was made of a different provision, Restatement, supra, Section 142,[4] which specifically addresses choice-of-law analysis for statutes of limitations. After oral

[4] The only passing mention was in plaintiff's brief on appeal, which states that "[c]hoosing New Jersey's law is also consistent with the Restatement's position on statute of limitations conflicts," and which merely cites Section 142 without discussing the elements of that provision.

argument on appeal, the parties were invited to and supplied us with supplemental briefing on this provision.

Section 142, as revised in 1988, instructs as follows:

> § 142 Statute of Limitations of Forum
>
> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) The forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.
>
> [Restatement, supra, § 142 (emphasis added).]

These elements, if they were applied here, conceivably could affect the analysis and the outcome in several ways.

Section 142(2) declares a presumption to apply the statute-of-limitations law of the forum, here New Jersey, unless both Subsections (a) and (b) are met. Section 2(a) considers whether maintenance of the claim under New Jersey's more permissive

limitations law would serve no substantial interest of the forum." (Emphasis added). Subsection 2(b) concerns the state with the "most significant relationship" to the case under Section 6. Because the two factors in Section 142(2) are recited conjunctively (using the connecting term "and"), both 2(a) and 2(b) must be true in order for the forum-law presumption in Section 142(2) to be negated.

A choice-of-law analysis under revised Section 142 is further complicated by the Section's prefatory language that the factors in subsections (1) and (2) will not control when "the exceptional circumstances of the case make such a result unreasonable." (Emphasis added). The Restatement's text does not define what would comprise such "exceptional circumstances." Case law from other states under Section 142 is scant, largely uninformative, and not squarely on point with the context here.

Section 142 notably has a markedly different "default rule" (i.e., the law of the forum) as compared with the default rule in Section 146 (the law of the place of injury). Hence, in close cases where the multiple factors weigh in different directions and are in equipoise, Section 142's presumption calls for the statute of limitations of the forum state to control, whereas the Section 146 presumption would favor the law of the state of injury.

Our Supreme Court previously rejected an earlier version of Section 142, which stated that an action permitted by the statute of limitations of the forum state would generally be maintained "even though it would be barred by the statute of limitations of another state." Heavner v. Uniroyal, Inc., 63 N.J. 130, 135-41 (1973) (citing Restatement, supra, § 142 (1971)). The Court in Heavner stated,

> that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred.
>
> [Id. at 141.]

Because "there may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the concept we here espouse," the Court "restrict[ed] [its] conclusion to the factual pattern identical with or akin to that in the case before [it], ibid., namely a products liability action where the plaintiff purchased a defective product in another state made by a manufacturer incorporated in New Jersey. Id. at 133-34. In Cornett, supra, the Supreme Court cited Heavner's holding, although the Court did not cite

either the former or revised version of Section 142. Cornett, supra, 211 N.J. at 373-74.

To date, the Supreme Court has neither endorsed nor repudiated the revised version of Section 142 of the Restatement. The provision is not mentioned in P.V. or Cornett. Nor did the trial court in this case mention it. In their supplemental post-argument briefs, plaintiff argues that revised Section 142 supports the application of New Jersey's statute-of-limitations law, a position that Roche opposes.

We recognize that, prior to Cornett, another panel of this court "conclude[d] that our Supreme Court would now apply the 'most significant relationship' test of [the amended] Section 142 in determining the applicable statute of limitations." Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP, 426 N.J. Super. 582, 589 (App. Div. 2012). The panel made that observation in the context of a malicious-use-of-process case, concluding that New Jersey's longer statute of limitations for such a lawsuit "arising out of a multi-faceted dispute centered in New York," would serve "no substantial interest of the forum." No published case in this state has yet to consider the application of revised Section 142 to a products liability case arising out of an allegedly-harmful drug manufactured by a New Jersey company and ingested by an out-of-state resident.

That said, we decline to analyze this case under the revised Section 142 factors. First, the provision apparently was not raised in the trial court and was only touched upon in plaintiff's initial appellate brief. Second, our Supreme Court had not yet stated whether it wishes to have that provision in the Restatement adopted within the fabric of law in our state. The Court has not provided any guidance on how, if at all, Section 142 should be applied to products liability cases by out-of-state plaintiffs against New Jersey drug manufacturers. We thus leave the implications of revised Section 142 to the Court itself for its possible consideration.

III.

Because we are reversing the trial court's judgment on statute-of-limitations grounds, we need not address Roche's alternative arguments for reversal.

Reversed. The trial court shall issue an order in due course dismissing plaintiff's complaint as time-barred.