2021 WL 3686059
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District Court of Appeal of Florida, Second District.

Caryn N. DAVIS, Appellant,
v.
Max Leroy CLARK, Appellee.

No. 2D21-171
|
August 20, 2021

Appeal from the County Court for Sarasota County; Erika Quartermaine and Dana M. Moss, Judges.

Attorneys and Law Firms

Derek W. Eisemann of Michael J. Belle, P.A., Sarasota, for Appellant.

Brian S. Kessler of Berg & Kessler, Venice, for Appellee.

Opinion

LaROSE, Judge.

***1** Caryn N. Davis appeals a county court judgment awarding attorney's fees to Max Leroy Clark. We have jurisdiction. [1] *See* Fla. R. App. P. 9.030(b)(1)(A). We affirm. We write to address Ms. Davis' claim that offers of judgment do not apply in small claims cases.

Background

Ms. Davis sued Mr. Clark for $4,814 for breach of an oral contract. She alleged that Mr. Clark "has items of mine, owned by me which he promised to return to me." She identified various personal items. In addition to her damages claim, Ms. Davis requested the "return of items ... or depreciated value of said items."

In an offer of judgment made "pursuant to Section 768.79[, Florida Statutes (2019)]," Mr. Clark proposed to resolve Ms. Davis' claims for $100. The offer did not mention Florida Rule of Civil Procedure 1.442 ("Proposals for Settlement"). Ms. Davis did not accept the offer. The matter proceeded to a nonjury trial. Mr. Clark prevailed.

Mr. Clark then moved to recover his attorney's fees. The trial court granted the motion and entered a judgment awarding Mr. Clark $10,740 in attorney's fees and costs.

Analysis

Ms. Davis contends that because Mr. Clark failed to "invoke" rule 1.442 in his offer, he may not recover fees under section 768.79. Incongruently, she also tells us that rule 1.442 does not apply in small claims proceedings. An ontological conundrum, indeed. Unfortunately for Ms. Davis, section 768.79 gave Mr. Clark a substantive right to recover his fees. [2]

I. The Categorical Prohibition that Wasn't

Ms. Davis' suggestion that section 768.79 has no place in small claims cases flies in the face of Florida case law. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1080 (Fla. 2006) (applying section 768.79, Florida's offer of judgment statute in the PIP small claims context, and specifically "hold[ing] that the offer of judgment statute applies to PIP suits"); *Tran v. State Farm Fire & Cas. Co.*, 860 So. 2d 1000, 1000 (Fla. 1st DCA 2003) ("Section 768.79, Florida Statutes, applies to cases brought pursuant to section 627.736, Florida Statutes, and to cases pending in small claims court."); *U.S. Sec. Ins. Co. v. Cahuasqui*, 760 So. 2d 1101, 1104 (Fla. 3d DCA 2000) (concluding that offer of judgment statute applied in the PIP context where section 768.79 explicitly applies "[i]n *any* civil action for damages filed in the courts of this state").

***2** Moreover, section 768.79 provides that an offer of judgment is available "[i]n any civil action for damages filed in the courts of this state." § 768.79(1). [3] Although it could have, the legislature did not exclude small claims cases from the statute's scope. *Cf.* *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)

("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Thus, we reject Ms. Davis' effort to tailor such a sweeping prohibition on the use of an offer of judgment.

II. Conflict Between a Statute and a Rule of Procedure

Trying to escape the breadth of section 768.79, Ms. Davis reminds us that the small claims rules do not adopt rule 1.442.[4] As a result, she urges, the rule has no role in small claims cases. She ignores the reach of the statute, however. Additionally, Ms. Davis' argument poses a false conflict between a statute and a procedural rule. "When a statute confers a substantive right, a conflicting procedural rule is invalid as a violation of separation of powers under article II, section 3 of the Florida Constitution because a rule of procedure cannot enact substantive law." *Hines v. State*, 931 So. 2d 148, 149-50 (Fla. 1st DCA 2006). Principally, there is no small claims rule in effect that conflicts with section 768.79. Further, section 768.79 is substantive. *See Se. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 80 (Fla. 2012) ("[W]e hold that section 768.79 is substantive for both constitutional and conflict of law purposes.").

***3** Mr. Clark's offer specifically referenced section 768.79. The statute grants him a substantive right to recover his fees. And, there is no dispute that the offer complied with the requirements of section 768.79(2). Consequently, we will not adopt Ms. Davis' contention that a talismanic incantation of rule 1.442 is required for an offer of judgment to be effective in the small claims context.

III. Trial Courts (Small Claims and Otherwise)

Ms. Davis explains that small claims cases are different than those filed in circuit court; therefore, the procedural rules are different. She posits that the use of offers of judgment in small claims cases unduly complicates otherwise simple disputes. We agree that the small claims rules are to "be construed to implement the simple, speedy, and inexpensive trial of actions at law in county courts." Fla. Sm. Cl. R. 7.010(a). Nor do we quibble with Ms. Davis' contention that small claims cases typically involve small amounts of money. *Compare* Fla. Sm. Cl. R. 7.010(b) ("These rules are applicable to all actions of a civil nature in the county courts which contain a demand for money or property, the value of which does not exceed $8,000 exclusive of costs, interest, and attorneys' fees."), *with* § 34.01(1)(c)(1), Fla. Stat. (2018) (providing that county courts possess jurisdiction over those cases in which "the matter in controversy does not exceed, exclusive of interest, costs, and attorney fees ... the sum of $15,000");[5] § 26.012(2)(a) (providing circuit courts with exclusive original jurisdiction "[i]n all actions at law not cognizable by the county courts").

But it does not follow that the small claims rules limit the use of offers of judgment. Whether in county or circuit court, "[t]he purpose of section 768.79 is to 'reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions.' " *Kuhajda v. Borden Dairy Co. of Ala., LLC.*, 202 So. 3d 391, 395 (Fla. 2016) (quoting *Att'ys Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010)); *Old Dominion Ins. Co. v. Tipton*, 269 So. 3d 653, 655 (Fla. 2d DCA 2019) ("The very purpose of a proposal for settlement is to facilitate settlement and to avoid the costs associated with unnecessary litigation." (citing *Nichols*, 932 So. 2d at 1078)). Ms. Davis offers no compelling authority to ignore the statute's command that it apply equally "in any civil action for damages." § 768.79(1).

We reject Ms. Davis' contention that offers of judgment are unauthorized or otherwise invalid in small claims litigation. Section 768.79 provides substantive rights that we must honor.

Conclusion

We affirm the attorney's fee and cost judgment entered on Mr. Clark's offer of judgment.

Affirmed.

SILBERMAN and STARGEL, JJ., Concur.

All Citations

--- So.3d ----, 2021 WL 3686059

Footnotes

1 Ms. Davis initiated the appeal in the circuit court. Before disposition of the appeal, the legislature amended section 26.012(1), Florida Statutes (2020), to eliminate circuit court jurisdiction over appeals of county court orders and judgments, effective January 1, 2021. *See* ch. 20-61 § 3, Laws of Fla. Consequently, the circuit court transferred the appeal to us.

2 The Florida Small Claims Rules "do not create a 'small claims court.' They simply create rules of procedure for use in county court when the amount in controversy is small." *LaSalla v. Pools by George of Pinellas Cnty., Inc.*, 125 So. 3d 1016, 1017 (Fla. 2d DCA 2013) ("[F]or the purposes of the concept of subject matter jurisdiction, a county court that applies the Florida Small Claims Rules in a particular proceeding is not a separate court from a county court that applies the Florida Rules of Civil Procedure. This is true even if a county court has elected to create a 'small claims division' to handle cases under the Florida Small Claims Rules.").

3 Ms. Clark also insists that section 768.79 was inapplicable because she sought "both damages and equitable relief." *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 374 (Fla. 2013) ("We hold that section 768.79 does not apply to an action in which a plaintiff seeks both damages and equitable relief, and in which the defendant has served a general offer of judgment that seeks release of all claims."). The trial court properly determined that the "true relief" sought by Ms. Davis was damages. *See, e.g.*, *Tower Hill Signature Ins. Co. v. Javellana*, 238 So. 3d 372, 377 (Fla. 3d DCA 2017) ("[W]e conclude that this case is an 'action for damages,' within the meaning of section 768.79(1), because it is plain that the true relief sought by the Javellanas was money damages for a breach of contract, rather than equitable relief."); *MYD Marine Distrib., Inc. v. Int'l Paint Ltd.*, 187 So. 3d 1285, 1285-87 (Fla. 4th DCA 2016) (concluding that the "true relief" sought in plaintiff's conspiracy in restraint of trade claim seeking monetary damages and a permanent injunction was monetary because the plaintiff did not actually pursue any nonmonetary relief during the course of the litigation).

4 Florida Small Claims Rule 7.020 provides that certain Rules of Civil Procedure "are applicable in all actions covered by these rules." Fla. Sm. Cl. R. 7.020(a). Ms. Davis contends that because rule 7.020(a) omits specific mention of rule 1.442, offers of judgment are omitted from the purview of the small claims rules. *Cf. Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) ("It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." (citing *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234 (1944))).

5 Effective January 1, 2020, the legislature expanded the monetary jurisdiction of county courts to $30,000. § 34.01(1)(c)(2), Fla. Stat. The $15,000 amount set forth in the 2018 version of the statute is relevant here because Ms. Davis filed her lawsuit in December 2018.

312 So.3d 914
District Court of Appeal of Florida, Fourth District.

Ethel RECONCO, Appellant,
v.
INTEGON NATIONAL
INSURANCE COMPANY, Appellee.

No. 4D20-887
|
[January 27, 2021]

Synopsis

Background: Mortgagor brought action against property insurer, seeking judicial declarations that she had standing to enforce appraisal provision in mortgagee's force-placed casualty insurance policy on her home, that she had standing to compel payment of additional money still owed to mortgagee, and that she properly invoked policy's appraisal clause. The Circuit Court, 19th Judicial Circuit, St. Lucie County, Barbara W. Bronis, J., granted insurer's motion to dismiss. Mortgagor appealed.

[Holding:] The District Court of Appeal, Forst, J., held that policy expressed an intent in clear and unambiguous language not to benefit mortgagor, and thus mortgagor was not third-party beneficiary and, therefore, lacked standing to bring action.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (7)

[1] **Appeal and Error** Standing

A de novo standard of review applies when reviewing whether a party has standing to bring an action.

[2] **Contracts** Agreement for Benefit of Third Person

A party seeking to enforce a contract as a third-party beneficiary must allege four elements: (1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach.

2 Cases that cite this headnote

[3] **Insurance** Construction or enforcement as written

Insurance Plain, ordinary or popular sense of language

Where the language in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written.

[4] **Declaratory Judgment** Contracts

Insurance Open mortgage or loss payable clause

Insurance Parties

Mortgagee's force-placed casualty insurance policy on mortgagor's home expressed an intent in clear and unambiguous language not to benefit mortgagor, and thus mortgagor was not third-party beneficiary and, therefore, lacked standing to bring action to obtain judicial declarations as to her entitlement to enforce policy's appraisal provision and to compel payment of additional money on claim; policy stated that it was only between mortgagee and insurer, that there was no policy of insurance between mortgagor and insurer, and that policy was intended for benefit and protection of mortgagee, and policy's loss-payment provision, which stated that mortgagor could have been a simple loss payee, did not apply given that mortgagor had no residual claim. Fla. Stat. Ann. § 627.405.

2 Cases that cite this headnote

[5] **Insurance** Parties

There is no per se rule that a party with an insurable interest is automatically vested with standing to enforce a policy of property insurance.

[6] **Insurance** Parties

Rather than a plaintiff automatically being vested with standing due to an insurable interest in a property, a court must determine whether, pursuant to the terms of the property insurance policy, the plaintiff has standing to bring her claims as an intended third-party beneficiary.

[7] **Contracts** Agreement for Benefit of Third Person

A third party is an intended beneficiary of a contract only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong.

3 Cases that cite this headnote

***915** Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Barbara W. Bronis, Judge; L.T. Case No. 56-2019-CA001782-AXXXHC.

Attorneys and Law Firms

William Terry of William Terry, P.A., Vero Beach, for appellant.

Joseph W. Gelli and George M. Duncan of Garrison, Yount, Forte & Mulcahy, L.L.C., Tampa, for appellee.

Opinion

Forst, J.

Appellant Ethel Reconco appeals the trial court's dismissal of her complaint with prejudice and the resulting final judgment in favor of Integon National Insurance Company ("the Insurer"). Appellant asserts the trial court erred in finding that she lacked standing as a third-party beneficiary under a "force-placed" casualty insurance policy on her home. We disagree and therefore affirm the dismissal of her complaint and the trial court's entry of final judgment.

Background

In 2013, Appellant purchased a home in Fort Pierce, Florida ("the Property"), with Bank of America ("the Bank") as the mortgage holder of the Property. Under the terms of the mortgage, Appellant agreed to maintain acceptable and continuous hazard insurance on the Property. If Appellant failed to do so, the mortgage allowed the Bank to obtain force-placed insurance at Appellant's expense that "might or might not protect [Appellant], [Appellant's] equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect."

Appellant failed to maintain the requisite hazard insurance. Therefore, the Bank purchased an insurance policy ("the Policy") from the Insurer to protect its interest in the Property. The Policy listed the Bank as the Named Insured, and the father of Appellant's two minor children ("the father") as the Borrower. [1] Further, the Policy provided as follows:

> The contract of insurance is only between the NAMED INSURED and [the Insurer]. There is no contract of insurance between the BORROWER and [the Insurer]. The insurance purchased is intended for the benefit and protection of the NAMED INSURED, insures against LOSS only to the dwelling and OTHER STRUCTURES on the DESCRIBED LOCATION, and may not sufficiently protect the BORROWER'S interest on the property.
>
> ...
>
> Appraisal. If YOU and WE fail to agree on the amount of LOSS, either can make a written demand upon the other that the amount of LOSS be determined by appraisal.
>
> ...
>
> LOSS Payment. WE will adjust each LOSS with YOU and will pay YOU. If the amount of LOSS exceeds the UNPAID PRINCIPAL BALANCE, the BORROWER may be entitled, as a simple ***916** LOSS payee only, to receive payment for any residual amount due for the LOSS, not exceeding the lesser of the applicable Limit of Liability indicated on the NOTICE OF INSURANCE and the BORROWER's insurable interest in the damaged or

> destroyed property on the DATE OF LOSS. Other than the potential right to receive such payment, the BORROWER has no rights under this RESIDENTIAL PROPERTY FORM.

"YOU," "YOUR," and "YOURS" referred to the Bank, and "WE," "US," "OUR," and "OURS" referred to the Insurer.

In 2017, Hurricane Irma damaged the Property. The Insurer determined that the Irma-attributable loss was covered by the Policy and issued payment to the Bank. However, Appellant was unsatisfied with the payment amount. Consequently, after the father assigned his rights under the Policy to Appellant, Appellant filed a complaint for declaratory relief against the Insurer.

In the complaint, Appellant alleged that she had made several demands for both the Insurer and the Bank to participate in appraisal under the Policy's appraisal clause. She stated, however, that the Insurer refused and that the Bank "failed and refused to demand appraisal under the Policy or to otherwise pursue full recovery on all amounts owed."

Appellant therefore sought judicial declarations that she: (1) had standing to enforce the Policy's appraisal provision; (2) had standing to compel payment of an additional $60,000 allegedly still owed to the Bank; and (3) properly invoked the Policy's appraisal clause. Appellant asserted standing as a third-party beneficiary under the Policy pursuant to section 627.405, Florida Statutes (2018), and alleged that—at the time of the complaint—$105,000 remained outstanding on her mortgage loan.

Shortly thereafter, the Insurer filed a motion to dismiss. The Insurer argued that Appellant's complaint should be dismissed because Appellant was not a named insured, an additional insured, nor an intended third-party beneficiary under the Policy, and because Appellant's loss did not exceed the unpaid principal balance under the Policy's loss payment provision. [2]

In response, Appellant relied upon our opinion in *Ran Investments, Inc. v. Indiana Insurance Co.*, 379 So. 2d 991 (Fla. 4th DCA 1980), for the proposition that a homeowner has standing to enforce an insurance policy due to his or her insurable interest in the property.

The trial court conducted a hearing on the matter, wherein the parties repeated their respective arguments. Appellant asserted that the motion to dismiss was "entirely determined and controlled" by *Ran Investments*. Moreover, as it related to the loss payment provision and any potential residual amount, Appellant's counsel stated: "We're not suggesting – in fact we've pled quite clearly, that the amount of [Appellant's] claim is less than the amount of her unpaid mortgage balance. She has no residual claim." In contrast, the Insurer asserted that for Appellant to constitute a third-party beneficiary, she must prove that the contracting parties—here, the Bank and the Insurer—had a clear and manifest intent that the contract directly benefit her. The Insurer asserted that, based on the express language of the Policy, ***917** Appellant could not meet this requirement.

At the conclusion of the hearing, the trial court found *Ran Investments* distinguishable, granting the Insurer's motion and dismissing Appellant's complaint with prejudice. The trial court subsequently reduced its findings to a written "Order Granting Defendant's Motion to Dismiss, Dismissing the Complaint and Entering Final Judgment for the Defendant" ("Order"). The Order found that the Policy in the instant case "contains the clear or manifest intent not to primarily and directly benefit the third-party beneficiary." The Order also stated that Appellant is not a loss payee under the Policy, as Appellant herself acknowledged that her claim was less than the unpaid principal amount. Following the written Order, Appellant timely appealed.

Analysis

[1] "A *de novo* standard of review applies when reviewing whether a party has standing to bring an action." *Wilmington Sav. Fund Soc'y, FSB v. Stevens*, 290 So. 3d 115, 117 (Fla. 4th DCA 2020) (quoting *Matthews v. Fed. Nat'l Mortg. Ass'n*, 160 So. 3d 131, 132 (Fla. 4th DCA 2015)).

[2] **[3]** A party seeking to enforce a contract as a third-party beneficiary must allege four elements: "(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach." *Mendez v. Hampton Ct. Nursing Ctr., LLC*, 203 So. 3d 146, 148 (Fla. 2016) (quoting *Found. Health v. Westside EKG Assocs.*, 944 So. 2d 188, 194–95 (Fla. 2006)). When construing an insurance policy, "[w]here the language in an insurance contract is plain and unambiguous, a court must

interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975–76 (Fla. 2017) (quoting *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013)).

In *Goins v. Praetorian Insurance Co.*, 302 So. 3d 478 (Fla. 5th DCA 2020), our sister court considered an insurance contract that stated: "The contract of insurance is only between the NAMED INSURED and Praetorian Insurance Company. There is no contract of insurance between the BORROWER and Praetorian Insurance Company." *Id.* at 479. Based on this language, the court found that "Goins, the borrower, was not intended to primarily and directly benefit from the policy of insurance" and that "it is not the role of this Court to rewrite the terms of the contract." *Id.* Accordingly, the court declined to hold that the borrower was a third-party beneficiary of the contract. *Id.* at 478–79. And in *Veloz v. Integon National Insurance Co.*, 304 So. 3d 22 (Fla. 4th DCA 2020), we issued a per curiam affirmance, citing to *Goins*. *Id.* at 23.

[4] Here, the Policy states: "The contract of insurance is only between the NAMED INSURED and [the Insurer]. There is no contract of insurance between the BORROWER and [the Insurer]." Thus, the language is identical to that of the applicable provision in *Goins*, differing only in the name of the insurance company. Further, even beyond this language, the Policy in the instant case also states that it is "intended *for the benefit and protection of the NAMED INSURED*" (emphasis added). It is therefore evident that the Policy did not evidence a "clear or manifest intent ... that the contract primarily and directly benefit" Appellant. ***918** *Mendez*, 203 So. 3d at 148. Instead, the Policy expressed a "clear or manifest intent" in clear and unambiguous language that the Policy was intended *not* to benefit Appellant. *Allstate*, 212 So. 3d at 975–76.

To the extent the Policy provides that "[i]f the amount of LOSS exceeds the UNPAID PRINCIPAL BALANCE, the BORROWER may be entitled, as a simple LOSS payee only, to receive payment for any residual amount due for the LOSS," Appellant conceded that the amount of her claim was less than the unpaid mortgage balance and that she has no residual claim. Consequently, even if the loss payment provision of the Policy can be interpreted as primarily and directly benefiting Appellant, that provision is inapplicable in the instant case.

Nonetheless, despite the seemingly clear authority of *Mendez*, *Goins*, and *Veloz*,[3] Appellant asserts that *Ran Investments*—a case which is factually similar to the instant case—is controlling. In that case, an appellant corporation owned an improved piece of realty that it leased to the Kral family. *Ran Investments*, 379 So. 2d at 993. As part of the lease contract, the Krals were required to—and did—maintain hazard insurance on the property. *Id.* The Krals' hazard insurance policy "contained a mortgagee clause naming as mortgagee the appellee, Community Federal Savings & Loan Association, as its interest may appear." *Id.* at 992. After a fire damaged the property, the mortgagee "failed or refused to proceed against the fire insurance company." *Id.* at 993. The appellant therefore brought suit as a third-party beneficiary of the insurance contract. *Id.*

The trial court dismissed the cause of action, finding that the insurance contract insured the Krals' interest in the property and not the property itself. *Id.* at 992. The trial court further found that nothing in the insurance policy demonstrated that the parties intended in any way to benefit the appellant. *Id.* On appeal, we reversed the trial court's dismissal and held that the "appellant can state a cause of action as a third party beneficiary of the mortgagee's loss payable clause to the extent of the amount due on the mortgage at the time of the loss, together with interest on the amount found to be due." *Id.* at 994.

In so holding, we aligned ourselves with the Third District's decision in *Schlehuber v. Norfolk & Dedham Mutual Fire Insurance Co.*, 281 So. 2d 373 (Fla. 3d DCA 1973), which held that a mortgagee payment clause within an insurance contract between an insurance company and the former homeowners could be enforced by the new homeowner "as a third party beneficiary even though he possessed no policy in his name." *Id.* at 374–75. As stated by the court in *Schlehuber*, section 627.405 "sets out by way of negative statement the proposition that a contract of insurance of property may be enforced for the benefit of persons having an insurable interest in the property." *Id.* at 375.

[5] **[6]** Notwithstanding this last statement, "[t]here is no *per se* rule in Florida that a party with an insurable interest is automatically vested with standing to enforce a policy of

property insurance." *Harnarrine v. Praetorian Ins. Co.*, No. 18-62848-CIV, 2019 WL 8508084, at *4 (S.D. Fla. Jan. 10, 2019). Rather than automatically being vested with standing due to an "insurable interest" in the property, a court "must determine whether, *pursuant to the terms of the Policy*, [a plaintiff] has standing to bring her claims as an intended third-party beneficiary under Florida law." *Rucker v. Integon Nat'l Ins. Co.*, No. 19-cv-23422, 2020 WL 2616210, at *3 (S.D. Fla. May 23, 2020) (emphasis added).

***919** **[7]** Indeed, *Ran Investments* and *Schlehuber* simply did not displace the requirement in Florida that "[a] party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong." *Dingle v. Dellinger*, 134 So. 3d 484, 488 (Fla. 5th DCA 2014). *Ran Investments* and *Schlehuber* must therefore be read in conjunction with this requirement, which has long existed in Florida law. *See, e.g.*, *Marianna Lime Prods. Co. v. McKay*, 109 Fla. 275, 147 So. 264, 277–78 (1933) ("The rule in this state is that when a contract shows that it was intended to be for the benefit of a third party, such third party may ... sue thereon.").

Despite the Insurer's assertion that *Ran Investments* and *Schlehuber* are no longer good law, both cases can be reconciled with the requirement that a party is an intended third-party beneficiary only if the parties or the contract express an intent to primarily and directly benefit the third party. In *Ran Investments*, after the trial court dismissed the appellant's claim, the appellant filed a motion for rehearing and "exhibited a proposed second amended complaint which alleged, among other things, that the Krals had agreed to insure the property against the usual hazards, including fire, *for the benefit of appellant*." *Ran Investments*, 379 So. 2d at 992 (emphasis added). Importantly, the Krals were required "to obtain hazard insurance on the property which would protect the mortgagee *as the mortgagor had agreed to do in its mortgage contract*." *Id.* at 993 (emphasis added). Thus, the Krals obtained the hazard insurance policy to protect the appellant's *contractual obligations*.

Moreover, in *Schlehuber*, *the former homeowner* purchased an insurance policy that contained in part a provision to protect both of the mortgagees' insurable interests in the property. *Schlehuber*, 281 So. 2d at 374. Payment to a mortgagee would necessarily "inure[ ] to [a homeowner's] benefit, as it will be applied to the balance of the outstanding mortgage, thereby reducing the amount of his indebtedness." *Kelly v. Balboa Ins. Co.*, No. 8:11-cv-450, 2015 WL 12843881, at *3 (M.D. Fla. Aug. 12, 2015). Therefore, intent to benefit a party or class of persons—here, persons with an insurable interest in the property—can be inferred even in the absence of the new homeowner being specifically named in the contract.

We agree with the trial court's determination that *Ran Investments*—and, by extension, *Schlehuber*—are distinguishable from the instant case. While in both of the earlier cases there may have been some question as to whether the insurance policy was intended to primarily and directly benefit the third-party beneficiary, the Policy in the instant case expresses a clear or manifest intent *not* to benefit Appellant.

This distinction is not unique to Florida state courts. *See Zabala v. Integon Nat'l Ins. Co.*, No. 20-22221-Civ, 2020 WL 3977380, at *3–4 (S.D. Fla. July 14, 2020) (rejecting the argument that section 627.405 itself confers standing and distinguishing several Middle District cases—which relied upon *Schlehuber*—on the basis that those cases "did not involve policies that contained a 'clear or manifest intent not to primarily and directly benefit the third party' ") (quoting *Catatonic Invs. Corp. v. Great Am. Assurance Co.*, No. 14-cv-21621, 2014 WL 11997839, at *3 (S.D. Fla. Nov. 25, 2014)); *see also Harnarrine*, 2019 WL 8508084, at *3 (stating that *Schlehuber* and the Middle District cases relying on such do not involve policies that contain "the clear or manifest intent not to primarily and directly benefit the third party"); ***920** *Hogan v. Praetorian Ins. Co.*, No. 1:17-cv-21853, 2017 WL 5643234, at *4–5 (S.D. Fla. July 31, 2017) (dealing with an identical insurance policy and finding that the language "clearly and unambiguously shows" that the appellant was not an intended third-party beneficiary). And, this distinction is in line with the Fifth District's recent opinion in *Goins* (which we cited in *Veloz*). Thus, as in *Goins*, we hold that Appellant lacked standing as a third-party beneficiary under the contract, and we distinguish *Ran Investments* on the basis that it did not involve a contract that expressed an intent in clear and unambiguous language *not* to benefit a third party.

Conclusion

Because we hold that Appellant lacked standing as a third-party beneficiary under the Policy, we also hold that the trial court did not err in dismissing Appellant's complaint with prejudice and in entering final judgment in the Insurer's favor. Therefore, we affirm the trial court's final judgment.

Affirmed.

Warner and Conner, JJ., concur.

All Citations

312 So.3d 914, 46 Fla. L. Weekly D243

Footnotes

1 The mortgage also included the father. However, the father is not a party to the instant case. Thus, any discussion of the father's involvement beyond assignment of his rights under the force-placed insurance policy to Appellant (as discussed below) is irrelevant and has been omitted.

2 The motion to dismiss also asserted that Appellant failed to sufficiently plead an action for declaratory relief. However, because the trial court did not address this basis, and because we find the trial court properly dismissed based on a lack of standing, we need not address this argument.

3 Both *Goins* and *Veloz* were decided after the instant appeal had already perfected.

2021 WL 3779161
Only the Westlaw citation is currently available.

Supreme Court of Florida.

IN RE: AMENDMENT TO FLORIDA RULE OF CIVIL PROCEDURE 1.280.

No. SC21-929
|
August 26, 2021

Original Proceeding – Florida Rules of Civil Procedure

Opinion

MUÑIZ, J.

***1** Many courts apply 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. [1] Florida's version of the apex doctrine, developed by the district courts of appeal as a common law gloss on our rules of civil procedure, protects only high-level government officials. [2] On our own motion, we now amend those rules to codify the apex doctrine and to extend its protections to the private sphere. [3]

I.

We begin with a brief discussion of *Suzuki Motor Corp. v. Winckler*, 284 So. 3d 1107 (Fla. 1st DCA 2019), the impetus for our decision to take up the apex doctrine now.

Suzuki came to the First District Court of Appeal on certiorari review. The issue was whether the trial court had departed from the essential requirements of law by not invoking the apex doctrine to prevent the examination of Osamu Suzuki, then his company's chairman and former chief executive officer. *Id.* at 1108. As the district court correctly noted, a court departs from the essential requirements of law when it violates a clearly established principle of law. *See* *Williams v. Oken*, 62 So. 3d 1129, 1133 (Fla. 2011).

The district court described "the essence of Florida's apex doctrine" as follows:

> [A]n *agency head* 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.

***2** *Winckler*, 284 So. 3d at 1109 (quoting *Dep't of Agric. & Consumer Servs. v. Broward Cty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002)).

The First District observed that the apex "doctrine is only clearly established in Florida in the government context, with respect to high-ranking government officials." *Id.* In fact, the district court added, "no Florida court has adopted the apex doctrine in the corporate context." *Id.* (quoting *Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 951 (Fla. 1st DCA 2015)). Against that baseline, the district court concluded that "the trial court did not depart from the essential requirements of the law by refusing to apply this doctrine to Suzuki Motor Corporation's corporate officer." *Id.*

Judge Thomas dissented. *Id.* at 1110. He accepted the premise that Florida courts have not invoked the apex doctrine outside the government context, but he maintained 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*." *Id.* at 1113. Judge Thomas lamented that the majority's approach —which found it determinative that the apex doctrine was not "clearly established" in the corporate context—would prevent Florida's appellate courts from ever extending the apex doctrine to that context in the first instance. *Id.* at 1110.

Notwithstanding the *Suzuki* panel's split on the merits, it unanimously certified to this Court the 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?" *Id.* at 1115. We initially granted Suzuki's petition to review the First

District's decision. But in an order issued concurrently with this opinion, we have exercised our discretion to discharge jurisdiction in the case.

II.

This rules case allows us to decide whether to adopt the apex doctrine in the corporate context. Our approach to this question is framed by three considerations. First, as reflected in Florida Rule of Civil Procedure 1.280(b) (Scope of Discovery), our rules generally take a permissive approach to the availability of discovery. Second, as reflected in Florida Rule of Civil Procedure 1.280(c) (Protective Orders), our rules' generally liberal orientation toward discovery is checked by the availability of protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." And third, rather than limit high-level government officers to the generic protection of rule 1.280(c), district courts in Florida have enforced the apex doctrine in the government context.

Preventing harassment and unduly burdensome discovery has always been at the heart of that doctrine in our state. The First District invoked that rationale in Florida's seminal apex doctrine case, *Department of Agriculture & Consumer Services v. Broward County*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002). There, the court observed that withholding the doctrine's protections would "subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole." *Id.* Similarly, in a case applying the apex doctrine for the benefit of a state university president, the First District warned that "compelling the deposition of President Bense in this context could have future widespread ramifications and subject her to deposition in numerous other employment disputes." *Univ. of W. Fla. Bd. of Trustees v. Habegger*, 125 So. 3d 323, 325 (Fla. 1st DCA 2013). Over the years, varied government officers in Florida have benefited from the apex doctrine.

***3** We think that the efficiency and anti-harassment principles animating that doctrine are equally compelling in the private sphere. "Virtually 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." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). Federal district courts in Florida have similarly commented that, "by virtue of their position," apex officials "are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts." *Brown v. Branch Banking & Trust Co.*, No. 13-81192-CIV, 2014 WL 235455, at *2 (S.D. Fla. Jan. 22, 2014) (citation omitted). We see no good reason to withhold from private officers the same protection that Florida courts have long afforded government officers.

Like other courts that have adopted the apex doctrine in the corporate context, we emphasize that the doctrine "in no way creates a blanket prohibition on the taking of a deposition of a high-ranking corporate official." *Sanders*, 724 S.E.2d at 364. The point of the apex doctrine is to balance the competing goals of limiting potential discovery abuse and ensuring litigants' access to necessary information. Properly applied, 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 warranted." *Liberty Mut. Ins. Co. v. Superior Ct.*, 10 Cal.App.4th 1282, 13 Cal. Rptr. 2d 363, 367-68 (1992).

III.

We believe that it is in Florida's best interests to codify the apex doctrine in our rules of civil procedure and to apply the doctrine to both private and government officers. Making this change as a rule amendment allows us to ensure consistency across the two contexts[4] and to define and explain the apex doctrine as clearly as possible.

New Florida Rule of Civil Procedure 1.280(h) (Apex Doctrine), that we adopt today, is as follows:

> 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.

We now explain key aspects of the rule.

"Current or former high-level government or corporate officer." A threshold issue in every case involving the rule is whether the would-be deponent is, in fact, a "current or former high-level government or corporate officer." When that person's "high-level" status is disputed, the burden is on the person or party resisting the deposition to persuade the court that this requirement is satisfied. Of course, if the requirement is not satisfied, the would-be deponent cannot claim the benefit of the rule.

***4** We do not think it is feasible or desirable to codify a definition of "high-level government or corporate officer." Courts have enforced the apex doctrine in the government and private contexts for decades, and there is a rich body of case law applying the term. In cases that are on the margin, the proper application of the term should be discerned the same way one interprets any other undefined term in a statute or rule—according to how a reasonable, fully informed reader would understand the term, in context. Given that the new rule codifies a doctrine of long legal standing, a proper interpretation of the term will necessarily consider how courts have traditionally used the term, together with the well-established purposes of the apex doctrine. And the typical reader's familiarity with those materials will be assumed. *Cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) ("If [words] are addressed to specialists, they must be read by judges with the minds of the specialists.").

Where courts apply the apex doctrine at all, they generally extend the protections of the doctrine to former high-level officers. *See* *Horne v. Sch. Bd. of Miami-Dade Cnty.*, 901 So. 2d 238, 241 (Fla. 1st DCA 2005) (holding in the government context that the apex doctrine "is equally applicable to former agency heads and high-ranking officials in circumstances such as these involving past official conduct"); *Palmisano v. Paragon 28, Inc.*, No. 21-60447-CIV, 2021 WL 1686948, at *3 (S.D. Fla. 2021) ("Palmisano is Wright's former CEO. His deposition, therefore, is subject to the apex doctrine."); *Fed. Deposit Ins. Corp. v. Galan-Alvarez*, No. 1:15-mc-00752, 2015 WL 5602342, at *4 (D.D.C. Sept. 4, 2015) ("The apex doctrine is no less applicable to former officials than to current officials."). To avoid any doubt, the rule explicitly covers former officers.

Finally, we note that the rule—consistent with the case law—uses the term "officer" in the generic sense of "[o]ne who holds an office of authority or trust in an organization, such as a corporation or government." *American Heritage Dictionary* 1223 (5th ed. 2011). The case law in this area treats as synonymous the terms officer, official, and executive. In the apex doctrine context, "high-level officer" status 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.

Affidavit or declaration and its contents. Courts applying the apex doctrine in the corporate context have typically required the person resisting deposition to produce an affidavit disclaiming unique, personal knowledge of relevant facts. By contrast, Florida courts applying the doctrine in the government context have not always required such an affidavit. *See Allen*, 271 So. 3d at 1199 (Miller, J., specially concurring). We think that requiring an affidavit or declaration is essential to the proper functioning of the rule in both contexts, so we have made the requirement explicit in the rule.

We emphasize the rule's requirement that the officer "explain" that he or she lacks unique, personal knowledge of the issues being litigated. Bald assertions of ignorance will not do. A sufficient explanation will show the relationship between the officer's position and the facts at issue in the litigation. The

point 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.

The parties' burdens. Under the rule, the person or party resisting a deposition has two burdens: a burden to persuade the court that the would-be deponent meets the high-level officer requirement, and a burden to produce an affidavit or declaration explaining the official's lack of unique, personal knowledge of the issues being litigated. If the resisting person or party satisfies those burdens, and the deposition-seeker still wants to depose the high-level officer, the deposition-seeker bears the burden to 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.

***5** The rule's approach to the parties' respective burdens is consistent with how Florida courts have applied the apex doctrine in the government context. *See, e.g.*, *Univ. of W. Fla. Bd. of Trs. v. Habegger*, 125 So. 3d 323, 325 (Fla. 1st DCA 2013) (placing ultimate burden of persuasion on the deposition-seeker). And although courts nationally are not entirely consistent in their allocation of the parties' burdens, [5] the rule's approach is common in the case law. *See, e.g., Shenzhen Kinwong Elec. Co. v. Kukreja*, No. 18-61550, 2019 WL 8298217, at *1 (S.D. Fla. Dec. 12, 2019) (party seeking apex deposition has burden to establish unique knowledge and exhaustion of other discovery); *Sanders*, 724 S.E.2d at 364 ("[T]he circuit court should first determine whether the party seeking the deposition has demonstrated that the official has any unique or superior personal knowledge of discoverable information."); *Affinity Labs of Texas v. Apple, Inc.*, No. C 09-4436CW, 2011 WL 1753982, at *15 (N.D. Cal. May 9, 2011) ("[P]arties seeking to depose a high ranking corporate officer must first establish that the executive (1) has unique, non-repetitive, firsthand knowledge of the facts at issue in the case, and (2) that other less intrusive means of discovery, such as interrogatories and depositions of other employees, have been exhausted without success.").

Relationship to rule 1.280(c). The rule we adopt today stands on its own. New rule 1.280(h) is an alternative to rule 1.280(c) for use in the limited context of depositions of high-level government and corporate officers. The new rule is not governed by the "good cause" standard of rule 1.280(c), and it imposes burdens of production and persuasion that are distinct from the burdens at play in rule 1.280(c). Government and corporate officers who cannot meet the new rule's requirements, or who choose not to try to, remain free to seek relief under rule 1.280(c).

IV.

We amend Florida Rule of Civil Procedure 1.280 as reflected in the appendix to this opinion. New language is indicated by underscoring. The amendment shall become effective immediately upon the issuance of this opinion, and it applies in pending cases. Where appropriate, courts should exercise their discretion to allow parties a reasonable opportunity to convert a pending motion for protective order under rule 1.280(c) to a motion under new rule 1.280(h).

Because the amendment was not published for comment previously, interested persons shall have seventy-five days from the date of this opinion in which to file comments with the Court. [6]

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., dissents with an opinion.

LABARGA, J., dissenting.

Today, on its own motion, effective immediately, and with the ease of a rule amendment, the majority abandons Florida's long-standing refusal of affording special discovery protections to top-level corporate decision-makers. I respectfully dissent.

***6** Rule 1.280, Florida Rules of Civil Procedure, sets forth "General Provisions Governing Discovery." The new rule adopted by the majority, rule 1.280(h) ("Apex Doctrine"), provides that "a current or former high-level government or corporate officer" may not be subjected to a 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." Majority op. at —— – ——. The corporate officer may seek such protection by filing a motion for protective order and attaching an affidavit or declaration explaining that the officer lacks such unique and personal knowledge of the issues being litigated. Majority op. at ——.

The majority's reasoning for the change is principally predicated upon the potential for abusive discovery tactics against an official at the highest level or "apex" of corporate management: "Virtually 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." Majority op. at —— – —— (quoting *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007)).

"Federal district courts in Florida have similarly commented that, 'by virtue of their position,' apex officials 'are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.' " Majority op. at —— (quoting *Brown v. Branch Banking & Trust Co.*, No. 13-81192-CIV, 2014 WL 235455, at *2 (S.D. Fla. Jan. 22, 2014).

However, as discussed below, the existing discovery framework contained in the Florida Rules of Civil Procedure adequately affords trial judges with the necessary authority and tools to deal with any potential abuse or harassment, thus rendering the new rule adopted here today unnecessary.

Any discussion of Florida's discovery process must begin with the recognition that the Florida Rules of Civil Procedure afford parties in litigation with broad discovery tools. "Our rules of civil procedure broadly allow parties to obtain discovery of 'any matter, not privileged, that is relevant to the subject matter of the pending action,' whether the discovery would be admissible at trial, or is merely 'reasonably calculated to lead to the discovery of admissible evidence.' " *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) (quoting Fla. R. Civ. P. 1.280(b)(1)).

Rule 1.280(a), for instance, provides that "[p]arties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission." Moreover, rule 1.280(a) further provides that unless the court orders otherwise, or except as provided by the rules, "the frequency of use of these methods is not limited."

Thus, the goal of our discovery rules is to expand access to information that is "relevant to the subject matter of the pending action," not to diminish it. Fla. R. Civ. P. 1.280(b)(1).

The discovery process, however, is not without limitations. Rule 1.280(c) authorizes the trial court, for good cause shown, to enter any order to protect a party or person from "*annoyance, embarrassment, oppression, or undue burden or expense* that justice requires." (Emphasis added.) Rule 1.280(c) further authorizes the trial court to impose terms and conditions on discovery, including:

> ***7** (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; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Thus, Florida's existing discovery framework provides trial courts with the necessary tools to address abusive discovery practices, ranging from mandating the method of discovery to be used, to prohibiting the discovery from occurring in the first place. Rule 1.280(c) even provides for the award of expenses incurred in relation to the motion for protective order. Accordingly, there is no need for the special discovery protection afforded to top-level corporate officers by the majority's new rule. The protection, if needed, is available in Florida's existing rules of civil procedure.

The majority also contends that the application of the apex doctrine to top-level corporate decision-makers will make the discovery process more efficient. I disagree. The majority correctly acknowledges that a threshold issue in every case involving the new rule will be "whether the would-be deponent is, in fact, a 'current or former high-level government or corporate officer.' " Majority op. at ——. According to the majority, "[w]hen that person's 'high-level' status is disputed, the burden is on the person or party resisting the deposition to persuade the court that this requirement is satisfied." Majority op. at ——.

Despite the potential difficulties of determining whether the would-be deponent is or was a "high-level" corporate officer, the majority gave any attempt to codify a helpful definition a pass. Instead, the majority offers the following:

> We do not think it is feasible or desirable to codify a definition of "high-level government or corporate officer." Courts have enforced the apex doctrine in the government and private contexts for decades, and there is a rich body of case law applying the term. In cases that are on the margin, the proper application of the term should be discerned the same way one interprets any other undefined term in a statute or rule—according to how a reasonable, fully informed reader would understand the term, in context. Given that the new rule codifies a doctrine of long legal standing, a proper interpretation of the term will necessarily consider how courts have traditionally used the term, together with the well-established purposes of the apex doctrine. And the typical reader's familiarity with those materials will be assumed.

Majority op. at —— – ——.

Thus, once it is determined, after what could amount to substantial, expensive, and lengthy litigation, that the would-be deponent is indeed a current or former high-level corporate officer, the next question will be whether that person is the officer who has the unique or personal knowledge of discoverable information. The potential for abuse, gamesmanship, expense, and delay that can be reasonably anticipated from this process clearly outweighs any benefits expected to be derived from the new rule adopted by the majority here today. This is especially the case when the protections the new rule espouses already exist in the rules of procedure.

Tellingly, in adopting the apex doctrine, Florida joins only four states that have adopted the doctrine: California, Michigan, West Virginia, and Texas. The remaining forty-six states have not adopted the doctrine, and courts in at least five states—Oklahoma, Missouri, Colorado, Connecticut, and North Carolina—have expressly rejected it. *See Crest Infiniti, II, LP v. Swinton*, 174 P. 3d 996, 1004 (Okla. 2007); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. 2002) ("This Court declines to adopt an 'apex' rule. Instead, depositions of top-level decision-makers should proceed in accordance with Rules 56.01(b)(1) and 56.01(c)."); *BlueMountain Credit Alternatives Master Fund L.P. v. Regal Ent. Grp.*, 465 P.3d 122, 131 (Colo. Ct. App. 2020) ("[A] growing number of state courts, including those whose rules of civil procedure, like ours, are modeled on the federal rules, have rejected it."); *Duke Energy Carolinas, LLC v. AG Ins. SA/NV,* No. 17 CVS 5594, 2019 WL 6699461, at *4 (N.C. Super. Ct. Dec. 6, 2019); *Netscout Sys., Inc. v. Gartner, Inc.*, FSTCV 1460229885, 2016 WL 5339454, at *6 (Conn. Super. Ct. Aug. 22, 2016) ("[I]t seems clear that the rule is incompatible with Connecticut law to the extent it shifts the burden of showing good cause to the proponent of the deposition.").

***8** Four of the five states that have rejected the apex doctrine have discovery rules which, with language that is nearly identical to Florida's rule 1.280, provide a discovery framework for dealing with abusive discovery tactics.

Given that framework, these states found it unnecessary to provide high-level corporate officers with any further special discovery protection—as should the State of Florida.

I respectfully dissent.

APPENDIX

Rule 1.280 General Provisions Governing Discovery

(a) – (g) [No Change]

(h) Apex Doctrine. 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.

Committee Notes

[No Change]

Court Commentary

[No Change]

All Citations

--- So.3d ----, 2021 WL 3779161 (Mem)

Footnotes

1 *See, e.g.*, *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 696 (D.N.M. 2019) (the apex doctrine "has been applied by a variety of federal district courts nationwide"); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 228 W.Va. 749, 724 S.E.2d 353, 359-63 (2012) (adopting the apex doctrine and examining case law from other jurisdictions that have done so). Federal district courts in Florida apply the doctrine. *See, e.g.*, *Office Depot, Inc. v. Elementum Ltd.*, No. 9:19-cv-81305, 2020 WL 5506445, at *3 (S.D. Fla. Sep. 14, 2020).

2 We appreciate that some judges have drawn a distinction between the apex doctrine (for private sector officers) and the "agency-head deposition test" (for government officers). *See, e.g.*, *Miami Dade College v. Allen*, 271 So. 3d 1194, 1198 (Fla. 3d DCA 2019) (Miller, J., specially concurring). For simplicity, we will use the term "apex doctrine" when discussing both contexts, private and government. *See, e.g.*, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-01362, 2020 WL 3520314, at *2 (S.D. W.Va. June 29, 2020) ("The 'apex doctrine' applies to a specific subset of deposition notices that demand the appearance of high-level executives or high-ranking government officials."); Iain D. Johnston, *Apex Witnesses Claim They Are Too Big to Depose*, 41 Litigation 41, 43 (2014) ("Although some courts articulate the tests differently, for practical purposes, courts apply the apex doctrine and the high-ranking government official privilege in the same way.").

3 We have jurisdiction. *See* art. V, § 2(a), Fla. Const; Fla. R. Gen. Prac. & Jud. Admin. 2.140(d).

4 Of course, we recognize that certain privileges or constitutional principles might be applicable in one context and not the other.

5 *See* Johnston, *supra*, note 2, at 44 ("[W]hen it comes to determining which party bears the burden on the issue of deposing apex witnesses, decisions are all over the place.").

6 All comments must be filed with the Court on or before November 9, 2021, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Florida Courts E-Filing Portal (Portal) in accordance with *In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal*, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment may be, but is not required to be, filed via the Portal. Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

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