IN THE FLORIDA SUPREME COURT

CASE NO.: SC19-1998

SUZUKI MOTOR CORPORATION,
a foreign corporation,

Petitioner,

vs.

SCOTT WINCKLER,

Respondent.
_____/

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION AND DRI IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST

The Florida Defense Lawyers Association (FDLA) is a statewide organization of civil defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to "bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort, insurance, or litigation issues.

DRI – The Voice of the Defense Bar is an international membership organization that includes tens of thousands of attorneys who defend the interests of businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys; promoting appreciation of defense attorneys in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. DRI has long been a voice in making the civil justice system fairer, more efficient, and more

consistent. To promote these objectives, DRI participates as amicus curiae in carefully selected cases raising issues important to its members, their clients, and the civil justice system. DRI's amicus participation focuses largely on matters before the U.S. Supreme Court, but occasionally participates as amicus curiae in state supreme court proceedings where, as here, the legal issues are extraordinarily important and have potential nationwide impact.

This case carries statewide importance as it addresses under what circumstances—if any—a high-level, private sector executive may be deposed in Florida. DRI's and FDLA's members actively litigate in courts across the state, defending corporations, and those corporations' high-level executives are regularly set for deposition. Those depositions are set despite the fact that those executives have no knowledge of the facts of the case or the circumstances from which the case arose. Florida courts have long applied the Apex Doctrine to high-level public officials, precluding their depositions unless certain criteria were met by the party seeking to depose that official. A decision from this Court affirmatively applying the Apex Doctrine to the private sector will affect DRI's and FDLA's members, their clients, and the cases which they defend.

DRI has a nationwide interest in ensuring that there are fair and consistent procedural rules governing the deposition of high-level executives to prevent forum shopping and promote predictability. Courts in one state frequently seek the

assistance of courts in another state to conduct out-of-state discovery from third parties. And just as in Florida, parties seeking third-party discovery will notice depositions of high-level executives who have no knowledge of the underlying facts to obtain leverage against the third party and, if the third-party has an influential business relationship with the opposing party in the underlying litigation, over the opposing party. DRI thus seeks the national adoption of the Apex Doctrine to promote a fairer and more consistent civil justice system.

SUMMARY OF ARGUMENT

DRI and FDLA urge this Court to adopt the Apex Doctrine for the private sector, in addition to the doctrine's current use in Florida for public sector entities. *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1267 (Fla. 4th DCA 2005). This Court has jurisdiction over this case, employs a de novo review, and may rephrase the certified question to apply the doctrine. Amendment to the Florida Rules of Civil Procedure is unnecessary to accommodate this adoption, because Florida Rule of Civil Procedure 1.280 and the case law applying the doctrine to the public sector provide the requisite guidance and safeguards.

ARGUMENT

I. BASED ON THIS COURT'S PRECEDENT, THERE IS NO BARRIER TO THE ADOPTION OF THE APEX DOCTRINE FOR USE IN THE PRIVATE SECTOR IN FLORIDA.

While the First District Court of Appeal invites the Court to answer a certified question in terms of whether the trial court departed from the essential requirements of law, the Court need not do so. *Suzuki Motor Corp. v. Winckler*, No. 1D18-4815, 44 Fla. L. Weekly D 2826 (Fla. 1st DCA Nov. 22, 2019). This Court has jurisdiction in this case pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), and Article V, section 3(b)(4), of the Florida Constitution. "Regarding a certified question of great public importance, this Court undertakes de novo review of questions that present a pure question of law." *Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 514 (Fla. 2013) (citing *Boatman v. State*, 77 So. 3d 1242, 1247 (Fla. 2011); *Insko v. State*, 969 So. 2d 992, 997 (Fla. 2007)). The Court is therefore empowered to rule on the case as it sees fit.

To that end, this Court regularly rephrases certified questions of great public importance and is not bound to answer the question as phrased by the district court. *See, e.g., Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 514 (Fla. 2013); *Boatman v. State*, 77 So. 3d 1242, 1244 (Fla. 2011); *Hearndon v. Graham*, 767 So. 2d 1179, 1181 (Fla. 2000). The Court's ultimate holding does not need to be couched in terms of whether the trial court—or any court—departed from the

essential requirements of law with regard to the application of the Apex Doctrine to the private sector.

As Judge Bradford Thomas noted in his dissent, requiring a determination that the lower court departed from the essential requirements of existing law would prevent this Court from using its certiorari jurisdiction to mold the law to the changing needs of our time. Judge Thomas recognized that Florida law permit extraordinary review by petitions for writs of certiorari of improper discovery orders. *Suzuki Motor Corp. v. Winckler*, No. 1D18-4815, 44 Fla. L. Weekly D 2219 (Fla. 1st DCA Aug. 29, 2019) (Thomas, J., dissenting). Moreover, he noted that the First District's opinion, i.e., that the trial court's ruling cannot be a departure from law because no law recognizes the apex doctrine in the corporate context, "is no answer at all" because the doctrine could never be applied or even developed. *Id.*

Nevertheless, this Court may apply the doctrine in the private sector and fashion a remedy here. As shown below, this Court, and district courts, have done so in other instances.

The Apex Doctrine was first adopted in Florida by an appellate court in the absence of pre-existing law recognizing the doctrine. It seems that the Apex Doctrine was first recognized in Florida by *Department of Agriculture and Consumer Services v. Broward County*, 810 So. 2d 1056, 1057 (Fla. 1st DCA

2002).[1] While the First District did not use the term "Apex," it analyzed a requested deposition of a high-ranking public official. In a petition for writ of certiorari proceedings, the court held the department was entitled to a protective order after the requesting party noticed the department commissioner for deposition and the department offered the deputy commissioner as substitute. *Id.* at 1057. The First District found that an agency head should not be subject to deposition, over objection, unless and until the parties seeking the deposition exhaust other discovery and show that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources. *Id.* at 1058. The court noted: "To hold otherwise would, as argued by the department, subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole."[2] *Id.* at 1058. Again, it appears this was a case of first impression and not the law before the *Broward County* decision—yet decided on a petition for review from a non-final agency order.

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[1] *See Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1267 (Fla. 4th DCA 2005).

[2] The theory employed should likewise be applied here. This is true especially where the authority relied upon by the agency was not related to the deposition of a high ranking government official; rather, it was a finding that a trial court could not compel the testimony at trial of such an official where the proponent of the testimony had not shown the inability of the a lesser official to attest to the same information. *Id.* (citing *Dep't. of Health & Rehab. Servs. v. Brooke*, 573 So. 2d 363 (Fla. 1st DCA 1991)).

In another case, this Court affirmed the Third District's use of certiorari to create a remedy where none previously existed. In *Syken v. Elkins*, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc), the Third District reviewed two petitions for writs of certiorari concerning orders that required the compilation of reports from medical experts' files and the production of financial information from those doctors. The district court granted the petitions and quashed the orders under review. Because there was conflict within the Third District's jurisprudence, as well as between the various District Courts of Appeal, there could be no departure from the essential requirements of the law. *See id.* at 544-45. Nevertheless, the Third District fashioned a remedy on certiorari "to prevent the annoyance, embarrassment, oppression, undue burden, or expense, claimed on behalf of medical experts" and set forth specific criteria to assist trial judges in addressing the issue. *Id.* at 546-47.

By separate order, the Third District certified that its decision conflicted with the decisions of other District Courts of Appeal, and this Court accepted jurisdiction. *Elkins v. Syken*, 672 So. 2d 517, 518 (Fla. 1996). The Court found that "the district court's opinion strikes a reasonable balance between a party's need for information concerning an expert witness's potential bias and the witness's right to be free from burdensome and intrusive production requests." *Id.* at 522. In so doing, the Court opined that "[d]iscovery was never intended to be used as a

tactical tool to harass an adversary …; nor was it intended to make the discovery process so expensive that it could effectively deny access to information and witnesses or force parties to resolve their disputes unjustly. *Id.* In other words, both the Third District and this Court fashioned a remedy.

Similarly, in *Keck v. Eminisor*, 46 So. 3d 1065 (Fla. 1st DCA 2010), the First District denied certiorari review of a circuit court order denying a motion for summary judgment based on individual immunity per section 768.28(9)(a). *Id.* at 1065. The First District found no irreparable harm, yet it certified a question of great public importance. *Id.* at 1068. On review, this Court quashed the district court's decision, applied the statute to the employee, and determined that the employee was entitled to interlocutory review. *Keck v. Eminisor*, 104 So. 3d 359, 361 (Fla. 2012). The Court did so, despite the First District's opinion that one of the elements of certiorari jurisdiction was not met below. *See also Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 358 (Fla. 2012) (Canady, J., dissenting) (explaining would have answered certified question in affirmative and granted certiorari even where First District found no irreparable harm).

If the parties were required to wait for there to be authority on this issue as per the First District's opinion, there could never be a departure of the essential requirements of the law. Defendants would be ultimately an appellate remedy

because the deposition would be required to go forward and the harm would be done.

Thus, DRI and FDLA urge this Court to adopt the Apex Doctrine for use in the private sector. It is irrelevant to this Court's review that this is a case of first impression or that because of these facts, the First District found no departure of the essential requirements of the law. Because the certified question is reviewed on a de novo standard, this Court can reach these issues and even rephrase the certified question if it deems necessary.

II. THERE IS NO NEED FOR THIS COURT TO REFER THIS MATTER TO THE CIVIL RULES COMMITTEE OR OTHERWISE AMEND THE RULES OF PROCEDURE.

At least one Florida court has questioned whether an amendment to the rules of procedure would be necessary to affect the adoption of the Apex Doctrine for use with the private sector:

> [N]o reported Florida appellate court opinion has expressly adopted the doctrine; a district court of appeal cannot adopt a doctrine which arguably conflicts with the discovery rules. Because discovery rules are rules of practice and procedure, only the Florida Supreme Court has this authority. Art. V, § 2(a), Fla. Const. Florida's discovery rules do not contain a requirement that a party must show that a high level officer has unique or superior knowledge before the officer can be deposed.

Citigroup Inc. v. Holtsberg, 915 So. 2d 1265, 1269 (Fla. 4th DCA 2005).

Nevertheless, there is no need for a rule change, as demonstrated by the adoption of the Apex Doctrine for public officials without such a change. In the public arena, the case law requires that "[b]efore requiring the head of a state agency to testify at a deposition, a trial court must find: 1) the party seeking the testimony has exhausted all discovery tools in an attempt to obtain the information sought; and 2) the testimony sought is necessary and unavailable from other witnesses." *Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs*., 159 So. 3d 945, 947 (Fla. 1st DCA 2015); *see also Miami Dade Coll. v. Del Pino Allen*, 271 So. 3d 1194, 1196-96 (Fla. 3d DCA 2019). "Thus, a party seeking to depose a high-ranking governmental official must demonstrate the personal involvement of the official in a material way or the existence of extraordinary circumstances. This doctrine also applies to trial testimony. Department heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer." *Fla. Office of Ins. Regulation*, 159 So. 3d at 950. A simple substitution of "high-level executive" for "head of a state agency" or "high-ranking governmental official" should be all the guidance the trial courts need on this issue.

Furthermore, it bears repeating that the Apex doctrine for government officials arose from case law—not the rules of procedure. It is judicially created

and part of this state's common law. There is no corresponding public sector rule of civil procedure to amend.

Moreover, the history of the Apex Doctrine in Florida and throughout the country shows that the doctrine does not conflict with the existing discovery rules. *See Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 492-493 (Mich. Ct. App. 2010) (concisely summarizing the development the doctrine in the federal courts). Instead, the Apex Doctrine is a function the court's authority to limit and schedule discovery and to prevent the misuse of discovery for harassment. *See id.* at 494-495; Rule 1.200(a)(4) (identifying courts' authority to limit and schedule discovery).

CONCLUSION

This Court should adopt the Apex Doctrine for the private sector. There is no need for this Court to refer the issue to the Rules Committee or to otherwise amend the Florida Rules of Civil Procedure.

WHEREFORE, DRI and FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully request this Court to expressly adopt the Apex Doctrine for application to requests for the depositions and trial testimony of high-level officials.

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CERTIFICATION OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Times New Roman font as required by Rule 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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