

## IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. OP 22-0101

---

DEERE & COMPANY, a Delaware Corporation,

Petitioner,

v.

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

Respondent.

---

**PLAINTIFFS' RESPONSE TO PETITION FOR 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*

---

Attorneys for Plaintiffs

Dennis P. Conner/Gregory G. Pinski/JR Conner  
Conner, Marr & Pinski, PLLP  
P. O. Box 3028  
Great Falls, MT 59403-3028  
Tel: (406) 727-3550  
[dennis@mttrials.com](mailto:dennis@mttrials.com)  
[greg@mttrials.com](mailto:greg@mttrials.com)  
[jr@mttrials.com](mailto:jr@mttrials.com)

Randall G. Nelson  
Nelson Law Firm  
2619 St. James Ave., Ste. E  
Billings, MT 59102  
Tel: (406) 867-7000  
[rgnelson@nelsonlawmontana.com](mailto:rgnelson@nelsonlawmontana.com)

Attorneys for Petitioners

Perry J. Schneider/Rachel H. Parkin  
Milodragovich, Dale & Steinbrenner, PC  
P. O. Box 4947  
Missoula, MT 59807-4947  
Tel: (406) 728-1444  
[perrys@bigskylawyers.com](mailto:perrys@bigskylawyers.com)  
[rparkin@bigskylawyers.com](mailto:rparkin@bigskylawyers.com)

## TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION .....	1
II. SUMMARY OF ARGUMENT .....	1
III. FACTUAL BACKGROUND AND LEGAL AUTHORITIES .....	4
IV. ARGUMENT .....	11
1. Plaintiffs established a substantial need to discover ordinary work product in Deere’s closed claim files relating to fires caused by bearing failures .....	11
2. The District Court correctly defined the scope of discovery to include claims relating to fires caused by bearing failures that occurred 10 years before manufacture of the subject baler .....	13
3. The District Court correctly ordered a sharing protective order .....	14
4. The time investment required for production of the compelled discovery does not unfairly prejudice Deere’s ability to prepare for trial .....	15
V. CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE .....	18
TABLE OF APPENDICES .....	19

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Brennan v. Bridgestone, Firestone et al.</i> , Montana Eighth Judicial District Court, Cascade County, Cause No. ADV-06-1218(b) .....	10-11
<i>Cont'l Oil Co. v. Elks Nat. Foundation</i> , 235 Mont. 438, 767 P.2d 1324 (1989) .....	1
<i>Cox v. Magers</i> , 2018 MT 21, 390 Mont. 224, 411 P.3d 1271 .....	2, 7
<i>Evans v. Mont. Eleventh Judicial Dist. Ct.</i> , 2000 MT 38, 298 Mont. 279, 995 P.2d 455 .....	1
<i>Henricksen v. State</i> , 2004 MT 20, 319 Mont. 307, 84 P.3d 38 .....	2
<i>In re Deere</i> , 299 S.W.3d 819 (Tex. 2009) .....	13-14
<i>Kuiper v. District Ct.</i> , 193 Mont. 452, 632 P.2d 694, 702 (1981) .....	2, 8
<i>Massaro v. Dunham</i> , 184 Mont. 400, 603 P.2d 249 (1979) .....	2, 17
<i>Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.</i> , 2018 MT 220, 392 Mont. 458, 426 P.3d 541 .....	2, 6
<i>Preston v. Montana Eighteenth Jud. Dist. Ct.</i> , 282 Mont. 200, 936 P.2d 814 (1997) .....	2, 8, 13
<i>State ex rel. Guarantee Ins. Co. v. Dist. Ct. of Eighth Jud. Dist.</i> , 194 Mont. 64, 634 P.2d 648 (1981) .....	15, 16, 17

*Stokes v. Ford Motor Company, et al.*,  
Montana Thirteenth Judicial District Court, Yellowstone County,  
Cause No. DV:05-1236 ..... 10-11

*Yellowstone Elec. Co. v. Dist. Ct.*,  
No. OP-19-0348, 397 Mont. 552, 449 P.3d 787 (Aug. 6, 2019).....17

<b>Rules</b>	<b>Pages</b>
M.R.Civ.P. 26 .....	7
M.R.Civ.P. 37 .....	7

## **I. INTRODUCTION**

Deere & Company seeks the extraordinary remedy of supervisory control. Deere claims the District Court is proceeding under a mistake of law and causing a gross injustice because:

1. Plaintiffs have failed to establish a substantial need to discover ordinary work product in Deere's closed claim files relating to fires caused by bearing failures;
2. The District Court erred in compelling discovery of bearing failure fire claims that occurred 10 years before the subject baler was manufactured;
3. The District Court erred in entering a sharing protective order; and
4. The District Court erred because the time investment required to produce the compelled discovery unfairly prejudices Deere's ability to prepare for trial.

Deere's claims are groundless and do not satisfy the supervisory control threshold.

## **II. SUMMARY OF ARGUMENT**

Supervisory control is an extraordinary remedy. *Evans v. Mont. Eleventh Judicial Dist. Ct.*, 2000 MT 38, ¶ 15, 298 Mont. 279, 995 P.2d 455. "Supervisory control is proper to control the course of litigation when the lower court has made a mistake of law or willfully disregarded the law so that a gross injustice is done and there is no adequate remedy by appeal . . . ." *Cont'l Oil Co. v. Elks Nat. Foundation*, 235 Mont. 438, 440, 767 P.2d 1324, 1326 (1989).

Pretrial discovery disputes are typically not appropriate for exercising supervisory control. As this Court has noted, “[i]t is not our place to micromanage discovery ...” *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 17 n. 12, 392 Mont. 458, 426 P.3d 541 (internal quotation omitted). Discovery promotes the ascertainment of truth by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.” *Massaro v. Dunham*, 184 Mont. 400, 405, 603 P.2d 249, 252 (1979). The rules of discovery are to be “liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage.” *Cox v. Magers*, 2018 MT 21, ¶ 15, 390 Mont. 224, 411 P.3d 1271. A trial court has “inherent discretionary power to control discovery based on its authority to control trial administration.” *Henricksen v. State*, 2004 MT 20, ¶ 35, 319 Mont. 307, 84 P.3d 38.

In the strict products liability realm, Montana law, as a matter of public policy, permits broad discovery about defective and dangerous products to promote public safety. *See Kuiper v. District Ct.*, 193 Mont. 452, 632 P.2d 694, 702 (1981), (*Kuiper D*); *Preston v. Montana Eighteenth Jud. Dist. Ct.*, 282 Mont. 200, 207, 936 P.2d 814, 818 (1997).

Before issuing its Order, the District Court held two discovery conferences and a hearing. The District Court viewed these discovery issues through the lens of

this Court's precedent. After carefully considering discovery law, the District Court ordered Deere to produce ordinary work product which implicate fires caused by failed bearings (excluding opinion work product and attorney-client communications), and the protective order proposed by Plaintiffs. The District Court issued these rulings within the confines of its discretionary powers and under established Montana law.

Deere intimates that the discovery and the District Court's Order are untimely. The Scheduling Order closed discovery on November 19, 2021. Having served multiple sets of discovery requests in 2019, Plaintiffs timely served additional discovery requests on October 15, 2021, before the Court's discovery deadline. Plaintiffs provided Deere with an extension to respond until December 1, 2021, which Deere supplemented on January 24, 2022. Plaintiffs immediately began to meet and confer with Deere, engaged the District Court in the dispute, and filed its Motion for Emergency Hearing Re: Protective Order and Discovery on February 15, 2022. All such actions were timely under the Scheduling Order. Trial is set for May 9, 2022. Deere's asserted prejudice in complying with the District Court's Order is a product of its own obstructive discovery.

This case does not implicate novel legal issues. Likewise, it does not contemplate gross injustice as the information Deere produces will be subject to a protective order that restricts dissemination and future use. And the District Court

reminded everybody that discoverability does not equate to admissibility. There is no basis for an extraordinary writ.

### **III. FACTUAL BACKGROUND AND LEGAL AUTHORITIES** **SUPPORTING ARGUMENT**

On July 27, 2016, Plaintiff Joe Garrity was baling hay with a 2003 Model 567 John Deere Round Baler. The lower bale roller drive provides power to a rotating shaft that drives bale forming belts. Bearings help the shafts rotate smoothly and efficiently. The baler's lower roller bearings were sealed and not meant to be lubricated, serviced, or maintained by the operator. They are intended to safely function throughout the expected useful lifetime of the baler. But on July 27, 2016, about halfway through the baler's expected life, the driver's side lower roller bearing failed. Its rolling surfaces were transferred into high friction sliding surfaces that became red hot, causing deformation and rupture of their seal, allowing them to escape the assembly. The escaped bearings fell into the field igniting a fire. The wildfire raged through thousands of acres of neighboring properties, destroying pastures, crops, fencing, and equipment.

Garrity was insured by Mountain West Farm Bureau. MWFB paid Garrity's policy limits to partially cover neighboring farmers' and ranchers' losses. Garrity, neighboring farmers and ranchers, MWFB, and the Vaughn Volunteer Fire Department sued Deere alleging strict product liability, breach of warranty, and negligence, seeking compensatory and punitive damages. Plaintiffs claim a simple,

low-cost alternative design employing a temperature sensor would have guarded against the hazard of the field fire. Garrity's and MWFB's lawsuit was set for trial on May 9, 2022.

On May 14, 2021, Plaintiffs deposed Steven O'Brien. O'Brien is a mechanical engineer who worked for Deere mainly in the product test and evaluation field. See O'Brien Deposition, Plaintiffs' Appendix Exhibit 1 at page 90:20-25. He has participated in or lead several fire investigations associated with Deere equipment. *Id.*, page 88:9-13.

Before retiring, O'Brien sat on Deere's "product safety committee." *Id.*, page 29: 13-4. This committee is charged with gathering and keeping abreast of Deere equipment fires. *Id.*, page 28:23-25. Documents related to products safety committee work are organized by subject and date and kept in a computer database. *Id.*, page 36:16 to page 37:5. It is not unusual for Deere to investigate a fire caused by a failed bearing. *Id.*, page 95:3-6. Deere has computer systems that store field information, including reports of fires. *Id.*, page 96:21 to page 99:17.

O'Brien was designated by Deere to investigate the Garrity baler fire. *Id.*, page 52:13-15. On August 24, 2016, O'Brien inspected the baler and made handwritten field notes. *Id.*, page 131:6-15. He admits the baler's lower drive bearing failed and caused the fire. *Id.*, page 18:10-15. O'Brien found no evidence that the failed bearing was not an original equipment part. *Id.*, page 67:23-25.

O'Brien shredded his handwritten field notes. *Id.*, 131:3-8. Because adverse litigation was reasonably foreseeable, O'Brien had a duty to preserve his relevant field notes. *Montana State University-Bozeman v. Montana First Judicial Dist. Ct.*, 2018 MT 220, ¶ 24, 392 Mont. 458, 426 P.3d 541. O'Brien's photographs were "lost" by the Deere legal department for years, until O'Brien admitted taking photographs in his deposition, and a short while later, Deere amazingly located them.

Before shredding his field notes, O'Brien used them to generate a "Fire Investigation Summary" of the Garrity fire which he entered into Deere's computer database system. *See* the Summary at Plaintiffs' Appendix, Exhibit 2. The Summary follows a template identifying specific information. O'Brien Deposition at 146:3-11. The Summary reports the July 26, 2016, fire involving a 567 Round Baler, serial number DV 00567301181, and:

Area of Origin – Lower Drive Roll (LDR)

Logical Heat Source – Failed LH LDR bearing

Logical First Fuel – Dry hay material buildup on side of baler

Cause Hypothesis – Failed bearing

On November 15, 2019, because of substantial need for evidence of fires caused by bearing failures and the inability to obtain the substantial equivalent by any other means, Plaintiffs propounded discovery to Deere asking:

**REQUEST FOR PRODUCTION No. 17:** Please produce 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.

On December 20, 2019, Deere responded:

**RESPONSE:** Objection, this request is vague, overly broad and unduly burdensome and is improper under Rule 26(b)(1), M.R.Civ.P., in that its likely costs outweigh any likely benefit and goes beyond claims or defenses pled in this case, and the information is more easily obtained from other sources that are more convenient, less burdensome and for less expense. With respect to the 567 Round Balers produced in 2003, at this time, Defendant Deere objects to producing documents that may be relevant to this response on the basis that such documents are considered confidential, proprietary, and/or competitively sensitive information of Defendant Deere. Accordingly, Defendant Deere will produce certain documents only subject to the entry of a protective order that ensures appropriate protections for these materials. A proposed form of protective order is attached as Exhibit A. Without waiving this objection, and subject to entry of the appropriate protective order, Deere will produce DEERE 1600-1611.

After making this objection, Deere never moved for a protective order and refused to produce responsive documents. This conduct violates the rules of discovery. *See Cox v. Magers*, 2018 MT 21, ¶ 22, 390 Mont. 224, 231, 411 P.3d 1271, 1276. In *Cox*, this Court held:

...under M. R. Civ. P. 37(d), a failure to answer interrogatories or to produce documents “is not

excused on the ground that the discovery sought was objectionable, **unless the party failing to act has a pending motion for a protective order under Rule 26(c).**” M. R. Civ. P. 37(d)(2). [Emphasis supplied].

The similar incident discovery sought by Request for Production No. 17 tends to prove Plaintiffs’ defect and punitive damages claims. In *Preston*, 936 P.2d at 819, this Court held:

Evidence of injuries caused by similar models is relevant to both the “defect” and the “danger.” ... *Preston* is also suing for punitive damages. In order to prevail on his claim for punitive damages, he will have to prove that the defendant acted with indifference to the “high probability of injury to the plaintiff.” ... Evidence of injuries caused by similar models is also relevant to this issue in that the existence of similar injuries tends to demonstrate the manufacturer’s knowledge of the “high probability of injury.”

In *Kuiper I*, this Court held that reports on closed product liability litigation prepared by Goodyear’s in-house counsel, reporting to superiors the results obtained are not protected by privilege because they relate to analyses of closed liability files. 632 P.2d at 701. The work product rule applies to terminated litigation, but such protection is not absolute. A plaintiff in a strict product liability case is entitled to discover ordinary work product in closed liability files upon showing there is a “substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” *Id.*

On April 15, 2021, June 10, 2021, and September 8, 2021, Deere supplemented its Responses to Plaintiffs' First Discovery Requests, standing on its objections and refusing to produce documents or answer interrogatories without a protective order. See Deere's Appendix 2, Exhibit B.

Before the expiration of discovery, in follow-up to O'Brien's deposition, Plaintiffs propounded their Second Discovery Requests to Deere asking for production of documents referenced in O'Brien's deposition including: Product Safety Committee and other Deere documents about balers, bearings and fires, the number of bearing fires and documents related to bearing fires kept by the Dealer Tactical Assistant Center, and on SharePoint, EPIRS, and VISION systems. (See Requests 58, 62, 78, and 79-82 at Deere's Appendix 2, Exhibit B). The propounded requests seek the very information O'Brien testified that Deere collects and stores. On December 1, 2021, Deere made the following boilerplate objection to Plaintiffs' Second Requests for Production:

**RESPONSE:** Deere objects to production of the referenced material on the basis that the request is overly broad and unduly burdensome in that the request does not include a reasonable temporal or subject limitation, and the request is improper under Rule 26(b)(1), Mont. R. Civ. P., in that its likely costs outweigh any likely benefit and goes beyond claims or defenses pled in this case and is not likely to lead to the discovery of admissible evidence. Deere further objects to production of the referenced material on the basis that the same is proprietary, confidential and commercially valuable and no protection of the same has been offered. Without waiver, Deere will

produce certain documents subject to the entry of a protective order that ensures appropriate protections for these materials and only after allowing third parties whose confidential information may be compromised an opportunity to object to the production or seek appropriate redactions. Such documents include ... A proposed form of protective order is attached as Exhibit A.

*Id.*

Deere again failed to produce responsive documents without moving for a protective order, violating the rules of discovery.

On November 31, 2021, Plaintiffs provided Deere with their proposed protective order. Courts have explicitly authorized (and even encouraged) sharing discovery between litigants in different cases. *See, e.g., United Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1428 (10th Cir. 1990) (agreeing with other appellate courts that information sharing should be permitted). Cooperation among similarly situated litigants promotes the speedy and inexpensive determination of every action and conservation of judicial resources and comes squarely within the purposes of the Montana Rules of Civil Procedure.

The Scheduling Order provided that before moving to compel discovery, the moving party was encouraged to contact the Court for a conference to hear the parties' legal basis for their positions. Plaintiffs contacted the District Court, and a conference call was set for January 26, 2022.

On January 26, 2022, Plaintiffs' counsel emailed the District Court and Deere's counsel a note which stated their position and attached supporting orders from *Stokes v. Ford* and *Brennan v. Bridgestone, Firestone, et al.*, compelling production of ordinary work product in closed claim files. See Plaintiffs' Appendix, Exhibit 3.

During the January 26, 2022, conference the District Court said it would like further input and scheduled a follow-up conference call for February 9, 2022. During the second hearing, the District Court agreed with Plaintiffs' position and believed the disputes were settled. *See* Order, page 1. On February 15, 2022, because Deere would not agree to resolve the discovery disputes consistent with the District Court's recommendations, Plaintiffs moved for an emergency hearing held on February 23, 2022. Deere's Appendix 2. For reasons stated on the record and in its Order Granting Motion Regarding Discovery, the District Court correctly compelled the discovery sought and adopted Plaintiffs' proposed sharing protective order.

#### **IV. ARGUMENT**

- 1. Plaintiffs established a substantial need to discover ordinary work product in Deere's closed claim files relating to fires caused by bearing failures.**

Deere's argument that "The record is devoid of a single articulated reason Plaintiffs have a 'substantial need' to access to Deere's closed claim files" is a gross

mischaracterization of the record. Plaintiffs “substantial need for this information and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship” are set forth in their January 26, 2022, position statement, accompanying supporting orders, and emergency hearing Brief.

At the hearing, Plaintiffs addressed their need for closed claim files involving bearing failures and Deere’s untrue response that this is public information easily obtained from other sources. See hearing transcript, Deere’s Appendix 1 at pages 11-13. Through supporting orders and arguments, Plaintiffs urged production of photographs, investigative reports, field notes, and ordinary work product from closed bearing failure files. Nowhere in the hearing transcript does Deere challenge Plaintiffs’ need for the requested discovery or its claim of equivalent access elsewhere.

Before ruling, the District Court held two lengthy conference calls with the parties to discuss the discovery issues and its familiarity with the parties’ positions, and that in most strict product liability defect cases, “it is just simply not true that the materials are available reasonably in the public domain to the Plaintiffs’ counsel.” Tr. 25:13 to 26:4. The Order discusses Plaintiffs’ substantial need for discovery 10 years before the baler was manufactured and addresses Deere’s position urging that discovery be limited to the subject model baler and incidents after its manufacture. The District Court made clear it was limiting discovery to

bearing-caused fires going back 10 years before the subject baler's manufacture. Tr. 27:10-16. This ruling was made "in consideration of the arguments of the parties, and mindful of the emphatic reminders from Montana and other courts about the public policy concerning discovery." Order at page 6.

**2. The District Court correctly defined the scope of discovery to include claims relating to fires caused by bearing failures that occurred 10 years before manufacture of the subject baler.**

Deere objected to Plaintiffs' discovery asserting it should be limited to 2003 Model 567 John Deere Round Balers and incidents after the subject baler's manufacture. These arguments were rejected as a matter of law in *Preston*. There, the manufacturer of an allegedly defective nailer "refused to provide any information pre-dating the manufacture of the N12, or any information concerning injuries caused by any model other than the N12." *Id.*, at 815. This Court reversed and held it was a mistake of law to limit discovery to the N12 model nailer only and withhold information predating the machine's manufacture because this significantly disadvantaged Preston by leaving him without the means to discover evidence relevant and crucial to his theory of the case. *Id.*, 818, and discussed *supra*.

Deere cites no authority supporting its proposition that a 10-year period of discovery before the baler was manufactured is too broad as a matter of law. There is simply insufficient evidence for this Court to second-guess and micromanage the District Court's discovery order. In *In re Deere*, 299 S.W.3d 819 (Tex. 2009) the

plaintiff was injured when stepping off a backhoe loader and sued Deere alleging strict product liability. The Texas trial court ordered Deere to produce its claims involving step assemblies failures on Deere products without a time limit. *Id.* at 820. The Texas Supreme Court directed the trial court to vacate its order compelling production without setting a reasonable time limit, while noting it offered no opinion on a time limit reasonable under the circumstances, leaving that to the trial court's discretion. *Id.*, at 820-21.

**3. The District Court correctly ordered a sharing protective order.**

Deere never provided the District Court with an affidavit or verification that discovery about its 2003 baler needed trade secret protection. Instead, defense counsel baldly asserted in an email that “as discussed during Mr. O’Brien’s deposition, Deere is very protective of its proprietary business information as the Chinese readily reverse engineer its products and put them on the market.” Nowhere in O’Brien’s deposition is “China,” “Chinese,” or “reverse engineering” discussed. In fact, to the contrary, Plaintiffs learned that O’Brien kept many of Deere’s supposed trade secrets in unsecured files at his home. Plaintiffs’ counsel noted:

I’ll specifically object to those documents being labeled as confidential or trade secret, among other things. Even to rise to the level of trade secret protection, . . . the company needs to have taken reasonable efforts to maintain the secrecy of those materials. An employee maintaining those documents outside of the company, at his home, is

certainly not reasonable efforts to maintain the secrecy of those documents.

Plaintiffs' Appendix, Exhibit 1 (148:7-16).

Deere's assertion that Plaintiffs do not challenge Deere's entitlement to a protective order is a stretch. Rather than fight "good cause," Plaintiffs proposed a sharing protective order, permitting sharing with "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." Tr. 7-10. Sharing would be permitted if the recipient agreed in writing consenting to the District Court's jurisdiction and to be bound by the terms of the protective order. Deere urged the right to 10-day notice and the opportunity to object before documents were shared. After considering privacy issues involving a 2003 design, taking into account the needless waste of time and resources, and discovery too often becoming a desultory game of hide and seek, the District Court followed the modern trend and entered Plaintiffs' proposed sharing order.

**4. The time investment required for production of the compelled discovery does not unfairly prejudice Deere's ability to prepare for trial.**

The thrust of Deere's contention is that compelling production of other claim files is a great hardship that will take time away from its preparation for the May 9, 2022, trial. In *State ex rel. Guarantee Ins. Co. v. Dist. Ct. of Eighth Jud. Dist.*, 194 Mont. 64, 68, 634 P.2d 648, 651 (1981), this Court, in denying a writ of supervisory

control where a hardship claim was made, noted: “In this day of computerized retrieval of claims records it is hard to understand the hardship involved.” *Guarantee Ins.* was decided over 40 years ago. Deere is the world’s largest farm machinery manufacturer, with a \$120.82 billion market capitalization, and over 75,000 employees, including around 50 in-house lawyers. By the admission of Deere’s own witness, O’Brien, it has systems in place identifying fires related to Deere equipment, their dates, product involved, area of origin, logical heat source, logical first fuel, and hypothesis of a fire’s cause. As held in *Guarantee Ins.*, control over pretrial discovery is best exercised by the District Court which is in a better position than this Court to supervise the day-to-day operations of pretrial discovery. *Id.*, 650. The District Court, in compelling discovery, exercised its discretion and was unpersuaded by Deere’s arguments of prejudice. It noted:

The Court is not persuaded by arguments of burden or prejudice in this instance. The discovery requests were propounded two years ago. Although it could have sought a protective order at that time, Deere chose to neither produce the documents nor ask the Court for a ruling on its claims of privilege. It has known for at least two years that Garrity sought the documents at issue, so has had a significant period of time to perform the necessary search, and to seek guidance from the Court on whether it must produce the documents. Without taking such affirmative steps, Deere did not have the authority to simply not produce the documents or to refuse to find them. Under these facts, continuing the trial would be inappropriate.

Order at page 7.

The District Court has inherent discretionary power to control discovery and that power is based upon the District Court's authority to control trial administration. *Massaro*, 603 P.2d at 251. As observed in *Guarantee Ins.*, this Court's interjection into an interlocutory review of discovery based on hardship, would make it difficult for the District Court to control day to day trial administration and open a flood of extraordinary discovery writs that this Court's precedent disfavors and discourages. *See Yellowstone Elec. Co. v. Dist. Ct.*, No. OP-19-0348, 397 Mont. 552, 449 P.3d 787 (Aug. 6, 2019) (the mere desire to avoid cost and delay with the normal appeal process does not meet the urgency or emergency factors for a writ).

## **V. CONCLUSION**

Deere has not met its burden. Deere's refusal to properly respond to discovery created the timing issue Deere now laments. This Court should not reward Deere for its dilatory conduct by exercising supervisory control. Deere's objective with this petition is to delay the approaching trial. The Court should view Deere's claims of privacy and prejudice as a pretext for its desire to delay. This Court should deny Deere's petition for writ of supervisory control.

DATED this 14th day of March, 2022.

CONNER, MARR & PINSKI, PLLP

/s/ Dennis P. Conner

DENNIS P. CONNER

P. O. Box 3028

Great Falls, MT 59403-3028

*Attorneys for Plaintiffs*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 (4)(3) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced, except for the quoted and indented material; and the word count calculated by Word is not more than 4,000 words.

DATED this 14th day of March, 2022.

CONNER & MARR, PLLP

/s/ Dennis P. Conner

DENNIS P. CONNER

P. O. Box 3028

Great Falls, MT 59403-3028

*Attorneys for Plaintiffs*

## TABLE OF CONTENTS OF APPENDIX

<b><u>Ex.</u></b>	<b><u>Document</u></b>	<b><u>Date</u></b>
1	Deposition of Steven E. O'Brien	05/14/2021
2	Fire Investigation Summary of Garrity Fire	08/24/2016
3	Email from Conner to Court and Counsel	01/26/2022

## CERTIFICATE OF SERVICE

I, Dennis Conner, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-14-2022:

Rachel Parkin (Attorney)  
620 High Park Way  
P.O. Box 4947  
Missoula MT 59806-4947  
Representing: Deere & Company  
Service Method: eService

Perry Schneider (Attorney)  
P.O. Box 4947  
Missoula MT 59806  
Representing: Deere & Company  
Service Method: eService

Gregory Pinski (Attorney)  
PO Box 3028  
P.O. Box 3028  
Great Falls MT 59403-3028  
Representing: Joe Garrity d/b/a Garrity Ranches  
Service Method: eService

Randall Nelson (Attorney)  
2619 St. Johns Ave., Suite E  
Billings MT 59102  
Representing: Joe Garrity d/b/a Garrity Ranches  
Service Method: eService

Elizabeth Best (Respondent)  
415 2nd Avenue North, Rm. 203  
Great Falls MT 59401  
Service Method: E-mail Delivery

Electronically Signed By: Dennis Conner  
Dated: 03-14-2022