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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2017-CP-16-0400

RECEIVED

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SC Court of Appeals

Johnson & Johnson and
Johnson & Johnson Consumer, Inc.,

Appellants,

v.

Antoine Bostic, Individually and as
Personal Representative of the Estate of
Bertila Delora Boyd-Bostic,

Respondent

RESPONDENT'S EMERGENCY MOTION TO DISMISS APPEAL AND
WAIVE OR EXPEDITE BRIEFING SCHEDULE
AND MEMORANDUM IN SUPPORT

Pursuant to Rule 240, SCACR, Respondent, through his undersigned counsel, respectfully moves this Court for an Order dismissing this Appeal, which was brought solely to delay the retrial of this case scheduled to begin November 5, 2018.

This is a state court wrongful death action alleging that Bertila Boyd-Bostic, a SC-licensed attorney, was exposed to asbestos from her use of Johnson's Baby Powder and, as a result, subsequently developed mesothelioma and died at the age of only thirty (30) years old. As an initial matter, this is not the first time that out-of-state Defendants Johnson & Johnson and Johnson

& Johnson Consumer, Inc. (“Appellants”) have filed eleventh hour pleadings in a thinly veiled attempt to delay the trial of this case. The original trial of this case was scheduled to commence on May 14, 2018. On April 6, 2018, in an effort to delay and avoid the original trial date, Appellants filed an extraordinary and fraudulent Notice of Removal with the United States District Court for the District of South Carolina, Florence Division. See Bostic v. 3M Company, C/A No. 4:18-cv-00948-DCC, Notice of Removal (Exhibit 1). In the Notice of Removal, Counsel for Appellants falsely represented to the court that “there is complete diversity of citizenship between Plaintiffs and all named defendants” despite the fact that Rite Aid of South Carolina, Inc. is a South Carolina corporation in good standing and was still a defendant in the case at the time of removal. Id. at 4. After the undersigned filed an Emergency Motion to Remand and subsequent filings, United States District Judge Donald C. Coggins, Jr. issued an Order on April 16, 2018 granting the Emergency Motion to Remand and noting, in part,

Plaintiff has submitted an Affidavit of Ron S. Chima, Senior Counsel in the Legal Department for Rite Aid, which was submitted in other litigation to this Court. The Affidavit states that stores in South Carolina that were Rite Aid stores prior to Rite Aid’s 2007 acquisition of Eckerd remain owned by Defendant Rite Aid of South Carolina, Inc. This is in direct contradiction to statements made by Removing Defendants in these removal proceedings.

Bostic v. 3M Company, CA No. 4:18-cv-00948-DCC, Order granting remand, at n.4 (Exhibit 2) (internal citations omitted).

The original trial of this case began as scheduled on May 14, 2018 and ended on May 25, 2018 with the jury involuntarily dismissing the in-state defendant, Rite Aid of South Carolina, Inc., via unanimous verdict and failing to reach a unanimous verdict with respect to Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. As such, a mistrial was declared as

to Appellants. On October 17, 2018, Chief Justice Donald W. Beatty, pursuant to the provisions of S.C. Const., art. V, §4, set a date-certain term of Court for this case beginning November 5, 2018 and continuing through the week of November 12, 2018, and assigned the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, as the presiding Circuit Judge. See Chief Justice Beatty's Order, dated Oct. 17, 2018 (Exhibit 3). On October 19, 2018, Judge Toal filed an "Asbestos Trial Docketing Order" ("Docketing Order") setting forth trial dates for pending South Carolina asbestos cases from November 5, 2018 through November 5, 2019; this case was set for trial beginning November 5, 2018. See Docketing Order, dated Oct. 19, 2018 (Exhibit 4). On that same day, Judge Toal also filed a "Scheduling Order Setting Trial Date of November 5, 2018 and Denial of Defendant's Motion to Continue and Objection to Date Certain" in this case ("Scheduling Order"). See Scheduling Order (Exhibit 5). In short, the Scheduling Order overruled Appellants' objections to the retrial of this case beginning November 5, 2018 and set pre-trial deadlines. Subsequently, Appellants filed a Rule 59(e) Motion requesting that Judge Toal's Scheduling Order be vacated, altered and amended on the grounds that Appellants are being severely prejudiced in that one of their attorneys, Michael Brown, Esq. of the Baltimore office of Nelson Mullins law firm is not able to participate in the retrial on the dates assigned. Judge Toal denied that Motion by Order dated October 22, 2018. See Order denying Rule 59(e) Motion, dated Oct. 22, 2018 (Exhibit 6).

Having failed to learn from its previous eleventh hour attempt to delay the trial of this case after receiving Judge Coggins' Order remanding this case for trial a mere ten (10) days after the Notice of Removal in April of this year, Appellants now burden this Court with a thinly veiled

attempt to delay the retrial of this case under the guise that one of its out-of-state, non-SC licensed attorneys is unavailable. Appellants appeal from the above-mentioned Docketing Order, Scheduling Order, and Order denying Defendants' Rule 59(e) Motion¹ on two grounds: (1) The effect of the Orders deprive the Appellants of their substantial right to lead trial counsel of choice under Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005); and (2) the Orders violate Rule 40, SCRPC. As discussed below, no basis exists for this appeal and it should be dismissed without further briefing or after expedited briefing such that the October 29, 2018 pre-trial hearing and November 5, 2018 retrial of this case may proceed as scheduled; Defendants' conduct should not be rewarded by delaying the retrial of this case.

I. Hagood is inapposite to the facts at issue here and does not provide a basis for appeal, as Judge Toal did not disqualify Appellants' attorney.

In Hagood, our Supreme Court concluded that "an order granting a motion to disqualify a party's attorney" may be immediately appealed because it affects a substantial right. Hagood, at 197, 607 S.E.2d at 710. In the instant case, Judge Toal did not enter an Order disqualifying Appellants' attorney, nor has there been any attempt whatsoever to disqualify attorney Brown. Judge Toal, acting under her authority and "jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestosis and asbestos litigation filed within the state court system,"² merely set this case, which has been pending since May 22, 2017,

¹ It is important to note that Defendants did not appeal Chief Justice Beatty's Order setting a term and day-certain for this case and appointing Judge Toal to preside as trial judge. Chief Justice Beatty's Order alone, entered pursuant to the provisions of the South Carolina Constitution, should be sufficient for this case to proceed to trial as scheduled.

² See Order of Chief Justice Donald W. Beatty, dated March 3, 2017, assigning Judge Toal as the presiding judge over asbestos litigation in the State of South Carolina (Exhibit 7).

for retrial on November 5, 2018. If out-of-state attorney Brown has another trial which may commence on or about the same date, attorney Brown must decide which trial he wishes to participate in.³ Appellants' strained reading of Hagood and the "substantial right" that it addresses creates a slippery slope and would hold South Carolina trial judges hostage to the schedules of out-of-state attorneys who fly from state to state to participate in trials, including cases pending in South Carolina primarily handled by competent South Carolina attorneys.

II. Rule 40 of the South Carolina Rules of Civil Procedure does not provide a basis for the instant appeal

Rule 40(b), SCRCP, provides: "The clerk initially shall place all cases in which a jury has been requested on the General Docket. A case may not be called for trial until it has been transferred to the Jury Trial Roster. Trial shall be had no earlier than 30 days from the date the case **first** appears on the Jury Trial Roster." Id. (emphasis added). This case was not only transferred to the Jury Trial Roster before May 14, 2018--more than 30 days prior to the retrial date-- but this case was actually tried to verdict in May 2018. As such, the Order(s) setting this case for retrial beginning on November 5, 2018, from which Appellants appeal, neither violate Rule 40, SCRCP, nor provide a basis for the instant appeal.

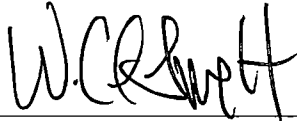
³ It should also be noted that Appellants' characterization of attorney Brown as "lead" trial counsel in the original trial of this case is questionable at best. In fact, attorney Brown was completely absent from the courtroom multiple days of the original trial. See generally portions of original trial transcript (Exhibit 8). Moreover, at least five (5) attorneys—Louis P. Hems, Esq; Bruce T. Bishop, Esq.; Mitchell C. Brown, Esq.; Michael A. Brown, Esq.; and Eric D. Cook, Esq.—were present during the original trial and currently represent Appellants in the instant case; all of these individuals are competent and capable attorneys. Even in criminal cases, our Supreme Court has recognized that the "Sixth Amendment does not confer an absolute right to be represented by one's preferred attorney." See State v. Sanders, 341 S.C. 386, 389 (2000).

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Honorable Court grant this Emergency Motion to Dismiss this appeal without further briefing or, in the alternative, expedite the briefing schedule and grant the instant Emergency Motion to Dismiss such that the retrial of this case may commence as scheduled on November 5, 2018..

Respectfully submitted, this 24th day of October, 2018.

MOTLEY RICE LLC



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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

ANTOINE BOSTIC, Individually)
and as Personal Representative of)
the Estate of BERTILA DELORA)
BOYD-BOSTIC)

Plaintiff,)

vs.)

3M COMPANY, a Minnesota)
Corporation, IMERYS TALC)
AMERICA, INC. f/k/a Luzenac)
America, Inc., a Delaware)
Corporation, JOHNSON &)
JOHNSON CONSUMER INC., a)
New Jersey Corporation, JOHNSON)
& JOHNSON SERVICES, INC., a)
New Jersey Corporation NAVISTAR,)
INC. f/k/a International Harvester)
Company a Delaware Corporation)
RITE AID OF SOUTH)
CAROLINA, INC., a South Carolina)
Company, DOLLAR TREE)
STORES, INC., a Virginia)
Corporation and FAMILY DOLLAR)
STORES, INC. a South Carolina)
Corporation)

Defendants.)

C/A No.: _____

NOTICE OF REMOVAL

Defendants, Johnson & Johnson (“J&J”), Johnson & Johnson Consumer, Inc. (“JJCI”), Imerys Talc America, Inc., f/k/a Luzenac America, Inc. (“Imerys”), Dollar Tree Stores, Inc. (“Dollar Tree”), Family Dollar Stores of South Carolina, LLC (“Family Dollar”), incorrectly named as “Family Dollar Store, Inc.”, and EDC Drug Stores, Inc. (EDC is an acronym for Eckerd Drug Corporation), incorrectly named as Rite Aid of South Carolina, Inc. (“EDC,” and together with JJCI, J&J, Imerys, Dollar Tree, and

Family Dollar collectively referred to as “Defendants”), by and through their undersigned counsel, and pursuant to 28 U.S.C. §§ 1441 and 1446, give notice that they have removed from the Darlington County Court of Common Pleas the action titled *ANTOINE BOSTIC, Individually and as Personal Representative of the Estate of BERTILA DELORA BOYD-BOSTIC vs. 3M Company, et al.*, Case No. 2017-CP-16-0400, to this Court, the United States District Court for the District of South Carolina, Florence Division. This removal is based on the following grounds:

BACKGROUND

1. Plaintiffs, Antoine Bostic, Individually and as Personal Representative of the Estate of Bertila Delora Boyd-Bostic (“Plaintiffs”) commenced this action on or about May 22, 2017 by filing a Summons and Complaint in the Court of Common Pleas for Darlington County, South Carolina (the “State Court Action”). The State Court Action was assigned case number 2017-CP-16-0400.

2. Plaintiffs, thereafter filed their Amended Summons and Complaint on or about July 27, 2017.

3. Plaintiffs, thereafter filed their Second Amended Summons and Complaint on or about September 1, 2017.

4. Plaintiff, thereafter filed their Third Amended Summons and Complaint (the “Complaint”) on or about March 2, 2018.

5. Plaintiffs’ Complaint alleges Bertila Delora Boyd-Bostic was exposed to asbestos as a bystander and while using Johnson & Johnson Baby Powder in her home in South Carolina beginning in the 1980s. Plaintiffs assert the dust and fibers from the alleged asbestos-containing products permeated her person and clothes, resulting in

Bertila Boyd-Bostic contracting mesothelioma on or about July 8, 2016 which resulted in her death on October 29, 2017. Relying on these allegations, Plaintiffs assert the following causes of action: Negligence as to all defendants named in the State Court Action; Strict liability as to all defendants named in the State Court Action; Breach of Warranty as to all defendants named in the State Court Action; Fraud and misrepresentation as to all defendants named in the State Court Action; Violation of the South Carolina Unfair Trade Practices Act as to all defendants named in the State Court Action; Wrongful death as to all defendants named in the State Court Action; Loss of consortium as to all defendants named in the State Court Action; and punitive damages as to all defendants named in the State Court Action.

6. Removal to this Court is proper pursuant to 28 U.S.C. §§ 1441 and 1446. Defendants file this Notice of Removal in the United States District Court for the District of South Carolina, Florence Division, which is the district court of the United States for the district and division embracing the state court where the State Court Action is pending.

7. Removal is timely, as Defendants J&J, JJCI, and EDC's Counsel first ascertained that the case at hand has become one that is removable to federal court when served by Plaintiff of his Third Amended Summons and Complaint on or about March 8, 2018 which dismissed Avon, Inc. ("Avon"). Avon was the only remaining Defendant in this case which is incorporated in South Carolina or has their principal place of business in South Carolina. Defendants are filing this Notice of Removal with the United States District of South Carolina on April 6, 2018, which is within 30 days after receipt by

Defendants J&J, JJCI, and EDC of a copy of the pleading from which it first ascertained that the case is one which is or has become removable. *See* 28 U.S.C. § 1446(b)(3).

8. This Notice of Removal is signed pursuant to Fed. R. Civ. P. 11. *See* 28 U.S.C. § 1446(a).

9. Defendants have met all other procedural requirements.

a. Appended hereto as Exhibit A is a copy of all process, pleadings, and orders served upon Defendants in the State Court Action, namely, the Civil Action Coversheet, Summons and Complaint, Amended Summons and Complaint, Second Amended Summons and Complaint, Third Amended Summons and Complaint, and other such orders and pleadings served upon Defendants in this case. *See* 28 U.S.C. § 1446(a).

b. Defendants will also file this Notice of Removal with the Clerk of Court of Common Pleas for Darlington County, South Carolina. A copy of Defendants' Certificate of Removal and Filing with State Court is attached hereto as Exhibit B.

STATUTORY REQUIREMENTS

10. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332 because (a) there is complete diversity of citizenship between Plaintiffs and all named defendants, and (b) the total amount in controversy exceeds \$75,000, exclusive of interest and costs.

A. Diversity of Citizenship

11. Diversity of citizenship exists between Plaintiffs, and Defendants pursuant to 28 U.S.C. § 1332(a)(1), both at the time Plaintiffs filed the State Court Action and at the time of this removal.

12. Plaintiffs are citizens and residents of the State of South Carolina. (Third Am. Comp. ¶ 1.)

13. Upon information and believe counsel for J&J, JJCI, and EDC is informed by Plaintiffs' Counsel W. Christopher Swett, that as of March 26, 2018 3M is no longer a defendant in the case as 3M has been dismissed as a party to this action by Plaintiffs.

14. Upon information and believe, Counsel for J&J, JJCI, and EDC is informed by Plaintiffs' Counsel W. Christopher Swett, that as of March 26, 2018 Navistar is no longer a defendant in the case as Navistar has been dismissed as a party to this action by Plaintiffs.

15. Defendant JJCI is a corporation organized and existing pursuant to the laws of New Jersey with its principal place of business located in New Jersey. Thus, Defendant JJCI is a citizen of New Jersey for removal purposes. *See* 28 U.S.C. § 1332(c)(1) (defining corporate citizenship).

16. Defendant J&J is a corporation organized and existing pursuant to the laws of New Jersey with its principal place of business located in New Jersey. Thus, Defendant JJCI is a citizen of New Jersey for removal purposes. *See* 28 U.S.C. § 1332(c)(1) (defining corporate citizenship).

17. Defendant EDC is a corporation organized and existing pursuant to the laws of North Carolina with its principal place of business located in Pennsylvania.

Thus, Defendant EDC is a citizen of North Carolina and Pennsylvania for removal purposes. *See* 28 U.S.C. § 1332(c)(1) (defining corporate citizenship).

18. Defendant Imerys is a corporation organized and existing pursuant to the laws of Delaware with its principal place of business located in California. Thus, Defendant Imerys is a citizen of Delaware and California for removal purposes. *See* 28 U.S.C. § 1332(c)(1) (defining corporate citizenship).

19. Defendant Dollar Tree is a corporation organized and existing pursuant to the laws of Virginia with its principal place of business located in Virginia. Thus, Defendant Dollar Tree is a citizen of Virginia for removal purposes. *See* 28 U.S.C. § 1332(c)(1) (defining corporate citizenship).

20. Defendant Family Dollar is a limited liability company organized and existing pursuant to the laws of Virginia with its principal place of business located in Virginia. Thus, Defendant Family Dollar is a citizen of Virginia for removal purposes. *See* 28 U.S.C. § 1332(c)(1) (defining corporate citizenship).

21. Defendants are not citizens of South Carolina, where Plaintiffs brought the State Court Action. *See* 28 U.S.C. § 1441(b).

22. The jurisdictional minimum is satisfied where the defendant demonstrates to a legal certainty or within a reasonable probability that the amount in controversy exceeds \$75,000. *See Phillips v. Whirlpool Corp.*, 351 F. Supp. 2d 458, 461 (D.S.C. 2005) (Norton, J.) (“[T]his court . . . leans toward requiring defendants in this position to show either to a ‘legal certainty’ or at least within a ‘reasonable probability’ that the amount in controversy has been satisfied.”).

23. In light of the claims asserted, it is clear to a legal certainty, or at least within a reasonable probability, that the amount in controversy exceeds \$75,000.

a. Actual Damages. Plaintiffs seek to recover unspecified actual damages. When considering an award of actual damages in light of the allegations concerning exposure to asbestos containing products, it is clear that the amount in controversy exceeds \$75,000 to a legal certainty or within a reasonable probability. (Third Am. Comp. ¶ 92; Prayer for Relief.)

b. Compensatory Damages. Plaintiffs seek to recover unspecified compensatory damages. When considering an award of actual damages in light of the allegations concerning exposure to asbestos containing products, it is clear that the amount in controversy exceeds \$75,000 to a legal certainty or within a reasonable probability. (Third Am. Comp. ¶ 92; Prayer for Relief.)

c. Punitive Damages. In addition to actual and compensatory damages, Plaintiffs seek to recover unspecified punitive damages. When considering an award of punitive damages in light of the allegations concerning exposure to asbestos containing products, it is clear that the amount in controversy exceeds \$75,000 to a legal certainty or within a reasonable probability. (Third Am. Comp. ¶ 93; Prayer for Relief.) A “claim for punitive damages alone makes it virtually impossible to say that the claim is for less than the jurisdictional amount.” *Woodward v. Newcourt Comm. Fin. Corp.*, 60 F.Supp.2d 530, 532 (D.S.C. 1999); *Lighthouse Prop. Ins. Corp. v. Rogers*, No. CV 9:17-1553-RMG, 2017 WL 3634593, at *2 (D.S.C. Aug. 22, 2017).

d. Attorneys' Fees. Plaintiffs seek to recover the amount of costs of this suit, including attorney's fees, expenses, and interest. (Third Amen. Comp. ¶ 93; Prayer for Relief.) The potential award of attorney's fees is included in the amount of controversy for diversity jurisdiction. *See Cast-a-Stone Prods. of S.C., Inc. v. Aetna Cas. & Sur. Co.*, 379 F. Supp. 929, 932 (D.S.C. 1974). Based on the allegations of the Complaint and the claims for actual, compensatory, and punitive damages, Plaintiffs' attorney's fees in this case, if they are successful, could exceed millions of dollars. *See Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (finding attorneys' fee award of \$500,000 reasonable where actual damages (after trebling) were only \$108,000).

24. Based upon the foregoing, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1441.

WHEREFORE, this action should proceed in the United States District Court for the District of South Carolina, as an action properly removed thereto.

Respectfully submitted,

s/ Louis P. HERNs

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Counsel for Defendants Johnson & Johnson Consumer, Inc.; Johnson & Johnson Service Inc.; and EDC Drug Stores, Inc.

April 6, 2017
Mount Pleasant, South Carolina

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Antoine Bostic, Individually and as)
Personal Representative of the Estate)
of Bertila Delora Boyd-Bostic,)

Plaintiff,)

v.)

3M Company, a Minnesota Corporation,)
Imerys Talc America, Ind. f/k/a Luzenac)
America, Inc., a Delaware Corporation,)
Johnson & Johnson Consumer, Inc.,)
a New Jersey Corporation, Johnson &)
Johnson Services, Inc., a New Jersey)
Corporation, Navistar, Inc. f/k/a)
International Harvester Company, a)
Delaware Corporation, Rite Aid of)
South Carolina, Inc., a South Carolina)
Company, Dollar Tree Stores, Inc., a)
Virginia Corporation, and Family Dollar)
Stores, Inc., a South Carolina)
Corporation,)

Defendants.)

C/A No. 4:18-cv-00948

ORDER AND OPINION

This matter comes to the Court on Plaintiff's Emergency Motion to Remand, Reduce the Defendants' Time to Respond,¹ and Award Attorneys' Fees. ECF No. 4.

I. Procedural and Factual History

Plaintiff filed a Complaint in the Court of Common Pleas for Darlington County, alleging that Bertila Delora Boyd-Bostic was injured because of exposure to asbestos in

¹ By text order on April 10, 2018, the Court expedited briefing on this Motion.

the 1980s.² ECF No. 1-1 at 4–20. Plaintiff amended the Complaint three times, with various parties being added and dropped to reflect the evolution of Plaintiff’s claims. On March 2, 2018, Plaintiff filed the Third Amended Complaint, which alleges that Ms. Boyd-Bostic “was exposed to asbestos as a bystander and while using Johnson & Johnson Baby Powder . . . in her South Carolina home and other homes beginning in the 1980s.” ECF No. 1-2 at 35. Plaintiff also alleges that this exposure led to Ms. Boyd-Bostic’s diagnosis of Mesothelioma and, ultimately, her death. *Id.* Plaintiff has named various entities who manufactured, distributed, or sold the asbestos-containing products as defendants. ECF No. 1-2 at 34–36. The case is scheduled for a date-certain trial on May 14, 2018, before the Honorable Jean H. Toal. ECF No. 4 at 2.

On April 6, 2018, Defendants Johnson & Johnson, Johnson & Johnson Consumer, Inc., Imerys Talc America, Inc., f/k/a Luzenac America, Inc., Dollar Tree Stores, Inc., Family Dollar Stores, Inc., and Rite Aid of South Carolina, Inc. (collectively, “Removing Defendants”) filed a Notice of Removal in this Court. ECF No. 1. Removing Defendants have subsequently attempted to amend the Notice of Removal, though they have not filed a proper Motion despite being directed to do so by the Clerk. ECF No. 9. In response, Plaintiff has filed an Emergency Motion to Remand, Reduce the Defendants’ Time to Respond, and Award Attorneys’ Fees. ECF No. 4. The parties have briefed the Motion and it is ripe for this Court’s review. The Court has determined that oral argument will not aid in the decisional process.

² The Complaint was originally filed by Bertila Boyd-Bostic and Antoine T. Bostic. ECF No. 1-1 at 4. Ms. Boyd-Bostic subsequently died, ECF No. 1-2 at 24, and Antoine Bostic was substituted as her personal representative. ECF No. 1-2 at 30–47.

II. Legal Standard

A. Removal and Diversity Jurisdiction

Federal courts are courts of limited jurisdiction, “constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute.” *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998). Because federal courts have limited subject matter jurisdiction, there is no presumption that the Court has jurisdiction. *Pinkley, Inc. v. City of Frederick, MD*, 191 F.3d 394, 399 (4th Cir. 1999). A party seeking to remove a case from state to federal court bears the burden of proving that jurisdiction is proper when it files its notice of removal. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996). Courts “are obliged to construe removal jurisdiction strictly because of the ‘significant federalism concerns’ implicated.” *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)). If federal jurisdiction is doubtful, remand is necessary. *Mulcahey*, 29 F.3d at 151.

The right to remove a case to federal court derives solely from 28 U.S.C. § 1441, which provides that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” Without jurisdiction based on the presentation of a federal question, see 28 U.S.C. § 1331, a federal district court has only “original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States” 28 U.S.C. §1332(a). The diversity jurisdiction statute has “consistently been held

to require complete diversity of citizenship. That is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (footnote omitted).

B. Removal Under 28 U.S.C. § 1446

When a case is not removable based on parties’ initial pleadings, 28 U.S.C. § 1446(b)(3) governs when a defendant may file a notice of removal. Under Section 1446(b)(3), “a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” “The ‘motion, order or other paper’ requirement is broad enough to include any information received by the defendant, ‘whether communicated in a formal or informal manner.’” *Yarnevic v. Brink’s, Inc.*, 102 F.3d 753, 755 (4th Cir. 1996) (quoting 28 U.S.C. § 1446(b)(3); *Broderick v. Dellasandro*, 859 F. Supp. 176, 178 (E.D. Pa. 1994)).

C. Fraudulent Joinder

“A civil action otherwise removable solely on the basis of [diversity] jurisdiction under [28 U.S.C. § 1332(a)] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b). The fraudulent joinder doctrine will permit a defendant to remove a case to federal court despite the presence of another non-diverse defendant. *Mayer v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). “To establish fraudulent joinder, the removing party must show either: (1) outright fraud in the plaintiff’s pleading of jurisdictional facts, or (2) that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.” *Toney v. LaSalle*

Bank Nat. Ass'n, 36 F. Supp. 3d 657, 663 (D.S.C. 2014) (citing *Benjamin v. Wal-Mart Stores, Inc.*, 413 F. Supp. 2d 652, 654 (D.S.C. 2006)). “The second means for establishing fraudulent joinder is even more favorable to a plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6).” *Id.* (citing *Hartley v. CSX Transp. Inc.*, 187 F.3d 422, 424 (4th Cir. 1999)). “A plaintiff does not have to show he will prevail against the defendant.” *Id.* “He must only show that he has a slight possibility of succeeding.” *Id.* (citing *Hartley*, 187 F.3d at 426). “If the plaintiff can show this glimmer of hope, the defendant is properly joined.” *Id.*

III. Analysis

A. Motion to Remand

Removing Defendants claim that removal is timely because they “first ascertained that the case at hand has become one that is removable to federal court when served by Plaintiff of his (sic) Third Amended Summons and Complaint on or about March 8, 2018[,] which dismissed Avon, Inc. (“Avon”). Avon was the only remaining Defendant in this case which is incorporated in South Carolina or has their principal place of business in South Carolina.”³ ECF No. 1 at 3. In response, Plaintiff claims that, “in the Notice of Removal, Defendants completely ignore the fact that Rite Aid of South Carolina, Inc. is still a defendant in the case.” ECF No. 4 at 4. Therefore, Plaintiff contends that complete diversity does not exist. Plaintiff also claims that Removing Defendants’ Notice of Removal is untimely.

Removing Defendants first allege that Plaintiff improperly named Defendant Rite Aid of South Carolina, Inc. and that the appropriate party is EDC Drug Stores, Inc.

³ All parties agree that Plaintiff is a citizen and resident of South Carolina.

Removing Defendants claim that EDC Drug Stores, Inc. “is a citizen of North Carolina and Pennsylvania for removal purposes.” ECF No. 1 at 6. Thus, Removing Defendants ask the Court to ignore Defendant Rite Aid of South Carolina, Inc.’s citizenship for purposes of evaluating diversity jurisdiction. The Court construes this argument as a claim that Plaintiff fraudulently joined Defendant Rite Aid of South Carolina, Inc.

On April 12, 2018, Removing Defendants filed an Affidavit of Susan Lowell, a Vice President of Eckerd Corporation—after both the Notice of Removal and Motion to Remand were filed. ECF No. 6. Additionally, on April 13, 2018, Removing Defendants filed a Motion to Amend the Notice of Removal. ECF No. 9. However, instead of filing an actual Motion to Amend, Removing Defendants simply filed an Amended Notice of Removal and categorized it as a Motion to Amend on CM/ECF. The Court, therefore, concludes that there is no valid Motion to Amend before it and will consider only the allegations in the Notice of Removal. The question then becomes whether the Court can also consider the supplemental Affidavit filed by the Removing Defendants.

“By leave of court, a defendant may amend a notice of removal to cure ‘[d]eeffective allegations of jurisdiction.’” *Sonoco Prods. Co. v. Guven*, No. 4:12-cv-00790-RBH, 2012 WL 4322521, at *4 (D.S.C. Sept. 19, 2012) (quoting 28 U.S.C. § 1653). “Authorities agree that a defendant may freely amend within the thirty-day period” to file a Notice of Removal. *Id.* (citing 14C Fed. Prac. & Proc. Juris. § 3733). Removing Defendants allege that this case became removable on March 8, 2018. ECF No. 1 at 4. Therefore, the Affidavit was filed outside the thirty-day period. The Fourth Circuit Court of Appeals has not issued a published decision resolving the standard to apply when a Motion to Amend is filed outside of the thirty-day period. That said, generally courts have allowed amendments

“for the purpose of setting forth more specifically grounds for removal which had been imperfectly stated in the original petition.” *Thompson v. Gillen*, 491 F. Supp. 24, 27 (E.D. Va. 1980). Accordingly, without resolving the underlying legal question, the Court will consider the Affidavit.

Nonetheless, Removing Defendants’ allegations in the Affidavit and Notice of Removal fall short of the standard required for this Court to find fraudulent joinder. Plaintiff has offered evidence that Ms. Boyd-Bostic used baby powder that was purchased at a Rite Aid in Hartsville as early as 1987. See, e.g., ECF Nos. 4-2 at 13–14 (stating that Ms. Boyd-Bostic used baby powder purchased from Rite Aid in Hartsville, South Carolina, which was located at the corner of 5th Street and Washington Street); 11-2 at 3 (stating that Ms. Boyd-Bostic used baby powder purchased from Rite Aid as early as 1987). Removing Defendants attempt to persuade the Court that this Rite Aid location has always been owned by EDC Drug Stores, Inc. ECF No. 6 at 2. However, Plaintiff has offered evidence that EDC Drug Stores, Inc. was not incorporated in North Carolina until 1997, ECF No. 11-4 at 2, and have provided a Title to Real Estate showing that the Hartsville Rite Aid was owned by Defendant Rite Aid of South Carolina, Inc. prior to 1997, ECF No. 11-5.⁴ Plaintiff also notes that Defendant Rite Aid of South Carolina, Inc. has not sought dismissal, summary judgment, or substitution in State Court.

⁴ Indeed, the Title to Real Estate document shows a transfer from Defendant Rite Aid of South Carolina, Inc. to Kerr Acquisition Corporation. ECF No. 11-5 at 2. According to documents submitted by Plaintiff, Kerr is the corporate predecessor to EDC Drug Stores, Inc. ECF No. 11-4 at 2. Further, Plaintiff has submitted an Affidavit of Ron S. Chima, Senior Counsel in the Legal Department for Rite Aid, which was submitted in other litigation to this Court. ECF No. 11-3. The Affidavit states that stores in South Carolina that were Rite Aid stores prior to Rite Aid’s 2007 acquisition of Eckerd remain owned by Defendant Rite Aid of South Carolina, Inc. ECF No. 11-3 at 3. This is in direct

The Court acknowledges that the parties appear to have a genuine dispute about who the proper corporate defendant is in this case. But the standard for proving fraudulent joinder is a high one, and Removing Defendants have not met it in this case. See *Toney v. LaSalle Bank Nat. Ass'n*, 36 F. Supp. 3d 657, 663 (D.S.C. 2014) (noting that the defendant must show “that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court”). Plaintiff has certainly demonstrated that he has, at least, a slight possibility of succeeding on the merits of his claims against Defendant Rite Aid of South Carolina, Inc. Therefore, the Court finds that Defendant Rite Aid of South Carolina, Inc. was not fraudulently joined, and there is not complete diversity in this case. Accordingly, the Motion to Remand is **GRANTED**.

B. Motion for Attorneys’ Fees

In his Reply to Defendants’ Response to Plaintiff’s Emergency Motion to Remand, Plaintiff withdraws his request for attorneys’ fees. Therefore, the Motion for Attorneys’ Fees is **DENIED AS MOOT**.

IV. Conclusion

For these reasons, Defendants have not proved that this Court has subject matter jurisdiction over this case. As a result, Plaintiff’s Emergency Motion to Remand; Reduce the Defendants’ Time to Respond; and Award Attorneys’ Fees is **GRANTED IN PART** with respect to the request for remand and **DENIED AS MOOT** as to the request for attorneys’ fees. Additionally, Removing Defendants have failed to properly file a Motion

contradiction to statements made by Removing Defendants in these removal proceedings.

to Amend the Notice of Removal. Therefore, the Court directs the Clerk to strike the filing, ECF No. 9, from the Record.

IT IS SO ORDERED.

s/Donald C. Coggins, Jr.
United States District Judge

April 16, 2018
Spartanburg, South Carolina

EXHIBIT 3

The Supreme Court of South Carolina

ORDER

Pursuant to the provisions of S.C. Const., art. V, §4,

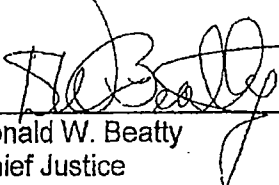
IT IS ORDERED that a nonjury term of the Court of Common Pleas for the Fourth Judicial Circuit for the day of October 29, 2018 be held and that the Honorable Jean Hoefler Toal, retired Chief Justice of the Supreme Court, be assigned as a Circuit Judge to preside over this term. Pursuant to this appointment, she is to have and exercise all powers and duties appertaining to a Circuit Judge of the Fourth Judicial Circuit while presiding over this term.

IT IS FURTHER ORDERED that a term of the Court of Common Pleas/Common Pleas Non-Jury for Darlington County for the week of November 5, 2018 be held and that the Honorable Jean Hoefler Toal, retired Chief Justice of the Supreme Court, be assigned as a Circuit Judge to preside over this term. Pursuant to this appointment, she is to have and exercise all powers and duties appertaining to a Circuit Judge of the Fourth Judicial Circuit while presiding over this term.

IT IS FURTHER ORDERED that a term of the Court of Common Pleas/Common Pleas Non-Jury for Charleston County for the week of November 5, 2018 be canceled and that the Honorable Jean Hoefler Toal, retired Chief Justice of the Supreme Court, be excused from presiding over this term.

IT IS FURTHER ORDERED that a term of the Court of Common Pleas/Common Pleas Non-Jury for Darlington County for the week of November 12, 2018 be held and that the Honorable Jean Hoefler Toal, retired Chief Justice of the Supreme Court, be assigned as a Circuit Judge to preside over this term. Pursuant to this appointment, she is to have and exercise all powers and duties appertaining to a Circuit Judge of the Fourth Judicial Circuit while presiding over this term.

IT IS FURTHER ORDERED that a term of the Court of Common Pleas/Common Pleas Non-Jury for Charleston County for the week of November 12, 2018 be canceled and that the Honorable Jean Hoefler Toal, retired Chief Justice of the Supreme Court, be excused from presiding over this term.



Donald W. Beatty
Chief Justice

Columbia, South Carolina
October 17, 2018

EXHIBIT 4

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
)
) FOR THE STATE OF SOUTH CAROLINA
)
 IN RE: SOUTH CAROLINA)
 ASBESTOS LITIGATION) ASBESTOS TRIAL DOCKETING ORDER
) AS OF October 19, 2018

This Order is designed to set forth trial dates from November 5, 2018 through November 5, 2019. The trial settings and dates are as follows:

November 5, 2018

Boyd Bostic (MR) Deceased Meso (Darlington)
 Harry Poole (MR) Deceased Meso (Charleston)
 Charles Caldwell (MR) Deceased lung cancer (Richland)

January 14, 2019

Barbara San Nicolas (SGPB/KM) Living Meso (Richland)
 Danny Farmer (KM/SGP) Deceased Meso (Anderson)
 Thomas Glenn (KM/DOB) Deceased Meso (Anderson)

March 18, 2019

James Michael Hill (KM/DOB) living Meso (Richland)***
 Taylor (KM/DOB) living Meso (Richland)***
 Linda Nolen (KM/DOB) Deceased Meso (Richland)
 Ella Greene (KM/DOB) Deceased Meso (Richland)
 Tracy Thompson (KM/DOB) Deceased Meso (Richland)

May 20, 2019

Beth-Anee Johnson (MR) Living Meso (Richland)
 Boyd Mitchell (Karst/Km) Living Meso (Richland)
 Johnny Sweatt (MR) Living Meso (Marlboro)
 James Sizemore (KM/DOB) Deceased Meso (Hampton)

July 15, 2019

Terran Dupree (MR) Living meso (Charleston)
 Robert Lee Devey (MR) Living meso (Charleston)
 John Glenn (MR) (Deceased Charleston)

September 9, 2019

William Morgan (KM/DOB) Deceased Meso (Spartanburg)
Jeremy Smith (MR) Deceased Meso (Spartanburg)
Timothy Howe (Covil only) (KM/DOB) Deceased Meso (York)
Charlotte Smith (KM/DOB) Deceased Meso (York)

November 5, 2019
Overflow

*** Hill and Taylor would be set in the March block if it were to qualify for an expedited trial setting.

These will be readjusted as needed if living cases are filed or upon showing of good cause. The parties shall work together to schedule depositions so as to address any conflicts that may arise. The first case in each block takes priority over any subsequent cases in that block. The parties should work together to resolve any conflict, with the understanding that the first case has priority. However, the parties shall work diligently to get each case in the block prepared in accordance with the scheduling order.”

AND IT IS SO ORDERED.

Jean H. Toal, Chief Justice of the Supreme
Court of South Carolina (Retired), Acting
as Circuit Court Judge

October 19, 2018

Columbia, South Carolina.



Richland Common Pleas

Case Caption: Barbara San Nicolas vs Borg Warner Morse Tec LLC , defendant, et al
Case Number: 2017CP4005764
Type: Order/Scheduling Order

IT IS SO ORDERED.

s/ Jean H. Toal #2758

EXHIBIT 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

ANTOINE BOSTIC, Individually and as)
Personal Representative of the Estate of)
BERTILA DELORA BOYD-BOSTIC,)

CASE NO. 2017-CP-16-0400

Plaintiff,)

vs.)

SCHEDULING ORDER SETTING
TRIAL DATE OF NOVEMBER 5, 2018
AND DENIAL OF DEFENDANT'S
MOTION TO CONTINUE AND
OBJECTION TO DATE CERTAIN

Johnson & Johnson Consumer Inc., et al.,)

Defendants.)
)
)
)
)

This case was commenced on May 22, 2017. Trial of this case began on May 14, 2018 and ended on May 25, 2018 with the jury involuntarily dismissing the in-state defendant, Rite Aid of South Carolina, Inc., via unanimous verdict and failing to reach a unanimous verdict with respect to Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. As such, a mistrial was declared as to Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc.

Another case against Defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc., Walter K. Wills, Individually and as Personal Representative of the Estate of Joyce F. Wills v. Johnson & Johnson, et al., No. 18-CP-10-01660, involving the same South Carolina lead attorneys and the same expert witnesses was scheduled to commence trial by agreement of the parties on November 5, 2018 in Charleston County, South Carolina. However, based on lack of courtroom availability and limited judicial resources, the Wills case cannot go forward in the November 2018 trial term.

Chief Justice Beatty has appointed the undersigned to retry this case in Darlington County Circuit Court on November 5th and November 12th 2018. That order is attached as Exhibit A hereto. Darlington County has courtroom availability and there are no outstanding issues in the Boyd-Bostic case and its ready for retrial. The Court hereby sets this case for trial in Darlington County to begin November 5, 2018. The Court finds that setting the Boyd-Bostic case for trial will further judicial efficiency and serve the ends of justice, and that no party will be prejudiced by the November 5, 2018 trial setting.

On October 8th 2018, the undersigned conducted a telephone conference granting Plaintiff's motion for dates certain setting retrial of this case for November 5th and November 12th 2018. On October 12th 2018, Defendant filed a motion and memorandum opposing setting a date certain for trial. I did not issue an order on this matter pending the Chief Justice's issuance of an order setting a term of court for November 5th and 12th and appointing the undersigned to conduct the Boyd-Bostic case. The main thrust of this motion was unavailability for trial of attorney Michael Brown of Nelson Mullins Law Firm whose practice is located in their Baltimore, Maryland office. Mr. Brown's participation in this case was characterized in the motion as lead counsel and it was contended he would not be available for trial on these dates. South Carolina lead counsel for Defendant in this case has always been South Carolina attorney Louis Hems of Milligan Hems Law Firm. Mr. Hems and Mr. Brown were two of at least eight lawyers who at one time or another appeared for Defendant during the course of trial of this case in May of 2018. Mr. Brown's inability to participate in this trial would not prejudice the Defendant. On Plaintiff's side, one of Plaintiff's lawyers who actively participated in the original trial was attorney Marlon Kimpson who is also a State Senator from Charleston County. Were this case to be continued to next spring, his ability to participate in the trial would be hindered due to legislative protection.

Additionally, another South Carolina attorney for Plaintiff, Gerald Malloy, is also a State Senator from Darlington County whose participation in retrial would be hindered if this case were continued to the spring of 2019. Balancing all of these issues, I find Defendant would not be prejudiced by trying this case November 5th and November 12th 2018. However, Plaintiff would stand to be more disadvantaged in a trial in which two of its attorneys would not be able to participate.

The following pre-trial deadlines shall apply:

October 22- Parties exchange final witness lists

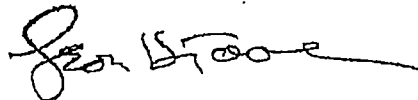
October 29- Parties exchange final exhibit lists and page/lines designations

November 2- Counter-page/lines designations due

November 4- Final page/lines designations due

IT IS THEREFORE ORDERED that this case shall commence trial in Darlington County, South Carolina on November 5, 2018.

IT IS SO ORDERED.



The Honorable Jean H. Toal, Acting Circuit Court Judge,
Retired Chief Justice of the S.C. Supreme Court

October 19, 2018
Columbia, South Carolina

EXHIBIT 6

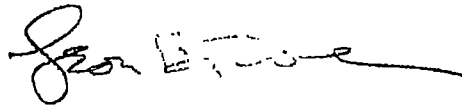
Bogan Esq., each of whom are highly experienced trial and appellate lawyers, as well as by other national counsel who have participated in numerous trials involving these same issues on behalf of Johnson & Johnson and participated in the trial of this matter in May 2018. Among the four attorneys who appeared for the Plaintiff were two members of the General Assembly, Gerald Malloy Esq., who participated in jury selection on behalf of Plaintiff, and Marlon Kimpson Esq., who actively participated in the entire trial on behalf of Plaintiff. The retrial is set for a time that will not conflict with these two attorneys' legislative duties or necessitate their asserting legislative immunity. With regard to the assertion that Rule 40 is somehow implicated in this matter, this is a retrial for a matter placed upon the docket in Darlington in March or April of 2018. It was set for a date certain and has been reset for a date certain, and as such there is no violation of any of the strictures of Rule 40.

The Defendant's Rule 59 motion denominates the Court's October 8, 2018 conference call/motion hearing with lawyers for the parties as an "unrecorded phone call." On October 8, 2018 the Court conducted a hearing on Plaintiff's motion to set the case for a retrial which had been requested for several months. This hearing was conducted by phone with no objection by the parties. The Court is not aware of any rule that requires this phone call to be recorded, and there certainly was not a court reporter available to do so. South Carolina has a crisis in court reporter availability. There was no requirement to conduct a hearing on this matter. The Court could have set this matter without any motion requesting the same or without any hearing on the motion that was filed by Plaintiff.

Finally, the Court received a letter dated October 22, 2018 from Louis HERNs, lead counsel for Defendants, which accompanies Defendants' Rule 59 motion, for reconsideration of the Court's order of October 19, 2018. Mr. HERNs in the letter objects to the Court's "adding some

points to [Plaintiff's] draft order" that were not contained in the Plaintiff's draft nor argued in the October 8th phone call. The Court's orders are its own and the Court is not constricted by what the parties place in front of it. The matters upon which the Court has ruled are all based on the facts in the record in the trial of this case. The motion is denied.

IT IS SO ORDERED



The Honorable Jean H. Toal, Acting Circuit Court Judge,
Retired Chief Justice of the S.C. Supreme Court

October 22, 2018
Columbia, South Carolina

EXHIBIT 7

2017-03-03-01

The Supreme Court of South Carolina

ORDER

I find that with the recent election of the Honorable D. Garrison Hill to the Court of Appeals of South Carolina on February 1, 2017, the asbestosis and asbestos litigation filed within the state court system must be assigned to another judge. Now therefore,

Pursuant to the provisions of S.C. CONST. Art. V, §4,

IT IS ORDERED that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, shall have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestosis and asbestos litigation filed within the state court system.

IT IS FURTHER ORDERED that copies of all motions shall be mailed by the clerk of court receiving them to the Honorable Jean Hoefer Toal within five (5) days of filing.

This Order is effective March 3, 2017.

s/Donald W. Beatty _____

Donald W. Beatty

Chief Justice

March 3, 2017
Columbia, South Carolina

EXHIBIT 8

1 STATE OF SOUTH CAROLINA

2 -----x

3 Antoine Bostic, Individually and as
4 Personal Representative of the Estate of
5 Bertila Delora Boyd-Bostic,
6
7 Plaintiff,

Case No.

8 -against-

2017-CP-16-0400

9 Imerys Talc of America, et al.,
10
11 Defendant.

-----x

12 May 21-25, 2018

13 Darlington, S.C.

14

15 B E F O R E:

16 HONORABLE JEAN H. TOAL

17

18 A P P E A R A N C E S:

19 Attorneys for Plaintiff:

20 W. Christopher Swett

21 Nanthan Finch

22 Marlon Kimpson

23 Attorneys for Defendant Rite Aid

24 Sandra Ko

25 Sarah Johnson

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Attorneys for Defendant Johnson & Johnson

Louis HERNs

Eric Cook

Bruce Bishop

Aileen Butler
Official Court Reporter

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2017-CP-16-0400

Johnson & Johnson and
Johnson & Johnson Consumer, Inc.,

Appellants,

v.

Antoine Bostic, Individually and as
Personal Representative of the Estate of
Bertila Delora Boyd-Bostic,

Respondent

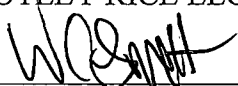
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OCT 24 2018
SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certifies that "Respondent's Emergency Motion to Dismiss Appeal and Waive or Expedite Briefing Schedule and Memorandum in Support" was served by US Mail and electronic means on October 24, 2018 to the following Counsel for Appellants:

Louis P. Hems, Esquire
MILLIGAN & HERNS, PC
721 Long Point Road
Mt. Pleasant, SC 29464

MOTLEY RICE LLC


W. Christopher Swett (SC Bar #78251)

October 24, 2018

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

***Re: Antoine Bostic, Individually and as Personal Representative of the Estate of Bertila Delora Boyd-Bostic v. Johnson & Johnson Consumer, Inc., et al.
C/A No. 2017-CP-16-0400***

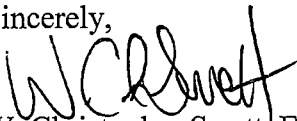
Dear Jenny:

Enclosed for filing, please find the original and seven (7) copies of "Respondent's Emergency Motion to Dismiss Appeal and Waive or Expedite Briefing Schedule and Memorandum in Support" in the above-referenced matter. Once this pleading has been filed, please return a time-stamped copy by hand. I have also included our firm's check in the amount of \$50.00, which represents the filing fee.

This Motion concerns out-of-state Defendants' appeal of a date-certain trial date of **November 5, 2018** set by Orders of Chief Justice Beatty and former Chief Justice Toal, who is the presiding trial judge. I respectfully request that this Emergency Motion be considered as quickly as possible, as we are currently scheduled to appear at a pre-trial hearing on **October 29, 2018** and begin jury selection and commence trial of the above-referenced case on **November 5, 2018**.

Please let me know if anything further is required, and thank you kindly for your assistance in this matter.

Sincerely,


W. Christopher Swett, Esq.

Enclosures

cc: Honorable Jean H. Toal, Presiding Trial Judge (via email)
Honorable Scott Suggs, Darlington County Clerk of Court (via email)
Louis P. Hems, Esq., Attorney for Appellants (via email and U.S. Mail)

RECEIVED
OCT 24 2018
SC Court of Appeals