COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00352-CV

NORTH AMERICAN TUBULAR SERVICES, LLC — APPELLANT

V.

BOPCO, L.P. — APPELLEE

FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 096-290800-17

MEMORANDUM OPINION[1]

This appeal concerns Texas parties who chose Texas law to apply to their contract that they negotiated and executed in Texas. Appellant North American Tubular Services, LLC (North American) contends, however, that New Mexico law should apply to the contract that it executed with appellee BOPCO, L.P.

[1]*See* Tex. R. App. P. 47.4.

(BOPCO) and that if New Mexico law applies, the parties' defense and indemnity agreements are unenforceable. Alternatively, North American contends that the defense and indemnity provisions are unenforceable even if Texas law applies. We reject both arguments. Therefore, we hold that the defense and indemnity agreements are valid and enforceable, and we affirm the trial court's declaratory judgment.

Background

BOPCO is an oilfield operator; North American is an oilfield contractor. Both companies are domiciled in Texas. North American maintains a Kilgore, Texas address; BOPCO has an address in Midland, Texas.

In January 2016 and through a May 2016 amendment, BOPCO and North American executed a Master Work/Service Agreement (the MWSA). The MWSA provided, in part,

> WHEREAS, it is contemplated by [BOPCO] and [North American] that from time to time [BOPCO] may request that [North American] perform work and/or render services for [BOPCO], and that pursuant to such request [North American] will perform such work, and
>
> WHEREAS, in lieu of negotiating and executing a separate written contract for each separate job, it is deemed more reasonable and practical to enter into a master agreement which will cover and be effective as to each and every job performed during the term hereof by [North American] for [BOPCO],
>
> NOW, THEREFORE, in consideration of . . . the mutual promises and agreements herein contained, [BOPCO] and [North American] do hereby contract and agree as follows:

1. CONTRACT DOCUMENTS. All work ("Work") which may be offered by [BOPCO], either orally or in writing, and accepted by [North American] during the term of this Agreement shall be subject to and governed by all the terms and provisions of this Agreement to the same extent and with the same effect as if the terms and provisions herein were incorporated in any such work order, either oral or written, given to [North American] by [BOPCO]. The "Contract Documents" consist of this Agreement [and] any drawings, plans, specifications or other documents identified as a Contract Document and applicable to a particular job. . . .

. . . .

6. CONFORMATION TO LAW. If it is judicially determined that the indemnities or insurance required hereunder exceed the maximum limits permissible under applicable law, it is agreed that said indemnity and insurance requirements shall automatically be amended to conform to the maximum limits permitted under such law and will be liberally construed in order to effectuate the intent and enforceability of these provisions. Furthermore, it is understood and agreed that for Work performed in the State of Texas and covered by TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001–.008 . . . as amended, (a) Section 8 herein is subject to and expressly limited by the terms and conditions of the aforementioned statute, and (b) the aforementioned statute is incorporated herein.

. . . .

8.A. [NORTH AMERICAN]'S INDEMNITY; HOLD HARMLESS. ***TO THE FULLEST EXTENT PERMITTED BY LAW, [NORTH AMERICAN] SHALL AND DOES AGREE TO INDEMNIFY, PROTECT, DEFEND AND HOLD HARMLESS [BOPCO], . . . FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, [AND] JUDGMENTS, . . . (COLLECTIVELY "LIABILITIES") WHICH IN ANY WAY ARISE OUT OF, ARE CAUSED BY OR RESULT DIRECTLY OR INDIRECTLY FROM THE PERFORMANCE OF THE WORK OR ANY PART THEREOF, AND WHICH ARE ASSERTED BY, OR ARISE IN FAVOR OF [NORTH AMERICAN] OR ANY OF [NORTH AMERICAN]'S AGENTS, REPRESENTATIVES OR EMPLOYEES . . . DUE TO BODILY INJURY, SICKNESS, DISEASE, LOSS OF SERVICE OR DEATH OF ANY AGENTS, REPRESENTATIVES OR EMPLOYEES OF***

[NORTH AMERICAN] . . . EVEN IF THESE LIABILITIES ARE CAUSED BY THE SOLE, JOINT, AND/OR CONCURRENT NEGLIGENCE, FAULT, STRICT LIABILITY, ACT OR OMISSION . . . [OF] ANY [BOPCO] INDEMNITEE . . . .[2]

. . . .

9. INSURANCE REQUIREMENTS. As to all Work provided for herein, each party shall secure and maintain during the term of this Agreement at its sole expense . . . insurance with insurance carriers satisfactory to [BOPCO] and licensed to do business in the state where the Work is being performed:

> a) Statutory Workers' Compensation Insurance and Employer's Liability Insurance in full compliance with applicable State and Federal laws and regulations where the Work is to be performed. This policy shall include a waiver of subrogation in favor of the other party (unless prohibited by law in the jurisdiction where work is performed). . . .
>
> b) Commercial General Liability Insurance with limits of $1,000,000.00 each occurrence or the equivalent. The policy will be on a form acceptable to [BOPCO], be endorsed to include the other party as an Additional Insured but only to the extent of the indemnity obligations assumed hereunder (unless prohibited by law in the jurisdiction where work is performed), and state that this insurance is primary over any other valid

[2]Section 8.B. of the agreement, through similar language, required BOPCO to indemnify North American with respect to claims arising out of BOPCO's performance of "work" under the agreement. On appeal, BOPCO characterizes these provisions as the parties' agreement to indemnify "each other against claims brought by or on behalf of their respective employees." *Cf. In re Deepwater Horizon*, 470 S.W.3d 452, 456 n.5 (Tex. 2015) (describing "knock-for-knock" indemnity agreements that require parties to assume responsibility for injuries to their own employees without regard to who caused the injuries); *see also Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 167 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (en banc) ("At first glance, it appears suspect that an innocent party would agree in advance to pay the costs of a liable party, no matter what happens. Yet indemnity clauses are widespread in oilfield contracts . . . .").

> and collectable coverage available to the other party. . . .
>
> c) Comprehensive Automobile Liability Insurance with limits of $1,000,000.00 per occurrence or the equivalent. The policy shall be on a standard form written to cover all owned, hired and non-owned automobiles, be endorsed to include the other party as Additional Insured, but only to the extent of the indemnity obligations assumed hereunder (unless prohibited by law in the jurisdiction where work is performed), and state that this insurance is primary insurance as regards any other insurance carried by the other party.
>
> d) Umbrella Liability Insurance as excess coverage . . . with limits of $1,000,000.00 adding the other party as Additional Insured, but only to the extent of the indemnity obligations assumed hereunder (unless prohibited by law in the jurisdiction where work is performed) and state that this insurance is primary insurance as regards any other insurance carried by the other party. In addition, the policy shall be endorsed to provide defense coverage obligations.
>
> . . . .
>
> Evidence of the above coverage . . . must be furnished to [BOPCO] prior to [North American] starting Work. Certificates of Insurance shall specify the additional insured status mentioned above . . . .
>
> . . . .
>
> **30. JURISDICTION.** This Agreement shall be subject to the jurisdiction and laws of the State of Texas.

In October 2016, Jorge Galvan, a North American employee, was fatally injured while working on a well site operated by BOPCO in New Mexico. His estate and his heirs filed a lawsuit for damages in a New Mexico district court against BOPCO, pleading that BOPCO's negligence caused the injury and

death.[3] BOPCO sent North American a letter asking for defense and indemnity under section 8.A of the MWSA. North American refused BOPCO's requests for defense and indemnification.

In March 2017, BOPCO filed a declaratory-judgment petition[4] in a Texas court.[5] BOPCO asked the trial court to declare that North American was "required to indemnify BOPCO from all claims and damages . . . asserted by" Galvan's estate in the New Mexico lawsuit. BOPCO also asked the trial court to award reasonable and necessary attorney's fees. North American filed an answer in which it pleaded that a New Mexico anti-indemnity statute and a Texas anti-indemnity statute barred BOPCO's requests for defense and indemnity.

BOPCO filed a motion for summary judgment. It contended that despite "clear and unequivocal language in the [MWSA], North American . . . denie[d] that it owe[d] BOPCO defense and indemnity." BOPCO asked the trial court to declare that section 8.A was enforceable and that the section required North American to defend and indemnify BOPCO with respect to Galvan's claim against BOPCO.

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[3]Galvan's estate also sued other parties for negligence. Those parties are not subject to this appeal.

[4]*See* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.003(a), .004(a) (West 2015).

[5]In North American's brief, it represents that other defendants in Galvan's suit in New Mexico have likewise filed declaratory judgment actions against North American seeking defense and indemnification.

North American also sought summary judgment. It contended that under New Mexico law and under Texas law, section 8.A was unenforceable, and North American was not obligated to provide BOPCO with defense or indemnity in Galvan's suit. Specifically, North American asserted that (1) New Mexico, where Galvan's death occurred, prohibited oilfield indemnity agreements based on the indemnitee's sole or concurrent negligence, New Mexico law applied to BOPCO's requests for defense and indemnity, and New Mexico law therefore voided section 8.A; and (2) even if Texas law applied, the law allowed for indemnity only if the indemnitee and indemnitor carried liability insurance, but the parties' agreement to do so in section 9 of the contract was ineffective because New Mexico law invalidates agreements to obtain insurance supporting indemnity and because language within section 9 applied the law of the "jurisdiction where work [was] performed"—here, New Mexico—to the parties' insurance obligations. North American also argued that to the extent that the result would be different under New Mexico law and Texas law, New Mexico law applied under principles recited by the Restatement (Second) of Conflict of Laws despite the parties' expressed choice in section 30 of the MWSA to apply Texas law. Based on these assertions, North American contended that "indemnity for BOPCO's sole and concurrent negligence [was] void" irrespective of the parties' general choice of law provision.

Replying to North American's arguments, BOPCO contended that the "defense and indemnity obligation [was] unquestionably valid" under Texas law

and that "New Mexico law ha[d] no relevance . . . to th[e] lawsuit." BOPCO contended that the indemnity obligation complied with a "safe harbor" exception within the Texas anti-indemnity law because section 9 of the MWSA contained "unambiguous mutual indemnity obligations supported by insurance coverage" and because the parties had fulfilled section 9's insurance requirement as evidenced by a certificate of insurance that North American had sent to BOPCO.[6] And BOPCO argued that New Mexico's anti-indemnity statute did not apply because the MWSA expressed that Texas law would govern it.

After hearing argument on the opposing motions for summary judgment, the trial court granted BOPCO's motion and denied North American's motion. The court signed a final judgment in which the court declared that section 8.A of the MWSA is enforceable and is governed by Texas law, declared that section 8.A requires North American to defend and indemnify BOPCO with respect to Galvan's lawsuit, and awarded BOPCO attorney's fees of $48,875.50.[7] North American brought this appeal.

[6]This certificate refers to North American as the insured and specifies, in part, that North American has $1,000,000 in commercial general liability coverage for each occurrence along with $5,000,000 in excess liability coverage for each occurrence.

[7]*See* Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2015) (stating that in a declaratory-judgment proceeding, the trial court may award "reasonable and necessary attorney's fees as are equitable and just").

BOPCO's Entitlement to Summary Judgment

In three issues, North American argues that the trial court erred by granting BOPCO's motion for summary judgment. North American contends that the trial court's declaratory judgment is erroneous because (1) New Mexico's anti-indemnity statute bars BOPCO's demand for defense and indemnity under the MWSA; (2) if New Mexico's anti-indemnity statute does not apply, Texas's anti-indemnity statute likewise bars BOPCO's demand for defense and indemnity; and (3) for those reasons, we should reverse the trial court's judgment and render judgment for North American.

Standard of review

In a summary judgment case, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review a summary judgment *de novo*. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of its cause of action. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). When both parties move for summary judgment and the trial court grants one motion and denies the other, we review both parties' summary judgment evidence and determine all questions presented. *Mann Frankfort*, 289 S.W.3d at 848.

New Mexico and Texas have passed statutes affecting oilfield indemnity

The New Mexico and Texas legislatures have enacted statutes that generally void agreements that purport to create indemnity for an oilfield indemnitee's sole or concurrent negligence. *See* N.M. Stat. Ann. § 56-7-2; Tex. Civ. Prac. & Rem. Code Ann. § 127.003(a) (West 2011).

Under New Mexico law, an agreement pertaining to an oil or gas well within New Mexico that purports to indemnify an indemnitee against liability for damages is void if the indemnity extends to "the sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee." N.M. Stat. Ann. § 56-7-2(a)(1). Furthermore, a provision

> naming a person as an additional insured or a provision in an insurance contract or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement described in . . . this section, be void, is against public policy and void.

Id. § 56-7-2(c).

Section 56-7-2 holds "each party responsible for its own negligence," thereby providing an incentive for oilfield safety. *See XTO Energy, Inc. v. ATD, LLC*, 189 F. Supp. 3d 1174, 1200 (D.N.M. 2016); *Guitard v. Gulf Oil Co.*, 670 P.2d 969, 972–73 (N.M. Ct. App. 1983) ("[T]he public policy behind [section 56-7-2] is to promote safety. The indemnitee, usually the operator of the well or mine, will not be allowed to delegate to subcontractors his duty to see that the well or mine is safe."); *see also Pina v. Gruy Petroleum Mgmt. Co.*, 136 P.3d 1029, 1034

(N.M. Ct. App. 2006) (explaining that "[b]y requiring an indemnitee to remain responsible for its own negligence, Section 56-7-2 protects third parties whose person or property would be placed at risk by the indemnitee's indifference to safety"). In enacting section 56-7-2, the New Mexico legislature subordinated public policies favoring the freedom to contract to the safety goals promoted by the section. *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 237 P.3d 728, 734 (N.M. 2010).

Similarly, under Texas law, an oilfield indemnity agreement is generally void if it "purports to indemnify a person against loss or liability for damage" that arises from personal injury or death and is "caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee." Tex. Civ. Prac. & Rem. Code Ann. § 127.003(a)(1)–(2)(A). But unlike New Mexico, Texas does not preclude such an indemnity agreement if "the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor." *Id.* § 127.005(a) (West 2011).[8] When the Texas legislature enacted its oilfield-anti-indemnity statute, it found that "an inequity is fostered on certain contractors by the indemnity provisions in certain agreements pertaining to wells" and that "[c]ertain agreements that provide for indemnification of a negligent

[8]In this manner, to the extent of the parties' insurance obligations, Texas assures a ready remedy to anyone, such as Galvan, alleged to have been injured or killed because of oilfield negligence.

indemnitee are against the public policy of this state." *Id.* § 127.002(a)–(b) (West 2011).

Section 56-7-2—the New Mexico anti-indemnity statute—does not apply

North American first contends that section 56-7-2 bars BOPCO's demands for defense and indemnity under the MWSA. North American argues that although section 30 of the MWSA generally states that Texas law applies to the contract, New Mexico law applies to the defense and indemnity provisions because (1) the language of the MWSA "concedes that . . . indemnification provisions must conform to the permissible scope of the appropriate jurisdiction," and (2) under a conflict-of-laws analysis, New Mexico law controls because the "place of performance of the project at issue was in New Mexico, the acts/omissions at issue occurred in New Mexico, [Galvan's] death occurred in New Mexico, and the wrongful death action in which defense and indemnification is sought is being pursued in New Mexico under New Mexico negligence standards."

BOPCO does not dispute North American's assertion that if section 56-7-2 applies, the section voids the parties' indemnity agreement under section 8.A of the MWSA. But BOPCO contends that section 56-7-2 does not apply and that Texas law does because the parties agreed in section 30 of the MWSA that Texas law applies to the indemnity obligation and because three principles in the Restatement (Second) of Conflict of Laws favor the application of Texas law: Texas has the most significant interest in determining whether the indemnity

agreement is valid, the application of Texas's anti-indemnity laws will not contravene New Mexico's anti-indemnity policies, and New Mexico does not have a materially greater interest than Texas in resolving the indemnity issue.

Which jurisdiction's laws apply to a dispute is a question of law. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000). We generally honor contracting parties' bargained-for and expressed choice of which state's laws govern their performance under the contract. *See Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 371 (Tex. 2001) (explaining that Texas has a "strong commitment to the principle of contractual freedom"); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990) (op. on reh'g) (explaining that "judicial respect for [a choice-of-law provision] advances the policy of protecting [contracting parties'] expectations"), *cert. denied*, 498 U.S. 1048 (1991); *Gator Apple, LLC v. Apple Tex. Rests., Inc.*, 442 S.W.3d 521, 532 (Tex. App.—Dallas 2014, pet. denied). But contracting parties' freedom to choose what jurisdiction's law applies is not unlimited; parties "cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply." *DeSantis*, 793 S.W.2d at 677. Application of the law of another state is "not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum's law." *Id.* at 680.

To determine the enforceability of a choice-of-law provision, we apply principles from the Restatement (Second) of Conflict of Laws. *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d 319, 324 (Tex. 2014); *DeSantis*, 793 S.W.2d at 677–81; *Branch Banking and Tr. Co. v. Seideman*, No. 05-17-00381-CV, 2018 WL 3062450, at *6–7 (Tex. App.—Dallas June 21, 2018, no pet. h.) (mem. op.). Under section 187(2) of the Restatement,

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue,[9] unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2). Under section 188, the "rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." *Id.* § 188(1).

[9]The enforceability of an indemnity provision is an issue that the parties "could not have resolved by an explicit provision in their agreement directed to that issue" under section 187(2). *See* Restatement (Second) of Conflict of Laws § 187 cmt. d (Am. Law Inst. 1971); *Gator Apple*, 442 S.W.3d at 532.

Under section 187(2)(a), Texas, the state chosen by North American and BOPCO to govern disputes under their contract, has a substantial relationship to the parties, who are both domiciled here. *See id.* § 187(2)(a); *see also In re J.D. Edwards World Sols. Co.*, 87 S.W.3d 546, 549 (Tex. 2002) (orig. proceeding) (concluding that Colorado had a substantial relationship to parties and their transaction because one party's office was in Colorado); *DeSantis*, 793 S.W.2d at 678 (holding that a state had a substantial relationship to the parties because one party's corporate offices were in that state); *Branch Banking*, 2018 WL 3062450, at *7 (holding that Texas had a substantial relationship to the parties when one party was a Texas resident and the contract was negotiated and consummated in Texas). Thus, we must determine under section 187(2)(b) and section 188(1) (1) whether application of Texas law would be contrary to a fundamental policy of New Mexico (in other words, whether New Mexico's policy would be contravened by applying Texas law); (2) whether New Mexico has a materially greater interest than Texas in determining the "particular issue" of indemnity, and (3) whether Texas has the "most significant relationship to the transaction and the parties." *See* Restatement (Second) of Conflict of Laws §§ 187(2)(b), 188(1); *DeSantis*, 793 S.W.2d at 678 (describing the three-part test); *Exxon Mobil*, 452 S.W.3d at 325–31 (applying the "three-step approach set forth in *DeSantis*").

We must enforce the parties' choice of Texas law in section 30 of the MWSA *unless all three* of these inquiries favor the application of New Mexico

law. *See Branch Banking*, 2018 WL 3062450, at *7; *Gator Apple*, 442 S.W.3d at 533. If we conclude that one of the three inquiries favors the parties' choice of Texas law to govern their dispute, we need not examine the other two. *See Gator Apple*, 442 S.W.3d at 533; *see also* Tex. R. App. P. 47.1.

We conclude that Texas—the forum that the parties chose in section 30 of the MWSA[10]—has the most significant relationship to them and to their transaction. *See* Restatement (Second) of Conflict of Laws § 188(1); *DeSantis*, 793 S.W.2d at 678–79. In determining which state has the "most significant relationship to the transaction and the parties," we weigh five factors: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile and place of

[10]We reject North American's argument that the parties' references to the laws of the "jurisdiction where work [is] performed" in section 9 of the MWSA indicates that the parties did not intend to apply Texas law (as chosen by section 30) to the indemnity obligations of section 8. As explained below, we conclude that such language in section 9 relates more specifically to additional obligations that the parties' agreed to incur.

We are also unpersuaded that section 6, which contemplates indemnity reduction (but *not* elimination) in certain circumstances and which expressly incorporates the provisions of chapter 127 of the civil practice and remedies code to apply to indemnity obligations for "Work" performed in Texas, implies that law of other states should apply to indemnity obligations for work performed in those states. To reach that conclusion, we would need to violate a principle of contract construction by reading words into section 6 or section 30 that the parties did not include. *See Doe v. Tex. Ass'n of Sch. Boards, Inc.*, 283 S.W.3d 451, 458 (Tex. App.—Fort Worth 2009, pet. denied). While section 6 may be superfluous given the language of section 30 (or perhaps section 6 is intentionally emphatic of section 30's application to indemnity obligations), we decline to hold that the silence about foreign law in section 6 implies the parties' intent to alter or limit section 30.

business of the parties. Restatement (Second) of Conflict of Laws § 188(2); *Branch Banking*, 2018 WL 3062450, at *8. In turn, we consider these factors in light of the conflict-of-law principles recited in section 6 of the Restatement: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations;[11] the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied. *See* Restatement (Second) of Conflict of Laws §§ 6(2), 188(1); *Branch Banking*, 2018 WL 3062450, at *8 & n.6. In conducting our analysis, we focus on which state has the most significant relationship to the particular substantive issue to be resolved. *Branch Banking*, 2018 WL 3062450, at *8.

As explained above, BOPCO and North American are each domiciled[12] in Texas and conduct business here. *See* Restatement (Second) of Conflict of

[11]A prime objective of contract law is to "protect the justified expectations of the parties . . . . [This objective] may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby." Restatement (Second) of Conflict of Laws § 187 cmt. e.; *see also Sonat Expl. Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228, 236 (Tex. 2008) ("When a contract involves oilfield work in many states, sophisticated parties should generally be free to designate the law that will govern their relationship and have that choice respected.").

[12]The place of a contracting party's domicile is significant because the domicile has an "enduring relationship" to the party. Restatement (Second) of Conflict of Laws § 188 cmt. e.

Laws § 188(2)(e); *see also Chesapeake Operating*, 94 S.W.3d at 173 & n. 19, 175 (giving "special weight" to the domicile factor and explaining that state and federal courts have traditionally applied the law of parties' domiciles, not the law of where work was performed, when considering conflicting indemnity laws). Next, BOPCO contends, and North American does not dispute,[13] that the parties negotiated[14] and executed the MWSA in Texas. *See id.* § 188(2)(a)–(b); *see also Branch Banking*, 2018 WL 3062450, at *8 (emphasizing that the "lending transaction that form[ed] the basis of the Bank's claim was negotiated and consummated in Texas"); *Kozuch v. Allstate Ins. Co.*, No. 14-97-00968-CV, 1999 WL 93252, at *3 (Tex. App.—Houston [14th Dist.] Feb. 25, 1999, no pet.) (not designated for publication) (holding that in a case involving a contract dispute, New Hampshire had the "most significant relationship" to the parties and to the transaction because, in part, New Hampshire was the place of contracting and was the place of negotiation); *Chase Manhattan Bank, N.A. v. Greenbriar N. Section II*, 835 S.W.2d 720, 726 (Tex. App.—Houston [1st Dist.] 1992, no writ) (considering under section 188 of the Restatement that a note and deed of trust

[13]BOPCO asserts that the parties' contract was "negotiated and executed in Texas." North American does not contest that assertion, and at oral argument, North American agreed that the parties "entered into the agreement in . . . Texas." Thus, we accept the assertion as true. *See* Tex. R. App. P. 38.1(g); *City of Fort Worth v. Alvarez*, No. 02-17-00091-CV, 2018 WL 2248481, at *1 n.2 (Tex. App.—Fort Worth May 17, 2018, no pet.) (mem. op.).

[14]The "place where the parties negotiate and agree on the terms of the contract is a significant contact." Restatement (Second) of Conflict of Laws § 188 cmt. e.

were executed in New York and that negotiation of the note occurred there). Without any dispute, then, three of section 188(2)'s factors weigh in favor of Texas as the state that has the most significant relationship to the parties and to their transaction. Restatement (Second) of Conflict of Laws § 188(2)(a), (b), (e).

North American, however, relies heavily on the place-of-performance factor.[15] *See id.* § 188(2)(c). In oral argument in this court, BOPCO acknowledged that the place-of-performance factor favors applying New Mexico law because if North American provides defense and indemnity, it will principally do so in New Mexico. But under guidance from the Restatement, we cannot conclude that the place-of-performance factor outweighs the other factors supporting the application of Texas law. One of the comments to section 188 explains that the place of performance factor bears little weight "when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue." Restatement (Second) of Conflict of Laws § 188 cmt. e. The MWSA did not limit the "Work" to be performed by North American to particular projects in New Mexico; in fact the MWSA did not even mention "New Mexico." Rather, the MWSA created a long-term relationship between the parties, stated that its terms would apply to "each

[15]In a case like this one where the contract's "subject matter" is a service rather than a tangible object, the "subject matter" and "place of performance" factors appear to be coextensive. *See Chesapeake Operating*, 94 S.W.3d at 170 & n.13.

and every job performed" during the relationship, and expressly contemplated that some of the "Work" would occur in Texas. Given these circumstances, we conclude that the "place of performance" factor carries less significance. *See id.*; *see also Chesapeake Operating*, 94 S.W.3d at 175 (recognizing that "the relationship between . . . companies and the states where they regularly conduct . . . bargaining [was] simply more significant than that of any number of other states *where they may be operating for the moment*" (emphasis added)).

North American relies on our supreme court's decision in *Maxus Expl. Co. v. Moran Bros.*, 817 S.W.2d 50 (Tex. 1991) to contend that New Mexico has the most significant relationship to the parties and to their transaction. In *Maxus*, the supreme court held that Kansas indemnity law applied to a contract negotiated in Texas and entered into by two Texas companies for the purpose of drilling a well in Kansas. *Id.* at 51. We conclude that *Maxus* is distinguishable for at least two reasons. First, the parties in *Maxus*, unlike the parties in this appeal, did not express in their contract which law governed their agreement, and the court emphasized that in the "*absence of an effective choice of law by the parties*," the place of performance of a service contract is of "paramount importance." *Id.* at 53 (emphasis added) (quoting Restatement (Second) of Conflict of Laws § 196). The *Maxus* court stressed that the parties in that case should have subjectively "expected that Kansas law would . . . be invoked." *Id.* at 57. Here, in contrast, the parties objectively agreed that Texas law would apply and burdened themselves with liability insurance obligations with the expectation that it did.

Second, unlike the contract in this case that contemplated "Work" performed on a continuing basis and at various locations, the contract in *Maxus* related more particularly to the drilling of a well in Kansas, and the court emphasized that the "contract was performable almost entirely in Kansas." *See id.* at 51, 54.

North American also relies on the decision of the New Mexico Court of Appeals in *Pina*, in which that court held that "indemnification agreements that undermine the indemnitee's incentive to promote safety at New Mexico well sites violate a fundamental public policy of New Mexico and are void and unenforceable." 136 P.3d at 1034. But the facts in *Pina* were materially different from those present here. There, one of the parties was domiciled in New Mexico, and that party executed the contract in New Mexico. *Id.* at 1030–31. Also, unlike in this case where the MWSA contemplated a continuing relationship between the parties with "Work" performed at various locations, in *Pina*, the parties' contract specifically referred to work on a site in New Mexico. *Id.* at 1030. Finally, in *Pina*, the court did not conduct an analysis under section 188 of the Restatement to decide whether Texas or New Mexico had the most significant relationship to the transaction and to the parties. *See id.* at 1030–34. Because of these differences, we will not follow *Pina*'s holding that invalidated the parties' choice to apply Texas indemnity law.

For all of these reasons, while we recognize that New Mexico has a relationship to the parties' transaction under the place-of-performance factor of section 188 of the Restatement, we hold that considering all of the factors

contained in that section and the quality and quantity of BOPCO's and North American's contacts with each state,[16] Texas has the most significant relationship to the transaction and to the parties. *See* Restatement (Second) of Conflict of Laws § 188(1)–(2). Because Texas has the most significant relationship to the transaction and to the parties, we must enforce the parties' choice of Texas law in section 30 of the MWSA.[17] *See DeSantis*, 793 S.W.2d at 678–79; *Branch Banking*, 2018 WL 3062450, at *7; *Gator Apple*, 442 S.W.3d at 533. We hold that Texas law governs the enforceability of the parties' indemnity obligations, and we overrule North American's first issue.

Chapter 127 of the civil practice and remedies code—the Texas anti-indemnity statute—does not preclude indemnity in this case

North American contends that even if Texas law applies, the "safe harbor" provision within chapter 127 of the civil practice and remedies code does not validate the indemnity agreement in this case. As explained above, section 127.003 of the civil practice and remedies code, consistently with New Mexico law, generally prohibits the "knock-for-knock" type of indemnity described in

[16]North American does not argue that the factors set forth by section 6 of the Restatement require the application of New Mexico law, so we decline to analyze those factors. *See* Restatement (Second) of Conflict of Laws §§ 6, 188 (incorporating section 6).

[17]We need not answer the other two inquiries posed by the Restatement and articulated in *DeSantis*: whether Texas has a materially greater interest than New Mexico in deciding the enforceability of the indemnity provision, and whether the application of Texas law would contravene a fundamental policy of New Mexico law. *See* 793 S.W.2d at 678; *Gator Apple*, 442 S.W.3d at 533; *see also* Tex. R. App. P. 47.1.

section 8 of the MWSA. Tex. Civ. Prac. & Rem. Code Ann. § 127.003(a)(1), (2)(A). But section 127.005—the safe harbor—allows such indemnity "if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor." *Id.* § 127.005(a); *see also id.* § 127.005(b); *Expro Americas, LLC v. Sanguine Gas Expl., LLC*, 351 S.W.3d 915, 929 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) ("Indemnity provisions between . . . drilling companies are void unless specific requirements are met to make the obligations mutual through the purchase of insurance.").

BOPCO contends that section 9 of the MWSA fulfills section 127.005's requirements. North American argues that it does not because according to its interpretation of the MWSA, (1) section 9 connects the parties' obligations to obtain insurance to the legality of indemnity obligations in the jurisdiction where work is performed, (2) the work in this case was performed in New Mexico, and (3) New Mexico law prohibits such indemnity obligations. In other words, North American asserts, "Since agreements imposing any type of indemnity obligations for an indemnitee's own negligence are void in New Mexico, [North American] did not, and could not, agree to provide insurance coverage for BOPCO's sole and/or concurrent negligence for work performed in New Mexico."

The parties' arguments require us to construe the language of the MWSA. When we construe a contract, we consider its terms as a whole and give the terms their plain, ordinary, and generally-accepted meaning to ascertain the true intentions of the parties. *In re Davenport*, 522 S.W.3d 452, 456–57 (Tex. 2017)

(orig. proceeding); *Loya v. Loya*, 526 S.W.3d 448, 451 (Tex. 2017); *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892 (Tex. 2017). We enforce an unambiguous contract as it is written. *Davenport*, 522 S.W.3d at 457. We may not rewrite a contract under the guise of construing it. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 486 (Tex. 2017). The parties' intent as expressed by their words controls, not "what one side or the other alleges they intended to say but did not." *Gilbert Tex. Constr. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010).

Section 9 states,

> **9. INSURANCE REQUIREMENTS.** As to all Work provided for herein, each party shall secure and maintain during the term of this Agreement at its sole expense the following insurance with insurance carriers satisfactory to [BOPCO] and licensed to do business in the state where the Work is being performed:
>
> > a) Statutory Workers' Compensation Insurance and Employer's Liability Insurance in full compliance with applicable State and Federal laws and regulations where the Work is to be performed. This policy shall include a waiver of subrogation in favor of the other party (unless prohibited by law in the jurisdiction where work is performed). . . .
> >
> > b) Commercial General Liability Insurance with limits of $1,000,000.00 each occurrence or the equivalent. The policy will be on a form acceptable to [BOPCO], be endorsed to include the other party as an Additional Insured but only to the extent of the indemnity obligations assumed hereunder (unless prohibited by law in the jurisdiction where work is performed), and state that this insurance is primary over any other valid and collectable coverage available to the other party. The policy will include the following coverages:

i) Surface Damage for Blowout or Explosion
ii) Premises/Operations
iii) Independent Contractors
iv) Contractual Liability (*insuring the indemnity obligations in this Agreement*)
v) Completed Operations Coverage and/or Products Liability Coverage
vi) Underground Property Damage Coverage
vii) Personal Injury Liability

c) Comprehensive Automobile Liability Insurance with limits of $1,000,000.00 per occurrence or the equivalent. The policy shall be on a standard form written to cover all owned, hired and non-owned automobiles, be endorsed to include the other party as Additional Insured, but only to the extent of the indemnity obligations assumed hereunder (unless prohibited by law in the jurisdiction where work is performed), and state that this insurance is primary insurance as regards any other insurance carried by the other party.

d) Umbrella Liability Insurance as excess coverage . . . with limits of $1,000,000.00 adding the other party as Additional Insured, but only to the extent of the indemnity obligations assumed hereunder (unless prohibited by law in the jurisdiction where work is performed) and state that this insurance is primary insurance as regards any other insurance carried by the other party. In addition, the policy shall be endorsed to provide defense coverage obligations. [Emphasis added.]

We conclude that this language created unambiguous insurance obligations that satisfy section 127.005's safe harbor provisions. The first sentence of section 9 states without qualification that the parties' obligation to secure and maintain insurance applies to "*all* Work provided for herein" and contemplates that the obligation will extend to more than one state. [Emphasis

added.] Accordingly, the first phrase of section 1 of the MWSA states, "*All* work ("Work") which may be offered by [BOPCO] . . . and accepted by [North American] during the term of this Agreement shall be subject to and governed by *all* the terms and provisions of this Agreement . . . ." [Emphasis added.] "All means all." *Davis v. Mueller*, 528 S.W.3d 97, 102 (Tex. 2017). Further, in section 6, the parties expressed their intention that the indemnity and insurance requirements would be "liberally construed in order to *effectuate the . . . enforceability*" of those provisions. [Emphasis added.] Thus, we conclude that in construing the MWSA as a whole, it expresses the parties' intent for each job under the agreement to be covered by insurance under section 9.

North American relies on the "unless prohibited by law in the jurisdiction where work is performed" parenthetical phrase in subsection 9(b) and in subsection 9(d) to contend otherwise. But North American's argument does not account for the placement of that phrase after the introductory language of section 9 and the first-appearing language of each section-9 subsection, which each create insurance obligations without limitation. We agree with BOPCO that North American takes the phrase out of its context by asking us to apply it to the more-remote words that broadly and without limitation *create* the insurance obligations instead of the nearer-in-context words that define the *manner* of the insurance obligations. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (describing the doctrine of last antecedent, which states that a

qualifying phrase generally applies to words and phrases immediately preceding it).

Contrary to North's American's proposed construction, we conclude that each of the four subsections within section 9 unambiguously states without limitation that each party must secure and obtain a certain type of insurance. Each of the four subsections then imposes an *additional* obligation unless that additional obligation is prohibited by law in the jurisdiction where work is performed: (1) in subsection 9(a), the parties' workers' compensation and employer's liability insurance policy must include a waiver of subrogation unless such a waiver is prohibited by law in the jurisdiction where work is performed; (2) in subsection 9(b), each party's liability insurance policy must be endorsed to include the other party as an additional insured to the extent of section 8's indemnity obligations[18] unless the endorsement is prohibited by law in the jurisdiction where work is performed;[19] (3) in subsection 9(c), the parties'

[18]Each party agreed to make the other party an additional insured "only as to liabilities assumed [under the MWSA] and no others." *See Deepwater Horizon*, 470 S.W.3d at 467. "[A] contract may reasonably be construed as extending the insured's additional-insured status only to the extent of the risk the insured agreed to assume." *Id.* at 468.

[19]In other words, we hold that section 9(b), read in conjunction with the introductory language of section 9, *created* an unlimited obligation for each party to obtain liability insurance with limits of $1,000,000 for each occurrence. Section 9(b) then *defined* that unlimited obligation by imposing additional independent requirements: (1) the policy's form was to be acceptable to BOPCO; (2) the policy was to be endorsed to include the other party as an additional insured to the extent of that party's indemnity obligations unless the endorsement was prohibited by law in the jurisdiction where work was performed;

automobile liability insurance policy must be endorsed to include the other party as an additional insured to the extent of the indemnity obligations unless the endorsement is prohibited by law in the jurisdiction where work is performed; and (4) in subsection 9(d), each party's umbrella liability insurance policy must add the other party as an additional insured to the extent of the indemnity obligations unless the additional-insured status is prohibited by law in the jurisdiction where work is performed. We agree with BOPCO's contention that North American's argument invites this court to "decide the validity of the indemnity agreement based entirely on where the job takes place," and we conclude that such a construction is unreasonable given that (1) section 8's bolded and italicized language related to the parties' indemnity obligations does not contemplate any such limitation, and (2) section 6 expresses the parties' intent for the indemnity and insurance obligations to be liberally construed in favor of their enforceability.

For these reasons, under the terms of the MWSA, we conclude that section 127.005's "safe harbor" applies in this case. *See* Tex. Civ. Prac. & Rem. Code Ann. § 127.005(a)–(b). We hold that the parties' defense and indemnity

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(3) the policy was to state that the liability insurance was primary; and (4) the policy was to include several coverages, including contractual liability that "insur[ed] the indemnity obligations in this Agreement." Nothing within section 9(b) indicates the contracting parties' intent to apply the limiting parenthetical language to each of these four independent requirements or to the general, previously-stated obligation to obtain a $1 million liability insurance policy.

obligations under section 8 of the MWSA are enforceable under Texas law, and we overrule North American's second issue.[20]

Conclusion

Having overruled North's American's first two issues, which are dispositive, we affirm the trial court's judgment.

/s/ Wade Birdwell
WADE BIRDWELL
JUSTICE

PANEL: MEIER and BIRDWELL, JJ.; and REBECCA SIMMONS, J. (Sitting by Assignment).

DELIVERED: August 30, 2018

[20]We need not resolve North American's third issue, which depends on a positive resolution to one of its first two issues. *See* Tex. R. App. P. 47.1.