

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 19-0546

ZACHARY SCOTT BUCKLES, deceased, by and through his personal representative NICOLE R. BUCKLES, and NICOLE R. BUCKLES, personal representative, on behalf of the heirs of ZACHARY SCOTT BUCKLES

Plaintiffs and Appellees,

v.

BH FLOWTEST, INC., a Montana Corporation, and BLACK ROCK TESTING, INC., a Montana Corporation,

Defendants and Appellants,

CONTINENTAL RESOURCES, INC., an Oklahoma Corporation, JANSON PALMER, d/b/a BLACK GOLD TESTING, and JOHN DOES I-V

Defendants.

On Appeal from the Montana Seventh Judicial District Court, Richland County,
Cause No. DV-15-14, Honorable Olivia Rieger Presiding

APPELLANT BLACK ROCK TESTING, INC.'S OPENING BRIEF

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The sole issue before this Court is whether the District Court incorrectly made the legal determination to apply Montana law to this wrongful death and personal injury action which involves a death occurring in North Dakota when North Dakota law is presumed to apply; the pertinent Restatement (Second) of Conflict of Laws factors favor application of North Dakota law; and two Article III Judges in Montana have concluded North Dakota law applies under similar factual scenarios.

II. STATEMENT OF THE CASE

The case at bar arises from the death of Zachary Buckles (“Mr. Buckles”), an individual who had been working in the North Dakota oil fields at a well site owned by Continental Resources, Inc. (“Continental”) located near Alexander, North Dakota, via a series of subcontracts between Continental, Appellant BH Flowtest, Inc. (“BH Flowtest”), Appellant Black Rock Testing, Inc. (“Black Rock”), and Janson Palmer d/b/a Black Gold Testing (“Mr. Palmer” or “Black Gold”). Mr. Buckles was found dead at the North Dakota well site on April 28, 2014.

In February 2015, Mr. Buckles, by and through his personal representative, Nicole R. Buckles, and Nicole R. Buckles, personal representative, on behalf of the heirs of Zachary Buckles (hereinafter “Buckles’ Estate”) commenced a lawsuit against Continental, BH Flowtest, Inc., BRTI, Janson Palmer d/b/a Black Gold Testing, and John Does I-V in Montana’s Seventh Judicial District Court, Richland

County under Cause No. DV 15-14, alleging negligence, negligent infliction of emotional distress, and loss of consortium. *See* Appendix (hereinafter “App.”)¹ 1.

After filing its Answer, BRTI filed a Motion for Declaration of Applicable Law along with an accompanying Brief in Support, arguing North Dakota law—the presumptive law that applies to the action—not Montana law, governs the case. App. 4 (BRTI’s Motion for Declaration of Applicable Law) and App. 5 (BRTI’s Brief in Support of Motion for Declaration of Applicable Law). Over a year after briefing on the choice of law issue concluded, the District Court issued a two-sentence Order denying BRTI’s Motion and holding Montana law applied “[f]or the reasons argued by [Buckles’ Estate] and because the [District] Court ha[d] dismissed [Continental,] the only non-Montana party[.]” App. 7 (August 19, 2016 Order on Defendant BRTI’s Motion for Declaration of Applicable Law).

In the meantime, specifically on July 26, 2016, United States District Court Judge for the District of Montana Susan Watters issued an opinion in *Otto v. Newfield Exploration Co.*, 2016 WL 9461791 (D. Mont. 2016) on the same exact choice of law issue currently before this Court. In *Otto*, which arose from the death of a Montana resident who was working for companies doing business in the North Dakota oil fields at a well site in North Dakota, Judge Watters held the presumptively

¹ The Appendix referenced is the one contemporaneously filed by BRTI titled “Appellant Black Rock Testing, Inc.’s Appendix” as required per M.R.App.P. 12(1)(i) and permitted by M.R.App.P. 12(5).

applicable North Dakota law, not Montana law, applied. *Otto*, 2016 WL 9461791 at **6-7. Judge Watters' opinion in *Otto* was consistent with a decision rendered by Judge Morris in 2015 in *Winter v. Pioneer Drilling Services, Ltd*, 2015 WL 9855923 (D. Mont. 2015), wherein Judge Morris held the presumptively applicable North Dakota law, not Montana law, applied to a death of a Montana resident which occurred in North Dakota at a well site.

On September 21, 2017, this Court reversed the District Court's dismissal of Continental on personal jurisdiction grounds and remanded the issue back to the District Court for further evidentiary proceedings. *Buckles v. Continental Resources, Inc.*, 2017 MT 235, 388 Mont. 517, 402 P.3d 1213. As Continental's dismissal from the action constituted one of the two reasons provided by the District Court for denying BRTI's Motion for Declaration of Applicable Law, and considering Judge Watters' decision in *Otto*, BRTI brought another Motion accompanied by a supporting Brief seeking an Order that North Dakota law applied. App. 8 (BRTI's Motion for Reconsideration Re: Applicable Law); and App. 9 (BRTI's Brief in Support of its Motion for Reconsideration Re: Applicable Law). Briefing on the new Motion re Applicable Law concluded in December 2017, and the District Court held a hearing on the choice of law issue on December 20, 2017.

In early February 2019—after the District Court once again dismissed Continental from the action, *see* R.² 132 (Findings of Fact, Conclusions of Law and Order on Continental Resources, Inc.’s Motion to Dismiss – Specific Personal Jurisdiction)—the District Court denied BRTI’s new Motion re Applicable Law. App. 10 (Order on BRTI’s Motion for Reconsideration re: Applicable Law). BRTI subsequently moved for an Order under Rule 54(b), M.R.Civ.P., seeking this Court’s review of the choice of law issue. App. 11 (Motion for Rule 54(b) Certification of Choice of Law Issue); and App. 12 (Brief in Support of Motion for Rule 54(b) Certification of Choice of Law Issue). The District Court granted BRTI’s certification motion on August 23, 2019. App. 13 (Order Granting Black Rock Testing, Inc.’s and BH Flowtest, Inc.’s Motion for Rule 54(b) Certification of Choice of Law Issue). BRTI timely filed a Notice of Appeal, and this Court accepted the appeal on October 1, 2019, to decide whether the presumptively applicable North Dakota law, or Montana law, applies to the instant litigation. App. 14.

III. STATEMENT OF FACTS

In April 2014, Mr. Buckles was working via a string of tiered subcontractors on an oil site owned by Continental located near Alexander, North Dakota. App. 1, ¶¶ 10-11. The chain of tiered subcontractors starts with Continental, a corporation existing under the laws of the State of Oklahoma with its principal place of business

² “R.” refers to the District Court record.

in Oklahoma City, Oklahoma. App. 1, ¶ 3; R. 8 (Continental's Brief in Support of Motion to Dismiss for Lack of Personal Jurisdiction), p. 3. Continental submitted it has significant operations in Montana, North Dakota, Oklahoma, and South Dakota, as well as field offices in Montana, North Dakota, Oklahoma, South Dakota, and Texas. R. 8, p. 3.

Next in the chain is BH Flowtest, a Montana corporation at all times relevant to the action who had all its business operations in North Dakota during the pertinent time period. App. 1, ¶ 4; and App. 3 (BH Flowtest's Answer and Demand for Jury Trial), ¶ 4. BRTI is the next entity in the chain of subcontractors. At all times relevant to the action, BRTI was a Montana corporation with its principal place of business in Glasgow, Montana. App. 1, ¶ 5; App. 2 (BRTI's Answer and Request for Jury Trial), ¶ 5. The next individual/entity in the chain of subcontractors is Black Gold (owned by Mr. Palmer), a Montana business entity with its principal place of business in Glasgow, Montana. App. 1, ¶ 6; R. 16 (Black Gold's Answer and Demand for Jury Trial), ¶ 6. The chain ends with Mr. Buckles d/b/a Dozer Well Testing. Dozer Well Testing was a Montana entity with its principal place of business in Glasgow, Montana. App. 16 (Discovery Documents produced by Buckles' Estate showing business information about Dozer Well Testing).

On April 28, 2014, Mr. Buckles was manually gauging crude oil production when he was allegedly overcome by exposure to hydrocarbon vapors, the same

which allegedly resulted in his death. App. 1, ¶ 16. Mr. Buckles had been working in the Bakken for a significant amount of time before his death. App. 15 (Sworn Statement of Janson Palmer), p. 28³, lns. 11-18 (indicating Mr. Palmer and Mr. Buckles had been working for about two weeks prior to Mr. Buckles' death). He was staying in a camper near his work site in North Dakota, along with Mr. Palmer. *Id.*, p. 27⁴, lns. 20-24.

Buckles' Estate's Complaint against the individuals or entities in the string of tiered subcontractors—in the middle of which lies BRTI—includes three (3) causes of action. The first cause of action alleges each Defendant “had a duty at the time of [Mr. Buckles'] accident and subsequent death to maintain a safe oil well site and secure work area on the oil well site pursuant to contract and in fact.” App. 1, ¶ 17. BRTI as well as the other named Defendants allegedly breached said duty “by allowing an inherently dangerous and unsafe well site to be operated which did not have adequate or appropriate air monitoring equipment in place for the tank gauging activities being performed by [Mr. Buckles] and by failing to protect [Mr. Buckles] from overexposure to hydrocarbon vapors[.]” *Id.*, ¶ 18. Buckles' Estate's Complaint claims such actions by BRTI and the other named Defendants constituted a substantial contributing factor to Mr. Buckles' death. *Id.* Buckles' Estate's

³ Page 9 of Appendix 15, but page 28 of the Sworn Statement itself.

⁴ Page 9 of Appendix 15, but page 27 of the Sworn Statement itself.

Complaint further alleges BRTI and the other named Defendants' actions resulted in exposing Mr. Buckles to the inhalation of hydrocarbon vapors which allegedly resulted in his death. *Id.*, ¶ 19. Buckles' Estate's Complaint alleges entitlement to punitive damages. *Id.*, ¶ 20.

The second cause of action alleges BRTI's and the other named-Defendants' actions constituted the tort of negligent infliction of emotional distress and that Mr. Buckles' heirs were subjected to serious and severe emotional distress. *Id.*, ¶ 21. The third cause of action alleges that "as a result of the [alleged] wrongful acts and/or omissions of the Defendants," Buckles' Estate (i.e. the named Plaintiffs) "have suffered and will continue to suffer loss of consortium as that claim is defined under Montana law[.]" *Id.*, ¶ 23. Buckles' Estate's Complaint requests damages, including punitive damages. *Id.*, pp. 8-9 (Prayer for Relief).

IV. STANDARD OF REVIEW

A choice of law question presents a question of law. *Tidyman's Management Services Inc. v. Davis*, 2014 MT 205, ¶ 13, 376 Mont. 80, 330 P.3d 1139 (citing *Newman v. Scottsdale Ins. Co.*, 2013 MT 125, ¶ 24, 370 Mont. 133, 301 P.3d 348). As such, "[t]his Court reviews decisions on choice of law de novo." *HSBC Bank USA, National Association v. Anderson*, 2017 MT 257, ¶ 17, 389 Mont. 106, 406 P.3d 416 (citing *Masters Group Intl., Inc. v. Comerica Bank*, 2015 MT 192, ¶ 33, 380 Mont. 1, 352 P.3d 1101). Thus, this Court reviews de novo the District Court's

decision to apply Montana law instead of the presumptively applicable North Dakota law.

V. SUMMARY OF ARGUMENT

The District Court incorrectly concluded Montana law applies to this action. Under Montana's choice of law principles, North Dakota law presumptively applies in this personal injury and wrongful death action because the subject death undisputedly occurred in North Dakota. That presumption is reinforced by application of the pertinent Restatement (Second) of Conflict of Laws factors. North Dakota is not only where the subject death occurred, but also where the conduct giving rise to Buckles' Estate's allegations stem from and where the relevant relationship between the parties is centered. Two Article III Judges in Montana have concluded North Dakota law applies when faced with the precise legal issue before this Court under similar facts, and nothing compels a different result here.

A holding that Montana law applies would constitute an open invitation to forum shopping as between Montana State and Federal courts. Since the pertinent Restatement (Second) of Conflict of Laws factors reinforce the presumption North Dakota law applies—as concluded by Judge Morris and Judge Watters under analogous facts—this Court should likewise hold North Dakota law applies in the instant case.

In total, North Dakota law presumptively applies as Mr. Buckles death occurred in North Dakota and the Restatement (Second) Conflict of Laws factors reinforce the conclusion that North Dakota has a more significant relationship to the litigation than Montana. North Dakota law should therefore apply to the litigation.

VI. ARGUMENT

A. CONSISTENT WITH TWO FACTUALLY AND LEGALLY SIMILAR DECISIONS FROM FEDERAL DISTRICT COURT JUDGES IN MONTANA, NORTH DAKOTA, NOT MONTANA, LAW APPLIES TO THIS ACTION.

The same legal question on appeal to this Court—whether the presumptively applicable North Dakota law, or Montana law, applies to a lawsuit arising from the death of a Montana resident in the North Dakota oil fields—has been answered in favor of North Dakota law by two Article III Judges in Montana—Judges Morris and Watters. *See Winter*, 2015 WL 9855923; and *Otto*, 2016 WL 9461791. *Winter* involved the death of Kyle Winter, who was fatally injured in an accident at a well site located in North Dakota owned by Whiting Petroleum Corporation (“Whiting”). The accident involved a drilling rig which was owned and operated by Pioneer Drilling Services, LTD (“Pioneer”). Winter’s personal representative brought suit against both Whiting and Pioneer in Montana. The suit alleged negligence against both defendants and requested punitive damages. *Winter*, 2015 WL 9855923 at *1.

Otto involved the death of Blaine Otto, a truck driver who hauled oil from well sites to the ultimate purchase of the oil. Blaine’s body was found on a catwalk

near an open hatch on one of defendant Newfield Exploration Company's ("Newfield") oil tanks located in McKenzie County, North Dakota. Newfield, who was headquartered in Texas but operated in Montana and North Dakota among other locations, had a regional office in Sidney, Montana. Newfield's Sidney, Montana office oversaw the well site where Blaine died. Blaine's personal representative filed suit in Montana against Newfield, alleging Newfield was negligent in its operation of the subject well site, Newfield had a heightened duty of care due to ultra-hazardous, deadly vapors in the Bakken, and that Newfield failed to warn Blaine of latent dangerous conditions. The suit against Newfield also included a request for punitive damages. *Otto*, 2016 WL 9461791 at *1.

As BRTI has done in the case at bar, the defendants in *Winter* and *Otto* moved for a declaration that North Dakota, not Montana, law applied. *Winter*, 2015 WL 9855923 at *1; *Otto*, 2016 WL 9461791 at *1. Despite Kyle Winter's Montana domicile, Judge Morris conducted a thorough analysis and, consistent with the applicable presumptive application of North Dakota law, held North Dakota law applied. *Winter*, 2015 WL 9855923 at **2-3. Judge Watters in *Otto* also followed the applicable presumption in concluding North Dakota law applied despite Blaine's Montana domicile and the fact that defendant Newfield had its regional office in Montana. *Otto*, 2016 WL 9461791 at **5-6.

The well-reasoned decisions Judges Morris and Watters issued in *Winter* and *Otto*, respectively, should be reaffirmed and followed by this Court considering the instant wrongful death and personal injury case also arises from a death of a Montana resident in the North Dakota oil fields and the same legal issue is presented. Further, as Judges Morris and Watters concluded in *Winter* and *Otto*, respectively, application of the facts to the pertinent factors Montana courts consider when confronted with a choice of law issue fail to show Montana has a more significant relationship to the litigation than North Dakota such that the presumption of North Dakota law applying could be overcome. North Dakota is the State where the injury occurred, the State where the conduct allegedly giving rise to liability occurred, and where the parties' relationship is centered.

For these reasons, this Court should reverse the District Court and hold consistent with the presumption that North Dakota law applies.

i. Actual Conflicts Exists Between Pertinent North Dakota and Montana Law.

The threshold question for a Montana court when faced with a choice of law issue is “whether an actual conflict exists with respect to a legal issue in the case.” *Winter*, 2015 WL 9855923 at *1 (citation omitted). Where “application of...various states' laws could produce diverging outcomes on the same legal issue[,]” an actual conflict exists. *Id.* (citation omitted). Montana and North Dakota law undisputedly conflict with respect to several key legal issues in the case at bar.

For example, as Judge Morris noted in *Winter*, “North Dakota [law] imputes the contributory negligence of the decedent to a plaintiff asserting a claim for wrongful death[,]” while Montana does not. *Winter*, 2015 WL 9855923, *1 (comparing *Champagne v. United States*, 513 N.W.2d 75, 81-82 (N.D. 1994) to *Mickelson v. Montana Rail Link, Inc.*, 2000 MT 111, 299 Mont. 348, 999 P.2d 985, 1003). While Buckles’ Estate has alleged wrongful death and loss of consortium, BRTI contends Mr. Buckles was guilty of a degree of comparative negligence and/or conduct which negligence was a proximate cause of his own injuries and death. App. 2 (BRTI’s Answer and Request for Jury Trial), p. 7 (Sixth Affirmative Defense).

Punitive damages, which Buckles’ Estate have requested, *see* App. 1, ¶ 20 and p. 9, constitutes another difference between Montana law and North Dakota law. Montana law caps punitive damages at \$10,000,000 or 3% of a defendant’s net worth, whichever is less, while North Dakota law limits punitive damages to either two times the amount of compensatory damages or \$250,000, whichever is greater. *Winter*, 2015 WL 9855923, *1 (comparing Mont. Code Ann. § 27-1-220(3) to N.D.C.C. § 32-03.2-11(4)).

Yet another difference between the two States’ laws is liability of a project owner who hires an independent contractor to perform allegedly inherently dangerous work. In Montana, such a project owner may be vicariously liable for injuries to a contractor’s employee. *Winter*, 2015 WL 9855923, *1 (citing *Beckman*

v. Butte-Silver Bow County, 2000 MT 112, 299 Mont. 389, 1 P.3d 348, 353-54). No such vicarious liability exists in North Dakota. *Winter*, 2015 WL 9855923, *1 (citing *Branum v. Petro-Hunt Corp.*, 2010 WL 1977963, *2 (D.N.D. March 15, 2010); and *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 454 (N.D. 1994)); see also, *Meyer v. McKenzie Electric Cooperative, Inc.*, 2018 WL 4702150, *5 (D.N.D. 2018) (discussing the fact that North Dakota has never held a claim for ultra hazardous activities exists under North Dakota law). Judge Watters in *Otto* went through the differing case law between Montana and North Dakota regarding strict liability for abnormally dangerous activity claims, and “follow[ed] the District of North Dakota’s view that North Dakota law does not yet apply strict liability for abnormally dangerous activities.” *Otto*, 2016 WL 9461791 at **3-4. Whether manual tank gauging constitutes an inherently dangerous activity, as Buckles’ Estate claims, such that strict liability would apply is a disputed legal issue in this case, as is BRTI’s liability for injuries to an independent contractor like Mr. Buckles.

Clearly, significant actual conflicts exist between North Dakota and Montana law regarding various legal issues in this case. Buckles’ Estate admitted as much at the District Court level. App. 6 (Buckles’ Estate’s Brief in Opposition to BRTI’s and BH Flowtest’s Motions for Declaration of Applicable Law), p. 8. As such, the question becomes whether North Dakota law or Montana law applies.

ii. Montana’s Choice of Law Principles Require Application of the “Most Significant Relationship” Test Under the Restatement (Second) of Conflict of Laws.

Montana courts apply the “most significant relationship” approach pursuant to the Restatement (Second) of Conflict of Laws in resolving choice of law issues. *Otto*, 2016 WL 9461791 at *4 (citing *Phillips v. General Motors Corp.*, 2000 MT 55, 298 Mont. 438, 995 P.2d 1002, 1007); *see also*, *Winter*, 2015 WL 9855923 at *1 (citation omitted). The first step in applying the “most significant relationship” test is to determine whether Montana, the forum in this litigation, has a statutory directive regarding choice of law. *Winter*, 2015 WL 9855923 at *2 (citing *Phillips*, 995 P.2d at 1008; and Restatement (Second) of Conflict of Laws, § 6). Montana has no relevant statutory directive regarding choice of law. *Phillips*, ¶ 29; *Otto*, 2016 WL 9461791 at *5. Thus, the next step is to reference the pertinent Sections of the Restatement (Second) of Conflict of Laws. *Winter*, 2015 WL 9855923 at *2 (citation omitted).

iii. The Pertinent Restatement (Second) of Conflict of Laws Sections Provide North Dakota Law Presumptively Applies.

As the instant action involves personal injury and wrongful death allegations, Sections 146 and 175 of the Restatement (Second) of Conflict of Laws are implicated. *Id.* As Judges Morris and Watters noted in *Winter* and *Otto*, respectively, those Sections provide for the presumptive application of North Dakota law where the subject death occurred in North Dakota. *Winter*, 2015 WL 9855923

at *2 (“Kyle Winter was injured in North Dakota. It is presumed therefore that North Dakota law applies[.]”); *Otto*, 2016 WL 9461791 at *5 (“Here, the injury occurred in North Dakota. Pursuant to Restatement §§ 146 and 175, North Dakota law presumptively applies.”) (citation omitted).

Section 146—titled “Personal Injuries—provides:

In an action for a 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.

Restatement (Second) of Conflict of Laws, § 146.

Section 175—titled “Right of Action for Death”—provides:

In an action for wrongful death, 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.

Restatement (Second) of Conflict of Laws, § 175.

Mr. Buckles undisputedly died in North Dakota at the well site he was working at. Therefore, North Dakota law is presumed to apply under §§ 146 and 175. The presumption that North Dakota law applies is well-established. *See, e.g., Livingston v. Baxter Health Care Corp.*, 313 S.W.3d 717, 722 (Mo. App. 2010) (noting that Sections 145 and 175 of the Restatement (Second) of Conflict of Laws

“impress the general rule, subject only to rare exceptions, the local law of the state where conduct and injury occur will apply to determine ‘whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor’s conduct was entitled to legal protection.’”); *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 987 (Del. 2013) (“Section 146 creates a strong presumption that the ‘law of the state where the injury occurred’ governs...”). As such, this Court’s analysis must start with the presumption that North Dakota law applies. That presumption is reinforced by application of the other pertinent Restatement (Second) of Conflict of Laws Sections as discussed below.

iv. Montana Lacks a More Significant Relationship to the Litigation Than North Dakota.

With the presumption that North Dakota law applies in place, the only way for Montana law to apply is if Montana has a more significant relationship to the occurrence and the parties than North Dakota. *See* Restatement (Second) of Conflict of Laws, §§ 146 and 175; *see also, Winter*, 2015 WL 9855923 at *2 (“It is presumed therefore that North Dakota law applies unless it can be shown that Montana has a more significant relationship to the legal issues presented.”). To determine whether Montana has a more significant relationship, courts are directed to look to the factors under Restatement (Second) of Conflict of Laws §§ 6(2) and 145(2). *Phillips*, ¶ 32. In pertinent part, Section 6 of the Restatement (Second) of Conflict of Laws provides as follows:

(2) When there is no [statutory] directive, the factors relevant to the choice of applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law
- (f) certainty, predictability and uniformity of result, and
- (g) ease in determination and application of the law to be applied

Restatement (Second) of Conflict of Laws, § 6. Again, Montana has no relevant statutory directive regarding choice of law principals, rendering § 6(1) inapplicable.

Phillips, ¶ 29.

The Restatement (Second) of Conflict of Laws, § 145 reads as follows:

- (1) The rights and liabilities of each of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (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. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws, § 145. As explained below, the presumption that North Dakota law applies pursuant to §§ 146 and 175 is reinforced by application of the §§ 6(2) and 145(2) factors, both of which favor North Dakota law, just as they did in *Winter* and *Otto*.

1. The § 6(2) Factors Weigh in Favor of Application of North Dakota Law, Just as They Did in *Winter* and *Otto*.

Consistent with the holdings in *Winter* and *Otto*, application of the § 6(2) factors to the facts in this litigation lead to the conclusion that North Dakota law, not Montana law, applies. North Dakota has a more significant relationship, and any relationship Montana has to the litigation is wholly insufficient to rebut the presumption that North Dakota law applies. Therefore, North Dakota law should apply to Buckles' Estate's claims.

Under § 6(2)(a)—the needs of the interstate and international system—the goal is to further harmonious relations between states and facilitate commercial intercourse between them. Restatement (Second) Conflict of Laws, § 6, cmt. d. In *Phillips*, the Montana Supreme Court noted this factor “supports the application of the Restatement approach, namely the law of the state with the most significant

relationship to an issue.” *Phillips*, ¶ 35. As Judges Watters and Morris held in *Winter* and *Otto*, respectively, this factor is neutral here because both Montana and North Dakota have adopted fluid choice of law principles from the Restatement. *Otto*, 2016 WL 9461791, at *6 (citing *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 467, ¶ 39, 342 Mont. 467, 178 P.3d 102, 111; *Nodak Mut. Ins. Co. v. Wamsley*, 687 N.W.2d 226, 233 (N.D. 2004)); *see also*, *Winter*, 2015 WL 9855923, at *2 (citations omitted). As such, § 6(2)(a) does nothing to rebut the presumption that North Dakota law applies.

The factors under § 6(2)(b) and (c) of the Restatement, which require a comparison of the competing policies of Montana and North Dakota, favor application of North Dakota law, just as they did in *Winter* and *Otto*. Judge Morris in *Winter* held these two factors favored North Dakota because although both Montana and North Dakota have a strong interest in protecting workers in the workplace and fairly compensating workers for work-related injuries, North Dakota “possesses a significant interest in regulating businesses that extract natural resources within its boundaries.” *Winter*, 2015 WL 9855923, at *3. Judge Watters held similarly in *Otto*. *Otto*, 2016 WL 9461791, at *6 (citing *Winter*, 2015 WL 9855923, at *3). Judges Watters and Morris were correct— “[t]he Legislative Assembly of North Dakota has specifically declared that the development and production of oil and gas is in the public interest.” *Paradigm Energy Partners, LLC*

v. Fox, 2016 WL 9496588, *15 (D.N.D. 2016) (citing N.D.C.C. § 38-08-01, which provides that it is “in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in [North Dakota].”). This only makes sense, as it is well known that North Dakota is one of the leading oil producing States in the Nation.

Here, application of North Dakota law would further North Dakota’s interest in protecting wage workers. *See* N.D.C.C. § 65-01-01 (“The State of North Dakota, exercising its police and sovereign powers, declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers...”). Thus, to the extent Buckles’ Estate prevails in the lawsuit, North Dakota law will work to compensate Buckles’ Estate.

Application of North Dakota law would also further North Dakota’s significant interest in regulating its petroleum extraction industry because Mr. Buckles died in North Dakota while working as an independent contractor via a series of tiered subcontractors, all of whom were hired to perform work at Continental’s North Dakota well sites. North Dakota’s interest in regulating companies like BRTI and the other named-Defendants who perform oil extraction business in its State remains, even if such companies are organized and hold their principal place of business in other states. Indeed, because North Dakota is one of the premier States for oil extraction, companies from all over the United States will

continue to perform work in the North Dakota oil fields. North Dakota’s interest in regulating its petroleum extraction industry would be forestalled if other States’ laws applied to oil field incidents occurring in North Dakota when the parties relevant to the incident were only brought together because of oil production activities in North Dakota. Thus, as they did in *Otto* and *Winter*, the § 6(2)(b) and (c) factors favor North Dakota.

Section 6(2)(d) is neutral in this case because tort cases generally do not involve justified expectations, as parties generally act without giving thought to the legal consequences of their conduct or the law to be applied. *Otto*, 2016 WL 9461791 at *6; *Phillips*, ¶ 62; Restatement (Second) Conflict of Laws, § 6, cmt. g. The Ninth Circuit has noted that “when the parties do not specify that the law of a particular state will govern their relationship, ‘tort cases generally do not involve justified expectations.’” *Butler v. North American Capacity Ins. Co.*, 686 Fed.Appx. 523, 526 (9th Cir. 2017) (citing *Phillips*, 995 P.2d at 1013 (¶ 62)). There is nothing to suggest Mr. Buckles specified the law of a particular state to govern his relationship with the individuals or entities defending the instant lawsuit.

While Buckles’ Estate may claim—as it did at the District Court level—that Mr. Buckles had a justified expectation that Montana law would apply, *see* App. 6, p. 18, that assertion lacks support from any evidence. Further, that assertion lacks objective reasonableness. Mr. Buckles voluntarily went *from* Montana *to* North

Dakota to work as an independent contractor to, like many during the height of the Bakken oil boom, make money. Just in the same way Mr. Buckles could not have reasonably expected to escape application of North Dakota law had he been arrested for something he did in North Dakota while working there, Mr. Buckles could not have reasonably expected for Montana law to apply to an incident which happened in North Dakota while Mr. Buckles was working in North Dakota.

For these reasons, application of the facts to § 6(2)(d) does nothing to rebut the presumption that North Dakota law applies.

Section 6(2)(e) is not applicable in the instant case. The comments to § 6 state that factor 6(2)(e) “is of particular importance in situations where the policies of the interested states are largely the same but there are nevertheless minor differences between the relevant local law rules...” Restatement (Second) Conflict of Laws, § 6(2), cmt. h. As discussed above, significant and appreciable differences exist between Montana law and North Dakota law regarding the legal claims in this case, including contributory negligence, punitive damages award amounts, and vicarious liability of a higher-tiered contractor who employs another to perform allegedly inherently dangerous work. Thus, this factor is not applicable. *Otto*, 2016 WL 9461791, at *6 (citing *Winter*, 2015 WL 9855923, at *3).

The factors listed under § 6(2)(f) and (g) are either neutral or favor North Dakota. Those factors require a court to weigh the certainty, predictability, and

uniformity of the result as well as the ease in the determination and application of the law to be applied. *Otto*, 2016 WL 9461791, at *6 (citing *Phillips*, ¶ 68). Pursuant to the Comments to § 6, the § 6(2)(f) and (g) factors are of particular importance in situations where the parties are likely to give advance thought to the legal consequences of their transactions. *Id.* (citing Restatement (Second) Conflict of Laws, § 6, cmt. i).

Consistent with the factual scenario in *Otto*, here too there is no indication the parties gave any advance thought to the legal consequences of their transactions. However, considering the decisions in *Winter* and *Otto*, a decision by this Court to apply North Dakota law would certainly increase predictability and uniformity in situations where a Montana resident gets injured or dies while working in the North Dakota oil fields and the injured individual or her personal representative brings suit in Montana. So, this factor weighs in favor of North Dakota. To the extent the decisions in *Winter* and *Otto* do not implicate the §§ 6(2)(f) and 6(2)(g) factors, the factors are neutral. *Otto*, 2016 WL 9461791, at *6 (citing *Winter*, 2015 WL 9855923, at *3; *Phillips*, ¶ 69).

Pursuant to the foregoing, the § 6(2) factors either favor North Dakota law or are neutral. Thus, the totality of the § 6(2) factors reinforce the presumptive application of North Dakota law. This Court should therefore conclude that under the § 6(2) factors, North Dakota has a more significant relationship to the

occurrences and the parties than Montana. North Dakota law should therefore apply to Buckles' Estate's claims.

2. The § 145 Factors Also Weigh in Favor of Application of North Dakota Law.

In addition to the § 6 factors weighing in favor of North Dakota as discussed above, application of the § 145 factors, considered collectively, also reinforce the presumption North Dakota law applies. As explained below, application of the facts to the § 145 factors demonstrates Montana does not have a more significant relationship to the occurrences and parties considering the subject injury occurred in North Dakota; the alleged conduct giving rise to the allegations in the lawsuit occurred in North Dakota; all of the parties worked in North Dakota; and the parties' relationship is centered in North Dakota.

The first factor, § 145(2)(a)—where the injury occurred—only reinforces the presumption North Dakota law applies, as Mr. Buckles died at a well site located in North Dakota. App. 1, ¶ 16. The comments to § 145 state that “the place of injury is of particular importance in the case of personal injuries[.]” Restatement (Second) of Conflict of Laws, cmt. f. Accordingly, this factor weighs heavily in favor of North Dakota.

The second factor, § 145(2)(b)—the place where the conduct causing the injury occurred—likewise weighs in favor of North Dakota. In *Otto*, Judge Watters held this factor weighed in favor of North Dakota because the complaint there

alleged Newfield's (the defendant's) negligent management of its oil tanks in North Dakota caused his death. *Otto*, 2016 WL 9461791, at *5. Similarly, here Buckles' Estate's own pleading demonstrates that the conduct allegedly causing Mr. Buckles' death occurred in North Dakota. Indeed, Buckles' Estate's Complaint alleges BRTI and the other named Defendants had a duty to maintain a safe oil well site and secure work area on the well site, but breached such duty by allowing an allegedly inherently dangerous and unsafe well site to be operated without adequate or appropriate air monitoring equipment for the tank gauging activities Mr. Buckles was hired to perform and by failing to protect Mr. Buckles from overexposure to hydrocarbon vapors. App. 1, ¶¶ 17-18. Buckles' Estate alleges such failures by BRTI and the other named Defendants led to Mr. Buckles' death. *Id.*, ¶¶ 18-19. The alleged failures Buckles' Estate's Complaint brings up all unequivocally occurred in North Dakota, the place where the well site Mr. Buckles died at is located.

With respect to the emotional distress and loss of consortium claims, *see* App. 1, ¶¶ 21-23, North Dakota was also the place where the alleged conduct causing those alleged injuries occurred. But for the alleged failures by BRTI and the other named Defendants noted above, Buckles' Estate could not have alleged either emotional distress or loss of consortium. In other words, the alleged conduct by BRTI and the other named Defendants relating to Continental's well site in North

Dakota where Buckles died gave rise to the emotional distress and loss of consortium claims. Thus, the § 145(2)(b) factor weighs heavily in favor of North Dakota.

The third factor, § 145(2)(c)—the domicile, residence, nationality, place of incorporation and place of business of the parties—does not render application of North Dakota law improper. In *Otto*, where Blaine was domiciled in Montana, defendant Newfield was domiciled in Texas, operated internationally, maintained well sites in both Montana and North Dakota, and had a regional office in Sidney, Montana, Judge Watters held this factor weighed in favor of Montana. *Otto*, 2016 WL 9461791, at *5-*6. In *Winter*, where Kyle Winter was domiciled in Montana but resided in North Dakota only during times when he was working in North Dakota and neither of the defendants were incorporated in North Dakota, Judge Morris concluded the § 145 factors, “considered collectively, weigh[ed] slightly in favor of North Dakota law.” *Winter*, 2015 WL 9855923 at *2.

Here, Mr. Buckles, BRTI, and the other named Defendants clearly conducted business in North Dakota, evidenced by the fact that all the parties had a connection to the North Dakota well site where Mr. Buckles died. True, Mr. Buckles’ permanent residence was in Montana, but the fact remains he stayed in and was working in North Dakota when he died. *See* App. 15, p. 27, Ins. 20-24 (Mr. Palmer indicating he and Mr. Buckles stayed in a camper on-site—meaning in North

Dakota—at the time of Mr. Buckles’ death); and p. 28, lns. 11-18 (Mr. Palmer indicating he and Mr. Buckles had been working for about two weeks).

Even though BH Flowtest was a Montana corporation, all of BH Flowtest’s business operations were in North Dakota at all times relevant to the dispute. App. 3, ¶ 4. BRTI was a Montana corporation at all times relevant to the lawsuit. App. 1, ¶ 5; App. 2, ¶ 5. However, it also conducted business in North Dakota during times relevant to the litigation. The same goes for Black Gold. R. 16, ¶ 6; *see also*, App. 15, p. 27, lns. 20-24, and p. 28, lns. 11-18. Finally, Continental is incorporated in Oklahoma and had its principal place of business in Oklahoma City, Oklahoma. R. 8, p. 3. Continental submitted it has significant operations in Montana, North Dakota, Oklahoma, and South Dakota, as well as field offices in Montana, North Dakota, Oklahoma, South Dakota, and Texas. *Id.*

Considering the facts outlined above collectively, the third factor—§ 145(2)(c)—does not provide a basis for overcoming the presumption that North Dakota law applies. All of the parties conducted business in North Dakota. The fact that Mr. Buckles and some of the named Defendants were residents of Montana is but one factor which does not negate the fact that this litigation is centered on actions in North Dakota—the State where the parties all performed business operations. Further, “[t]he residence of the parties is not the determining factor in a choice of law analysis.” *See, e.g., Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991

F.2d 1501, 1507 (9th Cir. 1993) (citation omitted). Thus, residency alone is an insufficient basis for concluding Montana has a more significant relationship such that the applicable presumption that North Dakota law applies could be overcome.

The final factor, § 145(2)(d)—the place where the relationship, if any, between the parties is centered—undisputedly supports the presumption North Dakota law applies. Judge Watters in *Otto* held this factor weighed in favor of North Dakota because the company who Blaine worked for was hired to transport oil from the defendant Newfield’s North Dakota well site, and Blaine was assigned that task. Further, Blaine died on a catwalk near the defendant-Newfield’s well site, which was located in North Dakota. *Otto*, 2016 WL 9461791, at *5-*6.

Here, similar to *Otto*, Mr. Buckles subcontracted with Black Gold to perform work at Continental’s well site in North Dakota. Black Gold was able to subcontract such work pursuant to a tiered-subcontractor situation between the named-Defendants to the lawsuit. The tiered-subcontractor situation here between BRTI and the other named Defendants is focused around Continental’s well sites in North Dakota, specifically the one Mr. Buckles died at. Any Montana connection between certain parties led to the parties’ relationship as a whole in North Dakota at the well site owned by Continental where Mr. Buckles died, which is the subject of the instant litigation. Therefore, § 145(2)(d) favors North Dakota.

Evidenced by the foregoing, the § 145(2) factors weigh in favor of North Dakota. In *Winter*, Judge Morris concluded the § 145 factors, “considered collectively, weigh slightly in favor of North Dakota law.” *Winter*, 2015 WL 9855923 at *2. Judge Watters in *Otto* concluded “that the totality of the § 145(2) factors favor the application of North Dakota law.” *Otto*, 2016 WL 9461791 at *6. Here, as explained above, factors (2)(a), (b), and (d) all favor North Dakota. Factor (2)(c) is but one factor that, at most, weighs slightly in favor of Montana. Therefore, consistent with the applicable presumption, the totality of the § 145(2) factors favor application of North Dakota law.

In total, a dearth of evidence exists showing Montana’s slight relationship with the instant litigation can overcome the presumption that North Dakota law applies. The totality of both the §§ 6(2) and 145(2) factors show Montana lacks a more significant relationship to the litigation. North Dakota is not just the place where the injury occurred, but also the central focus of events pertinent to the lawsuit. That is where the parties’ relationship is focused, the place where the alleged acts or omissions giving rise to the lawsuit occurred, and, accordingly, the State that has the most significant relationship to the litigation. So, even if this were a close call—which it is not as explained above—this Court should follow the presumption and conclude North Dakota law applies.

B. UPHOLDING THE DISTRICT COURT’S ERRONEOUS DECISION TO APPLY MONTANA LAW WOULD ENCOURAGE FORUM SHOPPING BETWEEN MONTANA STATE AND FEDERAL COURTS.

Considering the decisions in *Otto* and *Winter*, deciding Montana law applies in this case may encourage forum shopping as between State and Federal courts in Montana. Such a divergence between Montana State and Federal courts on the exact same issue under analogous factual scenarios makes no logical sense, thereby providing even more reason to reverse the District Court’s erroneous decision to displace the presumptive application of North Dakota law in favor of Montana law.

Forum shopping is defined by Black’s Law Dictionary as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.” Black’s Law Dictionary (11th ed. 2019). As the United States Supreme Court has explained, “[a]n opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws.” *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990) (citation omitted). One court has noted that “[o]ne particular concern in choice-of-law methodology is to minimize forum shopping designed to influence choice of law.” *Lommen v. City of East Grand Forks*, 522 N.W.2d 148, 151 (Minn. App. 1994) (citation omitted). Under a choice of law interest weighing analysis between two states, the Sixth Circuit has noted that “the importance of discouraging forum shopping is a legitimate factor[.]” *Standard Fire Ins. Co. v. Ford Motor Co.*, 723 F.3d 690, 699 (6th Cir. 2013) (citations omitted).

Here, no logical reason exists to stray from the well-reasoned decisions Judge Watters and Judge Morris rendered in *Otto* and *Winter*, respectively. Indeed, both decisions stand for the position North Dakota law applies where a Montana resident who voluntarily works in the North Dakota oil fields dies while working in the North Dakota oil fields. The precise legal issue under analogous facts is before this Court currently, so this Court should follow the reasoning in *Otto* and *Winter*.

The fact that Montana law may provide a plaintiff with a better chance of a higher damages award is an insufficient basis for inviting such forum shopping. In *Simmons v. State*, 206 Mont. 264, 286, 670 P.3d 1372, 1383 (1983), this Court noted that “predicating jurisdiction on which forum provides the highest possible damage award would be conducive to the unacceptable practice of ‘forum shopping.’” Similarly, here predicating which State’s law applies on what would be best for the plaintiff would reward forum shopping. Thus, any argument that Montana law should apply because Montana law could provide for a higher damages award should be disregarded.

If Montana State and Federal courts conflict with respect to whether North Dakota or Montana law applies in a situation where a Montana resident voluntarily goes to North Dakota for work and either suffers injuries or dies while in North Dakota, then every time such a situation arises, the injured party (or his or her representative) will file in Montana State court knowing Montana law applies.

Injured parties would therefore be encouraged to prevent removal to federal court by whatever means necessary, including suing a Montana party even if the facts did not support imposing liability on the Montana party. In turn, Defendants like BRTI would seek application of the presumptively applicable North Dakota by trying to get the case removed to Montana Federal court by whatever means available.

By simply applying the pertinent Restatement (Second) of Conflict of Laws factors and following the presumption, courts should only reach one result: Judges Morris and Watters were correct in applying North Dakota law rather than Montana law in situations where a Montana resident dies while voluntarily working in the North Dakota oil fields. Plaintiffs in such situations should not be allowed to bring suit in Montana and seek application of Montana law when North Dakota law presumptively applies and North Dakota has a more significant relationship to the litigation. Therefore, to avoid an invitation to forum shop as between Montana State and Federal courts, BRTI respectfully requests that this Court hold North Dakota law applies.

VII. CONCLUSION

Pursuant to the foregoing, the District Court erred by making the incorrect legal determination to apply Montana law instead of the presumptively applicable North Dakota law. The District Court's legal determination is inexplicably at odds with two Montana Federal District Court decisions which interpreted the exact same

legal question under substantially similar facts. As the relevant factors under the Restatement (Second) of Conflict of Laws support application of the presumptively applicable North Dakota law and no good reasons exists for Montana State and Federal courts to differ on the exact same issue, North Dakota law should govern the instant litigation. Accordingly, this Court should reverse the District Court's decision to apply Montana law and hold North Dakota law applies to the instant litigation. BRTI respectfully requests such relief.

RESPECTFULLY SUBMITTED this 20th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant’s Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is 7,906 words, excluding the cover, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 20th day of December, 2019.

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