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SC SUPREME COURT

The Supreme Court of South Carolina

JEAN HOEFER TOAL
CHIEF JUSTICE, RETIRED
SENIOR ACTIVE JUDGE

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November 3, 2026

The Hon. Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Andrew T. Gerken v. Avon Products, Inc., et al., 2023-CP-40-06111; Debra McAndrew Barnett v. Johnson & Johnson, et al., 2026-CP-40-01257

Dear Ms. Howard:

The above two cases are pending before me for trial. The *Gerken* case is a 2023 case upon which many pre-trial hearings have been conducted, and rulings made. The case has been reset several times on the Master Trial Block and most recently set for trial in the November Trial Block by my Order of March 18, 2026. It is set for trial for the weeks of November 9, 2026, and November 16, 2026. Tomorrow, Wednesday November 4, 2026, I have scheduled a pre-trial for the *Gerken* case as is my normal practice. *Barnett* is a 2026 case which was placed on the Master Trial Block by my Order of August 10, 2026. It is set for trial in the February 2027 Trial Block. Because many of the 30(b)(6) discovery issues are similar in these two cases, I have heard pre-trial motions together on the discovery disputes.

I still have pending the discovery disputes involving both the *Barnett* case and the *Gerken* case, and I will hear those matters tomorrow. Recently, I have had presented to me Motions by the Plaintiff to enforce Plaintiff's Notices of 30(b)(6) Depositions and Requests for Production in both of these cases. There is a dispute between the parties regarding the production of documents. Defendant submitted a Motion for Protection against Production of 57 documents. I reviewed those documents very shortly after Defendant Johnson & Johnson's made its Motion for Protection. I ruled that seventeen documents were protected by the attorney-client privilege. Defendant J&J then Moved to Claw Back required production of four of the thirty-seven documents required to be produced on the grounds of attorney client privilege. That Motion was made this past Friday, and I decided to wait until this week to rule on the Claw Back Motion in order to give the Plaintiff a chance to reply. My law clerk was being sworn in yesterday, and I had an engagement in Charleston, so we were not able to consider this matter again until today.

In the meantime, the Plaintiff has now made a response regarding Johnson & Johnson's continued assertion of attorney-client privilege above described. It is my intention to deal with this matter tomorrow in connection with the pre-trial regarding many more matters in this case. The parties have each submitted voluminous materials to me that must be examined in connection with

preparation for the trial of *Gerken*. I now find that Johnson & Johnson has filed a Petition for a Writ of Certiorari with a Supreme Court on October 6, 2026, asking that the Court intervene in what it describes as abusive discovery.[1] In its Petition for Writ of Certiorari, Johnson & Johnson asks that the Supreme Court make relevancy determinations and additionally make the determination that inquiry or discovery into Petitioner's lobbying activities violates the *Noerr-Pennington* doctrine. Plaintiff has made replies to the Defendant's Petition. Defendants have modified and supplemented their Petition for Certiorari and requested expedited disposition by the Supreme Court.

I would request that you advise the Court that with regard to claims of attorney-client privilege, Defendant Johnson & Johnson's Motions for Attorney-Client Privilege Protection are still pending before me and can be addressed tomorrow at the Pre-Trial Hearing. With regard to the Defendant's Petition that the Court involve itself now in matters of the relevancy and Constitutionality of Plaintiff's Discovery Requests regarding J&J's lobbying activities and make a determination of the applicability of the *Noerr-Pennington* doctrine, these matters do not present any emergency to the Court. If my rulings on these matters are not in accord with the Court's view, they should be properly addressed on appeal after the case is tried and on the basis of my rulings on admissibility of these documents. So far, the entire issue of these documents has been a discovery dispute.

With regard to J&J's attorney-client privilege issues, I am capable of making this determination and this is not a matter that should be immediately reviewable before I as the trial court make these determinations and create a record for appellate review. With regard to the propriety of my rulings on the *Noerr-Pennington* doctrine, this issue would only be presented to the Supreme Court or to an appellate reviewing court if evidence regarding Johnson & Johnson's lobbying activities are received into evidence. If these matters are improperly received into evidence in the opinion of an appellate court, this case can be reversed and sent back for retrial.

My docket continues to be much impacted by interlocutory appeals of matters that are pending in front of this court before this court has had an opportunity to finally rule on the matters. Inappropriate or improper interlocutory appeals disturb the normal functioning of these cases which are set long in advance of trial in order to have them prepared for trial under this Court's supervision in an orderly way. My request is that the Court withhold ruling on these Petitions and Amended Petitions for a Writ of Certiorari until the normal trial court processes have been given a chance to work. Please convey to the Supreme Court my appreciation for its consideration of this request.

With my kindest personal regards,
I am, Sincerely yours,



Jean Hoefer Toal

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[1] This Petition to the Supreme Court gives the correct civil action number above listed for these two cases, but incorrectly designates this as an appeal from the Charleston County Court of Common Pleas. These two cases are pending on appeal from the Richland County Court of Common Pleas.

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