IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. OP-24-0289

ANNETTE M. TRUJILLO,

Petitioner,

v.

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY, THE HONORABLE MOLLY OWEN PRESIDING JUDGE,

Respondent.

Original Proceeding from the Twentieth Judicial District Court
Lake County
Honorable Molly Owen
Cause No. DV-19-36

BRIEF OF *AMICI CURIAE* THE MONTANA CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

Nancy M. Erfle
Nathan A. Huey
Gordon Rees Scully Mansukhani, LLP
283 W. Front Street, Suite 003
Missoula, Montana 59802
Tel: 406-218-4074
nerfle@grsm.com
nhuey@grsm.com

Attorneys for Amici Curiae
The Montana Chamber of Commerce,
Chamber of Commerce of the United
States of America, and The Product
Liability Advisory Council, Inc.

Dennis P. Conner
J.R. Conner
Conner, Marr & Pinski, PC
P. O. Box 3028
Great Falls, MT 59403-3028
Tel: 406-727-3550
dennis@mttrials.com
jr@mttrials.com

C. Tab Turner
Turner & Associates, PA
4705 Somers Avenue, Suite 100
North Little Rock, AR 72116
Tel: 501-791-2277
tab@tturner.com

James P. O'Brien
O'Brien Law Office, PC
P. O. Box 7936
Missoula, MT 59802-7936
Tel: 406-721-0660
info@obrienlegalservices.com

Attorneys for Petitioner
Annette M. Trujillo

Lee Mickus
Evans Fear Schuttert McNulty Mickus
3900 E. Mexico Drive, Suite 820
Denver, CO 80210
Tel: 303-656-2199
lmickus@efsmmlaw.com

Stephen D. Bell
Dorsey & Whitney, LLP
125 Bank Street, Suite 600
Missoula, MT 59802-4407
Tel: 406-721-6025
bell.steve@dorsey.com

David Stone
Nelson Mullins
5830 Granite Parkway, Suite 1000
Plano, TX 75024
Tel: 469-484-6100
david.stone@nelsonmullins.com

Attorneys for Respondent
Toyota Motor Sales USA, Inc.

Todd A. Hammer
Marcel A. Quinn
Hammer, Quinn & Shaw, PLLC
P. O. Box 7310
Kalispell, MT 59904
Tel: 406-755-2225
toddhammer@attorneysmontana.com
marcelquinn@attorneysmontana.com

Attorneys for Defendant Ho's, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF *AMICI CURIAE*

Established in 1931, the mission of the Montana Chamber of Commerce ("Montana Chamber") is to advocate on behalf of Montana businesses and be the driving force in promoting a favorable business climate in the State of Montana. The Montana Chamber represents about 1,200 businesses large and small across the State. The Montana Chamber serves business members by working to create and to sustain an optimal business climate, business prosperity, and a strong Montana economy. Through advocacy, education, and collaboration, the Montana Chamber works to provide an empowered and educated workforce, reduce business growth obstacles, and advance positions that promote success for Montana businesses.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived primarily from its corporate members' experiences spanning a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of its members and seeking fairness and balance in the development and application of the law as it affects product risk management.

The Montana Chamber and the U.S. Chamber (collectively, "the Chambers") and PLAC have a strong interest in the legal issues presented in this case. The rule Petitioner proposes—that a subsidiary be compelled to produce documents and records from its out-of-state corporate parent—has

[1] https://plac.com/PLAC/PLAC/Amicus.aspx.

the potential to create an enormous barrier to outside investment in this State and has far-reaching national and international implications.

Petitioner's rule would harm Montana's ability to attract capital investments crucial to creating new jobs and propelling the economy. Jobs are created when companies make capital investments in manufacturing and distribution facilities in Montana. Compelling a company in Montana to disregard corporate formalities and produce documents from a separate parent corporation, as Petitioner seeks, would have a chilling effect on job-producing investment within the State.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Annette Trujillo ("Trujillo") sued the U.S. subsidiary of a multinational corporation located in Japan. Trujillo did not join the Japanese parent as a party. As part of its response to discovery requests served by Trujillo, the U.S. subsidiary agreed to ask its Japanese parent to provide certain documents, which were not in the subsidiary's possession, custody, or control. The parent corporation voluntarily agreed to provide certain core design, testing, and manufacturing documents to the subsidiary to be produced to Trujillo subject to a protective order, thereby obviating the need for Trujillo to avail herself of established procedures for obtaining third party evidence outside the United States.

Trujillo argues that the non-party parent corporation's agreement to provide certain documents to the U.S. subsidiary somehow "moots" the settled principle under Montana law that a party responding to discovery is required to provide documents within its control and is not required to produce documents that are not within its control. In making her mootness argument, Trujillo is seeking to expand the scope of document discovery under M. R. Civ. P. 34.

Not only that, what Trujillo seeks to have this Court impose has far-reaching implications in Montana, nationwide, and across the globe. The litigation involves a foreign manufacturer and a U.S. supplier. The non-party manufacturer is in Asia. The relationship between the U.S. legal system and the legal systems of other nations implicates principles of international comity and competing policies and interests of foreign nations. The United States is a party to conventions and treaties for the disclosure of evidence across international borders, providing a vehicle for litigants such as Trujillo to obtain discovery in other countries for use in litigation in the United States. Like the United States, foreign sovereigns have regimes in place to protect privacy interests and business interests and, in some instances, to limit what may be disclosed.

Trujillo's request for supervisory control to expand discovery obligations beyond the plain language of M. R. Civ. P. 34(a)(1) has all-embracing implications for multinational corporations (as well as domestic corporations) doing business in Montana. This Court should not exercise supervisory control as Trujillo requests.

ARGUMENT

A. The Boundless Reading of M.R. Civ. P. 34(a)(1) Put Forward by Trujillo is Contrary to Settled Montana Law and Principles of Corporate Separateness

1. *Montana Law Respects Principles of Corporate Separateness*

Corporate legal separateness is a fundamental principle of corporate law in Montana and throughout the country, protecting affiliated business entities (parents, subsidiaries, and sister companies) from legal liability and litigation. Separate business entities have distinct legal personalities and liabilities. Even though she has not made alter ego or veil-piercing allegations in her pleadings, Trujillo asks the Court to circumvent the corporate form and order discovery beyond what the foreign parent agreed to provide, without compulsory process, to its U.S. subsidiary for use in this litigation. At bottom, Trujillo is asking this Court to require a responding party to produce documents from an affiliated non-party entity and to disregard corporate separateness.

Underpinning principles of corporate separateness is respect for the corporate form. Courts in Montana and elsewhere presume that separate legal entities should be treated as such. Statutory liability protections have been established through decades of precedent and legislative enactments. Under Montana law, the separate corporate identities maintained by parent and subsidiary must be observed. *See State ex rel. Monarch Fire Ins. Co. v. Holmes*,113 Mont. 303, 308, 124 P.2d 1038 (1942) (general rule is that a corporation retains its separate and distinct identity where its stock is partly or entirely owned by another corporation) (citation omitted). Neither the immunities nor liabilities of one corporation automatically flow to the other. *Cf. Reynolds v. Burlington Northern, Inc.*, 190 Mont. 383, 401, 621 P.2d 1028 (1980).

Here, Trujillo did not allege in her pleadings that the U.S. subsidiary is the alter ego of its Japanese parent or that the protections of limited corporate liability may be lost because of some wrongdoing in the operation of parent and subsidiary. Instead, Trujillo seeks to create a dangerous end-run around Montana's jurisprudence requiring respect for the corporate form. The mere fact that Respondent Toyota Motor Sales USA, Inc. is a subsidiary of non-party Toyota Motor Corporation does not mean that corporate formalities have been (or can be) disregarded. *See Meridian*

Mineral Co. v. Nicor Minerals, Inc., 228 Mont. 274, 285, 742 P.2d 456 (1987) ("[a] mere showing that one corporation is owned by another, or that the two share interlocking officers or directors is insufficient to support a finding of alter ego") (citation omitted).

Rule 34(a) requires production of relevant, non-privileged documents requested by an opposing party that are in the responding party's "possession, custody, or control." M.R. Civ. P. 34(a)(1). The documents at issue here are not in the U.S. subsidiary's possession; nor does the subsidiary have legal ownership of the documents. The documents are maintained by a foreign corporate parent outside the subsidiary's control. As the District Court correctly acknowledged at oral argument, "The parent can get from the subsidiary; it doesn't work in the reverse." (App. 14, Tr. 48:15-16).

This Court articulated a clear legal rule defining "control" of documents in *Cox v. Magers,* 2018 MT 21, 390 Mont. 224, 411 P.3d 1271. There, this Court adopted the definition used by federal courts as to the meaning of documents in a party's "control" under M. R. Civ. P. 34(a)(1), which is identical to the Federal Rule of the same number. *Compare* M. R. Civ. P. 34(a)(1) *with* Fed. R. Civ. P. 34(a)(1). Under both rules, this Court concluded, "control is defined as the legal right to obtain documents upon

demand." *Id.*, ¶ 23 (quoting *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) (citation omitted).

Under this clear legal rule, litigants in Montana and in the federal courts must produce documents where they have physical possession or legal ownership, or where they have the legal right to obtain the documents on demand. They are *not* required to produce documents without such a right to control. No statute or precedent creates such an obligation, and it is antithetical to principles of corporate separateness. Litigants in Montana should continue to have confidence that, unless they have the legal right to obtain documents from a nonparty corporation—even though the nonparty may be an affiliate of the party—they will not be obligated to turn over purposefully-separated information under the control of an affiliate company.

2. *Trujillo's Proposed Rule Upsets Montana's Settled Framework*

Despite this settled law, Trujillo proposes a rule requiring U.S. corporations and multinational corporations to involuntarily shoulder additional risks and burdens in the context of document discovery. Invasive discovery across national or state borders could, and will, allow opposing parties to gain significant leverage over multinational (and other) third parties well beyond the spirit and the letter of M. R. Civ. P. 34(a)(1).

M. R. Civ. P. 34(a)(1), by its terms, requires a party to collect, search, and produce documents in its possession or custody, or for which has a legal right to obtain. It is uncontested that the U.S. subsidiary here does not have physical possession or legal ownership of the documents at issue, which are in Japan and owned by the corporate parent. "A subsidiary, by definition, does not control its parent corporation." *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 145 (D. Del. 2005). There has been no showing by Trujillo that the relationship between the Japanese parent and U.S. subsidiary is such that the subsidiary can secure documents of the parent on demand.

Rather, Trujillo asks this Court to create a pathway to foreign third-party discovery circumventing available procedures to obtain third party documents. For instance, Montana is a party to the Uniform Interstate Depositions and Discovery Act (UIDDA), *see* § 25-20-28, MCA, which allows access to documents (and witnesses) in forty-three states. Outside the United States, there are treaties and conventions setting forth procedures to obtain evidence in cross-border circumstances, including the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the Inter-American Convention on the Taking of Evidence Abroad, and the U.S.-Japan Bilateral Consular Convention of 1963. In addition, well-

recognized principles of international comity limit the authority of courts to compel the production of documents from outside the United States. *See* Restatement (Third) of the Foreign Relations Law of the U.S. § 442 (1987).

The expansive rule Trujillo proposes also creates serious issues concerning enforceability. If this Court requires the subsidiary to produce the foreign parent's documents, what role would Montana's trial courts be required to play if the parent does not provide them, or Trujillo is not satisfied with the voluntary production made? The parent has possession, custody, and control of the documents at issue but is not subject to jurisdiction in the District Court and is outside its reach. The subsidiary may make—and here, did make—a request for documents, but does not have the right to receive them upon demand. If the subsidiary is unable to produce the documents after being so compelled, would it be subject to discovery sanctions for failure to comply with the judicial process? Trujillo suggests the answer would be yes, even though the subsidiary attempted to accommodate Trujillo here by making the ask of its parent without any legal right to demand the documents, and voluntarily producing responsive documents received from the parent.

"In controlling discovery, the District Court must regulate traffic to insure a fair trial to all concerned, neither according one party an unfair

advantage nor placing the other party at a disadvantage." *Massaro v. Dunham*, 184 Mont. 400, 405, 603 P.2d 249 (1979) (citation omitted). Trujillo is asking this Court to impose a rule according an unfair advantage to Trujillo—and to any Montana litigant requesting that an opposing party provide non-party discovery from affiliated companies in discovery. At the same time, Trujillo's rule would discourage companies from doing business in Montana by creating state-specific exposure to burdensome third-party discovery demands that are unenforceable in other jurisdictions.

The proposed rule is fraught with the potential for mischief, affecting not only products liability cases such as this one but also business tort and other commercial litigation in Montana. To the extent that Trujillo asks the Court to exercise supervisory control and hold that a subsidiary should be compelled to produce a foreign parent's documents, *ultra vires* the plain language of M. R. Civ. P. 34(a)(1), such a rule improperly disregards the corporate form and the existence of distinct legal entities.

B. The Other Similar Incidents Discovery at Issue Shows the Unworkability of the Rule Trujillo Proposes

The discovery at issue illustrates how unwieldly the new rule Trujillo advocates would be in practice. The District Court directed the U.S. subsidiary to produce documents regarding certain other personal injury

claims and lawsuits involving 1998-2003 model year U.S.-bound Toyota Sienna minivans. But Trujillo's document request goes much further. It contains no temporal limitations. It seeks documents beyond the Toyota model at issue in the underlying litigation. It is not limited to U.S.-bound vehicles but requests the production of information for Toyota vehicles shipped around the globe.

Such a broad request creates both relevance and feasibility issues. The U.S. subsidiary is a supplier of U.S.-bound vehicles and not vehicles sold elsewhere. Non-party Toyota Motor Corporation sells, and has sold, millions of vehicles overseas annually. This request likely would require non-parties to collect documents from all over the world, which would be written in many languages. *Amici* anticipate that some of the documents may be electronically stored but many of them will be hard copy documents dating back decades. The wide-ranging, minimally relevant, and extraordinarily burdensome nature of this request highlights the sound policy considerations that underscore the District Court's correct application of Montana law.

Moreover, jurisdictions outside the United States have made their own policy choices to protect certain information from disclosure. As one example, the European Union (EU) General Data Protection Regulation

(GDPR) law, Regulation (EU) 2016/279, protects the data privacy of all EU citizens and guides organizational approaches to handling data, as well as transferring data across borders. The GDPR applies to organizations outside the EU if they offer goods or services to European citizens. This cross-border data protection law generally prohibits the transfer of EU citizens' information unless certain exceptions are met. If Trujillo were to make requests for customer complaints through established channels under international law, those requests and protections would be adjudicated in the countries of origin. The rule Trujillo proposes, however, would bypass those regulatory protections and place a foreign corporate affiliate at risk of violating data protections in disclosing customer complaints. Such an outcome would undermine principles of international comity.

Trujillo, who made a tactical decision not to file suit against the Japanese parent, is now asking this Court to allow her to get third-party documents through the subsidiary instead of working through the proper international channels. A ruling that the subsidiary can be compelled to produce documents solely within the possession, custody, and control of the parent will drastically undermine concepts of corporate separation and will be used against multinational and national corporate families that divide manufacturing and distribution responsibilities. And such precedent would

establish Montana as a jurisdiction willing to disregard the corporate form, chilling the state's business climate and inhibiting its ability to attract enterprise and commerce. The Court should decline Trujillo's invitation to rewrite M. R. Civ. P. 34(a)(1) and upend Montana discovery law.

CONCLUSION

The Court should decline to grant the writ, or if it does exercise supervisory control, reject the expansion of M. R. Civ. P. 34(a)(1) that Trujillo espouses.

Respectfully submitted this _day of July, 2024.

GORDON REES SCULLY MANSUKHANI, LLP

Nancy M. Erfle
Nathan A. Huey
Attorneys for Amici Curiae The Montana Chamber of Commerce, Chamber of Commerce of the United States of America, and The Product Liability Advisory Council, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(c), I hereby certify that this brief is double-spaced, is proportionately spaced, and uses the Georgia typeface in 14-point size; and that the word count of the body of the brief (including footnotes) calculated by Microsoft Word is 2,772 words.

Nancy M. Erfle
Nathan A. Huey

CERTIFICATE OF SERVICE

I, Taylor Jordan, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on July _, 2024:

Dennis P. Conner (Attorney)
J.R. Conner (Attorney)
Conner, Marr & Pinski, PC
P. O. Box 3028
Great Falls, MT 59403-3028
Representing: Petitioner Annette M. Trujillo
Manner of Service: eService

C. Tab Turner (Attorney)
Turner & Associates, PA
4705 Somers Avenue, Suite 100
North Little Rock, AR 72116
Representing: Petitioner Annette M. Trujillo
Manner of Service: eService

James P. O'Brien (Attorney)
O'Brien Law Office, PC
P. O. Box 7936
Missoula, MT 59802-7936
Representing: Petitioner Annette M. Trujillo
Manner of Service: eService

Lee Mickus (Attorney)
Evans Fear Schuttert McNulty Mickus
3900 E. Mexico Drive, Suite 820
Denver, CO 80210
Representing: Respondent Toyota Motor Sales USA, Inc.
Method of Service: eService

Stephen D. Bell (Attorney)
Dorsey & Whitney, LLP
125 Bank Street, Suite 600
Missoula, MT 59802-4407
Representing: Respondent Toyota Motor Sales USA, Inc.
Method of Service: eService

David Stone (Attorney)
Nelson Mullins
5830 Granite Parkway, Suite 1000
Plano, TX 75024
Representing: Respondent Toyota Motor Sales USA, Inc.
Method of Service: eService

Todd A. Hammer (Attorney)
Marcel A. Quinn (Attorney)
Hammer, Quinn & Shaw, PLLC
P. O. Box 7310
Kalispell, MT 59904
Representing: Defendant Ho's, Inc.
Method of Service: eService

Montana Twentieth Judicial District Court, Lake County (Respondent)
106 Fourth Avenue East
Lake County Courthouse
Polson, MT 59860
Representing: Self-Represented
Service Method: Email Delivery

Taylor Jordan
Paralegal