IN THE SUPREME COURT OF THE STATE OF MONTANA

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,

Petitioners and Appellees,

vs.

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

Respondents and Appellants

APPELLEES' ANSWER BRIEF

ON APPEAL FROM THE MONTANA SEVENTH JUDICIAL DISTRICT COURT,
RICHLAND COUNTY
HON. OLIVIA RIEGER PRESIDING

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I. WHETHER THE DISTRICT COURT'S DETERMINATION THAT MONTANA LAW APPLIES TO THIS CASE WAS CORRECT, BECAUSE MONTANA HAS THE MOST SIGNIFICANT RELATIONSHIP TO THE OCCURRENCE AND PARTIES.

STATEMENT OF THE CASE

Appellants, two Montana companies who employ Montana workers, are asking this Court to overturn twenty years of Montana conflict of law precedent, *Phillips v. General Motors Corporation*, 2000 MT 55, 298 Mont. 438, 995 P.2d 1002.

They base this remarkable assault solely on two factually inapposite federal court decisions. This attack is designed not for Montana public policy reasons, but simply to grant these two Montana companies employing Montana workers, in this case, the shelter of North Dakota laws severely limiting workers' rights when corporate entities hurt or kill them through action or inaction towards safe workplace practices.

This Court is well familiar with Buckles. Over the five years this case has been in existence, Montana law, the law first pled and used by the District Court and by this Court, has governed all decisions. This will be the third time the case is before this Court. First, it was here was on jurisdiction of Montana over the case, which resulted in Buckles I. *Buckles v. Cont'l Res., Inc.*, 2017 MT 235, 388 Mont. 517, 402 P.3d 1213. Currently, Buckles II is fully briefed since October 4, 2019,

and pending decision and opinion from this Court. Again, the issue is Montana jurisdiction over Continental Resources, Inc. (hereinafter "Continental"), based on the developed factual record from an August 13, 2018 jurisdictional trial.

The Appellants here, Black Rock Testing, Inc. (hereinafter "Black Rock") and BH Flowtest, Inc. (hereinafter "BH Flowtest") have been consistently advancing their current argument—that North Dakota law, not Montana law, controls the Buckles' case—since 2015. They were first rejected by the Richland County Court on August 19, 2016. Their last rejection, on "reconsideration," was February 8, 2019. The law of this case, since August 2016, has been Montana law controls.

Richland County Court Orders, both times, since August of 2016 were decidedly correct that Montana law controls this long-litigated Buckles' odyssey. Montana law applies to this case, because only Montana has the most significant relationship to the occurrence and parties under the facts of this case. North Dakota in no way does.

STATEMENT OF FACTS

Zachary Buckles, a Montana resident, was hired by Janson Palmer, d/b/a/ Black Gold Testing ("Black Gold"), a Montana resident doing business in Montana,

to manually gauge crude oil production tanks for Continental.[1] BRAPP. 9 at ¶10; BRAPP. 15 at pgs. 11:6-12:8, 17:14-22, 51:24-52:19; BHAPP. 8 at ¶¶6, 9, 10 and 11; SAPP. 1 at Answer to Int. No. 6. Black Gold did work for Continental in both North Dakota and Montana. BRAPP. 15, at pg. 17:14-22. At the time of his injury and subsequent death, Zachary was a resident of Glasgow, Valley County, Montana. BRAPP. 9, at ¶ 1; BRAPP 16. During his employment with Black Gold, Zachary maintained his Montana telephone number and address and received payment for his services in Montana from Black Gold's Montana address. SAPP. 1, at Answer to RFP No. 3, Bates Nos. 000004-000005; SAPP. 2; BRAPP. 15, at pg. 52:9-19.

On or about April 17, 2014, Zachary was dispatched by Black Gold from his residence in Glasgow, Montana to perform manual tank gauging and production monitoring activities on Continental's Columbus Federal 2-16H well site, which is a tank battery consisting of 20 tanks supporting five production oil wells to include Tallahassee 2-16H and Tallahassee 3-16H. SAPP. 1; BRAPP. 1, at ¶¶ 10 and 11; BHAPP. 8 at ¶¶ 10 and 11; BRAPP. 15 at pgs. 11:6-12:8, 17:14-18:7, 51:24-52:19. Black Gold performed manual tank gauging activities for Black Rock, a Montana corporation with its principal place of business in Montana and doing business in

[1] Black Rock Appendix is hereinafter referred to as ("BRAPP"). BH Flowtest Appendix is hereinafter referred to as ("BHAPP"). Where the Appendices have what appear to be duplicate entries, Buckles will use Black Rock's Appendix ("BRAPP") only. Buckles' supplemental appendix will be cited as ("SAPP.")

Montana, pursuant to a Montana agreement governed by Montana law. *Id.;* BRAPP. 1, ¶5; BRAPP. 2, ¶5; SAPP. 1, at Answer to RFP No. 3, Bates No. 000001-000002. Black Rock performed manual tank gauging activities for Continental pursuant to Continental's Master Service Contract with BH Flowtest, another Montana corporation with its principal place of business in Montana and doing business in Montana, that contracted with Black Rock. BRAPP. 1 at ¶¶ 4-6 and 11; BRAPP. 2, ¶¶ 4, 5 and 11; BRAPP. 3, ¶¶ 4 and 11; BRAPP. 15, at pgs. 51:24-52:5; SAPP. 1, at Answers to Int. No. 5 and RFP. No. 3; SAPP. 3, at Response to RFP No. 1, Bates No. 00001-00006.

Despite its allegations to the contrary, at the time of defendants' wrongdoing and Zachary Buckles' subsequent death, BH Flowtest's principal place of business was in Montana and it did business in Montana, by its own admissions. BH Flowtest used its Montana address in its Master Service Agreement with Continental; it listed its Sidney, Montana address as its principal business address with both the Montana and North Dakota Secretary of State; its Montana address was used in the OSHA investigation; its insurance policies during the relevant times used its Sidney, Montana address (even listing the "address of all premises" that BH Flowtest owned, rented or occupied as its Sidney, Montana address) and included Montana riders. SAPP. 3, at Response to RFP No. 1, Bates No. 00002; SAPP. 5; SAPP. 6.

Continental is an Oklahoma Corporation which has been authorized to do

business in the State of Montana since May 21, 1990. SAPP. 7; SAPP. 8, at Answer to Int. No. 2. Since that time, Continental has maintained a significant presence in Montana, as demonstrated by the fact it has an ownership interest in 508 oil and gas wells in Montana and is the operator of 348 oil and gas wells in Montana. SAPP. 8, at Answer to Int. Nos. 4 and 5. Continental also owns the production casing, well heads, tubing, and storage tanks which service those oil and gas wells in Montana. SAPP. 8, at Answer to Int. No. 6. Continental also owns over 100 vehicles licensed and registered in Montana, and real property in multiple counties throughout Montana to include Richland County. SAPP. 8, at Answers to Int. Nos. 7 and 10 and RFP Nos. 4 and 8.

Continental supervised and directed the activity of Black Rock and Zachary Buckles, including Zachary Buckles' tank gauging activities on its Columbus Federal 2-16H well site and Tallahassee 2-16H and 3-16H tanks, from its corporate office in Sidney, Montana. *Id.*, at Answers to Int. No. 7 and 10 and RFP No. 4 and 8; SAPP. 1, at Answer to RFP No. 3, Bates Nos. 000004-000005; SAPP. 10; BRAPP. 15, at pgs. 17:14-19:12, 22:4-25:12, 34:7-24. Continental's Sidney, Montana office told Zachary and Black Gold where to work and when to stop work, and its supervisors could fire subcontractors who did not follow their directions, and correct or shut down operations if there was unsafe activity or conditions. SAPP. 10, i.e. depo. excerpts of Joe Couture at pg. 19:5-14, Clint Dunn at pgs. 25:15-26:20,

Dusty Grosulak at pg. 14:6-22, Russell Atkins at pgs. 22-26 and 30-31, Darrell Berglund at pg. 29:8-22; BRAPP. 15, pgs. 17:14-19:23, 23:11-25:18. Continental also held safety meetings and training in Sidney, Montana, yet failed to provide those safeguards to Zachary Buckles. SAPP. 10, i.e. at depo. excerpts of Joe Couture at pgs. 22-23, Clint Dunn at pg. 24, Russell Atkins at pgs. 25-26, Darrell Berglund at pg. 27:6-23; BRAPP 28:19-29:17, 45:19-46:11.

The manual tank gauging of crude oil production tanks requires a person, such as Zachary, to have adequate and appropriate air monitoring equipment, as well as training regarding overexposure to hydrocarbon vapors at the time of their initial assignment. SAPP. 4; BRAPP. 1, ¶¶ 13 and 14; BRAPP. 2, ¶¶ 13 and 14; BRAPP. 3, ¶¶ 13 and 14. Prior to being dispatched for work from Montana to North Dakota, neither Black Gold nor Appellants nor Continental ensured Zachary had adequate and appropriate air monitoring equipment or training. SAPP. 4; BRAPP. 1, ¶ 15; BRAPP. 15, at pgs. 28:19-29:17, 30:10-21.

On April 28, 2014, Zachary was manually gauging crude oil production tanks for Black Gold on Continental's Columbus Federal 2-16H well site located near Alexander, North Dakota, specifically, Tallahassee 2-16H tank number three and Tallahassee 3-16H tank number one, when he was overcome by exposure to hydrocarbon vapors and died. BRAPP. 1, ¶¶ 10 and 16; BRAPP. 2, ¶16; SAPP. 4; SAPP. 9, ¶16.

Buckles' complaint seeks damages for, among other things, the Defendants' breach of their duty to maintain a safe and secure work area for Zachary, for allowing an inherently dangerous and unsafe well site to be operated, and for failing to protect Zachary from overexposure to hydrocarbon vapors, including, but not limited to, failing to provide adequate or appropriate air monitoring equipment for the tank gauging activities being performed by Zachary, failing to provide Zachary with effective information and training regarding overexposure to hydrocarbon vapors, and otherwise failing to protect Zachary from overexposure to hydrocarbon vapors. BRAPP. 1, at ¶¶ 16-18.

The wrongful activity in this case occurred in Montana. Continental and the other Defendants allowed an inherently dangerous and unsafe well site to be operated, which they did from Montana, where they supervised, operated and controlled the wellsite where Zachary died; they dispatched Zachary Buckles for inherently dangerous work on an unsafe well site, which they did from Montana, and; they failed to protect Zachary from overexposure to hydrocarbon vapors, including failing to provide him with adequate and appropriate air monitoring equipment and training regarding overexposure to hydrocarbon vapors while manually gauging crude oil production tanks that OSHA required, which should have occurred in Montana, when he was hired to do work for Continental. SAPP. 1, SAPP. 4; SAPP. 10; BRAPP. 1, ¶¶ 10, 11 and 15; BRAPP. 15, at pgs. 11:6-12:8,

17:14-19:12, 22:4-25:12, 28:19-29:17, 30:10-21, 34:7-24 and 51:24-52:19; BHAPP. 8 at ¶¶ 10 and 11. The critical conduct, or lack of conduct, at issue in this case is all centered in Montana—the State where Zachary lived, was employed, was supervised and directed, and was not issued appropriate air monitoring equipment or provided safety training before being dispatched from Montana to do inherently dangerous work. *Id.*

The District Court correctly held Montana law applies to this case, because Montana has the most significant relationship to the occurrence and parties. Montana companies that have their principal place of business in Montana, do business in Montana, receive Montana benefits, and take advantage of Montana workers for jobs supervised from Montana cannot be allowed to escape application of Montana law governing them and designed to protect those Montana workers.

STANDARD OF REVIEW

The choice of law is a question of law. *Tidyman's Management Services, Inc., v. Davis*, 2014 MT 205, ¶ 13, 376 Mont. 80, 330 P.3d 1139 (citations omitted.) Choice of law decisions are reviewed de novo. *HSBC Bank USA, N.A. 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. Therefore, the District Court's decision to apply Montana law to this case is subject to de novo review.

SUMMARY OF ARGUMENT

The District Court twice properly concluded Montana law applies to this action. Appellants now come to this Court asking it to overturn a twenty year old precedent, *Phillips v. General Motors Corporation,* 2000 MT 55, 298 Mont. 438, 995 P.2d 1002, and blindly follow distinguishable federal cases, so they can use North Dakota law favorable to corporations. No justification for such an upheaval exists.

Under the long established law of Montana, as set forth in *Phillips*, when there is a conflict of laws of two states, as in this case, the choice of law is not decided using the minority presumption that the law of the state of injury applies, but by the more flexible, multi-factor approach of determining which state has the most significant relationship to the occurrence and parties. *Phillips*, 995 P.2d at 1007. The Courts determine which state has the most significant relationship by analyzing the factors set forth in the Restatement (Second) of Conflict of Laws, as described in *Phillips,* 995 P.2d at 1007-08. In this case, those factors compel the application of Montana law.

Zachary Buckles was a Montana resident hired by a Montana company in Montana to do work for a company that operates out of and supervises the conduct of Montana employees, including Mr. Buckles, from its business in Sidney, Montana. No party to this action was a North Dakotan. Although Mr. Buckles died

in North Dakota, the conduct giving rise to Zachary Buckles' death occurred in Montana and the relationship between the parties centered around Mr. Buckles' employment by a Montana company and supervision from Montana. Applying Montana law would advance Montana's strong public policy of protecting Montana workers and regulating Montana corporations that hire and supervise Montanans in Montana. The Montana Supreme Court has a history of protecting the citizens of this state over corporate profiteering and should continue that legacy. Since Montana has the most significant relationship to the occurrence and the parties in this case, Montana law should apply.

Although Appellants seize upon two federal cases that made choice of law rulings in cases involving North Dakota well site accidents, those cases are distinguishable from this case. Neither of those cases involved defendants that were Montana companies hiring Montanans, and neither case indicated it involved the same relationships, duties and supervision as in the instant case. District Courts should make decisions regarding the proper choice of law on a case-by-case basis as mandated by *Phillips* and its progeny, rather than being directed, now, to apply a new "presumption" that accidents that happen on North Dakota oil and gas well sites should be decided by North Dakota law, as urged by Appellants.

Applying Montana law in this case would not lead to "forum shopping." Quite the contrary, for Montana Courts have been using *Phillips* for two decades, and both

the state and federal Courts shall continue in their unbiased analysis of the *Phillips* factors considering the "unique facts, issues, applicable law and jurisdictions implicated in a particular case," following *Phillips*. *Phillips*, 995 P.2d at 1007.

Finally, the application of Montana law will not violate due process, because Montana has significant contacts and state interests in this case. Given both Appellants were Montana corporations with their principal place of business in Montana and hired Montana residents for a job supervised from Montana, the use of Montana law would certainly not be arbitrary or fundamentally unfair. The District Court twice correctly determined Montana law applies, and neither the District Court nor this Court violates due process when applying Montana law in this case.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT WHEN IT DETERMINED THAT MONTANA LAW APPLIED IN THIS CASE

In cases where the parties disagree as to which state's substantive law applies to a case, the Court is tasked with the determination of the choice of law whenever there is a conflict in those laws that will affect the outcome of the case. *Phillips,* 995 P.2d at 1005-06; *Winter v. Pioneer Drilling Services, Ltd.*, 2015 WL 9855923, *2 (D. Mont. 2015).

There is a conflict between applicable Montana and North Dakota law in several respects in this case. Montana law recognizes joint and several liability for tortfeasors who are found more than 50% liable and/or those who act in concert.

Mont. Code §27-1-703. North Dakota law provides "each party is liable only for the amount of damages attributable to the percentage of fault of that party," and further provides that fault can be attributed to a tortfeasor, "whether or not a party." N.D. Cent. Code §32-03.2-02. Additionally, Montana holds an entity and/or employer like Continental "vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce the unreasonable risks associated with engaging in an inherently dangerous activity." *Beckman v. Butte-Silver Bow County*, 1 P.3d 348, 353 (Mont. 2000). However, North Dakota has not yet provided for strict liability in such instances. *Id.* at 351 (citing *Peterson v. City of Golden Valley*, 308 N.W.2d 550 (N.D. 1981)). Montana and North Dakota also differ in their punitive damages law, as Montana caps punitive damages at $10,000,000 or 3% of a defendant's net worth, whichever is less, and North Dakota limits a punitive damage recovery to two times the amount of compensatory damages or $250,000, whichever is greater. §27-1-220(3), MCA; §32-03.2-11(4), NDCC. Because of the clear conflict of these laws, it was appropriate for the District Court to determine the proper law to be applied. *Winter*, 2015 WL 9855923, *2.

Since Montana has no statute that governs choice of law in personal injury causes of action, to determine which state's law applies in such cases, Montana follows Sections 6, 145, and 146 of the Restatement (Second) of Conflict of Laws. *Phillips*, 995 P.2d at 1006-07 (applying Montana law in cause of action involving

injury that occurred in Kansas). When adopting the Restatement approach, Montana specifically rejected the *lex loci delicti* rule, which is the distinct minority rule stating that the law from the state of injury controls. *Id.* at 1007. Instead, under the Restatement, the law of the state with the "most significant relationship to the occurrence **and** the parties" is applied. *Id.* (emphasis added). The state's law of the place of injury will not be applied if "some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties." Restatement (Second) of Conflict of Laws §146.

Based upon the principles stated in the Restatement (Second) of Conflict of Laws §6, as adopted in *Phillips*, Montana clearly has the most significant relationship to the occurrence and parties. The District Court's two rulings that Montana law applies in this case are correct.

A. MONTANA HAS THE MOST SIGNIFICANT RELATIONSHIP TO THE OCCURRENCE AND THE PARTIES

Montana Courts do not follow the minority presumption that the law of the state of injury applies. Montana looks to the principles set forth in the Restatement (Second) of Conflict of Laws §6 to determine which state has the most significant relationship to the occurrence and the parties. *Phillips*, 995 P.2d at 1007-08. These principles are:

(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 the determination and application of the law to be applied.

Id. at 1008, citing Restatement (Second) of Conflict of Laws §6.

Additionally, when applying the principles set forth in Restatement §6, the Courts should consider the following contacts:

(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., citing Restatement (Second) of Conflict of Laws §145.

With respect to this case, there is neither any policy reason, nor legal authority for this Court to overrule *Phillips* and now hold a *lex loci* approach applies, as suggested by Appellants. Under well-established Montana precedent, the fact that Zachary was injured in North Dakota in no way controls the choice of law. *Phillips*'

rationale does.

1. THE MAJORITY OF THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 CONTACTS ARE IN MONTANA

When considering the Restatement (Second) of Conflict of Laws §145, this case presents an even more compelling case for the application of Montana law than the landmark *Phillips* case, because all of the Restatement (Second) of Conflict of Laws §145 contacts, with the exception of the place of injury, are in Montana.

Phillips was a personal injury/product liability/wrongful death case involving an automobile accident in Kansas that killed three members of a Montana family and injured a fourth. In the Phillips' diversity action against General Motors, the United States District Court for the District of Montana certified the choice-of-law question to the Montana Supreme Court, which adopted the Restatement test articulated above. The various states' policies and statutes were closely analyzed in light of the (a) place of injury, (b) place of conduct, (c) residence of parties, and (d) the place where the relationship between the parties is centered. Even though the accident occurred in Kansas, and the vehicle was purchased in North Carolina and designed and manufactured in Michigan, the Montana Supreme Court held that Montana law applied, because Montana had the most significant relationship to the cause of action, *Phillips*, 995 P.2d 1002.

Notably, in *Phillips*, the only Montanans were the plaintiffs. *Phillips*, 995 P.2d at 1005. In this case, in addition to the fact that Zachary Buckles was domiciled

in Montana at the time of his death and his heirs and estate are in Montana, Black Gold, Black Rock and BH Flowtest were all Montana companies, doing business in Montana, with their principal place of business in Montana. Continental was an Oklahoma company, but centered their contacts in Montana and supervised the job site where Zachary Buckles died from its Sidney, Montana headquarters. None of the parties were North Dakotans.

Additionally, the conduct causing the injury occurred in Montana. Like *Phillips*, where the claims were against General Motors, not against the driver of the other vehicle involved in the crash, Zachary Buckles' claims are not against co-employees located at the job site or the source of the hydrocarbon vapors that ultimately caused his death, but against Continental, BH Flowtest, and Black Rock for unreasonably employing him to do the inherently dangerous activity of manually gauging crude oil production tanks and failing to protect him from overexposure to hydrocarbon vapors, and failing to provide him with adequate or appropriate air monitoring equipment and training to prevent overexposure to hydrocarbon vapors while manually gauging crude oil production tanks, as OSHA required. SAPP. 4; SAPP. 10; BRAPP. 15, at pgs. 28:19-29:17, 30:10-21, 45:19-46:11.

Further, Continental's, BH Flowtest's and Black Rock's collective failure to provide a safe workplace and to do any other thing reasonably necessary to protect the life, health and safety of its employees all occurred in Montana, where they had

the ability and duty to ensure that the well site was safe through their Montana supervision and control, and that Zachary Buckles left Montana with the appropriate equipment and training to protect his life, health and safety. *Id.* The safety measures required should have been initiated in Montana and ensured to be in place, so Zachary Buckles would be safe when dispatched from Montana.

Finally, unlike *Phillips*, where the Montana Supreme Court held there was no relationship between the parties for purposes of the choice-of-law analysis, here, there is a *strong* Montana relationship between the parties. Again, Zachary was a Montana resident hired and paid in Montana by Black Gold, which was hired by Black Rock under a Montana contract governed by Montana law, and both were Montana companies with their principal place of business in Montana. Black Rock was hired by BH Flowtest, also a Montana company with its principal place of business in Montana. Although BH Flowtest continues to argue its relationship with the parties was centered on the North Dakota well site, its June 19, 2011 Master Service Contract with Continental provides that the work to be performed for Continental could occur whenever and wherever Continental directed. SAPP. 3, at Bates No. BH00001, ¶ 1.1. The work to be performed was in the Bakken region, which underlies Montana, as well as North Dakota and other areas, wherein Continental owns and/or operates hundreds of well sites and tank batteries without regard to specific borders or boundaries. BH Flowtest did not limit Black Rock's

work to any specific well site in the Bakken either, so neither Continental nor BH Flowtest was limited to North Dakota in their quest to extract resources.

Further, Continental actively conducts oil and gas business in Montana and chose and contracted with these Montana subcontractor(s) knowing they employ numerous Montana residents, and did not exclude Montana from the scope of its Bakken formation work in its contracts with these Montana subcontractors. *Id.* Moreover, Continental supervised and operated the particular well site and Zachary's work from its corporate offices in Sidney, Montana.[2] SAPP. 1, at Answer to RFP No. 3, Bates Nos. 000004-000005; SAPP. 10; BRAPP. 15, pgs. 17:14-19:12, 22:4-25:12, 34:7-24.

While the place of Zachary's death was in North Dakota, as *Phillips* found, the place of injury is not controlling. *Phillips*, 995 P.2d at 1007. In this case, all other contacts set forth in the Restatement (Second) of Conflict of Laws §145 were in Montana and compel the application of Montana law when considered in conjunction with the factors set forth in the Restatement (Second) of Conflict of Laws §6, discussed below.

[2] Despite the fact that Continental had offices in Killdeer and Tioga, North Dakota, Continental chose to operate and supervise the North Dakota well site where Zachary was killed from its Sidney, Montana office. Zachary Buckles' name and Montana telephone number even appear on the form that verifies Continental's supervision and direction of Zachary and others on the well site. SAPP. 1, at Answer to RFP No. 3, Bates Nos. 000004-000005.

2. THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6 FACTORS WEIGH IN FAVOR OF APPLYING MONTANA LAW

The principles set forth in Restatement (Second) of Conflict of Laws §6 are analyzed in light of the Restatement (Second) of Conflict of Laws §145 contacts, which weigh in favor of applying Montana law. Only Black Rock analyzes the Restatement (Second) of Conflict of Laws §6 factors in light of this particular case. BH Flowtest seems to simply rely on the argument that this case should be decided the same way as *Otto*. Both are dead wrong.

a) THE NEEDS OF THE INTERSTATE AND INTERNATIONAL SYSTEM IS A NEUTRAL FACTOR

In evaluating the needs of the interstate and international system, the goal is to "further harmonious relations between states and to facilitate commercial intercourse between them." *Phillips*, 995 P.2d at 1008-09 (quoting Restatement (Second) Conflict of Laws §6 cmt. d). In *Phillips*, the Montana Supreme Court held that this goal is furthered by the application of the Restatement approach, which "is preferable . . . to the traditional *lex loci* rule which applies the law of the place of the accident." *Id.* at 1009. Since both Montana and North Dakota appear to have adopted choice of law principles from the Restatement, there appear to be no diverse needs of the interstate and international system that would favor application of one state's laws over another. Black Rock and BH agree. *See*, Black Rock's opening brief at pg. 19; BH Flowtest's opening brief at pg. 10 (adopts *Otto*).

b) and c) THE RELEVANT POLICIES OF THE FORUM AND RELEVANT POLICIES OF OTHER INTERESTED STATES FAVOR APPLICATION OF MONTANA LAW

The relevant policies of the forum state (Montana) and the relevant policies of the other interested states (North Dakota) "are the most important factors" in a case such as this where the plaintiff was injured outside his state of domicile. *Phillips*, 995 P.2d at 1009. A state's relevant policies are reflected in both its statutory and common law. *Id.* (citing Restatement (Second) Conflict of Laws §6 cmt. e). "If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made." *Id.* (quoting Restatement (Second) Conflict of Laws §6 cmt. e).

Appellants reiterate the policy considerations conducted in *Otto* and *Winter*, noting that both Montana and North Dakota have a "strong interest in protecting workers in the workplace" and "fairly compensating workers for work-related injuries," and appear to believe North Dakota's interest in regulating its petroleum extraction industry tips the scales for the use of North Dakota law. See Black Rock brief at pg. 19-21; BH Flowtest brief at pg. 9.[3] However, Appellants fail to acknowledge that *Otto* and *Winter* did not deal with or discuss any policies in

[3] BH Flowtest also cites to 16 Am Jur. 2d, Conflicts of Laws, §119 (2009) and appears to recite the minority *lex loci* rule rather than the *Phillips* rule used by this Court.

relation to a Montana resident who was hired in Montana, by Montana companies with their principal place of business in Montana, or violations of Montana and federal laws by those companies while in Montana.

In *Phillips,* this Court discussed Montana's adoption of a strict liability standard in relation to products liability to prevent injuries to its citizens and afford "maximum protection for consumers." *Phillips,* 995 P.2d at 1012. Likewise, since this Court has seen fit to provide for strict and vicarious liability for its citizens injured while doing an inherently dangerous activity, it clearly believes its citizens like Zachary Buckles and other Montanans employed to do such work, are entitled to the maximum protection under the law. *Beckman*, 1 P.3d at 350-51 (citing Restatement (Second) of Torts §416, §427).[4] As was the case in *Phillips,* when

[4] When one hires "an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of harm to others unless special precautions are taken, [the employer] is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions." Restatement (Second) of Torts §416; Restatement (Second) of Torts §427 (a party that "employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work . . . is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.") Here, OSHA required, among other things, special precautions in the form of providing Zachary Buckles with effective information and training regarding hazardous chemicals. 29 C.F.R. §1910.1200(h)(1) and (h)(3)(i). Continental, BH Flowtest and Black Rock can be held vicariously liable for the violation of law and resulting harm. *Beckman,* 1 P.3d at 350-51.

Montana adopted strict liability for inherently dangerous activities and vicarious liability, Montana expressed its strong public policy of ensuring its employers are held to higher standards when they are sending workers off to do inherently dangerous activity and providing the "maximum protection" and compensation for its workers who are injured doing such activity.

North Dakota has not expressed a strong public policy one way or the other in relation to strict liability for workers engaged in inherently dangerous activity. North Dakota has not specifically adopted or rejected the Restatement test regarding abnormally dangerous activity and the application of strict liability. *Otto,* 2016 WL 9461791, *7-10, citing *Wirth v. Mayrath Indus., Inc.* 278 N.W.2d 789, 790-91 (N.D. 1979) and its progeny, including *Silliman v. Dirkwager*, 2011 ND 54, 795 N.W.3d 372 (2011). In fact, North Dakota has noted that a standard of care proportionate to known dangers is appropriate in some situations and has implied strict liability might apply in the right circumstances. *Id.* Nonetheless, because North Dakota has not yet specifically adopted strict liability for abnormally dangerous activity, its courts have found none is available. *Id.* Surely, such an undecided and ambiguous policy cannot override the strong public policy behind Montana's strict and vicarious liability laws for employers that send their Montana workers to do inherently dangerous activity in Montana or North Dakota, where the Bakken pool does not respect state borderlines.

With regard to comparative liability policies, both Montana and North Dakota appear to have the goal of fairly apportioning liability among those responsible for a person's injuries. §27-1-703, MCA; *Haff v. Hettich*, 1999 ND 94, ¶¶ 27-28, 593 N.W.2d 383, 390. Montana's joint and several liability statute requires that tortfeasors who are found more than 50% liable are jointly and severally liable. §27-1-703, MCA. North Dakota's statute does not provide this protection and further provides that non-parties can be apportioned liability. *See* §32-03.2-02, NDCC. Montana has previously determined that allowing for apportioning liability among nonparties without procedural safeguards for injured parties and nonparties violates substantive due process. *Newville v. State Dep't of Family Servs.*, 267 Mont. 237, 883 P.2d 793, 803 (Mont. 1994). The North Dakota Supreme Court disagreed with the Montana Supreme Court in this regard, believing its interpretation to be too broad. *Haff*, ¶¶ 27-28. However, Montana's Constitution is the supreme law of this state. *Associated Press v. Board. of Public Educ.* **(**1991), 246 Mont. 386, 391, 804 P.2d 376, 379. The Montana District Court should not be forced to apply a North Dakota law that will violate the Constitutional rights of one of its citizens, particularly when none of the parties are North Dakota citizens.

In addition to Montana's strong interest in protecting its citizens' substantive due process rights, Montana's statute reflects the state's strong public policy that its injured citizens should be made whole, and in order for its residents to be fairly and

fully compensated for their injuries, tortfeasors with over 50% liability, rather than the plaintiff, should bear the burden of paying for injuries proximately caused by fellow tortfeasors from which recovery is impossible. §27-1-703, MCA; *State ex rel. Deere & Co. v. District Court*, 224 Mont. 384, 396, 730 P.2d 396, 404 ("In retaining joint and several liability, the legislature saw the wisdom of protecting even a comparatively negligent plaintiff.") North Dakota's law reflects the opposite view and plaintiffs will have to bear the burden of an impecunious, immune, or otherwise deficiently-funded concurrent tortfeasor in such cases. *See* §32-03.2-02, NDCC. Comparative negligence principles do not determine what constitutes negligent conduct—the principles regulate the amount plaintiffs may recover and tortfeasors must pay, and the economic effects of the law will be felt in the state where the plaintiff and defendants are domiciled and incorporated—in this case, Montana and Oklahoma, not North Dakota. Since Zachary Buckles and all of those responsible for his death are from Montana and Oklahoma, not North Dakota, Montana policies should take precedence.

The application of Montana law would also advance Montana's Constitution, Article II, Section 16, which prohibits the enforcement of "[a]ny statute or court decision which deprives an employee of his right to full legal redress." *Trankel v. State Department of Military Affairs (1997)*, 282 Mont. 348, 359-62, 938 P.2d 614, 621-23*; Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶95, 303 Mont. 274, 305, 16

P.3d 1002, 1021, ("[…] any statute or court decision which deprives an employee of his right to full legal redress, *as defined by the general tort law of this state against third parties*, is absolutely prohibited.") If North Dakota law is applied, the plaintiff will not be allowed to obtain full legal redress or recover the full measure of his damages, even though Montana has determined certain tortfeasors could be held liable by its enactment of §27-1-703, MCA and its strict and vicarious liability laws.

Finally, both Montana's and North Dakota's policy and goal of punitive damages is to provide a punishment and deterrent to tortfeasors. § 27-1-220(1), MCA*; Ingalls v. Paul Revere Life Ins. Group*, 1997 ND 43, ¶48, 561 N.W.2d 273, 285 (citations omitted.) Montana and North Dakota each provide for punitive damages with limits that are capped. §27-1-220(3), MCA; §32-03.2-11(4), NDCC. However, Montana's punitive damage law focuses on a defendant's net worth, versus North Dakota's that is focused on a multiple of the damage to the plaintiff. *Id.* Montana has determined, "a defendant's financial condition is logically one of the essential factors to consider in determining an amount of punitive damages that will appropriately accomplish the goals of punishment and deterrence." *Seltzer v. Morton*, 2007 MT 62, ¶132, 336 Mont. 225, 154 P.3d 561. An award of punitive damages "may constitute a significant level of punishment for an individual of modest means, but it could amount to an inconsequential penalty for an individual with vast financial resources." *Id.* In Montana, "[p]unitive damage awards should

not be a routine cost of doing business," and the function of deterrence is not served where a wealthy defendant can easily handle a punitive damages award. *Id.*, ¶ 133. Montana's punitive damage law is more meaningful to large corporations, like Continental, as opposed to North Dakota's law sharply limiting awards to a plaintiff. Again, because all defendants in this case are from Montana and Oklahoma, not North Dakota, the deterrent effect and the economic impact will be most palpable in Montana, and Montana law should apply.

North Dakota's tort law and its defenses were primarily enacted to govern North Dakota corporations and citizens, but no party in this case is a North Dakotan. Appellants mimic *Otto* in arguing both North Dakota and Montana have an interest in protecting workers in the workplace and fairly compensating workers for work related injuries, however, when the worker is a Montana worker hired by a Montana company, as in this case, Montana's interest far surpasses any possible North Dakota interest. Additionally, while North Dakota may have an interest in regulating oil and gas development and activity that occurs within its borders, the application of Montana law to Montana corporations that hire Montana workers would have a nominal, if any, effect on companies developing oil and gas in North Dakota. These North Dakota economic interests are far outweighed by Montana's interests in protecting its citizens and ensuring they are made whole when injured in the workplace, regulating its employment relationships, making sure Montana

corporations hiring citizens of this state and doing business in this state are complying with its laws, and deterring those Montana companies from wrongdoing. Based on the foregoing, Montana policies must prevail.

d) THE PROTECTION OF JUSTIFIED EXPECTATIONS FAVORS APPLICATION OF MONTANA LAW

In *Phillips*, this Court explained that generally tort causes of action "do not involve justified expectations" because in the area of negligence "parties act without giving thought to the legal consequences of their conduct or to the law to be applied." *Phillips*, 995 P.2d at 1013. However, Zachary's case deviates from this generality, because certainly he gave thought to his employment and was hired by a Montana company, was supervised from Montana and received his paycheck in Montana, so he would have a justified expectation that his home state's laws would apply to anything related to his employment. SAPP. 1; SAPP. 2; BRAPP. 15 at pgs. 11:3-10, 17:14-22, 52:9-19. Zachary crossed state lines to work at Continental's Columbus Federal 2-16H well site only because the Montana business entity that hired Zachary dispatched him across state lines.

Neither Black Rock nor BH Flowtest have made any argument that this factor favors the application of North Dakota law and claim this factor is neutral. See Black Rock brief at pg. 21; BH Flowtest brief at pg. 10 (relying on *Otto*).

e) THE BASIC POLICIES UNDERLYING THE PARTICULAR FIELD OF LAW FAVOR THE APPLICATION OF MONTANA LAW

This Court in *Phillips* acknowledged "that the various interested states have reached different conclusions concerning the right level of compensation and deterrence for injuries caused by defective products." *Phillips*, 995 P.2d at 1014. Likewise, it appears that Montana and North Dakota both have the goal of finding the right level of compensation and deterrence in the field of tort law. When it comes to differing joint and several rules and punitive damage rules in Montana and North Dakota, the difference in these laws will change the amount to be paid by tortfeasors found to be at fault.

In this case, Montana's laws will advance the tort law goals of fair compensation and deterrence far better than North Dakota law. Montana's joint and several law will more likely result in fully compensating Buckles for the entire loss caused by concurrent tortfeasors, rather than providing additional defenses to these tortfeasors and reducing their potential financial liability. Additionally, again, Montana's punitive damage law is centered on providing a deterrent to tortfeasors based upon their net worth, which is more meaningful to large corporations, like Continental, as opposed to North Dakota's law based upon awards curtailed by plaintiff's damages. *Seltzer*, 154 P.3d 561, ¶¶132-34.

Both Black Rock and BH Flowtest allege this factor to be inapplicable based

upon the comments to this section stating the element to be "of particular importance" when the differences in the states' laws are only minor. See Black Rock brief at pg. 22; BH Flowtest at pg. 10 (relying on *Otto*.) The comment to this section does not say the factor is otherwise wholly inapplicable—it only provides guidance that the factor has *more* significance when there is a close call. Neither Appellant has argued this factor favors North Dakota for any reason.

f) and g) THE CERTAINTY, PREDICTABILITY AND UNIFORMITY OF RESULT AND THE EASE IN THE DETERMINATION AND APPLICATION OF THE LAW TO BE APPLIED FAVOR THE APPLICATION OF MONTANA LAW

In *Phillips*, the Montana Supreme Court combined the final two Restatement factors and held that "[a]pplying the law of the place of injury would not increase certainty or predictability any more than applying the law of the plaintiff's residence at the time of accident." *Phillips*, 995 P.2d at 1014. However, in this case, it would clearly increase the certainty, predictability and uniformity of law if Montana companies that hire Montanans for jobs that are supervised from Montana and that violate laws while in Montana, were held to the duties imposed by the laws of Montana that protect Montana citizens and workers, like Zachary Buckles, who have an interest in applying Montana's laws.

The Court in *Otto* noted that this factor is "particularly important 'in areas where parties are likely to give advance thought to the legal consequences of their transactions'." *Otto*, 2016 WL 9461791, *15, citing *Restatement* §6, *cmt. i*. It would

be disingenuous to argue Zachary Buckles and Black Rock did not give advance thought to the legal consequences of their Montana transaction at the time Zachary Buckles was hired by Black Gold in Montana or when Black Rock hired Black Gold in Montana. SAPP.1; SAPP. 2.

Black Rock claims these factors are either neutral or favor North Dakota law. See Black Rock's brief at pg. 22. Black Rock argues applying North Dakota law would increase predictability and uniformity in situations where a Montana resident gets injured or dies while working in the North Dakota oil fields, without any discussion of why the same would not be true if Montana law were applied to that same scenario. BH Flowtest again relies on *Otto*, which found these factors to be neutral. *See* BH Flowtest's brief at pg. 10; *Otto*, 2016 WL 9461791, *15-16.

It is unclear whether Appellants still argue, as they did in the District Court, that Continental's presence in the lawsuit somehow changes the conflict of law analysis, but there is no cause to deprive Buckles of the uniformity of the laws by applying different laws to different parties, like Continental. This is particularly true when all other parties are Montanans, none of the parties are North Dakotans, and Continental has chosen to own offices, scores of vehicles, oil wells and equipment in Montana, does business in Montana, and supervised, controlled, and operated the exact site where Zachary was killed totally from its office in Sidney, Montana. Indeed, such facts were unanimously testified to by five key Continental witnesses

at the August 13, 2018 hearing on jurisdiction. *See also*, SAPP. 10-deposition excerpts of Continental's supervising employees. While the Restatement has been applied to permit more than one state's law to apply to different *issues* in a case (under a process called "*depecage*"), there is no authority for applying more than one state's law to different *parties*, such as Continental. See *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 901 (Ill. 2007) ("the Second Restatement authorizes the process of *depecage*, which refers to the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis") (citing Restatement §145 cmt. d; *Phillips*, 995 P.2d at 1007); *Gregory v. Beazer East*, 892 N.E.2d 563, 580 (Ill. Ct. App. 2008) ("we find no precedent to support this use of *depecage* … [on] a defendant-by-defendant basis"); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1064 (10th Cir. 1992).

Without question, when analyzing the Restatement (Second) of Conflict of Laws §6 factors together with the §145 factors, only Montana has the most significant relationship to the occurrence and parties in this case, and Montana law must apply to protect Montana citizens, regulate Montana corporations and employment relationships, and ensure that Montana conduct does not violate Montana law. The District Court was correct, both times, when it ruled that Montana law is the law of this case.

B. THIS CASE IS DISTINGUISHABLE FROM THE FEDERAL CASES CITED BY APPELLANTS

Appellants claim the *Otto* case, decided in the Federal Court after the District Court's ruling in this case, along with the *Winter* case, which was fully addressed in the initial briefing prior to Judge Bidegaray's ruling, constitute grounds for overturning the District Court's opinion. The District Court was not swayed by either opinion.

Essentially, Appellants ask that the state courts of Montana, including this Supreme one, be bound by Federal District Court opinions they claim were rendered in similar cases, although in fact inapposite, even though the Montana District Court's prior ruling in this case found that Montana law applied in a case where a Montana resident hired by a Montana company to do a job supervised by a Montana office was killed or injured while working on a North Dakota oil well site. The federal courts applying Montana choice of law rules should follow Montana law, not the other way around. *Otto*, 2016 WL 9461791, *4; *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

Moreover, in Montana, each choice of law decision should be analyzed under the "unique facts, issues, applicable law and jurisdictions implicated in a particular case." *Phillips*, 995 P.2d at 1007. This case presents key differences from the *Otto* and *Winter* cases. In this case, Montana has different policy considerations and an increased interest, because, unlike *Otto* and *Winter*, it is not only dealing with a

Montana plaintiff supervised from a Montana office, but with defendants who were Montana employers with Montana based headquarters and duties that arose in Montana.

In *Otto* and *Winter*, no defendants were Montana corporations and no relationships were entered into between two Montanans. In *Winter*, the defendants Pioneer and Whiting were Texas and Delaware corporations, respectively, and the company that hired the deceased was a North Dakota company that was then hired by defendant Whiting in North Dakota, *Winter*, 2015 WL 9855923, *1 and *5. In *Winter*, there was no direct Montana relationship, but there was a direct North Dakota connection, since the deceased was employed by a North Dakota business. Similarly, in *Otto*, there was no direct Montana relationship, because defendant Newfield was a Texas corporation operating internationally, and the company that hired the deceased, Falco Energy, as well as the company that hired Falco, Enserco Energy, LLC, are believed to have been Delaware corporations. *Otto*, *13; SAPP. 11. In *Otto*, no Montana company hired the deceased for which defendant Newfield could be held vicariously liable. In fact, defendant Newfield had few, if any, identified Montana duties. There is nothing to indicate the conduct and relationship of the parties in *Otto* or in *Winter* was all centered in Montana like this Buckles case.

In this case, the addition of Montana corporate defendants, Black Rock and BH Flowtest, that hired a Montana resident for a job to be supervised from Montana,

creates critical, additional Montana policy considerations. Continental is the only defendant remotely similar to the defendants in *Otto* or *Winter*. However, dissimilar to the defendants in *Otto* and *Winter*, Continental knew from its Montana headquarters in Sidney it was hiring Montana companies with Montana employees and must be held to know it could be found vicariously liable for the torts of *Montana* subcontractors.[5]

Even if the *Winter* and *Otto* cases were exactly on point, which they are certainly not, nothing in *Winter* and *Otto* appears to have invoked Montana's strong public policy interests in ensuring its citizens are made whole when recovering for an injury in the workplace, and neither opinion even discusses the fact that the North Dakota law, which includes non-parties when determining liability, would violate a Montanan's substantive due process rights related to acts committed by Montana tortfeasors. Undoubtedly, the federal courts would have analyzed the Restatement factors and policy considerations differently in a case where, like here, there were multiple Montana defendants, who were Montana employers with their principal place of business in Montana and duties that arose in Montana, that violated their duties and Montana and federal laws in Montana.

[5] Continental's home state of Oklahoma also provides for strict and vicarious liability for ultrahazardous activity. *Davis v. City of Tulsa*, 87 P.3d 1106, 1109 (Okla. Civ. App. 2004); *Bouziden v. Alfalfa Elec. Coop., Inc.*, 2000 OK 50, ¶24, 16 P.3d 450, 458.

Aside from Zachary Buckles' place of death, everything in this case relates to and is connected with Montana. That was simply not the case in *Otto* or *Winter*. Despite Appellants' urging this Court to use sharply distinguishable federal cases, the same analysis and result used by the Montana Supreme Court in *Phillips* must be applied here. Consideration of both states' relevant policies, given the facts of this case, compels the application of Montana law to all claims, defenses, and parties. As the District Court twice found, neither *Winter* nor *Otto* provide ground to hold otherwise.

II. FINDING THAT THE DISTRICT COURT CORRECTLY DETERMINED MONTANA LAW APPLIED IN THIS CASE WILL NOT LEAD TO FORUM SHOPPING, AS THE COURTS WILL SIMPLY CONTINUE TO APPLY *PHILLIPS'* SIGNIFICANT RELATIONSHIP TEST ON A CASE-BY-CASE BASIS, AS THEY HAVE BEEN FOR NEARLY TWO DECADES

Contrary to Black Rock's claim, this Court's determination that Montana law applies in this case, rather than simply adopting the federal court's ruling in *Otto*, will not lead to forum shopping—it will simply continue the federal and state court practice of applying the *Phillips* factors on a case-by-case basis.

Black Rock predicates its "forum shopping" argument on the false premise that state judges will be biased in their analysis of the *Phillips* factors to favor the application of Montana law and federal judges will be biased in their analysis of the *Phillips* factors to favor the application of North Dakota law in all cases where a Montana resident is injured in a North Dakota oil field. Surely, the state and federal

judges must be trusted to apply the *Phillips* factors appropriately and such bias should not be presumed.

Black Rock and BH Flowtest are suggesting that because two federal courts have found that North Dakota law applied in two situations where a Montana resident was killed while working in a North Dakota oil field, this Court should reach the conclusion that North Dakota law applies in such circumstances. Essentially, Appellants are asking this Court to overrule *Phillips* and strangely switch to the minority rule in all cases where a Montana resident is killed while working in a North Dakota oil field. Without question, Montana has determined the choice of law issue is to be made considering the "unique facts, issues, applicable law and jurisdictions implicated in a particular case." *Phillips*, 995 P.2d at 1007. The District Courts of this state, we submit, are uniquely equipped to consider whether Montana has the most significant relationship under the unique facts, issues, applicable law and jurisdictions implicated in a particular case, including when the case involves an injury that occurs in a North Dakota oil field. Appellants' request for this Court to take the decision away from Montana's state courts and create a presumption again, because two federal courts, under different facts, applied the *Phillips* factors in a way that works best for them, must be rebuked.

III. THE APPLICATION OF MONTANA LAW WILL NOT VIOLATE DUE PROCESS

BH Flowtest, alone, makes this due process argument, stating that in order for Montana's substantive law to apply, "the state must have a significant contact or significant aggregation of contacts, creating state interests, such that choosing its law is neither arbitrary nor fundamentally unfair." *See* BH Flowtest's Brief at *pg.* 11, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985).

The United States Supreme Court in *Shutts* determined that Due Process in this regard placed only "modest restrictions on the application of forum law." *Shutts,* 472 U.S. at 818. In *Shutts,* the United States Supreme Court cited *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312–13 (1981). In that case, the U.S. Supreme Court upheld the application of Minnesota law involving an insurance policy that was delivered in Wisconsin to a Wisconsin resident who subsequently died in an automobile accident that took place in Wisconsin and involved another Wisconsin resident. The plaintiff in *Allstate* had recently moved to and opened the deceased's estate in Minnesota and the deceased was employed in Minnesota. *Id.* Due to the tenuous Minnesota contacts, "commentators have viewed *Allstate* as setting a highly permissive standard." *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1111 (9th Cir. 2013).

In this case, given that Montana clearly has the most significant relationship to the occurrence and parties, it cannot be said that applying Montana law would be

"arbitrary" or "fundamentally unfair." Indeed, BH Flowtest makes no meaningful attempt to explain how or why applying the law of the state of Montana would be "arbitrary" or "fundamentally unfair," considering BH Flowtest and its subcontractor(s) are incorporated, do business, and have their principal place of business in Montana; Zachary Buckles was a Montana resident hired in Montana by Montana companies and was supervised in Montana on the very job that led to his death; Appellants' wrongful conduct took place in Montana; Zachary Buckles' estate and heirs are located in Montana. BH Flowtest advances no facts showing Montana's significant contacts are somehow insufficient. Without question, Montana meets the "modest" due process restriction in this case.

"A state court is rarely forbidden by the Constitution to apply its own state's law […]" *Id.* at 1113 (internal citation omitted). Neither the Montana District Court nor this Court violate due process by adopting Montana law in this case, as they have for the last five years. Indeed, to rule as these Appellants urge would, instead, ironically deny Montanans due process.

CONCLUSION

Both Judges Bidegaray and Rieger properly rejected Montana corporations Black Rock's and BH Flowtest's two efforts to overrule Phillips and reject Montana law as governing this case. Both Judges, both times (in 2016 and 2019) correctly reasoned *Otto* and *Winter* have no application to the sound Montana precedent of

the *Phillips* analysis that compels Montana law governs Buckles.

Therefore, Buckles requests that this Court reinforce the two District Court Orders holding Montana law governs this case.

RESPECTFULLY SUBMITTED this 20th day of February, 2020.

EDWARDS & CULVER
and the SAVAGE LAW FIRM

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 9,234, excluding the cover, table of contents, table of authorities, signature block, and certificate of compliance.

By: /s/ A. Clifford Edwards
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