

STATE OF MICHIGAN
COURT OF APPEALS

LILIA ALBERTO, Personal Representative of the
ESTATE OF GUADALUPE ALBERTO,
deceased,

Plaintiff-Appellee,

v

TOYOTA MOTOR CORPORATION, TOYOTA
MOTOR ENGINEERING &
MANUFACTURING NORTH AMERICA, INC.,
TOYOTA MOTOR MANUFACTURING
KENTUCKY, INC., DENSO INTERNATIONAL
AMERICA, INC., and DENSO TENNESSEE,
INC.,

Defendants,

and

TOYOTA MOTOR SALES U.S.A., INC.,

Defendant-Appellant.

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

SAAD, P.J.

Defendant Toyota Motor Sales U.S.A., Inc.,¹ appeals by leave granted the trial court's order that denied its motion for a protective order to quash the depositions of two corporate officers, Yoshimi Inaba and Jim Lentz. We vacate the trial court's order and remand this case for further proceedings.

¹ The other named defendants were dismissed from plaintiff's lawsuit and are not parties to this appeal. References to "defendant" in the singular throughout this opinion are to defendant-appellant Toyota Motor Sales U.S.A., Inc., only.

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No. 296824
Genesee Circuit Court
LC No. 09-091973-NP

Advance Sheets Version

I. FACTS AND UNDERLYING PROCEEDINGS

This is a personal-injury, products-liability suit wherein plaintiff seeks to depose two high-ranking Toyota corporate officers in connection with the claim that a defect in a Toyota vehicle caused the accident that resulted in the death of plaintiff's decedent.

Plaintiff filed this wrongful-death action and claimed that the decedent drove a 2005 Toyota Camry at a speed of less than 25 miles an hour when the vehicle suddenly accelerated to a speed in excess of 80 miles an hour. Plaintiff also asserts that the decedent attempted unsuccessfully to apply the vehicle's brakes, but the vehicle struck a tree, went airborne, and struck another tree, and plaintiff's decedent sustained fatal injuries.

Plaintiff noticed the video depositions of Yoshimi Inaba, defendant's chairman and chief executive officer, and Jim Lentz, defendant's president and chief operating officer, pursuant to MCR 2.306 and MCR 2.315. Defendant moved for a protective order pursuant to MCR 2.302(C) to prevent the depositions, because defendant says that neither Mr. Inaba nor Mr. Lentz "participated in the design, testing, manufacture, warnings, sale, or distribution of the 2005 Camry, or the day-to-day details of vehicle production," and that neither officer had "unique information pertinent to issues in the case." Defendant also avers that plaintiff could not show that the depositions of Messrs. Inaba and Lentz were necessary to prevent injustice, because the information plaintiff sought could be obtained from those persons who worked directly on the design, testing, and manufacture of the vehicle at issue. Defendant noted that Michigan adheres to the so-called "apex-deposition rule" for high-ranking governmental officials, observed that various federal and state courts had applied the apex-deposition rule to high-ranking corporate officers in addition to governmental officials, and argued that Michigan should do so as well.

In response, plaintiff argues that while Michigan has adopted the apex-deposition rule for public officials, it has not applied the apex-deposition rule in connection with high-ranking corporate officers, and that even if Michigan were to adopt the apex-deposition rule for corporate officers, it should not apply here. Plaintiff contends that Mr. Lentz has been the "public face" of Toyota as the company's safety problems became widely known and emphasized that Mr. Lentz had made numerous public appearances and testified before Congress regarding Toyota's recent recalls of vehicles.² Plaintiff also noted that Mr. Inaba had testified before Congress regarding Toyota's efforts to complete its current recalls and review its quality-control processes and had said that he would be involved in the quality-control review.

Though the trial court found that Messrs. Inaba and Lentz were apex, or high-ranking, corporate officers, the trial court held that Michigan's caselaw and court rules did not preclude the depositions from taking place.

Defendant sought leave to appeal in this Court and moved for immediate consideration and a stay of the depositions. Ultimately, this Court granted defendant's application and

² The recent recalls do not involve the vehicle at issue here.

continued in effect a prior order of the Court that had stayed the depositions of Messrs. Inaba and Lentz. The Court also ordered the appeal expedited and directed the parties to “address specifically the issue of whether the apex deposition rule should or does apply to corporate defendants.” *Alberto v Toyota Motor Corp*, unpublished order of the Court of Appeals, entered March 11, 2010 (Docket No. 296824).

II. NATURE OF THE CASE AND THE APEX-DEPOSITION RULE

This appeal presents the question whether Michigan should formally adopt the apex-deposition rule in the corporate context. As used by other state and federal courts, the apex-deposition rule provides that before a plaintiff may take the deposition of a high-ranking or “apex” governmental official or corporate officer, the plaintiff must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees. See, e.g., *Baine v Gen Motors Corp*, 141 FRD 332, 334-335 (MD Ala, 1991).

Courts have applied the apex-deposition rule not to shield high-ranking officers from discovery, but to sequence discovery in order to prevent litigants from deposing high-ranking governmental officials as a matter of routine procedure before less burdensome discovery methods are attempted. See, e.g., *Sneaker Circus, Inc v Carter*, 457 F Supp 771, 794 n 33 (ED NY, 1978). Courts have reasoned that giving depositions on a regular basis would impede high-ranking governmental officials in the performance of their duties, and thus contravene the public interest. See, e.g., *Union Savings Bank v Saxon*, 209 F Supp 319, 319-320 (D DC, 1962). In essence, the apex-deposition rule prevents high-ranking public officials from being compelled to give oral depositions unless a preliminary showing is made that the deposition is necessary to obtain relevant information that cannot be obtained from another discovery source or mechanism. *Baine*, 141 FRD at 334-336.

Premised on similar reasoning, several federal appellate and district courts have extended application of the apex-deposition rule to high-ranking corporate executives. Generally, these cases hold that before a high-ranking corporate executive may be deposed, the plaintiff must establish that the executive has superior or unique information regarding the subject matter of the litigation and that such information cannot be obtained through a less intrusive method, such as by deposing lower-ranking executives. See, e.g., *Salter v Upjohn Co*, 593 F2d 649, 651 (CA 5, 1979); *Lewelling v Farmers Ins of Columbus, Inc*, 879 F2d 212, 218 (CA 6, 1989); *Thomas v Int’l Business Machines*, 48 F3d 478, 482-484 (CA 10, 1995); *Mulvey v Chrysler Corp*, 106 FRD 364, 366 (D RI, 1985); *Baine*, 141 FRD at 334-336; *Evans v Allstate Ins Co*, 216 FRD 515, 518-519 (ND Okla, 2003).

State courts, including those in California and Texas, have also adopted the apex-deposition rule in the corporate context. For example, in *Liberty Mut Ins Co v San Mateo Co Superior Court*, 10 Cal App 4th 1282, 1289; 13 Cal Rptr 2d 363 (1992), the California Court of Appeal, relying on federal decisions such as *Salter*, *Mulvey*, and *Baine*, adopted the apex-deposition rule in the corporate context and held that the potential deponent, the president and chief executive officer of Liberty Mutual, could not be deposed absent a showing that the officer had “unique or superior personal knowledge of discoverable information.” The *Liberty Mut*

court held that absent such a showing, “the trial court should issue the protective order and first require the plaintiff to obtain the necessary discovery through less intrusive methods.” *Id.* If after these less intrusive methods are exhausted and the plaintiff makes a showing that the apex officer has information relevant to the case, the trial court may allow the deposition to proceed. *Id.* Similarly, in *Monsanto Co v May*, 889 SW2d 274, 277 (Tex, 1994), the Texas Supreme Court, relying on federal decisions such as *Salter* and *Mulvey* and on the decision in *Liberty Mut*, adopted the apex-deposition rule and held that the rule “presents a fair balance between the right of a plaintiff to conduct discovery in its case within the limits of the rules, and the right of someone at the apex of the hierarchy of a large corporation to avoid being subjected to undue harassment and abuse.”

The question posed by Toyota’s motion and the trial court’s order is whether Michigan caselaw should take into account the position within an organization of the person sought to be deposed. Because Michigan’s court rules contemplate such a rule and because our courts have, in essence, applied the principles of the apex-deposition rule to governmental officials, albeit, without using the aforementioned terminology, and because there is no principled reason for not affording similar safeguards to corporate defendants, we hereby adopt the apex-deposition rule as explained more thoroughly below.

III. ANALYSIS

We hold that the apex-deposition rule applies to high-ranking officials in the public sector and to high-ranking corporate officers in the private sector.

Michigan has a broad discovery policy that permits the discovery of any matter that is not privileged and that is relevant to the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). However, Michigan’s court rules acknowledge the wisdom of placing reasonable limits on discovery. MCR 2.302(C) provides, in part:

On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place[.]

Michigan's rules of discovery largely track the federal discovery rules.³ In the absence of Michigan precedent, courts of this state routinely seek guidance from federal cases construing a similar federal rule. *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997).

This Court has applied the apex-deposition rule, while not referring to it as such, in two cases involving governmental officials. In *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617-618; 440 NW2d 45 (1989), this Court reversed the trial court's order that denied the defendant's motion to quash the deposition of the Secretary of State on the grounds that the Secretary of State lacked personal knowledge of the relevant facts and that the information sought could be obtained by other means. More recently, in *Hamed v Wayne Co*, 271 Mich App 106, 109-110; 719 NW2d 612 (2006), this Court reversed the trial court's order that denied the defendants' motion to quash the depositions of the Wayne County Executive and the Wayne County Sheriff on the ground that the plaintiff had made no showing that either official possessed relevant information that could not be obtained through other methods.

We find that application of the apex-deposition rule in the public sector and private corporate context is consistent with Michigan's broad discovery policy, *Reed Dairy Farm*, 227 Mich App at 616, and with Michigan's court rules, which allow a trial court to control the timing and sequence of discovery "for the convenience of parties and witnesses and in the interests of justice," MCR 2.302(D), and to enter protective orders "for good cause shown," MCR 2.302(C). As noted, in *Fitzpatrick*, 176 Mich App at 617-619, this Court reversed the trial court's denial of a motion for a protective order to preclude the taking of the deposition of the Secretary of State. The *Fitzpatrick* Court did not specifically state that the Secretary of State could be deposed if the plaintiff could show that doing so would be necessary to prevent injustice. However, in *Hamed*, 271 Mich App at 112, this Court adopted the holding in *Fitzpatrick* and clarified that depositions of governmental officials could be taken upon a showing by the plaintiff that the depositions were necessary "to prevent prejudice or injustice[.]" These cases rely on the Michigan Court Rules, see, e.g., *Fitzpatrick*, 176 Mich App at 617, and *Hamed*, 271 Mich App at 109-110, and the analysis employed in *Fitzgerald* and *Hamed* is consistent with those federal and state court cases that have applied the apex-deposition rule in the corporate context.

Recognizing that the highest positions within a juridical entity rarely have specialized and specific first-hand knowledge of matters at every level of the complex organization, courts have adopted the apex-deposition rule in the corporate context to (1) promote efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation, see *Salter*, 593 F2d at 651, and (2) prevent the use of depositions to annoy, harass, or unduly burden the parties. See *Lewelling*, 879 F2d at 218; *Baine*, 141 FRD at 335-336. Of course, no court has applied the apex-deposition rule to hold that an apex or high-ranking corporate officer cannot be deposed under any circumstances. And neither do we. Rather, courts have applied the rule to ensure that discovery is conducted in an efficient manner and that other methods of discovery

³ FR Civ P 26(c) provides for the issuance of a protective order in discovery proceedings.

have been attempted before the deposition of an apex officer is conducted. See, e.g., *Salter*, 593 F2d at 651-652; *Liberty Mut*, 10 Cal App 4th at 1287-1289. Moreover, those cases adopting the apex-deposition rule in the corporate context do not shift the burden of proof, but merely require the party seeking discovery to demonstrate that the proposed deponent has unique personal knowledge of the subject matter of the litigation 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 has made a showing regarding the lack of the proposed deponent's personal knowledge and that other discovery methods could produce the required information. Cf. *Crest Infinity II, LP v Swinton*, 2007 OK 77, ¶ 17; 174 P3d 996, 1004 (2007) (declining to adopt a form of the apex-deposition rule that shifts the burden to the party seeking discovery on the ground that the burden of showing good cause is statutorily placed on the party seeking discovery). In other words, after the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue, then the party seeking the deposition of the high-ranking corporate officer or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition.

Application of the apex-deposition rule does not, contrary to plaintiff's argument, shift the burden of proof to the party seeking discovery. If the defendant and the potential deponent make the requisite showing outlined above, only then must the party seeking the deposition show that the potential deponent has unique or superior knowledge of issues relevant to the litigation and that the information cannot be obtained by less intrusive means, such as by deposing lower-level officials or employees. Moreover, nothing herein can or should be read to preclude the deposition of high-ranking public or corporate officials who possess relevant personal knowledge of matters in issue that cannot be obtained by other allowable discovery.

In adopting the apex-deposition rule, we recognize, as have other courts, that an apex corporate officer, like a high-ranking governmental official, often has no particularized or specialized knowledge of the day-to-day operations or the particular factual situations that lead to litigation, and has far-reaching and comprehensive employment duties that require a significant time commitment. And, therefore, to allow depositions of high-ranking governmental officials or corporate officers without any restriction or conditions could result in the abuse of the discovery process and harassment of the parties. Accordingly, our adoption of the apex-deposition rule should serve as a useful rule for trial courts to use in balancing the discovery rights of the parties.

IV. APPLICATION

We review for an abuse of discretion a trial court's decision on a motion for a protective order. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002).

Defendant moved for a protective order on the ground that neither Mr. Inaba nor Mr. Lentz had unique, personal knowledge of facts relevant to the litigation.⁴ Plaintiff points to the fact that both Messrs. Inaba and Lentz have made public appearances to discuss Toyota's safety difficulties and recall efforts. But no evidence before us demonstrates that, during those appearances, either officer demonstrated any actual knowledge, much less a unique or superior knowledge, of the design, engineering, manufacturing, or testing processes that went into the building of the vehicle, a 2005 Camry. The executives spoke in only general terms about Toyota's safety difficulties and recall efforts.⁵

In terms of plaintiff's contention that Messrs. Inaba and Lentz had general knowledge of the issues, the instant case is analogous to *In re Continental Airlines, Inc.*, 305 SW3d 849 (Tex App, 2010). In *Continental*, the plaintiffs filed suit following an accident involving a Continental Airlines flight that injured 37 persons. *Id.* at 851. The plaintiffs noticed the deposition of Larry Kellner, Continental's chief executive officer (CEO) and chairman of the board of directors, arguing that Kellner had unique or superior knowledge of discoverable information regarding the accident. *Id.* The plaintiffs pointed to the following facts: (1) Kellner briefed members of the media immediately following the accident, (2) Kellner repeatedly stated that he would learn the cause of the accident in order to prevent future accidents, (3) Kellner sent personal letters to the passengers, (4) Kellner interviewed the pilots and gave commendations to crew and flight members, and (5) Kellner served on the board of directors of the Air Transport Association of America (ATA), a safety organization, and thus had knowledge regarding Continental's implementation of the ATA's policies. *Id.*

The trial court denied the defendant's motion for a protective order and granted the plaintiffs' motion to compel the deposition. *Id.* The defendant moved for a writ of mandamus, asking the appellate court to compel the trial court to set aside its order granting the motion to compel the deposition. *Id.* at 850-851.

The appellate court reviewed the pertinent law and the evidence, including statements made by other Continental employees in depositions and statements in Kellner's own affidavit, *id.* at 853-857, and found that the defendant showed that Kellner did not have "unique or superior knowledge regarding what occurred before and during the accident or the cause of the accident." *Id.* at 858. The court noted that while Kellner made public statements following the

⁴ We note that defendant also based its motion for a protective order on the ground that plaintiff had engaged in no discovery efforts designed to elicit the information she sought from Messrs. Inaba and Lentz. At the time the trial court heard defendant's motion, plaintiff had deposed a former employee of defendant Toyota Motor Engineering & Manufacturing North America, Inc., a company that had no involvement in the design or manufacturing of the vehicle at issue. The fact that plaintiff has engaged in other discovery, including the taking of depositions, since the hearing on defendant's motion, is irrelevant to the issue before us at this time.

⁵ As stated earlier, the recall campaigns about which Messrs. Inaba and Lentz spoke did not include the 2005 Camry.

accident, the information he provided was given to him by another Continental employee; that Kellner was not Continental's representative with regard to the investigation by the National Transportation Safety Board (NTSB); that Kellner had not received information regarding the cause of the accident in his executive briefs; and that Kellner did not serve as Continental's representative on the ATA's safety committee. *Id.*

Furthermore, the *Continental* court found that the plaintiffs had not demonstrated that less intrusive methods were inadequate to obtain the discovery sought, notwithstanding the fact that the plaintiffs in *Continental*, unlike plaintiff here, had conducted extensive discovery, including submitting 110 requests for production and 74 interrogatories and taking 11 depositions. *Id.* at 859. The court noted that Continental had asserted that the plaintiffs had not deposed Continental's corporate representative, other individuals were present when Kellner received information regarding the accident, and other employees were more directly involved in the NTSB investigation. *Id.* The court reasoned that, while Kellner would be "best able to address his own subjective intent in making his generalized public statements following the accident," Kellner's "subjective intent in making the subject public statements [did] not establish anything regarding negligence, proximate cause, or damages." *Id.* The *Continental* court held that the trial court had abused its discretion by compelling Kellner's deposition, and directed the trial court to set aside the order compelling the deposition. *Id.* Here, in contrast, virtually no discovery preceded the disputed efforts to depose Messrs. Inaba and Lentz.

We note that the CEO in *Continental* was in a position similar to that of the Toyota executives here, Messrs. Inaba and Lentz. The Continental CEO had generalized knowledge of the accident and served as the airline's public face in dealing with the media, but had no particular knowledge of the cause of the accident. The record reflects that Messrs. Inaba and Lentz had only *generalized* knowledge of Toyota's unintended acceleration problems and had no unique or superior knowledge of, or role in designing, the vehicle at issue or in implementing manufacturing or testing processes. The court's reasoning in *Continental* is instructive and applicable to the proposed deponents here.

V. CONCLUSION

We adopt the apex-deposition rule for high-ranking corporate officers, as well as for governmental officials,⁶ and therefore hold that the trial court abused its discretion by denying defendant's motion for a protective order to quash the depositions of Messrs. Inaba and Lentz. We vacate the trial court's order and remand this case to the trial court for reconsideration in accordance with this opinion.

Vacated and remanded. We retain jurisdiction.

/s/ Henry William Saad

/s/ Pat M. Donofrio

⁶ *Fitzpatrick*, 176 Mich App at 617-618; *Hamed*, 271 Mich App at 109-110.