ANDREW McCARRELL, Plaintiff-Petitioner v. HOFFMAN-LA ROCHE INC. and ROCHE LABORATORIES INC., Defendants-Respondents	SUPREME COURT OF NEW JERSEY Docket No.: 076524 On Petition for Certification from Superior Court of New Jersey Appellate Division Docket No.: A-4481-12T1 Sat Below: Hon. Jack M. Sabatino, J.A.D. Hon. Marie P. Simonelli, J.A.D. Hon. George S. Leone, J.A.D. On Appeal from: Superior Court of New Jersey Law Division, Atlantic County Docket No. ATL-L-1951-03 Sat Below: Hon. Carol E. Higbee, P.J.Cv. **ORAL ARGUMENT REQUESTED**

Brief of Amicus Curiae The New Jersey Civil Justice Institute

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PRELIMINARY STATEMENT

This Court has adopted the appropriate test to determine the choice-of-law question in this case. In P.V. v. Camp Jaycee, this Court determined that the most-significant-relationship test under sections 145, 146, and 6 of the Restatement (Second) of Conflicts of Laws should be applied to determine which law governs substantive legal issues in a personal injury case. The Appellate Division properly applied the most-significant-relationship test to the statute-of-limitations issue in this case.

Nearly forty-five years ago, this Court reversed what had been the prevailing common law practice of treating statutes of limitations as procedural matters to be governed by the law of the forum state. The decision to treat statutes of limitations like other substantive choice-of-law questions stemmed from a recognition that the policy rationale for forum-state procedure did not apply, and that the default forum-state rule was prone to abuse.

Rather than apply the prevailing most-significant-relationship test for questions of substantive law, according to P.V. and other precedent, plaintiff instead asks this Court to adopt a tortured interpretation of an entirely different test under section 142 of the Restatement. Plaintiff's argument that New Jersey law should apply to the statute-of-limitations issue

underscores this Court's wisdom in rejecting the common law rule applying forum-state law to statutes of limitations decades ago. As it has in every decision since P.V., this Court should affirm that the most-significant-relationship test applies to the substantive choice-of-law question in this case.

STATEMENT OF INTEREST

The New Jersey Civil Justice Institute (NJCJI or "the Institute"), has a strong interest in the clear, predictable, and fair application of the law. NJCJI is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations dedicated to improving New Jersey's civil justice system. The Institute 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 injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

NJCJI respectfully requests that this Court grant its application to appear as amicus curiae in this case. NJCJI has been granted leave to appear as amicus curiae in numerous cases before this Court. The Institute has a particular concern for the rules that apply in the civil justice system. This case raises the specific question of which choice-of-law analysis should be applied to statutes of limitations. The issue raised in this case is of significant public interest and NJCJI is particularly suited to provide this Court with guidance on that question. The Institute seeks leave to participate in this

appeal as amicus curiae in light of the significance of this matter to its constituent members, and submits this brief both in support of that application and on the merits of this case.

LEGAL ARGUMENT

I. THIS COURT HAS RECOGNIZED THE WISDOM IN TREATING STATUTES OF LIMITATIONS AS SUBSTANTIVE LAW FOR CHOICE-OF-LAW PURPOSES.

An historical perspective on choice of law, as applied to the statute-of-limitations issue, informs this Court's analysis in this case. At common law, "the statute of limitations [was] ordinarily a matter of procedure, affecting the remedy and not the right, and [was] therefore, like other procedural attributes, controlled by the law of the forum rather than that of the state whose law otherwise governs the cause of action." Heavner v. Uniroyal, Inc., 63 N.J. 130, 135 (1973) (citing Restatement, Conflict of Laws 2d § 142 (1971)). In 1971, the American Law Institute issued the Restatement (Second) of Conflict of Laws. At that time, section 142 followed the common law, treating statutes of limitations as procedural and governed by forum-state law. Restatement (Second) of Conflict of Laws § 142 (1971).

Only two years later, this Court corrected the common law approach, citing legal scholars who had "almost universally criticized" the rule espoused in section 142 of the 1971 Restatement. Heavner, supra, 63 N.J. at 136-37. In Heavner, Justice Hall, writing for the majority, described in detail the perils that would result if statutes of limitations were treated

differently from substantive issues for purposes of choice of law.

This Court described the "fundamental illogic and unsoundness of the [common law] rule," id. at 137, quoting authorities who saw no reason for a rule of law that allowed a claim to be brought elsewhere if it is barred by the law of the state governing the substantive legal claims:

> "There is little reason for this rule, other than historical . . . . As an original proposition, it could well be urged that, after suit is barred by the law to which reference is made as governing the claims of the parties, the plaintiff's claim, now deprived of its most valuable attribute, should be unenforceable by action elsewhere."
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> [Ibid. (quoting Goodrich, Conflicts of Laws § 85, at 152-53 (4th ed. 1964).]

This Court quoted Dean Leflar, author of American Conflicts Law (1968), who similarly had opined that the historical explanation -- "that the passage of the period of limitations destroys only the remedy and not the right inherent in a cause of action" -- made little sense because "'[a] right for which the legal remedy is barred is not much of a right.'" Ibid. (quoting Leflar, supra, § 127 at 304). He concluded that for choice-of-law purposes, statutes of limitations should be treated as substantive law. Otherwise, "'plaintiffs whose claims are barred by the governing substantive law are allowed to shop

around for a jurisdiction in which the statute is longer, in the hope of getting service there on the obligor.'" Ibid. (quoting Leflar, supra, § 127 at 304). This Court in Heavner also cited Professor Lorenzen, who urged that "'no court should enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties,'" id. at 138 (quoting Lorenzen, The Statute of Limitations and the Conflict of Laws, 28 Yale L.J. 492, 496-97 (1919)), and Professor Sedler, who asserted that "'[i]t has never been satisfactorily shown why a suit should be permitted if it cannot be maintained under the law to which the forum looks as a model.'" Ibid. (quoting Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y.U. L. Rev. 813, 847 (1962)).

In short, this Court in Heavner, supra, recognized the wisdom in applying the same legal analysis to decide which law applies on the statute of limitations and other substantive legal issues, and flatly rejected section 142's 1971 rule that forum-state law applies to statutes of limitations. 63 N.J. at 140-41.

II. P.V. SETS FORTH THE APPROPRIATE TEST FOR DETERMINING CHOICE OF LAW ON SUBSTANTIVE ISSUES, WHICH THE APPELLATE DIVISION CORRECTLY APPLIED IN THIS CASE.

In P.V. v. Camp Jaycee, this Court adopted the "most significant relationship" test for deciding choice of law for

substantive issues in tort cases. P.V. v. Camp Jaycee, 197 N.J. 132, 142-43 (2008). This Court described that test in the following way:

> Under that standard, the analysis in a personal injury case begins with the section 146 presumption that the local law of the state of the injury will apply. Once the presumptively applicable law is identified, that choice is tested against the contacts detailed in section 145 and the general principles outlined in section 6 of the Second Restatement. If another state has a more significant relationship to the parties or issues, the presumption will be overcome. If not, it will govern.
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> [Id. at 136.]

Thus, the analysis in this case should begin with the section 146 presumption:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.
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> [Restatement, supra, § 146.]

Then, "from that vantage point," the analysis turns to the remaining contacts set forth in sections 145 and the cornerstone principles of section 6. P.V., supra, 197 N.J. at 144. Under section 145, titled "The General Principle," the court weighs the following contacts to determine which state has the "most significant relationship to the occurrence and the parties":

(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.

[Restatement, supra, § 145; accord P.V., supra, 197 N.J. at 141.]

"Viewed through the section 6 prism, the state with the strongest section 145 contacts will have the most significant relationship to the parties or issues, and thus its law will be applied." Id. at 143. As this Court has stated, "[r]educed to their essence, the section 6 principles are '(1) the interests of interstate comity; (2) the interests 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." P.V., supra, 197 N.J. at 147 (quoting Erny v. Estate of Merola, 171 N.J. 86, 101-02 (2002)).

New Jersey judges and attorneys are familiar with the principles in sections 145, 146, and 6 of the Restatement. They have litigated and adjudicated a variety of tort cases and various issues, including statute of limitations, under that clear and well-established framework. See P.V., supra, 197 N.J. at 142-43; McCarrell v. Hoffman-La Roche Inc. ("McCarrell II"), No. A-4481-12T1 (App. Div. Aug. 11, 2015) (slip op. at 21-24,

32-44); Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 378-82 (App. Div. 2010), aff'd, 211 N.J. 362, 378 n.6 (2012).

Moreover, in the forty years since Heavner, New Jersey courts have consistently recognized that statutes of limitations are treated like other substantive issues in terms of choice-of-law analyses. That includes this Court's affirmance just a few years ago of the Appellate Division's Cornett decision, applying P.V.'s clear and structured analysis to the statute-of-limitations issue. See Cornett, supra, 414 N.J. Super. at 379-82, aff'd, 211 N.J. at 378 n.6. Even in Pitcock v. Kasowitz, Benson, Torres & Friedman, LLP, 426 N.J. Super. 582 (App. Div. 2012), which is not a personal injury case, and where the Appellate Division failed to properly apply the sections 145, 146, and 6 analysis adopted in P.V., the court nevertheless reached the correct outcome in holding that the New York statute of limitations barred the plaintiff's action because New York had "'a more significant relationship to the parties and the occurrence' than New Jersey." Id. at 590 (quoting Restatement, supra, § 142 (2)(b)). Significantly, Pitcock was decided in June 2012, two months before this Court's decision in Cornett, which affirmed the Appellate Division's application of P.V. and the Restatement sections 145, 146, and 6 to the issue of statute of limitations in a personal injury case.

As explained in more detail in Part III, infra, there is no reason for this Court to adopt a different test here, particularly the test advocated by plaintiff, which begins with a presumption contrary to that established in P.V. and Cornett - the presumption this Court properly rejected in Heavner.

III. THIS COURT SHOULD REJECT PLAINTIFF'S INVITATION TO ADOPT HIS INTERPRETATION OF SECTION 142.

Plaintiff asks this Court to apply section 142 in a way that departs from this Court's forty-year precedent and that would be contrary to the rationale for the section 142 revisions. Plaintiff's interpretation begins, and nearly ends, with the erroneous default rule applying forum-state law to the issue of statute of limitations. PSCb11-12. The same principles that led this Court to reject section 142 of the 1971 Restatement should lead to rejection of plaintiff's interpretation of the current version. Section 142 now provides in pertinent part:

> 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:
>
> . . . .
>
> (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.
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> [Restatement, supra, § 142 (revised 1988).]

The Official Comment to the revised section 142 confirms that the American Law Institute intended the revision to apply the most-significant-relationship test to statutes of limitations. See Restatement, supra, § 142, cmt. e (revised 1988). Comment e, titled "Rationale," states in part:

> Many subsequent cases . . . no longer characterize the issue of limitations as ipso facto procedural and hence governed by the law of the forum. Instead, the courts select the state whose law will be applied to the issue of limitations by a process essentially similar to that used in the case of other issues of choice of law. These cases represent the emerging trend. They stand for the proposition that a claim will not be maintained if it is barred by the statute of limitations of the state which, with respect to the issue of limitations, is the state of most significant relationship to the occurrence and the parties under the principles stated in § 6.
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> [Ibid. (emphasis added).]

Notably, comment g to the revised section 142 verifies that the drafters intended to avoid the deleterious effects of forum shopping that led to the demise of the 1971 version. See Restatement, supra, § 142, cmt. g (revised 1988).

The forum shopping that would follow if plaintiff's interpretation prevails here is not merely a hypothetical

concern. To recognize the practical likelihood of that perverse outcome, this Court need only review troubling statistics concerning the number of out-of-state litigants already pursuing lawsuits in New Jersey. Indeed, a recent study revealed that approximately 93% of the plaintiffs in cases filed against New Jersey-based pharmaceutical manufacturers and pending in New Jersey's Multi-County Litigation system reside outside of New Jersey. See Marcus Rayner, Letter to the Editor, "Litigation Tourism" Swells N.J. Complex Litigation Glut, N.J. Law Journal (Aug. 8, 2013), available at http://www.njlawjournal.com/id=1202614411546/Litigation-Tourism-Swells-NJ-Complex-Litigation-Glut?cmp=share_twitter&slreturn= 20160101135538.

Applying the most significant-relationship-test articulated in P.V., and again in Cornett, to the statute-of-limitations issue in this case also furthers the important interests of "'uniformity'" and "'predictability'" in choice-of-law determinations in our State. P.V., supra, 197 N.J. at 140 (quoting Restatement, supra, § 6). Plaintiff's efforts to undo New Jersey's history of treating statutes of limitations like other substantive issues would lead to a perverse outcome: under plaintiff's misconstruction of section 142, New Jersey's statute of limitations would trump Alabama's judgment that his claim should be time-barred; yet Alabama's substantive liability standards would trump New Jersey's legislative judgment

(expressed in New Jersey's Product Liability Act (PLA)) that liability should be limited here based on FDA approval.

Plaintiff's proposed reversal of forty years of precedent makes no sense from a policy perspective, particularly in a jurisdiction whose courts have been inundated with out-of-state plaintiffs suing domestic companies that the Legislature intended to protect through the PLA. See Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 623-24 (2007); Shackil v. Lederle Laboratories, 116 N.J. 155, 187-88 (1989). Moreover, plaintiff's legal argument -- that New Jersey has an overriding deterrence interest in applying its own statute of limitations but not in applying its much more important (and deterrent-defining) liability standard -- is nonsensical.

Plaintiff's proposal here, which seeks application of the law of the forum when competing statutes of limitations are at issue, is antithetical not only to this Court's enduring choice-of-law precedent, but also to New Jersey's important public policies. The decision below should be affirmed to confirm that the sound "most significant relationship" test applies to substantive legal issues, including those involving statutes of limitations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the most-significant-relationship test is the appropriate test for determining choice-of-law issues involving statutes of limitations and, accordingly, this Court should affirm the Appellate Division's decision.

Respectfully submitted,

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By: 
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Dated: February 3, 2016