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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2026-CP-40-01257 & 2023-CP-40-06111

Debra McAndrew Barnett..... Plaintiff-Respondent,

v.

Johnson & Johnson; Kenvue, Inc., et al..... Defendants,

Of which Johnson & Johnson and Kenvue, Inc. are the Petitioners.

And

Andrew T. Gerken, as Personal Representative of the
Estate of Anna Marie L. Gerken,
Deceased Plaintiff-Respondent,

v.

Johnson & Johnson; Kenvue, Inc., et al..... Defendants,

Of which Johnson & Johnson and
Kenvue, Inc. are the Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Respondents Debra Barnett and Andrew T. Gerken, individually and as Personal Representative of the Estate of Anna Marie L. Gerken, deceased, respectfully file this Return to the Petition for a Writ of Certiorari filed by Petitioners Johnson & Johnson and Kenvue, Inc.¹ (collectively, “J&J”).

¹ Kenvue, Inc. is a proper party in this case, as a successor-in-interest to Johnson and Johnson. The trial court has not ruled otherwise.

INTRODUCTION

This Court rarely grants petitions for writs of certiorari, and in fact has issued “public opinions” regarding such writs “only a handful of times over the past hundred years.” *Henson v. S.C. Dep’t of Corr.*, No. 2025-000689, 2026 WL 2106838, at *3 (S.C. July 22, 2026). The Court stated its “willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial ‘hen’s tooth.’” *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’t Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010). The Court has “no desire to micromanage discovery orders.” *Id.* “Ordinarily, an order compelling discovery is not directly appealable.” *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009).

In asbestos cases, however, there is an increasing trend of defendants seeking interlocutory relief. In fact, many of the interlocutory petitions filed by asbestos defendants “have bordered on frivolous.” **Ex. 1**, Order, *Tibbs v. 3M Company, et al.* at 5; *see also Welch v. Advance Auto Parts, Inc.*, 445 S.C. 640, 668, 916 S.E.2d 320, 335 (2025). This is the second such petition filed by J&J in this case alone.²

After carefully considering the arguments made by the parties, the Honorable Judge Jean Toal (Chief Justice of the South Carolina Supreme Court, Retired) issued a discovery order granting and denying in part J&J’s motion to quash Respondents’ deposition notices and accompanying subpoenas duces tecum. J&J acknowledged the legality of the order (in part) by

² Two days after filing its petition, J&J filed a “Complaint for Pure Bill of Discovery” against Dean Omar Branham Shirley, LLP in Florida. **Ex. 2**, Complaint. In direct contradiction to J&J’s position that Judge Toal’s discovery order egregiously exceeded her authority and immediate intervention is required, J&J now seeks the same information from the firm. The Complaint requests information regarding the firm’s “communications with HHS, the FDA, and the Executive Branch of the U.S. Government regarding: (a) the Consolidated Appropriations Act, 2023 . . . ; (b) MoCRA; (c) the Proposed Rule and its withdrawal; and (d) the Roundtable” and “documents and records reflecting its efforts to influence, participate in, or respond to European health agencies’ assessments of a potential ban on talc.” *Id.* at ¶ 18.

providing discovery regarding expert payments.³ J&J, however, refuses to comply with the portion of the order requiring it to disclose its communications with the FDA and other foreign and domestic regulatory agencies regarding a specific subset of laws related to talc.⁴ The order is based upon a valid 1981 Fourth Circuit case that is supported by an abundance of case law, which holds that such lobbying evidence is discoverable. J&J's attempts use the protections offered by the *Noerr-Pennington* doctrine, the First Amendment, or attorney-client privilege to invalidate the order are misplaced. The trial court properly ruled such information is discoverable.

J&J has not shown this interlocutory ruling presents the exceptional circumstances required to invoke this Court's original jurisdiction, as the trial court did not exceed its authority in any respect. This is merely another petition bordering on frivolous, J&J does not provide any valid reason for this Court to deviate from its general practice of denying writs related to discovery orders, and this Court should deny the petition.

FACTUAL BACKGROUND⁵

Respondents allege J&J engaged in a decades-long pattern of deception aimed to hide the true dangers of asbestos in Johnson's Baby Powder ("JBP"). Not only did J&J not issue warnings,

³ Where defendants continue "along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court," they risk a finding "right or wrong" that the discovery orders "form the law of the case." *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014).

⁴ J&J references two additional arguments made below regarding the notices' definitions and supposedly duplicative discovery requests, which the trial court overruled. Petition at 4 n.3 and n.4. As J&J's concerns are only noted in footnotes with no case citations or legal argument, they do not constitute additional issues to be considered by the Court. *See Stier, Kent & Canady, Inc. v. Jackson*, 317 S.C. 179, 183, 452 S.E.2d 606, 609 (Ct. App. 1994).

⁵ The factual background referenced here comes from Respondents' answer to the motion to compel. *See* Petition, Attachment 3. As the filing and the exhibits have already been presented to this Court in their entirety, Respondents provide an abbreviated overview of the facts here.

but it ensured regulators did the same. J&J routinely uses regulators' inaction to argue to juries cosmetic talc is safe. The following are J&J's opening slides exchanged in another trial:



Respondents have evidence confirming J&J hid the hazards of talc from those agencies and worked behind the scenes to ensure the scientific literature they were reviewing espoused its views regarding talc's safety. This conduct was not isolated, and it was well-underway by the time Respondents started using JBP.

J&J's pattern of deception started in the 1970s and it continues today. The most recent example, which is still being developed, involves the Modernization of Cosmetics Regulation Act of 2022 ("MoCRA"). The law requires the FDA to establish regulations for "[s]tandardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products."⁶ To comply with MoCRA, the FDA submitted a proposed rule in December 2024. The FDA withdrew the proposed rule in November 2025 with little explanation.

The withdrawal appears to be, at least in part, influenced by a letter written by a supposed "independent" third party, Dr. Korchevskiy, to the FDA with several co-signatories (the "Korchevskiy Letter").⁷ J&J has provided inconsistent statements and been less than forthcoming regarding its

⁶ See "Modernization of Cosmetics Regulation Act of 2022 (MoCRA)" available at: <https://www.fda.gov/cosmetics/cosmetics-laws-regulations/modernization-cosmetics-regulation-act-2022-mocra> (last accessed Sept. 25, 2026).

⁷ Petition, Attachment 3 at Ex. R, June 9, 2025 letter to FDA Commissioner Dr. Martin Makary.

involvement with the Korchevskiy Letter, including the involvement of its attorneys and its hired consultants. For example, J&J’s corporate representative, Dr. Kuffner, has contradicted himself multiple times regarding the specifics of J&J’s involvement with the Korchevskiy letter:

<i>Gerken Deposition</i>	<i>Gautier Deposition</i>
“And then I wanted to know were—was there any—did Kevin Hynes have any involvement in the letter. And he said no..” ⁸	Q: Your notes state: . . . “At that second meeting, Dr. Korchevskiy told me that Kevin wrote his thoughts down. Mr. Hynes said that during that second meeting he shared his computer screen and told me that he acted as a scribe for Dr. Korchevskiy.” . . . A: That’s correct. ⁹
“He said that Dr. Korchevskiy had reached out to him to get some contact information from a number of different people and that he provided that contact information to Dr. Korchevskiy.” ¹⁰	Q: But did Dr. Korchevskiy say to Mr. Hynes “I need the contact information for Dr. Finan and Dr. Permuth?” Or did Dr. Korchevskiy ask Kevin Hynes for the contact information of other experts who may be willing to cosign the letter? A: I don’t recall asking the specific question in the way that you just did. ¹¹

The Korchevskiy Letter does not identify J&J’s involvement, Dr. Kuffner at trial claimed no involvement in the letter by J&J, and in discovery Dr. Kuffner represented on behalf of the company that it was not involved. Yet now J&J has acknowledged it participated in the drafting of the letter through its attorney Kevin Hynes who was paid to be a “scribe.”

J&J has a history of hiding its relationships with “independent” researchers and “independent” studies by funneling payment through law firms “so as to preserve the benefit of

⁸ Petition, Attachment 3 at **Ex. S**, Kuffner Dep. (9/10/25) at 250:19-252:8.

⁹ Petition, Attachment 3. at **Ex. T**, Kuffner Dep. (5/6/26) at 81:25-82:12.

¹⁰ Petition, Attachment 3 at **Ex. S**, Kuffner Dep. (9/10/25) at 250:19-252:8.

¹¹ Petition, Attachment 3 at **Ex. T**, Kuffner Dep. (5/6/26) at 97:12-19.

the attorney work product privilege, which is helpful in protecting confidentiality.”¹² J&J chose to pay third-party experts through its law firms “[t]o maximize the effectiveness of [their] use of the attorney work product privilege for their work.”¹³ It appears J&J is influencing regulatory bodies through “independent” scientists, arguing that talc is safe (while knowing that not to be true), and hiding behind its attorneys. Respondents merely seek an understanding of the extent of J&J’s influence over supposedly “independent” information sent to regulators, experts, and scientific bodies regarding talc.

Respondents sought discovery regarding communications related to MoCRA (and the associated legislation) as, based upon J&J’s inconsistent testimony, Respondents have no assurance they have all the non-privileged documents related to these topics. When J&J moved to quash the notices and subpoenas, J&J chose not to provide a privilege log and asked the trial court to find a blanket exception to the discovery of “lobbying” documents. The trial court disagreed with the legal arguments set forth by J&J, and it found J&J’s blanket assertions to be insufficient.

STANDARD OF REVIEW

This Court’s “primary function is to act as an appellate court to review appeals from the trial courts.” *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). South Carolina’s Appellate Court Rules dictate that “[t]he Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.” Rule 245(a), SCACR. This rule was adopted for the purpose of protecting the Court “from the tremendous burden of hearing originally an avalanche of cases.” *King v. Aetna Ins. Co.*, 168 S.C. 84, 167 S.E. 12, 15 (1932) (internal quotations omitted).

¹² Petition, Attachment 3 at **Ex. O**, Tess Bird, et al, A Review of the Talc Industry’s Influence on Federal Regulation and Scientific Standards for Asbestos in Talc (2021).

¹³ Petition, Attachment 3 at **Ex. AB**, Ridgway Letter (2/28/05).

This Court, however, maintains the “power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.” S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310. Such a writ may not be used “as a substitute for a party’s right of appeal.” *State v. Price*, 441 S.C. 423, 433–35, 895 S.E.2d 633, 638-39 (2023). Instead, they will only be issued “when there is an extraordinary reason such as a question of significant public interest or an emergency.” *Key*, 305 S.C. at 116, 406 S.E.2d at 357. Review is further narrowed to “errors of law,” and the Court will not “review factual findings unless wholly unsupported by the evidence.” *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). Writs shall only issue to correct errors of law “where a trial court exceeded its authority.” *Price*, 441 S.C. at 433, 895 S.E.2d at 638.

ARGUMENT AND AUTHORITIES

To demonstrate this case involves a rare dispute worthy of this Court’s intervention, J&J must show the issue extends far beyond a routine discovery dispute and the trial court exceeded its authority in allowing discovery. J&J’s relevance, privilege, and undue burden arguments establish neither. J&J fails to show any error, much less error that implicates this Court’s original jurisdiction. The arguments amount to nothing other than disagreement regarding the trial court’s ruling, and J&J has failed to explain how the alleged harm justifies the extreme remedy it seeks.

I. J&J has failed to show this case warrants the Court’s discretionary intervention.

Review of a discovery order by a writ of certiorari is both exceedingly rare and wholly discretionary. “A trial judge’s rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion.” *Oncology*, 387 S.C. at 387, 692 S.E.2d at 924 (internal citations omitted). “A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist.” *Id.* (internal citations omitted). Such exceptional circumstances

have previously included a novel question of the law that has broad significance beyond the immediate dispute (*i.e.*, it will reduce the number of appeals before the Court), a manifestly abusive discovery order, the violation of a protected public interest, or a harm that cannot be remedied on appeal. *See generally Laffitte*, 381 S.C. 460, 674 S.E.2d 154; *Oncology*, 387 S.C. 380, 692 S.E.2d 920; and *Hollman*, 384 S.C. 571, 683 S.E.2d 495. No such exceptional circumstance is before the Court here. However, even where exceptional circumstances exist, the Court is still “not required to issue any writ, and doing so is in [its] discretion.” *Price*, 441 S.C. at 435 n.5, 895 S.E.2d at 639 n.5.

a. J&J has not raised a novel question of law.

The *Noerr-Pennington* doctrine does not present a novel issue of law. To be a novel issue, it must be something new and controversial that has not been analyzed by courts already at great length. For example, in *Laffitte*, the Court acknowledged how “[t]he question of what standard governs the discovery of trade secret information” was “a novel issue in South Carolina.” 381 S.C. at 472, 674 S.E.2d at 161. The Court granted the writ, as the issue was the “the subject of numerous claims in state and federal courts” and deciding the issue early would eliminate “the numerous inevitable appeals raising this novel issue of significant public interest.” *Id.* at 471-72, 160-61.

The *Noerr-Pennington* doctrine, by contrast, has been around since the 1960s. The question of whether it bars discovery of evidence of lobbying has been considered for decades (*see infra* Section II(b)(i)). Courts have consistently and repeatedly held it does not. J&J has provided no evidence that this settled question is hotly contested and the subject of voluminous litigation in South Carolina, or that the Court will create congestion if it does not decide the issue right away.

b. J&J has not identified how the order at issue is manifestly abusive of discovery.

Oncology, a case heavily relied upon by J&J as analogous, involved a party seeking discovery that “took a shotgun approach and sought virtually all information concerning every facet of” the opposing party’s operation. 387 S.C. at 383, 692 S.E.2d at 922; Petition at 6, 10. The Court granted the writ because of concerns that trial courts at that time were “generally unwilling to recognize and enforce” the limits of discovery and allowed discovery that was “abusive and beyond the pale.” *Id.* at 387, 924. The Court expressed its “hope that in resolving this matter, [it would] speak to trial courts generally.” *Id.* at 388, 924. This case is not analogous to *Oncology*.

Here, Respondents seek information regarding J&J’s involvement with, among other things, specific government regulatory decisions: the Consolidated Appropriations Act of 2023 (H.R. 2617 and PL 117-328); MoCRA; the FDA’s Testing Methods for Detecting and Identifying Asbestos in Talc-Containing Cosmetic Products (proposal and withdrawal of 89 FR 105490); and the May 20, 2025 Expert Panel with the FDA. Similarly, Respondents seek information regarding J&J’s involvement in Europe’s efforts in assessing the need to ban talc in products. All these areas of inquiry deal with government regulations regarding talc (the exact product at issue in this case), and J&J’s efforts to keep its customers in the dark regarding the dangers. This is not the fishing expedition described in *Oncology*. Respondents do not seek any and all information regarding J&J’s interactions with the FDA, or even all interactions with the FDA from 2023-2025. Respondents seek a narrow subset of information that directly relates to the subject of litigation here.

Unlike in *Oncology*, Judge Toal did not blindly acquiesce to the requests; she granted J&J’s motion to quash in part and denied it in part. The fact that Judge Toal considered the issues and did not merely provide a blanket approval of discovery, confirms her order is distinguishable from

the problematic order referenced in *Oncology*.¹⁴ The ruling in *Oncology* does not support a finding that the trial court's order was abusive and warrants this Court's intervention.

c. J&J has not shown the order implicates a protected public interest.

J&J invokes the *Noerr-Pennington* doctrine and its First Amendment protections in an attempt to place this case in the realm of a protected public interest. The *Noerr-Pennington* doctrine does not support that discovery into lobbying activities constitutes a First Amendment violation, and thereby a public interest. Just because a company has the right to petition the government and such speech constitutionally protects it from liability, that does not automatically mean that the communications are privileged from discovery or inadmissible if introduced for a proper purpose. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (“The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”).¹⁵ Put another way, “[t]he right to petition Congress is a valued one entitled to protection. To impose liability for those efforts might have a chilling effect upon those seeking redress. Whether such activity should be evidential for other purposes or whether the activity exceeds the boundaries of the protection afforded are issues which can only be decided in context.” *Cipollone v. Liggett Grp., Inc.*, 668 F. Supp. 408, 411 (D.N.J. 1987). Whether specific documents are entitled to protection is a factual question for the trial court, not a legal question warranting this Court's intervention. Judge Toal correctly held that any First Amendment rights (such as those implicated by the *Noerr-Pennington* doctrine) “would not bar Plaintiff[s] from seeking information

¹⁴ Judge Toal concurred with the *Oncology* decision.

¹⁵ *See also Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (“[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment.”); *Hrynda v. U.S.*, 933 F. Supp. 1047, 1053 (M.D. Fla. 1996) (noting “the abundance of law throughout the country concerning the use of speech as evidence in proving violations of conduct-based laws”).

concerning its lobbying activities.” Petition, Attachment 5 at 3.

J&J further invokes the attorney work product doctrine and attorney client privilege, which also fail to implicate a violation of a protected public interest. While South Carolina gives “significant weight to the attorney-client privilege,” “the privilege is not absolute” or automatic. *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 167–68, 829 S.E.2d 707, 712 (2019). The party asserting “privilege has the burden of establishing the confidential nature of the communication, including the absence of waiver.” *Id.* at 168, 712; *see also Crawford v. Henderson*, 356 S.C. 389, 395, 589 S.E.2d 204, 207 (Ct. App. 2003). “[I]nformation—in and of itself—does not become privileged merely because it was communicated to an attorney.” *In re Mt. Hawley Ins. Co.*, 427 S.C. at 168, 829 S.E.2d at 712. In line with this South Carolina rule, the trial court ordered “Defendant has not specifically pointed to any attorney-client communications for which it asserts the attorney-client or work product privilege; therefore, Defendant’s Motion to Quash is Denied.” Petition, Attachment 5 at 3.

It is not enough for J&J to just say discovery is barred because its lobbying efforts were part of its legal strategy in ongoing and anticipated litigation. Petition at 12-14. J&J made a choice not to provide a privilege log in this case before seeking to quash the discovery and asking this Court to intervene. As no specific documents have been exchanged, the Court can do nothing but speculate how this issue creates a public interest warranting this Court’s intervention.

d. J&J has not shown a harm that cannot be remedied on appeal.

To the extent this Court denies the petition, J&J has made it clear it does not intend to produce any additional lobbying documents. Instead, J&J intends to produce a privilege log. J&J’s own statements run contrary to its argument that it will be irretrievably harmed by the order. To the extent J&J produces a privilege log, the trial court can review such documents *in camera* to

determine the legitimacy of an attorney-client privilege or First Amendment designations. *See Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 578, 582 S.E.2d 405, 407 (2003).

In *Hollman*, for example, the Supreme Court granted review of a discovery order permitting plaintiffs to interview non-party patients regarding confidential medical information previously produced under a protective order “with the understanding the patients would not be contacted.” *Hollman*, 384 S.C. at 581, 683 S.E.2d at 500. The Court granted certiorari, in part, because “[a]llowing the interviews [would] moot any claim petitioners could raise on appeal that the discovery was erroneously allowed.” *Id.* at 577, 498. No comparable harm exists here. Allowing this case to move forward, particularly in the context where J&J has said it will not produce documents, will in no way moot any claim it could bring on appeal. Any claimed error can be raised in the ordinary course on appeal from the final judgment. *See Laffitte*, 381 S.C. at 471, 674 S.E.2d at 160.

II. J&J has failed to show the trial court exceeded its authority.

Even if J&J could establish exceptional circumstances, J&J has failed to show the trial court exceeded its authority: the trial court committed no error of law and its factual determinations were supported by the record.

a. The trial court did not exceed its authority in rejecting J&J’s relevance analysis.

J&J’s relevance arguments are misplaced. J&J’s motion did not trigger any heightened relevance showing, and the trial court did not abuse its discretion in finding that lobbying evidence was relevant in this case.

i. J&J never triggered any heightened relevance showing.

The law is clear the party opposing discovery must show “a particularized harm which will be caused by allowing the discovery.” *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498. *Only when*

that burden is met is the proponent required to show that the information is relevant and necessary (rather than admissible) to the case. *Id.* The Court is then charged with balancing the interests of the parties and determining whether to limit or deny the pending requests. SCRCP 26. Here, J&J did not meet that burden when submitting a motion riddled with speculation and conclusory statements and unsupported by a privilege log.

J&J seeks to use *Hollman* and *Oncology* to heighten the relevancy standard at the discovery phase, stating the trial court needed to explain how the lobbying evidence went to the “central issue” in the litigation and was “*specifically relevant to the issues involved in the litigation.*” Petition at 7. *Hollman* and *Oncology*, however, did not change a trial court’s task when responding to a motion to quash a subpoena. There is no such legal requirement that the trial court delve into relevance at the level of detail requested by J&J, especially when J&J has not even met its initial burden.

ii. The relevancy of the evidence is supported by the record.

Contrary to J&J’s position, post-injury evidence is admissible for some purposes. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 227, 701 S.E.2d 5, 18 (2010) (disallowing post-injury evidence when offered to prove a product defect at the time of use, but not for other purposes). Whether such evidence is admissible, and for what purpose, is a fact-intensive inquiry that should be undertaken by the trial court – rather than a legal issue to be determined by this Court.

Caselaw does not support a “uniform rule” barring the admission of post-injury evidence, instead courts should use “a case-by-case approach in ascertaining whether post-injury evidence is relevant to defendant's culpability.” *Dykes v. Raymark Indus., Inc.*, 801 F.2d 810, 817–18 (6th Cir. 1986). “It does not logically follow simply because the proffered evidence seeks to establish some act occurring after the injury that the evidence cannot make the fact of the pre-injury conduct

more probable than not.” *Id.* at 818. Such evidence is routinely admitted to show punitive damages, knowledge, intent, fraud, and absence of mistake or plan:¹⁶

- **Punitive Damages:** A defendant’s “intent to avoid public disclosure and cover up the health hazards caused by exposure to its asbestos products” and the defendant’s “continued malice, evil intent, and reckless and wanton disregard for the health and safety of those using its products” are material issues at trial. *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 256 (Fla. Dist. Ct. App. 1984). “Evidence of repetition and concealment of offensive conduct after it initially occurred is indicative of malice or evil intent sufficient to support punitive damages.” *Id.*
- **Knowledge:** A lobbying document that post-dates a plaintiff’s exposure can include a recitation of a defendant’s knowledge at an earlier time. *In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 181 F. Supp. 3d 278, 300–03 (E.D. Pa. 2016).
- **Fraud:** Lobbying evidence may be “relevant to the plaintiff’s fraud claims if the information the defendants sent to or received from the FDA was different from what the defendants were communicating to consumers.” *Id.* at 290. A defendant’s later conduct can throw light on the defendant’s fraudulent intent at the time of the fraud. *Young v. Goodyear Serv. Stores*, 244 S.C. 493, 499, 137 S.E.2d 578, 581 (1964).
- **Absence of Mistake/ Plan:** Evidence of a pattern of deception may be admitted to show “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* at 299 (internal citations omitted). “[E]vidence of similar acts used to prove ‘intent’ may postdate the event in question since the purpose is to prove lack of inadvertence. The more times something is repeated, whether before or after an event, tends to negate the event’s inadvertence.” *Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 94 (D.S.C. 1979), *aff’d*, 644 F.2d 877 (4th Cir. 1981).
- **Impeachment/ Admissible Character Evidence:** Where a defendant claims it has been forthright with a regulatory agency, lobbying information showing otherwise may be used to impeach that claim. *Tylenol*, 181 F. Supp. 3d at 299–300.

While a jury may not “punish a defendant directly on account of harms it is alleged to have visited on nonparties,” a plaintiff may still “show harm to others in order to demonstrate

¹⁶ The analysis is the same, whether the post-injury evidence relates to J&J’s efforts to influence regulations in the United States or in Europe. Regardless of the location of the regulation at issue, J&J is making similar claims that JBP and the talc used in its product is safe. Concealment is concealment, whether it occurred in the United States or abroad. As Respondents do not intend to show they relied on those statements, it is immaterial that they only used JBP in the United States. Petition at 5, 7-8.

reprehensibility.” *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). Moreover, post-trial, the court must review an award to see if it is consistent with the defendant’s degree of culpability, the duration of the conduct, and the defendant’s awareness or concealment. *Gamble v. Stevenson*, 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991). Post-exposure lobbying speaks directly to those issues. While the post-exposure lobbying may not have reached the Respondents’ ears or directly influenced their decision to use JBP, the relevance of the evidence is still otherwise supported by the record.

b. The trial court did not exceed its authority in holding *Noerr-Pennington* and the First Amendment do not bar discovery of lobbying material.

i. The *Noerr-Pennington* doctrine bars liability, not discoverability.

While lobbying activity may not provide the basis for an independent anti-trust cause of action, *evidence* of lobbying may be both discoverable and admissible for other reasons. *See City of Huntington v. AmerisourceBergen Drug Corp.*, No. CV 3:17-01362, 2021 WL 1986425, at *1 (S.D. W.Va. May 18, 2021) (internal citations omitted). The *Noerr-Pennington* doctrine is “an affirmative defense which exempts from anti-trust liability any petitioning activity designed to influence legislative bodies or governmental agencies.” *N. Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52 (4th Cir. 1981).¹⁷ As the trial court correctly noted in its order, the doctrine is “by definition an exemption from anti-trust liability, and not a bar to discovery of evidence.” *Id.* at 53 (emphasis added). That holding follows from the *Pennington* decision, which provided “that evidence of legislative activity, if relevant, must be accompanied by an instruction which limits the jury’s consideration to non-legislative activities.” *Id.* If *Pennington* presumes admissibility, “certainly it should be discoverable.” *Id.* *North Carolina*

¹⁷ While many states have adopted the *Noerr-Pennington* doctrine as a defense, South Carolina has not.

Electric has not been overruled and remains good law.¹⁸ *Noerr-Pennington*, and its First Amendment protections thus do not otherwise bar discovery and investigation into lobbying activity.

Courts have uniformly held that lobbying evidence is discoverable:¹⁹

- **Eastern District of Wisconsin (1995):** The *Noerr-Pennington* doctrine does not shield discovery of lobbying activities “concerning environmental legislation on vehicular emissions controls.” *Gen. Motors Corp. v. Johnson Matthey, Inc.*, 887 F. Supp. 1240, 1244-46 (E.D. Wis. 1995).
- **Northern District of Illinois (2003):** “The *Noerr-Pennington* doctrine does not address the discoverability of Defendants' lobbying efforts. The mere fact that the documents sought by [the plaintiff] relate to or arise from lobbying activity is insufficient to bar their discovery.” *Stallings v. Union Pac. R. Co.*, No. 01 C 1056, 2003 WL 21317297, at *7 (N.D. Ill. June 6, 2003).
- **District of Alaska (2019):** Discovery requests related to “[a]ll communications between you and the FDA relating to metal implants or the regulatory approval of medical devices” are proper. *Wardell v. Zimmer, Inc.*, No. 3:16-CV-00187-SLG, 2019 WL 13135858, at *2 (D. Alaska Feb. 7, 2019).

The inquiry at this stage should end there. There is no categorical bar to discovery, and the trial court did not err in allowing discovery into lobbying activities. While J&J argues such evidence can never be discoverable because it cannot lead to admissible evidence under Rule 26,

¹⁸ J&J's only argument that the case has been called into question comes from a vacated and remanded decision out of the United States District Court for the District of Columbia, which does not dispute the outcome of the Fourth Circuit case. *Australia/E. U.S. A. Shipping Conf. v. United States*, 537 F. Supp. 807, 809 (D.D.C. 1982), *vacated and remanded*, No. 82-1516, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986).

¹⁹ None of the cases cited by J&J discredit those cited herein. See Petition at 8. In each of the cited cases, the court denied the discovery of lobbying evidence based upon the specific (and distinguishable) facts of each case. *Id.* No case declares that such discovery is unallowed in negligence, products liability, or fraud cases. In fact, one case even acknowledges “[t]here may be some instances where information concerning a company's general lobbying efforts are relevant to issues in a products liability case.” *Shaffer v. Toyota Motor Corp.*, No. 5:22-CV-00151-R, 2024 WL 3682234, at *2 (W.D. Okla. Aug. 6, 2024).

it is again wrong. *See* SCRP Rule 26(b)(1). Evidence of lobbying is often admitted, subject to a 403 balancing test. The U.S. Supreme Court acknowledged in *Pennington* that lobbying evidence can be admitted where the evidence has probative value and is not unduly prejudicial. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 n.3 (1965). In interpreting that decision, courts have acknowledged, as follows:

- **Tenth Circuit Court of Appeals (2002):** “*Noerr–Pennington* does not bar the introduction of *all evidence* within its scope.” *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1138 (10th Cir. 2002).
- **Eastern District of Pennsylvania (2016):** “It would be a stretch to say that *Noerr–Pennington* bars any use of any evidence of the defendants' petitioning of the government, and its agencies, or evidence of any communications with the FDA.” *Tylenol*, 181 F. Supp. 3d at 306.
- **District of South Carolina (2023):** The *Noerr–Pennington* doctrine “has not been applied to bar otherwise admissible evidence. The *Noerr–Pennington* doctrine does not operate in this manner.” *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, No. 2:18-CV-3487-RMG, 2023 WL 3568128, at *6 (D.S.C. May 19, 2023) (internal citations omitted).

As there is no categorical bar to the exclusion of lobbying evidence at trial that would make it not discoverable, this is a factual rather than a not legal issue.

ii. J&J did not show discovery would “chill” protected speech.

“[T]he party claiming a privilege always bears the initial burden of establishing the factual predicate for the privilege.” *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 488 (10th Cir. 2011). Courts have declined to reduce, modify, or dispense of that burden “simply because the claimed privilege implicates the First Amendment.” *Id.* For example, the Tenth Circuit Court of Appeals declined to issue a writ of mandamus when the District Court refused “to presume that the information at issue [was] privileged under the First Amendment.” *Id.*

“[C]onclusory statements, alone, do not establish a *prima facie* showing of First Amendment infringement.” *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71, 84 (D. Ariz. 2022). It is not enough to offer “theoretical arguments” made by counsel regarding how it will harm a defendant’s ability to freely associate or share its thoughts and opinions. *Id.* J&J has not met its burden, as it only offers conclusory statements like those found to be lacking in *Mi Familia Vota*. It does not explain why these additional lobbying documents would chill its First Amendment rights when the approximately 19,000 lobbying and regulatory-communication documents it has already produced did not. Petition at 14. Those documents, and the accompanying testimony, did not just deal with past legislation but also indicate that J&J sought to influence the FDA panel (and thereby MoCRA). The distinction drawn by J&J that the remaining documents relate to current lobbying and thus increase the “chill” is not supported by the record.

Moreover, the facts in the record show that even if J&J did make such a showing, its statements may still not be protected as courts have been cautious to provide constitutional protection for misleading lobbying. “[T]here is no constitutional value in false statements of fact.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974). Misleading “commercial speech is not protected by the First Amendment.” *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 68, 777 S.E.2d 176, 194 (2015). First Amendment protection does not extend to statements where the “defendants knew the falsity” and “made those statements in a deliberate attempt to mislead a regulatory body.” *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982). J&J has not provided sufficient evidence to invoke any First Amendment privilege.

c. The trial court did not exceed its authority in rejecting J&J's blanket privilege and work-product claims unsupported by any privilege log.

J&J chose not to draft a privilege log. Legally, that alone is a reason to deny that its motion to quash (*see supra* Section II(a)(i)). J&J's supposed undue burden, does not change the analysis (*see infra* Section III). Again, all that remains are factual arguments.

J&J's attorneys' involvement is not a shield to discoverability. Lobbying activities are, by their nature, public-facing and non-confidential. This idea has been echoed in case law, where courts have held that information prepared for the purpose of presenting it to others is not confidential as it "was not intended to be kept in confidence." *In re Grand Jury Subpoena*, 204 F.3d 516, 521 (4th Cir. 2000) (internal citations and cases omitted). Where an attorney's work involves "convey[ing] information to third parties" rather than "provid[ing] legal advice for the clients' own guidance," such work is not protected just because it is done by an attorney. *Id.* (internal citations omitted). For example, when J&J paid its lawyer Kevin Hynes to act as a typist for experts his work was neither confidential nor undertaken in furtherance of legal advice.

J&J ignores the fact that the presence of asbestos in its talc was not only important to them for litigation purposes, but it was also important to its investors and to the reputation of the company. Since filing this petition, J&J has filed a report with the Securities and Exchange Commission pointing investors to "factsabouttalc.com." **Ex. 3**, Johnson & Johnson 8-K (10/18/26). J&J continues to tell its investors "[t]alc is safe," it is "more common than you think," and "does not cause cancer." **Ex. 4**, "Truth about Talc." J&J seeks to reassure its customers (and investors) by stating "[h]ealth authorities around the world have reviewed the data on talc, and it is used widely across the globe." *Id.* J&J has not shown that the documents it seeks to withhold were made in confidence for the purpose of obtaining legal advice, and common sense confirms they could have been drafted for the purpose of investor relations or legislative affairs—especially

considering J&J's past admissions that it uses its attorneys to shield information from the public. Like the trial court, this Court should not be made to rule in a vacuum and there is no legal issue to resolve at this time.

III. The trial court did not exceed its authority in rejecting J&J's unsupported undue burden argument.

J&J's own petition confirms J&J has the resources to provide the requested discovery, as J&J states it has already turned over approximately "*2.5 million pages* of documents and data collected from more than *200 individuals and other sources*." Petition at 3. Despite Respondents raising this discrepancy below, J&J has still failed to provide any information regarding "the time required to conduct the search, the cost, and the number of files that would have to be searched." *Glassmeyer v. S.C. Lottery Comm'n*, No. 2024-001296, 2026 WL 2177330, at *7 (S.C. Ct. App. July 29, 2026). It is not enough for counsel to argue there is an undue burden where there is "no evidence showing the cost of complying with the subpoenas, that the subpoenas imposed an undue burden, or that compliance caused them to incur undue expenses." *Taylor v. Taylor*, 434 S.C. 307, 326, 863 S.E.2d 335, 345 (Ct. App. 2021). J&J's "undue burden," is nothing other than a routine complaint seen in many discovery disputes.

CONCLUSION

J&J has failed to demonstrate that exceptional circumstances exist justifying this Court's discretionary intervention, or that the trial court exceeded its authority in any respect. The issues are not novel, the order is tailored and not manifestly abusive, any error is remediable on appeal, and the trial court correctly rejected J&J's factually based relevance, First Amendment, privilege, and undue-burden arguments. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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