IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1998

SUZUKI MOTOR CORPORATION,

Petitioner,

L.T. CASE NO: 1D18-4815

vs.

SCOTT WINCKLER,

Respondent.
_____ /

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

In this product-liability action, the Plaintiff alleges that he was riding a Suzuki motorcycle and was injured when the front braking system failed. Among other things, he claims that Petitioner Suzuki Motor Corporation failed to recall the motorcycle after identifying a defect. Discovery revealed that the decision to recall the motorcycle was made by a committee of Suzuki managers. Suzuki provided the Plaintiff with the names of all the committee members during the relevant periods. But the Plaintiff never sought to depose any of them. Instead, he sought to examine Suzuki's Chairman and former CEO, Mr. Osamu Suzuki, who happened to sign his initials at the top of a document referring to a list of possible field actions. But Mr. Suzuki was not on the committee and had no authority to order a recall or to override the committee's decisions. And his sworn Declaration stated that "he has 'no independent memory' of reviewing or signing [a] document regarding the brake issue and 'no personal knowledge' of the details" (R. 782).[1]

Nevertheless, in the first Florida appellate decision requiring the head of a corporation to sit for examination even though he has no relevant knowledge, the First DCA affirmed the order compelling Mr. Suzuki's examination. The court rejected Suzuki's argument that the order violates the apex doctrine—which

[1] "R. #" refers to the Supreme Court record. "S.R. #" refers to the supplemental record, filed on March 2, 2020. Because the supplemental record is not paginated, we cite to the PDF document. "R.A. #" refers to Respondent's appendix filed below, which Suzuki submitted as a supplemental record on March 4.

protects high-level officials from burdensome discovery unless and until discovery from lower-level employees has been conducted—on the basis that Florida courts have only applied the doctrine in the government context. The court did, however, certify to this Court a question of great public importance (R. 879-80).

A. Facts Relevant to the Appeal

The Plaintiff alleges he was injured because of a failure in the front-brake master cylinder (manufactured by co-defendant Nissin Kogyo) of a 2007 Suzuki GSX R-1000 motorcycle (R. 35-59).

Suzuki is a multi-national corporation with tens of thousands of employees around the world (R. 134). It manufactures, among other things, motor vehicles, motorcycles, ATVs, outboard engines and power generators (R. 128). During discovery, it produced over 250,000 pages of documents (R. 234-35). Only two of those pages are relevant here. The first is a "List of issues for which field actions are of concern" (the "Document") (S.R. 155). The Document lists four issues, one of which is "GSX R series Front brake pressure loss" (*id.*). The supplier is identified as Nissin Kogyo and the potential action is "recall" (*id.*). The three other issues address cars not sold in the U.S. (R. 238). Mr. Suzuki initialed the Document at the top left margin (S.R. 155).

The other page is an email (the "Email"), which attaches the Document and notes that the Document was shown to the Chairman and that he signed it

(S.R. 159). The Email was not sent by Mr. Suzuki, was not addressed to him, and does not copy him (*id.*). Rather, it was written by a Suzuki manager, addressed to two Suzuki general managers, and copied to two others (*id.*). It also identifies the manager who presented the Document to Mr. Suzuki (*id.*). Of the six managers identified in the Email, the Plaintiff did not seek to depose any of them.

B. Course of proceedings below

Plaintiff's amended complaint alleged that he was riding the motorcycle with the owner's permission when the front braking system failed and caused him to crash into another vehicle (R. 37). Plaintiff sued several defendants for damages, alleging counts against Suzuki for negligent design and manufacture, negligent warning, and strict liability (R. 38-59).

Plaintiff deposed Mr. Takao Kudo, executive vice president of Suzuki Motors America, for three days. Mr. Kudo was directly involved in the investigation of the front-brake issue and wrote an email in April 2013—when he was employed by Suzuki Motors Corporation, the defendant here—that evaluated whether to issue a recall (R.A. 358-62). He testified that it was the Quality Countermeasure Committee that decided to issue the recall, that the Committee was the only entity in the company that could do so, and that Mr. Suzuki has no authority over such decisions (R.A. 566-67). The Chairman's signature on the Document did not approve any field action but only confirmed that he had read the

Document (R.A. 566, 571). The Senior Managing Officer referred to in the Email (*see* S.R. 159) is a member of the Committee that ultimately decided on the recall (R.A. 569). Suzuki's answers to interrogatories identified *all* Committee members at all relevant times (R.A. 699-702). There were nine members in the quality control department, and Suzuki identified the Director and Senior Managing Officer as the Chief Officer and Chairman of the Committee during the relevant period (*id.*). Despite those disclosures and Mr. Kudo's testimony, the Plaintiff never sought to depose any of those individuals.

Instead, the Plaintiff noticed the deposition of Mr. Suzuki as a corporate representative under Florida Rule of Civil Procedure 1.310(b)(6) (R. 81). Plaintiff sought to examine Mr. Suzuki on eight topic areas (R. 81-83). These are the same topics as those numbered 38-45 in the notice for deposition of Suzuki's corporate representative, Yoshinobu Matsumoto (R. 94-95), who has the *most* knowledge about those topic areas because he was manager of the Suzuki brake group and "head of the special countermeasure team" that was "set up to investigate this [GSX-R series] brake issue" (R. 34-35, 751). At his deposition, which occurred in Japan during the pendency of the petition in the First DCA, Mr. Matsumoto testified extensively that there was no delay in notifying customers of any issue with the GSX-R series front braking system because—after careful, extensive and rigorous scientific testing, including consulting with "external opinions,"

"professors of the university" and Suzuki's "internal experts"—his investigative team concluded that no safety issue existed (R. 761-63). The recall was done "in order not to inconvenience customer[s]" who might seek repair of an issue that was not a safety risk (R. 773).

Suzuki sought a protective order against Mr. Suzuki's deposition, showing that a notice under Rule 1.310(b)(6) naming a specific deponent is improper, that Mr. Suzuki lacked any relevant knowledge, and that the notice to depose him was a transparent effort to harass Suzuki's most senior officer (R. 98). The trial court granted the motion, ruling that the court had no personal jurisdiction over Mr. Suzuki and that Plaintiff could not depose him under Rule 1.310(b)(6), but allowed Plaintiff to request a letter rogatory (R. 160-62).

Plaintiff then filed his Application for Letter Rogatory (S.R. 136-67). It states that Mr. Suzuki "possesses unique knowledge about specific facts relevant to Plaintiff's allegations;" but provides no specifics, merely referring to his signature at the top of the Document (S.R. 137). Suzuki filed objections and a Motion to Apply "Apex Doctrine" (R. 197-99, 201-05).

Suzuki also filed Mr. Suzuki's Declaration in opposition to the Application (R. 179-81). In it, Mr. Suzuki, now 90 years old, swore that he has "no independent memory" of signing the Document; that "[i]t was more than five years ago and I cannot recollect even after reviewing the document;" and that he was the

CEO of Suzuki when the Document was created and "signed many documents routinely in those days" (R. 208). He also testified that the Document is "an informational status report of matters under consideration;" that, under Suzuki's "internal standard, any field actions and even recalls are only decided by the [Committee], not by me;" that he "was not a member . . . of the [Committee] at that time;" and that, "[a]s Chairman of the Board, or even CEO at the time, I would have no authority to override, reject or even order a field action or recall" (R. 208). Mr. Suzuki's signature "indicates only that I have saw [sic] the document at that time (April 2013), but does not represent my decision of field actions or recall which might be necessary or when they might occur since that was not in my authority" (*id.*). In sum, Mr. Suzuki "did not prepare the document, and even what I might have known about it in 2013 would have been told to me by someone else in the Corporation. I would have had at that time no personal knowledge of the details in that document" (R. 209).

In addition to explaining his lack of involvement with any field action, Mr. Suzuki also summarized his responsibilities as Chairman of the company. He "sign[s] voluminous amounts of document[s]" and "attend[s] nearly constant meetings of one type or another as Chairman" (R. 208). As Chairman, he is "involved in governmental affairs in various countries [in which Suzuki] does business including domestically, on-going financial matters, exchange rate issues,

expanding and enhancing the multi-product line of [Suzuki] products domestically and internationally" (*id.*). Thus, he is "chronically busy with important and business management issues as [Suzuki]'s Chairman, meeting with other [Suzuki] high level executives . . . on [a] regular basis, meeting with government officials and representatives from all countries around the world in which Suzuki does business, regular speaking engagements to industry and business groups, making public appearances representing Suzuki, and regular meetings with major corporate stockholders on the status of Suzuki business" (R. 208-09). As a result, "hav[ing] to give testimony potentially in many litigation cases . . . would substantially interfere with my job responsibilities as Chairman" (R. 208).

The trial court held a hearing on Suzuki's objections (R. 322) and later issued an order (the "Order") granting Plaintiff's application (R. 321-24). Notwithstanding Mr. Suzuki's declaration that he has no relevant personal knowledge, the court ruled that "it is appropriate for Plaintiff to be granted an opportunity to discover from the Chairman, Mr. Suzuki, his perspective on the contents of the Document and Email" (R. 322). Citing no other evidentiary basis, the court permitted the Plaintiff to seek Mr. Suzuki's examination in Japan. Suzuki sought review through a petition for certiorari in the First DCA.

Although Plaintiff argued to the trial court that his need to examine Mr. Suzuki was "time sensitive" (R. 551), the Document—on which he most relied to

demand the examination—was produced in June 2016. And even though the parties agreed that Plaintiff could continue all aspects of the letter rogatory process during the appeals except for actually scheduling the examination, Plaintiff still has not completed that process. Plaintiff went to trial in the fall of 2019 without examining Mr. Suzuki. The trial ended in a mistrial. No new trial has been set.

C. Disposition in the First DCA

The First DCA's Opinion denied Suzuki's certiorari petition, with one judge dissenting (R. 781-92). The court reasoned that the trial court did not depart from the essential requirements of law because the apex doctrine "is only clearly established in Florida in the government context, with respect to high-ranking government officials" (R. 783). The court also rejected Suzuki's argument that the examination of Mr. Suzuki is not reasonably calculated to lead to discovery of admissible evidence (R. 784). Although the Opinion acknowledges that Mr. Suzuki's Declaration stated that "he has 'no independent memory' of reviewing or signing [a] document regarding the brake issue and 'no personal knowledge' of the details (R. 782), it found that the Order "cited specific evidence supporting its conclusion that the Chairman was personally involved with recall-related corporate documents and uniquely able to provide relevant information" (R. 784). But the Order cited only the Document and the Email, and the dissent disputed that there was any specific evidence that Mr. Suzuki had relevant knowledge (R. 785-87).

Suzuki moved for rehearing *en banc* or certification. The court denied rehearing but certified the following question of great public importance:

> Does a trial court depart from the essential requirements of law by not requiring a party seeking to depose the top officer of a corporation to show that (1) other means of discovery have been exhausted and (2) the corporate officer is uniquely able to provide relevant information that cannot be obtained from other sources? Stated differently, does a departure from the essential requirement of law occur when the so-called apex doctrine, which applies to governmental entities, *see, e.g.*, *Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 950 (Fla. 1st DCA 2015), is not applied to a corporation?

(R. 879-80). This Court should answer "yes" to the certified question and adopt the apex doctrine in the corporate context—either as an extension of the doctrine as it exists in the government context, or based on existing law barring the examination of a corporate head unless reasonably calculated to lead to the discovery of admissible evidence. If this Court declines to adopt the apex doctrine, it should still answer "yes" to the first sentence of the question based on that same existing law as well as established discovery principles.

D. Standard of Review

"Because the certified question of great public importance before this Court presents a purely legal question, the appropriate standard of review is de novo." *Kelsey v. State*, 206 So. 3d 5, 8 (Fla. 2016).

SUMMARY OF THE ARGUMENT

The Opinion does not dispute that if the Order stands, Suzuki will be materially injured with no remedy on appeal; and it does not analyze whether the apex doctrine would bar Mr. Suzuki's examination. Rather, noting that Florida courts have recognized the apex doctrine only in the government context, it concluded that the trial court could not have departed from the essential requirements of law when it refused to apply it. As we show below, however, no such bar exists. Indeed, on petitions for certiorari, district courts have granted relief even when deciding issues of first impression. And this Court has reviewed certiorari petitions presenting issues the Court has never decided.

As the Opinion acknowledges, Florida courts have recognized the apex doctrine in the government context, shielding agency heads with no relevant knowledge of a case from harassing and unduly burdensome depositions. That is precisely the case here. The Order is based solely on the Email and Mr. Suzuki's initials on the top corner of the Document. But the Email, which Mr. Suzuki neither sent nor received, notes only that the Document was presented to him. And only one of the four items listed on the Document concerns the alleged defect in the GSX R series front-braking system at the heart of Plaintiff's claim. Moreover, Mr. Suzuki's unrebutted Declaration shows that he has no memory of the Document and no personal knowledge of its details. He also testified that the

decision to recall motorcycles with the GSX R series front-braking system was made by Suzuki's Quality Countermeasure Committee, of which he was not a member and over which he had no control. In short, Plaintiff is using Mr. Suzuki's signature at the top of one document—out of 250,000 pages of documents Suzuki produced—to seek "abusive discovery" and "create settlement pressures" that "threaten[] the proper operation of the commercial enterprise for no legitimate factfinding purpose" (R. 785 (Thomas, J., dissenting)).

The rationale behind the apex doctrine—that subjecting agency heads to a flood of discovery requests would distract them from their duties of managing government agencies—applies equally in the corporate context. In fact, Florida federal courts, as well as several other states, have applied the doctrine to private corporations. And the doctrine does not impose an absolute bar to depositions. They remain available if the opposing party has exhausted other discovery and can demonstrate that the agency or corporate head has relevant information unavailable from other sources. But that is not the case here, where the Plaintiff deposed Suzuki's corporate representative—who has the *most* knowledge of the front-brake issue—over three days; and, as the dissent notes, "*failed to set a single* deposition of any member of the [Committee], *the sole body with the authority to decide what measures if any to take regarding the allegedly defective product part*" (R. 786 (Thomas, J., dissenting) (emphasis in original)).

The Court can also adopt the apex doctrine based on established discovery principles. Even under existing law, the deposition of a corporate head with no personal knowledge of relevant facts is not reasonably calculated to lead to the discovery of admissible evidence. If the Court declines to recognize the apex doctrine in any context, those principles dictate that the Court should answer "yes" to the first sentence of the certified question and hold that a trial court departs from the essential requirements of law by not requiring a party seeking to depose the top officer of a corporation to show that (1) other means of discovery have been exhausted and (2) the corporate officer is uniquely able to provide relevant information that cannot be obtained from other sources.

ARGUMENT

Certiorari relief requires a showing that (1) an order departs from the essential requirements of law, and (2) results in material injury to the petitioner through the remainder of the proceedings, leaving no adequate remedy on appeal of the final judgment. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) (quashing a district court decision that permitted discovery that was "neither relevant nor will lead to the discovery of relevant information"). As we show below, (I) if Mr. Suzuki's examination is allowed to go forward, Suzuki will be materially injured with no remedy on plenary appeal; and (II) the Order departs from the essential requirements of the law.

I. SUZUKI IS MATERIALLY INJURED BY THE ORDER, AND HAS NO ADEQUATE REMEDY ON APPEAL, BECAUSE ONCE MR. SUZUKI'S EXAMINATION OCCURS, THE DISRUPTION TO SUZUKI'S CORPORATE OPERATIONS IS IRREMEDIABLE

The Opinion does not address Suzuki's showing that it will be materially injured if Mr. Suzuki's examination goes forward—both by disruption to Suzuki's corporate operations and because, once Mr. Suzuki's examination occurs, it cannot be undone on appeal (*see* R. 24-26). As this Court has recognized, however, "[o]rders granting discovery . . . have traditionally been reviewed by certiorari. The rationale of these cases is that appeal after final judgment is unlikely to be an adequate remedy because once discovery is wrongfully granted, the complaining party is beyond relief." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987) (citations omitted). When a discovery order departs from the essential requirements of law, the party is "materially injur[ed] throughout the remainder of the proceedings below and effectively [has] . . . no adequate remedy on appeal." *Langston*, 655 So. 2d at 94.

That is the case here. The disruption of corporate functions that would result from examining Suzuki's chairman cannot be remedied on appeal. Mr. Suzuki's examination cannot be undone. *See CVS Caremark Corp. v. Latour*, 109 So. 3d 1232, 1234-35 (Fla. 1st DCA 2013) (holding that an order compelling the deposition in an improper county caused irreparable harm "because requiring a deponent to appear for deposition at an erroneous location results in harm that

cannot be remedied on appeal in that once the deposition is taken it cannot be untaken"); *Dep't of Highway Safety v. Marks*, 898 So. 2d 1063, 1064 n.1 (Fla. 5th DCA 2005) (holding that an order compelling a deposition or "letting the 'cat out of the bag'" results in "irreparable harm" if the order departs from the essential requirements of law).

And it is not just the deposition in *this* case that will occur. Plaintiffs in other cases—those involving the same front-braking system or other alleged defects—also will use this case as precedent to seek Mr. Suzuki's examination. As the Dissent noted, "if Mr. Suzuki is required to give testimony in this case, which would obviously result in being required to give testimony in hundreds of other cases, the deposition here would 'substantially interfere with [his] job responsibilities as Chairman'" by "subject[ing] him to countless other illegitimate discovery requests" (R. 791 (Thomas, J., dissenting)). As Mr. Suzuki's Declaration shows, he could not exercise his duties as Chairman if he were subject to examination in even a fraction of the vast number of lawsuits that Suzuki faces in U.S. courts. If the Order is not quashed, other litigants may seek to use it to gain an unfair advantage in other matters by seeking apex depositions that "can only be designed to harass and attempt to force a settlement to avoid significant corporate disruption" (R. 787 (Thomas, J., dissenting)).

Indeed, as Suzuki argued below, it is repeatedly sued in both state and federal courts. Searches of state and federal dockets showed that Suzuki was named as a defendant in as many as 513 cases in the previous ten years. A search of federal dockets revealed 105 such cases in a ten-year period (R. 326-45). A search of federal dockets for the same period identified 89 cases (R. 346-61). In the state courts, a search identified 412 cases in ten years, whereas a Bloomberg Law search for the same period identified 268 cases (R. 363-419).

Thus, the Order and Opinion will cause material injury to Suzuki throughout the remainder of the proceedings and Suzuki has no adequate remedy on appeal.

II. THE ORDER DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF LAW BECAUSE MR. SUZUKI WAS NOT INVOLVED IN THE FRONT-BRAKING SYSTEM'S RECALL

The Opinion concludes that because no Florida appellate court has adopted the apex doctrine in the corporate context, the trial court could not have departed from the essential requirements of law in ordering the examination of Suzuki's chairman. But as we show below, (A) the fact that the apex doctrine had not been adopted in the corporate context was no bar to applying it; (B) this Court should adopt the doctrine for both private corporations and public-agency heads; (C) applying that doctrine, the Order departs from the essential requirements of the law because Mr. Suzuki lacks any knowledge of this case; and (D) even apart from the

apex doctrine, the Order still should be quashed because an examination of Mr. Suzuki is not reasonably calculated to lead to the discovery of admissible evidence.

A. Neither the trial court nor the First DCA was barred from applying the apex doctrine merely because it had not previously been applied in the corporate context

Noting that the "[apex] doctrine is only clearly established in Florida in the government context" and "hasn't been adopted in the corporate context," the First DCA found that "it follows that . . . the trial court did not depart from the essential requirements of the law by refusing to apply this doctrine to [Mr. Suzuki]" (R. 783). As the Dissent noted, however, the First DCA's logic "is no answer at all, *because otherwise the doctrine could never be applied*" (R. 785 (Thomas, J., dissenting) (emphasis in original)). Indeed, the issue here will virtually always be raised in a certiorari petition because the apex doctrine addresses discovery—from which a non-final appeal is not authorized. *See* Fla. R. App. P. 9.130(a)(3) (identifying limited categories of orders reviewable by non-final appeal). The First DCA's position renders orders requiring corporate CEO depositions non-reviewable.

Two First DCA cases demonstrate how the lack of precedent does not preclude certiorari relief. In *Florida House of Representatives v. Romo*, 113 So. 3d 117, 119 (Fla. 1st DCA 2013), the Legislature challenged an order allowing the plaintiffs to depose Florida legislators about recent congressional reapportionment

legislation. The First DCA quashed the order, concluding that the "order departs from the essential requirements of law because it permits discovery of information protected by the legislative privilege." *Id.* Under the Opinion's logic, however, *Romo* could *not* have found a departure from the essential requirements of the law if the case had arisen just 14 months earlier—the first time a Florida court had recognized the legislative privilege. *See League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 142 (Fla. 2013) (noting that *Romo* relied on the First DCA's "prior decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st DCA 2012), which was the first published Florida case to explicitly recognize the existence of a legislative privilege in Florida"). And under the Opinion's logic, if *Expedia* had arisen on a petition for certiorari, the First DCA could not have adopted the legislative privilege in the first place. It was only by mere happenstance that *Expedia* was not decided through certiorari. 85 So. 3d at 520. The circumstances in *Expedia* were virtually identical to those in *Romo*—the Legislature challenged an order allowing the deposition of a house member and his aide—except that in *Expedia*, unlike in *Romo*, the Legislature was not a party. The First DCA "treat[ed] the petition for writ of prohibition as an appeal from a final order" because the "order compelling discovery in this case . . . adjudicates the rights of nonparties and [] otherwise meets the general test of finality." *Id.* Under the Opinion's logic, if the Legislature had been a party in

Expedia and had sought review by certiorari, the First DCA would have allowed legislators to be deposed about their intent—even though *Expedia* found that the legislative privilege existed in the common law of England and is "implicit in the separation of powers provision of the Florida Constitution." *Id.* at 519, 523.

Thus, the Opinion implies that, if *Romo* had preceded *Expedia*, the First DCA could not have applied the legislative privilege. But there is no principled reason for concluding that whether a legislator can assert a legislative privilege depends on whether the Legislature is a party. Likewise here, there is no principled basis to find that a district court may adopt the apex doctrine and quash an order allowing an apex deposition when it is challenged by a *non-party* and the order is deemed final, but could *not* grant the same relief when an order is challenged by a party that can only seek review by certiorari. In short, a district court need not have to wait for a non-party to challenge an order allowing an apex deposition in the corporate context before deciding whether the doctrine applies—particularly where the necessary principles already exist in Florida law.

This Court has not hesitated to review cases arising from certiorari petitions involving novel issues. Indeed, in *League of Women Voters*, 132 So. 3d at 142-43, in which the Court reviewed *Romo*, this Court accepted jurisdiction in part "because this Court has never considered whether a legislative privilege exists, which is clearly an important issue to resolve," and it agreed with the First DCA

that "a legislative privilege exists in Florida." Another example is *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994). There, the First DCA denied a petition for certiorari but certified a question of great public importance. *See Tucker v. Resha*, 610 So. 2d 460, 462 (Fla. 1st DCA 1992). This Court held that a public official asserting qualified immunity in a federal civil-rights claim filed in a Florida court is entitled to immediate review of the denial of immunity—even though no Florida court had so held. *See Tucker*, 648 So. 2d at 1187.

Yet another example is *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). In that case, the Third DCA reviewed an order requiring an expert physician to produce a host of financial documents, including tax returns. In granting certiorari, the Third DCA *receded from* its own precedent, "conclud[ing] that decisions in this field have gone too far in permitting burdensome inquiry into the financial affairs of physicians, . . ." *Syken v. Elkins*, 644 So. 2d 539, 545 (Fla. 3d DCA 1994). The court fashioned a new, eight-factor rule to determine whether a party should be allowed to seek financial information from an opposing party's experts. *Id.* at 546. This Court "approve[d] the opinion of the district court of appeal in its entirety," even "conclud[ing] that the district court's criteria should be included as commentary to Florida Rule of Civil Procedure 1.280." 672 So. 2d at 522.

On certiorari review, district courts have quashed discovery orders even on issues of first impression. *See Smith v. Fla. Power & Light Co*., 632 So. 2d 696,

697 (Fla. 3d DCA 1994) (considering a petition that "present[ed] a question of first impression in Florida—whether an attorney's *selection* of documents which by themselves would not be cloaked with the work product privilege renders that group of documents, as a discrete unit, immune from discovery," and holding that "it does," quashing an order compelling production because it "departed from the essential requirements of law"); *McGarrah v. Bayfront Med. Ctr., Inc*., 889 So. 2d 923, 925 (Fla. 2d DCA 2004) (holding, for the first time in Florida, that videotaping a compulsory medical examination was attorney work product, and concluding that an order ruling otherwise departed from the essential requirements of law). In fact, the First DCA itself expanded the apex doctrine to cover *former* government agency heads even though "whether [the doctrine] appl[ies] to former agency heads . . . is [an issue] of first impression in Florida." *Horne v. Sch. Bd. of Miami-Dade Cty.*, 901 So. 2d 238, 240 (Fla. 1st DCA 2005). Under the Opinion, *Horne* could not have applied the apex doctrine because it had been applied only to *current* agency heads.

These cases demonstrate that the First DCA was not barred from applying the apex doctrine and neither is this Court.

B. This Court should adopt the apex doctrine to protect high-level corporate officials from harassment

Plaintiff seeks to examine Suzuki's Chairman even though Mr. Suzuki has no relevant knowledge of this case, even though Plaintiff has already deposed

Suzuki's corporate representative with the *most* knowledge of the topics at issue, and even though Plaintiff has never sought to depose *any* member of the very committee that decided the product recall. In similar circumstances, Florida courts have protected apex officials from such harassment. Below we show that: (1) Florida appellate courts have applied the doctrine to public agency heads; (2) Florida federal courts and courts in other states have applied the doctrine in the corporate context; (3) the apex doctrine does not improperly shift the burden onto a discovery proponent, but rather is consistent with Florida discovery rules; and (4) this Court can clarify confusion about the doctrine in lower courts.

1. Florida appellate courts have applied the apex doctrine to protect public agency heads

The apex doctrine protects high-level officials from burdensome discovery unless and until discovery of lower-level employees has occurred. *See Gen. Star Indemn. Co. v. Atl. Hospitality of Fla., LLC*, 57 So. 3d 238, 239 n.3 (Fla. 3d DCA 2011). Under the apex doctrine—or, as some call it, the "agency-head deposition test," *see Miami Dade Coll. v. Del Pino Allen*, 271 So. 3d 1194, 1197 (Fla. 3d DCA 2019) (Miller, J., concurring)—an agency head "should not be subject to deposition . . . unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources." *Dep't of Agric. & Consumer Servs. v. Broward Cty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002).

"To hold otherwise would . . . subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency." *Id.*

Although this Court has never addressed the doctrine, lower Florida courts have applied it in similar circumstances. For example, the First DCA quashed an order compelling an agency head's deposition because his testimony was "neither necessary to [the plaintiff's] cause of action nor unavailable from other sources," and noted that "subjecting agency heads to a flood of discovery requests . . . would preclude them from being able to reasonably exercise the statutory duties of office." *Fla. Office of Ins. Reg. v. Fla. Dept. of Fin. Servs.*, 159 So. 3d 945, 951-53 (Fla. 1st DCA 2015).

Similarly, in *Del Pino Allen*, the Third DCA quashed an order permitting a university president's deposition because the plaintiff failed to show "that she had exhausted all other discovery tools in an attempt to obtain the information she seeks from President Padron or that the information was necessary and unavailable from another source." 271 So. 3d at 1197.

2. Federal courts in Florida and courts in other states have applied the apex doctrine in the corporate context

Florida federal courts routinely apply the apex doctrine to corporate heads. *See*, *e.g.*, *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, 310 F.R.D. 523, 527-29 (S.D. Fla. 2015) (granting a protective order against depositions of the

defendant's co-founders, where the plaintiff did not show that they had unique knowledge and there were less intrusive means of obtaining the information); *Noveshen v. Bridgewater Assocs., LP*, No. 13-61535, 2016 WL 824640, at *2, 4 (S.D. Fla. Feb. 26, 2016) (granting a protective order against the deposition of the defendant's president where the plaintiff could not show that his deposition would provide relevant information, and agreeing that the deposition sought cumulative information and was intended to harass the defendant); *Little League Baseball, Inc. v. Kaplan*, No. 08-60554, 2009 WL 426277, at *2-3 (S.D. Fla. Feb. 20, 2009) (denying a motion to compel the deposition of the plaintiff's chairman because the defendant could not show that his deposition would reveal unique information).

In addition, several other states have adopted the doctrine and have barred the depositions of high-level corporate officers. In a remarkably similar product-liability action alleging personal injury from a motor-vehicle accident, two Toyota executives had no more than "*generalized* knowledge of Toyota's unintended acceleration problems." *Alberto v. Toyota Motor Corp*., 796 N.W.2d 490, 497 (Mich. Ct. App. 2010). A Michigan court adopted the apex doctrine and quashed the denial of a protective order against their depositions. *See id.* *See also*, *e.g.*, *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (adopting the apex doctrine and directing the trial court to reconsider its order compelling the deposition of the CEO and chairman of an oil company, whose

affidavit showed that he had no personal knowledge of the plaintiff's claim); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 364 (W. Va. 2012) (adopting the apex doctrine and applying it to quash an order compelling the deposition of the president, CEO and chairman of an insurance company); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363, 367-68 (Cal. Ct. App. 1992) (adopting the apex doctrine and quashing the denial of a protective order against the deposition of an insurance company's president and CEO, whose affidavit stated that he had no knowledge of the plaintiff's claims).

3. The apex doctrine does not improperly shift the burden onto the proponent of discovery, but rather is consistent with Florida rules governing discovery

Parties in apex-doctrine cases have sometimes argued that the doctrine improperly shifts the burden of showing the need for discovery onto the proponent. But as courts have noted, no burden-shifting occurs. The doctrine "merely require[s] the party seeking discovery to demonstrate that the proposed deponent has unique personal knowledge . . . and that other methods of discovery have not produced the desired information *only after* the party opposing discovery has moved for a protective order and [shown] the lack of the proposed deponent's personal knowledge and that other discovery methods could produce the required information." *Alberto*, 796 N.W.2d at 495. That is precisely what Suzuki did here: it sought a protective order against Mr. Suzuki's examination, submitted his

Declaration showing that he lacks personal knowledge, and produced its corporate representative to testify on precisely the same subjects on which the Plaintiff proposes to question Mr. Suzuki.

Moreover, as *Liberty Mutual* made clear, the apex doctrine does not categorically prevent the deposition of high-level corporate officials; rather, it "prevent[s] undue harassment and oppression of high-level officials while still providing a plaintiff with several less intrusive mechanisms to obtain the necessary discovery, and allowing for the possibility of conducting the high-level deposition if warranted." 13 Cal. Rptr. 2d at 367-68. By adopting the apex doctrine, the Court can ensure that "high ranking" officials are not required "to testify as to information that is readily available from other sources." *Miami-Dade Cty. v. Dade Cty. Police Benevolent Ass'n*, 103 So. 3d 236, 239 (Fla. 3d DCA 2012).

In *dictum*, the Fourth DCA has suggested that the apex doctrine "arguably conflicts with Florida's discovery rules." *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1267 (Fla. 4th DCA 2005). But no such conflict exists. As the Michigan court noted, "[w]e find that application of the apex-deposition rule in the public sector and private corporate context is consistent with Michigan's broad discovery policy, and with Michigan's court rules, which"—like Florida's—"allow a trial court to control the timing and sequence of discovery . . . and to enter protective orders 'for good cause shown.'" *Alberto,* 796 N.W.2d at 494 (citations omitted).

See also Fla. R. Civ. P. 1.280(c) (providing that, "for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires," and listing several possible remedies).

4. In adopting the apex doctrine, this Court can clarify confusion about the doctrine in the lower courts

Although it is not the precise issue presented here, the Court may also want to address and clarify some confusion surrounding application of the doctrine. For example, the court in *Florida Office of Insurance Regulation* appears to have applied the doctrine in the government context; under the heading "'Apex' Doctrine," it describes how the agency-head rule applies to both discovery and trial testimony. 159 So. 3d at 950. The court also noted, however, that "[s]ome state and federal courts refer to this doctrine as the 'apex' doctrine, in the context of both high-ranking government and corporate officials," and notes that "no Florida court has adopted the apex doctrine in the corporate context." *Id.* at 950-51. Similarly, in *Del Pino Allen*, the Third DCA quoted *Florida Office of Insurance Regulation* for the agency-head rule as well as for its observation that "[s]ome state and federal courts refer to this doctrine as the 'apex' doctrine"—and then stated that "our application of this doctrine is limited to the issue before us involving the deposition of a governmental officer." 271 So. 3d at 1196-97 & n.4 (quoting *Fla. Office of Ins. Regulation*, 159 So. 3d at 950).

In her concurrence in *Del Pino Allen*, Judge Miller objected "to the extent the majority suggests existing precedent reflects the adoption of the apex doctrine," because by "assign[ing] the nomenclature 'apex doctrine'" to the agency-head rule, it "conflates the apex doctrine, a judicially-created rule shielding upper level executives and corporate officials from discovery, with Florida's two-pronged agency-head deposition test." 271 So. 3d at 1197-98 (Miller, J., concurring). Other cases have applied the agency-head rule to bar "apex" depositions without mentioning the apex doctrine by name. *See Broward Cty.*, 810 So. 2d at 1058; *Horne*, 901 So. 2d at 241; *Univ. of W. Fla. Bd. of Trs. v. Habegger*, 125 So. 3d 323, 325-26 (Fla. 1st DCA 2013).

Still other courts, even as they note that no Florida court has expressly adopted the apex doctrine in the corporate context, effectively *do* apply it in that context—or at least show that Florida courts know *how* to do so—as well as how *not* to bar apex depositions where an apex individual has relevant knowledge. For example, in *JMIC Life Insurance Co. v. Henry*, 922 So. 2d 998, 1001 (Fla. 5th DCA 2005), the court rejected defendant's argument that plaintiff should not be entitled to take the "'apex' deposition" of a Mr. Williams not because it rejected the doctrine, but because "Williams is not an 'apex' level executive" and he was "ultimately responsible for [defendant's] denial of [plaintiff's] claim." *See also*, *e.g.*, *Remington Lodging & Hospitality v. Southernmost House, Ltd.*, 206 So. 3d

764, 765-66 (Fla. 3d DCA 2016) (upholding an order allowing the "apex" depositions of a president and CEO because their own affidavits revealed that they had relevant knowledge); *Racetrac Petroleum, Inc. v. Sewell*, 150 So. 3d 1247, 1251-52 (Fla. 3d DCA 2014) (upholding an order allowing the "apex" depositions of the president and two former vice presidents where the company's own Rule 1.310(b)(6) witness identified them as having relevant knowledge); *Citigroup*, 915 So. 2d at 1269 (upholding the denial of motion for protective order against the depositions of the chairman and former CEO, where the "conduct and knowledge of the highest level executives were relevant in this case" and the motion "was not accompanied by the officials' affidavits denying any knowledge of relevant facts").

This case allows the Court to both adopt and define the apex doctrine and clarify the confusion in lower Florida courts.

C. Under the apex doctrine, the trial court departed from the essential requirements of law because Plaintiff did not first seek the information from managers involved in the recall decision

Mr. Suzuki lacks any knowledge of this case. Plaintiff can obtain the discovery he requires from one of several officials who were actually involved in the recall. The Order requiring his examination is based solely on two pieces of evidence: the Email and Mr. Suzuki's signature in the upper left-hand corner of the Document. The Document lists four items, only one of which concerns the GSX R series front-braking system. The other three items involve cars not sold in the U.S.

And Mr. Suzuki's unrebutted Declaration shows that he has no memory of the Document and no personal knowledge of its details (R. 208). He also testified that, under Suzuki's "internal standard, any field actions and even recalls are only decided by the Quality Countermeasure Committee, not by me;" that he "was not a member . . . of the [Committee] at that time;" and that, "[a]s Chairman of the Board, or even CEO at the time, I would have no authority to override, reject or even order a field action or recall" (R. 208). In discovery, Suzuki identified *all* Committee members at all relevant times (R.A. 699-702). Yet, as the Dissent noted, the Plaintiff deposed Suzuki's "corporate representative for *three days*," but Plaintiff has "*failed to set a single* deposition of any member of the [Committee], *the sole body with the authority to decide what measures if any to take regarding the allegedly defective product part*" (R. 786 (Thomas, J., dissenting)).

Suzuki's corporate representative, Mr. Yoshinobu Matsumoto, was manager of the Suzuki brake group and "head of the special countermeasure team" that was "set up to investigate this [GSX-R series] brake issue" (R. 565-57; 677). The Opinion notes that Plaintiff's counsel deposed him "but weren't satisfied with some of his answers" (R. 782). That was because he testified that Suzuki did *not* delay in notifying customers of a front-braking issue because his investigative team found that no safety issue existed (*see* R. 761-63). Plaintiff never complained to

the court or filed a motion to compel arguing that Matsumoto was not an adequate witness or that Suzuki had to produce another witness.

As to the Email, Mr. Suzuki did not write it, did not receive it, and is not copied on it. It merely notes that the Document was presented to him and that he signed it (S.R. 159)—which adds nothing. The Email is written by one Suzuki manager, is addressed to two general managers, and is copied to two more managers (*id.*). It also identifies the manager who presented the Document to the Chairman (*id.*). Yet Plaintiff never sought to examine any of the managers mentioned. Instead, he went after Suzuki's chairman. As Judge Thomas's dissent noted, such tactics "can only be designed to harass and attempt to force a settlement to avoid significant corporate disruption" (R. 787).

In short, Plaintiff is using the Suzuki chairman's signature at the top of one document—out of 250,000 pages of documents produced—to seek "abusive discovery [with] no basis in law or fact" and to "create settlement pressures" that would "threaten[] the proper operation of the commercial enterprise for no legitimate factfinding purpose" (R. 785 (Thomas, J., dissenting)). If the head of a corporation were subject to deposition every time a plaintiff could articulate such a nominal justification, CEOs and board chairs would be subject to the "flood of discovery requests" warned about in *Florida Office of Insurance Regulation*. 159 So. 3d at 952. Indeed, as Suzuki demonstrated to the district court, searches of

Bloomberg Law and Courthouse News Service show that Suzuki has been sued in U.S. federal court at least 89 times in a decade, and has been sued in state court at least 268 times in the same period (R. 326-419). Thus, the rationale in *Broward County* applies equally here: "To hold otherwise [and allow an apex deposition] would . . . subject [corporate] heads to being deposed in virtually every [case against the corporation], to the detriment of the efficient operation of the [company]." 810 So. 2d at 1058. The "*rationale* of the doctrine is equally applicable in the private sphere," and the Court should not "countenance unjustified discovery of lead corporate executives *for no legitimate reason*" (R. 789 (Thomas, J., dissenting)).

For these reasons, this Court should adopt the apex doctrine in the corporate context and apply it to quash the Order compelling the examination of Mr. Suzuki.

D. Even under established discovery principles and existing law, the trial court departed from the essential requirements of law by requiring Suzuki's chairman to be examined

Even if the Court concludes that Florida law recognizes only an "agency-head rule" in the government context, it still can adopt the apex doctrine in the private-sector context based on established discovery principles and existing law. Under those principles, the Court should still answer "yes" to the first sentence of the certified question—"Does a trial court depart from the essential requirements of law by not requiring a party seeking to depose the top officer of a corporation to

show that (1) other means of discovery have been exhausted and (2) the corporate officer is uniquely able to provide relevant information that cannot be obtained from other sources?" (R. 879-80).

As this Court has held, "[d]iscovery was never intended to be used as a tactical tool to harass an adversary." *Elkins*, 672 So. 2d at 522. *See also Univ. of W. Fla. Bd. of Trs.*, 125 So. 3d at 325-26 ("Discovery is usually permitted only on matters that are relevant or that are reasonably calculated to lead to the discovery of admissible evidence.") (citing Fla. R. Civ. P. 1.280); *City of Gainesville v. Scotty's, Inc.*, 489 So. 2d 1196, 1197 (Fla. 1st DCA 1986) ("The right of discovery does not extend to matters which are irrelevant or which cannot reasonably be expected to lead to the discovery of relevant matters.").

As shown above, Mr. Suzuki is the Chairman of a global company. His extensive duties consume his schedule. The notion that he has any personal knowledge about a motorcycle accident in Florida is not credible on its face, and Plaintiff does not claim that he does. Instead, Plaintiff and the Order rely on the Document and the Email. But Mr. Suzuki did not send or receive the Email, and his unrebutted Declaration shows that he has no recollection of the Document and that he is neither a member of, nor has any power over, the Quality Countermeasures Committee, whose action to recall the GSX R series front-braking system is just one of four items listed on the Document (the other three

involving unrelated issues). As Judge Thomas noted, there is no specific evidence showing that Mr. Suzuki had any personal involvement in the issues at stake: the "petition involves a challenge to a one-page document, one of more than 250,000 pages of documents provided to" Plaintiff, and Mr. Suzuki's Declaration states that he "did not prepare the document, and even what I might have known about it in 2013 would have been told to me by someone else in the Corporation. I would have had at that time *no personal knowledge of the details in that document*" (R. 786 (Thomas, J., dissenting) (emphasis in original)).

Therefore, this Court may quash the order for the simple reason that an examination of Mr. Suzuki is not reasonably calculated to lead to the discovery of admissible evidence; and that concluding otherwise was an abuse of discretion. That was precisely the outcome in *General Star* and the First DCA's opinion in *Habegger*. In *General Star*, upon the defendant's showing that "its president is a manager, not an adjuster or other employee with personal knowledge of the factual disputes involved in the lawsuit," the court quashed an order compelling the president's deposition, holding that it was not "'reasonably calculated to lead to the discovery of admissible evidence' under Florida Rule of Civil Procedure 1.280." 57 So. 3d at 239-40. Quoting *General Star*, Judge Thomas concluded that "[t]he facts here readily support granting extraordinary relief, where Respondents have failed to depose any member of the relevant corporate committee, spent three days

deposing the corporate representative, and have no legitimate reason to depose Mr. Suzuki, and this will subject him to countless other illegitimate discovery requests" (R.791 (Thomas, J., dissenting)). As *General Star* noted, the "job of the president of the company 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. . . . If all claimants demand and obtain the same right, the chief executive officer manages his or her deposition schedule, not the company." 57 So. 3d at 240.

The First DCA held similarly in *Habegger*. The university president's affidavit showed that she was not involved in the decision to fire the plaintiff and that her one conversation with the co-defendant did not address that issue. *See* 25 So. 3d at 325-26. The court held that, because the plaintiff "failed to show that President Bense's deposition could be reasonably calculated to lead to the discovery of relevant evidence, the order [compelling the deposition] departed from the essential requirements of law." *Id.* (citing *General Star*, 57 So. 3d 238).

CONCLUSION

For these reasons, this Court should quash the Opinion and remand for entry of an order protecting Mr. Suzuki from compelled examination.

Date: March 9, 2020

Respectfully Submitted,

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I certify that this brief complies with the requirements of Rule 9.210(a)(2) and is written in Times New Roman 14-point font.

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