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 AMENDED REPLY

Suzuki Motor Corporation, pursuant to this Court's March 21, 2019 order, files its amended reply to Plaintiff's amended response to its petition for writ of certiorari. The petition asks this Court to quash an order granting Plaintiff's Application for Letter Rogatory (the "Order"), which ordered the examination of Mr. Osamu Suzuki, Suzuki's Chairman and former CEO.

Plaintiff amended his response claiming that the Court must know of "recent developments" that "radically change" Suzuki's arguments (*see* mot. to amend 1). He argues that, although the Petition promised that Suzuki's Rule 1.310(b)(6) witness Mr. Yoshinobu Matsumoto would be knowledgeable about the issues here, Mr. Matsumoto was "ignorant of the information" Plaintiff sought (am. resp. 9). As shown below, however, Mr. Matsumoto had the *most* knowledge about the issues here. Indeed, he led the special countermeasure team that investigated the GSX-R brake issue, and none of his testimony changes Suzuki's arguments.

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" (am. resp. 2-3). But Plaintiff does not identify any fact found by any factfinder. Drawing selectively from documents produced and testimony given in discovery, he argues what he would *like* the trial court to find as fact, as if it already *were* a 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" (*id.* at 2, 6, 11, 20). It is not credible that Suzuki's current Chairman and former CEO knows everything happening at Suzuki and signs off on every piece of paper.

The only evidence Plaintiff cites to support his claim of Mr. Suzuki's omniscience are Mr. Suzuki's Declaration—which says nothing of the sort (*see id.* at 11 (citing A. 190, ¶¶ 8-90))[1]—and three documents authored by others, two of which Mr. Suzuki signed. Plaintiff argues that Suzuki "ignored" one of those

[1] A. 190 is a page of hearing transcript; Plaintiff meant to cite A. 180 ¶¶ 8-9.

documents, an "email amongst the Quality Countermeasure Committee ["QCC"] members" (*id.* at 14). But Suzuki defined that document as the "Email" and included it in its appendix, which Plaintiff cites—repeatedly (*see id.* at 6, 23, 27 (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.

By repeatedly invoking the QCC—and repeatedly complaining that Suzuki did not volunteer a member of the QCC for deposition—Plaintiff's response (at 6-7, 8, 9-11, 18-19, 21, 28-29) demonstrates that he does not need to examine the Chairman. Indeed, the response itself shows that the question he purports to want answered—why there was an alleged delay in recalling motorcycles with the GSX-R series braking system—should have been posed to a member of the "all-powerful" QCC (*id.* at 9), not to Mr. Suzuki. But, although Plaintiff knows the members of the QCC at all relevant times, he did not depose any of them.

Plaintiff also argues that Suzuki has schemed to avoid liability—making any injured party "ha[ve] to chase Suzuki all the way to Japan in order to recover"—by "secur[ing] a bankruptcy order" that former defendant Suzuki Motor of America, Inc. ("SMAI") would not be liable for claims against its predecessor, and by procuring an order dismissing SMAI with prejudice (*id.* at 6). But Plaintiff *agreed* to that order because SMAI only began to operate in 2013 and played no part in the

motorcycle's design, manufacture, or distribution (*see* RA. 417-31). And Plaintiff has not been forced to seek relief in Japan. He filed this action in Florida.

ARGUMENT

Plaintiff argues that this matter is "time sensitive" (am. resp. 1), but the Document he most relies on to demand Mr. Suzuki's examination was produced to him three years ago. Although Suzuki has agreed that Plaintiff can continue the letter rogatory process during this appeal, he has not sent a Japanese translation of the letter rogatory to Japan, because he has not set a hearing, with an interpreter, for the trial court to approve the translation. 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 irrelevant cases; and (C) Plaintiff's own response shows that he should have sought to depose a member of 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 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" (am. resp. 19). 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-R 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 recently deposed Mr. Yoshinobu Matsumoto over three days, 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" (*id.*)—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" (am. resp. 19), because he is not being examined under the Convention. *See* Fla. R. Civ. P. 1.300(b)(3).

B. Plaintiff attacks arguments that Suzuki did not make

According to Plaintiff, 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" (am. resp. 16); that a deposition would also be expensive (*id.* at 14); that "being subjected to discovery of non-privileged information" is irreparable (*id.*); or that "sitting for a deposition" itself is irreparable harm (*id.* at 16). 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 un-taken." *CVS Caremark Corp. v. Latour*, 109 So. 3d 1232, 1234-35 (Fla. 1st DCA 2013).

Plaintiff's cases are irrelevant. In *DeLoach v. Aird*, 989 So. 2d 652, 654 (Fla. 2d DCA 2007), the court dismissed a certiorari petition seeking review of an order granting leave to amend, 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"); *Killinger v. Grable*, 983 So. 2d 30, 31-33 (Fla. 5th DCA 2008) (denying a certiorari petition where the petitioner merely claimed that requests for production of documents were "overbroad, irrelevant, or burdensome"); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 531 (Fla. 1995) (approving 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").

Plaintiff argues that Suzuki cannot rely on *General Star Indemnity Co. v. Atlantic Hospitality of Florida, 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" (am. resp. 18). 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" (*id.*). 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); *Martin-Johnson, Inc.*, 509 So. 2d at 1098; *Jaye v. Royal Saxon*, 720 So. 2d 214, 214 (Fla. 1998). And the court in *City of Miami Beach v. Town*, 375 So. 2d 866 (Fla. 3d DCA 1979), only granted a petition where an order compelling a police officer's testimony would have jeopardized an ongoing police investigation.

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

Plaintiff also argues that Suzuki is evading the examination of Mr. Suzuki 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" (am. resp. 18, 21). But Plaintiff did not need to guess. His response shows 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—could have been answered by a member of the "all-powerful" QCC, which he repeatedly

invokes (*see id.* at 6-7, 8, 9-11, 18-19, 21, 28-29). Nevertheless, although Suzuki identified all of the members of the QCC at all relevant times (*see* RA. 699-702), Plaintiff never sought to depose any of them.

With respect to the Rule 1.310(b)(6) deposition of Mr. Matsumoto, Plaintiff accuses Suzuki of "purposely cho[osing] a witness ignorant of the information . . . requested," claiming that he lacked relevant knowledge and "could not testify about . . . why there was a decision to delay warning its consumers" (am. resp. 9-10, 28-29). But Mr. Matsumoto had the *most* knowledge—he was manager of the Suzuki brake group and "head of the special countermeasure team" that was "set up to investigate this [GSX-R series] brake issue" (*see* SSA. 9-10, 26).[2] He testified extensively that there was *no delay* in notifying customers of any issue with the GSX-R series braking system because—after careful, extensive and rigorous scientific testing, including consulting with "external opinions," "professors of the university" and Suzuki's "internal experts"—his investigative team determined that *there was no safety issue* (SSA. 16-17, 18, 19-20, 27, 28, 29, 30, 31, 32, 33, 34-50). The recall, he testified, was done "in order not to inconvenience customer[s]" who might seek repair of an issue that was not a safety risk (SSA. 48). Plaintiff deposed a fact witness at the very center of this dispute, and he got a clear answer. Plaintiff simply doesn't like the answer.

[2] "SSA. #" refers to the page number of the second supplemental appendix, filed with this reply.

In short, Plaintiff claims to need a witness who "would have been privy to reasons behind the [QCC]'s decision-making" (am. resp. 21), 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" (*id.*), 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" (*id.* at 21-22), but Mr. Suzuki has specifically disclaimed any such knowledge, and Mr. Matsumoto answered that very question with his testimony that there was no delay. Also, 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 he neither sent nor received (*see id.* 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 the trial court did not depart from the essential requirements of law because the apex doctrine is not "clearly established" in Florida (am. resp. 25). Accepting that argument, however, would mean that no DCA could ever adopt the doctrine. The issue can only be raised in a certiorari petition because it is a discovery-based doctrine. But Plaintiff's argument would defeat every such petition. 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 id.* 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 (am. resp. 26-27)—but Suzuki's petition addressed all those concerns (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" (am.

resp. 27). Plaintiff claims that there are "extraordinary circumstances" here, but the only circumstance he identifies is that Mr. Suzuki must have "personal involvement" because his signature appears on two documents (*id.*). 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 (am. resp. 28). 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 1267-70. 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 did not "offer[] anyone on the [QCC]" for deposition (am. resp. 29), but Suzuki had no such obligation and Plaintiff 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" (*id.* at 30). 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 Suzuki "misses the mark" in claiming 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" (*id.* at 22)—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 claims to need to examine Mr. Suzuki for "big picture" issues, because the "focus is on decision-making related to notifying . . . 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" (am. resp. 22-23, 24). But Suzuki

was granted partial summary judgment on Plaintiff's claims for failure to recall (*see* SA. 5-6). Any questions on that topic would be improper, and Mr. Matsumoto fully explained "what was going on inside the company regarding the timing of the recall." Moreover, Mr. Suzuki has disclaimed playing any part in such big-picture decision-making, because only the QCC has authority to recall vehicles. 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" (am. resp. 23), but that ignores Mr. Suzuki's sworn declaration, and Mr. Suzuki's *signoff* on a recall says nothing about the *timing* of that recall.

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 (*id.* at 23-24). 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. Plaintiff does not allege that Mr. Suzuki played any role in the design, manufacture and sale of the motorcycle at issue.

Third, Plaintiff argues 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" (*id.* at 24). Plaintiff 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 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 (*id.* at 24-25). 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 Chairman.

CONCLUSION

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

Date: April 22, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this petition, was served by electronic transmission on April 22, 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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