IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1998
L.T. Case No. 1D18-4815

SUZUKI MOTOR CORPORATION,
a foreign corporation,

Petitioner,

v.

SCOTT WINCKLER,

Respondent.

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF PETITIONER

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "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 Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and state and federal courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, business owners, business leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. Since its founding, the Institute has advocated practices that build faith in Florida's court system. It represents a broad range of participants in the business community who share a substantial interest in a balanced litigation environment that treats plaintiffs and defendants evenhandedly.

Businesses, particularly ones that operate throughout the United States, can find themselves involved as parties in dozens, hundreds, and even thousands of

lawsuits. If executives in such companies can routinely be deposed in cases when they have no unique, relevant personal knowledge, the burden of litigation on those businesses increases without any resulting benefit. Businesses will be disrupted because their key executives are required to devote time to depositions that do not aid the litigation. Also, the threat of such executive depositions will become a weapon to extract nuisance settlements. Thus, the Chamber and the Institute have an interest in enforcing the existing rules of civil procedure and promoting deposition ground rules that minimize disruptions to their members and the broader business community.

SUMMARY OF THE ARGUMENT

Discovery is not a weapon; it is a tool. Both the Florida and Federal Rules of Civil Procedure are designed to prevent plaintiffs from using discovery to harass defendants and force them into settling meritless cases. Unfortunately, many plaintiffs' attorneys have resorted to wielding discovery requests like a weapon in order to gain leverage over corporate defendants. One way this is done is by seeking to depose a high-level corporate official, not because of any unique knowledge the official possesses, but in hopes that doing so will impose logistical hurdles that lead the defendant corporation to settle the case rather than expend time and resources fighting the deposition.

Many state and federal courts have addressed this abusive litigation tactic by applying what is known as the apex doctrine. Under the apex doctrine, a high-ranking corporate official who lacks direct, relevant knowledge should not be deposed before less-intrusive means of discovery, such as deposing lesser-ranking employees, have been exhausted. This doctrine is an application of the traditional rules of discovery, which prevent irrelevant, duplicative, harassing, and unduly burdensome discovery requests.

Florida courts apply the apex doctrine to high-ranking government officials, but the doctrine's rationale against unwarranted and unduly burdensome discovery requests applies with equal force in the corporate context. Allowing the First

District's decision to stand—requiring the head of a corporation to sit for a deposition despite his assertion that he has no relevant knowledge of the facts at issue—has the potential to wreak havoc on businesses of all sizes in Florida. Allowing an apex employee of a corporation to be deposed when that employee does not have unique information may lead to a flood of discovery requests for that same employee in other cases, leaving him or her little time to actually do the job of running a business.

The Chamber and the Institute respectfully request this Court quash the First District's decision.

ARGUMENT

I. THE RULES OF CIVIL PROCEDURE ARE DESIGNED TO PREVENT PLAINTIFFS FROM USING DISCOVERY TO HARASS DEFENDANTS.

Florida's Rules of Civil Procedure prevent plaintiffs from using discovery to harass defendants and force them into settling meritless cases. This Court should enforce the existing rules and clarify that they apply in all contexts, including unwarranted discovery directed to business leaders and corporate executives.

A. The Florida Rules of Civil Procedure do not allow limitless, unfettered discovery.

The rules of civil procedure provide trial courts broad discretion in determining the scope and limitations of discovery. *See Friedman v. Heart Institute of Port St. Lucie, Inc.*, 863 So. 2d 189, 194 (Fla. 2003). In exercising this

discretion, "trial courts are guided by the principles of relevancy and practicality." *Id.*; *see* Fla. R. Civ. P. 1.280(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action[.]").

One purpose of discovery is to "provide each party with all available sources of proof as early as possible to facilitate trial preparation." *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1068 (Fla. 2011) (citation omitted). Discovery is also meant to "prevent the use of surprise, trickery, bluff and legal gymnastics." *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887, 893 (Fla. 4th DCA 2006) (quoting *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970)). Engaging in discovery allows parties to determine the strength and weaknesses of their respective positions before trial, which may result in settling cases and avoiding costly litigation. *Id.*

Importantly, "[d]iscovery is not a weapon. It is a tool." *Kobi Karp Architecture & Interior Design, Inc. v. Charms 63 Nobe, LLC*, 166 So. 3d 916, 920 (Fla. 3d DCA 2015). "Discovery was never intended to be used as a tactical tool to harass an adversary . . . ." *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996). This Court has expressly prohibited discovery used "to harass or embarrass litigants or witnesses for malicious purposes." *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) (citing *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111-12 (Fla.

1970)). Allowing such discovery "would lead to a lack of public confidence in the credibility of the civil court process." *Elkins*, 672 So. 2d at 522.

Unfortunately, the broad scope of discovery permitted by the rules of civil procedure has led some plaintiffs' attorneys to wield discovery requests like a weapon in order to gain leverage over corporate defendants. One example of such tactics is seeking to depose a high-level corporate official, not because of any unique knowledge the official possesses, but in hopes that doing so will impose logistical hurdles that lead the defendant corporation to settle the case rather than expend time and resources fighting the deposition. *See* Christopher M. Tauro & Kip J. Adams, *Protect High-Level Corporate Officials From Unnecessary Depositions*, 54 No. 2 DRI for Def. 8 (Feb. 2012). Some plaintiffs' attorneys will go so far as to pursue these depositions as part of an aggressive offensive strategy even after it is clear the corporate official does not have any knowledge of the pertinent facts and issues. *Id.* "Virtually every court that has addressed this subject has noted that deposing officials at the highest level of corporate management creates a tremendous potential for abuse and harassment." S. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006). That is the opposite of the truth-seeking function of discovery.

Many state and federal courts have addressed this abusive litigation tactic by applying what is known as the apex doctrine. *See generally Mulvey v. Chrysler*

Corp., 106 F.R.D. 364, 365 (D.R.I. 1985) ("Unfortunately, discovery has become an abusive tool in the hands of certain attorneys; the end result is the enactment of procedural rules to curb such practices . . . ."); *Alberto v. Toyota Motor Corp.*, 796 N.W. 2d 490, 492 (Mich. Ct. App. 2010) (explaining that the doctrine applies to a "high-ranking or 'apex' . . . corporate officer"). "[W]hen a high-ranking official of a corporation does not have any direct knowledge of the facts," the apex doctrine teaches that "it is inappropriate to compel his deposition without first deposing lesser-ranking employees who have more direct knowledge of the facts at issue." *Stelor Prods., Inc. v. Google, Inc.*, No. 05-80387, 2008 WL 4218107, at *4 (S.D. Fla. Sept. 15, 2008) (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)). In other words, a plaintiff cannot automatically "reach the pinnacle of the corporate structure" through a deposition without first using less intrusive means of discovery. *Liberty Mut. Ins. Co. v. Superior Court of San Mateo Cnty.*, 13 Cal. Rptr. 2d 363, 366 (Cal. Ct. App. 1992).

Although there is currently no decisional law in Florida that expressly applies the apex doctrine in the corporate context, the doctrine is a straightforward application of the traditional rules of discovery and cases interpreting those rules. As discussed above, relevancy and practicality are the guiding principles in resolving discovery disputes. *See Friedman*, 863 So. 2d at 194; Fla. R. Civ. P. 1.280(b)(1). Requiring a high-ranking corporate official without specific

knowledge to be deposed when the information sought can be obtained elsewhere would not satisfy either of those principles.

B. Courts across the country have recognized that the apex doctrine is simply an application of the traditional rules of discovery.

The apex doctrine asks three questions: (1) is the person sought for deposition a high-ranking corporate official; (2) does the official possess unique or superior knowledge of the information being sought; and (3) are there less intrusive means of obtaining the information. *See* Tauro & Adams, *supra* at p. 6. The principles motivating these questions are embodied in the existing procedural rules governing discovery.

Florida's Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure. *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1283 (Fla. 1992). "The Federal Rules of Civil Procedure generally permit the discovery of relevant evidence, but a discovery request may be subject to limitation if 'the discovery . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive.'" *Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 426277, at *2 (S.D. Fla. Feb. 20, 2009) (quoting Fed. R. Civ. P. 26(b)(2)). Accordingly, a trial court in Florida may issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" related to a particular discovery request. Fla. R. Civ. P. 1.280(c).

"Depositions of high level corporate executives may be duplicative, cumulative and burdensome where the person sought to be deposed has no personal knowledge of the events in dispute." *Harris v. Comput. Assocs. Int'l, Inc.*, 204 F.R.D. 44, 46 (E.D.N.Y. 2001).[1] From a practical standpoint, "it would seem sensible to prevent a plaintiff from leap-frogging to the apex of a corporate hierarchy in the first instance, without the intermediate steps of seeking discovery from lower-level employees more involved in everyday corporate operations." *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 366. As the court noted in *Liberty Mutual*, "[t]he head of a large national corporation will generally not have knowledge of a specific incident or case handled several levels down the corporate pyramid." *Id.*

In *Mulvey v. Chrysler Corporation*, for example, the plaintiff sought damages for personal injuries allegedly due to a design flaw in 1975 Dodge vans. 106 F.R.D. at 365. The plaintiff attempted to depose the then-president of Chrysler, Lee Iacocca, but the federal district court in Rhode Island prohibited the

[1] Because the Florida Rules of Civil Procedure are modeled after the federal rules, federal decisions interpreting those rules are persuasive and this Court looks to them for guidance. *See, e.g., Gleneagle Ship Mgmt. Co.*, 602 So. 2d at 1283-84; *see also, e.g., City of Jacksonville v. Rodriguez*, 851 So. 2d 280, 283 n. 3 (Fla. 1st DCA 2003); *Mims v. Casademont*, 464 So. 2d 643, 644 (Fla. 3d DCA 1985); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 611 (Fla. 4th DCA 1975).

deposition, citing rule 26 of the Federal Rules of Civil Procedure, which empowers the trial court to restrict the scope of discovery to prevent abuse. *Id.* at 366 (noting that rule 26 "specifically gives the Court authority to limit discovery if it determines that the discovery sought is obtainable from other sources, that is, those that are more convenient and less burdensome"). *Id.* The court explained that, due to his high-level corporate position, Mr. Iacocca was "easily subjected to unwarranted harassment and abuse" and he had a "right to be protected" by the courts, who have "a duty to recognize his vulnerability." *Id.* For this reason, and because Mr. Iacocca had signed an affidavit expressing ignorance of the facts sought by the plaintiff, the court ruled that Mr. Iacocca's knowledge should first be explored by the less-intrusive means of written interrogatories. *Id.*

Similarly, a federal district court in New York prohibited the deposition of the CEO of a computer company who lacked personal knowledge of the facts related to the plaintiff's lawsuit. *Harris*, 204 F.R.D. at 45-46. The court explained that the deposition would be "unreasonably repetitive and burdensome" because the plaintiff had already discovered the information he sought from another employee of the company. *Id.* at 46 (citing Fed. R. Civ. P. 26(b)(2)(i)). When a high-level corporate official "can contribute nothing more than a lower level employee, good cause is shown not to take the deposition." *Id.*

A California appeals court likewise applied the apex doctrine to prohibit the deposition of the president and CEO of Liberty Mutual Insurance Company in a workers' compensation dispute. *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 364. The CEO had signed a declaration stating he not was involved in handling individual claims and had no knowledge of the facts of the plaintiff's particular claim. *Id.* at 364-65. The plaintiff argued that the CEO's deposition nevertheless was justified because he had been copied on a few pieces of correspondence from plaintiff's counsel to Liberty Mutual. *Id.* at 365. The court rejected that argument, holding that the plaintiff had failed to show that "the official ha[d] unique or superior personal knowledge of discoverable information." *Id.* at 367.

These cases illustrate the application of the traditional rules of discovery to the narrow circumstance of deposing of high-ranking corporate officers. "When raised under the appropriate circumstances, the apex doctrine forces all sides to examine the actual necessity of the deposition, challenges the party seeking the deposition to present good-faith arguments to a court that it needs the deposition, and prevents a litigant from using it to gain leverage in the litigation or to harass the top brass of an opponent." Tauro & Adams, *supra* at p. 6.

C. Florida already applies the apex doctrine to high-ranking government officials, and the same principles support applying it in the corporate context.

Courts in Florida already apply the apex doctrine to high-ranking government officials (*e.g.*, heads of state agencies). Such officials are not subject to deposition "unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources." *Fla. Office of Ins. Reg. v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 950 (Fla. 1st DCA 2015) (quoting *Dep't of Agric. & Consumer Servs. v. Broward Cnty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002)).

In 1991, the First District Court of Appeal determined that the trial court abused its discretion by ordering the Secretary of the Department of Health and Rehabilitative Services to testify about matters that were within his discretionary authority. *State, Dep't of Health & Rehab. Servs. v. Brooke*, 573 So. 2d 363, 371 (Fla. 1st DCA 1991). The court reasoned that the Secretary, as a member of the executive branch, could be compelled to testify "for narrowly defined informational purposes" about specific agency programs, but that the doctrine of separation of powers prevented the trial court from requiring him to explain his budgetary decisions. *Id.* at 370-71. The court further determined that the Secretary should not have been compelled to testify at all because another agency official

had already provided the relevant information. *Id.* at 371. In reaching this conclusion, the court relied on a federal district court decision, which held that "[d]epartment heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer." *Id.* (quoting *Halderman v. Pennhurst State School & Hosp.*, 559 F. Supp. 153 (E.D. Pa. 1982)).

Brooke was the first Florida case to expressly apply the apex doctrine. Since then, Florida courts have followed its reasoning to limit the depositions of agency heads and other government officials when they were not uniquely able to provide relevant information. *See, e.g.*, *Miami Dade College v. Allen*, 271 So. 3d 1194, 1196-97 (Fla. 3d DCA 2019) (quashing ordering allowing deposition of college president because plaintiff had not "exhausted all other discovery tools" or shown that "the information was necessary and unavailable from another source"); *Dep't of Agric. & Consumer Servs. v. Broward Cnty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002) (holding that a deputy commissioner with authority over the state program at issue was a reasonable substitute for Commissioner Bronson). This rule was later extended to *former* agency heads and high-ranking government officials. *See Horne v. Sch. Bd. of Miami-Dade Cnty.*, 901 So. 2d 238, 241 (Fla. 1st DCA 2005) (quashing deposition of former commissioner of education).

As the First District has noted, the apex doctrine in Florida is rooted in two things: "separation of powers considerations" ***and*** "policy concerns that overly burdensome requirements for public officials could discourage people from accepting positions as public servants." *Fla. Office of Ins. Reg.*, 159 So. 3d at 950; *see also Horne*, 901 So. 2d at 241. These two important considerations were both highlighted in *Brooke*.

In *Brooke*, the court determined that the separation of powers doctrine precluded agency heads from being compelled to testify about discretionary matters. But the court also went on to explain that it would be improper and burdensome to compel agency heads to testify about information that could be found elsewhere. This second part of the rationale for the apex doctrine is derived from traditional discovery principles of relevancy and practicality and the existing rules of civil procedure. *See* Fla. R. Civ. P. 1.280(c) (providing that, in the context of discovery, a court "may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires").

Separation of powers is not present in the corporate context, but the rule against unduly burdensome discovery requests applies in *all* contexts and to *all* types of parties. *See* Fed. R. Civ. P. 26; Fla. R. Civ. P. 1.280(c). For this reason, among others, federal and other state courts have applied the apex doctrine to limit

discovery requests directed to an apex employee of a corporation or business. *See* Section B, *supra* at p. 8.

The same policy concerns regarding overly burdensome or duplicative discovery directed to government officials apply with equal force in the corporate context. Allowing an apex employee of a corporation to be deposed when the employee does not have unique information about a particular case may lead to a flood of discovery requests for that same employee in other cases. It is unreasonable to *begin* discovery by deposing, as in this case, the chairman of a major multi-national manufacturing corporation when suing over an alleged design defect of a motorcycle brake system. *See Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 365. To avoid discovery abuse and harassment, less intrusive discovery methods should be exhausted first. Finally, requiring a corporate executive to sit for a deposition in every case in which his corporation is a party would make it impossible to run a company and would discourage qualified, talented individuals from taking on such positions.

CONCLUSION

This case represents the first time an appellate court in Florida has required the head of a corporation to sit for a deposition despite his assertion that he has no relevant knowledge of the facts at issue. If the First District's decision is allowed to stand, it could wreak havoc on businesses of all sizes in Florida. As Judge Thomas

aptly observed, "[a]llowing discovery not meant to ferret out the truth, but designed to create settlement pressures, threatens the proper operation of the commercial enterprise for no legitimate factfinding purpose." *Suzuki Motor Corp. v. Winckler*, 284 So. 3d 1107, 1110 (Fla. 1st DCA 2019) (B.L. Thomas, J., dissenting). The Chamber and the Institute respectfully request this Court quash the First District's decision.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of March, 2020 a true and correct copy of the foregoing was furnished by e-mail to all counsel listed below.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 because it was prepared using Times New Roman 14-point font.

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