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You Can't Simply Say "No!" Almighty CEO: Georgia's View on the Apex Doctrine and Discovery Abuse

W. Warren Hedgepeth*

I. INTRODUCTION

Discovery is the process that allows litigants to gather information from the opposing party in a civil lawsuit. Discovery practices differ among states, and each state's discovery laws generally determine (1) the scope and limits of what information can be gathered, (2) how it is gathered, and (3) when it is gathered. Depositions are included in discovery methods and allow parties to ask the deponent questions relating to the case. Depositions are not only expensive but can be disruptive, especially to high-level corporate executives whose time and dedication to their companies should be their primary focus. In some jurisdictions, corporate executives rely on the Apex Doctrine, which may prevent such executives from being deposed or being subjected to other forms of discovery due to their high-ranked position. But would enforcement of this doctrine be unfair to litigants in asserting a claim against a large, profitable corporation?

Certainly, the corporation has a large pocket and may utilize the Apex Doctrine to stall the litigation process in hopes the opposing party will give up and settle. Should this be considered discovery abuse? On the other hand, individual litigants could use this doctrine for the same abusive purpose—to pressure a chief executive officer (CEO) to choose between settling or being deposed. This Comment evaluates a recent Supreme Court of Georgia decision in the light of the contemporary Apex Doctrine in other jurisdictions, especially Florida. Further, the broader

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issue of abusive discovery practices must be evaluated when utilizing the doctrine from the perceptions of the high-ranked executive or as an individual litigant.

II. HISTORY OF THE APEX DOCTRINE

Litigants seeking to depose a company executive is often a tactic "used for intimidation or harassment of the corporate defendant."[1] This fact led to the creation of the Apex Doctrine. The primary purpose of the doctrine is to prevent high-ranking corporate executives from being improperly and unnecessarily deposed. While the doctrine has not been specifically adopted in the Federal Rules of Civil Procedure (FRCP),[2] state and federal courts have implemented the doctrine to "promote efficient discovery" and "to prevent the use of depositions to annoy, harass or unduly burden the parties."[3] Before a court can invoke the doctrine and shield an executive from deposition, the court must consider factors such as whether the executive has "superior or unique personal knowledge of facts that are relevant to the litigation" and whether "the party seeking the deposition [can] obtain that information from less burdensome sources."[4] Essentially, a high-level executive will be able to seek a protective order to prevent being deposed and will rely on the Apex Doctrine. When relying on this doctrine, the high-level executive will need to establish that (1) he or she qualifies as an Apex-individual, (2) lacks unique, personal knowledge of the issues being litigated, and (3) that other, less intrusive means of discovery have not been exhausted.[5] Only then will the court issue a protective order. Making these determinations is no simple task, however, as courts must consider numerous factors when deciding to prevent the deposition of a high-level executive.

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1. Christopher R. Christensen & Justin M. Schmidt, *Revisiting the Apex Doctrine*, IADC Privacy Project Volume IV (2011), https://condonlaw.com/wp-content/uploads/2019/09/Revisting-the-Apex-Doctrine.pdf [https://perma.cc/ERR2-E2XP].

2. FED. R. CIV. P.

3. Michael Hewes & Jordan Jarreau, *The Apex Doctrine and the C-Suite Deponent*, JDSUPRA (June 3, 2022), https://www.jdsupra.com/legalnews/the-apex-doctrine-and-the-c-suite-8813387/ [https://perma.cc/J3PK-75YX].

4. Hewes & Jarreau, *supra* note 3.

5. Joseph V. Schaeffer, *The Apex Deposition: Practice Tips and Standards*, ABA (Apr. 29, 2018), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2018/the-apex-deposition-practice-tips-and-standards/ [https://perma.cc/UY97-S7TB].

A. Who is an Apex Individual?

As an initial matter, a corporation or a high-level executive will attempt to utilize the doctrine to prevent being deposed. This occurs when an opposing litigant seeks to depose such an executive. The first question the court must address is: who is considered "high-level" so as to render the invocation of the doctrine proper? The doctrine protects high-level corporate officials, and many courts assume that an individual "in a chief officer position, a board director, or a president" automatically qualifies as an Apex employee—even former or retired executives can qualify as such.[6] This list of positions is not exhaustive, and even lower-level employees may invoke the doctrine. To that end, courts assess "the size of the company as well as the ranking and responsibilities of the employee."[7] Considerations of company size include "whether the company is large enough to have executives who are not involved in the day-to-day management of the business."[8] Assuming the company is large enough, federal and state courts evaluate whether the executive "is typically removed from the subject matter of litigation" and whether a lower-level employee would have better information regarding the disputed issue.[9] By contrast, district courts have held that CEOs of relatively small companies involved in the business's day-to-day operations and who have direct knowledge regarding the issue in dispute will not be shielded under the doctrine.[10]

The Apex Doctrine has been applied not only to corporate executives but also to high-ranked government officials.[11] The Apex Doctrine has been used to protect deposing "staff members of the Executive Office of the President, governors, agency heads, former commissioners, chiefs of

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6. Hewes & Jarreau, *supra* note 3 (first citing *In re* Cont'l Airlines, Inc., 305 S.W.3d 849 (Tex. App. 2010); and then citing Gautheir v. Union Pac. R.R. Co., No. 1:07-CV-12 (TH/KFG), 2008 U.S. Dist. LEXIS 47199 (E.D. Tex. June 18, 2008)).

7. Hewes & Jarreau, *supra* note 3.

8. Hewes & Jarreau, *supra* note 3 (citing Sun Capital Partners, Inc. v. Twin City Fire Ins. Co., 310 F.R.D. 523, 528 (S.D. Fla. 2015)).

9. Hewes & Jarreau, *supra* note 3 (citing Gonzales Berrios v. Mennonite Gen. Hosp., Inc., No. 18-1146 (RAM), 2019 U.S. Dist. LEXIS 171104, at *11–12 (D.P.R. Sep. 30, 2019)).

10. *See, e.g.*, Ray v. BlueHippo Funding, LLC, No. C-06-1807 JSW (EMC), 2008 U.S. Dist. LEXIS 92821, at *7 (N.D. Cal. Nov. 6, 2008).

11. *See, e.g.*, Union Sav. Bank v. Saxon, 209 F. Supp. 319 (D.D.C. 1962); Simplex Time Recorder Co. v. Sec'y of Labor, 766 F.2d 575, 586–87 (D.C. Cir. 1985); Nat'l Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1144–46 (2d Cir. 1974); Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); Peoples v. U.S. Dep't of Agric., 427 F.2d 561, 567 (D.C. Cir. 1970); Church of Scientology v. IRS, 138 F.R.D. 9, 12 (D. Mass. 1990).

staff for department heads and parole board members."[12] Ultimately, the general goal of the Apex Doctrine is to prevent abuse of discovery when executives or high-ranked government officials do not possess the best sources of information about the disputed issue.

B. In What Circumstances Does the Apex Doctrine Apply to Non-Government Executives?

In jurisdictions that utilize the Apex Doctrine, and upon the determination that a corporate executive qualifies as an Apex employee, the court must first conduct a balancing test to decide whether to invoke the doctrine. The court will balance the burdensome and harassing nature of the deposition against the broad scope of the applicable discovery rules.[13] The court will assess (1) whether the Apex executive has unique, personal, and relevant knowledge of the subject matter of the issue in dispute and (2) whether the opponent may obtain that knowledge through less burdensome alternatives.[14] If such alternatives exist, the court will typically invoke the doctrine and prevent the deposition.[15]

The first issue contemplates the requisite level of knowledge of the subject matter of the litigation so that an Apex executive can be deposed. Generally, "[m]erely having *some* knowledge of the subject matter of a dispute is typically not enough to compel the deposition of a high-ranking executive."[16] The rationale is that it is improper to depose an executive under the presumption that "he or she has the ultimate responsibility for all corporate decisions or knows corporate policy."[17] Likewise, having "generalized knowledge about the subject matter of the litigation is not enough to justify deposing an Apex employee."[18] Second, if the Apex

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12. Hewes & Jarreau, *supra* note 3 (citing *In re* Bush, 287 S.W.3d 899 (Tex. App. 2009) (noting that the president and former presidents obtain protection by a more stringent doctrine)); *Simplex Time Recorder Co.*, 766 F.2d at 586–87; EEOC v. K-Mart, 694 F.2d 1055, 1067–68 (6th Cir. 1982).

13. Hewes & Jarreau, *supra* note 3.

14. Hewes & Jarreau, *supra* note 3 (first citing Alberto v. Toyota Motor Corp., 796 N.W.2d 490 (Mich. App. 2010); and then citing Crown Cent. Petroleum Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1999)).

15. Hewes & Jarreau, *supra* note 3.

16. Hewes & Jarreau, *supra* note 3 (first citing *In re* TMX Fin. of Texas, Inc., 472 S.W.3d 864, 877 (Tex. App. 2015); then citing *In re* Taylor, 401 S.W.3d 69, 74 (Tex. App. 2009); and then citing *In re* BP Prods. N. Am., Inc., No. 01-06-00613-CV 2006 Tex. App. LEXIS 6898, at *19–20 (Tex. App. Aug. 4, 2006)). *Accord, e.g.,* Dart Indus. v. Acor, No. 6:06-cv-1864-Orl-28DAB, 2008 U.S. Dist. LEXIS 37731, at *4 (M.D. Fla. May 7, 2008)).

17. Hewes & Jarreau, *supra* note 3 (citing *In re* El Paso Healthcare Sys., 969 S.W.2d 68, 74 (Tex. App. 1998)).

18. Hewes & Jarreau, *supra* note 3 (citing Armstrong Cork Co. v. Niagara Mohawk Power Corp., 16 F.R.D. 389 (S.D.N.Y. 1954)); *Alberto*, 796 N.W.2d at 496.

employee is the only source of the information, deposing the employee may be proper.[19] Even then, courts still assess whether the information sought can be obtained through alternative discovery methods such as "interrogatories or depositions of a designated spokesperson or lower ranked employee."[20] Ultimately, less burdensome alternatives should be attempted prior to seeking the deposition of an Apex employee, and if no alternative exists, the court will determine whether such deposition should proceed.

C. How is the Apex Doctrine Applied?

Application of the doctrine varies amongst jurisdictions. Typically, when a litigant seeks to depose a corporate executive, the executive or the corporation will file a motion seeking a protective order under the application of the Apex Doctrine.[21] Under the FRCP, a protective order is allowed "whenever justice requires 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'"[22] In support of the motion, evidence must be presented, "typically [through] an affidavit, demonstrating that: 1) the executive is an Apex employee and 2) lacks unique personal knowledge."[23] Upon filing a motion for protection, the opposing party bears the burden of establishing "that the relevant information sought cannot be obtained without the Apex deposition."[24] The court will then conduct the aforementioned test

19. Hewes & Jarreau, *supra* note 3 (first citing Cabrera v. SEIU, No. 2:18-cv-00304-RFB-DJA, 2019 U.S. Dist. LEXIS 203252, at *4 (D. Nev. Nov. 22, 2019); and then citing City of Farmington Hills Emp. Ret. Sys. v. Wells Fargo Bank, N.A., No. 10-4372 (DWF/JJG), 2012 U.S. Dist. LEXIS 190633, at *12 (D. Minn. Sept. 17, 2012)). *Accord In re* Celadon Trucking Servs., Inc., 281 S.W.3d 93, 98 (Tex. App. 2008) ("An individual has unique or superior knowledge when he or she is the only person with personal knowledge of the information sought or arguably possesses relevant knowledge greater in quality or quantity than other available sources.").

20. Hewes & Jarreau, *supra* note 3 (first citing Cmty Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621–22 (D.D.C. 1983); then citing Google Inc. v. Am. Blind & Wallpaper Factory, Inc., No. C 03-5340 JF (RS), 2006 U.S. Dist. LEXIS 67284 (N.D. Cal. Sept. 6, 2006); and then citing M. A. Porazzi Co. v. The Mormaclark, 16 F.R.D. 383 (S.D.N.Y. 1951) (refusing vice president's deposition where nothing could be contributed beyond that obtained from general claims agent)).

21. Hewes & Jarreau, *supra* note 3 (citing *In re TMX* Fin. of Texas, Inc., 472 S.W.3d at 875).

22. Mark A. Behrens & Christopher E. Appel, *Florida Supreme Court Leads on Apex Doctrine*, ABA (Mar. 9, 2022), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2021-22/winter/florida-supreme-court-leads-apex-doctrine/ [https://perma.cc/62D5-3TG2] (quoting FED. R. CIV. P. 26(c)(1)).

23. Hewes & Jarreau, *supra* note 3 (citing *In re TMX* Fin. of Texas, Inc., 472 S.W.3d at 875).

24. Hewes & Jarreau, *supra* note 3 (citing *Alberto*, 796 N.W.2d at 495).

to determine whether deposition is proper. If the court cannot definitively establish that the deposition is proper, it may implement limitations on the deposition, such as what topics may be discussed and the length of the deposition.[25] Ultimately, and as further discussed below, jurisdictions vary when determining when and how to invoke the Apex Doctrine to shield corporate executives. Nevertheless, executives and corporations should utilize this doctrine as a first line of defense to avoid depositions that could disrupt and burden the Apex executive.

D. How has the Apex Doctrine been Adopted?

Federal and state courts that adopt the Apex Doctrine "typically base their decision on existing rules that address unduly burdensome civil discovery."[26] For example, the FRCP, along with "many state rules of civil procedure, expressly limit the frequency or extent of discovery that is 'unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.'"[27] Courts have reasoned that the rationale to adopt the doctrine is to "promote[] the overall goal of civil procedure rules [and state rules]," and "to 'secure the just, speedy, and inexpensive determination of every action.'"[28] Under the Apex Doctrine, the party seeking the deposition must show the purpose is to advance the litigation and not for an improper purpose.[29]

In *Crown Central Petroleum Corp v. Garcia*,[30] the Texas Supreme Court adopted the Apex Doctrine and stated, "'virtually every court which has addressed the subject' has appreciated the need for discovery rules that accommodate the unique problems presented by deposing high-level officers."[31] The court stated that the burden of establishing that deposing the Apex executive is proper lies with the party seeking to depose and that courts retain the discretion to restrict the deposition in terms of duration, scope, and location.[32] Many courts, both at the federal and state level, "have formally adopted the apex doctrine based upon existing procedural rules."[33] On the other hand, "other courts have informally

25. Hewes & Jarreau, *supra* note 3 (citing *Garcia*, 904 S.W.2d at 128; Liberty Mut. Ins. Co. v. Superior Court, 10 Cal. App. 4th 1282, 1289 (1992)).

26. Behrens & Appel, *supra* note 22.

27. Behrens & Appel, *supra* note 22 (quoting FED. R. CIV. P. 26(b)(2)(C)(i)).

28. Behrens & Appel, *supra* note 22 (quoting FED. R. CIV. P. 1).

29. Behrens & Appel, *supra* note 22.

30. 904 S.W.2d 125 (Tex. 1995).

31. Behrens & Appel, *supra* note 22 (quoting *Garcia*, 904 S.W.2d at 128).

32. *Garcia*, 904 S.W.2d at 128.

33. Behrens & Appel, *supra* note 22.

applied the doctrine when identifying the circumstances in which high-level officers can be deposed."[34] For example, the Supreme Court of Appeals of West Virginia noted that "not all courts have examined the issue of whether to allow the deposition of a high-ranking corporate officer . . . in terms of whether to adopt the 'apex deposition rule.'"[35] However, "those courts, nonetheless, have applied similar common criteria . . . including whether the high-ranking corporate official has certain unique or personal knowledge and whether less intrusive methods of discovery are available."[36]

In *State ex rel. Ford Motor Co. v. Messina*,[37] the Missouri Supreme Court declined to formally adopt the Apex Doctrine, but held that a protective order in favor of the corporation's divisional executive director and its vice president chief of staff was proper.[38] The court reasoned that "[f]or top-level employee depositions, the court should consider: whether other methods of discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent."[39] In *Crest Infiniti II, LP v. Swinton*,[40] the Oklahoma Supreme Court applied the same principles as the court in *Messina* but formally declined to adopt the Apex Doctrine.[41] The court stated that a protective order in favor of a corporate executive is proper when the deposition "would inflict annoyance, harassment, embarrassment, oppression or undue delay, burden or expense."[42] Practitioners are increasingly requesting the courts to adopt the Apex Doctrine.[43] The question remains amongst those that do not—should they formally adopt the Apex Doctrine or less formally apply its considerations in the corporate context?

E. Does Utilizing the Apex Doctrine Prevent Abusive Discovery?

Courts recognize that high-level corporate officers will likely be targeted for discovery and that when they do not have direct knowledge

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34. Behrens & Appel, *supra* note 22.
35. *See* State *ex rel.* Mass. Mut. Life Ins. Co. v. Sanders, 724 S.E.2d 353, 361 (W. Va. 2012).
36. *Id.*
37. 71 S.W.3d 602 (2002).
38. *Id.* at 607, 609.
39. *Id.* at 607 (citing State *ex rel.* Anheuser v. Nolan, 692 S.W.2d 325, 328 (1985)).
40. 174 P.3d 996 (2007).
41. *Id.* at 1004.
42. *Id.*
43. Behrens & Appel, *supra* note 22.

of any facts relating to the lawsuit, they deserve protection.[44] In *EchoStar Satellite, LLC v. Splash Media Partners, L.P.*,[45] a federal district court in Colorado stated that "high ranking and important executives 'can easily be subjected to unwarranted harassment and abuse' and 'have a right to be protected.'"[46] Deposing those "apex" officials "can be misused as 'tactical weapons' to harass corporate defendants or extract settlements unrelated to the merits of the claim."[47] Numerous courts have recognized and agreed that "the deposition of even a single high-level executive during discovery 'creates a tremendous potential for abuse or harassment.'"[48] To that end, the Florida District Court of Appeals stated:

> The job of the president of the company is to manage the company, not to fly around the United States participating in depositions about . . . disputes of which the president has no personal knowledge . . . . If all claimants demand and obtain the same right, the chief executive officer manages his or her deposition schedule, not the company.[49]

The Apex Doctrine has also been recognized as promoting "sound public policy beyond curbing abusive discovery."[50] In fact, it has been stated that "[a]pex depositions can stifle the actions of high-level executives in setting corporate policy, speaking for the company on important safety or other public issues, and advancing corporate culture."[51]

The same rationale in support of utilizing the Apex Doctrine applies equally to depositions of a high-level government official.[52] For example, in *Murray v. County of Suffolk*,[53] the plaintiff individual sued the county for alleged sexual abuse committed by county police officers.[54] The court

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44. Behrens & Appel, *supra* note 22.

45. No. 07-cv-02611-PAB-BNB, 2009 U.S. Dist. LEXIS 43555 (D. Colo. May 11, 2009).

46. *Id.* at *6 (quoting Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985)).

47. Behrens & AppeL, *supra* note 22 (citing Intelligent Verifications Sys., LLC. v. Microsoft Corp., No. 2:12cv525, 2014 U.S. Dist. LEXIS 198819, at 6* (E.D. Va. Jan. 9, 2014) (executives "require protection from litigation tactics [used] to create undue leverage by harassing the opposition or inflating its discovery costs").

48. Behrens & Appel, *supra* note 22 (quoting Apple Inc. v. Samsung Elecs. Co., 282 F.R.D. 259, 263 (N.D. Cal. 2012)).

49. Behrens & Appel, *supra* note 22 (quoting General Star Indem. Co. v. Atl. Hosp. of Fla., LLC, 57 So. 3d 238, 240 (Fla. Dist. Ct. App. 2011)).

50. Behrens & Appel, *supra* note 22.

51. Behrens & Appel, *supra* note 22 (citing Guest v. Carnival Corp., 917 F. Supp. 2d 1242, 1243 (S.D. Fla. 2012)); Naylor Farms, Inc. v. Anadarko OGC Co., No. 11-cv-01528-REB-KLM, 2011 U.S. Dist. LEXIS 68940, at 10* (D. Colo. June 27, 2011)).

52. Behrens & Appel, *supra* note 22.

53. 212 F.R.D. 108 (E.D.N.Y. 2002).

54. *Id.* at 109.

ultimately held that a deposition of the police commissioner was not required given his lack of knowledge and the availability of other officers to give evidence regarding the county policy or procedures regarding officers' sexual abuse.[55] To allow deposing an agency head or high-level government official who lacks unique or personal knowledge relating to the issue "can unduly burden the business of governing and frustrate other public policies."[56] Even allowing the deposition of a "former government agency head could 'serve as a significant deterrent to qualified candidates seeking public service positions.'"[57]

Overall, the Apex Doctrine balances legitimate discovery needs against the potential for abusive discovery inherent in Apex depositions. Only when the high-level officer or government "official has unique or superior personal knowledge of discoverable information" will the deposition be proper.[58] Further, courts "often require that 'the information cannot be obtained by less intrusive means, such as by deposing lower-level officials or employees.'"[59]

III. CONTRASTING PERCEPTIONS OF THE APEX DOCTRINE IN GEORGIA AND FLORIDA

Georgia and Florida courts are very similar when it comes to discovery practices, generally. The Georgia discovery section, found in section 9-11-26 of the Official Code of Georgia Annotated, was adopted in 1966 and governs discovery practices.[60] Florida Rule of Civil Procedure[61] 1.280 governs discovery practices in Florida.[62] Both states allow parties to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . ."[63] Both states implement the same requirements when seeking a protective order.[64] However, they have taken a very different approach when considering whether and how to apply the Apex Doctrine in civil suits. In Florida, the Apex Doctrine has been codified into the Florida Rules of Civil Procedure. On the other

55. *Id.* at 109–10.

56. Behrens & Appel, *supra* note 22.

57. Behrens & Appel, *supra* note 22 (quoting Horne v. Sch. Bd., 901 So. 2d 238, 241 (Fla. Dist. Ct. App. 2005) (denying the deposition of the former state education department commissioner)).

58. *Garcia*, 904 S.W.2d at 128.

59. Behrens & Appel, *supra* note 22 (quoting *Alberto*, 796 N.W.2d at 495).

60. *See* O.C.G.A. § 9-11-26 (2022).

61. FLA. R. CIV. P.

62. *See* FLA. R. CIV. P. 1.280 (2021).

63. *Compare* FLA. R. CIV. P. 1.280(b)(1) *with* O.C.G.A. § 9-11-26(b)(1).

64. *Compare* FLA. R. CIV. P. 1.280(c)(1)–(8) *with* O.C.G.A. § 9-11-26(c)(1)–(8).

hand, the Supreme Court of Georgia recently rejected an opportunity to formally adopt and implement the doctrine.

A. General Motors, LLC v. Buchanan (Supreme Court of Georgia Decision)

1. The Trial Court and Court of Appeals' Decisions

As a matter of first impression, the Supreme Court of Georgia in 2022 addressed whether to adopt the Apex Doctrine, analyzing whether a high-level corporate executive could be subject to deposition in a civil suit brought by an individual plaintiff.[65] In *General Motors, LLC v. Buchanan*,[66] the plaintiff brought suit for wrongful death when his wife was killed while driving her 2007 Chevrolet Trailblazer, which was manufactured by the defendant corporation (GM).[67] The plaintiff sought compensatory and punitive damages and alleged the accident resulted from a "defect in the 'steering wheel angle sensor,' a component of the car's electronic stability control system."[68] Buchanan sought to depose GM's CEO, Mary Barra, based on prior "public statements she made about GM's commitment to safety, including the 'Speak Up for Safety' program under which the Trailblazer steering wheel angle sensor was investigated by GM."[69] Ultimately, GM decided no action would be taken regarding the steering wheel angle sensor upon concluding the investigation.[70] In response to the request to depose Barra, GM moved for a protective order, relying on O.C.G.A. § 9-11-26(c) and citing federal court cases that assessed the Apex Doctrine.[71]

The trial court denied GM's motion and emphasized Georgia's liberal discovery rules under the Civil Practice Act.[72] While the trial court rejected the attempt "to employ the apex doctrine framework, the trial court's order [did] not otherwise reflect that it actually considered whether GM's arguments as to apex doctrine factors constituted good cause for granting the motion for protective order."[73] The trial court

65. Gen. Motors, LLC v. Buchanan, 313 Ga. 811, 874 S.E.2d 52, 57 (2022) [hereinafter *Buchanan II*].

66. *Id.*

67. *Id.* at 812, 874 S.E.2d at 58.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 812–13, 874 S.E.2d at 58 (noting that this section of Georgia's discovery statute provides the requirements for a party seeking a protective order).

72. *Id.* at 813, 874 S.E.2d at 58.

73. *Id.*

declared that "until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoverer's action, the [trial] court should not intervene to limit or prohibit the scope of pretrial discovery" and concluded that GM did not show good cause for the protective order.[74]

The Georgia Court of Appeals granted GM's application for interlocutory appeal, affirmed the trial court's denial of a protective order, and refused to apply the Apex Doctrine.[75] The court of appeals compared the broad scope of O.C.G.A. § 9-11-26(b)(1)[76] to FRCP 26(b)(1)[77] and concluded that both "parties could 'obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved,' but that a trial court may prohibit, or impose limitations on, discovery requests . . . ."[78] While the court of appeals stated that the trial court was not required to do so, it "reasoned that the trial court could consider whether Barra had unique personal knowledge of properly discoverable facts and whether those facts could be discovered by other, less burdensome means as among the myriad considerations . . . ."[79] Ultimately, the court of appeals "held that there was evidence to support the trial court's conclusion that GM did not meet its burden of showing good cause because its only argument was that Barra should not be deposed because she was a high-ranking executive without unique knowledge."[80]

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74. *Id.* at 813, 874 S.E.2d at 58–59.

75. *Id.* at 814, 874 S.E.2d at 59 (citing Gen. Motors, LLC v. Buchanan, 359 Ga. App. 412, 417–18, 858 S.E.2d 102, 107–08 (2021) [hereinafter *Buchanan I*]).

76. O.C.G.A. § 9-11-26(b)(1) (establishing that in Georgia, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

77. *See* FED R. CIV. P. 26(b)(1) which provides that:

> [u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Id.

78. *Buchanan II*, 313 Ga. at 814, 874 S.E.2d at 59 (citing *Buchanan I*, 359 Ga. App. at 414, 858 S.E.2d at 105).

79. *Buchanan II*, 313 Ga. at 814, 874 S.E.2d at 59 (citing *Buchanan I*, 359 Ga. App. at 415, 858 S.E.2d at 105).

80. *Buchanan II*, 313 Ga. at 814, 874 S.E.2d at 59 (citing *Buchanan I*, 359 Ga. App. at 416–17, 858 S.E.2d at 106–07).

2. The Supreme Court of Georgia's Decision

The Supreme Court of Georgia granted certiorari to address whether the Apex Doctrine should apply to GM.[81] The court first noted the broad scope of discovery under the Civil Practice Act.[82] In doing so, the court recognized that "[t]he discovery procedure is to be construed liberally in favor of supplying a party with the facts."[83] The court referred to O.C.G.A. § 9-11-26(b)(1) and interpreted "relevant," as it relates to the subject matter sought to be discovered, "'very broadly' so as to 'remove the potential for secrecy' and to 'reduce the element of surprise at trial.'"[84] The court then noted that a trial court may limit discovery, through its wide discretion, by enforcing a protective order under O.C.G.A. § 9-11-26(c).[85] The discovery statute provides that:

> Upon motion by a party or by the person from whom discovery is sought and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (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;
> (4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;
> (5) That discovery be conducted with no one present except persons designated by the court;
> (6) That a deposition, after being sealed, be opened only by order of the court;
> (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

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81. *Buchanan II*, 313 Ga. at 814, 874 S.E.2d at 59.

82. *Id.* The Civil Practice Act is found under Title 9, Chapter 11 of the Official Annotated Code of Georgia and governs civil procedure within Georgia to "secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1 (2022).

83. *Buchanan II*, 313 Ga. at 814, 874 S.E.2d at 59 (quoting Tenet Healthcare Corp. v. La. Forum Corp., 273 Ga. 206, 210, 538 S.E.2d 441, 445 (2000)).

84. *Buchanan II*, 313 Ga. at 814, 874 S.E.2d at 59 (citing Bowden v. Med. Ctr., Inc., 297 Ga. 285, 291–92, 773 S.E.2d 692, 696 (2015)).

85. *Buchanan II*, 313 Ga. at 815, 874 S.E.2d at 59.

> (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.[86]

The court noted the high standard of review of the trial court's discovery decisions on appeal, stating that "it will not reverse a trial court's decision on discovery matters absent a clear abuse of discretion."[87] The court further stated that the movant bears the burden of establishing the need for a protective order under the statute by showing good cause.[88]

The court then addressed GM's contention that good cause existed, that a protective order was proper to prevent the deposition of Barra, and that the court should adopt the framework of the Apex Doctrine in Georgia.[89] Before considering the Apex Doctrine to assess good cause for a protective order, the court reviewed the factors of the doctrine and the burdens that attach when requesting such a protective order.[90] In its argument, GM had mainly relied on federal district court cases to support the justification that applying some iteration of the Apex Doctrine is proper.[91] GM contended that the court should consider:

> (1) whether the deponent is a sufficiently high-ranking executive considering her role and responsibilities in the organization; (2) the extent to which the facts sought to be discovered in the deposition are properly discoverable; (3) whether the executive has unique personal knowledge of relevant facts; and (4) whether there are alternative means, including written discovery or depositions of other witnesses (including a deposition of an organizational representative pursuant to OCGA § 9-11-30 (b) (6)) by which the same facts could be discovered.[92]

The court determined that "[i]n the corporate context, the apex doctrine generally is intended to apply only to high-level executives" but when an executive is considered sufficiently high-ranked in an organization, whether the doctrine should apply is less clear.[93] The court reviewed cases in other jurisdictions that attempted to guide this

86. O.C.G.A. § 9-11-26(c).

87. *Buchanan II*, 313 Ga. at 815, 874 S.E.2d at 59 (quoting Ambassador College v. Goetzke, 244 Ga. 322, 323, 260 S.E.2d 27, 28 (1979)).

88. *Buchanan II*, 313 Ga. at 815, 874 S.E.2d at 60 (citing O.C.G.A. § 9-11-26(c)).

89. *Buchanan II*, 313 Ga. at 816, 874 S.E.2d at 60.

90. *Id.*

91. *Id.*

92. *Id.* at 816–17, 874 S.E.2d at 60–61.

93. *Id.* at 817, 874 S.E.2d at 61.

determination.[94] It stated that cases have established that the doctrine "is aimed to prevent the high level official deposition that is sought simply because [s]he is the CEO or agency head – the top official, not because of any special knowledge of, or involvement in, the matter in dispute."[95] The court noted that other jurisdictions have determined that the person sought to be deposed "must have some knowledge of facts that are properly discoverable – that is, facts that are relevant to the litigation" and that "this knowledge must be personal and unique or superior to that of other persons from the organization who might be deposed in the litigation."[96] The court next stated that courts should determine "whether the high-ranking executive's 'unique or superior knowledge' is available through other means."[97] The court also recognized that "[e]xhaustion of less intrusive means of discovery is not necessarily 'an absolute requirement . . . [but it] is an important, but not dispositive, consideration for a court to take into account in deciding how to exercise its discretion."[98]

Upon concluding its analysis of the Apex Doctrine factors, the court next addressed the parties' respective burdens under the doctrine.[99] Notably, federal courts have adopted differing approaches when determining who bears the burden to prove or overcome a motion for a protective order under the doctrine.[100] Some courts have placed the

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94. *Id.*

95. *Id.* at 817–18, 874 S.E.2d at 61 (quoting Minter v. Wells Fargo Bank, N.A., 258 F.R.D. 118, 126 (D. Md. 2009)).

96. *Buchanan II*, 313 Ga. at 818, 874 S.E.2d at 61 (first citing Simms v. NFL, No. 3:11-CV-0248-m-BK, 2013 U.S. Dist. LEXIS 189697, at *8–9 (N.D. Tex. July 10, 2013); then citing Alliance Indus., Inc. v. Longyear Holding, Inc., No. 08CV490S, 2010 U.S. Dist. LEXIS 119973, *11–12 (W.D.N.Y. Mar. 19, 2010); then citing Thomas v. IBM, 48 F.3d 478, 483 (10th Cir. 1995); then citing Chick-Fil-A, Inc. v. CFT Dev., LLC, No. 5:07-cv-501-Oc-10GRJ, 2009 U.S. Dist. LEXIS 34496, *9–10 (M.D. Fla. Apr. 3, 2009); and then citing Burns v. Bank of Am., No. 03 Civ. 1685 (RBM)(JCF), 2007 U.S. Dist. LEXIS 40037, *9–11 (S.D.N.Y. June 4, 2007)).

97. *Buchanan II*, 313 Ga. at 818, 874 S.E.2d at 62 (first citing Cuyler v. Kroger Co., No. 1:14-CV-1287-WBH-AJB, 2014 U.S. Dist. LEXIS 190234, *15–16 (N.D. Ga. Oct. 2, 2014); and then citing Brown v. Branch Banking & Trust Co., No. 13-81192-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 7721, *11 (S.D. Fla. Jan. 22, 2014)).

98. *Buchanan II*, 313 Ga. at 818, 874 S.E.2d at 62 (quoting Reilly v. Chipotle Mexican Grill, Inc., No. 15-CIV-23425-COOKE/TORRES, 2016 U.S. Dist. LEXIS 193407, *19 (S.D. Fla. Sept. 26, 2016); *see also In re* Transpacific Passenger Air Transp. Antitrust Litig., No. C-07-05634 CRB (DMR), 2014 U.S. Dist. LEXIS 29947, at *26 (N.D. Cal. Mar. 6, 2014)).

99. *Buchanan II*, 313 Ga. at 819, 874 S.E.2d at 62.

100. *Id.*

burden on the party seeking the deposition.[101] On the other hand, other federal courts have placed the burden on the party seeking to be immune from discovery to establish good cause for a protective order based on the application of the Apex factors.[102] Other federal courts have adopted a hybrid burden-shifting approach.[103] This approach initially places the burden on the party seeking a deposition to show that the executive has unique personal knowledge of the relevant issue and then shifts the burden to the executive to establish good cause for a protective order based on the fact that he or she does not have such knowledge.[104] While federal courts have not been reluctant to apply the Apex Doctrine, jurisdictions disagree about which party bears the burden of proof for its application.[105]

The court next considered the Apex Doctrine as it might apply to Georgia law and who bears the burden of proving its factors.[106] GM argued that Georgia courts should consider federal cases that interpreted Federal Rule 26[107] and applied the Apex Doctrine factors as persuasive authority to determine whether good cause exists to allow for a protective order.[108] However, the court recognized that Federal Rule 26 provides a narrower scope of discovery than the discovery rules under O.C.G.A. § 9-11-26(b).[109] The court noted that under O.C.G.A. § 9-11-26(c), "the movant bears the burden of establishing that a protective order is necessary."[110] The court stated that "to the extent federal courts have interpreted Federal Rule 26, those interpretations are relevant only

101. *Id.* (first citing Degenhart v. Arthur State Bank, No. CV411-041, 2011 U.S. Dist. LEXIS 92295, *6 (S.D. Ga. Aug. 8, 2011); then citing Hickey v. N. Broward Hosp. District, No. 14-CV-60542-BLOOM/VALLE, 2014 U.S. Dist. LEXIS 180112, *6 (S.D. Fla. Dec. 17, 2014); and then citing Performance Sales & Marketing LLC v. Lowe's Cos., Inc., No. 5:07-CV-00140-RLV-DLH, 2012 U.S. Dist. LEXIS 131394, at *19–20 (W.D.N.C. Sept. 14, 2012)).

102. *Buchanan II*, 313 Ga. at 819, 874 S.E.2d at 62 (first citing Dyson, Inc. v. Sharkninja Operating LLC, No. 1:14-cv-0779, 2016 U.S. Dist. LEXIS 54267, *4 (N.D. Ill. Apr. 22, 2016); and then citing Scott v. Chipotle Mexican Grill, Inc., 306 F.R.D. 120, 122 (S.D.N.Y. 2015)).

103. *Buchanan II*, 313 Ga. at 819–20, 874 S.E.2d at 62–63 (first citing *Naylor Farms, Inc.*, 2011 U.S. Dist. LEXIS at *6; then citing *Alliance Industries, Inc.*, 2010 U.S. Dist. LEXIS at *12–13; and then citing Tierra Blanca Ranch High Country Youth Program v. Gonzales, 329 F.R.D. 694, 697–98 (D.N.M. 2019)).

104. *Buchanan II*, 313 Ga. at 819–20, 874 S.E.2d at 62–63.

105. *Id.* at 820, 874 S.E.2d at 63.

106. *Id.*

107. FED R. CIV. P. 26.

108. *Buchanan II*, 313 Ga. at 820, 874 S.E.2d at 63.

109. *Id.*

110. *Id.*

insofar as they comport with the text of our analogous rule."[111] The court specifically stated that insofar as "federal courts interpret the apex doctrine as establishing a burden-shifting scheme or a rebuttable presumption that the deposition of a high-ranking corporate executive violates Federal Rule 26 (b)(2)(C)'s proportionality standard, no such equivalent consideration exists under Georgia's Rule 26(c)."[112] The court concluded that it looks to federal cases that interpret the FRCP only as persuasive authority and "where the language of a Georgia statute deviates from the federal rules, the persuasive value of the authority interpreting and applying the federal rules is diminished."[113] Thus, the court "decline[d] to adopt any version of the apex doctrine that shifts the burden to the party seeking discovery."[114]

The court then determined Georgia courts should abide by its statutes when determining whether granting a protective order is proper.[115] Under this rationale, the court stated that "to justify a protective order, one or more of the statutorily enumerated harms must be established through a specific demonstration of fact, as opposed to [] conclusory statements . . . ."[116] The supreme court determined the court of appeals was correct when it noted, "[w]hat constitutes 'good cause' must be left largely to the trial judge who has a latitude of discretion in determining whether the showing has been made."[117] The supreme court then concluded that to adopt "the apex doctrine would necessarily restrict the trial court's discretion by placing a thumb on the scale so as to suggest a special rule for high-ranking executives of large companies that exists nowhere in the Civil Practice Act," and ultimately this "would contravene the principle of broadly available discovery under Georgia law."[118]

The court then "rejected[ed] GM's assertion that leaving the determination of good cause to a trial court's discretion will result in inconsistent outcomes that will make meaningful appellate review difficult, if not impossible."[119] The supreme court stated that trial courts

111. *Id.* at 820–21, 874 S.E.2d at 63.

112. *Id.* at 821, 874 S.E.2d at 63.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 821, 874 S.E.2d at 63–64 (citing Caldwell v. Church, 341 Ga. App. 852, 861, 802 S.E.2d 835, 844 (2017)).

117. *Buchanan II*, 313 Ga. at 821, 874 S.E.2d at 64 (citing *Buchanan I*, 359 Ga. App. at 417, 858 S.E.2d at 106 (quoting Harris v. Tenet Healthsystem Spalding, Inc., 322 Ga. App. 894, 901, 746 S.E.2d 618, 623 (2013))).

118. *Buchanan II*, 313 Ga. at 821–22, 874 S.E.2d at 64 (citing *La. Forum Corp.*, 273 Ga. at 210, 538 S.E.2d at 445; O.C.G.A. § 9-11-26(b)(1)).

119. *Buchanan II*, 313 Ga. at 822, 874 S.E.2d at 64.

regularly exercise their discretion to determine whether good cause exists and that appellate courts can review the reasonableness of those decisions based upon the evidence and arguments presented.[120] Thus the court felt no need to implement "a special test or framework different than that which generally applies to any claim of good cause made in support of a motion for protective order under" Georgia law.[121]

GM agreed that it had the initial burden of establishing good cause and that this burden is met when GM can show "that the deponent is a high-ranking executive, that she has no unique or personal knowledge that is properly discoverable, and that the discoverable information is available through other means – essentially, when it demonstrates that it has satisfied apex doctrine factors."[122] However, the court noted, "GM's view effectively builds in a presumption of good cause in favor of protection from discovery once apex doctrine factors are established."[123] And, referring to the text of O.C.G.A § 9-11-26(c), it emphasized that by statute the burden is placed "on the party seeking protection from discovery to establish good cause."[124] Thus, the court stated that "GM's formulation would impermissibly shift that burden to the party seeking discovery."[125]

The court further concluded that when a party seeking a protective order raises and adequately shows factors usually associated with the Apex Doctrine, "a court should consider those factors – as well as any other factors raised – and decisions applying those factors in determining whether the party seeking relief has shown good cause for a protective order under O.C.G.A. § 9-11-26 (c)."[126] Specifically to this case, the court must consider whether deposing "a particular individual would cause 'annoyance, embarrassment, oppression, or undue burden or expense' based on, for example, that person's scheduling demands or responsibilities and lack of relevant or unique personal knowledge that is not available from other sources."[127] Courts must also "consider on a case-by-case basis whether the evidence demonstrates good cause such as an undue burden or expense."[128] Thus, "[h]igh-ranking corporate executives are not immune from discovery and are not automatically

120. *Id.*
121. *Id.*
122. *Id.* at 822–23, 874 S.E.2d at 64–65.
123. *Id.* at 823, 874 S.E.2d at 65.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* (quoting O.C.G.A. § 9-11-26(c)).
128. *Buchanan II*, 313 Ga. at 823, 874 S.E.2d at 65.

given special treatment excusing them from being deposed simply by virtue of the positions they hold or the size of the organizations they lead."[129] The same is true regarding large multinational companies, as they also are subject to the same Georgia discovery rules as smaller companies.[130]

Georgia discovery rules do not require a deponent's knowledge to be "unique."[131] The Supreme Court of Georgia, as it has said before, stated, "[t]he availability of one form of proof does not make other forms of proof irrelevant."[132] Discovery can be "sought to uncover what witnesses do or do not know and to reveal inconsistencies between witnesses."[133] Under this rationale, the court determined that in Georgia, courts "need not interpret the factors as a firmly established basis for an order prohibiting an executive's deposition."[134] The court noted the possibility that courts could act within their discretion and find "that a protective order prohibiting the deposition of an executive need not be issued even where the executive is high-ranking, has no unique personal knowledge, and the discoverable information is available through other means."[135] Along these same lines, a lack of Apex factors does not definitively mean that a high-level official cannot obtain a protective order when other factors have been presented showing good cause for such a determination.[136] Courts must still balance factors, in the interest of justice, and protect parties "against 'annoyance, embarrassment, oppression, or other undue burden or expense.'"[137] Even when a protective order is denied, the court may still implement terms and conditions relating to the discovery, controlling the sequence and timing of a deposition.[138]

The court expressed its belief that the policy concerns raised by GM are not to be resolved by the court. Instead, they should be voiced to the General Assembly, which has the power to change the law.[139] GM raised

129. *Id.*

130. *Id.*

131. *Id.* at 824, 874 S.E.2d at 65.

132. *Id.* at 823–24, 874 S.E.2d at 65 (quoting *Bowden*, 297 Ga. at 296, 773 S.E.2d at 699).

133. *Buchanan II*, 313 Ga. at 824, 874 S.E.2d at 65 (first citing Flower v. T.R.A. Indus., Inc., 111 P.3d 1192, 1206 (Wn. App. 2005); then citing Kuwait Airways Corp. v. Am. Sec. Bank, N.A., No. 86-2542, 1987 WL 11994, at *2 (D.D.C. May 26, 1987); and then citing Travelers Rental Co. v. Ford Motor Co., 116 F.R.D. 140, 143 (D. Mass. 1987)).

134. *Buchanan II*, 313 Ga. at 824, 874 S.E.2d at 65.

135. *Id.* at 824, 874 S.E.2d at 66.

136. *Id.*

137. *Id.* (quoting O.C.G.A. § 9-11-26(c)).

138. *Buchanan II*, 313 Ga. at 824, 874 S.E.2d at 66 (citing O.C.G.A. § 9-11-26(d) (2022)).

139. *Buchanan II*, 313 Ga. at 824–25, 874 S.E.2d at 66.

"concerns about inefficiencies in discovery involving corporate defendants absent mandatory application of the apex doctrine," the possibility for abuse by the plaintiff's counsel, and the presence of a double standard between federal courts and Georgia's state courts.[140]

Finally, the court addressed the trial court's order.[141] GM urged "the trial court to consider Barra's alleged lack of 'unique or superior knowledge of issues relevant to the case,'" that "[the plaintiff] could obtain relevant information by other, less intrusive means," and "that the deposition was intended to harass Barra and GM."[142] The supreme court agreed with the trial court's denial of a protective order based on the absence of the Apex Doctrine under Georgia law as well as any other legal framework that could shield certain corporate individuals.[143] However, the supreme court stated that the "court's order does not otherwise indicate that [it] considered whether the substantive merits of GM's arguments constituted good cause for granting GM's motion for a protective order."[144] The court stated, "independent of the apex doctrine, the asserted factors are entitled to consideration as to whether they constitute 'good cause' if established, whether in isolation or in concert."[145]

The court determined that the lower court's reliance on the language in *Bullard v. Ewing*[146] was "incorrect and has no basis in the text of O.C.G.A.§ 9-11-26 (c)."[147] In *Bullard*, the Georgia Court of Appeals stated that "until such time as the court is satisfied by *substantial evidence* that *bad faith or harassment motivates the* (discoverer's) *action*, the court should not intervene to limit or prohibit the scope of pretrial discovery."[148] The lower court thus ruled that "GM had not shown good cause for the protective order."[149] The supreme court stated, however, that Georgia's statute clearly provides "that a court's decision whether to issue a protective order is to be based on the effect the proposed discovery would have on the party from whom the discovery is sought, not the intent or motivations of the requesting party."[150] The court then stated

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140. *Id.*
141. *Id.* at 825, 874 S.E.2d at 66.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. 158 Ga. App. 287, 279 S.E.2d 737 (1981).
147. *Buchanan II*, 313 Ga. at 825–26, 874 S.E.2d at 66–67.
148. *Bullard*, 158 Ga. App. at 291, 279 S.E.2d at 740.
149. *Buchanan II*, 313 Ga. at 825, 874 S.E.2d at 66.
150. *Id.* at 825–26, 874 S.E.2d at 66 (citing O.C.G.A. § 9-11-26(c)).

that the trial court's evident formation of this rule "based on the language [] in *Bullard* would require substantial evidence of bad faith or a purpose of harassment on the part of the party seeking discovery as a predicate to the issuance of a protective order."[151] Accordingly, the court overruled "*Bullard* to the extent it held otherwise."[152]

Finally, the supreme court noted the court of appeals' opinion, which suggested "that the trial court needed only to determine that the requested discovery was relevant and was not required to consider GM's arguments that apex doctrine factors constituted good cause for a protective order under O.C.G.A. § 9-11-26(c)."[153] However, the Supreme Court of Georgia stated

> to the extent a party seeking a protective order argues that a proposed deponent should be protected "from annoyance, embarrassment, oppression, or undue burden or expense" based on the apex doctrine (or any other) factors, a trial court must consider whether the movant's arguments (and evidence presented in support of such arguments) constitute good cause for protection from discovery under O.C.G.A. § 9-11-26(c).[154]

While the trial court has broad discretion, it must actually consider both the evidence and arguments presented and then exercise that discretion.[155] Ultimately, the supreme court vacated the judgment of the court of appeals with a direction to vacate the lower court's order and remand the case to the trial court for reconsideration consistent with its opinion.[156]

While the Supreme Court of Georgia refused to adopt the Apex Doctrine, it altered the law of discovery in Georgia. The court clarified and added to the list of factors a trial judge must evaluate when determining whether good cause exists to allow for a protective order.[157] A party may show the existence of Apex factors to support the contention that a protective order is proper, and the trial court must consider them and determine if an enumerated harm under O.C.G.A. § 9-11-26(c) has occurred. Although the court emphasized the broad discovery rules under

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151. *Buchanan II*, 313 Ga. at 826, 874 S.E.2d at 66–67.

152. *Id.* at 826, 874 S.E.2d at 67.

153. *Id.* (citing *Buchanan I,* 359 Ga. App. at 415, 858 S.E.2d at 105) (noting that "the court *may* consider a myriad of factors to determine whether GM showed good cause to protect Barra from annoyance, embarrassment, oppression, or undue burden or expense," but that it was not required to).

154. *Buchanan II*, 313 Ga. at 826, 874 S.E.2d at 67.

155. *Id.*

156. *Id.* at 826–27, 874 S.E.2d at 67.

157. *Id.*

the Civil Practice Act, it reiterated that Georgia discovery statutes trumped federal rules and affirmed the trial court's broad discretion when determining whether to issue a protective order. It also held that trial judges must consider the evidence and arguments presented by parties seeking protective orders before exercising such discretion.[158]

Sometimes an appellate opinion is as revealing about what it does not include as much as what it does say. The *Buchanan* decision failed to address the broader discovery abuse issue discussed by other courts as justification for the Apex Doctrine. GM properly raised concern about "the collective impact of discovery on corporate executives."[159] GM contended that "an overwhelming influx of deposition requests [] will expose [executives] to harassment and abusive, unduly burdensome discovery practices that will prevent them from fulfilling their professional duties" as well as "the potential for abuse by plaintiff's counsel."[160] Despite broad agreement on this conclusion in other jurisdictions, the court simply remarked that "these policy concerns are properly addressed not by this Court but by petitioning the General Assembly and advocating for a change in the law."[161]

In short, the Supreme Court of Georgia failed to acknowledge these policy concerns raised by GM. Presumably, the court did not feel that it should even consider whether discovery abuse is an issue that arises when a party seeks to depose a high-level executive. Instead, it left the duty on litigants to petition the state legislature to change the law. In the spirit of promoting a fair and efficient discovery process, the court should have, at the very least, acknowledged that discovery abuse is of major concern, especially when a party seeks to depose a high-level executive. Without attempting to mitigate or resolve the issue of abusive discovery practices, Georgia litigants will likely face this concern again and again. The court did not make it clear whether it believes civil justice concerns support change or, alternatively, why the legislature should not be concerned about this sort of discovery abuse.

B. Florida's Codification of the Apex Doctrine

Significantly, the Georgia and Florida Supreme Courts differ drastically regarding the Apex Doctrine. In late August of 2021, just a few months before the *Buchanan* decision, the Florida Supreme Court announced, through its own motion, an amendment to Florida's Rules of

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158. *Id.* at 826, 874 S.E.2d at 67.

159. *Id.* at 824, 874 S.E.2d at 66.

160. *Id.* at 824–25, 874 S.E.2d at 66.

161. *Id.* at 825, 874 S.E.2d at 66 (citing McEntyre v. Sam's East, Inc., 313 Ga. 429, 432–33, 870 S.E.2d 385, 388–89 (2022)).

Civil Procedure to codify the Apex Doctrine.[162] In the amendment, Justice Muñiz began his opinion by noting that numerous courts already apply and utilize the Apex Doctrine to "protect high-level corporate officers from the risk of abusive discovery, while still honoring opposing litigants' right to depose such persons if necessary."[163] Originally, Florida's interpretation of the Apex Doctrine, developed by the district courts of appeal, only protected those classified as high-level government officials.[164] The amendment stated that its purpose is to "extend its protections to the private sphere."[165]

The Florida amendment was motivated by the decision in *Suzuki Motor Corp. v. Winckler*,[166] reached two years before the amendment.[167] In *Winckler*, the Florida First District Court of Appeals investigated "whether the trial court had departed from the essential requirements of law by not invoking the apex doctrine to prevent the examination" of the Suzuki Motor Corporation's Chairman and former C.E.O., Osamu Suzuki (Suzuki).[168] In *Winckler*, a plaintiff motorist alleged that faulty brakes on his Suzuki motorcycle caused his collision, resulting in his paralysis from the waist down.[169] The plaintiff brought suit for product liability against the corporation and sought to depose Suzuki, stating that the chairman "possess[ed] unique knowledge about specific facts relevant to [the] allegations."[170] Specifically, the plaintiff cited "the Chairman's involvement with a document addressing the brake issue and a related email."[171] Suzuki filed a motion seeking protection under the Apex Doctrine, contending "that its top-level corporate manager should not be subject to examination when others within the corporation could testify as to the relevant issues."[172] The corporation further claimed that Suzuki possessed "'no independent memory' of reviewing or signing the document regarding the brake issue and 'no personal knowledge' of the details."[173]

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162. *See In re*: Amendment to Fla. Rule of Civ. Procedure 1.280, 324 So. 3d 459 (Fla. 2021).

163. *Id.* at 459.

164. *Id.*

165. *Id.*

166. 284 So. 3d 1107 (Fla. Dist. Ct. App. 2019).

167. *In re* Amendment, 324 So. 3d at 459.

168. *Id.* (citing *Winckler*, 284 So. 3d at 1108).

169. *Winckler*, 284 So. 3d at 1108.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1108–09.

The trial court found that, outside of the governmental context, the Apex Doctrine could not be applied to Suzuki.[174] The trial court not only rejected the Apex Doctrine, but found that Suzuki "had personal involvement and could uniquely provide case-relevant information due to having personal involvement with the brake issue."[175] Subsequently, Suzuki Motor Corporation petitioned for a writ of certiorari to the Florida First District Court of Appeals, challenging the trial court's refusal to include Suzuki as an individual subject to the protections of the Apex Doctrine.[176]

The court of appeals struggled with the corporation's contention that the Apex Doctrine should be applied because "the doctrine is only clearly established in Florida in the government context, with respect to high-ranking government officials."[177] The court of appeals stated that the nature of the Apex Doctrine in Florida is that the head of an agency "should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the *agency head* is uniquely able to provide relevant information which cannot be obtained from other sources."[178] The court concluded that "because the apex doctrine hasn't been adopted in the corporate context, the trial court did not depart from the essential requirements of law by refusing to apply [the apex] doctrine to [Suzuki.]"[179] Specifically, much like the Supreme Court of Georgia in *Buchanan*, the court recognized the broad discretion given to trial courts to oversee discovery and that Suzuki's "deposition was reasonably calculated to lead to the discovery of admissible evidence."[180]

Judge Thomas, in his dissenting opinion,[181] acknowledged that Florida courts have not utilized the Apex Doctrine beyond the government context, but contended that "the rationale of the doctrine is equally applicable in the private sphere: the courts cannot countenance unjustified discovery of lead corporate executives for no legitimate reason."[182] Judge Thomas was concerned with the majority's reason that because "the apex doctrine was not 'clearly established' in the corporate

174. *Id.* at 1109.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (quoting Dep't of Agric. & Consumer Servs. v. Broward Cnty., 810 So. 2d 1056, 1058 (Fla. Dist. Ct. App. 2002)) (emphasis added).

179. *Winckler*, 284 So. 3d at 1109.

180. *Id.* at 1109–10.

181. *Winckler*, 284 So. 3d at 1110 (Thomas, J., dissenting).

182. *Id.* at 1113 (Thomas, J., dissenting).

context [it] would prevent Florida's appellate courts from ever extending the apex doctrine to that context in the first instance."[183]

After the *Suzuki* decision, the Florida Supreme Court faced the following question: "Does a departure from the essential requirement of law occur when the so-called apex doctrine, which applies to governmental entities . . ., is not applied to a corporation?"[184] Essentially, this "rules case" allowed the court to determine whether it should "adopt the apex doctrine in the corporate context."[185] The court recognized that "[p]reventing harassment and unduly burdensome discovery has always been at the heart of [the apex] doctrine in [Florida]."[186] The court noted that this rationale has been invoked by Florida's First District as applied to governmental officials and that such individuals have actually benefited from the doctrine.[187] Under principles of efficiency and anti-harassment, the court stated that the doctrine should be equally compelling in the private sphere.[188] The Florida Supreme Court noted that essentially "every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment."[189] This remark strongly contrasts with the Supreme Court of Georgia's avoidance of the issue in *Buchanan*. Subsequently, the court determined that private corporate officers should receive the same protection that Florida courts have afforded government officers.[190]

The court pointed out that adopting the doctrine would not completely bar individuals from taking depositions of high-ranked corporate officials.[191] Specifically, the court stated that "[t]he point of the apex doctrine is to balance the competing goals of limiting potential discovery abuse and ensuring litigants' access to necessary information."[192] If applied properly, "the doctrine 'will prevent undue harassment and oppression of high-level officials while still providing a [party] with several less-intrusive mechanisms to obtain the necessary discovery, and allowing for the possibility of conducting the high-level deposition if

183. *In re* Amendment, 324 So. 3d at 460 (citing *Winckler*, 284 So. 3d at 1110).

184. *In re* Amendment, 324 So. 3d at 460.

185. *Id.*

186. *Id.*

187. *Id.* at 460–61 (citing *Broward Cnty.*, 810 So. 2d at 1058).

188. *In re* Amendment, 324 So. 3d at 461.

189. *Id.* (quoting Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *8 (N.D. Cal. Jan. 25, 2007)).

190. *In re* Amendment, 324 So. 3d at 461.

191. *Id.* (citing State *ex rel.* Mass. Mut. Life Ins. Co., 724 S.E.2d at 364).

192. *In re* Amendment, 324 So. 3d at 461.

warranted.'"[193] The court stated "that it is in Florida's best interests to codify the apex doctrine in [its] rules of civil procedure and to apply the doctrine to both private and government officers."[194] The court determined that doing so "allows [the court] to ensure consistency across the two contexts and to define and explain the apex doctrine as clearly as possible."[195] As a result, the newly codified Apex Doctrine in Florida provides:

> A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. The motion, whether by a party or by the person of whom the deposition is sought, must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated. If the officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.[196]

The court explained key aspects of the newly codified doctrine that will assist the lower courts when applying the doctrine.[197] First, the court addressed who is considered a current or former high-level corporate or government officer to render the doctrine applicable.[198] The court stated that when the individual's high-level status is in dispute, the party resisting deposition bears the burden of persuading the court that this requirement has been satisfied.[199] However, the court concluded that it is neither feasible nor desirable to define the phrase "high-level government or corporate officer" based on the "rich body of case law applying the term."[200] This is because "the new rule codifies a doctrine of long legal standing" that has been "enforced . . . in the government and

193. *Id.* (quoting *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 367–68).

194. *In re* Amendment, 324 So. 3d at 461.

195. *Id.*

196. *Id.* at 461–62. This new rule can be found in Rule 1.280(h) of the Florida Rules of Civil Procedure.

197. *In re Amendment*, 324 So. 3d at 462.

198. *Id.*

199. *Id.*

200. *Id.*

private context for decades," and courts already have "a proper interpretation of the term."[201] The court stated that, consistent with case law, the term "officer" shall be used "in the generic sense of '[o]ne who holds an office of authority or trust in an organization, such as a corporation or government.'"[202] Having "high-level officer status," in the Apex Doctrine context, "depends on the organization and the would-be deponent's role in it, not on whether the person is an 'officer' in a legal sense."[203]

Next, the court discussed each party's responsibilities regarding an affidavit disclaiming unique, personal knowledge of relevant facts.[204] Originally, Florida courts did not always require such an affidavit in the government context. The court, however, made this an explicit requirement in the rule and determined that "an affidavit or declaration is essential to the proper functioning of the rule in both contexts."[205] The high-level officer may not present "[b]ald assertions of ignorance", and instead, he or she must provide "[a] sufficient explanation [that] will show the relationship between the officer's position and the facts at issue in the litigation."[206] This requirement is "for the court—and the other side—to be able to evaluate the facial plausibility of the officer's claimed lack of unique, personal knowledge."[207]

The court next addressed the party's respective burdens.[208] First, the deposition-resisting party must establish that he or she is a "high-level officer" and submit the required affidavit explaining that he or she lacks unique, personal knowledge of the issues being litigated.[209] Once this has been satisfied, the deposition-seeking party must "persuade the court that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information."[210] These burdens are "consistent with how Florida courts have applied the Apex Doctrine in the government context."[211]

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201. *Id.*
202. *Id.* (quoting American Heritage Dictionary 1223 (5th ed. 2011)).
203. *In re* Amendment, 324 So. 3d at 462.
204. *Id.*
205. *Id.* at 462–63.
206. *Id.* at 463.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* (first citing Univ. of W. Fla. Bd. of Trs. v. Habegger, 125 So. 3d 323, 325 (Fla. Dist. Ct. App. 2013); then citing Shenzhen Kinwong Elec. Co., v. Kukreja, No. 18-61550-CIV-ALTMAN/HUNT, 2019 U.S. Dist. LEXIS 229725, at *4–5 (S.D. Fla. Dec. 12, 2019); then citing State *ex rel.* Mass. Mut. Life Ins. Co., 724 S.E.2d at 364; and then citing

Finally, the court compared its new rule with Rule 1.280(c), Florida's rule of civil procedure that governs protective orders.[212] The court stated that its Apex deposition rule stands on its own.[213] The new rule is to be used as an alternative to Florida's protective order rule "in the limited context of depositions of high-level government and corporate officers."[214] The court stated that this new rule differs from the state's existing rule because it is "not governed by the 'good cause' standard" and "imposes burdens of production and persuasion that are distinct from the burdens at play" in its existing rule.[215] A government or corporate officer remains free to seek relief under Florida's existing rule governing protective orders if he or she cannot meet, or chooses not to try to meet, the new rule's requirements.[216] The court concluded by declaring that this amendment to Florida's Rules of Civil Procedure "shall become effective immediately upon the issuance of [its] opinion."[217]

Significantly, the amendment "marks the first time a state has moved to codify the [Apex] doctrine [] as a stand-alone rule of civil procedure."[218] Many courts have adopted the doctrine "as a judicial interpretation or 'common law gloss' on existing procedural rules."[219] But this decision by the Florida Supreme Court "furthers a trend of courts protecting high-level officers from unduly burdensome or harassing depositions and may serve as a model for amendments to civil rules in other states."[220] Prior to this amendment, the Florida Supreme Court had not yet addressed the Apex Doctrine's acceptance or application. Federal district courts in Florida, as well as several intermediate appellate courts, previously used the doctrine to protect high-level government officials but had not yet adopted it to include high-level corporate officers. In late 2021, the Florida Supreme Court recognized the importance of preventing harassment and unduly burdensome discovery and concluded that corporate officers should be afforded the same protection under the doctrine as government officers.[221]

Affinity Labs of Tex. v. Apple, Inc., No. C 09-4436 CW (JL), 2011 U.S. Dist. LEXIS 53649, at *41–42 (N.D. Cal. May 9, 2011)).

212. *In re* Amendment, 324 So. 3d at 463; *see also* FLA. R. CIV. P. 1.280(c).

213. *In re* Amendment, 324 So. 3d at 463.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Behrens & Appel, *supra* note 22.

219. Behrens & Appel, *supra* note 22 (quoting *In re* Amendment, 324 So. 3d at 459).

220. Behrens & Appel, *supra* note 22.

221. *In re* Amendment, 324 So. 3d at 460–61.

Florida is among an increasing number of jurisdictions that have formally adopted the Apex Doctrine in both the corporate and government context. The Florida Supreme Court, through its creation and explanation of the "doctrine as a stand-alone rule of civil procedure and explaining its contours, . . ." has "provid[ed] a clear expression of the doctrine that should serve as a model for other states."[222] Will other states choose to do so?

IV. ANALYSIS

Whether or not a jurisdiction adopts some version of the Apex Doctrine, abusive discovery practices regarding executives are a genuine concern. Counsel could seek to depose an Apex executive strictly to burden or embarrass the executive whose time should primarily be dedicated to the company. Preparing the executive is not necessarily easy and requires both time and money, with little relevance to the dispute. Executives preparing for deposition and litigation could spend more time doing so than focusing on their corporate roles. On the other hand, Apex executives who may actually have unique knowledge about the issue in dispute and could properly be deposed will likely try and skirt around depositions based on the Apex Doctrine.

Notably, the Supreme Court of Georgia did not address the policy concerns raised by GM. However, in support of GM's attempt to persuade Georgia courts to adopt the Apex Doctrine, the Georgia Chamber of Commerce filed an amicus brief with the Georgia Court of Appeals in October of 2020.[223] The Georgia Chamber stated that there may not have been a compelling need for the doctrine in 1966 when the Civil Practice Act was passed, but that times have changed, and the Apex Doctrine is now needed.[224] The Georgia Chamber stressed that to maintain "a strong economic center for its citizens," Georgia must prevent court orders that allow deposing an Apex-individual when he or she does not have the requisite level of knowledge of the disputed issue.[225] Further, it raised its concern that if Georgia does not adopt the Apex Doctrine, companies will "not want to invest, establish substantial operations, or headquarter their senior executives" within the state.[226] Ultimately, the Georgia Chamber urged the Georgia Court of Appeals to adopt the Apex Doctrine,

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222. Behrens & Appel, *supra* note 22.

223. Brief for GM LLC. Georgia Chamber of Commerce as Amici Curiae Supporting Appellant, General Motors, LLC v. Buchanan, No. A21A0043, 2020 Ga. App. Ct. Briefs LEXIS 6691 (Oct. 28, 2020).

224. *Id.* at *3–4.

225. *Id.* at *5.

226. *Id.*

"which has already been embraced by the vast majority of the states in the country", and that doing so will ensure "Georgia's prominence in the international business marketplace and the global economy."[227]

Further, some courts have been quick to rely on *Buchanan*'s holding. In July of 2022, a month and a half after the decision in *Buchanan*, the Supreme Court of Indiana was requested to adopt the Apex Doctrine in *National Collegiate Athletic Association v. Finnerty*,[228] but rejected to do so.[229] The National Collegiate Athletic Association (NCAA) twice sought a protective order to disallow the plaintiffs, former college football players, the ability to depose three of its high-level executives.[230] Citing *Buchanan*, the court expressed its concern that adopting the Apex Doctrine would conflict with its broad discovery rules.[231] It therefore declined to formally adopt the doctrine but found "its principles relevant in determining whether good cause exists for a protective order to limit or prevent the deposition of a high-ranking official."[232]

The Supreme Court of Georgia did not absolutely reject concerns about executive depositions in *Buchanan*. Instead, it held that trial courts must consider the traditional Apex factors when weighing good cause.[233] This includes considering the Apex executives' "scheduling demands or responsibilities and lack of relevant or unique personal knowledge that is not available from other sources" if these issues are raised by the party seeking a protective order.[234] The court also held that persuasive authority from other jurisdictions that apply the Apex Doctrine may be cited and considered by trial courts when considering when and how to apply Apex Doctrine factors.[235] Ultimately, the court held that because the trial court failed to consider GM's contentions based on the Apex

227. *Id.* at *17–18.

228. 191 N.E.3d 211 (Ind. 2022).

229. *Id.* at 223.

230. *Id.* at 214.

231. *Id.* at 220.

232. *Id.* at 221.

233. Paul Alessio Mezzina & Billie Pritchard, *Georgia Supreme Court Declines to Adopt Apex Doctrine But Offers Some Protection To High-Ranking Executives*, WASHINGTON LEGAL FOUNDATION (June 24, 2022), https://www.wlf.org/2022/06/24/publishing/georgia-supreme-court-declines-to-adopt-apex-doctrine-but-offers-some-protection-to-high-ranking-executives/ [https://perma.cc/49Z2-QUNR] (citing *Buchanan II*, 313 Ga. at 823, 874 S.E.2d at 65).

234. Mezzina & Pritchard, *supra* note 233 (citing *Buchanan II*, 313 Ga. at 823, 874 S.E.2d at 65).

235. *Buchanan II*, 313 Ga. at 823, 874 S.E.2d at 65.

factors, the case must be remanded for reconsideration.[236] It also pointed out that the legislature can change the discovery rules.[237]

The *Buchanan* decision demands trial courts follow a new process in which they must consider Apex Doctrine factors without actually adopting the Apex Doctrine. It is only a matter of time until we can see how much weight these factors will be given by trial courts as well as "how rigorously appellate courts will review [protective] orders."[238] Apex executives will need to provide as much evidence as possible to support a claim that deposing him or her is unduly burdensome, and not simply assert that he or she lacks knowledge and has Apex-leveled responsibilities.[239] Even in jurisdictions that adopt and apply the Apex Doctrine, providing factual support regarding the burdensome nature of the deposition is considered best practice.[240] Alternatively or additionally, the party seeking a protective order may propose that limiting the deposition in terms of time, scope, or location should be considered.[241]

In jurisdictions like Georgia, which choose not to adopt or apply the Apex Doctrine, counsel opposing executive depositions may still urge their courts to consider the *Buchanan* decision.[242] Even if those courts believe that there is no "need for a special framework to regulate depositions of high-ranking executives, nearly every court that has addressed the subject has recognized that such depositions involve tremendous potential for harassment and abuse."[243] Because of the *Buchanan* decision, courts may be able to address those concerns without formally adopting the doctrine.[244] Courts may agree with *Buchanan* that trial courts must consider factors related to the special case of Apex depositions. Ultimately, "[i]f that hope proves unfounded, legislative action may be required so that apex depositions are not used to coerce settlement of meritless cases."[245]

236. *Id*. at 826–27, 874 S.E.2d at 67.
237. *Id*. at 825, 874 S.E.2d at 66.
238. Mezzina & Pritchard, *supra* note 233.
239. Mezzina & Pritchard, *supra* note 233.
240. Mezzina & Pritchard, *supra* note 233.
241. Mezzina & Pritchard, *supra* note 233.
242. Mezzina & Pritchard, *supra* note 233.
243. Mezzina & Pritchard, *supra* note 233.
244. Mezzina & Pritchard, *supra* note 233.
245. Mezzina & Pritchard, *supra* note 233.

V. Conclusion

Litigants, even in Georgia, should be aware of the Apex Doctrine and what must be established when asserting a protective order is necessary. The decision in *Buchanan* and Florida's codification of the Apex Doctrine has created a disagreement among neighbors in terms of acceptable discovery practices. Notably, in Georgia, the civil procedure rules, including O.C.G.A. § 9-11-26, are created by the legislature, whereas in Florida and in the federal courts, the authority to make civil procedure rules are delegated by the legislators to the courts.[246] Accordingly, Georgia courts are subordinate to the legislature when it comes to discovery. With the *Buchanan* decision, and the inevitability of litigants seeking to utilize principles of the Apex Doctrine, it is unclear how Georgia's trial courts will react to *Buchanan*'s rule of law.

Because the Supreme Court of Georgia did not formally adopt the Apex Doctrine, the *Buchanan* decision left litigants with the burden of petitioning the state legislature to adopt a rule preventing discovery abuses relating to depositions of Apex-individuals. Not only will Apex-individuals need to present the Apex factors in support of their requests for protective orders, but they will need to additionally worry about abusive discovery practices by the plaintiff's counsel. On the contrary, individual litigants should also be concerned about abusive discovery practices by corporations and Apex-executives who will present these Apex factors, stalling the litigation process in hopes that the individual will resort to settlement.

Further, some of the Apex factors remain unclear under Georgia law and will require additional inquiry by both trial and appellate courts when considering a motion for a protective order. The courts can certainly rely on persuasive authority from jurisdictions that adopt some form of the doctrine. However, by not formally adopting the doctrine itself, application of the doctrine in Georgia could become inconsistent. By rejecting the adoption of the Apex Doctrine, the *Buchanan* decision has left litigants with the rule that trial courts must consider Apex factors. It remains to be seen how courts will utilize this new environment for discovery. Ultimately, discovery abuse will occur, despite *Buchanan*. The question is whether, as the Florida Supreme Court believed, that abuse could be reduced by a formal Apex rule of law.

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246. *See, e.g.*, 28 U.S.C. § 2072.