

COA Opinion: The apex-deposition rule applies to corporate and government defendants

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In *Alberto v. Toyota Motor Corp.*, No. 296824 (published Aug. 5, 2010), the Court of Appeals adopted, in a divided opinion, the apex-deposition rule. The apex-deposition rule provides that before a plaintiff may take the deposition of a high-ranking or “apex” government official or corporate officer, the plaintiff must demonstrate (1) that the government official or corporate officer possesses superior or unique information relevant to the issues being litigated and (2) that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees. Judge Saad wrote the majority opinion, which Judge Donofrio joined, while Judge Jansen [dissented](#).

The case arose out of a car crash that killed Guadalupe Alberto. According to the plaintiff (a representative of the decedent’s estate), Mr. Alberto was driving a 2005 Toyota Camry at less than 25 mph when the vehicle suddenly accelerated to more than 80 mph and, despite his efforts to apply the brakes, crashed into a tree, went airborne, and then struck another tree. The plaintiff sought to depose Yoshimi Inaba, the Chairman and CEO of Toyota, and Jim Lentz, Toyota’s President and COO, because of public statements they had made about sudden-acceleration problems in certain Toyota vehicles, but Toyota moved for a protective order to quash the depositions, arguing that the apex-deposition rule should be applied to bar their depositions. The trial court held that Michigan law did not preclude the depositions from going forward and denied the motion for a protective order.

The apex-deposition rule, Judge Saad explained, acts not to shield high-ranking officers from discovery, but rather to sequence discovery by requiring litigants to attempt less burdensome methods before deposing high-ranking government officials. Courts adopting this rule have concluded it would harm the public interest if high-ranking government officials were regularly required to interrupt their work to appear at depositions. Judge Saad further noted that federal courts, including the Fifth, Sixth, and Tenth Circuits, have extended the rule to high-ranking corporate executives, as have the courts of California and Texas. The rule is consistent, the majority explained, with Michigan rules that place reasonable limits on discovery and also with prior Michigan cases. For example, the Court of Appeals had previously concluded a deposition of the Michigan Secretary of State should be quashed where the Secretary lacked personal knowledge and the information could have been obtained by other means. Similarly, the Court had reversed the denial of a motion to quash the depositions of the Wayne County Executive and the Wayne County Sheriff because the information they possessed could have been obtained through other sources. Applying the apex-deposition rule in the corporate context would both promote efficient discovery by allowing such depositions only if a plaintiff can show the officer has superior or unique personal knowledge and prevent the use of depositions to annoy, harass, or unduly burden the parties. Thus, if a party opposing the

deposition demonstrates by an affidavit or other testimony that the would-be deponent lacks personal knowledge or unique or superior information, then the party seeking the deposition must demonstrate that the relevant information cannot be obtained in another manner. Additionally, although the case did not involve government officials and the cases involving the Secretary of State and Wayne County officials had not expressly adopted the rule, the Court adopted the rule with respect to government officials as well.

Applying this rule, the majority concluded that despite public appearances by Mr. Inaba and Mr. Lentz addressing a sudden-acceleration problem and recalls in other cars (not the vehicle in Mr. Alberto's accident), neither executive had any actual knowledge, much less unique or superior knowledge, of the design, engineering, manufacturing, or testing of a 2005 Camry. Accordingly, the Court concluded the trial court abused its discretion in denying the motion to quash.

In dissent, Judge Jansen argued that adopting the apex-deposition rule was unnecessary on the facts of the case. Existing principles, she contended, could adequately protect high-ranking corporate officers from discovery abuses, as trial courts can already issue protective orders to prevent annoyance, embarrassment, oppression, or undue burden or expense and can already restrict abusive, excessive, or irrelevant discovery. Furthermore, while there is a public interest in good government, there is no public interest in the management and operation of private corporations. Furthermore, Judge Jansen concluded that the plaintiff had demonstrated a strong probability that Mr. Inaba and Mr. Lentz had personal knowledge, including personal knowledge of possible efforts to conceal the scope and breadth of the sudden-acceleration problem. Lastly, Judge Jansen noted that high-ranking corporate officers should be held to the same civil discovery standards as anyone else.