IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. _____

DEERE & COMPANY, a Delaware Corporation,

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY, THE HONORABLE ELIZABETH A. BEST, PRESIDING JUDGE,

Respondent.

PETITION FOR A WRIT OF SUPERVISORY CONTROL

Original proceeding from Joe Garrity dba Garrity Ranches, et al. v. Deere & Company, et al.
Cause No. BDV-19-0439, Montana Eighth Judicial District Court, Cascade County, Hon. Elizabeth A. Best, District Court Judge

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INTRODUCTION

On July 26, 2016, Joe Garrity's 2013 John Deere Model 567 round baler caught fire when the lower roller ball bearing failed, causing excessive heat and igniting hay allowed to collect in the baler. The fire burned several thousand acres in Cascade County. The Plaintiffs, Mr. Garrity and his insurer Mountain West Farm Bureau Mutual Insurance Company, brought a products liability suit against Deere on July 16, 2019, alleging the bearing on the baler was defective. Deere has consistently maintained the failed bearing was not an original Deere bearing.

On December 30, 2020, Deere responded to Plaintiffs' first discovery requests, and objected to Request for Production ("RFP") 17, which sought Deere's closed claim files for other Deere equipment fires related to a failed bearing. For two years, Plaintiffs made no response to Deere's objection, and it was not until two months after discovery closed that Plaintiffs complained *for the first time* that Deere's response to RFP 17 was not sufficient and that Deere should be required to produce the claim files.

The matter came before the district court not on a fully briefed motion to compel, but on Plaintiffs' motion for an "emergency hearing." The district court ruled Deere must produce claim files from 1993 to present that arose out of *any* Deere product, not just balers, where a bearing may have caused a fire. The district

court also ordered Deere to contact outside counsel for any of the responsive claims to obtain and produce such counsel's litigation file. The district court further ordered production of the ordinary work product contained in those files, and ordered production of the documents pursuant to a protective order that contains a sharing provision but no notice clause.

This order, issued two weeks before the parties must file trial exhibits, jury instructions, and trial briefs, expands the scope of discovery beyond what is permitted by Mont. R. Civ. P. 26(b), and is highly prejudicial to Deere's defense and ability to prepare for the May 9, 2022 trial. Deere seeks supervisory control to correct these mistakes of law which do a gross injustice to Deere by placing it at a significant disadvantage in litigating its case. Under the circumstances presented, remedy by appeal is inadequate.

STATEMENT OF FACTS

Deere has been ordered to produce documents responsive to Plaintiffs' RFP 17, despite that compelled production at this late date inhibits Deere's ability to prepare for trial and despite that the scope of the compelled production includes protected work-product and goes far beyond the scope of discovery permitted by Mont. R. Civ. P. 26(b)(1). Plaintiffs' RFP 17 sought:

> …all closed product liability files, including compilations with case histories, reporting to superiors the results obtained in cases relating to any suit, claim or notice, alleging that a bearing failure on the product designed, manufactured and/or sold by YOU resulted in property damage, fire, personal injury, or death.

Appx. 2 at Ex. B, p. 55-56. In response, Deere agreed to produce documents Bates numbered DEERE 1600-1611 pursuant to a protective order, but otherwise objected to the scope of the request. *Id*. Deere submitted this response on December 30, 2019, along with a proposed protective order. Appx. 2 at Ex. B, p. 56, 73-79.

As the following timeline shows, Deere repeatedly provided drafts of a proposed protective order, and Plaintiffs had ample opportunity to discuss the allegedly deficient response to RFP 17 with Deere or to request court involvement, but failed to do so *for over two years*:

12/30/2019	Deere provides its response and objection to RFP 17, and includes with its response a proposed protective order. (Appx. 2 at Ex. B, p. 55-56).
5/14/2021	Counsel for Deere and Plaintiffs discussed need for entry of the proposed protective order at Steve O'Brien's deposition. (Appx. 3 at Ex. A).
5/18/2021	Email from Deere counsel to Plaintiffs' counsel again providing draft of proposed protective order. (Appx. 3 at Ex. B).

11/9/2021	Email from Deere counsel to Plaintiffs' counsel regarding getting the proposed protective order in place, and offering to re-send a draft of the proposed protective order. (Appx. 3 at Ex. C).
11/19/2021	Discovery closes. (Appx. 4).
11/30/2021	Plaintiffs finally provide a version of a protective order to facilitate production of proprietary documents. (Appx. 3 at Ex. D, Email Conner to Schneider).
12/1/2021	Counsel for Deere provides redlined changes to Plaintiff's proposed protective order. (Appx. 3 at Ex. E).
12/10/2021	Dispositive motions deadline. (Appx. 4).
1/7/2021	Motions *in Limine* deadline. (Appx. 4).
1/14/2022	Plaintiffs' counsel sends letter to Deere's counsel discussing dispute over the terms of the proposed protective order. (Appx. 3 at Ex. F).
1/17/2022	Counsel for parties attend a meet and confer teleconference to discuss the proposed protective order.
1/24/2022	Plaintiffs' counsel sends email to Deere's counsel in advance of an informal discovery conference with the Court where, for the first time ever, Plaintiffs allege the response to RFP 17 is deficient. (Appx. 3 at Ex. G).

1/26/2022	First informal discovery conference with counsel and Judge Best.
2/9/2022	Second informal discovery conference with counsel and Judge Best.
2/15/2022	Plaintiffs file "Motion for Emergency Hearing Re: Protective Order and Discovery". (Appx. 2).
2/24/2022	Deere files its Response to Plaintiffs' Motion for Emergency Hearing. (Appx. 3).

On February 23, 2022, the district court held a hearing lasting less than an hour on these discovery issues. To place these dates in context, the scheduling order sets a March 11, 2022 deadline for submitting jury instructions, exhibits, objections to exhibits, witness lists, and trial briefs; an April 1, 2022 deadline for submitting the final pretrial order; and a May 9, 2022 trial setting for a two-week trial. Appx. 4.

At the conclusion of the hearing, the district court ordered production of the closed claim files responsive to RFP 17, including ordinary work product contained in the files. Though the district court cited "good cause" for such production, the only explanation it provided was that the materials sought were not available in the public domain. Appx. 1 at 25:24-26:4. There was no consideration

of whether the Plaintiffs had a substantial need for the documents. The district court also held it was "requiring that the Defendants contact the outside counsel handling these other cases and get from them the expert reports, photos, investigative reports, field notes, and other non-privileged, as I've defined it, materials in those counsels' custody and control of." *Id.* at 26:5-17.

The district court defined the scope of discovery to include documents for "ten years before manufacture" (1993 to present), and to include claims arising from "any product where a bearing caused a fire". *Id.* at 28:10-11, 25:9-12. The district court ordered entry of the stipulated protective order without any notice provided to Deere before the documents produced may be shared with other counsel in other cases. *Id.* Finally, despite a lengthy discussion of the prejudice and burden compelled production at this late date would work, the district court declined to extend looming trial deadlines. *Id.* at 29:16-18.

LEGAL ISSUES

Deere asks this Court to exercise supervisory control for the purposes of resolving the following legal issues:

1. Whether, pursuant to *Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, 392 Mont. 311, 425 P.3d 669, the Plaintiffs' failed to timely file a motion to compel discovery when they first raised the issue two months after discovery closed, and as a result whether the motion to compel should have been denied.

2. Whether the scope of discovery set by the district court violates the discovery scope set forth in Mont. R. Civ. P. 26(b)(1)

3. Whether the scope of discovery set by the district court violates work product protections set forth in Mont. R. Civ. P. 26(b)(3).

4. Whether the sharing provision in the protective order should also include a notice requirement.

WRIT OF SUPERVISORY CONTROL

A writ of supervisory control is "justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and… The other court is proceeding under a mistake of law and is causing a gross injustice". *Sweeney v. Dayton*, 2018 MT 95, ¶ 6, 391 Mont. 224, 416 P.3d 187 (*see also* Mont. Const. art. VII, § 2(2); Mont. R. App. P. 14(3)). This Court has sanctioned the exercise of supervisory control specifically "in order to prevent a litigant from being placed at a significant disadvantage and to prevent unwarranted expenses and delays in the ultimate resolution of the litigation." *Preston v. Montana Eighteenth Jud. Dist. Ct.*, 282 Mont. 200, 206, 936 P.2d 814, 817 (1997).

This Court has exercised supervisory control in the context of a discovery dispute where the discovery order at issue places a litigant "at a significant disadvantage in litigating the merits of the case". *State ex rel. Burlington N. R. Co.*

v. Dist. Ct. of Eighth Jud. Dist., 239 Mont. 207, 212, 779 P.2d 885, 889 (1989) (granting supervisory control and vacating trial date where the district court's order prejudiced defendant's ability to prepare for trial); *see also Preston*, 282 Mont. 200, 936 P.2d 814 (granting supervisory control where the district court improperly defined the scope of discovery in a products liability case); *Kuiper v. Dist. Ct. of Eighth Jud. Dist.*, 193 Mont. 452, 632 P.2d 694 (1981) (granting supervisory control where the district court improperly issued protective order); *Jaap v. Dist. Ct. of Eighth Jud. Dist.*, 191 Mont. 319, 623 P.2d 1389 (1981) (granting supervisory control where the method of discovery permitted by the district court was not authorized under the Montana Rules of Civil Procedure); *Lewis v. Dist. Ct. of Eighth Jud. Dist.*, 2012 MT 200, 366 Mont. 217, 286 P.3d 577 (granting supervisory control where district court improperly granted psychological examination despite that mental condition was not in controversy).

1. **The district court is proceeding under a mistake of law and causing gross injustice.**

The district court is proceeding under a mistake of law by ordering Deere to produce work product information contained in its own claims files and its outside counsels' litigation files dating back nearly 30 years, including files that are not relevant to the pending matter as required by Mont. R. Civ. P. 26(b)(1), and

without the Plaintiffs having made a showing of substantial need as required by Mont. R. Civ. P. 26(b)(3).

Here, as in *Burlington Northern*, compelled production at this late date creates a gross injustice by severely prejudicing Deere's ability to prepare for trial and its ability to defend itself in this litigation. A production that could reasonably have been accomplished given timely pursuit by the Plaintiffs is now an overwhelming, even impossible, task in the face of trial preparation.

Production requires Deere to sift through nearly thirty years of claim files on every type of equipment it has manufactured during that period and identify those files that involve a fire potentially caused by a failed bearing. Deere has begun the search and, given the sheer number of products manufactured since 1993, has identified approximately 2,000 claim files that may possibly relate to a fire. Appx. 3 at p. 8. However, not all 2,000 files are relevant or responsive. Deere must review each to identify whether they arise from an allegedly failed bearing, a task requiring not a simple word search but rather review of the files themselves. Then, both Deere and its counsel will have to review the entire contents of each responsive file to determine what is discoverable and what is privileged, and will have to create a detailed privilege log for every document withheld.

Deere is now also required to locate, contact, and obtain litigation files from its local counsel involved in any of the claims. With claims dating back 30 years, counsel may be difficult or impossible to locate. The litigation files may no longer exist. To the extent the files do exist, Deere and counsel will also have to review these files for privilege and create privilege logs.

The compelled production is a monumental task requiring a significant time investment. However, with jury instructions, exhibits, objections to exhibits, witness lists, and trial briefs due on March 11, 2022, with the pretrial order due on April 1, 2022, and with the trial beginning on May 9, 2022, Deere and its counsel must focus their time and energy on preparing for trial. Appx. 4. Compelling Deere to undertake such expansive production at this late hour severely prejudices its ability to defend the litigation and prepare for trial, and creates a gross injustice by punishing Deere for the Plaintiffs' own dilatory pursuit of discovery.

2. This case involves purely legal questions.

Deere's petition for supervisory control involves purely legal questions related to the timeliness of a motion to compel discovery under *Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, ¶ 39, 392 Mont. 311, 425 P.3d 669, the scope of discovery under Mont. R. Civ. P. 26(b)(1), the discovery of work product under Mont. R. Civ. P. 26(b)(3), and the application of a protective order

under *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986).

3. Emergency factors exist making the normal appeal process inadequate.

The compelled production creates emergency factors making the normal appeal process inadequate to remedy the mistake of law. First, the overbroad scope of discovery, especially without a notice provision in the sharing protective order, requires production of proprietary information that is not relevant to the present case. The order will require Deere to produce files that may contain, for example, design plans and information on the engineering of a relatively new combine. While this documentation has no evidentiary value to the Plaintiffs, it has plenty of value to Deere's competitors. Once the information in these files is produced, it cannot be clawed back, making the normal appeal process inadequate.

Second, the untimeliness of the Plaintiffs' motion for an emergency hearing and of the district court's order compelling production places Deere at a significant disadvantage in its trial preparation, a situation that cannot be remedied by appeal. As the motion *in limine* deadline has already passed, Deere will have lost the opportunity to ensure the scope of other accident evidence produced is properly limited in accordance with Montana law – something Deere was not concerned

about when it appeared that Plaintiffs had abandoned their search for such evidence by not following up after Deere's objection.

Additionally, Deere and its counsel must prepare for trial, and must satisfy the pending deadlines associated therewith. There is no time to undertake the scope of production the Plaintiffs belatedly seek. Deere did not create this situation, it timely produced documents and discovery responses. The Plaintiffs' delay and the district court's order condoning that unjustified delay places Deere in an impossible situation – comply with the order and undertake extensive discovery production or adequately prepare for trial.

ARGUMENT

1. Plaintiffs' dilatory pursuit of discovery prejudices Deere's ability to prepare for trial.

This Court takes a "dim view" of "inaction or dilatory responses to asserted inadequate discovery answers" and has explained that "broad discovery requests by a plaintiff and broad discovery objections by a defendant may be anticipated, and a party who believes he is aggrieved by discovery abuse must diligently follow the Rules to pursue relief." *Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, ¶ 39, 392 Mont. 311, 425 P.3d 669 (district court did not abuse its discretion in denying a motion to compel where plaintiff filed the motion well over a year after

the defendant first lodged its objections, and where the plaintiff failed to pursue the issue until well after discovery had closed).

In *Daley*, the Court cited to a federal district court out of Texas, which exhaustively catalogued authority for the rule that courts generally look to the deadline for completion of discovery to determine whether a motion to compel has been timely filed. *Id.*, ¶ 37 (citing *Days Inn Worldwide, Inc. v. Sonia Invs.*, 237 F.R.D. 395, 398 (N.D. Tex. 2006)); *see also Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000) (affirming district court's denial of discovery motion where the motion was filed two months after the completion of discovery and the plaintiffs gave no excuse for tardiness); *Ginett v. Federal Express*, 166 F.3d 1213, 1998 WL 777998, at *5 (6th Cir. 1998) (Table) (affirming trial court denial of a motion to compel filed two months after discovery deadline, because the plaintiff knew of the document at issue long before the discovery deadline); *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996) (affirming district court in denying an untimely motion to compel where filed more than one month after the second extended discovery deadline); *Mash Enterprises, Inc. v. Prolease Atlantic Corp.*, 2003 WL 251944, at *3-4 (E.D. Pa. Jan.31, 2003) (denying untimely motion to compel filed two months after the close of discovery and six months after receipt of objections, trial would soon be set, discovery would cause

prejudice to the other side, and court's schedule would be disrupted); *Lillbask ex rel. Mauclaire v. Sergi*, 193 F. Supp. 2d 503, 516 (D. Conn. 2002) ("After almost seven months of discovery, a motion to compel received after the expiration of the deadline for the completion of all discovery is untimely.").

The Plaintiffs in this case received objections to RFP 17 on December 30, 2019. For two years they did nothing, and waited until discovery closed, giving Deere no reason to suspect there was any objection to its response. Plaintiffs' own dilatory response to Deere's objections preclude them from now attempting to compel the documents on the eve of trial.

2. Plaintiffs failed to establish they have a substantial need to discover work product.

Work product rules prevent discovery of materials prepared in anticipation of litigation unless the party seeking discovery shows "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Mont. R. Civ. P. 26(b)(3)(A). The work product rule is a "perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were prepared." *Kuiper*, 193 Mont. at 464, 632 P.2d at 701. "Ordinary work product relates to factual matters and is only discoverable upon a showing of substantial need to the extent that it is not privileged and is relevant to the subject matter involved in the pending

action." *Draggin' Y Cattle Co. v. Addink*, 2013 MT 319, ¶ 43, 372 Mont. 334, 312 P.3d 451.

Despite two informal discovery conferences, a Motion for Emergency Hearing, and the February 24, 2022 hearing, the Plaintiffs failed to make any showing they are entitled to discover ordinary work product. The record is devoid of a single articulated reason Plaintiffs have a "substantial need" to access to Deere's closed claim files. Plaintiffs' RFP 17 is nothing more than a fishing expedition into 30 years' worth of claims files in an attempt to fabricate support for their product liability claim and to share files without notice to Deere to potentially garner additional clients.

3. The district court's defined scope of discovery is overbroad.

Mont. R. Civ. P. 26(b)(1) governs the scope of discovery: "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense…" Relevance is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. Evidence need not be admissible to be discoverable; however, the discovery must still be relevant.

The *Preston* Court considered restriction on the discovery of information in a products liability case arising out of a defective nail gun. *Preston v. Montana Eighteenth Jud. Dist. Ct., Gallatin Cty.*, 282 Mont. 200, 936 P.2d 814 (1997). The Court allowed discovery of "various product models which use *the same* allegedly defectively designed contact-trip mechanism that caused [the plaintiff's] injury..." *Id.* at 209, 936 P.2d at 819 (emphasis added); *see also Kissock v. Butte Convalescent Ctr.*, 1999 MT 322, ¶ 16, 297 Mont. 307, 992 P.2d 1271 (to guard against prejudice, prior accident evidence must be "substantially similar to" and "not too remote from the accident in question" in order to be relevant and admissible").

The scope of discovery is not so broad as to allow discovery of thirty years of closed claims files on *every product* Deere manufactured during that time, even with the limitation of fires caused by failed bearings. Deere manufactures a myriad of powered and unpowered implements and equipment, all of which are vastly different from its balers in size, purpose, capability, and limitations. Likewise, there are vast differences in the size, purpose, capabilities, and limitations of the bearings used in that equipment. Moreover, Deere does not manufacture its bearings, and uses several different manufacturers.

The scope of discovery sought by the Plaintiffs and ordered by the district court is overbroad and not proportionate to the needs of the case. Mont. R. Civ. P. 26(b)(1). The scope of discovery should be limited to Deere balers that are built with *the same* bearing in the lower drive roll present in the model 567 Deere baler, and that experienced a fire because the bearing failed.

4. The sharing provision in the protective order should include a notice clause.

The Montana federal district courts have considered sharing provisions in protective orders and defined the problem as "a very practical one of allowing discovery and use of information in the liberal sense mandated by the Federal Rules of Civil Procedure while affording as much protection from public disclosure of defendant's claimed sensitive materials without unduly restricting discovery of relevant facts essential for proper litigation." *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986). The *Kamp* court ordered inclusion of a sharing provision with a notice clause using the following language:

> … Plaintiff shall give defendants ten days written notice of intent to disseminate any confidential material. Within that period, defendants shall have the opportunity to file a written objection with the Court and to establish why such dissemination should not be made. The burden will be upon defendants to make a specific showing of harm or competitive disadvantage which will result from disclosure.

*Id.*at 221.

Plaintiffs do not challenge that Deere is entitled to a protective order for the documents it identified as proprietary, and the parties agree on the terms of the protective order with just one exception: Paragraph 8(e). The Plaintiffs' proposed and the district court ordered that Paragraph 8(e) provide documents may be disclosed to "Attorneys representing any party alleged to have suffered personal injury or property damage because of a fire caused by a failed bearing on a Deere & Company product." Appx. 1 at 25:5-12; Appx. 2 at Ex. A, p. 4.

Deere proposed, and the district court rejected, the addition of the following language to the sharing provision in Paragraph 8(e):

> Plaintiff shall give defendants ten days written notice of intent to disseminate any material produced pursuant to this Protective Order. Within that period, Defendant shall have the opportunity to file a written objection with the Court and to establish why such dissemination should not be made. The burden will be upon Defendant to make a specific showing of harm or competitive disadvantage which will result from disclosure.

Appx. 1 at 25:5-12; Appx. 3 at p. 14. Deere's proposed notice provision includes all the hallmarks of the notice provision crafted by the *Kamp* Court. Notice and the opportunity to object to dissemination is critical to Deere's ability to maintain the confidentiality of its proprietary information. This notice provision is reasonable and should have been included in the protective order.

CONCLUSION

Supervisory control is appropriate in the present case because the district court is proceeding under a mistake of law which does a gross injustice to Deere by placing it at a significant disadvantage in litigating its case. Under the circumstances presented, remedy by appeal would be inadequate.

Dated this 28th day of February, 2022.

MILODRAGOVICH, DALE &
STEINBRENNER, P.C.

By: /s/ Rachel H. Parkin
Perry J. Schneider
Rachel H. Parkin

Attorneys for Defendant Deere & Company

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11 and 14(9), I certify that this Petition for Writ of Supervisory Control is printed with a proportionately spaced Times New Roman text typeface of 14 point; is double spaced; and the word count is not more than 4,000 words, being 4,000 words excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Table of Appendices, and Service Certificate.

Dated this 28th day of February, 2022.

MILODRAGOVICH, DALE &
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By: /s/ Rachel H. Parkin
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by the means designated below this 28th day of February, 2022:

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TABLE OF APPENDICES

Appendix	Description	Filed Date	Docket Number
1	Hearing Transcript	February 23, 2022	n/a
2	Plaintiff's Motion for Emergency Hearing Re: Protective Order and Discovery	February 15, 2022	Dkt. 37
3	Defendant's Response to Plaintiffs' Motion for Emergency Hearing	February 24, 2022	Dkt. 39
4	Rule 16 Scheduling Order	May 26, 2020	Dkt. 19

CERTIFICATE OF SERVICE

I, Rachel Hendershot Parkin, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 02-28-2022:

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