IN THE GEORGIA COURT OF APPEALS

GENERAL MOTORS, LLC, Defendant-Appellant, v. ROBERT RANDALL BUCHANAN, Individually and as Administrator of the ESTATE OF GLENDA MARIE BUCHANAN, Plaintiff-Appellee.	)	CASE NO. A21A0043

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

SMITH, GAMBRELL & RUSSELL, LLP

Leah Ward Sears
Georgia Bar No. 633750

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

Attorneys for Amicus Curiae

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In this product liability case, Plaintiff-Appellee seeks to take the deposition of Mary Barra, the Chief Executive Officer of General Motors, LLC ("GM"). The State Court ordered the deposition of Ms. Barra to go forward without having found that she had unique or superior personal knowledge of any discoverable matter. 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.

Amicus Curiae the Chamber of Commerce of the United States of America ("the Chamber") respectfully submits that whether Ms. Barra's deposition should occur in this case is governed by the apex deposition doctrine, a doctrine that requires a party to exhaust less intrusive means of discovery before deposing another party's senior executive officers. The letter and spirit of the Georgia Civil Practice Act require the application of this doctrine, which serves the interests of litigants and promotes the orderly and efficient administration of justice. Amicus

Curiae respectfully urges the court to confirm that Georgia follows the apex deposition doctrine and apply it in this case.

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 the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This is such a case. Businesses, particularly ones that operate throughout the United States and all around the world, 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, relevant, personal knowledge 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 limit obstructionist tactics.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The Apex Deposition Doctrine Promotes Efficient Discovery While Protecting Parties From Undue Burdens

This case concerns whether Georgia law recognizes what courts and commentators have called the "apex doctrine" or the "apex deposition doctrine." That doctrine defines the legal standard for determining when a president, CEO, or other executive officer who has no unique personal knowledge of relevant facts can nevertheless be required to give a deposition. This Court should affirm that Georgia follows the apex deposition doctrine.

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 forcing 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.

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 provides that critical framework. It 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." *Crown Central*, 904 S.W.2d at 128.

The Texas Supreme Court in the *Crown Central* case articulated how a trial court should apply the apex deposition doctrine. If a party seeking the apex deposition cannot show that the witness has unique or superior personal knowledge of discoverable information, the trial court should enter a protective order preventing the deposition and obligating that party to first seek that information through other, less intrusive means of discovery. *Crown Central,* 904 S.W.2d at 128. After making a good-faith effort to obtain the discovery through less intrusive methods, the party seeking the apex deposition must show "(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate." *Id.* Only then should the trial court allow the apex deposition. By requiring a weighing of the costs and benefits, the apex doctrine promotes the

orderly conduct of discovery, reduces undue burden and expense, and furthers the speedy and inexpensive resolution of cases.

B. The Apex Deposition Doctrine is a Straightforward Application of 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). *See Southern Outdoor Promotions, Inc. v. National Banner Co.,* 215 Ga. App. 133 (1994) (privacy interests must be weighed against relevancy to determine if discovery imposes an undue burden). 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. This court accordingly has affirmed the power of trial courts under the Civil Practice Act to protect parties from burdensome discovery requests not reasonably calculated to lead to the discovery of admissible evidence. *See R. J. Reynolds Tobacco Co. v. Fischer*, 207 Ga. App. 292 (1993) (deposition properly blocked when it was not reasonably calculated to lead to discovery of admissible evidence); *Medical Center, Inc. v. Bowden*, 327 Ga. App. 714 (2014) (discovery request properly blocked when the information sought was not relevant to the plaintiff's claims).

These are the same principles that underlie the apex doctrine. Deposing an executive with no unique or superior personal knowledge of relevant matters is unlikely to advance the litigation but it does impose a significant burden. Moreover, the Civil Practice Act creates a number of discovery tools that can more efficiently obtain discovery from a corporation: interrogatories, requests to produce documents, deposition of corporate employees with first-hand knowledge, and depositions of corporate representatives. Only after a party has employed these more efficient and less burdensome discovery tools and

shown that those tools are inadequate should a court allow the party to depose a high-ranking officer.

While this Court has affirmed orders blocking depositions of high-level corporate executives, it has not clearly articulated a legal standard that trial courts should apply when deciding to allow or prevent such a deposition. *See Tankersley v. Security Nat. Corp.,* 122 Ga. App. 129, 130 (1970); *Wheeling-Culligan v. Allen*, 243 Ga. App. 776 (2000). This case presents an opportunity to make clear that the apex deposition doctrine provides the relevant standard.

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

Discovery in most federal and state courts follows rules similar to the Georgia Civil Practice Act. Those courts also follow the apex deposition doctrine.

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 Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 898-99 (1984). In *Bicknell*, this Court noted that the Civil Practice Act, like the Federal Rules of Civil Procedure, allows a court to control the taking of

depositions to avoid inconvenience and undue expense and prevent overly burdensome discovery. *Id*. at 899. *See Board of Regents v. Ambati*, 299 Ga. App. 804, 811 (2009) (citing O.C.G.A. §9-11-26(c); "The issuance of a protective order is recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting a party.").

Multiple Georgia federal courts have adopted and applied the apex deposition doctrine. 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 Gavins v. Rezaie*, Case No. 16-24845-CIV-Cooke/Torres, 2017 WL 3034621, at *4-5 (S.D. Fla. July 18, 2017); *Goines v. Lee Memorial Health Sys.*, Case No. 2:17-CV-656-FtM-29CM, 2018 WL 3831169, at *3-4 (M.D. Fla. Aug. 13, 2018); *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). 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 decision of the Texas Court of Appeals in *In re Continental Airlines, Inc.*, 305 S.W.3d 849 (Tex. App. 2010), is particularly instructive here. That case arose out of an aircraft accident that injured multiple passengers. The plaintiffs sought to depose the CEO and chairman of the board of directors of the defendant airline. The trial court entered an order compelling his deposition, but the Texas Court of Appeals reversed, concluding that the trial court had abused its discretion in ordering the deposition. *Id.* at 859. The plaintiffs noted that the executive had briefed media members on the accident and had stated that he intended to learn the cause of the accident. *Id.* at 851. But the court of appeals concluded that the executive did not have "unique or superior knowledge regarding what occurred before or during the accident or the cause of the accident." *Id.* at 858. Although the executive may have made public statements following the accident, he was only providing information supplied to him by other employees

of the defendant airline. *Id.*

The present case likewise calls for the application of the apex deposition doctrine. At any point in time, a company like GM can be subject to hundreds if not thousands of product liability lawsuits. If Ms. Barra gave a deposition in every one of GM's pending product liability cases, she would have no time for her customary executive responsibilities. She made a showing that she has no unique personal knowledge relevant to the case at issue. Before being allowed to depose Ms. Barra, Plaintiff-Appellee first should be required to exhaust other, less intrusive means of discovery from GM, and establish that those alternative discovery tools are inadequate to obtain the discoverable information relevant to this case.

III. CONCLUSION

For these reasons, Amicus Curiae respectfully requests that the Court reverse the order denying Defendant-Appellant's motion for protective order.

RULE 24 CERTIFICATION

This submission does not exceed the word count imposed by Rule 24.

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 15th day of October, 2020, served the foregoing **BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT** by first class mail upon:

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

C. Bradford Marsh, Esq.
Myrece R. Johnson, Esq.
Swift, Currie, McGhee & Hiers, LLP
1355 Peachtree St. N.E., Suite 300
Atlanta, GA 30309

Laurie Webb Daniel, Esq.
Jonathan Spital, Esq.
Holland & Knight LLP
1180 West Peachtree Street NW, Suite 1800
Atlanta, GA 30309

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

Darren Summerville, 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