

# IN THE SUPREME COURT OF TEXAS

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No. 98-1243  
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IN RE ALCATEL USA, INC. F/K/A DSC COMMUNICATIONS INCORPORATED,  
RELATOR

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ON PETITION FOR WRIT OF MANDAMUS  
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**Argued on December 1, 1999**

JUSTICE ENOCH, joined by JUSTICE BAKER and JUSTICE O'NEILL, dissenting.

This Court has held that the proper place to amend or promulgate a rule is through rulemaking, not judicial fiat.<sup>1</sup> Yet today, from mere guidelines intended to aid a trial court's decision to allow or prevent apex depositions in the context of discovery harassment, the Court effectively forges an apex deposition rule -- one, significantly, not found in our recently promulgated discovery rules. This new rule erects an improperly high barrier, imposing a special protection for corporate officials.

The apex guidelines arose from an evaluation of the existing Rules of Civil Procedure, which have long articulated a deponent's right to protection "from undue burden, unnecessary expense, harassment, [or] annoyance . . . ."<sup>2</sup> The progenitor of Texas cases analyzing the propriety of apex

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<sup>1</sup> See *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992).

<sup>2</sup>T EX. R. CIV. P. 192.6(b).

depositions is *Wal-Mart Stores, Inc. v. Street*.<sup>3</sup> In that case, this Court examined a business invitee's assertion in a slip-and-fall case that he should be allowed to depose the chair of Wal-Mart's Board of Directors, Sam Walton. We held that the trial judge abused his discretion by ordering the deposition to be taken at a location other than Walton's residence or place of business.<sup>4</sup> Our decision in *Street* recognized the potential for harassment that high-level corporate officials face when a corporation is routinely subjected to litigation, and when the official's connection to the case is as tenuous as Walton's connection to a slip-and-fall case in one of hundreds of Wal-Mart stores.

Despite the Court's concerns signaled in *Street*, litigants continued to seek the depositions of highest ranking executives of large corporations in what appeared to be nothing more than an effort to harass or pressure settlement by needlessly increasing the costs of litigation.<sup>5</sup> Deciding that it was appropriate to alert courts to such undue discovery burden and harassment, we established parameters to guide a trial court's discretion.<sup>6</sup> While I strongly support the protection from harassment that our apex deposition guidelines provide, I do not countenance a *de facto* rule, unavailable to any other potential deponent, that extends a privilege to corporate officials to avoid depositions by virtue of their position.

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<sup>3</sup> 754 S.W.2d 153 (Tex. 1988).

<sup>4</sup> *See id.* at 155.

<sup>5</sup> *See Monsanto Co. v. May*, 889 S.W.2d 274 (Tex. 1994) (opinion on denial of leave to file petition for writ of mandamus).

<sup>6</sup> *See Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995).

Consistent with this Court’s holding in *Crown Central*,<sup>7</sup> I would hold that when there is evidence that *arguably shows* that a high-level corporate official has any unique or superior personal knowledge of discoverable information, a trial court does not abuse its discretion by allowing an apex deposition. But when the evidence suggests only that a high-level official’s deposition is being sought because the official has ultimate decisionmaking authority, “this amounts to nothing more than the simple, obvious recognition that the highest-ranking corporate officer of any corporation has ultimate responsibility for all corporate decisions,”<sup>8</sup> and falls far short of supporting a trial court’s discretion to allow the deposition. Consequently, I disagree with the court of appeals’ conclusion in this case protecting Kang from being deposed, but agree that Lee cannot be deposed. I would therefore conditionally grant mandamus in part against the court of appeals, and allow the Kang deposition to proceed.

To determine whether the court of appeals improperly granted mandamus relief, this Court focuses on whether the trial court’s ruling was an abuse of discretion.<sup>9</sup> A trial court is vested with broad discretion in the area of discovery.<sup>10</sup> Indeed, the reviewing court may not substitute its judgment for the trial court’s.<sup>11</sup> *Crown Central*’s guidelines inform a trial court’s discretion to allow or prevent an apex deposition. Pertinent to this case, the trial court’s discretion was to be guided by

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<sup>7</sup> *See id.*

<sup>8</sup> *AMR Corp. v. Enlow*, 926 S.W.2d 640, 644 (Tex. App. -- Fort Worth 1996, orig. proceeding).

<sup>9</sup> *See In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998).

<sup>10</sup> *See Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985).

<sup>11</sup> *See Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990).

whether DSC *arguably* showed that Kang or Lee had *any* unique *or* superior personal knowledge of discoverable information, and, generally, whether the depositions were sought to harass.<sup>12</sup> The Court's decision today raises a barrier to many otherwise legitimate apex depositions by divesting the trial court of its discretion, and by substituting this Court's judgment for the trial court's.

### **LEE**

In *AMR Corp. v. Enlow*,<sup>13</sup> the plaintiffs argued that they could depose AMR CEO Robert Crandall in their dramshop negligence case because Crandall had ultimate authority on all of AMR's policies. The court of appeals prevented the deposition, concluding that ultimate policy authority is insufficient evidence and that parties must articulate facts implicating the apex official's personal knowledge.<sup>14</sup> The allegations and mandamus evidence in this case point to Lee in the same way the *AMR* plaintiffs pointed to Crandall. DSC's record evidence reflects such nebulous items as the fact that Lee sets the overall vision for Samsung, is a principal Samsung shareholder, and believes Samsung should actively pursue status as a top-five global telecommunications company. Allegations that a CEO should be deposed because that is where the buck stops are not evidence arguably showing unique or superior personal knowledge of discoverable information. As such, I believe the Court correctly adopts the *AMR* standard with regard to Lee. But while I agree with the Court's result on Lee, my decision would hinge only on the *AMR* rationale. The Fort Worth Court

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<sup>12</sup> See *Crown Central*, 904 S.W.2d at 128 (emphasis added).

<sup>13</sup> 926 S.W.2d 640 (Tex. App. — Fort Worth 1996, orig. proceeding).

<sup>14</sup> See *id.* at 644.

of Appeals described and answered the problem succinctly. I would not go beyond that rationale in analyzing whether the trial court abused its discretion by allowing Lee's deposition.

### **KANG**

The mandamus record reflects that the special discovery master, Judge Andrews, sat through more than thirty hearings on more than sixty discovery motions. The record also reflects that Judge Andrews understood that this was not a case in which the facts driving the litigation are extremely remote from the CEO and trickle up the corporate structure. Here, corporate policy and directives may have pushed the events driving this litigation down the corporate hierarchy. Inevitably, the policies driving corporate action and personal knowledge of actions taken in pursuit of such policies intersect. One federal court has held that at this intersection, "when the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action."<sup>15</sup> While it is not this Court's role to say whether Kang arguably was at the intersection of Samsung's corporate policy and the events driving this litigation, given the evidence before it, the trial court did not abuse its discretion by doing so.

Only after an exhaustive review of the evidence DSC presented did the trial court conclude that Kang arguably had unique or superior personal knowledge of discoverable information. DSC offered evidence that Kang was directly involved in Samsung's next generation switching system project and had been specifically informed of Samsung's efforts to obtain DSC technology. There was also evidence that Kang received a written and oral presentation in 1996 about the status of

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<sup>15</sup> *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987).

Samsung’s next generation switching system project in the United States, and that numerous reports were provided to Kang on the same project around the time of the events giving rise to this suit. One of the reports apparently contained an organizational chart for Samsung’s telecommunication project that contained the names of DSC employees — who were still with DSC at the time. When asked why he made the presentation to Kang, a lower-level Samsung official responded “because [Kang] had a lot of interest in the information telecommunications side of the business.” While this evidence shows Kang’s personal knowledge of relevant information, the question *Crown Central* requires the trial court to consider before allowing the deposition is whether DSC arguably showed that the knowledge was unique or superior.

Substituting its judgment for the trial court’s, the Court concludes that Kang could not be deposed because DSC did not arguably show that Kang’s knowledge of discoverable information was unique or superior. As evidence that Kang did not reach this level of knowledge, the Court offers Dr. J.H. Lee’s deposition testimony that: (1) the report was a simple thing that did not last long; (2) outside of the report, Dr. Lee had no other communication on the next-generation network switch system with Kang; and (3) Dr. Lee conveyed no project details to Kang.<sup>16</sup> In support of its conclusion, the Court announces the new apex deposition rule that a party must make a showing beyond *mere* relevance with evidence “such as . . . that “ (1) a high-level executive is the only person with personal knowledge of the information sought or (2) the executive arguably possesses relevant knowledge greater in quality or quantity than other available sources.”<sup>17</sup> Relying on this

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<sup>16</sup> \_\_ S.W.3d at \_\_

<sup>17</sup> *Id.* at \_\_ .

new rule, the Court surmises that Kang cannot be deposed because, at best, Dr. Lee’s deposition “conveys that Kang may have been made aware of information contained in reports prepared by others, but still does not show why Kang’s knowledge may be unique or superior.”<sup>18</sup> This new rule and its rationale are problematic.

The Court’s conclusion is problematic because it would require a litigant seeking to depose a CEO regarding a board-level decision, about which all present at the board meeting have the same information, to depose a lower-level board member and not the CEO. Why should a litigant be forced to depose the least qualified witness when it could depose the most qualified if they have the same information? While the CEO and a lower-level official may have the same information, they have different levels of knowledge. As one federal court has concluded, an apex official’s knowledge may be deemed unique and the deposition allowed, even if other corporate officials possess similar knowledge.<sup>19</sup>

Moreover, the Court’s opinion treats “knowledge” as though it were only the bare facts communicated to Kang and nothing more. But knowledge is more than mere information. The Court ignores the role that Kang’s, or any apex official’s, position within the corporation plays on the information received. When the policies driving corporate action and personal knowledge of actions taken in pursuit of such policies intersect, a new level of knowledge arises. When the motives behind corporate action are at issue, *arguably* the knowledge created at that intersection is

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<sup>18</sup> *Id.* at \_\_\_.

<sup>19</sup> See *Spadmark, Inc. v. Federated Dep’t Stores, Inc.*, 176 F.R.D. 116, 118 (S.D.N.Y. 1997).

unique to the corporate officer. And certainly that level of knowledge is “greater in quality” than the level possessed by the individual who communicated only the bare facts.

This does not mean that an apex official who merely receives information will automatically be deposed. Trial courts must continue to employ the Rules of Civil Procedure to protect all potential deponents from “undue burden, unnecessary expense, harassment, [or] annoyance . . . .”<sup>20</sup> Moreover, as the Fort Worth Court of Appeals correctly recognized, for corporate officials, bald allegations of final policymaking authority will not constitute sufficient evidence to justify an apex deposition. Likewise, mere allegations that the apex official both forms policy and has personal knowledge of facts relevant to the litigation do not arguably show unique or superior knowledge. Rather, there should be some evidence that the confluence of the official’s policy-forming role and personal knowledge of activities related to such policies arguably creates unique or superior knowledge of discoverable information.

The Court’s reliance on the amount of Kang’s knowledge that Dr. Lee’s deposition testimony “conveys” is also troublesome. Benefitted by numerous hearings and direct contact with the litigants and the evidence, the special master and the trial judge had no need to rely on the mere implications of the evidence. Indeed, trial courts have the best vantage point from which to determine whether an apex official’s receipt or use of information communicated by lower-level officials arguably shows unique or superior knowledge.

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<sup>20</sup> EX. R. CIV. P. 192.6(b)

To make this determination, trial courts should consider the context of the allegations the discovering party raises, the type of information sought from the official, any evidence of the official's role in the specific act or transaction underlying the suit, and the official's role within the corporation relative to the corporation's size. In addition, if the party merely seeks factual information an apex official receives, the trial court may limit such discovery if the information "is obtainable from some other source that is more convenient, less burdensome, or less expensive."<sup>21</sup> But if the discovering party presents some evidence showing that the receipt of information and the official's corporate role arguably combine to form unique or superior knowledge, the trial court does not abuse its discretion to allow the deposition. For this Court to decide that the trial court abused its discretion here, invades the trial court's discretion in the type of judgment call where it is uniquely implicated.

As *Crown Central* counsels, trial courts should carefully balance litigants' need for information against the potential for abuse apex depositions pose. And while the discovering party may not initially be entitled to the deposition if they fail to make the requisite showing, the matter is not foreclosed. *Crown Central* counsels that after a party has failed to offer some evidence that arguably shows the official's unique or superior knowledge, the party may still pursue a good faith effort to discover the information through less-intrusive methods, and then attempt to take the apex deposition .<sup>22</sup>

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<sup>21</sup>T EX. R. CIV. P. 192.4(a).

<sup>22</sup> See *Crown Central*, 904 S.W.2d at 128.

A trial court clearly abuses its discretion if “it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.”<sup>23</sup> Given the evidence before it, and the special master’s intimate familiarity with the case, I cannot say that the trial judge’s decision to permit Kang’s deposition was arbitrary and unreasonable. DSC presented evidence that supports the trial court’s decision because it arguably shows that Kang had unique or superior discoverable knowledge. And with respect to resolution of factual issues or matters committed to the trial court’s discretion, the reviewing court may not substitute its judgment for that of the trial court.<sup>24</sup> Finally, Judge Andrews was not unmindful of the possibility that the depositions were sought to harass. He therefore specifically limited the depositions to matters raised in the parties’ claims and counterclaims. Thus, the trial court did not abuse its discretion when it refused to quash the deposition of Kang. Consequently, I would conditionally grant mandamus in part against the court of appeals, allowing Kang’s deposition to proceed, but preventing Lee’s.

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Craig T. Enoch  
Justice

Opinion delivered: January 6, 2000

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<sup>23</sup> *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

<sup>24</sup> *See Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41-42 (Tex. 1989).