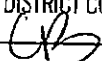


NO. _____

FILED

NOV 14 2022

KRISTI CELANDER
CLERK OF DISTRICT COURT
DEPUTY 

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
CUSTER COUNTY

JOSEPH MILOS,

Plaintiff,

vs.

OFTEDAL CONSTRUCTION, INC.,

Defendant.

Cause No. DV-9-2022-7

Hon. Michael B. Hayworth

ORDER ON CROSS-MOTIONS
SEEKING RULINGS ON
APPLICABLE LAW

Before the Court are cross-motions seeking rulings regarding the law to be applied in this case. The Motions have been fully briefed. Hearing was held on October 17, 2022. The Motions are deemed submitted and ripe for ruling.

BACKGROUND AND FINDINGS OF FACT

Plaintiff suffered injuries while working on a highway construction project; Oftedal served as general contractor for the project.

The three tort claims alleged in the *First Amended Complaint and Demand for Jury Trial* are: Count 1 – Direct Negligence of Oftedal; Count II – Inherently Dangerous Activity – Oftedal is Liable for its Negligence; and Count III – Inherently Dangerous Activity – Vicarious Liability. Upon motion by Plaintiff, Count III has been dismissed, with prejudice, by separate order.

1 For purposes of the Motions, the Court adopts as findings of fact any fact admitted
2 through the pleadings and any fact that is alleged in the briefing and not contested. (Information
3 designated as alleged is provided as background.)

- 4 1. At all times material to the Motions, Plaintiff was a resident of Montana.
- 5 2. Oftedal is a for-profit corporation, incorporated in Montana with its principal place of
6 business in Custer County, Montana.
- 7 3. In May 2019, the Transportation Commission of Wyoming (“Commission”)¹ awarded
8 Oftedal a \$67,484,899.75 contract to serve as general contractor on a Federal-Aid
9 Highway Construction project, commonly referred to as the “Snake River South Section”
10 (“Project”).
- 11 4. Exhibit 1 to the *First Amended Complaint* is the contract between the Commission and
12 Oftedal (“General Contract”).
- 13 5. Exhibit 2 is a copy of Form FHWA-1273, Required Contract Provisions for Federal-Aid
14 Construction Contracts (“Form 1273”).
- 15 6. Form 1273 must be “physically incorporated” in all subcontracts and the “prime
16 contractor” is “responsible for compliance by any subcontractor... .” (Ex. 2, p. 1).
 - 17 • Form 1273 requires Oftedal to “furnish a competent superintendent or supervisor”
18 with “full authority to direct performance of the work... .” (Ex. 2, p. 8).
 - 19 • Form 1273 also provides that Oftedal “shall provide all safeguards, safety devices
20 and protective equipment and take any other needed actions ... to protect the life
21 and health of employees on the job... .” (Ex. 2, p. 8).

22
23
24
25
26
27

¹ The Commission governs activities of the Wyoming Department of Transportation (“WYDOT”). Wyo. Stat. Ann.
28 §24-2-101.

- 1 7. Plaintiff was an employee of Drill Tech Drilling and Shoring Inc. (“Drill Tech”), a
2 subcontractor for Oftedal on the Project.
- 3 8. Exhibit 3 to the *First Amended Complaint* is the contract between Oftedal and Drill Tech;
4 Exhibit 4 is a second contract, containing a change order and addendum (these two
5 contracts are collectively referred to herein as the “Subcontract”).
- 6 9. The Subcontract requires Drill Tech to perform work under Oftedal’s direction and
7 cooperate with Oftedal’s fulfillment of its obligations under the General Contract.
- 8 10. Exhibit 5 to the *First Amended Complaint* is an excerpt from the State of Wyoming’s
9 Standard Specifications for Road and Bridge Construction. This document provides,
10 among other things, that a contractor like Oftedal “provide and maintain a safe
11 workplace... .” (Ex. 5, Sec. 107.5).
- 12 11. Plaintiff was injured in Wyoming on September 9, 2020. The allegations include that:
13 “Oftedal demanded that Drill Tech expedite the project”; Plaintiff was “assigned to the
14 drill crew despite having little to no experience working as a drill tender and/or chuck
15 tender”; and Plaintiff was “forced to try to change the 600 lb. hammer [drill bit] on the
16 drill rig manually, as opposed to using a piece of equipment called a rod-casing handler.”
17 (FAC ¶¶ 26, 28).
- 18 12. Oftedal’s alleged negligent conduct occurred in Wyoming.²
- 19 13. Plaintiff’s injuries included traumatic amputation of his right arm including the scapula,
20 traumatic brain injury, and traumatic arrest secondary to exsanguination. (FAC ¶ 29). He
21 also alleges cognitive impairment and post-traumatic stress disorder. *Id.*
- 22
23
24
25
26

27 ² Oftedal’s combined Response/Opening Brief contends that “Mr. Milos does not allege any conduct or injury that
28 occurred in Montana.” (Def. Resp./Op. Br. 3-15-16). Plaintiff has not disputed this contention.

SUMMARY OF ARGUMENTS

Plaintiff’s Motion and Opening Brief request a preliminary legal ruling on two issues of law (verbatim, underlined, with bullet-point comments):

(1) Montana procedural law, i.e., the Montana Rules of Civil Procedure and the Montana Rules of Evidence, apply in this case because Montana is the forum state.

- Oftedal’s combined Response/Opening Brief states: “Oftedal does not dispute Mr. Milos’s contention that the procedural law of Montana as set forth in the Montana Rules of Evidence and the Montana Rules of Civil Procedure applies in this case.” (Def. Resp./Op.Br. 4:8-10).
- Plaintiff’s combined Reply/Response presents a nuanced argument that there is a procedural, “evidentiary law” set forth Section 27-1-703, MCA (*Wetch v. Unique Concrete Co.*, 269 Mont. 315 (1995) construing §27-1-703(4), MCA (1987)) – and that Oftedal has acknowledged the application of this procedural/evidentiary law in this case. (Pl. Reply/Resp. 3:15-26; 4:1-28).
- Oftedal’s Reply notes that it has only conceded the application of the Montana Rules of Evidence and Montana Rules of Civil Procedure. (Def. Reply 6:3-4). This point was confirmed by Defense counsel at the hearing.

(2) Montana law, i.e., Article II, Section 16 of the Montana Constitution, §27-1-703(6)(c)(1)[sic]³, MCA, and the Montana Supreme Court cases construing these provisions, apply in this case and prohibit Oftedal from blaming Plaintiff’s immune employer, Drill Tech, for causing Plaintiff’s injuries and/or presenting any evidence of Drill Tech’s alleged negligence in causing Plaintiff’s injuries.

³ Both parties at times cite to §27-1-703(6)(c)(1), MCA; the correct citation is: §27-1-703(6)(c)(i), MCA.

- Plaintiff offers arguments anticipating and responding to Oftedal’s assertion of a conflict of laws. These include: there is no conflict of laws; a choice of law analysis is not required to address this aspect of Plaintiff’s Motion; Montana law prohibits a choice of law analysis in the present circumstances; if the Court disagrees and undertakes a choice of law analysis, Montana has a statutory directive that requires the application of Montana law; and, even if the Court goes on to conduct a choice of law analysis and determines that Wyoming law applies, the analysis is an exercise in futility because actually applying Wyoming law is unconstitutional given Article II, Section 16’s requirement of “full legal redress for injuries incurred in employment” and case law holding that Article II, Section 16 precludes limitations on this right.

Oftedal’s Motion asserts a conflict of laws and contends that a choice of law analysis is necessary in this case. As argued by Oftedal, a proper analysis under the applicable sections of the Restatement (Second) on Conflict of Laws leads the Court to conclude that Wyoming substantive law applies. Furthermore, applying Wyoming law would not necessarily violate Article II, Section 16’s requirement of “full legal redress.”

If Wyoming substantive law applies, Oftedal seeks: apportionment of fault among Oftedal, Plaintiff, and “any other person or entity, whether or not a party” (this would include Drill Tech); and limitation of its liability to the extent of its proportion of the total fault. (Ans. to FAC– Third and Ninth Affirmative Defenses).

SUMMARY OF RULING

Legally significant aspects of this case occurred in both Montana and Wyoming. Oftedal has raised a conflict of laws which necessitates a choice of laws analysis.

1 The Montana Supreme Court has not recognized a public policy exception to a district
2 court undertaking a choice of law analysis in the present circumstances. Nor has a public policy
3 exception been articulated in the present circumstances to ‘override’ a choice of law
4 determination. Rather, Montana law requires that public policy be considered an important factor
5 within a choice of law analysis – not before (as a prohibition on choice of law analysis) or after
6 (to ‘usurp’ a choice of law analysis).
7

8 After considering the pertinent factors and contacts with respect to choice of law, the
9 Court concludes that Montana law applies. Thus, the Court need not address whether *Wetch* and
10 Section 27-1-703(6)(c)(i), MCA, provide a procedural/evidentiary rule of law as opposed to
11 being substantive law. Nor does the Court reach the question as to whether Wyoming law
12 offends Article II, Section 16 such that it may not be applied in Montana when Wyoming law
13 applies based on the outcome of a choice of law analysis.
14

15 Finally, Plaintiff requests an order prohibiting Oftedal from presenting evidence with
16 regard to Drill Tech’s negligence. Formerly, Montana law provided that “the trier of fact may not
17 consider or determine any amount of negligence on the part” of an immune employer. (Sec. 27-
18 1-703(4)(1987)). This language and *Wetch* provide support for Plaintiff’s request. However, the
19 statute has been amended and now prohibits “comparison of fault” with an immune employer.
20 (Sec. 27-1-703(6)(c)(i), MCA (1997)).
21

22 The parties have not directly addressed whether the change in language impacts the
23 holding in *Wetch*. Furthermore, the Court is unable to anticipate the full impact of the
24 generalized order requested by Plaintiff. Thus, it is proper that the Court hold the matter in
25 abeyance and address arguments regarding the admission of specific evidence through future
26 motions.
27

PLAINTIFF'S CLAIMS AND THEORIES OF LIABILITY

Before undertaking discussion of the merits of the Motions, it is helpful to briefly review the Court's understanding of Plaintiff's remaining claims:

Count I - Direct Negligence. Plaintiff alleges that "Oftedal, as the general contractor ... contractually retained the right to direct Drill Tech's manner of performance and/or contractually assumed affirmative duties with respect to safety" on the Project.

It is the Court's understanding that Plaintiff claims that Oftedal assumed ultimate responsibility for safety in the General Contract and, because it confirmed ultimate responsibility for safety in the Subcontract, retaining control over Drill Tech's manner of performance, Oftedal is liable for harm to Plaintiff.

More specifically, at the hearing, Plaintiff's counsel indicated that the crux of Plaintiff's case is that Oftedal: had a duty to provide or require a rod-casing handler; this mandatory piece of equipment was not provided (breach); this caused Plaintiff's injuries; and Plaintiff suffered damages. Thus, Count I is grounded in black letter law on negligence.

Count II – Inherently Dangerous Activity – Oftedal is Liable for its Negligence. Plaintiff alleges that the work he was performing constituted an "inherently or intrinsically dangerous activity ... pursuant to the Restatement (Second) of Torts §413" and that "Oftedal owed a duty of reasonable care to Plaintiff even though Plaintiff was working for Drill Tech ... because 1) Oftedal failed to provide in the contract with Drill Tech that Drill Tech shall take such precautions, and 2) Oftedal failed to exercise reasonable care to provide in some other manner for the taking of such precautions" by Drill Tech.

The general rule at Restatement (Second) of Torts, §409 provides: "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of

1 the contractor or his servants.”⁴ Thus, ordinarily, Oftedal could not be held liable in a case where
2 Drill Tech was negligent.

3 This general rule of nonliability derives from common law and is essentially based on the
4 notion that “since the employer has no power of control over the manner in which the work is to
5 be done by the contractor, it is to be regarded as the contractor’s own enterprise, and he, rather
6 than the employer, is the proper party charged with the responsibility of preventing the risk, and
7 bearing and distributing it.” (Sec. 409, Cmt. b.)
8

9 However, there are a large number of exceptions to the general rule which are stated at
10 Sections 410 through 429. “They are so numerous, and they have so far eroded the ‘general rule,’
11 that it can now be said to be ‘general’ only in the sense that it is applied where no good reason is
12 found for departing from it.” (Sec. 409, Cmt. b.)
13

14 Section 413, cited by Plaintiff at Count II, provides one of the exceptions: “One who
15 employs an independent contractor to do work which the employer should recognize as likely to
16 create, during its progress, a peculiar unreasonable risk of physical harm to others unless special
17 precautions are taken,⁵ is subject to liability for physical harm caused to them by the absence of
18 such precautions if the employer (a) fails to provide in the contract that the contractor shall take
19 such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the
20 taking of such precautions.”
21

22 Thus, Plaintiff claims that if it is established that “special precautions” were required to
23 be taken by Drill Tech, Oftedal is liable if it failed to provide in the Subcontract, or in some other
24
25

26 ⁴ *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶12 (citations omitted).

27 ⁵ Montana case law sometimes uses the term “inherently dangerous activity” to describe work that is “likely to
28 create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are
taken.” See e.g., *Beckman v. Butte-Silver Bow County*, 2020 MT 112; *Pearson v. McPhillips*, 2016 MT 257.

1 manner, that Drill Tech would take such precautions and that this failure caused Plaintiff's
2 injury.

3 DISCUSSION

4 Conflict of Laws

5 Oftedal has raised a conflict of laws between Montana and Wyoming substantive laws.
6 Although both Montana and Wyoming are comparative fault states, Montana law differs from
7 Wyoming law in that Montana prohibits "comparison of fault" with "a person who is immune
8 from liability to the claimant." Sec. 27-1-703(6)(c)(i), MCA. Under Wyoming law, a non-party
9 actor's negligence is relevant to apportionment of fault and liability. Wyo. Stat. Ann. §1-1-109.
10

11 Choice of Law Analysis

12 Generally speaking, a conflict of laws prompts a choice of law analysis.⁶ According to
13 Plaintiff, however, in a case where the claimant is injured on the job and his employer is immune
14 from suit, Montana public policy (embodied in Section 27-1-703(6)(c)(i), MCA and Article II,
15 Section 16 of the Montana Constitution) prohibits the application of another state's law. In
16 simple terms, Plaintiff contends that Montana law prohibits a choice of law analysis in this case
17 or at least 'usurps' that analysis if the Court concludes that Wyoming law applies.⁷
18

19 With regard to choice of law in tort cases, *Phillips v. GMC*, 2000 MT 55, is particularly
20 instructive. In *Phillips*, the Montana Supreme Court undertook to answer four certified questions,
21

22
23 6 Plaintiff argues that there is no conflict of laws "because this case is being properly prosecuted in a Montana court
24 where Oftedal is incorporated and has its principal place of business. Oftedal is a Montana company and can
25 unquestionably be sued in Montana which is precisely why Oftedal has not challenged this Court's jurisdiction over
26 it." (Pl. Reply/Resp. 5:21-25). However, Plaintiff's decision to sue in Montana and Oftedal's lack of challenge to
27 jurisdiction does not require the Court to conclude that there is no conflict of laws. This is a case where the events
28 and transactions have a significant relationship to more than one state.

7 Plaintiff's briefing also suggests that the Court might be able to apply some Wyoming substantive law so long as it
does not affect Plaintiff's constitutional right to full legal redress. (Pl. Op. Br. 13:5-19; Pl Reply/Resp. 3:2-4).
However, because the Court concludes that Montana law applies, it need not address whether Wyoming law offends
Article II, Section 16, and whether offending law can simply be 'carved out' in a case where another state's law
applies. Thus, extended discussion is not provided.

1 one of which was: “Does Montana recognize a ‘public policy’ exception that would require
2 application of Montana law even where Montana’s choice of law rules dictate application of the
3 laws of another state?”

4 The Court concluded that “[t]he purpose of a choice of law rule is to resolve conflicts
5 between competing policies,” and that “considerations of public policy are accounted for under
6 the analysis contained in the Restatement (Second) of Conflict of Laws.” *Id.* at ¶¶75, 76.

7 Accordingly, the Court held that Montana does not recognize a public policy exception to the
8 Restatement’s most significant relationship test to be applied in the event another state’s law is
9 chosen. *Id.* at ¶76.

10
11 Furthermore, given the approach in *Phillips*, public policy does not prohibit a choice of
12 law analysis. Rather, district courts are directed to consider public policy within a choice of law
13 analysis.⁸ As indicated below, in this particular context (immune employer, suit against the entity
14
15
16

17 ⁸ Plaintiff also cites Restatement (Second) of Conflict of Laws, § 90, entitled “Action Contrary to Public Policy,”
18 for the proposition that this Court may not engage in a conflict of laws analysis. As Plaintiff acknowledges, Section
19 90 by its terms applies to a cause of action, not choice of law: “No action will be entertained on a foreign cause of
20 action the enforcement of which is contrary to the strong public policy of the forum.” As Comment a. makes clear,
21 “[t]he rule does not apply to situations where the forum does decide the controversy between the parties and, on the
22 stated ground of public policy, applies its own local law, rather than the otherwise applicable law, in determining
23 one or more of the issues involved.” Plaintiff also discussed *Talbot v. WMK-Davis, LLC*, 2016 MT 247. (Pl. Op. Br.
24 10:18-28; 11-12; 13:1-3). In *Talbot*, the Court addressed “whether a Montana court should undertake a choice of law
25 analysis before determining whether a workers’ compensation subrogation lien may be asserted against an injured
26 worker prior to the party being made whole.” The Court took the opportunity to clarify its approach to choice of law
27 issues in workers’ compensation subrogation cases, concluding that “Montana courts should utilize the Restatement
28 to determine choice of law issues involving the application of workers’ compensation subrogation liens to tort
recoveries in Montana” to bring “us in line with the analyses we use in contract and tort cases.” Nonetheless, the
Court refused to apply Section 185, a conflict of laws provision specific to workers’ compensation that is silent as to
public policy concerns. The Court noted “the distinction between actions in tort, such as *Phillips*, and subrogation
actions” and stated: “[w]hile an exception was not warranted in *Phillips* because the applicable test adequately
addressed public policy, the Restatement’s lack of consideration of public policy when evaluating workers’
compensation subrogation claims requires us to consider whether the public policy exception contained in §90 of the
Restatement should be applied.” The Court went on to conclude that Article II, Section 16 represented an
“exceptionally strong public policy interest as contemplated by §90 of the Restatement.” In summary, the Court
relied on Section 90 to “supplement” the determination that “courts in Montana will not entertain actions involving
workers’ compensation subrogation prior to an injured worker’s full recovery.” Thus, *Talbot* is distinguishable and
did not establish a public policy exception to be utilized in this case.

1 that engaged the employer), the result is that Montana’s public policy concerns are
2 determinative.

3 Choice of Law – Restatement Rules

4 Montana has adopted the Restatement (Second) of Conflict of Laws for choice of law
5 questions in tort cases.⁹ Under Section 6, as an initial consideration, a court must “follow a
6 statutory directive of its own state on choice of law.”
7

8 Plaintiff argues that Section 27-1-703(6)(c)(i), MCA, serves as a statutory directive on
9 choice of law. However, that provision does not specify that Montana law must apply when there
10 is a conflict of laws and, moreover, the Montana Supreme Court has acknowledged that “[t]here
11 is no statutory directive regarding choice of law in Montana for issues sounding in tort.” *Buckles*
12 *v. BH Flowtest, Inc.* 2020 MT 291, ¶12 citing *Phillips v. GMC*, 2000 MT 55, ¶23.
13

14 Because there is no statutory directive regarding choice of law, the Court must consider
15 relevant factors which include those stated at Section 6(2)(a)-(g), along with Sections 145, 146,
16 and 175 of the Restatement (Second) of Conflict of Laws. An overview of these provisions:

- 17 • Section 6(2) factors:
- 18 ○ The needs of the interstate and international systems;
 - 19 ○ The relevant policies of the forum;
 - 20 ○ The relevant policies of other interested states and the relative interests of those
21 states in the determination of a particular issue;
 - 22 ○ The protection of justified expectations;
 - 23 ○ The basic policies underlying the particular field of law;
 - 24 ○ Certainty, predictability, and uniformity of result; and
25
26

27 _____
28 ⁹ *Phillips v. General Motors Corp.*, 2000 MT 55, ¶23.

- Ease in determination and application of the law to be applied.
- Section 145(1) states the general principle “with respect to an issue in tort” and provides that a court should apply the law of the state that has the “most significant relationship to the occurrence and the parties under the principles stated in [Section] 6.”
- Section 145(2) sets forth the “[c]ontacts to be taken into account in applying the principles of [Section] 6” which include:
 - The place where the injury occurred;
 - The place where the conduct causing the injury occurred;
 - The domicile, residence, nationality, place of incorporation, and place of business of the parties; and
 - The place where the relationship, if any, between the parties is centered.
- Section 146 is specific to personal injuries and provides: “In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [Section] 6 to the occurrence and the parties, in which event the local law of the other state will be applied.”

Choice of Law - Analysis

Before addressing the particulars of the choice of law analysis, the Court acknowledges Oftedal’s argument that the cases cited by Plaintiff are not choice of law cases and do not plainly prohibit a choice of law analysis.¹⁰ Nonetheless, what resonates with the Court in terms of a choice of law analysis is that these cases demonstrate Montana’s strong, specific interest in “full

¹⁰ These cases are: *Francetich*; *Trankel*; *Meech*; *Oberson*; and *Talbot*.

1 legal redress” for people who are injured on-the-job and who file suit in Montana courts - and
2 that the Montana Supreme Court consistently and carefully guards this interest.¹¹

3 Turning to the particulars of the analysis, because the injury occurred in Wyoming,
4 Wyoming substantive law applies unless Montana has a more significant relationship to the
5 occurrence and the parties under the principles stated in Section 6. (Sec. 146). Thus, a proper
6 choice of law analysis requires the Court to address each of the factors enumerated under Section
7 6(2), taking into account, when appropriate, the contacts of Section 145(2).
8

9 Relevant contacts to keep in mind are: the injury occurred in Wyoming; the injurious
10 conduct occurred in Wyoming; Plaintiff is a Montana resident; Oftedal is incorporated and
11 headquartered in Montana; and the relationship of the parties was centered in Wyoming.

12 1. Needs of the Interstate and International System - Section 6(2)(a)

13 Comment d. to Section 6(2) states: “choice-of-law rules, among other things, should seek
14 to further harmonious relations between states and to facilitate commercial intercourse between
15 them.”
16

17 Montana has a strong interest in applying Montana substantive law to a dispute between a
18 Montana citizen and a Montana corporation. Harmony in the relationship between Montana and
19 Wyoming would not be advanced by a Montana Court denying the application of Montana law
20 and applying Wyoming law. Thus, this factor favors the application of Montana law. *See Buckles*
21 *v. BH Flowtest, Inc.*, 2020 MT 291, ¶23.
22

23 2. The Policies of Interested States – Section 6(2)(b) and (c)

24 The second and third factors from Section 6(2) require consideration of the relevant
25 policies of both Montana and Wyoming. As noted by Plaintiff’s counsel at the hearing, the
26

27 ¹¹ The Court appreciates the distinctions brought forth by Oftedal as to the meaning of “full legal redress” both at
28 the hearing and in the briefing. (Oftedal Reply 2:8-25; 3:1-19).

1 Montana Supreme Court has observed that the relevant policies “are the most important factors
2 in a case where the plaintiff was injured outside of his domicile state.” *Buckles* at ¶24.

3 In *Buckles*, the Court considered choice of law in a case where a Montana resident was
4 killed in North Dakota while performing dangerous work (manually gauging crude oil
5 production tanks).¹² The Montana Supreme Court noted the “strong policy interest in ensuring
6 that employers are held to a heightened standard when their workers engage in inherently
7 dangerous activities” and “ensuring injured employees’ rights to full legal redress.” On the other
8 hand, the Court observed that North Dakota’s policy “is not nearly as strong or specific.”
9 These same considerations apply in this case. Montana has strong and specific policy to protect
10 workers and incentivize persons who might be held liable for personal injury to enhance safety;
11 Wyoming’s policy is less strong and more general. Put simply, Montana’s public policy is so
12 strong that this factor is, practically speaking, determinative to the choice of law analysis.
13
14

15 3. Protection of Justified Expectations – Section 6(2)(d)

16 The Montana Supreme Court has recognized “that tort cases generally do not involve
17 justified expectations. Particularly in this area of negligence, when parties act without giving
18 thought to the legal consequences of their conduct or to the law to be applied, they have no
19 justified expectations.” *Buckles citing Phillips v. GMC*, 2020 MT 55, ¶62 (citing Sec. 6, cmt. g.).
20 Thus, this factor is neutral.
21

22 4. Basic Policies Underlying Tort Law – Section 6(2)(e)

23 The consideration under Section 6(2)(e), “is of particular importance in situations where
24 the policies of the interested states are largely the same but where there are nevertheless minor
25

26 ¹² Decedent’s mother brought a wrongful death action on behalf of the estate. The defendants were: Continental
27 Resources, Inc., BH Flowtest, Inc., Black Rock Testing, Inc., and Janson Palmer d/b/a Black Gold Testing.
28 Continental owned the well site and had a Master Service Contract with BH Flowtest who subcontracted with Black
Rock. Black Rock in turn subcontracted with Black Gold, decedent’s employer.

1 differences between their local law rules. In such instances, there is good reason for the court to
2 apply the local law... ." (Sec. 6(2), cmt. h.) Given this comment, and the difference in policy
3 between Montana and Wyoming, this factor is mostly inapplicable. *Buckles* at ¶24.

4 5. Predictability, Uniformity of Result, and Ease of Determination/Application of Law –
5 Section 6(2)(f) and (g)

6 "Predictability and uniformity of result are of particular importance in areas where the
7 parties are likely to give advance thought to the legal consequences of their transactions." (Sec.
8 6(2), cmt. i.) Despite the preceding discussion regarding "justified expectations," there is reason
9 to believe Oftedal would have given advance thought to the consequences of taking on the
10 Project.
11

12 Oftedal is a Montana corporation in the business of highway construction that chose to
13 serve as a general contractor on a \$67,484,899.75 highway project. It is reasonable to infer that it
14 is a sophisticated actor and, therefore, familiar with personal injury risks and differences in state
15 law. Oftedal could reasonably predict that it might be sued in Montana by a Montana resident
16 injured while working on the Project in Wyoming – and that a court might apply Montana
17 substantive law. Thus, applying Montana law would not upset "predictability" in this case.
18

19 As to ease of determination and application of law, the idea is that "choice-of-law rules
20 ... be simple and easy to apply." However, "[t]his policy should not be overemphasized, since it
21 is obviously of greater importance that the choice-of-law rules lead to desirable results." (Sec.
22 6(2), cmt. j.). On balance, the factors at Section 6(2)(f) and (g), favor the application of Montana
23 law.
24

25 In summary, after considering the factors and contacts, the Court concludes that although
26 there is a presumption in favor of applying Wyoming law, Montana has a more significant
27

1 relationship to the occurrence and the parties under the principles stated in Section 6. In reaching
2 this conclusion, the Court is not required to take a formulaic approach.¹³ Therefore, Montana
3 substantive law applies in this case.¹⁴

4 Application of Section 27-1-703(6)(c)(i), MCA

5 Having determined that Montana law applies, the Court must address Plaintiff's request
6 for an evidentiary ruling and order prohibiting Oftedal "from blaming Plaintiff's immune
7 employer, Drill Tech, for causing Plaintiff's injuries and/or presenting any evidence of Drill
8 Tech's alleged negligence in causing Plaintiff's injuries." In support of his request, Plaintiff's
9 cites and discusses *Wetch v. Unique Concrete Co.*, 269 Mont. 315 (1995).

11 In *Wetch*, the plaintiff was employed as a receptionist by Dr. Wallick, a chiropractor in
12 Miles City, Montana. Unique Concrete was hired as a subcontractor to do some remodeling to
13 Dr. Wallick's building, including removing concrete steps outside the rear door.

15 Unique, concerned with safety, wanted to barricade the rear door. Dr. Wallick said he
16 didn't want Unique to do that and would "take care of it" by posting a warning sign and bolting
17 the door during business hours. Dr. Wallick failed to do so.

18 Ms. Wetch, whether out of forgetfulness or force of habit, walked out the door, stepped
19 into a five- or six-foot hole, and was injured. She then sued, alleging negligence against Unique.
20 (Dr. Wallick was immune from suit because he had workers' compensation insurance.)
21

23 ¹³ Contrary to Defense counsel's argument at the hearing and the suggestion by Oftedal's Reply, the Court is not
24 bound to apply the law of a state if the majority factors favor application of one state's law. As noted by the
25 Comment to Section 6(2): "Varying weight will be given to a particular factor, or to a group of factors, in different
areas of choice of law." This allows the Court to heavily weight considerations of public policy in the area of on-the-
job personal injury.

26 ¹⁴ If the Court had chosen to apply Wyoming substantive law, it would have addressed the impact of Article II,
27 Section 16, a constitutional provision which absolutely prohibits the enforcement of "[a]ny statute or court decision
28 which deprives an employee of his right to full legal redress." *Trankel v. Department of Military Affairs*, 282 Mont.
348, 362 (1997) (without exception, Article II, Section 16 precludes limitations on claims by injured employees
against persons other than the employee's employer or fellow employee). The Court need not reach this issue.

1 Prior to trial, Unique filed a motion for summary judgment, arguing that Dr. Wallick's
2 failure to secure the door was negligence and an independent superseding, intervening cause
3 which absolved Unique of liability.

4 Based on Section 27-1-703(4), MCA (1987), Ms. Wetch filed a motion in *limine* to
5 exclude from consideration by the jury argument or evidence of Dr. Wallick's negligence. At
6 that time (1995), the statute provided that "the trier of fact may not consider or determine any
7 amount of negligence on the part" of an immune employer.
8

9 The trial court admitted the portion of the discussion where Unique acknowledged the
10 hazard but excluded the part where Dr. Wallick agreed to remedy it. The jury found for Ms.
11 Wetch.

12 Unique appealed, arguing that the grant of the motion in *limine* denied it a right to a fair
13 trial.
14

15 The Montana Supreme Court affirmed the trial court, stating that "Dr. Wallick's
16 negligence is simply not a part of the liability or damages equation." The Court noted that it was
17 compelled interpret the statute as written. Therefore, the Court held that the trial court correctly
18 applied the law.
19

20 Based on *Wetch*, Plaintiff requests an order barring any evidence that 'blames' Drill
21 Tech, i.e., suggests Drill Tech was negligent and caused Plaintiff's injuries. However, the current
22 version of the statute does not bar 'consideration' of negligence, but rather prohibits "comparison
23 of fault" with an immune employer. Neither Plaintiff nor Defendant has discussed the impact of
24 this change, if any, on the holding or application of *Wetch*.
25

26 Therefore, it may not be proper for the Court to prohibit evidence tending to establish
27 Drill Tech's negligence. *See Gibbs v. Goldwind, U.S.A., Inc.*, 2016 Mont. Dist. LEXIS 5; *Bell v.*
28

1 *Glock, Inc. (USA)*, 92 F. Supp. 2d 1067 (Mont. Dist. Ct. 2000). At this point, the Court is not
2 thoroughly informed on Plaintiff's theories, Oftedal's defenses, or the available evidence.
3 Accordingly, the Court declines to issue the requested order without knowing the specific
4 evidence to be offered (and for what purpose) and without further consideration of statutory
5 interpretation as to the updated language together with potentially persuasive authority.

6 Therefore, the matter is properly taken under advisement. The parties are invited to file
7 appropriate motions (such as motions in *limine*) as to specific evidence and the proposed use (or
8 limitation on use) of that evidence.
9

10 Nothing in this discussion should be construed as binding the Court to a particular ruling
11 in the future. It may well be that Plaintiff's request is fully supported by the law, or it may be that
12 the Court will be called upon to balance competing tenets of law.

13 **NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

- 14 1. Oftedal's *Motion for the Application of Wyoming Substantive Law* is DENIED; Montana
15 law applies in this case.
- 16 2. Plaintiff's request for a preliminary legal ruling that the Montana Rules of Civil
17 Procedure and the Montana Rules of Evidence apply in this case is GRANTED.
18
- 19 3. The Court makes no ruling as to whether Section 27-1-703(6)(c)(i), MCA, is a
20 procedural/evidentiary or substantive law because such a ruling is unnecessary to
21 determination of the Motions.
22
- 23 4. The Court makes no ruling as to whether Article II, Section 16, requires the negation of a
24 choice of law analysis when another state's law is chosen because such a ruling is
25 unnecessary to the determination of the Motions.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. Section 27-1-703(6)(c)(i), MCA, prohibits “comparison of fault” with Drill Tech. Plaintiff’s request for an order that Oftedal be prohibited from ‘blaming’ Drill Tech for causing Plaintiff’s injuries and/or presenting any evidence of Drill Tech’s alleged negligence in causing Plaintiff’s injuries, is TAKEN UNDER ADVISEMENT for further consideration with future motions as described in this Order.

Ordered November 14, 2022.



Cc: Counsel of record

Michael B. Hayworth
DISTRICT JUDGE

CERTIFICATE OF SERVICE

The foregoing was duly served by U.S. Mail or Email scan upon the parties or their attorneys of record at their last known address on November 14, 2022.

By