IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 24-0328

BRYAN LATKANICH,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Appellee, and EQT CHAP LLC,

Appellees/Appellant.

REPLY BRIEF OF THE APPELLANT, EQT CHAP LLC

APPEARANCES:

Murry Warhank
JACKSON, MURDO & GRANT, P.C.
203 North Ewing
Helena, MT 59601
mwarhank@jmgattorneys.com
406-442-1300
Attorney for Appellant EQT CHAP LLC

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
mike@meloylawfirm.com
406-442-8670
Attorney for Appellee Environmental Health Sciences

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Appellant EQT CHAP LLC ("EQT CHAP") submits the following Reply Brief in its appeal of the District Court's Order dated February 28, 2024, granting Environmental Health Sciences' Motion to Quash Subpoena (the "Order").

INTRODUCTION

This appeal concerns a straightforward choice-of-law question: Did the District Court err in determining that Montana privilege law, not Pennsylvania privilege law, applies to a subpoena originating in a Pennsylvania action that requests documents obtained by a Pennsylvania reporter for news articles related to Pennsylvania where the parent news organization for which the reporter worked is headquartered in Montana? In its Answer Brief, Appellee Environmental Health Services ("EHS") ignores the District Court's underlying factual findings governing this issue and misapplies the applicable law.

As the District Court recognized, EQT CHAP subpoenaed records from EHS in connection with an action pending in Pennsylvania. There, a Pennsylvania plaintiff relies on testing and sampling done on him and his property by EHS's Pennsylvania reporter. (Order at 2, 9.) The subpoena does not seek any information from a confidential source. EHS fails to recognize the District Court's findings that Pennsylvania is the state "with the most significant relationship" and that "Montana is far removed from the underlying substantive contest." (Quoting Order at 5, 9.)

EHS attempts to steer the Court away from Montana's long-established choice of law rules which focus on the most significant relationship test. EHS further fails to recognize this Court's opinion in *Goguen v. NYP Holdings, Inc.*, 2024 MT 47, 415 Mont. 356, 544 P.3d 868 which evaluates the factors from Section 6(2) of the Restatement (Second) of Conflict of Law based on which state had the "most significant relationship to the issue." *Id.* ¶ 32. Instead, EHS relies on Section 139 of the Restatement (Second) of Conflict of Laws, which has not been adopted by this Court and which even if adopted, would call for the application of Pennsylvania law to the Subpoena at issue because Pennsylvania has the most significant contacts with the issue.

Finally, EHS improperly argues for the first time that the Subpoena should be quashed based on Pennsylvania's First Amendment reporter's privilege. This argument was not raised in EHS's Motion to Quash or its District Court briefing and therefore cannot be considered in this appeal. *See Signal Perfection, Ltd. v. Rocky Mountain Bank-Billings*, 2009 MT 365, ¶ 13, 353 Mont. 237, 224 P.3d 604 ("We do not consider arguments that were not presented to the District Court, but raised for the first time on appeal.").

ARGUMENT

I. EHS misapplies Montana's choice of law rules that look to the state with the most significant relationship which is Pennsylvania.

A. The District Court found that Pennsylvania has the most significant relationship.

EHS ignores the District Court's findings that Pennsylvania has the "most significant relationship" with the issue and that "Montana is far removed from the underlying substance" of the dispute (quoting Order at 5, 9). As this Court held in *Buckles v. BH Flowtest, Inc.*, 2020 MT 291, ¶ 8, 402 Mont. 145, 476 P.3d 422, "[a] district court's factual findings underlying its choice of law determination are reviewed for clear error." In support of its conclusion that the "most significant relationship to the communication supports a conclusion that Pennsylvania law must apply" (Order at 9), the District Court reached the following findings of fact:

> Ms. Marusic is based out of Pennsylvania. Her work at issue in this matter involved communications she had in Pennsylvania. Ms. Marusic's research and work product occurred in Pennsylvania. Ms. Marusic is an employee of EHS, based in Bozeman, Montana. EHS is the owner and publisher of the material. The communications being subpoenaed occurred in Pennsylvania.

(Order at 9). EHS does not, and cannot, argue that these factual findings are clear error.

Despite the District Court's findings, EHS argues that Montana has the most significant relationship with the subpoenaed party and subpoenaed records. It

contends that EHS is headquartered in Montana and the materials are held on its digital storage devices. (Answer Brief at 18–19.) However, EHS's position would require this Court adopt a test that applies the law of the venue where a witness (in the case of a deposition) and documents (in the case of a subpoena) are located. This is inconsistent with the most significant relationship test which the Restatement and this Court have adopted.

B. EHS erroneously argues that Montana's policy should apply because it is better than Pennsylvania's policy.

EHS attempts to avoid application of the most significant relationship test by focusing on an erroneous analysis of which state has the "stronger" public policy. It argues throughout its Answer Brief that the Subpoena should be quashed because Montana has the "stronger" public policy. EHS's argument is misdirected. The threshold inquiry is not what state's privilege law is the most restrictive, but what state has the most significant relationship to the conduct or the communications at issue. *See, e.g.*, *Goguen*, ¶¶ 20–39 (applying New York law that had the most significant relationship to the issue); *Buckles*, ¶ 13 (applying the "most significant relationship" test); *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 23, 298 Mont. 438, 995 P.2d 1002 (applying most significant relationship test for conflict of law issue in tort); *Polzin v. Appleway Equip. Leasing, Inc.*, 2008 MT 300, ¶ 16, 345 Mont. 508, 191 P.3d 476 (applying most significant relationship test for conflict of law issue in contract).

Here, both Montana's and Pennsylvania's laws express strong policy interests. Montana law favors a policy of broad privilege that protects the media, and Pennsylvania law favors a policy of "free flow of information to the media, *while preserving access to certain media materials*." *Com.v. Bowden*, 838 A.2d 740, 752 (Pa. 2003) (emphasis added); *Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346, 350 (Pa. 1987) (holding that Pennsylvania's Shield Law allowed for the discovery of documentary information that does not reveal the identity of a confidential media-informant while serving the "obvious purpose . . . to maintain a free flow of information to members of the news media"). The proper issue is not whether one policy is better or "stronger" than the other, but rather which state has the most significant relationship to the issue.

C. EHS erroneously applies the factors in Section 6(2) of the Restatement (Second) of Conflict of Laws.

EHS does not dispute that the factors in Section 6(2) of the Restatement require analysis of the state with the most significant contacts, but instead as discussed above, seeks to argue that this state is Montana. This ignores the factual findings of the District Court which cannot be overturned absent clear error. Rather than acknowledging these findings and their applicability to the required Section 6(2) analysis, EHS ignores them and focuses on an improper application of factors d, e, f, and g of Section 6(2).

Citing *Buckles*, EHS argues that under comment h to factor e of Section 6(2), there is good reason for the court to apply the local law of that state which will best achieve the basic policy of the field of law involved. (Answer Brief at 20). EHS ignores that the *Buckles* Court held that factor e is applicable only in instances where "the policies of the interested states are largely the same but where there are nevertheless minor differences between their local law rules," not in instances, as here, where the differences in the state laws are significantly different. *See Buckles*, ¶ 29 (holding that this factor was "inapplicable" where the laws "differ significantly"); *Goguen*, ¶ 29 ("when there is a more major difference between the laws like this, we have deemed this factor to be inapplicable.").[1]

EHS further argues that under factor d of Section 6(2), EHS would have a justified expectation that Montana law would apply and that under factors f and g, there would be greater predictability and uniformity "in areas where the parties are likely to give advance thought to the legal consequences of their transaction." (Answer Brief at 21.) This argument ignores this Court's holding in *Goguen*, which

[1] The full text from comment h to § 6(2) (which EHS omits) as quoted in *Buckles* reads as follows:

> This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. ***In such instances,*** there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved.

Restatement (Second) of Conflict of Laws § 6 (1971) (emphasis added). EHS acknowledges throughout its Answer Brief that the policies of the interested states are very different by, *inter alia*, comparing Montana's absolute privilege to Pennsylvania's qualified privilege. *See, e.g.*, Answer Brief at 10 and 20. Because there are major differences between Montana's and Pennsylvania's laws, factor (e) is inapplicable and EHS's reliance on it is improper.

looked to where the conduct occurred and stated that "the certainty and predictability factor weigh in favor of applying the privilege consistently to *the conduct occurring in* New York." *Goguen*, ¶ 30 (emphasis added). Instead of following *Goguen*, EHS focuses only on the location of its chief executive officer and office manager (Montana).[2] Here, the Subpoena requests documents and information in connection with conduct that occurred in Pennsylvania where "Ms. Marusic is based" and where "[h]er work at issue in this matter involved communications she had in Pennsylvania" where her "research and work product occurred." (Order at 9.)

Under EHS's argument for predictability and uniformity, its "journalists [who] 'work remotely from more than ten different states, plus two other countries'" could engage in newsgathering in another state but not be subject to that state's judicial process and discovery laws through an application of Montana's MCA. This outcome is clearly not what was intended by Section 6 of the Restatement (Second) of Conflict of Laws, which states:

> Probably *the most important function of choice-of-law rules* is to make the interstate and international systems work well. *Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them.* In formulating rules of choice of law, *a state should have regard for the needs and policies of other states and of the community of states.* Rules of choice of law

[2] EHS acknowledges that its "journalists 'work remotely from more than ten different states, plus two other countries'" while only its chief executive officer and office manager work in Bozeman. Answer Brief at 21; Dec. of Douglas Fischer ¶ 1; EHS's Reply Memo in Supp. of its Mot. to Quash Subpoena, Ex. A (Second Dec. of Douglas Fischer) at 2.

> formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.

Restatement (Second) of Conflict of Laws § 6, cmt. d. (emphasis added). There would be little regard for "the needs and policies of other states" if EHS could employ reporters who engage in newsgathering on controversial environmental topics in different states and countries, as Ms. Marusic did in Pennsylvania, while also allowing EHS to circumvent the discovery laws of those states and countries. Accordingly, EHS's argument fails by ignoring the state where the news gathering took place and disregarding the needs and policies of that state. *See Goguen*, ¶¶ 23–39; Restatement (Second) of Conflict of Laws § 6, cmt. d.

D. EHS misapplies *Goguen* to avoid focusing on the state where the communications and reporting took place.

EHS attempts to argue that *Goguen* is not relevant to this case because it involved the application of privilege law to a tort claim. *Goguen* is not only relevant, but it is the first case in which this Court decided a *choice of law* issue related to a *privilege.*

In selectively quoting from *Goguen*, EHS ignores the *Goguen* Court's recognition of the most significant relationship test. The *Goguen* Court analyzed the

factors of section 6(2) to determine which state had the most significant relationship to the issue.

> When we examine and apply these § 6 factors, every factor that is of consequence points towards New York and its law having the most significant relationship to the issue of the fair report privilege.

Goguen, ¶ 32. That this analysis was done to determine the admissibility of evidence at trial, rather than its production in discovery or in connection with the fair report privilege as opposed to a reporter's privilege, does not make the Court's analysis any less pertinent.

E. EHS's reliance on Section 139 of the Restatement (Second) of Conflict of Laws is misplaced.

EHS argues that this Court should adopt Section 139 of the Restatement (Second) of Conflict Laws and, by doing so, replace this Court's most significant relationship test with EHS's suggested "strong-public-policy-of-the-forum" test that does not consider the public policy of the state with the most significant relationship. Even if this Court were to adopt Section 139, Pennsylvania law applies.

Section 139 provides:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

Restatement (Second) of Conflict Laws § 139(1). The comments to Section 139 recognize the rationale for application of the privilege law of the state with the most significant relationship:

> c. Rationale. There can be little reason why the forum should exclude evidence that is not privileged under the local law of the state which has the most significant relationship with the communication, even though this evidence is privileged under the local law of the forum. Admitting such evidence cannot defeat the expectations of the parties since, if they relied on any law at all, they would have relied on the local law of the state of most significant relationship. This state has a substantial interest in determining whether evidence of the communication should be privileged. If this state has not chosen to make certain evidence privileged, its interest obviously will not be infringed if this evidence is admitted by the forum. *Admission of this evidence, if relevant, will usually be in the best interests of the forum since such admission will assist the forum in arriving at the true facts and thus in making a correct disposition of the case.*

Restatement (Second) of Conflict Laws § 139 cmt. C (emphasis added).

The comments to Section 139 further recognize that the state that has the most significant relationship is the state where the communication took place. *See* Restatement (Second) of Conflict Laws § 139 cmt. e ("The state which has the most significant relationship with a communication will usually be the state where the communication took place . . . ."). Here, of course, the communications with the reporter which are at issue took place with a Pennsylvania resident in Pennsylvania, as did the reporter's sampling and testing.

EHS's reliance on Section 139's exception to the application of the privilege law of the state with the most significant relationship is misplaced as the comments and illustrations to Section 139 reflect. The comments provide that this exception will apply in "rare instances", such as where the forum state even though it is not the state with most significant relationship does have a substantial relationship to the parties and the transaction and a real interest in the outcome of the case. Restatement (Second) of Conflict Laws § 139 cmt. c.

Finally, EHS's reliance on comment f to Section 139 also supports application of Pennsylvania law. The comment provides that "[w]here the matter is privileged under the local law of the deposition state, a court of that state should not for this reason alone, apply its rule of privilege to bar the evidence". "The court should not apply the rule unless doing so would serve a substantial local interest. This would be the case when the deposition state is the one which has the most significant relationship with the communication and also perhaps when this state, although not that of the most significant relationship, nevertheless has a substantial relationship with the parties and the communication." Restatement (Second) of Conflict Laws § 139 cmt. f to 1988 Revision.

Thus, even if this Court were to adopt Section 139, it would require application of Pennsylvania law to this Subpoena.

II. The application of Pennsylvania's first amendment privilege to the subpoena is not properly at issue in this appeal.

EHS correctly states that the "sole issue [of this appeal] is which state's law governing the reporter's privilege applies to EQT's subpoena, the law of Montana or Pennsylvania." (Answer Brief at 7.) The District Court's Feb. 28, 2024, Order analyzed only "whether Montana law or Pennsylvania law applies." (Order at 3.) For the first time in this litigation, EHS argues that the Subpoena should be quashed based on Pennsylvania's First Amendment reporter's privilege. (Answer Brief at 24–25.) EHS's Motion to Quash makes no mention of Pennsylvania's First Amendment reporter's privilege; the parties never addressed the applicability of Pennsylvania's First Amendment reporter's privilege to the Subpoena; and the District Court's Order makes no mention of the privilege.

"The general rule in Montana is that this Court will not address either an issue raised for the first time on appeal or a party's change in legal theory." *Tai Tam, LLC v. Missoula Cnty. by & Through Bd. of Cnty. Commissioners*, 2022 MT 229, ¶ 21, 410 Mont. 465, 520 P.3d 312 (quoting *Unified Indus*., *Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100). This Court "do[es] not consider arguments that were not presented to the District Court, but raised for the first time on appeal." *Signal Perfection,* ¶ 13. Furthermore, it has repeatedly held that issues outside the scope of the District Court's order may not be raised on appeal. *Nelson v. Kralick*, 2015 MT 137N, ¶ 7, 379 Mont. 535, 353 P.3d 506 ("These issues are well outside

the scope of the District Court's . . . order . . . and are raised for the first time on appeal. It is well established that appellants may not raise legal issues, arguments, or theories for the first time on appeal.).

In addition to raising new arguments on appeal EHS also asks the Court to be fact finders. *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 17, 289 Mont. 255, 961 P.2d 100 ("[W]e are not fact finders."). EHS argues that EQT CHAP has not met the three-part test required to overcome the First Amendment reporter's privilege, which requires a factual determination that EQT CHAP has sought and requested information from other sources, EQT CHAP's only access to the information is from EHS, and that the information is crucial to EQT CHAP's defense. (Answer Brief at 25.) Because the District Court applied Montana law to the Subpoena, there was no reason or opportunity for EQT CHAP to present evidence in connection with Pennsylvania's First Amendment reporter's privilege. Yet, EHS asks the Court to quash the Subpoena based on Pennsylvania's First Amendment reporter's privilege, which would require significant fact finding by this Court. *Id.*

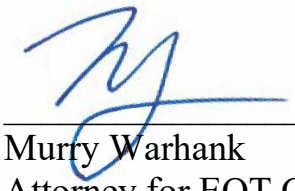
Instead, the Court should hold that Pennsylvania law applies to the Subpoena and remand for further proceeding consistent with that holding. During those proceedings, the District Court can receive argument and evidence as to what extent, if any, Pennsylvania's First Amendment reporter's privilege would apply, and, if necessary, whether EQT CHAP has satisfied the three-part test.

CONCLUSION

For the reasons stated above, EQT CHAP respectfully requests that this Court reverse the District Court's decision to grant EHS's Motion to Quash for failure to apply Pennsylvania law to the Subpoena.

Dated this 3rd day of October 2024.

JACKSON, MURDO & GRANT, P.C.



Murry Warhank
Attorney for EQT CHAP LLC

CERTIFICATE OF COMPLIANCE

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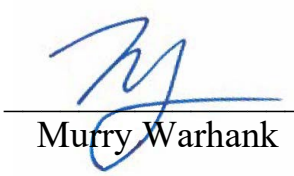
By: 
Murry Warhank

CERTIFICATE OF SERVICE

I, Murry Warhank, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-03-2024:

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: Environmental Health Science
Service Method: eService

Electronically signed by Kenzie Heimbach on behalf of Murry Warhank
Dated: 10-03-2024