No. A20I0192

In the
COURT OF APPEALS FOR THE STATE OF GEORGIA

GENERAL MOTORS LLC,
Applicant/Defendant,

v.

ROBERT RANDALL BUCHANAN,
individually and as Administrator of the
ESTATE of GLENDA MARIE BUCHANAN
Respondent/*Plaintiff*.

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF APPLICANT

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STATEMENT OF INTEREST

This case is of importance to *amici* and their members because it raises the core issue of whether Georgia courts can be relied upon to fairly administer cases when high-level executives are targeted for discovery. Allowing the deposition of a CEO or other high-ranking corporate executive is unduly burdensome when, as here, the executive does not have direct knowledge of the facts at issue in the case. If allowed in this and other such cases, depositions of high-level executives will become part of a regular pre-trial discovery arsenal in a way that would undermine, not advance justice. This Application provides the Court with the opportunity to instruct lower courts about the proper evaluation of the factual underpinnings needed before permitting wholesale depositions of high-level executives.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community

and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.[1]

National Electrical Manufacturers Association ("NEMA") is the association of electrical equipment manufacturers, founded in 1926. NEMA sponsors the development of and publishes over 500 standards relating to electrical products and their use. NEMA's member companies manufacture a diverse set of products including power transmission and distribution equipment, lighting systems, factory automation and control systems, building controls and electrical systems components, and medical diagnostic imaging systems.

STATEMENT OF FACTS

Amici adopts Applicant's Statement of Facts and Procedural History to the extent necessary for the arguments stated herein.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court should grant this Application to ensure the integrity of discovery in Georgia's civil justice system. The goal of discovery, as the Court has recognized, is to facilitate "the fair resolution of legal disputes." *Int'l Harvester*

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

Co. v. Cunningham, 245 Ga. App. 736, 738 (2000). However, there are times, as here, when discovery can be leveraged improperly to *distort*, not *advance* justice. Subpoenaing a corporate executive who has no unique knowledge of a matter, as Respondent has done in the trial court below, is often intended to generate an unwarranted litigation advantage, unconnected to the substantive merits of a case. Granting this Application, therefore, is critical for promoting responsible discovery and limiting discovery abuse.

Appellate review is particularly needed in this case because a fair application of Georgia's rules of civil procedure requires quashing this deposition demand. Although discovery rules are intentionally broad to facilitate the search for truth, they also have limits: litigants must be protected "from annoyance, embarrassment, oppression, or under burden of expense." O.C.G.A. § 9-11-26(c). As courts in Georgia and other states have found, seeking to depose a 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); *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129 (1970) (striking such a demand). Respondent has made no showing here that the deposition of the executive in question is needed for this case to be properly heard. To the contrary, the corporate

executive at issue has attested that she has no unique, specialized or superior knowledge of any of the issues in this case.

The importance of this Application is underscored by the decades-long concern that courts in Georgia and around the country have expressed over the ability of parties to abuse discovery rules. The fair and efficient functioning of the civil justice system is a critical element of American global competitiveness. Too often, though, the costs and imperfections of discovery interfere with achieving justice. In some lawsuits, "[d]iscovery has now become the main event—the end game—in pretrial litigation proceedings," as litigants try to use discovery requests like the one herein to pressure a party to settle, rather than litigate, the merits of the case. Hon. Patrick Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (Summer 2004).

Finding the right balance over discovery requests has proven to be an ongoing battle requiring this Court's oversight, just as it has at the federal level. 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 Advisory Committee Notes (1983). Accordingly, the Federal Rules have been amended numerous times to curb the potential that discovery will distort litigation

outcomes. For example, in 2015, Rule 26 was amended with the directive that courts be "more aggressive in identifying and discouraging discovery overuse." Fed. R. Civ. P. 26 Advisory Committee Notes (2015).

The Court should grant this Application to ensure that the deposition of a high-level executive is truly needed for the pursuit of justice, rather than an unjust attempt to gain an unwarranted litigation advantage irrespective of the facts. If the trial court's approval of this discovery demand is upheld, it will incentivize abusive discovery, erode confidence in judicial discovery process, and undermine fundamental fairness and justice for all litigants.

ARGUMENT

The trial court allowed Respondent's demand to depose Ms. Barra, the CEO of Applicant New GM, in this personal injury case based on general statements Ms. Barra made, publicly and in congressional testimony, and changes she directed be put in place in her effort to advance her company's culture of safety. As the trial court noted, Ms. Barra, who became CEO in January 2014, implemented several such *general* initiatives, including efforts to investigate and eliminate safety issues and the "Speak Up for Safety" program to emphasize the safety reporting.

Her leadership on these important institutional changes has *no* direct connection with the incident giving rise to this case. Here, Respondent alleges his

wife was involved in an accident while driving a 2007 Chevrolet Trailblazer. He alleges the Electronic Stability Control System and a component steering wheel angle sensor were defective and failed to prevent the accident. In 2018, as part of New GM's Speak Up for Safety program, the company investigated these systems in the 2007 Trailblazer and other models. Accordingly, it provided Respondent with information, materials and depositions of technical witnesses regarding this investigation as part of traditional discovery. As Applicant has stated, Ms. Barra was not involved in the design or investigation of these systems, and she does not have any unique, specialized or superior knowledge of issues related to this case.

Yet, the trial court would allow this deposition to proceed, asserting "there is no express or implied law in Georgia for the 'apex doctrine' or other framework" that would protect against deposition demands of high-level executives. Rather, the trial court claims it cannot limit such discovery without a showing of "*substantial evidence* that *bad faith or harassment motivates the* discoveror's *action*." (italics in original, underline added). Georgia's discovery rule and relevant case law, however, requires no such showing of intent. It states that a protective order should be given whenever "justice requires" that a person be protected "from annoyance, embarrassment, oppression, or undue burden or expense." O.C.G.A. § 9-11-26(c). Georgia's rule, therefore, looks at the *effect*, not the *motivation*, of a discovery

demand. This Court should grant the Application to make sure lower courts are properly applying Rule 26(c) and protecting parties from discovery abuse.

I. THIS COURT SHOULD GRANT THE APPLICATION TO CLARIFY THAT GEORGIA LAW ALREADY PROVIDES COURTS WITH THE ABILITY AND MANDATE TO PROTECT AGAINST THIS TYPE OF DISCOVERY DEMAND

This Court should grant the Application to make it clear that existing Georgia law provides courts with the tools needed to issue the protective order sought here. Courts in this state have long embraced the importance of preventing depositions that are "oppressive, unreasonable, unduly burdensome or expensive, harassing, harsh, insulting, annoying, embarrassing, incriminating or directed to wholly irrelevant and immaterial or privileged matters, or as to matter concerning which full information is already at hand." *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 296 (2008) (quoting *Young v. Jones*, 149 Ga. App. 819, 824-825 (1979)); *Sechler Family P'ship v. Prime Grp., Inc.*, 255 Ga. App. 854, 857 (2002).

Decades ago, this Court ruled in *Tankersley* that Georgia law provides trial courts with the authority to quash deposition notices improperly directed to high-level executives of a company. *See* 122 Ga. App. At 129. The Court explained that the deposition demand should be quashed because the information "sought was already admitted or had already been secured by the use of interrogatories, and if

any further information was needed it could be secured by further interrogatories." *Id*. at 130. More recently, this Court in *Wheeling-Culligan v. Allen*, upheld the quashing of a former Delta Airlines CEO deposition subpoena, as the trial court determined the CEO had "adequately responded to the interrogatories and that Wheeling-Culligan had alternate sources with more direct, specific or unique knowledge of the matters of which she sought to depose [CEO]." 243 Ga. App. 776, 776-777 (2000).

These rulings are consistent with how federal courts have applied comparable provisions in the Federal Rules of Civil Procedure, which the Court has instructed should be given "consideration and great weight" when trial courts apply the state's rules. *Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 899 (1984). Consistent with the Georgia cases cited above, federal courts have also looked to whether the deposition would be oppressive, inconvenient, harassing, or burdensome given the information available from other sources. Accordingly, using the same reasoning *amici* urge this Court to use now, federal courts have routinely declined to permit depositions of high-ranking corporate executives when they lack personal or specialized knowledge about the facts at issue in the pending litigation. *See*, *e.g.*, *Jiminez-Carillo v. Autopart Int'l, Inc.*, 285 F.R.D. 668, 670

(S.D. Fla. 2012) (explaining that depositions of corporate executives "who lack personal knowledge of the particular facts" are unwarranted).

As these courts have explained, the actions of high-level executives in setting corporate policy, speaking for the company on important safety issues, and advancing corporate culture are not sufficient bases for permitting such depositions. *See*, *e.g.*, *Guest v. Carnival Corp.*, 917 F. Supp. 2d 1242, 1243 (S.D. Fla. 2012) (quashing a subpoena for these reasons); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. 11-CV-01528-REB-KLM, 2011 WL 2535067 at *3 (D. Colo. June 27, 2011) (holding the involvement of an executive in a PowerPoint presentation was insufficient to permit the deposition of the executive).

These sorts of activities—typical for many high-level corporate executives—do not give these individuals the necessary personal involvement or knowledge to be truly useful in a specific lawsuit. *See Simon v. Pronational Ins. Co.*, No. 07-60757-CIV, 2007 WL 4893478 at *1 (S.D. Fla. Dec. 13, 2007); *accord Carnival Corp. v. Rolls-Royce, PLC*, No. 08-23318-CIV, 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"); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374MMC (JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) ("[Where] a high-level

decision maker 'removed from the daily subjects of the litigation' has no unique personal knowledge of the facts at issue, a deposition of the official is improper."). Thus, broadly permitting executive depositions does nothing more than "create a tool for harassment." *Treppel v. Biovail Corp.*, No. 03 Civ. 3002 PKL JCF, 2006 WL 468314, at *1 (S.D.N.Y. Feb. 28, 2006).

Amici brief do not intend to suggest that under no circumstances may a high-level executive be deposed. Such a deposition may be appropriate and necessary to the pursuit of justice when a person, in fact, has direct, unique personal knowledge not obtainable elsewhere. *See, e.g., Bose Corp. v. Able Planet, Inc.*, 11-CV-01435-MSK-MJW, 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.*, No. C 08-03172 RMW PSG, 2011 WL 4985279 (N.D. Cal. Oct. 19, 2011) (permitting deposition of CEO who had unique knowledge of facts that could not be secured by less obtrusive means); *Minter v. Wells Fargo Bank, NA*, 258 F.R.D. 118, 127 (D. Md. 2009) (permitting deposition of CEO where there was direct evidence the witness possessed unique knowledge regarding the subject matter of the lawsuit).

Respondent has not demonstrated that any such circumstances exist for Ms. Barra's deposition here. This Court should grant the Application to reinforce the ability of Georgia courts to protect against this type of discovery.

II. THIS COURT SHOULD GRANT THE APPLICATION TO KEEP GEORGIA COURTS WITHIN MAINSTREAM AMERICAN JURISPRUDENCE REGARDING DISCOVERY PRACTICES

Courts in other jurisdictions with criteria similar to Georgia's standard for protective orders have similarly precluded depositions of high-ranking corporate executives when those persons lack unique or specialized knowledge. These jurisdictions include those which have not adopted the "apex doctrine," as well as those which have. Formal adoption of the "apex doctrine" is not needed for Georgia courts to properly protect executives from abusive litigation demands. The nomenclature of the "apex doctrine" is simply an enunciation of existing principles identifying under what circumstances executives can be deposed.

For example, the Missouri Supreme Court declined to adopt the apex doctrine *per se*, but nonetheless granted a motion for a protective order of a high-level executive. *See State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 609 (Mo. 2002). The court explained that in determining whether to allow "top-level employee depositions, the court 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." *Id.* at 607. The Oklahoma Supreme Court has also declined to adopt the "apex doctrine," but has applied the same standard under existing state case law. *See Crest Infiniti II, LP v. Swinton*, 174 P.3d 966, 1004-1005 (Okla. 2007) (allowing for a protective order when the executive deposition "would inflict annoyance, harassment, embarrassment, oppression or undue delay, burden or expense" or where an "appropriate corporate official" may "provide the information sought").

Georgia Attorney General Chris Carr, along with other state attorneys general, have similarly observed that "[e]ven states that have not adopted [the apex doctrine] have recognized the importance of limiting the ability of litigants to force high-ranking officials to sit for depositions." Amici Curiae Brief of 15 State Attorneys General, *U.S. Dep't of Commerce v. U.S. Dist. Court for the Southern Dist. of New York*, Case No. 18-557 (U.S. Dec. 21, 2018), at 33 (joined by Georgia Attorney General Carr).[2] "[F]ailing to require litigants to exhaust other means of

[2] *See also Cheney v. U.S. Dist. Court*, 542 U.S. 367, 386 (2004) (stating depositions of high-ranking state officials can "disrupt the functioning of the Executive Branch"); *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) ("If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation.") (internal quotation omitted).

obtaining relevant information will only increase the risk of high-level officials facing harassing depositions." *Id*. at 4. Carr and the other attorneys general were concerned that similar tactics could be used against state officials.

In addition, this Court may find rulings adopting the "apex doctrine" useful in setting forth the factors lower courts should consider when a party seeks to depose a high-ranking executive. *See Netscout Sys., Inc. v. Gartner, Inc.*, 63 Conn. L. Rptr. 2, 2016 WL 5339454, at *6 (Conn. Super. Ct. Aug. 22, 2016) (setting forth what constitutes "good cause . . . to justify a protective order precluding a CEO's deposition"); *Bradshaw v. Maiden*, No. 14-CVS-14445, 2017 WL 1238823, at *4 (N.C. Super. Ct. Mecklenburg Co. Bus. Ct. Mar. 31, 2017) (same).

In Texas, for example, the state Supreme Court requires a showing that the executive has some "unique or superior *personal* knowledge of discoverable information." *See Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (emphasis added). As courts there have held, actions even more connected to the incident giving rise to litigation than those alleged by Respondent—namely, briefing the media and families about an accident, mobilizing an investigation to learn the cause of the accident, and sending personal letters to affected passengers—did not constitute sufficient personal involvement to

warrant a deposition. *See In re Continental Airlines*, 305 S.W.3d 849, 853-858 (Tex. Ct. App. 2010).

The Court of Appeals of Michigan issued a similar ruling in *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490 (Mich. Ct. App. 2010), a case which, like the case at bar, involved a motor vehicle products liability lawsuit. There, the plaintiff sought to take the deposition of the defendant's chairman, CEO and COO. The plaintiffs argued the COO made public statements regarding safety and had testified before Congress regarding vehicle recalls; the CEO had testified before Congress that he would be involved in the quality-control review. *See id*. at 491-92. Yet, the court found it was an abuse of discretion for the trial court to deny the protective orders given, in part, the lack of any personal knowledge of the witnesses. *See id.* at 497. As this and other cases indicate, "[v]ast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved." *Liberty Mut. Ins. Co. v. Sup. Ct.*, 10 Cal.App.4th 1282, 1287 (1992).

Speaking in public on broad issues of safety, testifying in Congress, and setting in motion important safety programs and cultural changes are critical to a company's success. They are not, however, sufficient personal involvement to warrant a deposition in a products liability case—in Georgia, in other states, or

under the Federal Rules of Civil Procedure. This Court should grant the Application to provide this needed guidance to the lower courts.

III. DISCOVERY TACTICS SHOULD NOT INTERFERE WITH THE VITAL ROLE OF COMPANY LEADERSHIP IN IMPROVING CORPORATE CULTURE, PARTICULARLY ON SAFETY ISSUES

It is critically important that executives are free to advance a beneficial corporate culture without fear of being subjected to deposition simply because of their job title when they have no direct involvement in or superior knowledge of a given lawsuit. "The job of the president of the company is to manage the company, not to fly around the United States participating in depositions." *General Star Indem. Co. v. Atlantic Hospitality of Florida, LLC*, 57 So. 3d 238, 240 (Fla. Ct. App. 2011). These leaders should not be subject to depositions based on the types of beneficial statements about safety, the implementation of safety programs, or the advancement of corporate safety cultures that are at issue here.

Consumers, employees and other members of the public benefit significantly when leaders, like Ms. Barra, take a personal stake in advancing a better corporate culture, particularly on issues of product safety. Based on *amici's* experience, developing a strong safety culture demands that high-level executives publicly and repetitively articulate the cultural attributes they want to see in their organizations, much like Ms. Barra has done. Others in the organization are then relied upon to

implement that vision. This needed visibility on driving cultural changes, though, cannot occur if senior executives must worry about being hauled into court and taken away from running their businesses, solely for publicly discussing these important safety issues. In fact, there are other areas in addition to product safety, including safety in the workplace, where such leadership is integral to achieving important corporate cultural advances. Thus, many people benefit when executives personally invest in positive cultural change, whereas subjecting executives to frivolous depositions in every type of case in every jurisdiction only inures to the benefit of litigants engaged in discovery abuse.

In sum, this Court should grant the Application to allow and incentivize senior corporate leadership to engage and energize their organizations and the public on such important matters as safety without fear of opening themselves and their companies to vexatious litigation tactics. Large product manufacturers, at any moment in time, can have hundreds, if not thousands, of pending cases. The executives tasked with running such a company should have to sit for depositions only when they have direct involvement and superior knowledge of the issues in the pending litigation. Indeed, as occurred here, litigants should be directed to the individuals, other than the executive, who actually have personal knowledge about

the issues relevant to the case. Seeking to depose an executive is a pressure tactic that, when misused, is corrosive to the goals of the civil justice system.

CONCLUSION

For these reasons, this Court should grant the Application for Immediate Review, and ultimately reverse the trial court's discovery order at issue here.

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RULE 24 CERTIFICATION

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

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of March, 2020, I caused to be served the foregoing *AMICI CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF APPLICANT in a first-class postage-prepaid envelope addressed to the following:

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