# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

3 2011

No. 11-1514

**STATE OF WEST VIRGINIA ex rel. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, Petitioner**

**vs.**

**HONORABLE DAVID H. SANDERS, Judge of the Circuit Court of Jefferson County; HOWARD G. DEMORY; CHARLOTTE P. DEMORY; 3RD TIME TRUCKING, LLC; and ERIC W. CUSTER, Respondents**

## VERIFIED PETITION FOR WRIT OF PROHIBITION

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## I. QUESTION PRESENTED

This is a verified petition for writ of prohibition[1] seeking interlocutory appellate review of orders[2] entered on October 26, 2011, requiring the President, Chief Executive Officer, and Chairman of Massachusetts Mutual Life Insurance Company ("MassMutual"), to submit to deposition despite his lack of any personal and unique knowledge regarding the facts and circumstances of the underlying case.

The question presented is whether a high-ranking corporate officer without any personal and unique knowledge of the facts and circumstances of a case can be compelled to be deposed despite the availability of other corporate witnesses for deposition, as well as the production of corporate representatives for deposition pursuant to R. Civ. P. 30(b)(7).

## II. STATEMENT OF THE CASE

In this case, plaintiffs served Rule 30(b)(7) notices seeking the deposition of a corporate representative of MassMutual concerning ninety-six separate topics, not including subparts. Appendix at 168-216. In addition, plaintiffs noticed the depositions of six MassMutual employees, none of whom had any contact with plaintiffs concerning the matters in this suit or otherwise. Appendix at 217-270. Finally, in order to maximize the time, expense, and

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[1] This Court has entered two scheduling orders in two other petitions for writs of prohibition in the same cases which are the subject of this petition. Appendix at 5-8.

[2] The Circuit Court entered orders in two cases, Demory v. Massachusetts Mutual Life Insurance Company, Jefferson County Civil Action No. 11-C-131, and 3rd Time Trucking, LLC v. Massachusetts Mutual Life Insurance Company, Jefferson County Civil Action No. 11-C-68, Appendix at 1-4, even though only the plaintiffs in the Demory case filed a response to MassMutual's motions for a protective order. The plaintiffs in the 3rd Time Trucking case never filed any response to the motion for a protective order; never set forth any facts or circumstances regarding Mr. Crandall's personal and unique knowledge concerning their case; and otherwise never opposed MassMutual's motion for a protective order. Nevertheless, making no specific findings of fact or conclusions of law in either case, the Circuit Court entered orders denying MassMutual's motions for a protective order in both cases.

inconvenience to MassMutual, plaintiffs noticed the deposition of Roger Crandall, Chairman, President, and Chief Executive Officer of MassMutual. Appendix at 271-279.

MassMutual filed timely motions for protective orders in response to the noticing of Mr. Crandall's deposition. Appendix at 9-42.

Plaintiffs in the Demory case filed a response[3] arguing that (1) because Mr. Crandall's facsimile signature appears on insurance policies, annuity contracts, and other corporate documents, and some of those documents are at issue in this case, he is subject to deposition; (2) because Mr. Crandall is the "face" of MassMutual, he is subject to deposition; (3) because plaintiffs wrote a letter to Mr. Crandall regarding their dispute, he is subject to deposition; (4) because MassMutual has corporate integrity policies of which Mr. Crandall would theoretically be ultimately responsible, he is subject to deposition; and (5) because there have allegedly been similar suits and MassMutual would have a responsibility to investigate allegations of impropriety regarding those matters, of which Mr. Crandall would theoretically be ultimately responsible, he is subject to deposition. Appendix at 43-72.[4]

MassMutual filed a timely reply to this response, specifically requesting, pursuant to Syllabus Point 6 of State ex rel. Allstate Insurance Company v. Gaughan, 203 W. Va. 358, 508 S.E.2d 75 (1998), that any order compelling Mr. Crandall's deposition contained findings of fact and conclusions of law for purposes of interlocutory appellate review, Appendix at 73-144, but the Circuit Court entered two-page orders making no specific findings of fact or conclusions of law, Appendix at 1-4.

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[3] No response was filed on behalf of plaintiffs in the 3rd Time Trucking case.

[4] There is nothing in the record to indicate that any of these arguments apply to the 3rd Time Trucking case. Nevertheless, as noted, the Circuit Court denied MassMutual's motion for a protective order in both cases.

Rather, the Circuit Court's orders merely state, "the 'Apex' rule is inapplicable to Mr. Crandall as a fact witness having unique knowledge with regard to facts, allegations and defenses in this case," Appendix at 1 and 3, ***without identifying any subject matter upon which Mr. Crandall has any personal and unique knowledge.***[5]

The Circuit Court's orders are a gross misapplication of the "apex" rule for the deposition of high-level corporate officers. Assuming the Circuit Court adopted plaintiffs' arguments in the Demory case,[6] which is unclear from the order, every high-ranking corporate officer whose facsimile signature appears on corporate documents would be subject to deposition merely because a legal dispute arose from the existence of that corporate document. Every chief executive officer who is ordinarily the "face" of the corporation would be subject to deposition merely because of his or her status as chief executive officer. Every chief executive officer to whom a claimant directed a letter would be subject to deposition merely because the letter was sent. Every chief executive officer of a corporation with integrity policies, which probably includes every corporation, would be subject to deposition merely because a claim involves allegations of misconduct. Finally, every chief executive officer of a corporation against which more than one suit is filed regarding the same general subject matter would be subject to deposition merely because multiple claims triggered in such officer some duty to "investigate."

## III. SUMMARY OF ARGUMENT

The Circuit Court's decision is contrary not only to the wealth of authority from other jurisdictions protecting high-level corporate officers from deposition in matters in which they

[5] Moreover, as noted, in 3rd Time Trucking, plaintiffs filed no response; so, in that case, not even the plaintiffs themselves have identified any personal and unique knowledge.

[6] As no arguments were made in the 3rd Time Trucking case, it is impossible to discern the basis for the Circuit Court's denial of MassMutual's unopposed motion for a protective order in that case.

have no personal and unique knowledge, but also the law of West Virginia in which this Court has applied a similar test for high-ranking governmental officials.

Accordingly, MassMutual respectfully requests that this Court issue a rule in prohibition arising from the Circuit Court's orders entered on October 26, 2011, compelling the deposition of Mr. Crandall, despite his lack of any personal or unique knowledge of the relevant facts and circumstances; the availability of other discovery tools, such as interrogatories and requests for production to learn the personal and unique knowledge, if any, of Mr. Crandall; the availability of other corporate witnesses for deposition; and the production of corporate representatives pursuant to plaintiffs' Rule 30(b)(7) notice.

## IV. STATEMENT REGARDING ORAL ARGUMENT

Because the Circuit Court refused to extend the rationale of this Court's decisions regarding high-ranking governmental officials to high-ranking corporate officials, and because this issue has arisen in the past but not resulted in the issuance of a published opinion, MassMutual requests oral argument in this matter pursuant to R. App. P. 20.

## V. ARGUMENT

### A. AN ORDER COMPELLING THE DEPOSITION OF A HIGH-RANKING CORPORATE OFFICIAL WITHOUT ANY PERSONAL AND UNIQUE KNOWLEDGE REGARDING THE FACTS AND CIRCUMSTANCES OF A CASE IS PROPERLY THE SUBJECT OF INTERLOCUTORY APPELLATE REVIEW BY WRIT OF PROHIBITION.

A "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1.

Prohibition may "'be substituted for a writ of error or appeal when the latter alternatives would provide an inadequate remedy.'" State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 257,

470 S.E.2d 205, 211 (1996) (citations omitted) (quoting State ex rel. Chafin v. Halbritter, 191 W. Va. 741, 743-44, 448 S.E.2d 428, 430-31 (1994)).

This Court's "'modern practice is to allow the use of prohibition, based on the particular facts of the case, where a remedy by appeal is unavailable or inadequate, or where irremediable prejudice may result from lack of an adequate interlocutory review.'" Amy M., 196 W. Va. at 257, 470 S.E.2d at 211 (quoting McFoy v. Amerigas, Inc., 170 W. Va. 526, 532, 295 S.E.2d 16, 22 (1982)); accord State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 667, 535 S.E.2d 727, 732 (2000) (citing Syl. pt. 2, Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973)).

This Court has identified five factors that will be examined by the Court in determining whether to grant a writ of prohibition:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.

Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Although all five factors need not be satisfied, "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." State ex rel. Packard v. Perry, 221 W. Va. 526, 532, 655 S.E.2d 548, 554 (2007). Applying these factors, this Court has issued writs of prohibition in circumstances similar to those presented here.

In State of West Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 601 S.E.2d 25 (2004), this Court issued a writ of prohibition against an order compelling the depositions of attorneys who had authored certain documents at issue in insurance litigation.

In State ex rel. Kaufman v. Zakaib, supra, this Court issued a writ of prohibition against an order compelling a judge arising from his presiding in a divorce proceeding.

In State ex rel. Wright v. Stucky, 205 W. Va. 171, 517 S.E.2d 36 (1999), this Court issued a writ of prohibition against an order compelling alleged assailants from refusing to answer certain deposition questions.

In State ex rel. Paige v. Canady, 197 W. Va. 154, 158, 475 S.E.2d 154, 158 (1999), this Court issued a writ of prohibition against an order compelling the deposition of the Tax Commissioner stating that, "This Court has previously determined that erroneous discovery orders may be subject to a writ of prohibition. 'A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.'" (citation omitted).

Finally, and most relevant to this proceeding, in State ex rel. Citizens Utilities Co. v. King, No. 24199, an employee whose position had been eliminated sought to depose the president of his employer's company who worked at the corporate headquarters in Stamford, Connecticut, and had no familiarity with the local West Virginia operations and no involvement in the reduction-in-force. Appendix at 145-166. After the circuit court refused to grant a protective order, the company filed a petition for writ of prohibition arguing that, under the "apex" rule, it was an abuse of discretion to require a CEO with no personal knowledge or direct involvement in the gravamen of a suit to submit to deposition. Appendix at 145-166. This Court issued a rule to show cause returnable on September 9, 1997, but the case was eventually

dismissed as moot after the plaintiff withdrew his request to depose the company's CEO. Appendix at 167.

Consequently, in this proceeding, where (1) MassMutual has no other adequate means, such as direct appeal, to obtain the desired relief; (2) MassMutual will be prejudiced in a way that is not correctable on appeal; (3) the Circuit Court's orders are clearly erroneous as a matter of law; (4) the Circuit Court's orders raise legal issues that have previously been presented to this Court; and (5) the Circuit Court's orders present this Court with an opportunity to clarify that its decisions regarding the deposition of high-ranking governmental officials extend to high-ranking corporate officials, issuance of a rule in prohibition is appropriate.

## B. THE CIRCUIT COURT'S ORDER COMPELLING THE DEPOSITION OF MASSMUTUAL'S PRESIDENT, CHAIRMAN, AND CHIEF EXECUTIVE OFFICER DESPITE HIS LACK OF PERSONAL AN UNIQUE KNOWLEDGE IS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION.

### 1. The Preferred Manner of Taking the Deposition of Corporate Representatives is Found in R. Civ. P. 30(b)(7) and Plaintiffs Can Obtain the Information They Seek Through the Deposition of MassMutual Employees and MassMutual Corporate Representatives.

The preferred manner of taking the deposition of corporate representatives is stated in R. Civ. P. 30(b)(7) as follows:

> A party may in his notice and in a subpoena name as the deponent a public or private corporation . . . and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more of its officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

"Courts throughout the country," it has been noted, "have prohibited the deposing of corporate executives who have no direct knowledge of a plaintiff's claim when other employees

with superior knowledge are available to testify. See, e.g., Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (the leading case on 'apex depositions,' finding no error in district court's issuance of protective order postponing deposition of defendant's president where he had no direct knowledge of plaintiff's claim and other employees had greater knowledge); Thomas v. Int'l Bus. Machines, 48 F.3d 478, 483 (10th Cir. 1995) (affirming district court's grant of protective order prohibiting deposition of chairman of defendant's board of directors where chairman had no personal knowledge of plaintiff's claim and other employees had direct knowledge); Lewelling v. Farmers Ins. of Columbus, 879 F.2d 1212, 1218 (6th Cir.1989) (protective order affirmed where chairman and C.E.O. lacked personal knowledge); Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I.1985) (prohibiting the deposition of Lee Iacocca where he had no personal knowledge); see also Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2037 (citing cases)." Roman v. Cumberland Ins. Group, 2007 WL 4893479 at * 1 (E.D. Pa.).

In the instant case, not only does Mr. Crandall not have any personal and unique knowledge regarding these cases and there are other employees with superior knowledge who are not only available to testify, but have testified in recent depositions with no inquiry by plaintiffs' counsel of Mr. Crandall's knowledge. Moreover, other depositions, including Rule 30(b)(7) depositions, have been or are in the process of being scheduled. Accordingly, the deposition of Mr. Crandall, before plaintiffs discern from other less intrusive discovery methods, including depositions of other MassMutual employees, whether he has any personal and unique knowledge, is inappropriate.

### 2. Mr. Crandall Has No Personal and Unique Knowledge of any of the Relevant Facts and Circumstances of these Cases and MassMutual's Employees and Corporate Representatives Can Address Any Matters of Relevance to these Cases.

Mr. Crandall never contacted plaintiffs or their counsel; did not have any involvement in the subject matter of these suits; and did not have any involvement in any of the other suits filed in Jefferson County related to 412i plans and their funding products which are the subject of this litigation.

Like any CEO, Mr. Crandall's name appears on a vast number of corporate documents, including the tens of thousands of insurance policies, annuity contracts, and other products. Without any legal support whatsoever, however, plaintiffs in the Demory case argued to the Circuit Court that when a CEO or other corporate officer's name appears as a matter of form on corporate documents, including insurance policies, annuity contracts, and other products, the CEO or other corporate officer is a party to such documents: "While Mr. Crandall's facsimile signature may appear on all MassMutual annuity contracts as a matter [of] ordinary business, ***the issuance of this contract by Mr. Crandall . . . is evidence of fraud for which he is a fact witness***." Appendix at 47 (emphasis supplied).

Of course, Mr. Crandall "issued" no "contract" personally; rather, his name simply appears by facsimile signature on many MassMutual documents. The only parties to any contracts upon which Mr. Crandall's facsimile signature appears are MassMutual and the other party. Mr. Crandall is not a party to the contract. Otherwise, Mr. Crandall and every similar corporate officer in his position would be subject not only to deposition, but to suit for breach of the contract to which, according to plaintiffs, he or she was a "party."

What makes plaintiffs' argument in the Demory case even more ridiculous in this case is that Mr. Crandall's signature did not appear on their annuity contract. Mr. Crandall's signature

was not on the annuity in 2005 when the Demorys' annuity contract was issued because Mr. Crandall was not MassMutual's President at the time: "Mr. Crandall was not the President of Massachusetts Mutual Life Insurance Company in 2005. . . . Rather, the President of MassMutual at the time was Robert J. O'Connell." Appendix at 48.

Mr. Crandall's signature simply appears on a form contract document generated in response to plaintiffs' discovery requests and plaintiffs reference no legal authority for the proposition that generation of a sample form contract document in response to a discovery request constitutes fraud, deceit, or any other cause of action.

If the original of any form document is not available at the time of a discovery request and a sample form document can be generated with the same provisions as the original document, it is common for such form document to be generated, and the fact that there has been a change in the person's name appearing on form documents in the interim certainly does not make the generation of such document fraudulent.

To the extent there are other issues plaintiffs wish to cover regarding their annuity contract, it is an appropriate topic for deposition of MassMutual's corporate designee. Therefore, there is no need for plaintiffs to depose Mr. Crandall.

### 3. High-Ranking Corporate Officers Are Protected From Deposition Other Than When They Have Personal and Unique Knowledge of the Subject Matter of Litigation.

In the context of large corporate defendants, the broad scope of discovery provides the significant potential for abuse, necessitating that discovery be appropriately limited: "[a]s virtually every court which has addressed the subject has observed, depositions of persons in the upper level of management or corporations often involved in lawsuits present problems which

should reasonably be accommodated in the discovery process." Crown Central Petroleum Corporation v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995).

In Liberty Mutual Insurance Company v. Superior Court, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363 (1992), for example, the court considered whether a protective order should have been entered by the trial court preventing the deposition of Liberty Mutual's CEO. The court noted that such depositions "raise a tremendous potential for discovery abuse and harassment." Id. at 1287.

Although no California decision had previously addressed the issue of "apex" depositions, the court relied on an established line of federal decisions that "generally do not allow a plaintiff's deposition power to automatically reach the pinnacle of the corporate structure." Id. at 1288.

Determining that these federal decisions were persuasive, the court concluded that a protective order should have been entered:

> This case raises an issue of first impression in California: whether the head of a corporation may be deposed when there is no showing that he or she had any involvement in a lawsuit against the corporation, and prior to the plaintiff's exhaustion of less intrusive means of discovery. We hold that under these circumstances a corporate head may not be deposed, and that the trial court abused its discretion by denying the protective order.

Id. at 1284.

The court determined that a protective order should be entered where the plaintiff has not shown good cause that the executive possesses unique or special knowledge of discoverable facts. The court further held that such a protective order would be lifted only after less intrusive methods of discovery had been exhausted, and the plaintiff makes a showing that the executive possesses "necessary information." Id. at 1289.

The court concluded that the rule would balance the rights of both parties: "the procedure outlined above will prevent undue harassment and oppression of high-level officials while still providing a plaintiff with several less intrusive mechanisms to obtain the necessary discovery, and allowing for the possibility of conducting the high-level deposition if warranted." Id. at 1290.

The Supreme Court of Texas reached the same conclusion in Crown Central, supra, where a former employee of the corporation died of lung cancer allegedly due to asbestos exposure in the course of his employment. In the wrongful death suit brought by the employee's estate, the plaintiff sought to depose Mr. Rosenberg, the corporation's vice president. The corporation subsequently filed a motion for a protective order on the basis that he had no discoverable information such as personal knowledge of the alleged asbestos exposure.

The Texas Supreme Court first noted the broad scope of permissible discovery, acknowledging that under the Texas Rules of Civil Procedure, a party is permitted "to take the deposition of 'any person.'" Crown Central, 904 S.W.2d at 127. The court also recognized, however, that "the person noticed for the deposition also has the right to protection from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights." Id. at 128.

The court set out a long list of prior federal and state decisions in which corporate executives were protected from deposition. See, e.g, Liberty Mutual, supra; Broadband Communications Inc. v. Home Box Office, Inc., 157 A.D.2d 479, 549 N.Y.S.2d 402 (1990) (affirming a protective order where the CEO lacked any involvement); Roman, supra at *1 ("Courts throughout the country have prohibited the deposing of corporate executives who have no direct knowledge of a plaintiff's claim when other employees with superior knowledge are

available to testify."); Simon v. ProNational Ins. Co., 2007 U.S. Dist. LEXIS 96320 (S.D. Fla. 2007) ("[C]ourts frequently restrict efforts to depose senior executives where the party seeking the deposition can obtain the same information through a less intrusive means, or where the party has not established that the executive has some unique knowledge pertinent to the issues in the case."); Baine v. General Motors Corp., 141 F.R.D. 332, 334-35 (M.D. Ala. 1991) (issuing a protective order and noting that where a high-level decision maker "removed from the daily subjects of litigation" has no unique personal knowledge of the facts at issue, a deposition of that official is improper).

The Crown Central court noted that nearly every court to examine the issue of "apex" depositions has acknowledged the need for special accommodation in the discovery process. After examining the prior decisions, the court set out the following rule:

> When a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has any unique or superior personal knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods. Depending upon the circumstances of the particular case, these methods could include the depositions of lower level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation. After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition makes this showing, the trial court should modify or vacate the protective order as appropriate. As with any deponent,

> the trial court retains discretion to restrict the duration, scope and location of the deposition. If the party seeking the deposition fails to make this showing, the trial court should leave the protective order in place.

Crown Central, 904 S.W.2d at 128. This common sense approach to "apex" depositions has become known as the "Crown Central Standard," and has been adopted by numerous other courts since its formulation.

**4. The Burden is on the Party Seeking to Compel the Deposition of a High-Ranking Corporate Officer to Demonstrate the Officer's Personal and Unique Knowledge of the Relevant Facts and Circumstances in a Particular Matter and Allegations of Knowledge Regarding Information Within the Officer's Ordinary Scope of Corporate Responsibilities Are Insufficient.**

The burden is on the party seeking the deposition to show that the employee sought to be deposed in fact possesses unique knowledge of the case. See EchoStar Satellite, LLC v. Splash Media Partners LLC, 2009 U.S. Dist. LEXIS 43555 (D. Colo.) ("Where a party seeks to depose a high level executive typically removed from the daily subjects of the matter in litigation, the party seeking discovery must first demonstrate that the proposed deponent has ***unique personal knowledge of the matters in issue***.") (emphasis supplied, internal citations omitted); Chick-Fil-A, Inc. v. CFT Dev., LLC, 2009 U.S. Dist. LEXIS 34496 (M.D. Fla. 2009) ("Under the apex rule, the party seeking the deposition must show that the executive has ***unique or superior knowledge*** of discoverable information that cannot be obtained by other means.") (emphasis supplied, internal citations omitted); Porter v. Eli Lily and Co., 2007 U.S. Dist. LEXIS 40282 (N.D. Ga. 2007) (upholding protective order prohibiting deposition of CEO where plaintiff failed to show that executive has personal knowledge).

Moreover, a party cannot force an Apex deposition by simply alleging that the individual possesses information regarding the structure of the corporation, the corporate decision making

process, or those decisions ultimately made at the highest levels of the corporation. See In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 111149 (M.D. Ga. 2009) ("Where an executive's only connection with the matter is the fact that he is the defendant corporation's CEO, with no direct involvement in or knowledge of the issues giving rise to the action, a deposition of the executive may not be appropriate."); In re Alcatel USA, Inc., 11 S.W.3d 173 (Tex. 2000) ("Allowing apex depositions merely because a high-level corporate official possesses apex-level knowledge would eviscerate the very guidelines established in Crown Central. Such evidence is too general to arguably show the official's knowledge is unique or superior."); In re El Paso Healthcare Sys., 969 S.W.2d 68, 74 (Tex. App. El Paso 1998) ("A generalized claim that a corporate president has ultimate responsibility for all corporate decisions or has knowledge of corporate policy is insufficient to establish that the corporate president has unique or superior personal knowledge of discoverable information."); AMR Corp. v. Enlow, 926 S.W.2d 640 (Tex. App. Fort Worth 1996) ("Testimony that a corporate executive possesses knowledge of company policies does not, by itself, satisfy the first *Crown Central* test because it does not show that the executive has unique or superior knowledge of discoverable information.").

**5. This Court's Previous Decisions Regarding the Deposition of High-Ranking Government Officers Logically Extends to High-Ranking Corporate Officers.**

Although this Court has not yet issued a published opinion regarding the matter of "apex" depositions in the context of corporate depositions, it has adopted a similar protective procedure as applied to depositions of highly placed public officials.

In Arnold Agency v. West Virginia Lottery Com'n, 206 W. Va. 583, 526 S.E.2d 814 (1999), plaintiff sought to depose former Governor Gaston Caperton in its suit against the

Lottery Commission for breach of contract and fraud in the award of an advertising contract to another marketing company.

Referring to Syllabus Point 14 of the Court's decision in State ex rel. Paige v. Canady, supra, in which this Court determined that the Tax Commissioner should not be deposed, the Court pronounced the following rule:

> When determining whether to allow the deposition of a highly placed public official, the trial court should weigh the necessity to depose or examine an executive official against, among other factors, (1) the substantiality of the case in which the deposition is requested; (2) the degree to which the witness has first-hand knowledge or direct involvement; (3) the probable length of the deposition and the effect on government business if the official must attend the deposition; and (4) whether less onerous discovery procedures provide the information sought.

This Court concluded that "'the submission of interrogatories by the plaintiffs is the appropriate manner in which to initially proceed to determine whether these [high-ranking government officials] have any [relevant] knowledge . . . .' Alexander v. FBI, 186 F.R.D. 1, 5 (D.D.C. 1998). Because of the availability of less burdensome means of initial discovery in the present case, we see no reason to conclude that the circuit court abused its discretion in entering the protective order." Arnold, 206 W. Va. at 600, 526 S.E.2d at 831.

Although this Court has not issued a published opinion applying this analysis to high-ranking corporate officials, it has intervened in a case similar to this one.

In State ex rel. Citizens Utilities Co. v. King, supra, an employee whose position had been eliminated sought to depose the president of his employer's company who worked at the corporate headquarters in Stamford, Connecticut, and had no familiarity with the local West Virginia operations and no involvement in the reduction-in-force. After the circuit court refused to grant a protective order, the company filed a petition for writ of prohibition arguing that, under

the "apex" rule, it was an abuse of discretion to require a CEO with no personal knowledge or direct involvement in the gravamen of a suit to submit to deposition. Appendix at 145-166. This Court issued a rule to show cause returnable on September 9, 1997, but the case was eventually dismissed as moot after the plaintiff withdrew his request to depose the company's CEO. Appendix at 167.

**6. Where Plaintiffs' Annuity Increased in Value; Mr. Crandall Has No First-Hand Knowledge or Direct Involvement in Plaintiffs' Annuity Purchase; the Probable Length of the Deposition Would Have a Negative Impact on the Performance of Mr. Crandall's Duties; and there are Less Onerous Discovery Procedures to Obtain the Information Sought Which Are Being Employed, the Circuit Court Should Not Have Compelled Mr. Crandall's Deposition.**

This case is in the same posture as Paige and Citizens Utilities in which this Court intervened by issuing a rule and/or writ or prohibition.

First, plaintiffs have filed suit even though the $100,000 annuity referenced in their response to MassMutual's motion for a protective order actually appreciated in value.

Second, Mr. Crandall has no first-hand knowledge or direct involvement in plaintiffs' annuity purchase or the other relevant facts and circumstances of plaintiffs' case.

If the fact that his facsimile signature appears on a document supports his deposition, Appendix at 47 ("the issuance of this contract by Mr. Crandall . . . is evidence of fraud for which he is a fact witness"), then the appearance of the facsimile signature of every CEO, CFO, CIO, or other high-ranking corporate officer on corporate documents would likewise support their deposition.

If the fact that "MassMutual's policies [requiring ethical conduct] are not just required of its agents and employees, but also required of its highest-level executive, Mr. Crandall" supports

his deposition, Appendix at 55, then every high-ranking officer in a company with a corporate responsibility policy would be subject to deposition.

If the fact that Mr. Crandall may be considered the "face" of the company supports his deposition, Appendix at 56 ("Roger Crandall Makes Himself the Face of Compliance"), then every high-ranking officer who is considered the "face" of a company would be subject to deposition.

If the fact that plaintiffs in the Demory case "wrote to" Mr. Crandall complaining about the subject matter of the litigation provided "notice" to Mr. Crandall of "possible litigation" warranting his deposition, Appendix at 60 ("the Demorys . . . wrote to Mr. Crandall asking that copies of their documents be produced to them"), then every high-ranking corporate officer to whom a claimant has written would be subject to deposition.

Finally, if the fact that, according to plaintiffs, "The jury has a right to know how deep and how far up the chain of command the cover-up goes and whether there was direction of it or acquiescence in it up to the top level," warrants Mr. Crandall's deposition, Appendix at 62, then every high-ranking corporate officer is subject to deposition to determine "how deep and how far up the chain of command" knowledge regarding the subject matter of a claimant's circumstances goes.

Plaintiffs' own response to MassMutual's motion for a protective order clearly illustrates that they have no good faith basis for asserting Mr. Crandall's personal and unique knowledge in these cases: "[W]hile MassMutual wants to take the position that Mr. Crandall is a high-level executive with no 'first-hand knowledge regarding the facts at issue in this case', it is exactly the reason that Plaintiffs would depose Mr. Crandall. Assuming MassMutual chose its words deliberately, then at the very least, ***Mr. Crandall has second-hand knowledge*** . . . That would

make Mr. Crandall . . . ***uniquely knowledgeable as to how he discovered the facts*** . . . ." Appendix at 64 (emphasis supplied). Of course, the logical extension of this circular argument is that all high-ranking officers, whether in the private or public sector, would always be subject to deposition not because they have any personal or unique knowledge regarding the subject matter of the litigation, but because they subsequently learned of the subject matter after suit was filed.

As this Court wisely observed in Paige, this "second-hand knowledge" is simply not enough; rather, plaintiffs may be entitled to depose a high-ranking officer, but only once plaintiffs start at the bottom of the organization chart with their discovery and that discovery produces evidence that the high-ranking officer had personal and unique knowledge of the subject matter of the litigation.

Indeed, such is the heart of the Crown Central "apex" rule, i.e., once there is evidence that a high-ranking corporate official had personal knowledge or involvement in the subject matter of litigation, it is perfectly appropriate to conduct that executive's deposition, but until a plaintiff meets the very high burden of establishing that knowledge or involvement, corporate executives are protected from deposition. Here, plaintiffs' "facsimile signature," "corporate ethics," "corporate face," "letter to the president," and "second-hand knowledge" arguments simply fail to satisfy their burden.

## VI. CONCLUSION

Petitioner, Massachusetts Mutual Life Insurance Company, respectfully requests that this Court issue a rule in prohibition to show cause why the Circuit Court's orders of October 26, 2011, requiring its President, Chief Executive Officer, and Chairman to submit to deposition despite his lack of any personal and unique knowledge regarding the facts and circumstances of

the underlying case, and despite the availability of other corporate witnesses for deposition, as well as the production of corporate representatives for deposition pursuant to R. Civ. P. 30(b)(7).

**MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY**

**By Counsel**

Dated: November 3, 2011

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA ex rel. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,**

**Petitioner,**

**vs.) No. 11-----**

**HONORABLE DAVID H. SANDERS, Judge of the Circuit Court of Jefferson County; HOWARD G. DEMORY; CHARLOTTE P. DEMORY; 3RD TIME TRUCKING, LLC; and ERIC W. CUSTER,**

**Respondents.**

**VERIFICATION**

STATE OF WEST VIRGINIA,
COUNTY OF CABELL, TO-WIT:

I, Ancil G. Ramey, being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRIT OF PROHBITION, that the factual representations contained therein are true, except so far as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

Ancil G. Ramey

Taken, subscribed and sworn to before me this 3rd day of November, 2011.

My commission expires: July 19, 2014

Renée Clay
Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
RENEE CLAY
RT. 2 BOX 75A
WEST HAMLIN, WV 25571
My Commission Expires July 19, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2011, I served the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION by electronic mail and by depositing a true copy thereof in the United States mail, postage prepaid, as follows:

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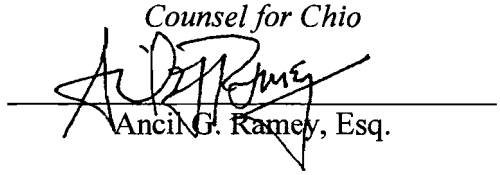

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