STATE OF MICHIGAN

COURT OF APPEALS

LILIA ALBERTO, Personal Representative of the ESTATE OF GUADALUPE ALBERTO,

Plaintiff-Appellee,

v

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC., TOYOTA MOTOR MANUFACTURING KENTUCKY, INC., DENSO INTERNATIONAL AMERICA, INC., and DENSO TENNESSEE, INC.,

Defendants,

and

TOYOTA MOTOR SALES USA, INC.,

Defendant-Appellant.

FOR PUBLICATION
August 5, 2010

No. 296824
Genesee Circuit Court
LC No. 09-091973-NP

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

JANSEN, J. (*dissenting*).

I cannot join the majority's announcement of a broad, new "apex deposition rule" shielding high-ranking corporate officers from certain discovery in Michigan litigation. Nor can I conclude, under existing principles of Michigan law, that the trial court abused its discretion by denying defendant's[1] motion for a protective order to quash the scheduled depositions of Yoshimi Inaba and Jim Lentz. Accordingly, I must respectfully dissent.

[1] I use the term "defendant" throughout this dissenting opinion to refer to defendant-appellant Toyota Motor Sales USA, Inc., only.

I

As explained by the majority, plaintiff noticed the video depositions of Mr. Inaba, defendant's chairman and chief executive officer, and Mr. Lentz, defendant's president and chief operating officer, pursuant to MCR 2.306 and MCR 2.315. Defendant moved for a protective order under MCR 2.302(C), seeking to prevent the scheduled depositions for the reason that neither Inaba nor Lentz "participated in the design, testing, manufacture, warnings, sale, or distribution of the 2005 Camry, or the day-to-day details of vehicle production." Defendant also asserted that neither Inaba nor Lentz possessed "unique information pertinent to the issues in this case," and argued that the so-called "apex deposition rule" should be extended to shield high-ranking corporate officers from certain discovery in Michigan.

Plaintiff responded by arguing that although the Michigan courts had occasionally applied something similar to the "apex" rule in the context of high-ranking governmental officials, the rule had never been applied to shield corporate officers from discovery. Plaintiff contended that Inaba and Lentz possessed specific information relevant to the litigation in this case and argued that defendant's motion for a protective order should therefore be denied. In particular, plaintiff asserted that Inaba and Lentz had failed to share with the government and the public certain information in their possession concerning the phenomenon of "sudden acceleration" in Toyota vehicles. Plaintiff pointed to a letter from two Congressmen alleging that Toyota had concealed information regarding this sudden acceleration problem. Plaintiff also pointed to certain public statements by Inaba suggesting that Toyota had saved $100 million by concealing information regarding sudden acceleration and to certain portions of Inaba's testimony before Congress in which he testified that he was personally involved in the quality control review of Toyota vehicles. Plaintiff argued that this evidence, taken together, was sufficient to show that Inaba and Lentz personally possessed information relevant to the litigation and that their depositions were therefore warranted. Plaintiff also argued that it could not obtain the desired information by deposing other lower-level employees because some of the information was uniquely within the possession of Inaba or Lentz, and because several of the statements and representations at issue had been made by Inaba or Lentz directly.

After oral argument, the trial court ruled that Inaba and Lentz were high-ranking corporate officers, but determined that Michigan law did not preclude plaintiff from deposing them. Specifically, the court observed, "[W]ith the documents [plaintiff] presented, it certainly would appear that [Inaba and Lentz] are in the know as to the issues that . . . [plaintiff is] concerned about in this particular case; and so I do think it is appropriate for [plaintiff] to depose them at this time." For the reasons that follow, I believe that the trial court's ruling on this issue was correct.

II

As an initial matter, I cannot join the majority's announcement of a broad, new "apex deposition rule" shielding high-ranking corporate officers from certain discovery in Michigan civil litigation. The majority's announcement of this new rule is neither necessary nor warranted on the facts of this case. It is well settled that Michigan law *already authorizes* a trial court to enter protective orders and restrict discovery in order to prevent "annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C); *Eyde v Eyde*, 172 Mich App 49, 56; 431 NW2d 459 (1988). Similarly, Michigan's trial courts are *already authorized* to restrict

discovery that would be abusive, excessive, or irrelevant, *Hartmann v Shearson Lehman Hutton, Inc*, 194 Mich App 25, 29; 486 NW2d 53 (1992), and to limit discovery for the purpose of preserving a litigant's privacy rights, see *Yates v Keane*, 184 Mich App 80, 84; 457 NW2d 693 (1990). Within the confines of these rules, Michigan's trial courts have "broad discretion to issue protective orders to prevent . . . potential abuses[.]" *Marketos v American Employers Ins Co*, 185 Mich App 179, 197; 460 NW2d 272 (1990).

Because I believe that these existing principles of law are already adequate to protect high-ranking corporate officers and their respective corporations from potential discovery abuses, I dissent from the majority's adoption of a broad "apex deposition rule" in this case. I fully acknowledge that, on occasion, certain litigants may seek to depose high-ranking corporate officers who truly lack personal knowledge of relevant facts. At times, such litigants may actually be driven by a desire to annoy or embarrass the high-ranking corporate officers, or to unnecessarily prolong the discovery process. But more commonly, I suspect, such litigants are simply mistaken about their belief that the high-ranking corporate officers at issue personally possess any relevant information. Whatever the litigants' motivations, however, our present rules of civil discovery are more than sufficient to curtail any undue burden, expense, or annoyance that might result from such discovery requests. See MCR 2.302(C). Given our existing discovery rules, Michigan does not need a broad "apex deposition rule" to shield high-ranking corporate officers from abusive or burdensome discovery. The new "apex deposition rule" announced by the majority today is quite simply unnecessary.

Nor do I believe that the majority's new "apex deposition rule" for corporate officers is merely a logical outgrowth of this Court's decisions in *Fitzpatrick v Secretary of State*, 176 Mich App 615; 440 NW2d 45 (1989), and *Hamed v Wayne Co*, 271 Mich App 106; 719 NW2d 612 (2006). In *Fitzpatrick*, this Court reversed the trial court's order denying the defendant's motion to quash the deposition of the Secretary of State. *Fitzpatrick*, 176 Mich App at 618-619. The *Fitzpatrick* Court observed that the Secretary of State lacked personal knowledge of the relevant facts and that the information sought by the plaintiff could be obtained through other means. *Id*. Similarly, in *Hamed*, this Court reversed the trial court's order denying the defendants' motion to quash the depositions of the Wayne County Executive and the Wayne County Sheriff. *Hamed*, 271 Mich App at 110-112. The *Hamed* Court based its holding on the fact that the plaintiff had not established that the information she sought was not available from other discovery sources, such as lower-ranking county officials. *Id*. at 111-112. Defendant and the majority appear to believe that this Court's decisions in *Fitzpatrick* and *Hamed* naturally lead to, and somehow compel, the creation of a new "apex deposition rule" for high-ranking corporate officers.

However, a faithful reading of *Fitzpatrick* and *Hamed* reveals a critical distinction between the circumstances of those cases and the circumstances of the case at bar. In *Fitzpatrick* and *Hamed*, this Court was concerned with protecting the public's interest in good government. Both the *Fitzpatrick* Court and the *Hamed* Court pointed out that the public has a strong interest in the effective and efficient operation of government agencies, and both panels suggested that allowing a litigant to depose a high-ranking government official without first making a showing of actual need might hinder the effective functioning of that official's office. See *Fitzpatrick*, 176 Mich App at 617 (explaining that "the time and exigencies of an agency head's everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, was allowed to take his oral deposition" and that "[s]uch a procedure is

against the public interest"); see also *Hamed*, 271 Mich App at 111 (observing that "[t]he purpose of this heightened scrutiny is to strictly limit the intrusions that would burden the public official's efforts to advance the effective and efficient operation of the public agency"). I agree with the statement of plaintiff's counsel at oral argument before this Court that "the very purpose of the *Fitzpatrick* and *Hamed* rule is to protect a public interest—the public interest in the service of the [governmental] employee." No such public interest is implicated in the present case; there is generally no public interest in the management and operation of private corporations. I cannot conclude that the rationale underlying this Court's decisions in *Fitzpatrick* and *Hamed* applies in the case at bar.

In sum, I believe that Michigan's existing rules of civil discovery are fully adequate to protect high-ranking corporate officers and their respective corporations from potential discovery abuses, and I cannot conclude that the majority's creation of a new "apex deposition rule" for high-ranking corporate officers is in any way compelled by this Court's decisions in *Fitzpatrick* and *Hamed*.[2]

III

I also conclude that, under our existing rules of civil discovery, the trial court properly denied defendant's motion for a protective order to quash the depositions. "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Our civil discovery rules "should be liberally construed to promote the discovery of the true facts and circumstances of the controversy rather than to aid in their concealment." *Dowood Co v Michigan Tool Co*, 14 Mich App 158, 161; 165 NW2d 450 (1968).

Plaintiff, through her reliance on certain statements, documents, and other evidence presented to the trial court, demonstrated a strong probability that Inaba and Lentz possessed personal knowledge of particular information relevant to the litigation in this case. Specifically, plaintiff established a high likelihood that Inaba and Lentz possessed relevant, personal knowledge concerning the phenomenon of sudden acceleration in Toyota vehicles, and that they also had personal knowledge of possible efforts to conceal or obscure the scope and breadth of this problem. Thus, unlike the appellants' discovery requests in *In re Hammond Estate*, 215 Mich App 379, 386-387; 547 NW2d 36 (1996), plaintiff's requests to depose Inaba and Lentz did not amount to mere "fishing expedition[s]." Instead, the record establishes that plaintiff had in mind certain, specific matters that she wished to pursue during the depositions. These matters

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[2] Even under the "apex deposition rule" adopted by the majority, I would still conclude that plaintiff is entitled to depose Inaba and Lentz. "[T]he apex deposition rule is intended to protect busy, high-level executives who lack unique or personal knowledge," and "is bottomed on the apex executive lacking *any* knowledge of relevant facts." *Minter v Wells Fargo Bank, NA*, 258 FRD 118, 126 (D Md, 2009) (emphasis in original). In light of the public statements and representations made by Inaba and Lentz, it is clear that they possessed *at least some* personal knowledge of the information sought by plaintiff in this case.

clearly would have been pertinent and material to the present controversy. I recognize that the precise Toyota Camry model driven by plaintiff's decedent was apparently not among the models subject to recall for sudden acceleration. However, plaintiff was nonetheless entitled to ask Inaba and Lentz about their knowledge of sudden acceleration in other, similar Toyota models. See *Savage v Peterson Distributing Co*, 379 Mich 197, 202; 150 NW2d 804 (1967); *McNamara v E W Ross Co*, 225 Mich 335, 339-340; 196 NW 336 (1923). And even if Inaba and Lentz only possessed knowledge pertaining to sudden acceleration in *unrelated* Toyota models, plaintiff was still entitled to ask them about this matter in order to establish that defendant was on notice of the problem of sudden acceleration in general. *Dowood*, 14 Mich App at 161. I conclude that the depositions of Inaba and Lentz likely would have led to the discovery of relevant, admissible evidence. *Domako v Rowe*, 438 Mich 347, 359 n 10; 475 NW2d 30 (1991).

I also conclude that the depositions of Inaba and Lentz would not have been annoying, embarrassing, oppressive, unduly burdensome, or unduly expensive under MCR 2.302(C), which is primarily intended to protect parties from discovery "abuses." See *Marketos*, 185 Mich App at 197. The party opposing discovery of a certain matter generally has the burden of showing why the request for discovery should be denied. See *Wilson v Borchard*, 370 Mich 404, 413; 122 NW2d 57 (1963). In the present case, there was simply no showing that plaintiff's depositions of defendant's officers would have been "abus[ive]."

The standard for judging whether a protective order should issue under MCR 2.302(C) surely cannot be a subjective one. After all, no one generally *wants* to give a deposition, and under a subjective standard it could almost always be argued that a proposed deposition would subject the deponent to "annoyance" or "embarrassment" within the meaning of MCR 2.302(C). Instead, the standard clearly must be an objective one. Thus, Inaba's and Lentz's own beliefs that the scheduled depositions would be annoying, embarrassing, or burdensome certainly were not sufficient for the issuance of a protective order in this case.

Moreover, Inaba and Lentz made several public statements and representations suggesting that they *uniquely* possessed certain information that was relevant to this litigation. And the very nature of these public statements implied that other, lower-level employees *did not* have knowledge of the same facts. Given the substance of Inaba's and Lentz's public statements, and viewed objectively, I cannot say that plaintiff's depositions of Inaba and Lentz would have been any more annoying, embarrassing, oppressive, or burdensome than any other deposition of any other deponent possessing relevant, discoverable information. While it might be annoying, embarrassing, oppressive, or burdensome to depose high-ranking corporate officers whose knowledge of the relevant facts is merely coextensive with that of lower-level employees, the public statements and representations made by Inaba and Lentz in this case implied a unique, singular knowledge concerning the phenomenon of sudden acceleration in Toyota vehicles and the possible effort to conceal or obscure this problem. Defendant failed to carry its burden of establishing that a protective order was warranted under MCR 2.302(C). See *Wilson*, 370 Mich at 413.

Lastly, I wish to make clear my belief that high-ranking corporate officers should be held to the same civil discovery standards as any other deponent, witness, or party. Indeed, I believe that our law demands this. It is clear to me that Judge Hayman carefully examined the evidence presented in advance of ruling, and applied the same standard to defendant and its officers as he

would have applied to any party appearing before him. This is exactly what every judge should strive to do.

In sum, I cannot conclude that the trial court abused its discretion by denying defendant's motion for a protective order to quash the depositions of Inaba and Lentz. See *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35, 38-39; 654 NW2d 610 (2002). Because I believe that the trial court's ruling was correct, I would affirm.

/s/ Kathleen Jansen