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. S21G1147

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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I. INTRODUCTION

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 or that alternative means of discovery had been exhausted. The Court of Appeals affirmed. Both got it wrong.

If executive officers like Ms. Barra routinely could be deposed in product liability cases, such depositions will come to consume enormous amounts of their time while not advancing the litigation. High-ranking officers seldom have unique or superior personal knowledge that could not be obtained from other sources within the company or in a less burdensome manner of discovery. The practical effect of the Court of Appeals' decision would be to weaponize discovery. Under that decision, plaintiffs could routinely seek depositions of CEOs as a settlement tactic. Collateral litigation over such requests would be expensive to the litigants, burdensome to the courts, and the prospect of tying up a CEO's time in a deposition might 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 it. Although the Court of Appeals considered itself powerless to recognize the apex deposition doctrine, this Court is not. The Georgia Supreme Court has previously adopted guideposts for the trial court's exercise of discretion over discovery matters, as have courts in other jurisdictions under comparable discovery statutes and rules, and it should do so again here.

Amicus Curiae, the Chamber of Commerce of the United States of America ("the Chamber"), respectfully submits that this Court should recognize the apex deposition doctrine. The Chamber urges this Court to recognize a formulation of that doctrine that requires a party seeking deposition of another party's senior executive officers to establish both that the officer has unique personal knowledge relevant to the case and that the party has exhausted less intrusive means of discovery before seeking such deposition.

This Court can set parameters that trial courts must follow when exercising their discretion to control the discovery process. The Chamber respectfully asks this Court to recognize the apex doctrine as a guide for trial courts.

II. 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.

III. ISSUE PRESENTED

What factors should a trial court consider in ruling on a motion for a protective order under O.C.G.A. § 9-11-26(c) that seeks to prevent the deposition of a high-ranking officer, and what is the appropriate burden of proof as to those factors.

IV. ARGUMENT AND CITATION OF AUTHORITIES

The "apex doctrine" or the "apex deposition doctrine" recognizes guidelines for determining when a senior corporate officer, including a president or CEO, can be required to give a deposition in a case. Specifically, it allows a deposition only when the senior corporate officer has unique personal knowledge relevant to the case and that the party seeking the deposition has exhausted less intrusive forms of discovery before seeking the deposition. This Court should recognize the apex doctrine to guide the discretion of trial courts in considering requests for protective orders under O.C.G.A. § 9-11-26(c).

A. Recognizing the Apex Doctrine Would Comport with the Georgia Civil Practice Act

The Georgia Civil Practice Act embraces the 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 issue 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 permits courts to control the timing and sequencing of discovery "in the interests of justice." *Id.* § 9-11-26(d). It also allows a court to order "[t]hat the discovery may be had only by a method of discovery other than that selected by the party seeking discovery." *Id.* § 9-11-26(c)(3). The Civil Practice Act empowers courts to control the discovery process to promote efficiency and eliminate abuse and undue burdens.

Recognizing apex deposition doctrine would not change the rules governing discovery in Georgia or eliminate the discretion given trial judges to manage discovery under O.C.G.A. § 9-11-26. Instead, recognizing the apex deposition doctrine would further the letter and spirit of the Civil Practice Act by establishing guideposts for a trial court to follow 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 do so again here and establish guideposts for trial courts to follow in deciding whether to allow an apex deposition.

B. 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 to pressure them into settling a meritless case. One way plaintiff's lawyers 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 significant logistical hurdles and lead the defendant corporation 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) (recognizng 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 where the senior corporate officer has "unique or superior knowledge of discoverable information" and the party seeking the deposition has exhausted less intrusive forms of discovery. *Id.*

In considering the potential for abuse and the need for rules to guide the discretion of trial courts, this Court should also weigh the cumulative impact that demands for apex depositions could have on a single business. Businesses, particularly larger enterprises that operate throughout the United States and worldwide, can find themselves party to dozens, hundreds, and even thousands of lawsuits. Even a brief deposition of a high executive would become burdensome if repeated dozens of times. Requiring high-ranking executives to devote time to depositions when they have no unique personal knowledge relevant to the case burdens and disrupts companies trying to do business in Georgia, without any resulting benefit and to the detriment of the local economy.

The total lack of standards set forth in the Court of Appeals decision only enhances the threat to businesses posed by that decision. Senior officials often must act as spokespersons for their businesses in matters in which they have no personal, first-hand knowledge. But these high-profile roles should not turn them into deposition targets. After the decision below, however, a senior official in any company doing business in Georgia could potentially be required to give a

deposition in a lawsuit in a Georgia state court merely for having made a public statement that touches in some slight way on the subject matter of that lawsuit. Such a burden would impact every entity doing business here.

By recognizing the apex deposition doctrine, this Court could alleviate these risks, promote the orderly conduct of discovery, reduce undue burden and expense, and further the speedy and inexpensive resolution of cases. All of which will help protect the State's economy.

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

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, this Court has looked to federal decisions for guidance in interpreting and applying the Civil Practice Act, including on issues of discovery. *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).

Multiple Georgia federal courts have 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 recognized 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 recognized the apex deposition doctrine too. In *Alberto v. Toyota Motor Corp.*, 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 the 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 alleged 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). Those 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. The record contains made no evidence 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, then depositions would consume her day. She would have no time for her 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. The apex doctrine properly balances those concerns with the need for discovery.

D. The Cases Recognizing the Apex Doctrine Set Out an Appropriate Method for Applying It

Georgia courts already have the tools used by other courts to apply the apex deposition doctrine. "The issuance of a protective order is a recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting 'a party

or person from annoyance, embarrassment, oppression, or undue burden . . . .'" *Borenstein v. Blumenfeld*, 151 Ga. App. 420, 421 (1979). Georgia courts have recognized that to balance a party's need for discovery against the competing need to protect other parties from annoyance, embarrassment, oppression, or undue burden, a court can require that discovery proceed in stages. For example, Georgia courts generally will not require a party to produce tax returns during discovery, but if a party's financial status is at issue, and other documents produced in the case do not adequately describe that party's financial condition, a court can require the production of tax returns. *See Snellings v. Sheppard*, 229 Ga. App. 753, 757 (1997). The cases that have applied the apex document lay out a similar step-by-step approach to allowing an apex deposition.

If a party seeks to depose a high-level corporate official, that official or the corporation must file a motion for a protective order seeking to prohibit the deposition. The motion must be accompanied by the official's affidavit denying that she has unique or superior personal knowledge of relevant information. *Crown Central Petroleum Corp.*, 904 S.W.2d at 128. The party seeking to prevent the deposition bears this

initial burden. In determining the sufficiency of a corporate official's affidavit, the question is whether the official "sufficiently denied knowledge of any relevant facts regarding" the subject matter of the litigation. *In re Texas Genco, LP*, 169 S.W.3d 764, 768 (Tex. App. 2005). In response, the party seeking the apex deposition may demonstrate that the official indeed has unique or superior personal knowledge of discoverable information and that the party seeking the deposition has exhausted less intrusive forms of discovery. *Crown Central Petroleum Corp.*, 904 S.W.2d at 128.

It cannot be enough to authorize an apex deposition that a high executive has testified before a legislative body on a subject relevant to a lawsuit or made public statements about such a subject. Here, Plaintiff cited Ms. Barra's statements to Congress as evidence of her possession of relevant information. *General Motors, LLC v. Buchanan*, 858 S.E.2d 102, 106 (Ga. App. 2021). But, when a Congressional committee conducts a hearing involving a large enterprise, it wants to hear from a senior executive such as a CEO. High-level executives act as the public face of the company. That is a part of the job of a Chief Executive Officer. But those actions should not turn them into

significant witnesses in litigation about that matter, especially when their knowledge is not unique. In gathering information upon which to speak, executives frequently rely on briefings supplied by those with personal knowledge or more direct involvement in the matter. Acting as a corporate spokesperson before the media or a Congressional committee on a subject, standing alone, does not demonstrate that an executive has unique or superior personal knowledge about that subject. *See In re Continental Airlines, Inc.*, 305 S.W.3d 849, 854-58 (Tex. App. 2010) (denying apex deposition of CEO in litigation arising out of aircraft accident despite CEO's briefing of the media after the accident).

If the party seeking the deposition cannot rebut the movant's initial showing and demonstrate that the official has unique or superior personal knowledge of discoverable information and that the party has exhausted less intrusive methods of discovery, the trial court should grant the motion for a protective order. *Crown Central Petroleum Corp.*, 904 S.W.2d at 128. Less intrusive methods of discovery can include depositions of lower-level employees, the deposition of the corporation pursuant to O.C.G.A. § 9-11-30(b)(6), and interrogatories and requests for production of documents directed to the corporation.

A party that believes it has exhausted less intrusive methods of discovery could establish both that (1) 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. *Crown Central Petroleum Corp.*, 904 S.W.2d at 128. This showing can be made either at the time the protective order is sought or later, upon a motion to modify or vacate the protective order, if the party seeking the deposition has undertaken further efforts to exhaust the available alternatives. *Id.* Merely completing other discovery, however, does not automatically entitle a party to take the apex deposition. The party must have "made a reasonable effort to obtain [the] discovery [sought] through less intrusive methods." *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 658 (Tex. 2000).

Although this process may require trial courts to hear the matter twice, that need not be the case. If the party only requests an apex deposition after it has exhausted less intrusive methods of discovery, the party seeking the apex deposition may be able to make the necessary showing for such a deposition. *See In re Alcatel USA, Inc.*, 11

S.W.3d 173, 176 (Tex. 2000).

This allocation of burdens follows the example recently set by the Florida Supreme Court when it codified the apex doctrine. *In re Amendment to Florida Rule of Civil Procedure 1.280*, Fla. Sup. Ct., Case No. SC21-929 (Aug, 26, 2021) (available at https://bit.ly/3CqStAH) (last visited Nov. 17, 2021). Florida state courts previously had recognized the apex doctrine as applied to government officials. *Id.* at 5-6. This year, the Florida Supreme Court expanded application of the apex doctrine to the private, corporate context. *Id.* at 2, 8.

The court recognized that the doctrine has widespread acceptance and that "the efficiency and anti-harassment principles animating th[e] doctrine are equally compelling in the private sphere." *Id.* at 6. The court went on to "explain key aspects of the rule," including that the initial "burden is on the person or party resisting the deposition to persuade the court" that the would-be deponent is "a current or former high-level" officer who lacks unique personal knowledge of the matters being litigated. *Id.* at 12. The party requesting the deposition must then show that it exhausted alternative means of discovery and that the alternatives were inadequate to obtain needed information. *Id.* The

Florida Supreme Court found this allocation of burdens "common in the case law." *Id.* at 13.

To determine whether "good cause" exists to issue a protective order under O.C.G.A. § 9-11-26(c) to govern the taking of an apex deposition, this Court can establish the guideposts that trial courts must follow. By directing that trial courts employ this step-by-step approach to authorizing an apex deposition, this Court will guide the discretion of trial courts in appropriately balancing the burdens and benefits of discovery, as O.C.G.A. § 9-11-26(c) requires.

V. CONCLUSION

For all the reasons asserted, the Chamber respectfully requests that the Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this 18th day of November, 2021, served the foregoing **BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER** by first class mail upon:

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