Received: 10/1/2021 3:56 PM

IN THE
SUPREME COURT OF INDIANA

Case No. 21S-CT-00409

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant/Appellant, v. JENNIFER FINNERTY, Individually, and as Personal Representative of the ESTATE OF CULLEN FINNERTY, Plaintiff/Appellee;	Court of Appeals Case No. 20A-CT-01069 Appeal from the Marion Superior Court 1 Trial Court Case Nos.: 49D01-1808-CT-033896, 49D01-1901-CT-002954, and 49D01-1905-CT0021770 The Honorable Heather Welch, Judge
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant/Appellant, v. CAROL ANDERSON, Individually, and as Personal Representative of the ESTATE OF NEAL ANDERSON, Plaintiff/Appellee;	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant/Appellant, v. MAURA SOLONOSKI, Individually, and as Attorney-in-Fact for ANDREW SOLONOSKI, JR. Plaintiff/Appellee.	

***AMICUS CURIAE* BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLANT**

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America ("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 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.

This case is of importance to the Chamber and its members because it raises the core issue of how Indiana courts will respond when high-level executives are targeted with potentially abusive discovery tactics. Businesses, particularly those that operate nationally and internationally, can find themselves involved as parties in hundreds, if not thousands, of lawsuits. If executives in these companies can be deposed in traditional tort and business cases in which they have no unique, relevant personal knowledge, they will have to devote enormous amounts of time to depositions that do not aid the litigation. And, the threat of such executive depositions will become a weapon to extract nuisance settlements. The Chamber has a strong interest in the proper enforcement of the rules of civil procedure and promoting fair rules for litigation that minimize such unnecessary disruptions to regular business operations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court should adopt the "apex doctrine," also called the "apex deposition rule," and instruct lower courts on the proper evaluation to be performed before permitting depositions of

[1] *Amicus* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

high-ranking officers. Specifically, the Court should not permit a party to depose a high-level corporate executive when the executive has no unique personal knowledge of the matter. If it is shown that the executive has such knowledge, the Court should require the requesting party to show that it has exhausted other less intrusive means of discovery before allowing the apex deposition. The problem, as courts have widely found, is that allowing depositions of high-level executives in other circumstances arms a party with an improper tool for creating an unwarranted litigation advantage. The party could harass an opposing company's senior leadership and burden its operations without any benefit to the litigation. Discovery is intended to assist the parties in the search for truth, not to become a tactic weaponized and deployed to pressure opponents, including into undue settlements. By adopting the apex doctrine, the Court can take an important step in safeguarding the integrity of discovery in Indiana courts.

Here, the courts below allowed depositions of three of the NCAA's top executives. However, Plaintiffs made no showing that any of these executives has personal knowledge of the issues in this case or that their depositions were needed for the case to be properly heard. To the contrary, the executives attested that they do not possess any such knowledge. In fact, none of them was even part of the organization at the relevant times.

In situations comparable to this case, state and federal courts have broadly granted protective orders to prevent the depositions. As courts in Indiana and elsewhere have found, deposing even a single high-level executive during discovery "creates a tremendous potential for abuse or harassment." *Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012); *Berning v. UAW Local 2209*, 242 F.R.D. 510, 514 (N.D. Ind. 2007) (denying deposition of union president). It is not pertinent, as the Court of Appeals suggested, whether the executives can access

the information, *see* App. Ct. Op. at *22, and it is not necessary, as Plaintiffs argue, to amend the discovery rules before denying such depositions, *see* Br. in Resp. to Pet. to Transfer at *3.

Although this Court certainly could act to include this doctrine expressly in the rules of civil procedure, as the Florida Supreme Court recently elected to do, *see In re Amendment to Florida Rule of Civil Procedure 1.280*, 2021 WL 3779161 (Fla. Aug. 26, 2021) [hereinafter "*In re Fl. Amend.*"], the apex doctrine is an expression of existing rules of trial practice that allow courts to enter protective orders against discovery that would result in "annoyance, embarrassment, oppression, or undue burden or expense." Ind. R. Tr. P. 26(C). It has become part of mainstream American jurisprudence and should be expressly adopted in the State. The Court should ensure that the deposition of a high-level executive is truly needed for the pursuit of justice and is not used as an unjust attempt to gain an unwarranted litigation advantage.

ARGUMENT

I. THE COURT SHOULD ADOPT THE APEX DOCTRINE TO PREVENT ABUSIVE DISCOVERY PRACTICES IN INDIANA

For decades, courts in Indiana and around the country have expressed concern over the ability of parties to abuse discovery rules. Too often, the costs and imperfections of discovery interfere with achieving justice. "Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hopes of coercing a quick settlement. As a result, discovery has become the focus of litigation, rather than a mere step in the adjudication process." John H. Beisner, *"The Centre Cannot Hold"— The Need for Effective Reform of the U.S. Civil Discovery Process*, U.S. Chamber Inst. for Legal Reform (2010), at 1-2.[2]

[2] *See also* Hon. Patrick Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (Summer 2004) ("Discovery has now become the main event—the end game—in pretrial litigation proceedings.").

In these situations, a party wields discovery as a weapon to harass and burden another party.[3] Threatening to depose senior executives "raise[s] a tremendous potential for [such] abuse and harassment." *Liberty Mut. Ins. Co. v. Sup. Ct.*, 10 Cal.App.4th 1282, 1887 (1992). Collateral litigation over these requests will be expensive and burdensome, and the prospect of tying up an executive's time in a deposition may induce an organization to settle even meritless suits.

Many state and federal courts have adopted the apex doctrine as a direct response to the plaintiffs' bar's effort to manipulate the civil justice system and achieve such results. "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." Scott A. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006). "Preventing harassment and unduly burdensome discovery has always been at the heart of the doctrine." *In re Fl. Amend.* at *2. It "recognizes that high ranking and important executives 'can be easily subjected to unwarranted harassment and abuse' and 'have a right to be protected, and the courts have a duty to recognize [their] vulnerability.'" *EchoStar Satellite, LLC v. Splash Media Partners, L.P.*, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009) (quoting *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D. R.I. 1985)); *see also Treppel v. Biovail Corp.*, 2006 WL 468314, at *1 (S.D.N.Y. Feb. 28, 2006) (cautioning that apex depositions "create a tool for harassment"). The potential for abuse is at its peak when senior executives are targeted for depositions "before less intrusive discovery methods are exhausted." *Liberty Mut. Ins. Co.*, 10 Cal.App.4th at 1287.

[3] The Federal Rules Advisory Committee has long observed that the spirit of discovery "is violated when advocates attempt to use discovery tools as tactical weapons rather than expose the facts and illuminate the issues." Fed. R. Civ. P. 26 Comm. Notes on Rules—1983 Amend.

These many state and federal courts have explained in their rulings that the apex doctrine is well grounded in existing rules of civil trial procedure. As in these jurisdictions, Indiana's rules of trial procedure are intended to "secure the just, speedy and inexpensive determination of every action." Ind. R. Tr. P. 1.[4] The scope of discovery expressly limits the frequency or extent of discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Ind. R. Tr. P. 26(B)(1). Protective orders are available when "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Ind. R. Tr. P. 26(C). As this Court has stated, the "sum of these provisions is that . . . a balance must be struck between the need for the information and the burden of supplying it." *In re WTHR-TV*, 693 N.E.2d 1, 6 (Ind. 1998) (citing *Terre Haute Reg'l Hosp. v. Trueblood*, 600 N.E.2d 1358 (Ind. 1992)).[5]

The adoption of the apex doctrine is a logical application of these procedural rules. *See, e.g, Craig & Landreth, Inc. v. Mazda Motor of Am., Inc.*, 2009 WL 103650, at *2 (S.D. Ind. Jan. 12, 2009). Discovery rules must be applied to "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). This doctrine protects high-level executives "from discovery abuses when they have no particular direct knowledge of the facts pertaining to the lawsuit, and thus require protection from litigation tactics [used] to create undue leverage by harassing the

[4] This objective mirrors Federal Rule of Civil Procedure 1, which was amended in 2015 "to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way." Fed. R. Civ. P. 1 Comm. Notes on Rules—2015 Amend.

[5] In addition, Indiana's Rules of Professional Conduct state that "[f]air competition in the adversary system is secured by prohibitions against . . . obstructive tactics in discovery procedure." Ind. R. Prof. Conduct 3.4, Comment 1; *see also Fire Ins. Exchange v. Bell by Bell*, 643 N.E.2d 310, 312 n.1 (Ind. 1994) (citing ethical tenets that a "lawyer should not abuse the judicial process by pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay").

opposition or inflating its discovery costs." *Intelligent Verification Sys., LLC v. Microsoft Corp.*, 2014 WL 12544827, *2 (E.D. Va. Jan. 9, 2014) (cleaned up). As one court stated, the job of executives "is to manage the company, not to fly around the United States participating in depositions about . . . disputes of which the president has no personal knowledge." *Gen. Star Indem. Co. v. Atlantic Hospitality of Fla., LLC*, 57 So. 3d 238, 240 (Fla. Ct. App. 2011).

The unfortunate reality, particularly in today's mass tort environment, is that some businesses can have large numbers, sometimes thousands, of pending cases at any moment. Seeking to depose an executive in any of these cases, let alone in many of them, can be corrosive to the goals of the civil justice system. "If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation." *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). To this end, Indiana's former Attorney General, along with other state attorneys general, called for apex protections for both public and private leaders, stating that targeting them for depositions permit "*in terrorem* litigation tactics." Amici Curiae Brief of 15 State Attorneys General, *U.S. Dep't of Commerce v. U.S. Dist. Court for the S. Dist. of New York*, Case No. 18-557 (U.S. Dec. 21, 2018), at 4 (joined by the then-Attorney General of Indiana).

As courts and these other leaders have appreciated, the apex doctrine does not diminish or undermine a lawsuit, change the rules of discovery, or eliminate the discretion that trial judges have to manage discovery. Rather, it stops litigation gamesmanship from dictating outcomes. Too many plaintiffs' lawyers wield discovery like weapons to gain leverage over corporate defendants. They know that if executive officers are required to give a deposition in routine product or business disputes, many of them would have no time to do their jobs. By adopting the apex doctrine, the

Court can set guideposts that will result in the more orderly conduct of discovery, reduced undue burdens and expenses, and furtherance of the speedy and inexpensive resolution of cases.

II. ADOPTING THE APEX DOCTRINE WOULD KEEP INDIANA COURTS WITHIN MAINSTREAM AMERICAN JURISPRUDENCE

The apex doctrine, as adopted by courts around the country, generally asks three questions: (1) is the person sought for deposition a high-ranking corporate or government officer; (2) does the officer possess unique or superior knowledge of the information sought; and (3) are there less intrusive means of obtaining the information. The Supreme Court of Texas explained that under these rules, a protective order is appropriate, as here, when the motion is "accompanied by the officials' affidavit denying any knowledge of relevant facts" and the party seeking the deposition has not shown that the official "has any unique or superior personal knowledge of discoverable information." *Garcia*, 904 S.W.2d at 128. Even if such knowledge is shown, the requesting party must make a "good faith effort to obtain the discovery through less intrusive methods," including depositions or interrogatories aimed at lower level employees or at the corporation itself. *Id.* Appellees made no such showing or effort here.

These guidelines are consistent with the Federal Rules of Civil Procedure, as federal courts routinely quash depositions of high-ranking executives who "lack personal knowledge of the particular facts" in the case. *See, e.g., Jimimez-Carillo v Autopart Int'l, Inc.*, 285 F.R.D. 668, 670 (S.D. Fla. 20120). For example, in *Mulvany v. Chysler Corporation*, a plaintiff seeking personal injury damages allegedly due to a design flaw in 1975 Dodge vans attempted to depose the then-president of Chrysler Lee Iacocca. 106 F.R.D. at 365. The court prohibited the deposition under the Federal Rules of Civil Procedure, noting that Rule 26 "specifically gives the Court authority to limit discovery if it determines that the discovery sought is obtainable from other sources." *Id.*

at 366. Mr. Iacocco had a "right to be protected" and the courts had "a duty to recognize his vulnerability" from unwarranted harassment and abuse. *Id.*

Many state courts have similarly adopted the apex doctrine and applied its principles in a variety of contexts. In California, an appellate court prohibited the deposition of the president and CEO of Liberty Mutual Insurance Company in a workers' compensation dispute. *See Liberty Mut. Ins. Co.*, 13 Cal. Rptr.2d at 366. As the court explained, "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." *Id.* "The 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 some cases, the executives were employed by the company at the relevant time and even had some knowledge of or had spoken about issues in the litigation. In *Alberto v. Toyota Motor Corporation*, the plaintiff sought to take the deposition of the defendant's chairman, CEO and COO. 796 N.W.2d 490 (Mich. Ct. App. 2010). The plaintiff argued the COO made public statements regarding the product defect and safety issues related to the litigation and that the CEO had testified before Congress that he would be involved in the quality-control review related to those same matters. *See id.* Yet the appellate court found it was an abuse of discretion for the trial court to deny the protective orders against the depositions given, in part, the lack of any personal knowledge of these individuals. *See id*. at 497. The court noted that although the 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.; see also Naylor Farms, Inc. v. Anadarko OGC Co.*, 2011 WL 2535067, at *3 (D. Colo. June 27, 2011) (similarly holding that the executive's involvement in a PowerPoint presentation did not permit his deposition).

Of particular concern is that allowing such depositions will stifle actions of executives in setting corporate policy, speaking on important safety or public issues, and advancing corporate culture. *See, e.g.*, *Guest v. Carnival Corp.*, 917 F. Supp. 2d 1242, 1243 (S.D. Fla. 2012). These activities—typical for many high-level corporate executives—do not give these individuals the necessary personal involvement or knowledge respecting matters they oversee to be truly useful in a specific lawsuit regarding the particulars of those matters, especially as here where the events took place before the current executives joined the NCAA. *See Simon v. Pronational Ins. Co.*, 2007 WL 4893478, at *1 (S.D. Fla. Dec. 13, 2007); *accord Carnival Corp. v. Rolls-Royce, PLC*, 2010 WL 1644959, at *3 (S.D. Fla. Apr. 22, 2010) (precluding deposition because executive's "knowledge regarding the underlying facts . . . are at best speculative"). Senior officials often are engaged on, involved in discussions on, and act as a spokesperson for business matters of which they have no personal, first-hand knowledge. And, as a general matter, consumers, employees and other members of the public benefit when leaders take a personal stake in these matters. By contrast, subjecting these high-level executives to unwarranted depositions only inures to the benefit of litigants engaged in discovery abuse.

For these reasons, even courts that have not yet formally adopted the apex doctrine "nonetheless, have applied similar common criteria . . . including whether the high-ranking corporate official has certain unique or personal knowledge and whether less intrusive methods of discovery are available." *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 361 (W.Va. 2012); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 609 (Mo. 2002) (stating that courts should consider "whether other methods of discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent"); *Crest Infiniti II, LP v. Swinton*, 174

P.3d 966, 1004-1005 (Okla. 2007) (stating that a protective order is needed when the executive deposition "would inflict annoyance, harassment, embarrassment, oppression or undue delay, burden or expense" or where an appropriate official could "provide the information sought").[6]

The Court should officially adopt the apex doctrine and should instruct courts to apply this test for high-level executive depositions. Doing so would further existing Indiana trial procedure principles and would properly balance the need for discovery against the goal of avoiding undue burdens and litigation abuse.

III. SINCE THE PARTIES BRIEFED THIS CASE, FLORIDA'S SUPREME COURT ANNOUNCED IT IS CODIFYING THE APEX DOCTRINE

Finally, on the same day the Court granted Appellant's petition to transfer, the Florida Supreme Court announced an amendment to its civil procedure rules to codify the apex doctrine for corporate and government officers. *See In re Fl. Amend*. at *1. While other states and federal courts adopted the doctrine pursuant to specific cases and under existing rules, the Florida Supreme Court deemed the issue of such importance that it chose to provide clear guidance in Florida's Rules of Civil Procedure. It noted the broad acceptance of the rule, and affirmed that it was "codif[ying] a doctrine of long legal standing" and "well-established" principles. *See id*. at *4.

In the past, Florida courts had invoked the apex doctrine with respect to high-ranking government officials, but not corporate executives. *See id.* at *2. In extending the doctrine to the private sector, the court explained: "Preventing harassment and unduly burdensome discovery has always been at the heart" of the apex doctrine and there is "no good reason to withhold from private officers the same protection that Florida courts have long afforded government officers." *Id.* at *2,

[6] *See also Todd v. Ocwen Loan Servicing, Inc.*, 2019 WL 8272621, at *3 (S.D. Ind. Dec. 13, 2019) ("The Seventh Circuit has not formally adopted the apex doctrine, but the District Courts, including this Court, routinely apply an apex doctrine analysis to the question of whether a high-ranking executive may be deposed.").

*3. The current version of Florida's apex doctrine rule, currently subject of notice and comment, states as follows:

> A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. The motion, whether by a party or by the person of whom the deposition is sought, must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated.
>
> If the officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.

Id. at *3 (to be codified at Fla. R. Civ. P. 1.280(h)).

To be clear, Florida and other jurisdictions are not suggesting a high-level executive may never be deposed. *See id.* at *7 ("[W]e emphasize that the doctrine in no way creates a blanket prohibition on the taking of a deposition of a high ranking corporate official.") (citation omitted). Such a deposition may be appropriate when he or she, in fact, has direct unique personal knowledge not obtainable elsewhere. *See, e.g.*, *Bose Corp. v. Able Planet, Inc.*, 2012 WL 5354795 (D. Colo. Oct. 30, 2012) (granting motion to compel deposition because the deponent had "unique personal knowledge related to his work"); *In re Google Litig.*, 2011 WL 4985279 (N.D. Cal. Oct. 19, 2011) (same); *Minter v. Well Fargo Bank, NA*, 258 F.R.D. 118, 127 (D. Md. 2009) (same). The apex doctrine merely 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." Christopher M. Tauro & Kip J. Adams, *Protect High-Level Corporate Officials from Unnecessary Depositions*, 54 No. 2 DRI for Def. 8 (Feb. 2012).

This Court should join mainstream jurisprudence, adopt the apex doctrine in Indiana, and instruct courts on the proper evaluation needed before permitting depositions of high-ranking officers. Otherwise, such depositions will become part of a regular pre-trial discovery arsenal in a way that would undermine, not advance justice. The fair and efficient functioning of the civil justice system is a critical element of American competiveness. Requiring a corporate executive to sit for a deposition in these cases will make it impossible to run a company.

CONCLUSION

For the foregoing reasons, the Court should adopt the apex doctrine and, pursuant to the doctrine, reverse the decision below allowing depositions of Appellant's high-level executives.

Respectfully submitted,

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Dated: October 1, 2021

WORD COUNT CERTIFICATE

I verify that, under Ind. Appellate Rule 44(F), the foregoing brief contains no more than 4,200 words, as counted by the word processing system used in Microsoft Office Word 2016.

/s/ Christopher P. Gramling
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CERTIFICATE OF SERVICE

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