IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JOSEPH M. ULIBARRI, JR., as personal representative to THE ESTATE OF TRAVIS RUIZ PIZARRO, deceased,

Plaintiff-Appellee,

vs.

No. A-1-CA-42067
No. D-412-CV-2022-00032
San Miguel County

AMAZON.COM, INC. & AMAZON LOGISTICS, INC.,

Defendants-Appellants,

and

KEECHI TRANSPORT LLC, JIM SENA CONSTRUCTION COMPANY INC., JIMMY BRITO, NEW MEXICO DEPARTMENT OF TRANSPORTATION, PAJARITO CREEK RANCH, LLC, MICHAEL ROMERO, Individually, STAR K LOGISTICS, CORP., and FARMERS ELECTRIC COOPERATIVE, INC. OF NEW MEXICO,

Defendants,

and

SCOTT ATKINSON, as Wrongful Death Personal Representative of the ESTATE OF JORGE MARTINEZ-SANCHEZ, Deceased, and LISET ARMENTERO,

Plaintiffs-In-Intervention,

v.

MICHAEL ROMERO, and PAJARITO CREEK RANCH, LLC,

Defendants-In Intervention,

and

JIMMY BRITO,

Third Party Plaintiff,

v.

AMERICAN NATIONAL PROPERTY & CASUALTY INSURANCE COMPANY,

Third Party Defendant.

BRIEF OF AMICUS CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF APPLICATION FOR INTERLOCUTORY APPEAL

BARDACKE ALLISON MILLER LLP

Benjamin Allison
Justin Miller
141 E. Palace Ave.
Santa Fe, NM 87501
ben@bardackeallison.com
justin@bardackeallison.com

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Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

INTRODUCTION[1]

In this wrongful death action, the plaintiff seeks to depose Amazon executives who have no superior or unique knowledge of relevant information before seeking discovery from those with specific knowledge, in violation of what has come to be known as the apex doctrine. The apex doctrine is an application of Rule 1-026(B)–(C) NMRA, which prohibits discovery that harasses or unduly burdens a party, to requests for depositions of government officials and corporate executives. The district court here held that New Mexico does not recognize the apex doctrine. Other New Mexico district courts have held the opposite. This Court's review is necessary to resolve these conflicting interpretations of Rule 1-026.

Indeed, interlocutory appeal is an ideal vehicle for this Court to consider the apex doctrine and provide much needed guidance on the appropriate timing and scope of discovery for executive depositions. No New Mexico appellate court has addressed the apex doctrine, and the present inconsistency could lead to forum shopping among district courts. But the apex doctrine is unlikely to receive traditional post-judgment appellate review. Once begun, a deposition offers little opportunity for Court intervention or oversight. If a harassing or irrelevant

[1]The Chamber certifies that its counsel authored this brief in whole, no party or their counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

deposition forces settlement, typically there is no appeal. Even if the case is litigated to its conclusion, an irrelevant but intrusive deposition is unlikely to figure in an appeal from a final judgment. At the same time, resolution of the apex doctrine question will materially advance ultimate termination of the ligation, because the apex doctrine promotes case resolution on the merits.

Further, the absence of reasonable limits on a party's ability to notice depositions of senior executives is a threat to New Mexico's business climate. Senior officials often must act as spokespersons for their businesses in matters in which they have no personal, firsthand knowledge. But these high-profile, indirect roles should not turn them into deposition targets. If organizational executives may routinely be compelled to sit for a deposition in the early stages of litigation, their time would be consumed with giving depositions that have little real benefit to those lawsuits. The district court's ruling here could, if replicated, result in executives of any company with even a tenuous link to a case being required to sit for a deposition in New Mexico merely for having merely generalized high-level knowledge of the incident or policy at issue in that case. Such a burden would discourage businesses from operating in New Mexico, contrary to the State's policy interest in promoting entrepreneurship and commerce.

Courts across the country have adopted the apex doctrine in various forms, but always as a means to guard against unnecessary and burdensome depositions.

Taking into account the confusion among district courts here, whether New Mexico does or does not recognize the apex doctrine is an issue with substantial grounds for difference of opinion, and its resolution will materially advance ultimate termination of the ligation, because the apex doctrine promotes case resolution on the merits. Interlocutory appeal is an ideal vehicle to consider this question, and this Court is poised to provide needed guidance on the appropriate timing and scope of discovery for executive depositions.

Whether and when district courts should allow such a deposition is an important question for this Court to consider on interlocutory appeal. Therefore, Amicus Curiae the Chamber of Commerce of the United States of America (the Chamber) respectfully asks the Court to grant the application for interlocutory review.

ARGUMENT

New Mexico's Rules of Civil Procedure limit discovery when a party could use it as a tool to harass and burden the opposing party. The apex doctrine distills from those rules a workable method for evaluating depositions in the unique context of government officials and corporate executives. Without interlocutory review, the Court will likely have no opportunity to assess this issue or provide guidance to the district courts. And as an application of the Rules, this Court may properly adopt the apex doctrine for use in New Mexico. The application should be granted.

I
INTERLOCUTORY REVIEW IS APPROPRIATE AND THE BEST MEANS FOR THIS COURT TO ADDRESS THE ISSUE

Interlocutory appeals help facilitate decisions on contentious and uncertain discovery issues material to a case. *See State ex rel. Balderas v. ITT Educ. Servs., Inc.*, 2018-NMCA-044, ¶¶ 5–7, 421 P.3d 849 (permitting interlocutory appeal of question related to subpoenas duces tecum); *Gingrich v. Sandia Corp.*, 2007-NMCA-101, ¶ 1, 142 N.M. 359 (permitting interlocutory appeal on privilege against discovery disclosure). This Court may grant applications for interlocutory review of issues involving "substantial ground[s] for difference of opinion," a decision on which "may materially advance the ultimate termination of the litigation." NMSA 1978, § 39-3-4(A) (1999); *see* Rule 12-203 NMRA. This case satisfies those requirements, because district courts are taking divergent approaches and an opinion from the Court will increase the efficiency of discovery and likelihood that lawsuits against organizations are resolved on the merits, rather than forced settlement through litigation gamesmanship.

No New Mexico appellate court has addressed Rule 1-026's unique application to executive depositions. Our appellate courts are even silent on the related question whether and when a plaintiff can depose government officials. District courts have nonetheless grappled with the issue and split on whether New Mexico recognizes the apex doctrine. In this case, the district court determined that

it does not exist in New Mexico and has permitted three executive depositions. Meanwhile, the First Judicial District Court determined the opposite, refusing to compel the deposition of a hospital's chief executive officer after applying the doctrine because the executive had no unique knowledge relevant to the plaintiff's case. *See* Order Denying Motion to Compel the Deposition of Jim Hinton, *Chapman ex rel. McConnell v. Presbyterian Healthcare Servs.*, D-101-CV-2009-00586 (1st Jud. Dist. Ct. June 20, 2012).

This district court split demonstrates there is substantial ground for difference of opinion over whether the apex doctrine should be applied in New Mexico. As discussed below, whether to apply the doctrine is an important question appellate courts in other jurisdictions have been required to answer. This Court has previously accepted interlocutory appeals to address important questions with broad implications arising from depositions, and it should do so here. *See, e.g.*, *Salazare v. St. Vincent Hosp.*, 1980-NMCA-095, ¶¶ 5, 8, 96 N.M. 409 (rejecting argument that the Court incorrectly granted an interlocutory appeal to review whether an institutional deponent was protected by privilege), *aff'd and rev'd on other grounds sub nom. St. Vincent Hospital v. Salazar*, 1980-NMSC-124, ¶ 12, 95 N.M. 147.

Additionally, an interlocutory appeal would materially further resolution of this and other litigation involving the potential for executive depositions. Providing clear guidelines on when an executive deposition is available would encourage

litigants to first seek discovery from sources who are more likely to have direct knowledge of the case, thereby promoting discovery of relevant information. *See, e.g.*, *Salitan v. Carrillo*, 1961-NMSC-176, ¶ 12, 69 N.M. 476 (recognizing that depositions are meant "[t]o clarify the basic issues between parties[] and to ascertain the facts or information as to the existence or whereabouts of facts relative to those issues"). By doing so, the litigant would no longer have any need to depose an executive who has no unique or superior knowledge. *See Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 14, 127 N.M. 446 (acknowledging that discovery may "properly be denied or limited" if "it appears that the party requesting discovery has already been granted sufficient information" (internal quotation marks and citation omitted)). Nor would litigants have an incentive to notice the deposition of a corporate executive for improper purposes. The apex doctrine could thus cut down on the total number of depositions, and eliminate those that are otherwise harassing and unduly burdensome, in both ways leading to more efficient resolution of lawsuits on their merits.

"Virtually every court that has addressed this subject has noted that deposing officials at the highest level of corporate management creates a tremendous potential for abuse and harassment." Scott A. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006). An organization's executive may have *no* unique or superior knowledge of a case, but without clear guidelines, may

be required to sit through a deposition that serves no purpose but to burden the organization. Left unchecked, an organization's executive—the person needed to direct the organization's operations—could be faced with an impossible number of full-day depositions, not to mention travel and preparation time, involving cases to which they have nothing to contribute. An appeal after a final judgment cannot repair that harm. And a traditional post-judgment appeal may never even occur, as in *Chapman ex rel. McConnell* from the First Judicial District.

An interlocutory appeal is necessary to provide guidelines under Rule 1-026(B) that accommodate the unique circumstances presented when deposing executives. The rate at which executive depositions are taken is likely to increase given New Mexico's continuing commitment to attracting both entrepreneurs and global industries to the state. *See* N.M. Econ. Dev. Dep't., *Empower & Collaborate New Mexico's Path Forward (Statewide Strategic Plan)* 292–304 (2023) (noting need and providing recommendations for economic growth in primary target industries). Given the foregoing, interlocutory application should be granted to allow this Court to define the legal standard governing executive depositions.

II
THIS COURT SHOULD ACCEPT THE APEX DOCTRINE AS AN APPLICATION OF RULE 1-026

This appeal does not ask the Court to manufacture a new doctrine—rather, it affords an opportunity to apply a well-established discovery rule in a logical and

pragmatic manner, similarly to how other states apply analogous discovery rules. As some district courts in New Mexico have already recognized, Rule 1-026's text and purpose curtail parties' ability to notice depositions of executives where less burdensome forms of discovery are sufficient.

Rule 1-026(B) provides a necessary limit on discovery process: Discovery is not permitted when it is "obtainable from some other source that is more convenient, less burdensome, or less expensive." Rule 1-026(B)(2)(a). Discovery should be limited when the "burden or expense of the proposed discovery outweighs its likely benefit." Rule 1-026(B)(2)(c). The apex doctrine is an explicit articulation of how these discovery limitations apply to executive depositions, and it balances the needs of organizations to maintain operations and a litigant's right to discover relevant information.

The apex doctrine stems from the recognition that corporate executives rarely have direct involvement in a plaintiff's case, and on-the-ground employees frequently possess the information needed by the plaintiff. If there is no indication that the executive has unique or superior personal knowledge of the issue, it is more appropriate for a plaintiff to first direct discovery at those who likely possess first-hand knowledge of the matter—even in cases where the executive has made general,

public statements about the subject areas involved.[2] But the apex doctrine does not bar important discovery: it is not a prohibition on executive depositions, and does not prevent them where the executive's testimony is truly necessary to the action. Instead, it provides a framework to ensure that the discovery sought is relevant, reasonable, and not overly burdensome or expensive compared to the discovery request's likely benefits.

Other state appellate courts have determined that the apex doctrine is a natural application of their version of New Mexico's Rule 1-026. *See, e.g.*, *Gen. Motors, LLC v. Buchanan*, 874 S.E.2d 52, 57 (Ga. 2022); *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459, 461 (Fla. 2021); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 364 (W.Va. 2012); *Liberty Mut. Ins. Co. v. Superior Ct.*, 13 Cal. Rptr. 2d 363, 366–67 (1992) (noting that deposing senior executives "raise[s] a tremendous potential for abuse and harassment"); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995). These states often compare the scope of the applicable state rule to its federal counterpart. *See, e.g.*, *Alberto*, 796 N.W.2d

[2]For example, in *Alberto v. Toyota Motor Corp.*, Michigan's court of appeals held that a protective order was appropriate when the executives made public statements, but had no role in designing the vehicle involved in the wrongful death suit and no "unique or superior" knowledge of the alleged defect. 796 N.W.2d 490, 497 (Mich. Ct. App. 2010). There was no indication that the plaintiff needed to depose the executives, because they merely had "*generalized* knowledge" and the plaintiff had not first directed discovery at on-the-ground employees involved in actually building the vehicle. *See id.*

at 493–95. New Mexico does the same when interpreting its rules. *See Marquez v. Frank Larrabee & Larrabee, Inc.*, 2016-NMCA-087, ¶ 12, 382 P.3d 968 (recognizing judicial interpretations of federal analogues as persuasive authority).

The United States District Court for the District of New Mexico has already accepted and applied the apex doctrine to grant protective orders and prevent early and harassing executive depositions. *See Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694 (D.N.M. 2019), *objections overruled*, No. 2:15-cv-00850-KRS-GBW, 2019 U.S. Dist. LEXIS 58284, at *8–9 (D.N.M. Apr. 4, 2019); *El Pinto Foods, LLC v. Ocean Spray Cranberries, Inc.*, No. 12cv1293 KBM/RHS, 2014 U.S. Dist. LEXIS 188374, at *1–2 (D.N.M. Apr. 21, 2014). The Court of Appeals for the Tenth Circuit has also applied the doctrine's factors to affirm a protective order when the executive lacked personal knowledge of the issue, the plaintiff did not attempt to first depose direct supervisors, and the deposition imposed "severe hardship" on the executive. *Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 483–84 (10th Cir. 1995). Since New Mexico courts will look to federal decisions when there is no New Mexico law on the issue, *San Juan 1990-A, L.P. v. El Paso Prod. Co.*, 2002-NMCA-041, ¶ 28, 132 N.M. 73, the existence of District of New Mexico and Tenth Circuit decisions—paired with the absence of New Mexico appellate decisions—demonstrates that the district court's contrary ruling here is ripe for the Court to consider.

The Court should take this opportunity to clarify, for the first time, how Rule 1-026 gives district courts the flexibility to require plaintiffs to seek discovery from less burdensome, and likely more knowledgeable, sources before permitting depositions of government officials or corporate executives. The apex doctrine is consistent with the principles of discovery set out in the Rules of Civil Procedure. Other courts applying similar rules have adopted the doctrine, including New Mexico's federal trial court. And the damage inherent in taking the plaintiff's requested executive depositions cannot be undone in an appeal after final judgment. Amicus curiae respectfully urges this Court to consider the issue on its merits.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant the application for interlocutory appeal.

Respectfully submitted,

BARDACKE ALLISON MILLER LLP

/s/ *Benjamin Allison*

Benjamin Allison
Justin Miller
141 E. Palace Ave.
Santa Fe, NM 87501
ben@bardackeallison.com
justin@bardackeallison.com

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I certify that on August 5, 2024, the foregoing amicus brief was filed through the Odyssey File-and-Serve electronic filing system, which caused all counsel of record to be served electronically. Plaintiff-appellee was also served through counsel via email.

BARDACKE ALLISON MILLER LLP

By: /s/ *Benjamin Allison*
Benjamin Allison