

IN THE SUPREME COURT OF MISSOURI

No. SC83933

STATE OF MISSOURI, ex rel. FORD MOTOR COMPANY,

Realtor,

v.

THE HONORABLE EDITH L. MESSINA,
Circuit Court of Jackson County, Missouri, at Kansas City,

Respondent.

ON PETITION FOR WRIT OF PROHIBITION FROM
THE CIRCUIT COURT OF JACKSON COUNTY

**BRIEF OF AMICUS CURIAE ON BEHALF OF MELINDA DAINA
BILLINGSLEY, INDIVIDUALLY AND AS NEXT FRIEND OF ANTHONY RAY
BILLINGSLEY, AND JOHN T. AND ELEANOR BILLINGSLEY**

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INTEREST OF AMICUS CURIAE

Melinda Daina Billingsley, individually, Melinda Daina Billingsley, as next friend of Anthony Ray Billingsley, and John T. and Eleanor Billingsley, as *amicus curiae* ("Billingsleys"), submit this brief in opposition to relator Ford Motor Company's Petition for Writ of Prohibition and in support of respondent, the Honorable Edith L. Messina, Circuit Judge of the Circuit Court of Jackson County, Missouri.

The Billingsleys have filed suit against Ford Motor Company in a cause entitled *Melinda Daina Billingsley, Individually, Melinda Daina Billingsley, as next friend of Anthony Ray Billingsley, and John T. and Eleanor Billingsley v. Ford Motor Company*, Case No. CV795-42CC, in the Circuit Court of Polk County, Missouri. Melinda Daina Billingsley, John Billingsley II, and Anthony Ray Billingsley were traveling in a 1988 Ford Bronco II on Highway 123 in Polk County, Missouri on May 6, 1992, when the Bronco II rolled over after John, the driver, performed a steering maneuver to avoid another vehicle. As a result of the rollover, John was killed and Melinda and Tony received serious injuries. The Billingsleys brought the product liability action against Ford for the injuries, death and resulting damages sustained as a direct result of the defective and unreasonably dangerous design of the Bronco II which caused the rollover.

The Billingsleys' primary purpose in filing this *amicus curiae* brief is to express to the Court their view regarding the necessity of proceeding with the depositions of three of Ford's top executives who were responsible for making the decision to produce, or to

continue to produce, the unreasonably dangerous Bronco II. The three executives were to be deposed in the Polk County case at the same time they were deposed in the instant case. The Billingsleys believe that it is not only in their best interest for the depositions to go forward, but it is also in the interest of all Missouri citizens that corporate officials be made to answer for their decisions that cause death and misery to the citizens of our state.

JURISDICTIONAL STATEMENT

The Billingsleys adopt the jurisdictional statement submitted by the Respondent.

STATEMENT OF FACTS

On July 5, 2001, counsel for Maria Church, plaintiff in the underlying action in the instant case, served a notice to take the depositions of four of Ford's top executives. The depositions were to be conducted on August 6-8, 2001. On July 18, 2001, the Billingsleys cross-noticed the same executives for deposition at the same times, dates and location of the Church depositions. The executives were thereafter noticed for the same times, dates and location in a third Bronco II rollover case pending in Jackson County. The depositions were coordinated in the three cases in order to accommodate Ford's executives.

Ford moved for a protective order and the Respondent denied the motion. Thereafter, Ford sought a writ of prohibition in the Missouri Court of Appeals, Western District, but the court denied the writ. Ford has now petitioned this Court for a writ of

prohibition to prevent its executives from having to give depositions in the State of Missouri.

POINT RELIED ON

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR EXCEED ITS JURISDICTION IN OVERRULING FORD'S MOTION FOR PROTECTIVE ORDER TO PREVENT PLAINTIFFS FROM TAKING THE DEPOSITION OF ITS TOP EXECUTIVES BECAUSE:

A. FORD FAILED TO CARRY ITS BURDEN TO DEMONSTRATE THE DISCOVERY WAS AN ANNOYANCE, EMBARRASSMENT, OPPRESSION OR UNDUE BURDEN ON FORD'S EXECUTIVES.

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998)

Richardson v. State Highway & Transp. Com'n, 863 S.W.2d 876 (Mo. banc 1993)

State ex rel. Lohman v. Personnel Advisory Bd., 948 S.W.2d 701 (Mo. App. 1997)

State ex rel. Plank v. Koehr, 831 S.W.2d 926 (Mo. banc 1992)

B. THE KNOWLEDGE, MOTIVE AND MENTAL STATE OF FORD'S TOP EXECUTIVES IS VITAL IN THIS PRODUCT LIABILITY CASE SEEKING PUNITIVE DAMAGES WHERE FORD PRODUCED AND SOLD THE DANGEROUS PRODUCT (AND FAILED TO RECALL IT) AND ITS EXECUTIVES KNEW OF THE PRODUCT'S DANGEROUS CHARACTERISTICS.

Travelers Rental Co., Inc. v. Ford Motor Company, 116 F.R.D. 140 (D. Mass. 1987)

Rolscreen Company v. Pella Products of St. Louis, Inc., 145 F.R.D. 92 (S.D. Iowa 1992)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR EXCEED ITS JURISDICTION IN OVERRULING FORD'S MOTION FOR PROTECTIVE ORDER TO PREVENT PLAINTIFFS FROM TAKING THE DEPOSITION OF ITS TOP EXECUTIVES BECAUSE:

A. FORD FAILED TO CARRY ITS BURDEN TO DEMONSTRATE THE DISCOVERY WAS AN ANNOYANCE, EMBARRASSMENT, OPPRESSION OR UNDUE BURDEN ON FORD'S EXECUTIVES.

Ford seeks an extraordinary writ in this Court which would command the trial court to enter a protective order preventing the depositions of three¹ of Ford's corporate executives. Such a remedy is only appropriate when the lower court has clearly acted without jurisdiction or in excess of its jurisdiction. *State ex rel. Lohman v. Personnel Advisory Bd.*, 948 S.W.2d 701, 703 (Mo. App. 1997). This Court reviews a lower court's actions regarding pre-trial discovery for an abuse of discretion. *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. banc 1998). An abuse of discretion occurs only when the trial court's ruling is "clearly against the logic of the circumstances" and is "so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration." *Richardson v. State Highway & Transp. Com'n*, 863 S.W.2d 876, 881

¹The three individuals are Jac Nasser (president), Tom Baughman (vice-president) and John Rinitamaki (vice-president). Ford originally objected to producing a fourth

(Mo. banc 1993). Ford has failed to carry its burden to demonstrate, in the instant case, that the trial court abused its discretion in denying Ford's motion for a protective order.

Rule 56.01(b)(1) of the Missouri Rules of Civil Procedure provides for liberal discovery. A party may "obtain discovery regarding any matter, not privileged" so long as the "information sought appears reasonably calculated to lead to the discovery of admissible evidence." This Court has repeatedly held that the rules of discovery should be construed broadly to facilitate a full and open exchange of information prior to trial. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992). The days of "trial by ambush" are long gone in Missouri courts.

The breadth of discovery, however, is not limitless. A party who feels aggrieved by a discovery request may petition the trial court for a protective order limiting the scope of discovery. Rule 56.01(c) provides the procedure:

Protective Orders. 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 . . .

The burden to establish this narrow exception to open discovery is on the party seeking protection. *Kingsley v. Kingsley*, 716 S.W.2d 257, 260 (Mo. banc 1986). The party opposing discovery must demonstrate that good cause exists for limiting the open

individual, Ernest Grush, but has now withdrawn that objection.

exchange of information contemplated by the Missouri Rules of Civil Procedure. *Brown v. McIBS, Inc.*, 722 S.W.2d 337, 342-43 (Mo. App. 1986). Good cause cannot be established by an unsupported plea of hardship or ignorance. *Id.* The movant for a protective order must present evidence demonstrating the need for relief under rule 56.01(c). *Id.*

It is common in the context of depositions of corporate officers for the corporation to move for a protective order claiming that the top management knows nothing about the facts of the individual case in which the deposition notice was issued. Ford has done so in this case. Courts across the country have held that such "know nothing" affidavits are not sufficient to carry the movant's burden for a protective order. The court in *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121, 122 (D. Conn. 1974), held that a party has the right to test the affiant's claimed lack of knowledge and is not bound by unsupported statements in an affidavit. Moreover, the fact that an executive has a busy schedule does not prevent the executive from being deposed. *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.*, 2001 WL 1033571 (S.D.N.Y. Sept. 6, 2001). According to the court in *Kuwait Airways Corp. v. American Security Bank, N.A.*, 1987 WL 11994 (D.D.C. 1987), the "overwhelming authority" supports the proposition that a "know nothing" affidavit is insufficient to prevent the taking of the corporate official's deposition. Each of the following cases so holds:

1. *A.I.A. Holdings v. Lehman Brothers, Inc.*, 2001 WL 1538003 (S.D.N.Y.

Oct. 17, 2000) (corporate chairman deposition to go forward despite "know nothing" affidavit).

2. *Naftchi v. New York University Medical Center*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997) (it does not matter if witness is busy or claims to lack knowledge -- party seeking deposition is entitled to test witness's asserted lack of knowledge).
3. *Taylor v. National Consumer Cooperative Bank*, 1996 WL 525322 (D.D.C. 1996) (plaintiff was entitled to depose bank CEO and President and test executive's professed ignorance).
4. *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 149 F.R.D. 686, 696 (E.D. Wisc. 1993) (corporate president's heavy workload and international travel were not enough to grant protective order).
5. *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984) (President of CBS must give deposition despite fact that he had busy schedule, and claimed to have little knowledge).
6. *Less v. Taber Instrument Corp.*, 53 F.R.D. 645, 647 (W.D.N.Y. 1971) (Chairman/CEO can be deposed despite fact that he claimed he had no knowledge and had busy schedule).
7. *Overseas Exchange Corp. v. Inwood Motors, Inc.*, 20 F.R.D. 228 (S.D.N.Y. 1956) ("know nothing" affidavit was no reason to prevent deposition).

8. *Horsewood v. Kids "R" Us*, 1998 WL 526589 (D. Kan. Aug. 13, 1998)(fact that executive was too busy to give deposition and that he claimed to have little knowledge was not sufficient to carry movant's burden for protective order).

The authority is indeed overwhelming establishing the principle that neither inconvenience nor feigned ignorance will suffice to preclude the deposition of a corporate executive. Ford has not carried its burden in the instant case and, accordingly, this Court should deny its petition for writ of prohibition.

B. THE KNOWLEDGE, MOTIVE AND MENTAL STATE OF FORD'S TOP EXECUTIVES IS VITAL IN THIS PRODUCT LIABILITY CASE SEEKING PUNITIVE DAMAGES WHERE FORD PRODUCED AND SOLD THE DANGEROUS PRODUCT (AND FAILED TO RECALL IT) AND ITS EXECUTIVES KNEW OF THE PRODUCT'S DANGEROUS CHARACTERISTICS.

The instant case, as well as the companion cases where discovery is sought, each involve roll-overs of Ford's Bronco II sport utility vehicle. The unstable handling properties of the Bronco II have been known by Ford for years. Despite Ford's knowledge that the Bronco II was dangerous and that it was causing catastrophic injuries and deaths to Ford's customers, Ford continued to sell the dangerous product to the unknowing public without warning of the product's dangerous characteristics or making

any attempt to recall the product. This was a conscious decision by Ford's executives at the highest level. Discovery of this information from the executives responsible for Ford's actions is a vital step in proving a punitive damages case². It is understandable that Ford wishes to avoid this discovery.

Ford sought protection in the lower court claiming that its executives know nothing and, moreover, they were too busy and important to be bothered with depositions in personal injury cases. Having lost below, Ford asks this Court to adopt a blanket rule precluding any discovery on top corporate officers in the absence of a showing that such officers have unique or superior knowledge to that of lower-ranking employees and that less intrusive means have been exhausted -- a so-called "apex" rule. The Court need not make such a sweeping policy decision, essentially eliminating all trial court discretion, in the context of this case. Even courts which have recognized a need to protect corporate officers under certain circumstances do not extend the privilege when the motives and reasoning behind corporate policy decisions are at issue. That is exactly what is at issue in the instant case (and the companion cases). Just what was Ford thinking when it

²M.A.I. 10.04 [1983 New] provides for punitive damages in a product liability case if "the defendant knew of the defective condition and danger of the product" and, by selling the product with such knowledge, the defendant "showed complete indifference to or conscious disregard for the safety of others."

continued selling Bronco IIs when it knew the dangerous vehicle was killing and maiming thousands of people a year?

Travelers Rental Co., Inc. v. Ford Motor Company, 116 F.R.D. 140 (D. Mass. 1987), a case which Ford should recognize, illustrates the principle at issue in the instant case. *Travelers* was a price discrimination case wherein Ford was alleged to have given special deals to Travelers' competitors. Travelers noticed up four top Ford officials for deposition seeking to investigate Ford's motives for engaging in the illegal pricing plan. Of course, Ford resisted the discovery. The court refused to give the Ford officials protection, reasoning as follows:

When the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action. Thus, the plaintiff in this case is entitled to depose those corporate officials of Ford who approved and/or administered the plan.

Id. at 142. The fact that the officers had filed affidavits claiming to know nothing (or very little) was of no import. The plaintiff, the court held, has the right to test such blanket *tabula rosa* assertions. *Id.* at 143.

Similarly, in *Rolscreen Company v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92 (S.D. Iowa 1992), the court refused to grant protection to the plaintiff's president where the issue of the company's motivation was relevant. "Although Bevis' deposition

testimony may prove to be duplicative in some respects from that provided by lower ranking executives, individuals with greater authority may have the final word on why a company undertakes certain actions, and the motives underlying those actions." *Id.* at 97.

The defense bar has for years been concerned with developing a strategy to prevent discovery on the top executives of their corporate clients. In an article entitled "How to Avoid, Control or Limit Depositions of Top Executives", the authors concede that "if the motives behind a corporate action are at issue and the opposing party seeks to depose executives who approved the action, then a court may allow the deposition." 63 *Def.Couns.J.* 213, 214 (April 1996). This is exactly the teaching of the *Travelers* and *Rolscreen* cases and makes absolute sense. Who is in a better position to explain to a jury why his company knowingly sacrificed the lives of thousands of customers for a profit than the president of the company?

Ford (and *amicus curiae*) argue that it is inconvenient for its executives to spend a day in a deposition. In the extreme, they argue, Ford and other corporation will be paralyzed by hordes of plaintiff's lawyers seeking to extort larger settlements through harassment. The Court should recognize this as pure hyperbole. If this were a fraction of the problem the alarmists claim, why is there not one reported case in the annals of Missouri law addressing it? At bottom, the matter is best left in the hands of the trial court who is better equipped to weigh the competing interests on a case-by-case basis and exercise sound judicial discretion. This has been the practice in the Missouri for 180

years and no compelling reason exists to change it now.

The only Missouri cases that Ford can find to cite to the Court are *Fogelbach v. Director of Revenue*, 731 S.W.2d 512 (Mo. App. 1987), and *Binkley v. Palmer*, 10 S.W.3d 166 (Mo. App. 1999). Neither case is remotely similar to the issue before the Court today. *Fogelbach* involved a situation where a person whose license was revoked because of driving while intoxicated noticed the deposition of the Director of Revenue in the trial de novo. When the director did not appear, the trial court ordered the driver's license reinstated. This trick worked until the case reached the Court of Appeals. The appellate court rightly held that the purposes of Missouri's DWI law would be completely frustrated if licensees were permitted to escape sanctions based upon this clever technicality. This case was decided purely on the public policy of the State of Missouri in vigorously prosecuting drunk drivers. It had little, if anything, to do with protecting the Director of Revenue.

Binkley involved a situation where the plaintiff claimed he needed more time to respond to defendant's motion for summary judgment. Although plaintiff claimed in a conclusory affidavit he needed the deposition of Arnold Palmer, no facts or evidence were presented demonstrating such need. The court exercised its discretion and granted summary judgment. The case had nothing to do with protecting Arnold Palmer from a deposition. If anything, *Binkley* is more supportive of Respondent's position than Ford's. Ford supplied conclusory affidavits similar to that filed by the plaintiff in *Binkley*. The

trial court rejected the unsupported affidavits in both cases. There was no abuse of discretion in *Binkley* and there was no abuse of discretion in the instant case.

Of course, there will be some inconvenience to Ford's executives in responding to questions concerning their decision to market dangerous products. This is as it should be.

The persons killed and maimed by the dangerous products have been inconvenienced too. Justice requires that major corporations, just like individuals, should answer for their actions. The Court should deny Ford's petition for a writ of mandamus/prohibition and permit discovery to proceed in the instant case.

CONCLUSION

This is not the case for the Court to make a blanket determination that corporate officials are too busy or too ill-informed to respond to a deposition in a product liability case where punitive damages are sought. Ford failed to carry its burden in the trial court to demonstrate that its executives know nothing. The trial court exercised its broad discretion wisely in rejecting Ford's plea of ignorance. Moreover, the information sought from these executives is exclusively within their domain -- why do you sell products you know are dangerous? The Court should deny Ford's Petition for Writ of Prohibition.

CERTIFICATE

I hereby certify that:

1. Two copies of the foregoing brief were express mailed this 3rd day of November, 2001, to: (a) John F. Murphy, Shook, Hardy & Bacon, L.L.P., One Kansas City Place, 1200 Main Street, Kansas City, Missouri 64105, Tel. (816) 474-6550; (b) Andrew Ashworth, Snell & Wilmer, L.L.P., One South Church Avenue, Ste. 1500, Tucson, Arizona 85701-1630, Tel. (520) 882-1200; (c) The Honorable Edith L. Messina, Sixteenth Judicial Circuit Court, Jackson County, Missouri, 415 East 12th Street, Kansas City, MO 64106, Tel. (816) 881-3612; (d) Randy W. James, Risjord & James, P.C., 218 Northeast Tudor Road, Lee's Summit, MO 64086, Tel. (816) 554-1500; and (e) Douglas R. Horn, The Horn Law Firm, 4741 South Arrowhead Drive, Ste. B, Independence, MO 64055, Tel. (816) 795-7500.
2. The foregoing brief complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure.
3. The foregoing brief contain 3558 words.
4. The foregoing brief submitted on floppy disk has been scanned for viruses and that it is virus free.

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