

IN THE SUPREME COURT OF MISSOURI

No. SC83933

STATE OF MISSOURI *ex rel.* FORD MOTOR COMPANY,

Relator,

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
PRODUCT LIABILITY ADVISORY COUNCIL, INC.**

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 3

INTEREST OF AMICUS CURIAE 7

JURISDICTIONAL STATEMENT 8

STATEMENT OF FACTS 8

POINT RELIED ON 8

ARGUMENT 9

 I. Relator Ford Motor Company Is Entitled to an Order
 Prohibiting Respondent From Enforcing Her Discovery Orders of
 August 3, 2001 and August 17, 2001 Requiring Relator to Produce
 Its Chief Executive Officer and President and Other Senior
 Management Employees for Depositions Because Respondent
 Abused Her Discretion in Issuing Her Orders in That Plaintiffs
 Failed to Show That These Top Ford Officials Have Unique or
 Superior Knowledge About the Firestone Matter on Which Plaintiffs
 Seek Discovery, Plaintiffs Have Not Attempted to Obtain Discovery
 Concerning the Firestone Matter Through Less Intrusive Methods,
 and Plaintiffs Have Not Shown That Less Intrusive Discovery
 Methods Are Unsatisfactory, Insufficient, or Inadequate for Any
 Legitimate Purpose of Discovery 9

A.	Missouri Law Does Not Afford Litigants an Unfettered Right to Whatever Discovery They Want.....	11
B.	Trial Courts Have an Affirmative Obligation to Prevent the Misuse of Discovery	11
C.	Trial Courts Must Balance the Need for Discovery Against the Burden and Intrusiveness Involved in Furnishing the Discovery	12
D.	Apex Depositions Are Permissible Only When High- Ranking Corporate Officers Have Unique or Superior Knowledge of Discoverable Information or Litigants Have Already Exhausted Less Intrusive Discovery Method That Turn Out to Be Unsatisfactory, Insufficient, or Inadequate.....	14
E.	This Court Should Adopt the Apex Deposition Guidelines Set Forth in <i>Crown Central</i> and <i>Daisy Mfg.</i>	20
F.	Ford Is Entitled to a Writ of Prohibition.....	23
	CONCLUSION	28
	CERTIFICATE OF SERVICE	29
	CERTIFICATE OF COMPLIANCE	30

TABLE OF AUTHORITIES

CASES

<i>Armstrong Cork Co. v. Niagara Mohawk Power Corp.</i> , 16 F.R.D. 389 (S.D.N.Y. 1954).....	15
<i>Baine v. General Motors Corp.</i> , 141 F.R.D. 332 (M.D. Ala. 1991).....	14
<i>Binkley v. Palmer</i> , 10 S.W.3d 166 (Mo. App. 1999)	22
<i>Boales v. Brighton Builders, Inc.</i> , 29 S.W.3d 159 (Tex. App. 2000)	25-26
<i>Broadband Communications Inc. v. Home Box Office, Inc.</i> , 549 N.Y.S.2d 402 (App. Div. 1990)	14-15
<i>Crown Central Petroleum Corp. v. Garcia</i> , 904 S.W.2d 125 (Tex. 1995)	9, 14-15, 21
<i>In re Alcatel USA, Inc.</i> , 11 S.W.3d 173 (Tex. 2000).....	24-25
<i>In re Daisy Mfg. Co., Inc.</i> , 17 S.W.3d 654 (Tex. 2000).....	9, 14, 21
<i>In re Daisy Mfg. Co.</i> , 976 S.W.2d 327 (Tex. App. 1998)	27
<i>Fogelbach v. Director of Revenue</i> , 731 S.W.2d 512 (Mo. App. 1987).....	9, 16-17, 20-22
<i>Kingsley v. Kingsley</i> , 601 S.W.2d 677 (Mo. App. 1980)	13
<i>Liberty Mutual Insurance Co. v. Superior Court</i> , 13 Cal.Rptr.2d 363 (Cal. App. 1992).....	9, 14-16, 21, 23
<i>M.A. Porazzi Co. v. The Mormaclark</i> , 16 F.R.D. 383 (S.D.N.Y. 1951).....	15

<i>Mischia v. St. John's Mercy Medical Center,</i>	
30 S.W.3d 848 (Mo. App. 2000)	11-12
<i>Mitchell v. American Tobacco Co.,</i> 33 F.R.D. 262 (M.D. Pa. 1963).....	15
<i>Monsanto Co. v. May,</i> 889 S.W.2d 274 (Tex. 1994).....	10, 16
<i>Mulvey v. Chrysler Corp.,</i> 106 F.R.D. 364 (D.R.I. 1985)	15
<i>Salter v. Upjohn Co.,</i> 593 F.2d 649 (5th Cir. 1979).....	15
<i>Simon v. Bridewell,</i> 950 S.W.2d 439 (Tex. App. 1997)	25-26
<i>State ex rel. Anheuser v. Nolan,</i> 692 S.W.2d 325 (Mo. App. 1985).....	12-13, 22
<i>State ex rel. Atchison, Topeka and Santa Fe Railway Co. v.</i>	
<i>O'Malley,</i> 898 S.W.2d 550 (Mo. banc 1995)	23
<i>State ex rel. Chaney v. Franklin,</i> 941 S.W.2d 790 (Mo. App. 1997).....	13
<i>State ex rel. Jones v. Syler,</i> 936 S.W.2d 805 (Mo. banc 1997).....	23
<i>State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan,</i>	
777 S.W.2d 247 (Mo. App. 1989)	11
<i>State ex rel. Lester E. Cox Medical Centers v. Darnold,</i>	
944 S.W.2d 213 (Mo. banc 1997).....	23
<i>State ex rel. Madlock v. O'Malley,</i>	
8 S.W.3d 890, 891 (Mo. banc 1999).....	11, 22-23
<i>State ex rel. Peabody Coal Co. v. Clark,</i>	
863 S.W.2d 604 (Mo. banc 1993).....	23
<i>State ex rel. Pitts v. Roberts,</i> 857 S.W.2d 200 (Mo. banc 1993)	23

<i>State ex rel. Plank v. Koehr</i> , 831 S.W.2d 926 (Mo. banc 1992).....	23
<i>State ex rel. Polytech, Inc. v. Voorhees</i> ,	
895 S.W.2d 13 (Mo. banc 1995).....	23
<i>State ex rel. Stecher v. Dowd</i> , 912 S.W.2d 462 (Mo. banc 1995).....	23
<i>State ex rel. Tracy v. Dandurand</i> , 30 S.W.3d 831 (Mo. banc 2000)	23
<i>State ex rel. Von Pein v. Clark</i> , 526 S.W.2d 383 (Mo. App. 1975).....	13
<i>State ex rel. Wilfong v. Schaeperkoetter</i> ,	
933 S.W.2d 407 (Mo. banc 1996).....	23
<i>State ex rel. Woytus v. Ryan</i> , 776 S.W.2d 389 (Mo. banc 1989).....	11-12
<i>Thomas v. International Business Machines</i> ,	
48 F.3d 478 (10th Cir. 1995).....	14
<i>Travelers Rental Co., Inc. v. Ford Motor Co.</i> ,	
116 F.R.D. 140 (D. Mass. 1987)	15
<i>VBM Corp., Inc. v. Marvel Enterprises, Inc.</i> ,	
842 S.W.2d 176 (Mo. App. 1992)	12

RULES

Missouri Rule of Civil Procedure 56.01	12, 18, 20
--	------------

OTHER AUTHORITIES

4 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 26.69
at p. 26-433 (1990)..... 19

Michael Hoenig, “Apex” Depositions; Excessive Award for
“Suffering,” N.Y.L.J., Sept. 11, 1995..... 15

Michael Hoenig, *Depositions of High Corporate Executives*,
N.Y.L.J., Dec. 14, 1992..... 15

The Product Liability Advisory Council, Inc., as *amicus curiae*, submits this brief in support of Relator Ford Motor Company's Petition for Writ of Prohibition.

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 124 corporate members representing a broad cross-section of American and international product manufacturers. A list of PLAC's corporate members is included in the Appendix to this brief. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court. The issue before the Court in this matter is one that has been and continues to be of significant concern to the many members of PLAC who are involved in product liability litigation in both Missouri and throughout the United States. PLAC is acutely aware of the practical ramifications of broad, inflexible discovery orders, such as Respondent's orders in the present case, that allow plaintiffs unfettered rights to depose top corporate officials. As one of the largest representative groups of industry in the nation, PLAC submits that this Court should be fully informed of the legal

and public policy aspects of Respondent's discovery orders before deciding whether to make permanent its preliminary writ of prohibition.

JURISDICTIONAL STATEMENT

PLAC adopts Ford's jurisdictional statement.

STATEMENT OF FACTS

PLAC adopts Ford's Statements of Facts.

POINT RELIED ON

I. Relator Ford Motor Company Is Entitled to an Order Prohibiting Respondent From Enforcing Her Discovery Orders of August 3, 2001 and August 17, 2001 Requiring Relator to Produce Its Chief Executive Officer and President and Other Senior Management Employees for Depositions Because Respondent Abused Her Discretion in Issuing Her Orders in That Plaintiffs Failed to Show That These Top Ford Officials Have Unique or Superior Knowledge About the Firestone Matter on Which Plaintiffs Seek Discovery, Plaintiffs Have Not Attempted to Obtain Discovery Concerning the Firestone Matter Through Less Intrusive Methods, and Plaintiffs Have Not Shown That Less Intrusive Discovery Methods Are Unsatisfactory, Insufficient, or Inadequate for Any Legitimate Purpose of Discovery

Fogelbach v. Director of Revenue, 731 S.W.2d 512 (Mo. App. 1987)

In re Daisy Mfg. Co., Inc., 17 S.W.3d 654 (Tex. 2000)

Crown Central Petroleum Corp. v. Garcia, 904 S.W.2d 125 (Tex. 1995)

Liberty Mut. Ins. Co. v. Superior Court, 13 Cal.Rptr.2d 363 (Cal. App. 1992)

ARGUMENT

I. Relator Ford Motor Company Is Entitled to an Order Prohibiting Respondent From Enforcing Her Discovery Orders of August 3, 2001 and August 17, 2001 Requiring Relator to Produce Its Chief Executive Officer and President and Other Senior Management Employees for Depositions Because Respondent Abused Her Discretion in Issuing Her Orders in That Plaintiffs Failed to Show That These Top Ford Officials Have Unique or Superior Knowledge About the Firestone Matter on Which Plaintiffs Seek Discovery, Plaintiffs Have Not Attempted to Obtain Discovery Concerning the Firestone Matter Through Less Intrusive Methods, and Plaintiffs Have Not Shown That Less Intrusive Discovery Methods Are Unsatisfactory, Insufficient, or Inadequate for Any Legitimate Purpose of Discovery

Plaintiffs have filed a product liability action against Ford Motor Company (“Ford”) and Continental General Tire, Inc., arising from an automobile accident involving a 1987 Ford Bronco II equipped with tires manufactured by Continental General Tire. Even though this action does not involve Ford Explorers or tires manufactured by Firestone, Plaintiffs seek to depose four high-ranking Ford officials—Jacques Nasser (Chief Executive Officer and President), Tom Baughman (Executive Director—Trucks), Ernest Grush (Corporate Technical Specialist—Environmental & Safety Engineering), and John Rintamaki (Vice-President-Chief of Staff)—about the recent, well-publicized issues involving Firestone tires on Ford Explorers.

Plaintiffs' attempt to depose these "apex" officials at Ford marks yet another attempt in a disturbing trend by plaintiffs' attorneys in Missouri to abuse the discovery process and harass and intimidate defendants' employees in an attempt to force defendants to capitulate and settle cases. "The use of apex depositions as a tool to coerce settlement is a recurring problem that needs to be addressed" in Missouri. *Monsanto Co. v. May*, 889 S.W.2d 274, 277 (Tex. 1994) (Gonzalez, J., dissenting from denial of leave to file petition for writ of mandamus). Ford's Petition for Writ of Prohibition presents this Court with the perfect opportunity to address this problem and establish guidelines for apex depositions.

Courts have repeatedly held that apex depositions are allowed only when high-ranking corporate officers have unique or superior knowledge of discoverable information or when litigants have already exhausted less intrusive discovery methods that turn out to be unsatisfactory, insufficient, or inadequate. In the present case, Plaintiffs have not shown that Messrs. Nasser, Baughman, Grush, and Rintamaki have unique or superior knowledge about the Firestone matter. Plaintiffs have not attempted to obtain discovery about the Firestone matter through less intrusive methods. Plaintiffs have not shown that less intrusive discovery methods are unsatisfactory, insufficient, or inadequate to satisfy any legitimate purpose of discovery. Respondent, therefore, abused her discretion in ordering the depositions of the Ford officials to go forward. This Court should make permanent its preliminary writ of prohibition against Respondent.

A. Missouri Law Does Not Afford Litigants an Unfettered Right to Whatever Discovery They Want

The Missouri Rules of Civil Procedure afford the right to obtain discovery in order “to eliminate concealment and surprise, to assist litigants in determining facts prior to trial, and to provide litigants with access to proper information through which to develop their contentions and to present their sides of the issues as framed by the pleadings.”

State ex rel. Woytus v. Ryan, 776 S.W.2d 389, 391 (Mo. banc 1989) (citations omitted).

However, Missouri courts have never afforded litigants an unfettered right to whatever discovery they want: “Despite all the beneficial aspects of our modern rules of discovery, they are not talismans without limitations.” *State ex rel. Kawasaki Motors Corp., U.S.A.*

v. Ryan, 777 S.W.2d 247, 251 (Mo. App. 1989). “The discovery provisions were not designed or intended for untrammelled use of a factual dragnet or fishing expedition.”

Misischia v. St. John’s Mercy Medical Center, 30 S.W.3d 848, 864 (Mo. App. 2000).

“The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants.” *State ex rel. Madlock v. O’Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999).

B. Trial Courts Have an Affirmative Obligation to Prevent the Misuse of Discovery

The trial courts have an affirmative obligation to prevent litigants from misusing discovery to force an adversary to capitulate and settle a case or to harass or intimidate

others. *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327-28 (Mo. App. 1985); *Misischia*, 30 S.W.3d at 864; *VBM Corp., Inc. v. Marvel Enterprises, Inc.*, 842 S.W.2d 176, 180 (Mo. App. 1992). Through the writ of prohibition, Missouri appellate courts have, time and time again, not hesitated to intervene in discovery matters when the trial courts have failed to fulfill this obligation. Indeed, “[p]rohibition is the proper remedy when a trial court makes an order that constitutes an abuse of discretion in discovery proceedings.” *Anheuser*, 692 S.W.2d at 327.

C. Trial Courts Must Balance the Need for Discovery Against the Burden and Intrusiveness Involved in Furnishing the Discovery

This Court has noted that “[t]he need for discovery [] must be balanced against the burden and intrusiveness involved in furnishing the information.” *Woytus*, 776 S.W.2d at 391. To this end, this Court has adopted Rule 56.01(c), which provides that the trial “court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Under the rule, a trial court may order (among other options) “(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; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; [or] (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.” As noted in *Anheuser*:

Determination of the appropriate boundaries of discovery requests involves the pragmatic task of weighing the conflicting interests of the interrogator and the respondent. Therefore, in ruling upon objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it. . . . Thus, even though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

629 S.W.2d at 328.

These same considerations also apply to depositions. The right to take depositions “is subject to the power of the trial court to issue protective orders to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including an order that discovery not be had.” *State ex rel. Chaney v. Franklin*, 941 S.W.2d 790, 792-93 (Mo. App. 1997). Trial courts must consider the “adverse consequences and hardships on the party sought to be deposed.” *Kingsley v. Kingsley*, 601 S.W.2d 677, 679 (Mo. App. 1980); *State ex rel. Von Pein v. Clark*, 526 S.W.2d 383, 386 (Mo. App. 1975).

D. Apex Depositions Are Permissible Only When High-Ranking Corporate Officers Have Unique or Superior Knowledge of Discoverable Information or Litigants Have Already Exhausted Less Intrusive Discovery Method That Turn Out to Be Unsatisfactory, Insufficient, or Inadequate

Federal and state courts have repeatedly held that plaintiffs are not entitled to depose the chief executive officer, president, or other officers at the apex of the hierarchy in large corporations as a matter of right. Instead, such apex depositions are allowed only when high-ranking corporate officers have unique or superior knowledge of discoverable information or when litigants have already exhausted less intrusive discovery methods—such as deposing lower-level, subordinate corporate employees who were primarily responsible for the corporate activities at issue—that turn out to be unsatisfactory, insufficient, or inadequate. *See In re Daisy Mfg. Co., Inc.*, 17 S.W.3d 654 (Tex. 2000) (issuing writ of mandamus blocking deposition of manufacturer’s chief executive officer in product liability suit); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Thomas v. International Business Machines*, 48 F.3d 478, 483-84 (10th Cir. 1995) (affirming protective order blocking deposition of IBM’s chairman of the board of directors); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal.Rptr.2d 363 (Cal. App. 1992) (issuing writ of mandate precluding deposition of insurer’s chief executive officer); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 335-36 (M.D. Ala. 1991) (blocking deposition of top executive of GM’s Buick division); *Broadband Communications Inc. v. Home Box*

Office, Inc., 549 N.Y.S.2d 402 (App. Div. 1990); *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140 (D. Mass. 1987); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985); *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979) (affirming protective order blocking deposition of Upjohn's president); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D. Pa. 1963); *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389 (S.D.N.Y. 1954); *M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383 (S.D.N.Y. 1951); Michael Hoenig, "Apex" Depositions; Excessive Award for "Suffering," N.Y.L.J., Sept. 11, 1995; Michael Hoenig, *Depositions of High Corporate Executives*, N.Y.L.J., Dec. 14, 1992.

"As virtually every court which has addressed the subject has observed, depositions of persons in the upper level management of corporations often involved in lawsuits present problems which should reasonably be accommodated in the discovery process." *Crown Central*, 904 S.W.2d at 128. Courts have "recognize[d] the potential for abuse" and have not allowed "a plaintiff's deposition power to automatically reach the pinnacle of the corporate structure." *Liberty Mut. Ins. Co.*, 13 Cal.Rptr.2d at 366.

"[A]pex" depositions..., when conducted before less intrusive discovery methods are exhausted, raise a tremendous potential for discovery abuse and harassment. Vast numbers of personal injury claims could result in the deposition of a national or international company whose product was somehow involved. It would be unreasonable to permit a plaintiff to *begin* discovery by deposing, for instance, the chief executive

officer of a major automobile manufacturer when suing over a design flaw in a brake show—especially if we were to accept real party’s argument that the mere act of copying the chief executive officer with a few pieces of correspondence creates “constructive notice” justifying the deposition.

Id.; see also *Monsanto Co.*, 889 S.W.2d at 274 (Gonzalez, J., dissenting from denial of leave to file petition for writ of mandamus) (“[W]hen these ‘apex’ depositions are allowed before less intrusive means of discovery have been exhausted, it creates a huge potential for abuse and harassment, and needlessly increases the cost of litigation.”).

There is precedent in Missouri for restricting apex depositions. In *Fogelbach v. Director of Revenue*, 731 S.W.2d 512, 513 (Mo. App. 1987), a licensee filed a notice seeking to depose the Director of the Department of Revenue. The Department filed a motion for protective order and offered to allow the licensee to depose another representative of the Department. Without ruling on the motion for protective order, the trial court entered an order striking the Department’s pleadings and ordering reinstatement of a licensee’s license to drive because the Director did not personally appear for a deposition. The court of appeals reversed, noting the burden that such depositions would impose on the Director and the fact that the licensee could seek adequate discovery by deposing another representative of the Department:

Department appeared at the deposition, and the employee representing Department was prepared to answer licensee’s questions. If we were to allow licensees to depose the director of revenue personally, the director

would be required to appear at innumerable depositions in all parts of the state, and when there he would most likely be unable to provide specifics of any particular case.

Id. While *Fogelbach* addressed apex depositions of high-ranking public officials, the same policy considerations apply to apex depositions of top officers of large companies in the private sector.

The officers of America's large manufacturers oversee their companies' operations, from corporate investments to charitable contributions, from product line decisions to personnel policies. The functioning of each company depends upon its officers' availability to manage its affairs. These officers cannot fulfill their responsibilities if they must submit to deposition whenever it fits the "strategy" of any lawyer prosecuting a lawsuit against the company.

That these executives may have some generalized knowledge of relevant issues should not by itself subject them to repeated depositions in every case in which those issues arise. For example, every chief executive officer or chairman of the board of a major product manufacturer may have some knowledge of high profile issues of product safety. For that matter, every top-level official probably may have some knowledge about a variety of issues affecting the company's operations. Therefore, if all that is required to depose a senior corporate official is an indication of his or her having held opinions about or having some generalized exposure to company policies in the relevant areas, every chief executive officer of every American company might be compelled to

appear as the lead-off deponent in every piece of litigation involving the company—in labor litigation, real estate litigation, tax litigation, product litigation, securities litigation, commercial litigation, antitrust litigation, patent and trademark litigation, environmental litigation, and more.

These depositions could be taken at the whim of any lawyer for any party, regardless of the cumulative havoc that the depositions would wreak by preventing these officers from effectively managing their companies' affairs. The depositions could be taken without regard for the resulting burden on the deponents themselves; on the company's employees, who depend on the company and its officers for their livelihoods; the company's stockholders, who depend on the company and its officers to protect their investments; the company's customers, who depend on the company and its officers for safe and reliable goods and services; and, potentially, the American economy, which depends on the company and its officers to compete effectively with foreign competitors who are shielded from this type of abuse by both legal and practical barriers. The effects would be not only direct, in the relentless siphoning away of productive time, but indirect, as the individuals who run their companies most conscientiously and effectively learn that they are most vulnerable to this kind of harassment. Public policy is not served when corporate leaders find that the only way to avoid being targeted for deposition is to be uninformed, invisible, and ineffectual.

Nor is public policy served when a corporation and its highest ranking officials are stripped of the protection otherwise mandated by Rule 56.01(c) and opened up to

repetitive, unproductive depositions simply because they have chosen to speak on issues of public interest affecting the corporation. Such a result effectively chills corporate speech without advancing any legitimate, let alone compelling, countervailing interest. This consequence is particularly troubling in an age when corporations are encouraged to pay more attention to their standing in and contributions to the community and the country, and to speak out rather than to be silent on matters of public concern.

This is not some far-fetched chimera. Mr. Nasser himself has been the subject of numerous deposition attempts, as Ford's petition describes. Professor Moore has observed in his treatise that the tactic of taking the deposition of "the busiest member of the corporate hierarchy or government agency, when the information sought could ... be obtained by deposing subordinate officials" is often used to attempt to coerce settlement at a level otherwise unsupported by the merits of the case. 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.69 at p. 26-433 (1990). The potential for wholesale employment of this tactic is staggering. Thousands of product liability lawsuits are filed each year. Any given major manufacturer of consumer products (such as Ford) has faced hundreds if not thousands of lawsuits. If depositions of the CEO or other high-ranking corporate officers were the starting point for litigation in each of these cases, these senior officials would have time for nothing but depositions and could not do their jobs.

Ford alone, for example, has over 350,000 employees and worldwide operations. The management of a company like Ford is not dissimilar to that of governing a state department, except that it is more difficult because the operations are spread across the

globe. In *Fogelbach*, the Missouri Court of Appeals recognized the importance of limiting the extent to which government officials could be taken from their duties for depositions about their decisions. Similar policy considerations apply here. If the senior officials of a company like Ford are subject to a “free-wheeling” deposition in any lawsuit, it will be physically impossible for them to meet their responsibilities, just as it would be impossible for government leaders to discharge their responsibilities if they were subject to being deposed in every case involving matters under their auspices. It is only the mandate of Rule 56.01(c) and the willingness of the courts to implement that mandate that keeps this potential from becoming reality.

Even if the depositions were limited in length, hundreds of hours would be required for preparation and testimony that could be better and more productively devoted to the operation of the company. That burden increases geometrically where, as here, the court does not even impose limitations on the scope or length of the deposition. The expense and time involved are out of all reasonable proportion to the benefits that the parties seeking the deposition may legitimately pursue through discovery.

E. This Court Should Adopt the Apex Deposition Guidelines Set Forth in *Crown Central and Daisy Mfg.*

To prevent the potential for discovery abuse, this Court should provide guidelines for trial courts to apply when considering whether to allow apex depositions to proceed. PLAC respectfully submits that this Court should adopt the guidelines for apex depositions that the Texas Supreme Court first established in *Crown Central* and later

clarified in *Daisy Mfg.* The Texas Supreme Court established these guidelines based on the numerous decisions of appellate courts in other jurisdictions addressing apex depositions. Within the past few years, the Texas appellate courts have been at the forefront in determining whether apex depositions are appropriate in various situations.

In *Daisy Mfg.*, the Texas Supreme Court recently summarized the *Crown Central* framework for apex depositions:

Under *Crown Central*, if a discovering party cannot arguably show that a high-level official has unique or superior knowledge of discoverable information, the trial court must grant a motion for protection, and “first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods.” The discovering party may thereafter depose the apex official if, after making a “good faith effort to obtain the discovery through less intrusive methods,” the party shows that (1) there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence, and (2) the less-intrusive methods are unsatisfactory, insufficient or inadequate.

Daisy Mfg., 17 S.W.3d at 656-57 (quoting *Crown Central*, 904 S.W.2d at 128). (The California Court of Appeal adopted essentially the same framework for apex depositions in *Liberty Mut. Ins.* See 13 Cal.Rptr.2d at 367.)

These guidelines for apex depositions find support in Missouri cases. In *Fobelbach*, discussed *supra*, the court refused to allow the licensee to depose the Director

of the Department of Revenue, essentially because the Director did not have unique or superior knowledge and the licensee could obtain the discovery sought through the less intrusive method of deposing a lower-level employee of the Department. 731 S.W.2d at 513. Similarly, in *Binkley v. Palmer*, 10 S.W.3d 166, 173 (Mo. App. 1999), the court affirmed the trial court's order denying the plaintiffs the opportunity to depose Arnold Palmer in a case against him and his golf course design and management companies over a failed investment in a golf course. Even though Mr. Palmer had some relevant knowledge about the matter and had even filed an affidavit in support of the defendants' motion for summary judgment, the appellate court excused him from deposition because the plaintiffs had been able to depose the individuals at Mr. Palmer's companies who were actually in charge of the business dealings at issue and there was no indication that Mr. Palmer would contradict the testimony of those individuals in a deposition. *Id.*

Plaintiffs argue that this Court should leave the issue of apex depositions to the unfettered discretion of the trial court and should refrain from adopting any standards whatsoever to guide Missouri trial courts in their decision whether to allow apex depositions to go forward. While trial courts have discretion concerning discovery matters, "[t]his discretion, however, has never been viewed as unlimited." *Anheuser*, 692 S.W.2d at 328.

This Court has frequently set down hard and fast rules that trial courts must follow when dealing with certain discovery issues. *See State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. banc 2000 (disclosure of materials given to testifying experts)); *State ex*

rel. Madlock v. O'Malley, 8 S.W.3d 890 (Mo. banc 1999) (scope of authorizations to inspect personal injury plaintiff's employment records); *State ex rel. Lester E. Cox Medical Centers v. Darnold*, 944 S.W.2d 213 (Mo. banc 1997) (information protected by peer review committee privilege); *State ex rel. Jones v. Syler*, 936 S.W.2d 805 (Mo. banc 1997) (medical authorizations); *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407 (Mo. banc 1996); *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462 (Mo. banc 1995); *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 553 (Mo. banc 1995) (information about oral interviews); *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13 (Mo. banc 1995) (waiver of privilege); *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604 (Mo. banc 1993) (crime-fraud exception to attorney-client privilege); *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200 (Mo. banc 1993) (statements of defendant's employees); *State ex rel. Plank v. Koehr*, 831 S.W.2d 926 (Mo. banc 1992) (depositions of corporate representatives). This Court should do the same for apex depositions. By adopting rules for apex depositions, this Court "will prevent undue harassment and oppression of high-level officials while still providing a plaintiff with several less-intrusive mechanisms to obtain the necessary discovery, and allowing for the possibility of conducting the high-level deposition if warranted." *Liberty Mut. Ins. Co.*, 13 Cal.Rptr.2d at 367-68.

F. Ford Is Entitled to a Writ of Prohibition

Under the *Crown Central/Daisy Mfg.* test, Ford is entitled to a writ of prohibition against Respondent's discovery order. Plaintiffs have not shown that Messrs. Nasser,

Baughman, Grush, and Rintamaki have any unique or superior knowledge of discoverable information. As Ford points out, these individuals “have no knowledge pertinent to the design and development of the subject Ford Bronco II,” “have no superior or unique knowledge on the Firestone issue,” and “have no personal knowledge of the conduct, actions, or events at issue in this case.” Ford’s Suggestions, p. 4.

In opposing Ford’s Petition for Writ of Prohibition before the court of appeals, Plaintiffs incorrectly argued that the *Crown Central* standard does not apply because the Ford officers have knowledge of relevant facts. The Texas Supreme Court has recently stressed that plaintiffs are not entitled to depose high-level corporate officials simply because those officials have some relevant knowledge. *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 179 (Tex. 2000).

This evidence arguably shows that Kang may have discoverable information. But the first *Crown Central* guideline requires more; it requires that the person to be deposed arguably have “unique or superior personal knowledge of discoverable information.” This requirement is not satisfied by merely showing that a high-level executive has some knowledge of discoverable information. If “some knowledge” were enough, the apex deposition guidelines would be meaningless; they would be virtually indistinguishable from the scope of general discovery. Although *Crown Central* did not elaborate on what character of knowledge makes it unique or superior, *there must be some showing beyond mere*

relevance, such as evidence that a high-level executive is the only person with personal knowledge of the information sought or that the executive arguably possesses relevant knowledge greater in quality or quantity than other available sources.

Id. (emphasis added). Here, Plaintiffs have not (and cannot) make any showing that Messrs. Nasser, Baughman, Grush, and Rintamaki are the only persons with personal knowledge of the Firestone matter or that these Ford officials possess relevant knowledge about the Firestone matter greater in quality or quantity than other available sources. As a result, Plaintiffs are not entitled to depose these Ford officials at this time, but must, instead, attempt to obtain discovery about the Firestone matter through less intrusive methods.

Plaintiffs argue that the apex deposition doctrine “does not apply where a corporate officer has ‘first hand knowledge of relevant facts.’” Respondent’s Return to Preliminary Writ, p. 7 (quoting *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App. 2000), and *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App. 1997)). Plaintiffs further argue that the depositions of Messrs. Nasser, Baughman, Grush, and Rintamaki are therefore proper because, Plaintiffs maintain, these officers allegedly have “first hand knowledge of relevant facts.” *Id.*

Whatever the meaning of the ambiguous phrase “firsthand knowledge,” it is difficult to believe that Messrs. Nasser, Baughman, Grush, and Rintamaki have unique or superior knowledge of Ford’s research, investigation, and actions with respect to the

Firestone matter. Surely, lower-level employees of Ford—not Messrs. Nasser, Baughman, Grush, and Rintamaki—have performed the actual research, investigation, and other actions with respect to the Firestone matter. Through various reports to them, Messrs. Nasser, Baughman, Grush, and Rintamaki may have learned about the results of the research, investigation, and actions taken. However, their receipt of information about the Firestone matter through reports from subordinate employees does not give them unique or superior knowledge of discoverable information. *See Alcatel*, 11 S.W.3d at 179 (“But evidence that an apex official received information requires something more to establish that the apex has unique or superior knowledge of discoverable information.”). *Cf. Boales*, 29 S.W.3d at 168 (apex doctrine did not apply to joint venture’s general counsel because his advice to joint venture’s vice president during contract negotiations between joint venture and homebuyer and to joint venture’s sales representatives during training sessions regarding disclosures to buyers were directly at issue); *Simon*, 950 S.W.2d at 442 (“[I]f the president of a Fortune 500 corporation personally witnesses a fatal car accident, he cannot avoid a deposition sought in connection with a resulting wrongful death action because of his ‘apex’ status.”).

Plaintiffs assert that these top Ford officials have “made public statements on behalf of Ford regarding Ford’s standard of care and its corporate responsibility for the safety of its customers. These gentlemen have been designated by Ford to be its public spokesmen on these important issues.” Respondent’s Return to Preliminary Writ, p. 2. However, such activities by top corporate officials do not imbue those officials with

unique or superior knowledge or subject them to depositions in product liability actions. *See In re Daisy Mfg. Co.*, 976 S.W.2d 327, 329 (Tex. App. 1998) (chief executive officer of air rifle manufacturer did not have unique or superior knowledge such that he was subject to deposition even though he made statements on a national television news show defending the safety of the manufacturer's BB gun's gravity-fee system and, according to plaintiff, thereby "volunteered to become the United States spokesperson" for the manufacturer). "Merely because a corporate official espouses a generalized opinion concerning the safety of one of his company's products does not imbue that official with unique or superior knowledge of the product." *Id.* The public statements that the Ford officials have made about the Firestone matter were obviously based on information communicated to them by lower-level Ford employees and not information personally generated by the Ford officials themselves.

Because Messrs. Nasser, Baughman, Grush, and Rintamaki do not have unique or superior knowledge about the Firestone matter, Respondent should have granted Ford's motion for protective order and required Plaintiffs to attempt to obtain discovery about the Firestone matter through less intrusive methods. Specifically, Plaintiffs should be required to depose the lower-level Ford employees who have primary responsibility for the Firestone matter, not the top management officials to whom they report.

Plaintiffs have not shown that Messrs. Nasser, Baughman, Grush, and Rintamaki have unique or superior knowledge about the Firestone matter. Plaintiffs have not attempted to obtain discovery about the Firestone matter through less intrusive methods.

Plaintiffs have not shown that less intrusive discovery methods are unsatisfactory, insufficient, or inadequate to satisfy any legitimate purposes of discovery. Respondent, therefore, abused her discretion in ordering the depositions of the Ford officials to go forward. This Court should make permanent its preliminary writ of prohibition against Respondent.

CONCLUSION

For these reasons, PLAC respectfully requests that this Court make permanent its preliminary order prohibiting Respondent from enforcing her discovery orders of August 3, 2001 and August 17, 2001 and adopt in Missouri the guidelines for apex depositions set forth in *Crown Central* and *Daisy Mfg.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk have been mailed, first class mail postage prepaid, on October 19, 2001 to:

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I certify that this brief complies with Rule 55.03, is proportionately spaced, using Times New Roman, 13 point type, and contains 6,117 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

APPENDIX