IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

SUZUKI MOTOR CORPORATION,
a foreign corporation,

Petitioner,

vs.

SCOTT WINCKLER,

Respondent.

_____ /

CASE NO.: 1D18-4815

L.T. CASE NO: 16-2014-CA-004130

SUZUKI MOTOR CORPORATION'S REPLY IN FURTHER SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

Suzuki Motor Corporation, under Rule of Appellate Procedure 9.100, replies to Plaintiff's response to its petition for writ of certiorari to review an order of the circuit court that grants Plaintiff's Application for Letter Rogatory (the "Order"), which compelled the examination of Mr. Osamu Suzuki, Suzuki's Chairman and former CEO. Suzuki respectfully requests that the Court quash the Order.

INTRODUCTION

Plaintiff agrees with Suzuki's "procedural facts," but claims that Suzuki "omits . . . how its deception and obfuscation go all the way to the top," stating that he will "inform[] the Court of the relevant facts" (resp. at 2-3). But Plaintiff does not identify any fact found by any factfinder. Drawing selectively from documents produced and testimony given in discovery—which is ongoing—he argues what he would *like* the trial court to find as fact, as if it already were fact. His "Statement of Relevant Facts" is an opening statement, not a statement of adjudicated facts.

Also pure argument, not the conclusion of any factfinder, are Plaintiff's statements that "objective evidence establishes that Mr. Suzuki was involved in the recall decisions," that he "was made aware of everything that was going on in his company," that he "sees and literally signs off on every piece of paper," and that he "manages his entire company, soup to nuts, and knows everything that is going on" (resp. at 2, 6, 10, 19). The notion that Mr. Suzuki, Suzuki's current Chairman and former CEO, knows everything happening in the company and signs off on every piece of paper is not credible on its face. And if every CEO must know everything about the company, then every CEO would be subject to deposition in every case.

The only evidence that Plaintiff cites in support of his claims that Mr. Suzuki is all-knowing are Mr. Suzuki's Declaration—which says nothing of the sort[1]—and three documents authored by other people, two of which bear Mr. Suzuki's signature. Plaintiff argues that Suzuki "ignored" one of those documents, an "email amongst the Quality Countermeasure Committee ["QCC"] members saying the issues had been explained to Mr. Suzuki" (*id.* at 12). Suzuki, however, defined that document as the "Email" and included it in its appendix at page 159, which Plaintiff even cites—repeatedly (*see id.* at 6, 22, 26 (citing A. 159)). Those three documents, out of over 250,000 pages produced in discovery, are still the *only* documents that bear any trace of Mr. Suzuki.

[1] Plaintiff actually cites "A. 190, ¶¶ 8-90" (resp. at 10). But A. 190 is a page of a hearing transcript. Suzuki believes that Plaintiff meant to cite A. 180 ¶¶ 8-9.

By repeatedly invoking the QCC—and repeatedly complaining that Suzuki has not volunteered a member of the QCC for deposition—Plaintiff's response (at 6-7, 8, 9-10, 16-17, 20, 27, 28) itself demonstrates that he does not need to examine the Chairman to obtain the information he wants. Indeed, the response makes it clear that the question he purports to want answered—why there was an alleged delay in deciding to recall motorcycles with the GSX-R series braking system—can only be addressed by a member of the "all-powerful" QCC (*id.* at 9). But although Plaintiff knows the identity of every member of the QCC at all relevant times, he has never sought to depose any of them.

Plaintiff also argues, baselessly, that Suzuki has schemed to avoid liability, "set[ting] it up so that anyone injured by the defective brakes has to chase Suzuki all the way to Japan in order to recover" (resp. at 6). This is purportedly because Suzuki "secured a bankruptcy order" that former defendant Suzuki Motor of America, Inc. ("SMAI") would not be liable for claims against its predecessor, and procured an order from the trial court dismissing SMAI from this action with prejudice (*id.*). But Plaintiff *agreed* to the order dismissing SMAI, which the Complaint does not even mention, because it did not begin to operate until 2013 and had nothing to with the motorcycle's design, manufacture, or distribution (*see* RA. 417-31). Moreover, of course, Plaintiff has not been forced to seek relief in a Japanese court. He has filed this action in Florida.

ARGUMENT

Plaintiff argues that this matter is "time sensitive" (resp. at 1), but the Document he most relies on to demand Mr. Suzuki's examination was produced to him three years ago, in June 2016. Even though Suzuki has agreed that Plaintiff can continue the letter rogatory process during this appeal, Plaintiff has not sent the Japanese translation of the letter rogatory to Japan, because he has not set a hearing, with an interpreter, to obtain the trial court's approval of the translation.

Plaintiff also complains that the "order of the arguments in Suzuki's petition are inverted" because Suzuki should have addressed irreparable harm first (resp. at 10), so we will start there. As we show below, Plaintiff's response does not disturb Suzuki's showing that (I) if the examination of Mr. Suzuki goes forward, Suzuki will be materially injured with no remedy on plenary appeal; and (II) the Order departs from the essential requirements of law.

I. SUZUKI IS MATERIALLY INJURED BY THE ORDER, AND HAS NO ADEQUATE REMEDY ON FINAL APPEAL

Plaintiff does not dispute that, if Mr. Suzuki is required to appear for examination, his examination cannot be undone later by plenary appeal. As we show below, (A) allowing the examination to proceed could subject Mr. Suzuki to demands for testimony in hundreds of cases; (B) Plaintiff attacks arguments that Suzuki did not make, relying on inapposite cases; and (C) Plaintiff's own response shows that the information he seeks can only be obtained from the QCC.

A. Allowing an examination of Mr. Suzuki would subject him, and Suzuki, to a flood of discovery requests

In response to Suzuki's showing that allowing the examination of Mr. Suzuki here could expose him to demands for deposition in literally hundreds of lawsuits in U.S. courts (*see* petition at 5-6, 11, 20), Plaintiff does not dispute that Mr. Suzuki, as Chairman, has constant demands on his schedule, but he argues that the threat of "endless depositions" is "unsupported hyperbole" (resp. at 18). He claims that an examination of Mr. Suzuki "can be used in other cases where there is a failure to warn claim," and that he is doing other plaintiffs a favor, because "that is the more economic option for [other] plaintiffs when compared to the cost of obtaining letters rogatory and then taking a deposition in Japan" (*id.*).

This is not a class action, however, and other plaintiffs with similar cases have *not* used Plaintiff's discovery. For example, although Mr. Takao Kudo gave three days of deposition in this case, plaintiffs in two other cases involving the GSX braking system took their own depositions of Mr. Kudo, and the plaintiff in another such case called him as a trial witness. And Plaintiff's counsel—*who refused to agree with parties in other cases that defense witnesses would not be subject to deposition in multiple cases*—himself just took a three-day deposition of Mr. Yoshinobu Matsumoto, even though he has testified in two other cases.

Plaintiff's conclusion—that an examination of Mr. Suzuki "will not set a precedent that he can be deposed for any reason in any case" (resp. at 18)—does

not follow from the premise that his examination could be used in similar cases. Plaintiff ignores the hundreds of *other* cases that have been filed against Suzuki in the past decade (*see* petition at 5-6). And Mr. Suzuki does not have "added protections . . . under the U.S.-Japan Consular Convention" (resp. at 18), because he is not being examined under the Convention. *See* Fla. R. Civ. P. 1.300(b)(3).

B. Plaintiff's response attacks arguments that Suzuki did not make

Plaintiff claims that Suzuki's arguments do not show material injury that cannot be remedied on appeal. He claims that Suzuki argues that Mr. Suzuki "is a busy man who is more important than other busy men and he will therefore be inconvenienced by a deposition" (resp. at 14, *see also id.* at 15); that a deposition would be expensive and inconvenient (*id.* at 13); that "being subjected to discovery of non-privileged information" is not irreparable (*id.*); or that "sitting for a deposition" itself is irreparable harm (*id.* at 15). But Suzuki did not make those arguments. And this Court has held that taking a deposition in the wrong venue *is* irreparable harm, because "once the deposition is taken it cannot be untaken." *CVS Caremark Corp. v. Latour*, 109 So. 3d 1232, 1234-35 (Fla. 1st DCA 2013).

Plaintiff's cases—most of which do not involve orders granting discovery—are irrelevant. In *DeLoach v. Aird*, 989 So. 2d 652, 654 (Fla. 2d DCA 2007), for example, the court dismissed a certiorari petition seeking review of an order allowing an amended complaint, where, unlike here, the *only* alleged harm was

"time, inconvenience, potential difficulty, and expense." *See also Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987) (dismissing petition seeking review of an order denying a motion to strike a punitive damages claim); *Riano v. Heritage Corp.*, 665 So. 2d 1142, 1143, 1145 (Fla. 3d DCA 1996) (dismissing petition seeking review of an order precluding certain testimony at trial, where petitioner was attempting to "save[] the time and expense of a trial"); *Hanchey v. Leaffer*, 138 So. 3d 1091, 1092 (dismissing petition seeking review of an order allowing an action to proceed where the "only injury" alleged was that petitioner "'could be subjected to claims and discovery that may otherwise not be permitted'"); *Bd. of Trs. of the Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 456 (Fla. 2012) (holding that "[o]verbreadth is not a proper basis for certiorari review of discovery orders").

Relying on *Killinger v. Grable*, 983 So. 2d 30 (Fla. 5th DCA 2008), and *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995), Plaintiff argues that "Mr. Suzuki's complaint that a deposition might interfere with his busy schedule falls short of invoking this Court's extraordinary writs jurisdiction" (resp. at 14-15). But in *Killinger*, 983 So. 2d at 31-33, the court denied a certiorari petition where the petitioner merely claimed that requests for production of documents were "overbroad, irrelevant or burdensome." *Haines* is even less relevant. In that case, the Supreme Court approved the district court's denial of a petition seeking

certiorari review of the reversal of a county court final judgment, holding that there is a "limited standard of review available to litigants after they have had the benefit of an appeal in the circuit court." 658 So. 2d at 531.

Plaintiff argues that Suzuki cannot rely on *General Star Indemnity Co. v. Atlantic Hospitality of Fla., LLC*, 57 So. 3d 238 (Fla. 3d DCA 2011), because those corporate officers had no relevant knowledge, and this Court "reasoned that if the officers sat for one deposition in a case where they had zero involvement, that would set a precedent to be deposed in all cases . . . and [] would make it impossible to run the company" (resp. at 17). But that is precisely the situation here, where Mr. Suzuki is Suzuki's highest officer and could not do his job if he were routinely subject to examination. And Plaintiff is incorrect that Suzuki "did not raise [*General Star*] in the petition," where it is cited on pages 9, 18 and 19.

Plaintiff's other cases do not involve orders compelling discovery. *See Damsky v. Univ. of Miami*, 152 So. 3d 789, 792 (Fla. 3d DCA 2014) (order *denying* discovery); *Martin-Johnson, Inc.*, 509 So. 2d at 1098 (order denying motion to strike claim for punitive damages); *Jaye v. Royal Saxon*, 720 So. 2d 214, 214 (Fla. 1998) (order striking a demand for jury trial); *City of Miami Beach v. Town*, 375 So. 2d 866 (Fla. 3d DCA 1979) (granting petition where an order compelling a police officer to answer certain deposition questions would have jeopardized an ongoing police investigation).

C. Plaintiff's response shows that he should be seeking to depose a member of the QCC, not Mr. Suzuki

Plaintiff also argues that Suzuki is evading the examination of Mr. Suzuki in order to force the Plaintiff to "guess the right lower-level executive" to depose, and "to play an expensive, time-consuming game of 'go fish' in the Suzuki executive pond" (resp. at 16, 20). But Plaintiff knows whom to depose. His response makes it clear that the question he purports to want answered—why there was an alleged delay in deciding to recall motorcycles with the GSX-R series braking system—can only be answered by a member of the "all-powerful" QCC, which he repeatedly invokes (*see* resp. at 6-7, 8, 9-10, 16-17, 20, 27, 28). Nevertheless, although Suzuki has identified all of the members of the QCC at all relevant times (*see* RA. 699-702), Plaintiff still has not sought to depose any of them.

Although Suzuki produced Yoshinobu Matsumoto under Rule 1.130(b)(6) for three days of deposition, in Japan, on the same subjects that he proposes to question Mr. Suzuki (*see* petition at 4), he complains that Mr. Matsumoto is a "weak candidate" for corporate representative who "is not even on the Quality Countermeasures Committee," and would not know what the QCC told Mr. Suzuki (resp. at 9, 16-17, 20). But Suzuki is not obligated to designate a member of the QCC for a Rule 1.130(b)(6) deposition, and Mr. Matsumoto—the lead engineer on Suzuki's investigation of the GSX-R series braking system—was heavily involved

in that issue, as the documents in Plaintiff's own appendix demonstrate (*see* RA. 320, 334, 341, 368, 371, 372, 581, 613, 833).

In short, Plaintiff claims to need a witness who "would have been privy to reasons behind the [QCC]'s decision-making" (resp. at 20), but Mr. Suzuki's Declaration shows that he was not privy. Plaintiff argues that "[o]nly Mr. Suzuki" knows what "led him to give his signature on the April 2013 and October 2013 recall plans" (resp. at 20), but Mr. Suzuki does not recall, either. Plaintiff argues that "the one who seems most likely to have the knowledge necessary to answer the question of 'why the delay?' is [Mr.] Suzuki" (resp. at 20), but Mr. Suzuki has specifically disclaimed any such knowledge. Moreover, as noted above, Plaintiff's claim that Mr. Suzuki is all-knowing is based on two documents that bear his signature, and an email that Mr. Suzuki neither sent nor received (*see* resp. at 6-7). And the Document—one of the two pages that Mr. Suzuki signed—is a table that lists four issues. The first three, which consume nearly the entire table, involve cars that are not sold in the U.S.; the fourth row, no more than an inch high, identifies the brake issue here in just three sentences (*see* petition at 3; A. 155).

II. THE ORDER DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF LAW

As we show below, the Order departs from the essential requirements of law (A) under the apex doctrine, and (B) under traditional standards for deciding the relevance of discovery.

A. Mr. Suzuki lacks any knowledge of this case and the Florida Courts know precisely how to apply the apex doctrine

Plaintiff argues that there is no departure from the essential requirements of law because the apex doctrine is not "clearly established" in Florida (resp. at 24). Accepting that argument, however, would mean that no DCA could ever adopt the doctrine. Indeed, the issue can only be live on a certiorari petition, but Plaintiff's argument would defeat every such petition. Moreover, Plaintiff concedes that the doctrine has been applied in the contexts of government and public universities, and he ignores Suzuki's showing that it is routinely applied in the corporate context in Florida federal courts and other states (*see* petition at 9-14). He does not address Suzuki's cases showing that Florida courts know exactly how to apply it, if not by name, in the corporate context (*see* resp. at 16). With no analysis, he lists arguments that have been made against applying the doctrine to corporate disputes—that it avoids a threat that might deter public servants from seeking office, that it raises separation of powers issues, and that it usurps judicial rulemaking powers (resp. at 25-26)—but Suzuki addressed all of those concerns in its petition (at 11-12, 14-15), and Plaintiff attempts no rebuttal.

The crux of Plaintiff's response on the apex doctrine is that "its application is not absolute," and that it does not apply where a high-ranking officer has "personal involvement" or where there are "extraordinary circumstances" (resp. at 26). Plaintiff claims that there are "extraordinary circumstances" here, but the only

such circumstance he identifies is that Mr. Suzuki must have "personal involvement" because his signature appears on two documents (resp. at 26). He cites *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1270 (Fla. 4th DCA 2005), to argue that apex officials are subject to deposition where the motivation behind corporate action is at issue (resp. at 27). As shown in the petition (at 16), however, in *Citigroup* the apex officials, unlike here, submitted no "affidavits denying any knowledge of relevant facts" and, further unlike here, the plaintiffs' claim depended on proof of Citigroup's intent in making certain allegedly false statements, which could only be established by the testimony of its senior officers. 915 So. 2d at 1267-68. Here, Suzuki's "intent" is irrelevant. Plaintiff alleges claims for negligence, not fraud. "Intent" is not an element of a negligence claim.

Plaintiff again complains that "Suzuki has not offered anyone on the [QCC]" for deposition (resp. at 28), but Suzuki has no such obligation and Plaintiff has never sought to depose a QCC member. And he again claims that he is doing a favor for other plaintiffs who have sued Suzuki because, "given the requirements under the U.S.-Japan Consular Convention, it is not as though lawyers with failure to warn claims are going to line up in the streets to spend the money to fight Suzuki tooth and nail to be allowed to take their own version of Mr. Suzuki's deposition in Japan" (resp. at 28-29). Plaintiff, however, is seeking to examine Mr. Suzuki not under the Convention but under Florida Rule of Civil Procedure

1.300(b)(3), and the experience in this case and others proves that plaintiffs with separate cases *will* seek their own depositions of Suzuki officers

B. Even if the apex doctrine does not apply, the Court should quash the Order because an examination of Mr. Suzuki is not reasonably calculated to lead to discovery of admissible evidence

Plaintiff argues that it "misses the mark" for Suzuki to claim that Mr. Suzuki's examination would not lead to the discovery of admissible evidence because he could not have "any personal knowledge about a motorcycle accident in Florida" (resp. at 21), as if that were Suzuki's *only* argument. Suzuki also showed that Plaintiff's demand to examine Mr. Suzuki is based on the Document, which he merely signed with his initials, and the Email, which he did not send or receive, and that his unrebutted testimony is that he has no recollection of either document and is not a member of the QCC, which has exclusive authority to make recall decisions (*see* petition at 17-18). Plaintiff barely acknowledges *those* arguments, and Plaintiff's threadbare justifications for the purported relevance of Mr. Suzuki's testimony do not bear any scrutiny.

First, Plaintiff argues that he needs to examine Mr. Suzuki for "big picture" issues, because the "focus is on decision-making related to notifying NHTSA or consumers of the problem with the brake system" and he needs to know "what was going on inside the company regarding the timing of the recall" (resp. at 21-22, 23). But the trial court granted partial summary judgment to Suzuki on Plaintiff's

claims for failure to recall or timely recall (*see* SA. 5-6). Any questions on those topics would be improper. Moreover, Mr. Suzuki has expressly disclaimed that he played any part in such big-picture decision-making—because the QCC, not Mr. Suzuki, has the authority to make recall decisions. Plaintiff again insists that "we know Mr. Suzuki had personal knowledge in April 2013 because that is when he was explained the problem and signed off on a proposed plan for a recall" (resp. at 22), but that simply ignores Mr. Suzuki's sworn declaration.

Second, seeming to accept Mr. Suzuki's lack of knowledge, Plaintiff argues that it does not matter because, if Mr. Suzuki disclaims knowledge of "matters involving hundreds of thousands of lives," his "'I don't recall anything about the multi-million dollar, life-threatening matter' answers . . . are still highly relevant to the jury's decision" whether Suzuki was negligent (resp. at 22-23). Such answers, however, even if they were given, would be completely *ir*relevant to Plaintiff's claims. The fact that a CEO of a large multi-national corporation is not aware of alleged claims against his company—even if they involve life-and-death matters—says nothing about whether the company met the standard of care. The answer to that question depends on whether the individuals responsible for the design, manufacture and sale of the particular product acted with reasonable care under the circumstances, and Plaintiff does not allege that Mr. Suzuki played any role in the design, manufacture and sale of the motorcycle at issue here.

Third, and even less persuasive, is Plaintiff's argument that he is entitled to examine Mr. Suzuki because he "is entitled to know what Suzuki's defense will be as to whether or not the delay was reasonable under the circumstances" (resp. at 23). Plaintiff's counsel surely knows that such a question—even if Mr. Suzuki could answer it—would be improper because it plainly intrudes on the attorney-client privilege. Mr. Suzuki would be a fact witness, nothing more. Plaintiff's counsel is well aware of the legitimate ways in which Plaintiff can obtain information about Suzuki's defenses.

Finally, Plaintiff argues that it is "the height of irony" for Suzuki to complain about cost, because Mr. Suzuki lives in Japan and Plaintiff has agreed to reimburse the Japanese court's costs (resp. at 23-24). But Suzuki was not complaining about cost to Mr. Suzuki. Suzuki's point was that the costs of a trip to Japan, to both Plaintiff and Suzuki and their U.S. counsel—as well as the burden on the Japanese court's time, even if its undefined "costs" are reimbursed—cannot be justified when weighed against the non-existent value of an examination of Suzuki's CEO.

CONCLUSION

For the reasons stated, Suzuki requests that the Court grant its Petition and quash the Order.

Date: February 26, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this petition, was served by electronic transmission on February 26, 2019 on the following:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this petition is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(l).

/s/ *Raoul G. Cantero*
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