IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

GENERAL MOTORS LLC,	§	
	§	
Appellant,	§	
	§	Case No. S21G1147
v.	§	
	§	
ROBERT RANDALL BUCHANAN, individual and as Administrator of the ESTATE OF GLENDA MARIE BUCHANAN,	§	Court of Appeals Case Number A21A0043
	§	
	§	
Appellee.	§	

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE

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Interest of Amicus Curiae

Public Justice is a national public interest legal advocacy organization dedicated to pursuing high impact lawsuits to advance consumer rights, civil rights and civil liberties, workers' rights, environmental sustainability, and the preservation and improvement of the civil justice system. A key element of Public Justice's mission is to ensure consumers and others harmed by corporate wrongdoing have access to the civil justice system, and to protect against unwarranted secrecy in the court system. Access to justice will be compromised if this Court imposes limits on the power that the Georgia legislature has given to trial judges and erects inflexible barriers to depositions of high-ranking corporate officers.

Introduction and Summary of Argument

A consistent theme runs through the Georgia Civil Practice Act and the case law construing it: the scope of discovery is broad, and a trial court has broad power to guide it, reviewable only for an abuse of discretion. That consistent theme counsels against adopting special rules to protect high-ranking corporate officers from discovery of relevant information.

In responding to General Motors' invitation to do otherwise, the Court has asked the parties to answer two questions: "What factors should be considered by a trial court in ruling on a motion for a protective order under O.C.G.A. § 9-11-26

(c) that seeks to prevent the deposition of a high-ranking officer and what is the appropriate burden of proof as to those factors?"

First, the factors a trial court should consider on a motion for protective order are found in two subsections of Section 9-11-26. The primary factor is relevance: The court should evaluate whether a party is seeking "any matter, not privileged, which is relevant to the subject matter involved in the pending action." OCGA 9-11-26(b)(1). If so, there is a strong presumption that the discovery should be allowed. The court then evaluates whether the movant has established "good cause," by "substantial evidence," for one of the required bases for a protective order: "annoyance, embarrassment, oppression, or undue burden or expense," thus warranting any limitation or modification on the presumption of access. OCGA § 9-11-26(c). If so, the court "may make any order which justice requires," including one or more of the options in § 9-11-26(c)(1)-(8), with the understanding that an order completely denying discovery is exceptional and to be avoided.

Second, Georgia law explicitly puts the burden of proof for a protective order on the movant. A protective order can only issue on "good cause shown" in a "motion by a party or by the person from whom discovery is sought[.]" § 9-11-26(c). The movant must clearly demonstrate that one or more of the enumerated bases for a protective order is satisfied, setting forth specific facts. The discovering party has no obligation to rebut the moving party's showing, though of course it

likely will attempt to do so. There is no basis in § 9-11-26(c) or Georgia law generally for imposing any burden of proof on a discovering party.

Appellant General Motors asks this Court to *restrict* the power that the Georgia legislature gave to trial courts in § 9-11-26, by adopting what it calls the "apex doctrine." More specifically, GM proposes rewriting the relevance and good cause standards of § 9-11-26 and imposing three new inflexible requirements: (1) requiring the discovering party to establish that the CEO has "unique" testimony, (2) requiring the discovering party to establish that it has "exhausted" alternative sources of information, and (3) imposing a "prima facie" test that shifts the burden of proof from the movant to the non-movant.

These three "apex" requirements have no basis in Georgia law. Moreover, GM has failed to show that there is a problem in Georgia trial courts for this Court to fix. The record here, and case law in Georgia and generally, show that trial courts are already responsive to the needs and concerns of high-ranking corporate deponents. Georgia law empowers a trial court with the power to limit subject matter, seal, postpone, quash, set time or place, and determine any manner of conditions for *any* deposition, reviewable for abuse of discretion. That explains why, in urging that this Court adopt the apex doctrine, GM and amici point to the minority of courts that have adopted some form of the apex doctrine, but they also point to courts that have not adopted it, yet still properly balance the needs of

litigants and the needs of deponents. Georgia law respects the fact that the trial court, and only the trial court, has the first-hand knowledge necessary to rule on fact-intensive discovery disputes.

The plain words of OCGA § 9-11-26, and its interpretation by Georgia courts, make clear that General Motors' call for an "apex doctrine" in Georgia should be rejected, and the trial court's discretion to determine appropriate discovery in the case before it should be preserved. The Court should affirm the judgment of the Court of Appeals and allow discovery to proceed.

Argument and Citation of Authority

I. The Georgia Civil Practice Act Answers the Court's Questions, and the Apex Doctrine Would Violate the Statute.

A. OCGA § 9-11-26 Lays Out the Standard for Any Question about Whether and How a Deposition Should Proceed.

The answer to the Court's question of what factors a court can consider in ruling on a motion for protective order of a high-ranking corporate officer lies in two subsections of the Georgia Civil Practice Act, § 9-11-26. First, § 9-11-26(b)(1) states in part, 'Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" Inadmissibility is not a ground for objection "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Second, § 9-11-26(c) states in part, "Upon motion by a party or by the person from whom

discovery is sought and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense[.]"

One notable feature of these two discovery rules is that they both contain the word "any." "Parties may obtain discovery regarding *any* matter," and the court "may make *any* order" protecting a target of that discovery who shows good cause. On the 26(b) side of the ledger, the court must respect the principle that the scope of discovery in Georgia is broad: "it is only in rare cases, based on good cause shown, that the trial court may refuse a deposition altogether."[1] It is even broader than the scope of discovery in the Federal Rules, which have been amended to

[1] *Osborne v. Bank of Delight,* 173 Ga. App. 322, 324 (1985); *Mead Corp. v. Masterack,* 243 Ga. 213, 214 (1979) (reversing a trial court order restricting discovery in opposition to summary judgment as an abuse of discretion, stating that a protective order cannot "have the effect of frustrating and preventing legitimate discovery"). *See also Hickman v. Taylor,* 329 U.S. 495, 507 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time–honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition–discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.").

require discovery to be "relevant to any party's claim or defense and proportional to the needs of the case[.]"

On the 26(c) side, the trial court has "wide discretion in the entering of orders to prevent the use of discovery which is unreasonably burdensome, unduly expensive, or directed to irrelevant or immaterial matter,"[2] including ordering that discovery not be had, allowing it "only on specified terms and conditions, including a designation of the time or place," changing the method of discovery, limiting the subject matter of the discovery, restricting access to the discovery, sealing the deposition, restricting disclosure of trade secrets and other sensitive commercial information, and/or requiring that the discovery only be filed under seal. § 9-11-26(c)(1)-(8). However, this Court has warned that "where the protective orders entered by the trial court have the effect of frustrating and preventing legitimate discovery, an abuse of discretion occurs."[3]

While these two provisions exist in some tension, it is not a zero-sum game. Simple modifications to a deposition notice, such as a change in its date or

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[2] *Mead,* 243 Ga. at 214.

[3] *Id*. *See also Douglas Asphalt Co. v. Linnenkohl*, 320 Ga. App. 427, 429 (2013) ("The grant or denial of a motion for protective order generally lies within the sound discretion of the trial court. We therefore will not reverse absent an abuse of that discretion. The trial court is in the best position to make determinations on these issues, and we will not overrule its judgment if there is any reasonable evidence to support it."). *Ambassador College v. Goetzke*, 244 Ga. 322, 323, 260 S.E.2d 27 (1979) ("This court has repeatedly held that it will not reverse a trial court's decision on discovery matters absent a clear abuse of discretion.") (quoting

location, can substantially reduce the burden on a deponent while allowing for the discovery sought. Georgia courts perform this balancing act for all litigants. The statute does not provide for any different rule based on the deponent's socioeconomic status or the perceived value of her time.

B. Section 9-11-26(c) Puts the Burden of Proof to Obtain a Protective Order on the Movant.

Section 9-11-26(c) allows a court to issue a protective order "[u]pon motion by a party or by the person from whom discovery is sought and for good cause shown[.]" The movant must make this good cause showing with "substantial evidence."[4] To impose any proof burden on the non-movant would violate this provision, and Section 9-11-26(b)(1), which gives parties the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" Moreover, many courts that incorporate some version of the apex factors into their good cause analysis make clear that the

Retail Credit Co. v. United Family Life Ins. Co., 130 Ga. App. 524, 526, 203 S.E.2d 760 (1974)).

[4] *Galbreath v. Braley,* 318 Ga. App. 111, 113 (2012) ("this Court has held that protective orders are intended to be protective—not prohibitive—and, until such time as the [trial] court is satisfied by substantial evidence that bad faith or harassment motivates the discoveror's action, the court should not intervene to limit or prohibit the scope of pretrial discovery.").

burden – and it is a "heavy burden" – remains completely on the movant.[5] The plain language of § 9-11-26(c) supports no other conclusion.

C. The Trial Court Properly Weighed the Good Cause Factors in Effectively Granting the Protective Order in Part.

The trial court did not abuse its discretion in denying GM's motion to quash Ms. Barra's deposition but limiting it to three hours. The court concluded that the deposition was reasonably calculated to discover admissible evidence. Among other things, it noted that "Barra stated that she would stand with her new vice president of global vehicle safety to quickly identify and resolve any product safety issues, and that she would review all future death inquiries in GM vehicle crashes." 359 Ga. App. at 416. Yet "the SWAS [the sensor defect] remained a problem 'To Be Determined' following twelve years after the first sale of 2007 Trailblazers and tens of thousands of warranty claims." *Id.* This is not just a case about what technical problem caused a defect and whether it caused Marie Buchanan's death,

[5] *See, e.g., The Apple iPod iTunes Antitrust Litig*., 2011 WL 976942, at *2 (N.D. Cal. Mar. 21, 2011) (refusing to quash the deposition of ailing CEO Steve Jobs, stating that a party seeking to prevent a deposition carries a "heavy burden"); *Blankenship v. Hearst Corp.,* 519 F.2d 418429 (9th Cir. 1975) (under liberal discovery principles of federal rules, party opposing discovery carries a "heavy burden" of showing why discovery should be denied). *See generally* Wright & Miller, Federal Practice and Procedure § 2037 (noting that it is "even more difficult" to obtain an order blocking a deposition, and most such requests are denied; "Since the notice for taking a deposition is not required to specify the subject matter of the examination, the need for protection usually cannot be determined before the examination begins").

which engineers could answer. It is a case about why, after GM and Ms. Barra promised to personally address any safety problems in GM vehicles, and Ms. Barra stated she would personally review any death inquiries, they let this product defect go on for so long without properly addressing it.

Ms. Barra's "apex affidavit," which she intended to show she possesses no unique information about the sensor defect, raises more questions than it answers. Ms. Barra states that she "was not involved in" any investigation of the product defect at issue in this case. One definition of "involved" is "actively participating in something."[6] Ms. Barra would not have to "actively participate" in the investigation to have received the results of it and decided what General Motors should do or not do. And it conflicts with her promise that she *would* be "involved" in identifying product safety issues and reviewing death inquiries, which presumably would include the death of Marie Buchanan. Only a live deposition can resolve the questions that GM has put at issue.[7]

Even though the trial court "denied" GM's motion for a protective order, it effectively granted it in part, by limiting the deposition to three hours and changing

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[6] *See* Merriam-Webster's Dictionary, https://bit.ly/3nfwyrm (viewed Jan. 11, 2022).

[7] *See Volkswagen Grp. of Am., Inc. v. Smith*, 2020 WL 598617, at *3 (S.D.N.Y. Feb. 7, 2020) ("A deposition, which will afford the parties the opportunity to examine and cross-examine a live witness, is clearly the superior method for obtaining discovery from CBP regarding the central issue in this litigation.").

the location to Michigan, where Ms. Barra lives and works. The trial court's accommodation of Ms. Barra is typical of how courts are responsive to the needs of corporate deponents. The time limitation is particularly generous here because Ms. Barra failed to provide the court with any facts to justify it. *See Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012) (stating that trial court should reject any motion for protective order that fails to specify one of the harms listed in Rule 26(c)(1)). Her affidavit failed to provide any information about why a deposition would constitute an undue burden on *her*. She provided only a brief summary of her work and the conclusory statement, "Given my role, the demands on my time are substantial."[8] To satisfy § 9-11-26(c), Ms. Barra could have supplied facts showing "the possibility of harassment and the potential disruption of business" that her deposition might cause. *See Gen. Star Indem. Co. v. Platinum Indem. Ltd.*, 210 F.R.D. 80, 83 (S.D.N.Y. 2002). Yet she said nothing about facing other discovery demands, how many hours she works per week, or whether her schedule is flexible, although she has previously stated that it is.[9] Courts reject protective order motions based on far more detailed and compelling showings.[10]

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[8] Barra Aff. ¶ 4.

[9] Richard Feloni, Why GM CEO Mary Barra Will End an Important Meeting to Go to Her Daughter's Soccer Game, Insider, Apr. 1, 2015, at https://bit.ly/3pOJsx4 (last viewed Dec. 9, 2021).

[10] *See, e.g., Huddleston v. Bowling Green Inn of Pensacola,* 333 F.R.D. 581, 586 (N.D. Fla. 2019) (denying protective order to parent of infant who moved for a

GM's position is that "apex" depositions are inherently harassing, and they do not require VIPs to make the fact-specific showing of injury that any other deponent has to make. Georgia law provides no support for this class-based presumptuousness. "Good cause for the issuance of a protective order designed to frustrate discovery must be clearly demonstrated . . . Such cause necessarily is not established by stereotyped or conclusional statements, bereft of facts." *Young v. Jones*, 149 Ga. App. 819, 824 (1979) (internal citation omitted); *see also Christopher v. State*, 185 Ga. App. 532, 533 (1988). The trial court acted well within its discretion in accommodating Ms. Barra, but also concluding that Ms. Barra failed to establish good cause for the "extraordinary" remedy of denying her deposition completely.[11]

protective order allowing a telephonic deposition; court faulted her for failing to provide affidavit as to her financial status, including "whether she could obtain a loan to pay for the flight").

[11] GM urges this Court to consider *Salter v. Upjohn*, 593 F.2d 649 (5th Cir. 1979). It certainly should, for this key admonition: "It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Id.* at 651.

II. The Proposed Apex Doctrine Is Inconsistent with Georgia Law, and the Radical Overhaul of OCGA § 9-11-26 Proposed by GM Is Unwarranted.

A. The Proposed Apex Doctrine Improperly Shifts the Burden of Proof onto the Non-Movant.

General Motors asks this Court to graft a summary judgment evidentiary test onto Section 9-11-26(c), creating a "good cause" test that looks like no other good cause test in Georgia law. According to GM, the moving party should first submit an affidavit stating that the individual is "sufficiently high-ranking," that she lacks personal knowledge, and possibly that others in the company have that knowledge. NT Brief at 19. Such an affidavit would establish a "prima facie" showing of good cause, satisfying the movant's "initial burden of production." *Id*. The burden would then shift to the non-movant to "rebut" the showing, by demonstrating that the affiant does possess "unique" knowledge, and that alternative sources of that knowledge have been "exhausted." *Id.* at 14, 16. If the non-movant cannot "rebut" the prima facie showing, GM proposes that only a "compelling reason" will suffice for the deposition to go forward *at all*, permitting no accommodations or half-measures.[12] *Id.* While GM perhaps has chosen the term "burden of production" to

[12] *Id. See Osborne,* 173 Ga. App. at 324 ("Because the plaintiff in the present case offered no evidence in support of its contention that the requested discovery was sought solely for harassment purposes, and because lesser restrictions than complete disallowance were available to prevent the requested discovery from being unduly burdensome, we hold that the trial court erred in disallowing the discovery altogether rather than employing such a lesser restriction.").

suggest it is not shifting the burden of proof, that is exactly what it would do, because the "rebuttal" involves convincing the court that the deponent knows more than she says she does, without the opportunity to depose the affiant. That is the only conclusion one can reach from the fact that GM considers Buchanan's fulsome showing of Ms. Barra's knowledge and involvement insufficient to rebut her incomplete and ambiguously worded two-page affidavit.

Trial courts in Georgia and elsewhere are quite familiar with making "good cause" findings. The concept underlies many of the decisions courts routinely make in managing court proceedings, whether they are reflected in a formal order or not. The term "good cause" appears in eight different provisions of the Georgia Civil Practice Act,[13] and 20 different provisions of the Federal Rules.[14] Georgia trial courts routinely use good cause as the standard for all manner of decisions, such as motions to change discovery and filing deadlines.[15] Even for a simple

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[13] *See, e.g.*, OCGA § 9-11-4 (requiring good cause for failure to comply with waiver of service and pay costs); 9-11-7.1 (good cause for discovery pending motion to dismiss on free speech grounds), 9-11-11.1 (same); § 9-11-26 (protective orders); 9-11-34 (good cause for motion to compel against non-parties), § 9-11-35 (requiring good cause for physical and mental evaluations); § 9-11-23 (two provisions of class action section).

[14] See Fed. R. Civ. P. 4(d)(2), 4(m), 6(c)(1)(C), 16(b)(2), 26(a)(3)(B), 26(b)(1), 26(b)(2)(B), 26(c)(1), 31(a)(5), 32(c), 33(b)(4), 35(a)(2)(A), 43(a), 44(a)(2)(C), 45(e)(1)(D), 47(c), 55(c), 65(b)(2), 71.1(h)(2)(C), & 73(b)(3).

[15] *See, e.g., Taylor v. Hunnicutt,* 129 Ga. App. 314 (1973) (extension of time to answer requests for admission may be granted for good cause shown and where opposite party is not prejudiced).

decision, like extension of a deadline, the movant and then the court should set out some facts that support a finding of good cause, which decision is reviewable for abuse of discretion.[16] Undersigned counsel is unaware of any other "good cause" test that puts the burden on the non-movant to establish that good cause does *not* exist.

Just as good cause tests do not shift the burden of proof, prima facie tests do not either. Consider that a defendant in a Title VII employment discrimination suit "need not persuade the court that it was actually motivated by the proffered [non-discriminatory] reasons" to rebut a plaintiff's prima facie claim. *Jones v. Valdosta Bd. of Educ*., 317 Ga. App. 771, 773–74 (2012) ("the employer's burden in the rebuttal stage is very light"). It just has to give a reason from which the finder of fact *could* conclude that discrimination was not the reason for the decision.[17] For a

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[16] *See Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir.1986) ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.").

[17] *See also Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); *St Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506 (1993) (trier of fact's rejection of employer's reasons for action is insufficient basis for judgment for plaintiff, who must still carry ultimate burden of persuasion on Title VII claim); *Miller v. Miller*, 258 Ga. 168, 169-70 (1988) (prima facie showing in paternity suit does not shift burden of proof); *Evans v. DeKalb Cty. Hsp. Auth.,* 154 Ga. App. 17, 19 (1980) (defendant in malpractice suit did not have the burden to prove the alternative cause of death it offered in rebuttal; burden of proof remains on plaintiff).

good cause analysis, there is no rebuttal or other obligation at all on the non-moving party. Yet GM here demands that Buchanan overcome a presumption that depositions of high-ranking officers are inherently harassing, while submitting no evidence of the imposition on Ms. Barra herself. This is not a prima facie analysis, and it is not a good cause analysis. It is a radical overhaul of Section 9-11-26. This Court should not displace the intent of the legislature and adopt GM's atextual arguments.

B. The Apex Test Unfairly Privileges Large Corporations and Frustrates Legitimate Discovery.

Any rule that the Court adopts will apply to companies of all shapes and sizes, including cases where companies sue individuals, individuals sue companies, and where companies of all shapes and sizes sue each other. But the most serious impacts will be in David versus Goliath cases, such as when an individual like Buchanan sues a multinational company like General Motors. Companies the size of GM may have hundreds or even thousands of "apex" officers that it could attempt to shield from discovery under an apex rule. A special rule for one class of litigants puts a thumb on the scale in favor of the biggest corporations, allowing

them the benefit of Georgia's liberal discovery rules while they restrict and direct the discovery of their opponents.[18]

An inflexible, formalistic limitation on the trial court's discretion is neither necessary nor appropriate. Even where companies are evenly matched, a strict apex rule would pose serious discovery problems that likely would require repeated court involvement. That was evident in *Apple Inc. v. Samsung Elec. Co., Ltd*, 282 F.R.D. 259 (N.D. Cal. 2012), a patent infringement action, where Samsung lodged "apex objections" to Apple's notices of deposition for six employees, arguing that Apple could not establish that the testimony it sought was unique, or that it had exhausted other sources of the information sought. *See id.* at 262.

The court registered its reservations about the apex doctrine: "the court finds the doctrine's common application to the classic paradigm of a single-hierarchy corporate structure to be ill-suited to determining apex status and the resulting bounds of appropriate discovery in the case of a large, multi-national corporation."

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[18] *See First Nat. Bank of Cicero v. Reinhart Vertrieb's AG*, 116 F.R.D. 8, 9-10 (N.D. Ill. 1986) ("[I]t would be unfair to require plaintiff to use a restricted discovery process while defendant takes full advantage of the liberal discovery provisions of the Federal Rules," ruling defendant had not shown anything that would "justify this inequity"); *In re Honda American Motor Co*., 168 F.R.D. 535, 539 (D. Md. 1996) (stating it would be "patently unfair to constrain plaintiffs' ability to discover facts necessary to make their case" through limits on depositions of corporations managing agents, as the scope of plaintiffs discovery would be limited, while defendant enjoyed "free reign to discover all relevant facts" under the Rules of Procedure).

Id. at 263. It warned that the apex doctrine may "become a tool for evading otherwise relevant and permissible discovery." *Id.* Instead, the court addressed the questions of burden and materiality as part of a good cause analysis, which is exactly what the trial court did in this case.

It is worth considering the absurd result that could have obtained if the court in *Apple* had applied the maximalist apex doctrine – including "exhaustion" and "uniqueness" – that GM demands. Samsung could have dictated to Apple which employees had "unique" testimony and which did not, and how many depositions Apple would have to take to "exhaust" alternative sources before it could "prove" the need for others. Every deposition notice of a corporate employee likely would result in fact-intensive motion practice. The *Apple* court recognized this absurdity and ruled on the discovery issues at hand with a full knowledge of the case and of what made sense at a particular point in time.

This is not an overstatement of what courts can expect under GM's proposed apex regime. GM protests that there are "at least 30 *other* individuals at GM who were involved in the 2018 investigation, none of whom had been deposed at the time of the hearing on the motion for protective order." NT Brief at 28. How many of these 30 individuals does Buchanan have to depose to establish "exhaustion," and that Ms. Barra's testimony is "unique," instead of the one three-hour deposition of Ms. Barra at issue here? *Id*. Suffice it to say that 30 depositions

instead of 3/7 of one is hardly an efficient result.[19] How many of these 30 people would GM consider to be "apex" executives, who could clog up the trial court's docket with "apex" motions? GM is proposing a comprehensive rewrite of § 9-11-26, including § 9-11-26(b), which sets out the relevance standard for discovery, § 9-11-26(c), which requires the movant to show good cause for a protective order, and OCGA § 9-11-26(d), which allows parties to determine the sequence and methods of discovery they pursue.

At its core, the apex doctrine amounts to a Catch-22. It is unreasonable to expect a party to prove, through a detailed evidentiary showing, what it will "discover" in discovery, what someone knows without the opportunity to depose them, or that the information it has not yet gotten can only be obtained from one person. Discovery does not take place in a world of such absolutes and certainties. That is not to say that there may be cases where it is clear that discovery appears duplicative or unnecessary, or at least likely enough that it makes sense to defer certain discovery until other discovery is completed, as the Fifth Circuit did in *Salter v. Upjohn Co.,* 593 F.2d 629 (1979), a case that GM misreads as supporting

[19] It is also notable that the "Valukas Report" that GM commissioned included hundreds of interviews of individuals with relevant information. V4 702-709.

an apex doctrine. A trial court needs the flexibility that § 9-11-26 provides to make these judgment calls.

This Court has repeatedly rejected similar misconceptions about Georgia law regarding discovery. "Uniqueness" is not the standard for discovery in Georgia. Relevance is. In *Bowden v. The Medical Center, Inc.,* 297 Ga. 285 (2015), the Court of Appeals reversed a trial court's order compelling production of a hospital's pricing agreements with insurance companies, based in part on the reasoning that the information was available from other sources. This Court rejected that reasoning: "The availability of one form of proof does not make other forms of proof irrelevant under OCGA § 9-11-26(b)(1)." *Id.* at 296. Although Bowden might be able to prove that prices were unreasonable through analysis from other sources, this Court recognized that "more directly applicable information of that type" from the defendant "would be even more relevant." *Id.* The discovery sought was not unique, but it was relevant, and it was the discovery that Ms. Bowden thought would best make her case, and so she was entitled to pursue it. *See also Hampton Island Founders v. Liberty Capital,* 283 Ga. 289, 296 (2008) (reversing order denying production of documents; trial court's reasoning that party already had the discovery it needed violated § 9-11-26(b)(1)).

Moreover, *who* knows certain facts may be just as important as the facts themselves. The fact that a CEO knows something is different from and likely

"more directly applicable information" than the fact that a middle manager knows about it. Senator Howard Baker's famous questions of President Nixon during Watergate, "What did the President know, and when did he know it?" is certainly apt here. The question of what Ms. Barra knew and when she knew it goes directly to the egregiousness of GM's conduct and may inform a jury verdict on punitive damages. As one court remarked in rejecting a motion to block the deposition of a company president, "individuals with greater authority may have the final word on why company undertakes certain actions, and the motives underlying those actions."[20]

No deponent should be able to escape discovery merely by submitting an affidavit attesting to their lack of knowledge. Such a privilege is foreign to Georgia's discovery rules. A live deposition is an essential discovery tool precisely because such witnesses may not be forthright, or they may have their recollection refreshed by skillful questioning and review of relevant documents. "[I]f the good

[20] *Rolscreen 23 v. Pella Products of St. Louis, Inc*., 145 F.R.D. 92, 97 (S.D. Iowa 1992). *See also Serrano,* 699 F.3d at 902 (high-level corporate awareness of discrimination "is likely to be highly probative"); *BlueMountain Credit Alternatives Master Fund L.P. v. Regal Entertainment Grp*., 465 P.3d 122, 133 (Colo. App. 2020) (rejecting apex doctrine, finding chief executive "may be the best possible witness to testify about his intent"); *Travelers Rental Co., Inc. v. Ford Motor Co*., 116 F.R.D. 140, 142 (D. Mass. 1987) (requiring testimony of Ford Motor's President, Executive Vice President, and General Manager of Parts and Services, as when motive behind corporate decisions are at issue, the plaintiff is entitled to depose the corporate officials who approved or administered the plan, rejecting Ford's apex argument).

cause requirement could be thus met by an ex parte affidavit that the affiant had no relevant knowledge of the subject matter of the action the salutary purpose of Rule 26, providing for unlimited discovery would be easily and unjustifiably frustrated." *Parkhurst v. Kling*, 266 F. Supp. 780, 781 (E.D. Pa. 1967). That is certainly the case here, where Ms. Barra's affidavit about her level of knowledge appears to conflict with other information in the record.

Both the "exhaustion" and "uniqueness" requirements would result in all manner of gamesmanship, allowing corporate defendants to play a shell game with their opponents' deposition notices, and to dictate their opponents' discovery strategy, forcing them to expend resources on depositions they do not want to take, which again, is precisely the result GM demands here. Only the trial court can make the call about whether and to what extent a particular deposition constitutes an "undue burden" on the specific facts before it, and the proper remedy. There is no support in Georgia law for imposing a burden to prove "uniqueness" or "exhaustion" on the non-movant. It will frustrate reasonable and efficient discovery in civil litigation.

C. This Court Should Not Adopt the Apex Doctrine Because it Is Inefficient, Inequitable, and Unnecessary.

Corporate proponents of the so-called "apex doctrine" assume that depositions of CEOs and other high-ranking officers are inherently harassing and worthy of suspicion, because these individuals' time is exceptionally valuable, and

they are least able to accommodate the demands of civil litigants. There is an element of class- and income-based entitlement in this assertion that should not go unexamined by this Court.

Is a three-hour deposition a greater burden on Ms. Barra than it would be on a parent who lives paycheck to paycheck, and may lose essential income? Ms. Barra has remarked that she prioritizes her family in setting her work hours, and that is certainly laudable.[21] But many working families do not have that luxury. They do not get to set their work hours,[22] and many working families struggle to find affordable child care.[23] No one has ever proposed anything like an "apex doctrine" for working parents, the indigent, or individuals with disabilities. What

[21] *See supra* note 9.

[22] For example, in the retail and food services industries, over three quarters of workers report that they have little to no input into their work schedules. *See* Daniel Schneider & Kristen Harknett, It's About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality, Shift Project 1 (Oct. 2019), https://bit.ly/3zw3KzM (viewed Jan. 6, 2022).

[23] "Currently, the average family with at least one child under age 5 spends roughly 13% of their income on child care, making it unaffordable to most families." Megan Cerullo, With Child Care Unaffordable, May Parents Struggle to Stay Employed, CBS News, Oct. 12, 2021, https://cbsn.ws/3J60Dme (last viewed Dec. 15, 2021).

every deponent deserves is what § 9-11-26(c) expressly provides: an opportunity to show good cause for accommodations.

An adage that is no doubt familiar to General Motors is fitting here: If it ain't broke, don't fix it. GM and amici celebrate the wonderful business climate that prevails in Georgia. Yet they also warn of a parade of horribles that will plague corporations and Georgia courts if the apex doctrine is not adopted. That only begs the question of why, during the decades that Georgia has existed without an apex rule, the state has not seen that parade already. All GM offers is a parade of hypotheticals. Where are the cases of CEOs who had to submit to endless fishing expeditions? The only conclusion that the Court should reach from the affidavit of Ms. Barra, and the entire case record, is that there is no problem to fix. The good cause requirement for a protective order is the proper legal standard, and Georgia courts apply it as they see fit.

This lawsuit began in 2016. Buchanan requested Ms. Barra's deposition in August 2019, almost two and a half years ago. GM's proposed apex doctrine violates the founding principle of the Georgia Civil Practice Act, set forth in OCGA § 9-11-1: "This chapter shall be construed to secure the just, speedy, and inexpensive determination of every action." The fact that this Court is considering a deposition that the plaintiff wanted to take so long ago is reflective of how the apex doctrine fails to construe the Georgia Civil Practice Act as § 9-11-1 requires.

Converting every deposition of a corporate officer into a multi-pronged, burden-shifting evidentiary hearing, reviewable as a matter of law,[24] will only slow down litigation further and strain the resources of parties and the courts.

Conclusion

OCGA § 9-11-26 provides trial courts with all the tools they need to address the legitimate concerns of deponents, including high-ranking executives. This Court should not rewrite that statutory standard, especially not in this case, where the lower courts properly accommodated the needs of both parties.

The Court should affirm the decision of the Court of Appeals.

Date: January 19, 2022

Respectfully submitted,

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(SIGNATURES CONTINUE ON NEXT PAGE)

[24] *See General Motors, LLC v. Buchanan,* 359 Ga. App. 412, 415 (2021) (noting General Motors' position that failure to properly consider apex factors constitutes error as a matter of law, not an abuse of discretion). That is clearly what GM contemplates, given its contention that "there is no need for a remand in this case to permit the trial court to exercise its discretion again." NT Brief at 29.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, I filed a copy of this **AMICUS CURIAE BRIEF OF PUBLIC JUSTICE IN SUPPORT OF APPELLEE** using this Court's electronic filing system.

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