Case Summaries
October 22, 2021

NO GRANTS
1 PER CURIAM OPINION

PROCEDURE—PRETRIAL
Discovery
In re Am. Airlines, — S.W.3d — (Tex. Oct. 22, 2021) [20-0789] (per curiam)

The issues in this mandamus case asked (1) whether the plaintiff could depose an apex executive when he did not show that the executive had unique or superior personal knowledge of discoverable information and (2) whether the party resisting discovery waived its right to mandamus relief because of a "delay" in filing its petition for mandamus. The Court held that (1) no, the plaintiff could not depose the executive; and (2) no, the resisting party did not waive its right to mandamus relief because any delay was neither unjustified nor unexplained.

Elise Eberwein is American Airlines' Vice President of People and Communications—an apex executive. Shortly before the close of discovery, plaintiff Donald Arnette served defendant American with a notice of deposition for Eberwein. American opposed the deposition notice, arguing that Eberwein was an apex executive with no knowledge of the case. After two hearings, the trial court denied American's motion for protective order and compelled Eberwein's deposition. It also required Arnette to serve deposition topics for Eberwein. Neither party received a copy of the trial court's order for four months. After that, the case sat essentially dormant; to date, Arnette has not served deposition topics. Eight months after receiving the trial court's order, American petitioned for writ of mandamus in the court of appeals, fearing a last-minute deposition notice that could derail its upcoming trial setting. The court of appeals denied relief based on American's "unexplained delay" in filing its mandamus petition.

The Supreme Court conditionally granted relief in a per curiam opinion. It held that the trial court abused its discretion in compelling this deposition. Under

Crown Central Petroleum Corp. v. Garcia, a party seeking to depose an apex executive must arguably show that the executive has unique or superior personal knowledge of discoverable information. The general statements in Eberwein's online biography, on which Arnette relies, do not meet this standard. Nor did Arnette even attempt to use less intrusive methods to obtain the information.

To the extent the trial court denied American's motion based on asserted procedural irregularities, that was error. First, no statute or precedent requires a party resisting discovery to use a particular procedural vehicle to assert the apex doctrine. Second, the fact that American filed Eberwein's affidavit after discovery had closed did not waive Eberwein's right to protection—especially when Arnette noticed the deposition on the eve of the discovery deadline. And third, the affidavit, which sufficiently invoked the *Crown Central* guidelines, was before the trial court in time for the hearings and the trial court's ruling on the motion.

Finally, American did not waive its right to relief by waiting to file its petition because its "delay" was neither unreasonable nor unjustified. For all of these reasons, the Court conditionally granted mandamus relief.