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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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners Johnson & Johnson (“J&J”) and Kenvue Inc. (“Kenvue”) (collectively, “Petitioners”) have sought a Writ of Certiorari asking this Court to vacate the Circuit Court’s October 2, 2026 Order compelling Petitioner J&J to produce a 30(b)(6) witness to be deposed on lobbying of the FDA that took place *after* Plaintiffs’ alleged talc exposures ended. That deposition is now scheduled for October 29, 2026.¹ This Court should grant a Writ of Certiorari in favor of

¹ Petitioners originally asked this Court to also vacate the Circuit Court’s October 2, 2026 Order compelling Petitioners to produce documents regarding their post-2023 lobbying of the FDA. That issue is now moot, however, because Petitioners produced those documents on October 14, 2026, in compliance with the deadline in the Circuit Court’s October 2, 2026 Order. Along with the October 14 document production, Petitioners also produced privilege logs listing certain responsive documents withheld under the attorney-client/common interest privilege or the attorney work product doctrine. Plaintiffs subsequently sought to compel production of the 57 documents listed on Petitioner J&J’s privilege log. On October 23, 2026, the Circuit Court reviewed those documents *in camera* and upheld Petitioner J&J’s privilege claims with respect to 17 of the 57 documents. Petitioner J&J has since produced the remaining 40 documents to Plaintiffs.

Petitioners and vacate the Circuit Court's discovery order for all the reasons set forth in the Petition. Plaintiffs'/Respondents' arguments do not support denial of the Petition.

First, the discovery compelled by the Circuit Court is patently irrelevant (doubly so because the lobbying occurred after Plaintiffs' alleged use of the product), and forcing J&J's corporate representative to sit for a deposition on wholly irrelevant topics would be improper. Plaintiffs initially argue that deposition testimony regarding Petitioners' post-exposure lobbying is relevant to Plaintiffs' fraud or punitive damages claims, but Plaintiffs could not have been defrauded by any post-exposure statements, and due process does not permit J&J to be punished for conduct that has no nexus to Plaintiffs' alleged injuries. Presumably for this reason, Plaintiffs fall back on the argument that the October 29 deposition of J&J's designee might theoretically uncover *some* relevant information that could be used to impeach J&J at trial, but that could be said of any possible deposition and is therefore meaningless. Plaintiffs do not even attempt to identify what relevant information might be obtained, much less explain why it is not already contained within the *extensive* lobbying-related discovery Plaintiffs already have at their disposal, confirming that their fallback impeachment theory is really just a pretext for obtaining otherwise irrelevant discovery.

Second, the discovery compelled by the Circuit Court would chill Petitioners' First Amendment rights in violation of the *Noerr-Pennington* doctrine. Plaintiffs insist that the *Noerr-Pennington* doctrine is a rule about liability (or at most, admissibility), but not discoverability. However, this doctrine was created to safeguard a defendant's fundamental right to freely petition the government. Plaintiffs' discovery tactics in this case directly implicate that essential purpose because allowing J&J's corporate representative to be grilled on the company's lobbying activities would discourage J&J from exercising its First Amendment rights, including in ongoing regulatory proceedings.

Third, the discovery compelled by the Circuit Court jeopardizes Petitioners' rights under the attorney-client/common interest privilege and work-product doctrine. Plaintiffs' argument that communications with regulators are not protected misses the point of Petitioners' argument. As Petitioners explained, all of their post-2023 lobbying efforts were undertaken with an eye toward pending and threatened talc litigation, and therefore reflect counsel's legal advice regarding those litigations. As a result, any questioning about the lobbying would necessarily invade Petitioners' confidential discussions with counsel about the legal strategy behind that lobbying.

Finally, Plaintiffs argue that any error can be remedied through normal end-of-case appeal, but that makes no sense. By the time of any such appeal, Petitioners will have already incurred irreparable damage to their rights under the First Amendment and attorney-client privilege. And because that damage cannot be undone through ordinary appeal, the proper course is to immediately “vacate” the erroneous discovery Order instead of forcing Petitioners to endure the irreversible harms that it will engender. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’t Control*, 387 S.C. 380, 387-89, 692 S.E.2d 920, 924-25 (2010).

ARGUMENT

I. THE LOBBYING DISCOVERY COMPELLED BY THE CIRCUIT COURT IS PATENTLY IRRELEVANT TO THE CLAIMS IN THIS LITIGATION.

First and foremost, this Court should grant a Writ and vacate the Circuit Court’s Order because any documents and deposition testimony regarding Petitioners’ FDA lobbying during the time period *after* Plaintiffs’ alleged exposures to Petitioners’ cosmetic talc products admittedly ended has no conceivable bearing on any claim or defense in this litigation. Tellingly, *even the Circuit Court* in its Order compelling the discovery at issue provided no rationale as to how the information Plaintiffs seek could possibly be relevant to their claims, which are for negligence, products liability, and fraud. This alone constitutes an “[e]xceptional circumstance[.]” warranting this Court’s immediate intervention. *See Oncology*, 387 S.C. at 387-89, 692 S.E.2d at 924-25 (“[e]xceptional circumstances” justify a writ because the “information and documents required under the discovery orders are not remotely relevant to resolution” of the claims or defenses).

Plaintiffs’ own description of how they wish to use the lobbying evidence in question only proves Petitioners’ argument. Specifically, Plaintiffs claim that the lobbying evidence will support their allegation that “J&J engaged in a decades-long pattern of deception aimed to hide the true dangers of asbestos in Johnson’s Baby Powder” and to “ensure[] regulators” did not issue warnings. Resp. at 3-4. However, it is only Petitioners’ lobbying *during the time period when Plaintiffs were allegedly exposed to Baby Powder* that could possibly be relevant. That is because, to the extent J&J’s lobbying caused regulators not to issue warnings regarding talc, that would only be relevant to Plaintiffs’ negligence and product liability claims if the regulators’ inaction *caused Plaintiffs to use Baby Powder*. Likewise, even if J&J made misstatements to regulators that caused them not to issue warnings (which Petitioners of course dispute), that would only be relevant to Plaintiffs’ fraud claims if Plaintiffs *relied on those misstatements in choosing to use Baby Powder*. But in no event—even according to Plaintiffs’ own framing—could Petitioners’

post-exposure lobbying be relevant. *See also Branham v. Ford Motor Co.*, 390 S.C. 203, 226-30, 701 S.E.2d 5, 17-19 (2010) (holding that post-distribution evidence was irrelevant in products liability case, and granting new trial on the ground that such evidence was introduced against defendant).

Plaintiffs then assert in conclusory fashion that “post-injury evidence is admissible for some purposes.” Resp. at 13. But Plaintiffs’ attempts to connect the particular post-injury evidence they seek—a deposition of J&J’s corporate designee regarding lobbying from 2023 to present—to their actual claims in this litigation all fail.

First, Plaintiffs contend that Petitioners’ post-exposure lobbying is somehow relevant to Plaintiffs’ punitive damages claims because it bears on Petitioners’ malice or willful and wanton misconduct. That argument is foreclosed by South Carolina law and binding U.S. Supreme Court precedent. As explained in the Petition, under both South Carolina law and U.S. federal constitutional law, punitive damages may only be awarded for conduct that harmed *Plaintiffs* themselves. *See* S.C. Code Ann. § 15-32-520(D); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (holding that the Due Process Clause of the U.S. Constitution is violated where punitive damages are awarded “to punish and deter conduct that bore no relation to the [plaintiffs’] harm”).² Plaintiffs do not (and cannot) argue that the supposed “malice” evidenced by Petitioners’ post-2023 lobbying in any way relates to Plaintiffs’ injuries. Instead, Plaintiffs rely on *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 256 (Fla. Dist. Ct. App. 1984), for the proposition that a defendant’s “malice” toward someone other than the plaintiff is relevant, but *Johns-Manville* pre-dates *State Farm* and was therefore abrogated on that point, as another case cited by Plaintiffs in their Response acknowledges. *In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 181 F. Supp. 3d 278, 301 n.52 (E.D. Pa. 2016) (“Punitive damages cannot be imposed on the defendants for conduct that occurred after the injury asserted.”).³ Thus,

² *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007), cited by Plaintiffs, Resp. at 15, is not to the contrary. Consistent with *State Farm*, that decision held that “[e]vidence of actual harm to nonparties can help to show that *the conduct that harmed the plaintiff* also posed a risk of harm to the general public” (emphasis added). The question, in other words, was whether *the same conduct that harmed the plaintiff* also harmed other parties. But *Philip Morris* nowhere holds that wrongdoing *unrelated* to the conduct that harmed the plaintiff bears on punitive damages.

³ Moreover, the Court’s holding in *Johns-Manville* was that the defendant’s post-exposure conduct was relevant to punitive damages because it showed an “intent to avoid public disclosure” 463 So. 2d at 256. But that cannot possibly be a rationale for admitting post-exposure lobbying evidence here, because by 2023, Plaintiffs’ allegations regarding Johnson’s Baby Powder were already widely known.

Plaintiffs' own authority confirms that Petitioners' post-2023 lobbying is irrelevant to the question of punitive damages under longstanding constitutional law.

Second, Plaintiffs contend that evidence regarding Petitioners' post-exposure lobbying is relevant to Plaintiffs' fraud claims because the evidence may show that "the information the defendants sent to or received from the FDA was different from what the defendants were communicating to consumers." Resp. at 14. But that argument is self-contradictory. Petitioners' statements to the FDA in 2023 or later could not possibly have been relied on by Plaintiffs in choosing to use Baby Powder prior to 2023. Because Plaintiffs admit that they had stopped using Petitioners' talc products by that point, they could not possibly have relied on statements made in 2023 or later. At best, *other* consumers might have relied on Petitioners' post-2023 statements to the FDA, but those statements are (by Plaintiffs' own concession) not "specifically relevant to the issues involved in the litigation," and therefore not a proper topic for discovery. *Hollman v. Woolfson*, 384 S.C. 571, 578-79, 683 S.E.2d 495, 499 (2009).

Third, Plaintiffs argue that Petitioners' post-2023 statements to the FDA might provide evidence of Petitioners' knowledge during an earlier time period, because the newer documents may "include a recitation of a defendant's knowledge at an earlier time." Resp. at 14. However, Plaintiffs already have *extensive* information regarding Petitioners' pre-2023 knowledge and have not articulated any particularized need for additional discovery on this topic. Specifically, Plaintiffs already have in their possession *hundreds of days* of deposition testimony and *millions* of pages of documents produced by J&J and Kenvue, as well as *tens of thousands* of pages of documents regarding Petitioners' lobbying, including documents regarding Petitioners' post-2023 lobbying produced during the pendency of this Writ. Plaintiffs do not explain how yet *another* deposition of a J&J corporate designee would break any new ground on Petitioners' pre-2023 knowledge. Plaintiffs' reliance on *In re Tylenol*, 181 F. Supp. 3d at 301, is misplaced. There, the court merely ruled that "[w]ithout the context of th[e] evidence," it could not adjudicate the admissibility of post-injury conduct, including internal communications reflecting pre-injury knowledge. *Id.* To the extent that decision has any relevance to the scope of discovery, there was no suggestion that the plaintiff had at its disposal such expansive alternative sources of information about the defendant's contemporaneous knowledge as Plaintiffs have here.

Fourth, Plaintiffs argue they are entitled to discovery on Petitioners' post-2023 lobbying, including a deposition of J&J's corporate designee on this topic, because it could result in evidence

that might be used for impeachment purposes at trial. Again, however, that could be true of *any* discovery. Plaintiffs’ argument therefore lacks any limiting principle and, taken to its logical conclusion, would permit precisely the type of “scorched earth” discovery that this Court has expressly rejected by granting writs in other cases. *See Oncology*, 387 S.C. at 389, 692 S.E.2d at 925. While Plaintiffs once again rely on *In re Tylenol*, the court in that case merely held that congressional testimony would be admissible “if the defendants’ witnesses provide inconsistent testimony at trial.” 181 F. Supp. 3d at 299-300. The court did not suggest—much less hold—that a plaintiff with extensive discovery on the topic of company knowledge should be permitted to take a corporate representative deposition on the off-chance it might uncover something the plaintiff could use for impeachment at trial. That is the very definition of a fishing expedition.

Finally, Plaintiffs accuse Petitioners of attempting to “heighten the relevancy standard at the discovery phase[.]” Resp. at 13. But Plaintiffs have it backwards because Petitioners are seeking to enforce longstanding limits on discovery, while Plaintiffs are trying to nullify those limits. As this Court made clear in *Oncology*, “discovery requests must be ‘reasonably tailored’ to include only relevant matters”—i.e., those that will “aid the dispute’s resolution.” *Oncology*, 387 S.C. at 388, 692 S.E.2d at 924 (citing *In re CSX Corp.*, 124 S.W.3d 149 (Tex. 2003)). Because Plaintiffs’ own Response confirms that a corporate representative deposition about post-exposure lobbying activities could not possibly achieve that fundamental objective, it is clear that the discovery ordered by the Circuit Court falls outside the ordinary relevance standard enshrined in South Carolina law and warrants the issuance of a Writ.

II. PLAINTIFFS’ DISCOVERY TACTICS IN THIS CASE DIRECTLY IMPLICATE THE PURPOSE UNDERLYING *NOERR-PENNINGTON*.

The discovery Plaintiffs seek—a broad and intrusive deposition of J&J’s corporate representative, who happens to be its former in-house lawyer and who was personally involved with efforts to lobby the FDA—would amount to punishing J&J for exercising its right to petition the government and would deter J&J from doing so in the future. That is exactly the outcome that *Noerr-Pennington* is intended to prevent, and the Circuit Court therefore abused its discretion in compelling the discovery that Plaintiffs seek. *See, e.g., U.S. Football League v. Nat’l Football League*, 634 F. Supp. 1155, 1171 (S.D.N.Y. 1986) (“The low probative value of this [lobbying] evidence is substantially outweighed by the defendants’ strong interest in preserving their First Amendment rights to petition Congress.”).

The purpose of the *Noerr-Pennington* doctrine is to “safeguard[] the First Amendment ‘right to petition the government for a redress of grievances[]’ . . . by immunizing citizens from the liability that may attend the exercise of that right.” *Navient Sols., LLC v. Lohman*, 136 F.4th 518, 522 (4th Cir. 2025). Originally a narrow doctrine applied only in the antitrust context, *Noerr-Pennington* has since been extended not only “to preclude virtually all civil liability for a defendant’s petitioning activities . . . before administrative and other governmental agencies,” *People ex rel. Gallegos v. Pacific Lumber Co.*, 158 Cal. App. 4th 950, 959, 964 (2008), *as modified* (Feb. 1, 2008), but also to bar even the *admission* of such evidence at trial. *See, e.g., Datatreasury Corp. v. Wells Fargo & Co.*, No. 2:06-CV-72 DF, 2010 WL 11468934, at *21 (E.D. Tex. Oct. 5, 2010). Each time courts have expanded the scope of this doctrine, they have done so in reliance on its underlying purpose, which is to avoid the “chilling” effect on “the First Amendment activities” of defendants and other parties that would occur if a person’s lobbying of the government were routinely turned into a litigation issue. *Id.*

Plaintiffs respond by citing cases holding that *Noerr-Pennington* is not a categorical bar on the discoverability of lobbying evidence, Resp. at 16-17, but that is not what Petitioners need to show to succeed on this Writ. Instead, what Petitioners need to show is that the discovery at issue *here*, if produced, would have a chilling effect on their First Amendment rights. That is undoubtedly the case. As detailed above, Plaintiffs have already received *extensive* discovery regarding Petitioners’ lobbying efforts, including deposition testimony and tens of thousands of pages of document discovery. That Plaintiffs still seek yet more deposition testimony is evidence that they intend to harass J&J for exercising its constitutionally protected right to petition the FDA. Worse still, Plaintiffs appear to wish to hold Petitioners liable for their lobbying activities *per se*—in direct violation of *Noerr-Pennington*—as shown by their accusation that Petitioners’ constitutionally protected lobbying is *itself* part of a “decades-long pattern of deception” aimed at regulators and consumers. Resp. at 3-4. For all of these reasons, this Court should grant a Writ and vacate the Circuit Court’s discovery order.

III. THE DEPOSITION OF J&J’S CORPORATE DESIGNEE WOULD INEVITABLY FOCUS ON PRIVILEGED INFORMATION.

As argued in Petitioners’ opening brief, a considerable amount of the discovery that Plaintiffs sought regarding Petitioners’ post-2023 lobbying is privileged or work product. Indeed, when Petitioners produced documents responsive to this topic in accordance with the Circuit Court’s October 14 deadline, Petitioners also produced privilege logs asserting attorney-

client/common interest privilege or work product protection over a substantial number of documents and communications involving J&J's counsel and/or counsel for industry groups that reveal counsel's legal advice related to regulatory issues that have a potential impact on anticipated or actual litigation. The Circuit Court subsequently upheld Petitioner J&J's privilege claims with respect to 17 documents on its privilege log, confirming that Petitioners' concerns about privilege are well-grounded. *See supra* Note 1.

Nonetheless, the Circuit Court's resolution of those document-by-document privilege claims does not solve the privilege concerns raised by Petitioners in their opening brief. Were the deposition of J&J's corporate representative to proceed as scheduled on October 29, that witness would also inevitably be asked to divulge privileged and protected information, which provides further reason for this Court to grant a Writ and vacate the Circuit Court's discovery order. Plaintiffs respond that "[l]obbying activities are, by their nature, public-facing and non-confidential." Resp. at 19. But Petitioners' privilege and work product assertions are not over communications with regulators themselves; rather, they relate to internal communications and communications by outside counsel with industry groups sharing a common legal interest with Petitioners. This presents a significant concern for the upcoming deposition of J&J's corporate representative because J&J's post-2023 lobbying efforts were largely led by attorneys who also direct litigation, and these lobbying efforts were undertaken precisely because of the potential interplay between government actions and the ongoing and anticipated talc litigation. For that reason, any corporate designee who could speak about the company's lobbying during this timeframe would inevitably have been privy to communications containing counsel's legal advice on how lobbying would affect the company's current and future litigation risks, and all such information is privileged. *See Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293-94, 692 S.E.2d 526, 530 (2010) (attorney-client privilege extends to confidential communications by or to "attorneys for legal advice"). Producing a witness for this deposition would accordingly cause J&J "particularized harm," warranting a Writ. *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498.

IV. THE CIRCUIT COURT'S DISCOVERY ORDER REPRESENTS A CLEAR ABUSE OF DISCRETION, WARRANTING THIS COURT'S INTERVENTION

For all of the above reasons, this case presents the "exceptional circumstances" necessary for this Court to exercise its authority to grant a Writ and vacate a Circuit Court's discovery order. *See Oncology*, 387 S.C. at 389, 692 S.E.2d at 925; *Hollman*, 384 S.C. at 577, 683 S.E.2d at 498. Indeed, as detailed in Petitioners' opening brief, this case bears a strong resemblance to *Oncology*,

where this Court not only granted a writ and vacated a trial court's order compelling discovery into irrelevant topics, but also reiterated this Court's willingness to "recognize and enforce" the limitations on discovery in Rule 26. 387 S.C. at 387, 692 S.E.2d at 924. Plaintiffs attempt to distinguish *Oncology* on the ground that the discovery compelled there was broader than that compelled by the Circuit Court here, but that argument is unpersuasive. In *Oncology*, the responding party "inundat[ed] [the moving party] with discovery requests" that "took a shotgun approach and sought virtually all information concerning every facet of [the moving party's] operation." *Id.* at 383, 692 S.E.2d at 922. Here, analogously, Plaintiffs have "inundated" Petitioners with enormously overbroad discovery requests—requests that have already resulted in Petitioners producing millions of pages of documents and hundreds of pages of deposition testimony—yet still seek "virtually all information concerning every facet of" Petitioners' efforts to lobby the government. If anything, the facts here are *more* egregious than those in *Oncology* because Plaintiffs here already possess extensive information regarding Petitioners' lobbying efforts during all time periods conceivably relevant to the case, yet now still seek a burdensome deposition that will be focused on a later, irrelevant time period. Just as the trial court in *Oncology* abused its discretion by permitting the discovery there, so too did the Circuit Court abuse its discretion here, warranting a Writ.

Finally, Plaintiffs argue that any harm to Petitioners can be remedied through an ordinary post-judgment appeal, but that too is unavailing. To the contrary, Petitioners have already incurred significant harms in responding to Plaintiffs' burdensome requests for document discovery, and those burdens would only be compounded if the deposition of J&J's corporate representative proceeds on October 29. Petitioners would have no way of addressing these burdens through post-judgment appeal because by then the harms would have already been incurred and it would be too late to seek redress. This Court should therefore exercise its authority to intervene now.

CONCLUSION

For all of these reasons, Petitioners request that the Court vacate the Circuit Court's October 2, 2026 order with respect to the Lobbying Topics and remand with instructions for the Circuit Court to grant Petitioners' motion to quash and for protective order with respect to those topics.

Respectfully submitted,

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