Third District Court of Appeal

State of Florida

Opinion filed June 22, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-1790
Lower Tribunal No. 19-7013

Domingo Sacramento, et al.,
Appellants,

vs.

Citizens Property Insurance Corporation,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Antonio Arzola, Judge.

David B. Pakula, P.A., and David B. Pakula (Pembroke Pines); and Corredor & Husseini, P.A., for appellants.

Lewis Brisbois Bisgaard & Smith, LLP, and Kathryn L. Ender, for appellee.

Before FERNANDEZ, C.J., and SCALES, and GORDO, JJ.

PER CURIAM.

Domingo and Olga Sacramento ("the Sacramentos") appeal the trial court's order granting summary judgment in favor of Citizens Property Insurance Corporation ("Citizens"). Because Citizens moved for summary judgment while discovery pertaining to key issues was pending, the trial court's summary judgment ruling was premature. We therefore reverse the order granting summary judgment and remand for further proceedings.

The underlying case concerns a typical all-risk home insurance policy. The Sacramentos filed a claim with Citizens alleging that their home incurred water damage caused by Hurricane Irma. Citizens denied the claim for lack of coverage due to a policy exclusion. On March 8, 2019, the Sacramentos filed suit against Citizens. The record is replete with exchange of discovery, notices of depositions and record activity between March and December of 2019.

On March 9, 2020, Governor Ron DeSantis declared a state of emergency for the entire State of Florida as a result of the COVID-19 pandemic. Exec. Order No. 20-52. On March 25, 2020, the Eleventh Judicial Circuit Court postponed all non-essential court proceedings through April 17, 2020. See In re: COVID-19 Emergency Procs. and Further Suspension of Time Periods Set Forth In Admin. Order No. 20-03 in the Eleventh Jud. Cir. of Fla., No. AO20-05 (Fla. Mar. 25, 2020). On March 30,

2020, a remote appearance platform was implemented and non-essential hearings without in-person court appearances were no longer suspended. See In re: COVID-19 Emergency Procs. Establishing Remote Platform to Hear Court Procs. in the Eleventh Jud. Cir. of Fla., No. AO20-05 (Fla. Mar. 30, 2020).

On April 24, 2020, Citizens moved for summary judgment. On June 4, 2020, Citizens filed notice of hearing for August 18, 2020. On August 10, 2020, Citizens filed a notice and cross-notice of deposition of Mitigation Co.'s representative scheduled to occur on December 1, 2020. On August 14, 2020, the Sacramentos filed their response to Citizens' motion for summary judgment arguing primarily that it would be premature to grant Defendant's motion for summary judgment at this juncture because there are still pending depositions which will shed light and reveal additional information regarding the cause of loss. The Sacramentos specifically requested the court not enter summary judgment until the mitigation expert's deposition was completed as it had already been noticed and set and he was a key witness who would be testifying regarding the cause of loss.

On August 18, 2020, the trial court held the summary judgment hearing. At the summary judgment hearing the Sacramentos' attorney moved ore tenus for a continuance arguing the motion was premature as the

deposition of this key witness was pending. He further argued he was delayed by the COVID-19 pandemic and subsequent office closures. Citizens' counsel conceded he received a message from opposing counsel asking to reset the summary judgment hearing, but he did not agree because it had been set since April.

The trial court entered summary judgment in favor of Citizens. On August 19, 2020, the Sacramentos filed two affidavits and a motion for rehearing. On August 24, 2020, the trial court denied rehearing and entered final judgement in favor of Citizens. This appeal followed.

An order granting a motion for summary judgment is reviewed *de novo*. Knowles v. JP Morgan Chase Bank, N.A., 994 So. 2d 1218, 1219 (Fla. 2d DCA 2008).

The Sacramentos raise several issues on appeal. We address only the discovery issue, which is dispositive of the matter. Citizens argues summary judgment was proper because no formal motion for continuance was filed. While it would have been better practice for the Sacramentos' attorney to file a written motion for continuance, we find his response to the summary judgment motion and phone call to opposing counsel asking to reset the hearing while the deposition of a key witness had already been noticed during the COVID-19 pandemic sufficient to find entry of summary

judgment was premature before the deposition was conducted. See Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932, 934 (Fla. 2d DCA 1995).

Citizens itself defeated its own summary judgment motion by subsequently filing a notice and cross-notice of deposition of a key witness, a witness whose testimony would most likely raise a genuine issue of material fact, eight days prior to the summary judgment hearing. The trial court was fully aware of Citizens' pending and noticed deposition that would potentially shed light on the causation issue central to the outcome of the case.[1] Florida District Courts agree that if there is a pending deposition that would most likely raise a genuine issue of material fact, discovery is considered ongoing and summary judgment is premature; this is especially the case if the deposition is noticed.[2] See Henderson v. Reyes, 702 So. 2d 616, 616 (Fla. 3d DCA 1997); Collazo v. Hupert, 693 So. 2d 631 (Fla. 3d DCA 1997); UFF DAA, Inc. v. Towne Realty, Inc., 666 So. 2d 199, 200 (Fla. 5th DCA 1995); Sica v. Sam Caliendo Design, Inc., 623 So. 2d 859, 860 (Fla.

[1] We find Citizens' argument that no further discovery was needed unpersuasive.

[2] When there is a pending deposition that has the potential to create a genuine issue of material fact, procedural failures, including failure to file a proper motion for continuance and supporting affidavits, are set aside. See Smith v. Smith, 734 So. 2d 1142, 1144–45 (Fla. 5th DCA 1999); Singer, 510 So. 2d at 639.

4th DCA 1993); Singer v. Star, 510 So. 2d 637, 639 (Fla. 4th DCA 1987). But see Estate of Herrera v. Berlo Indus., Inc., 840 So. 2d 272, 273 (Fla. 3d DCA 2003) ("Summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact."). The trial court cannot simply ignore a pending deposition of a witness whose testimony would most likely raise a genuine issue of material fact. "Facts upon which the court based its decision were not fully developed because discovery was in progress, and depositions were pending. Summary judgment was therefore premature." Singer, 510 So. 2d at 639.

Accordingly, we reverse the trial court's order granting summary judgment and remand for further proceedings.

Reversed and remanded.

Third District Court of Appeal

State of Florida

Opinion filed June 22, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-1206
Lower Tribunal No. 19-8921

Anita Tallo,
Petitioner,

vs.

Peter Illes, et al.,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Barbara Areces, Judge.

Olesia Y. Belchenko, P.A., and Olesia Y. Belchenko, for petitioner.

Brodsky Fotiu-Wojtowicz, PLLC, and Benjamin H. Brodsky and Robert S. Visca, for respondent Immo-Sonitó Ingatlanberuházázsi Kereskedelmi És Szolgáltató KFT.

Before HENDON, MILLER, and LOBREE, JJ.

PER CURIAM.

Petitioner, the spouse of the judgment debtor and a nonparty to the

proceedings below, seeks certiorari review of an order to show cause as to why she should not be held in contempt of court for failing to furnish certain personal financial information to respondent, the judgment creditor. We grant relief.

In Inglis v. Casselberry, 200 So. 3d 206, 209-10 (Fla. 2d DCA 2016), the Second District Court of Appeal discussed the considerations that must be examined prior to compelling financial disclosure from a nonparty in a postjudgment context:

> "Article I, section 23, of the Florida Constitution protects the financial information of persons if there is no relevant or compelling reason to compel disclosure." Rowe, 89 So. 3d at 1103 (quoting Borck, 906 So. 2d at 1211). "This is because 'personal finances are among those private matters kept secret by most people.'" Id. (quoting Woodward v. Berkery, 714 So. 2d 1027, 1035 (Fla. 4th DCA 1998)). Thus, the issue in this case is one of relevancy. "When a judgment creditor seeks to discover the personal financial information of a nonparty, he or she bears the burden of proving that the information sought is relevant or is reasonably calculated to lead to the discovery of admissible evidence." Furnell, 144 So. 3d at 602 (citing Rowe, 89 So. 3d at 1103). Further, the determination of relevancy should generally be made after an evidentiary hearing, due to the "strong public policy underlying this constitutional protection" of private financial information. Rowe, 89 So. 3d at 1103; see also Spry v. Prof'l Emp'r Plans, 985 So. 2d 1187, 1188 (Fla. 1st DCA 2008) (holding that judge of compensation claims "departed from the essential requirements of law by ordering discovery without considering evidence as to its relevance").
>
> We note that this case involves postjudgment discovery, which is generally broader in scope than prejudgment discovery. See 2245 Venetian Ct. Bldg. 4, Inc. v. Harrison, 149 So. 3d 1176,

> 1179 (Fla. 2d DCA 2014). The matters relevant for postjudgment discovery are those that will enable the judgment creditor to collect a debt or those that encompass information identifying or leading to the discovery of assets available for execution. See id.; Gen. Elec. Cap. Corp. v. Nunziata, 124 So. 3d 940, 943 (Fla. 2d DCA 2013). But a proper predicate must be laid before "someone other than the judgment debtor may be required to submit to financial discovery." Furnell, 144 So. 3d at 602 (quoting Nunziata, 124 So. 3d at 943).

In the instant case, the trial court compelled financial disclosure in the absence of any such predicate. This was a departure from the essential requirements of law and, because it involved financial discovery, irremediable on appeal. See Mana v. Cho, 147 So. 3d 1098, 1100 (Fla. 3d DCA 2014); Rousso v. Hannon, 146 So. 3d 66, 70 (Fla. 3d DCA 2014); Grabel v. Sterrett, 163 So. 3d 704, 706 (Fla. 4th DCA 2015). In similar circumstances, this court has invalidated contempt orders emanating from such erroneous rulings. See Carrington Mortg. Servs., LLC v. Nicolas, 46 Fla. L. Weekly D2519 (Fla. 3d DCA Nov. 24, 2021); Hudson v. Marin, 259 So. 3d 148, 166 (Fla. 3d DCA 2018); Aurora Bank v. Cimbler, 166 So. 3d 921, 927 n.5 (Fla. 3d DCA 2015); Eubanks v. Agner, 636 So. 2d 596, 597 (Fla. 1st DCA 1994); see also Tsokos v. Sunset Cove Invs., Inc., 936 So. 2d 667, 668 (Fla. 2d DCA 2006). Accordingly, we grant the petition and quash the order under review.

Petition granted.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2879

GGG FOUNDATION AND TRUST LLC and SHELDON J. VANN, Individually and as Manager of the Trust,

Appellants,

v.

HMC ASSETS, LLC solely in its capacity as separate trustee of Civic Holdings III Trust,

Appellee.

On appeal from the Circuit Court for Duval County.
Bruce Anderson, Judge.

June 15, 2022

PER CURIAM.

A trial court, in deciding whether there are equitable grounds to vacate a foreclosure sale, has "large discretion which will only be interfered with by the appellate court in a clear case of injustice." *Mitchell v. Mason*, 79 So. 163, 164 (Fla. 1918). In this case, the trial court did not abuse its discretion in overruling Appellant's objection to the sale. The trial court reasonably found Appellant did not prove the grounds for relief and failed to show that the sale price was inadequate or that it was the result of a

mistake, fraud, or other irregularity. *See Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 516 (Fla. 2013) (explaining that a plaintiff seeking to set aside a foreclosure sale based on the inadequacy of the sale price must show that the inadequacy resulted from a "mistake, accident, surprise, fraud, misconduct, or irregularity upon the part of either the purchaser or the person connected with the sale"). We therefore AFFIRM.

ROWE, C.J., and JAY and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Sheldon J. Vann of the Law Office of Sheldon J. Vann, Jacksonville, for Appellants.

Ashland R. Medley of Ashland Medley Law, PLLC, Coral Springs, for Appellee.

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DECISIONHR USA, INC., a Florida corporation,
and DECISIONHR HOLDINGS, INC., a Florida corporation,

Petitioners,

v.

WILLIAM MILLS, III, a natural person,
and COVERAGEHR, LLC, a Florida limited liability company,

Respondents.

No. 2D21-3468

June 17, 2022

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Darren D. Farfante, Judge.

Jon P. Tasso (withdrew after briefing), Ethan J. Loeb, and Maria A. Babajanian of Bartlett, Loeb, Hinds & Thompson, PLLC, Tampa, for Petitioners.

Bryan D. Hull, James J. Evangelista, and Ian P. Stanley of Bush | Ross, P.A., Tampa, for Respondents.

LABRIT, Judge.

Petitioners DecisionHR USA, Inc. and DecisionHR Holdings, Inc. (collectively DecisionHR) seek certiorari review of the trial court's order denying their motion for protective order. That motion sought to preclude Respondents William Mills, III, James Cote,[1] and CoverageHR, LLC, from deposing Dr. John Strong, who is a director of both DecisionHR entities and the chairman and CEO of the parent company of the DecisionHR entities, Bankers Financial Corporation (Bankers). Because the trial court did not follow the requirements of Florida Rule of Civil Procedure 1.280(h), we grant the petition and quash the order on review.

I. Factual and Procedural Background

A. Mr. Mills' and Mr. Cote's Employment with DecisionHR

From at least mid-2011 until approximately April 2015, Mr. Mills was employed by DecisionHR; the terms of his employment were memorialized in an "Executive Employment Agreement" that, among other things, imposed nondisclosure requirements upon Mr.

[1] Mr. Cote passed away several days after the order on review was rendered; by stipulation among the parties which the trial court adopted, all claims by and against Mr. Cote were dismissed with prejudice.

Mills as to various confidential and proprietary business information of DecisionHR. After Mr. Mills' employment with DecisionHR terminated, Mr. Mills and DecisionHR became embroiled in litigation to which Bankers also was a party.

In April 2016, Bankers, DecisionHR, and Mr. Mills executed a "Mediated Settlement Agreement" (settlement agreement) in which they resolved the litigation and executed mutual general releases of all claims through the date of the settlement agreement. The settlement agreement terminated Mr. Mills' Executive Employment Agreement "except for Article 5 and 6," which were the non-disclosure and confidentiality provisions of the Executive Employment Agreement.

Mr. Cote was employed by DecisionHR from early 2013 until January 2019. Upon commencing his employment, Mr. Cote executed a document entitled "Exempt Associate Confidentiality & Invention Agreement" in favor of Bankers, its affiliates and subsidiaries. This document contained a non-solicitation provision and required Mr. Cote to keep confidential various business and proprietary information of Bankers and DecisionHR.

B. This Action

Within weeks of terminating Mr. Cote's employment, DecisionHR sued Mr. Mills, EmployersHR (Mr. Mills' subsequent employer), Mr. Cote, and CoverageHR. DecisionHR alleged that after Mr. Mills' employment with DecisionHR terminated and he began working with EmployersHR—and while Mr. Cote was still employed by DecisionHR—Mr. Mills persuaded Mr. Cote to divert DecisionHR's clients and business opportunities to EmployersHR. DecisionHR also alleged that during the same timeframe, Mr. Mills and Mr. Cote collaborated to form CoverageHR for purposes of diverting clients and business opportunities from DecisionHR. Lastly, DecisionHR alleged that Mr. Mills and Mr. Cote effectuated their plan by using DecisionHR's confidential business information and disparaging DecisionHR. Based on these allegations, DecisionHR asserted various tort claims against all the named defendants; it also asserted a claim against Mr. Mills for breaching the confidentiality obligations in the Executive Employment Agreement and claims against Mr. Cote for breaching his obligations under the Exempt Associate Confidentiality & Invention Agreement.

C. The Motion for Protective Order

In June 2021, Respondents noticed Dr. Strong's videotaped deposition for September 21, 2021. Shortly after the supreme court issued its opinion in August 2021 amending Florida Rule of Civil Procedure 1.280 to codify the "apex doctrine,"[2] DecisionHR filed a motion for protective order (MPO) to preclude Dr. Strong's deposition. In support, DecisionHR submitted Dr. Strong's affidavit, in which he attested that he is the chairman and CEO of Bankers, that the DecisionHR entities are subsidiaries of Bankers, and that he is a director of the DecisionHR entities. He attested that he "is not involved in the day-to-day operations of DecisionHR"; while he acknowledged signing the Mills settlement agreement for Bankers, Dr. Strong stated that the "mediation process" that led to its execution was "handled by others at Bankers." Lastly, Dr. Strong swore that he has "no unique personal knowledge of any relevant facts or circumstances underlying this lawsuit."

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[2] *See In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459 (Fla. 2021).

DecisionHR argued that the deposition should be precluded under rule 1.280(h) because Dr. Strong is a high-level official who lacks unique personal knowledge of the issues in litigation. DecisionHR also contended that Respondents had not attempted to depose any other witnesses, and thus had not exhausted other discovery and could not demonstrate that other discovery would be inadequate or that other employees would not possess information equivalent to Dr. Strong's.

Respondents submitted a memorandum opposing the motion, primarily arguing that they had attempted to depose Dr. Strong long before the supreme court adopted rule 1.280(h),[3] so precluding the deposition based on the newly adopted rule would be unfair. Without providing any affidavit or deposition testimony or other evidentiary support, Respondents argued that Dr. Strong was knowledgeable about the settlement agreement with Mr. Mills and had "unique knowledge of Mills' separation agreement."

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[3] Respondents noticed Dr. Strong's deposition on several occasions before they issued the notice setting the deposition in September 2021, but the parties agreed to reschedule the deposition multiple times for various reasons.

Respondents also asserted that "while Mills was employed, Dr. Strong was actively involved in creating new business opportunities for DecisionHR" and spoke with Mr. Mills (1) "daily" on unspecified matters, (2) "regularly" about employee compensation, and (3) "multiple times a month" about the "business of DecisionHR." Lastly, Respondents contended that Dr. Strong chaired Bankers' compensation committee "while Mills was employed" and—by virtue of Dr. Strong's position as director of the DecisionHR entities and his chairmanship of Bankers—he has knowledge of "compensation discussions for highly-compensated employees," including Mr. Cote, and that such compensation is "a key issue in this case."

The trial court conducted a brief hearing on the MPO in October 2021. Ten days before the hearing, DecisionHR filed transcripts of depositions it had taken of Mr. Mills and Mr. Cote. At the hearing, DecisionHR argued that the testimony of these gentlemen confirmed Dr. Strong's lack of unique knowledge of the issues in litigation. Specifically, Mr. Cote testified that he had never been introduced to Dr. Strong and didn't know who he was. Mr. Mills testified that, during his employment, Dr. Strong was not involved in day-to-day operations of "any of the business units."

The trial court denied the motion for protective order in an unelaborated order and DecisionHR timely filed its petition for certiorari.

II. Discussion

A party seeking certiorari review of a non-final order must demonstrate "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on postjudgment appeal." *Tanner v. Hart*, 313 So. 3d 805, 807 (Fla. 2d DCA 2021) (alteration in original). "The last two elements are jurisdictional and must be analyzed before the first element." *Id.*; *see also Miami Dade College v. Allen*, 271 So. 3d 1194, 1196 (Fla. 3d DCA 2019) ("A finding of irreparable harm is jurisdictional and must be addressed before the merits.").

We have jurisdiction to review the order denying the MPO because "[o]nce discovery is wrongfully granted, the complaining party is beyond relief." *See Allen*, 271 So. 3d at 1196. Accordingly, the dispositive question is: did the trial court depart from the essential requirements of law by denying DecisionHR's motion for

protective order? Under the newly adopted "apex doctrine" rule, the answer is "yes."

A. The Apex Doctrine

The apex doctrine as codified in rule 1.280(h) is reproduced below in its entirety:

> 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.

Fla. R. Civ. P. 1.280(h). This rule became effective on August 26, 2021, and it "applies in pending cases." *See In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459, 463 (Fla. 2021). Accordingly, the trial court was required to follow rule 1.280(h) when it ruled on DecisionHR's MPO in October 2021.

To show a departure from the essential requirements of law, a party must establish that the trial court violated "a clearly established principle of law." *See Combs v. State*, 436 So. 2d 93, 95–96 (Fla. 1983); *accord Sahmoud v. Marwan*, 47 Fla. L. Weekly D592 (Fla. 3d DCA Mar. 9, 2022). It is well-established that

> "[c]learly established law" can derive from a variety of legal sources, including recent controlling case law, *rules of court*, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, *a procedural rule*, or a constitutional provision *may be the basis for granting certiorari review*.

Dodgen v. Grijalva, 331 So. 3d 679, 684 (Fla. 2021) (emphasis added) (quoting *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003)). We have no difficulty concluding that once the supreme court codified the apex doctrine in rule 1.280(h), the doctrine became a clearly established principle of law. Even more, in cases applying the apex doctrine in the government context before the supreme court codified the doctrine and extended it to the corporate context, the doctrine was as a clearly established principle of law. *See, e.g., Allen*, 271 So. 3d at 1197 (holding that "trial court departed from the essential requirements of the law" by denying MPO that sought to preclude deposition of agency head

where party seeking deposition failed to demonstrate that it exhausted other discovery and information sought from agency head was unavailable from other witnesses); *cf. Suzuki Motor Corp. v. Winckler*, 284 So. 3d 1107, 1109 (Fla. 1st DCA 2019) (holding that "because the apex doctrine hasn't been adopted in the corporate context, the trial court did not depart from the essential requirements of the law" by denying MPO directed to deposition of company president); *accord Petro Welt Trading Ges.m.b.H v. Brinkmann*, 336 So. 3d 881 (Fla. 2d DCA 2022) (concluding that trial court did not depart from essential requirements of the law by denying MPO as to deposition of high-level corporate officials before supreme court adopted rule 1.280(h)).

We construe rule 1.280(h) as we would a statute, *see Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006), which means that if the text of the rule is unambiguous, we apply the rule as written without resort to principles of construction, *see Gannon v. Cuckler*, 281 So. 3d 587, 591 (Fla. 2d DCA 2019). The text of rule 1.280(h) is unambiguous, and our supreme court has provided a detailed explanation of the reasons for the rule and key aspects of its application. *See In re Amend. to Fla. Rule of Civ. Proc.*

1.280, 324 So. 3d at 460–63. The party resisting the deposition is burdened to persuade the court that the corporate officer is high-level and must produce an affidavit or declaration of the officer explaining that he or she "lacks unique, personal knowledge of the issues being litigated." *See* Fla. R. Civ. P. 1.280(h). If those showings are made, the "[trial] 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." *Id.*

The trial court did not address the sufficiency of Dr. Strong's affidavit, nor did it evaluate whether Respondents had made the showing required by rule 1.280(h); it merely concluded that Dr. Strong was not subject to the rule because Dr. Strong undisputedly had some level of previous interaction with Mr. Mills. As we will explain, this was a departure from the essential requirements of law.

The parties do not dispute Dr. Strong's status as a high-level corporate officer. DecisionHR maintains that Dr. Strong's affidavit, along with the deposition testimony of Mr. Mills and Mr. Cote,

shifted the burden to Respondents. And DecisionHR contends that Respondents failed to demonstrate exhaustion of other discovery, that such discovery was inadequate, and that Dr. Strong has unique, personal knowledge of discoverable information.

Respondents maintain that Dr. Strong's affidavit was insufficient to shift the burden. In the trial court and in this proceeding, they have not attempted to demonstrate that they exhausted other discovery or that such discovery was inadequate. To the extent they contend that Dr. Strong has unique, personal knowledge of discoverable information, Respondents rely on Dr. Strong's execution of the Mills settlement agreement and his interactions with Mr. Mills while Mr. Mills was employed by DecisionHR.

B. Petitioners Met Their Burdens Under Rule 1.280(h).

As the supreme court has explained, the "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." *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at

463. Dr. Strong is undisputedly a high-level corporate officer, so DecisionHR met its burden of persuasion on that aspect of the rule.

To determine whether DecisionHR met its burden to produce an affidavit sufficiently explaining Dr. Strong's lack of unique, personal knowledge of the issues being litigated, we examine the pleadings because they frame the "facts at issue in the litigation." *See id.* The operative complaint is based entirely on actions of Mr. Mills and Mr. Cote that occurred between the spring of 2018 and the beginning of 2019, when DecisionHR terminated Mr. Cote's employment and filed this suit. Although the complaint is quite detailed and refers to several non-party individuals, it does not mention Dr. Strong, and neither do Respondents' answers and affirmative defenses to the complaint. This is unsurprising since Dr. Strong (as well as non-party Bankers and DecisionHR) were ostensibly unaware of the complained-of activities in which Mr. Cote and Mr. Mills allegedly were engaged.

Given Mr. Cote's death and the stipulated dismissal of all claims by and against him, the questions remaining for resolution in this litigation are:

- Whether Mr. Mills breached the confidentiality obligations imposed by the Executive Employment Agreement and whether Mills breached the non-disparagement provisions of the settlement agreement;

- Whether CoverageHR and EmployersHR (Mr. Mills' subsequent employer) tortiously interfered with Mr. Mills' confidentiality obligations imposed by the Executive Employment Agreement;

- Whether Mr. Mills, CoverageHR, and EmployersHR tortiously interfered with an employment agreement between Mr. Cote and DecisionHR; and

- Whether CoverageHR, EmployersHR, and Mr. Mills conspired to cause Mr. Cote to breach a duty of loyalty to DecisionHR.

Notably, DecisionHR has affirmatively disavowed the need to rely on testimony from Dr. Strong to prove these claims. Dr. Strong attested that as the CEO of non-party Bankers, and as a director of its subsidiaries DecisionHR, he is not involved in the day-to-day operations of the DecisionHR entities and thus "lacks unique, personal knowledge of the issues being litigated." Hardly surprising. And Dr. Strong specifically addressed the scope of his involvement in the matters about which Respondents claim he is uniquely knowledgeable. Given that the essential purpose of his affidavit was to prove a negative, Dr. Strong's testimony "show[ed] the relationship between [his] position and the facts at issue in

th[is] litigation." *See In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 463.

Respondents nonetheless maintain that Dr. Strong's affidavit is insufficient to shift the burden to them. They argue that Dr. Strong was a signatory to the settlement agreement with Mr. Mills, and that the settlement agreement "forms the basis of DecisionHR's claims against Mills." Thus, according to Respondents, Dr. Strong was required to explain "why he had no unique, personal knowledge **of the settlement agreement**." (Emphasis added).

Respondents' argument is unpersuasive and mischaracterizes the issues being litigated. Whatever transpired around execution of the settlement agreement in April 2016 (two years before Mr. Mills and Mr. Cote allegedly began their scheme to divert business from DecisionHR) has little if anything to do with DecisionHR's claims in this litigation. The settlement agreement is relevant to DecisionHR's claims only insofar as it (1) preserved the confidentiality obligations Mr. Mills owed to DecisionHR under Mr. Mills' otherwise terminated Executive Employment Agreement and (2) included a non-disparagement provision in favor of DecisionHR and Bankers.

Apart from a generalized allegation that Mr. Mills violated the non-disparagement provision in his efforts to divert DecisionHR's clients and business opportunities, DecisionHR alleges no other breach of the settlement agreement, nor does it allege that any other defendant tortiously interfered with the settlement agreement. In short, the settlement agreement does not "form the basis of DecisionHR's claims."[4] Instead, DecisionHR's claims are predicated on allegations that Mr. Mills breached confidentiality obligations imposed by the Executive Employment Agreement and engaged in tortious conduct calculated to divert DecisionHR's clients and business opportunities to EmployersHR and CoverageHR. Although Mr. Mills has asserted various defenses based on the release and jury trial waiver provisions in the settlement agreement, neither Mr. Mills nor DecisionHR claim that the settlement agreement is ambiguous such that parol evidence (i.e., testimony of a signatory) is required to interpret the agreement. Even if parol evidence were somehow relevant, Dr. Strong would be an unlikely source of

[4] It is also notable that while Dr. Strong signed the settlement agreement for non-party Bankers, another individual signed the agreement for each DecisionHR entity.

discoverable information since he attested that the mediation which preceded the settlement agreement was "handled by others."

Respondents' second argument fares no better. Notwithstanding Respondent Mills' own testimony that Dr. Strong was not involved in DecisionHR's day-to-day operations, Respondents insist that Mr. Mills' frequent interactions with Dr. Strong during Mr. Mills' employment by DecisionHR renders "implausible" Dr. Strong's denial of unique personal knowledge about the issues being litigated in this case. But Respondents didn't explain in the trial court and haven't explained to this court how interactions between Dr. Strong and Mr. Mills before Mr. Mills' employment with DecisionHR terminated in 2015 would relate in any way to the claims DecisionHR asserts in this suit, which turns almost entirely on acts Mr. Mills allegedly committed between the spring of 2018 and early 2019.[5]

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[5] In their memo opposing DecisionHR's motion for protective order, Respondents maintained that executive compensation was a "key issue in this case" and that Dr. Strong had unique knowledge concerning such compensation. Mr. Cote's counterclaims sought damages in the form of allegedly unpaid bonuses and commissions. But those claims have been dismissed with prejudice, and the remaining claims do not implicate executive compensation in any

Summarizing, Dr. Strong's affidavit was sufficient to explain his lack of unique personal knowledge of the issues being litigated. While we are mindful that "bald assertions of ignorance" are insufficient, in the context of Dr. Strong's high-level position as a director of DecisionHR and the issues raised by the pleadings in this case, Dr. Strong's affidavit enabled the court and Respondents "to evaluate the facial plausibility of [Dr. Strong's] claimed lack of unique, personal knowledge." *See In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 463.

C. The Trial Court Departed from the Essential Requirements of Law by Denying the MPO

Once DecisionHR established that Dr. Strong is an apex official and produced the affidavit explaining his lack of unique, personal knowledge of the issues being litigated, the trial court was required to issue a protective order unless Respondents "demonstrate[d] that [they] ha[d] exhausted other discovery, that such discovery is inadequate, and that [Dr. Strong] has unique, personal knowledge of discoverable information." *See* Fla. R. Civ. P.

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way. Put simply, the issues in litigation pertinent to Mr. Cote—and in turn to executive compensation—are now moot.

1.280(h). This provision of the rule is written in the conjunctive, so all three factors must be demonstrated. *See Gorham v. Zachry Indus., Inc.*, 105 So. 3d 629, 634 (Fla. 4th DCA 2013); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (discussing conjunctive/disjunctive canon). As DecisionHR correctly argues, Respondents didn't show—and couldn't attempt to show—that they exhausted other discovery or that such discovery was inadequate because Respondents had taken no other discovery when they noticed Dr. Strong's deposition, nor had they taken any other discovery when the trial court ruled on the motion for protective order.[6] For this

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[6] Somewhat tellingly, the deposition notice included an expansive list of twenty-four categories of documents Dr. Strong was requested to deliver a week before the deposition. For instance, Respondents requested that Dr. Strong produce "[a]ccountings of all damages sustained based upon the allegations of the complaints filed in this action" and materials "identifying confidential information 'stolen' by Jim Cote and/or William Mills III." For starters, it is difficult to understand why Respondents didn't seek such materials through an ordinary document request directed to DecisionHR. And it is likewise difficult to imagine that information concerning such documents would not be discoverable from a witness designated pursuant to Florida Rule of Civil Procedure 1.310(b)(6). Lastly, the list directed that Dr. Strong provide various categories of records to "establish **your** contention that . . . ." But Dr. Strong is not a party to this suit and has made no contentions.

reason alone, the trial court departed from the essential requirements of law. *See Allen*, 271 So. 3d at 1197 (holding that trial court departed from essential requirements of law by allowing deposition of agency head where party seeking deposition failed to demonstrate exhaustion of other discovery and that information was unavailable from other sources).[7]

Moreover, the trial court departed from the essential requirements of law by concluding that Dr. Strong could be deposed merely because he interacted with Mr. Mills before Mr. Mills' employment with DecisionHR terminated in 2015. Pursuant to the April 2016 settlement agreement, Mr. Mills, DecisionHR, and Bankers mutually released each other from all claims arising out of

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Requests for such information would be properly directed to DecisionHR, not a non-party such as Dr. Strong. And, for purposes of analyzing the apex doctrine criteria, the breadth of the document request directed to Dr. Strong begs the question of whether Respondents exhausted other discovery before attempting to depose Dr. Strong.

[7] *Allen* preceded adoption of rule 1.280(h) and applied the apex doctrine in the government context. It is nonetheless applicable here given the supreme court's explanation that it codified the doctrine as developed in the government context to "extend its protections to the private sphere." *See In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 459, 461.

Mr. Mills' employment. There simply is no meaningful link between DecisionHR's allegations that Mr. Mills and Mr. Cote collaborated to divert business from DecisionHR between the spring of 2018 and the beginning of 2019 and Dr. Strong's pre-April 2016 interactions with Mr. Mills. In short, Respondents fell far short of demonstrating that Dr. Strong has "unique, personal knowledge of discoverable information" about the issues being litigated in this suit.

For these reasons, we grant the petition and quash the trial court's order denying Petitioners' motion for protective order.

Petition granted; order quashed.

MORRIS, C.J., and KELLY, J., Concur.

Opinion subject to revision prior to official publication.