IN THE GEORGIA SUPREME COURT

GENERAL MOTORS, LLC, Petitioner, v. ROBERT RANDALL BUCHANAN, Individually and as Administrator of the ESTATE OF GLENDA MARIE BUCHANAN, Respondent.	)	CASE NO. S21C1147

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SMITH, GAMBRELL & RUSSELL, LLP

Leah Ward Sears
Georgia Bar No. 633750

Edward H. Wasmuth, Jr.
Georgia Bar No. 739636

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Certiorari is appropriate in cases of great concern, gravity, or importance to the public. Rule 40, Rules of the Georgia Supreme Court. This case meets that requirement.

In this product liability case, Respondent seeks to depose Mary Barra, the Chief Executive Officer of General Motors, LLC ("GM"). The State Court ordered the deposition of Ms. Barra to go forward without finding that she had unique or superior personal knowledge of any discoverable matter. The Court of Appeals affirmed. If executive officers like Ms. Barra routinely could be required to give a deposition in every product liability case, they would have no time left to do their jobs. Meanwhile, the lawsuits themselves would not benefit because high-ranking officers seldom have unique or superior personal knowledge that cannot be obtained from other sources within the company.

The only practical effect would be to weaponize discovery. Under the Court of Appeals' decision, plaintiffs can routinely seek depositions of CEOs as a settlement tactic. Collateral litigation over such requests will be expensive to the litigants and burdensome to the courts, and the prospect of tying up a CEOs time in a deposition may well induce companies to settle even meritless suits.

Now that the Court of Appeals has opened the door to this tactic, it is imperative that this Court immediately close that door. Though the Court of Appeals considered itself powerless to recognize the apex deposition doctrine, this Court certainly is not. Trial courts' discretion is not unbounded. This Court has previously imposed guideposts for the district courts' exercise of discretion over discovery matters, and courts in other jurisdictions have as well under comparable discovery statutes and rules.

Amicus Curiae, the Chamber of Commerce of the United States of America ("the Chamber"), respectfully submits that this Court should consider whether the State Court should apply the apex deposition doctrine to decide if Ms. Barra's deposition should occur in this case. That doctrine requires a party to exhaust less intrusive means of discovery before deposing another party's senior executive officers.

Because this case raises an issue with a broad and significant impact on the conduct of discovery on companies doing business in Georgia, it presents an issue worthy of this Court's consideration on a writ of certiorari.

I. THE INTEREST OF AMICUS CURIAE IN THIS CASE

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three 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 the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Businesses, particularly those that operate throughout the United States and worldwide, can find themselves involved as parties in dozens, hundreds, and even thousands of lawsuits. Requiring key executives to devote time to depositions even when they have no unique personal knowledge relevant to the case, would burden and disrupt businesses without any resulting benefit. And the threat of such executive depositions could be used as a weapon to extract nuisance settlements. The Chamber has an interest in promoting deposition

ground rules that minimize disruptions to its members and the broader business community and that limit obstructionist tactics.

II. ARGUMENT AND CITATION OF AUTHORITIES

The "apex doctrine" or the "apex deposition doctrine" defines guidelines for determining when a president, CEO, or other executive officer with no unique personal knowledge of relevant facts, can nevertheless be required to give a deposition. The Court of Appeals thought it lacked authority to apply the apex doctrine. However, in his concurring opinion, Judge Dillard noted that the issue of whether to adopt the apex doctrine was "above our pay grade" and stated that this Court could decide to adopt the doctrine. Opinion at 15. He was right, as this Court has authority to impose guideposts for the lower courts' exercise of their discretion over discovery matters. This Court should accept Judge Dillard's invitation to address this important issue.

A. The Apex Doctrine Addresses the Balancing of the Benefits and Burdens of Discovery, an Issue Critical to All Doing Business in Georgia

Discovery in a civil case serves two purposes: issue formulation and factual revelation. *Clarkson Industries, Inc. v. Price*, 135 Ga. App. 787, 789 (1975). But sometimes a party wields discovery as a weapon to

harass and burden another party, perhaps pressuring them into settling a meritless case. One way a plaintiff can do that is by seeking to depose a high-level executive of a corporate defendant, not because that executive possesses any unique personal knowledge relevant to the case, but in the hope that doing so will impose logistical hurdles and lead the defendant corporation to offer to settle the case rather than expend time and resources fighting the deposition or submit to the deposition.

After all, deposing senior executives "raise[s] a tremendous potential for abuse and harassment." *Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287, 13 Cal. Rptr. 2d 363, 366 (1992); *see* S. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006) ("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."). A CEO "is a singularly unique and important individual who can be easily subjected to unwanted harassment and abuse." *Mulrey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). Thus, "virtually every court which has addressed the subject" has recognized

the need for discovery rules that "reasonably accommodate" the unique problems presented by deposing high-level executives. *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (adopting and defining the apex deposition doctrine). The apex deposition doctrine balances the potential for abuse inherent in apex depositions with legitimate discovery needs by limiting apex depositions to situations in which the apex witness has "unique or superior knowledge of discoverable information." *Id.*

Because apex depositions present unique challenges and can be abused, it is appropriate and necessary for this Court to set guideposts for trial courts to follow in exercising their discretion on whether to allow such depositions. The decision of the Court of Appeals set no standards for a trial court to follow. Senior officials often must act as a spokesperson for their businesses in matters in which they have no personal, first-hand knowledge. That they fill such a role should not turn them into deposition targets. A senior official in any company that does business in Georgia could potentially be required to give a deposition in a lawsuit in Georgia state court merely for having made some public statement that touches in some way on the subject matter

of that lawsuit. Such a burden would impact every entity doing business in Georgia.

By setting guideposts for a trial court to follow in weighing the costs and benefits of a senior executive's deposition, the apex doctrine promotes the orderly conduct of discovery, reduces undue burden and expense, and furthers the speedy and inexpensive resolution of cases. Because the adoption of the apex deposition doctrine raises issues with a broad impact on litigation in Georgia, it is precisely the type of issue that the Court should review on a writ of certiorari.

B. Adopting the Apex Doctrine Would Comport with the Georgia Civil Practice Act

The Georgia Civil Practice Act embraces the same policies that animate the apex deposition doctrine. The stated purpose of the Civil Practice Act is to accomplish the "just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1. The Civil Practice Act helps fulfill the Georgia Constitution's mandate that the courts adopt rules designed to achieve "the speedy, efficient, and inexpensive resolution of disputes." Ga. Const., Art. VI, Sec. IX, Par. I.

To that end, the Civil Practice Act authorizes courts to make orders relating to discovery matters to "protect parties from annoyance,

embarrassment, oppression, or undue burden or expense." O.C.G.A § 9-11-26(c). The Civil Practice Act also permits courts to control the timing and sequencing of discovery "in the interests of justice." *Id.* § 9-11-26(d). It empowers courts to control the discovery process to promote efficiency and eliminate abuse and undue burdens.

Adopting the apex deposition doctrine would not change the rules governing discovery in Georgia or eliminate the discretion trial judges have to manage discovery under O.C.G.A. § 9-11-26. Instead, adopting the apex deposition doctrine would further the letter and spirit of the Civil Practice Act by establishing guideposts for a trial court to follow when exercising its discretion in deciding whether to allow an apex deposition. In other situations, this Court has set guideposts for trial courts to follow in exercising their discretion. *See Lee v. Smith,* 307 Ga. 815, 823-24 (2020) (as a matter of first impression, outlining the factors a trial court must weigh in deciding whether to exclude a late-identified witness). This Court should take this opportunity to adopt guideposts for trial courts to follow in exercising discretion over whether to allow an apex deposition.

C. Other Jurisdictions Overwhelmingly Recognize and Apply the Apex Deposition Doctrine

The practice of other jurisdictions further supports the recognition of the apex deposition doctrine in Georgia. This Court has looked to authorities from other jurisdictions to address issues of first impression in Georgia. *See Slade v. Rudman Resources, Inc.*, 237 Ga. 848, 850 (1976) (surveying authorities from other jurisdictions on an issue of first impression in Georgia). Because of the similarity between the Civil Practice Act and the Federal Rules of Civil Procedure, Georgia courts look to federal decisions for guidance in interpreting and applying the Civil Practice Act. *See Community & Southern Bank v. Lovell*, 302 Ga. 375, 377 & n.6 (2017); *Bowden v. The Medical Center, Inc.,* 297 Ga. 285, 291 n.5 (2015). Discovery in federal and most state courts follows rules similar to the Georgia Civil Practice Act. Many of those courts follow the apex deposition doctrine. That confirms both the authority of courts like this one to adopt the doctrine and the wisdom of doing so.

Multiple Georgia federal courts have adopted and applied the apex deposition doctrine. For example, the federal court in Atlanta invoked the apex deposition doctrine to prevent the plaintiff in an insurance dispute from deposing the CEO of the defendant insurer. *Dishtpeyma v.*

Liberty Ins. Corp., Case No. 1:11-CV-3809, 2012 WL 13013007, at *3 (N.D. Ga. April 9, 2012). In another case, that court relied upon the apex deposition doctrine to prevent the depositions of three executives in an employment discrimination case, including the defendant's board chair and president. *Cuyler v. The Kroger Co.*, Case No. 1:14-CV-1287-WBH-AJB, 2014 WL 12547267, at *6-7 (N.D. Ga. Oct. 3, 2014), *magistrate judge's report and recommendation approved,* Case No. 1:14-CV-1287-RWS, 2015 WL 12621041 (N.D. Ga. Jan. 8, 2015) *See also Degenhart v. Arthur State Bank*, Case No. CV411-041, 2011 WL 3651312, at *1 (S.D. Ga. Aug. 8, 2011) (deposition of defendant's board chair prevented). Other federal district courts in the Eleventh Circuit also have adopted and applied the apex deposition doctrine. *See Goines v. Lee Memorial Health Sys.*, Case No. 2:17-CV-656-FtM-29CM, 2018 WL 3831169, at *4 (M.D. Fla. Aug. 13, 2018) ("Courts routinely recognize that it may be appropriate to limit or preclude depositions of high-ranking officials, often referred to as 'apex' depositions, because 'high-level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.'"); *Gavins v. Rezaie*, Case No. 16-24845-CIV-

Cooke/Torres, 2017 WL 3034621, at *4-5 (S.D. Fla. July 18, 2017); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334-36 (M.D. Ala. 1991).

Appellate courts in other states have adopted the apex deposition doctrine, as well. In *Alberto v. Toyota Motor Corp.*, a motor vehicle product liability case, the Michigan Court of Appeals reversed a trial court and blocked the deposition of the defendant's board chair and CEO, as well as the deposition of its president and COO. 796 N.W.2d 490, 491, 497 (Mich. App. 2010). The court noted that although those two high-level executives had "generalized" knowledge of the alleged defect, they had no role in designing the vehicle and no "unique or superior" knowledge of the defect. *Id.* at 497. *See also Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363, 367 (1992); *Arendt v. General Elec. Co.*, 270 A.D.2d 622, 622-23, 704 N.Y.S.2d 346 (N.Y. App. 2000); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 737 S.E.2d 353, 359-61 (W. Va. 2012); *In re Continental Airlines, Inc.*, 305 S.W.3d 849 (Tex. App. 2010). These courts have recognized that the apex deposition doctrine creates a proper balance between the need for discovery and the equally important goal of avoiding discovery abuse.

The present case likewise calls for the application of the apex deposition doctrine. At any point in time, a company like GM, no matter how diligent, can be subject to hundreds if not thousands of product liability lawsuits. Respondent made no showing that Ms. Barra possesses unique personal knowledge relevant to the case at issue. If she were required to give a deposition in every one of GM's pending product liability cases, she would have no time for her customary executive responsibilities.

Other jurisdictions have recognized the unique challenges and potential for abuse in allowing apex depositions. Those doing business in Georgia face those same challenges and dangers. This Court should use this case to address those issues and adopt the apex doctrine.

III. CONCLUSION

For all the reasons asserted, Amicus Curiae respectfully requests that the Court grant the requested writ of certiorari.

Respectfully submitted,

SMITH, GAMBRELL & RUSSELL, LLP

/s/ Leah Ward Sears
Leah Ward Sears
Georgia Bar No. 633750
Edward H. Wasmuth, Jr.
Georgia Bar No. 739636

1230 Peachtree Street, N.E.
Promenade, Suite 3100
Atlanta, Georgia 30309-3592
Telephone: 404-815-3500
Facsimile: 404-815-3509
lsears@sgrlaw.com
ewasmuth@sgrlaw.com

Counsel for Amicus Curiae The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

This is to certify that I have this 21st day of June, 2021, served the foregoing **BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI** by first class mail upon:

Michael L. Bell, Esq.
Rachel M. Lary, Esq.
Christopher C. Yearout, Esq.
Lighfoot, Franklin & White, LLC
400 20th Street North
Birmingham, Alabama 35203

Keith R. Blackwell, Esq.
Cari K. Dawson, Esq.
Jamie S. George, Esq.
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, Georgia 30309

Lance A. Cooper, Esq.
Patrick A. Dawson, Esq.
The Cooper Firm
531 Roselane Street, Suite 200
Marietta, GA 30060

Darren Summerville, Esq.
Anna Green Cross, Esq.
The Summerville Firm, LLC
1226 Ponce de Leon Avenue, NE
Atlanta, GA 30306

/s/Leah Ward Sears
Leah Ward Sears
Georgia Bar No. 633750
Attorney for Amicus Curiae

1230 Peachtree Street, N.E.
Suite 3100, Promenade
Atlanta, GA 30309-3592
(404) 815-3500
Telecopy: (404) 815-3509
lsears@sgrlaw.com