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

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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.

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

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# APPELLANT BLACK ROCK TESTING, INC.'S REPLY BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page No(s).**



**Statutes**

**Other Sources**

# I. INTRODUCTION

The Restatement (Second) of Conflict of Laws provides for the presumption North Dakota law applies to this personal injury and wrongful death case arising from a death in North Dakota, and Appellees' Answer Brief ("Buckles' Response") fails to raise any argument that would overcome this presumption. North Dakota is not merely tangentially related to the litigation; North Dakota is inextricably intertwined with the litigation. North Dakota is where Buckles voluntarily went to for business; where Buckles performed manual tank gauging activities; where BRTI and the other named-Defendants were conducting business; where Buckles lived while working in North Dakota; where he died; where the nexus of the parties' relationship is located; and where the allegedly unsafe oil site is located. North Dakota, therefore, has the dominant interest in seeing its laws applied. Thus, application of the pertinent Restatement (Second) of Conflict of Laws factors shows North Dakota law applies in this matter.

# II. ARGUMENT

## I. NORTH DAKOTA LAW APPLIES IN THIS ACTION.

Contrary to Buckles' argument that BRTI is trying to "overturn twenty years of Montana conflict of law precedent," BRTI's assertion that North Dakota law applies in this case is consistent with the required presumption that North Dakota law applies in a case where the death giving rise to the claims occurred in North

Dakota; the Defendant entities' relationship was centered in North Dakota; and Buckles is alleging the Defendants failed to provide a safe well site in North Dakota. Federal Judges Morris and Watters—who both undisputedly considered and applied this Court's decision in *Phillips v. General Motors Corp.*, 2000 MT 55, 298 Mont. 438, 995 P.2d 1002—both concluded North Dakota law applies under facts strikingly similar to the case at bar. See *Winter v. Pioneer Drilling Services, Ltd*, 2015 WL 9855923 (D. Mont. 2015); *Otto v. Newfield Exploration Company*, 2016 WL 9461791 (D. Mont. 2016). Nothing compels a different result here.

### A. The Choice of Law Analysis Starts With the Presumption North Dakota Law Applies.

Although Buckles' Response declined to admit it, the choice of law analysis in this action starts with the presumption that North Dakota law applies. Indeed, multiple Montana courts, including this Court in *Phillips*, have recognized §§ 146 and 175 of the Restatement (Second) of Conflict of Laws provide for a presumption that the local laws of the place where the injury occurred applies in a personal injury and/or wrongful death action. *Phillips*, ¶ 32; *Winter*, 2015 WL 9855923, *2; *Otto*, 2016 WL 9461791, *5. This presumption does not equate to the *lex loci delicti* approach, but rather stands for the proposition that when faced with a choice of law question in a tort or wrongful death action, the most significant relationship approach *starts* with the presumption that the local law of the state where the injury occurred applies. *Burdick by and through Burdick v. Dylan Aviation, LLC*, 2012 WL

13080720, *1 (D. Mont. 2012) (explaining that the Restatement approach strays from the traditional *lex loci delicti* approach, but that "[t]o determine which state has the 'most significant relationship' the Court should presumptively apply the law of the location of the injury…"). As explained below, the presumption that North Dakota law applies cannot be overcome.

### B. Application of the Pertinent Restatement Factors Shows the Presumption that North Dakota Law Applies Cannot be Overcome.

With the applicable presumption in place, the only way Montana law could apply is if Montana has a more significant relationship to the litigation than North Dakota when applying the factors set out in §§ 6(2) and 145(2). *Winter*, 2015 WL 9855923, *2 (citing *Phillips*, 995 P.2d at 1008); *Otto*, 2016 WL 9461791, *5 (also citing *Phillips*, 995 P.2d at 1008). Again, the § 6(2) factors 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 interests;

(e) the basis 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

Restatement (Second) of Conflict of Laws, § 6(2). The § 145(2) factors are:

(a) the place where the injury occurred;

(b) the place where the conduct causing the injury occurred;

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

*Id*., § 145(2).

North Dakota is inextricably intertwined with the litigation and has the dominant interest in seeing its laws applied to an incident that happened within its borders where a worker voluntarily operating within North Dakota died while engaged in an industry undeniably crucial to the State.

**1. The § 145(2) Factors Weigh in Favor North Dakota.**

**i. North Dakota is Where the Subject Death Occurred.**

Buckles attempts to gloss over the fact that the § 145(2)(a) factor—where the injury occurred—weighs heavily in favor of North Dakota since that is where Buckles died. As the United States Supreme Court has noted, "the location of injury continues to hold sway in choice-of-law analysis in tort cases." *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, n.11 (2011). Buckles attempts to downplay the importance of the place of injury/death by citing to *Phillips*, a case where this Court declined to apply the law of the place of the injury. *See* Buckles' Response, pp. 15-18. *Phillips*, however, is easily distinguishable because unlike the

situation here, the place of the injury in *Phillips* was the *only* relationship that State had to the litigation.

There, Darrell Byrd was driving with his wife and two children—all of whom were Montana residents at the time—in a 1985 Chevrolet pickup from Montana to North Carolina when they were involved in an accident in Kansas. The accident caused a fire, which killed Darrell Byrd, Angela Byrd, and Timothy Byrd. Samuel Byrd survived. *Phillips*, ¶¶ 7-10. The 1985 Chevy was originally sold by General Motors in North Carolina, and North Carolina is where Darrell Byrd purchased the pickup. *Id*., ¶ 7. The truck was allegedly designed and manufactured in Michigan. *Id*., ¶ 49. The plaintiff, Phillips, a resident of North Carolina, was the legal guardian of Samuel Byrd and the personal representative of the estates of Darrell, Angela, and Timothy. Phillips brought a products liability suit in Montana against General Motors, alleging negligence and strict liability, and requesting both compensatory and punitive damages. *Id*., ¶¶ 11-12.

This Court found the presumption that Kansas law applied was overcome because Kansas' sole relationship to the litigation was the fact that the subject vehicle accident happened there. As this Court noted, "[t]he purpose of a state's product liability statute is to regulate the sale of products in that state and to prevent injuries incurred by that state's residents due to defective products." *Id*., ¶ 39 (citation omitted). Kansas' product liability law's purpose "is to establish the level

of safety of products sold either in Kansas or to a Kansas resident" *Id*., ¶ 40. Since the truck was neither sold in Kansas nor sold to a Kansas resident, Kansas had no interest in seeing its product liability laws applied. *Id*., ¶¶ 40-45, 60.

This Court declined to apply the laws of other States that potentially had an interest—North Carolina, the State where the truck was sold, and Michigan, the State where the truck was allegedly designed and manufactured—because North Carolina would not even apply its laws under the facts of the case since it adhered to the traditional place of injury rule and "Michigan has little interest in applying its law when its only contact with the dispute is the location of the manufacturer." *Id*., ¶¶ 48, 50 (citation omitted). That left Montana, who had "a direct interest in the application of its product liability laws because its residents were injured" in the subject accident. *Id*., ¶ 53.

Unlike the facts in this case, the place of injury in *Phillips* was the *only* connection Kansas had to the products liability dispute. Here, North Dakota is inextricably intertwined with the facts and claims. As this case is far more similar to *Winter* and *Otto* than *Phillips*, this Court should follow Judges Morris' and Watters' reasoning and apply the presumptively applicable law of the place of injury—North Dakota.

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### ii. The Place of the Conduct Allegedly Giving Rise to Buckles' Death was North Dakota.

The § 145(2)(b) factor contemplates where the conduct which allegedly caused Buckles' death occurred. *See* Restatement (Second) of Conflict of Laws, § 145(2)(b). Contrary to Buckles' argument, North Dakota, not Montana, is undisputedly that place, just as it was in *Winter* and *Otto*. *Winter*, 2015 WL 9855923, * 2; *Otto*, 2016 WL 9461791, *5 ("Otto alleges that Newfield's negligent management of the tanks in North Dakota caused Blaine's death. Therefore, the place of the conduct causing the injury occurred in North Dakota"). Buckles' Complaint (App.[1] 1), proves this point, and Buckles cannot change that fact by glaringly omitting the words "North Dakota" in the Response.

Indeed, the Complaint alleges the Defendants breached their duties "to maintain a safe oil well site and secure work area on the oil well site pursuant to contract and in fact" "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 [Buckles] and by failing to protect [Buckles] from overexposure to hydrocarbon vapors[.]" *Id*., ¶¶ 17-18. The allegedly unsafe work site at issue is undisputedly in North Dakota. *Id*., ¶ 18. Buckles was allegedly exposed to hydrocarbon vapors in North Dakota. *Id*., ¶ 19.

[1] As in BRTI's Opening Brief, "App." refers to the Appendix which accompanied BRTI's Opening Brief.

Buckles allegedly needed adequate and appropriate air monitoring equipment to prevent his death in North Dakota. *Id*.

While Buckles seeks to avoid the fact that North Dakota is undisputedly where the conduct which allegedly caused his death occurred by asserting Buckles was "dispatched from Montana," Buckles' Response, p. 17, that simply is not true. Janson Palmer (Black Gold) testified that after taking some time off, Buckles asked Palmer if he had anything going on "out there" (i.e. in North Dakota), to "see if [Buckles] could get back to work." App. 15, (p. 11, lns. 17-25). Once Palmer found some work, Buckles "dove right in." *Id*. (p. 11, ln. 24 to p. 12, ln. 1). This was not a situation where Buckles was ordered to get over to North Dakota as Buckles' Response insinuates. Further, Palmer testified this was not the first time Buckles had worked in the oil field. *Id*. (p. 9, lns. 13-20) (explaining Buckles actually got Palmer involved in the oil tank testing and gauging business). Thus, it is disingenuous to argue Buckles should have received certain training in Montana. The facts show Buckles jumped at the chance to go to North Dakota to work as a manual tank gauger again and died while performing this work in North Dakota.

Moreover, Buckles' argument that the conduct causing the injury occurred in Montana—because that is allegedly where the subject well site was controlled from and pointing to OSHA requirements—is misplaced. *See* Buckles' Response, p. 16. In fact, OSHA's North Dakota office conducted its investigation of the incident on

the North Dakota oil well site and issued a citation to Black Gold (Janson Palmer)—determined to be Buckles' employer—who Buckles was staying with in North Dakota at the time of his death. *See* Buckles' Appendix ("SAPP.") 4; App. 15 (p. 27, ln. 12 to p. 28, ln. 18) (Palmer explaining he and Buckles were living together on-site and had been for quite some time). Nothing about the OSHA citations indicates anything happened in Montana that caused Buckles' death. *See* SAPP. 4.

In total, the facts show North Dakota is the site where every action or inaction complained of took place. Thus, the § 145(2)(b) factor favors applying the presumptively applicable North Dakota law, just as it did in *Winter* and *Otto*.

### iii. The § 145(2)(c) Factor Does not Command Application of Montana Law.

The § 145(2)(c) factor under the Restatement considers the domicile, residence, nationality, place of incorporation, and place of business of the parties. While BRTI, BH Flowtest, and Black Gold were all legally Montana residents, that is not controlling because "the state of incorporation or location of the defendant's principal place of business receives less weight than the place of injury in the choice-of-law analysis." *Mathes v. Patterson-UTI Drilling Co., L.L.C.*, 44 F.Supp.3d 691, 698 (S.D. Tex. 2014) (citations omitted). The residence of BRTI, BH Flowtest, and Black Gold is especially inconclusive here, considering the parties all undisputedly conducted business in North Dakota, as evidenced by the fact that all parties were

connected to the North Dakota well site where Buckles died via a series of subcontracts. *See* App. 1, ¶ 11.

As for Buckles' residency, that is also not controlling. In fact, Montana courts have previously held the residence of the deceased and other relationship between the deceased and another state not precisely relevant to the primary issues in a case cannot "overcome the presumptive law of the location of the injury." *Burdick*, 2012 WL 13090720, *2 (concluding Montana law applied because that was the site of the subject helicopter crash despite the deceased's Tennessee residency and Tennessee's greater qualitative contacts with the deceased). In *Otto*, where the § 145(2)(c) factor was held to "support application of Montana law" since the decedent was domiciled in Montana, that did not control the Court's analysis. *Otto*, 2016 WL 9461791, *6. In *Winter*, even though the decedent was a Montana resident, the § 145 factors still favored North Dakota law. *Winter*, 2015 WL 9855923, *2.[2] Furthermore, as the comments to § 175 state, "[t]he local law of the state where the injury occurred is most likely to be applied when the decedent had a settled relationship to that state, either because he was domiciled or resided there ***or*** because he did business there."

[2] Contrary Buckles' Response's assertion on page 33, in *Winter*, one of the defendants was a Montana resident who conducted business in North Dakota as well as Montana. *Winter*, 2015 WL 9855923, *2 ("The Defendants are residents of Montana and North Dakota. Defendants conduct business in both states").

Restatement (Second) of Conflict of Laws, cmt. f (emphasis added). Buckles undisputedly did business in North Dakota.

Thus, even if this Court concludes the § 145(2)(c) factor favors application of Montana law, this factor cannot supplant the presumption North Dakota law applies when every other § 145(2) factor undisputedly favors North Dakota.

### iv. North Dakota is Where the Parties' Relationship was Centered.

The final factor to consider under § 145(2) is where the parties' relationship is centered. *Id*., § 145(2)(d). Contrary to Buckles' argument, North Dakota is where the parties' relationship was centered. In *Otto,* Judge Watters concluded the North Dakota well site was where the parties' relationship was centered because the company who employed the deceased tasked the deceased with transporting oil from a North Dakota well site, the deceased's employer contracted with another entity to perform such work, and the deceased died at the North Dakota well site. *Otto,* 2016 WL 9461791, *5. Buckles' Response fails to acknowledge that is the precise situation here. Indeed, as alleged in the Complaint, the defendants had a tiered subcontractor relationship which provided for manual tank gauging and production monitoring activities on a well site located in North Dakota owned by Continental. *See* App. 1, ¶ 11. In other words, the North Dakota well site where Buckles died is the nexus which brings all of the parties to this lawsuit together.

Buckles' attempt to shift the focus away from the North Dakota well site is unavailing. While Buckles relies on contractual relationships to argue Montana is where the parties' relationship was centered, Buckles' Response, pp. 17-18: contracts governing a commercial relationship between parties "has no bearing on a choice of law analysis based in tort." *Sura v. National Oilwell Varco, L.P.*, 2016 WL 4217766, *3 (D.N.D. 2016)[3]. Hypotheticals unattached to the facts are similarly unavailing. What the Master Service Contract between Continental and BH Flowtest *could* have provided for is irrelevant to what *did* happen. The same goes for Buckles' argument regarding BH Flowtest and BRTI's relationship. This case centers on whether BRTI and the other named-Defendants are liable for a death that occurred at a North Dakota well site because they were involved in a tiered subcontractor relationship which provided for work to be performed at Continental's North Dakota well site. *See* App. 1, ¶ 11. Thus, North Dakota is clearly where the parties' relationship was centered vis-à-vis the lawsuit. The § 145(2)(d) factor therefore favors North Dakota.

**2. The § 6(2) Factors Also Favor Application of North Dakota Law.**

**i. The § 6(2)(a) Factor is Neutral.**

[3] Notably, Buckles' Response did not bring up the fact that the contract between BH Flowtest and BRTI provided North Dakota law would govern the parties' agreement. *See* Exhibit 1 to Appendix 13 to BH Flowtest's Opening Brief, at BH00007-08.

Buckles' agrees the § 6(2)(a) factor—the needs of the interstate and international system—is neutral. Buckles' Response, p. 19.

### ii. The §§ 6(2)(b) and (c) Factors Favor Application of North Dakota Law.

Buckles devotes many pages to arguing the §§ 6(2)(b) and (c) factors—the relevant policies of the forum and the relevant policies of the interested states and the relative interests of those states in the determination of a particular issue—weigh in favor of Montana law. *See* Buckles' Response, pp. 20-27. Buckles is mistaken. As a threshold matter in this regard, Buckles argues the §§ 6(2)(b) and (c) factors are the "most important" factors, relying upon *Phillips* for that assertion. *Id*., p. 20. In *Phillips*, this Court found the § 6(2)(b) and (c) factors the most important "in the case *sub judice*." *Phillips*, ¶ 37. This Court did not make a blanket assertion the § 6(2)(b) and (c) factors are *always* the most important factors. Rather, this Court found the relevant policies of the forum and other states favored Montana in *Phillips*, a products liability suit, for reasons that do not exist under the facts of this case.

As discussed above, this Court found Kansas, whose only connection to the litigation was the site of the injury, did not have an interest in the products liability suit because Kansas was neither the place where the subject truck was sold nor where the plaintiffs resided. *Id*., ¶ 40-45, 60. Thus, applying Kansas law would not further Kansas' product liability law's purpose of "establish[ing] the level of safety of products sold either in Kansas or to a Kansas resident." *Id*., ¶ 40. As North Carolina

would have applied the laws of Kansas, *see id*., ¶ 48, this Court concluded application of Montana law would further the purpose of Montana's product liability law. *Id*., ¶¶ 60 and 73.

In contrast to the situation in *Phillips*, application of North Dakota law here would further two important interests relevant to this wrongful death and personal injury action arising from the death of a worker at a North Dakota well site: (1) regulating its petroleum extraction business; and (2) ensuring workers are protected and fairly compensating injured workers who sustain work-related injuries. *See Winter*, 2015 WL 9855923, *3; *Otto*, 2016 WL 9461791, *6; *see also*, *Sura*, 2016 WL 4217766, *5 ("North Dakota has an interest in deterring wrongful conduct within its borders and compensating individuals injured by such conduct") (citing N.D.C.C. §§ 9-10-01 and 9-10-06[4]). As North Dakota is where the conduct that allegedly caused Buckles' death occurred, North Dakota possesses the dominant interest in having its laws applied. *See* Restatement (Second) of Conflict of Laws, § 146, cmt. d ("the state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character").

[4] N.D.C.C. § 9-10-01 provides that "[e]very person is bound without contract to abstain from injuring the person…or infringing upon any of that person's rights." N.D.C.C. § 9-10-06 provides that "[a] person is responsible not only for the result of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or self…"

Buckles does not appear to take issue with the fact that North Dakota has a strong interest in regulating its petroleum extraction industry as pointed out in BRTI's Opening Brief and as Judges Morris and Watters both noted. *Winter*, 2015 WL 9855923, *3; *Otto*, 2016 WL 9461791, *6. BRTI will not repeat those arguments. However, this significant interest of North Dakota should not be discounted. *See* Restatement (Second) of Conflict of Laws, § 6, cmt. f. Indeed, application of Montana law would detract from North Dakota's interest in this regard, while application of North Dakota law would further North Dakota's interest.

Buckles takes issue with North Dakota's interest in protecting workers and compensating them for injuries sustained in the workplace by essentially asserting North Dakota's laws are not good enough. However, "sometimes different laws are neither better nor worse in an objective way, just different." *Sura*, 2016 WL 4217766, *6 (citation omitted). In this regard, Buckles argues the strict product liability analysis in *Phillips* should carry-over to the instant suit since manual tank gauging allegedly constitutes an inherently dangerous activity giving rise to strict liability. *See* Buckles' Response, p. 22. This is not a strict products liability lawsuit like *Phillips*. Moreover, Buckles has failed to cite to any authority establishing that manual tank gauging is an inherently dangerous activity giving rise to strict liability. Buckles' inherently dangerous/strict liability argument is purely aspirational and has never been established by a Montana Court. What is established is that North Dakota

undeniably has an interest in seeing its laws applied to an incident that happened within its borders in an industry vital to the State and its workers. Thus, Buckles' reliance on this Court's reasoning in *Phillips* regarding the policy underlying a strict products liability claim is completely inapposite.

North Dakota law is clear—it will fairly compensate Buckles should he prevail in the lawsuit. Indeed, if BRTI and/or any of the other named-Defendants are found negligent, "the measure of damages" under North Dakota law "is the amount which will compensate [Buckles] for all the detriment proximately caused thereby, whether it could have been anticipated or not." N.D.C.C. § 32-03-20; *see also, Johnson v. Monsanto Co.*, 303 N.W.2d 86, 94 (N.D. 1981) ("In tort actions, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might reasonably have been expected to follow from the circumstances") (citation omitted). Thus, application of North Dakota law would not deprive Buckles of the opportunity to obtain full legal redress as Buckles' Response suggests[5], nor would North Dakota law absolve Defendants of liability.

[5] Buckles' Response, for the first time in this litigation, raises a constitutional argument regarding application of North Dakota law. *See* Buckles' Response, p. 23-25. This Court has repeatedly stated it does not consider new arguments or legal theories for the first time on appeal. *Pilgeram v. Greenpoint*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. Buckles' constitutional argument should therefore be disregarded.

To the contrary, North Dakota law specifically protects workers like Buckles if he prevails on his claims.

Not satisfied with the fact that application of North Dakota law provides for fair compensation, Buckles attacks North Dakota's interest in protecting workers and fairly compensating them for workplace injuries by asserting North Dakota's comparative liability policies would allow blame to be placed on hypothetical nonparties. Buckles' Response, p. 23. Again, this argument departs from the operative facts, considering there are no non-parties to speak of that could potentially be assessed liability. If Buckles thinks parties should be added to prevent an "empty chair" defense, nothing is preventing Buckles from moving to amend the Complaint to join another party. Buckles also attacks the potential for no joint liability under North Dakota law, *see id.*, but Buckles has not even shown entitlement to recover, much less that any of the Defendants' liability would reach the threshold for applying joint liability under Mont. Code Ann. § 27-1-703(2). Finally, Buckles attacks the punishment and deterrent purposes of punitive damages under North Dakota law, which are the same purposes of punitive damages under Montana law. *See* Buckles' Response, p. 25. Clearly, Buckles' attacks on North Dakota law are misplaced.

In total, nothing in Buckles' Response compels a conclusion contrary to the holdings in *Winter* and *Otto* that the §§ 6(2)(b) and (c) factors favor application of North Dakota law. *Winter*, 2015 WL 9855923, *3; *Otto*, 2016 WL 9461791, *6.

### iii. The § 6(2)(d) Factor Does Not Rebut the Presumption That North Dakota Law Applies.

With no citation to authority, Buckles argues the § 6(2)(d) factor—protection of justified expectations—favors Montana law. Buckles' Response, p. 27. However, as this Court and other Montana courts have noted, the protection of justified expectations is inapplicable in personal injury and wrongful death tort actions, like the instant one, since parties act without giving thought to the legal consequences of their conduct or to the law to be applied. *Phillips*, ¶ 62 (citing Restatement (Second), § 6 cmt. g[6]); *Winter*, 2015 WL 9855923, *3; *Otto*, 2016 WL 9461791, *6. Thus, the § 6(2)(d) factor plays no part in the analysis here.

Regardless, the arguments Buckles' Response advances for arguing Buckles "certainly…gave thought to his employment" are misplaced. *See* Buckles' Response, p. 27. As Palmer testified, Buckles voluntarily left Montana to work in North Dakota, and "dove right in." App. 15 (p. 11, lns. 17 to p. 12, ln. 1). Further, Buckles was staying with Palmer onsite in North Dakota prior to his death. SAPP. 4; App. 15 (p. 27, ln. 12 to p. 28, ln. 18). OSHA's North Dakota office issued a citation to Black Gold (Palmer), not BRTI or anyone else who allegedly supervised

[6] Comment g. to § 6 provides: "[t]here are occasions, particularly in the area of negligence, when the parties act without giving though to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question."

Buckles. SAPP. 4. Finally, there is no indication Buckles physically received checks in Montana[7] or why this fact, if true, would create an expectation that Montana law would apply to a workplace injury/death in North Dakota. In total, nothing suggests justified expectations plays any role in the analysis.

**iv. The § 6(2)(e) Factor is Non-Determinative.**

As explained in BRTI's Opening Brief and as acknowledged in Buckles' Response, Montana and North Dakota law differ heavily with respect to issues in this case like vicarious liability, contributory negligence, and punitive damages. *See* BRTI's Opening Brief, pp. 11-13; Buckles' Response, pp. 11-12. As these differences are not minor, the § 6(2)(e) factor—the basic policies underlying the particular field of law—is not implicated. *Winter*, 2015 WL 9855923, *3 (citing Restatement (Second) § 6 cmt. h); *Otto*, 2016 WL 9461791, *6.

**v. The § 6(2)(f) and (g) Factors Favor North Dakota Law.**

The final factors for the court to consider under § 6(2) are certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws, §§ 6(2)(f) and (g). Consistent with the analysis in *Winter* and *Otto*, these factors weigh in favor of North Dakota. Judges in the Montana Federal Court have completed the choice of

[7] Buckles' Response's cites only show checks were made out to Dozer Well Testing by Palmer (Black Gold). App. 15 (p. 52, lns. 9-19); SAPP. 2.

law analysis under substantially the same facts as this matter and have held North Dakota law applies. It makes no sense to have divergent results on strikingly similar facts between Montana state and federal courts. The District Court's legal conclusions in this case cannot be upheld without vitiating Judges Morris and Watters decisions in *Winter* and *Otto*.

Moreover, applying the local law of the state where the injury occurred—North Dakota—"furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law." Restatement (Second) of Conflict of Law, § 175, cmt. d.

Buckles argues the § 6(2)(f) and (g) factors favor Montana law by asserting that "[i]t would be disingenuous to argue Zachary Buckles and Black Rock did not give advance thought to the legal consequences of their Montana transaction…" Buckles' Response, pp. 29-30. However, there is no "Montana transaction" between BRTI and Buckles, this action is not based on a contract between BRTI and Black Gold, and there is no evidence Buckles gave any advance thought to the legal consequences of his conduct before he died at a North Dakota well site.

## III. CONCLUSION

For the reasons set forth above and in BRTI's Opening Brief, the District Court erred by incorrectly holding Montana law applies in this matter instead of the

presumptively applicable North Dakota law. Application of the pertinent Restatement (Second) Conflict of Laws factors only reinforces the presumption that North Dakota law applies. Thus, this Court should follow the reasoning in *Winter* and *Otto* and conclude that North Dakota law applies to Buckles' claims. BRTI therefore respectfully requests this Court enter an Order reversing the District Court on the Choice of Law issue and remanding this matter for further litigation.

RESPECTFULLY SUBMITTED this 5th day of March, 2020.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is 4,983 words, excluding the cover, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 5th day of March, 2020.

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The undersigned hereby certifies that she is a member of the bar of this Court in good standing and counsel for Defendant/Appellant Black Rock Testing, Inc.

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